A COMPARATIVE ANALYSIS OF THE STANDARDS ADOPTED BY THE JUDICIARY IN MORALITY AS A RESTRICTION ON ARTISTIC FREEDOM IN ECHR AND IN INDIA- WHETHER PROACTIVE OR REACTIVE?

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ABSTRACT

Art as a facet of free speech is an argument that is potent and at the same time slippery. Article 10 of the ECHR and Article 19(1) (a) of the Constitution of India provides for the freedom of speech and expression. This right is however not an absolute right and it can restricted on the basis of several grounds of which 'morals' and 'morality and decency' are considered to be most challenging, in the light of standards adopted by the courts in defining the concept of morality. Issues of religion, faith, obscenity, public opinions, etc. are seen to play a large role is shaping the individual right of artistic freedom. These aspects keep changing with given time frame, region, culture etc. The objective of this paper is to analyse art as a form of expression which is a human right and a fundamental right, how the state through laws have restricted this freedom and what is the role played by the courts in instances of a dispute – is it proactive or reactive? For instance, the author considers the doctrine of 'margin of appreciation' adopted by the ECHR as a proactive measure to ensure the change in public attitude towards contemporary arts, whereas 'contemporary community standards doctrine adopted by the Indian Courts is more reactive, as it tends to reflect a different version of the Hicklin's test adopted by the Courts in previous cases.

Free speech across jurisdictions is not unfettered. For instance the ECHR stipulates restriction on free speech 'that are necessary in a democratic society ', in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Again under the Indian Constitution, free speech under Article 19(1) (a) can be restricted by a law made under any of the restrictions prescribed under Article 19 (2) in the interests of in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. In both these instances, 'morals' or 'morality' is a ground for restriction of free speech. Art is a form of speech and expression. In other words it means that there can be state interference in the form of law to restrict the right to freedom of speech, and whether this law is reasonable or not is the duty of court to deduce. The working premise of this article is thus- how have the courts looked into laws that restrict the individual's right to artistic freedom on the basis of morality as a societal value ? The focus of this article is thus to identify the varying standards of morality that has been applied by the courts under various jurisdiction(India and ECHR) across time, with respect to artistic freedom as a part of protected speech.

THE PROBLEM IN DEFINITION

Across literature one constant dilemma is in the definition of art. To protect art, artistic freedom, artistic creativity it is pertinent to find a reasonable definition that helps in identifying what can be protected as a right under the Constitution. In a debate on artistic freedom, and preventing governmental censor, it becomes important to understand what art is to be protected, and what cannot be part of protected speech. What is the defining characteristics of art? Is it creativity? If so, what about a painting of a God, or what about a painting of a photograph? Is that art, as there is no, or negligible amount of creativity involved. Also is it possible to give a legal definition for art, only for the purposes of identifying protected art and art that can be censored. These prepositions have been discussed by academicians, judges, scholars across jurisdictions, and it is impossible to find a satisfying definition to determine what art is. This could simply be because the beauty lies in the eyes of the beholder, or, like in *Cohen v*

California,[i] this age-old truth was phrased as follows, "*one man's vulgarity may be another's lyric".*

Another interesting definition which is very broad and liberal is as follows, "*Artistic expression should include books, movies, paintings, posters, sexy dancing, street theatre, graffiti, comics, television, music videos — anything produced by creative imagination, from Shakespeare to sitcoms, from opera to rock. Freedom of expression may mean that we have to tolerate some art that is offensive, insulting, outrageous, or just plain bad. But it is a small price to pay for the liberty and diversity that form the foundation of a free society."*[ii] This is the general trend adopted by courts in USA and South Africa. In US for instance, the umbrella of protected speech under the first amendment has grown over the years from *Roth v USA*[iii] to *Miller v Machechutes*[iv] indicating that even if the work is obscene it is still part of artistic freedom protected as free speech under the first amendment if has some artistic value.

Such a liberal definition however, has its pros and cons. A wide definition reduces the burden on the court to identify whether or not a material falls strictly within the concept of art, as it is already protected under free speech under the Constitution. A liberal understanding ensures tolerance to art. In a conflict between individual right of the artist and the social interest in protecting the 'morals' of the society, a liberal definition considers the dignity and autonomy of the artist in creating the art more valuable than the state interest in curbing it . This way, the court can judge whether or not the material attracts protection using other parameters, such as morality, religion, public opinion etc. But this has its own problems. These standards of constitutional protection will vary from judge to judge based on their subjective perceptions. It is very difficult to draw an objective standard. A wide definition is also a safeguard against censorship. The broader the definition the larger the scope of protection under the right to freedom of speech. A narrow definition, on the other hand shows that large number of material will not be given protection under the constitution. A liberal definition thus, ensures artistic creativity, self-fulfilment, and autonomy of an individual, dignity freedom and equality. The critics of unbridled artistic freedom always argue that art is subject to general societal values, such as morality. The impact that a radical piece of art will have on the society is huge, and hence it must be checked. For instance unbridled art in the form of pornography is considered by some authors as an insult to women. And constant viewing may result in violence against women. Though this farfetched it is still an argument in many academic circles.[v]

Another major problem in defining art or artistic freedom is in the content of art. In other words how is it possible to distinguish artistic expression from political speech, or how is a material artistic and not literary? For instance, instance art has sometimes been misused for political propaganda. In Nazi Germany there were two exhibitions that took place side by side. One showed paintings of lush green pastures and beautiful sceneries, whereas the other exhibition, more of a degenerating art, showed slogans and unrest in Germany because of the so called "Jewish monopolisation'. The first exhibition was criticised by the Nazi government in the light that it was a camouflage of Jewish ideologies that did not show that state of the nation effectively.[vi] Similarly the band called the Plastic People of the Universe which composed and sang songs against the communist regime in the Chech Republic in the 1960s was constantly abused by arrest and prosecution.[vii] Again, what is the protection given to a material that is artistic in nature but at the same time, affects the sentiments of a religious sect? For instance in a caricature demonstrating a highly politicised ideology, what is the scope of protection given to such an art? On one hand it could be argued that it is radical and highly seditious, on the other hand it is the individual's effort, autonomy, liberty and dignity in creating the caricature that is to be protected. Again, if an artist portrays gods and goddess in 'unacceptable' positions and paints them in the nude, how is the artist's individual right protected against the religious and moral sentiments that may get hurt if this painting is exposed to the public? Hence, it can be said that art does not possess only solely aesthetic or entertaining qualities, but may also expresses attitude to current events, criticism of society or political situation and significantly enriches public discussions and opinions. Encroachment on free art speech can inflict far-reaching consequences, especially limiting various views within the society.

Alongside with the problem in the definition of art is the problem in the definition of 'morals' or morality. In both the ECHR and under the Indian Constitution, the aspect of morals or morality respectively has been used as a means of restricting free speech. In other words, the national (in the case of ECHR) and the central or state[viii] (in the case of India) legislatures can make laws restricting free speech if it is against morality.

The obvious question in this respect is to what constitutes morality? There is no definition given by the ECHR or the Indian Constitution. A look into the Constitutional Assembly Debates show that most of the terms (under 19 (2), that restricts free speech) were discussed and deliberated upon, at least to some extent, as to the meaning, content and nature. The only

aspect left open was 'morality or decency'. The only reference made to these terms were with respect to whether the phrase 'offence against morality or decency should be used or 'offends morality or decency' should be used. This however was later substituted with the terms 'in the interest of' and the reason for such substitution is not available. Thus the content, nature and definition of morality as a restriction on free speech is still vague and an abstract. This gives the power to the legislature to make loose laws that ambiguously outline the contours of morality, thus further restricting the already restrictive freedom of speech and expression. Also, this law must also be reasonable. Essentially, since the word 'reasonable' has been inserted post the first amendment of the Indian constitution, the judiciary has taken upon itself the role of laying down tests and standards to determine what is morality and how this morality can restrict freedom of speech and expression. So, in order to understand what constitutes morality, it is imperative to fall back on the decisions of the court and the standards adopted by the courts in determining what restrictions are reasonable in the light of morality.

Most of the literature on morality is focused on whether or not the state should be enforcing morality through criminal law. Through the ages been it has been dealt in light of the Wolfenden Committee report on homosexuality and a vigorous protest by Lord Devlin, the Hart- Fuller conflict and Mill and Steaphen in the twentieth century. However very little has been done in terms of understanding this concept in constitutional law. The only available material on morality in constitutional law is that of Ronald Dworkin's 'Moral reading of the Constitution'.[ix] Where he says that every fundamental right prescribed in most constitutions are abstract, vague and have a moral connotation to it. This however has been severely criticised as revolutionary, and resulting in subjectivity than objectivity of the adjudicating judges. Again, Ambedkar's definition and reference to a concept of 'constitutional morality' has not made matters easy for the judges. What standard to attribute to morality- Is it private morality, public morality or constitutional morality?

PUBLIC MORALITY V CONSTITUTIONAL MORALITY

The problem here is that there is no clarity as to the content and source of constitutional morality. The questions that arise are: why 'constitutional morality' should be relevant when (or especially in parts wherein) the constitution does not make a reference to it at all and whether one could say that constitutional morality added anything to the debate without

expounding what the concept actually meant? There are four sources of constitutional morality - (1) Text of the Constitution; (2) Constitutional Assembly debates; (3) Events that took place during the framing of the Constitution; and (4) Case Law History. On a cursory assessment, the phrase had been used in less than ten reported cases by the Supreme Court till 2010 from the time the Constitution was adopted. It was used by the Delhi High Court in testing the Constitutional validity of Section 377 of the Indian Penal Code in 2009. However, in the year 2018 alone, it has been used in more than 10 reported cases by the Supreme Court. Are we to understand that the scenarios to put it to use did not arise earlier in India or that the phrase and its content are a new find?

In Ambedkar's[x] famous invocation of the phrase in his speech 'The Draft Constitution', delivered on 4 November 1948[xi], he defined 'constitutional morality' by quoting George Grote," *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 did Grote mean by 'constitutional morality'? Ambedkar quotes Grote[xii] again:

"*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".*

There are several meanings attributed to the term constitutional morality. While Grote relied on substantive elements of the constitution such as liberty, equality and fraternity as constitutional morality, Ambedkar on the other hand, emphasised on plurality and the will of the people. He said that the government is subject to the will of the people and the constitution functions on the concept of popular sovergnity. Hence while Grote relied on the fundamental aspects of the constitution as a whole and the underlying morality that runs as a thread to reflect constitutional morality, Ambedkar realised on societal values and public morality. He stressed on aspects of inclusiveness and acceptance within the Constitution. An interesting point to be

noted here is that the concept of constitutional morality was introduced in England, which had no written Constitution. The intention of the Court in such an introduction was to make sure that the government, and the entire sovereign was subject to the 'Constitutional conventions'. Thus, the original understanding of the term was just to indicate that the sovereign was subject to constitutional conventions.

What then is the difference between Constitutional Morality and Public morality? And the restriction under Article 19 (2) 'in the interests of morality' – does it indicate constitutional morality or public morality? The word 'morality' has been used only four times in the Indian Constitution (twice in Article 19 and twice in Right to religious Freedom under Article 25 and 26), and in all these four cases it has been used only as a restriction on the right, but it continues to be invoked by the courts in many rights claim cases such as sexual orientation to direct inclusiveness. And the courts have used the concept of constitutional morality to direct inclusiveness. But there is an underlying problem in this matter. For instance, in *Navtej Singh Johar & Ors. v. Union of India,*[xiii] the Supreme Court tested the validity of Section 377 of the IPC while deliberating upon the principle of constitutional morality and this landmark decision decriminalized consensual sex among adults in private, including homosexuality. Constitutional morality requires all citizens to have an understanding and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. The Court stressed that the State should maintain a heterogeneous fiber in the society and be guided by the well-founded notion of inclusiveness. The court emphasized that the term morality used under Article 19 (2) is not societal morality as it may change from time to time and from person to person. The litmus test is constitutional parameters and a restriction on individual autonomy must yield to the morality of the Constitution. This is understandable as the court was desperately trying to protect the rights of homosexuals, and the court felt that it may be impossible to do in the light of 'public morality' as a standard. The Court decided in the light that equality was a part of constitutional morality and unreasonable and arbitrary discretion and hence it was Section 377 was beyond the restriction of 'reasonable morality under Article 19 (2). Also, in *Indian Young Lawyer's Association v. State of Kerala*,[xiv] the traditional ban on the entry of women (10-50 years of age) into the Sabarimala temple was also challenged before the Supreme Court. Several legal questions were posed before the Supreme Court. Several legal questions were posed before the apex court and many of them owed their origination to the basis of constitutional morality. The apex court opined that morality implies constitutional

morality which includes values like justice, liberty, equality and fraternity and any view expressed by the constitutional courts must comply with the principle of constitutional morality. It is established that constitutional morality ought to be preferred over customary values, traditions and beliefs. The Constitution ensures the right to freedom of religion under Article 25 and 26 and entering the Sabarimala temple is a part of an individual woman's fundamental right to profess, practice and propagate religion. Restricting the freedom to freely practice and propagate religion and discrimination against women of the age group of 10 to 50 years by denying them their fundamental right to enter and offer prayers at the Sabarimala temple was a manifestation of patriarchal rules and that cannot be acceptable.

However, interestingly Justice Indu Malhotra giving her minority opinion concluded that Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical. Hence, it was opined that practice of prohibiting menstruating age women from entering temple was held as constitutionally valid for being protected under Article 25 (1) of Constitution.

In all these cases where the courts have used the aspect of constitutional morality, what must be noted is that it was used to ensure inclusiveness of the minority groups and have discussed their rights and freedoms as part of constitutional morality. Thus constitutional morality, is a recently developed technique by the courts to help as an aid in rendering a statute unconstitutional.

These interpretations in these cases is too far fledged for several reasons. The constitutional morality as a concept is static and rigid. It is unchanging and it cannot be flexed from time to time. "*The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the*

primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality."[xv]

It cannot be used by the judges according to their personal perceptions, beliefs and ideologies as is the case in India. In the *Shabarimala Case*, Justice Chandrachaud made a statement that it should not be fleeting and changing from time to time. But unfortunately that is exactly what has been happening. The majoritarian opinion was that public morality cannot be used as a colour for discriminating against women, and the underlying constitutional morality mandates freedom of religion to all, and it cannot be restricted by popular custom or belief. The dissenting opinion stated that though equality and right to religion are part of the constitutional morality it cannot be viewed in isolation. It is to be balanced out with the beliefs and faiths of a particular sect, or religious community, and this religious belief and faith is also a part of constitutional morality. The problem here is, on reading these two opinions of the court, it becomes unclear as to what is constitutional morality. Does it mean that under Article 25, the term morality indicates constitutional morality and anti-discrimination being against constitutional morality, is not a reasonable restriction? Or does it indicate that the higher principles of constitutional morality as under Article 25 is subject to the societal morality, or public morality , to bring out a balance between the right to freedom of religion to all and the rights of customary beliefs and practices of a particular sect. The latter seems more logical and comprehensive. Here the author is not going into the nuances and the reasoning of the case, but is only on the point of constitutional morality, and the fact that the concept lacking any clarity is being misutilised by the judges as an important aid to render a statute unconstitutional purely on personal standards.

This leads to the conclusion that though the courts have used higher principles of 'constitutional morality' in deciding several cases, due to the lack of clarity in concept, the courts have in effect equated it to majoritarian morality, or societal or public morality.

On reading the limited resources on constitutional morality, a more coherent argument would be that the underlying aspects of the Constitution, that forms the core structure of the Constitution such as fundamental right, sovernity, equality, rule of law , democracy, separation of powers, etc , which is the spirit of the constitution is what is meant by constitutional morality. The term morality as used under Article 19(2) and Article 25, indicates public morality. In other words free speech and right to religion, being higher aspects of constitutional morality

can be restricted by public morality. It is this balance that the courts have to adjudicate, and it is this balance that is sought to be studied in this article.

ARTISTIC FREEDOM AND THE CASES BY ECHR

In most of the cases on artistic freedom under Article 10 of the ECHR, the question of morality or 'morals' as restriction arises often when the items at stake are obscene.

In *Handyside v UK*[xvi], the European Court of Human Rights held that the law providing for the confiscation of a book deemed to be obscene did not violate the right to freedom of expression. Richard Handyside purchased the British rights to a book that aimed to educate teenage readers about sex (including subsections on issues such as masturbation, pornography, homosexuality, abortion, etc) and was convicted of possessing obscene publications for gain under the Obscene Publications Act. The Court concluded that the Act's intent to protect minors, as well as its measured and precise application, met the qualifications for a restriction on free speech that was "necessary in a democratic society." The Court considered that there was no European consensus on the protection of public morals, particularly as regards children. Therefore, States should be left a margin of appreciation in interpreting whether a particular measure is 'necessary'. At the same time, the Court stressed that the test of 'necessity' was a strict one: " the adjective 'necessary 'is not synonymous with 'indispensable' the words 'absolutely necessary' and 'strictly necessary', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. There are two things to be understood from this case, one, the fact that the court said that the margin of appreciation is wide, indicates that the freedom given to the contracting state is vast with respect to deciding how to restrict Artistic freedom on the restriction of morality. It means that the state can lay down their own standards of morality as, it is very difficult to form a uniform restriction throughout the European Union. But at the same time the court also said, this particular law that is restricting freedom on morality must be 'necessary in a democracy'. So the burden of proof that it is necessary vests on the contracting state, and not on the party alleging violation. Also the standard of necessity is a strict one, this shows that tough the state state can make laws as they are given a wide margin of appreciation, it is still subject to the strict standard of necessity under Article 10 of the ECHR.

In *Muller and Ors v Switzerland*[xvii], a private museum opened up an exhibition were painters could paint on the spot and exhibit their paintings. The concerned painter in this case, drew three paintings that were considered very highly by art critics for the use of paint and aesthetics , but was seen by others as heavily obscene as it showed men having sex with animals and with each other. The painting was confesticated and the artist was fined and convided under the Swiss Crimnal Code on grounds of obscenity . the appealed to the ECtHR. The Court repeatedly confirmed[xviii] that freedom of expression guaranteed under Article 10 is fundamental right both for society and individuals and, in general, it must be applied "*not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of the pluralism, tolerance and broadmindedness without there is no democratic society."* However, those who create, publicise or spread such ideas and information are not exempted from feasible limitations and restrictions allowed under second paragraph of Article 10. On contrary, the Court held that the Contracting States do have margin of appreciation in evaluating whether certain pressing social needs were endangered in regards of protecting morals. The Court added that since "*the view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject*"[xix] the local courts find themselves in better position to determine such requirements.

Notwithstanding the final decision, ECtHR expressed that the protection shall be awarded not only to generally accepted views, but also to those that *shock, disturb or offend*. Nevertheless, despite the wording might recognized as contradictory opinion to the final decision, it shall be borne in mind that the case was decided in 1988 when the attitude to unconventionality was surely more conservative than nowadays. Taking this into consideration, it only confirms that the views on morals do vary from place to place and time to time.

More than 20 years later, the Court dealt with the conflict between freedom of artistic expression and the protection of morals again, however with the opposite outcome. In the case *Akdaş v. Turkey*, the translation of obscene novel was seized and destroyed. The Court held that such measure was not proportionate, especially as the novel was available in many languages throughout Europe. Hence, a shift can be observed as access to cultural heritage was prioritised over the protection of morals.

Thus a wide margin of appreciation was given to the contracting states in deciding morality as a restriction on free speech. Though the doctrine gives freedom to the contracting parties to set standards, in each of these cases a different conclusion of was reached applying the same doctrine in similar fact situations. Whereas in *Handyside*, the publication was allowed to be in circulation, in *Muller* it was banned, but at the same time in *Akdas* the publication was allowed on the grounds of cultural heritage. Thus though, the general idea with respect to morals as a restriction is a wide margin of appreciation doctrine, it has been used by the ECtHR differently in different cases, based on the theory of proportionality and also the doctrine of 'necessary for a democratic society'.

When talking about the protection of morals, also the links to the protection of religious feelings are strong as many works were both profane and obscene. In *Otto Preminger-Institut v. Austria*,[xx] where a film questioning catholic Christian faith was released, showing Mother Mary enter into a tension filled erotic relationship with the Devil. The copy was seized and prohibited from screening to the public, as there was a provision against hurting religious sentiments in the Austrian Criminal Code. The question was whether this provision was against artistic freedom under Article 10, whether it was against the freedom of religion under Article 9. The ECtHR held that in case of religious sentiments a wide margin of appreciation should be given to the states under Article 10. Prior restraint and censor was allowed in this particular case it was felt the Austrian law restricting and penalising this form of speech was necessary and proportional under Article 10. One interesting point here is that though it was never shown publicly, it was assumed that it would hurt the sentiments of those who would watch it. It is interesting to note the dissenting judgment in this case, given by three judges. Firstly, they said that prior restraint is not part of a pluralistic society by acceptance and tolerance is. Again, they stated that 'religious sentiments' was not a restriction under Article 10, which meant that the Court could not provide a wide margin of appreciation to the countries, instead, the repressive action should be taken only in cases that *"the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.* "

In *Wingrove v UK*[xxi], a 10 minute long film called 'Visions of ecsatcy' where mother Teresa was shown to have sexual or erotic fantasies with Jesus Christ, the Board of Cinematographic Films in UK refused to grant a certificate. The ECtHR held that the law with respect to

blasphemy in UK did not violate the provisions of Article 10, as the scope for restrictions under second paragraph of Article 10 "*when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or especially, religio*n". Here again a wide margin of appreciation was given to the states. This was the dissenting judgment- "*artistic impressions are often conveyed through images and situations which may shock or disturb the feelings of a person of average sensitivity and that in presented video the limit of ridiculing religion was not overstepped.*

This position with respect to religious sentiments and religion as a restriction on artistic freedom, took a slight turn in the case of *Kunstler* v *Austria*.[xxii] Here an exhibition called the Apocalypse, with marked the 100th year of Artistic freedom was opened for public viewing in Vienna. An artistic displayed around 33 paintings where the heads of the painting were paper cut outs of famous personalities which included Mother Teresa, the Archbishop of Austria etc. the bodies in these paintings were painted by the artist depicting sexual positions. The artist was fined and penalised under the Austrian Law and one of the subjects to the painting filed a case against the artist for violating his individual right to reputation, by filing an injunction against the exhibition of the painting. The court took an interesting stand here, the court observed that this was a genre called satire, and the main aim of satirist art was not to please. It notes that *satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.* The Court held that, the instant case was not directed at reality and it was only a satire that could be protected under Article 10 as artistic freedom. The court's reasoning included that "*satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate*. *With this in mind, limitation of such expression can endanger free public debate."*

On the point of doctrine of margin of appreciation the court said that when it comes to artistic freedom, this should be heavily limited close to the extent that it becomes non-existent with respect to all forms of artistic freedom.

The pool of cases on artistic freedom in ECtHR is fairly high, the above mentioned cases indicate a shift in the trend of the court on concepts of doctrine of margin of appreciation. The initial idea was a liberal approach where a wide margin of appreciation was given to the nations

under the European Union, to determine the standards of restriction on the freedom under Article 10 of ECHR. In other words, the contracting countries were free to determine the contents, limits and the target group where morals can be used as a restriction on artistic freedom. This however changed in the recent past, where a stricter scrutiny was necessary in cases where a state law violates artistic freedom. This is a very proactive approach taken by the court. The court in the first instance itself recognises, artistic freedom as a part of free speech under Article10. The Court also understands the need for every country to have its own sets of restrictions, but at the same time these restrictions must be in conformity to the tests of proportionality, and 'necessity in a democratic society'. From *Handyside* to *Kuntsler*, what has remained a constant is that the court has emphasised on the fact that art is not always to please. In other words art that maybe undesirable or even radical and still be accorded protection under Article 10, unless using the doctrine of wide margin of appreciation it is seen that the national law prohibiting art is against the proportionality theory or against 'the necessary in democratic society' test. This shows a proactive approach taken by the ECtHR as they realised that in the future art as we know today will keep changing and it needs to be accommodated according to contemporary standards of morality rather than the providing a rigid standard and waiting for circumstances to arise that will ultimately push the court into taking a hasty and unprecedented decision without proper reasoning, though the outcome is one that is desired by the majority.

The Indian judiciary on the other hand have adopted a reactive approach to the concept artistic freedom.

ARTISTIC FREEDOM IN INDIA

In India majority of the cases where a legislation has been challenged under morality as a restriction on free speech, is to do with the offence of obscenity under the IPC. Section 292 has been challenged several times as unreasonable restriction against artistic work for vagueness and lack of clarity and giving huge discretionary powers to the judiciary. It is important to understand the concept of obscenity in the constitutional precepts.

The offence of obscenity per se falls within the restriction of morality under Article 19 (2). The judiciary has to determine whether the offence of obscenity is a reasonable restriction on free speech. The term obscenity has not been defined under the constitution. Neither is the term

morality. But if all the cases are to be collected in India, post-independence, most cases that deal with morality as a restriction is on the offence of obscenity and most of the obscene cases are on artistic freedom. Thus the standards adopted by the court in defining obscenity becomes highly relevant, not only because, it is this standard that determines, what art is protected as free speech and what is not , it lays down the theory of free speech as to whether it is liberal or narrow in India. If a liberal theory of free speech is adopted it means that even if the offence of obscenity prima facae falls within the restriction of morality, a strict or high standard in the definition of obscenity will ensure that materials with some sort value, whether social, artistic, scientific or literary will be protected as free speech . A narrow theory of free speech, on the other hand, will have a very low standard of obscenity, where most materials will satisfy the definition of obscenity and only those that are left out of this definition will be protected as free speech. *The Indian Penal Code does not define the word "obscene" and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by us.*[xxiii] The court in *Ranjith D Udeshi* understood the task placed upon its shoulders, and how it was important to formulate a standard that keeps in mind 'public interest' seen in the concepts of 'public decency and morality', and at the same time understand the importance of art, and the freedom available to an artist under Article 19. "*The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross.* The court emphasised on the need to formulate a standard that is able to distinguish between what is obscene and what is not, and this standard should be applied uniformly throughout India, from time to time. The Court went into the two standards laid down in the cases of *Rv Hicklin* [xxiv]and *Roth v USA*[xxv]. Interestingly the court mentioned that obscenity should be determined by *national standards* and held that regard must be had to "our community mores and standards" and whether the material "appeals to the carnal side of human nature, or has that tendency." Even if this was held by the court in this case, it ultimately used the narrow test in *Hicklin* without giving any importance to the contemporary community standards in *Roth*. There was a huge confusion as to what the court meant. On one hand they employed the most susceptible person test, and disregarded community standards, on the other hand the Court used words such as national standards and community mores and standards.

In *Ranjit Udeshi*, the Supreme Court relied on the standard laid down by the Victorian era Hicklin test which stated that, "*all material tending to deprave and corrupt those whose minds are open to such immoral influences*". There were certain drawbacks in this test i.e. firstly, the girth of the phrase „*deprave and corrupt*" made it open to misinterpretations. Secondly, conceptuality was not to be given any emphasis i.e. .any word, phrase or depiction would be independently judged irrespective of the context in which it is used and thirdly, the test considered the perspective of those who were most likely to be corrupt or deprave. But Hence the Indian Supreme Court, initially took a very narrow theory of free speech, by adopting a very narrow and low standard of obscenity and morality. The implications of such a low standard were many. Firstly, there were many cases that came up where the entire work was sought to be banned because a certain portion of the work was considered obscene applying the *Hicklin* test. For instance, in the *Phoolan Devi Case*, where a documentary portraying the life of Phoolan Devi was censored, the court held that the scenes in the movie showing a young girl being raped by policemen, was an integral and necessary part of the life of the subject in the movei, and the entire film should be considered as a whole and not in isolation or segregation. Here the Court did not overtly overrule the Ranjith Udeshi, but modified it to an extent.

Secondly, the standard adopted was 'obscene according to persons most susceptible to such immoral influences', which means that it targets the most vulnerable persons of the society. The problem here is that, since the test is based on the most susceptible person in the society it would mean that any material that ever so slightly touches upon lust, or sex, or nudity will be considered to be obscene.

Even though the courts in India have primarily followed the Hicklin test to judge obscenity but there arise a serious ambiguity when one looks at cases like *Directorate General of Doordarshan v. Anand Patwardhan*[xxvi] and *Chandrakant v. State*[xxvii] where the courts have followed the example of *Roth* test and the courts have used the yardstick of the community standard test and held that the judiciary was allowed to look into the overall impact of the material for determining the obscene content. This, the court has done without overruling or dispensing with the Hicklin test per se. This confusion was to a large extent put to rest when the Supreme Court in *Aveek Sarkar v. State of West Bengal*[xxviii] expressly abandoned the Hicklin Test and replaced it with the Roth test. Roth is a sharper and narrower test, though it has a

limitation that it gives an impression that a material is either fit for the entire community or otherwise not. However, Roth test is far better than Hicklin as a test for obscenity.

Another interesting case is that of *Samaresh Bose and Another v Amal Mitra and Another*[xxix], the Supreme Court, brought out a new criteria for determining what amounts to obscene materials. In interpretation of the terms' corrupt and deprave' the courts held that 'vulgarity' was different from obscenity. While vulgarity can form part of protected speech, obscenity on the other hand is a limitation on free speech. It held that vulgar writing is not necessarily obscene. "*Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences*." The instant case, was about a Bengali novel which had material on kissing, descripstions of the body and the figures of female characters in the book and suggestions of sex acts by themselves. The question was whether it has the tendency to corrupt and deprave, was lascivious and appealed to the prurient interests. Here the court, if it had strictly complied with *Hicklin* standard would not be able to protect the right of the author and distributor of this book, hence they deployed the 'vulgarity as opposed to obscenity' scheme to deviate slightly from the *Hicklin* test.

Another problem noticed in India is that the standard of obscenity will vary with the medium of artistic expression.

There is a slight deviation from the *Hicklin Test*, and artistic value of an allegedly obscene material is to be taken into consideration. With the change in medium, especially films and dramas, there are specific legislations, and guidelines that reflect morality with respect to these mediums. The cinematographic film act 1952, The Cinematograph (Certification) Rules, 1983, The Guidelines for Examination of Films, 1991, The Dramatic Performances Act 1876, The Cable Television (Regulation Act), 1995, Press (objectionable matter Act) 1951, have provisions restricting artistic speech on morality.

In *K. A. Abbas v Union of India* [xxx], the court said that the general principles that applied to exceptions to Article 19 (1) (a) applied to the censorship of film, and that there was nothing vague about the wording of the Censorship Act. The court held that in the interpretation of the allegedly vague term, the views of the average man and more so of persons who are likely to be the panel for purposes of censorship will only matter. Any more definiteness is not only not

expected but is not possible. However, the Court observed that the censors need to take into account the value of art while making their decision. "*The artistic appeal or presentation of an episode robs it of its vulgarity and harm and also what may be socially good and useful and what may not.*

In *Pratibha Naitthani v Union of India*[xxxi], the Court on deciding whether the cable TV networkers can broadcast adult movies, the adult viewer's right to view films with adult content on cable TV is not taken away in this case and "*Such a viewer can always view Adult certified films in cinema halls. He can also view such films on his private TV set by means of DVD, VCD or such other mode for which no restriction exists in law.*" The Court held that the restriction upon cable operators and cable service providers that no programme should be transmitted that is not suitable for unrestricted public exhibition did not violate their right to carry on trade and business. The Court further held that only films sanctioned by the CBFC, under the Cinematograph Act and Rules, as suitable for "*unrestricted public exhibition*" could be telecast or transmitted on Cable TV.

In *Directorate General of Doordarshan v. Anand Patwardhan*[xxxii],Dhoordharshan refused to telecast a documentary, 'Father, Son and the Holy war' on the lines that the second part of the documentary was given an 'A" certificate by the CBFC. The Court held that a film must be judged from an average, healthy and common sense point of view. "*If this said yardstick is applied and the film is judged in its entirety and keeping in view the manner in which the filmmaker has handled the theme, it is impossible to agree that those scenes are offended by vulgarity and obscenity*."

There general trend seen in cases where the laws relating to obscenity and morality challenging the artistic freedom in motion pictures and broadcasting, is that the Courts have upheld the validity of these rules and regulations. However, the courts have formulated standards of morality that is loosely based out of the *Hicklin* test, but have neither overruled it nor have they distinguished it. In fact, minimal reference is made to the test per se, even though they adopt similar standards. They have used aspects of average person test, and community standers in interpreting provisions relating to morality in these legislations.

In *Maqbool Fida Husain v Raj Kumar Pandey*[xxxiii], where the question was about a woman painted in the nude, and the painting title as "Bharat Matha", Section 292 was invoked and the Court held that nudity alone cannot said to be obscene. According to the judgment, *"…the*

aesthetic touch to the painting dwarfs the so-called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked." The nude woman was not shown in any peculiar kind of posture, nor were her surroundings painted so as to arouse sexual feelings or lust. The placement of the Ashoka Chakra was also not on any particular part of the body of the woman that could be deemed to show disrespect to the national emblem.

CONCLUSION

Hence the role of the judiciary in determining the standard becomes extremely important in developing the country's free speech theory. The ECHR irrespective of the individual standards of obscenity adopted by the countries, have balanced out the national interest and the interest of the European Union, by stating that though the countries have the freedom to form their own standards of obscenity and 'morals' using the doctrine of margin of appreciation in a wide sense, it is still subject to the strict standard of 'necessary in democratic country' and the theory of proportionality. This is a more proactive approach taken by the courts unlike in India

In India, the standards keep varying from medium to medium. The trend keeps shifting across mediums and according to the circumstances in hand. There is no uniform application of a strict standard of morality in adjudicating on artistic freedom. This is a more reactive approach, where the tendency of the courts is to wait for the damage to occur and then keep adding and subtracting to the principles of morality so as to suit the fact situation in hand.

A reactive approach, thus in comparison to a proactive approach, lacks clarity, minimum required elements of uniformity and varies from one medium of communication to the next. This is highly undesirable in a democratic country that values free speech at the highest pedestal of fundamental rights, and that comes from a background of great historic and contemporary pool of artists in all felids of work.

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[viii] Depending on the entries under various Lists of the VII Schedule to the Constitution, laws can be made by both the center and the state legislatures in India. For instance, dramatic performances is an aspect that comes under the state list (LIST II) and hence various states have made laws that restrict the artistic freedom of drama. For e.g., the Kerala Dramatic Performances Act, defines objectionable material as scandalous, highly obscene, scurrilous etc. this shows have the restriction of morality has been used by state legislations to restrict artistic freedom.
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