

“Laws on Pornography and obscenity in India”

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Law is an emerging practice, evolves day by day in the countries that follow Common law Principles. Laws on pornography especially its publication and circulation have evolved from Ranjit Singh Udeshi's¹ case to Devidas Ramachandra Tuljapurkar's case². Along with these cases, the Information Technology Act has also progressed and has started to analyse the law deeper to find its original legislative intent with reference to the constitution and has started to become complementary to each other rather than one being Ultra vires of the other. There is no fixed definition for obscenity in the Indian Penal Code, making it hard for the judges to define the said word according to the facts and circumstances of each case. In simple terms, it can be concluded that what may be considered obscene in India may not be considered obscene in another country.

Birth of Hicklin's Rule

The Hicklin test was first laid down by the Queen's Bench in *Regina vs. Hicklin*³, it was held “The tendency of the matter charged with obscenity is to deprave and corrupt those whose minds are open to such immoral influences and whose hands a publication may fall”. The facts of the case follow, where one Henry Scott distributed the resold pamphlets that were Anti-Catholic, which also included confessional statements of women

This Hicklin's rule was also applied in India, Ranjit Singh Udeshi's⁴ case the facts of the case follows, Ranjit D. Udeshi was a partner of a bookstall, he was prosecuted for the sale of allegedly obscene magazine *Lady Chatterley's lover* and was booked under Section 292 of the Indian Penal Code. Ranjit appealed stating that it was violative of Art. 19(1)(a) of the Indian Constitution. The constitutional bench of the Supreme Court found Ranjit Singh to be guilty of section 292 of the Indian Penal Code. The court took Hicklin's test into consideration. Under this rule an art must be viewed as a whole but also obscene matter should be viewed separately to see if it violates the test. It also implies that the art must have preponderance over obscenity and that obscenity must be insignificant compared to that of the art.

¹ AIR1965SC881

² AIR2015SC2612

³ [1868] LR 3 QB 360

⁴ *Ibid* 1

It is important to note that Hicklin's test is in contravention of Section 292 of the IPC as the section requires the material to be taken as a whole and the person is liable only when the material is taken as a whole and if it is lascivious and tends to deprave the people who read it. Hicklin's rule, on the contrary, requires the material to be seen in isolation too.

The supreme courts have also started to move away from the Hicklin's Test from the various other cases starting from *K.A. Abbas vs. Union of India*⁵ as that test was in contravention of the IPC.

Community Standards Test

After the Hicklin's Test, the U.S Supreme Court went against the said rule and established a new set of principles called as the community standards test, which says only the materials which have a tendency of exciting lustful thought can be held obscene. This rule was first established in *Roth Vs. United States*⁶ where one Samuel Roth had a literary business which published an obscene magazine called *American Aphrodite* containing literary erotica and nude photography. The court granted certiorari and affirmed the convictions.

This community standards test was also used in India in, *K.A. Abbas Vs. Union Of India*⁷ "(a) that the dominant theme taken as a whole appeals to prurient interests according to the contemporary standards of the average man; (b) that the motion picture is not saved by any redeeming social value; and (c) that it is patently offensive because it is opposed to contemporary standards".

Miller Test

This Miller test is a developed form of Community standards test which was given birth from *Miller V. California*⁸, Miller had a mail-order business specialising in pornographic films and books. He was convicted under section 311.2(a) which talks about selling and distribution of obscene contents. The court rejected the principle in Roth's case as well as Hicklin's rule and propounded more comprehensive community standards test which says:

1. Whether the average person, applying contemporary "community standards", would find that the work, taken as a whole, appeals to the prurient interest,
2. Whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law (the syllabus of the case mentions only sexual conduct, but excretory functions are explicitly mentioned on page 25 of the majority opinion); and
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

⁵ AIR1971SC481

⁶ 1957 354 U.S. 476

⁷ *Ibid* 5

⁸ 1973 U.S. LEXIS 149

Present Scenario in India

In *Aveek Sarkar V. State of West Bengal*⁹, the facts of the case follow to where a German magazine in 1994 published an article about Boris Becker an exceptional tennis player was portrayed naked with his fiancé Barbra and his arms around her in a manner that his palms cover her breasts. In the personal interview, they had openly talked about their engagement and future plans the main aim of the photograph was to signify to the world that love champions over anything.

This article was published in a Kolkata based sports magazine, a criminal case of section 292 of the IPC was filed against the editor of the magazine. It was further contended that the publication of such an obscene article was predominantly to increase sales and corrupt the minds of the readers.

The editor was also prosecuted under section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

The respondents contended that since the magazine was not banned in India, they considered that such publication will not lead to its obscenity and took the defence of Section 79 of the Indian Penal Code that goes “nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified bylaw, in doing it”. There was no action taken against STERN in India the respondents were of the assumption that such publication is not criminal.

The magistrate and the High Court of Kolkata held the editor criminally responsible the respondents appealed to the Supreme Court found the respondents innocent of the charges levied against them and held that in a situation like this Hicklin’s test cannot be used and the only measure to be taken is the community standards test and it further stated that the photograph must be viewed in the context of the message that the photograph appears to convey and not in isolation. The supreme further instructed that more adaptive community standards test must be applied for a continuously evolving society like India.

Publication and viewing of Pornographic Content and its laws in India

Internet pornography has become very popular. Majority of the population in India view pornographic content only via internet¹⁰. Viewing content through mobile phones is widely popular among the youths of the nation¹¹. Online erotic Comics are also made readily available to the citizens due to the convenience of the Internet.

⁹ (2014) 4 SCC257

¹⁰ Ghosh, Shauvik (4 August 2015). "Oops, Indian ISPs, telcos could lose 30-70% of data revenue because of porn ban". Retrieved 12 November 2016.

¹¹ Ravi Shankar, (2012). NU (DE) MEDIA: A PRELIMINARY STUDY INTO THE YOUNG PEOPLES' ACCESS TO PORNOGRAPHY THROUGH THE NEW MEDIA. *Indian Streams Research Journal*, Vol. II, Issue. IV, DOI : 10.9780/22307850, <http://istrj.org/UploadedData/975.pdf>

Under the Information Technology Act, 2000 Section 67 of the act makes it clear that publishing obscene content online is punishable with three years and a fine of rupees five Lakhs and on the subsequent conviction will lead to a punishment of five years and ten lakh rupees. Under the Information technology (Amendment) Act, 2008 section 67(A) makes it clear that a publication of sexual content will lead to a punishment of five years on the first conviction with a fine of rupees ten lakh and a punishment of 7 years with a fine of rupees ten lakh on the subsequent conviction,

Section 67(B) of the amendment is the turning point of the Children movement in India which is against child pornography this law makes it clear that not only publication, viewing but also possession of such pornographic content is punishable with five years and ten lakh rupees on the first conviction and seven years and ten lakh rupees on the subsequent conviction, with the given exceptions of the Indian Penal Code as well as the IT act, 2000.

Viewing of pornographic content online, privately is however not a crime in India, but the publication of such material is an offence in India. It is impossible to view such content without prior publication and the publication is an offence. However, the section is construed in a way where viewing cyber Pornography and storing of this content is not illegal but publication and transmission of the said materials are illegal.

Governments attempt to reduce viewership

The government frequently bans websites that have file sharing and other piracy-related websites. The government also made attempts to ban pornographic websites in the year 2014¹². Later the ban was lifted due to heavy public pressure. 32 websites were banned and the ban was lifted as on 1st January 2015.

August 2015 the government banned about 857 pornographic websites owing to implement section 67 of the IT, Act. The block was ordered by the department of telecommunication¹³. Later the ban was lifted as excessive blocking disturbs the regular users in day to day affairs and also due to the widespread protests on the internet.

Conclusion

In its entire attempt, the Supreme Court of India urges the government to provide fundamental rights and tries to widen its scope according to the changing morals of the society by broadening the scope of Article 21. The government must try to abide by the principles enlisted in the constitution as well as the common law principles. Banning porn is clearly a violation of the rights guaranteed under article 21 as it affects the right of an individual's personal liberty. The government can pry upon what the individual watches¹⁴.

¹² Shetty, Shreya (11 November 2014). "Govt to block all porn sites in India, asks Internet providers to deny access to such websites - Mobiletor.com". *mobiletor.com*. Retrieved 18 January 2017.

¹³ Shetty, Shreya (11 November 2014). "Govt to block all porn sites in India, asks Internet providers to deny access to such websites - Mobiletor.com". *mobiletor.com*. Retrieved 18 January 2017.

¹⁴ <http://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-rules-right-to-privacy-as-fundamental-right/articleshow/60203260.cms>- Right to privacy judgment