Guest Post: On the Gendered Criminalisation of Adultery

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Gautam Bhatia August 3, 2018

(This is a guest post by **Dr. Tarunabh Khaitan**, discussing the constitutional challenge to adultery, which is presently being heard by a Constitution Bench of the Supreme Court.)

As the Supreme Court considers the constitutionality of a gendered criminalisation of adultery, is has the opportunity to reorient Indian fundamental rights jurisprudence in several significant, and necessary, ways.

Article 21

As Anuj Bhuwania has convincingly showed, the post-Emergency PIL-turn in the Supreme Court did nothing to fix the main weakness of our constitutional jurisprudence, represented by the now overruled judgment in *ADM, Jabalpur*—the refusal to take civil liberties seriously. Even as the Court became populist and developed a social rights jurisprudence, its record on civil liberties remained mixed at best.

Now, the Court has an opportunity to reinvigorate the guarantee of 'personal liberty' in Article 21 by underscoring firm liberal limits on the powers of the police state in relation to its citizens. It should also recognise that criminal law is a particularly blunt tool even when there is a genuine problem, and must be a tool of last resort (and must require very special justification). A robust articulation of personal liberty, and a rigorous proportionality test for its infringement will give the much-needed vigour to the guarantee of civil liberties protection under Article 21.

Article 14

While Article 21 should be the main vehicle for a finding of unconstitutionality in this case, the Court also has an opportunity to revisit its muddled Article 14 jurisprudence. In this chapter, I had argued that the arbitrariness doctrine under Article 14 confuses administrative law standards with constitutional review. I also showed that, contrary to what is commonly believed, the arbitrariness standard is usually deeply deferential to the state, and does not in fact leave Article 14 with sufficient bite. Finally, I argued that, at least with regard to legislative review, Article 14's classification test should be reinterpreted in a less formalistic and less deferential manner than has hitherto been the case. In particular, the real-world *impact* of the classification, both material and expressive, should be part of the justification analysis under Article 14.

Article 15

The gendered dimension of the criminalisation of adultery also affords the Court with an opportunity–in conjunction with its anticipated judgments in the s 377 and the Sabrimala cases–to articulate a meaningful Article 15 jurisprudence. The criminalization of men only for adultery affords the court to identify that the disadvantage caused by discriminating can be both material as well as expressive. In three instant case, clearly the male adulterous partner suffers material and expressive disadvantage inflicted by criminalization. But even though she is not criminalized and may not therefore suffer material disadvantage, the expressive harm inflicted by the provision on women is significant. The symbolism behind the provision reflects attitudes that treat women as property of men. Section 497, IPC, which criminalises adultery, permits no other reading—it allows the husband to give his 'consent or connivance' to another man having sex with his wife, in which case no offence is committed. It is a collection of such social norms that support the institution of patriarchy, and their expressive force cannot be underestimated.

Furthermore, the provision also discriminates on the ground of marital status. But for the woman concerned being married, the offender would not have committed a crime. The social construction of gender norms is deeply intertwined with the norms surrounding marriage. Section 497 embodies a conception of marriage which entails the transfer of a woman (as property) from her father to her husband. Its gendered aspect cannot be separated from its connection with a particularly patriarchal understanding of the institution of marriage.

It is true that Article 15 is a closed list, and the Court has to do some creative interpretation to declare that 'marital status' is a constitutionally protected characteristic. There are two options before a progressive Court: either interpret 'sex' broadly to include 'marital status', given the deep sociological connection between the two. Courts in India, and elsewhere, have after all read pregnancy, maternity, sexual orientation, gender identity and other gendered characteristics as aspects of 'sex'/'gender' protection. A second alternative would be, as I argued in this paper, to read Article 15 as a sub-species of Article 14, and use the broader mandate of Article 14 to supply new grounds under Article 15. This second approach requires a caveat—while it is true that Article 15 is a sub-species of Article 14, the *level of protection* afforded under Article 15 is of a special character. Courts cannot continue to apply the same level of scrutiny to a law that distinguishes between sellers of tea and sellers of coffee (which is an Article 14 case, but *not* an Article 15 case), and one that distinguishes between Hindus and Muslims (which is an Article 15 case). This invites the Court to articulate a clear jurisprudence of the socio-political and economic conditions that elevate a characteristic for special protection under discrimination law (on this issue, see chs 2 and 3 of *A Theory of Discrimination Law*, especially pp 31-38 and 49-60).

Levelling-Up

To be clear, a finding of discrimination does not entail that the solution is to criminalise men as well as women. When two groups are treated differently, there are two ways of making them equal: either you bring the dominant group down to the level of the disadvantaged

group (“levelling-down”) or you lift the disadvantaged group up to the level of the dominant group (“levelling-up”) (see, generally of *A Theory of Discrimination Law*, especially pp 153-4). It is clear that the right judicial response to discrimination in this case would be to level up by decriminalizing men, rather than level down by criminalizing women as well.

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