

A CRITICAL ANALYSIS OF OBSCENITY LAWS IN INDIA: RECONCILING FREEDOM OF EXPRESSION, CONSTITUTIONAL MORALITY AND DIGITAL GOVERNANCE

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ABSTRACT

Obscenity law is one of the most controversial fields of constitutional and criminal jurisprudence, situated at the crossroads of individual liberty, freedom of expression, public morality and State regulation. However, neither, Constitution nor statutory enactments define obscenity in precise terms, leaving its determination largely to judicial interpretation. Indian obscenity jurisprudence has thus developed through judicial pronouncements since the advent of the English Hicklin Test and a slow shift towards the contemporary community standards approach.

Technological advancement in different dimensions has made so many changes in global internet governance, making the regulation of obscene material much more complex. Traditional legislative provisions, formulated in the colonial period, are increasingly inadequate to regulate twenty-first century forms of expression while simultaneously protecting constitutional freedoms.

This article critically analyses the evolution of obscenity laws in India by analyzing constitutional provisions, statutory enactments, judicial decisions and comparative international jurisprudence. It contends that the Indian obscenity law is still riddled with conceptual ambiguity, excessive judicial subjectivity and uneven enforcement. Finally, it proposes a rights-based framework balancing freedom of expression with legitimate State interests in protecting public morality, children and vulnerable groups in the digital age.

Keywords: Obscenity, Freedom of Expression, Constitutional Morality, Public Morality, Article 19, Bharatiya Nyaya Sanhita, Digital Governance, Human Dignity.

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I. Introduction:

Regulation of obscenity has been one of the most controversial aspects of constitutional democracies around the world. All legal systems face the difficult task of balancing two competing constitutional values. On the one side, the individual's right and on the other hand, society's interest to protect public morality, vulnerable groups and social order. The problem is that obscenity is neither an absolute legal concept nor a universal moral standard. Rather its meaning changes across cultures, religions,

historical periods and constitutional traditions. Perhaps nowhere else in constitutional jurisprudence is this tension more acutely displayed than in Indian obscenity law. The Indian obscenity law has its roots in Victorian England where morality was viewed through a paternalistic lens that justified extensive government regulation of literature, theatre and public discourse. These moral assumptions were transplanted into Indian criminal law by colonial administrators in the IPC 1860¹. Thus, obscenity in Indian jurisprudence was not the product of indigenous constitutional

¹ Indian Penal Code, 1860, s. 292 (now substantially replaced by corresponding provisions under the Bharatiya Nyaya Sanhita, 2023).

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principles, but was the fruit of 19th century English judicial precedents, especially the celebrated Hicklin Test formulated in *Regina v. Hicklin*². The Indian courts continued to apply the colonial standard for a number of decades after independence.

The Supreme Court approved the Hicklin Test, which permitted use of isolated passages of literary work to establish criminal liability³. It was a position of judicial deference to public morality but also of continued criticism by constitutional scholars, literary communities and civil liberties advocates for undercutting artistic freedom and ignoring the larger context of expressive works.

However, Indian constitutional jurisprudence started developing towards a liberal interpretation in respect of freedom of speech and expression. Judicial decisions such as “*Samaresh Bose v. Amal Mitra*,”⁴ *Bobby Art International v. Om Pal Singh Hoon*⁵ and finally *Aveek Sarkar v. State of West Bengal*⁶ gave way to modern societal standards from Victorian morality. The Supreme Court increasingly recognized that nudity, sexuality and artistic expression are not necessarily obscenity when viewed in their proper social, literary or artistic context.

Yet, despite these progressive developments, Indian obscenity law remains largely doctrinally uncertain. The BNS and IT Act, however, failed to give a complete statutory definition of obscenity. Courts continue to apply developing judicial standards which often result in inconsistent outcomes. Additionally, the emergence of social media, digital streaming services, AI-generated content and transnational internet communications has radically transformed the character of obscene expression, revealing the inadequacy of traditional legal doctrines⁷. Supreme Court has repeatedly held that in case of a conflict between social morality and constitutional rights, constitutional morality must prevail. This jurisprudential turn raises some important questions regarding the ongoing legitimacy of criminal obscenity laws that are premised primarily on shifting community standards. Despite substantial evolution in judicial doctrine from the stiff Hicklin Test to today’s community standards approach, the legal framework remains fractured, conceptually

ambiguous and not sufficiently flexible to technological developments. The article further contends that future reforms must be based not on subjective notions of public decency but a rights-based approach based on constitutional morality, proportionality and demonstrable harm.

II. Trends of Obscenity Law in India:

India's legal approach to obscenity is the product of the interplay of colonial criminal law, constitutional principles, judicial interpretation and changing community standards. While much criminal law relies on objectively verifiable effects, obscenity law has been grounded in moral judgments which are culturally, religiously, and historically contingent. The definition of obscenity has therefore never been stable but has changed with dominant social attitudes and political beliefs.

Indian obscenity legislation owes much to nineteenth century English criminal jurisprudence. The British colonial government incorporated Victorian notions of sexual morality into Indian criminal law through the Indian Penal Code of 1860, which criminalized the publication, sale, circulation and exhibition of obscene items.¹ The intent of the legislation was not only to preserve public order but to impose Victorian moral values upon the culture of the colonies. Even after independence, the Indian courts largely continued the colonial legacy for over a century.

❖ Phases of evolution of obscenity law in India:

1. Colonial Period (1860-1950)
 2. The Early Constitutional Period (1950–1985)
 3. Liberal Constitutionalism (1985-2014)
 4. Age of the Digital Constitution (2014 onwards)
- Each phase demonstrates the evolution of court opinion on morality, freedom of expression, and constitutional doctrine.

1. Colonial Period (1860-1950):

The Victorian morality of the Colonial Period (1860-1950) dominated the Indian criminal jurisprudence on obscenity which considered public decency and moral discipline as supreme. IPC Sec 292

² *Regina v. Hicklin* (1868) LR 3 QB 360.

³ *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

⁴ *Samaresh Bose v. Amal Mitra*, (1985) 4 SCC 289.

⁵ (1996) 4 Supreme Court cases 1. *Bobby Art Int v. Om Pal Singh Hoon*,

⁶ *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

⁷ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1 (SC).

– Punishment for sale etc., of obscene material. Obscene material is under statutory control as per Indian Penal Code. This stipulation was taken from the Hicklin Test set out in *Regina v Hicklin* (1868)⁸. This test looks at isolated passages which may be seen as having a corrupting influence, rather than the work as a whole. The standards unleashed a wave of censorship, suppressing all forms of artistic and literary expression and promoting a moralism that sacrificed personal freedom. The Press and Registration of Books Act, 1867, the Sea Customs Act, 1878 and other supporting legislation further strengthened government control over printed matter. This framework continued till the independence of India when article 19(1)(a) was incorporated in the constitution which guarantees freedom of speech but still has colonial influences. It is in this period that Indian obscenity law as such was born, linking public morality to colonial rule at the cost of artistic freedom and nascent constitutional values.

2. The Early Constitutional Period (1950-1985):

Indian jurisprudence on obscenity has developed substantially. The regulation of obscenity changed with the coming into force of the Constitution on 26th January, 1950. But there were still the colonial laws like Section 292 and Section 293 of Indian Penal Code but they were now read in the light of the guarantee of freedom of speech under Article 19(1)(a). In applying the Hicklin Test, a colonial vintage test based on Victorian morality, the judiciary was caught between the protection of individual expression and the protection of public morality⁹.

One of the significant decisions of this period is *Ranjit D. Udeshi v. State of Maharashtra* (1965). In this case, the Supreme Court upheld the constitutionality of section 292. The Supreme Court confirmed the Hicklin Test. The Court held that material could be banned if it could corrupt susceptible readers. Later cases such as *Chandrakant Kalyandas Kakodkar v. State of Maharashtra* (1969)¹⁰ and *Samaresh Bose v. Amal Mitra* (1985) took a more contextual approach to obscenity and weighed the merits of literature and social change.

Legislative measures include the enactment of the Young Persons (Harmful Publications) Act, 1956 to safeguard the minors against harmful publications. The Supreme Court in *K.A. Abbas v. Union of India* (1970) also recognized the special impact of cinema and upheld the enhanced regulatory control of cinema under the Cinematograph Act, 1952 but with the emphasis on the need for constitutional restrictions on censorship. In general, it was a period of transition in which colonial values were supplanted by constitutional values and the notion of obscenity became more liberal. This began to appear after 1985 when the Supreme Court began to deviate from the Hicklin Test in its jurisprudence.

3. Liberal Constitutionalism (1985-2014):

Indian obscenity law: colonial morality to constitutional liberalism (1985-2014). The Supreme Court stated the importance of freedom of speech as contained in Article 19(1)(a) and said that the scope of restrictions under Article 19(2) of decency and morality should be read narrowly. Obscenity has always been contextual. Landmark cases like *Samaresh Bose v. Amal Mitra* (1985)¹¹ and *Bobby Art International v. Om Pal Singh Hoon* (1996) have shown the artistic expression and message to the society. In *Ajay Goswami v. Union of India* (2007) the court held that objectionable content should not be a ground for general censorship and that the norm should be parental supervision. The advent of change in the modes of communication brought with it the Information Technology Act, 2000 as a regulatory measure for digital media. The Court in *Aveek Sarkar v. State of West Bengal* (2014)¹², has not followed the old Hicklin Test, but has adopted the Contemporary Community Standards Test, in conformity with the modern values. Overall, this period established the basis for a rights-based paradigm of artistic expression, consistent with modern democratic values and a balance of societal interests and individual freedoms.

4. Age of the Digital Constitution (2014 onwards):

The 'Age of the Digital Constitution': Indian Obscenity Jurisprudence from 2014 Onwards examines the effects of digital technologies and social media on the control of expressive content. Age has raised legal issues in respect of online communication,

⁸ *Regina v. Hicklin* (1868) LR 3 QB 360.

⁹ Constitution of India, art. 19(1)(a) & art. 19(2).

¹⁰ *Chandrakant Kalyandas Kakodar v. State of Maharashtra*, (1969) 2 SCC 687.

¹¹ *Samaresh Bose v. Amal Mitra*, (1985) 4 SCC 289.

¹² *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

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user generated content and OTT platforms. The Supreme Court in the landmark *Shreya Singhal v. Union of India* (2015) judgement struck down the vague Section 66A of the IT Act, expanding the scope of digital free speech under Article 19(1)(a)¹³. The Court also recognised the Right to Privacy as a fundamental right in *Justice K.S. Puttaswamy v. Union of India* (2017) which informs the laws of obscenity as to how they distinguish between private consensual expression and public obscenity. The consensual decriminalization of same sex relations and the inclusion of the notion of Constitutional Morality in *Navtej Singh Johar v. Union of India* (2018) where rights are given precedence over societal morality in the interpretation of laws. Regulation has gotten more complicated with new technologies coming up. An example of this is the 2021 Digital Media Ethics Code that was brought in as an attempt to balance freedom with the protection of the public. In sum, the legal approach to obscenity in the digital age is shifting from traditional morality to rights, autonomy and privacy.

III. Constitutionality of Obscenity Laws in India:

The constitutional regulation of obscenity in India is one of the most difficult problems of reconciliation of individual liberty with the collective social interests. Obscenity is different from ordinary criminal offences. It directly implicates the constitutional guarantee of freedom of speech and expression under Article 19(1)(a) and at the same time invokes the State's power to impose reasonable restrictions under Article 19(2) in the interest of "decency or morality". The constitutional validity of the obscenity laws therefore depends not only on the competence of the legislature but also on their conformity to the larger constitutional values of liberty, dignity, equality and democratic rule.

The constitutional setting for obscenity law has changed dramatically over the years since the Constitution was adopted. The judiciary has also recognised constitutional morality, dignity, privacy and proportionality and has greatly strengthened the freedom of expression. But the doctrinal problems persist.

First, the undefined terms 'decency' and 'morality' in Article 19(2) remain vague and allow for over-broad judicial discretion in interpretation.

Second, community standards are uncertain. In India's pluralistic society, community standards are very diverse.

Third, it is common for criminal sanctions to be used to unduly restrict artistic and literary expression.

Fourth, existing constitutional doctrine is ill-equipped to meet the challenges of technological advances such as social media, artificial intelligence and cross-border digital communication.

Constitutional jurisprudence has thus decisively moved beyond Victorian morality, but there remains further doctrinal work to be done to give consistent protection to freedom of expression, whilst protecting legitimate public interests.

IV.. Statutory Framework of Obscenity Laws in India: An Analytical Study

The statutory regime on obscenity in India has undergone a gradual legislative development during the last century. Many constitutional democracies have created extensive legislation on obscene publications and especially on digital content. But India has got many laws passed at different times for different purposes. The law relating to obscenity is therefore a patchwork, overlapping and in places inconsistent. This plurality of legislation gives rise not only to questions of uncertainty as to the applicable standards of law but important constitutional questions relating to freedom of expression, proportionality and due process. The major laws that govern obscenity are the *Bharatiya Nyaya Sanhita, 2023* (BNS), *Information Technology Act, 2000*, *Indecent Representation of Women (Prohibition) Act, 1986*, *Protection of Children from Sexual Offences Act, 2012* (POCSO), *Cinematograph Act, 1952* and other sectoral regulatory instruments. Each statute adopts a different approach to the regulation of obscene expression but the lack of coherent legislative policy has resulted in overlapping offences, inconsistent terminology and uneven enforcement.

1. *Bharatiya Nyaya Sanhita, 2023*:

The Indian Penal Code, 1860 has now been replaced by the *Bharatiya Nyaya Sanhita, 2023* and to a large extent the criminal law relating to obscenity has been retained. The former sections 292–294 created the offences of selling, publishing, distributing, publicly exhibiting or circulating obscene material, and of committing an obscene act in any public place.

¹³ H.M. Seervai, *Constitutional Law of India* (4th edn., Universal Law Publishing, New Delhi, 1996) 1278–

1285; M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, Gurugram, 2018) 1680–1686.

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The law broadly defines obscenity as publications or objects that are lascivious, appeal to prurient interests or tend to deprave and corrupt persons likely to read, see or hear them. These expressions have been judicially defined over the years but have not been statutorily defined in precise terms. This is a serious constitutional problem for the drafting of legislation. The terms “lascivious” and “prurient interest” and “deprave and corrupt” are subjective terms by their very nature. One judge sees lewdness, another sees artistic truth. Such vagueness in law-making opens up large discretion for investigating agencies and courts and a greater risk of arbitrary prosecution.

It has been a long-held position of the Supreme Court that criminal laws curtailing basic fundamental rights should be precise and certain. But the language of the obscenity law is still almost verbatim out of the criminal law of the nineteenth century England. The BNS has the additional problem that it is still focused on morality, as opposed to constitutional injury. The law criminalizes expression of ideas that do little more than offend public decency and do little less than harm identifiable individuals. Modern constitutional theory has become more open to a harm principle under which the state may criminalize conduct that causes measurable social injury rather than simply offends prevailing moral sentiments.

Moreover, the BNS does not adequately distinguish between commercial pornography, artistic work, academic publication, educational material and literary expression. Judicial interpretation has sought to fill the void, but clear legislative drafting is a more reliable protector of important constitutional rights than judicial discretion.

2. The Information Technology Act, 2000:

The explosion of digital communications has revolutionized the regulation of obscene materials. In light of the inadequacies of the traditional criminal law, the Parliament has enacted the Information Technology Act, 2000 for the regulation of electronic communications and cyber offences. The main sections relating to obscene digital content are section 67, 67A and 67B. Section 67: Publication or transmission of obscene material in electronic form is an offence. Section 67A deals with sexual material. Section 67B provides for stringent provisions on sexual abuse of children, online grooming and exploitation of children. The Information Technology Act, 2000, on the other hand, takes into account the peculiarities of digital communication, especially the

electronic publication and dissemination of information on the internet. But there are still serious problems doctrinal and practical. Firstly, the Act often overlaps with the offences created under the Bharatiya Nyaya Sanhita leading to confusion as to which law to prosecute under. Second, the statute is vague and subject to variable interpretation. Thirdly, the Act was passed before the age of social media, encrypted messaging services, live streaming and AI generated content. Hence much of modern digital communications is only semi-regulated. The Supreme Court of India in the case of *Shreya Singhal v. Union of India* has struck down Section 66A of the Information Technology Act as unconstitutional. This was a big win for free speech online¹⁴. Although Section 66A did not specifically deal with obscenity, the decision articulated an important constitutional principle that vague criminal provisions on online speech are violative of Article 19(1)(a) due to their chilling effect on free speech. The same logic applies to laws of obscenity. Criminal limits on digital expression must be drawn tightly so that courts can apply them in an objective fashion.

3. The Indecent Representation of Women (Prohibition) Act, 1986:

The Indecent Representation of Women (Prohibition) Act, 1986 is an important legislation to safeguard women against derisive and objectifying portrayals in advertisements, publications, writings, paintings, photographs and other media. It bars depiction of women in an indecent or derogatory manner or in a manner likely to deprave public morality. While the law serves a legitimate constitutional purpose of promoting gender equality and protecting the dignity of women, its implementation has been subject to considerable criticism. The question is where to draw the line between sexual objectification and female agency. Contemporary feminist constitutional theory does not assume that all representations of female sexuality are necessarily degrading. Much modern art presents female sexuality as an expression of autonomy, not exploitation. The legal regulation must walk a fine line between commercial objectification for exploitation on the one hand and artistic or personal expression on the other. Another criticism is that the language of the Act is outdated. Generally, the laws of 1980s cover print media and traditional advertising. It does not sufficiently cover digital platforms, influencer marketing, virtual reality environments or AI generated visual content. Draft amendments to modernize the legislation have been pending for a

¹⁴ Ibid

number of years, creating important regulatory gaps in the digital environment.

4. Protection of Children from Sexual Offences Act, 2012:

The Protection of Children from Sexual Offences Act, 2012 is not a general law against obscenity, but is based on the constitutional requirement of protecting children from sexual exploitation. The Act criminalizes the production, possession, storage, transmission and distribution of child sexual abuse material with strict procedural safeguards and increased penalties. Constitutionally, these provisions are fundamentally different from ordinary obscenity laws. Criminalization is justified not on the grounds of public morality, but for the protection of the dignity, bodily integrity and fundamental rights of children under Articles 21, 39(e), 39(f) and international obligations under the United Nations Convention on the Rights of the Child. Thus, the constitutional challenge on free speech grounds is much less compelling in the case of child exploitation where the primary constitutional interest is to prevent demonstrable harm.

5. The Cinematograph Act: Certification and Classification of Films :

Another significant feature of the law on obscenity is the control of the cinema.

Public exhibition is allowed only for films which are certified under the Cinematograph Act. The Central Board of Film Certification (CBFC) evaluates films for whether they fall within the legal parameters of decency, morality, public order and national security¹⁵. The certification process has often been the subject of constitutional dispute. They argue that pre-censorship severely limits artistic freedom and opens

the door to government interference in creative expression. Supporters say that film has a unique persuasive power, and therefore a unique ability to influence public behaviour, which ordinary publications do not have; and this, they say, calls for more regulation. The Supreme Court has generally upheld film certification but has emphasized that censorship should be carried out in a manner compatible with the constitutional guarantees of free expression.⁷ The advent of the Over-the-Top (OTT) platforms has broken this regulatory regime. The audiovisual content is distributed via digital streaming services, without the need for traditional theatrical certification, thereby revealing considerable gaps in the current legislative framework.

6. Critical Evaluation of the Statutory Framework:

A close look at the current statutory scheme reveals numerous structural deficiencies.

- First, the legal regime remains fragmented, as several statutes regulate similar subject matters without proper coordination.
- Secondly, important constitutional developments in relation to dignity, privacy and autonomy have not resulted in the abandonment of Victorian moral concepts such as 'lasciviousness', 'prurient interest' and 'depravity' in statutory terminology.
- Third, there is a significant overlap between the Bharatiya Nyaya Sanhita and the Information Technology Act, which causes uncertainty on investigation and prosecution.
- Fourth, most of the legislation was enacted before the advent of modern digital technologies and does not therefore adequately cover social media platforms, encrypted communications, artificial intelligence and cross-border digital publishing.

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- Finally, criminal sanctions remain the main regulatory tool, despite growing international awareness that age classification, content labelling, parental controls and platform regulation often offer more proportionate alternatives.

There is therefore a need for a complete overhaul of the existing statutory scheme to strike a balance between constitutional liberties and legitimate governmental interests, and to respond adequately to technological change.

V. Judicial Evolution Of Obscenity Jurisprudence In India: A Critical Analysis:

The law relating to obscenity in India has been shaped more by judicial interpretation than by legislative innovation. Although Parliament enacted statutory provisions regulating obscene publications during the colonial period, it has largely refrained from defining the scope and content of obscenity. Consequently, the Supreme Court and various High Courts have assumed the responsibility of developing constitutional standards for determining what constitutes obscene expression.

Judicial interpretation has not remained uniform. Instead, Indian obscenity jurisprudence reflects a gradual but significant transition from Victorian notions of morality towards constitutional values emphasizing freedom of expression, dignity, artistic autonomy, and individual liberty. This transition may broadly be divided into four stages: **(i) the colonial Hicklin era; (ii) the constitutional acceptance of Hicklin; (iii) the contextual and artistic approach; and (iv) the contemporary constitutional morality approach.** Despite this evolution, judicial inconsistency continues to characterize obscenity adjudication because courts frequently oscillate between public morality and constitutional values.

Ranjit D. Udeshi v. State of Maharashtra (1965): Constitutional Acceptance of the Hicklin Test

The Supreme Court's decision in *Ranjit D. Udeshi v. State of Maharashtra* remains the foundational judgment on obscenity in India¹⁶. The appellant, a bookseller, was prosecuted for selling D.H. Lawrence's novel *Lady Chatterley's Lover*,

which contained explicit descriptions of sexual relationships. The principal constitutional issue was whether Section 292 of the Indian Penal Code violated Article 19(1)(a) of the Constitution.

The Supreme Court upheld both the constitutionality of Section 292 and the conviction of the appellant. Chief Justice M. Hidayatullah adopted the **Hicklin Test**, holding that material is obscene if its tendency is "to deprave and corrupt those whose minds are open to such immoral influences"¹⁷. The Court further observed that freedom of speech under Article 19(1)(a) is not absolute and may legitimately be restricted in the interests of decency and morality under Article 19(2). Although the judgment represented the first authoritative constitutional interpretation of obscenity law in India, it has been subjected to extensive academic criticism.

- First, the Court relied almost exclusively on English precedents without independently analyzing Indian constitutional values. It effectively transplanted Victorian morality into post-independence constitutional jurisprudence.
- Secondly, the Court adopted a **paternalistic conception of the citizen**, assuming that readers required State protection from morally offensive literature. Such reasoning is inconsistent with modern constitutional democracies, which generally presume individual autonomy and rationality.
- Thirdly, the Court examined isolated passages rather than evaluating the literary work as a whole. This approach ignored the artistic and philosophical significance of Lawrence's novel.
- Fourthly, the decision blurred the distinction between **pornography and literature**, thereby exposing serious literary works to criminal prosecution.

Constitutional scholars have therefore argued that *Ranjit Udeshi* reflected continuity with colonial legal philosophy rather than the emergence of an indigenous constitutional jurisprudence¹⁸.

Chandrakant Kalyandas Kakodar v. State of Maharashtra (1969): Recognition of Evolving Social Standards

¹⁶Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.

¹⁷ Regina v. Hicklin (1868) LR 3 QB 360.

¹⁸ H.M. Seervai, Constitutional Law of India (4th edn., Universal Law Publishing, New Delhi, 1996) 1278–1285; M.P. Jain, Indian Constitutional Law (8th edn., LexisNexis, Gurugram, 2018) 1680–1686.

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A significant departure from the strict Hicklin rule was made in Chandrakant Kalyandas Kakodar v. State of Maharashtra¹⁹. The case was about prosecution for publishing an allegedly obscene Marathi short story.

The Supreme Court held for the first time that the standards of obscenity cannot remain static because society itself is constantly changing. The Court pointed out:

“The definition of obscenity varies from country to country according to prevailing social values.” This observation heralded an important constitutional principle: obscenity must be judged by contemporary standards, not by nineteenth century Victorian morality. However, the Court did not go so far as to abandon the Hicklin test entirely. Instead, it relaxed its strict enforcement. Thus, the judgment represents a transitional moment between colonial morality and modern constitutional interpretation.

Samaresh Bose v. Amal Mitra (1985): Contextual Reading and Literary Freedom

In the case of Samaresh Bose v. Amal Mitra²⁰ the Supreme Court has made considerable progress. The argument was about the Bengali novel Prajapati, which employed colloquial speech and frank talk of sexuality. The Court rejected the earlier approach and said that literary works should be read as a whole and not in isolation of selected passages. Literature often depicts unpleasant social realities and realistic depiction of human relationships cannot be equated with obscenity automatically, Justice Amarendra Nath Sen said. The Court further observed:

- literary merit must be properly weighted;
- vulgarity does not necessarily equal obscenity;
- Offensive language can be a valid part of a realistic portrayal of social conditions.

This decision significantly improved the constitutional protection of literary expression. Critical Reading. The judgment is interesting in that it acknowledged that artistic freedom must be interpreted contextually. But it did not set forth objective constitutional standards for distinguishing between legitimate artistic expression and criminal obscenity. Hence judicial discretion remained considerable.

Bobby Art International v. Om Pal Singh Hoon (1996): Nudity and Artistic Necessity

The Bandit Queen case is one of the most progressive decisions in Indian obscenity law²¹. The petition challenged the screening of the film Bandit Queen on the grounds that it contained scenes of nudity and sexual violence.

The Supreme Court tossed out the challenge. The Court found that the scenes of nudity cannot be viewed in isolation. Rather, they should be seen in the context of the film’s entire narrative and artistic intent. The challenged scenes showed the harsh social realities faced by Phoolan Devi and had a legitimate artistic and social function.

Justice B.P. Jeevan Reddy observed:

- Not obscenity alone is nudity.
- This principle was a watershed in Indian obscenity jurisprudence. Critical Assessment.
- The judgment commendably recognises artistic realism as an integral part of constitutional freedom.
- The Court did not, however, provide any objective standards as to when artistic necessity justifies explicit visual representations.
- The courts, accordingly, were still able to exercise wide subjective discretion in the future

Critical Assessment of Judicial Trends:

A survey of the evolution of obscenity jurisprudence in India shows several significant changes. The judiciary has undoubtedly shifted from the Victorian paternalism of Ranjit Udeshi to a more liberal constitutional approach, emphasizing artistic freedom and contextual analysis. But there are significant shortcomings.

- First, the judicial standards continue to be unpredictable.
- Second, courts frequently make subjective moral judgments.
- Thirdly, sometimes different Benches take inconsistent approaches, even though they rely on similar constitutional principles.
- Fourthly, Indian jurisprudence has not developed a harm principle as in several of the contemporary constitutional democracies.

¹⁹ Chandrakant Kalyandas Kakodar v. State of Maharashtra, (1969) 2 SCC 687.

²⁰ Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289.

²¹ Bobby Art International v. Om Pal Singh Hoon, (1996) 4 SCC 1.

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The judiciary has only partially dealt with the constitutional implications of social media, artificial intelligence, virtual reality and digital platforms finally. Accordingly, future constitutional adjudication should eschew morality based analysis in favour of a rights based framework based on proportionality, demonstrable harm and constitutional morality.

VI. Critical Analysis Of Obscenity Laws In India: Constitutional, Legislative And Digital:

The analysis of obscenity laws in India reveals a shift from Victorian morality towards constitutional liberalism, emphasizing freedom of expression while highlighting significant deficiencies in the current legal framework. Indian obscenity law contrasts two paradigms: the colonial model, focused on public morality, and the constitutional model, which upholds dignity, liberty, and privacy. A major issue is the lack of a clear statutory definition of "obscenity," leading to subjective interpretations that undermine legal certainty. The colonial legacy persists, as laws remain rooted in outdated moral philosophies, resulting in inconsistent judicial standards and the importance of community morals in legal assessments. This raises constitutional concerns, suggesting constitutional rights should prevail over majoritarian views. Modern trends show that obscenity law often punishes expression causing no demonstrable harm, contrasting with the principle that state intervention should be limited to harmful conduct. The digital age presents new challenges for obscenity regulation, necessitating a sophisticated framework that integrates criminal law and technology. Furthermore, broad obscenity laws can create a chilling effect on free expression, deterring discussions around sexuality and limiting democratic discourse. Finally, the lack of specialized institutional frameworks exacerbates enforcement inconsistencies and jurisdictional overlaps, calling for a unified regulatory authority to enhance effectiveness while safeguarding fundamental rights.

The above discussion leads to the conclusion that the Indian law on obscenity is at a constitutional cross road. Statute law still reflects Victorian moral philosophy, but case law is increasingly informed by liberal constitutional values. So the reform has to be driven by five constitutional principles:

1. The first test of constitutionality should be constitutional morality, not public morality.
2. Criminal liability should be based on actual harm, rather than subjective moral disapproval.

3. Consenting adults should be allowed more constitutional protection to express artistic, literary, educational or scientific value.

4. Digital regulation should be a platform-responsibility, technology-governance and child-protection approach, not censorship.

5. Need to legislate to bring the Bharatiya Nyaya Sanhita, the Information Technology Act and other special laws into a coherent constitutional structure.

Only a rights-based approach can balance the right of freedom of expression against legitimate governmental interests and preserve the transformative vision of the Constitution.

VII. Reforming Obscenity Laws In India: A Constitutional Framework For The Twenty-First Century:

This is not a question of more censorship, but of constitutional governance in the future of obscenity regulation. A modern legal system must recognize that freedom of expression and human dignity are complementary constitutional values, not conflicting ones. The purpose of criminal law should be to protect individuals and society from clear harm, not to enforce certain moral views. India therefore requires a legal framework on :

- constitutional morality;
- proportionality;
- respect;
- data protection;
- technology neutrality;
- protection of children;
- freedom of artistic and academic expression.

Only such a balanced constitutional approach can reconcile democratic freedoms with legitimate governmental interests in the twenty-first century.

VIII. Conclusion & Suggestions:

The regulation of obscenity in India navigates the tension between individual freedom of speech and the State's duty to maintain public morality. This study highlights the evolution of Indian obscenity law from its colonial roots to a framework that increasingly embraces constitutional values like liberty, dignity, and privacy. Key findings emphasize that Indian obscenity law is largely influenced by Victorian morality, yet modern judicial interpretations have begun to favor contextual understanding and artistic freedom.

Despite these progressive judicial decisions, the existing statutory framework remains fragmented and outdated, struggling to adapt to the digital age and

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new technologies. The analysis advocates for comprehensive legislative reform aimed at unifying and modernizing obscenity laws to reflect constitutional principles rather than antiquated moral standards. Moreover, the study suggests that obscenity regulation should focus on constitutional governance, prioritizing rights-based standards over fluctuating public moral norms.

Finally, the research underscores the need for a **multi-faceted approach to obscenity regulation, including legislative reform, technological oversight, and public awareness initiatives, to effectively balance individual rights with societal interests.** This transformation signifies a shift from viewing obscenity purely as a moral issue to recognizing its implications on human dignity and constitutional rights. Based on the above analysis, the study recommends that:

- 1. Instead of the piecemeal statutory provisions the Parliament should enact a Comprehensive Obscenity and Digital Content Regulation Act;*
- 2. Criminal liability should be limited to material that causes demonstrable harm, such as child sexual abuse material, non-consensual intimate images, sexual exploitation and trafficking.*
- 3. The constitutional touchstone should be constitutional morality and not public morality.*
- 4. Courts should develop a consistent approach to the application of the proportionality test on review of restrictions on freedom of expression.*
- 5. Literary, artistic, academic and scientific works are to be protected by the law.*
- 6. Establish a distinct regulatory framework for digital platforms, artificial intelligence and deep fake technologies.*
- 7. Establish an independent Digital Content Regulation Authority to coordinate policymaking and enforcement.*
- 8. Instead of excessive criminalization, we need more digital literacy, public education and international cooperation.*