

CONSTITUTIONALISM AND CONSTITUTIONAL MORALITY AS A CHECK ON CRIMINALISATION

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ABSTRACT

Constitutionalism means allegiance to the spirit of the constitution. It aims to put an end to the arbitrary exercise of power by the government by affirming that a government's authority is bound by constitutional principles. Constitutional Morality is an expansive term and it entails remaining true to the fundamental principles of the constitution. It's of paramount importance in today's world to nip in the bud the shades of authoritarianism in the workings of the democratically elected governments in their attempt to crush dissenting voices. Over criminalisation is a potentially lethal weapon. But the moot point is whether uncanalised criminalisation can be controlled by strictly conforming to the core values of the Constitution? What is the scope of constitutional morality in the realm of criminalisation? Should constitutional morality always trump public morality? Whether public morality is a baggage from the past and it has no place in the modern world? The author aims to examine all these issues in this paper and to provide his own conclusion on this issue.

From a normative point of view, the solution lies in developing a principled normative theory of criminalisation that will provide a conceptual basis for shaping and moulding criminalisation. But, it's easier said than done. There are different geographical, societal, and moral factors that vary across the globe and a master theory of criminalisation is an exercise in vain. In the Indian Constitution, Criminal law and criminal procedure have been put in the concurrent list in the Seventh Schedule as it's not feasible to have a uniform set of laws without taking into account the diverse needs of different geographical locations.

If we go into Mill's harm principle, it calls for criminalising conduct that causes harm to others. But, it has its own limitations. For example, suppose a person doesn't wear a seat belt, why should he be penalised as he is not causing harm to others. But, society has an interest in the well-being of every individual, which indirectly contributes to the well-being of society.

According to Feinberg, offense principle, not the harm principle, should guide the field of criminalisation. It calls for criminalising disgusting behaviour, even though it's not harmful to others. But, it's not a very sound proposition. It may have dangerous repercussions, such as if a person is a pure vegetarian and he may get offended by someone else eating meat. In that situation, it calls for criminalisation of that conduct. What is happening in our country in recent times in the name of cow protection or forcible shutting down of meat shops during Hindu festivals by vigilante groups provides ample testimony to the ulterior side of this proposition.

According to Tatjana Hörnl, it's impractical to develop one master theory in the field of criminalisation. He argues that it's advisable to have a three-pronged approach towards criminalisation. A distinction has to be made between offences that cause bodily harm, offences that deprive us of our rightful entitlements, and offences that threaten genuine collective interests. But, it's hard to define genuine collective interests.

It's also pertinent to analyse the Hart-Devlin debate on this topic. Devlin stressed the shared morality of society, and according to him, the function of law is to enforce a minimum standard of morality. But Hart realised the grave dangers of public morality and he argued that why should the freedom of people be curtailed in order to satisfy the moral dogma of a few people? He endorsed the Harm Principle on this issue.

The Hon'ble Indian Supreme Court has time and again stressed that public morality can't be allowed to prevail over constitutional morality if the fundamental rights of a section of society

have been trampled upon, however small it might be. In the Navtej Singh Judgement¹, the Hon'ble SC has held that constitutional morality must trump public morality even if public morality is based upon the sentiments of the majority. The morality that finds mention in the constitution is constitutional morality. A section of individuals who have a peculiar sexual orientation can't be prejudiced on the altar of popular morality. The vibrancy of Indian democracy depends on enforcing the constitutional morality contrary to public morality. In the Sabrimala case², the majority decision of the Hon'ble SC observed that constitutional morality is antithetical to the idea of exclusionary practices. The Hon'ble SC rejected the "doctrine of essentiality" in favour of constitutional morality. The Hon'ble SC in the decriminalisation of adultery case³ opined that criminal law has to be in conformity with constitutional morality. Public morality which is in confrontation with constitutional morality has to be done away with.

Now, the pertinent issue is whether public morality is always unfavourable and the criminal policy of the state should at all times be guided by constitutional morality alone? But, it's not always true. For example, Justice JS Verma committee was formed in the aftermath of the Nirbhaya gang-rape case, which sparked a national outcry. The committee recommended changes to the Criminal Code that would allow criminals convicted of sexual assault against women to be tried more quickly and receive harsh punishment. The Criminal Law (Amendment Act), 2013 was passed which is also known as Nirbhaya Act. It added new offences like acid attack, sexual harassment, voyeurism, stalking to the IPC which was a welcome step. Also, why should public morality always be looked down upon. Why shouldn't society be given a chance to evolve gradually and to find organic solutions to the emerging ethical and moral issues instead of a top-down approach?

But, there are grave dangers if the criminal policy of a State be guided by considerations of public morality alone. It can lead to the infusion of racial, ethnic, sexual, religious, social etc. biases in the criminal law which will negate the very essence of the rule of law. As the Indian Constitution itself promises equality, liberty, freedom of expression etc., it's essential that Constitutional Morality be a guiding light in the framing of criminal policies. The ultima ratio principle, i.e., criminal law should only be utilised when there is no other alternative and for the most heinous wrongs, must be kept in mind while framing criminal policies. The

¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

² Indian Young Lawyers Association v. The State Of Kerala, (2019) 11 SCC 1

³ Joseph Shine vs. Union of India, (2019) 3 SCC 39

constitutional values must be given a concrete shape in the form of the criminalisation policies of State. The aim of the criminal law is not to give the societal biases and dogma a platform to influence criminalisation decisions, but the aim should be to shape the criminal law in consonance with the conscience of the constitution to make a truly pluralistic, vibrant, and dynamic democracy. The conservative notions of prejudices, superstitions, patriarchy can't be allowed to be seeped into the criminalisation decisions.

Constitutionalism and Constitutional Morality can function as a check on criminalisation because if the notion of popular morality is carried into the criminalisation policies of the State, then there is a danger of criminalisation on a large-scale. As society is slow to imbibe constitutional principles, the courts must function as facilitators in the whole process to prevent majoritarian excesses and the usurpation of power by the State to the detriment of constitutional ethos. As the government is elected by the people and it can't afford to offend its constituency, the courts have a paramount importance in the infusion of substantive norms of the constitution into the realm of criminal law.

But, the doctrine of constitutional morality has its limitations too. There is always a danger of judicial overreach. Also, as the term "constitutional morality" is nowhere defined, it can militate against separation of powers as it's open to subjective interpretation by individual judges. There is no authoritative definition of the term "constitutional morality" and it has no fixed contours. It's open to abuse and interference, for example in religious practices, as Justice Indu Malhotra dissenting opinion in the Sabrimala case implied. The essence of constitutional morality has to be gradually infused into society, and it needs a concerted effort on the part of all stakeholders.