DISCOVERING THE CONSTITUTIONALITY OF PENAL OFFENCES THROUGH THE LENS OF POST-MODERN APPROACH OF CONSTITUTIONAL MORALITY

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Abstract: The right to live with dignity incorporates within itself a right of individuality, which symbolizes an inviolable zone free from interference or encroachment. The apex court in a deliberate attempt to decriminalize consensual homosexuality and adultery has inadvertently lighted a squib which will evidence a consequence of consequences. The decriminalization of such offence supports a corollary that Constitutional morality holds a greater place in comparison to social morality or the interests of majority, in the opinion of the apex court such offences are in violation of the basic human right to live with dignity which is a natural and inalienable right, and is to be protected and prospered even at the stake of a central social institution i.e. marriage and family. The paper puts focus on experimenting with the existing offences in the Indian Criminal Paradigm in the light of Post Modern Jurisprudence of Constitutional Morality.

Index Terms: *Post Modern, Individuality, Constitutional Morality, Deconstruction, Reconstruction etc.*

I. Introduction: the concept note

A relationship between Criminology and Constitution becomes more intricate in a democratic jurisdiction like India where the Constitution itself defines the extent and limitations of individual liberty in a sense that it cannot be thwarted by any concession of counsel.[1] Crime may be defined with different references at different point of time, having distinct outlook based on completely isolated circumstances but the general idea behind imposing a criminal liability is to regulate the human conduct. The term may be defined with different perspectives, for instance some consider it as a public wrong, for some it is social wrong and for some community oriented scholar it can be a moral wrong. **Raffaele Garofalo** defines crime as an "immoral and harmful act that is regarded as criminal by public opinion, because it is an injury to so much of the moral sense as is possessed by a community – a measure which is indispensable for the adaptation of the individual society.[2]" The term morality has no specific meaning and it differs from society to society and from one period of time to another, and there are certain offences where criminal liability is based on the moral standards of the community, permitting the actions of an individual based on the moral sense of that community as a whole to which that law applies. An act or omission is categorized as an offence on certain considerations, one of which is certainly the moral standard of the community, though every criminal act is categorized as an act affecting the society at large but some offences are directly related to the moral standards of the community such as obscenity, blasphemy or unnatural sexual intercourse[i], etc. The Constitution of India provisions for adaptation of Pre-Constitutional laws[ii] which were enacted by a legislative body hypothetically presumed to be an authorized legislative body. A series of Pre-Constitutional laws were superficially imposed upon the subjects who were in complete isolation from the cultural, moral and social outlook of the legislator itself. The law has to operate in a society, which could reflect the true needs and deeds of it. A formula tested in vacuum cannot operate with such efficiency in a completely different environment, for instance ***blackcurrant*** fruit is cultivated in Scotland, Poland and New Zealand but it cannot grow in India because of distinct environmental conditions. The last few decades in the history of Constitutional development of Fundamental rights has envisaged a path for an unprecedented growth of individual liberty, thereby assigning a completely distinct meaning to life and liberty. The era of liberal interpretation and viable expansion of human rights has unshackled every individual from the chains of moral standards of a community and had given him an identity distinct from the society.

The validity of every law in force within the territory of India needs to be in conformity with the Constitution being the Grundnorm and Criminal law being in direct confrontation with the liberty of an individual needs to pass the test of Constitutional morality rather than social or group morality. While recognizing the right to privacy as a fundamental right[iii] the apex court initiated a chain reaction resulting in decriminalization of certain offences which were directly in violation of individual liberty and privacy.

In order to conduct a systematic analysis of the issue at hand, section II of the paper delves deep into discovering the realms of Social and Constitutional Morality. Section III and Section IV of the paper are about the core analysis of the research paper. These sections focus on reconstruction and deconstruction of certain offences. The paper finally culminates into conclusion and suggestions under Section V.

[1] Election Commission of India v. St. Mary's School, AIR 2008 SC 655.
[2] Raffaele Garofalo, Criminology, Brown and Company, (1914).

II. Social morality versus Constitutional morality: understanding the dichotomy

Crime may be defined with different perspectives but the existence of morality will always be or it would be more proper to say that it has always been a catalyst in deciding the criminal liability. Emile Durkheim explains the phenomenon of crime in the following words:

"There is no society that is not confronted with the problem of criminality, its form changes: the acts thus characterized are not the same everywhere and always, there have been men who have behaved in such a way to draw upon themselves penal repression… No doubt, it is possible that crime itself have abnormal forms, as for example, when its rate is unusually high. This excess is undoubtedly morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for such social type, a certain level… to classify crime among the phenomenon of normal sociology is not to say merely that it is inevitable, although regrettable phenomenon due to incorrigible wickedness of man, it is to affirm that it is a factor in public health an integral part of all healthy societies."[iv]

Undoubtedly, the morality of the society has always been a guiding principle in recognition of an act or omission as an offence but this era is witnessing a direct confrontation between the morality of a group and the morality of an individual casting a duty upon the judiciary to maintain the equilibrium of the society, when interest of minority stands against the interest of majority. "The sexual autonomy to choose his/her sexual partner is an important pillar and an is segregable facet of individual liberty. When the liberty of even a single person of the society is smothered under a vague and archival stipulation that it is against the order of nature or under the perception that majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged."[v]The recognition of individual liberty as a paramount consideration, while deciding the extent of Group morality is a mile stone set by the Apex Court in Navtej Singh Johar. It has lighted a squib, thereby leading to a consequence of consequences.

The ultimate task of a social engineer(lawyer) is to maintain the equilibrium of the society[vi] by balancing the conflicting interests of the society and when the interest of a single person stands against the interest of the society, it is a duty cast upon the judiciary to put Constitutional morality on the other side and to apply the litmus paper test[vii], if the exercise of that individual liberty is within the reasonable restrictions imposed upon the rights guaranteed under Article 14, 19 and 21, then the exercise of such liberty shall be protected even at the cost of apocalypse.

III. Deconstruction of certain penal provisions

The recognition of right to privacy, dignity and individuality has led to deconstruction of certain offences and in the same line deconstruction of certain other offences becomes inevitable. Limiting the scope of this study let's take into consideration certain offences defined and punished under the Indian Penal Code.

3.1. Bigamy

The head note of the section reads as 'Marrying again during the lifetime of husband or wife[viii]' which means that a person cannot remarry if his or her spouse is living, but the issue which arises in the constitutional validity of the provision is that the section applies only to those marriages which are void according to the personal law or in other words this section applies to only those persons whose personal law prohibits bigamy

3.1.1. Void by reasons of its taking place during the life time of husband or wife: this clause specifically makes the provision dependent upon the personal laws and the code being a secular law cannot depend upon the precepts of a personal law. This section was not applicable upon the Hindus before the commencement of the Hindu Marriage Act, after which a subsequent Hindu marriage was specifically declared to be void and even today this provision is not applicable on a Muslim marrying twice or thrice, this means that the provision is not secular or it does not applies to all equally. While writing his concurrent judgment in *Mithu*[ix], **Chinappa Reddy, J**. stated "Section 303 Indian Penal Code is an anachronism. It is out of tune with the march of times. It is out of tune with the rising tide of human consciousness. It is out of tune with the philosophy of a Constitution like ours. If particularly offends Article 21 and the new jurisprudence which has sprung around it ever since the bank nationalization case has freed it from the confines of A.K. Gopalan v. State of Madras. After the bank nationalization case, no Article of the Constitution guaranteeing a fundamental right is to lead an isolated existence." The intelligible differentia test[x] states that if there is a difference in application of a law then there must be a nexus between the difference and the object sought to achieve but the same is missing in case of Section 494 IPC.

3.1.2. The Individuality test: the newly evolved right of individuality in *Joshep Shine case*[xi]has put the individual at the center of every legislation and any piece of legislation which disallows or restricts the freedom of individuality would cease to have the force of law. In the words of Chandrachud, J.

"The beauty of the Indian Constitution is that it includes '**I**' '**you**' and '**we**'. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. Individual dignity has a sanctified realm in a civilized society."

If in the opinion of the apex court an individual has right to choose his partner for sexual intercourse, then it would not be incorrect to say that the individual cannot be put behind bars for remarrying during the life of his/her spouse. Bigamy is itself a ground for divorce and an individual should not be prosecuted for the same because the postmodern development of jurisprudence has questioned each and every element of criminal liability, moreover if an offence is such which is directly associated with individual freedom and dignity, it needs to be revisited.

In the same line, there are certain offences which are in dire need of judicial revisiting, for instance the offence of ***sedition***, ***attempt to commit suicide***, ***offences relating to marriages*** and such offences which are directly related with individual freedom and self-realization.

IV. Reconstruction of certain penal offences

In the opinion of the Apex Court, women cannot be treated as chattels or they are not the property of a man in the sense that they have an independent existence, independent identity and an independent dignity[xii]. In the light of above development reconstruction of certain offences is desirable, which has been put to rest due to different considerations. Let's discuss some of the acts/omissions which need to be declared as criminal.

4.1. Marital rape

The Criminal Law Amendment Act, 2013 brought some drastic changes to the definition of rape[xiii] and the enactment of POCSO Act[xiv], gave new dimensions and meaning to the 150 years old colonial law, but it failed to change the status of a sexual assault of a husband against his wife to be considered as rape.The exception attached to Section 375 states that 'sexual intercourse or sexual act of a man with his wife not below the age of fifteen[xv], shall not be a rape' which means that the basic element to constitute the offence of rape has been diluted in case of a marriage. In order to constitute the offence of rape, two elements are required, *firstly* sexual intercourse and *secondly* consent, but if the sexual assault is done by the husband, consent of the wife is immaterial, thereby blatantly challenging a women's right of individuality and self-determination. The above discussed exception gives rise to certain legal issues as –

4.1.1. After reading down of Section 377 IPC by the Supreme Court, the non-consensual unnatural sexual intercourse by the husband against his wife has also been put under the protection by the Exception II to section 375 as it protects sexual intercourse and '**sexual acts**' including anal penetration. After the judgment in Navtej Singh, the husband is now immune from the application of Section 377 IPC, which is a collateral damage of the judgment.

4.1.2. If non-consensual unnatural sexual intercourse is between two individuals of same sex who consider themselves to be married[xvi] what will be the position regarding the Exception II of Section 375 IPC.

4.1.3. Also, if the non-consensual intercourse between husband and wife during judicial[xvii] separation is rape then the punishment for the same is not in parity with the punishment given in normal situations.

Rape is rape whether by husband or anyone else, considering which most of the nations have either explicitly criminalized marital rape or removed the exception of marriage in case of rape, on the recommendations of the Declaration on the elimination of violence against women[xviii]. The declaration specifically states marital rape as human rights violation. It is desirable to realize that women are not commodities, a woman is as human as a man is and when it comes to her consent, whosoever he may be, '***no means no***'.

4.2. Gender neutral sexual offence

The earlier notion of '*women the victim*' has been eclipsed by the change in the societal arrangements and the inter-societal relations of a women. It would be obsolete to say that only man can commit offence of sexual assault and not the women. The amended definition of rape leaves a huge scope for the extended definition and including women as an offender. The legal incidents related to such are-

4.2.1. A comparison between Section 7 of the POCSO Act with Section 375 clears the picture in the sense that in case of a child below eighteen years of age, a female can also be an offender but as soon as the child attains eighteen years of age she cannot be sexually assaulted by a female, this dilutes the aim and object of such laws.

4.2.2. The definition of rape under Section 375 has extended the meaning of penetration[xix] thereby including any object or any part of body. Now the irony is that the penetration of any object or any body part into the private parts of a female would constitute rape if done by a male but it would not be so if the same is done by a female. Whatever may be the argument behind this exemption but it is definitely unjustified, unreasonable and illogical.

4.2.3. The newly added definition also adds a clause i.e. or 'makes her to do so' thereby leaving a scope for the prosecution of a female under Section 376 r/w 34 IPC because a female can also make her to do so with another or with herself.

In the present times, a male is as vulnerable as female and a female can be a threat as a male can be, therefore the law relating to sexual assault in India needs a fresh approach. The attempt made by the **Justice Verma Committee** were limited in scope, the law needs to be revisited again.

V. Conclusion and Suggestions

Inference may be drawn from the above discussions that the plethora of legislation and judicial development has achieved a milestone in realization of true humane principles governing the human existence apart from bare human survival. The original meaning of human rights has now been expanded from life, liberty and dignity to privacy, individuality and self-determination. A vigilant judiciary and a liberal legislature can achieve the true purpose of human life, the true meaning of equality liberty and individuality.

While writing the judgment in ***Joshep Shine***, **Chandrachud, J.** stated[xx] "When a Constitutional Court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognizes a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the Constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A Constitutional Court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative Constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the Constitutional Courts." After the development made by Navtej Singh Johar case there is a dire need of legislation to tackle the incidental and consequential matters related the decriminalization of homosexuality as well as reconsidering the validity of certain other obsolete laws which does not hold to be relevant at the present point of time.

References:

[i]The Apex court has read down the offence stated in section 377 IPC in Navtej Singh Johar's case, which is also a subject of discussion in this paper.
[ii] *See*, The Indian Constitution, 1950, Article 372.
[iii] Justice K.S. Puttuswamy (Retd.) & Anr. v. Union of India & Ors, 2017 10 (SCC) 1
[iv]Hamlin, The Normality of Crime: Durkheim and Erikson, Department of Sociology and Anthropology, (2009).
[v]*See*, Navtej Singh Johar & Ors. v. Union of India & Ors, Para 230.
[vi] The Social Engineering Theory by J.R. Pound.
[vii] "The seminal point is to see whether Section 377 withstands the sanctity of dignity of an individual, expression of choice, paramount concept of life and whether it allows an individual to lead to a life that one's natural orientation commands. That apart, more importantly, the question is whether such a gender-neutral offence, with the efflux of time, should be allowed to remain in the statute book especially when there is consent and such consent elevates the status of bodily autonomy. Hence, the provision has to be tested on the principles evolved under Articles 14, 19 and 21 of the Constitution." Para 231: Navtej Singh Johar.
[viii]*See*, The Indian Penal Code, 1860, § 494
[ix]Mithu v. State of Punjab, AIR 1983 SC 473.
[x]Maneka Gandhi v. Union of India, 1978 AIR 597.
[xi] Joshep Shine v. Union of India, Writ Petition (Criminal) No. 194 OF 2017.
[xii]NALSA v. Union of India, 2014 5 (SCC) 438.
[xiii]*See*, The Indian Penal Code, 1860, § 376
[xiv]*See*, The Protection of Children from Sexual Offences Act, 2012, § 3
[xv] The same must be read as eighteen, as per a recent landmark judgment given by the Supreme Court.
[xvi] Marriage between persons of same sex is not illegal '*perse*'.
[xvii]*See*, The Indian Penal Code 1860, § 376(b)
[xviii]It is published by United Nations High Commissioner for Human Rights.
[xix]*See*, The Indian Penal Code, 1860, § 375 (b).
[xx]Joshep Shine v. Union of India, Writ Petition (Criminal) No. 194 OF 2017.