

OBSCENITY AND CENSORSHIP

I. A Brief History of Obscenity

Charu Gupta, "Dirty" Hindi Literature: Contests around Obscenity in Late Colonial North India, available at http://preview.sarai.net/language/popularculture/essays/dirty_hindi.pdf

Deanna Lee Heath, Defining the Undefinable: Reading the Obscene in Deanna Heath , Creating the Moral Colonial Subject: Censorship in India and Australia (1880 to 1939) (p. 190 – 227)

Sumanta Banerjee, Bogey of the Bawdy: Changing Concept of Obscenity in 19th Century Bengali Literature, Economic and Political Weekly, July 18, 1987.

Priya Jaikumar, More than Morality: The Indian Cinematography Committee Interviews (1927), The Moving Image, Volume 3, Number 1, Spring 2003, p. 82-109,

"*The Fourth Movements 1991-2006*" in Bhowmik, S. Cinema and Censorship: The Politics of Control in India, New Delhi, India: Oriental Black Swan.

A general understanding of the term 'obscenity' would indicate the violation of prevalent moral codes in words, representations or actions that are accessible to the public at large. It is largely associated with matters that contain sexually explicit material. Legal sanctions on obscenity, therefore, seek to protect citizens from harmful influence of obscene material and act as a curb on free expression.

Unfortunately, a categorical definition of harmful influence in this case is not possible. This is because moral codes when related to sexuality are not universal and tend to operate in diametrically opposite variations across cultures and temporal spaces. This has indeed become even more complex in an information age, where a person's geographic cultural identity need not be an indicator of his/ her cultural affiliation when it comes to moral codes related to sexuality. (Refer: http://www.dnaindia.com/bangalore/column_save-savita-bhabhi_1270664; <http://savitabhahi.110mb.com/>. According to Alexa, it was among the 100 most popular sites in India at the time of its release even though pornography is illegal according to Indian law. The comic was printed in 10 different Indian languages, not counting English.)

From *R v. Butler*: To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.

While the state's attempt at preserving the prevalent morality of a particular time and place can be a more accessible idea in the interests of the maintenance of social order – it should be kept in mind that sanctions on obscenity curb an individual's choice of voluntary exposure to topics of questionable taste, as well as involuntary ones. The questionability is largely dependent on state policies rather than any verifiable evaluation method.

The problem with this is that the state is more or less vested with the powers of guardianship of the nation's morality based on prevalent moral codes while its custodianship includes words, representations or actions across global cultures and time-spaces. Although any understanding of obscenity is a matter of taste and aesthetics – the judgment on obscene material generally does not take into account the specific culture of its heritage but instead evaluates it based on the cultural and moral context of its perceived current audience.

An echo of this can be found in Justice Douglas' comment in *Miller v California*:

“The idea that the First Amendment permits government to ban publications that are 'offensive' to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people to anger.' The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment. As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some.”

Historical Perspective:

A historical understanding of the term 'obscenity' could perhaps shed more light on the paradoxical nature of its current practice.

Rex v. Curl: English common law court for the first time found an act of publication obscene. The case involved the printer, bookseller, pirate and pornographer Edmund Curll's publication in 1724 of a translation of Jean Barrin's *Venus in the Cloister; or, the Nun in her Smock*, together with four other titles. Prior to this judgment, matters related to morality had been dealt with in the spiritual courts, under the jurisdiction of canon law. Indeed, Curll's counsel before the Court of King's Bench claimed the common law had no jurisdiction over personal moral matters, and that the writings in question were just such matter. But the judges who heard the case decided that the common law could indeed deal with what would later become known as "obscene publication." A new offence (termed "obscene libel," even though no individual was libeled) was created; a new demarcation of jurisdictional competencies and a new organizing legal threshold for the publication of writing were established.

For Curll's publication of *Venus in the Cloister* to be a crime and not a sin, there had to be a public offence, not merely a private immoral act. The latter would have been a matter for the spiritual courts or for the individual conscience. What made Curll's action criminal in the view of the judges was a contingent technological circumstance: the publication was a printed work, and as such it was capable of widespread public distribution. The court found that, as a printed book, Curll's publication "goes all over the kingdom," threatening "morality in general," as the Attorney General claimed in prosecuting, because it "does, or may, affect all the King's subjects".

The technological circumstance detailed in the above put the onus of the crime on the creator, publisher and distributor of the allegedly obscene material. But how do laws on a similar line apply in an information age where there is already a repository of materials available for free access and the distinct roles of creator, publisher and distributor are difficult to demarcate and/ or identify?

The Indian Perspective:

Ancient Sanskrit literary critics seemed to have a practical, utilitarian approach towards obscenity in creative works. J. Masson Moussaieff attempted to render a definition of obscenity in the ancient Indian context. Although most usage of pornography was frowned upon as literary faults, the critics conceded that vulgarity could serve a purpose in certain sections of literature.

The intention of the author would become the basis for judgment in such cases. Say, if the objective of a literary piece was to titillate and was understood to be such by the reader – the usage of pornography was justified. Also, the critics conceded for instances where even the most explicit description of the sexual act could be overshadowed by the imaginative genius of the poet. (Eg: Lovemaking between Siva and Parvati in Kumarsambhava. Although any description of the sexual act between gods should be as reprehensible as lovemaking between one's parents – it does not pander to baser emotions and is even rendered exquisite by the poet's imaginative genius.) This is in stark contrast with the Western ethos where the reader's personal disgust with a piece of literature could render the work culpable for obscenity.

The period of British colonialism, especially with the technological advancement in the media (photography, films etc.) saw India as a site for both growing censorship practices as well as a lucrative market for Western films. While British concerns about the impact on the naïve Indian psyche when exposed to Western films remained paramount – these concerns could be interpreted as an offshoot of the growing popularity of American and indigenous cinema while British films remained a subsidiary choice. The audience clearly wanted the sensationalism provided by the early American fare where the British films failed due to their ideological reluctance. The British concern for American films serving as a representation for all of the Western civilization to native Indians could therefore be interpreted as the loss of market shares for British films as well.

“Imperial ideology during the decline of empire was interrupted by its own conflicting impulses toward the colonial territory: Were Indians impressionable natives to be monitored, guided, and exposed to edifying images of the West? Or were they an untapped market resource to be enticed with commercial and sensational images? Conservative factions within the British state desired to control cinematic images in colonies and produce images to justify empire. Equally, dominions and India were desirable markets for Britain assessed the Indian colony as a site for censorship as well as a market, and these imperial constructions of India were frequently at cross-purposes.”

Bhowmik provides a history of modern Indian censorship. Since independence, censorship has been widespread in many different forms, stemming from widespread fears which the lawmakers had about an unrestricted freedom of expression being a barrier to social reform plans under

Nehru's development plans. The most severe period of censorship was under Indira Gandhi's emergency rule in the 1970s.

Looking specifically at a chapter on post-liberalisation India of the 1990s and 2000s, censorship in film Bhowmik talks about "new moral paradigms" in the new India where the moral guardians of Indian screen, being the film board, had to face. Sekhar Kapoor, Mira Nair, and Deepa Mehta have come across as three 'bold' film-makers.

Bhowmik also goes on to look at the emerging trends of a fear of communalism, and *vox populi* in film censorship in India today.

II. Elements of the Law/ Tests for Obscenity/ The Framework of Obscenity

R. v. Hicklin

Ranjit Udeshi

Amal Mitra

Miller (just to talk about that test?)

Madhavi Goradia Diwan,

Vishnu D. Sharma and F. Wooldridge, *The Law relating to Obscene Publications in India*, The International and Comparative Law Quarterly, Vol. 22, No. 4 (Oct. 1973), p. 632-647, available at <http://www.jstor.org/stable/757659>.

A.G. Noorani, Customs as Censors, Economic and Political Weekly

Central Board of Film Certification, Principles for Guidance in Certifying of Films, available at http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=1

Bandit Queen case

M.F. Hussain case (this and bandit queen featured hicklin being diluted)

Material can be obscene even if it has no likelihood of inciting anyone to unlawful conduct, and even if no unwilling viewer is ever likely to see and thereby be offended by it. Obscenity law aims at preventing the formation of certain thoughts—typically, erotic ones—in the minds of willing viewers.

The inevitable clumsiness of the law in this area is highlighted by the remarkably poor fit between obscenity law's scope and the evil that it seeks to prevent.

III. Measuring Morality?

R v Butler, [1992] 1 SCR 452 Canada

R v Labaye, 2005 SCC 80 (Canada)

Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, available at <http://www.law.northwestern.edu/faculty/fulltime/koppelman/moralharm.pdf>.

J. Masson Moussaeif, *Obscenity in Sanskrit Literature*, available at <http://www.jstor.org/stable/40874445> (provides a lens to explore obscenity at a time when censorship was a very different beast from how it stands today ...)

(HERE THE NUSSBAUM BIT COULD COME IN)

The core of most obscenity laws seems to lie in the prevalent community tolerance for disgust. Disgust is generally relied upon as an indicator of danger due to its primitive evolutionary roots. But as Martha C. Nussbaum points out, many things seem disgusting only by association. People often learn to hate according to cultural or social upbringing by associating their sense of disgust with objects that are known to arouse disgust traditionally.

From *R v. Butler*: To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.

D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367, at p. 370, refers to this as "legal moralism", of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the Charter.

To continue with Nussbaum's stance: "While disgust doesn't always warn us of danger, it always separates "us" from "them," as it patrols the borders of the body politic. When members of society are disgusted by a criminal, she says, they are warding off thoughts of their own capacity for moral corruption."

This reaction to a fear of 'sin' clearly had its origins in the ecclesiastical approach to sexuality, more specifically, the Puritanism movement in the late sixteenth century. But it would be remarkable to note that the first case of state censorship of expression based on sexuality (*Rex v. Curl*) followed as a consequence of the convict's long history of publishing politically libelous works although the judgment chose to focus on the attendant technological circumstance of the material having been printed. To put it more obviously, the judgment served to create an atmosphere of threat against further pursuance of activities in a similar vein.

The case and the following judgment served a political purpose while grounding the legal technicalities in a basis of the public's concern/ disgust at the possibility of its own moral corruption from the 'obscene' material.

From *R v Labaye*: Indecency has two meanings, one moral and one legal. Our concern is not with the moral aspect of indecency, but with the legal.

-Grounding criminal indecency in harm represents an important advance in this difficult area of the law. Harm or significant risk of harm is easier to prove than a community standard. Moreover, the requirement of a risk of harm incompatible with the proper functioning of society brings this area of the law into step with the vast majority of criminal offences, which are based on the need to protect society from harm

From Andrew Koppelman

"Discerning the moral context of texts is too complex a task for the law to undertake."

Glancing over the justification of the term 'moral harm' and the state's authority in presiding over such a personal notion, the challenges lie in recognizing and quantifying the extent of the harm and the process through which the victim suffers this indignation.

While quantifying harm or risk of harm in the case of indecent action may seem straightforward; a specific definition of harm becomes problematic in the case of words and representations. The latter may be termed as passive perpetrators of obscenity according to legal doctrines, the multifaceted problems arising from a mere representational interaction between the two will be detailed in the next segment.

1

If we can claim that certain books/ movies promote moral character, are healthy for one's development, then we can also postulate that some are bad, and HARM US.

Justice Burger: harm caused by bad books analogous to good caused by good books.

What good are good books? – They promote a specific belief, for instance Aesop's fables

- It is not about consequences: The best art, Murdoch argues, is that which "shows us the world, our world and not another one, with a clarity which startles and delights us simply because we are not used to looking at the real world at all

Recognizing Moral Harm: objectification;

IV. The Emotive Register of Obscenity

Roots of obscenity article

Carl F. Stychin, *Promoting a Sexuality: Law and Lesbian and Gay Visual Culture in America* in Lionel Bently and Leo Flynn (eds.), *Law and the Senses – Sensational Jurisprudence*, Pluto Press, 1996.

Lawrence, *Media's Law*

Shohini Ghosh, *Censorship Myths and Imagined Harms*

Jennifer Barker in *The Tactile Eye* argues that an aesthetic experience of a creative work is a tactile experience between the work and its audience that she situates at three overlapping levels of the bodies of both: the skin, the musculature and the viscera.

While it remains a somewhat contentious speculation, it can clearly indicate the problem with the sort of representational interaction that operates between media and law in the present practice. To elucidate, Lawrence Liang's observation in *Media's Law: From Representation to Affect* may be useful. He states that: Neither the focus on censorship, nor the filmic representation of law, is able to capture the experiential and affective dimension of the

encounter between law and media. In both instances, the appeal is to a transcendental claim rather than to the specifics of the encounter.

Another problem with this is the apparent 'no speaking' zone on sexuality instilled by the legal doctrines. Since legal codes form the very basic fabric of community building, the law's reluctance to talk about sexuality and sexual matters in greater detail echoes the kind of ecclesiastical ban on sexuality as an ideological original sin – something that actively prevents people from taking cognition of sexual realities. The sexual illiteracy and incoherence perpetrated by this approach can only provide fodder to religious fear-mongering of the sexual act and a gradual weakening of domestic and/ or social bonds.

A Dangerous Method – David Cronenberg (2011):

Carl Jung: Explain this analogy made between the sexes, the death instinct.

Sabina Spielrein: Professor Freud claims that the sexual drive arises from a simple urge towards pleasure. If he's right, the question is why is this urge so often successfully repressed?

Carl Jung: You used to have a theory involving the impulse towards destruction, self destruction. Losing oneself.

Sabina Spielrein: Suppose we think of sexuality as futile, losing oneself as you say, but losing oneself in the other. In other words, destroying ones own individuality. Wouldn't the ego in self defense automatically resist the impulse?

Carl Jung: You mean for selfish not for social reasons?

Sabina Spielrein: Yes. I'm saying that perhaps true sexuality demands the destruction of the ego.

On a relevant note, Dilip Chitre makes a useful distinction between obscenity and titillation/ sexual arousal in Creative Aspects of Obscenity. He differentiates linguistic obscenity into two categories:

- 1) sexual abuse
- 2) scatological abuse

Since the above are ritualistic private performances that are known to be associated with a sense of guilt; any no-holds-barred linguistic expression of the above forces them into the open and is thus recognized as a violation of social codes.

“The main categories of obscenity with which we deal here are (i) sexual abuse and (ii) scatological abuse. Both produce violent upsets.... So, linguistic secrecy is, symbolically, behavioural secrecy. Just as covert sexual advances are allowed in civilized behaviour, covert linguistic advances in the same vein are permissible in civilized writing. There is a formal similarity between a woman in the late 19th century Maharashtra draped in a nine-yard saree and yet establishing her feminine assets, and a novelist of the same age obliquely and metaphorically unfolding the content of an erotic situation. All obscenity is non-prurient by definition. It is the cover that is prurient: taking it off and showing the content in its stark naked form violently interrupts the gradual flow of prurient interest that runs through conventional behaviour. I do not use 'prurience' as a pejorative term. It has, like muzak, its own function”

Then, following Chitre's remarks, we can perhaps rid obscenity from the accusation of vulgarity.

1) True obscenity is not vulgar.

2) Since vulgarity is a function of taste and aesthetics, it can function only in cases where there is aesthetics involved.

3) If we consider obscenity to be a violation of linguistic taboo that arouses disgust - it cannot have anything to do with vulgarity. Since vulgarity, by definition, is an expression of low taste.

→ we are still dealing with taste that is supposed to perform the intended emotive function. Obscenity violates the process of creating that emotive function altogether and arouses disgust instead.

Following the above would indicate that since obscenity is simply a violation of the emotive process and on its own, rather meaningless. Although at a purely functional level, it can perhaps be used to perform certain literary functions.

V. Production of Knowledge

- Annette Kuhn, *Cinema, Censorship, and Sexuality 1909-1925*. London: Routledge
- Lawrence Liang, Sense and Censorability, available at <http://www.altlawforum.org/law-and-media/publications/sense-and-censorability>

- Shohini Ghosh, *The Secret Life of Film Censorship*, <http://infochangeindia.org/agenda/the-limits-of-freedom/the-secret-life-of-film-censorship.html>

Annette Kuhn radically reimagines the field of censorship, and invites us to look at censorship as a “play of production and prohibition”.

Traditionally, censorship has been understood as an act of prohibition, ~~exieision~~ excision, or ‘cutting out’ – practice through which certain subjects are forbidden expression. Censorship is seen as a problem in society, and debates only look at it through this prohibitive process, and whether these are justified as an exercise of power or not. Kuhn refers to this as the ‘prohibition/institutions’ model.

The problem with this model according to Kuhn is a) it suggests that censorship is an act carried out by a single empowered person or institution; b) it forgets that censorship may well be productive in its effects; and c) it assumes that the process of censorship can only be considered as a ‘repressive’ power (i.e. its only a negative relationship).

Kuhn asks us to not view the film censorship boards in isolation, but rather as one part of the wider regulatory apparatus. Further, she argues that the play amongst the different powers is ‘productive’. She states that ‘to assume that censorship only prohibits or represses is to forget that censorship might equally be productive in its efforts’. So for example, in the song ‘Chole ki piche’, the song attracted controversy by a censorship case brought forward through PIL litigation. The song attracted attention through intrigue; the sexuality of the song was through what one determined its effects on audience were; and generated further discussion which kept the song and the film in the public eye, and inevitably influenced viewing figures.

Further, Kuhn asks us to view censorship through the ‘ensemble of power relations’, or the historical, cultural and social relations which exist. The Central Board of Film Classifications (‘the Board’) is the regulatory film body of India, and is responsible for the government’s censorship of films. If we look at the Board’s role, it would be naive to think that censorship

decisions can be viewed in a vacuum. The Board is thoroughly embedded within the larger context of Indian society.

Therefore when we consider acts of censorship in India, through this re conceptualized view of Kuhn, we have to examine the play of power among the Indian state, film industries, and citizenry. For example, an examination on sexuality and censorship would show that the debates in these institutions on sexuality in India produce sexuality in as much as they call for their control.

Drawing partially on Kuhn's work, Lawrence Liang says, "In a trivial sense, it could be said that the judges are testing neither the aesthetic nor the literary worth of a book or movie, and that they are only interested in the issue of determining the scope of the fundamental right of freedom of speech and expression. However, nowhere except in the mist-enveloped regions of liberal legal theory, can one have 'a decision' on the abstract idea of freedom of speech and expression, which is not at the same time dependent on meta-discourses of taste, aesthetics, and propriety. If one were to look closely at the reading and viewing practices of courts, then one begins to see the outlines of a legal theory of aesthetics slowly emerging."

But Liang goes on to say that the productive powers of censorship can be modulated in so far as to cultivate a particular view of media texts. This important pedagogic function again serves the same function as the censorship of texts, but in a much more efficient manner since it controls the audience's perception itself.

"In the post-colonial context, the pedagogical mission of censorship is closely tied to the idea of creating an 'ideal citizen-viewer'. The task of censorship is to teach the viewer to become a citizen through particular spectatorial practices, and the imagined gaze of the citizen-viewer determines the specific content of censorship laws. A liberal constitutional approach to the question of speech often ignores the fact that a juridical model of speech also presumes a certain speaking subject, akin to the citizen viewer. At the same time it also defines the social domain of the speaking subject. Article 19(2) through the imposition of reasonable restrictions effectively lay out the domain of the unspeakable (in India).

While censorship never succeeds in instituting a complete and total subjectification of speech through a process of law, it does effectively circumscribe the social domain of the speakable.

The very idea of ‘reasonable restrictions’ in Article 19(2) of the Constitution testifies to the complications arising out of making a claim as a legally entitled speaking subject.”

The consequence of the above is that a citizen can either lay claim to his/ her right of free speech by appealing to the authorities or situate oneself outside the domain of permissible speech and forfeiting the rights of what can be termed as a legally entitled speaking subject. Defining the permissible domain of speech seems a more effective process in curbing the reach of free speech and expression than simply censoring particular elements. There is also the added problem of the prescribed domain pandering to certain accepted norms or notions of a majority in any populace based on tradition rather than reason.

In David Cronenberg’s 1996 visceral film *Crash*, the protagonists indulge in voluntary car crashes as the violent collision and the near-death experience seems to be the only way in which people can attempt to escape the excessively formal jurisdictions of social codes and decorum.

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