
OBSCENITY AS A CYBERCRIME AND ITS DETERMINATION

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ABSTRACT:

This article explores the concept of obscenity in the context of the digital age. It examines the historical evolution of obscenity laws, the challenges in determining obscenity in the internet era, and the judicial principles used for its evaluation. The article highlights the importance of striking a balance between freedom of expression and societal values, and the need for a nuanced and context-based approach to determine obscenity. It also discusses the role of international collaboration and technological advancements in addressing this complex issue. By understanding the complexities surrounding obscenity, we can navigate the digital landscape more effectively and promote a harmonious online environment.

Keywords: Obscenity, Hicklin Test, Roth Test, Miller Test, Digital Age, Freedom of Expression, Internet, Judicial Principles, Context-based approach, Cyber Age, IPC, IT Act, etc.

1. Introduction:

In the digital age, where the internet and digital revolution have transformed the way we communicate, share information, and express ourselves, the concept of obscenity has taken on a new dimension. Obscenity, often considered a subjective and elusive concept, has posed significant challenges in its determination and restriction within the realm of cybercrime. This article explores the meaning and concept of obscenity, its historical evolution, and the judicial principles used to determine its presence. It also delves into the significance of obscenity in the context of the cyber age and the complexities it presents for legal frameworks.

Obscenity, at its core, refers to material that is offensive or indecent, typically of a sexual nature, and violates prevailing standards of decency. Its origins can be traced back to ancient civilizations, where cultural and moral values played a significant role in shaping societal norms. Over time, obscenity has evolved, influenced by social, cultural, and technological advancements.

The determination of obscenity poses a significant challenge in the digital era. With the proliferation of online platforms and the ease of access to vast amounts of information, the boundaries between acceptable and obscene content have become blurred. What may be deemed obscene in one jurisdiction or community may be considered acceptable or even celebrated in another. This raises questions about the universality of obscenity standards and the need for a nuanced approach that takes into account cultural, societal, and individual sensitivities.

To address the complexities of obscenity determination, various legal frameworks have been developed. In this article, we will explore three key tests that have been used by courts worldwide: the Hicklin Test, the Roth Test, and the Miller Test. These tests have provided guidance in evaluating whether material is obscene based on its tendency to corrupt or deprave susceptible individuals, its effect on the average person, and its lack of social value or redeeming qualities. We will examine the historical context of these tests and their relevance in the modern cyber age.

Furthermore, this article will specifically focus on the Indian judicial context, where obscenity determination holds particular significance. In the absence of a specific legal definition of obscenity in Indian laws, the courts have relied on international frameworks and

judgments to establish their approach. Landmark cases such as *Ranjit D. Udeshi v. State of Maharashtra*, *Samaresh Bose v. Amal Mitra*, and *Aveek Sarkar v. State of West Bengal* have shaped the evolving jurisprudence in India, taking into account cultural sensibilities, societal norms, and the importance of freedom of expression.

To sum up this section, the determination of obscenity in the cyber age poses unique challenges due to the global reach of information and diverse cultural perspectives. The evolution of technology and the internet have made it necessary for legal frameworks to adapt and strike a delicate balance between freedom of expression and the protection of societal interests. Through an examination of historical evolution, judicial principles, and the Indian judicial context, this article aims to shed light on the complex and evolving nature of obscenity and its significance in the cyber age. By understanding the intricacies of obscenity determination, we can navigate the digital landscape with greater clarity and address the legal and ethical considerations it presents.

2. Meaning and Concept of Obscenity:

Obscenity is a complex and subjective term associated with societal moral values. It encompasses various forms of expression, such as words, thoughts, books, pictures, etc., that are offensive, morally repugnant, or vulgar. However, its definition is not fixed and evolves over time. What was considered obscene in the past may not hold the same perception today.

Understanding obscenity requires a broader perspective. Different societies have varying moral standards, meaning something offensive in one society may not be considered so in another. Moral values change over time as well, rendering actions that were once immoral potentially acceptable in the same society.

The legal definition of obscenity differs from the dictionary definition. While the dictionary describes obscenity as morally offensive,¹ the law does not provide a clear-cut definition. It relies on the specifics of each case. As famously stated by Mr. Justice Stewart in the case of *Jacobellis v. Ohio*, obscenity is something that is difficult to define explicitly but is recognizable when seen.²

¹ "Obscene: connected with sex in a way that most people find offensive," *Oxford Learner's Dictionary* (Oxford University Press, U.K.).

² "I will know it when I see it." - Justice Stewart. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

To determine obscenity legally, it must be examined whether a publication has the potential to corrupt minds and lead to a general decline in moral values, thereby violating the law. Each work must be assessed individually. Obscenity can be defined as an indecent act that results in widespread moral corruption, constituting a violation of the law.

It is crucial to differentiate between vulgarity and obscenity. Vulgarity may be offensive or distasteful, but it does not necessarily indicate obscenity. Artistic depictions of nude bodies, for example, can be seen as vulgar but not obscene. Similarly, an act may be vulgar in the sense of being offensive but not necessarily obscene in terms of arousing prurient interests.

In the case of *Sada Nand v. State (Delhi Administration)*,³ it was determined that pictures of nude or semi-nude women in a magazine cannot be deemed obscene unless they are suggestive of a depraved mind and intended to arouse sexual passion. While such depictions may be vulgar and indecent, labeling them as obscene may be challenging.

In conclusion, obscenity is a complex concept influenced by subjective perceptions and societal values. The legal interpretation of obscenity varies on a case-by-case basis, considering factors such as the potential to corrupt morals and the presence of prurient interests. It is important to distinguish between vulgarity and obscenity to avoid confusion in defining and categorizing explicit materials.

3. Obscenity Under Statutes:

The concept of obscenity, although not explicitly defined in the Indian Penal Code (IPC) of 1860, the Indecent Representation of Women (Prohibition) Act of 1986, and the Information Technology Act of 2000, is addressed through various provisions within these statutes. While the laws do not provide a comprehensive definition of obscenity, they do establish offenses and prescribe punishments for actions related to obscene materials and acts.

Section 292 of the IPC deals with the sale, distribution, exhibition, or circulation of obscene objects.⁴ Although the section does not define obscenity itself, it provides provisions

³ *Sada Nand and Ors. v. State (Delhi Administration)*, 1986 (2) Crimes 474, ILR 1986 Delhi 81, 1986 RLR 394.

⁴ Section 292 of the Indian Penal Code pertains to the sale, distribution, and exhibition of obscene materials. It states that any book, pamphlet, paper, writing, drawing, painting, representation, figure, or other object will be deemed obscene if it is lascivious, appeals to prurient interests, or tends to deprave and corrupt individuals likely to come across its content. The section outlines various actions that are considered offenses, including selling, distributing, publicly exhibiting, or circulating obscene materials. It also covers importing, exporting, or conveying such materials with the knowledge or belief that they will be sold, distributed, exhibited, or put into

to punish those involved in the trade of such material. The absence of a precise definition allows for interpretation based on societal norms and contemporary standards of morality.

Similarly, Section 293 of the IPC addresses the sale, distribution, exhibition, or circulation of obscene objects to persons under the age of 20.⁵ While the section does not explicitly define obscenity, it recognizes the harm and potential corruptive influence such material can have on young individuals.

In Section 294 of the IPC, the focus shifts to the commission of obscene acts or the utterance of obscene words in public places.⁶ The section aims to curb behavior that causes annoyance to others, although it does not provide a detailed definition of obscenity itself.

The Indecent Representation of Women (Prohibition) Act of 1986 aims to prevent the indecent portrayal of women in various forms, including advertisements, publications, writings, paintings, or any other medium.⁷ Section 2(c) of the Act describes indecent representation of women as the depiction that is indecent, derogatory, denigrating, or likely to deprave, corrupt, or injure public morality or morals.⁸ While the act does not explicitly define

circulation. Participating in or profiting from any business involving obscene objects, advertising or promoting obscene acts or materials, and attempting to commit offenses under this section are also punishable. On the first conviction, the punishment may include imprisonment for up to two years and a fine of up to two thousand rupees. Subsequent convictions can result in imprisonment for up to five years and a fine of up to five thousand rupees. However, the section provides exceptions, exempting materials that serve the public good, such as those related to science, literature, art, or learning, as well as materials used genuinely for religious purposes. Additionally, representations on ancient monuments, temples, or religiously significant objects are not covered under this section. *The Indian Penal Code, 1860.*

⁵ Section 293 of the Indian Penal Code deals with the sale, distribution, exhibition, or circulation of obscene objects to individuals under the age of twenty years. It states that anyone who engages in such activities, or attempts to do so, will be subject to punishment. Upon the first conviction, the offender may face imprisonment for a term of up to three years and a fine of up to two thousand rupees. For subsequent convictions, the imprisonment term may extend up to seven years, accompanied by a fine of up to five thousand rupees. The section aims to protect young individuals from exposure to obscene materials and emphasizes the severity of the consequences for those who violate this provision. *Ibid.*

⁶ Section 294 of the Indian Penal Code addresses obscene acts and songs. It states that any individual who, to the annoyance of others, engages in any obscene act in a public place or sings, recites, or utters any obscene song, ballad, or words in or near a public place will be subject to punishment. The penalty for such offenses can include imprisonment for up to three months, a fine, or both. This provision aims to maintain public decency and prevent the dissemination of obscene content in public spaces, ensuring that individuals are not subjected to offensive or inappropriate behavior or language. *Ibid.*

⁷ Preamble: "An Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto." *The Indecent Representation of Women (Prohibition) Act, 1986, 1986.*

⁸ Section 2(c): "Indecent representation of women means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals." *Ibid.*

obscenity, it acknowledges the harmful impact of indecent representation and seeks to prohibit such portrayals.

Under the Information Technology Act of 2000, Section 67 addresses the publication or transmission of obscene material in electronic form. It criminalizes the dissemination of material that is lascivious, appeals to prurient interest, or tends to deprave and corrupt individuals who are likely to come across it.⁹ Although the act does not provide a specific definition of obscenity, it recognizes the need to prevent the spread of explicit content through digital means.

It is important to note that the absence of a precise definition of obscenity within these statutes allows for flexibility in interpretation by the judiciary. The determination of obscenity is often influenced by societal standards, prevailing norms, and the overall impact on public morality. The judiciary plays a crucial role in examining individual cases and applying these statutes based on the facts and circumstances presented before them.

In conclusion, while the Indian Penal Code, the Indecent Representation of Women (Prohibition) Act, and the Information Technology Act do not explicitly define obscenity, they encompass provisions to address and regulate actions related to obscene materials and acts. The interpretation and application of these statutes depend on the judiciary's assessment of societal standards and the impact on public morality.

4. Judicial Principles to Determine Obscenity:

Obscenity is not explicitly defined in the Indian Penal Code or other relevant laws. As a result, the courts rely on judicial principles and doctrines to determine if material is obscene. In this regard, the Indian judiciary draws upon doctrines such as the Hicklin, Miller, and Roth tests, which assess whether the material lacks artistic merit and violates standards of decency. By applying these principles within the Indian legal context, the courts aim to strike a balance between protecting society and upholding freedom of expression. They consider specific laws,

⁹ Section 67: "Punishment for publishing or transmitting obscene material in electronic form. – Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is 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, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees." *The Information Technology Act, 2000.*

precedents, societal norms, and the evolving understanding of obscenity. This approach ensures a fair assessment of alleged obscenity, taking into account the changing dynamics of society and legal perspectives. Through the application of these principles, the judiciary contributes to the development of a just legal framework for addressing obscenity in India, providing clarity and guidance in complex cases.

(A). *Hicklin Test*:

The Hicklin Test, originated from the legal case *Regina v. Hicklin*¹⁰ in the United Kingdom, has had a substantial influence on the interpretation and application of obscenity laws in both the United Kingdom and the United States. In the aforementioned case, Benjamin Hicklin, the defendant, produced a pamphlet with the purpose of exposing alleged immorality and misconduct within the Roman Catholic Church, specifically focusing on the actions of the priesthood during the confessional process. The pamphlet contained content that was judged to be obscene and was intended to highlight the church's corruption. Consequently, Hicklin faced charges for creating an obscene publication. During the trial, Hicklin argued that his intention was not to corrupt the public, but rather to shed light on the church's misconduct. Nonetheless, he was convicted of the offense. Subsequently, his conviction was overturned upon appeal by the recorder. The prosecution then appealed to the Queen's Bench, asserting that Hicklin's motive for disseminating obscene material was irrelevant when determining his culpability for the crime.

The Queen's Bench, in its judgment, upheld the conviction and established the Hicklin Test as a valid standard for determining obscenity. The test evaluates "*whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.*"¹¹ It requires the consideration of the work as a whole while also separately examining the obscene content to determine if it violates the test. The court ruled that if the artistic or literary merits of a work overshadow the obscene aspects or if the obscenity is trivial and insignificant, having no effect, it may be overlooked.

However, the Hicklin Test had its drawbacks. It permitted works to be judged obscene based on isolated passages, thus disregarding the work's overall context. Additionally, it focused on the susceptibility of individuals rather than employing an objective standard based

¹⁰ *Regina v. Hicklin*, 11 Cox C.C. 19 (1868).

¹¹ Lord Chief Justice Alexander Cockburn. *Ibid.*

on a reasonable person. Consequently, this test led to the suppression of numerous forms of expression.

The influence of the Hicklin Test extended beyond the United Kingdom. Several early US courts adopted this standard for obscenity, embracing the notion that material could be deemed obscene based on isolated passages and their potential influence on vulnerable individuals. This approach often resulted in the censorship of works that were critical of religion. However, as societal values and legal standards evolved, the flaws of the Hicklin Test became increasingly apparent.

In the 20th century, the Hicklin Test was subject to criticism and legal challenges. Courts recognized the need for a more refined and objective test that took into account the work as a whole and focused on its impact on an average, reasonable person. Subsequent landmark cases, such as the U.S. Supreme Court's decision in *Miller v. California*,¹² introduced a new three-pronged test that evaluated community standards, the patently offensive nature of the material, and whether the work lacked serious literary, artistic, political, or scientific value.

In conclusion, the Hicklin Test served as a benchmark for obscenity laws and their interpretation in both the United Kingdom and the United States. While it initially provided a standard for determining obscenity, its focus on isolated passages and particularly susceptible individuals led to significant restrictions on freedom of expression. As legal understanding evolved, the flaws of the Hicklin Test became apparent, prompting the development of more refined and objective tests in subsequent years.

(B). Roth Test:

For approximately 60 years, the courts in the United States adhered to the Hicklin Test, which originated from the British case *Regina v. Hicklin* in 1868.¹³ Under the Hicklin Test, if any part of a publication was deemed obscene, the entire work would be considered obscene, without considering its potential social or artistic value. However, a significant shift occurred in the case of *United States v. One Book Called "Ulysses"* in 1933.¹⁴

¹² *Miller v. California*, 413 U.S. 15, 1973.

¹³ *Regina v. Hicklin*, 11 Cox C.C. 19 (1868).

¹⁴ *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934), 1934.

In this case, James Joyce's novel "Ulysses" was deemed obscene and banned in the United States. The decision sparked debates about the limits of free expression and the need for a more nuanced approach to obscenity. Eventually, the courts began to question the applicability of the Hicklin Test to contemporary morality and the value of artistic and social perspectives.

The pivotal case that marked the transition from the Hicklin Test to the Roth Test was *Roth v. United States* in 1957.¹⁵ Samuel Roth was indicted for violating a federal obscenity statute by sending obscene materials through the mail. The Supreme Court, led by Justice William J. Brennan Jr., rejected the Hicklin Test's restrictive approach and introduced the Roth Test.

The Roth Test focused on whether the average person, applying contemporary community standards, would find that the dominant theme of the material as a whole appealed to a prurient interest in sex. This new approach allowed for a more comprehensive assessment of obscenity, taking into account societal norms and the context of the work. The Court recognized the importance of considering the potential social and artistic value of the material.¹⁶

In subsequent cases, such as *Memoirs v. Massachusetts* in 1966, the Court refined the Roth Test by adding additional criteria, including the requirement that the material be utterly without redeeming social value to be considered obscene.¹⁷

¹⁵ *Roth v. United States*, 354 U.S. 476 (1957), 1957.

¹⁶ In a landmark decision, the Supreme Court, led by Justice William J. Brennan Jr., delivered a 6-to-3 ruling in which it concluded that obscenity did not fall within the realm of constitutionally protected speech or press. The Court acknowledged that the First Amendment was not meant to shield every form of expression and recognized that materials devoid of any redeeming social value were not deserving of constitutional protection. The Court established a test to determine obscenity, stating that it hinged on whether the average person, considering contemporary community standards, would find that the material's dominant theme, when taken as a whole, appealed to prurient interest. This definition of obscenity was considered to provide adequate notice and satisfy the requirements of Due Process. *Ibid.*

¹⁷ In the case of *Memoirs v. Massachusetts*, the Supreme Court made significant changes to the Roth Test, which was used to determine obscenity. The Court introduced a three-part test to assess whether material could be considered obscene. According to this new test, material would be deemed obscene if: (a) the dominant theme of the material, taken as a whole, appealed to a prurient interest in sex, (b) the material was patently offensive by affronting contemporary community standards regarding the description or representation of sexual matters, and (c) the material was found to be utterly devoid of any redeeming social value. This refined version of the Roth Test added the requirement of social value as a crucial factor in determining whether material was protected under the First Amendment or fell under the category of unprotected obscenity. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

The Roth case itself involved arguments over the constitutional protection of free speech and the definition of obscenity. Samuel Roth's conviction was ultimately upheld by the Court, which established the Roth Test as the new standard for determining obscenity. However, it is worth noting that the Roth Test faced resistance and ongoing debate within the Court, leading to further modifications and refinements in subsequent cases.

Overall, the transition from the Hicklin Test to the Roth Test represented a significant shift in the legal understanding of obscenity, emphasizing the importance of considering contemporary community standards and the broader context of the material in question. This evolution marked a more nuanced approach to balancing the protection of free speech with societal interests in the realm of obscenity laws.

(C). Miller Test:

Before the *Miller v. California (1973)* case, the Roth obscenity test was used to determine whether materials were obscene. However, over time, the Roth test became ineffective and controversial due to its vague and subjective nature. The test relied on determining whether the material had "redeeming social importance" and whether it appealed to prurient interests, leading to inconsistent interpretations.

In the Miller case, Marvin Miller, a California publisher, was prosecuted for distributing obscene materials through the mail. He argued that the Roth test allowed for subjective interpretation and lacked sufficient guidance. The Supreme Court, in a 5-4 decision, upheld Miller's conviction and introduced the Miller Test as a new standard to determine obscenity.

The Miller Test consists of three parts. First, it assesses whether the average person, using contemporary community standards, would find the work as a whole appealing to prurient interest. Second, it determines whether the work depicts or describes sexual conduct in a patently offensive way, as defined by state law. Lastly, it evaluates whether the work lacks serious literary, artistic, political, or scientific value.¹⁸

¹⁸ In a 5-to-4 decision, the Court ruled that materials deemed obscene were not protected under the First Amendment. This decision brought modifications to the existing obscenity test established in the Roth v. United States and *Memoirs v. Massachusetts* cases. The Court outlined new guidelines for determining obscenity, stating that the trier of fact should consider: (a) whether the average person, using contemporary community standards, would find the work appealing to prurient interests when taken as a whole, (b) whether the work depicts or describes sexual conduct in a clearly offensive manner as defined by state law, and (c) whether the work, as a

The Court's decision in *Miller v. California* was not without dissent. Justice William O. Douglas argued that obscenity cases had no place in the courts, while Justice William J. Brennan Jr., joined by Justices Potter Stewart and Thurgood Marshall, expressed concerns about the potential infringement on First Amendment rights.¹⁹

Subsequent cases further shaped the interpretation and application of the Miller Test. In *Paris Adult Theatre I v. Slaton* (1973), Justice Brennan dissented again, maintaining that obscenity laws could not be drafted consistently with the First Amendment.²⁰ *Pope v. Illinois* (1987) clarified that the "serious value" prong of the Miller Test should not be judged by contemporary community standards, creating further nuance in the application of the test.²¹

The challenges of applying the Miller Test in the modern era, particularly in the digital age, have prompted discussions about the need for a national standard. In *Ashcroft v. American Civil Liberties Union* (2002), justices expressed concerns about the application of local community standards to the Internet, highlighting the potential conflicts and limitations in regulating obscenity in an interconnected world.²²

whole, lacks serious literary, artistic, political, or scientific value. The Court rejected the previous "utterly without redeeming social value" standard established in the *Memoirs* decision. *Miller v. California*, 413 U.S. 15, 1973.

¹⁹ The First Amendment, part of the United States Constitution's Bill of Rights, states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Adopted in 1791, it guarantees fundamental freedoms and rights such as freedom of religion, speech, press, assembly, and the right to petition the government. The First Amendment is a cornerstone of democracy, protecting the principles of free expression, open discourse, and the ability of citizens to hold the government accountable. It has played a significant role in shaping legal interpretations and landmark cases that uphold these essential rights. "First Amendment (U.S. Constitution)," *Constitution Annotated (Library of Congress)*, 1791 available at: <https://constitution.congress.gov/constitution/amendment-1/>.

²⁰ In his dissent Justice William Joseph Brennan, Jr. (Author) along with Justices Potter Stewart and Thurgood Marshall stated that: "obscenity cases are difficult to evaluate because the standards are loose and vague. Applying these laws tends to restrain some constitutionally protected speech. While the state does have a legitimate interest in protecting children and unconsenting adults, the interests that it cites with regard to withholding obscene material from consenting adults are too speculative to be taken seriously. Obscene material should not be enjoined from distribution in the context of consenting adults, although the state can limit its distribution to certain channels." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

²¹ The court of appeals determined that there was an error in the application of community standards in the Miller obscenity test. According to the ruling, community standards should only be applied to the first and second prongs of the test. The Court concluded that the third prong should focus on whether a reasonable person would find value in the material as a whole, rather than whether an ordinary member of a specific community would find serious value in the alleged obscene material. The Court's decision was based on the principle that the protection of a work is not dependent on gaining approval from the majority of a community, and the value of the work should not vary across communities based on local acceptance. This case is significant because it establishes an objective and nationwide aspect of the Miller obscenity test. *Pope v. Illinois*, 481 U.S. 497 (1987).

²² *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

Overall, the Miller case and the introduction of the Miller Test replaced the ineffective and controversial Roth obscenity test. The Miller Test provides a more structured approach to evaluating obscenity, but its application continues to evolve and generate debates, considering the complexities of contemporary community standards and technological advancements.

5. Obscenity Determination in Indian Judicial Context:

Obscenity determination holds a significant place in the Indian judicial context, as the courts play a crucial role in defining and evaluating what constitutes obscene material. It is noteworthy that obscenity is not explicitly defined in any penal law in India. In the absence of a specific legal definition, Indian courts have looked to various international frameworks and judgments for guidance. The courts have drawn inspiration from landmark obscenity tests such as the Hicklin Test, developed in England, and the Roth and Miller tests, established by the United States Supreme Court. By adopting elements from these tests, Indian courts have crafted a unique approach to obscenity determination that considers cultural sensibilities and societal norms. This section explores the Indian judiciary's approach to obscenity determination, examining key court case judgments that have contributed to the evolving jurisprudence in this area.

*Ranjit D. Udeshi v. State of Maharashtra*²³ was a significant case in Indian legal history regarding obscenity. The appellant, a bookstore owner, was charged with selling the book "Lady Chatterley's Lover" by D.H. Lawrence. The Supreme Court addressed the constitutionality of section 292 of the Indian Penal Code, the interpretation of obscenity, and the application of the Hicklin test.

The appellant argued that section 292 violated the freedom of speech and expression guaranteed by Article 19(1)(a). However, the court held that section 292 was a reasonable restriction promoting public decency and morality.

Regarding obscenity, the court applied the Hicklin test, examining whether the matter tended to deprave and corrupt susceptible individuals. It stated that obscenity without a

²³ *Ranjit D. Udeshi v. State of Maharashtra*, 1965 AIR 881, 1965 SCR (1) 65, 1964.

preponderating social purpose or profit did not enjoy constitutional protection.²⁴

The court emphasized that when art and obscenity coexisted, the art should preponderate or the obscenity should be insignificant enough to have no effect.²⁵ Lady Chatterley's Lover was declared obscene, upholding the appellant's conviction.

In the case of *Samaresh Bose v. Amal Mitra*,²⁶ the Supreme Court of India was presented with the question of whether the Bengali novel "Prajapati" should be considered obscene due to its explicit content and vulgar language. The trial court had previously ruled in favor of obscenity, but the Supreme Court took a different approach. Rather than relying on a specific test like the Hicklin test, the Court emphasized the subjective assessment of obscenity, taking into account the cultural and moral context of the country. The Court acknowledged that the concept of obscenity can vary from country to country, shaped by the prevailing standards of morality and the subjective attitudes of judges.²⁷ In this case, the Supreme Court recognized the distinction between vulgarity and obscenity, asserting that the mere presence of explicit content or sexual references does not automatically render a work obscene.²⁸ Instead, the Court emphasized the importance of considering the readers' perspective and the overall artistic value of the work. Thus, the Supreme Court's judgment in *Samaresh Bose v. Amal Mitra* highlighted the need for a nuanced and context-specific approach when determining obscenity in literary works.

In the case of *Sada Nand and Ors. v. State (Delhi Administration)*,²⁹ the defendants were charged with publishing and distributing a magazine containing pictures of nude and semi-nude women. The prosecution argued that these pictures were obscene and violated Section 292 of the Indian Penal Code (IPC), which deals with obscenity. The defense, however, relied on the test of obscenity established in the Supreme Court's judgment in *Ranjit Udeshi v.*

²⁴ In India, "obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating sex in a manner appealing to the carnal side of human nature, or having that tendency." *Ibid.*

²⁵ Where art and obscenity coexist, "art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked." *Ibid.*

²⁶ *Samaresh Bose v. Amal Mitra*, 1986 AIR 967, 1985 SCR Supl. (3) 17, 1985.

²⁷ "The concept of obscenity is moulded to a great extent by the people who are expected to read the book. It differs from country to country, depending upon the standards of morality. Even the outlook of a Judge may differ from another Judge as it is a matter of objective assessment of the subjective attitude of the Judge hearing the matter." *Ibid.*

²⁸ "Vulgarity and obscenity need not be confused with each other." *Ibid.*

²⁹ *Sada Nand and Ors. v. State (Delhi Administration)*, 1986 (2) Crimes 474, ILR 1986 Delhi 81, 1986 RLR 394.

State of Maharashtra.³⁰ They contended that the pictures should not be considered obscene unless they were suggestive of a depraved mind and designed to excite sexual passion in viewers. After considering the arguments, the court held that the pictures could not be deemed obscene per se, as they lacked the tendency to deprave or corrupt minds. Although the pictures were found to be vulgar and indecent, they did not meet the threshold for obscenity under Section 292 IPC. This judgment aligns with the test of obscenity established in *Ranjit Udeshi's* case, emphasizing that the mere depiction of nudity is not sufficient to deem material obscene; it must also be shown to be suggestive of a depraved mind and designed to excite sexual passion in viewers.

In the case of *Bobby Art International v. Om Pal Singh Hoon*,³¹ the Supreme Court of India addressed the controversy surrounding the film “Bandit Queen,” which contained explicit scenes of rape and nudity. The film depicted the true story of a woman who endured sexual assault and sought revenge on her attackers. The Central Board of Film Certification initially granted the film an “A” certificate, but with conditions for the deletion or modification of certain scenes. The producer, Bobby Art International, challenged this decision, arguing that the explicit content served the purpose of conveying an important narrative and should not be restricted. On the other hand, Om Pal Singh Hoon, a member of the community portrayed in the film, filed a petition claiming that the film was abhorrent and derogatory, infringing on his rights to equality, freedom of expression, and personal liberty.

The Supreme Court observed that the depiction of sex should not automatically be deemed obscene or indecent, and that the focus should be on how the theme is handled by the producer. It referred to previous cases highlighting the distinction between vulgarity and obscenity and stressed the need to consider the overall context of the film rather than isolated scenes. The Court noted that social relevance and the advancement of the film’s message should be allowed, even if it involved portraying social evils.

After examining the guidelines given to the Censor Board, the Court emphasized that artistic expression and creative freedom should not be unduly curbed. It recognized that determining the necessity of depicting social evils should be left to the expertise of the Censor Board. The Court upheld the decision of the Tribunal, which had granted the film an “A”

³⁰ *Ranjit D. Udeshi v. State of Maharashtra*, 1965 AIR 881, 1965 SCR (1) 65, 1964.

³¹ *Bobby Art International and Ors. v. Om Pal Singh Hoon and Ors.*, (1996) 4 SCC 1, 1996.

certification without any deletions or modifications. It concluded that the explicit scenes in “Bandit Queen” served the purpose of conveying a powerful human story, evoking sympathy for the victim and disgust for the rapist. The Court held that the film’s message outweighed concerns about obscenity or immorality, and an “A” rating would sufficiently caution adult viewers.

The judgment in *Bobby Art International v. Om Pal Singh Hoon*, reinforces the principle that freedom of expression and creative expression should not be restricted based solely on the content being considered obscene or indecent. It highlights the importance of allowing social commentary through artistic expression and acknowledges the need to consider the overall context and message of a work when evaluating obscenity.

In the case of *Ajay Goswami v. Union of India*,³² a writ petition was filed before the Supreme Court of India, raising concerns about the balance between freedom of speech and the protection of children from obscene materials in newspapers. The petitioner, Ajay Goswami, argued that sexually explicit materials in newspapers should be regulated to safeguard minors. He proposed guidelines for newspapers and the creation of an expert committee to address the issue. However, the Court dismissed the petition, stating that there were existing regulatory measures in place to prevent the publication of obscene materials, such as the Press Council Act of 1978 and Section 292 of the Indian Penal Code. The Court emphasized that a publication alleged to contain obscene material should be assessed as a whole and examined separately to determine if it is grossly obscene and likely to deprave and corrupt. It further noted that imposing a blanket ban on certain photographs and news items would hinder the freedom of the press. Ultimately, the Court concluded that the petitioner failed to establish the need to curtail the freedom of speech and expression. While the case did not explicitly discuss leading obscenity tests, it reaffirmed the principle that obscenity should be judged by considering the work as a whole and not in isolation.

In the case of *Maqbool Fida Husain v. Raj Kumar Pandey*,³³ renowned Indian painter Maqbool Fida Husain faced accusations of obscenity and offending public decency due to his painting titled “Bharat Mata” (Mother India), which depicted India as a naked woman. Private complaints were filed in various parts of India, leading to a trial court issuing summons to

³² *Ajay Goswami v. Union of India*, (2007) 1 SCC 143, 2006.

³³ *Maqbool Fida Husain v. Raj Kumar Pandey*, 2008 CRI. L. J. 4107.

Husain under multiple provisions of the Indian Penal Code. The prosecution argued that the painting violated laws related to obscenity, religious sentiments, and national honor. However, Husain contended that the painting was a metaphorical representation of India's vulnerability and did not violate any laws.

The court acknowledged the importance of art as a form of expression and the protection of freedom of speech and expression under Article 19(2) of the Indian Constitution. While recognizing that obscenity offensive to public decency is not protected, the court considered factors such as contemporary mores, the preponderance of art over obscenity, the artist's perspective, and the onomatopoeic meaning of art. Ultimately, the court held that the painting did not meet the criteria for obscenity under section 292 of the Indian Penal Code.

The court also determined that Husain was not guilty under other relevant provisions, including section 294 (obscene acts and songs) and section 298 (expression intending to hurt religious sentiments). The placement of the Ashoka Chakra in the painting was found to not show disrespect, and no imputation capable of harming the complainant's reputation was present. The court emphasized the importance of artistic freedom and tolerance for diverse views within a democratic society, suggesting that objections to artistic works should be expressed through other avenues rather than the criminal justice system.

*Aveek Sarkar v. State of West Bengal*³⁴ marked a significant shift in the approach of Indian courts towards determining obscenity. Prior to this case, the courts primarily relied on the Hicklin test, which originated from an archaic 1868 ruling in England. The Hicklin test assessed whether the material had the potential to corrupt and deprave minds susceptible to immoral influences. However, in *Aveek Sarkar*, the Supreme Court discarded the Hicklin test and embraced the community standards test, aligning with the global trend.

The case stemmed from the publication of a photograph in a German magazine, featuring tennis star Boris Becker and his fiancée Barbara Feltus posing nude. The photograph was intended to convey a message of racial equality and love triumphing over hatred. It was subsequently reproduced in an Indian magazine and newspaper, leading to a complaint filed under Section 292 of the Indian Penal Code. During the proceedings, the arguments put forth by the respondents centered around the alleged corrupting influence of the photograph on the

³⁴ *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

minds of young individuals and its violation of cultural and moral values. The appellants, on the other hand, emphasized that the magazine had not been banned in India and contended that the article promoted the battle against racism in Germany.

The Supreme Court, in its judgment, rejected the Hicklin test as the correct approach for determining obscenity. Instead, it adopted the community standards test, which considers contemporary mores and national standards rather than the sensibilities of a vulnerable group. The Court held that a picture or article should be deemed obscene under Section 292 of the Indian Penal Code if it is lascivious, appeals to prurient interests, and tends to deprave and corrupt those likely to come across it.

Applying the community standards test, the Court evaluated the photograph and its context. It concluded that the photograph did not arouse sexual desire or tend to corrupt the minds of viewers. Instead, it conveyed a message of racial equality and love. The Court highlighted that a nude or semi-nude picture cannot be declared obscene unless it provokes sexual desire, and that obscenity should be assessed from the perspective of an average person using contemporary community standards.

The judgment in *Aveek Sarkar v. State of West Bengal* signifies the abandonment of the Hicklin test and the adoption of the community standards test in India. It emphasizes the importance of considering the context, message, and impact of the material in question. This case established a new approach to obscenity and provided guidance to courts and publishers regarding the sensitive issue of obscenity under Indian law.

6. Conclusion:

In conclusion, determining obscenity in the digital age presents complex challenges. The internet's global reach and diverse cultural perspectives make establishing universal standards difficult. However, a nuanced and context-based approach, international collaboration, and technological advancements offer potential solutions.

Flexible standards that respect cultural differences while protecting societal interests are essential. Sharing best practices and legal frameworks across jurisdictions can lead to a more cohesive approach. Technological tools, such as artificial intelligence and content filtering, can empower individuals to personalize their online experiences.

By understanding the historical evolution, judicial principles, and cultural contexts surrounding obscenity, we can navigate this complex terrain more effectively. With a commitment to balancing freedom of expression and societal values, we can work towards a more informed and harmonious digital landscape.