CHAPTER V

DEVELOPMENT OF OBSCENITY LAWS:
INTERNATIONAL PERSPECTIVE

Give me the liberty to know, to utter and to argue freely according to conscience, above all liberties.494

Meaning and Concept of Obscenity

The term obscenity originated from a latin word ‘ob’ which means on account of, ‘caenum’ which means unfavorable, unpleasant, evil, undesirable and ‘obscena’ meaning excrements. According to Encyclopedia Britannica, obscenity in general is that which offends the public sense of decency.495 According to Blacks Dictionary the word obscene means extremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate.496 Anything which has the effect of corrupting the morality or exciting lubricous thoughts in the minds of persons is considered to be obscene. Obscene is something which is repulsive by reason of malignance, hypocrisy, cynicism, irresponsibility, gross disregard of moral or ethical principles.497 Obscene means ‘Offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed; impure as obscene language, obscene picture, any thing ‘expressing or suggesting unchaste and lustful ideas, impure, indecent, lewd’.498 Anything deliberately made to incite a reader to indulge in acts of

495 Britannica Encyclopedia, 2007 P.857
497 Phillip Gove, Webster’s Third New International Dictionary, Merrium Webster, US, P. 1557
indecency or immorality is obscene. Obscenity can be said to be that which is antithetical to the ethical values of society. The meaning of the word obscene is repulsive, filthy, loathsome, indecent and lewd.\textsuperscript{499} Any material which arouses extreme immoral and perverse behaviour in respect of sexual indulgence, which have the tendency to encourage the corrosion of moral values would be obscene. Anything calculated to provoke the passions is obscene. The meaning of the word obscenity is the characteristic or state of being morally abhorrent or socially taboo especially as a result of referring to or depicting sexual or excretory functions.\textsuperscript{500}

The term obscenity is a relative and subjective term. The relative nature of the concept of obscenity emerges from the attitudes of people of different communities at different time towards the issue of obscenity. It is relative as concept of obscenity can not be the same in different societies or communities or countries. It is subjective as it describes the reaction of the mind to a certain kind of material and the reactions could differ depending on the upbringing and attitudes of the people. Obscenity is entirely fluid and subjective, both historically and geographically. Obscenity depends on many variables relating to age, culture, personal preferences and notions of taboo.

Decency and morality and the converse word ‘obscenity’ are imprecise, elusive and elastic terms which change as per changes in a society from time to time and place to place. The act of wearing a bikini by women at a swimming pool is suitable and normal, but wearing a bikini on the road is considered to be highly offensive especially in a country like say Saudi Arabia, when the society’s expectation of behaviour is kept in mind. If two persons indulge in sexual acts within closed room, it is acceptable. But the same action in a public place would be termed as obscene, even if they are husband and wife. The concept of

obscenity is the creation of mores and behaviour of a class of people at a particular time in history.

The concept of obscenity is dependent on the total culture of the society in the prevailing time. One person's object of obscenity could be visual succor for the person next door. Nothing can be treated as obscene unless it is culturally adjudged as such by society. The sculptures at the Khajuraho temples in Madhya Pradesh could seem to a foreigner to be obscene but not so to a devout Hindu. Obscenity is relative of time, place and circumstances. It depends on the morality and cultures of the country. The standard of obscenity is the result of the cultural values and mores of a given society at a particular time. What has been condemned as obscene by one community has been recognized as a masterpiece of literary work by another community. It is found that obscenity like beauty is in the mind of the beholder. It is more a matter of opinion than a fact. It is a matter of judgement of the individuals to a particular material. D.H. Lawrence has aptly remarked: 'what is pornography to one man is the laughter of genius to another'.

There seems to be a symbiotic relation between culture, morality and obscenity. In general all exposed lewdness, grossly shocking and reprehensible behaviour, open affrontation to decency, and disgusting and injurious to public morals is obscene. But the real connotation of the word obscenity poses a predicament.

The concept of obscenity becomes difficult to define clearly as it does not cover a specific area. The word obscenity is inextricably involved with human emotions, having emotive connotation. It is often held that the word 'obscene' means that which is offensive to modesty or decency and due to which there is an upsurge in emotions of lewdness, filthiness and repulsiveness.

This chapter deals with the meaning and concept of obscenity, along with the history of development of obscenity laws and the difference between words like nudity, pornography and sex, which are sometimes used synonymously with obscenity. The jurisprudence of laws of obscenity in England and United States of America is dealt with in this chapter together with the legal position of obscenity in other countries of the world.

Obscenity is a changing and relative concept. Sometimes terms like nudity, pornography, sex and indecency are also regarded as obscene, so an attempt has been made to decipher and separate obscenity from these terms.

**Nudity and Obscenity**

As per Law Lexicon, mere nudity in painting or sculpture is not obscenity. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene simply on account of their nudity.  

In ancient Sparta, the Gymnopaedia was a yearly celebration during which naked youths displayed their athletic and martial skills through the medium of dancing. In Japan, female sumo wrestlers wrestled in the nude. The word gymnast comes from gymnos meaning naked. Socrates had pederastic relationship with several of his students who trained naked in gymnasiums.

In United States v. Rosen in the year 1896, it was observed by the Supreme Court of America that the accused was liable for publishing the nude photographs of females in his newspaper. However, in 1940 the trend of the court changed and
in **Parmilee's case**, the court did not declare the nude pictures to be obscene because the pictures depicted a great artistic merit.

The Supreme Court of United States has laid down the norms as laid down in the case of **Sunshine Book Company v. Summerfield**: Posterior views of nudes of either sex are not obscene. Side views of nudes are not obscene if they do not reveal the genital or pubic areas. Front views of nude adults if photographed at sufficient distance are not obscene nor are they obscene if the pubic area is concealed or obliterated by retouching or shadowing the photograph. Front views of nude children between the ages of seven and fourteen years may or may not be obscene depending on an assessment of each individual photograph. Close range views of the female breast are not obscene. In **Jenkins v. Georgia** in United States the court held that the film, "Carnal Knowledge" is not obscene under the constitutional standards announced in Miller. The film shows occasional nudity, but nudity alone does not render material obscene under Miller's standards.

As per the decision of Courts in United Kingdom it is nuisance to expose the private parts of an individual in a public place and in the sight of diverse persons. But the mere exposure of one’s person is not indictable unless it was done to public view. The fact that a man exposed his private parts to a woman in a public place, where no one was in sight was held to be insufficient to support an indictment. Sedley (United Kingdom) was punished for standing naked in a public balcony... the most criminal part of his conduct was the exposure of his person. But it was held in the famous case of **Hicklin** in England that a picture of a woman in nude is not per se obscene, unless there is something in it which would shock or offend the taste of any ordinary or decent minded person.

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505 113. 2nd 72 (D.C. Cir.1940)
508 Thaliman. 33 L.I.M.C 58
509 Webb. Den C.C. 838
510 Commonwealth v. Sharpless, 2 S and R 91
511 1868. L.R. 3 QB 360
The court further held that when there is nothing in it to offend an ordinary decent minded person, it is impossible to say that it is obscene. For the purpose of deciding whether a picture is obscene or not, one has to consider to a great extent the surrounding circumstances, the pose, the suggestive element in picture, the person into whose hands it is likely to fall etc.\(^{512}\)

The trend in contemporary society is towards nudity. Nudity is accepted and even encouraged by people. The newspapers contain articles titled as, ‘Nude gardens go public.’ In United Kingdom a couple Ian and Barbara Pollard are flooded with calls from people who want to ape their hobby of gardening in the buff.\(^{513}\) In United Kingdom, their act of gardening in the buff was not regarded as obscene or punishable.

There is a revolutionary decision by Copenhagen Culture and Leisure Committee to allow topless bathing.\(^{514}\) The famous pop singer Janet Jackson reportedly appears without clothes in several shots during which she quickly covers her nude breasts.\(^{515}\) However, she is punished with fine for her action. In 2007, nude recreation represented a 440 million $ industry ---up from 400 Million $ in 2001 and $ 200 million in 1992 and is still growing. In Germany a travel operator has arranged for an all- nude charter flight this summer to take customers to a clothing optional retreat in the Baltics.\(^{516}\) Sex, nudity and vulgar language have become regular ingredients of the dramas, documentaries, and reality television staples that make up the television diet of many countries. Scenes that would have provoked a furor 15 years ago now rarely cause a fuss.

\(^{512}\) Ibid
\(^{513}\) Mumbai Mirror, June 7, 2007, P.21
\(^{514}\) Hindustan Times, Mumbai, April 8, 2008,
\(^{515}\) Mumbai Mirror, Monday, September 25,2006 , P.50
\(^{516}\) No shoes, shirts, worries- Michelle Higgins, California, DNA , Mumbai April 27, 2008, P. 9
Indecency and Obscenity

The words “indecent or obscene” convey the idea of offense against the recognized standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale. Decency and morality are vague and rather elastic notions that evolve with time and social change and vary vastly among different cultures. Something that may be morally acceptable to one section of society may be outrageous to another. Indecency is a concept wider than obscenity. Although anything that is obscene must necessarily be indecent, what is indecent need not always be obscene. In other words while indecent merely means non conformance with accepted standards of morality, obscenity refers to that which has prurient or lascivious appeal. Many countries have made laws to define what is considered to be obscene and censorship is often used to try to suppress or control material that is obscene under these definitions. The differentiation between indecent and obscene material is difficult and contentious. The level of offense generated by a word or phrase depends on region, context, and audience. When it comes to ‘indecency’, this term is often used in conjunction with obscenity. The word seems to mean ‘shocking and disgusting’ but less so than obscenity, but there has been relatively little offered in the way of definition by judges. In the case of Cohen v. California Justice Harlan said, ‘One man’s vulgarity is another man’s lyrics.’

In 1981 in England, the Indecent Display (Control) Act was enacted. Section 1 (1) of the Act laid down that if any indecent matter is publicly displayed, the person making the display and any person causing or permitting the display to be made shall be guilty of an offence.

517 R. v. Stanley (1965) 1 All E.R. 1035 at P. 1038
518 Ibid
519 R. v. Greater London Council (1976) 3 All E.R. 188-89
521 1971 (403) US 15
Lord Reid in England remarked in the context of indecency in the case of Knuller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions\(^{522}\) that indecency 'includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting', and Lord Simon of Glaisdale\(^{523}\) said that 'the authorities establish a common law offence of conduct which outrages public decency.' Lord Sands observed in the case of M. v. Langmuir\(^{524}\): 'I do not think that the two words indecent and obscene are synonymous. The one may shade into the other, but there is a difference of meaning. It is easier to illustrate than define and I illustrate thus: 'For a male bather to enter the water nude in the presence of ladies would be indecent, but it would not necessarily be obscene. But if he directed the attention of a lady to a certain part of his body his conduct would certainly be obscene.' In the case of R. v. Stanley\(^{525}\) in United Kingdom, Lord Parker differentiated between obscenity and indecency in terms of their relative seriousness on a spectrum of offensiveness to 'recognised standards of propriety'.

In Reno v. American Civil Liberties Union,\(^{526}\) the Supreme Court of United States struck down indecency laws which were applicable to the Internet. "Indecent," also has no specific legal meaning in the context of the Internet.\(^{527}\)

A majority of the Canadian Supreme Court adjusted its test for what constitutes "acts of indecency" to render the inquiry more objective in R. v. Labaye.\(^{528}\) The case was brought as an appeal by the owner of a club against his conviction for keeping a common bawdy house for the practice of acts of indecency. The central question was whether activities taking place at the club, L'Orage, were indecent. L'Orage was a swingers club, open to members as a place where they could meet people and engage in group sex. The club, which was only open to its 800

\(^{522}\) (1971) 2 All ER 898 at 905, (1973) AC 435 at 458
\(^{523}\) (1972) 2 All ER at 935, (1973) AC at 493
\(^{524}\) 1931 SC (J) 10
\(^{525}\) (1965) AC 435
\(^{526}\) 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)
\(^{527}\) American Civil Liberties Union v. Reno, 521 U.S. 844 (1997)
\(^{528}\) (2005) 3 S.C.R. 728, 2005
members, comprised of three floors. Sex was only allowed on the top floor, where access was limited to members and their guests and restricted by a lock with a coded access pad. To gain membership, people had to undergo an interview to ensure their understanding of the nature and values of the club and pay a membership fee. Both entry into the club and participation in sex was entirely voluntary. On appeal, seven judges of the Supreme Court found that acts at the club were not indecent. The decisions of the courts have found indecency to be wider than obscenity.

**Pornography and Obscenity**

According to the Britannica Encyclopedia pornography means the representation of erotic behaviour in books, pictures, statutes, motion pictures that is intended to cause sexual excitement. The word pornography is derived from Greek word πορνι( prostitute) and graphein ( to write). It is derived from the word μομυτύλαμπος (the writings of harlots). A principal theme of medieval pornography was the sexual license of monks and other clerics, along with their attendant displays of hypocrisy. It was originally meant as any work of art or literature depicting the life of prostitutes. According to the American Heritage Dictionary of the English Language (1976), "pornography" consists of "written, graphic, or other forms of communication intended to excite lascivious feelings."

The term "pornography" is a generic, not a legal term. Pornography, however, did not appear in any version of the American Dictionary from its first edition in the year 1828 till 1860. The term appeared in English language only around the mid-nineteenth century. Pornography is continued since time immemorial. But information on its origin is not available probably because it was not thought

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529 Britannica Encyclopedia, 2007 P.614
530 Britannica Encyclopedia, 2007 P.615
531 American Civil Liberties Union v. Reno, 521 U.S. 844 (1997)
worthy of transmission or preservation. A principal theme of medieval pornography was the sexual license of monks and other clerics and their hypocrisy. In the eighteenth century erotic graphic art began to be widely produced in Paris and came to be known as French Postcards. Even in the Victorian era, despite the prevailing taboos, pornography flourished. The development of motion pictures and photography contributed a great deal to the spread of pornography.

*Obscenity* as a legal term that applies to anything offensive to morals. Obscenity is equated with pornography. Obscenity includes pornography, nude dancing, sexually oriented commercial telephone messages, and scatological comedy. The courts experience difficulty in determining whether the material is obscene or only pornographic. Pornography has become more sexually explicit due to technology and cultural factors.

A century ago, pornography and graphic violence were not so pervasive. In modern society, violent and sexually explicit speech and material is easily accessible and even unavoidable. Indeed, each new communication medium seems to carry its own unique set of problems, from the behavioral effects of violent video games to the psychological problems caused by Internet pornography.

If we type the word 'sex' into an Internet search engine like Google, we will get 180 million hits. That is the reason why trade experts have hailed cyber porn as the only "recession-proof" business in the world; the only business to have come out unaffected from the dotcom bubble burst. The statistics mentioned below are eye-openers.
• Daily pornographic search engine requests: 68 million (25% of total search engine requests.

Most viewers of internet pornography are in the age group of 12-17 years. The size of the online porn industry is $57 billion worldwide, with revenue larger than all combined revenues of all professional football, baseball and basketball franchises or any other e-commerce website.

• The total number of pornographic websites are 4.2 million (12% of the total websites.

• A United States study says 42% of internet users aged 10 to 17 had seen online pornography in the past one year, though most claimed they were not looking for it.

• Morphine photos and derogatory profiles on popular sites are popular.

• Men admitting to accessing pornography at work: 20% and women admitting to pornography at work 13%. Breakdown of male/female visitors to pornography sites: 72% male, 28% female, 9.4 million women access adult websites each month.

• In New York the researchers have found that nearly half of the female students in six colleges across the United States who took part in their study, said that viewing pornography was an acceptable way to express their sexuality.

In fact, in the United States porn is a legalized industry where the backstreet sex shops and dirty old men in Macs have been replaced by hi-tech studios which bring out thousands of titles every year. The perplexing question is to distinguish between artistic works and pornography since freedom of expression began to be

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532 Bombay Times, The Times of India, August 2,2005 P.1. (There are over 800 million rentals of adult videotapes and Digital Viewing Devises in video stores across the United States along with 200 adult entertainment companies.)
533 Ibid
534 Ibid
535 Ibid
536 Mumbai Mirror February 7, 2007, P. 21
537 Afternoon, Despatch and Courier, December 8, 2007 P. 1
538 Bombay Times, The Times of India, August 2,2005 P.1
539 Ibid
540 The Times of India , Mumbai, December 17,2007, P.1

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taken seriously. Pornography constitutes an act of legitimation of male violence by presenting it as normal, attractive and pleasurable. The other side is that pornography shocks and disgusts decent people, but it does not tend to deprave or corrupt them. They revolt from it and turn away from it. The researchers from Brigham Young University Utah suggested that availability of pornography on the internet and changing social attitudes have led to a generation shift in which pornography seems to be less taboo.541

In the United States of America, Justice Bridge in R. v. Staniforth542 observed as under: The pornography writings depict and describe in explicit and graphic details almost everything imaginable variety of sexual activity, normal and perverted, lawful and unlawful, heterosexual and homosexual including sexual activities between three and more participants of either sex and of both, the strangest fetishes and most extreme sexual brutality.

In Mishkin v. United States543 the court held that hard core pornography which is offensive to the community lies outside the area of constitutional protected speech. In United States v. Reidel,544 a man was charged with distributing pornography. He argued that it had to be legal to distribute pornography because the Supreme Court in Stanley v. Georgia545 held it was legal to possess pornography. The Supreme Court in the case of Reidel said “The focus of this language (Stanley) was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials.” The Supreme Court of America has continually stated that there is no constitutional right to distribute pornographic materials.

541 Times of Indian Mumbai, December 17, 2007, P. 1
542 (1975) Cri. L.R. 291
543 383 U.S.502 (1966)
544 402 U.S. 351 (1971)
545 394 U.S. 557 (1969)
546 402 U.S. 351 (1971)
Many feminist thinkers, such as Gloria Steinem, Catharine MacKinnon, and Andrea Dworkin, have proposed another definition of pornography, distinguishing it from erotica. They think pornography as the "sexually explicit subordination of women" and view it as a form of discrimination against women, not simply a violation of traditional moral norms. Erotica, on the other hand, is sexually explicit material that portrays men and women in postures of equality and mutual respect.

Nowadays, a lot of photographs may be processed without ever being printed, without ever being visible. They may remain digital encodements for the entire time the processor has them. Opposition to the regulation of pornography cannot be justified by an appeal to the democratic rationale of free speech rights. This point was forcefully made in Young v. American Mini Theatres.\(^\text{547}\) In United States of America, people have a more tolerant attitude towards pornography, specially the youth of America. It is no longer confined to be viewed only by male. There is a big change in the attitude of people towards freedom of expression and enjoyment of that right of freedom. Pornography appeals to the basest aspect of individual fulfillment. In England, the attitude is not so free as in America. All countries in the world prohibit child pornography and have strict laws to control it. However, according to an interesting study by Todd Kendall an economist at Clemson University\(^\text{548}\) incidences of rape have reduced due to online pornography.

In 1970, the Presidential Commission on Obscenity and Pornography in the United States of America had concluded that "there was insufficient evidence that exposure to explicit sexual materials played a significant role in the causation of delinquent or criminal behavior." In general, with regard to adults, the Commission recommended that legislation 'should not seek to interfere with the right of adults who wish to do so to read, obtain, or view explicit sexual

\(^{547}\) 427 US 50 (1976)
\(^{548}\) The Times of India, Mumbai, February 4, 2009, P. 19
In 1986, the Attorney General's Commission on Pornography, reached the opposite conclusion, advising that pornography was in varying degrees harmful.

**Sex and Obscenity**

Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As per a Federal Survey about 96% of United States adults have had sex.\(^{549}\) Sex education is not considered as obscene in United States, England and other European countries.

Almost all countries in the world have laws governing the production and distribution of obscene materials. Generally, the statutes of many countries prohibit the production, sale, lending, renting, giving, publication, exhibition or other dissemination of obscene materials. As most of the legislations were drafted before the electronic age, the statutes of many countries defined "materials" as any written matter, picture, film or movie or sound recording. The obvious purpose of Acts passed against obscenity is to guard and protect the public morals, by erecting barriers, which the evil-mined and lascivious may not overpass with impunity.\(^{550}\)

More than fifty nations are parties to an international agreement for the control of obscene publications namely *International Convention for the Suppression of the*
Circulation of and Traffic in Obscene Publications treaty. However, the Convention has not defined 'obscenity' and it was agreed among the nations that this would differ from country to country. The reason being that description of obscenity is dependent on cultures and habits and it differs as per culture and communities. Different cultures adopt different meanings of obscenity. In many communities itself, there is absence of any agreement between what is revolting or repulsive or even what is moral or virtuous. It could be that something which is artistically bold to a person may be obscene to another. It is not possible to conclusively lay down universal moral norms. Many moral ideals are expressions of attitudes or feelings which are subjective and judgmental in nature. So, in this backdrop, it is difficult and improbable that all countries can agree on the same meaning of obscenity.

Although most countries suppress obscene material through the criminal law, many also attempt to control it through administrative or regulatory agencies such as customs, the postal service, and national or local boards for the licensing of motion pictures or stage performances. In some countries like Saudi Arabia and Iran, religious authorities play a major role in suppressing obscenity.

Historical development of laws regarding obscenity

During the ancient and medieval period, the laws of obscenity were not developed. Profanity and bawdiness did not amount to separate crimes. Anything opposed to religious and political matters was punishable. The offence of obscenity was included in heresy, sedition and blasphemy. The ancient cultures of Greece and Rome had high degree of tolerance for sexual decadence when mixed with religious themes. Even in religious gatherings obscene remarks were not looked upon with disgust or contempt. In Greece, erotic songs and poems were popular. The ancient Greeks used pornographic themes in songs in Dionysian

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551 The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications treaty was adopted on September 12, 1923
festivals. Men and women were segregated until they reached the age of 30 years during the times of the ancient Greeks. Boys left home for military camps at age seven and men courted them in their adolescence with the consent of their fathers. Men rarely married and if they were tempted to pass on their genes, they could borrow a friend’s wife who had already produced children to him. The Greek were casual about sexual intercourse and it was a part of religious ritual, and it was described in poetry and comedy. The ancient Greece civilization had an athletic and cultic aesthetic of nudity which included adult and teenage males.

Romans used to paint pornographic pictures on walls in the ancient city of Pompeii. Indispensable evidence of graphic pornography in Roman Culture is found at Pompeii. Even adultery in relationships and free exchange of wives did not disturb the Romans. Women were the subjects of obscene jokes and talks. The Romans believed nudity to be a gift of nature. They believed that as the man was born naked, there was nothing obscene in the naked body. Men and women participated in public sports without covering their bodies. In Nordic countries, with their sauna culture, nude swimming in rivers or lakes was a popular tradition. Posters for the 1920 Olympics in Antwerp, the 1924 Olympics in Paris and the 1952 Olympics in Helsinki feature nude male figures, evoking the classical origins of the games, are evidence of prevalence of nudity.

Sexual explicitness and obscenity were distinct offences only in the 17th Century. Even in early Anglo-Saxon literature obscene riddles were popular. In medieval Europe, authors used bawdy ballads and verses to ridicule the church. Even during the time of Queen Elizabeth, bawdiness was not punishable by the State. In the old Testament and Book of Genesis, there are profound details of stories about Judah and Tamer, which are replete with the sketches about women prostitutes.

552 V. S. Jayaschandran, Wicked Words, Off with his head, The Week, July 26, 2009
553 Britannia Encyclopedia, 2007, P. 615
554 DNA Speak Up, Mumbai, December 19, 2007, P. 2
and their patrons. Though these could be considered as obscene in modern times, due to the religious sanctity enjoyed by these stories, they were not considered so during those times.

There were places where people regard display of nakedness of a human body or even public performance of sexual activity quite normal. The Bangda in Africa permitted the females to appear naked in front of any person, but the males must be covered from neck to knee. Public exposure of nakedness was regarded as less obscene than kissing by some persons. There are people who regard that the boots should not be removed in the presence of strangers. At places, it is more shameful to be seen while taking food than roaming around all naked. But the Oriental culture maintains a rigid stand asserting that nudity of any kind in a public area is obscenity. Pornography was also prevalent in some ancient Eastern cultures, such as those of India, Japan, and China.

In European culture obscenity was known to have existed. Sex or nudity was not always regarded as obscene, but obscenity depended upon the idea of the people of that particular tribe / group at a point of time. In 1497, the artists of Italy had to confine their drawings of nudes to the fire. All copies of Ovid’s works in Italy were burned as they were considered to be erotic and impious. As a result writers and poets were dissuaded from writing. Pope Paul III established the Universal Roman Inquisition, or Congregation of the Holy Office in the year 1542 which could examine and condemn heretical or immoral works. From the year 1542, immoral, anti-religious and rebellious publications were prohibited in Protestant countries like England. In 1559, Pope Paul IV published a comprehensive list of more than four thousand works which were considered to be forbidden that went through numerous editions and the list was abolished only as late as 1966.

557 Ibid
558 Ibid
Obscenity laws emerged as a direct response to social and technological changes, particularly the development of the printing press in the fifteenth century and also because of the growth of democracy. The press permitted wide and easy distribution of materials including sexually explicit material.

In the medieval times when the Church in England exercised direct control over literature, the main concern of the Church was not to curb obscenity but to control heresy. In England, before the 18th century, restrictions were applied almost exclusively to anti-religious or seditious acts or publications rather than to obscene materials. The governments and church authorities arrested and prosecuted publishers and distributors of heresy materials. It was only in the latter part of Queen Elizabeth rule that puritanism became voiced.

In England, the Licensing Act, 1662 gave the English courts a vague mandate to suppress indecent books without indicating what is considered indecent. The first volume of 'Memoirs of a Woman of Pleasure' (Fanny Hill), written by John Cleland was printed by Thomas Parker and published in London by G. Fenton. They were convicted for the offence of printing an obscene book.

In Great Britain, Society for the Suppression of Vice and for the Encouragement of Religion and Virtue throughout the United Kingdom was established in 1892 to curb the spread of open vice and immorality and particularly to protect the minds of the young from contamination by exposure to the corrupting influence of impure and licentious books, prints, and other publications. During the reign of Queen Victoria, a period of sexual repression had began which spread throughout much of the English-speaking world. At the height of the Victorian Era, it was common to cover all legs, even those of pianos and tables, in order to prevent sexual arousal. Bathing suits at the time covered almost the entire bodies of both men and women. Society considered nudity and sexual arousal to be synonymous.
The famous book ‘Memoirs of a Woman of Pleasure’ was banned in the United States for obscenity in the year 1821. This is generally regarded as the first recorded suppression of a literary work in the United States on the grounds of obscenity. The Tariff Act of 1842 was enacted in the United States of America. The Act was the first United States federal law designed to restrict the flow of obscenity by prohibiting the importation of all indecent and obscene prints, paintings, lithographs, engravings and transparencies. The New York Society for the Suppression of Vice was founded by Anthony Comstock in the year 1873. The pornographic materials had to be secretly imported as no pornographic material was being produced in the United States till the year 1840.

In the United States of America, from the year 1820, State Governments legislated obscenity laws, and in 1842 the Federal Government enacted legislation that allowed the seizure of obscene pictures. In 1864 a Postmaster General reported that great numbers of dirty pictures and books were being mailed to Civil War troops. On this basis, Congress made it a law by which it became a crime to send any "obscene book, pamphlet, picture, print, or other publication of vulgar and indecent character" through the United States mail. The most comprehensive Federal legislation of the era was the Comstock Act, 1873. This Act provided for levying of a fine and awarding imprisonment to any person mailing or receiving “obscene,” “lewd,” or “lascivious” publications. The Comstock Law, an amendment in the year 1873, to the Postal Act, 1865, prohibited sending any obscene material through the domestic mails, including materials dealing with abortion or birth control. The Act became infamous as the basis for the widespread suppression, not merely of pornographic books and pictures, but also of publications containing legitimate medical information about contraception, abortion and even the contraceptive devices themselves. The Congress of the United States passed the first Federal obscenity law as part of the

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559 c. 270, 28, 5 Stat. 566
561 The official title of this Act was, "An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use," hereinafter called Comstock Act.
Tariff Act of 1842, barring the importation of all “indecent and obscene prints, paintings, lithographs, engravings, and transparencies.” However, few prosecution relating to obscenity took place in the United States until after the Civil War i.e. until after the year 1865.

In Japan, the progress of colour woodblock printing resulted in creating a substantial industry in erotic pictures. In France, in the nineteenth century the famous trial was of Gustave Flaubert, who was charged with “outrage to public morals and religion” for his novel Madame Bovary. Prosecutions for obscenity in other European countries reflected a merging of moral and political concerns.

Sexually explicit expression or sexual speech was banned by the most repressive regimes including communism in the former Soviet Union, Eastern bloc countries and China. The communist government of the former Soviet Union condemned nonconforming political views as pornographic and obscene and suppressed political dissidents under obscenity laws. Later in Russia, there was improvement in granting human rights including women’s rights, giving rise of free sexual expression. In Nazi Germany, Jewish writings were hated and considered as pornographic.

D.H. Lawrence had his book Lady Chatterley's Lover privately printed in Italy with the assistance of Pino Orioli. With Lawrence's aid, Orioli distributed the work through the writer's friends, who hid copies and delivered them to booksellers. The expurgated pirated editions mushroomed in both Europe and the United States.

In a landmark development, the Supreme Court of United States held in the case of Roth v. United States that the standard of obscenity should be whether, to the average person, applying contemporary community standards, the dominant

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362 354 U.S. 476 (1957)
theme of the material taken as a whole appeals to prurient interest. Reflecting this shift in sexual morality, obscenity laws in Australia, Canada, United States, and Western European countries were gradually relaxed. It was not as if the glass ceiling was shattered but broken carefully inch by inch. Even in Eastern Europe, Czech Republic and Poland, a number of pornography industries developed, and they faced little legal intervention or censorship from the government. North America and Europe also favoured greater sexual permissiveness and the right to individual privacy. An important exception to the general inclination towards greater permissiveness were laws against the sexually explicit depiction of minors. China and Saudi Arabia adopted stringent restrictions on most Internet access.

Feminist groups campaigned against pornography not because it offended traditional sexual morality but because, in their view, it degraded women, it commodified women’s bodies and consequently dehumanized them, violated their human rights, and encouraged sex crimes. Feminist like Andrea Dworkin and Catherine Mackinnon put forth arguments which had some influence on obscenity laws in certain countries especially Canada, which from the year 1980 tried hard to suppress pornography. Some states in the United States passed local ordinances against pornography. However, many of these regulations were struck down by United States federal courts in the year 1990.

Laws banning obscene or pornographic expression have been used to suppress all kinds of obscene expression and sometimes even outside the realm of sexuality. Many countries in the world have found it difficult to precisely define obscenity or banish it completely. An attempt has been made to study the laws dealing with obscenity in the different countries of the world with special reference to England and United States of America in the following paragraphs.
Laws regarding pornography/obscenity (International Scenario)

Position in England

Since the laws in India regarding obscenity are adopted from the British laws, it is important to have a background of the laws relating to obscenity in England.

a. Legislative approach in England

The Roman Catholic Church in England made attempts to regulate literature. It prohibited heretical or deviant works from the fourth century onwards. By the Middle Ages, the list of banned works had grown spectacularly. During the period of Anglo Saxon, obscenity was not an issue, though it was prevalent by modern day standards in most of the literature, drama and poetry of that period. Women and children were disqualified from reading literature or viewing drama in those days. Books were condemned not because of obscenity but because they were not in consonance with the concept of morality as perceived by religious groups. All offences relating to the violation of morals and religion were tried by Ecclesiastical courts. These courts could impose only spiritual penalties such as excommunication or some public humiliation. They had wide jurisdiction. They could punish anything which they regarded as openly immoral or sinful without any rule or precedent. The morality imposed by the Church was replaced by the morality of the common man in the medieval period. The Preamble of the Establishment of the Governors of the English Print, 1580 laid down: *An act to restrain the licentious printing, selling, and utterance of unprofitable and hurtful English books*...... . Any printing without license was not allowed under the Licensing Act, 1662. A certificate had to be obtained that the book contained nothing ‘*contrary to Christian faith or contrary to good life or good manners*’. In the year 1727 the jurisdiction to try obscenity offences slipped from Ecclesiastical courts. After the enactment of the Obscene Publications Act, 1857, obscenity was recognized as a distinct offence by law, independent of religion and morality.
During the Eighteenth Century, reading became popular and books replaced drama. The Vagrancy Acts of 1824 made it a summary offence to hold indecent exhibitions. In 1889, the Indecent Advertisements Act created a further summary offence of indecent advertising punishable by a fine of forty shillings or imprisonment for a month. The Act was intended to cover cases such as the pasting up of indecent posters in public places. The Indecent Advertisements Act dealt expressly with posters about venereal diseases and the Venereal Disease Act, 1917 were passed making it an offence, subject to certain exceptions, to offer by public advertisement to treat any person for venereal disease or to give any advice in that connection. The Post Office Act, 1953, replacing similar provisions in the Post Office Act, 1908, made it an offence to send indecent books or prints through the post, punishable on condemnation by a maximum of twelve months imprisonment or on summary conviction by a fine of ten pounds. The Act covered any indecent designs or words on the outside of the 'packet', as well as obscene enclosures, and it was under this section of the Act that those who sent vulgar postcards through the post were prosecuted.

A further summary offence of publicly offering obscene books or articles for sale or distribution or exhibiting them to the public view was created by the Metropolitan Police Act of 1839. Importation of obscene matter was an offence under the Customs Acts of 1876 and 1952. The Obscene Publication Act, 1857 equated obscenity to poison. It is also known as Lord Campbell's Act in the name of the then existing Lord Chief Justice of England. The defense of works of art, science and literary merit was not available to the accused under Lord Campbell’s Act of 1857. Lord Campbell’s Act prohibited the publication of obscene literature, while authorizing post offices to remove the publications from the mail and indict the senders. The Hicklin Rule was laid out by British Chief Justice Cockburn in the year 1868 in the famous case Regina v. Hicklin which was

563 5 Geo.4, c.83 and 1 & 2 Vict., c. 38.
564 1 & 2 Eliz 2. c. 36 (1953).
565 1868. L.R. 3 QB 360
named after Magistrate Benjamin Hicklin. A society called “The Protestant Electoral Union” exposed for sale at their office a pamphlet entitled “The Confessional Unmasked,” showing the decadence of the Priesthood, and the questions put to females in confession. The pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. The pamphlet dealt mainly with the author's perceived views of the dangers of the confession, as regards the type of question that Roman Catholic priests allegedly asked young ladies therein. About one-half of the pamphlets related to controversial questions and the remainder of it was obscene. A member of the society kept and sold these pamphlets. It was held that the publication of such a pamphlet was an offence as the inevitable effect of the publication must be to injure public morality.566

Benjamin Hicklin, a British magistrate ordered the pamphlet to be seized, and the author was convicted under the Obscene Publications Act of 1857, which was thereafter commonly known as the Hicklin Act. The importance of the case was two-fold. Firstly, the fact of the intent of the pamphlets was held to be irrelevant. Secondly, the prosecution was brought on the basis that the pamphlet was obscene per se, and therefore it was for the defendant to prove his innocence, not for the Crown to prove his guilt. Subsequent to this case, a pamphlet was published by one G giving a correct report of the trial for selling “Confessional Unmasked,” but setting out that work in full. It was held that the pamphlet, though a report of judicial proceedings, was an obscene book.567

The Obscene Publication Act, 1857 codified a definition of obscenity in law as ‘something offensive to modesty or decency or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd’.568 This Act empowered the magistrate to order destruction of books and prints if, in their opinion, such books or prints were pornographic and to grant warrants to the police to search

566 Ibid
567 Steele v Brannan (1872) LR 7 CP 261.
568 Section 1(A) of the Obscene Publications Act, 1857

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suspected premises. Prior to the enactment of this Act, the only law against sexually explicit material was the Royal Proclamation of King George III in 1787 for the encouragement of piety and virtue, and for the preventing and punishing of vice, profaneness and immorality, including the suppression of all licentious prints, books, and publications.

The Obscene Publications Act 1857 was amended and it became the Obscene Publications Act, 1959. This Act, along with the Theatres Act, 1968 had an earlier common law definition of obscenity, which defined obscenity as a 'tendency to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'. The provisions of the Obscene Publications Act, 1959 where the test of obscenity is stated thus:

1. Test of obscenity – (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, 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. The Preamble to the Obscene Publication Act, 1959 described the legislation as "an Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography". The definition of "obscenity" in the Act is, therefore, based on the tendency to deprave and corrupt the likely audience i.e. persons who are likely to read, see or hear the contents of the publication rather than those into whose hands the publication may accidentally fall.

Section 4 of the above mentioned Act upholds the ‘defense of public good’ and reads:
(1) A person shall not be convicted of an offence against Section 2 of this Act, and order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground\textsuperscript{569}.

Under the Obscene Publication Acts, 1959, obscenity was not limited to pornographic or sexually corrupting material, a book advocating drug taking or violence could be obscene. An article is to be deemed obscene if its 'effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it'.\textsuperscript{570}

This statute does not offer a definition of deprave and corrupt. It did not even lay down whether the concern is that the impugned material may cause people to commit wicked acts, or whether it is simply that erotic desires may be aroused in the minds of the reader. Under this Act, the impact of the impugned obscene material is not on all persons, but only on those into whose hands the material is likely to fall and whose minds are open to such immoral influence. The definition under the Act of 1959 refers to the likely reader rather than to the possible reader. The definition of obscenity under this Act is a relative definition because it refers to the likely reader rather than to the conceivable possible reader. Applying the concept of relative obscenity Lord Wilberforce observed in \textbf{R. v. Whyte}\textsuperscript{571} as

\textsuperscript{569} Section 4, Obscene Publications Act, 1959
\textsuperscript{570} Section 1 of the Obscene Publications Act, 1959
\textsuperscript{571} (1972) 2 All. E.R. 12
follows: 'An article cannot be considered as obscene in itself. It can be only so in relation to the likely readers.'

The Obscene Publication Act, 1959 was used in the obscenity trial brought against Penguin Books for publishing Lady Chatterley's Lover by D. H. Lawrence in 1960. The prosecution was based on the premise that the novel put promiscuity on a pedestal, and that the majority of the book consisted of scenes of sexual intercourse. The book was found to have social merit and Penguin Books was found not guilty. This ruling granted far more freedom to publish explicit material. This trial did not establish the 'merit' defense as an automatic right. A defense against the charge of obscenity on the grounds of literary merit was introduced in the Obscene Publications Act, 1959.

In England and Wales, the law on child pornography was defined by the Protection of Children Act 1978, Section 160 of the Criminal Justice Act 1988, further amended by the Criminal Justice and Public Order Act, 1994 to include pseudo-photographs, and the Sexual Offences Act, 2003 which raised the age of children from 16 to 18 years. The main legislation on pornographic materials is contained in the Obscene Publications Act, 1959, the Obscene Publications Act, 1964 and the Indecent Displays (Control) Act, 1981. The Criminal Justice and Public Order Act 1994 carried an amendment to the Obscene Publications Act that covered computer images. It became illegal to transmit electronically stored data which is obscene on resolution into a viewable form. This was mainly to protect children, and covered photographs, and pseudo-photographs. Even Section 43 of the Telecommunications Act 1984 makes it an offence to send 'by means of a public telecommunications system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.' The Criminal Justice and Immigration Act 2008 made possession of extreme pornography a criminal
offence from 26 January 2009\(^{572}\). It refers to pornography (defined as an image which is "of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal") which is "grossly offensive, disgusting or otherwise of an obscene character", and portrays any of the following: (a) an act which threatens a person’s life, (b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals, (c) an act which involves or appears to involve sexual interference with a human corpse, (d) a person performing or appearing to perform an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real. This Legislation was enacted because of the cases like that of Jane Longhurst who was strangled on 14th March 2003 by Graham Coutts who had a fantasy from the age of 15 of strangling a woman.\(^{573}\) At his trial, Graham Coutts admitted to being an avid user of depraved and corrupting internet sites, such as nacrebabes, death by asphyxia, and hanging bitches. He violated her dead body after killing her and, in between times, logged on to those very same internet sites to feed his sick fantasies.\(^{574}\) The images of women being raped and tortured for sexual gratification could be accessed from internet sites hosted from abroad without fear of prosecution.

b. Judicial approach in England

Some landmark decisions of the cases dealing with obscenity are mentioned below to indicate the development of the law of obscenity in England.

In the case of R v. Sedley\(^{575}\) the dramatist Sir Charles Sedley and his companions in a state of drunkenness presented themselves naked on a balcony of a tavern before hundreds of persons. Their gestures were so repugnant that crowd threw stones on them. Sedley was convicted on the charges of obscenity and fined

\(^{572}\) Part 5, Section 63 of the Criminal Justice and Immigration Act, 2008

\(^{573}\) Official Report, House of Lords, 23 February 2004; Vol. 658, WA31

\(^{574}\) http://www.eroticabibliophile.com/censorship_history.html as seen on March 23, 2004

\(^{575}\) 1663b 1 Keble 620, 83 E.R. 1146
2000 marks, imprisoned for one week and bound for good behaviour for three years. The issues in this case were whether obscenity libel could be an independent offence or it had to be clubbed with the offence of breach of King's peace and whether the common law courts had jurisdiction to try this case. In the case of **R. v. Read** the dispute arose due to the publication of an alleged obscene book titled 'The fifteen Plagues of a Maidenhood.' Mr. Justice Powell dismissed this case in these words, 'It is stuff not fit to be mentioned publicly. If there should be no remedy in the spiritual court it does not follow there must be a remedy here. There is no law to punish it.' The question which came before this case and also before **R. v. Sedley** was whether the bawdy stuff was a sufficient ground for conviction in such an instance or did it require the factor of breach of peace so as to bring it within the purview of Common Law Courts? Though these issues were decided in positive in **R. v. Sedley**, they were decided in negative in this case. The court declared that this kind of offence was with the jurisdiction of Ecclesiastical court.

The famous case of **R. v. Curl** ended all controversy regarding the jurisdiction of the Common Law Courts. In this case the dispute arose due to the publication of a book 'Venus in the Cloister 'or' The Nun in Her Smock' by the accused. In the above case, Curl was convicted on the charges of obscenity for the first time. However, his punishment was a fine and one hour in the pillory only because there was no specified punishment in law at that time for dealing with the offense of obscenity. The court declared that an act of breach of peace was not a prerequisite condition to make out the offence of obscene libel. The court found that the alleged work was not only offensive because of its sexual content but also because of its anti-religious content. In 1727, in this case it was ruled for the first time that it was a Common Law offence.
Obscene acts were prosecuted on the charges of conspiracy to corrupt public morals and outrage the public decency. The harsher punishment through legislation against publication and distribution of sexually explicit material was introduced by the mid-nineteenth century. A work was termed as obscene on the possibility of how it may influence anyone in the society and not on the basis of the intended readership. The Hicklin case became the standard case precedent in the matter of obscenity. The Hicklin test has been followed for about a century in England. But by the year 1900 the defense of word of art, science and literary merit was allowed in R. v. Thompson. In this case it was held that justification depended on the facts of the particular case, the form of the matter, the circumstances of its publication and the nature of the defendant’s business. The question as how to determine the work of ‘literary merit’ of any work in accordance with s. 4(2) of the Obscene Publication Act, 1959 was settled by Lord Byrne in R. v. Penguine Books Ltd. He opined that comparison with other books could be considered in order to determine the ‘literary merit of the book on the dock and in order to adjudge its quality as to its relevance with the climate of literary currents prevalent at that time’. This view was reaffirmed in the case of John Calder Publication Ltd. v. Powell. The other defense of existence of similar publication was not approved either by Lord Campbell nor by the Hicklin test as a concrete and substantial defense. Chief Justice of Queen’s Bench held in the case of Regine v. Reiter that the character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books. But this ruling was mitigated by the enactment of the Obscene Publication Act of 1959. For the first time in England the purpose of the author was considered as a relevant factor.

582 (1900) 64, J.P. 456
583 161 Cri. L.J. 176
584 Ibid
585 (1965) All.E.R. 159
586 (1954) 2 Q.B.D. P.16

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was influenced by the decision of *Ulysses* and *Roth* in United States. It seeks to protect serious works of literature in three ways: the court is required to consider the effect of a book as a whole, even if the book is regarded as obscene, it is a defense to show that the publication is of general interest, and the expert evidence can be admitted to decide whether the publication is of general interest.

The test of obscenity given by Cockburn, C. J. of the House of Lords in the case of *Regina v. Hicklin* was, ‘The test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall’. The expression tendency to deprave and corrupt was not explained in the case of *Regina v. Hicklin*. So in *R. v. Secker and Warburg* the court held that deprave and corrupt did not merely mean offending, shocking or disgusting but suggesting to the minds of young of either gender or even persons of more advanced years, thoughts of a most impure and libidinous character. In this case the words deprave and corrupt were decided to have any or all under mentioned three meanings:—tendency of the book is to arouse impure thoughts in the mind of the reader or viewer, such a person would be encouraged to commit impure actions and they can mean that the reading of the book or looking at the picture would endanger the prevailing standards of public morals. In *Philanderers case* it was observed that the task is to decide whether the tendency of the book is to corrupt those ‘whose minds today are open to such immoral influence and into whose hands the book may fall this year or last year when it was published in this country or next year or the year after that’.

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587 6 F. Supp. 182 (S.D.N.Y.) 1933
588 354 U.S. 476 (1957)
589 (1868) 3 QB 360
590 (1868) L.R. 3 Q.B. 360
591 (1954) 1 W.L.R. 1138
592 (1954) 1 W.L.R. 1138
In case of *R. v. Penguine Books* it was held that it cannot be regarded that tendency to deprave and corrupt was that simply some person was shocked or disgusted on reading the book. The effect of this test is that one party alleged for pandering obscenity may be convicted by a court, while the other party similarly situated may be acquitted by another court. Though it arouses lascivious thoughts in minds, but ascertaining such thoughts is not possible. Obscenity, under this 'deprave and corrupt' test, is not limited solely to sexual material. It seems that the tendency to deprave and corrupt is aimed at some kind of deviation from accepted community moral standards. The court held in *Knoller (Publishing, Printing and Promotion) Ltd. v. Director of Public Prosecution* that obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals. Indecency is not confined to sexual indecency, indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting or revolting. Currently in England, Britain's National Health Service has a message for teens; *Sex can be fun.* Health officials are trying to change the tone of sex education by urging teachers to emphasis that sexual relations can be healthy and pleasant instead of simply explaining the mechanics of sex and warning about diseases. A sea change has taken place in the attitude of people towards sexuality and obscenity since the time of Hicklin. People have become open, casual and relaxed about sexual relations.

**Position in United States of America**

The United States of America inherited the British legacy of common law. Today, America is the super-power in the world. People in India, specially the younger generation are greatly influenced by the culture, lifestyle, attitude and behavior of people in United States.
the American people. So a study of American jurisprudence on obscenity is considered necessary. In America the judiciary has played a pro-active role in evolving the dimensions of obscenity laws. A study of the different case laws is undertaken to derive at the development in obscenity laws.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1923 regulates the information change provisions of the prior treaty and grants jurisdiction to countries where offenders commit any element of the crime or where the offenders are nationals. United States is not a party to this treaty of International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1923.

a. Legislative approach in United States of America

A bill was enacted as a General Law of the province of East New Jersey for providing punishment for those who uttered obscene words in the year 1682. This was followed by a similar law in West New Jersey in 1683. As early as 1712 the province of Massachusetts adopted a law against publishing filthy or obscene pamphlets. The federal government enacted legislation in the year 1820 which permitted seizure of pictures considered to be obscene. The first reported prosecution for obscene literature in the United States was a Massachusetts case of 1821, in which the court held that obscene libel was a common law offence. The book, titled *Memories of a Woman of Pleasure*, in which the court held that the expunged book was entitled to the protection of the First and Fourteenth Amendment because it contained a degree of social value.

598 *Cw. v. Holmes*, 17 Mass. 336 (1821)

599 The First Amendment to the United States Constitution is the part of the United States Bill of Rights that expressly prohibits the United States Congress from making laws "respecting an establishment of religion" or that prohibit the free exercise of religion, infringe the freedom of speech, infringe the freedom of the press, limit the right to peaceably assemble, or limit the right to petition the government for a redress of grievances.

600 Amendment XIV-Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
In the United States of America, from the year 1820, State Governments legislated obscenity laws, and in 1842 the Federal Government enacted legislation that allowed the seizure of obscene pictures. In 1864 a shocked Postmaster General reported that great numbers of dirty pictures and books were being mailed to Civil War troops. On this basis Congress made it a law by which it became a crime to send any "obscene book, pamphlet, picture, print, or other publication of vulgar and indecent character" through the United States mail. 601

The New York Society for the Suppression of Vice was founded by Anthony Comstock in the year 1873. The most comprehensive Federal legislation of the era was the Comstock Act, 602 which prohibited the importation or mailing of obscene matter. The Comstock Act provided for levying of the fine and awarding imprisonment to any person mailing or receiving "obscene," "lewd," or "lascivious" publications. The definition of obscene matter included contraceptives or information about contraception. Sanger ordered a new type of diaphragm from a Japanese doctor to be shipped from Tokyo to the United States. The shipment was seized on arrival in United States and confiscated under the Tariff Act of 1930, which had incorporated the anti-contraceptive provisions of the Comstock Act. Initially, a lower court ruled against the government, but the government appealed to the United States Court of Appeals for the Second Circuit, which affirmed the ruling of the lower court. The appellate court held that the law could not be used to seize shipments which were derived from a doctor. Judge Augustus N. Hand wrote, in his decision, that it was illogical. 603

The first Federal obscenity law was part of the Tariff Act of 1842 604 which prohibited the importation of all "indecent and obscene prints, paintings, lithographs, engravings, and transparencies." Obscenity was almost negligible.

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601 Post Office Act, chap. 89, sec. 16, 13 Stat. 504, 507
602 The official title of this Act was, "An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use," hereinafter called Comstock Act.
603 United States v. One Package of Japanese Pessaries 86 F.2d 737
604 c. 270, 28, 5 Stat. 566
till the Civil War. The pornographic material had to be secretly imported as no pornographic material was being produced in the United States till the year 1840.

The English law laid down in the famous case of Regina v. Hicklin was soon adopted by the United States and was enforced by Anthony Comstock. In 1873, Comstock proposed that the Hicklin Rule be extended to prohibit "any article or thing designed or intended for the prevention of conception or procuring of abortion." He introduced in United States of America federal anti-obscenity statutes through Congress, known as the Comstock Law. This became the basis of anti obscenity laws in legal system influenced by British Laws. Although this law led to several court hearings, the outcome was usually based on the Hicklin definition of obscenity. Federal laws relating to the crime of obscenity are contained in the following titles and sections of the United States Code:

18 U.S.C. 1461 -- Mailing obscene matter
18 U.S.C. 1462 -- Importation or use of a common carrier to transport obscene matter
18 U.S.C. 1464 -- Broadcasting obscene language
18 U.S.C. 1465 -- Interstate transportation of obscene matter
18 U.S.C. 1466 -- Wholesale and retail sale of obscene matter which has been transported in interstate commerce (must be engaged in business of selling or transferring obscenity)
18 U.S.C. 1468 -- Distribution of obscene matter by cable or satellite television
47 U.S.C. 223 -- Making an obscene communication by means of telephone

Sections 1462 and 1465 cited above also prohibit distribution of obscenity on the Internet.

605 1868 L. R. 3 Q. B. 360
606 Title 18 U.S.C. 1461 -- The official title of this Act was 'An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use' hereinafter called Comstock Act.
In the United States, the word obscenity is a technical legal term. According to the American Law Institute's Model Penal Code: *A thing is obscene if considered a whole its predominant appeal is towards prurient interest i.e. a shameful or morbid interest in sex, nudity or excretion and if it goes substantially beyond customary limit of candor in description or representation of such matters.*

The Constitutional definition of Obscenity was further narrowed by the Supreme Court in *Brockett v. Spokane Arcades* which endorsed the Model Penal Code of obscenity as 'material whose predominant appeal is to a shameful or morbid interest in nudity, sex, or excretion and not materials that provoked only normal sexual reactions.'

The Federal Obscenity Statute lays down that, 'Every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information directly or indirectly, where or how or from whom or by what means any such mentioned matters, articles or things may be obtained or made ... whether sealed or unsealed – is declared to be non-mailable matter and shall not be conveyed in the mail or delivered from any post office or by any letter Carrier.' Who ever knowingly deposits for mailing or delivery anything declared by this section to be non mailable shall be fined more than $5,000 or imprisoned not more than 5 years or both.

The state of Virginia's obscenity statute defines obscenity as: "... that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of

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607 A. L. I., Model Penal Code. 207.10 (2) (Tentative Draft No. 6, 1957).
608 472 U.S. 491, 498 (1985)
609 (1873) 18 U.S. Code, Section 1461 Federal Obscenity Statute
candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value. In the United States, Pennsylvania Consolidated statutes defines "Obscene " as any material or performance, if the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest; the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value. Any picture, photograph, figure, article, write up, etc. or a public act which depraves or corrupts the mind and which appeals to the prurient interests or which is against the acceptable social moral standards would be called obscene and vulgar.

b. Judicial Approach in United States of America

In the year 1878, the case of Orlando Jackson was the first test of Comstock Act. The Supreme Court affirmed that the use of mails for the distribution of material which are regarded as contrary to public morals can be prohibited. But the first class mail had a complete immunity from this prohibition as it was not allowed to be seen. In case of Martinetti v. Maguire the County Court of California held that the dramatic composition which was grossly indecent and calculated to corrupt public morals did not promote the progress of science and arts.

In Swearingen v. United States the Supreme Court in the year 1896 held that the words obscene, lewd and lascivious signify that form of immorality which has relation to sexual impurity. In United States v. Harmon the statute was

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611 S. 5903 of United States, Pennsylvania Consolidated statutes
612 96 U.S. 727 (1878)
613 16 F.Cas. 920 (C.C. Cal. 1867)
614 161 US 446 (1896)
615 45 Fed. 414
directly assailed on First Amendment in the year 1891. The legal definition of obscenity required to be more wide. In *United States v. Bennett*, the definition of obscenity was ‘wherein it was held that words and sentences which are used in good faith and not wantonly or for the purpose of exciting lust or disgust are not within the law and that true character of these words must be determined by the whole scope of the essay and the purposes and intent of the author’. In the above case the question raised was whether the panderer of an obscene publication could be protected under the First Amendment. The court had held in the year 1879 that the publication of obscenity was not to be a constitutionally protected right. In 1879 the Hicklin ruling was accepted and applied by the United States Courts.

The question whether morality has to be viewed as a dynamic concept arose in *United States v. Kennerley*. It was observed that it is doubtful to apply morality of the present time and the court looked to a time when any language which was honestly relevant to the adequate expression of innocent ideas could not be regarded as obscene. It was laid down that the word obscene indicated a compromise between the community’s sense of shame and candor at which the community might have arrived at that time. The court further held that in order to attain the cherished morality a viable legal standard was required which could accommodate the rigidities of the present and the flexibilities of the future. It was not necessary that the publication was likely to arouse the sexual desires of any particular section of the community.

Two major court cases led to the decision that the Hicklin test will no longer be followed in United States. The first of these cases involved Mary Ware Dennet, a birth control activist, and her booklet on sex education. The case against Dennet was taken back after the agreement that sex education is acceptable if presented in a decent way. The second case involved James Joyce’s book *Ulysses*. In 1933

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616 24 Fed. Cas. 1093
617 (1913) 209 Fed. 119
Judge Woolsey lifted the ban on Ulysses and in so doing laid down a new test of obscenity in books. This book was forbidden to pass through the United States Customs. In this case of *One Book Entitled Ulysses v. United States* Ulysses was brought to trial. Judge John Woolsey found the book not obscene and his decision in the case did not apply the Hicklin Rule, which was the standard at that time. He observed that the judicial task is two sided. One was to determine whether the book was written with pornographic intention and if so, the book could be forfeited. But if there was some doubt, then the judge had to apply a more objective standard and had to determine the effect of the book on the reader. One aspect of the Hicklin rule stated that in order to determine a work as obscene, its effects on the most susceptible members of society had to be determined. Judge Woolsey remarked that instead of the most susceptible members of society, its effects on the average person determines a work as obscene. Furthermore, the Hicklin rule allowed for a work to be judged by individual passages, which could be easily taken out of context, so he based his judgment on the work as a whole. The Appeals Court upheld Judge Woolsey’s decision, and the Hicklin Rule was abolished in the United States on the federal level. The court observed that both moral and scientific values should be considered on an equal basis to conclude the obscenity of the alleged work. It was decided that as a whole Joyce’s book was not obscene. Because of this ruling, courts began to focus on the entire work when judging obscenity rather than isolated passages.

In 1929 the City Magistrates Court of New York declared the Well of Loneliness to be obscene under the state laws. The court held that though it contains no unclean words, the moral tone and thesis of the novel depraves and corrupts by idealization of lesbian love. The court concluded as follows: *The theme of the novel is not only anti social and offensive to public morals and decency but the method in which it is developed in its highly emotional way was attracting and focusing upon perverted ideas and unnatural vices and seeking to justify and*

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618 U.S. v. One Book Called 'Ulysses' 5 F. Supp. 182 (S.D., N.Y.) (1933.)  
619 Ibid
idealize them is strongly calculated to corrupt and debase those members of the community who would be susceptible to its immoral influences.620

In the late nineteenth century, prosecutors grew more active as the production of pornographic material increased and new anti-vice and anti-smut groups pressured them to bring cases. Congress enacted 20 obscenity laws between the years 1842 and 1956, most of which were variations of or amendments to the original Comstock Law. For the first time in the United States from the year 1937, flagellation books were considered obscene under the Comstock law. By the time of Comstock's death in 1915, he had prosecuted hundreds of persons in the name of moral decency, though many of which involved works of considerable literary merit. "Comstockery," as this came to be known, declined after 1920 with the advent of the modern civil liberties movement. However, till then, many classic works such as *Lady Chatterley's Lover*, by English novelist D. H. Lawrence, and *An American Tragedy*, by American novelist Theodore Dreiser were regarded as obscene.

The first legal definition of obscenity was laid down in the year 1957 when Justice Brennan crafted the first Supreme Court legal definition of obscenity in the case of *Roth v. United States *.621 Samuel Roth was charged with mailing obscene literature. He was convicted in the District Court of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and mailing an obscene book, in violation of the federal obscenity statute in the year 1956. He was found guilty and sentenced to six months imprisonment. Roth was arrested at least 13 different times for possession and sale of indecent literature, mailing obscene and salacious material. Roth was sentenced to five years for each count in the Lewisburg Penitentiary and fined $5,000. Samuel Roth's conviction was upheld on appeal by the United States

620 People v. Friede,133 N.Y Misc. 612
621 354 U.S. 476 (1957)
Supreme Court. The court held that: 'Obscenity is not within the area of constitutionally protected freedom of speech or press - either (1) under the First Amendment, as to the Federal Government, or (2) under the due process clause of the Fourteenth Amendment, as to the States.' Albert Roth challenged the provisions of the California Penal Code as the violation of freedom of speech and press from State action by the Fourteenth Amendment Clause. The constitutionality of the Federal Obscenity Statute was challenged as a violation of the First Amendment Clause. The Supreme Court declared the Hicklin's test as unconstitutionally restrictive of the First Amendment as it potentially included material legitimately dealing with sex. So Hicklin test was considered inappropriate. The court held that the First Amendment excluded obscenity which was utterly without redeeming social importance. In the great ruling in Roth's case, Justice Brennan observed: "All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests." The definition of obscenity set forth in Roth was: For something to be "obscene" it must be shown that the average person, applying contemporary community standards and viewing the material as a whole, would find (1) that the work appeals predominantly to "prurient" interest; (2) that it depicts or describes sexual conduct in a patently offensive way; and (3) that it lacks serious literary, artistic, political or scientific value. Justice William Brennan in the above case claimed that sexual materials that are considered prurient and are not socially important are not protected under the First Amendment and are open to censorship. However, the vague wording about social importance led to confusion in future obscenity court cases.

622 Ibid
623 Title 9, Chapter 7.5, Sections 311-312.7 (Title 9, Chapter 7.5, Sections 311-312.7
624 354 U.S. 476 (1957)
625 Ibid
In the above mentioned Roth’s case, the Court had quoted from the case of Chaplinsky v. New Hampshire626: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...such utterances are of no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' The Chiplinsky opinion contains the original version of redeeming social importance concept. The Court in this case had laid the foundation for the removal of obscenity from the realm of constitutionally protected expression. In Mishkin v. New York627 the Court removed the test of the average person by saying that if the material is designed for a deviant sexual group, the material can be censored only if it appeals to the prurient interest in sex of the members of that group when taken as a whole.

In Butler v. Michigan,628 the Supreme Court struck down in the year 1957 a section of Michigan Penal Code that made it a misdemeanor to sell or make available to the general reading public, any book containing obscene language "tending to the corruption of the morals of youth", as it violated the Due Process Clause of the Fourteenth Amendment. In the words of Justice Frankfurter, the Michigan approach was "to burn the house to roast the pig," since the effect was "to reduce the adult population of Michigan to reading only what is fit for children" in violation of the Fourteenth Amendment.629 Justice Potter Stewart expressed this difficulty at defining obscenity when he remarked, "I know it when I see it" in the case of Jacobellis v. Ohio.630 If material has a substantial

626 315 U.S. 568 (1942)
627 383 U.S 502
628 352 U.S. 380 (1957)
629 Ibid
630 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964))
tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires, it is obscene.

In 1959 the Supreme Court decided the Kingsley Pictures case ruling unanimously that New York could not ban the showing of the motion picture Lady Chatterley's Lover. Even the New York Board of Regents held that this film is immoral for its presentation of adultery as an acceptable and proper pattern of behaviour. As the distributor of a motion picture entitled Lady Chatterley's Lover, the appellant Kingsley submitted that film to the Motion Picture Division of the New York Education Department for a license. Finding three isolated scenes in the film immoral, the Division refused to issue a license until the scenes in question were deleted. The distributor petitioned the Regents of the University of the State of New York for a review of that ruling. The Regents upheld the denial of a license, but on the broader ground that "the whole theme of this motion picture is immoral under the said law, for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior." However, the Court of Appeals unanimously and unequivocally rejected any notion that the film is obscene. In Memoirs of a Woman of Pleasure v. Massachusetts involved a book about a prostitute called Fanny Hill. The Supreme Court said it was not obscene under this three part test: 1) original Roth test, 2) had to be patently offensive, 3) had to be utterly without redeeming social value. The Supreme Court in the above case held that if the expunged work possessed a modicum of social value, then even if he book had the requisite prurient appeal and was patently offensive, the book was entitled to escape condemnation and the accused deserved acquittal. The underlining principle is a work which could not be considered obscene if it had any redeeming social value of any kind whatsoever.

632 Kingsley International pictures Corp. v. Regents of the University of the State of New York. 360 U. S. 684 (1959)
633 (360 U.S. 684, 686)
634 383 U.S. 413 (1966)
After the abovementioned case of Memoirs of a Woman of Pleasure, the court began upholding time, place and manner restrictions rather than firming up content tests. In 1965 a New York City news-stand clerk, Robert Redrup, sold two sex novels, *Lust Pool* and *Shame Agent* to plainclothes police. He was convicted for the same. He appealed to the Supreme Court where his conviction was overturned by 7-2.\(^{635}\) The ruling of the court affirmed that consenting adults in the United States ought to be constitutionally entitled to acquire and read any publication that they wish including concededly obscene or pornographic ones without government interference. Prior to 1957, the court had paid little attention to the relationship between obscenity and the First amendment.

In another landmark decision of *Miller v. California*\(^{636}\) the court expanded on *Roth*’s decision by laying down that when trying an obscenity case ‘...The first test to be applied, therefore, in determining whether given material is obscene, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be’. This famous decision in *Miller v. California*\(^{637}\) was given in 1972 which established the Miller’s test for obscenity in United States. This test lays down that a work is considered obscene only if all three of the following conditions are satisfied: (1) *Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest*, (2)*Whether the work depicts/describes, in a patently offensive way, sexual conduct specifically defined by applicable state law*, (3) *Whether the work, taken as a whole, lacks serious literary, artistic,*

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\(^{635}\) Robert Redrup v. New York 386 U.S. 767

\(^{636}\) 413 U.S. 15

\(^{637}\) Ibid
political, or scientific value. The Supreme Court clarified that the first and second parts of the Miller test i.e. appeal to prurient interest and patent offensiveness are issues of fact for the jury to determine applying contemporary community standards. The predominant theme or purpose of the material, when viewed as a whole, means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental themes or isolated passages or sequences. In Paris Adult Theater v. Slaton,638 which was decided on the same day as was Miller, the court held that so called 'adult theater' were not protected by the First Amendment simply because they exhibited films solely to consenting adults. The key passage in the above case is following: ‘If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books plays and art lift the spirit, improve the mind, enrich the human personality and develop character, can we then say that as state legislature may not act on the corollary assumption that commerce in obscene books or public exhibition focused on obscene conduct have a tendency to exert a corrupting and debasing impact leading to antisocial behaviour’. So in the year 1973 in the above mentioned case it reaffirmed the basic holding of Roth and settled on a test laid down in Miller v. California639 for the determination of obscenity. The Supreme Court held in Pope v. Illinois640 in the year 1987 that an "objective" or "reasonable person" test should be applied to judging the value of a work rather than a community standards test.

In Federal Communications Commission (FCC) v. Pacifica Foundation641 the case was regarding the radio broadcast of satirist/humorist George Carlin’s "Filthy Words" monologue. The Federal Communication Commission received a complaint objecting to the broadcast, claiming that he and his young son had heard the material over his car radio. Pacifica Foundation appealed to the ‘FCC’

638 413 U.S. 49 (1973)  
639 413 U.S. 15 (1973)  
640 481 U.S. 497 (1987)  
641 438 U.S. 726
ruling, and the case eventually made its way to the Supreme Court. The Court held that the anti-censorship provision was not intended to prohibit the Commission from regulating obscene, indecent, or profane language but had to consider whether the language at issue came within that category. The Court concluded that "indecent," as used in the statute, merely refers to nonconformance with accepted standards of morality. The court held that indecent speech is protected by the First Amendment, unlike obscene and pornographic material, though it can still be regulated where there is a sufficient governmental interest. The District Columbia Court in Pramilee v. United States\textsuperscript{642} observed that in order to determine the obscenity of a book the court in each case had to see whether the publication as a whole has a libidinous effect.

In another case, Ralph Ginzburg and three corporations controlled by him were convicted in a federal district court in Pennsylvania for sending through the mail three obscene publications. In finding Ginsburg guilty, the trial judge applied the obscenity standards used in Roth v. United States\textsuperscript{643} case. The trial judge sentenced Ginzburg to five years imprisonment and fined him $28,000.\textsuperscript{644} Basically, this case upheld State laws against pandering based on erotic appeal or selling material that was considered obscene to minors even if it was not obscene for adults.

Contemporaneously with Roth and Miller line of cases, which dealt with publicly distributing and displaying obscene materials, the court decided the case of Stanley v. Georgia\textsuperscript{645} which involved the possession of obscene materials. In Stanley's case the court held without dissent that the Constitution protected the possession of sexually explicit material, even if legally obscene. The Court seems to have gone back on the Roth case and held that the right to receive information and ideas, regardless of their social worth, is also fundamental to society.

\textsuperscript{642} 113F. Ed.729(D.C.Cir. 1940)  
\textsuperscript{643} 354 U.S. 476 (1957)  
\textsuperscript{644} Ginzburg v. United States 383 U.S. 463 (1966)  
\textsuperscript{645} 1969) 394 US 557
In Osborne v. Ohio\textsuperscript{646} the court held that it may constitutionally proscribe the possession and viewing of child pornography. In Kaplan v. California\textsuperscript{647} the court held that obscene material in book form is not entitled to First Amendment protection merely because it has no pictorial content. The court remarked that a State may control commerce in such a book, even distribution to consenting adults, to avoid the deleterious consequences.

In the case of Kois v. Wisconsin,\textsuperscript{648} the petitioner was convicted under an obscenity statute for publishing newspaper pictures of nudes and a sex poem. The court held that in the context in which they appeared, the photographs were rationally related to a news article, in conjunction with which they appeared and were entitled to Fourteenth Amendment protection.\textsuperscript{649} In view of the poem's content and placement with other poems inside the newspaper, its dominant theme cannot be said to appeal to prurient interest.

The court in Barnes v. Glen Theatre Inc.\textsuperscript{650} observed that enforcement of Indiana's public indecency law to prevent totally nude dancing does not violate the First Amendment's guarantee of freedom of expression. The ordinance of Jacksonville, Florida which made it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, was held to be invalid as an infringement of First Amendment rights in the case of Erznoznik v. City of Jacksonville\textsuperscript{651}

The Court overturned a conviction by a Georgia jury of a theater manager who exhibited the film named Carnal Knowledge in Jenkins v. Georgia\textsuperscript{652}. The Court's decision was based on a conclusion that 'Carnal Knowledge' did not

\textsuperscript{646} 495 U.S. 103 (1990)  
\textsuperscript{647} 413 U.S. 115 (1973)  
\textsuperscript{648} 408 U.S. 229 (1972)  
\textsuperscript{649} Ibid  
\textsuperscript{650} 501 U.S. 560 (1991)  
\textsuperscript{651} 422 U.S. 205 (1975)  
\textsuperscript{652} 427 U.S. 50 (1976)
depict sexual conduct in a patently offensive way. The attempt was to regulate adult theatres and bookstores through restrictive zoning ordinances in the case of *Young v. American Mini Theatres Inc.*\(^{653}\) This case illustrates an approach towards the regulation of the public exhibition of sexually explicit material without attempting to distinguish and prohibit the technically obscene. An Indianapolis law banning pornography as an offense against the civil liberties of women was overturned in *Hadnut v. American Booksellers.*\(^{654}\) The Supreme Court remarked that defining an approved view of women was like thought control, and that a feminist view of pornography was only one of many. A law based on only this one view could not be justified. However, the Supreme Court recognized the harms caused to women by pornography, but concluded that the harm was outweighed by the need for free speech. The court pointed out that the law could be used to ban other works, for example Homer's *Iliad*, because they depict women as "*submissive objects for conquest and domination.*" The judiciary has played a vital role in laying down the obscenity jurisprudence.

c. Variable concept of obscenity in United States of America

The variability of legal definitions of obscenity is satisfactorily laid down by court cases in the United States. As obscenity is relative of time, place and circumstance, materials which are suitable for one situation may be liable for being obscene for another situation. Material not obscene to the general adult population may be proscribed if distributed to or exhibited to minors. Variable obscenity principles is situations where material has no prurient appeal for normal persons but may be prurient for a deviant group. Thus the obscenity of the material turns not only on the material itself, but also on the circumstances and intended persons involved in the distribution of the material. The test of obscenity as given in *Regina v. Hicklin*\(^{655}\) required that obscenity has to be considered taking into consideration in whose hands a publication of this sort may fall. However, with the adoption of the *Roth* test for obscenity, this built-in

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\(^{653}\) 427 U.S. 50 (1976)

\(^{654}\) U.S. 7\(^{th}\) Circuit, No. 84-3147, 771F. 2d. 323, 1985

\(^{655}\) 1868, LR 3 QB 360
variable obscenity factor was eliminated. The Roth test looked primarily to the materials themselves.

The variable obscenity factor was recognized again in *Ginsberg v. New York*. The defendant in this case was convicted of selling magazines containing pictures of female nudity to a sixteen-year-old boy. The state courts found it to be in violation of a New York law making it a crime to "knowingly sell... to a minor... any picture... which depicts nudity... and which is harmful to minors." The case of *Mishkin* laid the groundwork for the decision in *Ginsberg* where the Supreme Court held: 'Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material, taken as a whole, appeals to the prurient interest in sex of the members of that group'. In these two cases, the Supreme Court established the principle of law that the definition of obscenity may be geared towards, or varied for minors or clearly defined deviant groups. In *Renton*, the court upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. In 1996, the United States Court of Appeals in *United States v. Thomas* was presented with the issue of defining "community" in order to determine whether materials that had been transported over the Internet were obscene. The defendants, a husband and wife, operated a computer bulletin board system (BBS) from their home in California. A postal inspector in Tennessee became a member of their service and subsequently received images by means of a computer and by mail. These materials depicted a wide variety of sexual activity including bestiality, torture and excretory fetishism. The couple was convicted by a jury in the Western District of Tennessee for violating federal obscenity laws.

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656 390 U.S. (1968)
658 383 U.S. 463
660 74 F.3d 701 (6th Cir. 1996), 519 U.S. 820 (1996)
(18 USC 1462 and 1465) in connection with their operation of their Bulletin Board System. They appealed on the assertion that the trial venue was improper because it was in Memphis, where undercover Federal agents accessed and downloaded files, not in California; and it was unclear which community's standards should apply in determining whether the contents of a nationally-accessible Bulletin Board System are obscene. In upholding the convictions, the Court of Appeals rejected defendants' argument that the materials should have been judged by the community standards of California rather than Tennessee. The Court stated: "it is well established that there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent." In Philanderer's case the court opined that the corrupting influence of obscenity in any publication is to be determined ultimately by the time, place and circumstances of dissemination and the audience to whom it was directed. This liberal approach was stressed by Stable J. in his change to the jury in the above case when he observed: "Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall this year or last year when it was published in this country or next year, or the year after that."

d. Child pornography in United States of America

Child pornography has become highly organized, multimillion dollar industry that operates on a nationwide scale. There are too many magazines which depict children engaging in sexually explicit conduct. Obscenity impairs the moral and ethical development of the young. Child pornography is material "that visually depict sexual conduct by children below a specified age." It is unprotected by the First Amendment even when it is not obscene i.e. child pornography need not meet the Miller test to be banned. The reason that child pornography is

661 519 U.S. 820 (1996)
662 (1952) 2 All E.R. 683,
664 Ferber, 458 United States, at 764.
unprotected is that it is intrinsically related to the sexual abuse of children. It was
decided that child pornography is illegal because it involves acts that hurt
juveniles in the case of Ashcroft v. Free Speech Coalition. United States of America has set a trend by enacting tough laws to deal with child
pornography and prescribed heavy penalties. The Federal Protection of Children
Against Sexual Exploitation Act of 1977 "PCASEA" made it a federal crime for
anyone to employ, use, persuade, induce, entice, or coerce any minor to engage
in, or assist another person in engaging a minor in, any sexually explicit conduct
for the purpose of producing a visual depiction of such conduct. It also
criminalized activities of parents, legal guardians, and custodians of minors who
knowingly permitted the minors to engage or assist in such conduct. The
provisions of the ‘PCASEA’ have been amended several times to expand its
protection.

The Child Pornography Prevention Act of 1996 (the "CPPA") was enacted
specifically to combat the use of computer technology to distort visual depictions
of pornography to convey the impression that children are involved in sexual
activities, even if no children were actually used in the creation of the images. The
Child Pornography Prevention Act of 1996 (CPPA) created a definition of child
pornography that included visual depictions which appear to be of a minor, even
if no minor was actually used. The law is based on the premise that depictions of
children engaged in sexually explicit conduct is inherently dangerous. In 1996
President Bill Clinton signed the Telecommunications Act of 1996. Title V of the
Act includes provisions of the Communications Decency Act of 1996 (CDA). The
Communications Decency Act of 1996 expanded the law prohibiting the
importation of, or interstate commerce in, obscenity to apply to the use of an
"interactive computer service" for that purpose. It defined "interactive computer

service" to include "a service or system that provides access to the Internet." Federal law bans interstate commerce in child pornography. It defines "child pornography" as "any visual depiction" of "sexually explicit conduct" involving a minor, and defines "sexually explicit conduct" to include not only various sex acts but also the "lascivious exhibition of the genitals or pubic area of any person."

However, the Communication Decency Act was declared unconstitutional because it constitutes a sort of "cyberzoning" on the Internet. The Act applies broadly to the whole of the universe of cyberspace. The purpose of the Act was protection of children from the main outcome of indecent and "patently offensive" speech, and not from the "secondary" effect of such speech. Therefore the Communication Decency Act constituted a content based blanket restriction on speech, and, as such, cannot be "properly analyzed as a form of time, place, and manner regulation." The Supreme Court struck down the 1996 Communications Decency Act (CDA), which they said was an unconstitutional attempt to control communications on the Internet. The Communication Decency Act was succeeded by the Child Online Protection Act, 1998. This Act prohibited communication to minors only of "material that is harmful to minors" rather than material that is indecent, and it applied only to communications for commercial purposes on publicly accessible Web sites. "Material that is harmful to minors" is defined in this Act as material that is prurient as determined by community standards, depicts, describes, or represents, in a manner patently offensive with respect to minors, sexual acts or a lewd exhibition of the genitals or post-pubescent female breast, and lacks serious literary, artistic, political or scientific value for minors. A communication is deemed to be for "commercial purposes" if it is made in the regular course of a trade or business with the objective of earning a profit.

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669 18 U.S.C. §§ 2252, 2252 A
670 18 U.S.C. § 2256
671 FCC v. Pacifica Foundation, 438 U.S. 726
672 Reno v. American Civil Liberties Union 521 U.S. 1997
673 P.L. 105-277
In 2000, the United States Court of Appeals for the Third Circuit invalidated the Child Online Protection Act because the law, which restricts children's access to obscene-for-minors material on the World Wide Web, uses community standards in determining whether sex material is obscene for minors. The Supreme Court ruled on June 29, 2004, in Ashcroft v. American Civil Liberties Union, that the law was likely to be unconstitutional. The Court upheld this decision in American Civil Liberties Union v. Mukasey in the year 2008.

Another enactment called the Protection of Children from Sexual Predators Act was enacted in 1998. It expanded the liability of persons who attempt to use the Internet for purposes of child pornography, use of Internet for purposes of engaging in sexual activities with minors and targeted commercial pornographers. In the year 2000 another legislation enacted was Children’s Internet Protection Act (CIPA), 2000 to regulate computer access to adult-oriented Web sites in public schools and libraries. The United States of America has been very particular in enacting laws to curb and eradicate child pornography. Time and again new laws are made to serve the new challenges of pornography relating to children. Laws are strict and implementation is stringent.

The issue in the case of New York v. Ferber was the constitutionality of a New York statute that prohibited persons from knowingly promoting sexual performances by children under the age of 16 years by distributing material that depicts such performances. By upholding this statute, the Court opened another avenue to regulate obscenity without having to determine that the Miller standard had been violated. The Court recognized that the protection of children from abuse and sexual exploitation was a most important Government objective.

674 535 U.S. 564
675 322 F.3d 240, 251-71 (3d Cir. 2003)
However, in *Ashcroft v. American Civil Liberties Union*, the Court held that the use of community standards does not by itself render a statute banning on the internet materials harmful to minor as unconstitutional. In response to *Ashcroft*, Congress enacted Title V of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or ‘PROTECT Act’. This statute prohibits any “digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.” It also prohibits “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that ... depicts a minor engaging in sexually explicit conduct,” and is obscene or lacks serious literary, artistic, political, or scientific value.

Extreme Associates, a pornography company owned by a couple was prosecuted by the federal government for alleged distribution of obscenity across state lines. In defense, the company argued that since their customers had the legal right to receive such material, a right to distribute must also exist. The lower court agreed with this reasoning and ruled that United States obscenity law was unconstitutional, though this was overturned on appeal in December 2005. The case of *Young v. American Mini Theatres, Inc.* concerned the attempt to regulate adult theatres and bookstores through restrictive zoning ordinances. The ordinance was viewed by the Court as an innovative land-use regulation with minimal impact on First Amendment prohibitions against regulating the content of expression per se. This case illustrates an approach to regulating the public exhibition of sexually explicit material without attempting to distinguish and prohibit the technically obscene.

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678 Public Law 108-21.
679 (as amended by 1466A for Section 2256(8)(B) of title 18, United States Code).
680 United States v. Extreme Associates 2005
681 427 U.s. 50 (1976)
State legislators in Virginia passed a law that would require adults who French kiss a child younger than 13 years to register as a sex offender and those convicted of tongue kissing a child would be guilty of a misdemeanour, punishable by up to one year in jail and a $2,500/- fine.682

In the year 2008, the court considered in United States v. Williams683 latest effort to attack the problem of child pornography on the Web. The Supreme Court of the United States held in this case that a federal statute prohibiting the pandering684 of child pornography did not violate the First Amendment to the United States Constitution, even if a person charged under the code did not in fact possess child pornography. The case of United States v. Knox685 arose out of a criminal action brought under federal child pornography laws. In that case, the courts considered whether videotapes which depicted children whose genitals and pubic areas were "always concealed by an abbreviated article of clothing," could come within the purview of the federal child pornography laws proscribing a "lascivious exhibition of the genitals and pubic area." The court decided that the federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad.

In the United States of America, laws dealing with child pornography have changed as per the needs of the time. Various strict laws dealing with child pornography have been enacted balancing the need for freedom of speech of the people and the need of the society to protect the young generation from the harmful effects of obscenity. The Government has made it very clear that it cannot condone or overlook any types of obscenity regarding children. Child pornography could be a tool for child abuse.686 The words sex and porn made it

682 The Times of India, March 11, 2008, P.20
684 (offering or requesting to transfer, sell, deliver, or trade the items)
685 32 F.3d at 737, 3rd Circuit, 1994
into the top 10 searches by children as per the computer security firm Symantec Corp.  

**e. Use of redeeming social importance concept in United States**

The original version of the redeeming social importance concept was contained in the case of *Chaplinsky v. New Hampshire*. In this case the court handed down the opinion that free speech was not absolute at all times and in all circumstances, that there existed certain "well-defined and narrowly limited classes of speech, the prevention and punishment of which had never been thought to raise any constitutional problem." If the work charged as obscene has some social value or literary, scientific or artistic value, then the accused is exonerated from the liability of the charge of obscenity. In America, the defense available to the accused of publishing or writing obscene material is that the work has redeeming social value. In *Roth's case* it was held that the protection under the First Amendment was available to all sexual and obscene publications which had even the slightest social importance. In *Miller v. California* the defense of serious literary, artistic, political or scientific value and not only redeeming social value was allowed by the court.

**f. Prurient interest**

An appeal to prurient interest is an appeal to a morbid, degrading and unhealthy interest in sex, as distinguished from a mere normal interest in sex. The term prurient interest was used by the court in Roth's case. The court held that the matter could be charged as obscene only if it appealed to the prurient interest of an average person.

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687 The Times of India, August 13, 2009, P.17  
688 (1941) 315 US 567.  
689 Ibid  
690 354 U.S. 476 (1957)  
691 413 U.S. 15  
692 354 U.S. 476 (1957)
In *Memoirs v. Massachusetts*\(^{693}\) it was held that if the expunged work possessed a modicum of social value, then in spite of the fact that the book possessed the requisite prurient appeal and patently offensive nature, the book was entitled to escape condemnation and deserved acquittal. In *Miller v. California*\(^{694}\) the court held that both prurient interest and patent offensiveness were required to be evaluated on the basis of community standards.

The courts gave another standard to those previously established for the determination of obscenity, it is a standard which is designated by the term pandering. Pandering is that kind of promotion and advertising of erotic literary materials which flagrantly exploits the sexually provocative or stimulating properties of such materials.\(^{695}\)

**Position in other countries**

Almost all countries in the world provide some laws and rules for regulating and controlling acts of obscenity. Many cultures have produced laws for censorship and for punishing acts which are regarded as obscene. Even the most tolerant and non-domineering and open minded societies do not allow obscenity to be actively spread under a total protection specially if it is child pornography. Obscenity laws are concerned with prohibiting lewd, filthy, or disgusting materials but there are disagreements as to what is or is not obscene and the role of government in enforcing social morals. In modern society, violent and sexually explicit speech and material is easily accessible and even unavoidable. Even the attitude of public became permissive towards sexuality. Obscenity laws exist to protect the morals of society, promote public safety and prohibit other ancillary crime involving violence. The position of other countries with regard to pornography/ obscenity laws is dealt with below.

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\(^{693}\) 383 U.S. 413 p. 419  
\(^{694}\) 413 U.S. 15  
Australia - It is legal to possess pornography materials but it is illegal to sell or rent obscene materials in all states in Australia. The book Lady Chatterley's Lover was banned in Australia, and even another book describing the British trial, The Trial of Lady Chatterley, was also banned. A copy was smuggled into the country, and then published widely. This led to the easing of censorship of books in the country. However the country still retains the Office of Film and Literature Classification. When the office considers material to be too offensive or obscene it refuses to classify the material. Material which do not receive a classification cannot be distributed. The material described as Youth-imperiling materials or those which violate human dignity cannot be displayed or sold to persons under 16 years of age. Nudity, however is not considered to be such type material. The right of free artistic expression in Australia is constrained by defamation law; trade practices laws; the provisions as per the Online Services Act and various State and Territory obscenity laws, in particular the state Summary Offences Acts which create offences related to the display of indecent, obscene or offensive material. There is no express right to free speech in Australia as in the United states of America. In the absence of definitions of 'obscene' or 'indecent' in the legislation, courts rely on traditional legal tests such as the capacity of the material to 'deprave and corrupt' and/or 'community standards.' Justice Windeyer settled the test for obscenity in Australia in Crowe v. Graham as "Does the publication... transgress the generally accepted bounds of decency, where contemporary standards are those currently accepted by the Australian community... And community standards are those which ordinary decent-minded people accept."

Brunei - Pornography from various regions such as the America, Africa and Europe are easily available in retail shops known as 'kedai runcit'. However, it is illegal to sell to minors, and it is illegal to produce pornography materials.

696 www.theage.com.au/article as seen on October 14, 2006 P.1, 2,3
697 (1968) 121 CLR 375
Bulgaria - In Bulgaria erotica and pornography are illegal and production and distribution of obscene material is a crime.

Brazil - Regular pornography is legal in Brazil and can be sold to people over eighteen years of age. However, child pornography is a crime.

China - The Chinese Government has required that personal computer makers bundle software that filters internet content from July 1, 2009. Unhealthy words and images can be filtered through this software. In China enforcement of laws against pornography are strict and even internet pornography is illegal. China shut down 44,000 Web sites and homepages and arrested 868 people in the year 2008 in a campaign against Internet porn. The authorities have introduced scores of regulations, closed Internet cafes, blocked e-mails, search engines, foreign news and politically-sensitive websites, and have recently introduced a filtering system for web searches on a list of prohibited key words and terms. Those violating the laws and regulations which aim to restrict free expression of opinion and circulation of information through the Internet may face imprisonment and according to recent regulations some could even be sentenced to death. Since 2008, the production of pornographic movies has been banned by state censors. The State Administration of Radio, Film and Television's prohibition on pornography has been complete.

Canada - The Canadian Government introduced the most stringent laws against internet child pornography in the world. It is illegal for a person under the age of 18 years to appear in any pornographic film produced in Canada, regardless of whether such participation is a sexual act. It is also illegal for someone depicted as being under the age of 18 years to appear in a pornographic film, regardless of the age. Pornographic material is legal for persons above the age of 18 or 19 years.

698 The Times of India, Mumbai, June, 2009, P.15
699 www.melomfarmers.co.uk.in P.1 as seen on July 7, 2008
depending on province. Pornographic magazines and movies are widely sold, though sometimes magazines are packed in opaque bags for censorship.

Section 163(1)(a) of the Criminal Code of Canada is very broadly worded to prohibit all phases of the making, printing, publication, distribution and circulation, and the possession of obscene things, with the intention of doing any of the prohibited activities. The prohibited class of obscene things is expansive, covering written material, pictures, models, records or "any other thing whatsoever". Section 163(8) provides the sole definition of what is deemed to be obscene. It states that if a dominant characteristic of the publication is the undue exploitation of sex, or the combination of sex and at least one of crime, horror, cruelty or violence. The Canadian Criminal Code defines obscene material as-

"For the purposes of this Act, any publication, a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."700 In Brodie, Dansky, Rubin v. The Queen701, the Supreme Court of Canada found that D. H. Lawrence's novel, Lady Chatterley's Lover, was not obscene within the meaning of the Code. The Brodie case lay the groundwork for the interpretation of s. 163(8) by setting out the principal tests which should govern the determination of what is obscene for the purposes of criminal prosecution. The first step was to discard the Hicklin test. The decision of the Canadian court in Butler v. The Queen702 is the best articulation of how pornography hurts the rights of women. This case is highly important to women's rights. The Supreme Court of Canada ruled that although the criminal obscenity law of the nation infringed on the freedom of expression, it was legitimate to outlaw pornography that was harmful to women. The court defined obscenity as sexually explicit material that involves violence or degradation. So, the Canadian court acknowledges that something which harms women is obscene, materials that subordinate, degrade or dehumanize women are obscene. The court

700 150A of the Criminal Code of Canada
701 (1962) S.C.R. 681
702 (1992) 1 S.C.R. 452
acknowledged that women and children are usually the subjects of pornography, but it said that materials that degrade men would also be covered by the law.

The Canadian Supreme Court recognized the harms to women and children and society arising from pornography in *Regina v. Butler*. The court concluded that pornography appeals only to the basest aspect of individual fulfillment, physical arousal and it is primarily economically motivated. The Canadian Court observed that while the obscenity law does limit the charter's freedom of expression, it is justifiable because this type of expression harms women personally, harms their right to equality, affects their security and changes attitudes toward them so they are more subjected to violence. Addressing the nature of pornography, the court in the above case observed the harm caused by "the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression." Indeed, the court recognized a growing concern that the sexual exploitation of women and children, depicted in publications and films, can lead to abject and servile victimization.

Denmark - Denmark was the first country in the world to legalize pornography. People in Denmark have free access to pornography. It is sold in many stores, and is available for purchase or rental in practically every video store. The main regulation is only that such pornographical materials should be kept out of the reach of children. Pornography is not sold to persons under the age of 15 years. The television channel broadcasts hardcore pornography free and uncoded at night. In 1967 pornographic texts were legalised in Denmark; just two years later pornographic images were also legalised. But no corresponding decline in public morals was observed. Child pornography and other pornography involving violation of the law, for example sex with animals are banned.

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704 ibid
705 www.kvinfo.dk/I P.1 as seen on April 4, 2009
Egypt - Websites featuring pornography are not blocked.

Finland - In Finland, pornography involving a child, violence or bestiality is prohibited, but one is allowed to sell pornography.

France - In France, extremely violent or graphic pornography can be shown only in specific theaters and can not be displayed to minors.

Greece - In Greece mild pornographic magazines, calendars, and decks of cards are sold openly at roadside kiosks and tourist shops. Extreme or graphic pornography is allowed only to adults. There is no restriction on possession or sale of pornographic materials to adults.

Germany - The laws in Germany are strict about hardcore pornography, but liberal in case of softcore pornography, prostitution and sex shops. Child pornography is illegal, which includes real or fictional people who are under the age of eighteen or appear to be under the age of eighteen years. Pornography involving violence or bestiality can not be produced or distributed though it is legal to possess. Websites hosting pornographic material within Germany must comply with very strict rules about verifying that viewers are over 18 of age.

Hungary and Iceland - In Hungary and Iceland, child pornography is illegal, but regular pornography is permitted.

Italy - Child pornography and bestially is illegal but softcore pornography is not illegal.
**Ireland** - Hardcore pornography is legal in Ireland. Prior to the legalisation of homosexuality in Ireland, in the wake of the European Court of Human Rights decision in *Norris v. Ireland*, the media was not allowed to promote it in a positive light. This has since been removed, and discrimination against homosexuality is now illegal. The Censorship of Films Act, 1923 was an act "to provide for the official censoring of cinematographic pictures and for other matters connected therewith." It established the office of the Official Censor of Films and a Censorship of Films Appeal Board. It was amended by the Censorship of Films (Amendment) Act, 1925, in connection with advertisements for films and in the year 1930 to extend the legislation to "vocal or other sounds" accompanying pictures.

**Iran** - Pornography and obscenity laws are strict. No public display of emotion between males and females is allowed. Pornographic films are called super films and are sold in the black market. Iranian President Mahmoud Ahmadinejad has been accused of indecency because he publicly embraced and kissed the hand of his schoolteacher, an elderly woman. It was filmed by the state media on the Iranian Teachers Day ceremony. The elderly woman wore thick gloves along with a headscarf and long black coat. His action raised objections because according to Shariat law, it is forbidden for a man to have any physical contact with a woman to whom he is not related. His act amounted to obscene behaviour.

**Israel** - Except for child pornography, it is legal in Israel to produce, buy or sell soft porn. Internet pornography is allowed in Israel. Actors must be at least 18 years or older. Before 1996, this age was 16 years or older.

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707 Application No. 10581/83, Judgment of 26 October 1988
708 [http://www.melonfarmers.co.uk/in.html#Unhealthy_Censorship_Irish_Laws-P.1_2](http://www.melonfarmers.co.uk/in.html#Unhealthy_Censorship_Irish_Laws-P.1_2) as seen on 27.02.2008
Indonesia - Based on the law books of Indonesia KUHP (Kitab Undang-Undang Hukum Perdata) article number 282 "it is forbidden to spread a pornographic content".

Japan - The term obscenity (in Japanese waisetsu) first appeared in the Article 259 of the 1880 Penal Code. However, it is Article 175 of the Japanese Code which remains as the main legal base to regulate obscenity. This Article 175 of the Japanese Penal Code regulates reading materials in newspapers and other kind of publications and films. Paragraph 2 of this article reads as "no censorship shall be maintained", stipulates that "any person who distributes, sells or publicly displays an obscene writing, picture or other materials shall be punished with penal servitude for not more than two years or be fined not more than two million and a half yen or minor fine. The same shall apply to any person who possesses the same with the intention of selling it."

Since the end of the Second World War Article 175 of the Japanese Penal Code, known as the obscenity law, has represented the only official restriction on freedom of expression, which is nevertheless guaranteed by Article 21 of the 1947 Constitution. Obscene matter is that which wantonly stimulates or arouses sexual desire or offends the normal sense of sexual modesty of ordinary persons, and is contrary to proper ideas of sexual morality. Article 175 prohibits the distribution and exhibition of obscene pictures and documents in public, a violation of this section is punished with prison terms of upto two years or fine of upto 2,50,000 yen. The foundation for the current interpretation of the term obscenity was developed in the fifties in response to the translation and distribution of the famous novel Lady Chatterley's Lover written by the British writer D.H. Lawrence. In 1950, the editor Kyujiro Koyama and the translator Sei Ito were accused of the charges of obscenity for the translation, publication and distribution of this novel. The Supreme Court of Japan upheld the accusations.

709 Takato, Natsui, http/es.geocities.com as seen on January 25, 2009
710 Japan: An Illustrated Encyclopedia, 19b 83, P. 170
made by the prosecution that the twelve passages at issue made the whole book obscene arguing that "the description of the sex acts contained therein at twelve passages, as pointed out by the prosecutor, is all too bold, detailed, and realistic". The Supreme Court remarked that the term obscene "refers to a writing, picture, and everything else which tends to stimulate and excite sexual desire or satisfy the same; and consequently, to be an obscene matter, it must be such that it causes man to engender feeling of shame and loathsomeness". Translator and editor were forced to pay a fine and the publication of the book was prohibited in Japan. The Supreme Court also declared that the protection of freedom of expression granted by Article 21 of the Constitution did not exclude the prohibition of obscenity.

The Supreme Court during the trial of Yojohan gave the clarification about the term obscenity declaring that it should be judged according to five criteria: (1) the relative boldness, detail, and general style of a work's depiction of sexual behavior, (2) the proportion of the work taken up with the sexual description, (3) the place assumed by sex within the intellectual content of the work as a whole, (4) the degree to which artistry and thought content mitigate the sexual excitement induced by the writing, and (5) the relationship of the sexual portrayals to the structure and plot of the story. The Japanese Supreme Court in the case of Koyama v. Japan, ruled that a work could be judged "obscene" under Article 175 of the Constitution if "it aroused and stimulated sexual desire, offended a common sense of modesty or shame, and violated "proper concepts of sexual morality." The Japanese Supreme Court has been rather pragmatic in its approach when dealing with subjects like obscenity. The degree of explicitness of visual images have been taken as the yardstick to determine and define obscenity. Japanese magna comics depict child like faces and bodies in extreme violence and copulation with futuristic machines.

711 Kensuke Tamai, Censorship in Kodansha, Encyclopedia of Japan, Volume 1, 1983, P. 254
712 Allison, Anne, Notes 10 http://es.geocities.com on October 31, 2007, P.1
713 http://es.geocities.com on October 31, 2007 Ps. 1 and 2
714 http://www.akibanana.com/?q=node/1111 P.1 as seen on June 9,2009
Korea- Korean approach towards legal proscription of obscenity was strict and conservative. Korea is a conservative society influenced by Confucianism. The Hicklin test of England which defines obscenity, ‘as the tendency to deprave and corrupt’ susceptible persons remains a part of obscenity jurisprudence in Korea. There are various legislations to control obscenity like the Juvenile Protection Act; the Promotion of the Movie Pictures Industry Act; the Sound Records, Video Products, and Game Software Act; the Broadcasting Act, the Registration of Periodicals Act; the Telecommunications Business Act, Act on Promotion of Information and Communication Network Utilization and Information Protection; the Outdoor Advertisements Control Act; the Customs Act; and the Import and Distribution of Foreign Publications Act, the Criminal Act. Almost all these acts contain penal provisions that authorize imprisonment and imposition of fines against violators. De facto censorship of the media through administrative regulations and quasi-governmental committees is an effective source of enforcement. Juveniles in Korea cannot legally obtain materials even for sex education. In another attempt to regulate the dissemination of obscene materials available on the Internet, the legislature passed the Telecommunications Business Act.

The Nude Maja case was typical of the Supreme Court and was influenced by Confucianism, which abhors open discussion of sex. In the case of Happy Sara the author was arrested for violation of Articles 243 and 244 of the Criminal Act. The trial attracted the attention of the entire nation. This case was considered to be a litmus test of whether the judiciary could adapt to an open and free society.

However, the courts maintained their traditional attitudes. Both the trial court and the appellate court held that Happy Sara was obscene and sentenced Professor

717 Hee Ki Shim, Munyejakpumee Eumranseong Pandangijun (Obscenity Standards in Literature), 4-1/2 YOUNGNAM BUBHAK 261, 265 (1998).
Ma, the writer of the book to eight months imprisonment, with probation for two years.\textsuperscript{718}

**Lebanon** - Laws do not permit broadcast of pornography on national television or to even produce it. However, enforcement of laws are not strict and pornographic magazines and movies are widely sold.

**Middle East** - In countries of the Middle East and Israel, there is strong opposition of non traditional sexual behaviour. People fear a breakdown due to the introduction of non normal sexual laxity. Saudi Arabia and United Arab Emirates block the websites depicting pornography on the internet and the use of cell phones with built in cameras are banned. In Riyadh, after more than 30 years people were allowed to view a movie, a Saudi film named Menahi.\textsuperscript{719} No women were allowed to view the film.

**Mexico** - Pornography is illegal if sold or shown to persons below eighteen. However, magazines and comics featuring softcore pornography are commonly available for sale in the market.

**New Zealand** - The Indecent Publication Tribunal is empowered to classify reading material as unsuitable for sale to persons below eighteen. The hearings of the Tribunals are public. Laws dealing with pornography are relaxed in New Zealand. However, child pornography and pedophilia, rape, bestiality are declared to be objectionable materials. The depiction of illegal sexual activities, such as those involving children, animals, rape, violence or the use of force, remains illegal.

In New Zealand, the Films, Videos, and Publications Classification Act 1993

\textsuperscript{718} 71. Ma Kwang Su v. State, 94 To 2413, Daebeobwon (Supreme Court) (June 16, 1995).
\textsuperscript{719} The Times of India, Mumbai, June 9, 2009, P.15

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classifies a publication as objectionable if it promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes. Making, distribution, import, or copying or possession of objectionable material for the purposes of distribution are offences punishable by a fine of up to NZ$10,000 on strict liability, and 10 years in prison if the offence is committed knowingly. In December 2004, the Office of Film and Literature Classification determined that *Puni Puni Poemy* - which depicts nude children in sexual situations as obscene under the Act and therefore illegal to publish in New Zealand. A subsequent appeal failed, and the series remains banned.

**Norway** - In Norway hardcore material of pornography is illegal to sell, distribute or produce but not illegal to possess. In Norway, any images or videos that depict pornography of persons in a childish context, which would include, for example, an adult model with childish clothes/toys/surroundings are to be considered child pornography and therefore illegal.

**Netherlands** - has the most liberal rules regarding obscenity. Pornography is sold openly at normal news-stands.

**Papua New Guinea** - The possession, import, export, and sale of pornography is illegal. Laws are strictly implemented.

**Poland** - According to Section 202 of the National Penal Code since 1998 pornography is legal in Poland except pornography materials involving minors below 18 years old, bestiality and scenes of violence/rape. According to Article 202 § 3 of Penal Code “each person who produces, consolidates or brings or

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720 Paul Christoffel, *A short history of censorship in New Zealand*, Research Unit, Department of Internal Affairs, Wellington, Monograph Series No. 12. 1989
transmits or publicly presents the pornographic contents with the participation of the child or the pornographic contents connected with presenting violence or making use of an animal is liable to imprisonment for a term from 6 months to 8 years". Pornographic magazines and movies are sold in transparent plastic bags openly in kiosks, oil stations. Polish constitution provides for freedom of speech and the press, which is respected by the government.

Russia - It is illegal to produce and sell pornography in Russia. The production, distribution and public demonstration of child pornography is a crime by imprisonment but possession of pornographic materials is not a crime if there is no intent to distribute or exhibit the material. Moscow city authorities reportedly considered levying fines for public display of affection, because police and the lead education committee believed children were in danger of being corrupted by sight and sound of passionate embraces in public.721

Romania - In Romania pornography is legal. However pornographic materials are not allowed to be sold to minors i.e. below eighteen. Pornographic materials are required to be enclosed in plastic bags with a small red square printed on the enclosing material. Television channels showing pornographical films by cable operators have to be encrypted.

SriLanka - Sale or possession of pornographic material is illegal under the Explicit Literature Ordinance. Child pornography is also considered to be illegal under the National Child Protection Act and the punishments are very severe.

Scotland - The laws regarding child pornography are strictly punished.

Spain - Pornography is legal except for children below eighteen years. The world’s biggest pornographic company has its headquarters in Barcelona.

721 The Times of India, Mumbai, March 15, 2009
South Africa - Schedule 1 of the 1996 Films and Publications Act defines the XX Classification of prohibited publications as material, which contains a real or simulated visual presentation of: child pornography; explicit violent sexual conduct; bestiality; explicit sexual activity which degrades a person and which constituted incitement to cause harm; or the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm. The laws relating to obscenity were completely revised in 1996, when the old apartheid era laws were replaced with the Films and Publications Act, No. 65 of 1996. Public display of affection is banned for those under the age of sixteen.

Pornography is a criminal offence in Nigeria. Pursuant to sections 233C, 233D, 233E of the Criminal Code and sections 202 and 203 of the Penal Code, distribution or marketing of pornography and dissemination of obscene publication are criminal offences punishable with varying degrees of imprisonments. The Children and Young Person Act prohibits the dissemination of certain pictorial publication to children. There is also the Cinematography law which prohibits the showing of films without censorship. According to section 45(1) of the 1999 Constitution, the exercise of the rights guaranteed under sections 37, 38 and 39 of the Constitution are curtailed to the extent that they are in conflict with laws that are reasonably justifiable in a democratic society in the interest of public morality or public health. In Botswana the possession of indecent and obscene material such as pornographic books, magazines, films, videos, digital viewing devices and software are prohibited.

Sweden - Pornography is legal except for child pornography. Also it is illegal for persons below eighteen years to act in films and pose for pornographic photography. Material involving sexual acts with animals is de-facto legal but

722 www.allafrica.com, P.1, as seen on May 4, 2009
subject to animal-welfare laws. Porn movies can be viewed beginning at 15 years and there are no age restrictions for pornography magazines.

**Singapore** - The Government blocks a symbolic number of websites containing mass impact objectionable material, including Playboy and YouPorn. In addition, the Ministry of Education blocks access to pornographic websites. In 1996, Singapore took an initial step by shifting the responsibility for regulating the internet from the Telecommunication Authority of Singapore to Singapore Broadcasting Authority.

**Thailand** - Pornography laws are strict and pornography is illegal.

**Taiwan** - The sale or display of pornographic material to children under 18 years of age is illegal in Taiwan.

**Turkey** - It is illegal in Turkey to diffuse "obscene" images, words or texts through any means of communication.

**Ukraine** - From 2009, distribution and possession of pornography in Ukraine results in a fine or a three year jail sentence.

Pornography is totally illegal in Saudi Arabia and Malaysia, Philippines, Indonesia, Pakistan, Islamic Republic of Iran, Egypt, Srilanka, Bangladesh, Russia and even China. Pornographic material cannot be created, distributed or sold or given on rent in these countries. All dealings with child pornography are strict in practically all parts of the world. Most countries attempt to restrict minors’ access to hard core materials, so that it is only available in adult bookstores. Most western countries have some restrictions on pornography involving violence or animals. Many of these efforts have been rendered ineffective by the wide and easy availability of internet pornography. In the late
20th and early 21st century, differences between countries regarding legal definitions and cultural conceptions of obscenity became increasingly important with the development of the Internet. Internet has enabled anyone to view materials including texts, images, and motion picture originating from virtually anywhere in the world. Sexually explicit material can be viewed over the internet easily, which has complicated the regulation of child pornography in many countries, in particular because of differences between countries regarding the legal definition of obscenity, childhood, the legal age of sexual consent, and tolerance of indecent images of children.

To sum up, it is observed that the confusion begins with the vague definition of obscenity laws in various countries of the world. Obscenity laws are concerned with prohibiting lewd, filthy, or disgusting words or pictures. There is disagreement to the role which the Government should play in controlling obscenity. The point of view of theoretician regarding obscenity is subversion of accepted standards of sexual morality,723 the invitation to venereal pleasure,724 the individual or communal feelings of indignation,725 the leer of the sensualist726 or the community sense of shame at the exposure of sexual or excremental matters.727 What constitutes 'obscene' however has been the subject of national and international debate and continues to be even till today.

It is observed that in ancient times obscenity was more an offence against religious tenets than against moral licentiousness and sexual perversity. In ancient times in most of the countries of the world, obscenity was not considered a crime. Men enjoyed a lot of obscene speeches and dramas without any fear of punishment. Nudity or indecency were not recognized as obscene. Portrayals of sexuality have existed in virtually every society for which the records are

724 Gardiner, Catholic View point of Censorship, New York, 1958, P.36
726 U.S. v. One Book Called ‘Ulysses’ 5 F. Supp. 182 (S.D., N.Y.) (1933.)
727 (1913) 209 Fed. 119

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available. In England only the Ecclesiastical Courts had the jurisdiction to try offences of obscenity. In the year 1727 the jurisdiction to try obscenity offences slipped from these courts to Common Law Courts. Obscenity became as an independent crime as distinct from moral values and religion after the enactment of Obscene Publications Act, 1857. The Act empowered the magistrate to order destruction of books and prints if, in their opinion, such books or prints were pornographic. In England in the year 1868 a test of obscenity was announced in Regina v. Hicklin which was also followed in United states of America and India and many other countries in the world. This test required that the determination of obscenity be made taking into account "the tendency of the materials to deprave and corrupt those who are likely to be influenced by these material and into whose hands a publication of this sort may fall." The Hicklin rule requirement of strict liability is a major flaw in this because a person can be held guilty of an offence without having a guilty mind. Also, the intention of the accused is not considered.

The Obscene Publications Acts of England are a series of laws amended in 1959 and 1964 that basically determine the criteria for what material is allowed to be publicly accessed and distributed within the member countries of the United Kingdom. The laws were tested in 1963, with the release of D. H. Lawrence's Lady Chatterley's Lover, which was brought to trial and acquitted under protection from the Obscene Publication Act of 1959.

The courts in England have established that the meaning of the word 'obscene' in relation to the Post Office Act 1953 should be given its dictionary meaning - covering material that is shocking, lewd, indecent and so on. This means that under the Obscene Publication Act, 1959 the material must tend to 'deprave and corrupt' in order to qualify as obscene, while under the alternative definition the material can be found to be obscene if it 'shocks and disgusts' the reader.

728 1868. L. R. 3 Q. B. 360
However, it should be noted that 'shock and disgust', under the Obscene Publication Act, 1959, can provide a defense to an obscenity charge, because a person who is shocked and disgusted by material may be unlikely to be depraved and corrupted by it. Thus, at present, in English law, there are two contradictory definitions of the meaning of the term 'obscenity'.

In United States of America, sale and distribution of obscene materials has been unlawful in most of the states since the early 1800s, and has been prohibited by federal law since 1873. These laws have at times been stringent and their enforcement vigorous. The Supreme Court of United States relaxed prohibitions on the sale, distribution, and possession of sexually oriented materials during the years from 1950 to 1960. Workable statewide obscenity laws exist in 40 states. In some states, cities and counties also enact obscenity laws.

In the United States of America, the Hicklin's test was the guiding test for deciding cases relating to obscenity. The first case decided on the basis of this test was United States v. Bennet. Mr. Justice Blatchford of the Supreme Court of United States applied the most susceptible person test as the guide to determine the class of persons to be protected against the pandering of obscene words. The most vulnerable test was applied by the courts in America until the decision of United States v. Kennerley in 1913, where the court gave the average person test as the guiding spirit to determine the class of persons in obscenity cases. So this test means that the depraving and corrupting effect of the obscene matter is to be judged from the view of the average person, and not according to the standard of the susceptible or vulnerable person. The Hicklin test was overruled in United States v. Ulysses. In Roth v. United States too the average person test was incorporated. It was observed as under: The test is not whether it would

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729 24, Fed. Cas. 1093 (N.Y.S.D. 1879)
730 209 F. 119, 121 (SDNY 1913)
732 354 U.S. 476 (1957)
arouse sexual desire or sexually impure thoughts in those comprising a particular segment of the community... You may ask yourself—does it offend the common conscience of the community by present day standards.

In Pope v. Illinois733 the Supreme Court held that an "objective" or "reasonable person" test should be applied to judging the value of a work rather than a community standards test. The court held in New York v. Ferber734 that state may proscribe sexual material involving minors, even if that material may not meet all of the prongs of the Miller test.

In 1997, in American Civil Liberties Union v. Reno,735 the Supreme Court of United States held that the term patently offensive is too vague to provide for a basis for a criminal charge in modern times. In the case of Reno v. American Civil Liberties Union,736 the Supreme Court overturned provisions of the Communication Decency Act prohibiting transmission of obscene or indecent material by means of a telecommunication device. In Stanley, the Court concluded that Georgia cannot, consistent with the First Amendment, criminalize the private possession of pornography—even if the sale and distribution of that same material would not be constitutionally protected. In Roth Albert's case,737 Roth challenged the constitutionality of the Federal Obscenity Statute as a violation of the First Amendment Clause. The court held that the amendment primarily excluded obscenity which was utterly without redeeming social importance. This climate of sexual repressiveness prevailed until approximately the mid-twentieth century. The Supreme Court of America in Miller's case loosened restrictions on the sale to adults of sexually explicit materials wherein a new definition of obscenity was laid down. In Roth the Court

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733 481 U.S. 497 (1987)
734 458 U.S. 747 (1982),
735 31 F. Supp. 2d 473, 481 (E.D. Pa. 1999
737 354 U.S.476(1957)

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provided a definition of obscenity that clearly tied the concept to sex and elimination. It is observed that this definition is too narrow.

The legal concept of obscenity emerged from the Roth case with its basic component was indistinct and obscure. The contemporary community interest part of the definition was confusing. The Roth test proved difficult to use because it could not give a conclusive definition of obscenity. The Supreme Court justices could not fully agree to what constituted "prurient interest" or what "redeeming social importance" meant. The court's failure to concern itself with the rationale for legal regulation of obscenity resulted in most of the deficiencies and ambiguities. Under the Roth test, if material has prurient appeal, but prurience is not its dominant theme, the work is not obscene. For example, if some scenes of a film are sexually arousing but the dominant effect is depressing, the film is not obscene.

There is no uniform national standard under the Federal obscenity law in the United States as something which is legally "obscene" in one jurisdiction may not be so in another. After Roth, sixteen years later, another breakthrough was the decision in Miller v. California,\textsuperscript{738} wherein the Court reframed the test of obscenity as "must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which... do not have serious literary, artistic, political, or scientific value."

The Supreme Court avoided giving a precise definition of obscenity. The main shortcoming of the Miller standard is that obscenity is defined in terms of the reactions of the people to it, rather than being defined in terms of some objective qualities. So people remain clueless as to what actually is obscene.

The individual views of the judges themselves as to whether material is "obscene" is of paramount importance because of the inherent subjectivity of

\textsuperscript{738} 413 U.S. 15, 24 (1973).
defining obscenity. Justice Potter Stewart of the Supreme Court of America once stated that he could not define obscenity but "I know it when I see it." Justice Stewart's dilemma illustrates the difficulty for the courts in clarifying the ground rules for obscenity. In Miller, the Court simplified the test using instead the phrase "work taken as a whole." The standard that to be judged obscene a work must lack "serious literary, artistic, political or social value" is imprecise and uncertain. It is impossible to draw the exact line between "important" and "worthless" material.

The federal laws are very comprehensive in prohibiting child pornography. The Court felt that the government's interest in protecting children from abuse was paramount. Not only United States of America, but almost all countries in the world prohibit child pornography. Most countries have strict laws to control and prohibit child pornography i.e. banning children from viewing it and also prohibiting children to act in pornography films. The legislation of United States or United Kingdom have not tried to give legal connotation to the term obscenity. Obscenity as an offence against public morality is subjected to change as per the changing times in its content.

The general trend in most of the countries barring the Muslim countries is of greater permissiveness in dealing with obscenity. In Saudi Arabia, Iran, Pakistan and other middle East countries, religious authorities play an important role in suppressing obscenity. Also, the laws and their implementation are strict. Internet access are controlled in these countries as well as in China.

A definition that deals with the problem of pornography with precision is the one adopted by the Supreme Court of Canada in R.v. Butler. The Court held that material would probably be obscene if it depicted explicit sex with violence, and that it would certainly be obscene if it showed "explicit sex without violence, but

739 Jacobellis v Ohio, (1964) 378 US 184
740 89 Dominion Law Reports 449 (1992), (1992) 1 S.C.R.452

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which subjects participants to treatment that is degrading and dehumanizing if
the material creates a substantial risk of harm." In this case the Canadian
Supreme Court recognized the harms to women and children and society arising
from pornography. The Canadian Supreme Court's Butler decision, accepted the
feminist argument that pornography leads to violence against women, and thus
redefined obscenity legislation in the Criminal Code. The judgment, however,
noted that there was no conclusive proof as to a relation between consuming
pornography and aggressive behaviour. Nevertheless, the court ruled that there
was no need to establish a connection between pornography and its alleged
harmful effects. In this case, the Court had to balance the right to freedom of
expression under section 2 of the Canadian Charter of Rights and Freedoms with
women's rights; the outcome has been described as a victory for anti-pornography
feminism.

Most countries in present times are permissive about display of obscenity and
pornography. Denmark, being the first country to lift any kind of prohibition on
pornography did not experience any fall in morality of its people. In Australia,
Brazil, Finland, France, Greece, Hungary, Iceland, Italy, Ireland, Israel, Mexico,
Newzealand, Netherlands, Poland, Romania, Spain, Sweden pornography is
permitted to adults. The laws are strict only when it is relating to child
pornography. In Saudi Arabia, Iran, Pakistan and other middle east countries,
religious authorities play an important role in suppressing obscenity. Also, the
laws and their implementation are strict. In Thailand, Singapore, Turkey,
Bulgaria, Indonesia, Korea, Russia and Papua New Guinea pornography is illegal.

Human development is the epicenter of all developments. The importance of the
protection of rights towards a moral society can be visualized from the resolution
passed by the International Convention for the Suppression and Circulation of and
Traffic in obscene publications at Geneva as long ago as 1923. Women should

741 India signed the Convention on 12th September, 1923
be protected from all kinds of degrading behaviour and not be left only as an object for men’s sadist pleasure.