A CRITICAL ANALYSIS ON THE LAW OF OBSCENITY IN INDIA

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ABSTRACT

With the advent of time, the 'community test' as developed by the Supreme Court of India warrants reform on account of its regressive nature and the absence of cultural consensus within society. The test rests upon the way the majority perceives the material which renders a judgement's effect limited to the territory occupied by the habitants of a particular place rather than a global standard of what can be accepted as obscene. Therefore, this test fundamentally goes against the 'Harm Principle' postulated by John Stuart Mill and recognized by the Supreme Court of India in Navtej Singh Johar vs Union of India1 in 2018. This paper will establish that the most efficacious approach for a diverse society like India would be the adoption of the test of 'Harm Principle', akin to the implementation in the jurisprudence of Canada and as opposed to community standard test which can safely be ruled out as archaic and arbitrary. The community standards test is bygone, and it is time to sever, judicially and philosophically its nucleus.

[1] (2018) 10 SCC 1

Introduction

Bertrand Russell once remarked, "Obscenity is whatever happens to shock some elderly and ignorant magistrate[2]". His statement, although pertinent to England, however, finds ubiquitous relevance. It further highlights a problem that beleaguers the realm of Indian obscenity: regressiveness, stagnancy and subjectivity in definition. 'Obscenity' has not been defined anywhere in Indian law. In 2014, Aveek Sarkar vs State of West Bengal[3], laid down the framework of the 'community standards test' which was developed as a solution to what ought to be considered as 'obscene' and also as an effective alternative to the Hickin test developed in Regina v Hicklin[4]. The **'**community standards test' elaborates, 'any material that possesses the tendency to excite lustful thoughts is to be considered from the contemporary standards of a society'. Further, the impugned material will now be taken as a whole to see the appropriate meaning it conveys.

In Mill's 'On Liberty', he argued that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others[5]. At the heart of his argument is that freedom is a catalyst for humanity's progress and the existence of a shielded private realm that is completely untethered by external forces is vital. Expounding on morality, Mill asserts that there needs to be established a clear distinction between acts or behaviour that directly affects another individual(s) and an act that affects solely that person. On a tangential note, society more often than not, is right than wrong in judging the conduct that affects them for the sole reason that they are the 'best judges of their own interests' as opposed to judging conduct that affects the actor alone. Here, they are definitely wrong rather than right on account of the fact that his act does not affect society at large and the individual himself is supreme in ascertaining his best interests[6].

Adopting the 'Harm Principle' as propounded by Mill is the best approach which has been proven effective owing to its widespread application in the western developed world. To prevent exposing the individual or the general public from being depraved or corrupted by sexually oriented publications is the rationale given while pondering over the widely contested bastion of the existing obscenity law and its implications. The courts function under the

[2] Matter of Kay v. Bd. of Higher Education, N.Y. City, 173 Misc. 943, 18 N.Y.S.2d 821 (N.Y. Misc. 1940)
[3] (2014) 4SCC 257
[4] (1867-68) L.R. 3 Q.B. 360
[5] HLA HART, *Law, Liberty, and Morality*, 9 Am. J. Jurisprud. 151, 1964, https://doi.org/10.1093/ajj/9.1.151
[6]Bret Boyce, *Obscenity and Community Standards*, 33 Yale J. Int'l L. 300, 352 (https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1343&context=yjil.

unuttered assumption of the expression of sexual desires as being immoral and dangerous to the interests and principles of society. Therefore, it calls for such shameful and unconscionable conduct to be suppressed for greater public good.

The idea of moral harm is omnipresent and very conventional. It has existed since time immemorial and has manifested itself in a plethora of ways such as censorship and restriction. Evidently, art and literature shape our view of the world and undoubtedly influences the psyche of the community as a whole. Good art and literature, on the one hand, could encourage empathy and responsibility as opposed to other literature such as pornography involving degrading and violent sexual fetishes that could mobilize the public to be inclined towards cruelty and inhumanity. There is no denying that art and literature possesses the ability to effectuate moral harm. However, the basis of a workable legal test cannot rest upon discerning the morality of any content. It cannot be the basis of a workable legal test for obscenity because it is too vague and its application too contestable to be a rule of law[7]. The test relies on a task that is extremely complicated for the legal fraternity to explicate. The majority cannot distinguish between literature that has the capacity to corrupt and literature that is rich in virtue and righteousness. The test hinges on cultural consensus and a community standard that is not well-defined, is devoid of clarity and is generally regressive. Consequently, the questions one is faced with are - Which community is to be taken? Can these standards and notions be discerned? Can there be a consensus between everyone in the community to establish the same set of standards?

The popular phrase, “I know it when I see it” aptly portrays the contemporary status of the obscenity laws in India. The expression is pervasively cited as a test proposed by Judge Potter Stewart for ‘obscenity'. While ruling on whether a movie with a love making scene is ‘obscene’, he propounded that he knows what fits the "shorthand description" of "hard-core pornography" without resorting to the intricacies of the established ‘community standards’[8]. This basic phrase, rooted in a multitude of views, bears conflicts and inconsistencies that appear to plague the Indian law on obscenity. In effect, "I know it when I see it" can still be paraphrased and unpacked as: "I know it when I see it, and someone else will know it when they see it, but what

[7] Andrew Koppleman, Does Obscenity Cause Moral Harm?, 105 Colum L. Rev. 1635, 1635 (2005), https://www.jstor.org/stable/4099411
[8] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)

they see and what they know may or may not be what I see and what I know, and that's okay[9]."

Similarly, the Indian judges are prejudiced and whimsical when it comes to deciding matters on obscenity. The detrimental effect of having such a vague law is stark in the case of Devidas Ramachandra Tuljapurkar vs State Of Maharashtra & Ors[10]. The division bench was put forward with the question of whether a 'poem' or 'write-up' can utilise the name of a historically respected personality by way of an allusion or symbol in an obscene manner? The obscene matter impugned here refers to the instance in the poem where the author claims to have met Mahatma Gandhi at a red light district. Furthermore, he asserts to have seen Gandhi not only performing untoward activities but also hurling abuses. The author claimed the poem to be a mere satirical parody against those people who claim to be the followers of Gandhi, portray themselves as a saint and still hypocritically indulge in wrongful immoral acts. Though the Supreme Court refused to interfere in the charge and sent the matter back to the trial court, it still challenged the test of poetic licensing espousing that historically represented figures should not be mocked. The test has serious implications on the operation of freedom of speech and expression granted under Article 19 of the Indian constitution. In a way, the court abridged and discouraged political satires, thereby attempting to curb potential criticism of the government. Consequently, the court based its application of the 'community standards test' on the notions of an extremely sensitive and conservative section of society.

Keeping 'community standards' as the overriding principle governing obscenity, in addition to being a grave threat to individual freedom, freedom of expression and diversity of opinion is also hypocritical in the Indian context. Classifying an extremely explicit and by modern standards 'obscene' a book as the Kamasutra as completely acceptable and legal and permitting children to visit a temple as sexually explicit as the Khajuraho temple in Madhya Pradesh whilst ruling it as 'not obscene' is duplicitous. Such art and literature that instills sexual cravings are perceived to not have the capacity to corrupt minds in India, owing to its religious connotation. On the other hand, ruling films and TV shows that are overtly sexual or the 'Kiss of Love' campaign as obscene are actions that are extremely unjustified.

In Kartar Singh v. State of Punjab[11], it was held: "*It is the basic principle of legal jurisprudence*

[9] William Goldberg, *Two nations, one web: comparitive legal approaches to pornographic obscenity by the United States and the United Kingdom*, 90 B. U. L. Rev 2121, 2123 (2006), https://www.bu.edu/law/journals-archive/bulr/documents/goldberg_000.pdf
[10] (2015) 6 SCC 1
[11] (1994) 3 SCC 569

that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly". Obscenity as a vague law can be ascertained from its reliance on culture as an abstract concept. The advent of the 'digital internet age' has resulted in a contemporary bastion that is significantly varied than the 'pornography' approach as espoused by Roth[12] or Miller[13]. Aveek Sarkar[14] relied heavily upon Roth v United States[15], to justify basing obscenity on Community Standards. These cases were decided at a time (1957-1973) when access to pornography was limited through only physical channels. However, the present day implication of pornography being instantly accessible through the internet has led to the upspringing of issues that are far from the imagination of the legal fraternity and the general public a few decades back. In the time of globalization, easy and widespread access to the internet has made culture and practices transcend borders in a way that has established a world that is far more homogeneous than different. Earlier 'community standards' have become obsolete in addition to it having become a very complex task to ascertain a fixed well-defined cultural and moral code. The digital age has further worsened the pre-existing issues of subjectivity and vagueness. It makes us ponder over questions of freedom and free expression, diversity of opinion in the existing cultural and religious sphere and its consequent practical implications.

In 2009, a popular pornographic comic called 'Savita Bhabhi' was banned by the government on the grounds that it featured a married woman's sexual adventures which went against society's decency and morality. The government and society could not tolerate the 'scandalous' appeal that Savita Bhabhi had, where a traditional Indian woman was an unabashed pursuer of pleasure who had by then also become a symbol of empowerment, rebelliousness and female sexuality. Despite the regressive view and intention of the government to moderate sexuality and exercise control over sexual autonomy, it merely resulted in the emergence of the 'Indian Porn Conundrum', which is aptly representative of the problematic disconnect between the legal system and the ground reality. India is the third largest consumer of pornography in the world after the United States and the United Kingdom despite the ban and has recorded a 95%

[12] Roth v United States, 354 U.S. 476 (1957)
[13] Miller vs California, 413 U.S. 15
[14] Aveek Sarkar vs State of West Bengal, (2014) 4SCC 257
[15] Roth v United States, 354 U.S. 476 (1957)

increase in pornography viewership after the commencement of the COVID-19 lockdown[16]. This is representative of how detached and regressive the government, the judiciary and the obscenity law is when it comes to effectively encompassing and reflecting contemporary public morality.

The Supreme Court used the precedent laid down in Kartar Singh[17] to decide upon the constitutional validity of Section 66 A of the Information Technology Act, 2000. It struck down Section 66 A for being unclear and vague in Shreya Singhal v/s Union of India[18]. The court opined: *A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.* A vague law such as obscenity, therefore, grants excessive power of determination to the state for applying correct standards of the community which are indescribable and highly subjective. It takes away from an individual the reasonable opportunity to know what is prohibited, so that they may act accordingly. Consequently, it can be logically deduced that obscenity, without distorting the balance between individual autonomy, community moral standards and the government, cannot be accurately defined. The present obscenity law serves as an unsuitable solution to the problem it seeks to address and therefore, warrants reform.

In 2014, The Supreme Court, in Aveek Sarkar[19] relied upon Regina v Butler[20], from the Canadian jurisprudence. However, the Supreme Court of Canada realized the untenability and infeasibility of applying the 'community test' and did away with the Butler test in the case of Regina v Labaye[21], in 2005 itself. Therefore, the Court's rationale of adopting the 'community standards test' is based on an incorrect and outdated principle of law. To further support its claim, the Court relied upon Roth v United States[22], which was overruled by the Miller test[23] in 1973. It only took into consideration the first stage to determine obscenity, completely bypassing the other two stages. Thereby, the Indian jurisprudence is being deprived of the first

[16] Kannan Saikiran, *Pornography gets a pandemic boost, India reports 95 per cent rise in viewing*, INDIA TODAY (11 April, 2020), https://www.indiatoday.in/news-analysis/story/pornography-gets-a-pandemic-boost-india-reports-95-per-cent-rise-in-viewing-1665940-2020-04-11
[17] Kartar Singh vs State of Punjab, (1994) 3 SCC 569
[18] AIR 2015 SC 1523
[19] Aveek Sarkar vs State of West Bengal, (2014) 4SCC 257
[20] (1992) 1 SCR 452
[21] [2005] 3 S.C.R. 728
[22] 354 U.S. 476 (1957)
[23] Miller vs California, 413 U.S. 15

necessary condition of a conduct being 'patently offensive', which is rather a high standard for determining 'obscenity', in addition to the second condition which elucidates that the conduct must lack serious literary, artistic, scientific or political value. If the Devidas[24] judgement was adjudicated in the United States, it would have never fulfilled the requirements of the other two stages. The Court consequently adopted and implemented an incomplete test in India and for six years now, all cases since, have been based on this incorrect and problematic interpretation of the law.

Therefore, to absolve the law on obscenity of any hindrance, the correct approach to the question of obscenity should be the 'Harm Principle' test as adopted by Canada in the Labaye case[25] . The test that the court propounded is that the impugned material must cause harm that is so great as "to interfere with the proper functioning of society". Accordingly, the threshold for proof of harm is very high and it would not be dependent on what the society would consider harmful. In most cases, expert evidence would be required to establish the nature and degree of harm and this harm should make the proper functioning of society improbable[26]. Here, the test proposed is not to say that the expert testimony will and should be binding on the judge, rather their role would be that of an advisor to the court in determining if there was harm. The use of an expert is an aid to fill the evidentiary vacuum which could be created owing to subjectivity. The parties presenting the experts will confine their witnesses to specialists who have spent their life engaging with the local community to ascertain whether the conduct caused irreparable harm.

The Harm Principle by default forces countries to adopt a 'reactive' approach as opposed to a 'proactive' one. A 'reactive' approach, in addition to allowing room for the obscenity standards to develop using case law, is the most logical approach to ensuring that standards keep up with contemporary times. Another very positive side effect of the 'reactive' approach is also the benefit that is accrued with respect to individual freedom and the freedom of expression. With the normalization of art and literature that was previously considered 'obscene' comes a newly established status quo, which further assists in making the country more tolerant and liberal in addition to prioritizing personal liberty and freedom of expression.

[24] Devidas Ramachandra Tuljapurkar vs State Of Maharashtra & Ors, (2015) 6 SCC 1
[25] Regina v Labaye, [2005] 3 S.C.R. 728
[26] Doug Rendlemant, *Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute*, 44 UCLR 509, 516 (1977), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3910&context=uclrev

Therefore, the emergence of the internet has blurred the distinction between cultures of different communities and presented the world with the problem of establishing a uniform community standard. The community standards test has resulted in unfair prosecutions and the violation of free speech by subjugating the people to a half-hearted test developed by Aveek Sarkar[27]. Today, content creators are faced with the fear of being prosecuted by the State and being subjected to the most restrictive and regressive framework of censorship in the nation. Framing a suitable definition for what could be considered 'obscenity' and basing it on the community is subjecting an individual to the tyranny of the majority. The present test must be substituted in favor of a more flexible and holistic test that keeps liberty at its core and does not render decency and morality to the whims of the State. It is imperative that India adopts the 'Harm Principle Test' which does away with flaws of the community standards test. It serves as a catalyst for social change by transforming the legal domain's outlook to keep up with the contemporary times in addition to making the society as a whole, more tolerant.

[27] Aveek Sarkar vs State of West Bengal, (2014) 4SCC 257