Criminalising welfare issues

Before the legislature adopts coercive legal measures, a welfare response should be considered

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The Supreme Court recently issued notice on a writ petition on the condition that the petition's prayer seeking a direction to "restrain beggars and vagabonds/homeless from begging on traffic junctions, markets and public places to avoid the spread of COVID-19 pandemic in all the States and Union Territories across India" be modified to focus on the rehabilitation of those forced to beg for a living. In doing this, the court rightly observed that being compelled to beg was a socio-economic issue that could not be remedied by directions of the kind originally sought. It required, instead, a welfare response from the state. This order points to the largely ignored nexus between coercive measures and welfare issues, which can be a useful guide to making and implementing criminal law in three ways.

What should be criminalised?

First, when decisions about criminalisation are being taken by the legislature, an important point of consideration should be whether the issue sought to be addressed might be better suited to a welfare response. Salient examples of welfare issues against which the coercive force of criminal law has inappropriately been deployed serve to illustrate the point. In holding the criminalisation of beggary under the Bombay Prevention of Begging Act, 1959 (as extended to the NCT of Delhi) unconstitutional, the High Court of Delhi, in *Harsh Mander & Anr. v. Union of India* (2018), had noted that the criminalisation of beggary served only to invisibilise beggars without doing anything to address the structural deprivations that drove people to beg. Similarly, the criminalisation of triple talaq by the Muslim Women (Protection of Rights on Marriage) Act, 2019, purportedly to 'protect' Muslim women, does nothing to address the structural gender inequality, social stigma, poor employment options, and lack of state support which actually cause the deprivations associated with divorce (and not just with triple talaq).

Second, socio-economic marginalisation and poverty may frequently make people susceptible to exploitation, whether through poorly paid/unpaid labour, trafficking and sex work, or indeed, begging. A criminal response to those who seek to take advantage of such vulnerability (but never the vulnerable themselves) might be appropriate, but it would amount to little more than lip service to the predicament of the exploited without accompanying welfare measures. In other words, it is important to ensure that pimps, brothel owners, and traffickers are held criminally liable for sexually exploiting a person. Equally important is to create alternative, well-paying and dignified employment, to make such employment accessible by imparting requisite education and skills, and to have social security nets to ensure that no person feels that sex work is their 'least worst' option. This is essential not only to prevent exploitative practices, but also to rehabilitate those who have been rescued (and/or those who would like an exit option) from such practices. To 'rescue' a sex worker is meaningless unless they have a legitimate way out of such work, an option that is materially (not morally) better for them.

Focusing on the welfare aspect of exploitative practices also sheds light on structural forms of impoverishment, and on who is most likely to be exploited as a result. It is, thus, largely those marginalised and discriminated against based on gender, caste, class and even age who occupy the ranks of beggars, sex workers, bonded labourers, and child labourers. Such a focus also exposes the culpability of the state and society in creating or enabling the vulnerabilities of those prone to exploitation. This recognition is reflected in the apt remarks of the High Court in *Suhail Rashid Bhat v. State of Jammu & Kashmir and Others* (2019), "Begging is also in fact evidence of the failure of the Government as well as the society at large to protect its citizens from debilitating effects of extreme poverty and to ensure to them basics of food, clothing, shelter, health, education, essential concomitants of the right to life ensured under Article 21 of the Constitution of India."

Criminal law for whom?

Finally, when evaluating the function or necessity of a criminalisation response to something that is essentially or even partly a welfare issue, it is crucial to question whose interests the law does, in fact, serve. Does it help the vulnerable and/or the exploited, or is it a tool of persecution? Does it cater to the morality and sensibilities of the powerful? Does it hide the failures of the state? Or is it a quick fix that allows the government to abdicate and divert attention away from its welfare responsibilities? Only by following these interests can we, as citizens, hope to hold the state accountable in its use of the power to criminalise conduct.

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