

## OBSCENITY: A NEED FOR JUDICIAL REFORM

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### Abstract

*The subjectivity of the term 'obscenity' has paved the way for several controversies. This has created the need for the community standards to evolve with regards to the changing circumstances and the factors such as ongoing political, social and cultural atmosphere play a quintessential role. The definition of what may be considered to be obscene should not be limited to the interpretative standards of an ultra-sensitive group of individuals but should rather depend upon the era. It is imperative to realise that though the community standards play a crucial role in determining obscenity, it cannot be used as the sole criteria for evaluation. Several other factors such as the targeted audience, the predominant theme, associated artistic and literary value, standards of a reasonable man etc. need to be taken into consideration while asserting the same. The vagueness and malleability of community standards test is indeed a substantially influential mechanism of suppression in the government's arsenal. The conception of social morality is congenitally subjective and therefore, the inordinate obstruction in the sphere of individual autonomy should not be exploited by the criminal law.*

### Obscenity: A Need for Judicial Reform

The notion of obscenity is an anomaly in the paradigm of freedom of expression.<sup>1</sup> The word is inherently illusive as it is frequently used but is in no way accurately defined. The subjectivity of the term paves the way for controversies, as illustrated in the recent case of Sabarimala Activist Rehana Fatima, who was booked by the Kerala police for posting a video of her child painting on

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<sup>1</sup>Bret Boyce, *Obscenity And Community Standards*, 33 Yale J. Int'l L. (2008), <https://digitalcommons.law.yale.edu/yjil/vol33/iss2/2> .

her semi-nude body.<sup>2</sup> The Supreme Court bench said that it was wrong on her part to use her minor children, because it will create a bad impression on children about the culture of the society and therefore labelled her act as “obscene and objectionable”<sup>3</sup>. There is a need for the community standards to evolve with regards to the changing circumstances and factors such as the ongoing political, social and cultural atmosphere play a quintessential role. The definition of what may be considered to be obscene should not be limited to the interpretative standards of an ultra-sensitive group of individuals but should rather depend upon the era. The vagueness and malleability of community standards test is indeed a substantially influential mechanism of suppression in the government's arsenal. The conception of social morality is congenitally subjective and therefore, the inordinate obstruction in the sphere of individual autonomy should not be exploited by the criminal law.

In the Indian Penal Code (IPC), 1860, obscenity is specified in the Sections 292, 293 and 294. If a book, pamphlet, paper, writing, drawing, painting representation, figure or any other object comes under the blanket of these dialectics - where it is ‘lascivious’, appeals to the ‘prurient’ interest or tends to ‘deprave’ and ‘corrupt’ persons<sup>4</sup> as obscene, then the IPC would recognise it as an obscene material under Section 292<sup>5</sup>. Section 293 deals with sale of any obscene material to young people, that is, anyone below 20 years<sup>6</sup>. The scope of section 294 is extensive since its main objective is to stonewall any obscene acts carried out in public, causing annoyance to public as a whole and the ambit of the word “others” is not only restricted to the person who is the expected injured party of the “obscene act of the accused”<sup>7</sup>. But in these foregoing sections, the IPC does not describe the word obscene” and this sensitive responsibility of differentiating which is obscene and which is not, has to be executed by the judicial authorities.

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<sup>2</sup>*Painting By Kids On Semi-Nude Body: SC Junks Activist's Pre-Arrest Bail Plea*, TOI (Aug. 8, 2020), <https://timesofindia.indiatimes.com/india/painting-by-kids-on-semi-nude-body-sc-junks-activists-pre-arrest-bail-plea/articleshow/77425347.cms>.

<sup>3</sup> *Id.*

<sup>4</sup> Sagrika Rajora, *Criminal Law And Obscenity – A Legislative Analysis*, THE CRIMINAL LAW BLOG (Dec. 12 2020, 1:30 AM), <https://criminallawstudiesnluj.wordpress.com/2020/01/18/criminal-law-and-obscenity-a-legislative-analysis/>.

<sup>5</sup> Indian Penal Code, 1860, § 292, No. 45, Acts of Parliament, 1860 (India).

<sup>6</sup> Indian Penal Code, 1860, § 293, No. 45, Acts of Parliament, 1860 (India).

<sup>7</sup> Indian Penal Code, 1860, § 294, No. 45, Acts of Parliament, 1860 (India).

The test of obscenity has advanced over the years in India. The Courts went from applying the obstinate Hicklin test to formulating the conducive community standards. The first attempt in determining what material is obscene was established by the Queen's Bench in *Regina v Hicklin*<sup>8</sup> by formulating the Hicklin test. The implications of the Hicklin test is as follows:

1. The material could be declared obscene if isolated parts rather than the publication taken as a whole contained immoral or indecent material.<sup>9</sup>
2. The test is dependent on the impact on the most susceptible audience, not the average reader.<sup>10</sup>

In the *Kherode Chandra Roy Chowdhury v Emperor*<sup>11</sup>, while the bench majorly relied on Section 292 of the IPC, there were certain notable elements of the Hicklin Test such as when the material was declared not to be obscene on the basis that only a small section would consider the story as immoral. A thorough application of the Hicklin test is observed in *Ranjit D. Udeshi v State Of Maharashtra*<sup>12</sup>. The court, held the appellant liable, stating that the material was obscene since isolated parts were indecent and that it corrupted and depraved a susceptible audience. There was also an acknowledgement of 'community mores,' which makes this a comparatively progressive judgement. Finally, the Hicklin test was set aside and a community standard test was laid down. In *Aveek Sarkar v. State of West Bengal*<sup>13</sup>, the Supreme Court, in 2014, formulated guidelines to determine obscene materials, disregarding the views of a group of sensitive persons and taking into consideration the contemporary national standards. It was also established that the paradox of obscenity should be discovered in the settings in which the material emerges and the meaning it wishes to articulate. There were certain issues with the Aveek Sarkar judgement and the community standard it set out, which can be examined in contrast with *Regina v Roth*<sup>14</sup> and *Regina v. Butler*<sup>15</sup>.

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<sup>8</sup> Regina v. Hicklin, (1868) LR 3 QB 360.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Kherode Chandra Roy Chowdhury v. Emperor, (1912) ILR 39 Cal 377.

<sup>12</sup> Ranjit D. Udeshi v. State of Maharashtra, (1965) AIR 881.

<sup>13</sup> Aveek Sarkar v. State of West Bengal, (2014) 4 SCC 257.

<sup>14</sup> Regina v. Roth, 1957 354 U.S. 476.

<sup>15</sup> Regina v. Butler, 1992 1 S.C.R. 452.

The paradigm of obscenity should not be constrained by the obstinate opinion of the majority but should rather be perceived based on the conception of the concerned section of the population or has to be judged individually based on the given problem at hand. In deciding community standards, on many occasions it is observed that the Courts merely endorse the dominant majority's publicly affirmed mindset, and thereby exclude, more than ever, the alternative, marginalized and minority means of thinking. *Regina v. Butler* attempts to deliver at a minimum, some safeguard to counter the despotism and oppression by the majority, indicating that community standards should be not be rendered dispositive instead it should be made suitable in its obscenity enquiry. The Supreme Court of Canada, in *Butler*, dismissed the claim that the state may "impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community."<sup>16</sup> In *Butler*, the belief that the traditional majoritarian morality could validate the infringement of the freedom of expression was rejected and rather, further injury and harm can be avoided if the obscenity law was warranted on the basis of this rationale. This harm was accepted not in relation to the moral corruption, but instead in respect to the damage that can be done to the society.<sup>17</sup>

The community test should be applied by prioritising the freedom of speech and expression instead of focussing on ultra-sensitive attitude of a particular group of people. What this means is that just because a category of individuals feel anxious about an alleged obscene material does not warrant the fact that they vent their standpoints in a malevolent attitude, and the state can definitely not use the excuse of 'state's incapability' to manage the difficulties of a hostile and aggressive audience. As things stand now, in a democratic country like India, an ambiguous construction of a potentially dreadful influence on a particular section is not a justification adequate enough to divest an artist or an author of his expression. In the case *S. Tamilselvan v. Government of Tamil Nadu*<sup>18</sup>, it was held by the Supreme Court that, "art is often provocative and is not meant

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<sup>16</sup> *Id.*

<sup>17</sup> Bret Boyce, *Obscenity And Community Standards*, 33 Yale J. Int'l L. (2008), <https://digitalcommons.law.yale.edu/yjil/vol33/iss2/2> .

<sup>18</sup> *S. Tamilselvan v. Government of Tamil Nadu*, (2016) SCC OnLine Mad 5960.

for everyone.”<sup>19</sup> The Court further went on to say that the entire society is not coerced by art to recognise it since the option ultimately remains in the hand of the viewer. So a material cannot be labelled as obscene simply because it is disagreeable to one segment of the community. In *K. A. Abbas vs The Union Of India*<sup>20</sup>, the court made a remarkable assertion by indicating that the safeguard and shelter of the least able is diminished to such an extent whereby, the exceedingly dissolute and corrupt between ourselves ascertain what the morally sound cannot observe or study. The requirements that we fix regarding obscenity must incorporate considerable concession for the benefit of freedom of expression. Thus, this separates a wide range for innovative art to decipher life and society, giving room for some of its flaws to showcase itself along with a wider elements of what is good.

The idea of community covers a broad spectrum of interpretations ranging from national, geographical, local to virtual but is not limited to the contours of these expositions. It generally refers to an amalgamation of individuals who are bound together in lieu of their commutual social and cultural attributes. However, even individuals within these specific communities are expected to have distinct and at times contradictory opinions on issues such as obscenity. While defining communities geographically, it becomes crucial to realise that the members vary in their values pertaining to sexual expression. And in the absence of common values regarding obscenity, establishing national standards becomes more intractable<sup>21</sup>, especially in a country as diverse as ours. In *Jacobellis v. Ohio*<sup>22</sup> Justice Brennan, geographically defined communities by setting national standards. The substitution of national standards for state or local standards took place under the *Miller v California*<sup>23</sup> but it hardly solved the difficulty of articulating such standards as it created the likelihood of jeopardising the uniform implementation of the constitutional provisions. With the increase in the free flow of information across the nation, any content can now be accessed by the entire nation and members of different communities are

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<sup>19</sup> *Id.*

<sup>20</sup> *K. A. Abbas v. The Union of India*, (1971) AIR 481.

<sup>21</sup> Bret Boyce, *Obscenity And Community Standards*, 33 *Yale J. Int'l L.* (2008), <https://digitalcommons.law.yale.edu/yjil/vol33/iss2/2> .

<sup>22</sup> *Jacobellis v. Ohio*, (1964) 378 U.S. 184.

<sup>23</sup> *Miller v. California*, (1973) 413 U.S. 15.

in a position to evaluate the material based on their standards, which would likely result in offending their sentiments. This draws our attention towards another complication of asserting, ‘what may constitute a community?’. The wide scope of the word can refer to a community as large as the entire nation in one instance, while as small and as specific as the city block from which the material or performance complained of was promoted, at another<sup>24</sup>. This clearly highlights the inherent flaw in establishing the rigid definition of the notion of community. Therefore, it is imperative to define community with regards to the standards of an individual who forms the basic unit of a community.

The understanding of what may be considered to obscene depends upon the era as the changing circumstances bring about a variation in the associated definition. Several factors including, but not limited to the ongoing political, social and cultural atmosphere are significant in deciding the context of perceiving obscenity. This is evident in Justice Potter Stewart’s statement on being unable to define obscenity he says, “I know it when I see it.”<sup>25</sup> This clearly throws light on the need for a subjective approach towards the issue. In *Chandrakant Kayandas Kakodar v The State of Maharashtra*,<sup>26</sup> Justice Reddy focused on the changing societal settings, which has enabled the adolescents to access a wide range of media such as classics, novels, stories and pieces of literature having content of sex, love and romance<sup>27</sup>, which a century back, would have not only been considered as derogatory to public morality but also would have been viewed as something that debases the mind. The evolution of obscenity can be traced from the principle of Hicklin’s test as applied in *Ranjit Udeshi vs State of Maharashtra* to a more progressive step, the Roth test which covered:

- 1) evaluation of a reasonable person
- 2) acceptability of community standards
- 3) works with questionable predominant theme
- 4) importance of considering work in its entirety

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<sup>24</sup> Sagrika Rajora, *Criminal Law And Obscenity – A Legislative Analysis*, THE CRIMINAL LAW BLOG (Dec. 12 2020, 1:30 AM), <https://criminallawstudiesnluj.wordpress.com/2020/01/18/criminal-law-and-obscenity-a-legislative-analysis/>.

<sup>25</sup> *Jacobellis v. Ohio*, (1964) 378 U.S. 184.

<sup>26</sup> *Chandrakant Kayandas Kakodar v. The State of Maharashtra*, (1970) AIR 1390.

<sup>27</sup> *Id.*

5) judging whether an obscene work is aimed to excite individuals' prurient interest

The same was effectively used in the later judgement of *Aveek Sarkar Vs State of West Bengal*<sup>28</sup>. The present times create the need for a more inclusive definition, which can be systematically derived from the Miller test for obscenity which adds certain nuanced criteria to the Roth test such as:

- 1) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,<sup>29</sup> and
- 2) whether the work, 'taken as a whole,' lacks serious literary, artistic, political, or scientific value.<sup>30</sup>

The aforementioned fundamentals, as laid down in the Roth test have to be combined with specific guidelines of the Miller test to bring forward a more progressive and comprehensive approach towards perceiving obscenity. Therefore, the new test should be developed on the lines of both these tests to include an enhanced form of community standards, which would be inclusive of the predominant theme under consideration necessary to evaluate the underlying motive of the work which has to be judged in its entirety. For determining the absence of the expected values and discerning the reason for the presence of depictions of sexual conduct, this task must be undertaken from the perspective of a reasonable man. This new standard will not form an obstruction to the freedom of speech and expression as guaranteed by the Indian Constitution, but rather enable it to flourish.

The term "morality" can either be used descriptively to refer to certain codes of conduct established by a society or a group (such as a religion), or accepted by an individual for her own behaviour.<sup>31</sup> While normatively, it would refer to a code of conduct that, given specified conditions, would be approved by all rational people<sup>32</sup>. This in turn varies with regards to the

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<sup>28</sup> *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

<sup>29</sup> *Miller v. California*, (1973) 413 U.S. 15.

<sup>30</sup> *Id.*

<sup>31</sup> *The Definition Of Morality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Apr 17, 2002 <https://plato.stanford.edu/entries/morality-definition/>.

<sup>32</sup> *Id.*

contemporary settings but has to be conscious of the commitment of creating an inclusive atmosphere for the execution of democratic-political processes in which both the individual as well as the collective interests can flourish. This is because preserving the individual autonomy is at all times of primary interest. As reflected in the case of *M.F Husain v Raj Kumar Pandey*<sup>33</sup>, the court emphasised on maintaining a balance between the freedom of speech and expression, on one hand and public decency and morality,<sup>34</sup> on the other hand. The Court's obligation to protect the former cannot be subjugated as long as the circumstances are such that the use of the sanctioned freedom poses a threat to the interest of the community. And similarly, the doctrine of morality as perceived by a particular community should not transgress the freedom of speech and expression in any way. However, the inconsistency and the ever-changing nature of interpretation makes it imperative for the courts to derive their understanding based on the evolving meaning of obscenity and changing societal settings.

*Regina v Hicklin* highlighted that when obscenity and art are at crossroads, the art has to have such an overbearing effect that it would render obscenity as insignificant. It becomes an impossible task to assert limitations based on the perception of a particular community. Any attempt to rationalize or regularize the community standards test, by applying a uniform national standard, or by imposing the opinion of the majority will likely result in greater suppression of important political, literary, and artistic expression, especially for dissident and subordinated groups (such as feminists and sexual minorities)<sup>35</sup>. The problems of arriving at a homogenous definition of community have been previously mentioned and the constant need for the evolution of the idea of obscenity has provided a greater scope for inclusion. Therefore, the distribution of art/literature should not be restricted by the morality of a community and its standards for obscenity. It is imperative to realise that though the community standards play a crucial role in determining obscenity, it cannot be used as the sole criteria for evaluation. Several other factors such as the targeted audience, the predominant theme, associated artistic and literary value,

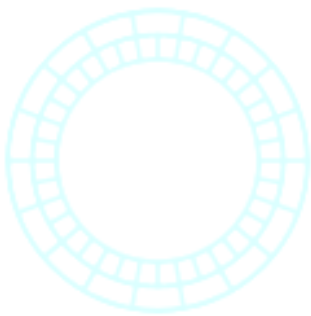
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<sup>33</sup> Maqbool Fida Husain v. Raj Kumar Pandey, (2008) Cri LJ 4107 (Del).

<sup>34</sup> *Id.*

<sup>35</sup> Bret Boyce, *Obscenity And Community Standards*, 33 Yale J. Int'l L. (2008), <https://digitalcommons.law.yale.edu/yjil/vol33/iss2/2> .

standards of a reasonable man etc. need to be taken into consideration while asserting the same. Section 294 of the IPC should not be used as an instrument for overriding the civil liberties. Therefore, a balance has to be maintained between public morality and constitutional morality which change in accordance with the changing ethos.



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