OBSCENE OR ARTISTIC?: AN OUTLINE OF THE OBSCENITY LAW IN INDIAN ART AND LITERATURE

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Abstract

This article charts out how the obscenity law has played its course in Indian art and literature. By taking into account the effect of section 292 of IPC on the lives and careers of a few renowned personalities in the aforesaid fields, from Manto to M. F. Husain, this article seeks to establish the requirement to afford art a certain amount of leeway free from the obscenity law. It also includes a brief review of the cases pertaining to this issue. Moreover, arguing for the need to look at art in a perspective broader than legal purview of obscenity, this article talks about the various possible metrics to do so and the ones already in place.

Article

On being questioned about the purported elements of obscenity in his writing, back in 1956, Manto replied, “why would I want to take the clothes off a society, civilisation and culture that is, in any case, naked?” (Manto 1956). Perhaps it was with the same audacity manifest in this statement that he had fended off the obscenity law on six occasions, three before independence and three after. His bane was section 292 of the Indian Penal Code, 1860 – a law that deems all “lascivious representations” which “appeal to the prurient interests” as obscene, banning the dissemination and possession thereof. The law had undergone a gradual process of transition over the course of the 20th century, and, to an extent, throughout whatever has elapsed of the 21st century. This has been a transition brought about by the changing attitudes towards obscenity, the constant friction between the progressives and conservatives, andthe will of the judiciary – taking two steps forward, then one step back. This paper shall attempt to chart out how the obscenity law in the annals of literature and art has morphed from being the profanity of depravity to “the profanity of prudery” (Kapur 1997).

Manto was not the first author to be dragged to the court on account of obscenity and certainly not the first one to oppose it vehemently. In 1933, around the same time when Manto's association with Abdul Bari Alig began, an anti-imperialist, left-oriented writers' movement was emerging. With the motive of giving way to an open-minded space for writers, this consortium of organisations, better known as the Progressive Writers' Movement, was vastly influenced by Russian and French intellectuals; and so was Manto (Jalil 2012). One of the pioneering organisations of this movement was founded in 1935 – the Indian Progressive Writers' Association, of which Manto was a member. Built on the foundation of backlash incited by the allegations of obscenity against a collection of short stories edited by Sajjad Zaheer, titled *Anghare*, which entailed contributions from Ahmed Ali, Mahmuduzzafar and Rashid Jahan, IPWA was at the forefront of the cause to provide literary expression immunity from obscenity (The Open University n.d.). Subsequently, Manto fell out of terms with his fellow progressives due to a number of reasons, though his quest against societal vices continued, and so did the flow of obscenity charges (Akhtar and Flemming 1985).

Amongst these dauntless voices, one also belonged to a remarkable lady by the name of Ismat Chugtai. Her celebrated short story, *Lihaaf*, landed her in the midst of a legal controversy with – should not be hard to guess – obscenity at its core. The bone of contention was homosexuality, a taboo even today. Taken up in 1944, the charges against her were quashed by the Lahore Court on being argued by her lawyer that the story was devoid of any expletives and depiction of a sexual intercourse (Gopal 2012). Women like Ismat Chughtai, Krishna Sobti, Qurratulain Hyder, Mahashweta Devi, Shivani and Kamla Das afforded the generation of their day an insight into the issues of women – emotional, sexual, economic and social. All such efforts, however, faced considerable impediments in the form of a question that would hound the judiciary for a great many years to come: at what point does literary merit override obscenity?

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. Despite that, the section fell deficient when it came to a definitive mechanism of determining obscenity. The prevalent procedure in place was the Hicklin test that had emanated from the English case of *Regina vs Hicklin* (1868). The crux of the test was in grasping obscenity in terms of the potential of a material to corrupt anyone whose mind was open to immoral interpretations, the literary merit of the work notwithstanding. The feud between literature and the obscenity law was particularly highlighted in *R vs Penguin Books*

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Ltd. (1960), a case concerning D. H. Lawrence's *Lady Chatterley's Lover*. Both Manto and Lawrence wrote with the same ink, the kind that was usually considered more of a blemish by the society than the ink with which their masterpieces were crafted. It is, for that reason, hardly surprising that the law treated them on a similar note when its provisions on obscenity were invoked. Penguin was tried under the Obscene Publications Act, 1959. The trial ended in Penguin's favour since the law in England provided for the publication of explicit material in furtherance of literary purposes (Robertson 2010).

That the Indian judiciary would likewise make such a liberal intervention in the aftermath of the aforesaid judgement was reasonable to expect, albeit it never happened. What the judiciary, to the contrary, actually did was upholding the Hicklin test in the 1964 case of *Ranjit D. Udeshi vs State of Maharashtra*. This landmark case revolved around an unexpurgated edition of *Lady Chatterley's Lover* published by the appellant. It was argued from his end that section 292 stood as a vague restriction on the freedom of speech and expression; and that even if it was extended to this case, the book, as a whole, would not be found obscene. Mulk Raj Anand, a renowned writer himself, opined in his detailed analysis of the book that it was a work of considerable literary merit and not obscene (Narrain 2009). Nevertheless, the trial court held the appellant guilty, with the conviction later being upheld by the Bombay High Court and the Supreme Court. In accordance with the Hicklin test, the court made the assertion that when art and obscenity are intertwined, "art must so preponderate as to throw the obscenity into a shadow."In other words, the court was obstinate on overlooking obscenity only if it was so trivial to not have any visible effects – a notable departure from *R vs Penguin BooksLtd.* where the court let literary merit trump over obscenity, regardless of the repeated use of the words "fuck" and "cunt." It was additionally held that the effect of an impugned obscene work ought to be understood not in terms of a person capable of resisting its carnal exertion, but the ones who are most susceptible to it. Astoundingly, the British got over their restrictions on literary brilliance, but the Indians failed to move on from a law drafted by the British.

The 60s saw the growth of a reinvigorated discourse on obscenity and its role in art and literature. In 1960, Tamil Nadu went a step ahead in this tussle and amended section 292, inserting a new 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

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punished with imprisonment of either description for a term which may extend to two years, or with fine or with both." The amendment effectively roped in anyone profiting out of a "grossly indecent or scurrilous" circulation or exhibition, be it a vendor, be it an advertiser. There is an explanation to this amendment that it guards a public servant against the criticism of the discharge of his public functions by a conduct respecting his character. What if the public servant is involved in sexually harassing his co-worker? It is surely an act in his workplace and a matter of public concern as well. As though the amendment was not enough, Tamil Nadu promulgated an ordinance the same year on September 21, rendering the offence cognisable and non-bailable. Its implications: policemen could now judge an artist's works and arrest him as per their idea of obscenity; even worse, politicians could direct them to do so (Noorani 1981).

Lady Chatterley's Lover case in England produced a chain events across the world. The book was disputed in Japan, Australia, Canada and the United States, in addition to England and India. Consequently, in India, it led to the appointment of a select committee under the chairmanship of Akbar Ali Khan in 1963. The committee recommended for an exception to be made in the obscenity law in respect of publications and objects meant for "public good" or for a well-intended purpose in science, literature or art (Sharma and Wooldridge 1973). For example, in keeping with the committee's suggestions, pictures of organs of procreation in a biology textbook could not anymore be termed obscene for the reason of its greater scientific worth beyond the trifle that obscenity in this regard is. The recommendations were finally effected by Act No. 36 of 1969, though the law remained by and large unchanged.

The ambit of obscenity is a pretty broad one, so broad that the inclusion of censorship should barely come as something unexpected. This is what precisely happened in the Supreme Court case of *K. A. Abbas vs Union of India* (1970). The petitioner in this case had sought a 'U' certificate for his documentary from the Central Board of Film Certification instead of the 'A' certificate that the board was ready to issue. The court ruled that pre-censorship is a valid tool for filtering content while urging the board to take a note of the literary or artistic quotient of a work.

The metric to measure the presence of obscenity in art is a complicated one. Many a time it involves the important parameters of fundamental rights, public good, target group and the producer's intention. Art can be separated from obscenity on the basis of three variables, namely, the genetic, structural and functional variables (Morawski 1967). By this logic, a good

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many reportedly obscene works, say, for example, Manto's *Thanda Gosht*, can be absolved: genetically, since the author's intention is not to arouse amorous desires; structurally, since the erotic elements are not the dominant values of the story; functionally, since it is a product of fiction, not showing any real-life persons. The disharmony between art and the obscenity law reached its culmination in the widely debated 2008 case of *M. F. Husain vs Raj Kumar Pandey*. Championing the right to freedom of expression and artistic merit, the court established that mere nudity does not constitute obscenity. The structural variable becomes particularly vital in making sense of Husain's paintings – or, for that matter, any other piece of art castigated for obscenity. The key is to see beyond the confinements of the familiar narrative of Hindu Gods and mythological characters that accompany his paintings. Beyond simply being steeped in the portrayal 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"(Das 2010).

It would be wrong to surmise that there exists one unified, consolidated side contesting the restraint of obscenity on art. To be frank, the proponents on this side have seldom arrived at one agreeable method of gauging obscenity. One predominant view in this regard is that of the subjectivists' who think of obscenity to be variable based on the beholder's perception. "Obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture," (Schroeder 1906) is a contention commonly made by them. Although it may appear a perfectly fair claim *prima facie*, a thorough and critical take on it does reveal its shortcomings. Firstly, embracing such a position in law could open floodgates of cases in that someone taking offence to anything seemingly obscene to him would be justified in doing so due to his personal perception of obscenity. Secondly, should someone be prompted by a perverted impulse to spread an indisputably salacious object in an untoward place, like a pornographic video through an email to colleagues, he would easily get away by citing subjectivity of obscenity. An extension to the subjectivist stance is that of the 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 in a *work of art* (Kaplan 1955). The latter weakens the elements of obscenity by focusing majorly on the aesthetics of art, thereby diluting them with the very artistic touch of the work itself: what may project to someone as an obscene element might be nothing but the artist's imagination at work on the aesthetics. But this view too suffers from the same flaws inherent in the subjectivist view, that is, the sheer lack of an objective ground for law to rely on.

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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 thepractice of superstitious beliefs (Adler 1937). A more pragmatic approach is insistence on "objectivity relative to a specified context"(Kaplan 1955). Yet this view, much like the others, has not been let scot-free. D. H. Lawrence (1955), given his own experiences with obscenity in the books of law, censured the objectivist approach for the better part of his career: "It is the mind which is the Augean stables, not language".With this, the feminists would markedly disagree. Their conception of obscenity deals with the "domineering, aggressive, degrading or objectifying" relation between men and women, typically poising women at a compromising situation in the portrayals of it (Bessmer 1981). 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 that the feminists are concerned with. What is needed, ergo, is 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 where the imperative question arises: how should the two aspects, the normative and objective, be balanced?

The struggle between art and obscenity was invariably rooted in the Hicklin test for a significant duration. Assailed by numerous quarters, the test had long been due a replacement until *Aveek Sarkar vs State of West Bengal* in 2014. This case did away with the Hicklin test and introduced 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; the same is to be identified in accordance withcontemporary "community standards" (Roth vs United States 1957).Relaxing the strict 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. 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.

Section 292 leaves an ample amount of leeway for it to be exploited by bigots to bedevil those who they disapprove of. This is especially pertinent in an extensively diverse, and equally volatile, country like India where every now and then someone or the other takes offence to someone else's remarks. Often the social reality comes into play in shaping out how these cases are reported, framed and investigated. Caste, class, religion, etc. are all relevant indicators for

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construing the underlying intent behind the filing of a complaint – or failing to do so –in the first place. For instance, Surya Wagh, a Goan poet was awarded for an anthology of his poems earlier this year. The accolade caused massive uproar on social media, ensuing in an FIR against him and his publisher (Nair 2017). It is best left up to one's sagacity to make out how crucial is the fact that his poems primarily attacked the Brahmins, and also that he himself belonged to a lower caste.

From Manto to *Aveek Sarkar*, the idea of obscenity has been subjected to a huge metamorphosis in Indian literature and art. This paper has refrained from commenting on where specifically the line between them must be drawn, for this shall require another set of arguments with even more profound analysis. What this paper has indeed tried to expound is that this line keeps on changing frequently, effacing the previous demarcation and then delineating a newer one. Nowadays, obscenity is increasingly becoming a wand in the hands of those who are wont to go in a huff 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 IT Act, surged from 69 to 139 (National Crime Records Bureau n.d.). The obscenity law might well be a warranted whip, but the moment it is employed for moral policing it takes a nigh irredeemable toll on art and the society at large.

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