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"Obscenity" in The New Bill

By

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Author Iroing Wallace has pointed out that in 1928 a book was banned because it contained the phrase "And that night they were not divided." In 1968 the Indian Supreme Court did not find a story to be obscene which depicted the slow but steady maturing love between a boy and a girl, their seeking of and getting of opportunities to be near to each other, their having to sleep in the same bed and ultimately falling in love with each other. Even graphic descriptions of intimate behaviour are deemed to give outer expressions to the inner emotive actions. Thus it is no more obscene to read "She was kneeling opposite him on the bed. He unhooked her brassiere, and this time (she) offered no resistance. He removed it and bit softly at her breasts. They waved at him, pennants in the wind of lust, and he bit deeply into the acid of her drugs..."

A change has set in the outlook as well as in the contemporary moral standards. It may be that we have come quite near to the permissive society. It is difficult to be a judge to pronounce upon the desirability or otherwise of this change. It remains, however, a fact to reckon with, to search for the general prevailing community mores. In the matter of determining obscenity the community mores provide the testing ground but as Norman St. John Stevas pointed out these grounds themselves "are a frequently forced or changed by the influence of books."

There is no gamsaying that sex does no more remain an anathema. Aphrodisiac thoughts and actions are catered through the medium of books, magazines and films. Massive readership is claimed for the "hot stuff" circulated under the counters. Blue films are viewed with wide open eyes at closed door parties.

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The notional existence of obscenity seems to have gradually smelted into thin volatile vapours. Yet our law reformers, with an ostrich sense of morality, are unable to perceive the change. The law (Section 292 F.P.C.) has remained unaffected; The 1969 amendment Act had made to lay down a test of obscenity, but the use of expressions like "lascivious" "appeals to prurient interest", and "tend to deprave and corrupt the morals" do not take us anywhere except to leave the matter for being told by the courts as to one has transgressed or not the limits of proscribed conduct only after a prosecution has been launched. It can indeed be a ground of defence that the publication is in the interest of art or science or literature and bearing." but this will turn on the expert evidence. Accordingly, the proposal, in this context has been, to incorporate a provision making it possible to admit the expert opinion in evidence.

There are few snags in the proposal. The experts who are to pronounce an opinion in a subjective matter like obscenity have their own notions of aggregate values of good and bad. As the experts are to be mostly from a particular set of society they are to cultivate their own sense and style of morality. Secondly, the admissibility of expert evidence as the conclusive evidence in cases of obscenity is a drastic departure from the rules of prudence and caution. Hitherto expert evidence is only a matter of opinion which is used to corroborate a fact. Essentially the testimony goes to the weight of evidence rather than being the evidence itself. Apart from the above legal technicality the issue of obscenity raises the question as to whether the ethical issues can be the subject matter of penal provisions. By far the attitude of the society as reflected through the provisions of the Bill and the Joint Select Committee Report does not promise any change in this regard. They still cling and adhere to the archaic rules. They seek to enforce a moral code on an individual member of the society to keep him out of the pale of obnoxious conduct with a full sense of realisation that the meaning of obscenity has always lacked precision. It will continue to have elusively mobile limits.

The Khosla Committee points out that "we are greatly agitated because our film producers are beginning to copy the worst in Western film e.g. scenes of excessive love making, indecently dressed women, scenes of cruelty and torture...all of which have become favourite themes of the so called progressive and creative artists." This is equally true of artists employing other media of expression. But to protect ourselves from the baneful and immoral influences of such thoughts and actions the use of the

penal law of obscenity is an inverted process.

In expounding the law of obscenity the Supreme Court has ventilated the view that any thought or action which "tend to treat with sex in a manner which appeals to the carnal Side of the human nature is obscene". A carnal thinking or conduct of an individual is a normal human behaviour. The restraints put on the conduct by penal sanctions and also to penalise the moral injunctions knit around the proscription of such behaviour had its roots in other areas of social interests. To illustrate the carnal conduct outside the bonds of matrimony, and any behaviour antecedent to carnal conduct would seek to undermine the institution of marriage, legitimacy and consequently it tended to cloud the rights and interests in property there- by causing imbalances in the individual relations which had been attained in the society through arduous experimenta- tions and setting up of viable economic, social and welfare unit of the "family". With the advent of technology of family planning and the gradual change in the concept of "woman" not being at par with the chattel, the entire institutions of family and marriage are at the helm of a severe threat. The urge of human nature continues to persist but the urbanisation, and developments in science and technology continue to upset the ways of living and thinking to the extent that the superimposed restraints of moral code on the human behaviour avowedly to protect the social interest at a given point of time find their grips gradually loosening. Accordingly, the judicial approach to treat a conduct underlined with carnal appeal as offen- sive is not consistent with the actualities of life. It would only mean that out sense of prudery, however, hypocritical it may be, ought not to be offended.

In the commonly known Lady Chatterly's Lovers' case the Supreme Court endeavoured to improve upon the obscenity law. The court said that "the obscenity without a prepon- drating social purpose or profit cannot have the constitu- tional protection of free speech and expression..."

Later in K.A. Abbas' case (1971) these were set also as standards for censorship of the movies. But this rule also fails to take us much further except that one may find that the preponderant "social purpose" or "social profit" are nothing more than vague judicial gargous until and unless these are interpreted and implemented in terms of a system which the social order wants to enforce and retain. Undoubtedly these expressions enable the court to assume the role of a moral mentor.

Our statute books are litt red with laws which make it punishable to think or act in lascivious manner, or express oneself ina way that appeals to the prurient

interest so as to deprave and corrupt persons who are likely to read, see or hear the matter contained or embodied in a work purported to be obscene. The Indian Penal Code, the Criminal Procedure Code, the Foreign Exchange Regulation Act, the Customs Act, Cinematograph Act and myriads rules and regulations, notifications, orders and directives are in currency to see that neatly processed and filtered morals are available to the people. Indeed, the moral pills are known for long, to be most efficacious contraceptive for checking of "adulterations" of thoughts.

Illustratively the law on obscenity can be cited from the Indian Penal Code (S.292 I.P.C.) which forbids the sale, circulation, import or export or advertising of any book, pamphlet, paper writing, drawing, painting, representation figure or any other object which causes or tends to cause an obscene effect upon those who happen to have an audio visual access to these. With a view to ensure that the vague standards of moral conduct are observed faithfully, severe penalties have been pumped into the provisions of law. The Penal Code would see that any breach of the provision entails upon the author, holder or the distributor of the obscene object a conviction which may extend to a period of two years and a fine which may extend to a period of two years and a fine which may extend to two thousand rupees. Any subsequent defiance is met with more the double penalty - both in terms of conviction as well as of fine. Confiscation of the material is also not precluded.

It is, however, possible to contravene a rule of traditional morality which may not be adjudged as obscene, if it could be proved that the obscenity is justified and is in good faith under the Penal Code it is provided that the obscenity is not obscene if the object of obscenity is kept for bonafide religious purposes or it be sculptured, engraved, painted or otherwise represented in any ancient archaeological monument or temple. Thus the obscenity can go hand in hand with religious purposes, and while to dally with the morbid prurience of the past is permissible, no attempt at understanding the mystiques of modern sex behaviour has been made. To this extent our law givers, law commissioners and law reformers have miserably failed.