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CRIMINAL LAW BILLS AND A HOLLOW DECOLONISATION

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‘The narrative of decolonisation surrounding the Bills must not be seen in isolation from developments in other areas of criminal law that are contemporaneously pushing us back into colonial ways and outcomes of lawmaking’ | Photo Credit: Getty Images/iStockphoto

In introducing the three criminal law Bills in 2023 and, earlier, while setting up the Committee for Reforms in Criminal Law in 2020, a lot was said about the decolonisation that these Bills will bring about. Unfortunately, the Bills do very little to decolonise Indian criminal law. They do, however, indicate the continuation and intensification of colonial-style powers.

Colonisation is, broadly, a process of oppression where the colonised become vehicles for the supreme colonial power to fulfil its desires. The subject unquestioningly serves the colonial state and remains at its mercy. Those in power have rights; those without must oblige. At the same time, the colonial state also considers itself to forever be at risk of being victimised by those it rules. Therefore, the interest it needs to protect is its own, not the subjects’, who are not just inferior but also suspicious. This is the foundational essence of colonial laws — to secure and protect the colonial state and not the colonised. The purpose of laws such as the Indian Penal Code (1860) which the Bharatiya Nyaya Sanhita (BNS) seeks to replace, was not just to maintain law and order; it was an opportunity for the colonial state to legitimise, through the law, its status as a potential victim under threat from the people it colonised.

A ‘decolonised’ or a post-colonial law, then, would necessarily need to reflect the changed relationship between the citizen and the state. An independent people are not to serve but to be served through the state and government they give themselves. This fundamental shift changes the process of law-making, and the priorities and purpose of the law.

The Bills fail these essential requirements both in how they have been brought about and their content. The framework produced by them views citizens with such increased suspicion and mistrust that the state appears to almost be in opposition to the citizen.

Through the major changes in the Bills run twin threads which severely compromise people and simultaneously arm the state against them. That almost all proposed changes to the BNS (see provisions on organised crime, false information jeopardising sovereignty, acts endangering sovereignty, terrorist acts) are overbroad, and constitutionally suspect is not just the result of

poor drafting. It is an outcome of the state casting the net of what constitutes an offence as wide as possible, which in parallel increases the avenues to use police powers. Many of the ‘new’ offences are already covered by existing laws (either under special laws or the Indian Penal Code). Adding an additional layer of criminalisation, therefore, does nothing except increase police powers.

A notable feature of colonisation is suppression in the guise of security by giving the executive unchecked police powers. This particular feature is so deeply entrenched that the Indian state has only increased its police powers post Independence. The Bharatiya Nagarik Suraksha Sanhita (BNSS) — it repeals the Code of Criminal Procedure, 1973 — expands those powers considerably. For instance, it allows police custody for periods longer than is allowed under the current Criminal Procedure Code. Some provisions of the BNS, such as terrorist acts, allow the police powers that are significantly broader than even those under harsh laws, such as the Unlawful Activities (Prevention) Act. The legislative increase in the use of police or police adjacent powers, including through other laws, is a continuation of colonial powers — not a route for undoing them.

Enough has been written about the police and prison being relics of colonisation. Yet, the decolonisation that the Bills seek to achieve provides no scope for their reform. Without reorienting the foundational perspective of these institutions, though, calls for decolonisation will remain vacuous. The hope of decolonisation will remain unfulfilled because the state has not indicated, either now or earlier, the willingness to audit and reimagine these essential instrumentalities of colonial power. Increasing terms of punishments across the board, as the BNS does, while broadening police powers borrows heavily from the logic of colonial criminal law. What this means for India’s severely overcrowded prisons and the implications on policing (how, who and on whom) are either non-considerations or over-looked considerations.

The narrative of decolonisation surrounding the Bills must not be seen in isolation from developments in other areas of criminal law that are contemporaneously pushing us back into colonial ways and outcomes of lawmaking. For instance, laws such as the Criminal Procedure (Identification) Act, 2022 which authorises the police to take measurements of convicts, accused and even those taken into custody for preventive detention, further the aim of colonisation — increased surveillance of the populace and increased control by the state.

Though the idea of decolonisation must be seen in opposition to colonisation, that is not all it is. It is an optimistic endeavour brimming with the promise of a people shaping their own destinies. It gives effect to reordered relationships between the state and citizen. It honours and centres the citizenry. But, hidden behind the rhetoric of decolonisation of the criminal law Bills lie exaggerated anxieties of colonial power.

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THE COURT'S 'NO FUNDAMENTAL RIGHT TO MARRY' IS WRONG

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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A LGBTQ+ community supporter sports a tattoo in Sanskrit that reads "Dharma protects those who protect it" in New Delhi on October 17, 2023. | Photo Credit: AP

So we have it from the Supreme Court of India in *Supriyo Chakraborty*. There is no fundamental right to marry, it holds. On that account, the Court decided that same sex persons cannot marry. In my view this is a wrong decision.

However, to the credit of the Court, it directed, unanimously, that same sex couples have to be protected from any harassment. The Court also passed directions to sensitise the authorities on this behalf and even directed the setting up of a committee to look into a number of issues. However, the flaw is fundamental which needs to be corrected, sooner than later.

To understand Supriyo Chakraborty, we need to contextualise it. In 2009, the Delhi High Court read down Section 377 of the Indian Penal Code (IPC) in Naz Foundation (Naz). That was set aside in Suresh Kumar Koushal by the Supreme Court in 2013, but ultimately upheld Naz in Navtej Singh Johar in 2018. Section 377 IPC, a law made by the British, that criminalised sex between non-heterosexual couples was punishable with 10 years imprisonment.

As a result, the LGBTQI communities suffered blackmail, torture, violence, harassment at the hands of the police, their lovers and families. A gay man, for instance, could not disclose his orientation for the fear of reprisals. This is what I heard from clients who began coming to the Lawyers Collective from 1997, when we took the decision to challenge the constitutional validity of Section 377 in 2001. Both Naz and Navtej Johar did not strike down Section 377. They held that adult non-heterosexual couples having physical relations with consent in private would not be criminalised.

In the meantime, even before Navtej Johar, the Court had held, in NALSA, that persons are entitled to identify their own gender. They may be born as males but if they want to identify as females or transgenders, they are entitled to do so. Pursuant to that, the Transgender Persons (Protection of Rights) Act was passed by Parliament which provides the procedure for changing one's gender and protection against discrimination in diverse establishments, private or state.

It had also been held by the Court in diverse decisions that in India a person is entitled to

autonomy, dignity, privacy and the right to choose their own partners to live with or in marriage. Obviously, after Navtej Johar, when one can have intimate relations with a person of any gender or sexual orientation, it is logical to assume that in that situation when a couple are having a physical relationship, they may prefer to develop a long-term relationship, including that of marriage. For marriage brings along with it a host of advantages for the couple, including succession in the field of inheritance, adoption of children, taking decisions in case of hospitalisation, and benefits from employers.

Decoding the Supreme Court's judgement against same sex marriage legalisation

More than anything else, in the eyes of society, it sanctifies the relationship beyond reproach. A relationship less than marriage is not considered by society to have the same legitimacy. Without that legitimacy, LGBTQI communities are stigmatised. Consequently, LGBTQI communities began making strong demands for their right to marry. Petitions were filed in the Delhi and the Kerala High Courts which were all transferred to the Supreme Court where too fresh petitions were filed. It is in this background that the Court, in Supriyo Chakraborty, was asked to decide the right of recognition to marriage by the state of non-heterosexual couples

The fundamental core decision of the Supreme Court in Supriyo Chakraborty is that there is no fundamental right to marry in India. In arriving at this decision, the Court ignored the fact that India was an original signatory to the Universal Declaration of Human Rights (UDHR), the founding document of all human rights in the world. It is well known that the Indian Constitution was greatly influenced by the UDHR.

As a signatory country to the UDHR, legislation by Parliament and State Legislatures in India must be in accord with the UDHR. More importantly, courts in India have interpreted the Constitution and statues in line with the UDHR and other international covenants.

Article 16 of the UDHR, 1948 provides that, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family...." Under the UDHR, the right to marry is a human right. In the face of this can it be argued that it is not a fundamental right?

Editorial | Law and custom: On the Supreme Court's verdict on same-sex marriage

Critics would argue that the Indian Constitution does not provide for the right to marry explicitly. However, this ignores the Indian constitutional jurisprudence where the courts have interpreted constitutional provisions and enunciated new penumbral rights in a liberal and expansive manner.

The Supreme Court of India has read the right to be treated with dignity into Article 21 (a classical negative covenant on the state). It is on that basis, that positive rights, including the rights to education, food, environment have been evolved.

The Supreme Court has used the provisions of UDHR to elaborate rights under the Constitution. Thus, in the context of handcuffing and consequential torture contrary to Article 21 of the Constitution, in Prem Shankar Shukla, the Supreme Court referred to Article 5 of the UDHR stating that, "After all, even while discussing the relevant statutory and constitutional requirements court and counsel must never forget the core principle found in Article 5 of the Universal Declaration of Human Rights." This was reiterated in Francis Coralie Mullin, which based on the concept of dignity stated,"It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the [UDHR]". In Maneka Gandhi, the Supreme Court relied on Article

10 of the UDHR to read in principles of natural justice into the administrative process to state, “Hark back to Article 10 of the [UDHR] to realise that human rights have but a verbal hollow if the protective armour of Audi altered parted is deleted”. Thus, it was eminently reasonable to develop the concept of the right to marry into Articles 19 and 21, especially because the right to intimate relations is now recognised in Supriyo Chakraborty itself. Surprisingly, the Court says that we cannot use foreign jurisprudence in the case of legal issues relatig to marriage, despite the fact that in Surpriyo Chakraborty, the Court has introduced the doctrine of intimate association borrowed from the jurisprudence developed in the United States.

The irony is that for transgender persons, the Court holds that marriage between a trans-man and a cis-woman or between a transwoman and a cisman is legal. That is correct. But there lies irony. It needs to be appreciated that according to the logic of the judgment, marriage is only legal between a man and woman, that is a biological man and woman. The Court has rightly made the leap from biological sex to gender, which is self-identified in accordance with NALSA. If the leap was possible for biological sex to self-identified gender, it is difficult to understand why a leap could not be made from biological sex to sexual orientation. After all, not recognising marriage for same sex couples is not only discriminatory against them. The unintended consequence of the judgment in the larger society is that the notion that same sex couples are “not fit for marriage” will be perpetuated. It now has the imprimatur of the highest court. It reduces them to second class citizens.

Also read |Transgender persons in heterosexual relationships have the right to marry under existing law, Supreme Court holds

The sooner this wrong is set right the better it would be for society as whole. My message to my LGBTQI colleagues is that fighting involves falling several times before the ultimate victory. We fell after Koushal. But we fought and won in Navtej. Now, we need to get up and fight and win again, which we shall do.

Anand Grover is a senior advocate practising in the Supreme Court of India. He appeared in the Naz Foundation, Suresh Kumar Koushal, Puttaswamy, NALSA, Navtej Johar and Supriyo Chakraborty of the LGBTQI groups/individuals

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