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2nd Year, BA LL.B.**ANALYSIS ON SECTION 294 OF THE INDIAN PENAL CODE, 1860.****ABSTRACT**

Alfred Schultz inquired - "Does man's social being determine his consciousness, or does his consciousness determine his social being?" – to unravel the workings of social phenomenology. Combined with Cooley's theory of looking glass self, we have enough theory to prove how mind is social and society is mental – both equally sculpting the other periodically. Thus, through combination of various minds and matter, comes collective social consciousness. However, with structural osmosis of social groups, there prevails a continuous evolution of collective morality especially in the rapid dynamism of the nouveau globalism. Thus various social groups experience receding transformative rate in comparison to others when it comes to reformation of accepted moral norms. This is where moral policing comes to play. Constitutional morality when crystallised, forms law, and law reflects the collective conscience of the public at large. However, provisions for safeguarding the majoritarian conscience cannot absolutely refute personal autonomy and subjective morality.

Section 294 of the Indian Penal Code, 1860 which aims to preserve public conformity of norms also presents immense ambiguity to the platter regarding the interpretation of what is considered as an act of "public obscenity". This article aims to analyse, criticise and discuss the same.

KEYWORDS

Section 294, Indian Penal Code, 1860, obscenity, ambiguity, morality, obscene acts and songs, public, moral policing.

INTRODUCTION

The Section 294 of the Indian Penal Code, 1860 deals with “*obscene acts and songs*”. It states—

“*Obscene acts and songs — Whoever, to the annoyance of others—*

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.”¹

For a brief understanding of this section, we must seek what the word “obscene” means in terms of legal interpretation. No statute still gives a clear definition of what actions or words come under the purview of obscene however the judiciary has often attempted to give its own interpretations. The ambiguity regarding the extent and scope of the word “obscene” in legal context makes this Section volatile to moral interjections.

The essentials of **section 294** IPC are –

The accused-

- Did some act,
- Or sang, or recited, or uttered any song or ballad;
- Which was obscene in nature and was done in a public place. The word obscene being vague again.

Section 294 of the Indian Penal Code, 1860 is a cognizable and bailable offence. The punishment includes imprisonment for 3 months and a fine may also be levied upon the same, depending upon the nature and gravity of the offence committed. These offences are non-compoundable in nature and can be tried by any Magistrate.

1. Section 294, Indian Penal Code, 1860, Bare Act.

ANALYSING SECTION 294

The definition of “obscenity” in law and language is vague, but the standard of crime is "whether the display, or the subject of the act tends to deprave. Obscenity can be understood generally as "something an overt act or words or even gesture – impure and indecent in its nature, which deliberately infringes upon people's moral consciousness - ignoring the norms of chastity or modesty in the respective society”.

The meaning of the word "obscene" used in IPC section 294, should be held consistent with interpretation of the word as applied in IPC sections 292² and 293³. Section 294 aims to prevent obscenity that is offensive to the public, and does not limit the scope of the act only to people who are apparently intended to be the direct victims of the defendant's obscenity. What is of paramount importance in this case is the “interest of society” – the hindrance of the same sets this section into motion. The word obscenity, however not very vague in the general social understanding, is in fact imprecise in moral understanding.

This section can be analysed under the following salient points -

1. Subjective in morality:

Social morality and conforming norms of acceptance and normalcy are inherently subjective in nature. Criminal law cannot be used as a tool to evaluate morality by unrightfully intervening into the space of personal autonomy. Morality and criminality are therefore not coextensive concepts. The evolving current of social structures today demand a more open, nuanced, sensitive and liberated evaluation of Section 294, from the courts, to appreciate the changing perspectives of morality and its standards and changing views of obscenity. Statutory provisions and their evaluation are not petrified by time and must be updated by changing ethos as popular ethics are not absolutes but abide and evolve as community consciousness enlivens and escalates. The test to determine whether public order is disrupted or has tendency to disrupt, is, does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquillity of society undisturbed?

2. Individuals may differ from popular morality:

Criminal law is not mandated to punish individuals simply for expressing or exercising upon unpopular views. However, uncompromisingly, there indeed must be a balance between the interests of freedom of expression and the interests of society. The Court's commitment to freedom of expression demands that it cannot be extinguished unless situations are created where at large the public interest at stake or when it infringes upon other's rights. The danger foretold must not be conjectural or far-fetched. It must have a close and direct relationship with expression or action so performed. Courts have always recognized that the practice of protecting privacy involves, in essence, balancing rights so that legitimate conflicting rights and interests do not contribute to the denial of another right.

2. Indian Penal Code, 1860, Bare Act.

3. Indian Penal Code, 1860, Bare Act.

3. Community norms are dictated by the collective conscience:

Norms of what is moral or immoral are established by the dominant conscience of society. It can be manifested, unwritten and more or less mythical, or found as legend, as tradition, as opinion, as custom or folklore and at last when finally crystallized - enshrined in law. Therefore, the standard or “norm” is established by the consensus of opinion, the evaluation of the majority. When the majority to minority ratio is small, of course there will be greater opposition from the minority to the norm. The majority can become a minority and standards change. But as long as any standard is established, the measurement must be made according to its conditions.

4. An act of pornography in a private place is not an offense:

In its decision in the “*State of Maharashtra v. Joyce Zee*”,⁴ judge remarked that he had serious doubts as to whether places such as the Blue Nile Hotel could be considered a public place within the meaning of Article 294 where entry must be paid. for vaudeville performances as done or not. in this case. He went on to observe that when an adult pays and goes to see such a spectacle, he runs the risk of getting being borne by obscenity or being entertained by obscenity to his liking.

From these words, a question arises as to whether hotels like the one involved in this case are public places. Article 294 of the IPC is intended to punish those who commit pornographic acts in any public place causing trouble to others. Therefore, the places where such pornography is performed must be public and open to the public and in such open public places the question of selective access or entry is ruled out. The public, as mentioned, is one which must allow people to have free access. Unless this factor is met the requirement of an “offence” to qualify under section 294 is not possible. A place where the general public, regardless of conditions, does not have the right to enter, such places cannot be considered public. Seen from this angle, an apartment / flat in a building belonging to a private person which is exclusively used by the owner cannot be considered as a public place. Thus, when acts are performed or words spoken in a closed room, it cannot be said that obscene words were spoken in or near a public place.

4. 1973 SCC OnLine Bom 141 : ILR 1973 Bom 1299.

5. Prior evidence of discomfort:

A brief reading of this section will clearly show that this section is intended to prevent obscene acts committed in public which are offensive to the general public. Disturbing others is a fundamental factor in an offense under this section. To constitute a crime, one must irritate others. If it's not offensive, it's not a crime. There must be real discomfort and not just the likelihood of it. There must be some who say that the action taken, or the song sung, upset the public.

In "*Narendra H. Khurana v. Comm. Police*"⁵, the Bombay High Court ruled that dancing in pubs where indecent and obscene acts were committed would not attract the provisions of Article 294 IPC if the requirements were not met. It was held that there is no dispute that bars and restaurants are public places, however there is no evidence that the indictment caused trouble for others. Therefore, prosecuting applicants is merely an abuse of the process. It is un-understandable how the actions complained of, could annoy non-watchers or affect public order. It is equivalent to saying that watching a Hindi movie with dance scenes and revealing dancers will affect public order. Such places, although open for public are still restricted private entities where an onlooker avails such services or is exposed to such visuals at their own discerning choice. Unless one chooses to enter such places, the alleged exhibitionism is not possible. Thus the requirement of such acts being carried out in public is ruled out.

To prove an offense under Article 294 of the IPC, a simple act is not enough, there must be additional evidence to prove that the act has caused inconvenience to others. The presence of at least one person is necessary, otherwise the inconvenience would not be proved and therefore the accused cannot not be found guilty.

6. Proof may not be necessary:

Under Section 294, unless there is proof of the conduct, it cannot be necessarily considered obscene. The test for obscenity is whether there is a tendency in the act of debauchery and perversion of those whose souls are ready to accept such immoral influences. Discomfort, an important element of the offense in this article is often related to a mental condition and for this reason, it is difficult to prove its veracity with solid evidence. In most cases, it must be inferred from proven facts.

In *Nicholson v. Glasspool*⁶, it was alleged that: With a charge against a person prohibiting the use of obscene language in the street causing discomfort to a person in it, where there is evidence of harassment. Statement made it clear and that the nature of the language was obscene and calculated to be offensive, the judges had the power to infer discomfort and conviction, although there was no corroborating evidence that anyone upset was brought by the prosecutor's office. In case of pornography prosecution will not be deprived of objectionable evidence if the pornography victim is not presented as a witness.

In case of words spoken which are obscene, do such words potentially degrade and corrupt those who are subjected to such immoral influences? It is a practical question which must be decided on the basis of evidence which can be supplemented by references in the sense given to it. For example, the words in that particular region / locality, the tone and content of these words and their meaning all are commonly used in a certain context. However, when an alien listener is subjected to such profanities which are used as common slangs for amusement in daily conversation, he / she is shocked to hear the words. Whether or not then, such words

said will be considered obscene or not are questions that must be decided on the basis of evidence that may need to be added.

5. 2003 SCC OnLine Bom 1109 : 2004 Cri LJ 3393

6. (1959) 123 JP 229

CAN MESSAGES SENT ON WHATSAPP BE PENALISED UNDER SECTION 294?

The Bombay High Court has ruled that abusive messages sent via WhatsApp do not constitute obscene conduct in public and therefore are not punishable under section 294 of the Indian Penal Code. IPC Section 294 states that

“Whoever, to the annoyance of others—

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.”

Judges **T.V Nalawade** and **M.G Sewlikar** of Aurangabad bench of the Bombay High Court argue that WhatsApp messages sent by one person to another are end-to-end encrypted, meaning that only the sender and recipient of the message can read them. No one in the middle, not even WhatsApp, can read these messages.

In **Nivrutti Hariram Gaikwad vs The State Of Maharashtra And Anr**⁷: Nivrutti Hariram’s wife Pooja Nivrutti Gaikwad filed an FIR under Articles 294, 500, 506 and 507 of the Indian Penal Code after being brutally treated by her husband and also being called a “prostitute” both verbally and in writing. It is also alleged that the applicant married the defendant under pressure from other people because the applicant was homosexual. During the action, the applicant's lawyers filed this offense under the IPC Article 294. However, this section will only find expression if the obscene words were spoken in public.

Bench said that as Whatsapp messages are end to end encrypted and only the recipient and the sender have the access to read them, sending private messages on WhatsApp will therefore not amount to total profanity in public. Consequently, article 294 of the IPC was expelled from the charges said bench.

Here the question arises, that whether hurling profanities in group chats invoke Section 294?

Will the presence of any other person, or the possible presence of any other person, even in an encrypted and enclosed WhatsApp group, regardless of the degree of intimacy or closeness of the relation, satisfy the condition of “public obscenity” if an act of this kind were to arise again?

7. ICL 2020 Bom. 392

MORAL POLICING, SECTION 294, AND KISS OF LOVE PROTEST

There were many incidents of moral policing in Kerala in the 2000s.

In 2011, a 26-year-old boy in Kodiatour, Kerala, was killed by a mob on suspicion of having an affair with a married woman. In June 2014, a theatre artist and her colleague were detained by the police for traveling together at night, sparking protests against moral vigilance on social media. In July 2013, the police arrested a couple suspected of “immoral activities” on Alappuzha Beach because the woman did not wear any accessories that indicated that she was married.

In April 2013, an artist from Kochi was harassed by two policewomen while walking with friends on Marine Drive. In June 2012, a group of men attacked and beat a pregnant woman who was sitting alone at the Kannur bus station.

In June 2011, an IT professional was approached by a group of drunks because he was riding on the back seat of a colleague's bicycle on his way to work in the Kochi IT Park. The drunk argued with her, then insulted and slapped her. Several similar cases have been reported throughout Kerala.

Legality

Section 294(a) of Indian Penal Code clearly states that *"Whoever, to the annoyance of others, does any obscene act in any public place shall be punished with imprisonment for a term which may extend to three months, or with fine, or with both"*. IPC however, does not define the word 'obscene', hence it is interpreted differently by different authorities. This is what draws morality into judiciary where the judges have to interpret the meaning of the word obscene based on their understanding and subjective moral standpoint.

The Supreme court has however, noted that “obscenity” should be gauged with respect to the contemporary community standards, however within the same society various social groups exist whose collective conscience that dictate moral understandings can be highly contrasted with that of the other.

The court has also observed that the *“standards of contemporary society in India are fast changing”*. Regarding 'contemporary community standards', the Supreme court has noted that it is not *“the standard of a group of susceptible or sensitive persons”* that can be held as the standard of the community. Regarding social morality, the Supreme court has observed that *“Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy”*. However, the Section 294 of the Indian Penal Code, deals with the very subject of moral acceptance and the balances on the ethos of right and wrong and modest and obscene, without any well bound statutory definition - which

brings a cloud of ambiguity to be cast upon suits that are submitted under this section. The vagueness itself makes its section an ardent tool - potential in wrongful trials of moral policing.

Now with regards to the activities of kissing and / or hugging in public places, the Supreme Court of India has made its stand clear that *“no case can be made out of two people consensually hugging and/or kissing”*. Supreme Court gave this verdict, in response to a petition filed by actor Richard Gere. The petition was issued in response to the arrest warrant filed against him, which the Jaipur high court upheld, after the actor had taken Shilpa Shetty in his embrace and kissed her on the cheek at an AIDS awareness programme.

A verdict by Delhi High Court has also made it strikingly clear that kissing in public is not a criminal offence.

However still, section 294 stands volatile to not just the cases of kissing or hugging but many other choices that empower personal liberty and autonomy or the public, which are still attacked by moral policing squads that aim in conservatism and upholding orthodox morals – unchanging and inflexible. This amounts to a serious threat against right to freedom of expression and right to life, unless the ambiguity around the word “obscene” is removed through a well sought codification that will prevent any undue exploitation.

Kiss of Love Protest

In light of similar events, The Kiss of Love protest was sparked off in October 2014 when Jai Hind TV, a Malayalam news channel owned by the Indian National Congress, telecast an exclusive report on alleged immoral activity at the parking space of Downtown Cafe in Kozhikode. The video showed a young couple kissing and hugging each other. A mob of attackers, who were later identified as belonging to the Bharatiya Janata Yuva Morcha vandalized the cafe following the report. Following this, a group of friends from a Facebook page called 'Freethinkers', started the Facebook page 'Kiss of Love'. Activists from all over Kerala decided to protest against the series of moral policing incidents by organizing a public event at Marine Drive beach on November 2 in Kochi.

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CONCLUSION

Condemnation of acts that lead to the annoyance of the public or society at large, especially through acts which aim to cause disturbance, disapproval and dissatisfaction of the public should definitely take head, effectively so by invoking Section 294, to preserve public peace, harmony and order. However, this section cannot be used as a tool to infringe upon civil liberties. Mere public disapproval of certain acts cannot lead to an overall reduction in a person (legal or natural)'s fundamental rights. Public service ethics should not take precedence over constitutional ethics.