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The Art of (De-)Banning Books: Towards an Aesthetics of Obscenity

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ABSTRACT:

This paper is intended to be an exploration of the disjunctions between the domain of aesthetic theory and the domain of law through an analysis of the varied definitions that can be seen coming out from these different domains. While the legal definition of law (that can be gleaned from various judgements on books that have been banned) focuses on social function of art and morality of the reading subjects, aesthetic theory seems to imply that a fixed definition may not even be possible given the subjective nature of the reception of art. Cases of books that courts considered banning on account of obscenity have been taken up as this is where the clash between these two ideologies can be best seen through a tussle between Section 292 of IPC and Article 29 of the

Indian Constitution. The paper thus essentially deals with the question of whether aesthetics and obscenity are reconcilable without necessarily locking horns with law.

KEYWORDS:

Law, Culture, art, Article 19, obscenity, aesthetics

Through an analysis of legal judgments following trials of books that have been subsequently banned in India on the grounds of being 'obscene', this paper seeks to explore the contours of what comes to be defined as 'art' and how that definition gets formed. A crude distinction between the 'aesthetic' and the 'obscene' was linked closely with distinctions made within the reading public on the basis of class, gender and age (all of which remain notably indistinct) on the one hand, and the formulation and implementation of generalized laws on the other, based on the idea of 'moral harm'. I will try to analyse the discrepancies that arise when judges are faced with this paradoxical task that has always informed aesthetic theory: that of having to pass a single 'objective' judgment (/establish a single theory) that explains, limits and (de-)legitimizes everyone's experience of a particular piece of art while at the same time being faced with the necessity to concede that subjectivity forms the very bedrock of aesthetic judgments. The juries' claim to knowledge of not just the author's intention but also the effect of the work on people of different ages and being able to calculate, as if with mathematical precision, the residue left after subtracting "obscenity" from what

is called "artistic value" are further things that draw attention to themselves. Triggered by this tension apparent between aesthetic judgments in the sphere of art and aesthetic judgments in the court room, this paper will explore two strands of critical thought resulting from this- one that answers by considering aesthetics and morality as separate projects altogether and hence value art for art's sake; and the other that answers by asserting that aesthetics and ethics are parts of the same project. After an analysis of these strands though, the paper will still end with the question- is an aesthetics of obscenity possible?

The three cases that will be explored at some length in this paper are: Ranjit D. Udeshi v. State Of Maharashtra, 19 August, 1964 (that convicted a seller of a copy of D.H. Lawrence's *Lady Chatterley's Lover*), Ranjit Udeshi and Ors. v. The State, 6 February, 1962 (the Maharashtra High Court case that precedes the Supreme Court case) and Samaresh Bose and Another v. Amal Mitra and Another, 1985 (in which the author of the novel *Prajapati* and the publisher were charged for obscenity). Out of the various trials of art, those that revolve around 'obscenity' are particularly relevant for this paper for certain reasons. First, aesthetics and morality seem to be both separated from as well as inextricably linked to each other in these judgments, opening up the possibility for exploring the nature of this link and its relevance to what we call 'art'. Second, the definition of 'obscenity' remains notably vague in all such judgments, making visible the aggression involved in invalidating certain definitions in order to uphold other, equally vague ones that vary in their application from case to case. Third,

since definitions and their application vary so much, the issue of who is carrying out this process becomes significant. This brings up a related and pertinent issue of who the apt judge of a work of art is – a court or an art critic. The frequent absence of art critics even as witnesses and the undermining of their evidence as irrelevant (on account of being mostly oral and not empirically based on Section 292 of the IPC) are once again, issues of concern.

While tracing the history of the concept of obscenity in India, attention has often been drawn to the debates following the Indian Cinematograph Committee's report in 1928. When the (stated) danger of Indians' morality being depraved by watching 'Western' (more sensuous and 'open' in terms of morality) films was felt, this committee was set up and asked to give a report on the effect of films on Indians. It is then that questions of censorship of 'immoral' films came up so distinctly not only because Indians' morality might be depraved but also because it was considered demeaning for white women to be shown involved in amorous activities on the screen while Indians were watching them. Madhava Prasad in his essay "The Natives are Looking: Cinema and Censorship in Colonial India" points at what several Indian nationalists realized was mostly a ploy of the British to maintain what Partha Chatterjee later called "rule of colonial difference"[1] and similarly Priya Jaikumar points at economic gain as the ulterior motive in her essay "The Indian Cinematograph Committee Interviews (1927)". Issues of moral harm (without the use of the term 'obscenity'), the division of the

[1] Partha Chatterjee as quoted by Madhava Prasad, 11.

audience and the division of space, have since been the staple elements as it were, for all debates around censorship till present times.

In the same breath however, we must mention that though the ICC interviews are perhaps the most detailed written records, these issues or their precursors had already been witnessed in the sphere of literature (particularly literature coming from Indian authors) way before the twentieth century.[2] Charu Gupta in her book *Sexuality, Obscenity, Community: Women, Muslims and the Hindu Public in Colonial India* traces the representation of sensuousness, passion and amorous activities in Indian literature back to the 'riti kal' poets between the mid sixteenth and mid-nineteenth centuries and the subsequent nationalist (/Hindu) backlash against such representations through who we know as 'chhayavad poets' (Bharatendu Harishchandra, Sumitranandan Pant and others) but interestingly, both (riti kal and chhayavad poets) were censored out by magazines considered both nationalist and elitist. This renders problematic the simple picture of colonial censorship of Indian literature as censorship and moral uprightness became closely linked with the construction of a Hindu identity (distinct from 'Western' identity) characterised by chaste womanhood and male prowess.

Thus at least in this distinction between high and low art, between respectable interest and what is called "prurient interest" as well as between aesthetics and obscenity, Section-292 (which is pertinent to this discussion) of the Indian Penal Code

[2] Some of the responses to the ICC interviews stressed the particularity of cinema (as compared to literature) with its visual appeal and its ability to affect even those who cannot read or write.

does seem to be in congruence with the idea of morality and obscenity already prevalent by the time of its formulation in 1925 (even though the British influence on Indian morality and on the formulation of this act are not to be negated). Section-292 makes punishable any content that is "lascivious", "appeals to the prurient interest" and/or "if its effect, or (where it comprises two or more distinct items) the effect 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"[3]. However, with the terms 'obscenity', 'art' and 'public good' never clearly defined and despite the clauses (making exceptions for books that are for the public good and aid science, art and literature in any manner or are religious) added through amendments in 1960 (in order to comply with the International Convention for suppression of or traffic in obscene publications to which India is a signatory)[4], Section-292 has often been considered to contradict Article 19 of the Indian Constitution that guarantees freedom of speech and expression but allows for "reasonable restrictions" being placed on this right. One of the cases cited as those where this restriction may be exercised is when "decency" and morality are at stake. This confrontation between Section-292 (with its vagueness about definitions) of the IPC and Article-19 of the Constitution (with its vagueness about the restrictions it allows)

[3] http://www.indiankanoon.org/doc/1704109/

[4] Drawn from the well-known Hicklin test with minor changes.
For details of the Hicklin test, see Ranjit D. Udeshi v the State of Maharashtra, 1964 (Sections 18, pp. 73-76)

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and the implications of this confrontation form primarily the focal point of all the cases under consideration. [5]

The Supreme Court judgment in Ranjit D. Udeshi v Stare of Maharashtra (1964) addresses this and other issues discussed above. What is at issue in this case is whether a bookstall owner should be punished for selling D.H. Lawrence's novel *Lady Chatterley's Lover* which, allegedly, is an 'obscene' book.[6] The court upholds the Hicklin test, asserting that "It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases" (Section 75 of the case). The court then defines obscenity using the dictionary as "offensive to modesty or decency; lewd, filthy and repulsive" (which could include not only sexual excesses but even excessive violence based on caste or other issues) but subsequently as treating with sex in a manner appealing to the carnal side of human nature, or having that tendency" (Section 77 of the case).

Then follows the difference between obscenity and pornography as the latter has a clear intention to arouse sexual desire but the former might tend to do so without the intention necessarily being there. Pornography is not even considered 'art' but

[5] In the English context, this debate could be traced back to the controversy over photographs (sold on footpaths) of Victorian nude paintings (on display in museums). For details, see Nicola Beisel, "Morals Versus Art: Censorship, The Politics of Interpretation, and the Victorian Nude"

[6] For a complete transcript of the case, see http://www.indiankanoon.org/doc/1623275/
All further references to and quotes from this case will be based on this transcript.

"obscenity may be overlooked if it has a preponderating social purpose or profit". This, then, forms the basis of the legal definition of art: "social purpose", "profit", not offensive to public decency and never filthy and/or lewd. It is thought to be "clear" that "obscenity by itself has extremely 'poor value in the-propagation of ideas, opinions and information of public interest or profit'." It is believed to be possible to subtract (with mathematical precision) the amount of obscenity in a text from the total social purpose or value to society to judge whether the residue should be considered art for society's sake or "dirt for dirt's sake" (section 70 of the case).

The question of how well does this conception of art sit with the definitions (or rather hypotheses) offered by artists, art critics and aesthetic theorists is something we could fruitfully investigate. Let us now take up one by one the issues arising from this detailed judgment: the effect of art on the receivers (and ways of predicting that effect); and as a subset of this, the idea of moral harm (whether works considered obscene can really cause moral harm and whether censorship can prevent it); and finally, the relationship between morality and art (and whether art must be loyal to morality in this relationship).

The Effect of Art

Perhaps it is safe to begin with the premise that art does have an effect on those who receive and perceive it. But is this effect knowable? This point is significant because legal judgments place such great emphasis on the effect of art in depraving the morality

and offending public decency. In the case cited above, the court does not give any empirical evidence by which we know the effect that Lawrence's book has had on the public reading it. To stand in for that, we have a detailed description of the author's stated intentions for writing the book. Lawrence's stated intention for writing the book, we are told, was to "shock the genteel society of the country of his birth which had hounded him" (Section 78 of the case) and this is the shock that the Indian court is trying to protect the Indian public from. The question that remains unanswered is- why would the Indian public, so far removed in place and time from the British genteel society feel the same kind of shock in the same way? And how do we know that the author's intentions (if knowable in the first place) will be successful and the public will be shocked at all? The court's solution to this problem is to pose as an "average reader" as it does in the High Court judgment in Ranjit D. Udeshi and Ors. v The State, 1962[7] where the court does not refute that there can be "beauty of the literature" even in obscene books (Section 19 of the case) but maintains that the average person will not see it and will only have his sexual desires aroused by reading erotic works. The court can stand in for and judge like an "average person" whose mental abilities apparently lie somewhere between those of an intellectual and of one with a "depraved mentality". The task that judges perform in order to judge a book obscene or otherwise becomes apparent quite ironically in the Supreme Court judgment in Samaresh Bose and

[7] See the complete transcript of the case at http://www.indiankanoon.org/doc/455682/
All further references to the case are based on this transcript.

Another v. Amal Mitra and Another, 1985[8] (the author of the novel *Prajapati* and the publisher were charged for obscenity). A lengthy passage from the judgment is worth quoting:

> …including the question of obscenity, the Judge in the first place should try to place himself in the position of the author and … try to understand what is it that the author seeks to convey and whether …(it has) any literary and artistic value. The Judge should, thereafter, place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have ... A Judge, should thereafter, apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of section 292 I.P.C.... (Section 20 of the case)

The seeming impossibility of the task of placing oneself in the place of people of different age- groups and then "dispassionately" giving an "objective assessment" strikes one in the face, only to be made more overt by a consideration of how different the effect of a piece of art might be on different people even within the same age group. Further art does not seem to work through a knowable cause-effect relationship. Andrew Koppelman, in his essay "Can Obscenity Cause Moral Harm", establishes quite convincingly that "it is impossible for the law to predict the consequences of the

[8] For complete transcript of and future references to the case, see http://www.indiankanoon.org/doc/1383068/

dissemination of any text, picture, or film" (p.1672). He draws from Catherine MacKinnon's argument that unlike in a science laboratory experiment where variables can be strictly controlled and cause-effect relationships established with certainty, it is not possible to do the same in matters of art for the simple reason that we never precisely can know the various ingredients that go into the making of an art-work. Similarly moral harm, one of the slated effects of censorship cannot be denied existence (particularly when a specific age group is considered) but again, it might be nearly impossible to pin down the cause. And then to generalize on the basis of that particular age-group or that particular social class of readers would fail to do justice to the "average person".

Can censorship prevent moral harm?

What logically follows from the above discussion is that if the effect of art is not precisely knowable, it must be extremely difficult to effectively censor it out. However there are more convincing arguments that could be advanced in this regard, though they might be derived from contexts other than obscenity and trials of art. Judith Butler, in her book *Excitable Speech: A Politics of the Performative,* discusses hate speech and consequently the issue of when speech can be considered conduct. A comparison of this text with the discussion at hand seems possible due to, to begin with, the similarity between the idea of defamation caused due to hate speech and moral harm caused by obscenity: in both cases it is the use of language that comes to be treated as conduct

(something having a tangible effect on the one it is directed at) in certain contexts. Thus Butler's argument about the nature of language and speech-acts can very well be applied in this context. Butler offers the argument that a speech-act always exceeds itself because: first, speech-act is at the same time a bodily act and the body of the speaker conveys more than the words themselves convey; second, language of the present includes references to the past and future as well which are not encapsulated in a given speech-act. It follows that the power and effect of a speech-act cannot be fully grasped by considering the context of its occurrence alone, thus complicating further the task of judging language, a speech-act and by extension, a literary text.

Another significant aspect of Butler's text is that of repetition of the offensive words and the trauma associated with it, pointing out that even proposals to regulate offensive speech and/or representations cannot do without repeating and citing at length the words and representations that have had an offensive effect, "rehearsing in a pedagogical mode the injuries that have been delivered through such speech" (Butler, 37). Attempts to regulate offensive speech thus inevitably bring that speech and those representations into re-circulation in another context. In the Ranjit D. Udeshi case the complete text of Lawrence's *Lady Chatterley's Lover* attached with the petition with offensive sections specifically marked out is a case in point. Further, practically speaking, given the cyber age, even judges are known to have admitted that even if a book is banned, people eager to read it (even children) will manage to find it through

various sources. In light of all these it seems pointless to hope that censorship will be able to prevent any moral harm.

Conclusion: Morality and Art

Mr. Garg, the book-seller in Ranjit D. Udeshi was convicted for selling a copy of *Lady Chatterley's Lover* while Samaresh Bose (the author of *Prajapati*) in Samaresh Bose and Another v. Amal Mitra and Another was acquitted on the grounds that the vulgar words used in the novel are necessary for the theme of the novel. Through the above discussions we established that on several counts, aesthetic judgments in the sphere of art and aesthetic judgments in the court room are in observable tension with each other: that we can possibly not deem something absolutely 'obscene' as the effect of the same piece of art can be radically different on different people (with age not being the only variable), i.e., art is not characterized by this empiricism that law recognizes; even human nature and responses radically vary from person to person and thus the effect is not just impossible for law to predict and/or generalize but is also law's blind-spot (for the effect is unknowable and when felt, is immeasurable); while law insists on seeing art within a framework of "social profit" and "moral value" or amoral "artistic value", the messy relationship between art and morality seems to be a matter of debate even between aesthetic theorists themselves. This last point renders problematic the issue: who the judge of obscenity in art should be.

In Ranjit D. Udeshi v. State of Maharashtra, Mulk Raj Anand's verbal evidence (through an analysis of Lawrence's novel) that "the novel was a work of considerable literary merit and a classic and not obscene" was turned down simply because as the Supreme Court suggests- "The question does not altogether depend on oral evidence because the offending novel and the portions which are the subject of the charge must be judged by the court in the light of s. 292, Indian- Penal Code, and the provisions of the Constitution" (Section 68 of the case). On the other hand, in Samaresh Bose (the author of *Prajapati*) in Samaresh Bose and Another v. Amal Mitra and Another, the Supreme Court relies heavily on other authors and art critics including Budhadev Bose, and even seems to speak critically of the trial court judges who did not give any importance to the testimonies of other authors. Budhadev Bose totally rejected the idea of Prajapati being obscene by highlighting how the work does an important service to Bengali literature and by revealing parallels between this and several works of Rabindranath Tagore to insist that if these things were not considered obscene then, they shouldn't logically be considered so in the present day. However even if art critics and authors get to be key witnesses in such cases, they rely (as in the two cases cited above) for their judgment, on the novel's literary merit and service to art and whether or not the work offends the sensibilities of those who read it. But the question of the relationship of art with morality (whether art must always strive to not be obscene; whether obscenity can have aesthetic possibilities and so on) remains largely unexplored. To this last segment of the paper we will now turn.

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Such witnesses, driven by the desire of getting an acquittal for the accused, often conform to the same standards as those followed in the court room (because they must), thereby concealing the nature of the misfit between aesthetic judgments in these two different spheres. But is it possible to have a conception of art that offers a reconciliation between the two spheres at all? Noel Carroll in his essay "Art and Ethical Criticism: An Overview of Recent Directions of Research" offers an overview of the various positions on the relationship of morality and art, ranging from autonomism, anticonsequentialism and others to the newer approaches including what he calls 'Cultivation Theory' and 'Simulation Theory'. Cultivation Theory, seemingly the stronger approach, offers that literature is not meant to teach us morality but to sharpen our faculties to decide for ourselves by presenting us innumerable options and their possible outcomes. On whether fictional stories and their fictional outcomes are apt for the job, the cultivation theorists would say that "insofar as the imagination (the capacity to entertain contrary-to-fact situations) is integral to moral judgment, fictional explorations of what such and such would be like are… relevant to keeping our powers of moral judgment in proper order…" (Carroll, 367). The power of imagination (being able to think from another's position) required not only in law-making but also interpreting and executing law makes this a significant point.

However it seems that even cultivation theorists rely on some fixed notion of morality as they assert, in Carroll's words, that "the quality of the moral experience" the art-work shapes or prescribes can be evaluated: moral understanding and promotion of

reflection in the receivers is considered desirable while confusing the receiver's moral reflection is considered undesirable. It seems that Cultivation Theory does move towards a newer sense of literature and art in general but fails to free art of morally judgmental overtones like those expressed by the High Court in its condemnation of "indulging in sex relation under the roof of the husband" (Section 15 of the case) in Ranjit D. Udeshi v. The State (1962). Thus while Cultivation Theory might allow for toleration of obscenity in art because it augments the thinking process, it is unclear how it will respond to the idea of obscenity positively adding aesthetic/artistic value to an art-work or be considered an art in itself. Separating rigidly aesthetics and morality will take us nowhere because there is literature that is strongly moral in its intention and there are moral writings that are highly aesthetic. The development of an aesthetics of obscenity is possible first by maintaining a distinction between ethics and morality (with ethics being morality with respect to others in the larger order of things – society and so on; and morality being a personal sense of ethics). Lawrence Liang, in his lectures, analyses Vladimir Nabokov's controversial novel *Lolita* which, as he suggests, one likes for the style (personal way of looking at things) but cannot like for the pedophilic content. The solution that Liang offers to this aesthetics/morality dilemma is what he calls 'ethical aestheticism' which derives from considering aesthetics and ethics as "part of the same project". Ethics, he asserts, when understood in the classical sense of being other-directed (being able to see from another's viewpoint) is perfectly compatible with what art does. As already discussed earlier in this paper, I extend this argument to consider the role of the imagination in the making, interpretation and

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implementation of law. This idea of ethical aestheticism is similar to Cultivation Theory in that it professes that art is not meant to preach morality or maintain a specific moral order but to show us the various possibilities and sharpen the power of moral judgment.

Let me conclude with the consideration of one question that still comes to mind regarding this idea of ethical aestheticism- would it still stand good when considered along with cases of indecent representation of women? This issue becomes important given our consideration of speech-acts as performative acts whose effects can neither be accurately predicted nor be undone (as discussed above). Indecent representations are covered in section 499 of the IPC which holds that "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, of defame that person." The only other harm recognizable in this regard is the depraving of public morals. Interestingly, in the Indian context, it seems difficult to find cases of defamation due to literary material though cases of defamation through journalistic lack of ethics, misquoting and so on abound. In the one such case available, Neelam Mahajan Singh vs Commissioner Of Police (1 March, 1996), Neelam Mahajan had complained that her "chastity and dignity" and "Sensibilities as a women" had been hurt by Khushwant Singh's book *Women and Men in My Life*. The court however converted it into a case of obscenity (rather than strictly

indecent representation) and concluded that since Khushwant Singh has not crossed the line of obscenity, the question of such hurt does not arise.

It does seem that it might be interesting to test the idea of ethical aestheticism against one such case where defamation has actually occurred (through literature). Further what could be added to this idea is an analysis of the concept of beauty in art where beauty could be understood in its formal characteristics (internal consistency and flow, and so on) and the skilful use of language. In the final analysis, it does seem safe to conclude that this understanding of art and law (that reduces the differences between the two spheres) that we could perhaps hope to reconcile the aesthetic judgments coming from the different spheres and also begin to develop an aesthetics of obscenity.

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