# OBSCENITY IN INDIA: TRACING JUDICIAL STANDARDS

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The Delhi Metro has recently played host to a series of absurd scenes: people dancing and singing loudly, influencers chasing virality though their videos; couples engaging in untimely public displays of affection, and brawls breaking out between passengers. The label of 'obscenity' is thrown around quite liberally, and indeed, some of these scenes would prove to be a shock to even the most open-minded amongst us. But beyond the shock-value, incidents such as these lead to broader and more pertinent talking points. What exactly is obscenity? Where is the line to be drawn in terms of public behaviour? What does the line look like in a society that finds itself navigating several ideological extremes?

Obscenity, and the closely linked terms decency and morality, are not words that can be defined in a vacuum. Their meanings and interpretations rely on the status of the society they're being discussed in; the socio-cultural currency being utilized, and its varying exposure and needs. These interpretations change in each successive generation; with the intermingling of ideas and beliefs from new sources, what was not accepted earlier may become the norm in a matter of few years. That is precisely why it is so dangerous to rely purely on public opinion when it comes to assessing the barometer of obscenity or morality. Indeed, many a times unfavourable decisions may be taken under the guise of public morality or decency in order to maintain control and subdue the propagation of new ideals. It is the responsibility of the decision makers to ensure that progressive ideas are granted stable footing, from which they can be disseminated and then stand the test of the court of public opinion. Often, we may look at judicial pronouncements over a period of time to decode changing public standards.

Under the Indian Penal Code (IPC), Sections 292, 293 and 294 deal with the offence of obscenity. Section 292 states that any content shall be deemed to be obscene if it is lascivious or appeals to prurient interests, or if its effect is likely to deprave and corrupt persons who might read, see or hear the content. It prohibits the sale or publication of any obscene pamphlet, book, paper, painting, and other such materials. Section 293 criminalises the sale, exhibition, circulation or distribution of obscene objects to anyone who is under the age of 20, or an

attempt to do so. Section 294 prohibits the performance of obscene acts and songs in public spaces.

The understanding of 'obscenity' in Indian jurisprudence has evolved through several iterations. Before tracing the growth of this concept, we must look at two foreign judgements which have played an emphatic role in informing our current understanding of these concepts.

### ***R. v. Hicklin*: The Hicklin Test**

In *R. v. Hicklin, (1868) LR 3 QB 360,* the Queen's Bench laid down what was the regarded as the 'Hicklin Test'. As per Cockburn, C.J., "*The test of obscenity is this, whether the tendency of the matter charged as obscenity 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."* [1]

The test had several constituent elements. The matter being published needed to necessarily have the tendency to deprave and corrupt, or to influence readers into having 'impure' thoughts. While deciding whether a particular material was obscene or not, the question was to be considered from the perspective of a 'reasonable person', with an emphasis on those whose minds are more vulnerable to such immoral influences. These reasonable persons may include children or persons of more advanced years.

Further, while deciding the question of obscenity, the intention or motive behind publication was not considered to be relevant. Also, the published work had to be judged on its own merits and the court could not inspect other literature that was in circulation during that period of time. However, the context of the publication was considered to be of importance. For example, a medical treatise with illustrations necessary for information of students or practitioners may not be treated as obscene, since the intended audience was quite limited.

Most significantly, it was not the whole work or the theme which was to be investigated when the question of obscenity was being considered; the presence of a singular, isolated paragraph now had the capacity to render the entire work obscene.

[1] R. v. Hicklin, (1868) LR 3 QB 360

## The Roth Test

The Hicklin test did not provide room for social or artistic value of the published material. The standard was extremely restrictive, and imposed a harsh limit on expression, artistic or otherwise. It informed the predominant judicial view on obscenity, until it was challenged by the case of *Roth v. United States*.[2] In this case the focus shifted to an average person, with the application of **'contemporary community standards'**. Although the test reaffirmed that obscenity is not protected under freedom of speech, it broadened the judicial test to decide what can be considered obscene. Most importantly, the entire work, taken as a whole, was to now be considered before the material could be declared obscene.

*"...whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest".*[3]

The American Supreme Court held that the mere presence of sex in art, literature, or scientific works did not automatically characterise the material as obscene. Sex and obscenity could not be treated as synonyms. "*Roth* brought about a change in the old *Hicklin* test on two levels. First, it changed the impact that obscene material was to have – *Hicklin* sought to ban material that would "corrupt" any potential receiver of the material, while *Roth* sought to ban material that would offend the community's standards. Second, *Roth* required the material to have an impact on the community in general, while the negative effect on any one particular receiver, as prescribed in the *Hicklin* case was abandoned."[4]

## Judicial Views on Obscenity in India:

### Utilising the Hicklin Test: *The Ranjit D. Udeshi Case*

In India, the Hicklin test was most famously used in the case of *Ranjit D. Udeshi v. State of Maharastra* (AIR 1965 SC 881).

This case involved the sale of D.H. Lawrence's *Lady Chatterley's Lover* by a bookstall in Bombay. The partners of the bookstall were prosecuted u/s 292 of the IPC for selling this

[2] Roth v. United States, 354 US 476 (1957)
[3] *Supra*
[4] S. Aatreya, Siddharth, *Obscenity and the Depiction of Women in Pornography: Revisiting the Kamlesh Vaswani Petition* (November 26, 2018). 13 Nalsar Student Law Review, 2018

allegedly obscene book. The petitioners argued that section 292 was violative of the right to freedom of speech and expression, and that the book, when considered as a whole, could not be declared obscene.

The Supreme Court confirmed the conviction and dismissed the appeal. In its deliberations, the Court asserted that obscenity possesses limited worth in the domain of promotion of influential ideas and information. Nonetheless, the Court recognized that certain instances necessitate the inclusion of elements that may be deemed obscene, such as the intimate illustrations and photographs found in medical literature. In such cases, these materials could not possibly be declared obscene and were entitled to the constitutional protections of freedom of speech and expression.

The Court noted that section 292 does not provide a clear definition for the term 'obscenity,' thus necessitating the Supreme Court to discern between what is deemed obscene and what is considered as art. To establish the constitutional boundaries of obscenity, the Court undertook a thorough examination of the obscenity test, recognizing that mere depictions of sex and nudity do not automatically constitute obscenity. The Hicklin test was adopted by the Court, without infringing upon the provisions of article 19 of the Indian Constitution. The Supreme Court interpreted the word 'obscene' to mean that, which is "offensive to modesty or decency; lewd, filthy and repulsive". In determining what can be classified as "obscene", the Court held that regard should be had to "our community mores and standards" and whether the material "appeals to the carnal side of human nature or having that tendency".[5]In situations where a work blatantly violates societal standards of decency and morality, it is necessary for the principles of free speech and freedom of expression to be set aside.

The Court carefully examined the text of Lady Chatterley's Lover and determined that it fell under the definition of obscenity according to the Hicklin test. As a result, the appeal against conviction was dismissed.

Hidayatullah, J., writing the judgement for the Court, made three modifications in the Hicklin test:

- The mere inclusion of sexuality and nudity in art and literature does not by itself amount

[5] Morality, Obscenity and Censorship, (2003) 1 SCC J-1

to indecency. Further evidence is necessary to substantiate obscenity, as mention of sexuality alone is insufficient to undermine moral values.

- The evaluation of a piece of work should include its entirety, taking into consideration the presence of any vulgar language or explicit passages. It is essential to examine whether the non-offensive sections of the work possess more significance, thereby diminishing the impact of any obscenity, or if the obscenity itself is so inconsequential that it can be disregarded.

- Another differentiator from the test was the introduction of a defense to counter the accusation of obscenity, specifically in cases where the publication in question served a greater societal purpose.

***K.A. Abbas v. Union of India and Anr*[6]**

In this case the Court affirmed the limitations imposed on public showings in accordance with the Cinematograph Act of 1952, thereby dismissing a petition that raised concerns regarding the Act's authority to censor. In response to the petitioner's film being denied an unrestricted viewing certificate due to a particular scene deemed unsuitable for younger audiences, he argued that his right to freely express himself had been infringed upon by the imposition of prior censorship—a practice susceptible to arbitrary decision-making as authorized by the Act. The Court determined that such prior censorship can be deemed a reasonable restriction within the realm of free expression, and that the Act itself is adequately defined, thereby preventing any unjust or whimsical exercise of its powers. Chief Justice Hidayatullah held that *"the standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some with some of its foibles along with what is good".*

The Court also advised that the guidelines given in the Act should delineate a differentiation between artistic and non-artistic forms of expression when evaluating obscenity. It observed that *"the censors need to take into account the value of art while making their decision. The artistic appeal or presentation of an episode robs it of its vulgarity and harm and also what may be socially good and useful and what may not."*

[6] *K.A. Abbas v. Union of India and Anr,* AIR 1971 SC 481

***Bobby Art International & Ors. v. Ompal Singh Hoon*** [7]

This was another case where the Supreme Court drew a distinction between nudity and obscenity. The petition was filed by a member of the Gujjar community seeking to restrain the exhibition of the film *Bandit Queen* on the ground that the depiction in the film was "abhorrent and unconscionable and a slur on the womanhood of India" and that the assault scene in the film was "suggestive of the moral depravity of the Gujjar community". The Court rejected the petitioner's contention that the scene of frontal nudity was indecent within Article 19(2) and Section 5-B of the Cinematograph Act and held that the object of showing the scene of frontal nudity of the victim was not to arouse prurient feelings but revulsion for the perpetrators.[8]

The Court held that "*a film illustrating the consequences of social evils must necessarily show that social evil",* and that *"a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil".*

***Chandrakant Kayandas Kakodar vs The State of Maharashtra*[9]**,

Here the Supreme Court observed that *"what we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds".* The Court recognised that India was a fast-changing society, and its standards were changing as well. An increasingly large number of citizens now had available to them pieces of literature which contained sex, love, and romance.

The Hicklin test was thus qualified with an 'overall view of the work' now being required. It was observed that *"it is, therefore, the duty of the court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influences of the book on the social morality of our contemporary society."*

[7] *Bobby Art International & Ors. v. Ompal Singh Hoon* (1996) 4 SCC 1
[8] Morality, Obscenity and Censorship, (2003) 1 SCC J-1
[9] *Chandrakant Kayandas Kakodar vs The State of Maharashtra* (1969) 2 SCC 687

## A Move to Community Standards: *Aveek Sarkar v. State of West Bengal*[10]

The court's decision in *Aveek Sarkar v. State of West Bengal* was rendered in the context of a German magazine with a picture of Boris Becker, the famous tennis player, posing nude with with his dark-skinned fiancée Barbara Feltus, while covering her breasts with his arm being challenged as 'obscene'. Here, "…the court abandoned the *Hicklin* test, aligning the Indian position with that in the USA by adopting the American *Roth* test, of testing obscene material against community standard. This brought the concept of 'contemporary community standards' into Indian jurisprudence, requiring the courts to determine whether the effect of any material, taken on the whole, was to *offend* the contemporary community standards on sexual depiction."[11]

The Court observed that a picture of a nude/semi-nude woman *"cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of [a] deprave[d] mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of exciting lustful thoughts can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."*

Thus, the Court's judgement marked a clear shift away from the Hicklin test, and contemporary community standards are to now inform the test for obscenity.

## The Way Forward

While the *Aveek Sarkar* judgement brought in a welcome change from the Hicklin test, it can still be critiqued on certain aspects. The Court cited *Roth v. United States*, however the community standards test given in in *Roth* was subsequently overruled by the US Supreme Court in *Memoirs v. Massachusetts*[12], and by *Miller v. California*[13]. In the case of *Miller* v.

[10] *Aveek Sarkar v. State of West Bengal* (2014) 4 S.C.C. 257
[11] S. Aatreya, Siddharth, *Obscenity and the Depiction of Women in Pornography: Revisiting the Kamlesh Vaswani Petition* (November 26, 2018). 13 Nalsar Student Law Review, 2018
[12] Memoirs v. Massachusetts, 383 U.S. 413 (1966)
[13] Miller v. California 413 US 15 (1973)

*California*[14], the Court refined its earlier decision with a new three-pronged test:

*(1) whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest;*

*(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and*

*(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*

"It is also not clear on what ground the Court holds sexual arousal to be something that ought to be criminalised. Additionally, the last *Roth* ground is crucial, because it is on the social value prong that works of art, literature, sculpture etc., that would otherwise be deemed obscene, are spared. The Court has referred to social value elsewhere, notably in *Udeshi* itself, and so its absence in this judgment, that otherwise rejects the foundation of *Udeshi*, leaves the law of obscenity in a state of flux."[15]

The 'community standards' doctrine might in itself be problematic, as whether something is obscene or not is then determined on the basis of the perspective of an average person, with the application of existing community standards. "It won't be far-fetched to conclude that an average person's point of view will be in conformance with the moral convictions of the society's majority. It is the latter that is representative of contemporary community standards."[16]

The Court is not faced with an easy task, as it seeks to define obscenity in a country with such diversity of opinion and lived experiences. The abandonment of the Hicklin Test has indeed been a welcome move. However, as we proceed forward with the community standards test, special care must be taken to ensure that the voice of a loud majority is not used as the singular criteria in the assessment of obscenity.

[14] *Supra*
[15] Gautam Bhatia, *Obscenity: The Supreme Court discards the Hicklin Test,* https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/
[16] *Supra*

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