Judicial Censorship of Obscene Literature

The recent decision of the Supreme Court in Ranjit D. Udeshi v State of Maharashtra\(^1\) has once again brought into sharp focus the problem of law and obscenity. The decision declared D. H. Lawrence’s “Lady Chatterly’s Lover” an obscene publication. The need for an objective and liberal approach with respect to art and literature, consistent with the changing values and standards of contemporary society was advocated in the extensive public discussion that followed the decision. Responsible opinion in the country went even to the extent of warning that “the growing trend towards puritanism and authoritarianism, in the name of morality, in India is far more dangerous than the corruptive influence which a handful of books might exercise over a few persons”.

A Perspective:

It is true that the protection of public morals is very much the duty of every civilized government. It is also true that everybody wants pornographic, filthy books to be stamped out, either on account of its presumed corrupting tendency or because it is revolting to our moral standards. They are just filth and they should be stamped out completely in the interest of social good. But this desire to maintain standards of morality in the interest of a healthy society shall not be used as a means of suppressing that branch of literature which conceives it as its function to deal with sex. In this respect, Stable J.’s address to the jury in R. v Martin Seeker\(^2\) is worth recording here. He said:

“...in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is there not a risk that there will be a revolt, a demand for change in the law, so that the pendulum will swing too far the other way and allow to creep in things that under the law as it exists today we can exclude and keep out”. In short, censorship with respect to literature being essentially an evil in a democratic society, a truly liberal utilitarian approach is called for from the “guardians of public morals”.

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2. Cr. A.R.Vol. XXXVIII (1954) at p.132,
It is a fact that all great literature contain elements we call obscene. Nevertheless we cherish them as part of our cultural heritage. This is because we realize that literature has a message and a social function in holding up a mirror to the society of its own day. If this is so, literature must be frank even if sometimes the truth is unpalatable. It is only through literature that we get real guidance about how people thought and behaved at a particular age. It may also be noted that literary merit depends largely on a healthy moral sense and literary works are not likely to sustain public appreciation with no better warrant than their obscene content.3 Besides, a law of obscenity administered so as to strike not merely at pornography but also at serious literature, may have a restraining influence on publishers from putting before the public new literary works. This will ultimately impair that very social good for the protection of which the law is designed and enforced.

It may be asked as to how far in India the law has been fair and satisfactory with respect to censorship of “obscene literature” and to what extent judicial interpretation of obscenity provisions has helped to resolve the conflicting interests involved to the ultimate public good. The law relating to obscenity is to be found in sections 292 to 294 Indian Penal Code. Section 292 prohibits the sale, distribution, import, production, circulation etc. of obscene matter. The only exception provided therein is with respect to objects kept or used bona fide for religious purposes. Section 521 of the Criminal Procedure Code provides that on a conviction under this section the court may order the destruction of all copies of the thing in respect of which the conviction was had. Besides, various other statutes4 give wide powers to the Central and State governments with respect to censorship of books, films, newspapers, dramatic performances etc. The decision as to what is “obscene” or against “decency and morality” is left entirely to the subjective decision of the government and in many cases even a review of the decision by an independent tribunal is not provided for. “Obscenity” is nowhere defined in the Penal Code. This itself violates a cardinal principle of legality which requires criminal offences to be as precisely defined as possible so that it can be known with reasonable certainty beforehand what acts are criminal and what are not. The consequent

4. S.18(c) The Sea Customs Act (VIII) of 1878; S.5B (i) The Cinematograph Act (XXXVII) of 1952; S.3(c) The Dramatic Performances Act (XIX) of 1876; Ss. 20-23 The Post Office Act (VI) of 1898 etc.
result is that the law remains a potential weapon of arbitrary censorship and there is no guarantee that genuine works of literary and artistic merit will be saved from legal condemnation.

The law in its enforcement has equally been unsatisfactory. In the absence of a correct definition of "obscenity" and a fair machinery for the adjudication of disputes the interests of the artists and the public have often suffered. The courts, as "the general censor and guardian of public morals", are expected to make a delicate balancing of the various interests involved and to check the possible invasions of individual liberty by the executive in exercise of the large powers conferred on it for the purpose of the maintenance of standards of "decency and morality". It was believed that in order to protect genuine art and literature from the operation of obscenity laws, the courts would enlarge the scope of the exception to section 292. The courts in India have belied the hopes that, in the absence of a proper statutory test of obscenity the undoubted judicial discretion in this area will be exercised in a liberal spirit. The courts steadfastly followed the century old Hicklin test which says, "... The test of obscenity is this - whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The test, being predominantly subjective, if blindly followed, would result only in foisting the moral prejudices of a few on the community as a whole.

Obscenity censorship is of very real importance to the publishers and to the individuals who are associated with them. It is of still greater significance to the authors and artists themselves. A vague and elusive test as the present one may even operate as an unreasonable restriction on the freedom of speech and expression guaranteed by Article 19 (1)(a). The community in general has a stake in it as it may be denied the privilege of the message and the inspiration of art and literature. As it was said by an American judge, censorship in any form is essentially bad in a free society and it only "reflects a society's lack of confidence in itself". Freidman observed in R. V. Dominion News and Gifts Ltd., unless

5. See the Select Committee Report on the inclusion of the obscenity provisions: Gazette of India, Vol.V. dated 14.2.1925


proscription is confined to clear cases, "suppression may tend to inhibit those creative impulses and endeavours which ought to be encouraged in a free society".

The law is still groping with respect to this problem of enforcement of morals through criminal law. There is no reliable data to support the theory that moral depravity is related to, and is the necessary result, of "obscene literature". On the other hand, there are overwhelming evidence to show that the causes for moral disintegration lie in the social and physical environment - crowded slums, broken families, erotic motion pictures, starved emotion and the "hidden approach" to sex. As sociological and psychological experts have pointed out sex, being a primary urge inborn in human nature, if suppressed by society in the name of obscenity and kept as a "dirty secret", it would only make its appearance in reprehensible and dubious forms. All this would suggest that the problem is not as simple as it is made out to be and the present law and enforcement are far from satisfactory. There is need for a decisive change in the attitude of the Indian courts to the question of obscenity, particularly in its application to art and literature.

Obscenity Censorship in Foreign Jurisdictions:

Obscenity was indictable at common law on the ground that what tended to corrupt society amounted to a breach of the peace. The word "obscenity" was understood in a general sense as meaning offensive to morality or chastity and the test followed was whether the tendency of the matter charged as obscenity was to deprave and corrupt those whose minds were open to such immoral influences, and into whose hands a book of that sort might fall. The test, unduly narrow and unfair in operation, was capriciously followed by the courts in England for many decades. So long as the Hicklin test remained, there was nothing to require the publication to be viewed as a whole nor could the general literary or artistic merit of the publication be allowed to excuse passages which might tend to "deprave or corrupt". There was neither any scope for the admission of expert evidence as to the literary or artistic merit of the work in question nor was public good recognized as a defence. It led to the conviction of innocent publishers. The logical result of the test was the possibility of assessing literary standards according to their suitability for young people.

This unsatisfactory position of the common law based on the Hicklin rule was substantially modified in England by the obscene Publications Act, 1959. Section 1 of the Act incorporates the requirement that the work shall be considered as a whole before judging whether it tends to "deprave or corrupt". The Act provides in Section 4 the defence of 'public good'. A conviction for an offence and an order for forfeiture under the Act shall not be made if it is proved that the publication is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning. The opinion of experts as to such merit is admissible in any proceedings under the Act either to establish or negative the defence. Further, it is provided that regard has to be had as to who is likely to read the book. The old phrase of "into whose hands it may fall", which allowed any court, if it was so minded to judge the most esoteric work by its effect on the most unlikely and susceptible reader, has disappeared.

In the United States the trend of judicial decisions is towards a relaxation of the standard of obscenity mainly based on the constitutional aspect of the problem. Rejecting the Hicklin test, the American Supreme Court adopted in Roth v United States a test that required examination of the book as a whole to determine whether it could properly be classified as a literary work or whether it was "filth for filth's sake". The Court defined obscene publications as those which incite "prurient thoughts" and added that the test is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest, and the material is utterly without social importance. The Hicklin test was rejected on the ground that "judging obscenity by the effect of isolated passages upon the most susceptible persons might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press".

It is according to this test of dominant effect on normal person that courts in America have upheld literature on sex themes from legal condemnation even though it might have an incidental tendency to arouse sex impulses.

In spite of the Supreme Court's verdict in Roth's case that obscenity is not protected by the First Amendment guarantee of

10. Ibid.
free speech, many justices still hold a contrary view. In a recent decision Potter Stewart J. observed, "the constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbour. In the free society to which our constitution has committed us, it is for each to choose for himself.\textsuperscript{11}\) Justices Hugo Black and William O. Douglas urged the court to quit all censorship on the ground that the First Amendment protects all expression, including obscenity, that does not actually incite anti-social conduct.

However, in the United States through a series of recent decisions the Supreme Court is reported to have evolved a workable constitutional formula to suppress the growing body of pornography while leaving serious literature uncensored. This new obscenity standard is based not so much on the content of the publication as on the way one uses it. Feeling strongly on the conduct of those who make a business of pandering to the widespread weakness for titillation by pornography, the court stated, "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity". Thus evidence of a publisher's pandering or commercial exploitation of a book for the sake of prurient appeal, to the exclusion of all other values, might justify censorship on the ground of obscenity.\textsuperscript{12}

In Canada too, with a shift of judicial emphasis from a 'tendency to deprave and corrupt' to the effect of a publication on community standards, the Hicklin test had a natural death.\textsuperscript{13}\) Under Section 150 (8) of the Criminal Code of Canada a publication will be deemed to be obscene if its dominant characteristic is the undue exploitation of sex. This objective test introduced an inquiry by the court into the general standard of feeling in the community. The Hicklin rule reduces the whole question into purely a matter of opinion - the opinion of a few men whose mental processes will have been conditioned by their background and their personal

\textsuperscript{11} See "Time" April 1, 1966 at pp. 34-35.

\textsuperscript{12} Ibid.

\textsuperscript{13} L.H.Heign, Aspects of the Control of Obscene Literature in Canada Mod. Law, Rev. Nov. 64 pp. 669-681.
prejudices. In Canada expert evidence is admissible on literary merit and public good is a statutory defence in respect of a prosecution for obscenity.

Censorship of (Obscene Literature) in India:

In India the Hicklin test has been uniformly applied by the courts and the fundamental changes effected in Western legal systems have not received substantial judicial support in this country. Consequently the law as it stands today is the same as it was in 1868 and remains a potential weapon of censorship and a continued threat to free speech and expression, the only safeguard being the good sense of the judge. Greatly obsessed by the virtues of the Hicklin rule, Indian courts have constantly endeavoured to redeem and re-establish the century-old test by attempting to answer the criticisms from within the Hicklin formula. The changes in moral values and social conditions and the impact of the Constitution did not make much head-way in the matter of law of obscenity as applied to literature. The guardians of public morals seem to maintain a double standard of morality. On the one hand they want society to change the accepted attitude toward sex and sex relations through an indiscriminate propaganda of family planning, birth control measures and a plea for legalising abortion. Having failed in their duty to protect society from the growing body of pornography, the authorities seem to have adopted a general attitude of indifference towards this subtle exploitation of sex in the commercial world. We are proud of Vatsyayana's Kama Sutra. The sculptures and paintings of Khajuraho and Konarak and the frescoes of Ajanta are accepted parts of our cultural heritage. On the other hand the authorities adopt a rigid attitude of legalism, conservatism, puritanism towards current literature which deems it as its function to deal plainly with sex and human relations. A code of censorship based on double standards of morality which tends to produce dubious results is bad enough. Further, does it mean

15. Section 150(i) of the Canadian Criminal Code.
17. This double standard is particularly striking in the matter of film censorship. While foreign films are allowed to depict all sorts of love-play and cater to the sex urges of Indian public, Indian films are carefully censored of such scenes.
that it is all a few penal provisions of the law that keep up literary standards and public morality, and a rigorous enforcement of those provisions is the answer to the increasing moral vacuum and ethical decadence in modern society? The enforcement of morality through law has always been a controversial issue and it is the generally accepted view that the role of law in this respect is, and ought to be very limited and clearly circumscribed. Law should effectively suppress pornography and writings of the nature of dirt for dirt’s sake but should leave literary and artistic expression to be determined by prevailing community standards.

The various points raised in criticism of the Hicklin test and the attitude of the Indian courts towards them may be briefly summarised as follows:

1. Dominant effect of the work as a whole: Many High Courts in India are of the opinion that a book may be obscene within the meaning of Section 292 although it contained but a single obscene passage.\(^{18}\) In \textit{Udeshi v State of Maharashtra} the Supreme Court made the following observation on the point:

"An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by \textit{itself and separately} to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall" \(^{19}\) (emphasis added).

2. Defence of absence of intention: The courts have consistently held that the motive for the publication or circulation of the impugned matter was not relevant and the intention was to be presumed from the consequences of the act, namely, corruption of the minds and morals of the public.\(^{20}\) The Supreme Court also observed that under Section 292 of the Indian Penal Code, knowledge of obscenity is not an ingredient of the offence and the liability under the section is strict. "Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section".\(^{21}\)


3. Public goods: On the question whether public goods on the ground that it is in the interests of science, literature or art can justifiably save an otherwise obscene matter from the penal provisions of the law, the courts have not given a definite opinion though they seem to be inclined in favour of it. The Supreme Court observed in Udeshi's case that "...... ideas having social importance will prima facie be protected unless obscenity is so gross and decided that the interest of the public dictates the other way".

4. Meaning of obscenity: On this question as well as on the test to be followed in the determination of obscenity the courts could not evolve a satisfactory alternative to the Hicklin formula. On the contrary, the Hicklin test has been given the seal of approval by the Supreme Court. The strong arguments against it nevertheless found expression in many passages in the Lady Chatterly's Lover judgment. The court observed that in ascertaining the question as to what is obscenity as distinguished from a permissible treatment of sex, "the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked...... where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked....... In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency".22 And finally in finding Lady Chatterly's Lover as an obscene publication the court said, "In treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above".22a

But this apparently simple statement of the test does not in any way make it a fair, objective and workable one in practice. The test leaves the possibility of determining literary standards from the point of view of an immature teenager. For, the court

22a Ibid, at p.891.
observed, “the law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings”. Can a test evolved on this basis reflect the standards of the community? Further, in determining obscenity the court is expected to apply the social concept concerning sex, that constitutes the collective conscience of the community and this can only be done by ascertaining the views of “the right-thinking members of the society generally”. Though judicial difficulties in this respect are real and numerous this type of community standard test alone will mitigate the extent of subjectivity in the judicial process that is potentially dangerous under the Hicklin rule. The test ought to be whether a reasonable man brought up in conditions of life as they exist today would believe that the book was obscene not in certain passages, but in its main purpose and construction, and published for no socially useful purpose, but simply to cater the base instincts of human nature”. Sex being a legitimate subject of discussion the inquiry should be of the relevancy of the objectionable parts to some theme, the established reputation of the work in the estimation of approved critics and the use the publication is made of. Evidence of pandering or commercial exploitation of the weakness for titillation may be probative with respect to the nature of the material. Such a formula will be least restrictive of free speech and therefore constitutionally more acceptable.

While discussing the constitutionality of the obscenity provisions, the Supreme Court pointed out:

“That cherised right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality...........It does not go beyond obscenity which falls directly within the words ‘public decency and morality’ of Article 19 (2)”. (Emphasis added).

As it happens more often than not, the law against obscenity is seldom “correctly understood and applied” and herein lies the danger the vague and elusive Hicklin test poses to the Constitutional right of free speech and expression.

Thus it may be seen from the above discussion that judicial interpretation of the existing provisions of the law against obscenity has neither been a progressive utilitarian one consistent with social changes nor fair to genuine art and literature. In view of the vital interests involved in the question a definite legislative and judicial change is urgently needed so that, while pornography may be ruthlessly suppressed, genuine literature may be freed from censorship. It is refreshing to note in this connection the Bill introduced by a private member in the Rajya Sabha seeking suitable amendment to Section 292, Indian Penal Code, whereby the court is required to take into consideration the dominant effect of the book as a whole to find whether the publication of the matter is justified on the ground that it is for public good or in the interests of science, literature, art or learning and in cases of dispute, to admit the opinion of experts as evidence of the literary, scientific or other merits of the publication. Though, this measure when adopted, would go a long way in reforming the law in the proper directions yet, ultimately it depends on the judiciary in evolving a fair, objective test of obscenity based on public good and community standards. The alternative would be to permit the personal tastes and predilections of the particular judge trying the measure in question to prevail.

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OBSCENE LITERATURE: POTENCY AS A STIMULANT

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are
the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency, but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who knew so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sex thoughts as compared with other factors in society.

The arousing of sexual thoughts and desire happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man".