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CENSORSHIP:
A Moral Dilemma or an Immoral Siege on Freedom of Speech?

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Notes and Comments

CENSORSHIP:
A Moral Dilemma or an Immoral Siege on Freedom of Speech?

Dhawal Shankar Srivastava[*] *& Zubair Ahmed Khan*[**]

[Abstract: *The concept of obscenity is usually understood as something offensive in nature. But, it is not easy to comprehend the criteria of obscenity. The degree of offensiveness and depravity in any art, literature, etc, may play a substantial role in determining the obscenity. With the passage of time, the interpretation of obscenity keeps on changing from state to state depending on the objective assessment of the judge and the circumstances of the case, but the violation of the standard of morality, societal norms and ethos will be a deciding factor to determine obscenity. The present article delves deep into the judicial process involved regarding interpreting obscenity how the courts in India particularly dealt with this concept as the concept is in itself very cryptic and vague and often leading one to the sticky slope of morality, which in itself is very relative. The problem becomes severe, as the court has to dovetail between the conflicting claims of the artist who exercises his right under Article 19(1)(a) and the apparent notions of morality.*]

I

Introduction

The idea of obscenity is very relative in nature. The most prominent justification for censorship being that bad literature inflicts harm to the psyche of a person, particularly children and adolescents, who are most prone to moral affliction. It is presupposed that human beings are more or less corruptible, and the forces of corruption need to be controlled. Literature is what is expressed by the writer, painting is the reproduction of the image in the mind of the painter. Basically, an artist pours out his imagination, which is influenced by his experience. All experience is the content of literature. An experience in the realm of literature is neither moral nor immoral, it is rather amoral.[1] A work can later on be categorized, it may be praised as a work of literary value or may be brushed aside as a work of

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[1] Madhao B. Achwal, THE LITERARY ASPECT OF OBSCENITY IN ROOTS OF OBSCENITY 29 (A.B. Shah, *ed.*, 1968).

less literary value. The criteria of a literary work, insofar as it is an expression, cannot, therefore, be ethical or social; they can only be aesthetic.

Since the time when the history of civilisation was at its embryonic stage, the connection between law and religion is indistinguishable. Naturally, there has been zest in the lawmakers to consider it immoral to picture religion in the wrong colour. Even under the Indian Penal Code, 1960, herein referred to as 'IPC', the exception was made to section 292 so as to cater to the needs of the religious feelings of the people. As per the section, it does not extend to any book, writing, drawing or painting which is kept or is used for a *bonafide* religious purposes. Or even if it has been engraved, painted, or sculptured in a temple. Such has been the relaxation that even if a car is used for the conveyance of idols, then these cars will be exempted from the charge of obscenity getting levelled against the owners of the cars. The exception has been with regard to the monument under the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958. There is a string of old cases that show how the courts have approached the issue of morality when the impugned material is laced with religious overtones. In the case of *Sukanta Halder* v. *The State*[2], there was a sex magazine which had reproduced many architectural figures from the walls of old Hindu temples, the court held:[3] '...The particular items selected for the article are not really the best from the artistic point of view but those which are indecent and more aphrodisiac... the articles cannot in any view be considered as to be one in which article is explained for the sake of art'. The case of *Sarat Chandra Ghose* v. *King Emperor*[4] is an interesting case which shows how hypersensitive the subject of sex had always been. In this case, the accused was prosecuted not under the IPC but under the Post Offices Act (VI of 1898) for sending some postcards that advertised a specific called Angel's Health Restoring Food and was alleged to contain obscene matter.

From the case of *Ranjit Udeshi* v. *State of Maharashtra*[5], one thing is clear that the laws of obscenity, in fact, facilitate cultural regulation. Under the legal gloss, the courts are setting boundaries as to what people should do and what they should not do. While upholding the validity of S.292 of the IPC, the court held that obscenity is not protected under Article 19 (1) (a) as the decency and morality clause justifies restricting obscene expression. However, in para 9, the court observes that the expression of free opinions is to change political and social conditions or advancement of human knowledge. It was observed that such freedom is restricted in the interest of public decency and morality. The question thus arises that when the court has already held that obscenity is not protected under Article 19 (1) (a), then the question of discussing Article 19 (2) does not arise. The court, on the one

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2 *Sukanta Halder* v. *The State*, (1952) Cr.L.J. 575 (India).

3 *Id*.

4 *Sarat Chandra Ghose* v. *King Emperor*, (1904) I.L.R. 32 Cal. 247 (India).

5 *Ranjit Udeshi* v. *State of Maharashtra*, AIR 1965 SC 881 (India).

hand, seems to uphold the spirit of free-thinking, but that free thinking is outweighed by social interests such as public decency and morality. The other critical problem with which this judgement is infested is that while discussing the scope of Article 19 (2), the court uses the words 'public decency' and 'morality'. However, it is submitted that such expressions are not used in the Constitution itself. The precise wording of Article 19 (2) is 'public order, decency or morality'. We can see that only order is qualified by the term public, and the manner in which the terms order, decency, and morality are read in the compendium is an erroneous method. The question of the moral majority imposing its moral convictions is not new. This particular angle had been assiduously debated by Lord Devlin, H. L. A. Hart and Ronald Dworkin in the 1960's. There was a public concern that there was a decline in sexual morality. The Government at that time established a committee to analyze as to whether the laws pertaining to homosexuality and prostitution be changed or not.

A debate ensued when the committee submitted its report, whereby it advocated legalizing prostitution and homosexuality. The committee called the Wolfenden Committee, reasoned that there are a few areas that need to be left to individual morality.

The purpose of the report was:[6]

> *to preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others especially the vulnerable, that is the young, weak in body or mind, inexperienced or those in a state of physical, official or economic dependence. The law should not intervene in the private lives of citizens or seek to enforce any particular pattern or behaviour further than necessary to carry out the above purposes.*

The reasoning is quite analogous to Mill's harm principle that so long as the individual choices of people do not harm the other, the individual choices should be free to exercise. So, prostitution may not be wrong in itself and should not be banned as an individual be allowed to exercise his choice. However, when it comes to soliciting, then regulations can be imposed. The report started a debate, and some of the most influential thinkers were divided on this matter. Lord Devlin refused to accept the report. He argued that there is some form of common morality in society, and there is an agreement on the basic notions of good and evil, which was necessary to keep society together. Law has every right to uphold the common form of morality.[7] He also contended that such practices that generate a feeling of disgust in society should be prohibited and that society has every right to eliminate such practices. He also advocated that law should prescribe a certain minimum level of morality; the standard of morality for society will, of course, be high.

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[6] Catherine Elliott & Frances Quinn, LAW AND MORALS 660 (2015).

[7] *Id*.

In light of the arguments of Lord Devlin, let us assume that an institution of marriage and family is the essence that society considers necessary for its existence. Now, as per the argument of Lord Devlin, the abundant existing presence of pornographic material will erode the concept of marriage and family. Or maybe it (pornographic material) changes the understanding of sex and relationships that will degenerate society. In both cases, society has the right to stymie such changes with the help of legislation.[8] Hart, who was influenced by the works of J. S. Mill, attacked Lord Devlin's arguments. Hart argued that using the law to enforce moral values was unnecessary, undesirable and morally unacceptable and unnecessary because society was capable of containing many moral standpoints without being disintegrated; undesirable as it would freeze morality at a particular point; and morally unacceptable because it infringes the liberty of the individual.[9] Hart further contended that society is anthropomorphically an arrangement where the community shares ideas about politics, morality, and ethics, and society is always in a state of flux. It is constantly changing, so is it desirable for the majority at that point in time to cement a transient moment into a state of permanence.

Ronald Dworkin attacked Lord Devlin on the basis of moral convictions. Lord Devlin defined the term to be a level of disgust and rising to intolerance. Dworkin separates true moral conviction from that of taste, prejudice, rationalizations based on demonstrably incorrect facts and parroting (parroting here means the tendency of a person to believe something which is grapevine and understood as a gospel truth). Dworkin explained in the following terms as to why the stated grounds could justifiably restrict forms of action of expression:[10]

> *...the principles of democracy we follow do not call for the enforcement of the consensus (against homosexuality), for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality. Nor would the bulk of the community then be entitled to follow its own lights, for the community does not extend that privilege to one who acts on the basis of prejudice, rationalization or personal aversion. Indeed, the distinction between these and moral convictions, in the discriminatory sense, exists largely to mark off the former as the sort of positions one is not entitled to pursue.*

The argument of both Hart and Dworkin lays emphasis over the fact that moral conviction entails that a very high level of public morality is necessary, but at the same time, even the highest level of morality cannot play rough shots towards the entrenched rights. In the case of *West Virginia Board of Education* v. *Barnette,*[11] the court has beautifully summed up the importance of entrenched provisions:

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[8] Gautam Bhatia, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 114 (2016).

[9] Catherine Elliott & Frances Quinn, et.al., LAW AND MORALS 667 (2015).

[10] Ronald Dworkin, TAKING RIGHTS SERIOUSLY 254 (2005).

[11] *West Virginia Board of Education* v. *Barnette*, 319 U.S.624, 638 (1943).

> *The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*

Again, there will be a hounding question that what will be the public morality, can such public morality be defined in concrete terms. How can we say that the Indian public morality is against homosexuality? Is there a way by which this can be ascertained? By saying that this particular thing is public morality, we are somewhere assuming that a society, culture or community is an indivisible whole. The problem with public morality is that it is incongruous, undefined and indeterminate; if we conduct a historical investigation into this concept, then we will see that the privileged voices have been dominant over others, and it is practically impossible that all members of the society can be unison over one aspect of public policy.

If we look at the *Hicklin* test, which was adopted by the court in the case of *Ranjit Udeshi* then we will see that the test is based on the reason that individuals need to be protected from corruption or depravity. This test, in one aspect, is reflective of Mill's harm principle. This test isn't just a reflection of the harm principle, but two more justifications can be given, which can differentiated in legal paternalism and legal moralism. Legal paternalism means using law as a means to prevent a person from inflicting harm on himself, for example, laws against smoking or laws that entail wearing a seat belt compulsory while driving. It is based on the assumption that in certain areas, it is the state which knows best for its citizens. Legal moralism, on the other hand, does not see whether there is an infliction of harm or justifies the prohibition of action solely on the grounds of immorality. Legal moralism blocks the state function of liberal neutrality. The case of *Ranjit Udeshi* is that of legal paternalism, where the court is reasoning that it has to save the minds of the vulnerable class from getting depraved and corrupted.

This paternalism can further be differentiated between soft and hard paternalism.[12] Soft paternalism is limited to those cases where there is an absence of knowledge or imperfect volition. Hard paternalism knows no such limitations. Soft paternalism restricts itself to mistake of fact, hard paternalism, on the other hand, permits interference of the state for the sake of values.[13] This, however, brings us to another question, as to whether moral compulsion is valuable to an individual's life in the first place. Dworkin believes that it is not a necessity. As per his endorsement theory, unless and until an individual endorses a particular thing, it cannot contribute to the value of his life. There is another ground on which an individual may hold a

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[12] *Id*. note 9. Gautam Bhatia, *Offend, Shock or Disturb*, in FREE SPEECH UNDER THE INDIAN CONSTITUTION at 119.

[13] *Id*.

distinguished position. For example, the distinction between fact and value. For example, a person is a chain smoker, and he likes to smoke. At the same time, the state controls his right to smoke in an explicit or implicit manner. Explicit manners can be such that he is not allowed to smoke in public places, and implicit manners are such where the state regulates his smoking differently, for example, by imposing additional taxes on the manufacturing of cigarettes so that a smoker is discouraged from smoking. Such measures have been backed by scientific facts. Even a smoker agrees that smoking is injurious to health, not just his own but people who live near him, and, therefore, he agrees with such regulations. On the other hand, value comes. A can believe that homosexuality is a sin because his religion says so, but an atheist who doesn't believe in religion or God may not accept that homosexuality is a sin. Paternalism takes a hard stand when the law is tweaked and framed on the basis of values such as religion.

Homosexuality under section 377 of the IPC is a crime, the language itself shows how it is loaded with certain values. The section prescribes that there is a certain order of nature as per which a man and a woman should only indulge in sexual intercourse. Any such intercourse which defies such 'natural order' will be punished. In the case of *Ranjit Udeshi,* the court ended up imposing an external authority which labelled a set of values as good, true and integral to well-being without taking into consideration that there may be disagreement with that perspective. Apart from fact and value, hard paternalism deeply affects the autonomy and personal freedom of an individual. Autonomy and personal freedom vest in the citizens themselves, and it is up to them what kind of ideas and conceptions of well-being they want to adopt. Moral paternalism denies them this opportunity. Under such hard paternalism, we can look at the case of *Devidas Ramchandra Tulijapurkar* v. *State of Maharashtra*[14]*.* This case entails a person to respect an individual, here, the court is determining which person is to be respected and which is to be not, and one needs to be cautious to write anything regarding them. When in *Khushboo* v. *Kanniamal,*[15] the court observed that it is a desideratum that stress be laid on the need to tolerate unpopular opinions in the socio-cultural space, then the court struck at the roots of public morality. The morality clause of Article 19(2) does not allow the asphyxiation of free expression on the basis that it attacks institutions which the society believes to be sanctimonious.

[14] *Devidas Ramchandra Tulijapurkar* v. *State of Maharashtra*, (2015) 6 SCC 1 (India).

[15] *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India).

II

Issue of Constitutional Morality and Obscenity

The phrase 'constitutional morality' has gained currency of late. Now the Constitutional law experts talk of constitutional morality. Interestingly, even Dr. B. R. Ambedkar has shed his views on constitutional morality. In his speech 'The Draft Constitution', which was delivered on November 4th, 1948, he used this expression while quoting classicist George Grote. The quotation is suitable enough to be reproduced in full:[16]

> *The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves.*

What is this constitutional morality which Grote was referring to? Here, Dr. Ambedkar quotes Grote again:[17]

> *By constitutional morality, Grote meant... a paramount reverence for the forms of the Constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution will not be less sacred in the eyes of his opponents than his own.*

For Grote, it appears that constitutional morality is twofold. Freedom and self-restraint. For Ambedkar, on the other hand, constitutional morality serves a greater purpose. It is a recognition of plurality in its most profound form. This form of morality can be the most potent method of creasing out differences. He believed this to be the only non-violent method that leads to unanimity in a constitutional process and a method of adjudication that leads to agreements.[18] Therefore, constitutional morality entails submission and allegiance to the Constitution. The Constitution, on the other hand, should not be based on the belief of any agent.

Another important aspect of constitutional morality is suspicion towards such claims that boast of representing the will of the people. The will of the people brings in a certain kind of universalism, which muzzles the disagreement which prevails

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[16] CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS); *available at:* http://www.parliamentofindia.nic.in/Is/debates/debates.html (last visited Feb. 7, 2022).

[17] *Id*.

[18] Pratap Bhanu Mehta, *What is Constitutional Morality*, *available at*: http:// http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (last visited Feb. 7, 2012).

among other people.[19] We can see that even the Constitution is loaded with morality of its own. For example, the concept of equality. What is the notion of equality? The traditional understanding of equality before the law projects a very universalistic idea of equality. The universalistic idea thus commits the *Himalayan blunder*. Should the notion of equality for children be judged while keeping in mind the notions of equality for adults? Such a problematic touchstone flies into the face of universalism. Therefore, Article 14 uses the terms equality before the law and equal protection of the laws. This is why our Constitution has provisions like Article 15(3), which makes special provisions for women and children. There are many provisions which depart from the traditional liberal conception of personal rights enforceable against the State, for example, Article 15(2) (which prohibits horizontal discrimination in certain public spaces), Article 17(abolition of untouchability), Article 18 (abolition of titles), Article 23 which abolished bonded labour, Article 25(2)(b) through which Hindu religious institutions were opened to all classes and sections of Hindus.

The decency and morality aspects of Article 19(2) entail restrictions upon free speech, which is of a content-based nature. The restriction of free speech based on content is in contravention of autonomy. Naturally, the question arises as to why such restriction is there, can its presence be justified? The justification here is that when the state goes for curtailment of the rights of the person, then such curtailment should be done with regard to the values grounded within the Constitution. The provisions which were discussed above show that our Constitution supports an anti-subordination form of equality. Now, under this argument let us see what could be the definition of obscenity. There is a connection between sexually explicit material and subordination of women. The decency and morality in Article 19(2) should be interpreted within the constitutional value of equality as anti-subordination. Feminist critique like Catherine Mackinnon and Andrea Dworkin argue that the morality laws pertaining to obscenity are drafted in a way which fulfils the criteria from the male standpoint. Mackinnon points out the politics behind pornography which aims at the subordination of women to men.[20] In her own words:[21]

> *...pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.... Men are permitted to put words (and other things) in women's mouths create scenes in which women desperately want to be bound, battered, tortured, humiliated and killed.... This is erotic to the male point of view. Subjection itself, with self-determination ecstatically relinquished, is the content of women's sexual desire and desirability*.

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[19] Pratap Bhanu Mehta, *What is Constitutional Morality*, *available at*: http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (last visited Feb. 7, 2022).

[20] Catherine A. Mackinnon, FEMINISM UNMODIFIED: DISCOURSE OF LIFE AND LAW 34 (1987).

[21] Catherine A. Mackinnon, *Id.*

During the apartheid regime, signs such as 'Whites Only'did not just represent the idea of apartheid, but these signs were specific instances of it. Similarly, pornography is to be understood as not just representing reality but an instance of reality.[22] This line of argument is totally different from what we have been understanding hitherto. The laws pertaining to obscenity were justified on the grounds that society needs to be protected from the mental depravity and corruption of society. This line of argument focuses on subordination and exploitation.[23] Now, looking back at Article 19(2), we realise one thing freedom in Article 19(1) is not absolute and absolute neutrality has not been the conception of free speech in India. Such a departure from neutrality is justified when such regulation over free speech is based on constitutional morality. Therefore, such sexually explicit material which eulogizes the subordination of women should be identified and regulated.

The case of *R* v. *Butler*[24] is an actual example where the court applied the community standard test in a modified manner. This case incorporates the feminist point of view. In this judgement, the court demarcated between those obscene materials which depicted explicit sex with violence and explicit sex without violence, which subjects participants to treatment that is degrading or dehumanizing.[25] This judgement also invoked the idea that society needs to be protected from harm that such content can inflict upon it. This judgement is notable because it tweaked the community standard test. Instead of determining whether the material under impugnity is prurient or offensive, the test was used to see whether the depiction as such is degrading or not. In this way the tweaked test was different from the community standard test of *Roth.* This approach is, however, problematic too. Understanding of the wrong of pornography is contingent. Society may not be able to take into its stride the dehumanizing aspects of pornography into its stride today, but it is not necessary that this theory would not change in due course.[26] Discussions are happening over BDSM form (bondage, domination, submission, sadomasochism) of sex, novels like 'Fifty Shades of Grey' are openly discussing about the pleasure derived by a woman when she voluntarily submits herself to bondage or other forms of depriving sexual activities, which we call as sadistic. Should a woman be sent on a guilt trip for fantasizing about her own violation and expressing a desire to be violated, society is still pondering over such concepts. *Butler*, therefore, is a controversial case and can be criticized. Still, it has a better

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[22] Catherine A. Mackinnon, *Id.*, at 21.

[23] Catherine A. Mackinnon, *Id.*

[24] *R* v. *Butler,* (1992) 1 SCR 452.

[25] *Supra,* note 20, Catherine A. Mackinnon, at 9. See also Gautam Bhatia, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 132 (2016).

[26] *Richard Moon, R* v. *Butler*: *The Limits of The Supreme Court's Feminist Re-Interpretation of Section* 163, 25 OLR 369 (1993).

approach as it departed from the problematic concepts of public morals to constitutional morality, such as equality.

The South African-Constitutional Court has followed this approach and has criticized the *Butler* approach as well, saying that the Canadian approach may stifle the marginalized discourse.[27] In *De Reuck* v. *DPP*,[28] the court dealt with the provisions that criminalized the creation, distribution, or possession of child pornography. Here, as per the provision, child pornography was defined as such sexual conduct which tantamount to sexual exploitation or degradation of children. We can see that whereas, in *Roth* and *Sarkar,* the focus is on prurient interest, South African child pornography requires exploitation and degradation as an additional requirement. The court upheld the law on the grounds that such objectification violated the right to the dignity of children, which is a specific constitutional moral. So, we can say that the South African approach is better in a way that it understands the harm in context with the protection of established constitutional values such as equality, dignity, etc.[29] The shift of Indian obscenity law, from *Hicklin* to *Roth,* is based upon the protection of the individual from moral degradation by preventing access to material which spawns prurient interests. Here, the morality of the community becomes the touchstone. The case of *Devidas Talujapurikar* has *hicklified the community standard test by introducing the concept of a historically respected figure.*[30]

Therefore, it is necessary that the morality clause in Article 19(2) be read as neither the public morality nor the morality of the individual but constitutional morality, one aspect of which is equality or dignity. Thus, an approach based on the morality of the Constitution read in light of the anti-subordination approach can give us a method which is justifiable both philosophically and constitutionally.

III

The Question of Aesthetics Getting Ignored in the Discourse of Obscenity

Apart from being an expression, literature is also communication. Through a work of literature, the author communicates with the readers. Such communication of the individual author with his readers is a social fact. The main context of the book is the experience of the individual author. Naturally, this experience will gradually

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[27] *Case* v. *Minister of Safety and Security*, 1996(5) BCLR 608: 1996(3) SA 617.

[28] *De Reuck v. DPP* ,2004(1) SA 406.

[29] *Id*. note 9. Gautam Bhatia, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 169 (2016).

[30] Emphasis supplied.

affect a section of society. Obscenity is thus concerned with literature as a 'social fact', not with literature as an aesthetic fact. In society, a linguistic taboo may not necessarily be considered as a behavioural taboo. Violation of the norm may produce strong emotional reactions. But the production of such strong emotions may not necessarily be unpleasant. An obscene expression can be loaded with a mixed number of emotions which are very ambivalent in nature. To some, the expression can be pleasing; to some, other it can be utterly disgusting. To some people, the expression may bring upon a cathartic effect. The result may be a release from the tensions of prohibition in the form of laughter.[31]

In 'Lady Chatterley's Lover', there are several instances of sexual intercourse between Connie and Mellors. Connie is a woman from high society, the wife of an affluent man who has an affair with none other than the gamekeeper. The trend during that time was those portions which were sexual in nature were not expressed in a direct manner. The consummation portion was usually written in the most subtle and indirect manner. This novel was path-breaking. First, it dealt with the romance of unequal. The woman not only belonged to the higher society but was also married. Adding to the angularities, Lawrence used the word 'fuck' in connection to the instances of sexual intercourse rather than the usual 'lovemaking'. There is a great deal of significance in his not using the innocuous 'to make love' instead of the strictly prohibited 'fuck', which is precisely emotive and, therefore, functional in its context. This word was commonly used at that time in the lower class only and was considered as indecorous in the higher society (though now it is frequently used in the so-called respectable society as well). It is assertive of triumph and also expressive of the discovery of the sacred within the profane. If, however, we critically look at the structure of the novel, we will find that the word has been forcefully inserted and is not able to harmonize the powerful but chaotic lyricism which is perceptible in the novel. For a reader, the emotive discharge of the word 'fuck' is crucial. It intends to be a kind of sacrilege, and the sacrilege demands a change in the reader's entire orientation. It disturbs the set of values which he has ingrained over time. The suggestion here is that obscenity, by virtue of its emotive charge, is used by writers as an aesthetic element. The emotional reaction it produces is relevant to the perception and appreciation of literature because it has an emotive function.[32] As per Madhao B. Achwal, the study of obscenity from the literary angle will include:[33]

1. An examination of the nature of the areas of experience the phenomenon of obscenity is supposed to deal with;
2. the relation of these areas to other areas of experience;

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[31] Dilip Chitre, *Creative Aspects of Obscenity* in ROOTS OF OBSCENITY 21 (A.B. Shah, *ed.*, 1968).

[32] *Id.*

[33] Madhao B. Achwal, *The Literary Aspect of Obscenity* in ROOTS OF OBSCENITY 30 (A.B. Shah *ed.*, 1968).

3. the consideration of the areas under reference as content of a literary work;
4. the artistic, inartistic and non-artistic usage of this content, with reference to our concept of what constitutes a literary work;
5. the consideration of literature both as expression and as communication from the literary angle; and
6. the border lines where the literary aspect touches the legal-sociological aspects.

The artist basically is dealing with his own sets of internal tensions, in a literary work; these tensions are brought to a state of dynamic equilibrium. When this dynamic equilibrium is established, then it acquires the ability to create an evocative potential which compels the reader to contemplate, the reader here does not give volitional reactions. As earlier discussed, literature is neither moral nor immoral, it is amoral. The literary aspect can only deal with the artistic and the inartistic. The question of aesthetics has to be resolved. While using the content of a literary work, it is necessary to see the aesthetic material out of which the writer builds an organization. This organization has dynamic equilibrium as an important factor. This dynamic equilibrium is necessary as it tells us about the stage where we can comfortably say that nothing new can be added nor anything can be taken out without disturbing the overall balance and symmetry of the organization.[34] In a well-balanced equilibrium, the parts which are capable of immediate sense stimulation are counterbalanced by the sense of the whole and the predominant theme has its lingering presence all over the structure of the work. This point can further be understood by looking at another novel of D.H. Lawrence *i.e.*, 'Sons & Lovers'.

This classic work of Lawrence deals with the concept of Oedipus complex. Under this phenomenon, there is a desire in the child to have a sexual relationship with the mother. The child unconsciously develops a sense of rivalry with the father. Without contextualizing the theory in the plot, a neutral person may reach to the conclusion that the subject is obscene as it is showing incest. But if we look at the plot, then we will realize that Gertrude, who belonged to a very high class, married a collier. The marriage took place not out of love but out of infatuation. Soon, the marriage transformed into an inconvenience. The continuous bickering resulted in disillusionment for Gertrude, she unconsciously substituted her sons in the place of lovers. In the novel, she can be seen playing a rival to William's love interests and then to Paul's (both her sons). If we look at the relationship between the sons and their mother in the backdrop of the circumstances, then we will realize that, as a reader, we have a sense of empathy for the characters in the novel. The psychoanalysis of Gertrude and Paul is so brilliant that we, as readers, are compelled to appreciate the beauty of the novel. Here, the novel is so balanced with

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[34] *Supra,* note 31; Dilip Chitre, *Creative Aspects of Obscenity* in ROOTS OF OBSCENITY (A.B. Shah *ed.,* 1968) at page 31.

the proper aesthetic weightage that even sensuous lovemaking is balanced and does not stimulate or titillate the reader.

Truth in its complete and frank revelations leaves nothing to suggest. The mind here concentrates on the form. It is the half-truth, the suggestive expressions, that give rise to obscenity. In lesser forms of literature, there is a lack of overall unity, the details are purposefully inserted which are laced with implied suggestions which may cause stimulation, leading to obscenity.[35]

IV

Legal Reading of the Aesthetical Aspect

The case of *Aveek Sarkar* v. *Union of India*[36] though has been hailed as a marked improvement, as it did away with the *Hicklin* test, but the case is laced with problems of its own. It shows that how distinction of legal and non-legal is marked by reason of law which is quite different from other expressions. Both law and aesthetics looks to be acquiring seemingly different platforms. Law, it is said, is a reflection of reason. Aesthetics on the other hand transcends the realm of reason; it is too claustrophobic to be contained by the realms of reason. When the image is an erotic image, especially a feminine erotic image, the affect unravels the desires and erotics of the Law itself.[37] The image to be considered by the Supreme Court was a photograph of legendary tennis player, Boris Becker and her fiancée, Barbara Feltus. The couple posed nude before the camera, with Becker's hand wrapped around the breasts of his fiancée. Section 292 of the IPC was thus invoked. The court looked into the excerpts of the interview which Becker gave while justifying the image. As quoted in the article, he said:[38] 'The nude photos were supposed to shock, no doubt about it.... What I am saying with these photos is that an interracial relationship is okay'. The court observed that it is necessary to understand the picture in the light of the statement made and the message being imparted by the image. In the relevant para,, the court observed the following:[39]

> *The message the photograph wants to convey is that the colour of skin matters little and love champions over colour. The picture promotes a love affair, leading to a marriage, between a white skinned man and a black skinned woman. We should, therefore, appreciate the*

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[35] N.S. Rangnath Rao, *Obscenity: Literature and The Law* in ROOTS OF OBSCENITY 66 (A.B. Shah *ed*., 1968).

[36] *Aveek Sarkar* v. *Union of India*, (2014) 4 SCC 257 (India).

[37] Latika Vashist, *Law and The Obscene Image: Reading Aveek Sarkar* v. *State of West Bengal* 5 JILS 248 (2014).

[38] *Supra* note 36; *Aveek Sarkar* v. *Union of India*, (2014) 4 SCC 257 (India) at para 27.

[39] *Supra* note 36; *Aveek Sarkar* v. *Union of India*, (2014) 4 SCC 257 (India) at para 28.

> *photograph and the article in the light of the message it wants to convey*[40]*, that is to eradicate the evil of racism and apartheid in society and to promote love and marriage between white skinned men and black skinned women*.

Though, we must appreciate the intent of the court that it tries to look at into the message imparted through the image. But the method adopted is open to criticism, while seeking validation through the accompanying statement, the court is neglecting to appreciate the visuals and the aesthetic weight which the image carries. Even though the court is looking with regard to the accompanying message, it is not able to appreciate the purpose of the message. According to Becker, the purpose of the image was to shock, but here the court is not ready to appreciate the shock value of the message even. Here, the court is conveniently de-eroticising the erotic, robs it of its message and then drapes it under the attire of morality. Also, the court here applied the community standard test, here, the application of the community standards needs to be analysed. The court observed that the image is depicting interracial love, therefore, contextualising the picture under this background, the image does not have the tendency to deprave or corrupt the mind of the person. Also, the breasts of Miss Feltus were totally covered. The question arises, what if the breasts were uncovered, can the image then pass through the community standard.[41] The judgement is loaded with certain value judgements. Here, the following passage of the judgement is very important:

> *We have to examine whether the photograph of Boris Becker with his fiancée Barbara Feltus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense that it violates Section 292 IPC.... Breasts of Barbara Feltus have been fully covered with the arm of Boris Becker, a photograph of course, semi-nude, but taken by none other than the father of Barbara*.

Here, heterosexual love becomes the measuring rod of the community to give protection to the image. Again, the image of the erotic is kept on the side burner. Such reading which is in consonance with the heterosexual marital union and familial ideology completely de-sexualizes the image and takes away the actual intent of shocking.[42] What if the image consisted of two men in a nude position? The community standard test would have termed it as obscene. The whole method of the court in approaching this case was based upon subtracting the sexuality associated with the image. The image reflected a certain kind of nonchalance, inhibitions which the court did not even try to look into. All it did was to judge the image by qualifying it with the set norms which are prevalent in society. The whole

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[40] Emphasis supplied.

[41] *Supra* note 36.

[42] *Supra*, note 37; Latika Vashist, *Law and The Obscene Image: Reading Aveek Sarkar* v. *State of West Bengal* 5 JILS 248 (2014) at 252.

argument gave a certain degree of qualification whereby the feminine can be represented only either as lover, caring sacrificing givers or perpetual victims.[43]

V

Devidas Ramchandra Tuljapurkar: Mystifying the Already Vague Discourse

The case of *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*[44] is a very important case which has been decided on May 14th 2015. As per this case if a historically respected person is used as a medium of expression or allusion to express words which are obscene or to allude that the historically respected person is engaged in such obscene acts then such material under impugnity can be considered obscene, notwithstanding the fact that the material under impugnity has passed the 'community standard test'. This case has set the cat among the pigeons and has initiated a debate regarding the sweeping ambit, which section 292 will be equipped with, as the consequence of this judgement. It has already been contended that that S. 292 of the IPC has a certain degree of vagueness and overbreadth-ness which has in the past got many artists into its invisible traps. The expression such as 'historical person' is only going to make the jurisprudence more nebulous. It will be appropriate to discuss the facts of the case in a nutshell: The material under impugnity was a poem titled *Gandhi Mala Bhetala* (I met Gandhi). This poem was published in the magazine called 'Bulletin". The magazine was published in July-August, 1994 and it was meant for private circulation amongst the members of the All-India Bank Association Union. It was under this backdrop a charge of obscenity was alleged against the author of the poem. A complaint was lodged with the Police regarding publishing of the poem. Subsequently a First Information Report (FIR) was registered against the author and the publisher for the offences punishable under Sections 153- A and 153- B read with Section 34 and eventually a charge sheet was filed by the police after due investigation with an additional charge under Section 292 against the publisher (the appellant in the case), the printer (Respondent 3) and the author. While the matter was pending in the court of the Chief Judicial Magistrate, all the accused persons filed an application that they be discharged. The Magistrate passed an order that no offence under Sections 153- A and 153-B was made out and accordingly discharged them of the said offence, however, the court refused to discharge the accused people in respect of charges framed under Section 292 of the IPC. Since the Additional Sessions Judge refused to interfere with the Magistrate's order, the accused persons filed a petition under Section 482 CrPC

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[43] *Supra* note 38 at 253.

[44] *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*, (2015) 6 SCC 1.

requesting that the order framing charges under Section 292 be quashed. The High Court opined that there was a *prima facie* case for proceeding against the accused under Section 292 IPC.

The main questions raised were:[45]

- Whether there could be a reference to a historically respected personality?
- Could that reference be by way of allusion or symbol?
- Could that allusion be resorted to in write- up or a poem?
- Whether the conception and concept of poetic license permit adopting an allusion? and
- Whether any of the above could involve ascribing words or acts to a historically reputed personality which could appear obscene to a reader?

Gopal Subramaniam, who appeared for the appellant, contended that the freedom of expression encourages fearlessness and cannot be pigeonholed by a parochial test. The fact that a personality of historical importance is involved and that he is respected cannot be a valid ground for limiting the freedom. Here it is appropriate to quote the relevant paragraph, which reverberates with the basic notion of freedom of expression:[46]

> *...quintessential liberty of perception and expression when placed in juxtaposition with "poetic license", is in opposite since the expression "permissible" sounds a discordant note with "liberty of perception and expression", a sacrosanct fundamental right, integral to human dignity, thought, feeling, behaviour, expression and all jural concepts of human freedom guaranteed not only under the constitution but even recognised under the international covenants, for they can never be placed in the company or association of expressions such as "license" or "permissibility*.

Fali. S. Nariman who was the amicus curiae in this case contended that as per Article 19(2), freedom of expression is a qualified right and cannot be seen in absolute terms. Section 292 is saved by Article 19(2). He further contended that it is to be seen whether the poem *prima facie* exhibits obscenity, especially, in the context of Mahatma Gandhi who is the Father of the Nation and his identity as a historically respected person is established in the mind of an average reader.[47]

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[45] *Supra* note 15.

[46] *Id*.

[47] *Supra* note 15, *Khushboo* v. *Kanniamal* ,2010 (4) SCALE 467 (India) at para 4.

VI

Judicial Interpretation or Judicial Invention?

This judgement has a potential notoriety of its own. The judgement has come up with some newly coined jargon such as historically respected person without shedding optimum light by defining as to what the term really means. Hence further adding vagueness to the already vague test in determining obscenity. The court firstly discussed the *Hicklin test* which focussed on the fact, if the material under impugnity which is charged with obscenity has the tendency to deprave and corrupt those minds which are open to such immoral influences. The court criticized the test on the account that the expressions such as 'tendency to deprave and corrupt those mind' as vague, also what does the term immoral influences, precisely means? The following paragraph aptly summarises the chink with which the test is loaded with:[48]

> "Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: "Well, corrupt, or deprave whom? And again, the test: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What exactly does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen-year-old school girl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public".

It is for the above-mentioned reasons *Hicklin* test was abandoned in the United Kingdom itself. Though the Supreme Court applied the *Hicklin* test in the case of *Ranjit Udeshi,* over a period of time, the test was modified and finally abjured in the case of *Aveek Sarkar* and was replaced by the *Roth* test. The *Roth* test states that: 'The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest'.

We can see that the *Roth* test is a better test than the *Hicklin* test to ascertain the question of obscenity as in the Roth test, the whole matter is to be taken into cognizance instead of looking at specific portions as what was done while applying the *Hicklin* test. Therefore, the *Roth* test is better. The *Roth* test does not make separate touchstones for different people. The most important thing which is

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[48] *Supra* note 15, *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India) at para 16.

required in this test is whether the work taken as a whole appeals to the prurient interest or not. In the old *Hicklin* test, it was possible to make such a distinction by arguing that disrespecting such people by showing them in a bad light may corrupt all those people who follow such people. Under the *Roth* test, such a distinction cannot be made, all that has to be seen is whether the work under impugnity, taken as a whole, appeals to the prurient interest or not. However, if we read the judgement, then we will see that the test has not been applied in its entirety. In the relevant paragraph of the judgement, the court observes the following:[49] 'From the development of law in this country, it is clear as day that the prevalent test in praesenti is the contemporary community standards test'. We can see that an essential part of the community standard test has been omitted. The complete statement of the test is: '...applying contemporary community standards, [whether] the dominant theme of the material, taken as a whole, appeals to prurient interest'.

It seems that the court was involved in cherry-picking the portion of the test, thus stultifying the test of its whole essence.[50] The court cannot be at liberty to apply only a portion of the test. Any such test is established through years of gradual increment of precedents, which is laid down by the judiciary. Even if we look at the *Aveek Sarkar* case, we will find that the court gave ample reasoning as to why it is essential to replace the *Hicklin* test by a much better *Roth* test. The approach of the court was a bit flaky in this regard. Also, we need to understand that the second part of the test has a vital importance of its own. The second part says that the material will be obscene only if it appeals to the prurient interest, thus bringing into its ambit, hardcore pornographic material.[51] But the way the second part has been conveniently omitted, one can say that this is a *Hicklified way of applying the Roth test*.[52]

Another aspect which has been overlooked by the court while applying the *Roth* test is the social value of the material under impugnity. This aspect of the *Roth* test was upheld later in the case of *Memoirs* v. *Massachusetts*.[53] The judgement at several places talked about the missing social value aspect from the material under impugnity but failed to connect it to the literature.[54] Now, the main point of contention in the judgement is regarding the demarcation made by the court in the

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[49] *Supra* note 15; *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India) at para 91.

[50] Gautam Bhatia, *Free Speech Obscenity and respected historical personalities a new troubling doctrine*, *available at*: http://www.livelaw.in/free-speech-obscenity-and-respected-historical-personalities-a-new-troubling-doctrine/ (last visited Apr. 15, 2022).

[51] Nirmit Agarwal, *Devidas Ramchandra Tuljapurlar* v. *State of Maharashtra: Who is being protected by the Supreme Court?* 2 IJLLJS 188 (2016).

[52] Emphasis supplied.

[53] *Memoirs* v. *Massachusetts*, (1966), 383 U.S. 413.

[54] Gautam Bhatia, *Free Speech Obscenity and Respected historical personalities a new troubling doctrine*, *available at*: http://www.livelaw.in/ (Visited on February 15th, 2023).

form of historically respected figures. The court discussed an ample part of the judgement on the teachings of Mahatma Gandhi and other aspects of Gandhian philosophy. However, this discussion has not made clear how it could be linked to the aspect of obscenity. After this long discussion, the court observes the following:[55]

> *If the image of Mahatma Gandhi or the voice of Mahatma Gandhi is used to communicate the feelings of Gandhiji or his anguish or his agony about any situation, there can be no difficulty. The issue in the instant case, whether in the name of artistic freedom or critical thinking or generating the idea of creativity, a poet or a writer can put into the said voice or image such language, which may be obscene*.

This is highly contentious, the question is not whether, in the name of artistic freedom or critical thinking..., a poet or a writer can use such a language which is obscene as it is already not protected by Article 19(2), and this is clear. The question is, what constitutes obscenity? The court has already admitted that the term historically respected personalities is not used in Article 19(2). Still, it believes that this new development will not add any dimension to Section 292 of the IPC.[56] It is true that Gandhi is respected by millions, but the term historically respected person attributes a kind of universality, we cannot say that Mahatma Gandhi is respected by each and every one. The court referred to the case of *Bobby article International* v. *Om Pal Singh Hoon*[57]. In this case, Phoolan Devi was shown nude in a scene, the problem with such kind of judgement is that if a similar kind of movie is made today, where such a scene is depicted, then the question may arise of showing Phoolan Devi in the nude is an obscene act as Phoolan Devi is also respected by certain groups or people. Here lies the problem, when the court invents such terms, it fixates certain notions with which respect for a person can be determined. Such an outlook is basically the majoritarian way of understanding and determining what the characteristics of a historically important person should be, and it brings in a sense of universalism, which reduces the scope of dissent. The concluding paragraph exacerbates the confusion more:[58]

> *When the name of Mahatma Gandhi is alluded to or used as a symbol, speaking or using obscene words, the concept of 'degree' comes in. To elaborate, the 'contemporary community standards test' becomes applicable with more vigour, to a greater degree and in an accentuated manner. What can otherwise pass the contemporary community standards test for use of the same language, it would not be so if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene*.

This interpretation opens up a can of worms. The question arises of how the community standard test can be applied as a matter of degree. What does the

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[55] *Supra* note 15, *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India) at para 129.

[56] *Supra* note 15. *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India) at para 108.

[57] *Bobby article International* v. *Om Pal Singh Hoon*, (1996) 4 SCC 1.

[58] *Supra* note 15. *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India) at para 142.

expression 'applicable with more vigour' really mean? Are there cases where the test should be applied with less vigour or a mediocre level of vigour? By inventing a degree in the application of the test, the court has created a higher 'degree' standard of burden of proof for the accused, which the court is not permitted to do. The court has not shed any light or guidance on these legitimate questions, which are posing like a *Trojan Horse*.

The confusing stand taken by the court is getting validation from a judgement cited by the learned *amicus curie*. In the case of *Vereinigung Bildener Kinstler* v. *Austria,*[59] in the dissenting opinion, it was observed that the dignity of the person should be respected no matter whether the person is a respected figure or an ordinary person. However, in the present case, the court veered in a different direction by creating a hierarchy between historically respected persons and any ordinary person. The court, by taking this route, has opened a floodgate for claims under Section 292. The chilling effect of Section 295A and 153A will not be compounded because of a conceptually incoherent and incorrect judgement that has made vague observations about strict community standards for 'historically respected personalities' but has made no attempt to clarify the meanings of those vague and open-ended terms.[60] This judgement again brings into discussion the chilling effect that can be created as a possible outcome of the judgement. Even though there has been no reference to a judicially respected person in the requisite legislation, the court has created one. Any person in society will think twice before commenting on any supposedly historically respected personality for a possible fear of a legal backlash.

VII

Poetic Liberty Under Siege

The judgement has also delved into the concept of poetic license. It was contended on behalf of the appellant that the word license does not stand steadily when placed in the realm of fundamental rights as enshrined in our Constitution and as envisioned by our framers. Liberty of perception is integral to human dignity, and understanding liberty with reference to words like 'license' and 'permissibility' is not the correct way. The court here clarified that the word license, as used in the expression 'poetic license' can never mean a license as used or understood in the language of the law. The court defined the word poetic license in a very broad way,

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[59] *Vereinigung Bildener Kinstler* v. *Austria*, (2007) ECHR 25.

[60] Nirmit Agarwal, *Devidas Ramchandra Tulijapurkar* v. *State of Maharashtra: Who is being protected by the Supreme Court?* 2 IJLLJS 188 (2016).

holding that there is no authority in law which can give license to a poet. The following passage of the court will be relevant to refer:[61]

> *As far as the words 'poetic license' are concerned, it can never remotely mean a license as used or understood in the language of law. There is no authority who gives license to a poet. These are words from the realm of literature. The poet assumes his own freedom which is allowed to him by the fundamental concept of poetry. He is free to depart from reality; fly away from grammar; walk in glory by not following systematic metres; coin words at his own will; use archaic words to convey thoughts or attribute meanings; hide ideas beyond myths which can be absolutely unrealistic; totally pave a path where neither rhyme nor rhythm prevail; can put serious ideas in satires, euphemism, notorious repartees; take aid of analogies, metaphors, similes in his own style…*

The description, though, is very satisfying and brilliant, is not applied and is made anaemic by using expressions such as 'historically respected personalities as has been pointed out by the learned court satire is a device that is used by the poet while exercising his poetic license. There have been memorable poems in which satire has been used to expose malpractices against rulers. For example, 'My Last Duchess' by Robert Browning is a dramatic monologue that has historical allusions. The characters mentioned in this poem are based on real-life historical figures. The narrator in the poem is Duke Alfonso II, who ruled a place in northern Italy called Ferrara between 1559 and 1597.[62] The Duchess of whom he speaks was his first wife, Lucrezia de Medici. She died at the age of seventeen under suspicious circumstances. The poem is a scathing criticism of the hypocrisy that the Royal family was very proud of. Browning's attribution of a historical figure in his dramatic monologue could never have been possible had he been under fear of a possible legal backlash. The most vital aspect of poetry is the freedom of thought, a spontaneous overflow of powerful emotions. It is this liberty that the great poet calls as *wings of poesy*, the wings which take the imagination of a writer away from the claustrophobic shackles which impede his string of thoughts. The irony of the judgement is that the court has cited such judgements, which have been very progressive in nature, whereby they put the right to free speech at the highest possible pedestal.

In this case, the *Shreya Singhal* v. *Union of India*[63] was also discussed. The court failed to take inspiration from this case and argued that this case pertains to repealing S.66A of the I.T. Act and does not fall in the realm of obscenity per se. The court failed to take note that the crux of *Shreya Singhal* was freedom of speech and, therefore, a very apt case that should have been taken note of it. The interpretation of the court strikes at the roots of the discourse of free speech to question the most entrenched norms of morality is the most essential aspect of the free speech

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[61] *Supra* note 15; *Khushboo* v. *Kanniamal*, 2010 (4) SCALE 467 (India) at para 6.

[62] Robert Browning, *My Last Duchess* in WINGED WORD 144 (David Green, *ed*., 2009).

[63] *Shreya Singhal* v. *Union of India*, (2013) 12 SCC 73 (India).

discourse. This judgement has further mystified the already vague and all-pervading reach of the S.292. It is high time that this case should be reviewed and correct the judicial chicanery which can lead to great public mischief.

VIII

Conclusion

When free expression is curtailed in the name of cultural morality, then a bulwark is placed on the exchange of competing thoughts in order to appease the majority, it is not correct that an entire set of ideas be denied to the public. By denying such ideas, the government creates a scenario where there is a distorted public discourse, and people form their choices on the basis of implicit coercion. For an organic society that aspires to thrive, it should always strive to broaden the circumference of the thought process; a claustrophobic environment only leads to death not just of the article but also the death of a healthy and organic way of thinking. While one cannot totally do away with reasonable regulations as it is equally necessary for the protection of real articles that the penny dreadful needs to be uprooted, unnecessary regulations only lead to fear in the mind and, thereby, create a chilling effect on the freedom of expression. A yardstick to ascertain the obscene is not feasible. However, it is necessary that S.292 of the IPC be amended and should be brought in conformity with the morality of the Constitution, thereby narrowing down the scope of the personal and community standard of morality.