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LAW AND MORALITY: Constitutional Morality as a Restraint on Criminalization

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Contents

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LAW AND MORALITY:
Constitutional Morality as a Restraint on Criminalization

Chinki Verma[*]

[Abstract: *Recently, Criminal Law has frequently been charged of an 'unprincipled and chaotic construction' by scholars and has led to a considerable disillusionment of the scholars with the Criminal Law. This disillusionment can be majorly attributed to state monopoly over criminal law, which has assumed the status of a myth and fable, supported by consensus-theorization as to majority of population consenting to the state monopoly in the field of criminal law. In recent times, the Indian Criminal Law has also been a witness to controversial new crimes and controversial increase in punishments, such an 'unprincipled and chaotic construction' has led to the dismantling of the important place which criminal law once held in the lives of people and scholars alike. The present article provides the proposition to tackle the problem of unprincipled criminalization in India by appealing to the interface between constitutional law and criminal law and morality, by incorporating the concept of constitutional morality in the criminalization policy to constitutionalize the harm principle. This paper navigates through various complexities by critically engaging with the said proposition and attempts to provide a framework to reconcile the seemingly conflicting notions of constitutional morality and popular morality.*]

I

Introduction

With the advancement of civilizations, the body of criminal law has also evolved and grown substantially and new offences have been added to the list of existing ones. This addition and growth have, however, also made Criminal Law amenable to charges of an 'unprincipled and chaotic construction' by scholars and has led to a considerable disillusionment of the scholars with the Criminal Law. This disillusionment can be majorly attributed to state monopoly over criminal law, which has assumed the status of a myth and fable, which is supported by consensus-theorization as to majority of population consenting to the state monopoly in the field

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of criminal law. This has led to varied responses from the scholars in the West. Andrew Ashworth[1] and G.R. Sullivan[2] belong to this category of skeptics. Both of them propose different solutions to the problems of criminal law but do not abandon criminal law altogether.

In recent times, Indian Criminal Law has also been a witness to controversial new crimes and controversial increase in punishments, recent ones being the criminalization of Cheque Bounce under the Negotiable Instruments Act, 1881 and the Anti-Love Jihad Ordinance in states like Uttar Pradesh and Madhya Pradesh. Such an 'unprincipled and chaotic construction' has led to the dismantling of the important place which criminal law once held in the lives of people and scholars alike. The idea of 'principled criminalization' is a continuous quest. Here, moral universalism and historical particularism become crucial to study different facets of criminal law in a particular society along with balancing the interest of the individual at one hand and the society at other.

In light of this, the questions regarding criminalization (or decriminalization) of homosexual conducts, adultery, marital rape and abortion urge for a deeper understanding of principles of criminalization wherein the question of morality is primarily involved. The Hart-Devlin debate becomes important here to locate the relationship between law and morality and determine whether morality may be enforced through criminal laws.

II

Morality and Law

Law and morality are strange bedfellows. Much scholarly ink has been spent on the relationship between law and morality. The intersection between law and morality and its impact on the public policy of the State has invited much academic attention[3] with questions regarding the meaning and precise content of morality and its relationship with law occupying the centre-stage, particularly after the development of the new concept of 'constitutional morality'.

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1 Andrew Ashworth, *Is Criminal Law a Lost Cause,* 116 L.Q. Rev. 225 (2000).

2 G. R. Sullivan, *Is Criminal Law Possible?* 22 (4) OXFORD JOURNAL OF LEGAL STUDIES 747-758 (2002).

3 The most celebrated exploration of this interface can be found in the Hart-Devlin debate. See, Peter Cane, Taking Law Seriously: Starting Points of the Hart/Devlin Debate, 10 THE JOURNAL OF ETHICS 21 (2006); A. R. Blackshield, The Hart Devlin Controversy in 1965, 5 SYDNEY LAW REVIEW 441 (1967).

It may be observed that a common social opinion concerning conduct being immoral and hence illegal, cannot be a justification for its criminalization. Rather, the views of reasonable and right-minded people are crucial for the said purpose. Here, constitutional morality may act as a guiding principle to lay down the rational basis of criminalization but the reforms or transformation cannot be brought forth in a radical manner.

Patrick Devlin suggested the need for differentiating positive morality from critical morality.[4] The former relates to the standard of morality which is based on a shared and collected consensus model which is a static notion whereas the latter is based on individualism accompanied with positive morality which is a dynamic concept. In *Naz Foundation* case[5], an attempt has been made to invoke critical morality by making a diversion from positive morality. The Hon'ble High Court remarked on the importance of individual autonomy while pronouncing its decision. Further, a transformation concerning the thesis of critical morality may be observed from *Naz*[6] to *Navtej*.[7]

Another issue may be addressed from the viewpoint of the purpose of law (particularly the criminal law herein), which is to protect the public and not to interfere in the domain of private lives.[8] Wolfenden Committee invoked the crucial idea with regard to the realm of private morality, which it argued to be not a matter of law and that the issue of homosexual acts between consenting adults not being a business of morality.[9]

There are two important issues which need to be addressed while concerning the moral limits of criminal law: (i) whether morality may be enforced through criminal law? And (ii) if it is presumed that the society is entitled to do so, then which principle is to be applied? HLA Hart argued that these questions themselves are moral questions, to which positive morality (actual practice) of any society does not provide a satisfactory answer.[10] Hence, these questions need to be addressed first whenever the issues regarding constitutional morality are being dealt with.

In India, criminal law still remains the subject matter of governmental policies. The law cannot be seen in isolation and has to be seen through the lens of social context. With regard to social legislations, though the consensus is presumed yet in reality, a complete consensus is missing and even the public morality is not agreed to by all. Hence, it may be said that the rhetoric of criminal law is easy but the reality is different and complex.

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4 Patrick Devlin, *The Enforcement of Morals* 27-28 (1965) (cited in A. R. Blackshield, The Hart Devlin Controversy in 1965, 5 Sydney Law Review 441, 445 (1967)).

5 *Naz Foundation* v. *Govt. of NCT of Delhi*, (2009) 160 DLT 277.

6 *Id*.

7 *Navtej Singh Johar & Ors*. v. *Union of India*, (2018) 10 SCC.

8 Claude J. Summers, 'Wolfenden Report', *available at*: http://www.glbtqarchive.com/ssh/wolfenden_report_S.pdf.

9 Peter Cane, Taking Law Seriously: Starting Points of the Hart/Devlin Debate, 10 THE JOURNAL OF ETHICS 21, 27 (2006).

10 *Id*. at 28.

Given the pluralism persisting in the Indian society, the attempts to even out the conflicts and inherent contradictions of the criminal law cannot follow a uniform standard and a balancing act has to be performed on a case-to-case basis within some broad contours, the limits to which, need to be set by the foundational text of the Constitution of India. Before exploring the possibilities of constitutional morality in the realm of criminalization, it becomes important to trace its evolution.

III

The Many Meanings of Constitutional Morality

Drawing its life-force from *Naz,* another important premise of the author is that criminalization of harm should be based upon constitutional morality rather than popular morality and only the previous type of morality can pass the test of '*compelling state interest'*. In doing so, originalist view of interpretation of the Constitution has been taken where the intent of framers was ascertained by referring to the debates in the Constituent Assembly. The present section will trace the history and development of the concept of constitutional morality in India.

The contemporary understating of the concept of constitutional morality is quite different from how it was understood about a century ago. Earlier the discussion of the concept was more inclined towards the formalistic understating than the substitutive understating that is found today. The great historian, George Grote, in his most acclaimed work 'The History of Greece' talks about the necessity of 'constitutional morality.' Constitutional morality for Grote was a 'sentiment' that should guide not only the leading men but the whole the community.[11] This exposition inspired Dr. Ambedkar to make a mention of this term in the Constituent Assembly Debates as a counter-majoritarian construct[12] which was an answer to the charge of including administrative details in the Constitution. Ambedkar's fear was that the 'spirit of the constitution' can be subverted by merely altering its 'forms' and such inclusion of administrative details was an attempt to put constraints on the government of the day

[11] To quote Grote, 'The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves.' See, George Grote, A HISTORY OF GREECE 93 (Routledge, London, 2000).

[12] Aravind Narrain, *What Would An Ambedkarite Jurisprudence Look Like?* 29(1) NATIONAL LAW SCHOOL OF INDIA REVIEW 1 (2017).

as the people of India were 'yet to learn' constitutional morality.[13] This sentiment was thus perceived as a respect for the forms of Constitution which prevents any sizeable minorities from subverting its spirit.[14]

Grote invoked the idea of constitutional morality to save Athenian democracy. Ambedkar, on the other hand, employed the concept as a backing for his arguments regarding incorporation of administrative details in the constitution. For Ambedkar, constitutional morality is not a 'natural sentiment', rather it is something that needs be 'cultivated', i.e., it is something that should be taught and understood. Without understanding of constitutional morality, 'Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.'[15] In Ambedkar's view, the constitution 'only contains legal provisions, only a skeleton. The flesh of the skeleton is to be found in what we call constitutional morality.'[16]

Ambedkar invoked the idea of constitutional morality as a counter against majoritarianism. Perhaps his experience as himself being a member of communal minority, he wanted a shield against majoritarianism, particularly communal majority. According to him, recognition of constitutional morality would mean that 'there must be no tyranny of the majority over the minority.'[17] Aravind Narain calls Ambedkarite notion of constitutional morality as 'a response to the particular conditions of India, where majorities are often communal majorities and where minorities may not have bargaining power in the Parliament.'[18] According to Pratap Bhanu Mehta, the real anxiety for Ambedkar 'was not 'Constitution' the noun, as much as the adverbial practice it entailed.'[19] Thus, Ambedkar presented the notion of 'constitutional morality' into the public and constitutional domains to emphasise that democracy in India could, and should not be grounded on majoritarianism, but instead it should be founded on a constitutional ethic of regard for minorities. For him, constitutional morality meant harmonization of both features – 'abstraction' and 'agreement/co-operation', a recognition for individuality as well as commonality. A constitutional morality promotes a feeling that regardless 'all differences we are part of a common deliberative enterprise[20]'.

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[13] Constituent Assembly Debates, Vol. VII (4th November 1948), *available at*: https://www.constitutionofindia.net/debates/04-nov-1948/.

[14] Parliament of India, Constituent Assembly Debates (Proceedings) Vol.VII Part II: November 4, 1948, *available at*: http://parliamentofindia.nic.in/ls/debates/vol7p1b.htm.

[15] Narendra Jadhav, AMBEDKAR SPEAKS 291 (2013).

[16] *Id*.

[17] *Id*.

[18] Aravind Narain, *What would an Ambedkarite Jurisprudence look like?* 29(1) NATIONAL LAW SCHOOL OF INDIA REVIEW 1 (2017) at 19.

[19] Pratap Bhanu Mehta, *What is constitutional morality? available at*: https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm

[20] *Id*.

The actual intellectual foundation was supplied to the concept of constitutional morality only after the *Naz foundation* case, which triggered academic and judicial discussions over the term. In *Naz Foundation* v. *Govt. of NCT of Delhi,* the Delhi High Court took a progressive stand and ruled the criminalization of consensual homosexual relations as a breach of right to equality and liberty. The court in this judgment grounded its argument on constitutional morality. Though the decision was overruled by the Apex Court later by invoking the plea of public morality, but the importance of the Delhi HC judgment in providing foundational clarity to the concept of constitutional morality could not be ignored. It is this 'radically transformative' vision of the Delhi High Court of constitutional morality as substantive values, that has been made by the author as the core of her argumentation for creating a principled criminalization policy in India. The concept has further been developed by the Apex Court through judicial discourse[21] which highlights the nature of constitutional morality as a set of substantive values which form the foundational core of the Constitution of India. This value-based conception of constitutional morality is intimately linked with the idea of transformative constitutionalism and has given rise to fierce debates over the merit (or lack thereof) of the concept. The inherent complexities of the concept have been explored in the latter parts of the paper.

IV

The Existing Binaries of Morality: Need for a Revisit

Although the term 'constitutional morality' was introduced in India through Dr. Ambedkar's exposition of it in the Constituent Assembly Debates,[22] there exists no mention of the term in the Constitution. Morality simpliciter has been used in the Constitution at four places but it is difficult to gauge the standards of morality which has been applied. Moreover, the bulk of statutory law in India too does not contain any mention of constitutional morality. In such circumstances, the boundaries between constitutional morality and public morality become fuzzy while the law enforcement mechanism of the State applies the yardstick of morality to declare certainacts as an offence or the Courts try to interpret such laws. A classic exampleof such ambiguity can be seen in the obscenity cases which has been dealt with at a later stage in the paper.

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[21] See, *Manoj Narula* v. *Union of India*, (2014) 9 SCC 1; *Navtej Johar* v. *Union of India*, (2018) 7 SCC 192; *Joseph Shine* v. *Union of India*, (2018) 2 SCC 189; *Indian Young Lawyers' Association* v. *State of Kerala*, (2019) 11 SCC 1.

[22] Constituent Assembly Debates, Vol. VII (4th November 1948), *available at*: https://www.constitutionofindia.net/debates/04-nov-1948/

Constitutional morality vis-à-vis societal morality

One of the major premises of the author is to use constitutional morality asthe guiding factor behind the criminalization policy of the State. While this premise is intriguing and has also been supported by the judgments of the Apex Court,[23] the paper has not made a detailed assessment of the doctrineof constitutional morality and the complexities associated with it. One of the reasons for this could be that the doctrine, as invoked by the Delhi High Court in *Naz Foundation*[24], was only at a nascent stage at the time the paperwas written.

Further developments in this doctrine reveal that the concept of constitutional morality has so far been invoked by the Apex Court only as an interpretiveaid to bring the constitution in line with its normative commitments. Two of the landmark cases in the area of criminal law which have invoked this concept have dealt with the decriminalization of adultery[25] and thedecriminalization of consensual homosexual acts.[26] A close reading of these cases would reveal the use of constitutional morality as an interpretive aid wherein the Court has invoked this concept in judicial interpretation and sought to remedy certain social maladies and bring transformation in the social realm. However, further analysis would reveal that the court seems to be creating an artificial divide through the binaries of constitutional morality and societal morality and juxtaposing one against the other in an attempt to purge law of the majoritarian constructs. This can be substantiated by the observations in *Naz Foundation*[27] and *Navtej Johar*.[28]

Dr. Saumya Uma & Samudyata Sreenath have examined the relationship between constitutional morality and societal morality and whether the juxtaposition of the two is tenable.[29] They conclude that the relationship between societal morality and constitutional morality cannot be understood in silos. It is not desirable to view law as devoid of 'societal morality'. The assumption that constitutional morality is counter-majoritarian and societal morality is necessarily majoritarian bears testimony to law's restricted imagination of society as a homogenous unit and ignores the pluralities that exist in the society. Caught up in this terminological quagmire, the Court has chosen to look over the difference between *societal* and majoritarian. These judgments give us no guidance as to what is to constitute this 'societal' morality that the Court is set against.

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[23] *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39; *Navtej Singh Johar & Ors*. v. *Unionof India*, (2018) 10 SCC.

[24] 160 Delhi Law Times 277.

[25] *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39.

[26] *Navtej Singh Johar & Ors*. v. *Union of India*, (2018) 10 SCC.

[27] MANU/DE/0869/2009, 79, 80.

[28] *Navtej Singh Johar & Ors*. v. *Union of India*, (2018) 10 SCC, paras - 12, 120, 123, 253(v).

[29] Saumya Uma & Samudyata Sreenath, *Legal Imagination and Social Reform: Navtej Johar Revisited*, 13 NUJS L. Rev. 3 (2020).

Moreover, the content of the open-texture construct of constitutional moralityhas still not been methodologically distilled out. Owing to this, the interpretation of underlying constitutional morality becomes heavily independent on the judges' subjective identity and runs the risk of their own sense of social values getting cloaked as morality. It can thus be argued that unless a methodology is devised to delineate the broad contours of this doctrine, there are chances that constitutional morality itself can be subjected to an unprincipled use by the Courts, despite the assertion used in the paper under review which calls it as a panacea for unprincipled criminalization.

The popular morality and constitutional morality interface

The author in her paper has done a commendable job in highlighting the importance of constitutional morality in criminalization policy in India. The paper is flawless from the liberal and progressive viewpoint as it emphasises on the liberal construction of the Constitution to recognise the rights and to criminalise or decriminalise certain harmful conduct.

By reviewing the paper without any preconceived notion, one can observe that the author over-emphasises on constitutional morality and completely discards popular morality. She also appeals to have objective rather than subjective standards of criminalization. In a legal culture like that of India where the democratic principles are part of the constitutional value, popular morality cannot be completely done away with. There are certain issues which are required to be tested from a recombinant form of popular morality and constitutional morality lens employing subjective standards. A few examples are in order to drive this point home.

The prime example of popular morality versus constitutional morality conundrum can be seen in the obscenity legislations.[30] All further modifications in Hicklin's test[31] do not transform the standards radically and still define obscenity in terms of sexual explicitness which is considered morally repugnant by societal standards. A survey of

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[30] If we examine the language used in §292 and 293 of IPC, a material is deemed to be obscene if 'it is lascivious or appeals to the prurient interest, or if the over-all effect ofany of its items is to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.' §2(c) of Indecent Representation of Women (Prohibition) Act, 1986, also reflects legal moralism by prohibiting the any matter which is 'likely to deprave,corrupt or injure the public morality or morals' from entering the public domain.
Ss. 67, 67A and 67B in IT Act, 2000 which criminalise obscenity in the electronic media also talk in terms of 'lascivious material appealing to public interest' and 'sexually explicit act.' Thus, we can form an opinion that legal moralism forms the basis for criminalization of obscenity in print and electronic media.

[31] In *R.* v. *Hicklin*, ([1868] 3 L.R. (QB) 360), the test was stated as: 'Whether the tendency of the material charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication ofthis sort may fall…'

case laws on obscenity decided after *Udeshi*[32] brings home the point that despite sufficient modification in test for determining obscenity, *community standards* test still prevails. The criminalization of obscenity is to be checked through the lenses of both societal and constitutional morality. This is the reason that the Apex Court in *Aveek Sarkar* v. *State of West Bengal*[33] held that 'Hicklin Test' is not the correct test to determine the obscenity and advocated the application of the 'Community Standard Test'. Community Standard Test means that the determination of obscenity of any impugned object, paper, or photograph depends upon the community standards prevalent at that time. This means that if society finds anything acceptable and non-obscene then that thing cannot be labelled as obscene just because some overtly sensitive people find it to be lascivious or against the prurient interest or tending to deprave or corrupt them when they are exposed to the impugned thing.

In *Maqbool Fida Hussain* v. *Raj Kumar*[34], Delhi High Court did not find the nude Painting of 'Bharat Mata' as obscene. The court rather found it as an expression of art. In order to determine whether it was obscene or not, two parameters were required to be seen – (i) Prevailing Community Standards and (ii) The art to be preponderating and obscenity to be trivial in suchadmixture of art and obscenity. All of this is to be judged as per the 'Reasonable Man' standards. The court concluded that even if some people feel offended by seeing Mother India as naked, the court could not, on such conservative view, apply the particular standard. A liberal view is to be adopted, and as per the Community Standards, it is an expression of art, thus does not attract obscenity as defined under section 292 of IPC.

Another example of such legislation is the Immoral Traffic (Prevention) Act, 1956. A close look at the working of the Act reveals that it aims at enforcing the State's standards of sexual morality on the citizens. It tends to conflate between 'trafficking' and 'prostitution' and restricts its use only to prostitution. In its bid to purge the society of the perceived evil of sex work, the State seems to have incorporated the yardstick of public morality.

In *State of Uttar Pradesh* v. *Kaushaliya*[35], the Court upheld §20 of the Act on the ground of social morality. The Indecent Representation of Women (Prohibition) Act, 1986 is another example. It is interesting to note that in §2(c)of the Act, 'public morality' has been explicitly stated as the yardstick of determining indecent representation. Yet another example that can be cited is that of §23 of the Indian Contract Act, 1872 which talks about unlawful consideration or object as being something which *the Court regards*

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32 *Ranjit Udeshi* v. *State of Maharashtra*, AIR 1965 SC 881.

33 AIR 2014 SC 1495.

34 2008 Cri. L.J. 4107 Del. HC.

35 AIR 1964 SC 416.

as immoral, or opposed to public policy. This was interpreted by the Apex Court to be confined to sexual immorality.[36]

The illustrations cited above establish that the variants of societal morality or public morality have not been eliminated from the sphere of legislative or judicial action in the realm of criminalization. The next part deals with the limits of constitutional morality as an interpretive aid.

V

Limits of Constitutional Morality as an Interpretive Aid

The author has highlighted the role of both legislature (ex-ante) and judiciary (ex-post) in developing fair and reasonable policy of criminalization. Through the ex-ante approach, the specific rights in the constitution shall act as a restraint on states' monopoly of violence through criminal justice system. What becomes more important is the ex-post approach where judiciary checks the constitutionality or validity of any law or act on the touchstone of the constitutional morality. The author explains through *P. Rathinam* v. *State*[37] how that particular provision under challenge violates article 21 of the Constitution. Here, the author has criticized *Rathinam* and its specific rights-based approach on the basis of the reversal of logic in *Gian Kaur* v. *State of Punjab*[38] that 'the desperate attempt of decriminalizing the conduct failed because the court merely resorted to express rights and their possible (mis)interpretation of Right to life.'

Inherent complexities in the concept

In independent India, it took more than half a century to decriminalize homosexuality through judicial interpretation, although constitutional morality was there since 1949. Delhi High Court invoked this very concept to decriminalize homosexual activities between two consenting persons in *Naz Foundation*[39], which subsequently was overturned by the Apex court in *Suresh Kaushal*.[40] The way to decriminalize it was later unlocked after many landmark judgments. The presence and importance of constitutional moralitycannot be denied but at the same time its efficacy must also be taken into consideration. If we are only dependent upon judicially-interpreted constitutional morality then the path to resolve any other disputed issue risks being beset with inordinate judicial delays and conflicting interpretations by different

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36 *Gherulal Parakh* v. *Mahadeo das Maiya*, 1959 Supp (2) SCR 406.

37 (1994) 3 SCC 394.

38 (1996) 2 SCC 648.

39 7 (2009) 160 Delhi Law Times 277 (Delhi High Court) per A.P. Shah CJ and S. Muralidhar.

40 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1.

benches of the Court. After all things are said and done, constitutional morality still seems to be a 'top-dressing' on Indian soil and thepeople are 'still to learn' the full import and significance of the term.

The author emphasizes upon the notion that constitutional morality and not public morality should qualify as the compelling state interest. However, this is only partially true. Public morality is not separate from constitutional morality and they affect each other. *Navtej*[41] itself is an example of suchoverlap. The main core of her paper is to adopt constitutional morality in theories of criminalization. But this solution seems lacking in practicality.

Even if we consider it as a guiding principle, constitutional morality does not seem to satisfy the criteria for deciding the degree of punishment. To illustrate this point, it would be pertinent to cite an example from Indian experience. Justice Verma Committee, while working on Criminal Law Amendment Act, 2013 after the brutal Delhi rape Case opened the floor for such groups who represent interest of general public which included all stakeholders and experts like women's groups, social activists, academia,eminent persons, medical personnel, psychologists, psychiatrists and mental health providers for suggestions regarding criminalization of sexual offences and the punishments associated with them. It is pertinent to ask what compelled the Justice Verma Committee and Government for such open discussion. No doubt the whole country was seething in anger and demanding capital punishment and it was the need of the hour to involve those groups to seek suggestions to satisfy the public sentiment in the legislative process to strengthen the laws protecting women, it was public demand and frustration which resulted into tough punishments including death sentence. This reflects how public morality affects the criminalization process in any country if such need arises.

Referring to another example which has been mentioned by the author, the right to wear apparel associated with religion cannot be criminalized because it is the fundamental right to practice one's own religion and a core value of constitutional morality, but what if the right itself is declared illegal by the legislative process in a democratic country? France is such an example where wearing Burqa is banned in public places. In supporting the burqa ban, the French National Assembly noted that 'it is necessary to maintain the French values of individualism and human dignity' along with 'security reasons.'[42] Recently the Senate voted in favour of banning Hijab for the girls below 18 years which is a direct encroachment against religious belief.[43] Thisillustration does not

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[41] *Navtej Singh Johar* v. *Union of India*, (2018) 1 SCC 791.

[42] Leane, Geoffrey W.G. 'Rights of Ethnic Minorities in Liberal Democracies: Has France Gone Too Far in Banning Muslim Women from Wearing the Burka?' Human Rights Quarterly 33, no. 4 (2011): 1032-061. Accessed April 18, 2021. https://www.jstor.org/stable/41345421

[43] Al Jazeera, *'Law against Islam': French vote in favour of hijab ban condemned*, AL JAZEERA

Contd…

delve into the rightness or wrongness of the decision of the Senate but only demonstrates the limits of constitutional morality as an interpretive aid.

The author favours the opinion that only constitutional morality must be used to determine the wrongfulness and harmfulness of any conduct to be criminalized. A question arises as to how far it can be successful. If we analyse the argument concerning the right to die, constitutional morality was not the sole element which affected the judgements from *Rathinam*[44] to Passive Euthanasia Case[45]. There is a difference between a person committing suicide out of frustration and a person asking for euthanasia for his or her worst medical condition, the answer to which cannot be found by merely invoking the notion of constitutional morality. Committing suicide is a sin as per the religious view and against public morality as per the society. It was public morality which led the Apex Court to the two different notions of '*right to die*' and '*right to die with dignity*', which is beyond the sphere of wrongfulness and harmfulness.

In summation, what the author is repeating in connection with the principleof criminalization is already in-built within the Constitution. It provides for the safeguards against the executive and legislative encroachment offundamental rights arising out of criminalization of any conduct by the State. The only need is to practice such constitutional features in good faith by all the organs of the state. Therefore, proposing constitutional morality as an additional guiding principle or policy for the purpose of criminalization is only a little helpful. At the same time, it makes the process more complex andconfusing. It must be kept in mind that constitutional morality is largely a discretionary interpretive tool of the judiciary which is not free from the personal biases of the judges.

Ex- Post Facto Determination of Constitutionality of Criminal Legislation

The author claims that there is an over-reliance on the rights-based approach for determination of constitutionality of a statute. She has made the claim for using constitutional morality for determining the *ex-ante* validity of criminal legislation. She has also made the claim that constitutional morality can be used for *ex-post facto* determination of constitutionality of a criminal legislation and aid the judiciary by supplementing the presently used *rights-based* approach. She illustrates the limitations of the rights-only approach by using landmark judgments such as *P. Rathinam*, where the Apex Court was asked to rule upon the constitutionality of Section 309 of theIndian Penal Code 1860.

She also claims that the rights-based approach leaves a wide sweep for criminalization. She is trying to establish that any conduct of a person which is protected under Part

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(Apr. 09, 2021) *available at*: https://www.aljazeera.com/news/2021/4/9/a-law-against-islam (last visited on Apr. 18, 2021).

[44] *P. Rathinam* v. *Union of India*, (1994) 3 SCC 394.

[45] *Common Cause* v. *Union of India*, AIR 2018 SC 1665.

III of the Constitution cannot be regarded as wrongful harm but any conduct which does not have the blanket protection of Part III of the Constitution can be subsumed in the fold of criminalization making the area of conduct which cannot be criminalized as extremely scarce.

The author claims that by confining to a rights-based approach for criminalization, no coherent constitutionalization of the harm principle has been formulated in India. She also makes a very coherent claim that the lack of a constitutional conception of criminalization of harm forces the court to adopt a fallacious judicial reasoning. She says that in the case of *Rathinam* the Supreme Court's hands were tied due to the lack of any coherent constitutional conceptualization of the harm principle because of which, the court had to adopt a riskier approach which interpreted Article 21 negatively. She has characterized the impugned approach as suffering from the 'slippery slope' fallacy which was subsequently discarded at the first instance by the Apex Court itself. Through her illustration, it seems as if the Apex Court was desperate to de-criminalize the act but could not create a coherent basis for the same.

The author has also made an adept demonstration of the gaps existing in judicial reasoning while determining the criminality of a statute. Vide the means of the aforesaid complex argument, the author is trying to make a case for the use of constitutional morality along with the rights-based approach so thatthe Supreme Court can reach on more palatable conclusions on the questions of decriminalization. Through these illustrations, the author has made a commendable attempt at demonstrating the gaps which exist in the judicial process of determining criminalization. However, the author fails to make a demonstration of how the use of constitutional morality will be able plug the identified gaps.

Having acknowledged the dexterous demonstration of the limitation of the rights-based approach of the Apex Court, the author has not made a case asto why constitutional morality will help the court in arriving at a more reasonable adjudication on the issues of decriminalization. She criticizes the rights-based approach because it is dependent on 'judicial delineation limits of the rights in focus.' She says that the right-based approach is susceptible to the personal ideals of the judge, their levels of activism and restraint, and dominant notions of morality, but she herself concedes by saying that 'For even in judges, constitutional morality is not a natural sentiment, it has to be cultivated.' Her argument can be countered, as is itself acknowledged by the author, that the interpretation of constitutional morality will also be burdened by the same infirmities of personal presupposition of judges as are suffered by the rights-based approach.

The author has also created an artificial distinction between the rights-based approach and constitutional morality. The reading of the author's claim might suggest that constitutional morality and the rights enshrined in Part III of the Constitution are two separate entities but it needs to be understood that both these approaches are basically cut from the same cloth and ignoring one in the name of the other would be

fallacious. As we have seen in the famous case of Sabarimala[46] and as was demonstrated by Justice Malhotra's dissent that Constitutional Morality is a culmination of the principles of the Constitution and Part III itself is a very important ingredient of the admixture of Constitutional Morality. Therefore, it is not necessary that the doctrine of Constitutional Morality can always be resorted to reach desired conclusions, de-hors the interpretation of Part III of the Constitution. The Sabarimala verdict is a great example of how the use of doctrine of constitutional morality can certainly help us put certain issues into perspective simultaneously forcing the judges to engage with the complex dynamic which exists between Constitutional Morality and the written text ofPart III of the Indian Constitution. The process of conceptualizing harm with the aid of constitutional morality would not be as straightforward as is envisioned by the author.

Having discussed the limitations of the concept as an interpretive aid, the next part attempts to draw a comparative analysis between India and USA to establish that public conception of morality does play a role in the criminalization of any conduct.

VI

Conclusion and Suggestions

Cultural and religious conceptions of morality still hold their sway over public policy and they have to be reconciled with constitutional morality in a manner that there is a balancing of interests of all the stakeholders, especially in the diverse culture like that of India. The Habermasian idea of 'public reason' which involves reasoning and consensus-building in the public sphere can be a rationalizing factor in such an endeavour. In order to be fair, the criminalization policy needs to take into consideration the moods of the country along with the core constitutional values and seek to achieve a fine balance between the two. The task of influencing the public policy cannot be achieved radically but should be achieved in a gradual and systematic manner. A three-step process of *bottom-up work, formal proposals* and *litigation* can be one of the approaches to deal with the issue of unprincipled criminalization.

The *preparatory or bottom-up work* can be done by organizing discussion forums which involves various stakeholders of criminal justice system suchas policy-framers, law-enforcers, legislators as well as members fromacademia, civil society organizations and religious clergy. These can be brought together to have discussions on effectively regulating human conduct through criminal law. This can be followed by organization of consultative forums in public domain with wide and diversifiedrepresentation. This very step will be considerate of the public sentiments in the framing of criminalization

[46] *Indian Young Lawyers Association & Ors*. v. *The State of Kerala & Ors*., (2018) 11 SCC 1.

policy, while at the same time rationalizing the same through the exercise of consensus-building and diffusion of constitutional morality in the masses. The learning and unlearning involved in this process can lead to dispelling of a number of biases. Balanced proposals for criminalization policy can emerge out of this exercise.

The next stage is that of presenting formal proposals distilled out from the preparatory stage to the law-makers. This can lead to the formulation of a more principled policy of criminalization. If the above two stages fail to yield any fruitful result, then the tool of judicial review can act as the last resort remedy whereby the *ex-ante* conception of constitutional morality as an interpretive aid can help in bringing about the desired social change through constitutional adjudication.

The suggestions presented in this paper might seem as a far-fetched dream considering the current legal and constitutional culture of India. However, if implemented in a gradual and systematic manner as suggested in the paper, this three-stage process will help take the public policy away fromunprincipled criminalization towards a fine balance between individual liberty and social control.

The above discussion provides the proposition to tackle the problem of unprincipled criminalization in India by appealing to the interface between constitutional law and criminal law and morality, by incorporating the concept of constitutional morality in the criminalization policy to constitutionalize the harm principle.

This paper has sought to navigate through various complexities by critically engaging with the said proposition. Through the suggestions offered in the preceding section, the author have attempted to provide a framework toreconcile the seemingly conflicting notions of constitutional morality and popular morality. The slow percolation of constitutional morality in the Indian legal culture has just begun. The concept is one of the silences in the Constitution whose myriad possibilities remain to be unraveled in times to come, albeit the path has to be trodden with considerable caution.