TENDENCIES OF DECRIMINALIZATION OF OFFENCES: A SOCIO-LEGAL STUDY

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Abstract - Concern about the penal turn in criminal law has sparked a proliferation of scholarship tentative criminalization and decriminalization. In the human rights field, most scholars has concerned itself with precise categories of criminal offences and whether they are appropriately criminalized, what the consequences of this criminalization are, and the arguments for curtailing criminal laws. This research tends to be issue specific and is comparatively studied. In current arena Supreme Court applies judicial activism for the purpose of decriminalizing homosexuality, adultery and passive euthanasia which violates article 14, 15 and 21 of the Constitution. It aims to clarify current patterns and practice in interpreting and applying the provisions of the Constitution to the issue of decriminalization. Further understanding of the scope and content of jurisprudence that supports decriminalization may help inform efforts to reconsider the inappropriate criminalization of a wide assortment of conduct.
This paper is divided into six parts. Part 1 is a brief introduction of the decriminalization. Part 2 consist of the meaning of the term Decriminalization, part 3 talks about the Definitions in legal conceptions whereas part 4 talks about Socio-legal conceptions. Part 5 talks about certain offences which were decriminalized are discussed thoroughly in the paper & further part 6 consists of the Concluding remarks and Suggestions of the author.

Keywords- Decriminalization, Adultery, Euthanasia, Homosexuality, Offences, Indian Penal Code.

I. INTRODUCTION

Concern about the penal turn in criminal law and the "untrammeled expansion of criminal law" has sparked a propagation of scholarship examining criminalization and decriminalization[1]. The penal turn explains the dilate reach and rising numbers of criminal laws with more keen punishments, for what may be the improper use of criminal law to deal with a wide range of social problems. International human rights bodies are a prominent source of new criminal norms, as national legislatures frequently pass or repeal laws to fulfill their State's international obligations. As such, these bodies are an essential subject for analysis. Similarly, aiming analysis on decriminalization can help demarcate where efforts exist to halt unfortunate regulation through the criminal law. This paper examines on decriminalization of offences by Supreme Court judgments, which collectively provide guidance for the criminal jurisprudence. It aims to explain current patterns and practice in interpreting and applying international human rights norms to the issue of decriminalization writ large, as an overall and systemic account of the subject does not currently exist. Further understanding of the scope and content of jurisprudence that supports decriminalization may help inform efforts to reassess the inappropriate criminalization of a wide array of conduct.

Evidently, there are some complex anxieties about the current relationship between human rights law and criminal law. While the judgments presents varying forms of analysis on specific categories of acts to be decriminalized, the consequences of criminalization, and critiques of the reach for criminal law for rights vindication above other alternatives, we do not at present have sufficient contextualizing scholarship, such as a systematic account of the frontiers of decriminalization within International Human Rights Law. The aim of this paper is to serve as one useful point by the way of analyzing the judgments which was pronounced by Supreme Court of India.

II. THE MEANING OF DECRIMINALIZATION

The meaning of decriminalization may seem self-evident, but it can be defined and conceived of in scholarly works and policy credentials in various ways that are sometimes indistinct or contradictory.

It could swallow up almost every theoretically interesting question about criminal law, criminal responsibility, criminal justice and retribution[2]. The hypothesis, thoughts, ambitions and interests underlying criminal legislation, or the political promises of such legislation; those which inform citizens' decision-making, along with patterns of policing, prosecution and plea-bargaining; the contours of criminal law doctrine and of criminal legislation; the practices of judges and magistrates both in applying criminal law to particular offenders and sentencing them: the practices of officials in the penal system; even the impact of social attitudes and the predictable economic costs, the personal ruptures and the knock-on social effects which accompany punishment: all of these, and more, contribute to our understanding of the social and political phenomenon of 'criminalization'.

III. LEGAL CONCEPTIONS AND DEFINITIONS

Decriminalization in terms of de jure means decriminalization, where legislatures repeal or narrow criminal statutes, to eliminate all or portions of a conduct from the purview of the criminal law. This is often a codification of de facto practices of decriminalization, where a criminal offence remains in the criminal code but is no longer enforced. De facto decriminalization is often due to obsolescence, and the resulting legal anachronisms may sometimes reflect a less politically divisive option where it is easier to cease enforcement of a criminal law than it is to remove it from the criminal code. For certain behavior that may still be in contention, full de jure decriminalization would help avoid the risk of future enforcement.

Mostly the term de-penalization is mistakenly used interchangeably with decriminalization, but this is a much tapered concept which describes the removal of custodial sentences as a punitive measure, while the conduct itself remains a criminal offence. In this position other forms of criminal punishment may be imposed instead, for example probation or compulsory rehabilitative programming.

IV. SOCIO-LEGAL CONCEPTIONS AND DEFINITIONS

Other conceptions of decriminalization are Socio-legal[3]. These examine decriminalization across the entire criminal justice system and examine the wider social and political processes in which criminal justice systems are surrounded, within states and internationally. They are helpful for understanding how legal categories are applied to whom, in what circumstances, and with what consequences. They enable the assessment of "the relations of class, race, and gender, the cultural assumptions and prejudices, and the political considerations that inform and influence the practice of law,"[4] and the "partial, besieged, and often biased ways" in which criminal laws are applied.

V. SEVERAL OFFENCES

5.1 Decriminalization of homosexuality

While addressing to the Constituent Assembly on November 25, 1949, Dr. B.R. Ambedkar laid out his transformative vision for the Constitution of India. The script, he said, ought to serve as a lodestar in the attempt to make India not merely a political but also a social democratic system. He saw liberty, equality and fraternity as principles of life, as a collective "union of trinity*". "To divorce one from the other,"* he said, *"is to defeat the very purpose of democracy."* [5] Now, after the Independence, these values that Dr. Ambedkar saw as integral to India's republic, find new meaning in a remarkable ruling of the Apex Court in *Navtej Singh Johar and Ors.* v. *Union of India*[6]. Not only has the court struck down the miserably wicked Section 377 of the Code[7], in so far as it criminalize homosexuality, but it has also recognized the Constitution's enormous and extraordinary transformative power. The Apex court has provided us with a deep expression of democratic hope. And perhaps we can finally believe, as Nehru said, in his famous speech, which was given at the midnight that "the past is over, and it is the future that beckons to us now".

5.1.1 Macaulay's shadows on section 377[8]

According to Section 377 of the Code[9] "*any person who voluntarily has carnal intercourse against the order of nature with any man, woman or animal"* over the years, the term, *"against the order of nature",* has been used Macaulay, the law's drafter, despised the idea of even a debate on the legislation's language. *"We are decidedly of*

the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."[10]

It is to be noted that if the any person is found breaching this provision he shall be punished with imprisonment for life or for a term which may extend to ten years and he shall also be liable for fine.

Like many other colonial-era laws, therefore, Section 377[11] was inserted with a view to upholding a conspicuously Victorian notion of public morality. But post-Independence, the law remained on the books, as an edict that the Indian state saw as essential to the enforcement of its own societal customs. The criminal law, the government understood that, it was a legitimate vehicle through which it could impose and entrench in society its own ideas of what constituted a good life.

5.1.2 Long road to freedom on decriminalization of homosexuality

In July 2009, the Delhi High Court, in a judgment pronounced by a bench comprising Chief Justice A.P. Shah and Justice S. Muralidhar, discarded this vision, and declared Section 377, insofar as it criminalized homosexuality, unconstitutional.[12] In the court's belief, the law was patently biased. It offended not only a slew of explicitly guaranteed fundamental rights - in this case, Articles 14, 15, 19 and 21 - but also what the judgment described as *"constitutional morality".* At the time this was an important statement to make. Indeed, just about four years later, the Supreme Court reversed the findings in Naz[13], and rendered the judgment's radical idea nugatory. In a catastrophic decision, the court, in Suresh Kumar Koushal,[14] once again acknowledged homosexuality as an offence. LGTBQ peoples, to the court, constituted only a "miniscule minority", and they enjoyed, in the court's belief, neither a right to be treated as equals nor a right to ethical liberty, a autonomy to decide for themselves how they wanted to lead their lives.

But now, in *Navtej Singh Johar* v. *Union of India*[15], the court has restored both the quotidian and the stupendous glories of the judgement in Naz[16]. Unexceptionally, Section 377[17], it has found that, it infringes the guarantee of equality in Article 14, the guarantee against discrimination in Article 15, the right to freedom of speech and expression contained in Article 19, and the pledge of human dignity and privacy inherent in Article 21. But, perhaps, more critically, the court has taken inspiration from Naz in bringing to the heart of constitutional elucidation a theory that seeks to find how best to understand what equal ethical status in society really demands, a speculation that engages profoundly with India's social and political history.

5.1.3 Interpreting the constitution on homosexuality

In the case of *Navtej Singh Johar* v. *Union of India*[18], the judges have given separate opinion which was written respectively by Chief Justice of India Dipak Misra and Justices R.F Nariman, D.Y Chandrachud and Indu Malhotra; collectively adopt an interpretive model that gives to India's history at its full consideration. The Constitution of India *"was burdened with the challenge of 'drawing a curtain on the past' of social inequality and prejudices,"* Justice Chandrachud wrote that, invoking Professor Uday Mehta. The manuscript, therefore, was an *"attempt to reverse the socializing of prejudice, discrimination and power hegemony in a disjointed society."* Or, as Chief Justice, Justice Dipak Misra placed it: *"The adoption of the Constitution was, in a way, an instrument or agency for achieving constitutional morality and a means to discourage the prevalent social morality at that time. A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness.*[19]

Future disputes will certainly have to be conducted by the court's general rule prescribed in Navtej Singh Johar[20]. The court has already held in reserve its judgment in a number of cases that will tell us how it intends on applying this theory. Its pronouncement in cases concerning the entry of women into the Sabarimala temple, on the practice of female genital mutilation of minor girls in the Dawoodi Bohra community, on the legality of the Indian Penal Code's adultery law, will all prove telling. Yet, much like the challenge to Section 377[21], the issues at the core of these cases are barely controversial as a matter of pure constitutional interpretation. Ultimately, therefore, the right worth of Navtej Singh Johar[22] will only be seen when the court sees this conjecture as integral to its skill to judge clashes between the power of the state and individual freedom, to cases such as the challenge to the Aadhaar

programme, which seek to reverse the alteration that the Constitution brings. There too, as Chief Justice, Justice Dipak Misra has written, the court must be *"guided by the conception of constitutional morality.*[23]

5.1.4 Analysis of decriminalization of section 377 of IPC

The Supreme Court has given a very narrow definition of the provisions under the Articles 14, 15 and 21 of the Constitution of India in the case of Navtej Singh Johar[24]. It has not taken into account according to the changing trends in the world and wider acceptance of different sexual orientations. Unlike the Delhi High Court, it has not considered the historical background and values of the Indian culture where there is evidence of the prevalence of homosexuality. Many temples noticeable scenes of people indulging same gender sexual intercourse which the society today considers obscene.

5.2 Decriminalization of adultery

The five-judges of Supreme Court constitute bench which comprised of Chief Justice Dipak Misra and Justices R F Nariman, A M Khanwilkar, DY Chandrachud and Indu Malhotra, they dealt with the issue of adultery and overturn three previous ruling which has declared adultery law as constitutional. **Striking down Section 497 of IPC[25], the court said it is *'manifestly arbitrary, violates right to equality, dents individuality of women'.*[26]**

A 158 year old section[27] provided that *"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery".*

The offence of adultery leads to a maximum punishment of five years, or with fine, or both.

The Chief Justice of India and Justice Khanwilkar said: *"We declare Section 497 IPC and Section 198 of Cr.P.C dealing with prosecution of offences against marriage as unconstitutional"*.

5.2.1 Inequality not constitutional

Chief Justice of India, who wrote the judgment for himself and Justice Khanwilkar, said adultery dents the independence of women and it is not a crime in countries like China, Japan and Australia. Adultery might not be cause of gloomy marriage, it could be result of an unhappy marriage, the Chief Justice of India said. The Chief Justice of India said unequal treatment of women invites the wrath of the Constitution of India.

The judgment[28] by apex court's five-judge bench headed by Chief Justice Dipak Misra said the beauty of the Constitution is that it includes "then I, me and you". Reading out the judgment, the CJI said that equality is the governing parameter of the Constitution. The Apex court held that any provision treating women with inequality is not constitutional and it's time to say that husband is not the master of woman[29].

5.2.2 To be treated as *'Civil Wrong'*

The CJI said section 497[30] is manifestly arbitrary the way it deals with women. The bench of judges held that adultery can be treated as civil wrong for dissolution of marriage. There can't be any social authorization which destroys a home, the Chief Justice of India said, but added that adultery should not be a criminal offence. The Supreme Court said in the ruling that adultery can be a ground for civil wrong, a ground for divorce but not a criminal offence. Justice Chandrachud said self-sufficiency is basic thing in dignified human existence and Section 497 strips women from making choices and held adultery as a relic of past. Parliament has obligated a condition on sexuality of women by making adultery as offence, he said, adding that section 497 is rejection of substance of equality. Chief Justice said Section 497 is held to be unconstitutional as adultery is manifestly arbitrary[31].

5.2.3 Analysis of decriminalization of section 497 of IPC[32]

In the instant case[33], the Supreme Court struck down Section 497[34]. With a single knock of a pen, the Court has added its bit to cause danger to the institution of marriage. Winds have been cast to dilute the institution upon which the strong base of the Indian Society rests. The preclusion effect has been out rightly blown. This termination will lead to rapid profiling in the crimes related to adultery. With absolute rights come absolute consequences. Hence, this verdict can lead to sexual chaos. Adultery is no longer a criminal offence now. It is just a civil wrong for which the remedy is given which is divorce. An ethical wrong can never be a legal right. The reasons are vain and hence this cannot become Lex Loci. If Adultery is not a crime or a wrong, then obtaining a divorce on this ground would be an endless chase. Criminal law is a guardian of the historical roots and ethical principles of the society.

"If we start subjecting laws to our personal rationale, it would lead to chaos, as a counter-narrative would always exist."

In *State of U.P. v. Deoman Upadhyaya*[35] the Constitution Bench of the Supreme Court observed:

"In considering the constitutionality of a law on the ground whether it has given the same treatment to all persons similarly circumstanced, it has to be remembered that the legislature has to deal with realistic problems. The question is not to be judged by merely enumerating other theoretically possible situations to which the ruling may have been, but has not been, applied."

Section 497 IPC acted as a deterrent so that the adulterer does not commit the same crime again. The law didn't fall short to prevent adultery, but the enforcement did. Just because of this reason, it cannot be decriminalized. A whole house can collapse with the collapse of a single brick. Crime rates in rape, murders etc. are also increasing rapidly but these are not decriminalized relying on this argument. India is still a semi-squire and conservative nation. So adjudication merely on the ideas of the western countries is not possible. Many factors regarding the socio-economic order of the country need to be considered.

It was well observed by Justice Frankfurter in *Trop v. Dulles*[36] *"All power is, in Madison's phrase, of an encroaching nature. Judicial power is not immune from this human weakness. It must always be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint on it is self-restraint. The Court must observe fastidious regard for limitations on its own powers, and thus preclude the Court giving effect to its own notions of what is wise and politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit on the wisdom of Congress or the Executive Branch."*

As observed by the Supreme Court in *Govt. of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi*[37] *"Adjudication must be done within the system of historically validated restraints and conscious minimization of the judges preferences*", and as held in *State of Bihar v. Kameshwar Singh*[38]**,** *"The legislature is the best judge of what is good for the people by whose suffrage it has come into existence."*

The immediate consequences will be that the suicide rates in marital relationships will increase now and then prosecution under Section 306 relating to abetment of suicide will take place. It would have been reasonable if the section was amended instead of being struck down. The elimination of women in this provision *"delegitimizes the sexuality of women by careful erasure of it".*

Instead, Section 198 of Code of Criminal Procedure, 1973 should have been struck down as it prevents wives from filing complaints against adultery. As rightly cited by J. Indu Malhotra in her judgment[39] that *"Women are no longer invisible to law, and they no longer live in the shadows of their husbands".*

5.3 Decriminalization of passive euthanasia

The Supreme Court has given legal sanction to passive euthanasia in a landmark verdict[40], permitting 'living will'[41] by patients on withdrawing medicinal support if they slip into permanent coma. The Supreme Court said that directions and guidelines lay down by it and its directive shall remain in force till legislation is brought on the issue.

5.3.1 What is passive euthanasia?

Passive euthanasia is a situation where there is withdrawal of medicinal treatment with the premeditated intention to be quick with the death of a terminally-ill patient.

5.3.2 What is the case law?

The ruling stems from a petition[42] filed by an NGO 'Common Cause', who had move towards the court seeking a direction for recognition of *'living will'* and challenged that when a medicinal expert said that a person troubles with terminal disease had reached a point of no come back, then she should be given the right to refuse being put on life support.

"How can a person be told that he/she does not have right to prevent torture on his body? Right to life includes right to die with dignity. A person cannot be required to live on support of ventilator. Keeping a patient alive by artificial means against his/her desires is an assault on his/her body," the petition[43] said.

The central government, however, had told the court that the government had in principle decided to make legal, attempt to suicide which at present is an offence punishable by up to one year jail term under Section 309 of Indian Penal Code.

5.3.3 What is a living will?

A living will is a written manuscript by method of which a patient can give his explicit directions in advance about the medicinal treatment to be administered when he or she is terminally ill or no longer able to express informed permission. Passive euthanasia, meanwhile, is a situation where there is withdrawal of medicinal treatment with the deliberate intention to hasten the death of a terminally-ill patient.

5.3.4 Analysis of decriminalization of passive euthanasia

A five-judge bench of the Supreme Court in recent times legalized passive euthanasia and issued guiding principle in recognition of *'living will'* made by terminally-ill patients[44]. The judgment has been hailed for its far-reaching impact on Indian society. It may be worth mentioning here that though the five judges were of different views on the matter, yet they were unanimous on allowing a *'living will'* to terminally-ill patients.

I believe that death has an inevitability and amorality of its own. The Supreme Court judgment has in a sense ascribed morality to death by bringing in human intervention.

Paul Kalanithi, in his book[45], has written, *"But knowing that even if I'm dying, until I actually die, I am still living."* The process of life is not over till it ends. Whether this judgment is bound to change that perception or not is something we will have to wait and see. A *'living will'*, which allows one to choose death, is a freedom which only the educated can avail. In a country which is challenged with ignorance and illiteracy, who can make such a *'living will'* is no secret. Thus, in a sense, the provision of passive euthanasia in India becomes exclusive to the sophisticated, if not the elite.

Thus, the basis of using passive euthanasia in terminal conditions as allowed by the Supreme Court judgment can be easily misused by doctors, kin and even by the patients. This is something which would need constant evaluation by the treating physician, free from the diktats of the law. This for me is a critical flaw in the judgment and will raise a storm once fully operational in our society.

In an interesting point made in the verdict, it is mentioned that:

"It is to be borne in mind that passive euthanasia fundamentally connotes absence of any overt act either by the patient or by the doctors."

This is remarkable because it raises a question of ethics versus legality on part of the doctor who will preside over the death of a willing patient. Doctors are bound by acts of commission or omission which should be in tune with patient's welfare. The intention of treatment is defined through doctor's acts of omission or commission, which should help the patient to get better.

To accept development without losing one's tail would be the most terrible mistake of advancement. For passive euthanasia to be seriously considered as a choice in a country like ours, we need to keep in mind the words of Immanuel Kant, the proponent of principles of ethics which form the basis of medical ethics too. He argued that morality can't be based on happiness; moral principles could be derived from practical reason alone.

VI. CONCLUSION & SUGGESSIONS:-

Decriminalization of offences by the judgment of supreme court of India shows to fold a progression, first is progression in criminal jurisprudence which change its nature with the passage of time which reflect the progression of criminal jurisprudence and make it healthy and comfortable administration of justice in Indian legal system, in second fold of progression shows that law is dynamic in true sense which change with the necessary circumstances, needs and reason as well as with object.

In the entire process of decriminalization of offences we cannot overlooked the role of Indian judiciary which play vital role in decriminalizing and making necessary and desirable change in existing law.

The recently judgment such as in the case of Navtej Singh Johar[46], Joseph Shine[47] and Common cause[48] shows that violate Article 14,15 and 21 of the Constitution of India.

As was said in *Proprietary Articles Trade Association v. AG for Canada*[49]: "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?" The administration is thus responsible for the certain of crimes, and if this is to be done in a lucid manner, it is necessary that there should be a satisfactory body of knowledge relating to the criteria which a lawmaker should take into account when deciding whether or not to make conduct criminal or whether or not to remove existing criminal sanctions.

Also the conscience of the society plays a major role that what should be inclusive and what should be not as an acceptable crime. For instance the bloody sport of *jalikattu* is legislature by the legal framers but the mindset of the society can never accept this and thus for removal of this and to keep harmony in the society, the ordinance was passed by the governor. Thus we can conclusively say that the conscience of the society also one of the major key to decriminalize the offences.

There can be a little doubt that decriminalization of criminal law is essential to relieve the congest machinery of criminal justice and to increase the criminal sanctions effectiveness by restricting it to its proper function, as an ultimate tool to protect fundamental interest against punishment able conduct. Wholesale decriminalization of the law, unfortunately, is as unlikely as it may be desirable and necessary. The legislature, under pressure from various groups in society, could only with difficulty repeal crimes without substituting satisfactory alternative sanctions.

From the above discussion, a few suggestions would include:

1. Legislature can enact statutes in ways that promote leniency, or they can enact statutes in ways that permit old habits to persist.

2. Courts can interpret those statutes in ways that promote the values of decriminalization, or they can issue interpretations that permit business to proceed as usual.

3. Perhaps most importantly, police are at the front lines of ensuring that decriminalization really works the way it's supposed to.

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