FROM HICKLIN TO HASHTAG: THE CHANGING LEGAL FRAMEWORK OF OBSCENITY IN INDIA

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ABSTRACT

In India, the legal definition of what is obscene has transformed from the colonial 'Hicklin test' of 1868 to what we see in today's digital and online age. In the provisions 294-296 of Bharatiya Nyaya Sanhita 2023, which have replaced Sections 292-294 of the Indian Penal Code, India has attempted to modernise its statutory framework on obscenity. Yet still at the core of what is defined as "obscene" material, we find colonial and moralist concepts.

This research paper looks at whether the BNS is a sign of a doctrinal realignment or just a semantic shift, especially in the issue of digital content, social media discourse, and artistic expression. The paper looks at how legal doctrine, social morality, and technological change play into a shifting definition of what is considered to be "obscene" in a constitutional democracy. It also examines not just formal statutory language but also how courts include majoritarian anxieties, gendered assumptions, and heteronormative values in the application of obscenity standards. The paper looks at judicial trends from the case of Ranjit Udeshi v State of Maharashtra to that of Aveek Sarkar v State of West Bengal, and also the outgrowth of what came post-BNS, to see how Indian courts balance free speech as guaranteed in Article 19(1)(a) against that of public decency and constitutional morality. Also, to analyse the U.S. Miller Test and the E.U. digital regulations to put forth a rights-based and context-sensitive framework for regulation of obscenity, which at the same time is in tune with India's democratic and constitutional values in the digital age.

Keywords: Hicklin test, constitutional morality, obscenity law, BNS 2023, digital content regulation.

1. INTRODUCTION

The legal definition of what is to be considered "obscenity" has always been in flux, a reflection of our changing social morals, technology, and constitutional principles. In India, this evolution has been very complex because of its colonial past. The modern Indian obscenity framework is rooted in an 1868 English case, which interpreted the Obscene Publications Act of 1857.[1]

In 1868, a pamphlet titled "*The Confessional Unmasked*" was published in London.[2] The pamphlet exposed the practices within the catholic confessional process, which according to the author, were immoral in nature. When it came to the knowledge of the authorities in London, they ordered its seizure and destruction under the Obscene Publications Act, 1857.[3] This gave rise to a pivotal legal question: how to interpret the word "obscene"? The Chief Justice Sir Alexander Cockburn delivered the judgment that gave the famous Hicklin test for obscenity.[4] This test defined obscene material as that which tends "to deprave and corrupt those whose minds are open to such immoral influences", focusing particularly on vulnerable members of society, like children.[5]

For decades, this test became a leading standard for defining obscenity in the UK and influenced legal frameworks in several common law jurisdictions, including India, Canada, and the United States. The test permits censorship of individual passages without regard for the work as a whole or its literary and artistic merit.

As India was a British colony, the drafting of the Indian Penal Code in 1860 inherited the Hicklin test through section 292. The Supreme Court, in the landmark case of *Ranjit D. Udeshi* v. *State of Maharashtra*, applied this test, which supported a ban on Lady Chatterley's Lover by D.H. Lawrence. At the time of the ban, it was of literary importance.[6] Since then, the test has come under growing criticism for its restrictive nature which it plays on freedom of expression as protected under Article 19(1)(a) of the Constitution.[7]

However, as Indian society modernised the Hicklin standard proved to be more deficient.

[1] Obscene Publications Act, 1857 (U.K.).
[2] The Confessional Unmasked (London, 1868).
[3] *supra* note 1.
[4] Regina v. Hicklin, (1868) L.R. 3 Q.B. 360.
[5] *Id* at 371.
[6] Ranjit D. Udeshi v. State of Maharashtra, A.I.R. 1965 S.C. 881.
[7] INDIA CONST. art. 19(1)(a).

Literature, cinema, art movements, feminist writing and issues of sexuality demanded a new and progressive judicial approach. The judiciary has, over time, adopted a more context-based approach to the issue of obscenity, as seen in cases like *Samaresh Bose* v. *Amal Mitra*.[8] The apex court looked at the work as a whole and its social value. In a significant shift evident in Aveek Sarkar v. State of West Bengal, the Supreme Court abandoned the Hicklin test in favour of the "community standards test," which assesses obscenity based on contemporary social norms.[9]

Recently, the Bharatiya Nyaya Sanhita, 2023, inserted new provisions that aim at modernising India's obscenity laws.[10] But these changes are a work in progress, which still includes colonial moral ideas in the legal structure. This paper looks at whether these are in reality, radical changes which bring about a transformation in doctrine or are they only in name, as semantic changes, with special study given to the regulation of digital content, social media discourse and artistic expression in India's constitutional democracy.

2. THE COLONIAL ROOT: The Hicklin test and its import into India

The roots of the Indian obscenity law's present framework are in the social and legal climate of Victorian England. The 19th century witnessed issues of sexuality, morality and lower-class and child vulnerability. The Obscene Publications Act,1857 came forth as a free speech issue but as a device for moral policing, which also had strong input from Christian missionary groups and social purity movements. The question of what constitutes obscenity in the Indian legal system has largely emerged from the colonial legacy, which stems from the judgment put forth by Chief Justice Sir Alexander Cockburn in the English case of R v. Hicklin.[11] Out of that decision came a very strict and restrictive framework, which, as a consequence, dominated common law jurisdictions for almost a century.[12]

2.1 Defining the Hicklin test

The test for obscenity, as determined by Cockburn C.J., did not look at the whole of the work but at the effect of that work on the most vulnerable audience which would be exposed

[8] Samaresh Bose v. Amal Mitra, (1985) 4 S.C.C. 289.
[9] Aveek Sarkar v. State of West Bengal, (2014) 4 S.C.C. 257.
[10] Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).
[11] Hicklin, *supra* note 4.
[12] *Id.*

to any given passage out of it.[13] The base of the standard was that the material in question:

"Tendency to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[14]

This test included two critical limitations, which promoted a culture of censorship:

- Isolation Principle: It allowed for the study of individual passages, which did not take into account the total picture of the literary, artistic, or social value of the work.
- Vulnerable Person Standard: It determined the material's impact on the most vulnerable segment of the audience (as in children or the morally weak) instead of the average adult reader or the community at large.

2.2 Statutory import: section 292 of the Indian Penal Code

As a result of the colonial past which imposed its legal systems onto the Indian legal framework, the Hicklin test became a part of Indian law's fabric through the Indian Penal Code of 1860. In that Code Section 292 (Sale, etc. of obscene books, etc. put into law the prohibition of the sale, distribution or public display of what the law defined as "obscene". Also, there was no exact constitutional-aligned definition within the IPC, which made it easy for the Indian courts to fall back on the Hicklin standard when the issue of literary obscenity came before the Supreme Court.[15]

2.3 Ranjit Udeshi: the landmark precedent

In the landmark 1965 case of *Ranjit D. Udeshi* v. *State of Maharashtra*, which saw the formal adoption of the Hicklin test as the pre-eminent element of Indian obscenity law post-independence.[16] The legal challenge brought forward to the Supreme Court grew out of the conviction of Mr. Udeshi for the sale of an unexpurgated version of D.H. Lawrence's novel Lady Chatterley's Lover, which he put forward as a bookseller under Section 292 of the Indian Penal Code. This case presented a turning point, which forced the Court to put forth a decision regarding whether the statutory laws on what constitutes obscenity were, in fact,

[13] *Id.*
[14] *Id* at 371.
[15] Indian Penal Code, 1860, § 292, No. 45, Acts of Parliament, 1860 (India).
[16] Udeshi, *supra* note 6.

a violation of the fundamental right to free speech and expression put forth in Article 19(1)(a) of the Constitution. The Supreme Court led by Justice Hidayatullah, put the issue to rest in support of the constitutionality of Section 292. The Court held that free speech is a right which is subject to what it deems are reasonable restrictions put in place in the name of "decency or morality" as per Article 19(2).[17] They determined that what was put forth as obscene is by its very nature anti-social and not in the public interest, and thus is out of the protection of Article 19(1)(a).[18]

The court held that the decisive inquiry was whether the book had "a tendency to deprave and corrupt" those who are susceptible to such influences. This judgment was critical as it put the colonial moralist framework into Indian constitutional law, which in turn gave the state great power to suppress literary works based on the putative vulnerability of the audience and which put forward a very vague standard of "public decency" at the expense of wide-ranging protection of artistic and intellectual expression. The judgment established the Hicklin test as the dominant judicial model for decades.[19]

3. THE DOCTRINAL SHIFT: RETREAT FROM COLONIAL MORALISM

Beginning in the 1980s, Indian courts recognised that applying Hicklin strictly would lead to unjust results in a society undergoing cultural transformation. Following the formal establishment of the Hicklin test in Ranjit D. Udeshi, the Indian judiciary initiated an extensive and progressive attempt to modify its restricted application. The first hints of judicial discomfort appeared when courts encountered literature and art that clearly had social or intellectual significance despite their sexually explicit elements. The key judicial manoeuvre during this phase was the introduction of the requirement to consider the "work as a whole" and its social purpose.

This approach was evident in cases such as *Samaresh Bose* v. *Amal Mitra*,[20] in which the Supreme Court scrutinized the overall theme and intent of the literary work rather than just isolated provocative passages. The Court stated that the fundamental test of obscenity should not be predicated on the ability to corrupt a single, susceptible class of viewers, but rather on whether the content offended the standards of decency and morality existing in society as a

[17] INDIA CONST. art. 19(2).
[18] Udeshi, *supra* note 6.
[19] *Id.*
[20] Samaresh Bose, *supra* note 8.

whole. While the Court did not expressly overturn Ranjit Udeshi, this decision was significant: it established a contextual criterion and confirmed that works with genuine artistic, literary, or social value could not be judged obscene simply because they dealt with sex or nudity. This interpretation established a 'Hicklin-plus' standard.[21]

Samaresh Bose marked a turning point: it insisted that a work must be evaluated as a whole and interpreted from the viewpoint of a reasonable, average person not from the standpoint of the most vulnerable. This created a hybrid model, Hicklin remained formally valid, but judicial interpretation softened its edges.[22]

3.1 The coming of the community standards test

The break from the colonial past came almost five decades later in the 2014 Supreme Court judgment in *Aveek Sarkar* v. *State of West Bengal*.[23] The Court saw an opportunity to put to rest the Hicklin test. The bench rejected the Hicklin test and held that it was a product of Victorian morality and was not appropriate for modern Indian society. Also, the Court put forward the Contemporary Community Standards Test.

The Aveek Sarkar ruling did support the ideas in the U.S. Miller Test, which put forth that the work as a whole must be judged and also that which has real literary, artistic, political or scientific value is what should be protected.[24] In this judgment, there was a great victory of constitutional morality over traditional public morality, fulfilling the long-term call for a rights-based approach to censorship.

However, this doctrinal growth was a result of judicial interpretation; the statutory text of Section 292 of the IPC remained unchanged.[25] This statutory void became the basis for the legislative update. The Bharatiya Nyaya Sanhita (BNS) 2023 has put forth set the stage for the next part of this paper.[26]

4. INTERNATIONAL FRAMEWORK

The regulation of obscenity has never been limited to national borders; rather, it has developed

[21] *Id*.
[22] *Id.*
[23] Aveek Sarkar, *supra* note 9.
[24] *Id.*
[25] Indian Penal Code, 1860, § 292, No. 45, Acts of Parliament, 1860 (India).
[26] Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

in conjunction with international discussions about digital rights, gender justice, freedom of speech, and morality. Examining effective international models is necessary due to the drawbacks of the Bharatiya Nyaya Sanhita (BNS) 2023.

At the international level, the International Covenant on Civil and Political Rights (ICCPR) is the pre-eminent instrument that regulates freedom of expression.[27] Article 19 reports that which to obtain, to receive, and to circulate information, while Article 19(3) puts forth that which is to be restricted in very specific terms that is of public order, public health, and morals.[28] Also, it is brought to notice through General Comment No. 34 of the UN Human Rights Committee (UNHRC) that "morals" must not be determined by a single tradition or dominant culture; instead, what is required is that the restriction is a necessary, proportional and the least intrusive means available.[29] This proportional approach which is put forth by the ICCPR is in contrast to former judicial rules like Hicklin which looked at the material's effect on the susceptible individual. Thus, the ICCPR puts out a model which encourages states to take a rights-based, contextual and less paternalistic approach to what constitutes obscenity.

- **European Union digital regulations**

  Unlike the U.S., which goes by the constitutional definition of obscenity, the European Union presents a different model, which does not get into traditional moral issues related to obscenity at all instead puts forward regulations for harm in the digital space. Rather than put forth definitions of what is obscene, EU law instead puts forward platforms' accountabilities, which include user safety, child protection, and what we may term as large-scale risks under extensive frameworks like the Digital Services Act, 2022. The approach puts forward objective risk factors which may include the spread of material related to child sexual abuse, hate speech, and content which is amplified by algorithms.[30] Also included in this is the requirement for large platforms to report on their content moderation practices, to avoid biased application of rules and to put in place appeal processes for users. This harm-based model also avoids the subjectivity of moral standards,

[27] International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
[28] Id. art. 19(3).
[29] U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression (2011), https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-34-article-19-freedoms-opinion-and.
[30] Digital Services Act, Regulation (EU) 2022/2065, arts. 26–28 (2022).

which may be open to interpretation and does very well in a diverse cultural setting which is what we see in today's cross-border digital communication.

- **The Miller test of U.S.**

In a constitutional democracy that values free speech, the United States Supreme Court's ruling in *Miller* v. *California* offers the highest possible standard for defining obscenity.[31] The Miller Test created a three-pronged test that specifically protects political and artistic expression, formally abandoning the constrictive Hicklin standard. The content must concurrently fulfil all three requirements to be deemed obscene:

i. **Prurient Interest:** The work must appeal to the prurient interest when viewed as a whole by the average individual using modern community norms.

ii. **Patently Offensive:** Sexual behaviour as defined by relevant state legislation must be depicted or described in the work in a way that is obviously offensive.

iii. **Lack of Value (LAPS Value):** The entire work must be devoid of significant literary, artistic, political, or scientific value.[32]

The most important doctrinal component absent from the BNS is the LAPS Value prong. It serves as a constitutional firewall, guaranteeing that works of true value are shielded from censorship regardless of whether they are contentious or sexually explicit. Despite the advancements in Aveek Sarkar, Indian jurisprudence still requires this constitutional firewall to be mandated by law, creating a serious weakness in the BNS structure.

India stands to gain great benefit from a blend of the abovementioned three models. The ICCPR's proportionality and necessity principles would serve as a constitutional base for which any restriction of obscenity is to be put to the test of careful justification. The U.S. LAPS protects value in art and politics from at random determined censorship would see Indian case law align with that of global free speech norms. The EU's regulations have put in place frameworks for the mitigation of harm in the digital space, which in turn give workable solutions for the issues of user-generated content without falling back on subjective moral

[31] Miller v. California, 413 U.S. 15 (1973).
[32] *Id* at 24.

standards.

As a whole, these international approaches put forth that for effective and constitutionally sound regulation of obscenity in the 21st century which rights-based analysis, clear legal parameters, and responsive technology are what is required. The BNS 2023, although a step forward, does not meet these global standards.[33] Thus, there is a call for more in-depth legislative reform into what other countries are doing.

5. THE STATUTORY SHIFT FROM IPC TO BNS 2023

The shift from the Indian Penal Code, 1860 (IPC) to the Bharatiya Nyaya Sanhita, 2023 (BNS) is more than a simple statutory reorganisation; it is a deliberate effort by the legislature to modernise India's criminal legal structure at the same time that it addresses very old issues related to what is considered obscene. The BNS restructures the law that governs what we consider to be obscene material, and it also puts forward some basic principles that trace back to the Hicklin test of the 19th century.

The correspondence between IPC and BNS obscenity provisions reveals both continuities and strategic divergences:

Legal Concept	IPC Section	BNS Section	Key Modifications
Sale of obscene books/objects	292	294	Digital content explicitly included
Obscene materials to minors	293	295	Terminology shifted from "young person" to "child"
Obscene acts and songs	294	296	Enhanced fine structure (Rs. 1,000 to Rs. 5,000)
Obscene publications (digital)	292/293	294 (with IT Act, 2000)	Explicit recognition of electronic transmission

[33] Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

The BNS carries the substantially same definition as IPC.[34] But to that is added present-day interpretation and digital age application which represents a shift in how the law is interpreted instead of a change in the text.

While Section 292 of the IPC is a product of a time before wide-scale internet commerce and did not see text-based amendments which would put it to the modern age's issues, through the use of interpretive case law it did manage application to electronic forms.[35] The BNS, on the other hand, does forward-looking work, including digital material, which the IPC did not. Section 294 of the BNS read with Section 81 (which deals with electronic transmission under the Information Technology Act, 2000),[36] states that which is to be included in the definition of obscene material now includes:

- Digital publications and e-books
- Online streaming and video platforms
- Social media content and user-generated material
- Electronic mail and messaging systems
- Web-based publications and digital archives

In BNS, a penalty enhancement reflects legislative judgment of the severity of obscenity crimes and the increased damage in digital settings. The fine has been raised to a range of Rs.1000 to Rs.5000.[37] Also, the term "young person" has been replaced with "child", which is in alignment with current child protection language and the UN Convention on the Rights of the Child.

These changes put forth a case for legislative re-evaluation of proportionate punishment which in turn especially regarding vulnerable groups. In Section 295, the shift from "young person" to "child" is of great importance. It is noted that language in criminal law functions as a performative element that shapes judicial interpretation and public perception of the law's

[34] Indian Penal Code, 1860, § 292, No. 45, Acts of Parliament, 1860 (India).
[35] *Id.*
[36] Information Technology Act, 2000, § 81, No. 21, Acts of Parliament, 2000 (India).
[37] Bharatiya Nyaya Sanhita, 2023, § 294, No. 45, Acts of Parliament, 2023 (India).

protective scope.[38]

The BNS introduces explicit statutory recognition of vulnerability-based differentiation. Section 295 (formerly Section 293), protecting children from obscene material, operates as a strict liability offence in certain contexts, requiring no mens rea regarding the child's age if the accused knew or had reason to believe the recipient was a child.[39] This represents an important doctrinal shift: vulnerability becomes a constitutive element of the offence structure, not merely an aggravating factor. The statutory architecture thus privileges protective jurisprudence over libertarian conceptions of obscenity regulation.

6. TOWARDS A RIGHTS-BASED APPROACH: ENSURING PROPORTIONALITY IN THE DIGITAL AGE

While in the Supreme Court has been put forward the objective Contemporary Community Standards Test which also includes in itself the for value, the new statutory framework (BNS Section 294) is very much in the past time of vague moralistic language of "prurient interest" and "tendency to deprave and corrupt".[40] To really put Indian law in agreement with the spirit of Article 19(1)(a) and the needs of the digital age a prescriptive rights-based framework is a must.

This new framework is to be based on three key pillars which are from the study of the US and EU models:

6.1 Codifying the LAPS value

The major issue with BNS Section 294 is that it does not include the LAPS Value test. As the Supreme Court's Miller Test shows, the value element is a requirement of the Constitution. If a work has important LAPS merit, it cannot be censored which is true of no matter how sexual or repugnant it may seem to the average viewer.[41]

6.2 Contextualising Standards for Digital Content

The BNS did recognise the "electronic or digital form" issue but it did not put in place the

[38] *Id.* §295.
[39] *Id.*
[40] Bharatiya Nyaya Sanhita, 2023, § 294, No. 45, Acts of Parliament, 2023 (India).
[41] Miller, *supra* note 31.

framework of standards required for online content. The digital environment which is defined by user-generated content, transitory communication, and algorithmic distribution, requires a different approach that goes beyond what we think of as traditional censorship. The EU's approach which centres on platform liability and particular harm (like child sexual abuse material or CSAM), provides a workable alternative.[42]

7. CONCLUSION

The incept of obscenity law in India from the colonial base, which presented the Hicklin test to the more progressive community standards approach. Although judicial interpretation has grown to a more context-based, value-sensitive and rights-oriented take on what is considered obscenity that statutory change has not. The passage of the Bharatiya Nyaya Sanhita in 2023[43] is a very important legislative step, yet it falls short of a true doctrinal turn. It does what it must to update the law, but at the same time it does not go far enough to break away from the paternalistic past. It retains wide and moralistic language and also does not put in place what we see in the LAPS value test[44] or proportionality principles. It does recognise digital content, which is a positive step, that said the structure which it puts forth for regulation is still very much under developed for the issues present in today's algorithmic, user-generated online world.

Present on which we have discussed ICCPR proportionality tests,[45] the U.S. Miller standard[46], and the EU's harm-based digital regulation[47] that which today's laws of obscenity must have a fine equilibrium between protection of vulnerable groups and at the same time, upholding the constitution's promise of free speech. In the case of India's present structure which is very wide in terms of gray areas, that in turn put forward a risk of selective enforcement, moral policing and a non-uniform approach to online content. The judiciary's shift in Aveek Sarkar[48] is a move toward constitutional morality but without legislative codification, judicial innovation alone does not guarantee uniformity or legal

[42] Digital Services Act, Regulation (EU) 2022/2065, arts. 26–28 (2022).
[43] Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).
[44] Miller, *supra* note 31.
[45] International Covenant on Civil and Political Rights, art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
[46] Miller, *supra* note 31.
[47] Digital Services Act, Regulation (EU) 2022/2065, arts. 26–28 (2022)
[48] Aveek Sarkar, *supra* note 9.

certainty.

It is to that which we either see the obscenity laws refined through a series of judicial actions, or we as a country adopt a contemporary legislative approach which is founded in constitutional principles and global best practices. Only with the second will we see the transition from "Hicklin to hashtag" which also includes the preservation of dignity and democratic freedom.

8. RECOMMENDATIONS

Here are the policy recommendations, which are balanced and rights-based.

8.1 Implement the LAPS Value Test.

India should put in place a parallel system to the Miller Test's LAPS element. Through this, which requires courts to determine the works' literary, artistic, political, or scientific value, the law puts an end to the suppression of art, satire, political commentary, gender-based expression and documentary reportage.

8.2 Add a proportionality clause.

Explicitly having courts apply the proportionality tests of the ICCPR would put an end to arbitrary censorship. For restrictions on speech to be:

- Lawful
- Necessary
- Proportionate
- the least intrusive measure

This includes the protection of legitimate expression which at the same time allows for action against harmful content.

8.3 Differentiate between Harm-Based Offences.

India should put out distinct categories for what is offensive, sexual in nature, non-

consensual, child sexual abuse material and deepfakes. We no longer live in a time when the above issues can be grouped into one moral issue. As for deepfake sexual content, that should be put forward under privacy and dignity laws as opposed to what we may have in past used for morality-based obscenity issues.

8.4 Accountability Framework Platform.

Upon the EU Digital Services Act, India should:

- Require reports of algorithmic amplification of issues.
- provide transparent moderation guidelines
- establish an independent appeals mechanism
- mandate rapid removal of child-abuse content

This has put in place a framework that targets the distribution system as a whole instead of the private consumer.

8.5 Gender Blind Enforcement.

Women content creators see a great deal of disproportionate policing under current obscenity laws. We can have a statutory gender bias check in which is similar to that which we see in anti-discrimination case law, which will help to see that the laws aren't used for harassment or moral policing.

8.6 Judicial training in technology-based communication issues.

Courts require specialised training on: Courts require dedicated training on:.

- meme culture
- virtual avatars
- AI-generated content
- viral distribution patterns

In this vacuum, courts may misinterpret online behaviour through the lens of outmoded morals.

8.7 Clarify Issues of Overlap Between BNS and IT Act.

A harmonised legislative note or statutory amendment is required, which details when BNS Section 294 applies and when Section 67 of the IT Act does, which in turn will prevent double prosecution and excessive criminalisation.