



ILS LAW COLLEGE, PUNE

CENTRE FOR PUBLIC LAW'S

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VOLUME VIII

FEBRUARY 14, 2019



INSTANCES OF CHEQUERED HISTORY OF CELEBRATION ON
VALENTINE'S DAY IN INDIA

Celebration of Valentine's Day: driving force for yellow journalism

1. The War on Valentine's Day in India¹
2. V-Day moral police harass, harangue couples, get animals 'married'²
3. Valentine's Day Vandalism and the Political Economy of Policing in India³
4. Watch: Valentine's Day vandalism! This is what Bajrang Dal members did in Hyderabad⁴
5. A tough cookie, Valentine's Day continues to irk conservative societies⁵
6. Trust Shiv Sena to plan something ridiculous for Valentine's Day⁶
7. Valentine's day, Vandalism and its future in India⁷

¹ <https://www.theatlantic.com/international/archive/2018/02/protecting-valentines-day-in-india/553244/>

²

http://timesofindia.indiatimes.com/articleshow/62912822.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

³ <https://thewire.in/featured/valentines-day-vandalism-policing-india>

⁴ <https://www.financialexpress.com/india-news/watch-valentines-day-vandalism-this-is-what-bajrang-dal-members-did-in-hyderabad/1066385/>

⁵ <https://indianexpress.com/article/opinion/web-edits/a-tough-cookie-valentines-day-continues-to-irk-conservative-societies-4524261/>

⁶ <https://www.dailyo.in/variety/valentines-day-shiv-sena-uttar-pradesh-moral-police-love-jihad-vhp-hindu-right/story/1/22321.html>

⁷ <http://mikeghouseforindia.blogspot.com/2015/02/valentines-day-vandalism-and-its-future.html>

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MESSAGE FROM THE EDITOR(S)



Date: February 14, 2019

Thursday

Dear All,

I congratulate the entire Editorial team of PLB for bringing out this tiny volume on the awesome occasion of Valentine's Day on a very short notice. Though the idea looked innocuous its actual shape on paper took lot of hard work and commitment to the entire team.

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(A.) INTRODUCTION: EMBRACING LOVE CONSTITUTIONALLY

The Preamble of Constitution of Philippines *inter alia* provides “*We, the sovereign Filipino people...secure to ourselves and our posterity the...a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.*”⁸

A close look on this text is bound to excite any modern scholar in public law, because it is plausible to read in the aforesaid excerpt that love is one of the values foregrounding the constitution of a nation. I want to argue in this introduction which I am very excited to write on the occasion of Valentine’s Day that festivities and enjoyment on this occasion is constitutionally justified and deserves protection and approbation.

Should love really foreground the Constitution of any civilised state as a fundamental value?

I intend to grapple with this question in the context of public law. Borrowing the idea from my mentor Dr. Deshpande, I argue that although love is not explicitly mentioned in the text of our Constitution. It is one of the foundational assumptions if we conceive it as a process. Indeed, I conceive love as a process.

Love is a process because it is impregnated with substance. Substance means the attachment. The relationship of love and attachment can be explained by arguing that without the existence of others, loving is impossible. Understood this way, love is bilateral, but speaking philosophically it is possible to conceive a dichotomy of self and body of one’s own. For example, I may love myself but not my body and vice versa. Plainly understood as a process, there can be several public law objects which can be attached to love, for example, love for freedoms, love for human rights or love for rule of law.

⁸ <https://www.officialgazette.gov.ph/constitutions/1987-constitution/#preamble>

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One such object of self-determination was attached to the ideal of love by D.Y. Chandrachud J. in *Navtej Singh Johar v. Union of India*, in a very romanticized passage, drawn from the work of Leila Seth J.

“What makes life meaningful is love. The right that makes us human is the right to love. To criminalise the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalisation, or worse, to recriminalise it, is to display the very opposite of compassion.”⁹

He then went onto build upon the above edifice by foregrounding right to equal love in Article 14, by observing that Section 377 asks *“of a section of our citizens that while love, they may, the physical manifestation of their love is criminal. This is manifest arbitrariness writ large.”*

In the context of right to freedom of marriage locating love in Article 21, the Learned judge went onto opine “Matters of dress and of food, of ideas and ideologies, of **love** and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled.”¹⁰

The above discussion shows that love as a constitutional value is strongly entrenched in our legal order and vigilantes have no business to meddle with the personal lives of the citizens which they can enjoy publicly. Looked at from this perspective, celebration of Valentine’s Day is more than symbolic. It is indicative of the extent of maturity and tolerance our society has reached.

⁹ Justice Leila Seth, “A mother and a Judge speaks out on Section 377”, *The Times of India*, 26-1-2014.

¹⁰ *Shafin Jahan v. Asokan K.M.*, Criminal Appeal No. 366 of 2018.

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Just to conclude, to love in public view might have been de facto interest in the Poundian sense, but with judicial dicta in Navtej and Shafin Jahan, its de jure dimension is crystalized by the Apex Court making out a strong case against protestations on the choice to celebrate Valentine's Day.

SPECIAL EDITION

A. Tracing Certain Instances of the word 'Sex' in Constituent Assembly Debates¹¹

There is this one very interesting intervention by a member in the Constituent Assembly contesting the views of few lady members against the use of word 'sex'

7.57.90 - 7.57.92

Lakshminarayan Sahu: That in clause (v) of Article 31, for their words 'age', the words 'their age, sex' should be substituted.

Mr. Kamath admitted here that even he considers that the word 'Sex' should be put in but that he did not do so because the term 'Sex' was not liked by some lady members of this House. But I insist that this word should be retained here. I would like to know the reasons which led them to say that they did not like this word. We see that the word 'Sex' has already been used in article 9 of the Fundamental Rights. We also know that we use the word 'Linga' in our language, and so I fail to see the harm likely to be done by the use of this word here.

Secondly, if we do not use the word 'Sex' here, many unpleasant complications are likely to ensue. In order to avoid all such complications I would like that the words "Unsuited to their age, sex and strength" should be retained. There are many such factories and mines which are not fit for women to work in. But many women are compelled by circumstances to work there. To stop this practice the word "Sex" should be specifically used here.

¹¹ This compilation is prepared by Varad S. Kolhe, IV B.A. LL.B., ILS Law College, Pune. All excerpts are borrowed from <https://cadindia.clpr.org.in>.

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The third point is that the members of the Drafting Committee like to use the word 'sex' here. When it is so, I do not find any reason to delete it. And hence the word sex must be retained so that women may be saved from exploitation. The condition of the women of our country is rather deplorable and I do not like that they should workday and night in the mines and be obliged to adopt some such profession which may spoil their home life. On account of these three reasons I propose that this word 'Sex' must be retained here and I move this amendment accordingly.*

In this connection, the views of Professor HV Kamath who tried to paternalistically assuage the feelings of the one of the lady members, Ms. Purnima Banerjee are equally interesting.

10.148.152

H.V. Kamath: Then there is the point raised by my Friend Shrimati Purnima Banerji. Though she has not pleaded for her own sex on the basis of special reservation, yet I feel that that is a point which may be easily conceded by this House. She went so far as to say that the seat formerly occupied by the late Shrimati Sarojini Naidu cannot perhaps be filled from among the ranks of men. I know not what she implied but I would not pick a quarrel with her on that point. As a matter of fact I would not mind, I would be quite happy, if there are more women in this House than there are today, but I do not think she should make an issue of that so far as this article is concerned. So far as the work of Government is concerned, if I heard her aright, she said that women should be given a greater chance more scope, in affairs of administration and government than they are being given today. The most common and the strongest objection so far put forward by political philosophers in this connection, that is to say as regards the capability of women for government and administration is that woman is ruled more by the heart than by the head, and where the affairs of Government are concerned, where we have to be cold and calculating in dealing with various kinds of

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men, women would find it rather awkward and difficult to deal with such persons and that the head may not play the part that it must play in the affairs of government. If the heart were to rule and the head to take a secondary place then it is felt by many thinking men, and thinking women too, that the affairs of government might go somewhat awry, might not fare as well as we might want them to be. However, I do not wish to dwell on this point further. But I think the House will not quarrel with Shrimati Purnima Banerji on this point that where a seat held by a woman Member is vacated that seat should normally go to another woman.

The aforementioned excerpts clearly demonstrate that the members of Constituent Assembly broadly conceived women from the lengths of tradition and culture, rather than from the modern perspective.

**B. Valentine's Day and Moral Policing in India: Why does Rule of Law
Collapse?¹²**

On the eve of Valentine's Day, people find reasons and means to express love and affection for their close ones. However, this might be a disturbing or rather unpleasant idea for some factions of society. It is not otherwise possible to comprehend why the mere act of expressing love or celebrating any form of love would be morally objectionable. The trend of snooping and interfering in the Valentine's Day celebrations between couples can be succinctly summarised in the instances where:

1. The Pune city police in 2010 proscribed, under Section 144 of the CrPC, any public show of affection tantamount to obscenity in colleges and schools, public or private, from 1 am on February 3 to 6 pm on February 14th. Those found involved in the acts of public display of affection would be punished under Section 188 (disobedience to order duly promulgated by public servant) of the Indian Penal Code.
2. A young man in Pallakkad in 2017 was attacked, filmed and targeted with a video on social media by moral vigilantes on Valentine's day, was later found hanging outside his home. A suicide note was found in which he cited the harassment on Valentine's day as the reason for taking the extreme step.

These horrific instances provide us a glimpse of how the morality of a special faction of society is allowed to be all pervasive and allowed to effectively control and deter the liberties of the citizens. The basis for this morality is perhaps rooted in the idea that private relationships must be relegated to private sphere, discomfort due to physical intimacy of men and women and objection to women having sexual agency and occupying public spaces more freely. Sometimes the desire to intervene between

¹² This essay is authored by Neha Deshmukh and Sharanya Shivraman, both V B.A. LL.B., ILS Law College, Pune.

the individuals and moral police them might also masquerade as a protectionist move to prevent men from taking advantage of women.

The question that then arises is why despite having a rule of law which prohibits such vigilantism, the police officials and law enforcement machinery toe the moral/political line and refrain from stopping the vigilantism. The most plausible explanation is that the police department and law enforcement department is severely subject to political function and power. In a recent research article¹³ it was stated that “**since postings and transfers take place according to the whims and fancies of the ruling dispensation of the day despite the Supreme Court directives in the famous *Prakash Singh*¹⁴ case, it is only logical that police officers will go out of their way to accommodate the illegal political and economic demands of their political masters based on vote bank politics. As a result, the rule of law makes way for the dictates of politics.**”

A significant amount of illegal surveillance or bypassing authority to violate privacy and liberty goes unchecked due to the discretion that police is afforded in preventing the illegality from occurring. There are fewer opportunities to hold the police officials liable for lack of action taken on a certain matter or failure to perform duties. Hence, the liberty to love as most other liberties will only be provided for if it is adequately safeguarded from disturbance or intervention by anti-social elements.

It further becomes pertinent to take note of the various judgments which have highlighted and ruled upon the trend of moral policing in India. First, the Supreme Court, in a very significant judgment in the case of **Shakti Vahini v. Union of India**

¹³ <https://thewire.in/featured/valentines-day-vandalism-policing-india>

¹⁴ *Prakash Singh v. Union of India* (2011) PL May S-12 available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=135&do_pdf=1&id=21218

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and Ors.,¹⁵ has held that any attempts by the Khap Panchayat or any other assembly to stop or prevent consenting adults from entering into marital bond, is illegal. The court further ordered the setting-up of a high-level committee consisting of senior police officers in order to deal with these intervention issues. The court opined that the Khap Panchayat should not be “the conscience keeper of the society”. It thereby ruled that whether a particular marriage was null or void, could only be decided by the courts of law and that the Khap Panchayat “have no business in such matters”.

Additionally, in the landmark case on Right to Privacy¹⁶, the apex court laid down ground-work for securing the rights of the LGBT community, which was rightfully affirmed in the case of **Navtej Singh Johar & Ors. v. Union of India**¹⁷. The Supreme Court in this case struck down a 157-year-old law, which criminalised consensual homo-sexual acts between consenting adults. The judgment vehemently stated that no constitutional right can be dictated by majoritarian views or even public notions of popular morality.

These series of judgments make it apparently clear that the courts in India have taken a stern stand against any attempts or commission of moral policing.

¹⁵ Shakti Vahini v. Union of India and Ors, AIR 2018 SC 1601

¹⁶ Puttuswamy v. Union of India, AIR 2017 SC 4161

¹⁷ Navtej Singh Johar & Ors. v. Union of India, AIR 2018, SC 4321

C. Morality as we know it *versus* Morality the Constitution has¹⁸

India as a country is often consorted as a conservative country, especially when it comes to expression of love, given the constant societal moral nagging (what is perceived as public morality) and most individual's complacency with such conception for society's approval. It is interesting to note that India was not always such a conventionalist. In fact it was quite the opposite and such ancient liberal attitude is evident in the exquisite sculptures and carvings in *Khajuraho* Temple and *Konark* Sun Temple, which are today recognised as a heritage sites. There are also manuscripts and treatises which reflect that neither sex nor sex education (including all its variation) was the taboo as is considered to be so now.¹⁹ The stark shift of India's age-old stance to the now inhabited orthodox and traditionalist outlook is attributed to censorious puritanism of the colonisers, Mughals as well as British, for whom matters of sex were to be kept under wraps; subsequent declaration of independent India as a secular state, which did nothing to change the subjugated thoughts imbibed by the colonisers; and lastly the misguided and uninformed impressions of fringe groups which believe Christian and Islamic ideals to be Hindu ideals and accordingly impose fetters in the name of public morality.²⁰

This is nothing but a clear irony where on one hand the world's youngest nation, modern India, which of late in its attempts to celebrate a day like Valentine's Day is lynched, morally policed and subjected to social embarrassment for expression of love and on the other hand the government shies away from the use of phrase 'sex education', and instead a program to impart such education is labelled as 'National

¹⁸ This essay is authored by Saranya Mishra, V B.A. LL.B., ILS Law College, Pune.

¹⁹ Sex was taught as a subject in formal education, and *Kamasutra*, the world's first sex treatise, was written in ancient India between the 4th Century BCE and the 2nd Century.

See <http://www.bbc.com/travel/story/20150921-indias-temples-of-sex>.

²⁰ <https://www.hinduwebsite.com/upanishads/essays/sex-in-Upanishads.asp>.

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Adolescent Health Programme'²¹²². Both these incidents are reasoned on the touchstone of public morality. But can such morality be imposed to regulate private conduct? Does public morality hold constitutional value? What is constitutional morality?

The author with this background delineates the difference between public morality and constitutional morality.

What is public morality?²³

Generally when people use Public Morality, it merely means morality observed by public or the morality observed by fringe mob. This morality has nothing to do with constitutional morality.

What is constitutional morality?²⁴

In the words of Dr. Ambedkar who envisaged a living Constitution, was of the opinion that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said:

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.”²⁵

²¹ <http://nhm.gov.in/nrhmcomponnets/reproductive-child-health/adolescent-health.html>.

²² <https://www.indiatoday.in/education-today/featurephilia/story/sex-education-importance-978571-2017-05-23>.

Also see <http://medind.nic.in/jah/t11/i2/jaht11i2p23.pdf>.

²³ https://www.jstor.org/stable/1051072?seq=1#page_scan_tab_contents;
<https://academic.oup.com/ajj/article-abstract/45/1/17/218013?redirectedFrom=PDF>

²⁴ <https://www.telegraphindia.com/opinion/a-debate-on-constitutional-morality-would-help-the-nation/cid/1677336>.

Also see <https://www.thecitizen.in/index.php/en/NewsDetail/index/4/15831/2018-The-Year-of-Constitutional-Morality> and
<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198080961.001.0001/acprof-9780198080961-chapter-4>.

²⁵ *Constituent Assembly Debates*, 1948, Vol. VII, 38.

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In the words of Supreme Court;

“The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner...Commitment to the Constitution is a facet of constitutional morality.”²⁶

“After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will supersede any culture or tradition.”²⁷

Simply put the basic distinction between constitutional and public morality is that former is in consonance with the values of the Constitution, and the latter is not.²⁸

Moral policing is not permissible because of the notion of constitutional morality. Further, since Constitution is the grundnorm, also to say that Indian is governed by Constitutional law as the supreme law and rule of law is recognised, it is the principle of constitutional morality which is acceptable and not treacherously twisted public morality.

It appears that and as is evident from the introduction the Court is engaged in evolving a new dimension of Right to Life by way of Right to Love.²⁹ To quote A.P. Shah J. *“What makes life meaningful is love. The right that makes us human is the right to love.”³⁰*

²⁶ *Manoj Narula v. Union of India*, (2014) 9 SCC 1, Para 75.

²⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, Para 606.

²⁸ <http://www.commonlii.org/in/journals/NUJSLawRw/2009/25.pdf>

²⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³⁰ Section 377 IPC: From Hostility and Hatred to Courage and Freedom, (2016) 2 SCC J-1 at page J-13.

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