

“DECRIMINALIZATION OF ADULTERY: A SOCIO-LEGAL SCRUTINY”

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“When adultery walks in everything worth having walks out”

- Woodrow Kroll

Adultery had been brought under punishment nearly 150 years ago under the Penal Code 1860 where women were exempted from any penal liability. Though many provisions of the Code had been amended during the span and demand of time, the provisions of adultery remain unchanged. The relevant legal provisions appear to be unconstitutional but the judicial interpretations are still in favor of them. It is explored that the law of adultery is not only defective but also induces the extra-marital sexual relationships. Apparently the law protects the women but because of its weakness, the law makes the women more vulnerable in society and also deprives them of legal protection.

INTRODUCTION

Section 497 of Indian Penal Code provides punishment for adultery. Adultery is an invasion on the right of the husband over his wife. It is an offence against the sanctity of the matrimonial home and an act, which is committed by a man. It is an anti-social and illegal act. The Apex Court previously viewed that it cannot be said that in defining the offence of adultery so as to restrict the class of offender to men, any constitutional provision is infringed. The earlier stand of higher judiciary was that section 497 of IPC is not violative of Article 21. **Recently, the Supreme Court has declared 150 years old law on adultery as unconstitutional, which treats a husband as the master. The adultery law is arbitrary and it offends the dignity of a woman, it further lays down that when there is consent of the man to develop relationship outside the wedlock then there is no offence. The Court declares that husband is not the master of wife.** Section 497 of IPC is absolutely and manifestly arbitrary and irrational because it confers a license on the husband to deal with the wife, as he likes which is extremely excessive and disproportionate.

Section 497 of the Indian Penal Code, 1860 shows that it punishes the offence of adultery committed with a married woman without the consent or connivance of

her husband. The main feature of this offence is that the male offender alone has been made liable. This offence is committed by a third person against a husband in respect of his wife. If an act of sexual intercourse takes place between a married man and an unmarried woman or with a widow or with a married woman whose husband consents to it, this offence shall not be deemed to have been committed. It is not required for an offence under this section that the offender should know whose wife the woman is, but he must know that she was a married woman. **In Sowmithri Vishnu v. Union of India and another(1985)** it was contended that section 497, IPC is violative of Articles 14 and 15 of the Constitution on the ground that it makes an irrational classification between men and women¹. It confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband committed adultery; it does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.; it does not take in cases where the husband has sexual relation with an unmarried woman with the result that it amounts to having a free license under the law to have extra marital relationship with unmarried woman. However, the Apex Court previously rejected these afore said contentions and held that it cannot be said that in defining the offence of adultery so as to restrict the class of offender to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is seducer and not the woman. In this case, the Apex Court observed that this position might have undergone some change over the years that women may have started seducing men but it is for the legislature to take note of this transformation and amend section 497 appropriately. In the aforesaid case, it was also contended that since section 497 of IPC does not contain provision for hearing wife, therefore, it is violative of Article 21 of the Constitution i.e., freedom of personal liberty.² In connection with this question the Court observed that this section is not violative of Article 21, because although this section does not contain provision for hearing of married women with whom the accused is alleged to have committed adultery but if she makes an application in the trial court that she should be given an opportunity of being heard, she would be given that opportunity. Neither substantive nor adjective criminal law prohibits the court from providing a hearing to a party, which is likely to be adversely affected by the decision of the Court directly or indirectly.

SECTION 497 OF THE IPC CRIMINALISED ADULTERY

¹ www.bartleby.com

² www.civilserviceindia.com

This section provides punishment for adultery. Adultery is an invasion on the right of the husband over his wife. It is an offence against the sanctity of the matrimonial home and an act, which is committed by a man. It is an anti-social and illegal act. The scope of the offence under the section is limited to adultery committed with a married woman, and the male offender alone has been made liable to be punished with imprisonment, which may extend up to five years, or fine or with both. The consent or the willingness of the woman is no excuse to the crime of adultery. Hence, adultery is an offence committed by a man against a husband in respect of his wife. It is not committed by a man who has sexual intercourse with an unmarried or a prostitute woman, or with a widow, or even with a married woman whose husband consents to it or with his connivance.³ Adultery under 497 of IPC is limited in scope as compared to the misconduct of adultery as understood in divorce proceedings. As stated earlier, the offence is committed only by a man who has sexual intercourse with the wife of another man and without the latter's consent or connivance. The wife is not punishable for being an adulteress, or even as an abettor of the offence, despite being a consenting party to the crime. The victim (woman) must necessarily be a married woman whose husband consents or connives to the sexual intercourse, it will not be an offence of adultery and therefore, Section 497 IPC will not be attracted. It is to be noted that the aggrieved party in the offence of adultery is the husband whose wife has consented to have sexual intercourse with some other person than her own husband. Section 198(1) of the Code of Criminal Procedure, 1908 specifically provides that no person other than the husband of the woman shall be deemed to be aggrieved by an offence of adultery under section 497 or the section 498 of IPC, provided that in the absence of the husband, some person who had care of the woman on behalf of the aggrieved husband, with leave of the court, make a complaint against the accused. However, the consenting woman (wife of the aggrieved husband) cannot be made an accused in the case. It has been expressly provided in section 497 that the woman who is a party to the offence of adultery will not be prosecuted as an abettor or a co-accused because the law considers her as victim and not as an author of the crime.⁴ Though while passing the Indian Penal Code (Amendment) Act 1972, it was proposed that this privilege conferred on woman as regard to an offence of adultery must be abolished keeping in view the transition of Indian society and change in socio-legal as well as ethical norms with the advance of time and progressive approach, but the suggestion did not muster the required support and

³ www.uniassignment.com

⁴ www.megaessays.com/matter

therefore, had to be dropped. imprisonment, which may extend to five years with or without fine. The offence of adultery reflects discrimination.⁵

CONSTITUTIONAL VALIDITY OF SECTION 497

Judiciary's earlier stand in *Yusuf Abdul Aziz v. State of Bombay, (1954)* the Supreme Court observed section 497 of IPC is not ultra vires under Article 14, 15 and 21 of the Constitution on the ground that it is only the man, who is held liable for adultery and not the wife with whom adultery is committed. The wife is saved from the purview. The Court further observed that sex is a reasonable and sound classification accepted by the constitution, which provides that State can make special provisions for women and children vide article 15(3) of the constitution. In *Somnathri Vishnu v. Union of India, (1985)* the court observed that the consent of the women in section 497 is of no relevance.⁶ The provisions of this section do not contravene any fundamental right the classification between man and woman made by law is not bad. It is commonly accepted that it is the man who is the seducer and not the woman. The position might have undergone some change over the years, but it is for the legislature to consider whether section 497 of IPC should be amended appropriately so as to take note of the transformation which society has undergone. The court further observed that the fact a provision for hearing the wife is not contained in section 497 of IPC cannot make that section unconstitutional as violating Article 21 of the Constitution. True, section 497 of IPC does not contain a specific provision for hearing the married woman, but that does not justify the proposition that she is not entitled to be heard at the trial, if she makes an application to the court to that effect.

The patriarchal mindset of our society states that a woman has no entity and she is a non-person. An analysis of Section 497 of IPC along with the various observations by the Supreme Court of India and High Courts, bring us to the conclusion that only a man can commit adultery. The married woman who is involved in the conduct is not punishable as the adultery. The married woman who is involved in the conduct is not punishable as the adulterer, because she is treated as a "victim", not as "the author of the crime", because she has no entity and she is a non-person. The section negates the free will of the woman in adulterous conduct and does not concern itself with the intentions behind her act. Further, women whose lives are affected by the crime of adultery the aggrieved wives if the

⁵ www.indiatoday.com/1

⁶ www.lawteacher.net/adultery102

adulterer is married are not deemed to be necessary and interested parties in the trial or in its criminal consequences. *This is because the woman is looked upon as an object, an inanimate property, whose rights are almost transferable.* Property on its own has no legal existence. Moreover, if a married man has sexual intercourse with an unmarried woman it is no adultery because an unmarried woman does not belong to anybody as property and is not owned by anybody, not even her parents or brother because they hold her in trust and have no ownership rights to prosecute the person.

The law regarding adultery as prescribed under section 497 is blatantly biased against the woman. The makers of the law seemed to have thought that the sanctity of matrimonial home would be violated if either of the parties resorts to adultery. The law is thus blatantly biased against the woman. *It has put the man in a privileged position by treating the relationship between husband and wife as one of the owner and owned. The section is only meant to punish the adulterer because he has laid his hands on another man's property i.e., wife and tried to steal the same. The law continues to treat woman as a nonperson and an object, giving her the status of property. The idea of equal status, identity and liberty should be fundamental to any democratic civilization. A law, which forces the woman to live under a code imposed by man, totally negating the feminine viewpoint, is alien to truly humanistic values.*⁷

THE SUPREME COURT STRUCK DOWN SECTION 497 OF THE INDIAN PENAL CODE AND DECRIMINALIZED ADULTERY IN INDIA.

Five-judge bench of the Supreme Court struck down Section 497 of the Indian Penal Code in *Joseph Shine v. Union of India* (2017) and decriminalized adultery in India, however adultery remains a civil offence. Adultery can be a ground for divorce. The judgment directly blows the archaic and patriarchal law in our country. This judgement is also important because of its consequences for the future. A husband is not the master and equality is the governing parameter Supreme Court in *Joseph Shine v. Union of India* (2017) has clearly laid down that the beauty of the Indian Constitution is that it includes “I”, “you” and “we”. The Court further asserted that “Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness, which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the space in an annexed to the main building. That is the manifestation of concerned sensitivity.

⁷ www.outlookindia.com/?1

Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. ⁸Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. In addition, it is time to say that a husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written.”

The binding nature of precedent should not be allowed to retain its status or allowed to be diluted. In *Joseph Shine v. Union of India*, (2017), the Supreme Court asserted that the binding nature of precedent should not be allowed in order to retain the status of precedent or allowed to be diluted. The Court observed that “When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognizes a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendently grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach.” There is need to adopt progressive Jurisprudential Parameter’s for determining the women’s rights in Para 3 of the *Joseph Shine v. Union of India*, the Supreme Court clearly lays down that, women cannot be considered as a property of men in the modern progressive jurisprudential parameters and expansive constitutional vision. In the relationship between a husband and wife, it is improbable to allow a criminal offence to enter and make a third party culpable. Section 497 of Indian Penal Code is a reflection

⁸ www.rgcis.org/uploads1

of the Social/Patriarchal Dominance. The provisions as contained under section 497 of IPC indicate that women are treated as subordinate to men. It further lays down that when there is consent of the man to develop relationship outside the wedlock then there is no offence. The provision of Section 497 of IPC does not enable the wife to file any criminal prosecution against the husband. However, wife can take civil action where adultery is considered as the important ground of divorce while husband also have such a right. This provision on one hand protects the women on the other hand; this provision does not protect the other women. This seems to be that this provision is illogical and it cannot be justified Article 14 of the Constitution. This Section 497 of IPC is unconstitutional and arbitrary under Article 14 of the Constitution.

Section 497 of Indian Penal Code violates Article 21 of the Constitution. The Supreme Court in Para 37 of *Joseph Shine v. Union of India*, clearly lays down that autonomy, desire, choice and identity are the important aspects of the dignity of a woman. In this regard, the Apex Court refers the recent judgement *K.S. Puttaswamy and another v. Union of India* and others (2017) in which court declares that right to privacy is a fundamental right as prescribed under Article 21 of the Constitution. The above-mentioned judgement gives much importance to the dignity of an individual. The Apex court determines the aspect of dignity of an individual in the following words: “The cardinal value of fraternity which assures the dignity of the individual. The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. In addition, this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information, which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted. Therefore, the Apex Court after analyzing the whole concept of right to privacy and equality of women declares that section 497 of Indian Penal Code violates Article 21 of the Constitution. In Para 41 of the *Joseph Shine v. Union of India*, (2017) the Court has recognized the conceptual equality and dignity of woman which cannot be curtailed. However, Section 497 of IPC curtails the dignity and equality of women because it is based on gender stereotypes and these types of stereotypes put a serious blow on the individual’s dignity of

women. Section 497 of IPC lays emphasis on the element of consent of the husband, and this element is equal to subordination of women and violates Article 21 of the Constitution.⁹ Patriarchal monarchy over women is unacceptable. The broad objective of the exercise should be to restore the honor and dignity of both sexes by bringing them on an equal pedestal under the law for delivery of rightful and impartial justice because what is at stake is the jurisprudence. Curtailing sexual autonomy of a woman is antithetical to the Constitution. The Court asserted that woman could not be asked to think how a man or society desires. Adultery can be a ground for any kind of civil wrong including dissolution of marriage. Burke would like to put it in two compartments, namely, “equity and utility”. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life.” The above-mentioned observation of the Court clearly declares that adultery can be a ground for divorce, but not a criminal offence. The Court asserted in Para 49 of Joseph Shine’s Judgement that there are so many situations and the Court do not intend to get into the same because “It is different from an offence committed under Section 498-A or any violation of the Protection of Women from Domestic Violence Act, 2005 or, for that matter, the protection conceived of under Section 125 of the Code of Criminal Procedure or Sections 306 or 304B or 494 IPC. These offences are meant to sub-serve various other purposes relating to a matrimonial relationship and extinction of life of a married woman during subsistence of marriage. Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. Under the existing provision, the husband is treated as an aggrieved person and the wife is ignored as a victim. Presently, the provision is reflective of a tripartite labyrinth. A situation may be conceived of where equality of status and the right to file a case may be conferred on the wife. In either situation, the whole scenario is extremely private. It stands in contradistinction to the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a complaint for second marriage. Adultery stands on a different footing from the aforesaid offences. We are absolutely conscious that the Parliament has the law making power. We make it very clear that we are not making law or legislating but only stating that a particular act, i.e., adultery does not fit into the concept of a crime. We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to be left as a ground for divorce. For any other purpose as the Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband

⁹ www.bartley.com/?ii

and wife, as the case may be, and the privacy attached to a relationship between the two. Let it be clearly stated, by no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship. In case of the said offences, there is no third party involved. It is the husband and his relatives. There has been correct imposition by law not to demand dowry or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so. In the above-mentioned Para, the Supreme Court clearly declares that law-making powers are always vested to the Parliament and the Court is aware about this. The Court further declares that Court are not making law but only analyze and clarifies a particular act such as adultery which does not fit into the concept of a crime. If Adultery is treated as a 'crime' then this will be considered as the interference in the extreme privacy of the matrimonial sphere. Therefore, Adultery is not a crime however, it is better to be left as a ground for divorce. Adultery is a discriminatory command. The Supreme Court in Para 53 of *Joseph Shine v. Union of India*, (2017) asserted that "in case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite." In case of adultery, criminal law expects people to be loyal which is a command however this command gets into the realm of privacy. Adultery might not be the cause of an unhappy marriage however; it could be the result of an unhappy marriage. The Court asserted that the question arises here is that whether the adulterous action should be made a criminal offence especially when on certain occasions adultery can be the cause and in certain situations adultery can be the result. The Court gives answer to this question in the following words

"If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness. The Supreme Court also clarifies in Para 56 of *Joseph Shines Judgement* that the offence of Adultery as prescribed under Section 497 of IPC should not be treated as an offence because it is unconstitutional. Therefore, the procedure for filing a complaint regarding the

offence of adultery as prescribed under section 198 of CrPC is also unconstitutional. Because when the substantive provision goes, the procedural provision has to pave the same path of Transformative Constitutionalism. The Apex Court in Para 55 of Joseph Shine's Judgement declares that India has adopted largely the jurisprudence of England. However, Jurisprudence in England has never considered adultery as a crime. Most of the countries at international level also abolished adultery as a crime. Adultery considered as a crime would be a retrograde step. This is an era of transformative Constitutionalism. Any provision which treats a woman with inequality is not constitutional. Therefore, to treat adultery as a crime would be unwarranted in law.¹⁰

CONCLUSION

The Supreme Court has declared 150 years old law on adultery as unconstitutional, which treats a husband as the master. The then Chief Justice of India declares, "The adultery law is arbitrary and it offends the dignity of a woman," In this recent landmark judgement, the Apex Court directly blows the archaic and patriarchal law in our country. Supreme Court in Joseph Shine v. Union of India (2017) has clearly laid down that the beauty of the Indian Constitution is that it includes, "I", "you" and "we". Court asserted that the binding nature of precedent should not be allowed in order to retain the status of precedent or allowed to be diluted. The women cannot be considered as a property of men in the modern progressive jurisprudential parameters and expansive constitutional vision. The provisions as contained under section 497 of IPC indicate that women are treated as subordinate to men. It further lays down that when there is consent of the man to develop relationship outside the wedlock then there is no offence. The Court declares that husband is not the master of wife. Section 497 of IPC is absolutely and manifestly arbitrary and irrational because it confers a license on the husband to deal with the wife, as he likes which is extremely excessive and disproportionate. The Apex court declares that autonomy, desire, choice and identity are the important aspects of the dignity of a woman. In this regard, the Apex Court refers the recent judgement *K.S. Puttaswamy and another v. Union of India and others* (2017) in which court declares that right to privacy is a fundamental right as prescribed under Article 21 of the Constitution. The Court has recognized the conceptual equality and dignity of woman, which cannot be curtailed. However, Section 497 of IPC curtails the dignity and equality of women because it is based on gender stereotypes and these types of stereotypes put a serious blow on the individual's dignity of women. the

¹⁰ www.civilservices.com?>1<

Apex Court declares that there cannot be a patriarchal monarchy over the daughter as well as husband's monarchy over the wife. Male dominance is unacceptable in today's scenario. Moreover, the Supreme Court in asserted that adultery can be ground for civil issues such as dissolution of marriage however, it cannot be a criminal offence. In case of adultery, criminal law expects people to be loyal which is a command however this command gets into the realm of privacy. Adultery might not be the cause of an unhappy marriage however; it could be the result of an unhappy marriage. Along with Section 497 of IPC, section 198 of CrPC is also declared unconstitutional thereby decriminalizing the offence of adultery. Justice D.Y. Chandrachud asserted that "the history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency." However, the judgement has a variety of impacts on the institution of marriage in India from which some are positive and some are negative which cannot be ignored. Decriminalization of adultery would badly endanger the institution of marriage in India. Decriminalization will give license to the married parties to set up an extra marital affair. The divorce cases would increase with such extramarital affairs, which would badly affect the future of their children and institution of marriage.

"Infants have their infancy, adults, adultery."