3.

THE CONCEPT OF OBSCENITY AND THE SEARCH FOR OBJECTIVE STANDARDS BY THE SUPREME COURT OF INDIA

Mahesh Menon[1]

The Conjunction of free press, growing mass media and a section population that attempts to preserve values which they consider to be "Indian" with the legal system produces challenges of new kinds that pose questions on the limits of freedom to express and the mooted need to protect the society from objectionable content. When this objective brought into the regulation of obscene materials, we face a challenge of a different sort – as obscenity, in its ultimate analysis is thinly objective. Marked by a severe lack of (and nearly impossible) consensus on what can be called as obscene, and left with a colonial penal code that carries a century old Test for obscenity, the courts have struggled to expand the freedoms of speech and balance it with the need to contain the spread of certain category of materials. The debate on what is obscene assumes contemporary significance in the light of demands from some quarters to remove or block all materials that are obscene from the internet, particularly the social networking websites and the often repeated demands to regulate the cable television and broadcasting media. This paper attempts a study on the limitations of the statutory law relating to obscenity and the judicial quest to overcome those limitations and how they are relevant to our present times. The paper concludes with reflections on the nature of the discretion vested in the judges to determine what is obscene and suggests the standards on which amendments can be made to the statues to limit the exercise of discretion.

[1] The Author was a Legal Officer at Asian-African Legal Consultative Organization. He is currently working as an Assistant Professor in West Bengal National University of Juridical Sciences.

THE CONTEXT: GROWING MASS MEDIA AND THE LIMITS OF FREE SPEECH

The growth of Mass media in India was initiated since colonial times from the latter half to the 18th Century with the print, radio broadcasting and cinema, all making its entry between 1780 and the end of 1800s. Since post-independence times, barring the short span of time when 'the emergency' was in operation, Singh B (1980:38) remarks media in India has remained free and independent.[2] But post- independence times have also witnessed oppositions and differences of opinion on what all can be disseminated through the media. Particularly interesting are the results produced when the process of law met with materials that certain groups of persons considered to be fitting within the category 'obscene'. Events even from the immediate past has shown us how the process of law has been used, mostly by private citizens who believe that certain acts performed or certain images published offends the nation's inherited 'cultural values'. Thus, actors Richard Gere and Shilpa Shetty were charged with 'performing obscene act in a public place' with a court issuing process against him on a private complaint when he kissed the latter on stage at a public meeting.[3] Similarly, actors[4], writers and painters[5] have at various times faces prosecution for dissemination of so called obscene materials. While we may or may not agree on whether there is a need to prevent the dissemination of obscene materials or the need to insulate the society from such materials, we cannot deny that where law is involved, setting of standards that leaves room for arbitrary actions and subjective satisfactions (especially in criminal law) would be impermissible. Clarity in what is the prohibited act is an indispensible element.

[2] Singh, Indu B, 'The Indian Mass Media System: Before and After the National Emergency', *(1980) 7 (2) Canadian Journal of Communication 38.*

[3] Richard Gere, 'Cleared of Obscenity', http://news.bbc.co.uk/2/hi/7295797.stm [accessed on: 28 July 2011].

[4] Sharukh Khan a prominent actor was slapped with an obscenity case by a private complainant after he performed with some 'skimpily clad' dancers in Kerala at a public function, http://www.indianexpress.com/news/shah-rukh-khan-slapped-with-obscenity-case/890904/ [accessed on February 13 2012]; Actress Vidya Balan is also facing charges on her posing in the posters of a movie, http://articles.timesofindia.indiatimes.com/2011-12-18/hyderabad/30530734_1_obscenity-case-vidya-balan-promos accessed, [accessed on: 13 February 2012].

[5] Eminent painter M.F. Hussain for painting the 'Bharat Mata' in nude had also met with a similar fate, See *infra* n.76.

The question then what amounts to being obscene is of immense contemporary relevance in the light of the immense growth of mass media over the last decade.[6] While traditionally the courts have looked at obscene content in literary works, films and paintings, the platforms for artistic expression has changed manifold, with cable television and the internet taking a significant share of the mediums for expression. Thus the ongoing debate on the removal of obscene content from social networking websites[7] and the often heard debate on the need to prevent content that is obscene and that which offends 'Indian Values' from being disseminated through media has to be judged in this context.

However, trying to define what would be obscene would immediately run into difficulties of numerous sorts. Where do we place that thin line that demarcates legitimate expressions and obscene ones? What standards are we to apply to judge whether something is obscene or not? The quest for these answers also involved a quest for identifying the limits of one of our most cherished freedoms: the freedom of speech. For the courts, it is also a quest to devise objective standards to test something that falls almost entirely in the realms of subjectivity. Attempts to define and objectify what is obscene have historically met with several failures and in a moment of candid admission Justice Potter of the United States went on to state "I know it [i.e. what is obscene] when I see it".[8] How far has the Indian statutory law managed to infuse the desired levels of objectivity? A Survey of the Statues on the subject demonstrates that they fall miles short of this objective as they stop with using the word "obscene" with no guidance on determining what is obscene. This has then necessitated an exercise of

[6] The World Press Trends Indicate the steady growth of print media in India, http://www.wan-press.org/article17377.html [accessed on 13 February 2012]. India is now ranked 4th amongst the list of countries by number of television broadcast stations, CIA World Fact book, Field Listing: Television Broadcast stations, https://www.cia.gov/library/publications/the-world-factbook/fields/2015.html [accessed on February 13, 2012] In addition to this the internet is also gaining popularity with increasing number of users over the last decade. http://www.internetworldstats.com/asia/in.htm [accessed on: 14 February 2012]. The massive growth potential of media convergence has also been projected, *The Indian Entertainment and Media Industry, A Growth Story Unfolds*, http://www.pwc.com/en_IN/in/assets/pdfs/indian-entertainment-media-industry-growth-story-unfolds.pdf [accessed on: 14 February 2012].

[7] The Delhi High Court recently ordered the major social networking websites to "remove all obscene content" from it's websites, http://www.firstpost.com/india/we-can-block-websites-like-china-if-steps-not-taken-delhi-hc-180346.html [accessed on: 18 January 2012]. The Court summoned the executives of the websites and threatened a China like blockade of the websites if such content is not removed, http://www.hindustantimes.com/technology/SocialMedia/We-ll-do-a-China-HC-warns-Facebook-Google/Article1-796243.aspx [accessed on: 1 January 2012].

[8] *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

judicial standard setting. The next section makes a survey of how the judges took to the task of defining what was obscene.

THE STATUTES ON OBSCENITY: OF EMPTY SHELLS AND SOME JUDICIAL WORK

A. Statues that deal with the notion of "obscenity"

Numerous statutes have provisions that touch upon the concept of Obscenity.[9] However, attention here is primarily placed on the provisions of the Indian Penal Code as even the other statutes would depend on the Code to give content to the word 'obscene'. The principal provisions of law concerning the criminalization of publication and circulation of materials with obscene content are Sections 292 – 294 of the Penal Code of 1860. Section 292 punishes the publication and dissemination of materials that are obscene and section 293 provides for an enhanced punishment for distribution of obscene materials to persons who are below 20 years of age. Both these provisions were substantially amended in the year 1925, pursuant to India's participation in the International Convention for Suppression of Traffic in Obscene Literature, 1923. [10] However, Section 292 in its 1925 form lacked any definition of obscenity and the Courts in India were taking recourse to the English Common Law test of Obscenity as laid down in Hicklin's Test [11] to elaborate on the concept.[12] The section punishes inter alia

[9] Section 20 of the Post Office Act of 1898, which however uses the word "indecent". In *Nathuram Varma* v. *Secy. of State*, AIR 1930 Lah 552, "indecent" was held to be, quoting with approval the Oxford dictionary, 'Offending against the recognized standards of propriety and delicacy, highly indelicate, immodest, suggesting or tending to obscenity'.; The Customs Act, 1962 contains provisions to prevent the importation of articles that are obscene; The Indecent Representation of Women (Prohibition) Act, 1986 does not use the expression 'obscene', however, it is clear that the subject matter covered by the legislation is directly concerned with notions of obscenity .The expression 'indecent representation' of women is defined by S. 2 (c) of the Act as 'the depiction in any manner of the figure of a woman; her form or body or any part thereof in such 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'. Notably, the Act reproduces the exceptions under the Penal Code; The Cinematograph Act has no direct provisions relating to obscenity. However the mechanisms of pre-censorship and certification is used to prevent *inter alia* the spread of obscene Materials. Section 3 (c) of The Dramatic Performances Act, 1876 empowers the government to prohibit the performance of any 'play, pantomime or other drama' which in its opinion is 'likely to deprave and corrupt persons present at the performance'. Section 67 of the Information Technology Act, 2000 borrows the definition of obscenity from section 292 of the Penal Code to punish the spreading of obscene materials over the internet.

[10] It is worth to take note of that S. 98 of the then Code of Criminal Procedure was also amended to empower a magistrate to enter and search premises with a warrant and take possession of obscene materials.

[11] (1868) L.R. 3 Q.B. 360.

(i) The sale, distribution, circulation, exhibition and possession with a view to sell, any obscene articles; and

(ii) Its import, export or conveyance for the purposes aforesaid;

(iii) Taking part or receiving profits out of a business that such person knows to be connected to obscene articles ; and

(iv) Advertising the sale of such articles and offering to do any acts contrary to the section.

In its 1925 form, the section admitted of only one exception: the keeping of such articles used bona fide for religious purposes and engravings or sculptures on temples or on cars used for religious purposes. Quite notably, the section did not provide lack of knowledge as to the contents of the article being sold or the lack of intention on the part of the accused as a defense to the charge. This was highly unfortunate in a country like India with numerous languages, diverse cultures and low rates of literacy. It was only after the passing of the Obscene Publications Act in England in 1959 (and perhaps owing to unsatisfactory and the widely criticized judgment in Lady Chatterly Lover's Case[13]) that the legislature saw a need for reform. Thus a select committee was appointed under the chairmanship of Akbar Ali Khan in 1963. The recommendations made by the committee resulted in the passing of Act 36 of 1969, which brought about several significant changes in the provision. The 1969 amendments sought to bring clarity on the concept of obscenity. According to the amended provision, an article was obscene if "it is lascivious or appeals to the prurient interest or if its effect" or where it comprises of two or more items, the effect of one of any of the items if taken as a whole is "to tend to deprave and corrupt persons" who may come into access of those articles. Notably, the scope of exceptions were considerably expanded with articles published in the interests of 'science, literature, art or learning or other objects of general concern' being exempted. Representations on 'ancient monuments' within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 were also exempted.

[12] The *Hicklin Test* and its adaptation by the Indian courts shall be discussed in the next section.

[13] *Ranjit D. Udeshi* v. *The State of Maharashtra*, AIR 1965 SC 881.

S. 294 of the Code punishes the doing of an obscene act or singing of an obscene song in a public place – a provision that can be possibly used against dramatists and Stage Performers.

Section 67 of the Information Technology Act 2008 adopts the definition of obscenity in the Indian Penal Code and penalizes it's transition or publication. Section 67A penalizes the transmition or publication of any material with sexually explicit act or content. Both these provisions are however subject to the exceptions carved out by S.67B which gives the same set of exceptions carved out by clause (a) to Section 292 of the Code. Notably the requirement in the penal code that where the content in question comprises of two or more distinct items, the effect of any one its items is to be considered in isolation is dispensed with. This then can only mean that the totality of the content is what needs to be considered. Since, the definition of Obscenity and it's exceptions in the Act are same as that of the Penal Code, the judgments under the Penal Code Continue to be of relevance to determine what is Obscene.

The Cable television Networks Rules, 1994[14] prohibits the showing of anything that is obscene[15] or that which makes an indecent representation of women.[16] Stipulations are made in the case of advertisements also, by Rule 7.[17] However, the Rules do not lay down what amounts to obscenity. This then takes us back to the Penal Code's definition of obscenity. Similarly, the Direct To Home[18] Guidelines (DTH)[19]also mandate the operator to ensure that his facilities is not being used to run any obscene content.

[14] Framed under the Cable Television Networks Ordinance, 1994, subsequently passed by the legislature as an Act in 1995. Interestingly, the statement of objects of the Act state that that cable TV constituted a 'cultural invasion' as cable programmes were predominantly western and alien to Indian culture and way of life. It declared that the lack of regulation had resulted in undesirable programmes and advertisements being shown to Indian viewers without any censorship.

[15] Rule 6 (d).

[16] Rule 6 (k). Though the rule makes no explicit reference to this, in substance that is what the rule deals with.

[17] Which prohibits advertisements that make an indecent representation of women or is indecent or vulgar.

[18] Direct-to-Home (DTH) Broadcasting Service, refers to the distribution of multi-channel TV programmes in Ku Band by using a satellite system by providing TV signals direct to subscribers' premises without passing through an intermediary such as cable operator

[19] Guidelines for Obtaining License for Providing Direct-To-Home (DTH) Broadcasting Service in India,

As regards the internet, The Rules[20] framed by the Central Government under the under Section 69A[21] of the Information Technology Act empowers the government to direct the removal of content from internet. The Rules envisages a designated officer (who shall be an officer of the Central Government not below the rank of a joint secretary)[22] to entertain a request for blocking only from Government Agencies or from the Court, as a result of a judgment.[23]

As one can see, all these statues merely prohibit or criminalize the sale, distribution, publication or performance of what is obscene, without not once providing a guideline for how to determine what is obscene. This then was a judicial task which involved the application of some objective standards of judging. What are these standards and how did we arrive at them? This is the next question that needs examination.

B. The First Time - Lady Chatterley's Lover and The Supreme Court

As was noted in the previous section, the 1925 form of Section 292 did not define the word 'obscenity'. Consequently, in its quest for standards to determine liability, the courts, as was the practice then, chose to follow the then popular and prevalent Common Law standards propounded in *Queen* v. *Hicklin*[24] **(**the "Hicklin Test") to determine what was obscene. The test asks "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral

[20] The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

[21] Which is apparently the provision that empowers the Central Government to block access to content on internet that contains obscene materials. However, it is argued that the provision grants no such power as the enumerated grounds for the exercise of the power are : Sovereignty and integrity of India, defense of India, security of the state, friendly relations with foreign state or public order or to prevent the incitement to the commission of any cognizable offence relating to above. If the expression "relating to above" means only the grounds enumerated within the section, then it would be hard to conclude that there exists any such power. However, if it means a reference to all penal provisions that come in that chapter(which would be a more teleological approach) , one may be able to make a better argument for the existence of the power.

[22] Rule 4 of The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules

[23] Rule 6 of *ibid*.

[24] (1868)L.R.3Q.B.360. The text of the judgment can be accessed at http://en.wikisource.org/wiki/Regina_v._Hicklin [accessed on: 17 July 2001].

influences".[25] If it answered yes, then the matter in question was to be considered as obscene. Though the 1925 form of the statute had carved out only one exception, i.e. articles used for bona fide religious purposes, the courts in India mitigated the rigors of the provision to some extent by recognizing a limited defence of public good and thus saving some articles from being called obscene *per se*. Thus authors who made reference to sex in medical works[26] or made works that were circulated only amongst a certain class of persons[27] were saved from prosecution under the provision. In some cases, works of a classic nature which were found to be of artistic value were also saved.[28] However, Hicklin's Test suffered from several flaws: To begin with, the test permitted particular passages to be considered in isolation or in other words that the totality of the work needs to be considered. Thus the existence of isolated portions in a book that could be termed 'obscene' could leave an artist susceptible to prosecution. Secondly, the use of the test meant that the influence of the article in question on a particularly susceptible group of persons received an undue consideration.

It was only in 1964 that the Supreme Court of India found an occasion to deal with the limits of artistic expression vis-a-vis obscenity. In *Ranjit D. Udeshi* v. *The State of Maharashtra*[29] the court was invited to consider the correctness of convicting a book seller who sold an unexpurgated copy of Lady Chatterley's Lover authored by D.H. Laurance. Though in several countries (including the United Kingdom) the book had escaped condemnation and prosecution, the Supreme Court held that book to be obscene, applying and upholding the Hicklin's Test. From the very beginning, by stating that "The word obscenity is really not vague because it is a word which is well-understood even if persons differ in their attitude to what is obscene and what is not"[30], the court was also mindful of the fact that "Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of

[25] Cockburn, J, *ibid*.

[26] *Emperor* v. *Harnam Das*, (1946) 48 Cr.L.J. 910, which involved references to sex while dealing with marriage in a medical context.

[27] *State* v. *Girdharlal T. Popatlal*, [1954] 57 Bom.L.R. 452.

[28] *Kherode Chandra Roy Chowdury* v. *Emperor*, (1911) I.L.R. 39.
[29] *See supra n.13.*

[30] *Ibid*, at para. 9.

degree or as the lawyers is accustomed to say, of where the line is to be drawn."[31] Lamenting about the impossibility of lying down of any "true test" to determine what is obscene, Justice Hidayathulla (1977: 284-285)[32] observed:

> *"The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross[33]"*

However, room was sought to be left for expression of art, observing that 'It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more.'[34] But when invited to discard the Hicklin's Test in favor of the more recent American doctrines, the same was rejected.[35] The court reasoned that whether a work of art is obscene or not would have to be worked out on a case to case basis and that courts would do that keeping in mind the contemporary moral standards prevailing at the relevant time. Further, though it was held that the totality of the work needs to be considered for determining whether the matter is obscene, the dictum in the Hicklin's Test that the alleged obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity was retained. Thus, portions of a book that had obscene content continued to be punishable under the Penal Code. Notably, the evidence of Mulkraj Anand, a prominent writer and an art critic on the literary merit of the novel was also held to be of not much

[31] *Ibid.*

[32] With whom the rest of the court concurred. It is interesting however to note that Justice Hidayathulla later claimed that personally he thought that the book was not obscene, however he wrote that opinion as it was the opinion of the other members of the bench. *See* M Hidayathullah, 'Thoughts on Obscenity', *(1977) 2 Illinois University Law Journal 284,* at. p.285.

[33] *Supra n.13,* at para.16

[34] *Ibid*

[35] *Manual Enterprises Inc.* v. *J. Edward Day*, 370 U.S. 478, was rejected stating that there was little concurrence in the court and hence it was of 'little opinion value'. The same was said of *Nico Jacobellis* v. *State of Ohio*, 378 U.S. 184 (1964). *See* Ranith D, *Supra n.36* at para. 12; *Samuel Roth* v. *U. S. A.*, 354 U.S. 476 was rejected as the court found that to be the test of "hard core pornography" which was held to be of no relevance to interpret the Penal Code. Further, it was also noted that there was a lack of a uniform approach within the court.

relevance, holding that it was for the court to decide on the element of obscenity of the work with reference to the Penal code and the Constitution. Further, the contention that to convict the author had to have 'an intention to corrupt the minds of the public in general' was also repelled, observing on the near impossibility of proving such a state of mind.

C. And Elsewhere in the Meanwhile…

Before continuing with the analysis of the work of the Indian Supreme Court, it is worthwhile to take a short break to study the developments in this branch of law in two foreign jurisdictions that continued to punish obscene acts and publications, The USA and the UK. The survey is of importance as most frequently, lawyers have cited judgments from these jurisdictions in support of arguments for a broader test of obscenity and the courts from initially being reluctant to follow them gradually adopted them.[36] This chapter takes a limited survey of those key cases that brought about a change in standards by which obscenity was judged and that which were frequently relied on by counsels.

Both of the aforesaid countries had rejected the Hicklin's Test. In USA, the courts evolved new doctrines and in the UK new statues were being introduced. By 1933, a federal court in America had refused to follow a most basic part of the Hicklin Rule: that a work had to be judged by its effect on the most susceptible members on the society. Dealing with the question on Ulysses (authored by Jamce Joyce, the work is considered by many as a modern classic) the court rejected Hicklin's Test, under which the work would have to have been treated as obscene. The court propounded that the work must be judged based on its effect on the most average members of the society and not on persons who are particularly susceptible.[37] The ruling was upheld by the U.S. Court of Appeals the next year.[38] According to Overbeck (2004: 300) by the 1950s most courts in USA had already abandoned the Hicklin Test and had adopted the test propounded in the Ulysses Case.[39] However it was only in 1957 that the US Supreme

[36] Right From *Ranjith Udeshi* (*supra n. 13)* where five foreign judgments were relied on, in almost every major case the counsels have relied on precedents from United States and Britain to further their cases. 21 such Judgements were discussed in *K.A. Abbas (infra n.54*) and 4 and 2 respectively in *Ajay Goswami* (*infra n.73*) *and Samaresh Bose* (*Infra n.64).*

[37] Wayne Overbeck, *Major Principles Of Media Law,* Poverty Hill Books, 2004 at p.300.

[38] *United States* v. *One Book Entitled Ulysses* by James Joyce, 72 F.2d 705, 706 (2d Cir. 1934).

[39] See Wayne Overbeck, *Supra* n. 37, at p.300.

Court had an occasion to deal with the question. In its first deviation from the Hicklin Principle, The court struck down a law that prohibited the sale of books that might incite minors or corrupt them, thus effectively holding that merely that the materials in question would tend to harm a section of the society could not be reason enough to ban them.[40] However, it needs to be taken note of here that the court did not dwell deep into the question what could be called obscene or otherwise -the question was whether such obscene materials could be banned from public circulation.

The landmark decision that propounded a fresh test for obscenity came in the same year in *Roth* v. *U.S.*[41] Though the validity of statutes that prohibited the dissemination of obscene materials was upheld[42], the court propounded a new standard for judging what was obscene: "whether to the average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interest". The court ruled that the Hicklin Test violated the principles of the 1st Amendment as it permitted the judging of obscenity by the effect of isolated passages on the most susceptible persons.[43]

In a decade's time, the Roths Test[44] was further expanded with the requirements of "Patent Offensiveness" and the work being without any redeeming social value being additional requirements. Finally, in the 1973 decision in *Miller* v. *California*[45] the Supreme Court propounded a new 3 point test for determining obscenity, effectively doing away with the century old Hicklin Test. The new test that was evolved was:

[40] *Butler* v. *Michigan*, 352 U.S. 380 (1957).

[41] 354 U.S. 476 (1957).

[42] Justices Black and Douglas dissented, stating that the First Amendment protects even Obscene Materials.

[43] The *Roth's Test* was not however without it's share of shortcomings. Determination of "Contemporary Community Standards" had given rise to fresh set of issues which had given rise to a lot of controversy on whether obscenity must be judged based on a national standard or whether to adopt region wise standards on a case to case basis. After a series of conflicting judgments, the issue was put to rest in *Miller* v. *California*, 413 U.S. 15(1973), ruling in favour of national standards. For a general discussion on this aspect See: Overbeck, W., *Supra n.37*, at pp. 401-403.

[44] *Samuel Roth* v. *U. S. A.*, 354 U.S. 476.

[45] 413 U.S. 15 (1973).

1. whether the average person, applying contemporary community standards…. would find that the work, taken as a whole, appeals to the prurient interest;
2. whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Thus the concept of "redeeming social value" was abandoned in favour of "serious literary, artistic, political or scientific value", which was something broader and easier to prove for a defendant in a criminal proceeding. The above test has ever since remained in force.

In the UK, the Hicklin Test that held field for more than a century and publication of obscene materials remained an offence under common law. However, in 1959, the Parliament Enacted the Obscene Publications Act. According to the Act an article is deemed to be obscene "if its effect or where the article comprises of two or more distinct items, the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the manner contained or embodied in it."[46] The definition had in substance retained the test laid down in Hicklin. However, the Act introduced public good grounds as a defense to the charge.[47] Further, in England, unlike in India, it is a jury that decides whether the matter in question is obscene or not, thus introducing community standards of determination, rather than the judgment being made by a lone judge. Furthermore, Section 4 (2) of the Act specifically made admissible the opinion of experts as to the literary, scientific, artistic or other merits of an article – to prove or negate such grounds. In 1961, the Famous Publishing house Penguin Publishers was charged under the Act for the publication of Lady Chatterly's Lover. Applying the Hicklins Test, the result ought to have been a conviction. However, the jury chose to acquit. The case also laid down an important principle that evidence relating to other books are also relevant and admissible to establish the 'climate of literature', which is

[46] The Obscene Publications Act 1959, Section. 1(1).

[47] *Ibid*, Section. 4.

relevant in determining the literary merit of the article in question.[48] Similarly, by 1969 the courts evolved the rule that in considering the defense of public good, the jury was to consider on one hand the number of readers that would tend to be "depraved and corrupted" by the publication, the strength of the tendency to so deprave and corrupt and it's nature; and on the other the strength of the literary, scientific, artistic, sociological or ethical merit that the book prophases to have. It was only after a balancing of these two factors, the question of obscenity was to be decided.[49]

Thus both the USA and the UK had discarded or qualified the Hicklin Test by the end of 1960's and evolved new tests or introduced several exceptions. In England, though the statue essentially continued to carry the concept of obscenity propounded in Hicklin, the prevalence of the jury system, expert evidence and new rulings created the atmosphere that ensured judging by community standards.

With this in the background, the next section continues the study of the major decisions in which the supreme court of India dealt with prosecutions of persons who were alleged to have published or disseminated obscene materials.

D. Watering Down The Hicklin Test: From Udeshi To Goswami

Within 5 years after Udeshi was decided, the Supreme Court had chanced once again on the question of artistic freedom vs. Obscenity. In *Chandrakant Kalyandas Kakodkar* v. *The State of Maharashtra*,[50] the Court considered the question of obscenity in a novel that centered on the life and times of a revolutionary poet. The objectionable content there was the descriptions of the sexual relations that the protagonist chanced upon. Notably, this was a private prosecution that resulted in a verdict of conviction by both the trial and the High courts. Quoting extensively from Udeshi on the position of law, the Supreme Court however made an important and nearly new requirement. It was observed that :

[48] *R.* v. *Penguin Books Ltd*., [1961] Crim LR 176. As quoted in *Halsbury's Laws of England*, Voll 11(1), at para.357, n.6 (1990).

[49] *Ibid*.

[50] AIR 1970 SC 1390.

> *"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[51]". (Emphasis supplied)*

"An overall view of the entire work" was the words that now qualified the Hickiln's Test, and this was an important step ahead. Because, the Hicklin's Test stipulated even consideration of isolated passages to affix criminal liability, the Supreme Court now directed consideration in the overall scheme of things. With that the author, though he was found to be a poor one and the novel not of much literary quality, was let off with an observation at the tail end of the judgment that the standards of contemporary society in India are also fast changing. "The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance.'[52] Though the Hickiln's Test was not wholly discarded, it was 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 thought aroused in their minds".[53]

The next occasion came a year later in *K.A. Abbas* v. *The Union of India*[54] where the objectionable content was in a film. The petitioner there produced a film that sought to explore the contrasting standards of life of the urban rich and the poor. Inter alia the movie contained scenes of the red light districts of Bombay, of prostitutes there soliciting for prostitution and the life of prostitutes was depicted in a symbolic manner. When the petitioner approached the censor board for a 'U' certificate under the Act, the same was rejected and so he approached the Central Government which was the appellate authority under the Act. The Central Government was prepared to grant a 'U' certificate, provided however that certain scenes, in particular the scenes that depicted the life and living of the prostitutes were removed. The petitioner then approached the

[51] *Ibid* at para.5.

[52] *Ibid* at para. 13.

[53] *Ibid.*

[54] MANU/SC/0053/1970.

Supreme Court under Article 32, complaining of a violation of his fundamental rights. Justice Hidayathulla (who was now the Chief Justice) authored the judgment. An important feature of the judgment was the elaborate references which it made to the American Jurisprudence on the Subject.[55] This was in stark contrast to Udheshi where there was a lot of reluctance to rely on the American precedents cited.[56] It was observed that 'Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral'.[57] and that 'Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read'.[58]

A decade later, Raj Kapoor, an eminent film maker found himself being prosecuted for his home production 'Satyam Sivam Sundaram', a movie that contained several scenes that some members of the public felt to be obscene. Though the film was granted certification for public viewing, Raj Kapoor faced members of the public initiating private complaints against him at various places. In *Raj Kapoor* v. *The State and Others*[59] Justice Krishna Iyer rejected the contention that a prosecution would not lie in a case where certification had been obtained, holding that it would lie on the court to decide whether the matter was obscene, holding only that the certificate must be taken to be of immense value. At the same time, the great judge observed that "The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies."[60]

[55] *See ibid* at paras. 22-35. A good number of decisions of the Supreme Court of America relating to the scope of the right offered by 1st Amendment and pre –censorship was discussed. It was concluded that films are entitled to the protection of the 1st Amendment, however in cases of clear and present danger and on fulfilling the requirements of the *Roths Test* (*supra*) prior and and subsequent restrains would be imposed. However, the court also observed that "The attitude of the Supreme Court of the United States is not as uniform as one could wish." (at para35).

[56] *Ranjith D. (Supra n. 13)* at paras. 12, 22.

[57] *Ibid*, at para.50.

[58] *Ibid.*

[59] AIR 1980 SC 258.

[60] *Ibid* at para.7.

However, in less than two months' time, in *Raj Kapoor* v. *Laxman*[61] the said position was reversed, holding that a certificate under the Cinematograph Act would be a bar to prosecution under s.292 of the Penal Code. It was reasoned that though the ingredients of s.292 were prima facie made out, with the receipt of the certificate the display of the film would stand justified in law and hence protected by s.79[62] of the Penal Code.[63] Quite notably, it was the same bench that reversed the earlier proposition, and the case also related to the same party and the same film.

The decision that finally brought a sea of change in the law relating to obscenity and pitched the need to adopt more liberal standards in judging works of art was arrived in *Samaresh Bose* v. *Amal Mitra & Anr*.[64] The appellant there was a prominent Bengali author, whose novel 'prajapathi' was accused of being obscene. The said novel was published in a popular Bengali magazine and a young lawyer who found the contents of the novel to be obscene set the criminal law in motion against the author and publisher. Both the trial court and the High Court concluded that the novel was obscene and convicted the author and the publisher, which was reversed by the Supreme Court in appeal. In stark contrast from the approach in Ranjith D. Udeshi[65] that the author's intentions were irrelevant, the Court held that:

> *"In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers[66]" (Emphasis supplied)*

[61] AIR 1980 SC 605.

[62] S.79 reads: "Nothing is an offence which is done by any person who is justified by law, or who reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it."

[63] In 1981 the Cinematograph Act was amended vide Act 49 of 1981, which introduced Section 5A. The proviso to S.5A(b) maintains that no prosecution would lie under any law relating to obscenity for any matter contained in a film for which certificate under the Act has been granted.

[64] AIR 1986 SC 967.

[65] *See* Ranjith D, *See supra n.13.*

[66] *Ibid* , at para.35.

The emphasized portion was one of those 'leaps' in law, whereby the intentions of the author was sought to be given some space .The book used several slang words and further contained details of sexual unions and descriptions of female body with sexual overtones. The court however held that all these by themselves cannot constitute obscenity as these references and descriptions were to be understood in the context in which they were written. The court found that they were perhaps vulgar but that "a vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion…but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt…."[67] Another important result of the judgment was that more room was made for the opinion of experts on the literary field. In that case the defense counsel had examined two prominent critics of Bengali literature who deposed as to the artistic value of the novel. Though the law was that the opinion of experts was to have little bearing on deciding the question of obscenity and that the court was to form its own opinion, taking a step forward the Supreme Court held that it was proper for courts to rely to a certain extent on the evidence and views of leading litterateurs on the aspect particularly when the book is in a language with which the court is not conversant.

A decade later in *Bobby Art International* v. *Om Pal Singh Hoon*[68] the Supreme Court was called upon to decide on whether the controversial and acclaimed film 'The Bandit Queen' was obscene or not. The movie was about the life story of the infamous dacoit – turned politician Phoolan Devi. It contained several nude scenes and depictions of rape, sex and violence along with murder, bloodshed, abusive words and language. The movie was granted an 'A' certificate by the censors (conditional on certain cuts being made) which on appeal the appellate tribunal confirmed (however with much lesser cuts that what was directed by the board). However the release of the film was sought to be stifled by some private members, who initiated prosecution on the grounds that the film was obscene and a writ petition was filed challenging the certificate issued to the film. The Delhi High Court allowed the writ petition and quashed the certificate granted, against which appeals were filed before the Supreme Court. Making a significant deviation from the cases before, it was observed that:

[67] *Ibid* at para.41.

[68] AIR 1996 SC 1846.

> *"Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favor of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good.*[69]*" (Emphasis supplied).*

Following the dictum in Samaresh Bose[70] it was held that the film was to be viewed in its entirety and scenes must not be considered in isolation to judge whether they were obscene. The nude scenes and the violence and rape in the movie were held to be justified considering the totality of the movie – which was based on the true life story of Phoolan Devi. It was stressed once again that nudity *per se* cannot be held to be obscene. Noting that provision of the statue in question were to be considered in the light of the prevalent social mores of the society, it was observed that 'The relation between Reality and Relativity must haunt the Court's evaluation of obscenity, expressed in society's pervasive humanity, not law's penal prescriptions'.[71]

The last in the series of the cases on obscenity was *Ajay Goswami* v. *The Union of India*.[72] The Petitioner there was a lawyer, who initiated a Public Interest Litigation seeking interference from the Court to ensure that minors are not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. According to the petitioner, the news items published in various newspapers contained suggestions of sex, jokes with sexual connotations and pictures of scantily clad (or naked) women with captions that had a 'double meaning'. In addition to this, he complained of the articles and responses to letters by various sexologists which contained discussions on various matters relating to sex. The petitioner found this scandalizing and to be capable of corrupting the mores of the children and prayed for the intervention of the court to prevent the spread of such materials. The court taking note of the mechanism under the Press Council of India Act and the norms framed there under and the provisions of the Indian Penal code held that there did appear to be a vacuum of effective regulation of the print media. However, the fundamental right to

[69] *Ibid* at para.49.

[70] AIR 1986 SC 967.

[71] *Ibid.*,at para.49.

[72] AIR 2007 SC 493.

freedom and expression was held to be above such considerations. Once again, authorities from the United States were cited and relied on to explain the ambit of the freedom of speech and expression.[73] Making a comprehensive survey of the Indian Case law too, the Hicklin Test as modified by the subsequent cases was held to continue to be standards by which obscenity was to be judged. Quite notably, the court called upon the members of the public to be 'less sensitive' and demanded a culture of 'responsible reading' from the members of the public – that the publication has to be read as a whole and news items and advertisements are to be understood in their context. The writ petition was dismissed holding that '…. we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law." and that "Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person'.[74]

E. Continuing With The Run: Developments Post - Goswamy

Ajay Goswami[75] was the last time the Supreme Court commented on Obscenity and the law. However, an important further step in mitigating the rigour of the law by the Delhi High Court. In *Maqbool Fida Hussain* v. *Raj Kumar Pandey*[76] the High Court while considering a work of prominent artist M.F. Hussain propounded a more liberal approach. The Court held that

> *"The legal test of obscenity is satisfied only when the impugned art/matter can be said to appeal to an unhealthy, inordinate person having perverted interest in sexual matters or having a tendency to morally corrupt and debase persons likely to come in contact with the impugned art.[77]" (Emphasis supplied)*

[73] *See ibid* at paras. 33-35 and 47.

[74] *Ibid*, at para.47.

[75] See *supra n. 72.*

[76] 2008 CriLJ 4107. Private Criminal Proceedings were initiated against prominent artist M.F. Hussain for a picture that he composed. The picture was that of a nude women with her hair flowing from the Himalayas. Hussain had soldthe painting untitled and some years later it came up for auction with the title "Bharath Matha: Hussain denied having given such a title to the painting. The Delhi High Court quashed the proceedings, noting that the painting in question could not be considered as obscene.

[77] *Ibid*, at para.70.

It is submitted that the same is not in line with the decisions of the Supreme Court, which still demands the test in terms of an "ordinary person." Further the Delhi High Court has also propounded a shift from the over emphasis on the effects on the consumer of art/literature and has laid down that:

> *"The judge also must not apply his more liberal or conservative view in determining this aspect but should place himself in the shoes of the painter and endeavor to decipher the theme and thought process of the painter who created the painting. It would always be prudent for the judge to err on the side of a liberal interpretation giving the scheme of our Constitution.[78]" (Emphasis supplied).*

Hopefully the Supreme Court would adopt this line of thinking as the same would be more accommodative of artistic interests.

Though the general trends of the Constitutional Courts has been to be liberal and allow more room for creative expression,[79] it is seen that very often the members of the public has used the law of obscenity to harass artists and performers by initiating criminal proceedings before the trial courts and with the police.[80] This is because without adequate standards and clear guidelines what is obscene for one judge or court may not be so for another and precisely here lies the threat to freedom of speech and expression. It is thus seen that ultimately it has been for the judges to decide what is obscene and what is not within the framework of the section, making the result of a prosecution dependant heavily on the attitude of the judge concerned.

---

[78] *Ibid*, at para 101.

[79] *See*: The Judgment of the High Court of Delhi in *Vinay Mohan* v. *Delhi Administration*, 2008 CriLJ 1672: wherein it was held that the pictures of a nude/semi-nude woman cannot *per se* be called obscene; *S. Khushboo* v. *Kanniammal & Anr.*, (2010) 5 SCC 600; The judgment in *Sada Nand and Ors.* v. *State (Delhi Administration), MANU/DE/0242/1986* would be of particular interest: The Court quashed proceedings against the printers and publishers of Debonair magazine holding that, though the magazine contained pictures of nude women that were published with the sole aim of attracting persons with a prurient mind and they lacked any artistic or aesthetic qualities, it could only be termed vulgar and relying on Samaresh Bose, *Surpa n.50*, it was held to be not obscene just because it was vulgar. In *T. Kannan* v. *Liberty Creations Ltd*, MANU/TN/8161/2007, the Madras High Court dismissed a writ petition that challenged the exhibition certificate granted to a biopic on E.V. Ramasamy, alleging that a song in the movie had lyrics that made vulgar criticisms of Sita, the wife of Lord Rama.

[80] *See supra n.3.*

REGULATING THE MASS MEDIA

The call to remove/block from internet and the social networking websites (and all of media) must be judged against the backdrop of all these developments brought forth by case laws over five decades. This then also raises more questions on the competency of the persons to determine whether it is obscene and the procedure to be adopted by them. The Rules[81] framed by the Central Government to invoke the powers under Section 69A of the Information Technology Act envisages a designated officer (who shall be an officer of the Central Government not below the rank of a joint secretary)[82] to entertain a request for blocking only from Government Agencies or from the Court, as a result of a judgment.[83] The Rules also contemplate hearing the persons who have uploaded the content or the intermediary before blocking the content.[84] Thus a case by case determination would be required before any content can be blocked and the parties would have to be heard and be allowed to adduce evidence in support of their stand and more importantly, whether it is obscene will have to be determined in the light of the case laws discussed above.

The same must then also apply to the cable television networks and the broadcasting media. It is seen that courts have often taken a proactive role to ensure that television and broadcasting is kept clean from obscene materials. In 2004, the Rajasthan High Court suo motto initiated proceedings to deal with the 'depiction of women in an undignified manner by the media'.[85] The court issued directions to ensure coordination between the governments and the monitoring agencies and reminded that strict action was to be taken in the case of violation. In 2006, the Bombay High Court in a public interest litigation held that the cable television operators could not air content that was unsuitable for unrestricted public viewing and that their right to trade and commerce is not impeded by this restriction.[86] However, in such cases scant attention has been paid to the inherent difficulties in determining whether or not the content is obscene or

[81] The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

[82] Rule 4, *ibid*.

[83] Rule 6, *ibid*.

[84] Rule 8, *ibid*.

[85] *Suo Motto* v. *State of Rajasthan*, AIR 2005 Raj 300.

[86] *Pratibha Naitthani* v. *Union of India*, AIR 2006 Bom. 259

indecent. As stated before, since none of these regulations define what is obscene, the stipulations in the penal code would continue to guide the determination. This then gives another reason for the immediate need to update the definition in the penal code in line with the developments brought forth by case law.

CONCLUSIONS

The Supreme Court has over time watered down the rigorous Hicklin Test, introducing exceptions and qualifications, which was in some cases contrary to the language of the words of the statue. The first time it was cited in Ranjit D. Udeshi[87], the Roths Test itself was of doubtful authority with several opinions that called for different standards.[88] At that juncture our Supreme Court held that it was the test of hard core pornography and hence improper to adopt the same for interpreting the provisions of the IPC and went on to adopt the test of 'obscenity, without a preponderant social purpose or profit cannot have the constitutional protection of free speech and expression'.[89] However, over the years we find a gradual shift from an initial reluctance to accept the American authorities to a more accommodative view of the same, especially with the Roths test and its subsequent modifications gaining a firmer footing in American Jurisprudence.

However, notably, S.292 of the Indian Penal Code or any other law lacks a test of obscenity in line with the developments in case law. This then leaves the judge with the Hickilin Test which leaves plenty of room for the judge to decide what is obscene and to bring in his personal convictions in the process. The dangers of such a wide discretion is evident right from the stage of taking cognizance of the matter, especially when we see that all the cases that was discussed in this essay (and as is discernable from the frequent newspaper reports, some of which was cited here) were the result of private prosecutions. A magistrate who receives a complaint alleging the dissemination of obscene materials is guided only by the words of the Indian penal code, which are vague and leaves large spaces for his personal convictions on obscenity to be reflected in his judgment on the issue. Further, there appears to be too much of emphasis on the word

[87] Ranjith D, *See supra n.13.*

[88] Justice Brennan opined that obscenity could not be judged on the effect of an isolated passage or two upon particularly susceptible persons as it would then hit even materials that legitimately treated sex. Justice Warren on the other hand adopted the standard of "substantial tendency to corrupt by arousing lustful desires". Justice Harlan regarded the tendency to direct "sexually impure thoughts" as obscene.

[89] Ranjith D, *See supra n.13* at para.22.

'tendency of the matter' charged as obscene to deprave and corrupt those minds. Here Bhatia (1997: 248) comments that the words 'tendency' and 'tends to' by itself alone without being qualified with an adjective creates a lot of doubt as to whether the obscenity of the matter will be decided objectively and justly keeping in view the people's fundamental right to freedom of speech and expression as is manifested through works of art.[90]

The provision also lays too much emphasis on the readers, especially the adolescents - the intention, motivation and intellectual inclination of the author and the publisher are immaterial. This shows that the writer would have to keep in mind what he produced is not merely for the satisfaction of his intellectual emotions and inspiration but the effect it would have on the people whose minds are open to such immoral influences - which in effect becomes a sort of a pre-censorship on the writer.

Kearns P (2007: 667) argues that the urgency for amendments is more relevant when we consider that at least by practice, the prosecutions of persons for publication of obscene materials has undergone a considerable decline in countries like England.[91] Amendments that direct the consideration of the materials in its entirety and in the context of the intended expression and that which includes the broader categories of exceptions propounded in the Roths Test[92] would be the immediate requirement.

It is no less an interest than the interest of democracy that the statutory provisions relating to obscenity be amended at the earliest to provide more clarity on the concepts of obscenity and discard the century old Hickiln's Test as:

> *"A real democracy is one in which the exercise of the power of the many is conditional on respect for the rights of the few. Pluralism is the soul of democracy…. There should be freedom for the thought we hate. Freedom of speech has no meaning if*

[90] Sita Bhatia, *Freedom Of The Press : Politico- Legal Aspects Of Press Legislations In India*, Rawat Publications, 1997, at p.248.

[91] P. Kearns., 'The Ineluctable Decline of Obscene Libel: Exculpation and Abolition', *(2007) Criminal Law Review 667.*

[92] The scope of *Roths Test* was discussed at *Supra* Ch. III.A.

there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends.[93] ''

[93] Maqbool Fida Huassain, *See supra n.76* at para 113.