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OBSCENITY IN THE INTERNET AGE AND INTERMEDIARY LIABILITY

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INTRODUCTION

As law is dynamic and not a static one the sphere of law is also changing from time to time and place to place also at a given point of time law may be different at different place of a country the concept of obscenity would differ from country to country, society to society, region to region depending on the standard of morals of contemporary society.

Obscenity may be moral as well as legal but it is the legal obscenity with which are concern here The definition of obscenity is depend upon the nature of society in which the prohibition is to operate.

In this article I wish to draw the attention of this aspect of individual interest vs societal interest as it is balance between freedom of speech vs public decency and morality.

I will start from the origin of obscenity and its situation in the different countries and then I will show the position of obscenity in India under the constitutional guaranteed fundamental rights and under the Indian penal code 1860 and under the Information Technology Act, 2000 covering its exception and burden of proof and highlighting the change occurred by the amendments in the information technology act.

I will go through the case laws in which the various test were followed showing the obscenity jurisprudence in India from Hicklin test to community standard test, the test of ordinary man, the rule of social purpose and profit, the rule of strict liability under Indian penal code to intermediary immunity (safe harbour regime under European law) under information technology act.

ORIGIN

"Obscenity is the legal concept used to characterize sexual material as offensive to the public sense of decency"[1]

Since the legal obscenity is different from moral obscenity as the scope of moral obscenity may be wider than the legal obscenity because it is only that area which is protected by the law falls

[1] Obscenity (no date) Encyclopedia Britannica. Available at: https://www.britannica.com/topic/obscenity.

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under the legal obscenity.

The restrictions on art and literature was present in ancient times restrictions on the content of literature and works of visual art have existed since ancient times it was in the 4th century for the first time the roman catholic church banned heretical works.[2]

By the middle ages huge work was banned and it was in 1542 pope paul suppresed heretical and immoral books.[3]

With the advancement of technology and the social phenomena of people the law of obscenity was also changed in the 15th century especially with the development of printing press and As the books and prints containing sexually explicit material was widely available by the 17th century throughout the Europe publishers and distributers were arrested by the government and church authorities. Such kind of instances also occurred in various countries as also in japan where the colour woodblock printing ended up creating a sizable industry in erotic pictures.[4]

In England

In England the law relating to obscenity was not there because of which in the early 18th century the defendent charged with obscenity are set free and temporal courts failed to pass judgment for want of any law proscribing publication of obscene material. It was with the passing of the obscene publications act 1857 in the Great Britain publication of obscene material was prohibited it was the first legislation in England dealing with publication of obscenity.[5]

Though the definition of obscenity was not defined under the act and was defined in Britain in *Regina* v. *Hicklin* (1868) known as Hicklin test in which the court held that obscene material is marked by a 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."

In USA

The first amendment to the United States Constitution adopted on December 15, 1791.

Wherein absolute prohibition was imposed on the abridgment of freedom of speech. Since the constitutional provision contained no exceptions, these had to be evolved by judicial decisions. It was in the case of *Chaplinsky* v. *New Hampshire*[6] , wherein the courts recognized "obscenity" as an exception to an absolute freedom guaranteed by the American constitution.

[2] Id.
[3] Supra note 1.
[4] Id.
[5] Id.
[6] 315 U.S. 568.

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USA state governments in the 1820s began passing obscenity laws and 1842 the federal government enacted legislation that allowed the seizure of obscene pictures. Comstock act 1873 was one of them which provided for the fine and imprisonment of any person mailing or receiving "obscene," "lewd," or "lascivious" publications.[7]

Until the mid of 20th century, the U.S. courts followed the definition of obscenity as followed in Hicklin case. In 1934 a New York circuit court of appeals discarded the Hicklin standard in permitted the novel of **James Joyce's** which was 'Ulysses' and discussed the test to decide obscenity and hold that it is to be judge from the whole of its effect and not from some isolated part of it.[8]

Shift in sexual morality in late 20th and early 21st century

With the change in time the social standards also changes and this also happened with regard to sexual morality in different countries which was reflected in 1960s when the obscenity laws in some countries such as Australia, Canada, the United States, and western European countries where the law was made liberal such instances also take place similar developments occurred in countries in eastern Europe following the collapse of communism there in 1989. For example, the development of pornography industries in the Czech Republic and Poland in the 1990s, and the government did not choose to be harder on them.[9]

Obscenity and Pornography in Indian Context

In the Constitution of India the fundamental rights provided under part 3 are not absolute because of the express provision under the same part provides exception to these rights. Article 19[10] provides for the freedoms in which article 19(1)(A) provides the right to speech and expression on which the parliament by law impose reasonable restriction under article 19(2) on ground of 1. Sovereignty and integrity of India 2. Friendly relations with foreign states 3. Security of the state 4. Incitement to an offence 5. Defamation 6. Decency 7. Morality 8. Contempt of court 9. Public order.

Hence the law of obscenity is protected on ground of public morality Obscenity under Indian penal code, 1860 Section 292 and section 354-c Obscenity related provisions under the information technology act, 2000 Sections 66E, 67, 67A, 67B, 67C the definition of obscenity

[7] *Supra* note 1.
[8] Id.
[9] Id.
[10] The Constitution of India, Art. 19.

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is provided under section 292 of IPC the primary object of this section is to prevent circulation and traffic in obscene literature. The purpose behind the provision is to preserve such moral values on which there is universal consensus Section 292. Sale, etc., of obscene books, etc.-

(1) For the purposes of Sub-section (2) book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever- sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution public exhibition of circulation, makes produces, or has in

(a) Possession any obscene book, pamphlet, paper, drawing painting, representation or figure or any other obscene objects whatsoever, or

(b) Imports, exports or conveys any obscene objects for any of the purposes, aforesaid, on knowing or having reason to believe that such objects will be sold let to hire, distributed or publicly exhibited or in any manner put into circulation or

(c) takes part in or receives profit from any business in the course of which he knows or has reasons to believe that such an object are for any of the purposes aforesaid, made produced, purchased , kept, imported, exported, convey, publicly excited, or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) Offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.] [Exception- this section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation of figure-

(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

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(ii) which is kept or used bona fide for religious purpose;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958(24 of 58), or

(ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose.]]

Section 292 was discussed in the case of *Maqbool Fida Husain* v. *Raj Kumar Pandey*[11] wherein it was stated that Section 292 IPC was inserted through the Obscene Publications Act to implement Article I of the International Convention for suppression of or traffic in obscene publications to which India is a signatory. By Act 36 of 1969, It was by amending Section 292 the word 'obscene' was provided with clear and certain meaning and also some exception were also inserted for publication of matter which is proved to be justified as being for the public good, being in the interest of art, science, literature or learning or other objects of general concern.

Before the amendment obscenity was not defined in section 292 and after amendment the section does not provide for a definition of 'obscenity' inasmuch as it introduces a deeming provision.

On perusal of this deeming provision the sub-section (1) of Section 292 it provides three conditions of whom any one of them to be satisfied and then only the deeming provision shall operate which means that a book etc. shall be deemed to be obscene if (i) it is lascivious; or (ii) it appeals to the prurient interest, or (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter alleged to be obscene.

It is only once the impugned matter satisfies any of the above three conditions then only the question of whether the impugned matter falls within any of the exceptions contained in the section would arise.

Section 67 of the Information Technology Act, 2000 relevant for the subject under discussion reads as follows:

Section 67-Publishing of information which is obscene in electronic form.--Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either

[11] 2008 CRLJ 4107 (DEL).

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description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

On the bare reading of section 292 of IPC and section 67 of the IT act it is found that the obscenity under section 292 of the Indian penal code and under section 67 of the information technology act is the same and the basic difference between two is that the former deals with all types of circulation and publication whereas the later deals with publication and circulation in electric form.

In the cyber space Section 67 of the IT act is the first statutory provision dealing with obscenity. It must be observed that the language used to define 'obscenity' in deemed form is same both under the Indian Penal Code, 1860 and the Information Technology Act, 2000 thus the test to determine obscenity is also same. Therefore, it is necessary to understand the broad judicial parameters of the law laid down by the courts in India and their development, in order to determine "obscenity".[12]

The Indian Penal Code on obscenity is based on the English Law and the supreme court in defining obscenity laid down the law and held in the case of *Ranjit D. Udeshi* v. *State of Maharashtra* wherein the test laid down by the English Court in Hicklins Case Supra was adopted in which it was held by lord Cockburn who is also known for giving the Mcnaghten's rule that "the word "obscene" in the section is not limited to writings, pictures etc. intended to arouse sexual desire. At the same time, the mere treating with sex and nudity in art and literature is not per se evidence of obscenity." It is to be considered that a matter as a whole is such which can suppress its literary importance over obscenity but if obscenity is so trivial which can be overlooked and the other test is that the matter to be seen from the perspective of the author what actually he want to convey by his work if he is using the nudity just to put forward his idea and that is justified in context to the matter to be conveyed that any person who will see it will not likely to deprave and corrupt his mind and he will also be able to see the idea conveyed through it.[13]

The 'obscenity' must be differentiated from 'pornography' the distinction between obscenity and pornography is as such of 'intention' as in case of pornography the matter is intended to arouse sexual desire but in case obscenity it is having that likelihood that it may cause mind to corrupt and deprave. As in case of Innuendo which does not shown to have defaming anybody

[12] Id. Para 33.
[13] Id. Para 34.

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but have that possibility to defame someone in his hidden meaning.

The Delhi high court in the case of ***Vinay Mohan* v. *Delhi Administration***[14] **Pradeep Nandrajog J.** while dealing with a case of obscenity held "that it is a recognized principle of law that concept of obscenity is moulded to a great extent by the social outlook of people and hence in relation to nude/semi-nude pictures of a woman it would depend on a particular posture, pose, the surrounding circumstances and background in which woman is shown with respect to the fundamental right to speech and expression the supreme court in *S. Rangarajan* v. *P. Jagjivan Ram and Ors*[15], while interpreting Article 19(2) this Court borrowed from the American test of clear and present danger which was laid down in case of Schenek v. United States[16] by Justice Holmes and observed:

That the freedom of speech and expression must be protected in the community interest and where the freedom of expression is of such a nature which may endanger the interest of community in that case such freedom should not be protected and with regard to the danger he observed that the danger he held that "The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest."

Public decency and morality cannot be endangered for the sake of protection of free speech and expression, and thus a balance approach should be maintained between freedom of speech and expression and public decency and morality and if the former encroaches upon the latter such encroachment must be rejected.[17]

Test of ordinary man

As usually the test adopted by the judiciary to check any impugned material is of a man of ordinary prudence and not an extraordinary man which is also followed in case of intellectual property rights what we known as lay observer test or lay hearer test.

Always the perspective is of ordinary man is taken and same is the situation with the concept of 'obscenity' as followed in *M. F. Husain case supra* The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man".

Some other considerations which justifies the use of obscenity are also necessary to be considered while deciding any matter the exception under section 292 is also based on public

[14] 2008 II AD (Delhi) 315 also referred in *supra* note 11 para 43.
[15] 1989 SCR (2) 204, 1989 SCC (2) 574.
[16] 249 U.S. 47 (1919) also referred in *supra* note 11 para 63.
[17] *Supra* note 11 para 64.

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good and in the interest of art, science, or literature and some other public concern.

One of them is:

Social purpose or profit

in which case we permit the obscenity because of some social message etc which overrides the obscenity and the obscenity is gets blurred in such cases because the larger interest of society example. Nudity in cases of a campaign to draw attention on breast cancer or some other physical concern relating to human body cannot by itself amount to obscenity.

But on the other hand the same nudity without any such or other social purpose can not attract immunity and is punishable.

Though the general rule of *mens rea* is also being gradually relaxed in case of obscenity under the IPC and the rule of strict liability is followed where knowledge on the part of accused is immaterial means whether he knows that the matter contained obscene content or not does not makes any difference to attract liability this is known as rule of strict liability.

In deciding obscenity the test applied in *Maqbool Fida Hussain* v. *Rajkumar Pandey*[18] is as follows:

That on perusal of the provisions of obscenity under the law and the judgments relating to that the law is well settled and clear in India as well as in other countries the court held that "On applying the said tests governing obscenity, in my considered view, the said painting cannot be said to fall within the purview of Section 292 thereby making it obscene. The impugned painting on the face of it is neither lascivious nor appeals to the prurient interests. At the same time, the person who is likely to view the said painting would not tend to be depraved or corrupted." Though the court also observed that on seeing the mother India in nude prima facie some may feel offended but that in itself is not justified to carry that matter into the shadow of obscenity and as there is no particular face of that painting which can offend anyone personally the painting also not lost its artistic value.

Keeping in view the ancient artistic history of our nation as well as culture where nudity is mostly used and community have no objection with that the court find no offence of obscenity is being committed by the artist.

The court also taken the view of artist and observed that A piece of art should not ordinary be considered to be offensive and it should also be seen from the perspective of the artist that what he tried to represent in his work and if he is successful in conveying that through use of some

[18] *Supra* note 11 para 98-99.

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nudity or sex which are not per se considered obscene and that should not be taken as offensive when it has nothing more than just nudity or sex which can easily be ignored.

With regard to the test of obscenity the major shift accrued when "More recently, in *Aveek Sarkar* v. *State of West Bengal*[19] ('Aveek Sarkar'), the Supreme Court has discarded the earlier, Hicklin test adopted in *Ranjit Udeshi* v. *State of Maharashtra*[20] ('Ranjit Udeshi'), which had focused the depraving or corrupting influence on "lascivious, prurient or sexually precocious minds" by individual or partial aspects of an allegedly obscene object."[21]

In this article the test laid down previously by supreme court was reiterated and it was observed that in Ranjit Udeshi Case we look a matter partially and from an individual's perspective means if any part of such matter contain any obscene object or it has tendency to deprave or corrupt an individual without anything more than that we can conclude it as obscene but in the aveek Sarkar case the supreme court taken a 'community standard' approach and states that nudity is not per se obscene, "unless it has the tendency to arouse feeling or revealing an overt sexual desire". A social message, such as the anti-racial message in Aveek Sarkar case, may dilute nudity from the charge of obscenity. And followed a similar standard as followed in Ranjit udeshi case and states, "Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."[22]

Now we move to the obscenity in internet age wherein it is difficult to reach the actual source of the alleged obscene material because at many times it is difficult to trace the accused who may be located in any foreign country. This created a necessity to catch those who acts as a mediater or facilitator to commit such offence through cyber space which we known as Intermediary liability which is based on the ground of necessity.

Intermediary liability

Intermediary liability was first acknowledge as a serious issue in case of *avinish bajaj* v. *state*[23] *(Nct of delhi).*

The use of market platforms, email, social networking, peer to peer network and texting

[19] (2014) 4 SCC 257.
[20] AIR 1965 (SC) 881.
[21] Geeta Hariharan, "our unchanged sexual selves: a case for the liberty to enjoy pornography privately", 7 NUJS L. REV.89 (2014), available at http://nujslawreview.org (last visited on 31/03/2022).
[22] Id.
[23] 2008 Delhi HC.

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services in the cyber space makes it difficult to find the accused.[24]

This is the reason why the legal process not restrict itself to the accused but also to the facilitators of cyber space or the intermediary who causes the wide circulation of illegal material there is a chain of intermediaries who are responsible for such circulation they are the internet service provider (ISPs) such as, airtel and Vodafone whose work is to physically connect with the internet, web based service providers and platforms such as yahoo etc, and word press enable us to share content.[25]

The main function of these intermediary entities is that they function as gatekeepers to the illegal content. making gatekeepers liable for enforcing law is a common choice example; instead of merely forbidding underage individuals from driving cars it also imposes liability upon their parents since they are gatekeepers facilitating the misconduct.[26]

As the criminal law have two essential characteristics such as *Mens Rea* and *Actus Reus* and liability can not be imposed on any person if he lacks any of these characteristics on its part and hence law also provides Immunity under the information technology act.

Section 79 of the information technology act provides conditional immunity which is as follows:

Section 79 Exemption from liability of intermediary in certain cases

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if–

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not–

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if–

[24] Chinmayi Arun, "Gatekeeper liability and article 19(1)(A) of the constitution of India", 7 NUJS L. REV. 73 (2014), available at http://nujslawreview.org last visited on 04/04/2022.
[25] Id.
[26] Id.

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(b) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act;

(c) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner;

Explanation — For the purpose of this section, the expression 'third-party information' means any information dealt with by an intermediary in his capacity as an intermediary."

Umbrella of immunity

Prior to amendment, section 79 offered immunity to intermediaries with respect to offences under the it act only and not for offences under other legislations means in mms scandal the bazee.com was not immune from liability under Indian penal code.[27]

Though you may suggest that there was no mens rea as intention or knowledge on part of Avinish Bajaj but was attached with liability because of strict liability principle where lack of knowledge is irrelevant under section 292.

Consequences of Strict Liability Standard

In Avinish bajaj the Delhi high court followed Ranjit Udeshi case and find managing director of bazee.com guilty though supreme court acquitted him on procedural grounds and observed that as the company was not made party and principle of vicarious liability does not apply under the IPC.

After amendment under IT act internet intermediaries are conditionally immune not only under IT act but also under under IPC, as now the immunity extends "under any law for the time being in force" however booksellers and librarians are not having any kind of immunity.

SAFE HARBOR REGIME

It is a international standard contained in European union directive on e-commerce which we have accepted as intermediary liability immunity.

[27] The Information Technology (Amendment) Act, 2008.

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BURDEN OF PROOF

The burden of proof was also changed with the amendment. The distinction which is as follows Prior to amendment –it is upon the intermediary to prove that "the offence or contravention was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence or contravention to avail the safe harbour protection."[28]

Post amendment- however after the amendment the intermediary receives safe harbour protection if it does not initiate transmission, select the receiver of transmission and select or modify information contained in the transmission and it also observes 'due diligence' while discharging its duties.[29]

Now it would be up to prosecution to prove against the intermediary that it did not comply the due diligence for protection which means knowledge is essential for intermediary to be liable.

Due diligence may be shown by technical mechanisms like filters and inbuilt storage intelligence which can block/eliminate the alleged objectionable and obscene content

The degree of care expected by term 'due diligence' is classified by information technology (intermediary guidelines) rules, 2011

These rules require intermediaries to remove 'grossly harmful, obscene, blasphemous, defamatory, disparaging, harmful to minors and any unlawful content' within 36 hours of receiving actual knowledge that it is being stored, hosted or published on its system.[30]

The process to remove content by intermediaries was also settled down by the supreme court in *Shreya Singhal* v *Union of India*[31] supreme court held that to bind the intermediary to remove content the internet users have to give notice of court order requiring removal of content, but the order of court is required in cases relating to Article 19 of the constitution and in case of other matters such as IPR infringement cases the affected party can direct approach intermediary to remove disputed content.

Conclusion

The law of obscenity is basically the law based on morality and public decency the jurisprudence of obscenity in our country was based on English law from Hicklin test to contemporary standard test of US courts as we have so far tried to define obscenity and now the matter to taken as a whole to check whether it is obscene or not.

[28] *Supra* note 24.
[29] Id.
[30] Id.
[31] (2013) 12 SCC 73.

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In this electronic age the cases of obscenity in cyber law are more and the intermediary immunity is granted to them if they acted with due diligence

So obscenity is a dynamic concept as the public morality and decency changes the law on obscenity will also change and will enter in a new phase.