Obscene or Artistic?
The Poetics and Politics of the Obscenity Law in Indian Art and Literature

Dikshit Sarma Bhagabati

Jindal Global Law School, O.P. Jindal Global University, Sonipat, India

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Abstract

This review article charts how the obscenity law has been a shaping influence across different forms of media in India, especially literature and art. By taking into account the effect of Section 292 of the Indian Penal Code on the lives and careers of a few renowned creative professionals, from Manto to M.F. Husain, this article reveals the shortcomings of a moralistic approach to obscenity. Over the course of the 20th century and the early years of the 21st, the law has undergone notable changes, some inspired by comparative law developments around the world and some unique to the Indian context. Through a thematic arrangement of case law, this paper attempts to throw light on the Indian judiciary's quest to gauge obscenity and penalize it. The various ideologies which are brought to bear on obscenity highlight the need for an objective test in this area. Moreover, by criticising the existing legislative definitions of obscenity and its doctrinal development over time, this paper will map the trajectories towards that objective standard.

Keywords

Section 292; Obscenity; Literature; Art; Progressive Writers; Hicklin Test; Roth Test

On being questioned about the purported elements of obscenity in his writing as far back as 1956, Saadat Hasan Manto, the controversial Urdu author and playwright, replied: "Why would I want to take the clothes off a society, civilisation and culture that is, in any case, naked?"[1] Perhaps this very attitude was responsible for his prosecution for obscenity on no less than six occasions, three before India's independence and three subsequently in Pakistan. His bane was Section 292 of the Indian Penal Code 1860 ('IPC') — a British-made law that prohibits the production and dissemination of obscene materials. This provision can be read as part of a retraining or reconditioning of aesthetic sensitivity, which the British were perpetuating through literary education. By regulating what the colonial society could make of a work of creative expression, the colonial administrators tried to foster a relatively liberal civil society — burgeoning along with the colonial public sphere — free from the traditional normative order.[2] To this end, the autocratic British rule in India was portraying itself as a paragon of liberal democracy in the West. This civil society, primarily through the press and a literary curriculum saturated with 'suitable' aesthetic principles, was a way for the British to whitewash this apparent contradiction.[3] However, as we shall see later, eroticism has been present, and broadly acceptable, in many Indian engravings and paintings considerably before the British Imperial project in India. The colonial enterprise to redefine aesthetics and impose a certain sensibility upon India, therefore ended up being superimposed over a more nuanced historical engagement with eroticism in India.

[1] Manto, *Lazzat-e-Sang* (Saqi Book Depot 1983).

[2] In practice, this was strongly constrained by the politics of colonial administration. Many a time, the interests of the colonial administration aligned shockingly with the orthodoxy. Indeed, they generally were reluctant to intervene in the social sphere unless guided by political objectives. For an account on the intersection between colonial masculinity and patriarchy within the Hindu orthodoxy, see generally, Mrinalini Sinha, *Colonial Masculinity: The "Manly Englishman" and the "Effeminate Bengali" in the Late Nineteenth Century* (Kali for Women 1997); to understand the nature and dynamics of colonial intervention in the social sphere against the backdrop of the regulations on *Sati* (widow immolation), see generally, Lata Mani, 'Contentious Traditions: The Debate on Sati in Colonial India' in Kumkum Sangari and Sudesh Vaid (eds), *Recasting Women: Essays in Colonial History* (Kali for Women 1989).

[3] Henry Schwarz, 'Aesthetic Imperialism: Literature and the Conquest of India' (2000) 61 Modern Languages Quarterly 563; T Agathocleous, '"The Coming Clash of East and West": Syncretism, Cosmopolitanism, and Disaffection in the Colonial Public Sphere' (2017) 31(4) Textual Practice 661.

The idea of obscenity itself has gradually changed over time. Since obscenity laws have been used to persecute creative visionaries in different countries at different points in time, the discussion lends itself to comparative analysis cutting across time and space. This long conflict between those seeking to uphold and apply such laws and many writers, painters and thinkers at odds with it, can be traced as a timeline of transition propelled by the changing attitudes towards obscenity, the constant friction between various cultural and legal narratives around it, ideological discourses and conservative voices within the Indian judiciary—taking two steps forward, only to then take one step back. In this article, I will attempt to map how the disquiet about depravity across different forms of Indian media has been articulated through the workings of the obscenity law, further legitimating an environment of repressed sexual expression through legal regulations—"the profanity of prudery".[4] The history of the law is inseparably enmeshed in its dealings with literature and art, and so shall my focus mainly be on these fields. But only a study of the full array of media, from cinema to photographs, that fall under the ambit of the law can reveal its real progression. Cinema in particular becomes interesting, for the sheer extent of its reach is unparalleled in historical terms. Yet, considering it is a relatively newer phenomenon as compared to more conventional forms of art and literature, the foundations of the obscenity law and its tests were laid at a time when the latter still had greater purchase in public consciousness.[5] Moreover, the existence of a statutory body for pre-censorship for films in India filters out most of the objectionable content before the dissemination stage. Of course, that is not to ignore the considerable number of film-related cases that do reach the courts regardless, but my analysis in this paper will focus on the

[4] Ratna Kapur, 'The profanity of prudery: The moral face of obscenity law in India' (1997) 8(3) Women: A Cultural Review 293, 293.

[5] Producing a wide range of works from travelogues to poetry, the colonial literary culture saw amateurs rising to prominence, as well as professionals consolidating their footing more firmly. See, Máire ní Fhlathúin, *British India and Victorian Literary Culture* (Edinburgh University Press 2015) 1-6.

constitutive significance of the legal encounters with art and literature, which provide the doctrinal foundations for other areas of media that fall within the remit of the obscenity law.

Although there remain no qualms today regarding the need for an objective test of obscenity, I will try to show towards the end of the article that obscenity is yet to be detached completely from its moralistic interpretations. A great many visionaries who had challenged the prevalent social norms of their times were harassed relentlessly by the law, all under the pretext of public policy concerns. Every time there was a controversial application of the law, the test emerged out of it redefined and reoriented. That a law against obscenity is needed, lest society be flooded with undesirable, dehumanising materials, is conceded right at the outset. However, as one author has perspicaciously summed up the confusion in the 1960s in the United States, which is equally relevant for India today: "we either do not know or cannot agree upon what is obscene or why we should censor whatever it is that we may regard as obscene".[6]

As shall be explained in greater detail below, almost all liberal interpretations of the obscenity law favour the sort of art that demonstrates "serious…artistic…value".[7] The exact wordings might differ from case to case but the point persists, be it a case in England or one in India: in order to determine what is obscene, there must be a prior judicial determination of what is art. This particular phraseology has been borrowed from the 1973 US case *Miller v California*.[8] In the long litany of obscenity cases, this one stands at a juncture when law gradually began embracing post-modern art, hints of which can be seen in the dissenting minority opinion in this case.[9] Post-Modern art came about not merely as a new genre but also in opposition to the very attempt of defining art. By this time judicial opinions had reluctantly started discarding the dichotomy between good art and bad art. Fitting within the former

[6] Robert McClure, 'Obscenity and the Law' (1962) 56 ALA Bulletin 806, 806.
[7] *Miller v California* 413 US 15 (1973) [2].
[8] ibid.
[9] Amy Adler, 'Post-Modern Art and the Death of Obscenity Law' (1990) 99 The Yale Law Journal 1359, 1361.

category ensured insulation against the obscenity law, whereas the latter constituted a valid reason to penalize a work. The exacting attention to conforming with an artistic tradition was also losing ground. Many regard Modernism as a purist movement and this is equally applicable to the art of that time.[10] But one wonders if such a chronology is suitable for Indian art. With its opulent trove of ancient erotic engravings and paintings, texts, poetry, and prose that deals expansively with love-making, Indian art seems to have been less puritan in the past.[11] When Indian progressive writers emerged in the 20th century, most of them lamented the rigid morality that literature was imprisoned in, and nostalgically glorified the outlook towards sex in classical times. Sex, for them, was a real part of life, nothing much out of the ordinary; the expression of which was severely curtailed in the kind of literature that was then being produced. Before these progressive writers began influencing the Indian literary scene, having been strongly inspired by the 1917 Bolshevik revolution, Indian literature was increasingly striving to sustain the nationalist movement by producing works that were overtly patriotic.[12] However, the works of these writers were strongly imbued with a sense of social justice. They rejected the banality of sanitised literature and reminisced about a golden age of Indian literature in the past. It is therefore understandable that contemporary judges continue to prefer alluding to their texts in passing, even when favouring artists charged with obscenity.

This imagination of the ancient past still reverberates in Indian politics, not just in occasional judgments.[13] In this article I shall undertake a critical review of the primary sources

[10] Clement Greenberg, 'Modernist Painting' in Francis Frascina and Charles Harrison (eds), *Modern art and Modernism: A Critical Anthology* (Harper and Row 1982) 6.

[11] This erotic artistic past is once again relevant as a reference point, in the context of striking down Section 377 of the Indian Penal Code as unconstitutional. See, Amy Bhatt, 'Decriminalising homosexuality is a restoration of ancient Indian sexual norms' *The Asian Correspondent* (17 September 2018) <https://asiancorrespondent.com/2018/09/decriminalising-homosexuality-is-a-restoration-of-ancient-indian-sexual-norms> accessed 16 January 2019.

[12] Bhisham Sahni, 'The Progressive Writers Movement' (1986) 29 Indian Literature 178.

[13] In fact, the past, however distorted, has always been conceived of as an anchoring point for reconstituting the lost "Indian Civilisation" ever since the colonial times. More recently, the populist politics of the Hindu right has rejuvenated this conception of a glorious ancient past. For a compelling account on how this kind of politics stands the test of actual history, see generally, Romila Thapar, *The Past as Present: Forging Contemporary Identities Through History* (Aleph Book Company 2014).

(judgments and legislation) as well as the existing literature on the legal evaluation of obscenity in the context of art and literature. My effort will be to probe the interventions that have moulded Section 292 and, through this interface, influenced a great deal of contemporary creative expression in the country.

The 19th century: obscenity in British India

For a matter which was regulated in England by more than one statute and in more than one domain, it is slightly bemusing that the draft of the IPC, prepared by the Indian Law Commission headed by Thomas Babington Macaulay and submitted to the Governor-General of India Council in 1837, talked of obscenity narrowly, merely as an insult to the modesty of a woman.[14] In 1857, the Obscene Publications Act 1857 was passed by the British parliament, and three years later the IPC came into effect in British India. Unlike the 1837 draft, the IPC that was finally enforced did have a section on obscenity which proclaimed that

> A book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be 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 person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[15]

An offence under this section today is punishable, on first conviction, with imprisonment which may extend up to two years and with a fine of two thousand rupees. In the event of a subsequent conviction, the prison term may be extended up to five years and the fine to five thousand rupees.

Perhaps what led to the framing of Section 292 in this manner was the outrage of some Britishers, perturbed by "indecent books" being "[thrusted] into the hands of passengers in all

[14] Abhinav Chandrachud, *Republic of Rhetoric* (Penguin Random House India 2017) 110.
[15] Indian Penal Code 1860, § 292.

principal streets and thoroughfares of this city [Calcutta]".[16] It was a prevalent belief in British India that the cheaper a material was, the greater would be its potential to corrupt. These apprehensions had a certain appeal, for cheaper material could be acquired by a larger number of people and thus would make up a more sizeable pool to corrupt. In colonial India reprints of books originally published in the West were being sold at a fraction of their original prices.[17] The fact that they were made available in a number of vernacular languages was no less discomforting to the colonial administrators. Their failure to understand what was being said behind their backs in an unintelligible tongue, which now many could read and write owing to colonial education, added to their challenges in keeping an immensely diverse India tightly in the grip of first the East India Company, and later the British Crown.[18] Nonetheless, the government continued to downplay the volume of imported publications in India till the 1880s. The British were convinced that India was not a "reading country". They were certain that if counted, there would not be "ten tradesmen altogether, European and Native, who import[ed] books".[19] This bubble of complacency burst in 1887 when the London publisher Henry Vizetelly brought out translations of Emile Zola's *La Terre*.[20] Shortly before his trial in July the next year, the then Viceroy Lord Northbrook informed the Secretary to the Government of India, A.P. MacDonnel, about these translations being readily made available at railway

[16] 'Proceedings of the Legislative Council of India' (R3-1/677, Odisha State Archives 1855) 582-586, as cited in Chandrachud (2017) 110.
[17] In addition to overseas colonial markets, like India and Australia, cheap reprints bothered publishers in England as well. *See*, Paul Eggart, 'Robbery under Arms: The Colonial Market, Imperial Publishers, and the Demise of the Three-Decker Novel' (2003) 6 Book History 127.
[18] For a general account of the colonial government's dealings with the vernacular press, see, Hassan Imam, 'Vernacular Press and the Rise of Political consciousness in Colonial South Asia' (2016) 2 International Research Journal of India 1. For insights into how vernacular languages were a site of political contestations (Punjabi in this case), *see*, Farina Mir, *The Social Space of Language: Vernacular Culture in British Colonial Punjab* (University of California Press 2010), 49-53. For a short case study on the power dynamics in the colonial education policies regarding vernacular languages, *see*, Anu Kumar, 'New Lamps for Old: Colonial Experiments with Vernacular Education, Pre- and Post-1857' (2007) 42 Economic and Political Weekly 1710.
[19] Judicial, A, Home Department, NAI (June 1886) 317-318, as cited in Deana Heath, *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia* (Cambridge University Press UK 2010) 149.
[20] Deana Heath, *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia* (Cambridge University Press UK 2010), 149-155.

stations. Northbrook advised MacDonnel to investigate and take action if necessary under the IPC. Concerns were lodged with the authorities regarding translations of French novels, and in particular how they were eroding "moral sense" and the "respect of authority" among the Indian youth.[21] While the former was a professed goal of the Civilising Mission of which the British were torchbearers — the White Man's Burden that the high-headed Victorian morality had taken on itself — the latter was absolutely crucial for the maintenance of British rule in India. For example, William Mazzarella gives a meticulous account of the influence exercised by Victorian morality, among others, in fashioning cinema in late colonial India.[22] His is an account of growing sexual conservatism. It is in cultivating this very aversion towards the expression of sex that Wendy Doniger holds the British complicit, vindicating the Mughals.[23]

The classic colonial generalisation was that Indian morality could not match that of the civilised West's in dealing with questionable literature. Numerous critics blamed the Indian household for this lapse of morality; for harbouring a sense of invariable immorality in the "inflammable minds of Indian boys". Indians, they said, breathed in their impure homes and thus were given to adversely comprehending books that would be rather innocuous to the "pure and healthy morals of English boys".[24]

While colonialism was maturing in India, in England the Hicklin test was en route to being formalised. The test, which would prove tremendously influential for many years to come, emanated from the 1868 English case of *Regina v Hicklin*.[25] The object in question here was a pamphlet titled "The Confessional Unmasked" — a scathing attack on Roman

[21] A Neut to A Croft, 19 December 1887, as cited in Heath (n 20) 150.
[22] William Mazzarella, 'Making Sense of the Cinema in Late Colonial India', *Censorships in South Asia: Cultural Regulation from Sedition to Seduction* (Indiana University Press 2009).
[23] Wendy Doniger, *Beyond Dharma: Dissent in the Ancient Indian Sciences of Sex and Politics* (Speaking Tiger 2018).
[24] L Garthwaite to Director of Public Instruction, Madras (17-72 September 1889, Education, B, Home Department, NAI), as cited in Heath (n 20) 151.
[25] (1867-68) LR 3 QB 360.

Catholicism and the conduct of its priests. The pamphlet essentially took up issues such as "how many women may commit adultery?" and "how they may afterwards deceive their husbands?" and, much to the horror of the "infallible" church and its devout adherents, went on to address these questions by copiously quoting texts and scriptures.[26] Chief Justice Cockburn, however, did not think very highly of the author's heroics. He opined in his judgment that

> [I]t is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. Is he justified in doing that … because he thinks that some greater good may be accomplished .... It appears to me the only good that is to be accomplished is of the most uncertain character.[27]

The test became an accepted standard in quite a few common law jurisdictions.[28] It consists of a couple of vital ingredients that still make up its application, even after all the iterations it has been through over the years. One is presumed intent: as clear from the excerpt above, the intention of the wrongdoer had to be deduced from his words and conduct, irrespective of his actual intent. Another is that the impugned object must "deprave and corrupt [those] whose minds are open to such immoral influences."[29] In other words, the yardstick that the Chief Justice used was not that of a reasonable person, but the most immature and the most vulnerable.

The fundamental problem with this metric is the mischaracterisation of the underlying obscenity on which it is based. A person's distaste for a supposedly obscene object is not

[26] *The Confessional Unmasked* (The Protestant Electoral Union 1857).
[27] *Regina v Hicklin* (1867-68) LR 3 QB 360, 372.
[28] KE Mullin, 'Unmasking The Confessional Unmasked: The 1868 Hicklin Test and the Toleration of Obscenity' (2018) 85 English Literary History 471, 471. Among other jurisdictions, Canada adopted a version of the test in 1892 and it remained on the Criminal Code until 1959; in the US, the test remained in force from 1896, when the Supreme Court adopted it as the standard definition, till 1959.
[29] ibid 371.

because of something inherently obscene in it, but because it threatens, or so the person thinks, the values that s/he cherishes. Therefore, at the end of the day, the courts must still search for an objective standard, which, in this case, is attained by benchmarking reactions against the values of the most vulnerable. And precisely because the test bends towards the extremes instead of acknowledging the middle ground — the reasonable person — it rests on an overly-sensitive sense of moral indignation. For instance, if some person fancies women with short hair and an artist paints a nude portrait of such an imaginary woman, the court has at its disposal two broad approaches. Firstly, it can hold that nudity is intrinsically bad. This would not only be a decision lacking any credible rationale but one that also contravenes the Hicklin test, in that "whether" and "whom" the object corrupts is a crucial consideration. Secondly, it can hold that nudity depraves the young: the court is not responding to the sensibilities of the person who singularly likes women with short hair but is primarily concerned with the potential for any nude portrait harmfully affecting people lacking the maturity to cope with it. This is where the Hicklin test goes awry, for it is by nature loaded in favour of interests on the margins. If the cherished value is religion, then the test tilts towards fanatics; if nationalism, then jingoists; if ethics, then puritans; if morality, then perverts.

1900-1950: the emergence of progressive writers and readers

Section 292 received a material amendment through Act No. 8 of 1925, passed as a result of India's participation in the International Convention for Suppression of Traffic in Obscene Literature 1923.[30] Despite that, there was still no definitive legislative test for obscenity. The common law Hicklin test was well ensconced in Indian law, as a growing number of authors discovered.

[30] Vishnu D Sharma and F Wooldridge, 'The Law Relating to Obscene Publications in India' (1973) 22 The International and Comparative Law Quarterly 632, 633-636.

Manto[31] was the first author to be compelled to appear in court on account of obscenity and certainly not the first to oppose it vehemently either. In 1933, around the time when Manto's association with Abdul Bari (an academic and educational reformer) had begun, an anti-imperialist, left-oriented writers' movement was starting to emerge. Founded to create an open-minded space for writers and visionaries, this consortium of organisations, better known as the Progressive Writers' Movement, was considerably influenced by Russian and French intellectuals, as was Manto.[32] One of the pioneering organisations of this movement — of which Manto was also a member — was established in 1935 and christened as the Indian Progressive Writers' Association (IPWA). In 1932, an anthology of short stories edited by Sajjad Zaheer[33] and entailing contributions from Ahmed Ali,[34] Mahmud-uz-Zafar and Rashid Jahan[35] was published under the title of *Anghare*. Some of its inclusions stirred up massive controversies. Fuelled by this backlash, the IPWA went on to occupy the forefront of the cause

[31] Saadat Hasan Manto was originally an Indian writer who later migrated to Pakistan during the partition. His works in Urdu include twenty-two anthologies of short stories, a novel, five series of radio plays, three collections of essays and two collections of personal sketches. His left leaning politics were inspired by Russian and French authors like Chekov and Hugo — translating whose works was his first major literary endeavour. Manto today is renowned for his writings about the atrocities and chaos during the partition. See, Shiv Visvanathan, 'Celebrating Manto' (2009) 35 India International Centre Quarterly 260; also see, Ayesha Jalal, *The Pity of Partition: Manto's Life, Times, and Work Across the India-Pakistan Divide* (Princeton University Press 2013).

[32] Rakhshanda Jalil, 'Loving Progress, Liking Modernity, Hating Manto' (2012) 40 Social Scientist 43.

[33] Sajjad Zaheer, an Urdu writer and Marxist ideologue, was a member of the Communist Party of India who later became a founding member of the Communist Party of Pakistan after the partition. Zaheer was jailed in Pakistan during the Rawalpindi Conspiracy case along with Faiz Ahmed Faiz and others. The conspiracy is said to be a Soviet-backed plot hatched by the communists to seize power in Pakistan. See, K Satchidanandan, 'Syed Sajjad Zaheer' (2006) 50 Indian Literature 8.

[34] Ahmed Ali's career in literature is often overshadowed by his career as a professor, civil servant and diplomat. He joined the Bengal Senior Educational Service as a professor and the head of the English Department at Presidency College, Calcutta in 1944. During the partition, he was teaching at University of China in Nanking. There he failed to mention whether he wanted to remain in India as a government servant or transfer to Pakistan, and thus was not allowed to return to India in 1948. Forced to move to Pakistan, he joined the Foreign Service there in 1950. He his best known for his first novel in English, *Twilight in Delhi*.

[35] Rashid Jahan is considered a forerunner among the 20th century women writers in Urdu literature. She is best remembered for her unconventional contributions in *Anghare*. Her first among the two pieces, *Dilli ki Sair*, is a narrative about the wait of a burqa-clad woman on a railway platform; she sits there watching life go by, waiting for her husband to come and take her home. The theme draws attention to the blindness of male privilege towards the women in veil. The other piece, *Parde Ke Peeche*, is a conversation between two women from affluent families. See, Begum Khurshid Mirza, *A Woman of Substance* (Zubaan 2005), 86-104; also see, Rakshanda Jalil, *A Rebel and Her Cause: The Life and Work of Rashid Jahan* (Oxford University Press 2014).

to provide immunity to literary expression from narrow-minded persecution.[36] Though this was the trigger, the crux of the movement rather lay in harnessing literature as a means to achieve the nobler end of reforming the Indian society at large. Yet, the attendance of literary delegates at the first All-India Progressive Writers' Conference in 1936 was not very promising. Only two delegates from Bengal, three from the Punjab, one from Madras, two from Gujrat, six from Maharashtra and twenty-five from Uttar Pradesh were present.[37] Jawaharlal Nehru delivered an address: a clear sign of support from the left-wing of the Indian National Congress for a movement charged with Marxist ideals, that too in an environment where Soviet diplomacy was encouraging antifascist alliances.[38] Speaking on the need to downplay the importance of structure in literature, Munshi Premchand, an authority on the Hindi prose himself, remarked in his inaugural speech: "Hitherto we had been content to discuss language and its problems …. We have now to concern ourselves with the meaning of things and to find the means of fulfilling the purpose for which the language is constructed".[39] The manifesto of the movement, drafted in 1936 by Sajjad Zahher and Mulk Raj Anand,[40] goes a long way in locating a place for literature in the India of that time. That "Indian literature, since the breakdown of classical literature, has had the fatal tendency to escape from the actualities of life"[41] is an accusation that seems equally valid even today. Many an erotic engraving on the temple walls of Khajuraho and Madan Kamdev and many a page in the *Kama Sutra* would have ceased to

[36] 'Progressive Writers' Association' (The Open University) <http://www.open.ac.uk/researchprojects/makingbritain/content/progressive-writers-association> accessed 29 October 2017.
[37] Hafeez Malik, 'The Marxist Literary Movement in India and Pakistan' (1967) 26 The Journal of Asian Studies 649, 649-650.
[38] ibid, 654.
[39] Ajoy A Mahaprashasta, 'Writers for Change' *Frontline* (17 December 2011) <http://www.frontline.in/static/html/fl2826/stories/20111230282608900.htm> accessed 15 July 2018; *also see*, Carlo Coppola, 'Premchand's Address to the First Meeting of the All-India Progressive Writers Association: Some Speculations' (1986) 21 Journal of South Asian Literature 26.
[40] Mulk Raj Anand is renowned for his depictions of the poorer castes in India. Writing primarily in English, he was one of the first authors to incorporate Punjabi idioms into English. Influenced by communism like many of his fellow progressive authors, Anand is also known for his scathing attacks on the British rule in India.
[41] 'Manifesto of the IPWA' (*Red Diary* 1935) <https://reddiarypk.wordpress.com/2007/08/22/manifesto-of-the-pwa/> accessed 26 December 2017.

reflect the rich diversity of human experience had their craftsmen viewed them from the same myopic vantage point that the IPWA was fighting against. And so the manifesto urged:

> Witness the mystical devotional obsession of our literature, its furtive and sentimental attitude towards sex, its emotional exhibitionism and its almost total lack of rationality. Such literature was produced particularly during the past two centuries, one of the most unfortunate periods of our history, a period of disintegrating feudalism and of acute misery and degradation for the Indian people as a whole.

In its heyday, the movement flourished as a conducive platform to challenge and rethink the hold of the obscenity law on a variety of arts, including, but not limited to, literature. However, by the late 1950s, the movement, dented by the partition of British India into the independent states of India and Pakistan, began nearing its demise, breaking up into remnants within and without the borders between these two newly formed countries. Subsequently, Manto also fell out with his fellow progressives, though his brutally honest stories continued to thrive, and so did the flow of obscenity charges.[42]

The Progressive Writers' Movement became a concerted platform for liberal voices in the Indian literary scene — voices that were seeking an environment where they could write to the utmost of their literary and creative skills without the fear of societal scorn or legal persecution. Among these courageous voices, one belonged to the remarkable Ismat Chugtai.[43] Her celebrated short story, *Lihaaf*, landed her in the midst of a legal controversy with obscenity at its core. *Lihaaf* is a marvel of Chugtai's ability to speak about the impermissible with euphemisms and literary devices; a fine display of her literary dexterity; to cover and yet not hide or obfuscate. She speaks through the innocence of a child-narrator and uses a plethora of metaphors and imageries to depict all that can be considered obscene in the story — sexual

[42] Salim Akhtar and Leslie A Flemming, 'Is Manto Necessary Today?' (1985) 20 Journal of South Asian Literature 1, 2-3.
[43] Ismat Chugtai was considered a pioneer in writing about female sexuality. Coming from a well-to-do liberal Muslim family, Chugtai's content displayed prominent signs of feminist and reformist sentiments. Her short story *Lihaaf* is considered not only as a pioneer in homosexuality in South Asian literature but also as a bold statement of female sexuality.

intercourses, homosexuality and perhaps even an insinuation at paedophilia. The child-narrator only understands so much as her age could have taught her, but an adult reader is meant to see past the veil. It is therefore worth wondering about the role of the reader — if not complicity — in the active construction of obscenity. The charges against Chugtai were taken up in 1944 and eventually quashed by the Lahore Court. Her lawyer argued that the story did not contain any expletives or an explicit depiction of a sexual intercourse — the requisites to prove obscenity at the time.[44]

One can safely maintain that Manto and Chugtai both wrote with the same ink, the kind that produced more blots than masterpieces from a certain societal (i.e., conservative) perspective. Of course, Manto's flamboyance and outspokenness outdid even Chugtai's, but in what the society deemed obscene, both saw acts that were rampantly committed either in open or, usually, behind the *purdah* (veil), in a locked bedroom unscathed by criticism and questioning. For them, obscenity was a construct to obscure the oppression faced by so many whom the society renders invisible: the prostitute whose sexuality is owned by everyone but her; the undocumented rape survivor of the partition; the countless heads severed in mindless religious fervour and lost in the tragedy of statistics. An anecdotal account is presented in Chugatai's memoirs collated under the title *Kaghazi Hai Pairahan*. A witness, upon being asked by Manto's lawyer to point out which word or phrase he had found obscene,[45] confidently answered, "bosom," which was used to denote a woman's breast. Manto snapped at this and blurted, "What else did you expect me to call a woman's breasts — peanuts?".[46]

Women like Ismat Chughtai, Krishna Sobti, Qurratulain Hyder, Mahashweta Devi, Shivani and Kamla Das, among others, took to the pen to put a sense of their own lives into

[44] Priyamvada Gopal, *Literary Radicalism in India: Gender, Nation and the Transition to Independence* (Routledge 2012) 65-66.
[45] Manto was being tried for his story *Bū* (Smell or Scent).
[46] Ismat Chugtai, 'An Extract from Kaghazi Hai Pairahan (The Lihaf Trial)' (2000) 15 The Annual of Urdu Studies 429, 440.

words, affording a close and intimate insight into the emotional, sexual, and social issues of women. This surge in women writers was symptomatic of larger changes that were occurring in Indian society, transforming the dynamics of not just who was writing, but also of what was being written. The bedrock of this change was increasing literacy rates and rising accessibility to education after independence. This phenomenon is intelligibly illustrated by Mahadeo Apte in his study of contemporary Marathi literature. Stated briefly, its readership and authorship underwent drastic transformations in the post-independence period. The college-educated, upper-or-middle-class writer, influenced by western ideas and writing for readers from a similar background, gave way to writers and readers from all strata of the society, especially those from the lower rungs.[47] While the former was content with "good and evil persons, good and evil customs, stagnation and reform, ignorance and reason",[48] works belonging to the emerging category of writers had a vivid reflection of their lived experiences. The former's account of chaste, romantic love was losing out to a conception of love that was no more platonic, with sex as a part of it rather than a perversion. The quintessential Indian writer departed from trading his kurta for a suit or vice versa to piercing the drapery of the tainted society and looking at ignored or marginalised groups: this writer peeped into brothels, questioned caste prejudices, lived in slums and regretted the iniquitous household. Yet, in doing so s/he engaged in a practice that would fluster the judiciary for a great many years to come — at what point does literary merit override obscenity?

The 1950s and the early 60s: the Hicklin test rages on

The two decades of 1950s and 60s were marked by a nascent acknowledgement of artistic merit as a justificatory response to obscenity allegations, both in England and India. While in

[47] Mahadeo L Apte, 'Marathi Fiction: Obscenity or Reality?' (1969) 29 The Association for Asian Studies 55, 56-58.
[48] D K Bedekar, 'Contemporary Marathi Literature' (1967) 1 Indian Writing Today 49, 51.

England this progress was largely driven by legislation, in India the push came from case law. By this time, it had become an accepted trend even in India to not find an object obscene merely for nudity.

By 1954, Jehangir Art Gallery in Bombay had already struck a responsive chord among artists and their admirers. Within two years of its establishment, it had become a renowned hub for both masters and new talent, the casual visitor and the trained eye.[49] It was in such a fertile breeding ground for art, niche yet steadily expanding at the same time, that Akbar Padamsee took his paintings to be exhibited at Jehangir Art Gallery.

On the 29th of April, an Inspector of the Bombay Police paid a visit to the gallery and decided that two of Padamsee's paintings were obscene in nature. Each of these paintings depicted a nude man laying his hand on the bare breasts of a woman. Repulsed by the paintings, he asked Padamsee to remove them, but Padamsee was unyielding. Later the police seized the artworks and booked Padamshee under Section 292; an episode that was supposedly orchestrated at the behest of Morarji Desai, who was then the Chief Minister of Bombay state.[50]

The court reiterated the rule that nudity per se is not obscene, so long as the circumstances in which it is displayed does not "shock or offend the taste of any ordinary or decent minded person".[51] Notably, though the Hicklin test had arrived well in India, judges were yet to embrace it in its entirety: the dictates of the test, the consideration for the most vulnerable groups, were yet to be uniformly accepted by every echelon of the judiciary. The Presidency Magistrate, quite rightly, failed to see how people turning up for an art exhibition, having already encountered such exposure before, could be offended by the paintings. The

[49] Rahul Mehrotra and Sharada Devi, *The Jehangir Art Gallery : Established 21 January, 1952* (Jehangir Art Gallery 2002).
[50] Joenna Fernandes, 'At 60, its Celebration Time for Iconic Mumbai Art Gallery' *Times of India* (7 October 2012).
[51] *Akbar Padamsee v The State* Case No. 249/P of 1954 [3].

judge could see that the viewership of Padamshee's artwork, at least in this instance, was limited to a mature mind.[52] He applied the rule and found that the paintings did not come within the purview of Section 292. The case went up to the Bombay HC, where Padamsee eventually won as well.

Spaces like art galleries, which have little interface with the masses, were relatively shielded from the obscenity law. Literature, however, seldom had this comfort. In England, the feud between literature and the obscenity law took a high-profile turn in *R v Penguin Books Ltd.*,[53] a case concerning DH Lawrence's *Lady Chatterley's Lover*. The plot of the book revolved around one Connie Reid, an attractive woman from an upper-middle class, culturally bohemian background, and her aristocratic husband. After sustaining injuries in the Great War, he became paralysed downwards from his waist and, thus, impotent. Connie, isolated from her husband, fell for the gamekeeper of the estate, first sensually and then profoundly in love. The crux of the tale lay in Connie's exploration of her sexuality and how neither could one remain aloof from physical urges nor would love so blossom.[54] A year prior to the publication of the book by Penguin in 1960, the Obscene Publications Act 1959 had come into force on the 30th of August. The act codified the existing common law offence of obscene libel, yet stipulating two broad defences to it. The defences were innocence[55] — unlike the Hicklin test which had no space for the publisher's intention — and of "public good".[56] The prosecution submitted before the jury that it must decide if the book was obscene and if its literary merit amounted to

[52] Although it was held that S. 292 does not extend to art galleries, this is not an established rule and can differ from case to case as per the requirements of the test applied. However, in England, as per the Indecent Displays (Control) Act 1981, museums and art galleries are protected from obscenity charges. This provision was cited in the 109th report of the Law Commission of India. See, 109th Law Commission of India Report, Obscene and Indecent Advertisements and Displays, 4 (1985) <http://lawcommissionofindia.nic.in/101-169/Report109.pdf> accessed 17 July 2018.
[53] [1961] Crim LR 176.
[54] David H Lawrence, *Lady Chatterley's Lover* (Penguin 1960).
[55] The Obscene Publications Act, 1959, § 2(5).
[56] *Ibid*, § 4.

a public good under Sections 2 and 4 of the Act, respectively.[57] The jury heard thirty-five defence witnesses in total, as opposed to the prosecution which presented none. These testimonies were enriched by diverse expert opinions, from academics to priests, so much that the judge could not resist a casual comment, "In these days the world seems to be full of experts".[58] The case concluded after six days of trial with a victory for Penguin. The decision was grounded on an interpretation of the Obscene Publications Act 1959 which provided for the publication of sexually explicit material in furtherance of a literary purpose. Penguin, to show their gratitude towards the deliverers of the verdict, inserted a dedication to the jury at the beginning of the second edition of their *Lady Chatterley's Lover*.[59]

Like England, India too entered the 1960s with a reinvigorated discourse on obscenity. However, the move was more towards strengthening and enlarging the ambit of the obscenity law rather than providing relief to art and other media. In 1960, the Indian state of Tamil Nadu went a step further and amended Section 292, inserting a new state amendment in the form of section 292 A:

> Whoever prints or causes to be printed in any newspaper, periodical or circular or exhibits or causes to be exhibited to public view, or distributes or causes to be distributed or in any manner puts into circulation any picture or any printed or written document which is grossly indecent or scurrilous or intended for blackmail, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.[60]

The amendment effectively broadened the law to include anyone profiting out of a "scurrilous" circulation or exhibition, be it a vendor or an advertiser. Yet at a very practical level, what

[57] Geoffrey Robertson, 'The Trial of Lady Chatterley's Lover' *The Guardian* (22 October 2010) <https://www.theguardian.com/books/2010/oct/22/dh-lawrence-lady-chatterley-trial> accessed 15 July 2018.
[58] Bernard Levin, 'The Lady's Not for Burning' *The Spectator* (4 November 1960).
[59] 'Penguin and Random House' *The Telegraph* (29 October 2012) <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/9640102/Penguin-and-Random-House-facts-and-figures.html> accessed 15 July 2018.
[60] Indian Penal Code 1860, § 292 A.

exactly does scurrilous mean? What can possibly be so scurrilous that the section on defamation in the IPC — Section 499 — would not have sufficed to deal with it? Perhaps the "scurrilous" object in question was nothing more than an abuse or a similar triviality. And if that was so, one struggles to make out the sanctimonious need to criminalize abuses and profanities. As though the amendment was not enough, Tamil Nadu promulgated an ordinance on September 21 of the same year, rendering the offence cognisable and non-bailable. Its implications: the police could now judge an artist's work and arrest her, as per their own subjective notion of obscenity; or even worse, a politician could direct the police to do so.[61]

India in the 1950s and the 60s was a country struggling to reconcile its past with the future that it was opening itself up to. In an attempt to revive the idea of the civilisation that it once was, and at the same time to forge for itself a unique place in the fast-changing global landscape, India's dilemma was not simply what to preserve and what not to; close to two centuries of colonisation had engendered questions as to what was its own and what not, and how much of it to keep and how much to shed. It was in this context that the debate surrounding *Lady Chatterley's Lover* reached India, having run its course around the world in Japan, Australia, Canada, and the United States, besides England. With a constitution bench of the Supreme Court set to hear the matter in 1964, speculations that the Indian judiciary would make a liberal intervention in the aftermath of the developments in England were doing rounds. Yet, in the end, there was not much respite for literature. The Supreme Court, in the 1964 case of *Ranjit D. Udeshi v State of Maharashtra*,[62] ended up adopting the Hicklin test. The case revolved around an unexpurgated edition of *Lady Chatterley's Lover* in the possession of a book store owned by Udeshi in Bombay. In dismissing the appeal against the previous conviction, the court upheld the constitutionality of Section 292 and devised an application of

[61] A G Noorani, 'Policemen and Obscenity' (1981) 16 Economic and Political Weekly 2033, 2033.
[62] AIR 1965 SC 881.

the Hicklin test that formalised its many existing iterations in the country. Writing the judgment for the court, Justice Hidayatullah clarified the scope of the Hicklin test:

> The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross.[63]

Ranjit Udeshi's case made it apparent that the judiciary was willing to tweak the test so far as it suited the distinctive Indian requirements, and no more. This, as mentioned earlier, had been characteristic of Indian courts — the willingness to cut as much slack in the test as was convenient. At its kernel was not a concern for creative expression, but trepidatious judicial notions about depravity and decadence among the masses. In fact, a select committee under the chairmanship of Akbar Ali Khan, appointed a year ago in 1963, had endorsed some of the provisions of the Obscene Publications Act 1959. The committee recommended for an exception to be made in Section 292 in respect of publications and objects meant for "public good" or for a well-intended purpose in science, literature or art.[64] The recommendations were only effected by Act No. 36 of 1969, a good five years after Udeshi's case had already been decided by the Supreme Court. Though the Supreme Court did express similar sympathies, it was hesitant to go all out in favour of art and literature. Justice Hidayatullah held in his judgment that sex or nudity, by itself, was not sufficient to constitute obscenity. Their presence, he noted, could not be taken as "evidence of obscenity without something more." Moreover, the court refused to parse a book by stressing on "the importance of a few words or a stray passage." For literary merit to trump over obscenity, the whole of the obscene part of a book had to be weighed against the whole of the inoffensive part and "art must so preponderate as

[63] ibid, [15]-[16].
[64] Vishnu D Sharma and F Wooldridge, 'The Law Relating to Obscene Publications in India' (1973) 22 The International and Comparative Law Quarterly 632, 636-637.

to throw the obscenity into a shadow."[65] Simply put, if the court deemed a book to be good literature, it would be let off scot-free. However, if it was thought to be bad literature, it automatically became obscene in the eyes of law. The fact that it was literature nevertheless was yet to be acknowledged.

Justice Hidayatullah's version of the Hicklin test, much like Lord Cockburn's, strove to protect the ones most vulnerable to erotic exposure. The judge subsequently conceded in a (non-judicial) speech that he had indeed read *Lady Chatterley's Lover* with some interest as a student. Later, well past the heights of his youth, when the book was supplied to him during this trial by the Attorney General of India, he failed to "find it amusing enough." Contrasting his younger self with the one on the podium, he wondered if he had grown old.[66] This was the purpose that the court wished for the Hicklin test to serve: to protect the likes of the judge in his youth, easily excited by a book that later they might learn to appreciate on its merits. (The question of how the benefits of the book — if supressed under Section 292 — would be available in later years for more mature reflection was not addressed by the court.) The stifling of expression was being weighed against the protective policies of the state, and the latter came out as the winner. Perhaps it was best for the legislature to intervene, scrap Section 292 and replace it with a system of selective restrictions, like age restrictions in films.

Ranjit Udeshi's case also raked up the sensitive debate on the right to freedom of expression in the context of publications. Not surprisingly, the defence argued that Section 292 constituted an unacceptably vague restriction on the freedom of speech and expression, and that even if it were to be extended to this case, the book as a whole should not be found obscene. Mulk Raj Anand, having batted for progressiveness in literature from the time of the IPWA, testified in the court that the book was a work of impressive literary merit and not obscene. He

[65] *R D Udeshi v State of Maharashtra* AIR 1965 SC 881 [22].
[66] M Hidayatullah, 'Thoughts on Obscenity' (1977) 283 Southern Illinois University Law Journal 283, 285.

beseeched the court not to muzzle free speech and expression, a hallmark of any true democracy. It would have been far more prudent to leave matters of aesthetic judgment, such as obscenity and literary worthiness to the peers in the field, or at least to give sufficient weight to their testimony, but the apex court, in line with the Hicklin test, refused to give any credence to Anand's analysis.[67] This case is therefore additionally remembered for its contribution to the ever-growing corpus of cases relating to the freedom of speech and expression. Article 19(1) of the Indian Constitution guarantees the freedom of speech and expression as a fundamental right, while article 19(2) categorically allows the state to impose "reasonable restrictions" in the interests of "public order." A great many have pondered the actual meaning of the phrase "public order." In *Romesh Thappar v The State of Madras,*[68] public order was referred to as the "state of tranquillity which prevails among the members of a political society". Clearly, the degree of seriousness needed for the imposition of those "reasonable restrictions" was revealed to be manifestly higher than an immature, vulnerable section of the society taking offence to a nude portrait. In conflating the concern for "public order" with the judicial morality on obscenity, the judgment in Ranjit Udeshi's case overlooked this rider on seriousness. For in an attempt to balance the fundamental right and its ramifications if exercised in an unbridled manner, Justice Hidayatullah wrote, "No doubt this article [19(1)] guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality".[69] In the end, the Supreme Court found Udeshi guilty, dismissing the appeal and upholding the twenty-rupee fine. Ironically, England had done away with its restrictions on

[67] Siddharth Narrain, 'Obscenity Under the Law: A Review of Significant Cases' (2009) Alternative Law Forum <https://www.scribd.com/document/192488357/Obscenity-under-the-Law-A-Review-of-Significant-Cases> accessed 15 December 2017.
[68] AIR 1950 SC 124 [5].
[69] *R D Udeshi v State of Maharashtra* AIR 1965 SC 881 [7].

acknowledging literary merit, but the Indian judiciary failed to see beyond the limitations of a colonial era law.

The late 1960s and 70s: whom to deprave and how?

Ranjit Udeshi's case and the Tamil Nadu ordinance heralded the beginning of a long and fragmented reassessment of the obscenity law, predominantly by the judiciary and civil society. Over the course of the next two decades, a number of cases contributed to the redefinition of art and literature's position in the books of law. Udeshi's case stands apart because it laid down a detailed and unique framework within which the Hicklin test was to be employed; a framework characteristic to Indian conditions, distinct from those in England where the test had emerged. Perhaps this was also because it was the first obscenity case to be heard by the Supreme Court after independence. In other words, this case marked a cusp in the timeline of the obscenity law: it drew a line on the varied attitudes towards the law, especially in the lower judiciary, and signalled the beginning of the regime of the Hicklin test based on a settled interpretation of it. It also flagged off an era of increased activism to emancipate art from the clutches of the law.

A lot of prominent literary works are known to have an attitude towards sex that is averse to religion and morality. Of course, this is not universally true. For instance, Enid Blyton, bound by her "husband's most definitive wishes," was not quite sure where she stood in the debate on *Lady Chatterley's Lover* case when most of her peers were firmly vouching for Penguin.[70] Thankfully, more often than not literature has been quite frank with sex — at times for commercial purposes, at times for artistic ones. Although such frankness is more evident in contemporary literature, candour with sex in literary texts dates back to antiquity in India.[71] Innumerable Sanskrit verses, poetry that is of the most exquisite nature, are rife with

[70] David Kynaston, *Modernity Britain, Book Two: A Shake of the Dice, 1956-62* (Bloomsbury 2014) 198.
[71] J Masson-Moussaieff, 'Obscenity in Sanskrit Literature' (1971) 7 Mahfil 197.

phrases that the Indian courts of the 60s and 70s and 80s would have looked at askance. For instance, in *State v Thakur Prasad*,[72] a Hindi version of the *Kokshastra* was disputed in the Allahabad High Court. Although this manual of sexual methods, first written in the 11th or 12th century, draws primarily on the *Kama Sutra* and *Rati Rattan Pradipka*, the court found it to be obscene since the book "dealt with the sex, sexual organs, curiosities of love and of sex life…".[73] The trend was yet to subside a decade later. In *State of UP v Kunji Lal*,[74] a publisher was alleged to be in the possession of sixty-six obscene books, including the *Kama Sutra* and *Rati Rahasya* (*Kokashastra*). Pronouncing a guilty verdict under S. 292, the same court opined that something might not be "obscene in the setting of the society as it existed then but the circulation of their ideas in the context of the contemporary society may be considered to be obscene".[75]

While religion and morality might refer to sex inconspicuously, or rather not do so at all, aspects of Indian literature have attempted to celebrate it in a manner markedly different from religion and morality's disdain. For religion and morality, sex is the pursuit of amorous pleasure that ought not to be referred to evocatively; it should not be an impediment to the regulation of social life and societal mores. On the contrary, Indian literature has typically engaged with sex not so much as physical pleasure, but as a catharsis of it.[76] More than something that must be repressed, sex serves to purge repression.

Ranjit Udeshi's case unambiguously laid down that a stray passage cannot selectively be picked for proving obscenity. This was upheld in 1969 in Chandrakant Kalyandas Kakodar's case.[77] The appellant was the author of a short story titled *Shama* that had appeared in the

[72] 1959 CriLJ 9.
[73] ibid [6].
[74] 1970 Cri LJ 1638.
[75] ibid [24].
[76] Adya Rangacharya, 'Sex and Indian Literature' (1991) 34 Indian Literature 139, 141.
[77] *C K Kakodar v The State of Maharashtra* AIR 1970 SC 1390.

Marathi monthly *Rambha*. The complainant alleged that certain paragraphs in the story were obscene and hence sought to initiate criminal proceedings under Section 292 against the writer, publisher, and the selling agent. In a noteworthy departure from Ranjit Udeshi's case, the court not only agreed to admit two expert testimonies presented by the defence, but on its own summoned a magistrate and a high court judge conversant in Marathi. But what loaded the verdict in Kakodar's favour were the isolated paragraphs that the complainant had adduced, to which the court refused to pay much heed in light of the literary quotient of the work. Additionally, the court observed that for material to be obscene, it must have the potential to deprave not just one or two individuals, but a class of persons taken together.

The 1970s, 80s and 90s: stifling expression in a new India

The three decades from 1970s onwards saw an unprecedented rise in litigation pertaining to Section 292. This period also saw the blossoming of internationally acclaimed works from Indian authors, painters, filmmakers, etc. While Indian literature and the obscenity law were trying to find a meaningful middle ground, obscenity allegations were steadily making inroads into Indian cinema, as evident in the Supreme Court case, *KA Abbas v Union of India*.[78] Abbas, the petitioner, produced a documentary in 1968 called *Tale of Four Cities*. The documentary contrasted the lavish lifestyle of the rich in the four cities of Bombay, Madras, Calcutta and Delhi, with the lives of the poor. All this was fine to the discomforted eye, but a blurred shot of the red-light district of Bombay was not. The petitioner in this case had sought a 'U' certificate for his documentary from the Central Board of Film Certification, colloquially known as the Censor Board, instead of the 'A' certificate that the board was ready to issue.[79]

[78] (1970) 2 SCC 780.

[79] Films endowed with a 'U' certificate are deemed suitable for unsupervised and unrestricted public exhibition. These are family-friendly content with themes like education, drama, romance, etc. A mild degree of violence and sexual scenes without nudity are also permissible. On the contrary, 'A' certificate films are allowed screenings only for adults.

As noted earlier, ever since the days of the colonial courts, judges in India have tended to be less generous with materials that have mass appeal and availability than those that enjoy restricted, or more cultured audiences. Given the mass appeal of cinema, Justice Hidayatullah felt compelled to draw a distinction between cinema and other forms of expression. One simply would not be as "deeply stirred" by a "painting or sculpture" as by a "motion picture".[80]

The rise of obscenity charges in films occurred in tandem with the widening scope of other laws. For instance, in *KA Abbas*, the Cinematograph Act 1952 and Article 19 of the Constitution were invoked along with Section 292. The court finally ruled that pre-censorship was a valid tool for filtering content and urged the board to take note of the artistic quotient of a film while censoring it.

In *KA Abbas*, the Supreme Court reaffirmed the authority of the Censor Board, India's statutory censorship body. But the question regarding whether the court had passed the baton entirely to the Board, was answered only in the 1979 case of *Raj Kapoor and Others v State and Others.*[81] The case arose from a private complaint filed by the president of a youth organisation claiming to be committed to defending Indian cultural standards and ethos. It alleged that the movie *Satyam Shivam Sundaram* was obscene under Section 292. The producer of the film argued that the prosecution could not legally sustain the charges since the Censor Board had already certified the film. Justice Krishna Iyer of the Supreme Court of India, writing the judgment on behalf of the division bench, held that a certificate from the Censor Board does not preclude the court from taking up a pertinent case. He also observed that,

> The court will examine the film and judge whether its public policy, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions …. The world's greatest paintings, sculptures, songs, and dances, India's lustrous heritage, the Konarks and Khajurahos,

[80] *K A Abbas v Union of India* (1970) 2 SCC 780 [20].
[81] (1980) 1 SCC 43.

> lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and state moralists prescribe paradigms and prescribe heterodoxies.[82]

All this while, the Hicklin test continued to be the favourite mechanism of the courts while adjudicating on Section 292 charges. In the process, the Indian rendition of the test evolved further. Whether connotations of sexual acts by themselves constitute obscenity was the issue in the Supreme Court case of *Samaresh Bose v Amal Mitra.*[83] Samaresh Bose, a Sahitya Academy Award winner, was a widely-read author who wrote over 200 short stories and 100 novels primarily in Bengali. In 1967, his novel *Prajapati* was first published in *Sarodiya Desh*, a journal of Bengali literature. *Prajapati* was one of his two novels which were briefly banned. The plot, narrated in first person, delved into a flashback through the eyes of its young protagonist, Sukhen. Sukhen narrated how he fell victim to wine and women and slid into a debauched life. A few paragraphs in the book evinced his disgust for his past deeds, especially the encounters with women, which the respondents found problematic. Dasgupta, the second appellant, was the publisher and the printer of the journal. They were initially tried in the Metropolitan Magistrate's Court, Kolkata (Bankshall Court) under Section 292 of the IPC in 1968 and were eventually convicted by the Chief Presidency Magistrate at Calcutta. The appellants then appealed to the Calcutta High Court, but without any success. At last, they approached the apex court.

Both the style and content of *Prajapati* were deviations from purist Bengali literature. As such, many could not digest the novel. Even a businessman who claimed to be an avid reader deposed against the book. The appellants defended the use of crude language on the grounds that anything more sophisticated would have taken away from the realism of the book. The Supreme Court quashed the charges and held that mere vulgarity, in words or depictions,

[82] ibid [14]-[15].
[83] (1985) 4 SCC 289.

did not constitute obscenity. Justice Amarendra Nath Sen noted in his judgment: "Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel".[84] Although a progressive stride forward, this was very much consistent with the Hicklin test wherein a material was required to deprave and corrupt in order to be proven obscene.

The language of Section 292 leaves no doubt that it seeks to penalize only the dissemination and production of obscene materials, not possession in itself. This was reiterated by the Kerala High Court in the 1999 case of *Ramesh Krishnan v State of Kerala*.[85] The petitioners were accused of watching a pornographic film, screened in the drawing room of the first accused's residence. The charge sheet filed by the police alleged an offence under Section 292 (2) (a). The court dismissed the charges, for Section 292 does not prohibit viewing in itself. It held that the prosecution would have succeeded had the defendant been the person who "sold, distributed or put the film on circulation".[86]

The legal developments of this period were marked by the enduring uncertainty as to how far the creative license could be stretched. One only needs to be reminded of the banning of Salman Rushdie's *Satanic Verses* in India, as an exemplar of the state's propensity to ban something and wash their hands off it.[87] Banning books — whether via a censorship regime or penal prosecution — has been a frequently utilised political tool both in India and globally.[88]

In 1959, while the home of the Hicklin test was witnessing debates on liberalising the hitherto existing law on obscenity, the Indian reader was eagerly waiting to get her hands on Vladimir Nabokov's *Lolita* — literature to some and pornography to others. Amid

[84] ibid 290-291.
[85] (1999) 2 KLT 806.
[86] ibid [para 3].
[87] Mini Chandran, 'The Democratisation of Censorship: Books and the Indian Public' (2010) 45 Economic and Political Weekly 27.
[88] N Gerald Barrier, *Banned: Controversial Literature and Political Control in British India, 1907-1947* (University of Missouri Press 1974).

controversies that had already been sparked in England, Russia and France, Jaico, a publishing house based in Mumbai, decided to import several copies of the book, only to have them seized by customs in Bombay. It was primarily due to the efforts of Prime Minister Nehru that the book could at last be published in the face of stiff opposition. D.F. Karaka, the editor of a weekly called *Current,* wrote critically of the book to the then Finance Minister Morarji Desai, terming it "disgusting."[89] Desai, in reply, scribbled on the file, "I do not know what book can be called obscene if this cannot be."[90] Eventually, the Finance Secretary, in his wisdom, forwarded the file to the Prime Minister, who saw to it that the consignment was immediately released by customs. The whole affair drew sharp reactions — some calculated and incisive, while others best attributed to impulse. One stakeholder, the Honorary Secretary of the Federation of Publishers and Booksellers Association, went so far as to propose the creation of a censor board to regulate the bread and butter of the very members of his organisation.[91]

The *Lolita* episode was a precursor to a very similar debate swirling around Arundhati Roy's *God of Small Things.* This book helped Roy attain global eminence, millions in royalties and the 1997 Booker Prize. It also fetched her an obscenity trial. An advocate in Kerala filed a Public Interest Litigation in June 1997 in the court of a magistrate in Pathanamthitta district.[92] Having read through the book quite intricately — how else could he have stumbled upon one small passage in the whole book of over 300 pages? — he objected to a certain paragraph on page 337 of the edition published by Indian Ink as being obscene. That paragraph briefly described intercourse between a Christian girl and her Hindu lover. Religious affiliations of the two characters here might be of particular importance, since the advocate chose to turn a

[89] S Gopal (ed), *Selected Works of Jawaharlal Nehru: Second Series* (Vol 49, Nehru Memorial Fund 2013) 685.
[90] ibid 687.
[91] ibid 688-689.
[92] John K Binoo, 'The God of Small Things: Petition Adds a New Chapter to the Arundhati Roy Story' *India Today* (30 June 1997) <https://www.indiatoday.in/magazine/society-the-arts/books/story/19970630-the-god-of-small-things-petition-adds-a-new-chapter-to-the-arundhati-roy-story-832645-1997-06-30> accessed 14 July 2018.

nelson's eye to potential paedophilia and incest.[93] In a case that ran for almost a decade, the charges were eventually dismissed. It is not hard to understand why the prosecution did not triumph given the way in which the paragraph was cherry picked.

While these disputes were incrementally liberalising the approach to the Hicklin test, a tectonic shift in the media landscape in the 1990s had a more dramatic effect on its application. Indian media found itself responding to a multitude of socioeconomic and cultural changes. Economic liberalisation ushered in an era of rapid globalization, which was reflected in patterns of media consumption. With the emergence of private channels in the mid-1990s, not only did the government's hold weaken over what was being broadcasted over television, but viewers for the first time were given a real choice in content.[94] This was also a period when right wing religious politics was emerging more prominently than before, alongside a growing nationalistic discourse. The fears of globalization and eroding economic sovereignty fomented insecurity among the Indian middle class. This facilitated the narrative of the Hindu right, who offered their cultural nationalism as an anchor. Women's bodies and feminine identity were fused with the borders and spirit of the nation. To be an Indian — rather, to be India itself — meant being a pure, uncontaminated woman guarded against masculine external aggression.[95] All in all, Indian culture had become a site for contestation; a struggle between ideological forces, influencing the various understandings of obscenity that were in play at the time.

Ratna Kapur insightfully epitomised the Hindu right's opposition to representations of sex and sexuality in her analysis of the events surrounding the release of the movie *Fire*. A tale of love blossoming between two sister in-laws, the movie chronicled the sexual deprivation

[93] Sara, 'God of Small Things' (*Index of /group/dosti/archive/essays, Stanford University*, 17 December 2007). <https://www.stanford.edu/group/dosti/archive/essays/2002_Sara%20GodOfSmallThings.doc> accessed 26 December 2017.
[94] Lakshmi M Thomas and H K Mariswamy, 'Impact of Globalisation on Indian Media' (2017) 6 Educational Research International 14.
[95] Rupal Oza, *The Making of Neoliberal India* (Routledge 2006).

faced by the two wives, eventually leading to a sexual encounter between them. Kapur reminded us that any attempt to define Indian culture must be evaluated against its historical backdrop. The late nineteenth-century Hindu revivalists sought to reconstitute the household as a pure, autonomous space untouched by colonialism.[96] *Fire* portrayed a household where the husbands were uninterested in their wives, digressed from their familial duties and, most abhorrently for the Hindu right, the women dared to engage in sex among themselves. The plank of Hindu right's angst was the contention that all this was obscene, antithetical to Indian culture, which in their scheme of things was functionally the same as Hindu culture.[97]

Ever since Victorian morality began shaping cinema in colonial India — or, for that matter, any other form of expression — there was a concern shared equally by both the state and civil society regarding the deleterious effects of cultural works on vulnerable audiences. In essence, this was precisely what the Hicklin test attempted to prevent. This period saw a gradual alignment of the Hindu right's agenda with these concerns.[98] Censorships, mobilisations around cultural nationalism and other trends in this period highlighted the anxieties of globalization and polarisation attempts in a volatile political climate of coalition governments.

The 21st century: redefining obscenity

In all of the cases above, newspapers had played a vital role in providing the masses with opinions from across the board. Yet, they observed legal proceedings from the sidelines and were affected by the judicial outcomes only to the extent of what they could and could not publish. This changed in *Ajay Goswami v The Union of India*,[99] decided by the Supreme Court in 2006. The petitioner's grievance was that the freedom of speech and expression enjoyed by

[96] Partha Chatterjee, 'The Nationalist Resolution of the Women's Question', *Empire and Nation: Selected Essays* (Columbia University Press 2010) 116-135.
[97] Ratna Kapur, 'Too Hot to Handle: The Cultural Politics of "Fire"' (2000) 64 Feminist Review 53, 56.
[98] Nandana Bose, 'The Hindu Right and the Politics of Censorship' (2009) 63 The Velvet Light Trap 22.
[99] (2007) 1 SCC 143.

the newspaper industry was not counter balanced by the protection of children from harmful and disturbing materials. Ajay Goswami, perturbed by obscene images and reports in newspapers, petitioned the Supreme Court to curb the unrestrained liberty of the press in matters of such harmful expression. More specifically, he requested the court to direct the concerned authorities to introduce a regulatory system of facilitating reciprocal tolerance, including: "(a) an acceptance of other people's rights to express and receive certain ideas and actions; and (b) accepting that people have the right not to be exposed against their will to another person's expression of ideas and actions."[100] The court had to examine if the material in newspapers was detrimental to minors and if so, did minors have an independent right under article 32, which grants the right to a constitutional remedy for the violation of a fundamental right. The court accepted submissions from *Times of India* and *The Hindustan Times*, two of India's most widely-circulated English dailies, which unequivocally stated that their brand of journalism had a more public spirited intention than to deprave the minds of minors; their statements said that the Norms of Journalistic Conduct had sufficient guidelines for newspapers to abstain from publishing such material that had disgusted the petitioner. The bench headed by Justice A.R. Lakshmanan, holding the writ petition unmaintainable, observed that there already were ample safeguards for minors in the form of existing laws and statutes. Although individual cultural works (i.e., newspaper articles) could be tried under the obscenity law, a blanket ban would not only impinge on the freedom of press, but also deprive adults of entirely legitimate content in newspapers.[101] The court did not apply the Hicklin test since no particular work was in question. What made this case relevant for the test was the treatment meted out to the protective policies of the state — a lesson in how the test of obscenity ought to be. The judgment emphasised statutory safeguards limiting a minor's access to an obscene material,

[100] ibid 144.
[101] ibid 146.

but refused to rob adults of their literary enjoyment. By contrast, the Hicklin test was still insistent on penalizing any and all circulations of a questionable material.

That obscenity has long had a nexus with politics in India should be apparent by now. Art has been no exception in this regard. When Srilamanthula Chandramohan exhibited his paintings at Maharaja Sayajirao University in Baroda, Gujarat in 2007, little did he know that this element of his post-graduate coursework would lead to his arrest. One of his paintings showed Jesus with his penis on the crucifix. This might not have angered a few irate Hindu nationalists as much as his other painting: one that portrayed Goddess Durga trying to attack a baby coming out of a woman's vagina with her trident.[102] For those who were willing to consider the subtler visual semiotics, this was a strong statement against female foeticide. For the Hindu nationalists and the police accompanying them however, this was downright obscenity, an offence under Section 292. If the Hicklin test were applied here, there would hardly be any case against Chandramohan. The fact that the paintings were in furtherance of his coursework and were primarily accessibly by people who had a genuine interest in art, would have sufficed to allay the fears of corrupting the corruptible mind. The site itself was not much different from Jehangir Art Gallery in Padamsee's case back in 1954. But as a result of its political undertones, it made headlines across the nation.[103] Chadramohan was not the only victim in this case; the Dean of the Fine Arts Department, upon refusing to take action against the protesting students, had to give up his job.

The year 2007 was also when the floodgate of lawsuits and death threats against M.F. Husain culminated in an arrest warrant against him. Though the warrant was later suspended

[102] 'Art Under Attack' *Outlook* (11 May 2007) <https://www.outlookindia.com/website/story/art-under-attack/234602> accessed 25 December 2017.
[103] 'When Artistic License Doesn't Count' *Financial Express* (20 May 2007) <https://www.financialexpress.com/archive/when-artistic-license-just-doesnt-count/107152/> accessed 30 December 2017.

by the Supreme Court,[104] the threat of lawsuits only abated in 2008 with the judgment in *M. F. Husain v Rajkumar Pandey*,[105] a case pertaining to his painting titled *Bharat Mata* (Mother India). Husain, one of the most celebrated Indian artists of the 20th century, was tried for a painting showing a naked woman whom some claimed to be a depiction of Mother India in the nude. Championing the right to freedom of expression and artistic merit, the court drew from the old well-established rule that mere nudity does not constitute obscenity. Justice Kaul, in his judgment acquitting Husain, noted that "art, to every artist, is a vehicle for personal expression," and that

> One of the tests in relation to judging nude/semi nude pictures of women as obscene is also a particular posture or pose or the surrounding circumstances which may render it to be obscene but in the present painting, apart from what is already stated above, the contours of the woman's body represent nothing more than the boundaries/map of India …. To my mind, art should not be seen in isolation without going into its onomatopoetic meaning…. The nude woman in the impugned painting is not shown in any peculiar kind of a pose or posture nor are her surroundings so painted which may arouse sexual feelings or that of lust in the minds of the deviants in order to call it obscene.[106]

Most interpretations of the obscenity law are premised upon some conception of aesthetics. The metric to measure the presence of obscenity in art is a complicated one. Many a time this legal assessment expands beyond aesthetics to encompass fundamental rights calculus, notions of the public good, identifying and characterising the target group and the artistic creator's intention. It has been suggested that art can be separated from obscenity on the basis of three variables, namely, its genetic, structural and functional variables.[107] By this

[104] 'Supreme Court Stays Case Against MF Husain' *Livemint* (08 May 2007) <https://www.livemint.com/Consumer/SYzVbw4977PUdhFIOCoi5I/Supreme-Court-stays-case-against-MF-Husain.html> accessed 14 July 2018.
[105] 2008 Cri LJ 4107.
[106] ibid [1], [99].
[107] Stefan Morawski, 'Art and Obscenity' (1967) 26 The Journal of Aesthetics and Art Criticism 193, 195-197. The genetic variable investigates the artist's intention to arouse sexual desires based on the theme, plot, character development, and other similar factors in the work. The structural variable deals with the dominance of the erotic elements in the aesthetics and structure as a whole of the work. The functional variable considers

logic, a good many reportedly obscene works — say, for example, Manto's *Thanda Gosht* — can adequately be absolved. Genetically, since the author's intention is not to arouse amorous desires; structurally, since the erotic elements do not make up the dominant value of the story; functionally, since it is a product of fiction, not showing any real-life persons.

The structural variable becomes particularly vital in making sense of Husain's paintings. The key is to see beyond the familiar narrative of Hindu gods and mythological characters that accompany his paintings. Beyond simply being steeped in portrayals of Sita, Hanuman, Draupadi or Ravana, the true essence of his virtuosity lies in "the struggles of the flesh, the movement of the hands and the featureless face".[108]

Justice Kaul's judgment deserves to be commended for its sensibility. With issues such as national pride and religious sensitivity at stake, the manner in which it tread to construe the painting as a work of art, coloured with nothing beyond the domain of aesthetics, went a long way in making the point in favour of an artist's creative licence. Neither did the judgment consider art as an intrinsic incitement to debase any cherished values, nor did it see the painting as completely sequestered from the associated values. Art, in Justice Kaul's judgment, was a purely different exercise which may or may not negatively affect an incidental aspect of it — in this case, hurting the sentiments of those endearing the religiosity of the portrayal in the painting. The creation of art could very well give birth to discord in the society, but that would not have been the intended end. The artist, therefore, deserved a certain amount of leeway.

A 2004 Delhi High Court order authored by Justice JD Kapoor in a case concerning another of Husain's paintings, *Saraswati*, starkly exposed the weaknesses of the contrary point

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the ability of the work in eliminating "a practical, operational attitude involving us in the work of art as if it were a real person or situation".

[108] Veena Das, 'Of M.F. Husain and an Impossible Love' in Sumathi Ramaswamy (ed), *Barefoot Across the Nation: Maqbool Fida Husain & The Idea of India* (Routledge 2010) 121.

of view.[109] Failing to see beyond the religious connotations of the painting, he vociferously lambasted Husain's work not just on textual grounds but more so for its capacity, as he believed, to offend.[110] For ages, followers have worshipped their gods inside the temples of Khajuraho and Madan Kamdev where erotic engravings adorn the walls in abundance. Never had that been an issue, but the moment an artist tried to take the deities out of the temples and encapsulate them in his paintings without their religious symbolism, there was public outrage. The judiciary, considering Justice Kapoor's take, proved to be no more farsighted. Against such a backdrop, Justice Kaul's judgment came as a timely relief for many who were beginning to despair.

Ideologies of obscenity

It would be wrong to surmise that there exists one unified, consolidated opinion contesting the restraint of obscenity in the case of art. Seldom has there been convergence at one agreeable method of gauging obscenity. One predominant view is that of the subjectivists' who think of obscenity to be variable based on the beholder's perception. That "obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture,"[111] is a contention commonly made by them. Although it may appear a perfectly fair claim on its face, a critical exploration reveals its shortcomings. Firstly, embracing such a position in law could open floodgates of cases, in that someone taking offence to anything seemingly (subjectively) obscene to him would be justified in doing so based on her personal perception of the boundary between obscenity and acceptable art. Secondly, if someone is prompted by a perverted impulse to spread an indisputably salacious object in a place where it is certainly

[109] *MF Hussain v State of Bihar* Crl M(M) 420/2001 (Delhi High Court, 8 April 2004) <https://www.hindujagruti.org/wp-content/uploads/2014/03/hussain_verdict.pdf> accessed 16 December 2018.
[110] Harini Sudershan, 'Religion and Censorship in the Indian Media: Legal and Extra-Legal' (2010) 1 Media Law Review 114, 134-135.
[111] Theodore Schroeder, *Freedom of the Press and 'Obscene' Literature: Three Essays* (Free Speech League 1906) 36.

untoward, like a pornographic video through an email at the workplace, he could attempt to escape responsibility by citing the subjectivity of his viewpoint on obscenity. Another approach to this question is developed by relativists. Somewhat akin to the structural variable in the art-obscenity metric, the relativists seek to differentiate relatively between obscenity in an *art object* and that in a *work of art*.[112] The latter weakens the elements of obscenity by focusing mainly on the aesthetics of art, thereby diluting obscenity with the artistic touch and context of the work itself. Simply put, the obscene element is nothing but the beholder's experience with the work. Take, for example, the courts' disdainful dealings with the *Kama Sutra* and *Kokashastra* discussed above. Between what they were when written and how they were received by the judges centuries later, these works are not solidified, crystallised *art objects* but different *works of art* as perceived by the experiences of the judges. Once an *art object* is conditioned by history and politics, it becomes a work of art and, accordingly, obscenity becomes a social construct. However, this view too suffers from the same flaws inherent in the subjectivist view, that is, the apparent lack of an objective ground for law to rely on.

Having said that, the answer to subjectivism is not absolutism. Absolutism would advance a universal concept of obscenity credited across the board, like superstition — what is superstition is almost universally accepted, irrespective of the region-to-region variations in the practice of superstitious beliefs.[113] A more pragmatic approach is insistence on "objectivity relative to a specified context".[114] Yet this view, much like the others, has not passed unchallenged. DH Lawrence, given his own experiences with the law, censured the objectivist approach for the better part of his career: "It is the mind which is the Augean stables, not language".[115]

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[112] Abraham Kaplan, 'Obscenity as an Esthetic Category' (1955) 20 Law and Contemporary Problems 544, 545-546.
[113] Mortimer J Adler, *Art and Prudence: A Study in Practical Phillosophy* (Longmans, Green and Co. 1937).
[114] Abraham Kaplan, 'Obscenity as an Esthetic Category' (1955) 20 Law and Contemporary Problems 544.
[115] David H Lawrence, *Sex, Literature, and Censorship* (Twayne Publishers 1953) 59.

Feminists would sharply disagree with this. Their conception of obscenity focuses on the "domineering, aggressive, degrading or objectifying" relation between men and women, typically depicting women in compromising situations in such portrayals.[116] Limiting obscenity to one's state of mind, as the subjectivists do, is to be dismissive of the power relations between men and women engrained in the social structure. Even in the realm of art, the idea of obscenity and creativity plays out quite differently between nude portrayals of men and those of women. While it has historically been considered as a display of artistic excellence to liken a woman's breasts to, say, apples — the ripe fruits embodying desire and pleasure — replicating the same with a penis, likening it to a banana, has never been thought of as anything more than frivolous. The latter "lowers and denigrates rather than elevates and universalizes the subject of metaphor".[117]

The neutrality of the obscenity law is a myth. Its complicity in making pornography a legal and social institution stems directly from the moralistic mis-definition of sex, evading the "real harms" by assuming that the solution lies in a greater exercise of "prosecutorial will". If in this "unworkable design" the meaning of obscenity is ascribed to the viewpoint of the observer, then the law does not merely regulate pornography, but pornography shapes the societal perceptions about obscenity.[118] Pornography must, therefore, be curbed as MacKinnon and Dworkin have argued.[119] The dehumanizing, degrading aspects of obscenity infantilises women as subservient to the sexual desires of men.[120] Yet, these concerns do not go into the

[116] Sue Bessmer, 'Anti-Obscenity: A Comparison of the Legal and the Feminist Perspectives' (1981) 34 The Western Political Quarterly 143, 146.
[117] Linda Nochlin, *Women, Art, and Power and Other Essays* (Routledge 2018), 141.
[118] Andrea Dworkin and Catharine MacKinnon, *Civil Rights: A New Day for Women's Equality* (Organising Against Pornography 1989) 27.
[119] Dworkin and MacKinnon drafted an anti-pornography ordinance for the city of Indianapolis, stipulating civil penalties for the distribution of pornography. The law was finally overturned after being challenged by a group of adult bookstores in *American Booksellers Association v Hudnut* 1985 US App LEXIS 22623. See, Steve Robertson, 'Catherine MacKinnon' *The First Amendment Encyclopaedia* <https://mtsu.edu/first-amendment/article/1300/catharine-mackinnon> accessed 21 January 2019.
[120] Catherine MacKinnon, 'Pornography, Civil Rights, and Speech' (1985) 20 Harvard Civil Rights-Civil Liberties Review 1.

formulation of the obscenity law. The law is not an instrument in the hands of women, but its terms are dictated precisely by those who dehumanize women; thus, for example, the Hicklin test is loaded in favour of the vulnerable.

Feminist voices against the patriarchal construct of obscenity laws have not yet resonated with the Indian judiciary. This does not mean that the legislators have had a free pass. Consider, for instance, the time when the Indecent Representation of Women (Prohibition) Amendment Bill 2012 came up in public discussions. When the Indecent Representation of Women (Prohibition) Act 1986 was passed, a section of feminists, primarily the readers of the magazine *Manushi*, had strongly opposed the legislation. The result of the long-standing demand of the feminist movement for safeguards against derogatory representations of women, the law came into effect in October 1987. The term "indecent representation" has been defined in the 1986 act as

> A depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals.[121]

The feminists criticised this moralistic understanding of obscenity, something that had become common across all obscenity laws.[122] The act also conferred wide ranging powers on "any gazetted officer" to harass people. Armed with a warrant, one could now enter and search anyone's residence and confiscate anything supposedly indecent, including personal letters. Among other things, the 2012 amendment retained the vagueness of the principal act. Expression of female sexuality had been integral to third wave feminism, and campaigns like "Free the Nipple" and "Slut Walks" received widespread participation. The 2012 bill arose against the backdrop of fears of moral policing against a women's body, especially against the

[121] Indecent Representation of Women (Prohibition) Act 1986, § 2 (c).
[122] 'India: Feminists Criticize Porn Law' (1987) 17 Off Our Backs 9.

slightest display of nudity.[123] The bill was tabled in the Rajya Sabha in December 2012 and then sent to the Parliamentary Standing Committee on Human Resource Development. Based on inputs from the committee, the draft was revised but little was done about its ambiguity.[124]

Again, ambiguity was one of the most fatal drawbacks of the Hicklin test and so was its inordinate moralistic approach. It was high time for the lawmakers and the judiciary to devise an objective standard of obscenity set in the societal context, coupled with a normative standard as to how the society ought to see obscenity. And this is the dilemma which endures: how should the two aspects, the normative and the objective, be balanced — for that matter, can they ever be?

Recent developments: the "Contemporary Community Standards" test and the prudery of the law

The struggle between expression and obscenity had for long been rooted in the Hicklin test. Although Indian courts had seldom put the test into play in a hard and fast fashion similar to its rendition in England, they were loath to forsake it completely all the same.[125] Assailed from numerous quarters, a replacement for the test had long been due, until *Aveek Sarkar v State of West Bengal*[126] in 2014. The matter in question was a nude photograph of Boris Becker with his fiancée Barbara Feltus, originally published in a German magazine by the name of *STERN* and reproduced in the Bengali daily *Anandabazar Patrika*. Aveek Sarkar was then the Chief-Editor of the ABP Group, the media company that brings out *Anandabazar Patrika*. Acting on a complaint filed under Section 292 by a lawyer practising at the Alipore Judge's Court, Kolkata, the Sub-Divisional Magistrate, Alipore ordered a trial. This case shed light on the

[123] Disha Chaudhari, 'Analysing the Indecent Representation of Women Act 2012' *Intersectional Feminism* (9 February 2017) <https://feminisminindia.com/2017/02/09/indecent-representation-women/> accessed 22 December 2017.
[124] 'Law Against Indecent Representation of Women on Digital Platforms in the Works' *The Wire* (5 June 2018) <https://thewire.in/women/indecent-depiction-women-digital-platforms-punishable> accessed 16 July 2018.
[125] Abhinav Chandrachud, *Republic of Rhetoric* (Penguin Random House India 2017) 140.
[126] (2014) 4 SCC 257.

lower judiciary's excessive mechanical prioritisation of the procedural aspects in obscenity cases, even at the cost of substantive law. By refusing to intervene, perhaps the Calcutta HC as well erred this once. The Supreme Court later observed:

> Learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the Appellants to face the trial. The High Court, in our view, should have exercised powers under Section 482 Cr.P.C. to secure the ends of justice.[127]

Reforming the law itself, therefore, would be to little avail unless procedural reforms are initiated and judicial discipline is encouraged.

By the time the Supreme Court adjudicated the case, the Hicklin test had established for itself a secure presence in obscenity cases. Having determied the fate of allegedly obscene books and films and paintings, this case ultimately escaped the shackles of the Hicklin test, avoiding its piecemeal application and ushered in the regime of the Roth test. The Roth test, emerging from an eponymous US case, consists in pronouncing only those sex-related materials obscene which have a tendency to stimulate lustful thoughts, though not simply in the minds of the ones most adversely affected by them. The essence of the case is identifying obscenity in accordance with "contemporary community standards".[128] Relaxing the stringent criterion institutionalised by its predecessor, this test made an average person the reference point for ascertaining obscenity, unlike the Hicklin test where the most vulnerable were taken into account. Justice KS Radhakrishnan's judgment in Aveek Sarkar's case stated in clarion terms that the "Hicklin test is not the correct test to be applied to determine what is obscenity." He wrote:

> A picture of a nude/semi-nude woman, as such, cannot per se be called obscene…. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but

[127] ibid [31].
[128] *Roth v United States* (1957) 354 US 476 [4].

> the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.[129]

An average, right-thinking, reasonable person with as lenient a take on obscenity as any is where the balance between objective societal standards and normative preferences was finally struck.

The domain of the contemporary community standards test was further addressed in *Devidas Ramachandra Tuljapurkar v State of Maharashtra & Ors*.[130] The Supreme Court was concerned with the specific question of balancing the creative licence with obscenity articulated through an "allusion or symbol" to a "[h]istorically respected personality".[131] The poet in this case had liberally used Gandhi's name. Justice Misra's elaborate judgment began with a circumspective reaffirmation of the creative license by referring to various poets, from Romanticists like Keats to Modernists like TS Eliot and Ezra Pound.[132] Subsequent to that, the judgment recalled the glory of Sanskrit literature.[133]

In the more operative parts of the judgment, it was noted that a reference to a "historically respected personality" would have a more indelible effect on the collective consciousness of the masses and, thus, authoritatively influence the "contemporary community standards" than someone of lesser fame. In a situation of this semblance, the test "becomes applicable with more vigour, in a greater degree and in an accentuated manner";[134] the "creativity melts into insignificance and obscenity merges into surface".[135] However, since the publisher and the printer had issued an unconditional apology, the decision went in their favour in spite of these observations. The poet, who was still facing trial, was left to defend himself.

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[129] *Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257, 259.
[130] (2015) 6 SCC 1.
[131] ibid [5].
[132] ibid [6].
[133] ibid [7].
[134] ibid [142].
[135] ibid [141].

The relevance of the case lies in its consolidation of the "contemporary standards test". Yet, as Veena Das had astutely remarked for Husain, in this case as well the court trapped itself in the "familiar narrative" of historically respected personalities, diminishing the aesthetic factors in the work.[136] Obscenity has not yet become a question of art, or aesthetics, but still is shaped by external moralistic considerations.

Right from its inception, Section 292 has often been seized by prudes to impose their morality. Undoubtedly, it leaves an ample amount of leeway for bigots to exploit it and bedevil those that they disapprove of. This is especially true of a precipitously diverse country like India where the variety of cultural baggage implies different conceptions of what is an untoward comment and what is appropriate. Often the social reality mired in caste, class, religion and other social factors becomes relevant in determining how these cases are reported, framed and investigated. For instance, Surya Wagh, a Goan poet was awarded for a collection of his poems in 2017. The accolade caused considerable uproar on social media, ensuing in a police complaint against him and his publisher.[137] It is best left up to one's sagacity to make out how pivotal it is to the incident that his poems primarily attacked the Brahmins, an upper caste, and also that he himself belonged to a lower caste.

Conclusion: obscenity is everywhere

From Manto to *Aveek Sarkar*, the idea of obscenity has undergone a huge metamorphosis in Indian literature and art. This article has refrained from commenting on where specifically the line between what is obscene and what is not must be drawn, for this needs another line of argumentation with even more profound analysis — something that has been slackened here for the sake of comprehensiveness. With the commercial crave for sexually explicit material

[136] See Das (n 108).
[137] Smita Nair, 'Awarded, Then Trashed: Goa Poet Hounded for Questioning Brahmins' *The Indian Express* (18 October 2017) <http://indianexpress.com/article/india/goa-former-bjp-mla-vishnu-surya-wagh-poet-hounded-for-questioning-brahmins-4896000> accessed 26 December 2017.

burgeoning in this day and age, it is understandable why content creators, from authors to youtubers, should cater to what the audience desires.[138] Though the idea of "contemporary community standards" does away with the outdated criteria of the Hicklin test, it is still prone to the arbitrariness of the judges. The test of obscenity remains vague in the absence of any legislative development in this regard. The scant few legislations that do centre around obscenity fall prey to the same deficiency: defining obscenity with a ridiculously long string of negative adjectives where a single positive term would have sufficed. "Immoral", "salacious", "scurrilous", "prurient", "lurid" and similar adjectives contribute nothing to the test of obscenity save creating a pornographic spectacle around the disputed material. Legislations are needed to formalize a test, even if the test is the Roth test, the best available metric at the moment. Guidelines elucidating what can be considered as acceptable content, probably buttressed by an inclusive list, might help guarding against the dogma of the odd whimsical judge.

But for any legislation or any test to be successful, it must understand that even after the repeated calls for an objective test, obscenity still lies in the eyes of the beholder. Obscenity lies not in a material but in how one approaches it, and from where. There is obscenity in Kalidas and in Milton; in the ancient Greeks and Indians and the modern pornographic actors; in the bare-bodied gym-goer and the model on the billboard; in the brush of the painter and the crotch of the patron. And so has the Indian judiciary looked for an answer: where exactly does obscenity lie? There is no set line with x-y coordinates, but there surely are tests and standards which help in fixing material on either side of the line. That this line keeps on changing continually, effacing the previous demarcation and then delineating a newer one, is by and large established considering how the law has run its course in India.

[138] Ka Naa Subramanyam, 'Tamil: the Birth of a Poet' (1983) 26 Indian Literature 141.

What then becomes a relevant question is why the law still continues to operate in India more than seven decades after its original creators left the country. Robin Jeffery attributes the foundation of India's broadcasting policy to restrictive colonial policies and the puritan character of the Gandhian national movement.[139] However, it might be a bit problematic to gauge a policy simply against the influence of historical continuities. With major changes occurring in the 90s-decade, one might find it hard to be convinced that the past could so tenaciously restrain the forces of globalization. The answer might lie in the practicalities of administration confronting the independent Indian state and the law perfectly fitting into the larger picture. At different points in time since independence, the obscenity law has been conveniently usurped by a number of trajectories at play in the politics of the country, from purist literature to the Hindu right.

Nowadays, the obscenity law is increasingly becoming a wand in the hands of those who are disposed to get upset as soon as a distasteful statement is uttered or video published: from 2006 to 2009, the volume of registered cases of electronically transmitted obscenity, Section 292's equivalent in Information Technology Act, 2000, surged from 69 to 139.[140] Section 66A of the act had made it a punishable offence to "send by the means of a computer" any "grossly offensive material".[141] After incidents of shameful abuse of the law came to light, the Supreme Court struck down the provision in the 2015 case of *Shreya Singhal v Union of India.*[142] During the proceedings while rebuking the arguments of the Additional Solicitor-General, the two-judge bench reassuringly declared that obscenity cannot be a "question of morality."[143] The admission perhaps came half a century too late, but did come at last.

[139] Robin Jeffrey, 'The Mahatma Didn't Like Movies and Why it Matters' 2 Global Media and Communication 204.
[140] National Crime Records Bureau, 'Cyber Crimes' <http://ncrb.nic.in/StatPublications/CII/CII2009/cii-2009/Chapter%2018.pdf> accessed 29 October 2017.
[141] Information Technology Act 2000, § 66A.
[142] (2015) 5 SCC 1.
[143] 'Not a Question of Morality: SC' *The Telegraph* (25 March 2015).

Nonetheless, moral policing festered by the force of the obscenity law is a sad truth that cannot be denied; whether be it to deplore women reclaiming their sexuality or to vent caste prejudices. It indeed is a testament to the disconnect between the judiciary and the executive that people are still booked under Section 66A, almost half a decade after the draconian law failed scrutiny by the SC.[144] Proponents of the obscenity law might cite one benefit of it after another, but moral policing can never be one. The moment the law is usurped by vigilantes, it takes a nigh irredeemable toll on art and the society at large.

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[144] '"Shocked" that Section 66A is Still Being Used, SC Seeks Centre's Response' *The Hindu* (7 January 2019) <https://www.thehindu.com/news/national/shocked-that-section-66a-is-still-being-used-sc-seeks-centres-response/article25931913.ece> accessed 16 January 2019.