Law and the Obscene Image: Reading Aveek Sarkar v. State of West Bengal

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This paper investigates the encounter of Law with aesthetics. Grounding the analysis in psychoanalytic reading of law, the author argues that the legal interpretation of an erotic image is marred by interpretive violence in the contemporary judicial discourse, which not only erases the image (by fixating a legally permissible meaning on it) but eliminates any possibility of foregrounding the erotic subject in Law. Erotic justice in so-called progressive cases is determined by confining the image in permissible emotional categories (in this case, heterosexual, marital love). This paper by analyzing a recent Supreme Court decision attempts to show how the focus on the explanatory text obliterates the aesthetic dimension of the image which may be saying more than what Law can presently understand. This erasure constitutes a simultaneous erasure of the feminine in Law.

The genesis of modern Law is marked by a foundational violence, which repeats itself in every act of legal interpretation.[1] The institution of Law as the ultimate language of rationality necessitates grammar of violent exclusion. The formation of a unified, rational, legal self demands an erasure of multiplicity of worldviews and ways of being, by characterising them as irrational and logically the 'Other' of Law. The long history of the paradigmatic separation of Law from the non-Law is an account of Law's struggle of claiming the domain of Reason by the *othering* and marginalisation of primordial, mythical, emotional and artistic.[2] The distinction of legal and non-legal is, thus, marked by the articulation of Law's Reason as significantly different from, and exclusive to, all other forms of expressions and cosmologies.

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1 Walter Benjamin, *Critique of Violence, in* Selected Writings, [M. Bullock & M.W. Jennings, (Eds.), 1999].

2 *See* Peter Goodrich, Languages of Law: From logics of memory to nomadic masks (1990).

Law has come to be the primary actor in the project of European modernity as it sieves out "the non-legal, the extraneous, the other- in particular the aesthetic, the beautiful and the image."[3] The genealogy of Law furnishes diverse accounts of the repressed and the hidden dimensions that form and constitute, what Pierre Legendre and following him, Peter Goodrich calls, "the unconscious of Law".[4] In this genealogical (and psychoanalytic) enquiry, the image, emotions and the feminine emerge as the repressed parts of modern Law. In the event of unconscious spilling out, the rational self of Law is disrupted. One such event is the encounter of Law with its other: aesthetics. Law and aesthetics seem to be situated as polar oppositions as law claims to be rooted in rationalistic thinking whereas art by definition transcends the rational to be artistic. Thus, their confrontation with one another needs a closer diagnosis. This brief comment is an instance of such an account of Law's encounter with aesthetics whether as an image or as a visual. (This also marks the beginning of an affective interpretive exercise that jeopardises the site of courtroom as the space of pure reason. Further, when the image is an erotic image, especially a feminine erotic image, the affect unravels the desires and erotics of Law itself. The question of Law and Aesthetics raises many other sub-issues *viz.* how to understand the transformation of judges' role from interpreters of Law to critics of art or how to imagine a dialogue between the two completely distinct disciplines of Law and Art?[5]

The Supreme Court of India in the recent case of *Aveek Sarkar* v. *State of W.B.*[6] was called upon to adjudicate on the criminality and obscenity of a semi-nude image that had appeared in a magazine in 1993. According to the Court, the contemporary moment of history demanded a change in the interpretive approach on the question of 'obscene' and thus, the court rejected the "Hicklin test" in favour of the "community standard test".[7] One way to see this move to the "community standard test" is to view it as symptomatic of the progressive Indian judiciary[8]- an approach that traces the history of the notion

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[3] C. Douzinas & L. Nead, Law and the Image: The Authority of Art and the Aesthetics of Law 4 (1999).

[4] Law and the Unconscious: A Legendre Reader [Peter Goodrich (Ed.), 1997].

[5] Alison Young, Judging the Image: Art, Value, Law (2005).

[6] (2014) 4 SCC 257.

[7] It may be noted that this case is not the first case in which this shift has been made. In *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780, the Supreme Court observed: "Our standard must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer." The standard set in *K.A. Abbas* has been followed by the Supreme Court in subsequent cases pertaining to obscenity.

[8] *Obscenity: The Supreme Court discards the Hicklin Test*, Indian Constitutional Law & Philosophy (7-2-2014), <http://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/>; *Obscenity in today's context*, The Statesman, (15-5-2014), <http://www.thestatesman.net/news/54626-Obscenity-in-today-s-context.html>; *Move Over, Ranjit Udeshi: The SC on Obscenity*, Glasnost (25-2-2014), <http://glasnostnludelhi.wordpress.com/2014/02/25/move-over-ranjit-udeshi-the-sc-on-obscenity/>.

of 'obscene' and the obscenity laws through a comprehensive, continuous and linear trajectory- a teleological movement from past to the present, from conservative judgments to liberal and progressive decisions. However, the methodology adopted in this paper is different. Following Foucault, "History becomes 'effective' to the degree that it introduces discontinuity into our very being- as it divides our emotions, dramatises our instincts, multiplies our body and sets it against itself."[9]A genealogical account of history deals with events in all their discontinuities, complexities, multiplicities and messiness "and if it chances upon lofty epochs, it is with suspicion- not vindictive but joyous- of finding a barbarous and shameful confusion".[10] Thus, the author would not attempt to situate this case within the frame of a discursive shift in the judicial interpretive approach. Instead, the underlying objective of this analysis is to unravel the disarray and incoherence of Law's regime of reason by examining the judicial "slips" in the narrative script of the present case.

I. Seeing the Image through the (con)text

The image under consideration was a photograph of the German tennis player, Boris Becker with his fiancée, Barbara Feltus. The couple posed nude for the camera which appeared on the cover page of a magazine in 1993 with the caption, 'love champions over hatred'. The moral sensibilities of a lawyer were offended with this nude picture which led to the present case. The law on obscenity (section 292 of the Indian Penal Code[11]) was invoked and the judicial system was called upon to protect the morality and public order by censuring the editors of the concerned magazine.

At the outset, the Court emphasised that the judging of the image requires it to be viewed in a broader context. For the Court, appreciation of the context meant setting the (provocative) visual or image against the (explanatory) speech or narrative to understand the meaning of the former. So the Court examined the statements that appeared within the photograph. The title of the cover story said: *"Posing nude, dropping out of tournaments, battling racism in Germany. Boris Becker explains his recent approach to life- Boris Becker Unmasked"*. Further, excerpts of Becker's interview which appeared in the article were looked into by the court. One of his comments, which the court scrutinised, is as follows: *"the nude photos were supposed to shock; no doubt*

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[9] Michel Foucault, *Nietzsche, Genealogy, History*, *in* The Foucault Reader 76 [Paul Rabinow (Ed.), 1984].

[10] *Id.,* at 88.

[11] As per Section 292 of the Indian Penal Code "a 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 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."

about it…What I am saying with these photos is that an inter-racial relationship is okay".

The Court found that posing nude *for* battling racism "is okay", and hence, the photograph is not obscene. Here it appears that the ascertainment of obscenity or criminality of the image depended upon the speech or the accompanying narrative text, ironically marking the erasure of the visual. The impossibility of reading the image *as an image* is clear from the 'context' based enquiry done by the Court. The Court had to rely on the accompanying words that in turn explained the meaning of the image. It is not to say that the context is always only understood by some accompanying speech; for example in the *Bandit Queen case*[12], where the issue before the court was to adjudicate upon the motion picture based on the life of rape victim turned dacoit, the question of obscenity was evaluated in the overall context of Phoolan Devi's life history. The argument that the author attempts to foreground in this paper is that the image is never seen or appreciated on its own terms by Law. This impossibility is not on account of judges' limitations in interpreting art-work but, following Goodrich, due to Law's *fear of the image*. This fear is rooted in the fact of stark rationalistic foundations of *modern* Law which are premised on exclusion of the domain of anything that falls outside the domain of Cartesian rationality including aesthetics.[13] The image is necessarily relegated to the periphery in an exercise to constitute the rational centre of modern Law. Thus Law's encounter with the image reminds it of its own self, its own repressions and inconsistencies. The only way then to guarantee neutrality and impartiality embodied in *Justicia* is by blindfolding and protecting it from the seduction of the image.[14]

In the present case, in holding the image not obscene, and thus "not guilty", Law remained blindfolded to the image. The "photos were supposed to shock" but the Court refused to appreciate the shock value of the image by restricting and confining its interpretive focus to the accompanying text. The Court therefore refused to see the erotic, sensual, and the sexual in the image, all of which was obliterated under the textual logic. In other words, the progressive interpretation of Law was founded on the annihilation of the erotic image. It is important to note that the Court could not simultaneously find the image erotic, sensual, sexual (and thus morally shocking), and yet not legally obscene. Sex, desire and sensuality will always be obscene for Law and Law would necessarily have to hide these erotic images. In these terms it is

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[12] The court observed: "It is the serious and sad story of a ... turning: a village-born female becoming a dreaded dacoit. An innocent who turns into a vicious criminal because lust and brutality have affected her psyche so. The film levels an accusing finger at members of society who had tormented Phoolan Devi and driven her to become a dreaded dacoit filled with the desire to revenge. It is in this light that the individual scenes have to be viewed." *Bobby Art International* v. *Om Pal Singh Hoon*, (1996) 4 SCC 1.

[13] *Supra* note 2, at 179-184.

[14] Lawrence Liang, *Media's Law: From Representation to Affect*, 2(1) BioScope 23 (2011).

important to recognise the impossibility of progressive interpretation within the existing framework of Law. Legitimising erotic desire will always remain outside Law's own desire of sovereignty, order and compliance that is founded on the repression of erotic desire.[15]

II. Law's Emotional Reasoning

The judicial reasoning and the Court's application of "community standard test" in this case requires a closer examination. Legal reasoning, inundated as it is with 'emotional slips', betrays Law's claim to pure reason. The Court dropped the criminal charges *because* the message of the photograph was that "the colour of skin matters little and *love* champions over colour."[16] *Because* the photograph suggested inter-racial harmony and love, it had "no tendency to deprave or corrupt the minds of people".[17] Further, the community could still be tolerant towards this image because it did not have the tendency of "exciting lustful thoughts" since the "[b]reast of Barbara Feltus has been fully covered with the arm of Boris Becker".[18] The arm of fiancée covering bare breasts was not obscene[19] since it was a "love affair, leading to marriage, between a white-skinned man and a black skinned woman."[20] Heterosexual love became the chief marker in the discursive terrain, which erased sensuality, desire and pleasure, even as the image got protection.

The completion of the heterosexual "community standard" was further marked by the fact that the picture was "taken by none other than the father of Barbara". Reading the image within the harmony of heterosexual marital union and the familial ideology[21], the court brought it into the zone of permissibility, completely de-sexualised it, and stripped it of its actual intent of "supposed to shock". After all, what could be shocking about a woman posing semi-nude with her husband-to-be, in the presence of and with the permission

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[15] For a psychoanalytic account of the repression of erotic desire and the emergence of legal system see generally Jeanne L. Schroeder, *Totem, Taboo and the Concept of Law: Myth in Hart and Freud,* 1(1) Wash. U. Juris. Rev. 139 (2009).

[16] *Supra* note 6, at para 28 (emphasis supplied).

[17] *Supra* note 6, at para 26.

[18] *Supra* note 6, at para 26.

[19] It is useful to recall here the observation made by Justice Muralidhar in *Rahul Mookerji* v. *State of NCT of Delhi* (2-2-2009). Quashing the proceedings initiated against a couple u/s 294 IPC for kissing near a metro pillar, the Judge held: "the FIR even when taken on its face value, does not make out a case for the offence under Section 294 read with Section 34 IPC. It is inconceivable how, even if one were to take what is stated in the FIR to be true, *the expression of love by a young married couple,* in the manner indicated in the FIR, would attract the offence of obscenity and trigger the coercive process of the law" (emphasis supplied). It is important to note that even this "progressive" decision of the court, confined the expression of love within heterosexual marital bond.

[20] *Supra* note 6, at para 29.

[21] For a comprehensive analysis of how the equality discourse of judiciary reinscribes women into natural, familial roles, *see* Ratna Kapur, *Women, Familial Ideology and the Constitution, in* Feminist Terrains in Legal Domains 61 [Ratna Kapur (Ed.), 1996].

of her father? This community standard is in consonance with debates around obscenity in the early 19th century. While fashioning a new collective identity for itself, Hindi literature redefined the 'obscene' figure to censor female sexuality and thereby created zones of sexual permissibility and proscription. As Gupta notes:[22]

> *"The debate on obscenity was largely a debate on sex for pleasure and recreation versus sex for reproduction. In the discourse of the nation, non-reproductive and hedonistic sexual behaviour came under extraordinary pressure, resulting in the near exclusion of all non-reproductive sexuality. Thus Kalidasa's Kumarsambhav was considered 'legitimate' in spite of its detailed erotic descriptions because the activities ultimately lead to the birth of a male child. As soon as sexual descriptions celebrate desire and eroticism for their own sake, they become unacceptable and obscene."*

III. Erasure of the Feminine

In the context of the obscenity discourse, postcolonial feminists have been arguing that a totalising narrative of complete censorship of sexual imagery would amount to reinforcing the dominant cultural norms and sexual ideology that only recognises women in their roles of chaste wives and mothers.[23] This is obviously not to suggest that sexual imagery which is sexist or misogynist must not be condemned. But the point is that the first step towards what may be called 'erotic justice' would begin with the recognition that sexual imagery (and sexual speech as free speech) is *not always* sexist or misogynist; it rather plays a significant role in challenging dominant sexual normative framework. Any possibility of sexual imagery that acknowledges women's sexual agency and promotes women's sexual pleasure is also lost if all sexually explicit representation is characterised as obscene.[24]

The feminist politics for positive representations of sex in this context is a politics of affirmation of the "the specificity of feminine desire" within sexual difference.[25] Drucilla Cornell uses the expression "the feminine within sexual difference" to challenge the dominant notion that collapses feminine sexual difference to either femininity or subordination wherein women are either loving, caring, sacrificing givers or perpetual victims. Theoretical framework of

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[22] Charu Gupta, Sexuality, Obscenity, Community: Women, Muslims, and the Hindu Public in Colonial India 46 (2005).

[23] Ratna Kapur, *The Prurient Postcolonial: The Legal Regulation of Sexual Speech*, *in* The Phobic and the Erotic (2007).

[24] *See also*, Ratna Kapur, *Who Draws the Line? Feminist Reflections on Speech and Censorship*, 31 (16/17) Econ. & Pol. Wkly. WS15-WS19+WS21-WS3 (Apr. 20-27, 1996).

[25] Drucilla Cornell, Transformations: Recollective Imagination and Sexual Difference 113 (1993).

cultural feminists[26] as well as dominance feminists[27] construct women in, what Luce Irigray has called, "the old dream of symmetry" i.e. what men fantasize women want is actually what we want.[28] Breaking away from these notions, Cornell claims that "(t)he feminine has yet 'to be' in law, other than as a stereotypic conception of femininity".[29] In other words, feminine sexuality cannot just be reduced to being "fuckees"[30] since feminine sexual difference cannot be coalesced with the "cultural trappings of femininity" or mere victimisation.[31]

Where does *Aveek Sarkar* [32] fit in this feminist terrain? As is evident, the court in the present case did not censor the image. However, at the same time it marked the erasure of the feminine subject, in as much as it made invisible female sexuality. Can one miss the 'interpretive violence'[33] bound within such 'jurispathic' mode of judicial reasoning here? It must be emphasised that the image got protection *only* because it neatly fit into the heteronormative framework. The image was within the bound of licit love entrenched within familial ideology; a chaste wife covered by the arms of her husband, under the eyes of her father. While the court did grant protection to the image and brought it within the constitutionally protected free speech and expression, one is left wondering whose freedom of expression is protected, and what is the nature of that freedom?

To sum up, it would be apt to argue that this case illustrates that when Law encounters its Other (the aesthetic, erotic, feminine) the pure reason of Law gets corrupted by emotionality, its own unconscious spills over and legal reasoning seeks to sustain itself through the juridicalisation of the acceptable emotion: here, love (heterosexual, leading to marriage). The decision of 'not obscene' in this case came along with the concomitant declaration of maintaining the status quo of dominant sexual normative order. The legal construction of obscene or not obscene remained discursively entangled with the project of construction of legitimate emotions, acceptable relationships and the good woman in the family. The white male body claiming the black woman's sexuality, the object of his love, as he also protects her from the voyeuristic gaze of other men. The court's emotional reasoning, its reliance on the notion of "multicultural love" pronounces the image 'not obscene'. Here, love emerged

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[26] Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

[27] Catherine A. MacKinnon, Towards A Feminist Theory of the State (1989).

[28] *Supra* note 24, at 115.

[29] *Id.,* at 114. (According to Cornell, this "yet to be" in law can emerge only when we can live without "the shame of our sex").

[30] In MacKinnon's analysis, "[t]o become a woman is to be a 'fuckee'." Drucilla Cornell, Beyond Accommodation 133 (1999).

[31] *Supra* note 24, at 137.

[32] (2014) 4 SCC 257.

[33] Robert Cover, *Nomos and Narrative, in* Narrative, Violence, and the Law: The Essays of Robert Cover [Martha Minow (Ed.), 1995].

as "a sign of respectable femininity, and of maternal qualities narrated as the capacity to touch and be touched by others".[34] In this version of love, the reproduction of femininity is the work of love.[35] Love is love within heterosexual family and the institution of marriage. It reproduces femininity but erases the feminine. But can this love expand itself to include others, especially if that other is the erotic feminine subject? This remains the unanswered feminist question. Till we answer this question, Barbara Feltus is bound to be erased, like the image, between her husband-to-be and her father.

[34] Sara Ahmed, The Cultural Politics of Emotion (2004).
[35] *Id.,* at 124.