RE-THINKING CRIMINALISABLE HARM IN INDIA: CONSTITUTIONAL MORALITY AS A RESTRAINT ON CRIMINALISATION

Abstract

In the absence of an explicit constitutional right not to be criminalised, unprincipled criminalisation can be regulated by re-structuring the policy of criminalisation along the principles of constitutional morality. The concept of constitutional morality was reviewed in the recent Indian case of *Naz Foundation* where the High Court of Delhi held that criminalisation of homosexuality is unconstitutional. The court identified "diversity" as an important aspect of constitutional morality and rejected the Devlin- type public morality argument to conceptualise wrongful harm. Unprincipled criminalisation of harmless conducts like passive begging and homosexuality is founded on notions of public morality rather than on the mandate of constitutional morality. The paper argues that the policy of criminalisation must be guided by constitutional principles. The manner in which the Delhi High Court employs the notion of constitutional morality is exemplary and it has far reaching implications in reformulating the policy of criminalisation. In the contemporary times when the states are required to conform to the normative framework of human rights, constitutional morality can play a vital role in guiding public policy decisions.

I Introduction

THE CONTOURS of modern Indian state driven by the philosophy of neo-liberalism are constantly shrinking. However, in the domain of criminal law the state remains the holder of Leviathan like power and *monopoly over legitimate violence*;[1] indeed, its authority is solidifying its roots and gaining fresh ground. The evolution of the framework of human rights and resurgence of constitutionalism has had little regulatory impact on the *exponential* and *unprincipled* growth of criminal laws and penal statutes in India. Though the issues of over-criminalisation[2] and disproportionate application of criminal law[3] have detrimental consequences for

1 This old Weberian insight remains militantly alive in the discipline of criminal law in contemporary times. For a lucid exposition of this Weberian notion see Sheldon S. Wolin, "Max Weber: Legitimation, Method & the Politics of Theory" 9(3) *Political Theory* 401-424 (Aug, 1981).

2 On the phenomenon of over-criminalization, see Douglas Husak, *Overcriminalization: The Limits Of Criminal Law* (Oxford University Press, New York, 2008); Andrew Ashworth, "Is the Criminal Law a Lost Cause" 116 *The Law Quarterly Review* 225 (2000); Andrew Ashworth, "Conceptions of Overcriminalization" 5 *Ohio State Journal of Criminal Law* 408-425, *available at:* http://moritzlaw.osu.edu/osjcl/Articles/Volume5_2/Ashworth-PDF.pdf (last visited on June 14,2012).

3 See J. Reiman, *The Rich Get Richer and the Poor Get Prison* (Allyn & Bacon, Boston, 1995).

people, there is no sustained and coherent dialogue amongst law-makers on the policy of criminalisation[4] followed by the criminal justice system in India. Even the judiciary, though recognized for its human rights activism, has not been able to direct the judicial process towards a well-conceptualized theory of criminalisation in order to fill the gaps in the existing framework. The adjudicative focus in criminal law is largely on factual scenarios and procedures rather than on the theoretical discussions of what constitutes "right" and "wrong" conduct. While one may argue that this is not what courts are meant to do, these questions are significant in order to demarcate the terrain of constitutional theory of criminalisation. Though it is the state's prerogative to formulate its criminalisation policy within its legitimate authority, criminalisation should be fair and justified as it subjects people to detrimental and harmful consequences.[5] Criminal sanctions encroach upon individual liberty, limit individual's space for free choice and constrict a person's thought and action. And since personal liberty and freedom of choice are constitutionally protected guarantees, people have a general right not to have their choices restricted by arbitrary criminalisation of human conduct. "The right", Dennis J. Baker argues, "is not only about having the freedom to do as one chooses so long as it does not wrong others, but also about not being subjected to the harmful consequences that flow from unfair criminalization (detention, penal fines, conviction, stigmatization *etc.*)."[6] The only way in which this right can be overridden by the state is by reasonable, fair and principled criminalisation. Under the scheme of the Indian Constitution, there is no express guarantee of "right not to be criminalized". While there have been significant path-breaking developments in Indian jurisprudence through judicial process- right to life has evolved to include within its scope right to privacy,[7] right to

4 Though there have been many government initiated research groups on reforms in the criminal justice system in India, there is a lack of academic and theoretical rigor in their findings and conclusions. For instance, the Malimath Committee Report on Criminal Justice Reforms, 2003 was subject to scathing critique for its "shoddy" research and populist conclusions. See Upendra Baxi, "Introductory Critique" in Amnesty International India, *The Malimath Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights* . It may be noted that though the Draft National Policy on Criminal Justice, 2007, recognizes that "It is time to adopt de-criminalization as a part of national policy" it does not expound on the issue of a coherent determination of the contours of principled criminalisation. It refrains from delving deeper into policy considerations and leaves the same "for the lawmakers to decide" and on the "advice of expert bodies like the Law Commission of India." *Report of the Committee on Draft National Policy on Criminal Justice*, Ministry of Home Affairs, Government of India 12 (2007).

5 Nigel Walker, *Punishment, Danger and Stigma* (Basil Blackwell, Oxford, 1980).

6 D.J. Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* 2 (Ashgate Publishing Limited, 2011).

7 *Kharak Singh* v. *U.P.*, AIR 1963 SC 1295.

speedy trial,[8] right to free legal aid,[9] and even socio-economic rights like right to shelter[10] and livelihood,[11] right to health,[12] right to clean drinking water and fresh air,[13] right to education,[14] right to development[15] *etc.* – the "right against unfair criminalization" or "right not to be criminalized" has not been read in right to life or any other right. Therefore what is made a crime, and what is not depends on the state's policy of criminalisation; in the legitimate discharge of its authority, the state can prohibit any conduct by making it a criminal.[16]

In this constitutional vacuum, the judgment delivered by the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi*[17] (hereinafter *Naz*) has sought to provide a legal right not to be unfairly criminalised by invoking the notion of constitutional morality. This paper argues that *Naz* has set out the constitutional limits of substantive criminal law. It expounds constitutionalism by demarcating the bound of state's criminalisation policy. The policy of criminalisation, if *Naz* is taken seriously, has to conform to constitutional morality. No conduct can be made/ or remain criminal if it is not wrongfully harmful–wrongful harm defined in consonance with the spirit of constitutional principles, guided by the norms of constitutional morality. This re-formulation of policy of criminalisation by reading into it the constitutional norms sets in motion a serious debate in Indian criminal law tradition to decriminalise certain conducts like begging, adultery, homosexuality; and criminalise conducts like marital rape.

Naz has completely transformed the concept of constitutional morality in an adept fashion by de-historicizing the same in order to serve a larger social purpose. Further, by invoking constitutional morality in a case involving an issue of substantive criminal law, *Naz* has the potential of re-invigorating the debate (or lack thereof) on criminalisation in India, and paving the way for a constitutional theory of criminalisation. Under this scheme, "harm" has to be conceptualized in accordance with the normative framework of constitutional morality (which includes specific rights and their interpretations) rather than public morality. This will enable the

8 *Hussainara Khatoon (I)* v. *Home Secretary, Bihar* (1980) 1 SCC 81; *Hussainara Khatoon (I)* v. *Home Secretary, Bihar* (1980) 1 SCC 91; *Hussainara Khatoon (I)* v. *Home Secretary, Bihar* (1980) 1 SCC 93.

9 *M.H. Hoskot* v. *State of Maharashtra* (1978) 3 SCC 544.

10 *Gauri Shankar* v. *Union of India* (1994) 6 SCC 349.

11 *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545.

12 *CERC* v. *India* (1995) 3 SCC 42.

13 *M.C. Mehta* v. *India,* AIR 1988 SC 1037.

14 *Unni Krishnan* v. *State of A.P.* (1993) 1 SCC 645.

15 *Municipal Council, Ratlam* v. *Vardhichand,* AIR 1980 SC 1622.

16 Criminal law is the first item in the concurrent list of seventh schedule of the Constitution of India and both the centre and state governments have the authority to legislate upon criminal law matters.

17 (2009) 160 Delhi Law Times 277 (Delhi High Court) *per* A.P. Shah CJ and S. Murlidhar J.

courts to identify a *law free zone* which can be designated as the "right not to be unfairly criminalised".

II Case of decriminalisation of homosexuality: towards a constitutional theory of criminalisation

On 2nd July, 2009, in *Naz*, the High Court of Delhi held that the law criminalising homosexuality in India is unconstitutional. This decision, though limited to the State of Delhi (National Capital Region),[18] has become historic for securing the space for sexual minorities within the domain of constitutional rights. This decision has been extensively discussed and debated, by constitutional theorists,[19] gay rights activists, and legal community, generally for its significant contribution to the constitutional theory. However, it is yet to be analysed from the perspective of the theory of criminalisation by examining its unique manner of dealing with criminalisation with reference to the norms of constitutional morality.

The High Court of Delhi, in its detailed verdict declared that section 377 of Indian Penal Code, 1860 (hereinafter IPC) which criminally penalizes "unnatural offences"[20] violates articles 14,[21] 15[22] and 21[23] of the Constitution of India. Affirming that penalisation of homosexuality is an infringement of the rights to dignity and

18 Since the jurisdiction of a high court is limited to the state concerned, this judgment holds only for the State of Delhi and not any other part of India. The appeal from this case is now pending in Supreme Court of India. If the decision of Delhi High Court is upheld by the Supreme Court it would lead to decriminalisation of homosexuality in India.

19 This judgment has witnessed tremendous academic writing being on various facets of the decision. For comparative constitutional dimensions of this case see Madhav Khosla, "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision" 59 *Am. J. Comp. L. 909* (2011); Sujit Choudhry, "How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation" in S. Khilnani, V. Raghavan, A. Thiruvengadam (eds.), *Comparative Constitutionalism In South Asia* (Oxford University Press: New Delhi, 2010).

The sheer impact and magnitude of this decision can be seen from the fact that National University of Juridical Sciences (NUJS), Kolkata devoted an entire issue of their law review critically discussing various dimensions of the high court decision. Interested readers can access the journal issue. Available *at:* http://www.nujslawreview.org/law-review-vol2no3.html.

20 S. 377 of IPC reads: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

21 Art. 14 is the equality clause of the Constitution of India.

22 Art. 15(1) of the Constitution prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. In *Naz* the court innovatively ruled that prohibition on the basis of 'sexual orientation' offends art. 15 as the expression 'sex' includes 'sexual orientation'.

23 Art. 21 guarantees that no person that be deprived of life and personal liberty except according to procedure established by law.

privacy, the court ruled that "[t]he way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy."[24] Relying on the principles laid down by United States Supreme Court[25] *viz*, "strict scrutiny" and "compelling state interest", the court declared that "[a] constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems".[26]

The focus of this paper is on court's invocation of constitutional morality for building the argument towards the decriminalisation of voluntary sexual conduct that falls outside the *hegemonic* paradigm of hetero-normativity. Categorically discarding the populist argument of criminalisation[27] *i.e.* homosexuality is against public morality and thus deserves to be penalized, the court held that "enforcement of public morality does not amount to a 'compelling state interest' to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others".[28] According to the court, "[i]f there is any type of 'morality' that can pass the test of compelling State interest, it must be 'constitutional' morality and not public morality".[29] Constitutional morality is completely distinct from popular morality[30] since the former is "derived from constitutional values", while the latter "is based on shifting and subjecting notions of right and wrong."[31]

Though in *Naz*, the references to constitutional morality are directly taken from Constituent Assemble Debates (CADs) of the Indian Constitution, the court in its innovative activism has completely transformed the meaning as well as the potential

24 *Supra* note 17 at para 40 (quoting Ackermann J. in *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice*, decided by Constitutional Court of South Africa on Oct. 9, 1998).

25 Khosla defends the use of foreign sources from other jurisdictions varying from the US, South Africa and even Fiji Courts in *Naz* and opposes those who call it as "cherry picking".

26 *Supra* note 17 at para 114.

27 On penal populism see Julian V. Roberts, *et al.*, *Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, Oxford, 2003).

28 *Supra* note 17 at para 75 (the court relied on the US Supreme Court decision of *Lawrence* v. *Texas* 539 US 558 (2003) and ECHR decisions Dudgeon v. *The United Kingdom* 45 Eur. Ct. H.R. (ser. A) (1981), and *Norris* v. *Republic of Ireland,* 142 Eur. Ct. H.R. (ser. A) (1988)).

29 *Supra* note 17at para 79.

30 The court uses the expressions "public morality" and "popular morality" as synonyms. The author follows this synonymous use in this paper.

31 *Supra* note 17 at para 79.

of this expression. The idea of constitutional morality was first introduced by B.R. Ambedkar. While moving the Draft Constitution in the Constitution Assembly, Ambedkar quoted Grote, the Greek historian:[32]

> 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 ascendency for themselves.

He explains constitutional morality as:[33]

> [A] paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own.

A closer examination of the Constituent Assembly Debates reveals that Ambedkar referred to the idea of constitutional morality to justify the inclusion of extensive details of the administrative structure in the Constitution which made it a very voluminous document.[34] In that context, constitutional morality refers to the

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32 VII *Constitution Assembly Debates* Nov., 1948 at 37.

33 *Ibid.*

34 *Ibid.* Ambedkar also observed: "While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic." *Id.* at 38.

respect, reverence and internalization of the "form"[35] as well as spirit of the Constitution. Till such norms are cultivated, it was necessary to even specify the form of administration in order to preserve the form of the Constitution.[36] So it is clear that at least when Ambedkar used this expression, it was less about the constitutional values themselves but more about *internalization* of constitutional values or inculcating the "habit of obedience"[37] of the Constitution and that too in more of an administrative/federal context.

With this historical background, the court's reference to constitutional morality in *Naz* is remarkable and unique. The court has dexterously appropriated the expression "constitutional morality" to radically transform its meaning and reconstitute its content to suit the present context. Without venturing to attribute a definition of the expression, the court gave a rather illustrative account of constitutional morality. Quoting Glanville Austin,[38] the court reiterated that "The core of the commitments to the social revolution lies in Part III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution".[39] Hence, constitutional morality is expounded in terms of the "goals of the social revolution"[40] as well as the "attempt[s] to foster this revolution by establishing the conditions necessary for its achievement".[41]

Part III and part IV of the Constitution are the chapters on fundamental rights and directive principles of state policy respectively. Part III of the Indian Constitution

35 By form, Ambedkar referred to unitary and federal forms of the Constitution.

36 Pratap Bhanu Mehta argues that for Ambedkar the central elements of constitutional morality are self-restraint, recognition of plurality in its deepest form (and thus recognition of adjudicative contrivances) and rejection of any claims of embodiment of popular sovereignty. See Pratap Bhanu Mehta, "What is Constitutional Morality" *available at*: http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (last visited on June 8, 2012).

37 The expression has been borrowed from H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961).

38 Glanville Austin, *The Indian Constitution: Cornerstone of a Nation* 50 (Oxford University Press, 1966).

39 *Supra* note 17 at para 80.

40 "Through this revolution", points out Austin, "would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of Indian society". This necessitated fundamental changes in the political, social and economic structures. *Supra* note 38 at xvii.

41 *Supra* note 17 at para 80.

guarantees fundamental[42] civil and political rights.[43] Part IV of the Constitution encapsulates the directives that are "fundamental for the governance of the country"[44] and include socio-economic rights, socialistic principles, Gandhian principles and other matters of governance.[45] While reference to part III is apposite to develop the concept of constitutional morality (as the chapter includes right to equality, right against discrimination, right to life and personal liberty which formed the touchstone for declaring section 377 as unconstitutional), what is particularly striking is that the court ventures into the domain of policy through part IV. The court seems to be indicating that the notion of constitutional morality, on the one hand, secures dignity and freedom to individuals and prohibits any affront of diversity even of different sexual orientation. On the other hand, by evoking the charter of socio-economic rights it undoubtedly creates a potential of using this notion for a possible resurgence of the lost language of redistribution.[46] It is possible to use this notion as an aspiration for a society that is equitable, egalitarian and equalitarian and a state that constitutes institutions and structures that promote common good.[47] It also refers to a standard of morality that resurrects the politics of recognition and redistribution within the Indian political thought.[48] Constitutional morality has the potential of reviving the lost cause of re-distribution and re-fashioning neo-liberal policy decisions (including the policy of criminalisation) according to the

42 These rights are fundamental to the extent that the state cannot make law in abrogation of these rights and any law that is in contravention of any of these rights would be *void ab initio* (art. 13, Constitution of India). However, at the time of declaration of national emergency fundamental rights (except arts. 20 and 21) can be suspended.

43 These include right to equality (art. 14), right to freedoms of expression, movement, association, residence, trade/occupation/ business (art. 19), right against self-incrimination, *ex post facto* laws and double jeopardy (art. 20), right to life (art. 21), right to freedom of religion (art. 25), right to linguistic and religious minorities (art. 30) and right to constitutional remedies (art. 32).

44 Directive principles though fundamental in the governance of the country, are not enforceable in any court (art. 37). For a jurisprudential exploration of the meaning and potential of art. 37, see Latika Vashist, "Enlivening Directive Principles: An Attempt to Save their Vanishing Present" 1(2) *ILI Law Review* (2010).

45 *Ibid.*

46 This point becomes important as the debate of lesbi-gay rights is seen sometimes in conflict with the politics of redistribution. In this context the court's contribution remains potentially progressive and laudable. An excellent discussion on politics of recognition and redistribution is presented by Bhikhu Parekh, "Redistribution or Recognition? A Misguided Debate" in *Ethnicity, Nationalism and Minority Rights* 199 (Stephen May *et al*, Cambridge University Press, 2004).

47 For a similarly interesting use of the expression "constitutional morality" in the context of scope of judicial review and extent of legislative authority in the US, see, William D. Guthrie, "Constitutional Morality" 196 (681) *The North American Review* 154 (1912).

48 *Supra* note 46.

redistributive and egalitarian spirit of the Constitution.[49]

In *Naz*, the court draws on the notion of constitutional morality and in the context of sexual orientation rights affirms:[50]

> The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

Interestingly the court juxtaposes the idea of respect for and celebration of diversity with the notion of constitutional morality. It is crucial to notice how the court relates the claim of decriminalisation of homosexuality with constitutional value of diversity. It questions the hetero-normative foundations of the penalisation of homosexuality and introduces the idea of different sexual orientation as a value which strengthens the diversity of Indian society and thereby fosters constitutional morality.

The reasoning that criminalisation only on account of their different sexual orientation is against constitutional morality- infuses a new dimension in the contemporary debates on discerning policy of criminalisation by the state.[51] *Naz* has sought to evolve the constitutional standards as well as principles of criminalisation and has radically paved the way for development of a constitutional theory to guide the existing principles of criminalisation. With this background the next section will attempt to explore different questions posed in the articulation of a constitutional theory of criminalisation. Can the state criminalise conducts which, though not explicitly recognised as rights, are protected under the framework of constitutional morality? Or is it possible to argue for a general right not to be criminalised if the conduct remains within the permissible limits of constitutional morality? Can the state penalise those who have been deprived of the constitutional promises of equal respect, dignity and egalitarianism? How would constitutional

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49 In the context of criminalisation decisions that directly affect impoverished classes (*e.g.* begging laws, provisions outlawing street vendors) the redistributive focus of constitutional morality can go a long way in articulating the impoverished group's right not to be unfairly criminalised.

50 *Supra* note 17 at para 80.

51 Post *Naz* the expression constitutional morality has been widely discussed by political and social scientists but there has been no serious discussion about re-orientating criminalisation according to constitutional morality see *supra* note 36; Andre Béteille, "Constitutional Morality" XLIII (40) *Economic and Political Weekly* 35 (Oct. 4, 2008).

understanding affect the harm principle which serves as a guide for criminalisation? What would be the influence of constitutional morality as an aspect of constitutionalism on the conceptualisation of "wrongful harm"?

III Re-inventing the principles of criminalisation with constitutional morality

Crime is any conduct that is labelled as criminal.[52] Any conduct that the state identifies as *so objectionable* that it be regulated or curtailed by exercise of its authority to censure the wrongdoers (through punishment) is criminal. What the state regards as *so objectionable as to be labelled criminal* depends on its policy of criminalisation. The prerequisite for criminalisation of any conduct is the recognition of *harmfulness* and *moral culpability* of the act.[53] Does the state have the authority to label *any* conduct as harmful and morally culpable? In *Naz* it was held that imputation of criminality to any constitutionally protected conduct is not permissible and the policy of criminalisation has to function in consonance with the constitutional morality and not against it (*i.e.* criminalisation policy should not contravene the values and spirit of the Constitution that is encapsulated as constitutional morality).

In this section, it is argued that *Naz* offers an opportunity to the policy makers to develop a well-knit framework for a theory of criminalisation that conforms to the Constitution of India. The existing jurisprudential principles of criminalisation, though highly sophisticated, operate in a vacuum, which allows public morality to dominate the realm of criminal law in India. Appeal to constitutional morality in *Naz*, which is primarily a case dealing with the issue of decriminalisation (and thereby discusses the legitimate bounds of criminalisation), juxtaposes criminal law with constitutional law. The jurisprudential foundations of criminal law, which *hitherto* operated as abstractions, have been now provided with a concrete constitutional setting to conform to.

The "harm principle" is the central jurisprudential principle that provides the essential justification to the state to criminalise a conduct and impose criminal censures on the wrong doer. John Stuart Mill's categorical assertion that the "*only purpose* for which power can be rightfully exercised over any member of a civilized

52 Henry M. Hart, "The Aims of Criminal Law" 23 *Law and Contemporary Problems* 404 (1958).

53 These concepts have been extensively discussed by Joel Feinberg in his theory of criminalization. *See* Joel Feinberg, I *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, New York, 1984). Also see, R.A. Duff, "Harms and Wrongs" 5 *Buff Crim L Rev* 13 (2001); Hamish Stewart, "Harms, Wrongs and Set-Backs in Feinberg's Moral Limits of the Criminal Law" 5 *Buff Crim L Rev* 47 (2001).

community, against his will, is *to prevent harm to others*"[54] had furnished an elementary platform in classical liberal thought for the foundation on which many classical criminal law theorists have built their own accounts of culpable wrongdoing.[55] Joel Feinberg's re-formulation of the harm principle is especially noteworthy:[56]

> It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor and there is probably no other means that is equally effective at no greater cost to other values.

In Feinberg's theory, harm must be caused by wrongful conduct and it refers to a setback to the interests of others. Thus, "only setbacks of interests that are wrongs, and wrongs that are setbacks to interests are to count as harms in the appropriate sense."[57] It is possible that a person is harmed without being wronged (for example, when she becomes a victim of an attack by a tiger on her walkabout trip or is driven out of business by the fair and legitimate competition) but this would not call for criminalisation. Similarly, when an individual is wronged but not harmed (Feinberg gives the example of a wrongfully broken promise that in the end works for promisee's advantage), the conduct is not criminalisable.

Here the expression "interest" refers to the stake that a person might have in her well-being. Identification of harmfulness as well as wrongfulness of the conduct has to be objectively determined. Subjective preferences and premonitions do not qualify as the criteria for criminalisation. For an objective account of harm, it was important for Feinberg to classify the life interests and delineate which ones of them ought to be protected from others' interference by criminal censure. Welfare interests are at the centre of Feinberg's theory of harm. Welfare interests are the

54 J.S. Mill, *On Liberty and Other Essays* (Oxford University Press, 1991). Mill's harm principle is thus a restraining principle of criminal law as it forbears the state from criminalizing morally reprehensible conduct if the same is not harmful to others. For the same reason it limits the authority of the state to infringe on individual liberty through legal paternalism.

55 Arthur Ripstein, however, makes a clear shift from the "harm principle". He proposes a "sovereignty principle" according to which violations of equal freedom render a legitimate basis for criminalisation. In formulating the sovereignty principle of criminalisation, he draws on Kant's "universal principle of right". This principle rests on the concept of human dignity and accords every individual the right to pursue his or her own ends to the fullest *i.e.* without being impaired by others, and without causing hindrance to the freedom of others. Basing his theory on Kantian, Ripstein's sovereignty principle mandates a person to exercise her free choice such that they can co-exist with the freedom of all others in accordance with a universal law. Extending it to form a theoretical premise of criminalisation policy, he argues that those actions that are not able to harmoniously co-exist with the freedom of others are criminalisable. Arthur Ripstein, "Beyond the Harm Principle" 34(3) *Philosophy and Public Affairs* 215 (2006).

56 *Supra* note 53 at 26.

57 *Id.* at 36.

interests "in the necessary means to the more ultimate goals, whatever the latter may be, or later come to be"[58] These interests are jointly shared by all individuals such as *inter alia* interest in continuance of life, interest in health and security, maintaining social intercourse and minimum financial stability, being free from unwarranted coercion *etc.* These are the primary and most basic life interests that all individuals share notwithstanding the differences in the life course or life plans.[59] These are the pre-requisites of individual well-being and any wrongful setback to these interests is harm. On the other hand, ulterior interests that refer to an individual's more ulterior aims, goals or dreams (desire to build a mansion, having a successful professional life, achieving spiritual growth *etc.*) are not protected by law.[60] But those ulterior interests "that consist of the extension of welfare interests to transminimal levels" are also protected.[61]

A rich person is as much *wronged* by theft of a rare artefact (that she had forgotten about) in her house, as an impoverished person who loses her daily wage, though she may not be harmed as much as the latter.[62] But, by theft her security interests (intrusion in the house) as well as accumulative interests ("various good things in life" in the words of Hirsch) are also being threatened.[63] Thus in Feinberg's account apart from welfare interests, even those security and accumulative interests that cushion the welfare interests, are also protected.[64]

It is also pertinent to note that not all invasions of welfare interests would amount to criminalisable harm. Only the intentional or unjustifiable or inexcusable conduct of a human agent that constitutes a setback to protected interests would be *wrongful* harm and thus criminalisable. Thus, according to Feinberg, the conduct is wrongful only when it is intentional or unjustifiable or inexcusable and is designed to violate the moral rights of others, and not otherwise.[65] The requirement of wrongfulness for the purposes of criminalisation would be fulfilled only when the harm is brought about by *culpable* actions of a human agent (*i.e.* the person was aware of the wrongness and was responsible for her actions). It is important that the conduct is wrongful or culpable (intentional, reckless, negligent) since

58 *Id.* at 37.

59 *Id.* at 37.

60 *Id.* at 62.

61 *Id.* at 112.

62 *Ibid.*

63 Andrew von Hirsch, "Injury and Exasperation: An Examination of Harm to Others and Offence to Others" 84 *Michigan Law Review* 703 (1985-86).

64 *Supra* note 53 at 37, 207. In this reformulation Feinberg also allows for various other criterions for criminalization besides harm, *viz.* gravity, degree of probability, social value of the conduct etc. which can be engulfed in a wider meaning of harm.

65 *Id.* at 112.

"culpableness is the fulcrum between bad consequence and criminalization."[66] It deserves clarification here that harmfulness and wrongfulness of the conduct cannot be separated from each other for the purposes of criminalisation. A harmful conduct is criminalisable if it is wrongfully done: killing in self-defence is a harm, but is not criminalised because it is not wrongful (it is not done with the intention to murder but with the intention to save one's own self).[67]

In the universal theory of criminal law these aspects are sufficient to proscribe any conduct by criminalising it. But in application there are many difficulties in conceptualising an objective criterion for defining "harm" or determining wrongfulness. Owing to this, there is an absence of jurisprudential coherence in the policy of criminalisation and hence, the harm principle is being regulated and defined by public morality or other such subjective criteria. In the next section the potential of constitutional morality to induce objectivity in conceptualisation of harm will be examined.

As stated above, the pre-requisite for any policy of criminalisation is that the conduct sought to be censured or deterred or eliminated must be recognized as wrongful harm. However, a lot of non-objective harm arguments, influenced by the line taken by Lord Devlin decades earlier,[68] wherein an act can be criminalized if it evokes disgust, abhorrence and indignation in social psyche affect the criminalisation decisions today. What is assumed as wrongful and harmful is left to the subjective and arbitrary whims of the dominant majority, and sometimes a dominating minority. Bernard Harcourt concludes that the harm principle has disintegrated since conservative harm arguments, poorly scrutinised empirical claims

66 *Supra* note 6 at 55.

67 Baker clarifies that the question of intention, excuse and justification determine the wrongfulness of a conduct that causes harm and are as important considerations for criminalisation as they are at the determination of *ex post* blameworthiness. *Id.* at 54-55. It may also be noted that in addition to harmfulness and wrongfulness, Ashworth mentions a third aspect of criminalisation: public element in wrongs. Public wrongs refer to those set of obligations that are such an important part of the peaceful continuance and sustenance of state that deviations from them are to be critically regulated. Offences related to state security, religious harmony, taxation *etc.* are categorized as public wrongs. These are not wrongs against any one individual but the community as a whole. However, it is not the harm to the public that qualifies them as public wrongs but the fact these wrongs concern public at large and not specific individuals. Public wrongs thus are about "the public evaluation of the wrong". With this rationale, rape, though a crime against one individual, would still be considered a public wrong as it concerns the public. Andrew Ashworth, *Principles of Criminal Law* 29 (Oxford University Press, Oxford, 2003).

68 Patrick Devlin, *Enforcement Of Morals* (Oxford University Press, Oxford, 1965).

and anecdotal evidence dominate criminalisation decisions.[69] He also points out that conservative non-objective harm arguments have been used to label people as dangerous, and thus, criminals. Baker also surfaces the non-objectivity of harm arguments in the global trends on criminalisation, while advancing his arguments for "taking harm seriously as a criminalization constraint".[70] He points out that in United Kingdom passive begging has been targeted by the criminal law regime[71] without attempting to distinguish between harm (if any) caused by passive begging and harm caused by aggressive or active begging. Passive begging involves no aggression or intimidation on the part of the person begging; it is begging to seek help from others without exercising any physical or mental coercion on the passer by. Criminalising passive begging, without objectively demonstrating the wrongful harm caused by it is certainly disproportionate over-criminalisation.[72] In the United States non-objective conceptions of harm have led to the unprincipled criminalisation of innocuous activities like feeding homeless persons,[73] passive begging[74] and possessing sex toys.[75]

Following a similar pattern, the criminalisation policy of criminal justice system in India is heavily influenced by subjective standards of moral indignation and abhorrence (public/ popular morality), rather than objective accounts of harm.[76] Curiously, one of the contentions of the state in *Naz* was that lesbianism or homosexuality is wrongfully harmful since "[i]n our country, ***homosexuality is abhorrent and can be criminalized*** by imposing proportional limits on the citizens' right to privacy

69 Bernard E. Harcourt, "Collapse of the Harm Principle" 90 *Journal of Criminal Law and Criminology* 109 (1999-2000). For a critique of Harcourt's reasoning see Dennis J. Baker, *supra* note 6 at 64. Baker asserts that "The Harm Principle has not collapsed, but lawmakers have never made a distinction between objective and non-objective harm and have recently failed to give the former any meaningful considerations".

70 *Supra* note 6, ch. II.

71 UK Vagrancy Act, 1824, s. 3.

72 See Dennis J. Baker, "A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging" 73 *J Crim L* 212 (2009). Also see, Brian C. Thomas, "Examining a Beggar's first Amendment Right to Beg in an Era of Anti-Begging Ordinances: The Presence and Persistence Test" 26 *U. Dayton L Rev* 155 (2000).

73 Randal C. Archibold, "Las Vegas Makes it Illegal to Heed Homeless in Parks" *New York Times* (July28, 2006).

74 Right to free speech has been used in US to decriminalise begging. *The people of the State of New York* v. *Eric Schrode* 617 N.Y.S. 2d 429; *Loper* v. *New York City Police Department* 802 F. Supp. 1029 (S.D.N.Y. 1992). Also see, Fay Leoussis, "The Constitutional Right to Beg – Is Begging really Protected Speech?" 14 *St. Louis U Pub z Rev 529* (1995).

75 *Williams* v. *Pryor* 240 F. 3d 944, 949 (2001).

76 This point is well articulated in the classic Hart-Devlin debate and later synthesized by Ronald Dworkin. See Ronald Dworkin, *Taking Rights Seriously* 240-258 (Harvard University Press,1978).

and equality."[77] Abhorrence, disgust, and in some cases sheer absurdity has resulted in criminalisation of conspiracy to breach a civil contract,[78] adultery,[79] attempt to suicide,[80] begging[81] and prostitution,[82] leading to an incoherent, regressive and absolutely unprincipled policy of criminalisation. It is the impoverished, disadvantaged and vulnerable groups of the society that suffer the disproportionate impact of criminalisation. The dominant interpretations of harm by the powerful groups in society[83] have manufactured criminal law to suit their own interests.[84] Various harms committed by corporations and governments, knowingly as well as recklessly, are left out from the domain of criminal law[85] and the criminal justice system "[makes] it look as if crime is the work of the poor."[86] On such a tangent, policy of criminalisation acquires a tenor and impact that goes against the letter and spirit of the Constitution. If substantive equality forms the basic structure of the Constitution, how can the state structure criminalisation to disadvantage a particular class of people? The mandate of the Constitution extends to all policy decisions, including the policy of criminalisation. And this calls for constitutionalising the harm principle.[87] The discourse of constitutional morality can significantly contribute to this endeavour to change the course of criminalisation policy.

IV Conceptualising harm through the lens of constitutional morality

The argument for constitutionalising the harm principle is pertinent from the perspective of both *ex ante* determination of wrongful harm for criminalisation

77 *Supra* note17 at para 24. In fact, the extent of religious and conventional morality is apparent from the fact that one of the petitions challenging the *Naz* decision in the Supreme Court has been filed by a religious Yoga guru himself.

78 S.120 of the IPC.

79 S. 497 of the IPC.

80 S. 309 of the IPC.

81 The Bombay (Prevention of Begging) Act, 1959 (BPBA). The Act was extended to Delhi in 1960. Premised on a presumption of criminality of the impoverished, the law is a clear example of disproportionate criminalisation that selectively targets the weaker groups. For a critique of begging statutes see Usha Ramanathan, "Ostensible Poverty, Beggary and the Law" XLIII (44) *Economic and Political Weekly* 33 (Nov.1, 2008); B.B. Pande, "Vagrants, Beggars and Status Offenders" in (Upendra Baxi (ed.) *Law & Poverty: Critical Essays* 262 (Tripathi Publications, Bombay, 1998); S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* 260 (LexisNexis, New Delhi, 2004).

82 The Immoral Traffic (Prevention) Act, 1986.

83 See B.B. Pande, "Controlling the Working Classes through Penal Measures in British India (1858-1947)" *Delhi Law Review* 100 (1981-82).

84 *Supra* note 3 at 123, 55.

85 Upendra Baxi, *Mass Disasters and Multinational Liability: The Bhopal Case* (N.M. Tripathi Publications, Bombay, 1986).

86 *Supra* note 3 at 7.

87 *Supra* note 6 at 67.

decisions (legislative action) as well as *ex post* determination of the constitutionality of *existing criminal law*[88] (judicial action).[89] A coherent theory of criminalisation based on constitutionally recognized harmful conduct is significant from the point of view of law-makers as well as the judiciary which are bound to balance the authority of the state with citizens' rights. From an *ex ante* criminalisation perspective, fundamental rights constitute part of the principles of constitutionalism that regulate the state's monopoly of violence through the criminal law machinery. Specific rights guaranteed in the Constitution are a restraint on the state's policy of criminalisation; *i.e.* these protected conducts cannot be made criminal, notwithstanding the demands of public morality and general abhorrence of the majority. For instance, the state cannot enact any law that puts criminal censure on wearing religious apparel in public as it will clearly violate the right to freedom of religion.[90] But laws criminalizing obscenity[91] and contempt of court,[92] though highly controversial in themselves, may be enacted according to the constitutionally defined limits of right to freedom of speech and expression.[93]

In *ex post* determination of constitutionality of existing criminal laws, there have been many instances when constitutional rights were invoked to contest criminal laws. But even in these judicial decisions, one fails to identify the elements of a theory of principled criminalisation based on wrongful harm which in turn is determined according to the constitutional norms. There are many cases where the court was called upon to decide the constitutionality of substantive criminal law provisions, but the court confined the adjudication to investigating presence or absence of wrongful harm by only making it contingent on pre-existing legal rights.[94] In other words, the judicial approach towards decriminalisation petitions has been entirely dependent on the expressly recognized constitutional rights of an individual.

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88 By existing criminal law is meant both pre-Constitution as well as post-Constitution enactments of criminal law statutes.

89 Dennis J. Baker, "Constitutionalizing the Harm Principle", *available at:* http://ssrn.com/abstract=1300356 (last visited on June 12, 2012).

90 Art. 25 of the Constitution of India.

91 S. 292 of the IPC.

92 Contempt of Court Act, 1971.

93 Art. 19(2) of the Constitution provides that the state may impose reasonable restrictions in the interest of, *inter alia*, decency or morality or in relation to contempt of court. This makes obscenity and contempt issues which can be considered wrongful harms and hence not protected under the Constitution.

94 There is still a debate in India about the scope of judicial review. While procedural due process has become an integral part of Indian constitutional law after *Maneka Gandhi* v. *Union of India* (AIR 1978 SC 597), many Indian jurists argue that substantive due process has never been relied by courts. *See* M.P. Singh, "Decriminalization of Homosexuality and the Constitution" 2 *NUJS L Rev* 361 (2009). Owing to this view there is a visible judicial deference and the decisions of decriminalisation are left to the legislature.

Consequently, if the conduct in question is protected by the doer's legal or constitutional rights then it cannot be called wrongful harm, but if the conduct in question cannot be protected within the scope of existing rights, then labelling it criminal is justifiable. Therefore, the meaning of wrongful harm becomes determinable by the constitutionally recognized rights as any conduct that is protected as a fundamental constitutional right cannot be labelled as harm for the purposes of criminalisation. In this manner the judiciary delineates the policy of criminalisation according to the rights based principles of constitutionalism. However, this rights-based judicial approach towards decriminalisation has not yet constitutionalised the harm principle in the criminal law tradition of India.

In order to better understand the limits of the rights-based policy of criminalisation, it may be useful to discuss some landmark decisions of the Supreme Court of India pertaining to the issue of decriminalisation. *P. Rathinam v. State*[95] is one of the most relevant cases in this regard. In this case the issue was one of the constitutionality of section 309 of Indian Penal Code which criminalises attempt to commit suicide. According to the court, "Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide."[96] In arriving at this conclusion to decriminalise attempt to suicide, the court relied upon a negative reading to the right to life. According to the court, since right to life included the right to die (positive of a right also includes its negative), section 309 is violative of article 21 of the Constitution. The judicial reasoning, from the perspective of harm principle was that the attempt to commit suicide is not criminalisable harm since it is constitutionally permissible conduct under article 21. This apparent constitutionalisation of harm in the context of attempt to commit suicide was attached to the slippery slope of recognizing right to die under article 21 which in turn would have had far reaching implications.[97] As a criminal law scholar has rightly stated:[98]

> [I]t is one thing to welcome the decision for having suggested the rationalisation of the criminal law and attempted selective de-criminalisation, but quite another thing to have reservations in accepting a constitutional right to die. This is because the implications of de-criminalisation are entirely of a different order than the implications of constitutional recognition of the right to die.

95 (1994) 3 SCC 394.

96 *Id.* at 429.

97 *See* B.B. Pande, "Right to Life or Death? For Bharat Both Cannot be 'Right'" (1994) 4 SCC (Jour) 19.

98 *Ibid.*

Two years later in *Gian Kaur* v. *State,*[99] *Rathinam* was overruled by reversing its constitutional logic. The irony was that it was actually the constitutionalisation of the issue (through invocation of article 21 of the Constitution) that led to the failure of all attempts to decriminalise attempted suicide. In *Rathinam*, the court juxtaposed the issue of decriminalisation with the determination of the scope of a constitutional right. The desperate attempt of decriminalizing the conduct failed because the court merely resorted to express rights and their possible (mis)interpretations- here the right to life- to attribute meanings to harmful and harmless conduct. *Rathinam* was definitely an important contribution in the debates of theorizing harm for criminalisation but its reliance on *specific rights–based-approach* to (de)criminalisation thwarted its potential of constitutionalising the harm principle. This is because the court overlooked the norms of constitutional morality *vis-à-vis* the interpretation of the rights and decriminalisation. What is suggested here is that constitutionalisation of harm using specific rights-based-approach should also be guided by constitutional morality. It is difficult to derive *Rathinam's* conclusion, that right to life includes the right to die from the norms of constitutional morality which mandate positive intervention from the state to enable all individuals to lead a fuller life.

Analysis of cases pertaining to decriminalisation of adultery (section 497 of the IPC)[100] also surfaces the limits of the judicial process that confines the constitutional aspect of decriminalisation to specific rights guarantees and not beyond it. The law criminalising adultery was challenged on the ground that it violates the right to equality. But the court, in an extremely appalling interpretation of article 15(3) (which is a facet of equality that provides for special provisions for women), held that the provision is in fact a special provision in favour of women. This is in spite of the fact that the offence of adultery is defined in such a manner that only a person having 'sexual intercourse' with the 'wife of another man' can commit the offence, thereby, giving a *carte blanche* to any married man to have sexual intercourse with a widow, unmarried woman or divorcee.[101] Adultery is a criminal offense in India as it is seen as an attack on the 'sacred' institution of marriage, which is considered a serious wrongful harm. Right to equality fell flat in this case because the contours of right to equality were constrained by its liberal interpretation. A regressive and narrow interpretation of right to equality, that gave in to dominant moral and social normative structures, prevented the court from striking off the anachronistic provision of adultery that remains rooted in Victorian morality. It

99 AIR 1996 SC 946.

100 *Yusuf Abdul Azizv.* *The State of Bombay,* 1954 AIR SC 321; *Smt. Sowmithri Vishnu* v. *Union of India* 1985 AIR SC 1618.

101 Still further, the offence is conceptualized against the husband only. Thereby, the aggrieved wife of a husband who has committed the offence of adultery cannot sue in the court of law.

were the dominant normative structures of society- sexual norms, public morality, religious dogmas *etc.*- and not the norms of constitutional morality that determined the wrongfulness and harmfulness of the conduct of adultery. The question here is: if the court had the opportunity to invoke the language of constitutional morality to determine the validity of this arcane provision it would not be possible to arrive at the similar conclusion. These decisions display the limits of the process of constitutionalisation of criminal law without recourse to a much more refined notion of constitutional morality in understanding the process of criminalisation.

It is evident that in the contemporary judicial discourse "harm" is constitutionalised only to the extent of possible interpretations of existing specific rights and not beyond it. Even the interpretations–meaning, content and extent–of rights is dominated by societal values and notions of good and bad.[102] Owing to these extra-legal influences, the shape and contours of criminal law get crystallised according to dominant normative structures of society; and the state coalesces with the *hegemonic* power structures in and through its policy of criminalisation. Through its criminal laws, the state acquires the hegemonic power to *discipline and punish,*[103] and leads to gross violations of human dignity and person through unguided criminalisation.

Since sole reliance on specific rights has not proved to be effective for evolving a coherent criminalisation policy, there is a need to resort to the principles of constitutional morality to determine the wrongfulness and harmfulness of any conduct. The Indian Supreme Court may find it difficult to apply this standard of judicial review, with its history of deference where the courts have been very reluctant to strike off any legal provision/statute, but constitutional morality can definitely serve as the touchstone to analyse the policy of criminalisation. Moreover, such a theorization of the policy of criminal law as a function of the broader constitutional values and principles cannot only considerably contribute to the conceptualisation of harm through the lens of constitutional morality, but also initiate a dialogue on the dormant questions of over-criminalisation and under-criminalisation within the criminal law scholarship in India.

Formulation of constitutional arguments in every case for decriminalisation requires that the contesting party relies on specific fundamental right(s) guaranteed in the Constitution, right(s) that are violated by impugned conduct. The ultimate

102 *Contra Ram Lakhan* v. *State* (2007) Delhi Law Times 173. In this case the court relied upon right to freedom of speech and expression to investigate the criminalisation of passive need based begging in India. While the court did not hold the begging statute as unconstitutional (since this was not an issue in the case), it read down the Act and excluded from its purview necessity driven begging.

103 To evoke Michael Foucault, *Discipline and Punish: The Birth of The Prison* (Penguin Books, 1991).

decision to a very large extent depends on the judicial delineation of the scope and limits of the right(s) in focus. This in itself is an issue contingent on the level of judicial self-restraint exercised by the deciding bench (a justice-oriented and activist bench may transcend the "rule of law" to attribute adequate meaning and range to a fundamental right),[104] personal philosophies of the judges, as well as to the influence of dominant normative framework and propositions on the outcome. In all these scenarios the interpretation of a right in a matter of decriminalisation should be determined by the norms of constitutional morality. Interpretation of a fundamental right in order to determine whether it protects the impugned conduct or not requires that the quality of judicial activism, the philosophy of the bench as well as the dominant normative framework, are all influenced and subjected to the notions of constitutional morality. For even in judges, constitutional morality is not a natural sentiment; it has to be cultivated!

V Conclusion

If the meaning of right and the range and content of harm is to be determined by constitutional morality, it is imperative to determine the content of constitutional morality. *Naz* correctly identifies "diversity" as one of the elements of constitutional morality. Since the Constitution of India protects all facets of individual diversity, any conduct that is a reflection of diversity, cannot be labelled as harm. As pointed out earlier in this paper, it is extremely interesting to observe how *Naz* explains constitutional morality in terms of the constitutional aspiration for social revolution. Transforming the structure of society by addressing the existing social and economic inequalities is the aim of social revolution. In the Preamble, the Constitution guarantees justice–social, economic and political–to all the citizens; it protects the identities of minorities, secures the well-being of marginalized and vulnerable individuals, and directs the government to work towards the interests of impoverished classes by policy decisions that have an egalitarian objective and content. These all form part of the norms of constitutional morality. The text of the Constitution of India is an important guide to establish a connection between what the Constitution wants and what should not be permissible in criminalisation decisions. The Constitution of India is definitely an instrument of change for the have-nots, impoverished, and the untouchables of the society. Inclusiveness by ensuring dignity to every individual is one of the primary goals of the Constitution. In terms of social revolution, transforming societal caste based inequalities is the essence of the Constitution. This aspiration for social revolution takes recourse to criminal sanctions

104 Reading due process in art. 21 (*Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597) was clearly against the intention of the framers of the Constitution but the demands of justice required that "rule of law" be subjected to the test of reasonableness.

for securing a caste-less society. Substantive provisions of criminal law find a place in the chapter of fundamental rights. Articles 17 and 23 criminalise the practice of "untouchability" and traffic in human beings and forced labour because constitutional morality mandates an interventionist state that has the power to regulate individual behaviour even through censure and punishment. It is thus the norms of constitutional morality that justify the constitutional crimes of untouchability, trafficking in human beings and forced labour.

Another fact of constitutional morality is redistribution. The Constitution makes the Indian state duty-bound[105] to adopt egalitarian policies and free all people from "undeserved want".[106] While these elements of constitutional morality may not be of direct relevance for criminalisation policy, but these definitely go a long way in developing an understanding of conduct that is not "wrongfully harmful". The 'criminal' conduct of need-based passive begging, for example, which is a reflection of a person's helplessness and state's apathy towards her helplessness, is clearly in violation of constitutional morality. There can be no possible reconciliation of state's conduct in violating the norms of constitutional morality, by endorsing policies that create impoverishment[107] whilst simultaneously imputing criminality on the impoverished through its unprincipled policies of criminalisation. Developing a sophisticated argument for decriminalisation of begging in India, was not within the scope of this paper, but reflections on constitutional morality as a restraining principle of constitutionalism for the criminalisation policy offer significant reasons for re-examining the policy of criminalizing the country's impoverished classes.

Naz has offered to us a valuable opportunity to initiate a debate on these issues within the paradigm of constitutional morality. It remains to be seen how the policy makers, judiciary and academicians will invoke it to change the face of criminal law in India.

*Latika Vashist**

105 Art. 37, the Constitution of India.

106 Art. 41, the Constitution of India.

107 Upendra Baxi, "Introduction" in Upendra Baxi (ed.), *Law and Poverty: Critical Essays* vi (Tripathi Publications, Bombay, 1998).

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