

JUDICIAL TESTS CONCERNING OBSCENITY

Authored by: Kanishka Shankar, Kang Lama** & Richin Jacob****

** 3rd Year BBA L.L.B (Hons.), Symbiosis Law School, Pune*

***3rd Year BBA L.L.B (Hons.), Symbiosis Law School, Pune*

****3rd Year BBA L.L.B (Hons.), Symbiosis Law School, Pune*

CHALK OUT JUDICIAL TESTS CONCERNING 'OBSCENITY'

Cybercrime is a concept which cannot be defined with exactitude. As with the passage of time and advancement in technology, the dynamics of it changes. Similarly, obscenity is a concept which is rather hard to fit in watertight compartments because with the passage of time, the perspective of the society and its citizens changes.

Another area of convergence between the two streams lie in confounding the judiciary. Justice Potter Stewart, speaking on behalf of the United States Supreme Court, while attempting to define obscenity, exclaimed: "I know it when I see it." He further observed about the task of defining obscenity as "...trying to define what may be indefinable."¹

The definition of obscenity, though not synonymous, but is tangled with sex. Obscenity refers to a narrow category of pornography that violates contemporary community standards and has no serious literary, artistic, political, or scientific value.²

JUDICIAL TESTS

To better understand Indian jurisprudence concerning obscenity, we must understand the global perspective.

HICKLIN'S TEST

As with all things common law, regulation of obscenity began in England with the Obscene Publications Act of 1857. In the 1868 case of Regina v. Hicklin, the English judges provided

¹ Jacobellis v. Ohio, 378 U.S. 184 (1964).

² Hudson, Obscenity and Pornography, (Dec. 16, 2020) Available at <https://www.mtsu.edu/first-amendment/article/1004/obscenity-and-pornography>.

the following test for obscenity: “*whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.*”³

This gave the authorities sweeping powers to view materials out of context, in isolation and judge it per the standards of the most susceptible members of society. This was a direct attack upon the freedom of speech and expression in society and was exploited to control religious dissent.

ROTH’S TEST

After blindly applying the Hicklin’s test, the United States Supreme Court, finally, in 1957 announced the test for obscenity, holding that material is obscene if, in view of contemporary community standards, its dominant theme appeals to the average person’s “prurient interest.” Accordingly, courts were to judge content by its tendency, when viewed as a whole, to arouse sexual desire.⁴

This laid the foundation for the Community Standards test which is closely followed in Indian jurisprudence. The Indian Supreme Court in the case of *Ranjit D. Udeshi v. The State of Maharashtra*⁵, observed that the test of obscenity is, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to immoral influences, but the test of obscenity must agree with the freedom of speech and expression guaranteed under our Constitution. The Court noted that the concept of obscenity would change with the passage of time. This observation was closely on the lines of the Hicklin’s test which is aforementioned.

The Supreme Court in *Aveek Sarkar V. State of West Bengal*⁶ held that “the question of obscenity must be seen in the context in which the photograph appears and the message it wants to convey.” The Court further said that the correct test to determine obscenity would be, Community Standards Test i.e., Roth test and not Hicklin Test. The Court observed that in every case related to check on obscenity the material in question to be ‘taken as a whole’. When the matter taken as a whole and it is lascivious and tends to deprave the person who reads, see, or

³ Regina v. Hicklin, (1868) 3 Q.B. 360.

⁴ Roth v. United States, 354 U.S. 476 (1957).

⁵ Ranjit D. Udeshi v. The State of Maharashtra, 1965 SCR (1) 65.

⁶ Aveek Sarkar v. West Bengal, (2014) 4 SCC 257.

hear that material, then only that material can be said to be obscene. The court observed that the Hicklin test is in contravention of Section 292 IPC. Further court observed that as the terms 'obscene' and 'obscenity' is not defined in Indian Law, this makes the community standard test to be more suitable for Indian Law Regime, also, the community standards test is more adaptive to any changing society.

CYBERSPACE

We look at the general domain of cyberspace and its interactions with obscene material and obscenity in general to better understand how it plays out in the e-commerce context.

THE CASE OF MILIND SOMAN

Yesteryear's supermodel, Milind Sonam, was booked under IPC section 294 (obscene act in a public place) and section 67 of the Information and Technology Act (Punishment for publishing or transmitting obscene material in electronic form) for posting a nude image on his Instagram. The reasoning was two-fold: Milind was naked in public space; it depicts Goa (where the image was shot) indecently.

If we apply community standard's test, it would be a cogent argument that the act being in public space did not conform to India's community's standards which is largely conservative.

However, looking at the context of the image, it was posted by Milind to mark the occasion of his 50th birthday and to convey to his followers and the world at large (him being a public figure) that age is just a number. He running and displaying his figure the way he did was with the intention to promote fitness and an active lifestyle. It in no way depicted or demeaned the image of the state of Goa.

Considering the two arguments, should Milind be charged for obscenity under IT Act or should he be just convicted for going naked in public space? Unfortunately, the present laws apply the same standards both 'online' and 'offline'

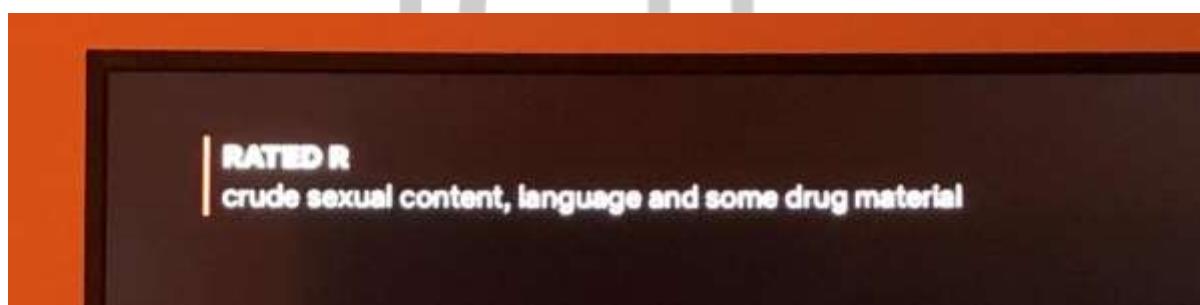
OVER THE TOP PLATFORM (OTT)

There has been a recent push in India to regulate OTT content placing it on the same level as 'offline' content like the movies played at theatres or the sitcoms played on television. Recently, the Government issued guidelines seeking to regulate OTT platforms but did not specify the details.

However, placing two very different mediums of the same level of regulation is unfair. In movies and television, the audience is not in control of the content that is being offered to them. Though for cinema they have an option to choose between different movies released at the same time and for television they have the option of skipping through channels; they do not however have the option to choose what is finally shown on the screen. With online content, the audience is in greater control of what they choose to finally see from among the many options available.

The former involves the content being "pushed" to consumers while consumers "pull" their desired content in the latter. Since the audience has a better say in the latter, a regulatory approach followed for push-based consumption may not necessarily do justice to the mechanics of how online content is offered especially considering our archaic CBFC.⁷

Presently, online platforms self-regulate and add warnings like the one given in the image below:



Countries like Australia and Singapore have self-certification procedure for OTT platforms with moviesque ratings like X 18+, R 18+ or MA 15+. This self-regulating/monitoring program has revealed that Netflix's tool can assess and classify content with 94% accuracy.⁸

⁷ Unknown, Online Content Regulation, (Dec. 16, 2020), <https://www.ikigailaw.com/online-content-regulation-how-is-it-done-in-other-parts-of-the-world/#acceptLicense>.

⁸ Australian Classification, Australia leading the way with Netflix on classification, (Dec. 16, 2020), <https://www.classification.gov.au/about-us/media-and-news/news/australia-leading-way-netflix-classification>.

E-COMMERCE

Intermediary Rules 2011 under the IT Act stipulates the regulations relating to the content displayed on the intermediary website especially pertaining to defamation and obscenity. In an era when Section 377 IPC was still criminalized, the Delhi High Court asked a very puzzling yet fundamental question, “Does sale of sex toys violate Section 377?”⁹

Though Section 377 IPC is now long gone, what still remains is the lack of clarity around the commerce of such goods and services. Earlier, platforms like Flipkart and Amazon had a “Sexual Wellness” section dedicated to such goods. However, playing it safe, they soon discontinued it.

The authorities, by and large, apply the same standards of regulation ‘online’ and ‘offline’. However, since the mediums are very different, I beg to differ.

Online sale of goods and marketing, which would be considered an act of obscenity if done offline, should be viewed from a perspective different from that we view offline activities.

1. Online content provides a choice; a discretion to the viewer to continue forward with the activity they are about to indulge in. It gives them complete control to pause, skip, and forward.
2. E-Commerce platforms selling adult goods do not advertise like other businesses. They do not employ large scale television/other media commercials inviting viewers to transact on their platform. These sites are visited by choice and sell a wide range of essential goods like contraceptives.
3. OTT platforms, like Netflix, are subscription-based services with effective parental lock mechanism already in place besides having a 94% successful rate of self-regulation.
4. There are proper Disclaimers in place upon chancing such content/material/goods and services.
5. Rather than casting complete burden of regulating content on the Government and online platforms, duty must be cast upon citizens, specifically parents, to ensure the proper use of parental locks and other tools for limiting and regulating online access.

⁹ U. Anand Does sale of sex toys violate Section 377, (Dec. 17, 2020), <https://indianexpress.com/article/india/india-others/does-sale-of-sex-toys-violate-section-377-asks-delhi-court/>.

CONCLUSION

Due to the advent of social media, it has become easier than ever for obscene content to travel and reach millions of people at a time. Recent examples have shown us how this ability of information to travel as quickly as it can, can sometimes be a downfall, especially with regard to obscenity and obscene cultural works. There is a thin line between what is artistic and obscene.

Platforms need to have more regulated moderating. Definite guidelines must be established to define what is tasteful and what is just absolutely obscene. Many platforms are open on tasteful nude art and so on, as they should be. YouTube, for example allows nudity as long as the content posted comes within the realm of education or art.

Children in particular are at risk of being exposed to obscene works, especially young teens, which if not regulated or controlled by parents or guardians, can lead to serious mental and physical health problems, which is why all internet platforms have a vested responsibility to properly regulate obscene content and protect them from being released into the mainstream, and into the hands of children and so on.

JCIL