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Research Article

Changing Dimensions of Judging Obscenity-An Analysis of Judicial Decisions, India and Abroad

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"We know no spectacle so ridiculous as (our society) in one of its periodical fits of morality".

– Macaulay

Abstract: India is known for its moral values. Obscenity, vulgarity and pornography have no place in the society, but in this era, the age of globalization, it is hard to deal with the menace, rapidly corrupting the youth. The burden to uphold the well established traditions is also on the media. Law has a definite role to play. Restrictions to be imposed must also be within the bounds of fundamental freedoms ensured by the Constitution. The judiciary finds out in a given case as per its facts and circumstances, whether, right to freedom of speech and expression has exceeded the prescribed limits. Certain tests have been laid down by the courts to know what is obscene and what is not. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society, therefore, what is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in India. The present paper is an humble attempt to analyse the law relating to obscenity and to find out the tests propounded in various countries as well as the position in India in order to know whether the material is obscene or not.

Article 39 of the Constitution of India imposes a duty on the State to protect the young against exploitation and moral and material abandonment. Article 19(1) (a) of the Constitution provides that all citizens shall have the right to freedom of speech and expression. Clause (2) of Article 19 makes an exception in favour of any existing law, and also empowers the State to make any law, in so far as such a law imposes reasonable restrictions on the exercise of the right conferred by sub-clause (1) (a), inter alia, in the interests of 'public… decency or morality'. Any act of the State which lawfully and reasonably restrains the publication or possession of "obscene" material in India may be justified under these provisions. Generally speaking, decency means lack of obscenity. The problem, however, is to know that what is obscenity and how to test whether a work is obscene or not? It is difficult to define obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for, however, merely treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more.[1] The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society, therefore, what is considered as a piece of

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[1] Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.

literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in India.[2]

Obscenity and pornography both offend against public decency and morality but pornography is obscenity in a more aggravated form. Both need to be suppressed.

Concept of obscenity

In the Black's Law Dictionary the word 'obscene' has been defined as (something) extremely offensive under contemporary community standards of morality and decency; or grossly repugnant to the generally accepted notions of what is appropriate. And the word 'obscenity' means character or quality of being obscene, conduct, tending to corrupt the public merely by its indecency or lewdness. According to Webster's New International Dictionary, word 'obscene' means disgusting to the senses, usually because of some filthy grotesque or unnatural quality, grossly repugnant to the generally accepted notions of what is appropriate.[3]

In ***Miller v. Callifornia***,[4] the U.S. Supreme Court laid down three-part test. According to the test that a material is legally obscene and, therefore, not protected under the First Amendment if, taken as a whole, the material (1) appeals to the prurient interest in sex, as determined by the average person applying contemporary community standards; (2) portrays sexual conduct, as specifically defined by the applicable state law, in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value.

The Allahabad High Court in ***Kamla Kant Singh v. Chairman/Managing Director, Bennett Coleman and Company Ltd.,***[5] while dealing with the meaning of the word 'obscenity' referred to the 'Jowitt's Dictionary of English Law. The dictionary, explains that "an article is deemed to be obscene, if its effect, or where the article comprises two or more distinct items, the effect of any one of its items if taken as a whole, is to tend to deprave and corrupt persons, who are likely having regard to all the relevant circumstances to read, to see or hear matters contained or embodied in it.[6] It further clarifies that obscenity and depravity are not confined to sex[7].

Tests of obscenity evolved or adopted in various countries

United Kingdom

Earlier in United Kingdom, in ***Regina v. Hicklin***,[8] the test adopted was "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose mind are open to such immoral influences, and into whose hands a publication of this sort may fall." Hicklin gives a complete go by to

[2] Chandrakant Kalyandas Kakodkar v. State of Maharashtra, AIR 1970 SC 1390.
[3] Devidas Ramachandra Tuljapurkar v. State of Maharashtra, CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.
[4] 413 U.S. 15 (1973).
[5] (1987) 2 AWC 1451.
[6] R. v. Claytone and Hasley, (1963) 1 QB 163, R. v. Anderson, (1972) 1 QB 304.
[7] See John Calder Publications v. Powell, (1965) 1 QB 509.
[8] LR 1868 3 QB 360, by Cockburn C.J.

the principle of "mens rea" and is based on the concept of presumption[9] which deviates from the basic principles of criminal law.

In ***R. v. Martin Secker & Warburg LD***,[10] Stable J. did not approve the test laid down in Hicklin case (infra). He observed that the test of obscenity was laid down in 1868, but that did not mean that the book (allegedly containing obscene material) was an obscene book by the standards of nearly a century ago, because one has to decide whether the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in England. The function of the Judge is not to express his own opinion about the work in question as he tries a criminal charge and in a criminal court, the accused cannot be held guilty unless, on the evidence the charge against him are proved, he said.

He emphasized on the point that the charge was a charge that the tendency of the book was to corrupt and deprave and not that the tendency of the book was either to shock or to disgust, which was not a criminal offence. Here, the question arises- "Well, corrupt or deprave whom?" The judge did not agree with the solution suggested by the test: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. He posed a question: Can the literary standards be taken to a level of something that is suitable for children only? He answered in negative. A publisher cannot be held guilty of a criminal offence for making certain works of literature available to the general public only because it is wholly unsuitable for reading by the adolescent. He said that pornography cannot be tolerated, but while having a zeal to make and preserve a healthy society, the criminal law cannot be stretched too far, than it ought to be, otherwise there will be a risk of revolt, a demand for a change in the law. On the basis of above mentioned discussion, Stable, J. held the accused not guilty.

In England, the Obscene Publication Act, 1959 was enacted to amend the law relating to publication of obscene matters. It provided for the protection of literature and to strengthen the law concerning pornography. Sub-section (1) of section 1of the Act provides that for the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises 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 matter contained or embodied in it. Section 4 of the Act makes an exception in favour of a person accused of obscenity if the publication in question is justified for public good as it is in the interest of art, literature, science, etc. Applying the standards, in ***R. v. Penguin Books Ltd***.,[11] the Court upheld the publication of the book 'Lady Chatterley's Lover' by the Penguin Books.

United States of America

[9]See the Article by J.E. Hall Williams in Obscenity in Modern English Law, 20, Law and Contemporary Problems (1955): 630-647 referred to in Devidas Ramachandra Tuljapurkar v. State of Maharashtra, CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.
[10] (1954 1 WLR 11 1138. Referred to by the author (see the footnote above).
[11] [1961] Crim. LR 176.

Obscenity or alleged obscenity has been the subject of several decisions of the Courts in the United States. Hicklin rule[12] was rejected by the U.S. Supreme Court in 1957 in ***Butler v. Michigan***,[13] while holding that condemning the adult people for reading only what children might safely read was unconstitutional. In the same year, the Court delivered an important decision in ***Samuel Roth v. United States of America***,[14] in which it was made clear that sex and obscenity are not synonymous and obscene material is the material which deals with sex in a manner appealing to prurient interest. The question before the Court to decide was whether the Federal Obscenity Statute violated the First Amendment of the US Constitution which guaranteed freedom of speech and the Court held that obscenity was not within the area of constitutionally protected speech or press.[15] Justice William Brennan said[16] that while all ideas having even the slightest redeeming social importance are entitled to the full protection of the First Amendment, obscenity and pornography were not included within that protection. The Court applied the following test to judge obscenity: "Whether an average person, applying contemporary community standards, keeping in view the dominant theme of the material in question as a whole, feels that the material appeals to prurient interest?"

In ***A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts***,[17] the test evolved in Roth case was reshaped into the three-element definition. To rule that a work was obscene, following three requirements must present: (i) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (ii) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (iii) the material is utterly without redeeming social value.

Till 1973 the Courts took the view that obscenity should be restricted because it lacks social value. However, in ***Marvin Miller vs. State of California***,[18] the U.S. Supreme Court rejected the 'redeeming social value' test (supra) and established following three pronged test: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court further said that the application and ascertainment of 'contemporary community standards' would be the task of the Jury as they best represent the 'contemporary community standards'. However, it has been clarified that the jurors are not supposed to

[12] R. v. Hicklin, LR 1868 3 QB 360, by Cockburn C.J.
[13] 352 U.S. 380 (1957).
[14] 354 US 476 (1957).
[15] Roth v. United States, 354 US 476 (1957). See also Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[16] "…..But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

[17] 383 U.S. 413 (1966).

[18] 413 US 15 (1973).

use their own standards. A juror has to draw on his own knowledge of the standards of the average person in the community.[19]

In American Jurisprudence another test known as "comparables test" has gained considerable force in cases of obscenity and freedom of speech. It is based on the argument that comparable materials are easily available in the market which indicate that the materials are accepted by the community and hence, not obscene under the Miller test. In ***Kavita Phumbhra v. Commissioner of Customs (Port), Calcutta***,[20] the High Court of Calcutta has also applied the test. In that case certain publications were imported by the petitioner, which were meant for sale only to adults. Taking note of the change in the society as well as similar articles and works readily being available in newspapers and magazines, the High Court held that the items which were produced in courts, do not appear to be more sexually explicit than many of those which are permitted to be published in leading journals and magazines. However, it does not mean that the concept of contemporary comparative standards test along with other tests has been abandoned.[21]

European Courts

In ***Vereinigung Bildender Kinstler v. Austria***,[22] display of a painting entitled "Apocalypse", produced for the auction by the Austrian painter Otto Muhl was permanently barred by the Austrian Court on the ground that the painting debased the plaintiff and his political activities. Besides Mr. Meischberger, a reputed politician, who at the time of the events was a member of the National Assembly, the painting showed a series of 33 persons, some of whom were very well known to the Austrian public such as Mother Teresa, the former head of the Austrian Freedom Party (FPO) Mr. Jorg Haider, and the Austrian cardinal Hermann Groer in sexual positions. Interestingly, the heads and faces of these public figures were depicted using blown-up photos taken from newspapers (the eyes of some of them portrayed hidden under black bars), their naked bodies were painted.
The Association of Artists appealed to the European Court which did not approve of the prohibition imposed by the Austrian Court. The Court found that such portrayal amounted to a caricature of the persons concerned using satirical elements though the painting in its original form was somewhat outrageous.

In his dissenting opinion, Judge Loucaides, observed that the effect of the visible image on the observer counts more than the nature, meaning and effect of such image is conveyed by its maker.[23]

Where a cartoon portrayed a well-known politician as a pig copulating with another pig dressed in judicial robes, the German Federal Constitutional Court[24] did not accept the publisher's argument relating to

[19] Hamling v. U.S., 418 U.S. 87 (1974).
[20] (2012) 1 Cal LJ 157.
[21] Devidas Ramachandra Tuljapurkar v. State of Maharashtra, CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.
[22] Application No. 68354/2001, 25th January 2007. Source: Devidas Ramachandra Tuljapurkar v. State of Maharashtra, CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.
[23] Two more judges also dissented with the majority of 4 judges.
[24] In a case about cartoons, BVerfGE 75, 369 ; EuGRZ, 1988, 270. As referred to in Devidas Ramachandra Tuljapurkar v. State of Maharashtra, CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.

artistic freedom as protected by Article 5 (3) of the Basic Law. Relying on the concept of human dignity as expressly enshrined in the Basic Law [Article1(1)], the Court dismissed the complaint of the publisher on the ground that the cartoons were intended to deprive the politician concerned of his dignity by portraying him as engaging in bestial sexual conduct. If there is a conflict between human dignity and artistic freedom (Kunstfreiheit), the latter must always be subordinate to the former.[25]

In ***Editorial Board of Pravoye Delo and Shtekel v. Ukraine***,[26] the European Court of Human Rights, for the first time, acknowledged that Article 10 of European Convention of Human Rights (ECHR) has to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of freedom of expression of journalists on the Internet. In ***Akda v. Turkey***,[27] the European Court of Human Rights has held that ban on translation of classic work of literature that contained graphic description of sex, violated the right to freedom of expression.

In ***Wingrove v. United Kingdom***,[28] a video movie characterising Saint Teresa of Avila in profane (showing disrespect for religion or something sacred) ways was held to be properly banned and not a violation of Article 10 of the European Convention on Human Rights.

A British national Nigel Wingrove filed an application with the European Commission under Article 25 to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State (United Kingdom) of its obligation under Article 10 of the ECHR. Mr. Wingrove wrote a script for a video and directed making of a video work entitled 'visions of ecstasy' on the life and writings of St. Teresa of Avila, the sixteenth century Carmelite, nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ. There were scenes depicting a nun, intended to represent St. Teresa, dressed loosely, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing etc., but no attempt was made in the video to explain historical background. The European Court of Human Rights held the various visions including a female character with a leg on either side of the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature and upheld the decision of the national authorities that the video was not less than a work of pornography.

In ***Muller and Others v. Switzerland***,[29] certain paintings were displayed to the public at large at an exhibition depicting sexual relations particularly between men and animals in a crude manner, to which general public had free access as the organisers had not imposed any admission charge or any age limit, the European Court of Human Rights held that though the conceptions of sexual morality have changed in

[25] See E. Barendt, *Freedom of Speech*, (2nd Ed. Oxford, Oxford University Press, 2005), p.229. He cites the order of the German Constitutional Court of July 17, 1984 in the "street-theatre" case, (BVerfGE 67, 213; EuGRZ, 1984, 474), where Mr. Franz-Josef Strauss, then a candidate for the Chancellorship, in a moving street theatre was portrayed in the same float as prominent Nazis, the court held that the theatre as a work of art should be protected under freedom of the arts in the absence of evidence that there was a very serious injury to personality rights. As referred to in Devidas Ramachandra Tuljapurkar v. State of Maharashtra, CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.

[26] Application No. 33014/05, 5 May 2011.

[27] Application No. 41056/04, 16 February, 2010.

[28] 1997 24 ECHRR (1).

[29] 13 EHRR 212.

recent years, nevertheless, the paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity".

Provisions of the Indian Penal Code and Obscenity

Sections 292 to 296 of the Indian Penal Code, deal with obscenity and some other related matters offending public morality including religious sentiments. Sub-section (1) of section 292[30] of the Code sets out the parameters in which any material like a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene. It is obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises 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 matter contained or embodied in it. Sub-section (2) makes punishable, any activity relating to an obscene material from selling, distributing, publicly exhibiting or circulating to importing, exporting or advertising or offering or attempting to do any act which is an offence under the section, **except** in cases either where the material published is in the interest of science, literature, art of learning or other objects of general concern to serve the public good, or it is kept or used bona fide for religious purposes. It also provides for exceptions in favour of any representation sculptured, engraved, painted or otherwise represented on or in any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

The constitutional validity of section 292 of the Indian Penal Code was challenged in ***Ranjit D. Udeshi v. State of Maharashtra***,[31] on the ground that it imposed incompatible and unacceptable restrictions on the freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution. Rejecting the contention, the Constitution Bench observed that the section of the Penal Code does not go beyond obscenity which falls directly within the words 'public decency and morality' of the second clause of Article 19. The Court further said that the approach to the problem may become different and tilt the scales in favour of free speech and expression, if the society is benefited by propagation of ideas, opinions and information in public interest or profit. The Court took example of the books on medical science with intimate illustrations and photographs. The Court emphasised the need the need to understand the provisions of section 292 of the Indian Penal Code in that sense only while testing the same on the touchstone of the second clause of Article 19.

Section 292A provides for punishment for printing, distributing, selling, making, producing, possessing, conveying, advertising etc., of grossly indecent or scurrilous matter or matter intended for blackmail. Explanation 1 to the section clarifies that for the purposes of the section, the word scurrilous shall be deemed to include any matter which is likely to be injurious to morality or is calculated to injure any person but it is not scurrilous to express in good faith, about the conduct of: a public servant in the

[30] Section 292 of IPC was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article 1 of the International Convention for the Suppression of or Traffic in Obscene Publications which was signed by India in 1923 at Geneva. As far as legislative history of proscription of obscenity in India is concerned, the Obscene Books and Pictures Act, 1856 provided for the prevention of sale or exposure of obscene books and pictures. It also prohibited singing of obscene songs, etc. to the annoyance of others.

[31] AIR 1965 SC 881.

discharge of his public functions or respecting his character so far as his character appears in that conduct and no further, or; any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further. According to the provisions of explanation II, in deciding whether any person has committed an offence under the section the general character of the person charged, plays an important role. Section 293 makes selling, letting to hire, distributing, exhibiting or circulating of any obscene object to any person under the age of twenty years (young person) an offence. Section 294 declares that whoever, to the annoyance of others does any obscene act in any public place, or sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both. Section 294A prohibits keeping of lottery office the purpose of drawing any lottery not being a State lottery or a lottery authorized by the State Government.

Section 295 sanctions against the injuring or defiling any place of worship with intent to insult the religion of any class and the offence shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Deliberate and malicious acts, intended to outrage religious feelings of any class of citizens of India (by words, either spoken or written, or by signs or by visible representations or otherwise) by insulting its religion or religious beliefs is a punishable offence under section 295A of the IPC and the punishment is- imprisonment of either description for a term which may extend to three years, or with fine, or with both. Voluntarily causing disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both- mandates section 296 of the Code.

The question before the judiciary in India has been that, what is the proper test to judge obscenity? It should be judged by the effect of certain isolated lines or passages or scenes from an allegedly obscene material upon the most susceptible persons, or the work as a whole should be judged from the contemporary community standards or that the material which has a substantial tendency to corrupt by merely arousing lustful desires, does not have the protection of freedom of expression.

In ***Ranjit D. Udeshi v. State of Maharashtra***,[32] the Supreme Court of India has held section 292 of the Indian Penal Code valid. The Court in this case approved the test to determine obscenity which was propounded in ***R. v. Hicklin***.[33] The test propounded to know, whether the material is obscene or not, is popularly known as the Hicklin test of obscenity. The test is as follows:

> "Whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort is likely to fall".

In ***Ranjit D. Udeshi***[34] case, the appellant was one of four partners of a firm which owned a book-stall in Bombay. He and his partners were prosecuted under section 292 of the Indian Penal Code for selling and keeping for sale a well known obscene book titled "Lady Chatterley's Lover" written by D.H. Lawrence

[32] AIR 1965 SC 881.

[33] R.v. Hicklin, (1868) 3QB 360, at page 371 quoted in Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 at p. 887.

[34] Ranjit D. Udeshi v. State of Mah, AIR 1965 SC 881. The case was heard by a 5 JJ. Bench of the Supreme Court of India and the Judgment of the Court was delivered by Hidayatullah J.

(unexpurgated edition). Applying the above mentioned Hicklin test of obscenity, the Supreme Court upheld the decision of the Magistrate convicting the book seller for keeping for sale an obscene material. The appellant argued that the novel was work of art, if read as a whole, and he did not have the intention to corrupt the public as he did not read and he had no knowledge about the book. The Court rejected the argument and held the impugned section (section 292) valid because it restricted the right to freedom of speech and expression on the grounds of decency and morality. Regarding the pleas of knowledge and guilty intention (mens rea) taken by him the Court in respect of the former said that knowledge was not an essential ingredient of the section (section 292 IPC) and there was no need to prove it. In respect of the latter (guilty intention) the court said that it could be inferred from the fact that he was in possession of the book for sale. [35] The law against obscenity imposes strict responsibility.

What the Hicklin test emphasizes upon is that the work should have a tendency to deprave or corrupt i.e. it might deprave and corrupt. It means that the work itself does not have to deprave and corrupt.

Another important aspect of the test is to judge that whom must the work have a tendency to deprave and corrupt? The answer is: Those whose minds are open to such immoral influences. In fact Children's minds are open to such influences more than an adult's. The result of Hicklin test is that if a book or a piece of artistic work might have an impact upon a child or an extremely sensitive person, it is obscene and no one can go through it. The effect of applying the test and thereby giving a wide meaning to the word 'obscenity' is clear. There will be danger that many a literary work will not be available to the public at large and it will certainly reduce the population of the nation to reading what is fit only for children.[36] The adverse effect of the Hicklin test of obscenity was that if some part of a work of is obscene, the entire work was considered as obscene.

However, it is interesting to note that in order to remove the above said anomaly, the Court was urged to modify the Hicklin test in two respects: (i) that the overall effect of the book should be the test, i.e. a book is not necessarily obscene because there is a word here or a word there, or a passage here and a passage there which may be offensive to particularly sensitive persons; and (ii) that the book should only be condemned if it has no redeeming merit at all, for then it is "dirt for dirt's sake", or as Mr. Justice Frankfurter put it in his inimitable way "dirt for money's sake." Rejecting the contention the Court explained that the words, "the matter charged" must have "a tendency to deprave and corrupt", do not suggest that even a stray word or an insignificant passage would suffice.[37]

However, in subsequent cases, the Supreme Court has departed from its earlier practice of applying Hicklin test and has given the freedom to the judges trying the cases under section 292 of IPC to go through the literature alleged to be obscene as a whole and not in pieces, words or parts to assess the impact of such literature on the minds of readers including adolescents.[38] If the overall effect of the work

[35] See Constitution of India, Prof. V.N. Shukla, 12th Edition, page 149.
[36] See Don R. Pember, Mass Media Law, Wm. C. Brown Company Publishers, Third Printing 1978. p. 318.
[37] Ranjit D. Udeshi v. State of Mah, AIR 1965 SC 881.
[38] See Constitution of India, Prof. V.N. Shukla, 12th Edition, page 151.

is not corruption of minds or taken as a whole it does not appeal to prurient interest, it cannot be called obscene. [39]

In ***Chandrakant Kalyandas Kakodkar v. State of Maharashtra***,[40] the appellant, an author of a short story was charged under section 292 of IPC along with the printer, publisher and the selling agent. The Supreme Court found him not guilty. Referring to the Constitution Bench decision in *Ranjit D. Udeshi* (supra) the Court (three Judges Bench) observed that the morals of contemporary society in India are changing fast. A large number of classics, novels, stories and pieces of literature are available which have a content of sex, love and romance. While judging a charge of obscenity it is to be seen that whether a class, not an isolated case, into whose hands the book, article, or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. It is clear that the court considered three aspects, namely, "morals of contemporary society", their fast changing and the impact of the material, allegedly obscene, on a class of readers or viewers but not an isolated individual.

In ***K.A. Abbas v. Union of India***,[41] there were certain allegedly obscene scenes in a movie depicting problems of prostitutes and the exhibition of the movie was restricted to adults only. Recognising that treatment of motion pictures must be different from that of other forms of art and expression, the Court referred to the decision in Roth (supra), wherein three tests[42] were laid down, and observed that Hicklin test (supra) was not accepted in the said case. However, in K.A. Abbas case, the Court opined that the test in Ranjit D. Udeshi (supra) would apply even to film censorship. The reason given by the court is that in a theme-oriented story sometimes a situation may require delicate depiction of sex and the sex and obscenity are not always synonymous. The Court made a distinction between a historical theme without true history and portrayal of an artistic scene in this regard. The Court observed thus:

> "Our standard 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. Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer."[43]

In ***Samresh Bose v. Amal Mitra***,[44] the appellants were convicted under section 292 of IPC for writing an allegedly obscene novel titled "Prajapati" that came to be published "Sarodiya Desh". The Supreme Court observed that in order to know that a book or any work of art or literature is obscene or not the court has to take an overall view of the matter. The Court also suggested certain guidelines to the court in its task to judge an obscene work, viz.: There should be an objective assessment and the Judge must put himself in

[39] In 1973 in U.S.A a new obscenity test was adopted by the judiciary in Miller v. California, 413 U.S. 15 (1973). The test may be divided into following three parts: (1) That an average person applying contemporary community standards would find that the work taken as a whole appeals to prurient interest. (2) That the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law. (3) The work in question must lack serious literary artistic, political, or scientific value.

[40] AIR 1970 SC 1390.

[41] (1970) 2 SCC 780. For the facts see infra.

[42] "(a) That the dominant theme taken as a whole appeals to prurient interests according to the contemporary standards of the average man; (b) that the motion picture is not saved by any redeeming social value; and (c) that it is patently offensive because it is opposed to contemporary standards."

[43] K.A. Abbas v. Union of India, (1970) 2 SCC 780, at page 802.

[44] (1985) 4 SCC 289.

the position of the author, and reader of every age. He must eliminate the subjective element or personal preference. A novel does not become obscene because of slang and unconventional words used in it. The writing should not bring home to the adolescences any suggestion which is depraving or lascivious. The concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries.

In ***Ajay Goswami v. Union of India***,[45] the petitioner urged the Court to protect children from harmful and disturbing material published by the newspaper industry, in the name of the fundamental right of freedom of speech and expression enjoyed by the press, as it was a duty of the Government, being signatory of the United Nations Convention on the Rights of Child, 1989 and Universal Declaration of Human Rights, 1948 to protect the vulnerable minor from abuse, exploitation and harmful effects of such expression. The court observed that the moral values should not be allowed to be sacrificed in the guise of social change or cultural assimilation. The question before the court was whether the minors have got any independent right enforceable under Article 32 of the Constitution. Referring to the provisions of section 13(2) of the Press Council Act, 1978, section 292 of the IPC and sections 4[46] and 6[47] of the Indecent Representation of Women (Prohibition) Act, 1986, the court dealt with test of obscenity and observed in judging as to whether a particular work is obscene, regard must be had to 'contemporary mores and national standards'. However, it doubted about the utility of the test of 'contemporary mores and national standards' in the age of internet which has broken down traditional barriers and made publications from across the globe available with the click of a mouse. The Court held that the term 'obscenity' is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. No news item or a publication must be judged in isolation, it should be taken as a whole.

In ***Gandhi Smaraka Samithi, v. Kanuri Jagadish Prasad***,[48] publication of a novel, showing two characters in nude one over the other in a bathroom, titled "Kamotsav", published in a weekly, namely, Andhra Jyothi was in question. The accused was tried under sections 292 and 293 of the IPC as well as under sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, but he was acquitted. On appeal the Single Judge of the High Court, held that the portions appearing on the pages, which were objected to by the appellants were not obscene, in the strict sense, if analysed in the context of the theme of the novel (the present day society, behaviour of members of the high class society, their indulgence in free sex and their addiction to drunkenness). The Court observed that the object of the writer was only to create some fear in the minds of the readers.

Where an adult person and a woman were found in possession of a photograph which was sexually explicit in nature, the High Court of Kerala held that the provisions of the Indecent Representation of Women (Prohibition) Act, 1986 (Act 60 of 1986) will not apply, unless the prosecution has a case that those photographs were distributed or published for advertisement or for any other incidental purpose.

[45](2007) 1 SCC 143.

[46] Section 4 of the Act prohibits publication or sending by post of books, pamphlets, etc; containing indecent representation of women.

[47] Section 6 of the Act provides the penalty and states that the contravention of the provisions of Sec 3 or Sec 4 shall be punishable.

[48] (1993) 2 APLJ 91.

Therefore, mere possession of sexually explicit photos in private custody without circulation or publication will not amount to a crime under the Act. The Court quashed criminal proceedings against the two persons.[49]

In ***Promilla Kapur v. Yash Pal Bhasin***,[50] a book, dealing with the subject of call girls, was sought to be banned on the ground that it was obscene because some sort of vulgar language has been used in some portions of the book in describing the sexual intercourse. Negativing the contention, the Court observed that prostitution has never been liked by the society and 'sex' has been considered an ugly word, but in a vastly changing society, there is no wrong if a research is made on the subject of call girls in order to know the reasons as to why and how the young girls fall in this profession and what society could do in that respect. The Court held that the book, as a whole appeared to be a serious study done on the subject of call girls and in the overall setting of the book, it could not be deemed to be obscene. The Court further observed that if some portions of the book taken in isolation, create the effect of giving lustful thoughts to some young adolescent minds, that alone would not make the entire book obscene.

In ***S. Khushboo v. Kanniammal***,[51]the appellant made a statement in a magazine to the effect that it may not always be improper for women to have pre-marital sex but they must observe precaution against disease and pregnancy. The Court said that obscenity should be measured with respect to the contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person. The Court applied the above said contemporary community standards test and held the statement not obscene.

In ***Aveek Sarkar v. State of West Bengal***,[52] the controversy was erupted due to the reproduction of a nude photograph of Boris Becker, a world renowned tennis player, with his dark-skinned fiancée named Barbara Feltus, a film actress and an article published in the German magazine titled 'Stern', by a widely circulated magazine 'Sports World' and by the 'Anandabazar Patrika', a newspaper having wide circulation in Kolkata, as it appeared in Sports World. A complaint under section 292 of IPC and under section 4 of the Indecent Representation of Women (Prohibition) Act, 1986 was filed against the Editor, the Publisher and Printer of the newspaper and also against the Editor of Sports World, former Captain of Indian Cricket Team, Late Mansoor Ali Khan Pataudi. In the article both of them spoke freely about their engagement, their lives and future plans and the article projected Boris Becker as a strident protester of the pernicious practice of 'Apartheid' and the purpose of the photograph was also to signify that love champions over hatred. The Court applied the "contemporary community standards test" and ruled that the factum of obscenity has to be judged from the point of view of an average person. The Court relied on Samresh Bose case (supra), and observed that the view expressed therein was the contemporary social

[49] https://www.livelaw.in/news-updates/sexually-explicit-photos-indecent-representation-of-women-prohibition-act-kerala-hc-145520.

[50] 1989 Cr.L.J. 1241.
[51] AIR 2010 SC 3196.
[52] (2014) 4 SCC 257.

standards in the year 1985, therefore, regard must be had to the contemporary mores and the national standards and not the standards of a group of susceptible or sensitive persons, while judging a particular photograph, or an article of the newspaper as obscene in 2014. The Court refused to apply the 'Hicklin test to determine what 'obscenity' is.

In ***Director General of Doordarshan v. Anand Patwardhan***,[53] the Supreme Court said that keeping in view the decisions of the U.S. Supreme Court, a material may be regarded as obscene if an average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value.

In ***Devidas Ramachandra Tuljapurkar v. State of Maharashtra***,[54] regarding the test of obscenity, the Court after analyzing various foreign and Indian cases concluded the contemporary community standards test as the parameter and observed that the contemporary community standards test would vary from time to time, for the perception, views, ideas and ideals can never remain static. The Court, however, refused to accept comparables test[55] as the applicable test. According to the Court, it may at best reflect what the community accepts for the Court may sometimes refer to various books on literature of the foreign authors and express the view that certain writings are not obscene.

As per the facts of the case, a complaint was lodged by one V.V. Anaskar, a resident of Pune, and a member of 'Patit Pawan Sangthan', relating to the publication of a poem titled "Gandhi Mala Bhetala" (which means 'I met Gandhi') in a magazine, 'Bulletin' (meant for private circulation amongst the members of All India Bank Association Union), in its July-August, 1994 issue. A crime was registered for the offences punishable under Sections 153-A and 153-B read with Section 34, IPC and after investigation charge sheet was filed for the said offences along with 292, IPC against the appellant, the publisher and the printer of the Bulletin and the author, named Vasant Dattatraya Gujar. The Chief Judicial Magistrate, Latur, found that no case for the offences under Sections 153-A and 153-B was made out but refused to discharge the accused in respect of the offence under Section 292, IPC. The Additional Sessions Judge the High Court of Bombay did not interfere with the findings of the Magistrate, therefore, an appeal by special leave at the instance of the publisher was filed to the Supreme Court. The author did not choose to assail the order passed by the High Court.

The question before the Supreme Court was whether in a write-up or a poem, keeping in view the concept and conception of poetic license[56] and the liberty of perception and expression, use the name of a

[53] (2006) 8 SCC 433; followed in Shreya Singhal v. Union of India, 2015 (4) SCALE 1 (The Court while dealing with constitutional validity of section 66-A of the IT Act noticed that the said provision conspicuously did not have the word "obscene".).

[54] CRIMINAL APPEAL NO.1179 OF 2010, decided on14 May, 2015.

[55] See the judgment passed by the Kolkata High Court in Kavita Phumbhra (supra).

[56] Mr. Gopal Subramanium, learned senior counsel, appearing for the appellant urged that a poem or a write-up is a part of free speech and expression, as perceived under Article 19(1) (a) of the Constitution and the expression "poetic licence" is neither a concept nor a conception because the idea of a poetic freedom is a guaranteed and an enforceable fundamental right which should not be converted into a permissive licence by the Court. The Court clarified that the words, "poetic licence" have been used to show the strength of a poet or a writer to write freely expressing his thoughts and that no one can stop them.

historically respected personality (here 'Mahatma Gandhi') by way of allusion or symbol in an obscene manner is permissible.

The Court appointed Mr. Fali S. Nariman, learned senior counsel as Amicus Curiae, to assist the Court. He submitted that the words (used in the poem) may not be taken as obscene if they are spoken in the voice of an ordinary man but if they are used with reference to the established identity pertaining to Mahatma Gandhi, their character will change assuming the position of obscenity. In other words, the poem could not have been characterized as obscene otherwise, had the name of Mahatma Gandhi, a highly respected historical personality, not been used. Mr. Nariman further submitted that the poem did not sub serve any artistic purpose and is loathsome and vulgar and hence, it comes within the ambit of section 292, IPC.

Mr. Subramanium submitted that the free speech is a guaranteed human right and poetry which encourages fearlessness of expression, cannot be restricted because of use of name of a personality. He also said that freedom to offend is also a part of freedom of speech and the instant poem is one where there is "transference of consciousness" that exposes the social hypocrisy that cannot be perceived with a conditioned mind.

The Court did not accept the argument that the freedom of speech and expression gives the liberty to offend. The Court said that in the context of obscenity, the provision enshrined under section 292, IPC has its room to play, and clarified that by bringing in a historically respected personality to the arena of that section, neither a new offence has been created nor an ingredient has been interpreted. The Court reminded that the judicially evolved test to adjudge obscenity is the "contemporary community standards test" and in that context, the test must be applied in a greater degree, if an artistic work gets signification through the mouth of a historically respected personality. Choosing historically respected persons as medium to put into their mouth obscene words means melting creativity into insignificance and perversity, even if a 'target domain had been chosen by the author.

Upholding the decision of the High Court pertaining to the framing of charge under section 292, IPC, the Court held that when the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in and with that mandate, left it to the poet, the co-accused, to put his defense at the trial explaining the manner in which he had used the words and in what context.

Regarding the case of the appellant-publisher, the Court noticed though he had published the poem in question, he immediately tendered unconditional apology in the next issue of the 'Bulletin' after coming to know about the reactions of certain employees. Therefore, the Court quashed the charge framed against him as well as the printer, because the printer submitted that he had printed the poem as desired by the publisher.

Obscenity and Vulgarity: Distinguished

Mere use of vulgar language does not make a piece of literature an obscene one as vulgarity and obscenity are two different concepts.[57]

In ***Crossword Entertainment Private Limited v. Central Board of Film Certification***,[58] the Central Board of Film Certification (CBFC) declined to issue a Certificate for exhibition of the film entitled "Mohalla Assi" under the provisions of the Cinematograph Act, 1952 on the ground that the movie was full of abusive words, derogatory remarks against a particular community, inflammatory speeches, political linkups, sentiments are hurting for a particular local area, abusive words against women, therefore, the movie might hurt the feelings of community, and could create a law and order problem etc. The petitioner challenged the order of the CBFC in appeal before the Film Certificate Appellate Tribunal (FCAT) which also refused the certificate in the original form of the movie and suggested certain modifications before granting certificate.

Aggrieved by the decision the petitioner filed the writ petition and sought a direction to the respondent No.1 to give the requisite certificate to the film "Mohalla Assi" for exhibition without any cuts/modifications/excisions. The respondents contended that the film has to be judged in its entirety from the point of view of its over-all impact and in the light of the period depicted in the film. It was also contended that the film should be examined keeping in view the contemporary standards of the country and the people to which the film relates.

The Court directed the film "Mohalla Assi" to be certified subject to the restrictions that- (i) the film shall be exhibited only to the adult audience, hence, the respondent shall issue the "A" certificate; (ii) it shall incorporate the disclaimer as directed by the Tribunal; and (iii) the word "Bhos…." said by the man dressed as Shiva while talking to Panditji at the Ghat and wherever else shall be deleted.

The Courts have applied different tests as per their application in the circumstances of the case in hand. The Courts have shown leniency in favour of the media unless the matter in question grossly in violation of the standards set out by the law. There is a need to address the demand for regulating the OTT platform also as it seems that the same is beyond control of the Government.

[57] Ibid.

[58] W.P. (C) 11992/2016, High Court Of Delhi, Judgment delivered on: 11th December, 2017.