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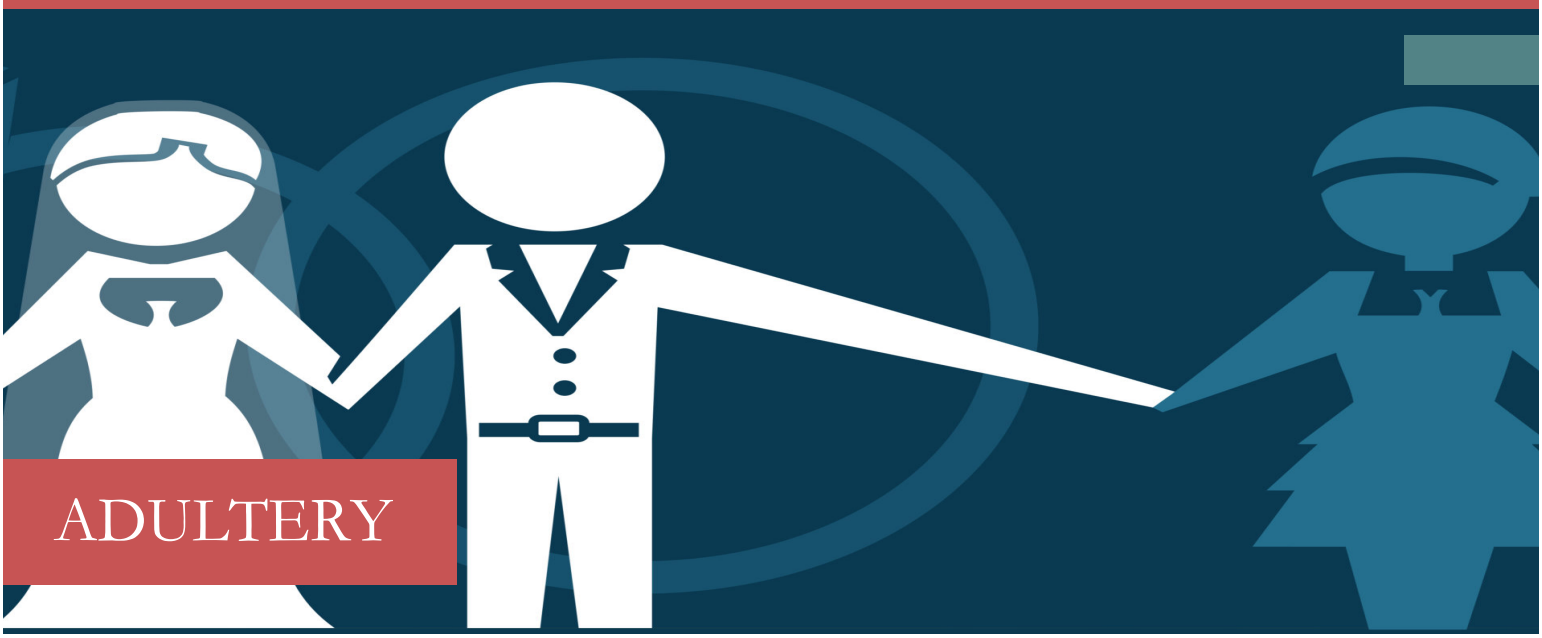

ADULTERY

"A woman loses her voice, autonomy after entering marriage and manifest arbitrariness is writ large in Section 497."

- Justice DY Chandrachud

Keeping up with the spirit of transformative constitutionalism, the Supreme Court passed yet another progressive judgement in September 2018. In *Joseph Shine* v. *Union of India*[1], the Constitutional Bench of the Supreme Court comprising former Chief Justice Dipak Misra, AN Khanwilkar, DY Chandrachud, RF Nariman and Indu Malhotra, JJ. struck down S.497 in four concurring judgements. The 158 years old S. 497 criminalised adultery, thereby making it a penal offence.[1] The punishment could be of either description for a term which could have extended to five years, or fine, or both. According to S.497, *a man having sexual intercourse with a woman who he knows or has reason to believe to be the wife of another man, without the consent or connivance of her husband, can be prosecuted for committing the offence of adultery*. In such case the wife could not be punished as an abettor. The provision has been criticized as archaic and discriminatory across the four judgements on various grounds.

Historical Backdrop

In most societies, marriage came to be recognised as an exclusive union of man and woman. Over time, this union transformed into a bond, both sacred and irrevocable. Keeping the Vedic God, Agni, as a witness of this bond, couples started promising themselves to each other. Amongst these promises, one was of loyalty and fidelity, and hence a breach in this called for wrath against adultery in the Indian society. 19th century Britain considered married women to be chattel of their husbands in law. Still, in its heyday, adultery was a tort and not a crime. Thus, the idea of making adultery criminal was, in fact, quite alien to the framers of the IPC. Lord Macaulay, after giving due consideration to the possibility of criminalising adultery in India, concluded it would serve little purpose. He suggested pecuniary compensation as a remedy against this wrong. He accepted that for such cases, the law could never provide a satisfactory solution in dealing with marital infidelity given the sacramental nature of marriage. Those involved with finalising the IPC disagreed and gave us Section 497. Although one can trace their justification for exempting women from liability under the Section, considering the deplorable social conditions of women at that time, it is difficult to find their reasons for criminalising adultery in the first place.

A popularly used argument is this regard is that the interface of law and society lead to the criminalisation of adultery. As explained by Justice Nariman in his judgement, in 1860, when the Penal Code was enacted, the vast majority of population in this country, had no law of divorce as marriage was considered a sacrament. Thus, adultery could not be give as a ground for divorce then. The only option left was to criminalize adultery.

In the Indian context, *Dharmasastras*, the ancient Indian law books, describe the crime of adultery and the most suitable punishment for both the partners depending on the social status of the 'criminal'. The punishment varied from being corporeal to societal, depending on the strata in which the offender fell. In Kautilya's *Arthashastra*, there is an exemption to punishment for a sexually unfaithful wife and her paramour if her husband 'forgives' her, but if he refuses to, then she is to be mutilated and her paramour executed. This finds resonance in the colonial provision of the said activity. He accepted that for such cases, the law could never provide a satisfactory solution in dealing with marital infidelity given the sacramental nature of marriage. Those involved with finalising the IPC disagreed and gave us Section 497. Although one can trace their justification for exempting women from liability under the Section, considering the deplorable social conditions of women at that time, it is difficult to find their reasons for criminalising adultery in the first place.

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What is wrong with criminalising adultery in the present times?

As discussed earlier, one of the major reasons, the provision for adultery attained its present form because it resonated with the value system of the society. However, with the advent of modern day constitutions, the ideas of freedom, liberty, equality, autonomy started evolving. Today, these ideas are not mere ideas but manifest themselves in the form rights which are most fundamental to meaningful human existence. Some of these rights are Article 14, 19, 21 etc. Keeping this changed matrix in mind, the idea of criminalising adultery, which is in its essence, a sexual act between two consenting adults is not only obsolete but also regressive. Taking this as the broad base, following arguments were advanced by the Constitutional Bench of the Court for striking down S.497:

The fundamental flaw with the idea of criminalising adultery is that we end up criminalising an act which is of an extremely private nature. In the *KS Puttaswamy case*, the Court observed that:

> *Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual and are an aspect of privacy.*

When viewed in perspective, this means that if something goes wrong in an extremely personal relationship like marriage, it is between the parties concerned how they choose to remedy the situation. Therefore, if a marriage has broken down and a party engages in sexual intercourse outside the marital tie, that person cannot be criminalised. Even so, the sexual autonomy inherent in every human being has not been recognised as absolute. Thus, adultery still remains a ground for divorce u/s 13 of Hindu Marriage Act, 1955, and very rightly so. The Court has also clarified that if an act of adultery leads the aggrieved spouse to suicide, the adulterous partner could be prosecuted for abetment of suicide under Section 306 of the IPC.

One major ground for criticism of the said provision is that it treats women as chattel and has chauvinistic undertones to the effect that if a man had sexual intercourse with a married woman and with her husband's connivance or consent, it could not be considered adulterous. As observed by Justice Chandrachud, the word 'connivance' attaches a certain deviousness to the act. This clearly treated a woman as the property of her husband. Even though marriage does not preserve ceiling of autonomy, S. 497 perpetrated subordinate nature of woman in a marriage. The objective behind criminalising adultery, as recognized by the Malimath Committee Report[1], was to preserve the sanctity of the marriage. If it were so, all kinds of sexual engagements outside wedlock should have been criminalised. However, the instant provision covered only those situations in which a married man indulged in intercourse with a married woman. Sexual acts with an unmarried woman were kept out of the ambit of this section despite the fact that these acts equally affect the sanctity of marriage.

Further, S.497 created two classifications. Both of these classifications were held to ultra vires Article 14 in the following ways:

a) The first classification is based on who has the right to prosecute: It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery.
b) The second classification is based on who can be prosecuted. It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence. This is based on the ancient belief that only a man can be a seducer whereas a woman can only be seduced.

The aforesaid classifications were based on the historical context in 1860 when the IPC was enacted. At that point of time, women had no rights independent of their husbands. Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a "theft" of his property, for which he could proceed to prosecute the offender.

International Perspective

As India criminalizes adultery, here is a look at where some of the other countries stand in this respect. In Philippines, adultery is punishable under Article 333 of the Revised Penal Code. Both adultery and concubinage are considered "crimes against chastity" under the Revised Penal Code of the Philippines and are treated as sexual infidelity in the Family Code. A wife and her partner can be sentenced if the husband proves that she had a sexual intercourse with a man outside the marriage. Husband, on the other hand, can only be charged if the wife proves that he had sexual intercourse under "scandalous circumstances" with his concubine or lived together with his mistress in any other place.

In Pakistan, adultery is a crime under the Hudood Ordinance, promulgated in 1979.[1] The controversial law mandates a woman making an accusation of rape to provide four adult male eyewitnesses of good standing (tazkiyah-al-shuhood) to "the act of penetration" as evidence to avoid being charged with adultery herself.

South Korea, in 2015, was the latest country that decriminalised adultery. By a 7-2 majority, a nine-member bench revoked the 1953 law under which cheating spouses could be jailed for up to three years.[1]

Adultery is still considered a crime in 21 states of the United States, including New York. Adultery is rarely prosecuted as a criminal offence. More common than criminal prosecutions for adultery are job terminations, sanctions, penalty or demotions.[1]

Conclusion

By decriminalising adultery, the Supreme Court has shown reception to the changing paradigm in which the society is evolving. This move marks the journey from prevalence of ideas that refused to recognise the separate identity of women to those which assert equality and freedom of women. A very interesting aspect of this decision is that it has struck down S. 497 not only on the grounds of gender bias but has also paid due heed to the changing nature of marriage. Former Chief Justice Dipak Misra has observed that the act of adultery cannot always be seen as the cause of an unhappy marriage. It is rather, in some cases, an effect of already existing disturbances in the matrimony. Thus, criminalising a highly personal act as this unreasonable, to say the least. Having said that, one spouse cannot be reasonably expected to totally absolve the adulterous act of another and continue the marriage. Thus, some redressal is needed for this wrong, even though it is of a personal nature. For this, the judgement has very rightly retained adultery as a ground of divorce. This is the most apposite form of redressal of a personal wrong in marriage.

Another very appreciable aspect of this decision is that it doesn't look at women as meek, hapless victims of sexual advances made by men. It has been observed that keeping in mind the changed position of women in the societal fabric, in many cases they are active participants and prosecuting only the man is unfair and discriminatory.

Thus, this judgement is in consonance with the broader themes of human rights. It is a more than welcome change in the arena of human rights, matrimonial law as well as the penal code of the country.

INTERNATIONAL NEWS

Saudi Arabia expresses 'regret and pain' over Khashoggi killing

Saudi Arabia expresses 'regret and pain' over Khashoggi killing, during UN rights review.

Confirming that an investigation is still on-going into the death of Mr Khashoggi, who was last seen entering the Saudi consulate in Istanbul, Turkey, on 2 October, Dr. Bandar bin Mohammed Al-Aiban told Member States in Geneva that King Abdel-Aziz had personally initiated the probe.

Following Dr Al-Aiban's comments, 40 Member States appealed to Saudi Arabia to find out what had happened to Mr Khashoggi, many also calling for reform to the Kingdom's freedom of expression laws.

UN rights chief warns of potential 'witch-hunt' as Tanzanian official plans to track and arrest LGBT people

On Friday, Michelle Bachelet, UN High Commissioner for Human Rights (OHCHR), expressed apprehension over a statement earlier this week by the Regional Commissioner of Dar-es-Salaam that a committee would soon be put in place to track and arrest gays, and to encourage member of the public to report people suspected of being gay. "Lesbian, gay, bisexual and transgender people in Tanzania have already been subjected to growing violence, harassment and discrimination over the past two years," said the High Commissioner. "And those defending their rights to health, to a life free from discrimination and violence.

Sabarimala:
On the path to gender equality

In different walks of life, time and again man has tried to prove his higher position and display that a woman cannot leave her footprint at par with him . There is inequality even in devotion to God. In a country that claims to be a secular democratic republic, the character and intensity of devotion and divinity cannot be limited to the obstinate typecasts of gender. Let us analyze the Sabarimala issue and the verdict to see how it contributes to the changing trend of the Constitution and its implementation.

A Constitution Bench of the Supreme Court led by Chief Justice Dipak Misra held by a majority of 4–1, that the Sabarimala Temple's practice of prohibiting the entry of women between the age group of 10-50 was unconstitutional and against the principle of gender equality. The verdict encompassed a swarm of complex disputes, where the interaction between the principal statute, subordinate rules, and the laws of Constitution were questioned. However, the underlying reasoning of the bench was well-defined and equitable and sufficiently justifies the verdict.

A Transformative Constitution

It is a well known fact that the Indian Constitution was introduced to bring in a radical transformation of the society and country. This transformation included placing four principles at the very foundation of the new social order - Justice; Liberty of thought, expression, belief, faith and worship; Equality of Status and opportunity; and Fraternity. The purpose of these principles is to ensure the dignity of the individual, which the Constitution enshrines as the "focal point of a just society"[1]. These four principles must work together for the "pursuit of happiness" of the individual, in order to fulfil the purpose of a social transformation. In order to find solutions to problems or conflicts between two rights, the aim of constitutional transformation must be kept in mind. The present case and judgment serve exactly this purpose.

The Verdict

The barring of this particular group of women, of menstruating age, from entering the prestigious Temple was defended on the grounds of it being an ancient custom, which was stated under Rule 3(b) of the 1965 Kerala Hindu Places of Worship (Authorization of Entry Act). Section 3 of the Act required that "places of public worship be open to all sections and classes of Hindus, subject to special rules for religious denominations". Rule 3(b), though, underlined the exclusion of "women at such time during which they are not by custom and usage allowed to enter a place of public worship." However, this legislation was questioned and examined as it appeared to be against the constitutional provisions stated under Article 25(1) offering the freedom of worship, Article 14 ensuring equality of all and Article 15(1) guaranteeing non-discrimination of citizens.

Chief Justice Misra and Justices Khanwilkar and Nariman hold the practice of exclusion of women as unconstitutional on technical grounds. Chief Justice Misra and Justice Khanwilkar held that the devotees of Lord Ayappa at Sabarimala do not form a separate religious denomination and that the exclusion of women from the temple did not have any scriptural or textual backing and hence was not an essential religious practice. As a result, Rule 3(b) is ultra vires Section 3 of the parent Act and hence, cannot stand.

Justice Nariman too holds that the devotees do not form a separate religious denomination and therefore, protection under Article 26 of the Constitution cannot be granted. Due to this, even if the exclusion of women in a particular age group was an essential religious practice, it still cannot override Section 3 of the parent Act which provides for equal access and Article 25(1) which guarantees the equal entitlement to all of the freedom to practice religion. [1]

Justice Chandrachud and India's Transformative Constitution

While Justice Chandrachud also holds the practice unconstitutional on these technical grounds, he emphasises immensely on the transformative nature of the Constitution. He highlights the vision of social transformation of the Constitution and the creation of a new just social order which sought to undo historical injustices and to right fundamental wrongs with fundamental rights. He recognises that the liberal values of the Constitution secure to each individual an equal citizenship. Justice Chandrachud places constitutional morality over social morality, which is transient. He states that social discrimination must be examined through the "prism of constitutional morality" and thus, in his view the denial of entry to women of a particular age group is violative of this equal citizenship. It denies women the dignity that the new social order of the Constitution guarantees. He holds that Article 25(1) of the Constitution protects the equal entitlement of all persons to freedom of conscience and to freely profess, protect and propagate religion. This equal entitlement is without exception. The right to religious freedom must be viewed in consonance with the other provisions of Part III of the Constitution.[1] According to him, even the right of a religious denomination to manage its own affairs is subject to other provisions of Part III and cannot override the foundational principles of the Constitution.

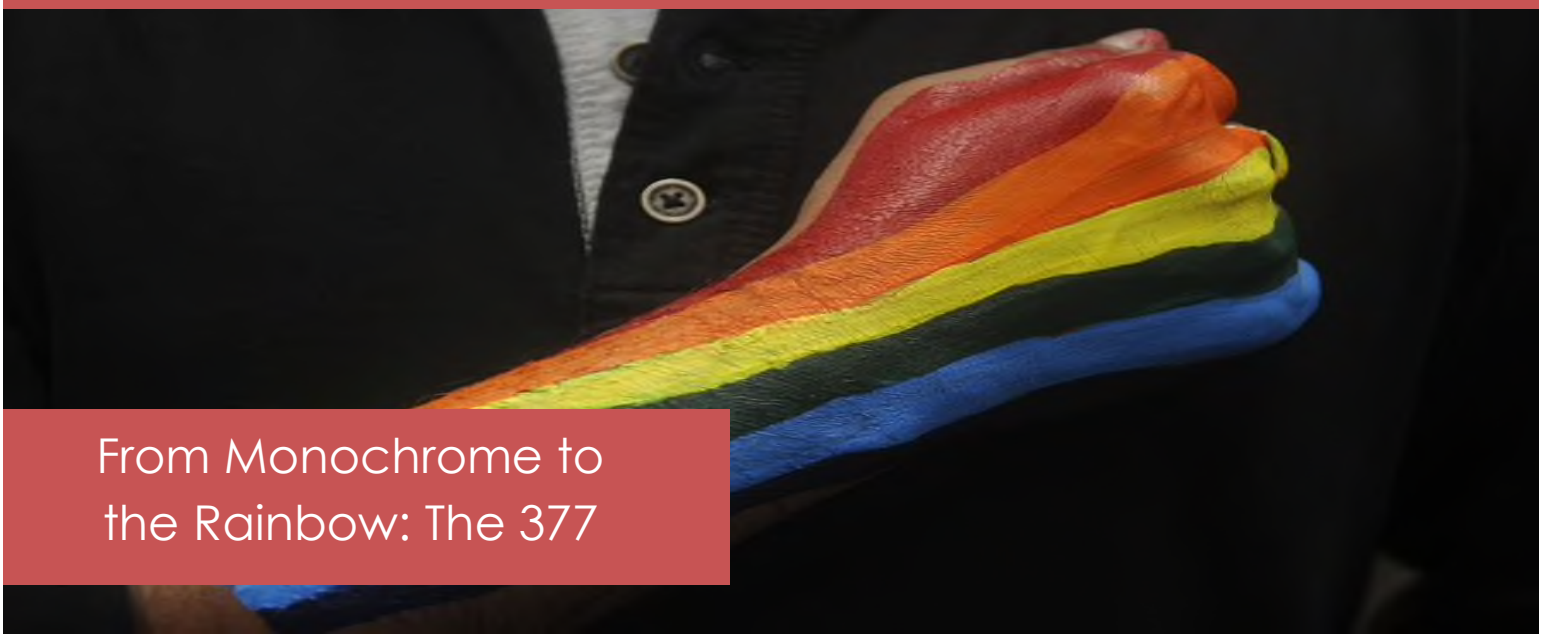
Women and Untouchability

The most radical and transformative aspect of Justice Chandrachud's judgement is however his take on untouchability. Article 17 of the Constitution abolishes untouchability in all its forms, and on this basis the Hon'ble Justice has expanded the definition of untouchability by including the exclusion of women from the Sabarimala temple as one of these "forms". He has gone to great lengths to discuss how the makers of the Constitution did not attempt to define untouchability to ensure that the scope and ambit of the same was not restricted. According to this view, , the exclusion of women of a certain age group is a form of graded inequality similar to the caste based discrimination. Caste based discrimination was based on notions of purity and pollution wherein the higher classes were seen as pure and the lower were considered to be impure. As a result, contact or interaction of any sort with the lower classes was seen as polluting the purity of the higher classes. The exclusion of women has been contended on the ground of a biological process- menstruation. Since time immemorial, the stigma and stereotypes around menstruation has seen a woman as impure and restricted her social and religious activity. Justice Chandrachud states that the Constitution cannot and must not allow such prejudice and discrimination. The equality of status of all individuals and their equal citizenship must be ensured. He states "*the Constitution exists not only to disenable entrenched structures of discrimination and prejudice, but to empower those who traditionally have been deprived of an equal citizenship. The equal participation of women in every sphere of the life of the nation subserves that premise.*"[1]

The Sanctimonious Society

The hypocrisy of religion - the portrayal of women as goddesses who are worshiped and glorified all the while considering a substantial proportion of them impure due to the biologically natural state of the bodies- has been brought to the fore after this verdict. Society still has to undergo a humongous change from being the broadcaster of patriarchal notions to an advocate of pure and unbiased rules and customs for women. We need to stop the suppression of women under the veil of law, legality, legitimacy and moral and religion uprightness. Practices grounded on the principles of discrimination, prejudice or exclusion of women owing to their biological construction and processes is not only unsubstantiated, unfortified and improbable but also a question on the ideology of humanity.

The court upheld the transformative and evolving nature of the Constitution by declining to award constitutional validity to derogatory practices that put down the dignity of women and violate their right to an equal citizenship and gender equality. Most importantly, the judgement upholds constitutional morality over social morality and norms. The rights to equality, dignity and liberty of women were upheld. Another recent judgement of the Supreme Court holds that "Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy."1 The purpose of the Constitution to discourage prevalent violative social morality and to transform society for the better has been fulfilled



From Monochrome to the Rainbow: The 377

Identity is what colours an individual. It is what makes a person unique and hence is fundamental to the very being of any individual. Therefore, in any country that claims to be a secular democratic republic, all persons should have a Right over their identity to the extent it does not violate the Right of others. In India, Section 377 of the Indian Penal Code was, for the longest time, impeding one of the core constituents of identity which was the Right to determine one's own sexuality. The section reads as follows-

Unnatural Offences-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 a 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.

The section was interpreted to criminalize homosexuality by construing any sexual contact between humans of the same gender as something which was against the 'order of nature'. The constitutional validity of this section of the Indian Penal Code was struck down by the Delhi High Court in *Naz Foundation* v. *Govt. of NCT. of Delhi* but it was later overruled by the Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation*. This rollercoaster of rulings took the Rights of the homosexual community for an unpredictable ride.

Everything was on the line and all was about to change when the Supreme Court of India began hearing the case of Navtej Singh Johar v. Union of India. In this case, the Supreme Court agreed to revisit its judgement on the constitutional validity of Section 377 (supra) by referring to a larger bench.

The bench comprised of former Chief Justice Justice Deepak Mishra, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud, Justice Indu Malhotra and Justice R.F. Nariman.

After the hearings, the Supreme Court decided to reserve its Judgement leaving the entire country in anticipation particularly the LGBTQ+ community. When the Judgement was delivered, Section 377 of the Indian Penal Code was held to be constitutionally invalid to the extent of criminalisation of homosexuality and carnal intercourse against the course of nature. Bestiality remained an offence. The Supreme court's 493 paged judgement has paved way for the assertion of identity and preservation of individual autonomy which was in furtherance of fundamental Right to Privacy which was laid down in the landmark judgement of Justice K.S *Puttaswamy (Retd.) and Anr.* v. *Union of India and Ors.*

The Judgement

The judgement given by the Supreme Court *in Navtej Singh Johar* v. *Union of India* which decriminalized homosexuality already marked its place among the Court's landmark judgments. Each Judge remarkably underlined the Right to Privacy and the freedom to choose one's own sexuality by having autonomy over identity.

The then Chief Justice of India, Justice Deepak Mishra wrote the judgement on behalf of himself and Justice A.M Khanwilkar. Their judgement stressed upon individual autonomy and the freedom to choose one's sexual orientation as integral parts of the Right to Privacy.

While talking about constitutional morality, the learned Judges remarked that it is the duty of the courts to realize constitutional vision of equal rights in consonance with the demands and situations of the society and not on scrutinized notions and ideals of the society. Also, that constitutional morality embraces itself with the virtues of a pluralistic and inclusive society while adhering to the principles of constitutionalism. In their judgement the learned judges also observed that identity which has constitutional tenability, cannot be pigeon-holed singularly as it may keep individual choice at bay.

Justice Indu Malhotra in her judgement observed that just because the LGBTQ+ persons constituted a miniscule fraction of the country's population, it did not deprive them of Fundamental Rights guaranteed under Part III of the Indian Constitution. The learned Judge also remarked that history owed an apology to the members of the LGBTQ+ community for the delay in providing redressal for the ignominy and ostracization that they have suffered for centuries and that they deserve to live life "unshackled from being the shadow of unapprehended felons".

Case Analysis

The verdict of the Supreme Court decriminalizing sexual intercourse between the members of the LGBTIQ community came as a welcoming, and a compelling change in Indian Jurisprudence. Overnight, a puritanical law- deemed to be the preserver of the sanctity and 'uprightness' of the act of sexual intercourse between two individuals- was struck down as unconstitutional.

It received a mixed reaction from the people- while some celebrated the verdict, others shunned it, calling it 'against Indian values and culture' and 'a moral degradation.' For both the categories of people, it is necessary to understand that the judgement was, in no way, an extension of the right to personal autonomy to the LGBTIQ community. It was rather a recognition of the inherent dignity and autonomy of the individuals, which was long denied to them. It was a reprehensible historical wrong undone. Better late than never.

The awaited verdict settled the dust on the long debate on the constitutional soundness of the archaic law. However, it will play the role of a stepping stone in changing the community perception and social attitude towards gays, lesbians and homosexuals. The judiciary took cognizance of the issue, and addressed it rightly. The next big question looms large before the lawmakers, enforcing authorities, and we, the citizens- what will be the way forward from here.

Although the effects of the verdict and improvements, if any, in the condition of LGBTQ Community's will take time to manifest itself, there are certain issues that should gauge our attention at this stage.

While Section 377 has indeed been a tool to vilify and arbitrarily punish members of the LGBTQ community, it may be surprising to learn that an overwhelming majority of those who utilize the section at police stations are abused and physically tormented women.

Women, who were the victims of spousal abuse, used to file their cases under section 377, in the context of Section 498A, to aggravate the 'heinousness' of the 'cruelty' mentioned under the said section, which criminalizes marital abuse, which includes harassment for dowry.

A column published in The Hindu, stated that:

"In a legal context in which marital rape is not recognized, section 377 emerges as a tool for married women to highlight the 'unnatural' abuse they face. Interestingly, the media in Kerala have found that the use of Section 377 is often added to the Protection of Children from Sexual Offences (POCSO) Act to increase its stringency."

While the court acknowledged the fact that Section 377 was used to protect women, but implied that since consensual acts against women are already criminalized under section 375, section 377 is redundant with regards to women.

However, this is not the complete truth. An exemption in Section 375 states that 'sexual intercourse by a man with his own wife (not being under 15 years of age) will not be rape.' For that reason, police officers had to register many dowry harassment cases that involved sexual violence under Section 377.

Therefore, as observed by analyst Dr. Nirvikar Jassal- "While Sec 377 will now apply to minors and in cases of bestiality, it is unclear whether abused married women will be able to use the law in quite the same way as they did before."

Another important challenge that faces us is the health hazards facing the LGBT community, especially STD's. The judgement has decriminalized Section 377 and accepted sexual relations between LGBT's as normal. But, the society will take time to shift the popular belief and perspective that it has held against the community since eternity. The debate has been settled on paper, but social acceptance is yet to look after.

As Justice Chandrachud observed: "Studies show that it is the stigma attached to these individuals that contributes to increased sexual risk behaviour and decreased use of HIV prevention services." Therefore, the authorities must ensure that a safe, secure and dignified environment be created so that the members of the community could get themselves diagnosed without the fear of humiliation.

JUSTICE K.S. PUTTASWAMY & ANR. V UNION OF INDIA & ORS.

The right to privacy refers to the concept that one's personal information is protected from public scrutiny. Privacy is a human right enjoyed by every human being by virtue of his or her existence. The Indian Constitution does not explicitly declare the same to be a fundamental right but is included under the broader purview of Right to Life under Article 21 as was recently upheld by the Supreme Court. The debate concerning privacy as a fundamental right was triggered by the introduction of the Aadhaar Scheme whose main objective was the identification of the beneficiaries for effective disbursing the benefits of the welfare schemes. The same was considered a breach of privacy as it included collection of biometric data and lack of provisions to safeguard the privacy concerns raised by the stakeholders. The concerns culminated into filing of petitions contending the act to be unconstitutional. The judgment was full of surprises for many people. It upheld the constitutional validity of the act, although, some provisions of the act were struck down, whereas many were read down by the Court. Be it as it may, the judgment marks a landmark in both constitutional and human rights jurisprudence. This short analysis of the judgment attempts to highlight some key issues that attracted limelight amidst enduring reverberations of the judgment.

THE JUDGMENT

The Supreme Court upheld the overall validity of Aadhaar Act 2016. The court held that Aadhaar card would continue to be mandatory for availing social benefit schemes. The Court also upheld the mandatory linking of PAN card with Aadhaar card and the requirement of Aadhaar for filing IT returns. However, the Court said that Aadhaar would no longer be mandatory for opening bank accounts, availing educational facilities and pensions. Further companies are no longer are permitted to use the authentication and e-KYC facilities by using Aadhaar. Court held that retention of data for 5 years was unconstitutional and metadata should not be stored beyond the period of six months. These were some of the major takeaways among many of the important aspects considered by the court.

This judgement is multi-layered and various important aspects of the judgement are analysed below.

ANALYSIS

It was argued by the petitioners that the biometric authentication, which is essentially based on fallible probabilistic system, is depriving many people the benefit of social welfare schemes. They said that the requirement of Aadhaar for social welfare schemes compromise with the privacy of the large section of society who rely on them. However, Government of India argued that the authentication through Aadhaar enlivened the Fundamental Right to Life under Article 21 of the Constitution. It was also stated that no citizen could have a "reasonable expectation of privacy" over their fingerprints or iris-scans as they were not intimate aspects an individual's life.

The Court in this case was concerned with balancing two facets of right to dignity: privacy and access to basic necessities. In *Anuj Garg v Hotel Association*, Hon'ble Supreme Court held that safety measures to a freedom cannot be so strong as to negate the essence of the right itself. However, it seems that in the present judgment Supreme Court strayed from *Anu jGarg*. The Court held that inroads into the right to privacy by mandating Aadhaar was minimal in view of larger public interest of plugging leakages in distribution of benefits and subsidies. It gives the impression as if the only relief of common people was that the state was at least not profiling beneficiaries or tracking them. However, the dissenting judgment of Justice Chandrachud holds that the dignity and the rights of an individual cannot depend on weak and uncertain algorithms and privacy of people cannot be bargained.

Incompatible Reasoning

Supreme Court's judgment failed to provide a consistent line of reasoning. On one hand, Supreme Court held that only welfare schemes similar to subsidies and benefits could be made conditional on Aadhaar-based biometric authentication as per Section 7 of the Aadhaar Act. Therefore, it excluded from its ambit *rights and entitlements* like education (Article 21A) and pension. On the other hand, the Court overlooked that access to food, shelter, employment *etc.,* which these social welfare schemes cater to, are also a right under Article 21. By this reasoning, social welfare schemes could also not be characterised as a subsidy so as to authorise compulsory Aadhaar requirement.

Passage of Aadhar Bill as Money Bill

It is disappointing to note that the Supreme Court's majority opinion overruled the Court's previous case laws to conclude that courts cannot judicially review the Speaker's decision of classification of a bill as money bill. By holding this, Court averted any further consideration of this issue in the present case, yet the Court went on to read down many provisions of the Act to exclude their application in transactions unrelated to Consolidated Fund of India or to establish nexus of such provisions with the Consolidated Fund.

For instance, Section 57, which enabled private entities to require Aadhaar for KYC purposes, was read down to exclude Aadhaar authentication that does not have a considerable relation with appropriation of funds from the Consolidated Fund. Similarly, the power of UIDAI under Section 23(2)(h) to specify the purposes for which Aadhaar can be used was limited to purposes analogous to Section 7. This interpretation aided the court to hold that all the matters in the Act were either concerned with or incidental to expenses from the Consolidated Fund of India.

This approach seems very defective. The court should have first decided if the Speaker appropriately certified the Bill as a Money Bill, instead of *retrospectively* justifying this certification by reading down its provisions. The original bill evidently did not deal "only" with Consolidated Fund of India. Justice Chandrachud opined that "the passing of the act as a money bill is a fraud on the constitution." The power of the speaker cannot be exercised arbitrarily in violation of constitutional norms as it damages the essence of federal bicameralism. Further, judicial review of the decision of the speaker must exist, in order to protect the basic structure of the constitution.

The Lack of Security of Data

The Aadhaar programme suffers from violations of the fundamental rights and many rules and regulations framed under it along with its framework being unconstitutional. The architecture of the Aadhaar poses a risk of potential surveillance activities through its database. It is possible to locate the places of transactions of any individual in the last five years and it can also track down the location of an individual

National News

Targeted killings of Bengalis in Assam

There have been various reports of targetted killings of Bengalis in Assam. Reacting to such reports of the killing of five Bengalis at Tinsukia in Upper Assam, Aakar Patel of Amnesty India said,

"There is already a climate of fear and stigma consequent to exclusions from the National Register of Citizens. It is time that Chief Minister Sarbananda Sonowal takes proactive steps to prevent further violence."

According to eyewitness accounts, five to six people dressed in fatigues picked up five people from a Bengali dominated village and then shot them dead. Reports suggest that the gunmen belonged to the Paresh Baruah faction of ULFA, also known as ULFA-Independent. ULFA-I has denied involvement in the killings. On October 13, ULFA-I claimed responsibility for a low intensity blast near Guwahati.

Bhima Koregaon: Clampdown On Dissent Continues, Three Human Rights Defenders Placed In Police Custody

Human rights defenders Arun Ferreira, Sudha Bharadwaj, and Vernon Gonsalves were arrested by the Maharashtra Police on 26 and 27 October. Reacting to the same, Asmita Basu, Programmes Director, Amnesty India stated,

"The decision taken by a court in Pune on Friday, to reject bail applications and discontinue the house arrest of human rights defenders Sudha Bharadwaj, Arun Ferreira and Vernon Gonsalves, is unfortunate. The Maharashtra Police's subsequent arrest of these activists, despite failing to provide credible evidence against them, is concerning."

On 26 October, a Pune Sessions Court rejected bail applications filed by the three activists and human rights defenders. On the same day, the court also rejected Ferreira and Gonsalves' application seeking a week's extension of their house arrest. Following this, Ferreira and Gonsalves were taken into custody on Friday evening and activist Sudha Bharadwaj was arrested on Saturday. "The activists who have been arrested have a history of working to protect the rights of some of India's most marginalized people. All of them have been arrested under a draconian counter-terrorism law that has repeatedly been used to silence government critics."

without the verification. Besides, any leakage in the verification log poses a greater threat to individual's data being vulnerable to the exploitation by the third parties. It is also appalling to notice that the biometric data in the CIDR is accessible to the third party vendors, as the source code for the programme does not vest with UIDAI, and it is merely a licensee. Even prior to the enactment of the Aadhaar Act, UIDAI had contracted with L-1 Identity Solutions, which is a foreign entity that has provided the source code for the biometric data, to provide any personal information of any resident of India. This is a clear violation of the right that an individual has to protect oneself against the probable misuse of data. Moreover, the data of 1.2 billion citizens cannot be subjected to the terms and conditions of a contract that puts the security and protection of the data in peril.

The Concept of Identity

'Identity is necessarily a plural concept', said Justice Chandrachud, while acknowledging the many identities that the Constitution recognises through the rights guaranteed to the citizens. The Aadhaar Act ostensibly seems to reduce the constitutional identity of an individual to merely 12 digits thereby infringing upon the right of an individual to identify oneself through a specifically chosen means. Besides, the regulation framed under the act does not provide for a suitable mechanism on how 'informed consent' is to be obtained from the citizens before collecting their biometric data and it is bereft of the procedure through which an individual can access his or her information. No alternative has been provided if the Aadhaar holders do not want to submit their information for authentication and does not consent to the authentication.

Fear of surveillance state

The petitioners believed that Aadhaar was a thinly veiled surveillance tool in the hands of the government and we are heading towards a totalitarian state. They argued that Aadhaar data at the disposal of government has significantly changed the power equation between people and government. However, surprisingly, the Supreme Court dismissed apprehensions of any Orwellian state as speculative. At this juncture, the Supreme Court's reasoning seems to be appropriate having regard to the present purpose for utilization of Aadhaar. Nevertheless, a risk of such Kafkaesque or Orwellian state would continue to loom if effective checks are not put on the government (and for that matter on private entities also) over the use of Aadhaar data. This issue may acquire severity in the future

Commercial Dilemma

A debate has arisen in the aftermath of this judgment on the possibility of voluntary use of e-KYC and whether such use could be legalised through a new law. The majority verdict takes an unclear stance on this issue. There are serious concerns in the commercial corridors of the country given the huge economizing potential, time-efficiency and pervasive use by a large number of private sector players of the e-KYC model.The reading down of Section 57 was mainly because of use of Aadhaar for e-KYC which allowed the private and contractual use of Aadhaar and Aadhaar based authentication. The Court read down this provision because such authentication was used for establishing the identity of an individual for 'any purpose', was not provided by law and thus it failed to fulfil the first requirement of the test of proportionality. This makes it clear that any use of Aadhaar must be backed by law. A mere contract, even if consent-based, will not suit the purpose unless there is a law backing it. However, a specific law providing for voluntary Aadhaar authentication for KYC purposes might find favour with the Court's judgment.Use of Aadhaar by private entities has also benefitted people. For example, migrant workers use Aadhaar-enabled payment system to send money home and this judgment might force them to resort to hawala operators again. Similarly, use of Aadhaar has also significantly reduced the costs of loans in some cases.

Conclusion

Supreme Court's judgment in the Aadhaar case was ruptured and inconsistent. The fissure between the majority and minority judgments was so glaring that it is difficult to believe that all judges had been sitting in the same room and listening to the same facts. The judgment offered no lucidity or finality. Its tall pronouncements seemed detached from reality and aloof of the implications or social costs of implementation. And after bypassing the Rajya Sabha to pass the Aadhaar Act as money bill has invited severe criticism. Though not many have been satisfied with verdict but in the light of the basic necessities to be provided to all, the majority did not hold the Aadhaar Act as unconstitutional.

Contributions are invited for February Issue of the CASIHR Newsletter. The last day is 29th January 2019 which can be mailed on casihr@rgnul.ac.in

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