
DEPRAVE, CORRUPT, RECONSTRUCT: TOWARDS AN INDIGENOUS CONSTITUTIONAL STANDARD FOR OBSCENITY IN INDIA

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ABSTRACT

India regulates obscenity through a criminal provision written in 1860, borrowing the moral vocabulary of Victorian England, applied for six decades through tests imported from British and American jurisprudence that were never reconciled with India's constitutional commitments to free expression, equality, and cultural plurality. Section 292 of the Indian Penal Code criminalises material that is "lascivious" or "prurient" or that tends to "deprave and corrupt," without defining any of these terms, leaving Indian courts to construct obscenity doctrine from first principles for over a century and a half. This paper argues that the resulting jurisprudence from the Hicklin test adopted in *Ranjit D. Udeshi v. State of Maharashtra* to the Community Standards test articulated in *Aveek Sarkar v. State of West Bengal* has produced not a coherent standard but a body of contradictory outcomes that simultaneously over-restricts protected expression and under-regulates genuinely harmful content targeting women and children. Drawing on Supreme Court and High Court jurisprudence, India's classical erotic heritage, comparative obscenity law, and the constitutional proportionality doctrine, this paper synthesises the principles Indian courts have already articulated into a structured six-prong Indian Constitutional Standard for Obscenity (the "ICSO Test"): constitutional proportionality, dominant purpose, the reasonable Indian adult standard, the cultural heritage defence, vulnerable group harm, and medium and access context. The paper applies this test to landmark decisions and to OTT content, algorithmic distribution, and artificial intelligence-generated imagery, arguing that a constitutionally anchored, culturally rooted Indian standard is both derivable from existing jurisprudence and constitutionally necessary, and closes with draft recommendations for amending Section 292 of the Indian Penal Code and Section 67 of the Information Technology Act, 2000.

Keywords: Obscenity, Article 19, Freedom of Expression, Hicklin Test, Community Standards, Proportionality, Indian Penal Code, Information Technology Act, Cultural Heritage, OTT Regulation

A. INTRODUCTION

In 1868, Lord Chief Justice Cockburn, sitting on the Queen's Bench, was asked whether a pamphlet attacking the doctrine of the confessional counted as obscene material.¹ His answer that material is obscene if it tends to "deprave and corrupt those whose minds are open to such immoral influences" became the governing standard for speech across the British Empire, India included.² More than a century and a half later, India is a sovereign constitutional republic with its own Bill of Rights, a plural and multireligious population exceeding 1.4 billion people, and centuries of classical erotic art and literature predating the Victorian magistrate by well over a millennium.³ Its courts, remarkably, are still reaching for that magistrate's test.

This persistence is not a quaint historical footnote; it is a constitutional failure with concrete consequences. Speech in India is policed using tests built for a culturally homogeneous Victorian England or a mid-century United States jurisdictions that never had to reckon with a constitutional democracy of India's scale, its internal plurality, its own erotic traditions, or an age of over-the-top ("OTT") streaming platforms and generative artificial intelligence.⁴ A filmmaker does not know where the line is. Neither does a novelist, a painter, or a digital content creator. Enforcement becomes arbitrary, prosecution becomes selective, and artistic freedom is chilled less by what the law prohibits than by what it refuses to define.

Section 292 of the Indian Penal Code, 1860 ("IPC") still the primary criminal provision on the subject defines "obscene" material as that which is "lascivious or appeals to the prurient interest" or whose effect, taken as a whole, "tend[s] to deprave and corrupt" persons likely to encounter it.⁵ This is not a definition; it is one undefined term explaining another. Parliament delegated the entire interpretive burden to the judiciary, and the judiciary has discharged that burden inconsistently for sixty years.⁶ The consequences are visible in the case law itself: an underwear advertisement was flagged as obscene while materially similar advertisements passed unremarked; the painter M.F. Husain faced criminal prosecution for nude depictions of

¹R. v. Hicklin, (1868) LR 3 QB 360, 371 (Eng.) (Cockburn, C.J.).

²Id. at 371 ("[T]he 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.").

³See Vatsyayana, Kamasutra 3 (Wendy Doniger & Sudhir Kakar trans., Oxford Univ. Press 2002); Bharata Muni, Natya Shastra (Adya Rangacharya trans., Munshiram Manoharlal 1996).

⁴Andrew Murray, Information Technology Law: The Law and Society 412 (4th ed. 2019).

⁵Indian Penal Code, 1860, § 292(1) (India).

⁶See Law Commission of India, 109th Report on Obscene Literature and Prevention of Corruption of Young Minds, ¶ 2.4 (1985).

Hindu goddesses while temple sculptures depicting more explicit imagery are celebrated as national heritage; and OTT content receives wildly divergent treatment depending on which State happens to be watching.⁷ This is not judicial incompetence it is the predictable consequence of a statute that defines nothing being applied to facts that urgently need defining.

This paper argues that four crises converge on Indian obscenity law. First, a definitional crisis: neither the IPC nor the Information Technology Act, 2000 ("IT Act") supplies a workable definition of obscenity.⁸ Second, a jurisprudential crisis: India imported the Hicklin test in 1965 and the American "contemporary community standards" language in 2014 without asking whether either premise a single susceptible reader, a single national community survives contact with India's constitutional pluralism.⁹ Third, a constitutional crisis: obscenity law has never been subjected to the proportionality analysis that the Supreme Court now requires of every restriction on a fundamental right.¹⁰ Fourth, a digital crisis: none of the existing tests has a vocabulary for algorithmic curation, OTT subscription platforms, or sexual imagery generated by artificial intelligence with no human author.¹¹

Rather than adding to the substantial existing literature cataloguing these failures, this paper the work of Mugdha Dwivedi, Research Scholar, Faculty of Law, University of Delhi attempts a constructive intervention. Working from principles already latent in Indian superior court decisions what this paper terms "jurisprudential latency," the phenomenon of a court system gradually articulating the elements of a doctrine without ever formally assembling them this paper proposes the Indian Constitutional Standard for Obscenity (the "ICSO Test"), a structured six-prong test built entirely from Indian constitutional text, Indian case law, and India's own cultural inheritance.¹² Part II traces the colonial origins of the definitional void. Part III surveys comparative obscenity law. Part IV examines six decades of Indian judicial interpretation. Part V explains why the borrowed tests are structurally, not merely contingently, inadequate for Indian conditions. Part VI presents the ICSO Test. Part VII applies the test to

⁷See *M.F. Husain v. Raj Kumar Pandey*, 2008 Cri LJ 4107 (Del) (India); Ministry of Info. & Broad., Press Release on Blocking of OTT Platforms and Websites for Obscene Content (Mar. 2024) (Gov't of India).

⁸See *infra* Part II.

⁹*Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881 (India); Aveek Sarkar, (2014) 4 SCC 257.

¹⁰*Modern Dental Coll. & Rsch. Ctr. v. State of Madhya Pradesh*, (2016) 7 SCC 353 (India); Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

¹¹Info. Tech. (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021, Gazette of India, pt. II, § 3(i) (Feb. 25, 2021) (India).

¹²This paper borrows and adapts the concept of "jurisprudential latency" to describe a body of case law that has articulated the elements of a doctrine without formally assembling them into a single test.

OTT platforms, social media, and artificial intelligence. Part VIII proposes legislative reform, and Part IX concludes.

II. THE COLONIAL INHERITANCE AND THE DEFINITIONAL VOID

The word "obscenity" derives from the Latin *obscaenus*, denoting the ill-omened or ritually unseemly rather than a fixed moral category a reminder that obscenity has always been culturally contingent rather than universal.¹³ India's obscenity law, however, is not an indigenous creation. Sections 292 to 294 of the IPC, drafted under the supervision of Thomas Babington Macaulay and enacted in 1860, were straightforward importations of Victorian English moral assumptions, transplanted without any inquiry into Indian cultural traditions or social conditions.¹⁴ The absence of a statutory definition was not an oversight; it was a delegation of moral authority to an English-educated judiciary expected to share the sensibilities of its colonial administrators.¹⁵

That transplantation sits uneasily beside India's own classical inheritance. The *Kamasutra* of Vatsyayana treats kama erotic pleasure as one of the four *purusharthas*, the legitimate goals of human life, alongside *artha*, *dharma*, and *moksha*.¹⁶ The *Natya Shastra* identifies *shringara*, the erotic sentiment, as the foundational *rasa* of Indian dramatic art.¹⁷ The temple sculptures of Khajuraho, Konark, Belur, and Halebid depict sexual imagery not as obscene but as auspicious, representing divine creative energy on the threshold between the profane and the sacred.¹⁸ The Bhakti devotional tradition the poetry of Jayadeva, Mirabai, and Surdas treats erotic longing as a legitimate vehicle for spiritual yearning rather than its opposite.¹⁹ A legal system that criminalises what this tradition celebrated is not protecting Indian citizens from moral harm; it is, in an important sense, vandalising their own cultural inheritance.²⁰

¹³See T.F. Hoad, *The Concise Oxford Dictionary of English Etymology* 320 (1996) (tracing "obscene" to Latin *obscaenus*, "ill-omened, abominable").

¹⁴Indian Penal Code, 1860, §§ 292–294 (India); Thomas Babington Macaulay, *Minute on Indian Education* (Feb. 2, 1835), reprinted in *Speeches by Lord Macaulay* 359 (G.M. Young ed., 1935).

¹⁵See Saurabh Bindal, *Obscenity: Prevention, Law & Practice* 18–22 (Eastern Book Co. 2009).

¹⁶Vatsyayana, *Kamasutra*, ch. 1 (Wendy Doniger & Sudhir Kakar trans., Oxford Univ. Press 2002).

¹⁷Bharata Muni, *Natya Shastra* ch. 6 (Adya Rangacharya trans., Munshiram Manoharlal 1996) (identifying *shringara* as the foundational *rasa*).

¹⁸See Devangana Desai, *Erotic Sculpture of India: A Socio-Cultural Study* 41–58 (1985).

¹⁹See Barbara Stoler Miller (ed. & trans.), *Love Song of the Dark Lord: Jayadeva's Gita Govinda* 3–13 (Columbia Univ. Press 1977); Sudhir Kakar, *Intimate Relations: Exploring Indian Sexuality* 62 (Univ. of Chicago Press 1989).

²⁰Cf. Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* 112 (Glasshouse Press 2005).

Section 292 IPC criminalises the sale, distribution, exhibition, and possession for commercial purposes of any material meeting its undefined standard, and *Ranjit D. Udeshi v. State of Maharashtra* confirmed that even knowledge of the offending content is not required for conviction.²¹ Section 67 of the IT Act extends the identical undefined language "lascivious," "prurient," "deprave," "corrupt" to the digital environment, multiplying the class of potential defendants from booksellers and publishers to every one of India's hundreds of millions of internet users.²² Sections 67A and 67B, inserted in 2008, criminalise "sexually explicit" material and child sexual abuse material respectively, again without defining the operative terms save for a partial definition in Section 67B.²³ The Indecent Representation of Women (Prohibition) Act, 1986 defines "indecent representation" as depiction having "the effect of being indecent" a definitional circle closing on itself.²⁴ Of the principal statutory provisions governing obscenity across different media in India, only Section 67B of the IT Act and Section 13 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO") supply even a partial definition of prohibited content.²⁵

The Law Commission of India recognised this vacuum as early as its 109th Report of 1985, observing that the absence of a legislative definition had produced "a state of legal uncertainty in which the boundaries of permissible expression are determined not by clear legal rules but by the moral instincts of individual judges."²⁶ Its recommendations for legislative reform were never implemented, and the *Bharatiya Nyaya Sanhita*, 2023, which is intended to replace the IPC, substantially reproduces Sections 292 to 294 without resolving the underlying definitional ambiguity, adding only express reference to digital dissemination.²⁷ The Parliamentary Standing Committee on Information Technology's 51st Report of 2021 reached the same conclusion in the digital context, finding that platforms, enforcement agencies, and courts were "each applying different standards to the same category of content."²⁸ Sixty years of case law,

²¹*Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881, 885 (India) (holding that mens rea as to the obscene character of the material is not an ingredient of the offence under § 292).

²²Information Technology Act, 2000, § 67 (India); Devika Prasad & Chinmayi Arun, *Obscenity and the Digital Turn*, 4 NLU Delhi L. Rev. 1, 6 (2018).

²³Information Technology Act, 2000, §§ 67A–67B (inserted by the Information Technology (Amendment) Act, 2008) (India).

²⁴Indecent Representation of Women (Prohibition) Act, 1986, No. 60, Acts of Parliament, 1986, § 2(c) (India).

²⁵See Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012, § 13 (India); Information Technology Act, 2000, § 67B(a) (India).

²⁶Law Commission of India, 109th Report on Obscene Literature and Prevention of Corruption of Young Minds, ¶ 2.4 (1985).

²⁷*Bharatiya Nyaya Sanhita*, 2023, No. 45, Acts of Parliament, 2023, §§ 294–296 (India).

²⁸Parliamentary Standing Comm. on Info. Tech., 51st Report on Safeguarding Citizens' Rights and Prevention of Misuse of Social Media Platforms including Special Emphasis on Women Security in the Digital Space, ¶ 5.2, Lok Sabha Secretariat (2021) (India).

several statutes, and a digital revolution later, Indian law remains unable to answer the foundational question every obscenity case requires it to answer: what, precisely, is obscenity?

The enforcement data confirms that this is not a merely theoretical difficulty. National Crime Records Bureau figures show registrations under Section 67 of the IT Act rising from 3,229 in 2018 to 7,338 in 2022 a 127% increase over four years even as conviction rates fell from 8.4% to 5.2% over the same period.²⁹ That combination of high-volume registration and low-volume conviction is consistent with definitional vagueness producing prosecutions that serve an intimidatory rather than an adjudicatory function: cases initiated not because they are likely to succeed but because the threat and cost of prosecution chill speech regardless of eventual outcome.³⁰ The pattern is also unevenly distributed. Reported decisions between 2010 and 2022 suggest that digital content creators and social media users bear the highest volume of prosecutions and the lowest conviction rates, while visual artists working in the wake of the Hussain jurisprudence face a near-zero conviction rate without ever having been told, in advance, what standard protects them.³¹ Scholars including Professor Ratna Kapur have observed that this dual failure over-inclusive as to artistic and literary expression, under-inclusive as to the commercial exploitation of women's bodies that obscenity law was ostensibly designed to address is the predictable consequence of leaving "obscene" undefined and delegating definitional power to whichever party currently holds it.³²

III. COMPARATIVE PERSPECTIVES: LEARNING FROM, WITHOUT IMPORTING, FOREIGN STANDARDS

Comparative analysis illuminates what India's obscenity law lacks without supplying an off-the-shelf substitute. The United States, after decades of fragmented First Amendment doctrine, settled the modern law in *Miller v. California*, asking (i) whether the work, applying contemporary community standards, appeals to the prurient interest, (ii) whether it depicts sexual conduct in a patently offensive way as defined by applicable law, and (iii) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (the

²⁹Nat'l Crime Records Bureau, *Crime in India 2018–2022* (Ministry of Home Affairs, Gov't of India, annual eds.).

³⁰See Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the Chilling Effect*, 58 B.U. L. Rev. 685, 693 (1978).

³¹See analysis of reported decisions in AIR, SCC, and Cri LJ reporters (2010–2022), supplemented by Nat'l Crime Records Bureau data, discussed in Bindal, *supra* note 18, at 140–46.

³²Kapur, *supra* note 23, at 118.

"SLAPS" criterion).³³ The Miller test's emphasis on serious value is a genuine advance over Hicklin, but its "community standards" prong presupposes a reasonably homogeneous community a premise that strains even within a single American state and fractures entirely across India's twenty-two scheduled languages, multiple major religious traditions, and vast regional variation in attitudes toward the body.³⁴

The United Kingdom, the original source of the Hicklin test, has since moved beyond it. The Obscene Publications Act, 1959 asks whether material tends to "deprave and corrupt" its likely audience, but English courts, most famously in *Regina v. Penguin Books Ltd.* the prosecution over D.H. Lawrence's *Lady Chatterley's Lover* have increasingly weighed literary merit and authorial purpose against the raw depravity inquiry.³⁵ Canada's Supreme Court, in *R. v. Butler*, replaced community-standards moralism with a harm-based test, classifying sexually explicit material by whether it depicts violence, non-violent degradation or dehumanisation, or neither, and reserving the most severe restriction for the first two categories on the ground that they predispose viewers towards antisocial attitudes, particularly toward women.³⁶ The European Court of Human Rights, applying Article 10 of the European Convention on Human Rights, requires that restrictions be prescribed by law, pursue a legitimate aim, and be "necessary in a democratic society" a proportionality framework articulated in *Handyside v. United Kingdom* that has no counterpart anywhere in Indian obscenity doctrine.³⁷ Australia regulates content through a graded classification system rather than a binary permitted/prohibited distinction, allowing restricted material in access-controlled contexts that would be prohibited in the public commons.³⁸

Each of these frameworks contributes something the ICSO Test incorporates: the Miller test's insistence on serious value informs the dominant purpose inquiry; Butler's harm-based classification informs the vulnerable group harm prong; the European Convention's proportionality doctrine supplies the constitutional threshold; and Australia's classification system informs the medium and access context prong.³⁹ But none of these tests can simply be

³³Miller v. California, 413 U.S. 15, 24 (1973).

³⁴See Geoffrey R. Stone, Sex, Violence, and the First Amendment, 74 U. Chi. L. Rev. 1857, 1863 (2007).

³⁵Obscene Publications Act, 1959, 7 & 8 Eliz. 2 c. 66, § 1(1) (Eng.); *Regina v. Penguin Books Ltd.*, [1961] Crim. L.R. 176 (Eng.) (Central Criminal Court).

³⁶*R. v. Butler*, [1992] 1 S.C.R. 452, 478–79 (Can.).

³⁷Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221; *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. Ct. H.R. (ser. A) (1976).

³⁸See Classification (Publications, Films and Computer Games) Act 1995 (Cth) sch. 1 (Austl.).

³⁹See *infra* Part VI.

imported. As this paper argues in Part V, each rests on premises a single community, a single susceptible reader, a single national moral yardstick that clash structurally with Indian constitutional pluralism.⁴⁰ The comparative exercise exists to isolate, by contrast, what is distinctly and irreducibly Indian about the standard this paper proposes, not to find a foreign model worth transplanting a second time.⁴¹

IV. THE JUDICIAL JOURNEY: FROM HICKLIN TO AVEEK SARKAR AND BEYOND

Indian obscenity jurisprudence begins with *Ranjit D. Udeshi v. State of Maharashtra*, in which the Supreme Court upheld a Bombay bookseller's conviction for stocking *Lady Chatterley's Lover*, applying the Hicklin test fifteen years after the Constitution came into force without conducting any serious inquiry into whether that Victorian standard was compatible with the freedom of speech guaranteed under Article 19(1)(a).⁴² Justice Hidayatullah did qualify Hicklin by requiring courts to assess "the dominant effect of the work as a whole" rather than isolated passages, and to weigh literary merit a genuine, if incomplete, advance.⁴³

K.A. Abbas v. Union of India, examining film censorship, produced one of the Court's more thoughtful observations: that "[s]ex and obscenity are not always synonymous," and that standards must be framed so as to save "literature, art, science and other matters of public interest from the chill of a too rigorous application of the law of obscenity."⁴⁴ The Court nonetheless upheld the constitutionality of prior censorship for films specifically, reasoning that the medium's unique capacity for influence justified differentiated treatment a medium-sensitivity principle this paper later incorporates.⁴⁵ Two decades after *Udeshi*, *Samaresh Bose v. Amal Mitra* took the most significant definitional step to that point, holding that a judge assessing obscenity must approach the material "as a reasonable, strong-minded, firm and courageous man, and not those of a weak or vacillating mind," attending to the author's purpose and the work's literary seriousness.⁴⁶ The purposive inquiry this decision introduced remains,

⁴⁰See *infra* Part V.

⁴¹Cf. Upendra Baxi, *The Future of Human Rights* 42 (3d ed. 2008) (cautioning against uncritical transplantation of foreign doctrine).

⁴²*Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881, 884 (India).

⁴³*Id.* at 886 (Hidayatullah, J.).

⁴⁴*K.A. Abbas v. Union of India*, AIR 1971 SC 481, 499 (India) (Hidayatullah, C.J.).

⁴⁵*Id.* at 496–98 (upholding pre-censorship of films on the ground of the medium's distinctive capacity for influence).

⁴⁶*Samaresh Bose v. Amal Mitra*, AIR 1986 SC 967, 974 (India) (Mukharji, J.).

this paper argues, incomplete: it leaves undefined who is qualified to assess "serious literary merit," a judgment historically made by judges drawn overwhelmingly from India's English-educated urban elite.⁴⁷

Bobby Art International v. Om Pal Singh Hoon, the Bandit Queen litigation, examined explicit depictions of sexual violence and held that the constitutionally relevant question was whether nudity was used "to arouse the baser instinct" or, instead, to convey the "savagery" of the acts depicted and evoke disgust rather than titillation.⁴⁸ This purposive approach asking what effect the material was designed to produce, rather than what effect it might produce on an unusually susceptible viewer marked a genuine conceptual departure from *Hicklin*, though it remained an ad hoc judicial assessment rather than a structured test. *M.F. Hussain v. Raj Kumar Pandey* then supplied the most culturally significant contribution to Indian obscenity doctrine: the Delhi High Court held that "[n]udity per se is not obscene," invoking the sculptures of Khajuraho, Konark, Belur, and Halebid as evidence that Indian civilisation has long accepted nudity "as an expression of beauty, divinity and the human form."⁴⁹ This was the first explicit judicial recognition that India's classical cultural tradition bears on obscenity adjudication though, as a High Court decision never definitively affirmed by the Supreme Court, its constitutional status remains uncertain.⁵⁰

Aveek Sarkar v. State of West Bengal represents the current state of Indian law. The Supreme Court formally abandoned *Hicklin* in favour of a "contemporary community standards" test, holding that a semi-nude photograph of a tennis player and his fiancée, published alongside an anti-racism message, was not obscene when judged "from the point of view of an ordinary man, of common sense and prudence and not an out of the ordinary or hypersensitive man."⁵¹ The decision left unanswered the questions that matter most in a plural society: which community supplies the standard national, regional, religious, or linguistic and by what method is that community's standard to be ascertained?⁵² Subsequent decisions have deepened rather than resolved this uncertainty. *Shreya Singhal v. Union of India*, while not an obscenity case, struck down Section 66A of the IT Act for vagueness and overbreadth, holding that speech restrictions

⁴⁷See Madhavi Sunder, *Cultural Dissent*, 54 *Stan. L. Rev.* 495, 522 (2001).

⁴⁸*Bobby Art Int'l v. Om Pal Singh Hoon*, (1996) 4 SCC 1, 12 (India) (Bharucha, J.).

⁴⁹*M.F. Husain v. Raj Kumar Pandey*, 2008 Cri LJ 4107, ¶ 78 (Del) (India) (Shah, C.J.).

⁵⁰See *id.* ¶¶ 78–80; Bindal, *supra* note 18, at 210 (noting the absence of a definitive Supreme Court pronouncement).

⁵¹*Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257, ¶ 24 (India) (Sikri, J.).

⁵²See *id.* ¶¶ 24–27; cf. Prasad & Arun, *supra* note 25, at 9 (noting the decision's failure to specify a method for identifying the relevant community).

must be narrowly tailored and must not produce a chilling effect disproportionate to any legitimate aim reasoning this paper argues applies with equal, if unacknowledged, force to Sections 292 IPC and 67 IT Act.⁵³ *Khushboo v. Kanniammal* held that an actress's comments on premarital sex could not sustain an obscenity prosecution absent incitement to public disorder, reinforcing that expressions of opinion enjoy constitutional protection even where unpopular.⁵⁴ *Apoorva Arora v. State (Govt. of NCT of Delhi)* clarified that abusive or vulgar language alone does not constitute obscenity under Section 67 of the IT Act unless it arouses lustful thought or corrupts the average adult mind, reaffirming a contextual and holistic standard.⁵⁵ And *Navtej Singh Johar v. Union of India*, decriminalising consensual same-sex relations, indirectly affects obscenity doctrine by removing the predicate criminality that had previously rendered any depiction of same-sex intimacy automatically suspect under obscenity law.⁵⁶

Two further decisions confirm that courts are already reasoning their way toward a medium-sensitive, access-conscious standard without articulating it as such. In the writ petition concerning the Malayalam film *Churuli*, the Kerala High Court held that films streamed on OTT platforms are governed by a three-tier self-regulatory structure under the IT Rules, 2021, that dialogue alleged to be obscene must be assessed holistically rather than in isolation, and that the petitioner's failure to invoke the statutory grievance-redressal mechanism rendered the challenge non-maintainable.⁵⁷ The court's reliance on *State of Bihar v. Shailabala Devi* and *K.A. Abbas* reaffirmed that contextual, whole-work assessment continues to govern even in the OTT context, while its emphasis on the three-tier regulatory architecture implicitly recognised that the medium and its access controls bear on the obscenity inquiry the very insight this paper formalises as Prong 6.⁵⁸ *Shreya Singhal's* vagueness doctrine, though decided outside the obscenity context, supplies the constitutional vocabulary "width," "vagueness," and "chilling effect" that this paper argues applies with undiminished force to the identically vague language of Sections 292 IPC and 67 IT Act.⁵⁹

⁵³*Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶¶ 82–94 (India).

⁵⁴*Khushboo v. Kanniammal*, (2010) 5 SCC 600, ¶¶ 29–31 (India).

⁵⁵*Apoorva Arora v. State (Govt. of NCT of Delhi)*, 2024 SCC OnLine SC 3013, ¶¶ 22–25 (India).

⁵⁶*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁵⁷*Peggy Fen v. Cent. Bd. of Film Certification*, W.P.(C) No. (Ker. High Ct. 2022) (India) (concerning the Malayalam film *Churuli*).

⁵⁸*Id.*; *State of Bihar v. Shailabala Devi*, AIR 1952 SC 329 (India); *K.A. Abbas v. Union of India*, AIR 1971 SC 481 (India); Info. Tech. (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021, r. 8-12 (India).

⁵⁹*Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 87 (India).

Across these decisions this paper identifies a set of latent principles that Indian courts have articulated without ever formally assembling: literary and artistic merit (Udeshi); medium-sensitivity (Abbas); purposive intent (Samaresh Bose); contextual, condemnatory purpose (Bobby Art International); cultural heritage (Hussain); the reasonable, non-hypersensitive adult (Aveek Sarkar); vagueness and chilling effect (Shreya Singhal); protected opinion (Khushboo); and holistic, access-conscious assessment of digital content (Churuli).⁶⁰ No single decision assembles these principles into a structured, predictable test. That assembly is the task Part VI of this paper undertakes.

V. WHY THE BORROWED TESTS FAIL: A STRUCTURAL DIAGNOSIS

The inadequacy of Hicklin, Miller, and the Community Standards test in India is not incidental to their application; it is a consequence of how each test was designed. Hicklin fails on at least three structural grounds. First, its susceptibility premise that obscenity is measured by its effect on the most vulnerable potential reader has no defensible place in a constitutional order that treats adults as autonomous rights-bearers rather than wards to be protected from their own reading choices.⁶¹ Second, its isolated-passage rule, only partially cured by Udeshi's "dominant effect" gloss, permits condemnation of an entire work on the strength of a fragment divorced from its purpose and context.⁶² Third, and most fundamentally, Hicklin contains no proportionality analysis whatsoever it asks only whether material might deprave and corrupt, never whether restricting it is necessary, narrowly tailored, or proportionate to any legitimate state interest.⁶³

The Miller test corrects some of these defects but imports a new one specific to Indian conditions: the assumption that "contemporary community standards" refers to an ascertainable, sufficiently homogeneous community.⁶⁴ India has twenty-eight States, eight Union Territories, twenty-two scheduled languages, and enormous regional variation in attitudes toward sexuality and the body, ranging from the erotic sculptural tradition of

⁶⁰See supra notes 41–55C and accompanying text.

⁶¹See Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 J. Legal Stud. 693, 701 (1998).

⁶²Ranjit D. Udeshi, AIR 1965 SC at 886.

⁶³See H.M. Seervai, Constitutional Law of India: A Critical Commentary 891 (4th ed. 1999).

⁶⁴Miller v. California, 413 U.S. 15, 30–34 (1973) (Douglas, J., dissenting) (questioning the ascertainability of a national community standard).

Khajuraho to the austere visual culture of certain religious communities.⁶⁵ "Whose community standard?" is accordingly not a rhetorical objection but a question the Miller framework cannot structurally answer. Aveek Sarkar's adoption of a Community Standards test inherits precisely this defect: the Supreme Court gestured toward community standards without ever specifying how a trial court is to identify the relevant community or ascertain its norms, leaving lower courts to guess.⁶⁶

More fundamentally, none of the borrowed tests has been subjected to the constitutional proportionality doctrine that the Supreme Court now applies to every restriction on a fundamental right, most fully articulated in *Modern Dental College and Research Centre v. State of Madhya Pradesh* and applied to the right to privacy in *Justice K.S. Puttaswamy v. Union of India*.⁶⁷ That doctrine requires that a restriction pursue a legitimate aim, be rationally connected to it, be no more extensive than necessary, and strike a fair balance between the right restricted and the benefit gained.⁶⁸ Section 292 IPC imposes strict liability without any of this analysis; *Ranjit Udeshi* itself confirms that knowledge of the content is not even a prerequisite for conviction.⁶⁹ A body of law that restricts a fundamental right was never architecturally built to survive the scrutiny that fundamental-rights restrictions are now constitutionally required to satisfy. This is the gap the ICSO Test is designed to close.

VI. THE INDIAN CONSTITUTIONAL STANDARD FOR OBSCENITY: AN ORIGINAL SIX-PRONG FRAMEWORK

This paper's original contribution is the Indian Constitutional Standard for Obscenity the ICSO Test a structured six-prong test for determining whether material is obscene under Indian law. Each prong is anchored in specific constitutional provisions and identified decisions of Indian superior courts; none is imported wholesale from any foreign legal system. Material is obscene, and may be regulated consistently with Article 19(2) of the Constitution, only if it fails Prongs 1 through 3 cumulatively, is not shielded by the Prong 4 defence, and where independently engaged causes the harm addressed by Prong 5. Prong 6 operates as a contextual modifier

⁶⁵Census of India 2011, Language Atlas: India, Office of the Registrar Gen. & Census Comm'r (Gov't of India, 2018).

⁶⁶Aveek Sarkar, (2014) 4 SCC 257, ¶ 24; see Prasad & Arun, *supra* note 25, at 9.

⁶⁷*Modern Dental Coll. & Rsch. Ctr. v. State of Madhya Pradesh*, (2016) 7 SCC 353, ¶¶ 60–64 (India); *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶¶ 310–13 (India) (Chandrachud, J.).

⁶⁸*Modern Dental Coll.*, (2016) 7 SCC 353, ¶ 64.

⁶⁹*Ranjit D. Udeshi*, AIR 1965 SC at 885.

across all other prongs.

Prong 1 Constitutional Proportionality [Articles 19(1)(a) and 19(2)] requires that any restriction on the material satisfy the four-stage proportionality doctrine of *Modern Dental College*: a legitimate aim recognised under Article 19(2), a rational connection between the restriction and that aim, necessity in the sense that no less restrictive alternative would serve the same purpose, and a fair balance between the right restricted and the benefit secured.⁷⁰ This prong operationalises the reasoning of *Shreya Singhal*, making proportionality review never previously applied to obscenity law the constitutional threshold inquiry.⁷¹ It is further deepened by the constitutional morality doctrine articulated in *Navtej Singh Johar* and *Puttaswamy*: majoritarian moral offence, however widespread, is not itself a proportionality justification; only demonstrable constitutional harm qualifies.⁷²

Prong 2 Dominant Purpose [Article 19(1)(a)] asks whether the material's dominant purpose, considered as a whole, is to arouse prurient interest without serving a legitimate expressive, artistic, literary, journalistic, educational, scientific, or social-commentary function that outweighs any prurient element.⁷³ This prong synthesises the merit principle of *Udeshi*, the purposive intent principle of *Samaresh Bose*, and the contextual purpose principle of *Bobby Art International*.⁷⁴ It differs from Miller's SLAPS criterion in a constitutionally significant respect: it does not require "serious" literary value, a qualification that privileges the aesthetic judgments of an English-educated judiciary over popular art, vernacular literature, folk expression, and satire, none of which need meet an elite threshold of seriousness to merit constitutional protection.⁷⁵

Prong 3 the Reasonable Indian Adult Standard [*Aveek Sarkar*] asks whether a reasonable, ordinarily educated Indian adult of average moral sensibility, neither hypersensitive nor permissive, would find that the dominant effect of the work, considered in its cultural, social, and temporal context, tends to deprave or corrupt.⁷⁶ This prong refines *Aveek Sarkar's*

⁷⁰*Modern Dental Coll.*, (2016) 7 SCC 353, ¶ 64; India Const. art. 19, cl. 2.

⁷¹*Shreya Singhal*, (2015) 5 SCC 1, ¶¶ 82–94.

⁷²*Navtej Singh Johar*, (2018) 10 SCC 1, ¶ 253 (*Chandrachud, J.*); *Puttaswamy*, (2017) 10 SCC 1, ¶ 298.

⁷³*Cf. Cass R. Sunstein*, *Democracy and the Problem of Free Speech* 121 (Free Press 1995).

⁷⁴*Ranjit D. Udeshi*, AIR 1965 SC at 886; *Samaresh Bose*, AIR 1986 SC at 974; *Bobby Art Int'l*, (1996) 4 SCC at 12.

⁷⁵*Cf. Marjorie Heins*, *Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars* 88 (New Press 1993) [hereinafter *Heins, Censorship Wars*]; see also *Marjorie Heins*, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* 205 (Hill & Wang 2001).

⁷⁶*Aveek Sarkar*, (2014) 4 SCC 257, ¶ 24.

unanchored reference to "community standards" in three respects left unaddressed by that decision. First, the standard is audience-specific: the relevant community is the one for which the material was actually produced and to which it is actually addressed, not an undifferentiated national public.⁷⁷ Second, the standard is culturally literate: the reasonable Indian adult is assumed to possess some familiarity with India's classical erotic heritage and is not presumptively shocked by nudity falling within that tradition a refinement drawing directly on the cultural analysis in M.F. Hussain.⁷⁸ Third, the standard is constitutionally aware: it understands that artistic expression, literary fiction, and social commentary enjoy heightened constitutional protection, and it asks not merely "does this offend me" but "does this cause a real change in attitude or behaviour that harms others."⁷⁹

Prong 4 the Cultural Heritage Defence [Article 51A(f)] is the prong most distinctively Indian, without parallel in Hicklin, Miller, Butler, or the Obscene Publications Act. It operates as a positive defence: material falling within India's classical, folk, literary, or artistic traditions including the sacred-erotic sculptural tradition, classical erotic literature such as the Kamasutra and the Gita Govinda, and the shringara rasa of classical performance carries a strong constitutional presumption against characterisation as obscene, grounded in Article 51A(f)'s injunction to "value and preserve the rich heritage of our composite culture."⁸⁰ The defence is not absolute: it yields to Prong 5 where a vulnerable group is specifically harmed, and it does not protect material whose dominant purpose under Prong 2 is prurient arousal merely because it invokes classical imagery.⁸¹

Prong 5 Vulnerable Group Harm [Article 21 and POCSO] provides that material specifically targeting, sexualising, degrading, or endangering children, women, or other constitutionally recognised vulnerable groups may be regulated on this basis alone, regardless of whether it satisfies Prongs 1 through 4.⁸² This prong translates Professor Catharine MacKinnon's harm-based critique of obscenity doctrine, and the Canadian Supreme Court's reasoning in Butler, into Indian constitutional terms, anchoring the inquiry in Article 21's guarantee of dignity and

⁷⁷Cf. *Ajay Goswami v. Union of India*, (2007) 1 SCC 143, ¶ 41 (India) (Kapadia, J.) (differentiated audience principle).

⁷⁸M.F. Husain, 2008 Cri LJ 4107, ¶ 78.

⁷⁹See *Navej Singh Johar*, (2018) 10 SCC 1, ¶ 253 (constitutional morality doctrine).

⁸⁰India Const. art. 51A, cl. (f); see Desai, *supra* note 21, at 45–52; Miller, *supra* note 22.

⁸¹See *infra* notes 86A–86C and accompanying text.

⁸²India Const. art. 21; Protection of Children from Sexual Offences Act, 2012, § 13 (India).

Article 51A(e)'s duty to renounce practices derogatory to women's dignity.⁸³ Its independence from the other prongs is deliberate: content that is proportionate, purposeful, inoffensive to a reasonable adult, and culturally rooted may nonetheless be regulated where it causes concrete, identifiable harm to children or women a recognition that artistic merit does not immunise exploitation.⁸⁴

Prong 6 Medium and Access Context [K.A. Abbas] requires that the medium of delivery and any access controls be weighed in applying every preceding prong. This paper proposes three categories: Category A, the public commons unrestricted broadcast, roadside hoardings, and open social media feeds assessed against the full Prong 3 standard at the lowest proportionality threshold for restriction; Category B, access-controlled adult content subscriber-only OTT tiers and age-gated platforms assessed more permissively, reflecting reduced likelihood of child access and the viewer's constructive consent; and Category C, algorithmically distributed content material pushed to audiences who did not seek it assessed more strictly than its nominal access controls suggest, because algorithmic mediation diminishes constructive consent.⁸⁵ This prong operationalises K.A. Abbas's recognition that different media occupy different constitutional positions, extending that insight to the digital distribution architectures Abbas could not have anticipated.⁸⁶

Applied to the landmark cases surveyed in Part IV, the ICSO Test produces more consistent and constitutionally coherent outcomes than the existing framework. Ranjit Udeshi's conviction fails Prong 1: the strict liability the Court imposed involved no proportionality analysis whatsoever, and would not survive it.⁸⁷ Samaresh Bose and Bobby Art International pass all applicable prongs their restrictions were, on the Court's own reasoning, proportionate, purposeful, and inoffensive to a reasonable adult confirming that the ICSO Test would not have disturbed outcomes the Court itself considered correct.⁸⁸ M.F. Hussain's paintings pass decisively on Prong 4, the cultural heritage defence providing the doctrinal clarity that a High Court decision, standing alone, could not.⁸⁹ Aweek Sarkar's photograph passes Prong 3, now

⁸³Catharine A. MacKinnon, *Only Words* 22 (Harvard Univ. Press 1993); *R. v. Butler*, [1992] 1 S.C.R. 452, 479 (Can.); India Const. art. 51A, cl. (e).

⁸⁴MacKinnon, *supra* note 79, at 25.

⁸⁵Cf. Murray, *supra* note 7, at 415–20; Info. Tech. (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021, r. 8-12 (India).

⁸⁶K.A. Abbas, AIR 1971 SC at 497.

⁸⁷Ranjit D. Udeshi, AIR 1965 SC at 885.

⁸⁸Samaresh Bose, AIR 1986 SC at 974; *Bobby Art Int'l*, (1996) 4 SCC at 12.

⁸⁹M.F. Husain, 2008 Cri LJ 4107, ¶ 78.

applying a standard with defined content rather than an unelaborated reference to community sentiment.⁹⁰

Three objections merit brief consideration. The first is that a six-prong test is too protective of sexual content that its cultural heritage defence and multi-stage structure will immunise genuinely harmful material. This objection misreads the test's architecture: Prong 5 operates independently of every other prong precisely so that vulnerable-group harm cannot be defeated by artistic merit, proportionate restriction, or cultural pedigree, making the ICSO Test more protective of women and children than any test currently applied in Indian courts, not less.⁹¹ The second objection is that a structured six-prong inquiry is too complex for trial-level courts to administer. The proportionality analysis at Prong 1 is, however, already part of Indian constitutional law and already applied by trial courts across other domains; the true alternative to structure is not simplicity but the arbitrariness the NCRB data already documents.⁹² The third objection is that the cultural heritage defence in Prong 4 is overbroad, capable of shielding exploitative content that merely gestures at classical imagery. But Prong 2's dominant-purpose inquiry continues to operate independently: material whose dominant purpose is prurient arousal does not acquire heritage protection simply because it borrows classical iconography, and Prong 5 independently regulates content that harms vulnerable groups regardless of any heritage claim.⁹³

VII. APPLYING THE ICSO TEST: OTT PLATFORMS, SOCIAL MEDIA, AND ARTIFICIAL INTELLIGENCE

The ICSO Test's practical value is most visible in the domains existing law handles worst. OTT platforms distribute content that never passes through the Central Board of Film Certification and is instead self-classified under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which retain the same undefined vocabulary as Section 292 IPC while adding a three-tier grievance mechanism.⁹⁴ Prong 6's Category B treatment provides what those Rules presently lack: a principled basis for distinguishing subscription-gated adult content from content on the public commons, so that a series accessible only behind age verification is not judged by the same threshold as a roadside

⁹⁰Aveek Sarkar, (2014) 4 SCC 257, ¶ 24.

⁹¹MacKinnon, *supra* note 79, at 22; see *supra* Part VI (Prong 5).

⁹²See *supra* notes 31A–31C and accompanying text (NCRB enforcement data).

⁹³See *supra* Part VI (Prong 2, Prong 5).

⁹⁴Info. Tech. (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021, r. 8-12 (India).

hoarding.⁹⁵ The Delhi High Court's observation, in *Shyam Narayan Chouksey v. Union of India*, that OTT content warrants "some level of regulation" without "excessive regulation," gestures toward precisely this differentiated approach without supplying its structure.⁹⁶

Social media and algorithmic amplification raise a distinct question: intermediary liability for content the platform did not create but did algorithmically distribute. The gatekeeper liability model established for booksellers in *Ranjit Udeshi* and extended to online intermediaries in *Avnish Bajaj v. State* sits uneasily with a business model in which recommendation algorithms, not human editorial choices, determine what any given user actually encounters.⁹⁷ Prong 6's Category C addresses this by treating algorithmic push-distribution as diminishing the viewer's constructive consent, warranting stricter scrutiny than the platform's formal access controls would otherwise suggest while leaving the safe-harbour framework under the IT Rules, 2021 to separately govern the platform's own liability for third-party content.⁹⁸

Artificial intelligence-generated sexual imagery, including deepfakes and synthetic child sexual abuse material, poses the sharpest challenge: none of the existing tests, each built around a fixed work with an identifiable human author, has any vocabulary for content with no author in the conventional sense.⁹⁹ The ICSO Test resolves this through Prong 5's independence: because vulnerable group harm can be established without reference to authorial intent or artistic purpose, synthetic material sexualising children or women can be regulated on the strength of Prong 5 alone, sidestepping the intent-focused inquiries that Prongs 2 and 3 would otherwise require and that AI-generated content structurally frustrates.¹⁰⁰ The Ministry of Information and Broadcasting's blocking of numerous websites, applications, and social media handles in March 2024 illustrates the present alternative: state power exercised at scale against content branded obscene, without a publicly stated legal standard or prior judicial finding precisely the arbitrariness a codified six-prong test is designed to discipline.¹⁰¹

⁹⁵See supra Part VI (Prong 6).

⁹⁶*Shyam Narayan Chouksey v. Union of India*, 2021 SCC OnLine Del 3861, ¶ 34 (India).

⁹⁷*Ranjit D. Udeshi*, AIR 1965 SC at 885; *Avnish Bajaj v. State* (NCT of Delhi), 2008 Cri LJ 4536 (Del) (India).

⁹⁸Info. Tech. (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021, r. 3(1)(d) (safe-harbour framework) (India).

⁹⁹Cf. Murray, supra note 7, at 430–35 (on authorless digital content).

¹⁰⁰See supra Part VI (Prong 5); Protection of Children from Sexual Offences Act, 2012, § 13 (India).

¹⁰¹Ministry of Info. & Broad., Press Release on Blocking of OTT Platforms, Apps and Social Media Handles for Obscene and Unlawful Content (Mar. 2024) (Gov't of India).

VIII. TOWARDS LEGISLATIVE REFORM

Doctrinal synthesis alone cannot cure a definitional vacuum created by statute; the cure requires legislative codification. This paper proposes that Section 292 IPC and its successor provision in the Bharatiya Nyaya Sanhita, 2023 be amended to replace the undefined "lascivious or prurient" formulation with an express six-prong definition tracking the ICSO Test, supplemented by a statutory direction that courts apply the proportionality doctrine before any conviction.¹⁰² Section 67 of the IT Act should be amended in parallel, with Prong 6's medium-and-access framework given express statutory force through cross-reference to the age-verification and content-classification provisions of the IT Rules, 2021.¹⁰³ The Law Commission's unimplemented recommendations from 1985 and the Parliamentary Standing Committee's 2021 findings both anticipated the need for exactly this kind of structured statutory criteria; codifying the ICSO Test would finally discharge that long-deferred legislative obligation.¹⁰⁴ Judicial training programmes, coordinated by the National Judicial Academy, should accompany any such amendment, given that Samaresh Bose's purposive inquiry and Aveek Sarkar's community-standards language have both suffered in practice from inconsistent application by trial-level judiciary lacking specialised training in constitutional proportionality analysis or comparative obscenity doctrine.¹⁰⁵

IX. CONCLUSION

India regulates a fundamental right with a nineteenth-century vocabulary, applied through twentieth-century tests borrowed from societies that never resembled India's constitutional and cultural condition, to twenty-first-century content those tests were never built to comprehend. This paper has argued that repair is not merely available through better judicial interpretation of the existing undefined terms sixty years of judicial effort has already demonstrated the limits of that approach. What is required, and what six decades of Indian jurisprudence already contain in latent form, is a structured, constitutionally anchored, and culturally rooted indigenous test.

¹⁰²Cf. Law Commission of India, *supra* note 29, ¶ 6.1 (recommending legislative definition).

¹⁰³Info. Tech. (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021, r. 8-12 (India).

¹⁰⁴Law Commission of India, *supra* note 29; Parliamentary Standing Comm. on Info. Tech., *supra* note 31, ¶ 5.2.

¹⁰⁵See Samaresh Bose, AIR 1986 SC at 974; Aveek Sarkar, (2014) 4 SCC 257, ¶ 24; Nat'l Judicial Acad., Annual Report 2022–23, at 34 (India) (on the absence of specialised training modules for obscenity adjudication).

The Indian Constitutional Standard for Obscenity proposed in this paper is not a break from Indian legal tradition; it is a formalisation of what Indian courts have already been building, case by case, without ever stepping back to see the whole. Its six prongs do not ask judges to invent new constitutional values; they ask judges to apply, consistently and in a stated sequence, values the Supreme Court has already recognised in *Modern Dental College, Puttaswamy*, *Navtej Singh Johar*, and *Shreya Singhal*, together with a heritage recognition the Delhi High Court has already extended to M.F. Hussain's canvases. What has been missing is not the raw material but the architecture. Until Parliament codifies that architecture, Indian courts, content creators, and enforcement agencies will continue to operate in the zone of uncertainty that vague speech restrictions always produce and the citizens whose fundamental rights are at stake will continue to bear the cost of a legal system regulating a right it has never taken the trouble to define. A constitutional democracy as old, as plural, and as culturally sophisticated as India deserves an obscenity standard built from its own constitutional commitments and its own civilisational inheritance, rather than one borrowed a second time from jurisdictions whose history is not India's own.