A RESEARCH PROJECT ON SEXISM IN INDIAN LAWS - A JURISPRUDENTIAL ENQUIRY

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Abstract

The basic purpose of this project is to examine why law as it is does not confirm to any jurisprudential schools but rather, a fair amalgamation of it. Any given law, on close examination is apt to prove the same. So, easiest way to examine how inter-related law is with society, is to prove the very existence of this hesitation of Indian judiciary when dealing with sex and sexuality. The conformity of law to the wish of the general public and the resistance to change despite of the fact that change being inevitable to law, leads to a new theory of jurisprudence which has nothing new but everything unlike the past. - The unifying theory of jurisprudence, a perfect amalgamation of all existing jurisprudential theories.

Keywords: Indian law, Jurisprudence, Unifying theory, Sexism, gender bias

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INTRODUCTION

Law is like a work of art where jewels of simple logic of good and bad embed itself in the intricate ornament of popular opinion, emerging as a beauty in itself, transcending the meaning and form apportioned to it by its own creator. What law is has been debated more than what law ought to be. Is law merely a scale of calculus where pleasure and pain are weighed to decide the best course of action? Or is it a holy book bound with leather of morality and inscribed with the golden nib of conscience and styled with the secrets of a greater knowledge? Or is it something much simpler – a middle path through which a society threads without greater considerations of morality or conformity to dry lifeless calculus? The true solution to this conundrum must lie somewhere in between. Someplace where all the theories propounded on law are proved and disproved simultaneously. The relevance of unifying theory comes into picture at this very juncture. More often than not, jurisprudential theories are found on a particular social condition in existence. Therefore its purview would be restricted to that particular society at that specific time period. There would be limited application on law outside this sphere but that would not be an exclusive application nor would the definition of law be the accurate. Now let us see how a close examination on gender bias seen in Indian laws might help us to arrive at a new theory known as the great unifying theory of jurisprudence.

India fears sex. Whether taken in the meaning of gender or in that of intercourse, society is customized to fear it, hate and prejudice against it. Generations that went by taught the present generation that sexual intercourse is to be shunned from, to be ashamed of and to be fought against. Gender differences are so glaring that it sits proudly in the crown of our legal leviathan.

The latest trending practices include but are not limited to shunning homosexuality, intolerance to public display of affection and live in relationships, making separate and gender based laws in the name of protective discrimination which with its lacunas in written law present to be more detrimental than useful, blind eye to marital rape and most importantly keeping uniform civil code inside the cupboard in the name of cultural sentiments. Where did that ‘turn’ of events take place- Those specific incidents that kick started the whole process or that catalyst that hastened up the growing inequalities in gender? Or was it a gradual dip, if so then what would have caused the dip towards the male end of the scale. At which point in the history did the laws begin changing its colour? And if the

laws do change its colour, then why we are seemingly stuck with the unjust and pointless laws in existence. Why do laws show that resistance to change that it did not show previously when it took a turn for the worse? Law is more of a social consent than historical conformity.

Bias in criminal law

Marital rapes get a silent nod whereas laws such as Domestic Violence Act are accepted despite of its cons outweighing the pros. Sec 376, 363, 354, 509 of IPC is in their language, highly 'unsettling' when it comes to equality. We must not forget the SLLs like the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; The Protection of Women from Domestic Violence Act, 2005; Indecent Representation of Women (Prohibition) Act, 1986; Immoral Traffic (Prevention) Act, 1956; Now moving on to other laws like rape legislations and other legislations subject to bias. It is a sad joke that the law perceives that only females can be kidnapped, immorally trafficked, harassed or raped. For reason incomprehensive to the author, the traditional law says that females cannot commit adultery. There also exists the harm of over interpretation of art 15 (3) of the constitution of India[1]. The harm done by this clause is seen in sec 498 (A) of Indian Penal Code, 1860. Further, sec 376, 363, 354, 509 of IPC[2] is in their language, highly 'unsettling' when it comes to equality. We must not forget the SLLs like the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; The Protection of Women from Domestic Violence Act, 2005; Indecent Representation of Women (Prohibition) Act, 1986; Immoral Traffic (Prevention) Act, 1956; The author is not of the view that these legislations have entirely failed in its purpose. In fact, authors concern is in the very existence of these legislations. Why does the government think that females need protection? The gender biased laws have proven to be disastrous in many aspects and yet why is the government hesitant in amending and altering them?

Before we go deeper in this regard let us focus on the infamous 498 (A) of IPC.

498A. - Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be pun-ished with imprisonment for a term which may extend to three years and shall also be liable to fine.

[1] 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
15.3 Nothing in this article shall prevent the State from making any special provision for women and children.
[2] Assumption that only females can be raped, kidnapped or sexually abused or indecently represented.

There are three fundamental problems with this law – a) excessively gender biased in favor of women, b) it has high chances of misuse c) the definition of domestic violence is too vague and extensive.

The major flaw in this section is that it assumes that females are the only victims of domestic violence. But the statistics show a different story. Statistics show that 40% of domestic violence victims are men. Additionally, heterosexual male victims of IPV are often judged harshly for "allowing" themselves to be beaten by a woman. This view is based upon the general rule that men are physically stronger than women, and, therefore, should be able to prevent any kind of female violence; a view which disregards that violent women tend to use objects during IPV at a higher rate than violent men.[3] The misuse is another major issue of this legislation. Every 8 minutes an innocent male is arrested for domestic violence suit. Around 2286 woman are annually arrested annually on fake law suits of domestic violence. Every 8 minutes a married man commits suicide in India due to the misuse of sec 498 (A) of IPC. After years of legal turmoil, 82.5 percent of the total FIRs filed under Section 498- A (non- bailable) were found false.[4] The shame affects not just the husband but also his mother and sister and other relatives, posing itself as a threat to their peaceful family life. It is ironic how a legislation intending to protect the peaceful marital life of one endangers that of others. The effect of this legislation is so fatal that Supreme Court called this legislation 'legal terrorism'.[5] The existence of this legislation is based on the presumption that females are weak and prone to domestic violence. Societal attitude combined with selective reporting of the media is the main reason for this law. Domestic violence laws incriminate people on claims by the victims and are hardly based on any other criteria and the penalty can extent up to 7 years of rigorous imprisonment. Such a powerful law indeed prevents domestic violence but is it not fair to amend the laws so as to suit both gender than to presume that only females can be victims of domestic violence. The question why hasn't the law changed? The answer is simple – society cannot comprehend the male being harassed, though that is the hardcore reality now.

[3] Anant Kumar, 'Domestic Violence Against Men in India: A Perspective', (2012) Journal of Human Behavior in the Social Environment 22 (3): 290–296, doi:10.1080/10911359.2012.655988, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034049> March 2012, Last visited date Feb 24 2015.

[4] 'In every 8 minutes, a married man commits suicide in India', The Free Press Journal, Apr 17 2014, <http://www.freepressjournal.in/in-every-8-minutes-a-married-man-commits-suicide-in-india >, Last visited date Feb 24 2015.

[5] Sushil Kumar Sharma v. Union of India JT (2005) (6) SC 266

Sec 377 and unnaturality.

The mere description of the two articles, 13 (2) and 21, read with section 377 of IPC is enough to prove the invalidity and unconstitutionality of section 377 of IPC. The judiciary would have no right to deprive an individual of his right to have sexual intercourse with anyone he deems fit provided that there is mutual consent and that the both consenting parties are adults and is prudent enough to understand his acts and that his acts are done in places where he is reasonably expecting privacy.

But here is the stand of the Supreme Court of India in the same. In Suresh Kaushal v. Naz Foundation the honourable court has said that the details provided to the High Court were thus "wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment" and that the party 'failed miserably' to provide the details and evidences of such practices.[6]

As for the contradiction with Art 14, the court has said,

"Those who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification."

But despite of the well detailed judgment the court seem to fail miserably as to why gay couples cannot have a family life or intimate relationship. Why is their relationship termed as unnatural? The answer is because the society says. Rather, the majority of the people in this country seems to think that homosexuality is unnatural and the scale of justice always weighs a little down on the prejudice the society seems to carry. In simpler terms, what society fears and frowns, law fears and frowns too. An exaggerated inference would be that 'Law is nothing but a projection of the society it rules over'. For the blind denial of the naturality of homosexuality there is simply no excuse.

Personal Laws

The inherent gender bias is all prevailing in our personal laws. From marriage to succession, law is what the society thought it should be. Restitution of conjugal rights is a practice which

[6] Case Summary, Suresh Kumar Koushal & another v NAZ Foundation and others, Supreme Court of India: Civil Appeal No. 10972 of 2013

is a violent and blatant denial of fundamental rights, where the spouse is dragged by the law to an unwilling sex and cohabitation. Age of consent sometimes stooping down to 14 years of age and this age differences varying for different communities is another example. We are still prejudiced about custody of a child after divorce. The courts would give mothers 5 or lesser year old child's custody as somehow females are seen more caring and fathers go under the inherent presumption that they cannot care for a child. The examples are many but the reason, just one – The society thinks so, agrees so and insists so.

The famous example would be Kaur v. Chaudhary[7] the issue was whether the statutory remedy of the restitution of conjugal rights violated the constitutional right of 'personal liberty' in Article 21[8] The Delhi High Court held that "*in the privacy of the home and the married life neither Article 21 nor Article 14 have any place.*"[9] Restitution of conjugal rights in literal terms can be perceived as a weapon with which the law drags an unwilling wife or husband to her partner for sexual intercourse. This crude form of legal-marital rape exists because the society thinks it is ideal for it to be that way. It is nothing but an indirect way to state that individual rights and basic human rights are no match for societal compulsion, even in this modern era. And then we have the famous quote from Delhi High Court "Introduction of constitutional law in the home is the most inappropriate. It is like introducing a bull in a china shop…. In the privacy of the home and the married life neither Article 21 nor Article 14 has any place."[10] What more could exemplify the author's assertion than this statement by the court? A ray of hope comes in the form of Personal Laws Amendment Act, 2010 and now we are ever so proud to announce that after 60 years of democracy and largest written constitution, we finally gave women equal rights in adoption and guardianship. Irony laughs at how ironic hypocrisy can be. We have finally broken free from a 120 year old law and it happened a decade into the new millennium. Another 'interesting' development in family law happened was the Marriage Amendment Bill which has caused so much raucous in the 'conservative' parts of the society. The law was passed in the Rajya Sabha but failed to get voted in Rajya Sabha. The very introduction of the bill caused those self-proclaimed men's activists to go hyper on it.

[7] 331984 A.I.R. 66 (Del.)

[8] Article 21 protects life and personal liberty

[9] Kaur, (1984) A.I.R. at 75 Kaur, 1984 A.I.R. at 75. The court further stated:

Introduction of constitutional law in the home is most inappropriate. . . . In a sensitive sphere which is at once intimate and delicate the introduction of cold principles of constitutional law will have the effect of weakening the marriage bond.

[10] Harvinder Kaur v. Harmander Singh AIR (1984) Delhi 66; ILR (1984) Delhi 546; (1984) RLR 187

The Unifying Theory of Jurisprudence

Having discussed why what we perceived to be the rules of law has at times nothing to do with the course of law, and that law seems like a public drum where anyone can tune it to his liking. And now we have finally arrived at that question. What is law? It is not any but all. It is that cannot be defined yet be explained by many terms. Law is like its very genetic material – human thoughts and emotions, something that can be described but never defined. We have before us the great theories of jurisprudence names the felicific calculus, imperative theory of law, the theory of volksgeist, the grundnorm theory of law and Dworkin's soundest theory of law.[11]

Felicific calculus is a simple method of counting heads – the happy ones and the not so happy ones and if the happy ones exceed the unhappy ones by even the smallest of margins, it is the law of the land. One major drawback of this theory is that it does not take into consideration the intensity of pain and pleasure. The core contention of the theory goes thus "quantity of pleasure being equal, push-pin is as good as poetry"[12] Though law, it its roughest of sense is indeed a mere felicifc calculation where pleasure and pain are weighed. But law as we see it is much more than that. If it were simple pleasure and pain counting, then many laws protecting minorities or the laws like Special legislations for Dalits or other minorities would not exist and if the theory was utterly pointless then homosexuality would have been legal in India long back. Next is the imperative theory of law. Imperative theory views law as the command of the sovereign backed up by sanction[13] and what sovereign is, is an entity which receives habitual obedience from and the bulk of the society and who pays habitual obedience to none.[14] Despite of the huge flaw that it fails to explain the existence of International laws and other customary laws, one of the major issues in this definition is the assumption that sovereign is an entity or a personality in itself. What is a sovereign? It is claimed to be a determinate human superior. But in reality, there is no determinate human superior. Sovereign is nothing but a mirror image of the people it rules over. The will of the sovereign is nothing but a translation of the collective conscience of its people and hence the core contention fails.

[11] R. Dworkin, The soundest theory of law (1979) Oxford Journals, 88th ed, pg 522 - 537
[12] Moore G.E. Principia Ethica (1903), Chapter 3
[13] Denise Meyerson, Understanding Jurisprudence (2007), Routlegde Cavendish, pg 10
[14] Ibid.

Now for the more 'purified' of theories – The grundnorm theory of law by Hans Kelson. This theory states that laws are based on norms which are arranged in hierarchical order and has a basic norm called grundnorm at the bottom of it. He advocated for the separation of law and morality and called for the division of law into its dynamic and static aspect. A daringly straight forward positivist approach, sadly suffers from some severe and inherent problems while separating law and morality. Grundnorm cannot be questioned further on its existence. In the later years of his life, Kelson himself has admitted that the grundnorm was hypothetical and just a mere presupposition. It is nothing but a mere assumption to exert that law is completely separated from morality and used to obscure the roots of law in the moral reasoning of the people of that society. This is mentioned in the second edition edition of pure theory of law as follows

"A father orders his child to go to school. The child answers: Why? The reply may be: Because the ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey the father, the answer may be: Because God has commanded 'Obey Your Parents', and one ought to obey it. If the child now asks why one ought to obey the commands of the God, then the answer is that such an authority cannot be questioned."[15]

There is a silent admission that the grundnorm exists without possible explanations for its existence and that it has may be from the preexisting beliefs of the people. These are the beliefs which form the base of what would be later called as morality and therefore it would seem that the law is not different from morality but rather an extension of it, which would clearly contradict the basic assumptions of this theory. Grundnorm also gets invalidated with the advancement of technology and the technological laws that are connected to it. These laws are in existence for mere convenience and not because of any basic norm for its support. Yet, it would be preposterous to say that law is completely a-moral. With the provisions of mercy petitions and the very existence of a choice of punishment with its minimum and maximum prescribed prove that laws have their roots in morality and law is not completely apathetic.

Savingy's theory is about law and its origin from the will of the people. The law is but the spirit of its people and that the collective national conscious that has evolved along with its society is none other than the fairy god mother of that state's legal system. He popularized

[15] H. Kelson, Pure theory of law, 2nd ed, trans. M. Knight, Berkerley, university of California Press, (1967) pg 196 – 197

the German term by J. G Herder, volksgeist that means 'the spirit of the people'. The core contention was that law is an expression of will of the people. It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation.[16]

While the concept of collective conscience of people as source of law seems closer to the reality, it is also filled with flaws. While asserting that law has its origin from the spirit of the people, it must be noted that people hardly have a collective consciousness. Every individual perception of law would be fueled by a selfish motive and something with a selfish motive cannot evolve to become an unbiased law. Let us not ignore the fact that collective consciousness is not the only source of law.

And finally to Dworkin's claim that morality can veto a law[17], morality essentially arises from the society, and if the society happens to have a 'bad' moral, that would imply that it is justified to have bad laws in that particular society. That is to say that in a cannibalistic society, murder would be perfectly moral and hence legal. This would mean law for barbarians and hence no law at all.

If all these theories fail, then where do they fail and why? The basic mistake happens when we connect law to ambiguous and subjective terms like morality or justice. Something as definite as law cannot be related to something as subjective as morality or justice. Them what is law? Law is the residue from cultural and traditional practices modified by people's changing views on what are and ought to be right and wrong. Law of a land can be well explained by the monkey experiment. In a 2011 PT blog post called "*What Monkeys Can Teach Us About Human Behavior*", Michael Michalko described an experiment involving five monkeys, a ladder, and a banana. An experimenter puts 5 monkeys in a large cage. High up in the cage, bananas are placed which can only be accessed by a ladder. But every time a monkey climbs the ladder, other monkeys are sprayed with cold water, that they soon started beating up any monkey who attempts to climb the ladder. Now one monkey is removed and a new monkey is introduced to the cage. This monkey is beaten on its attempt to climb the ladder. One by one the monkeys were replaced and all got beaten up when attempting to climb the ladder. By the end of the experiment, none of the original monkeys were left and yet, despite none of them ever experiencing the cold, wet, spray, they had all learned never to

[16] Doherty Michele, Jurisprudence: The Philosophy of Law, 2nd edi., Old Bairy Press, London, p.g. 233
[17] H, Baxter, Dworkin's 'one-system' conception of law and morality, Boston Law Review, vol 90, pg 857 - 861

try and go for the bananas. If monkey could talk, they would have told you that ‘it’s the way things are done here’.

This is exactly what law is about. A common code of conduct prescribed generations back and modified with time that it loses its initial intention and ends up being entirely different in its form. Law is not any of these theories but a perfect mixture of all these theories. In right amount, all the theories have their implications and none the full. Thus only a layered chocolate fudge cake of all these theories would represent what law in real life is.