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DECRIMINALIZATION OF ADULTERY: RIGHT OR WRONG? WITH SPECIAL EMPHASIS ON THE JOSEPH SHINE V/S UNION OF INDIA CASE

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ABSTRACT

The provision of Adultery has a place in the Indian Penal Code and Code of Civil Procedure in sections 497 and 198 respectively. Adultery is an attack or invasion of the institution of marriage, a peccadillo against the purity of a relationship. It is a very illegitimate and self-centred act. In this paper, I have tried to give the best plausible explanation to the question that whether section 497 of I.P.C (read with section 198 of Cr. P.C) be decriminalised or not. The prime focus of this paper is the case of Joseph shine v. Union of India and last I have given two opinions on this topic from two different perspectives.

Keywords: Adultery, Indian Penal Code, Cr. P.C

I. Introduction

This case talks about the topic of adultery and tries to give a concrete answer to the question that whether it should be considered an offence or should be decriminalized. In India, Adultery is based on the belief and idea of female chauvinism and patriarchy and makes a man guilty and liable if he comes into a sexual relationship with the wife of another man. Here in all circumstances, only these two men will suffer (the husband of the woman and the man with whom she has a sexual relationship) and women will only consider a victim. The question arises that why women always escape from punishment when the act was committed both by men and women. Another problem with this is that it portrays women as an object. In this

case, Supreme Court struck down the 158-year former law by decriminalizing section 497 of IPC.

II. Factual Matrix

A hotelier, named Joseph shine filed the writ petition under article 32²⁴ of the Indian constitution challenging the constitutional validity of section 497 of i.p.c²⁵ which declares adultery as an offence. In his PIL, he stated that this section of i.p.c violates the fundamental rights mentioned in articles 14, 15 and 21 of the Indian constitution. The main reason behind filing PIL was that Indian men should be protected from punishment under section 497 for coming into a sexual relationship with a vengeful husband or wife. He filed the petition after his friend committed suicide because he was accused of rape by his co-worker with whom he had an extramarital affair. This section of i.p.c is a ghastly occurrence of sexual inequality, male patriarchy and authoritative imperialism. Section 497 of i.p.c was drafted in a conventional framework, which is not pertinent in the current Indian society.

III. Arguments

A. Petitioner – Joseph Shine

- The petitioner's counsel pleaded that section 497 of i.p.c declares adultery as an offence on the basis of sex which has no logical relation to an objective that it aims to achieve.
- Petitioner also argued that this provision of i.p.c portrays women as a possession of men/husband because if a wife enters into a sexual relationship with

²⁴ INDIA CONST. art. 32.

²⁵ Indian Penal Code, § 497, NO. 45, 1860 (India).

other men after taking the consent of the husband then it would not be considered as an offence.

- This section also violates article 15 of the Indian constitution as it punishes a man only which is a discriminative approach on the basis of gender.
- Another argument from the petitioner's counsel is that this provision should be declared unconstitutional because it subverts the dignity of a wife/woman by disregarding her self-determination and sexual autonomy.

Therefore, section 497 of IPC should be struck down (read with section 198 of Cr. P.C²⁶)

B. Respondent – Union of India

- Respondents argued that the offence of adultery breaks the institution of marriage and blemishes the relationship between a husband and a wife. Therefore, the institution of marriage needs to be protected.
- Counsel from the respondent side stated that the discrimination on the basis of gender in this section is protected by article 15 (3) of the Indian constitution which says that the state can make special provisions for women and children²⁷.

Hence, they appeal to the court to delete only that portion which is unconstitutional and not the entire section.

C. Issues Raised

- 1) Is section 497 of IPC discriminatory and arbitrary under article 14 of the Indian constitution?
- 2) Whether this provision portrays women as the property of the husband or men and violates article 15 of the constitution due to its discriminative approach on the basis of gender?

- 3) Is this provision subverts the dignity of a woman by disregarding her self-determination and sexual autonomy?
- 4) Whether outlawing the provision of adultery is considered as interference by law in the personal domain of an individual?

IV. Precedents

A. Yusuf Abdul Aziz v/s State of Bombay²⁸

The constitutional validity of section 497 of i.p.c was challenged on the basis that no criminal liability of the wife arises under this provision, which is violative of articles 15 and 14 of the Indian constitution.

The bench of 3 judges held that this provision comes under the protection of article 15 (3) and as far as article 14 is concerned, the court said that it has to be read with other articles²⁹ and the discrimination or classification based on sex is justified, hence this provision is valid.

B. Sowmithri Vishnu v/s Union of India³⁰

Under article 32 of the Indian constitution, a writ petition was filed to challenge the provision of adultery. It was challenged on the basis that this section of i.p.c was unjust and discriminatory.

The court held that only the legislature can increase or decrease the scope of this provision if needed and upheld its validity.

C. V. Revathi v/s Union of India³¹

The court, in this case, held that section 497 of i.p.c (read with section 198 of cr. p.c) is constitutionally valid and this provision is not discriminatory as it prevents both husband and wife from getting punished and puts criminal liability only on the third person who comes in between them and tries to

²⁶ The Code of Criminal Procedure, 1973, § 198, No. 2, Acts of Parliament, 1974 (India).

²⁷ INDIA CONST. art. 15, cl. 3.

²⁸ Yusuf Abdul Aziz v. State of Bombay, 1954 AIR 321.

²⁹ BLOG.IPLEADERS, <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/> (last visited Mar. 19, 2023).

³⁰ Sowmithri Vishnu v. Union of India, 1958 AIR 1618.

³¹ V. Revathi v. Union of India, 1988 AIR 835.

sabotage or ruin their purity of a relationship.

D. W. Kalyani v/s State Through Inspector of Police and another³²

Although the constitutional validity of the provision of adultery didn't challenge in this case, the court held that the fact that the appellant is a woman makes her free and immune from the charge of section 497 of i.p.c.

V. Judgement of the Court

- Regarding the first issue, the court observed that this provision is discriminatory and arbitrary in a manner that only the husband of the woman is considered aggrieved and not the woman or wife of the adulterer. Hence, this provision violates the principle of equality mentioned under article 14.
- Further, the court stated that this section of i.p.c portrays women as the property of men/husbands because it says that with connivance or consent of the husband, it would be not considered an offence.
- The wife would not be treated as a wrongdoer under this provision of i.p.c but they were also not having the right to file any complaint against their husband.

In the end, by citing the judgements of cases like E.P. Royappa v/s State of Tamil Nadu³³ and Shayara Bano v/s Union of India³⁴ the court held that this section of i.p.c is discriminatory and arbitrary and violates article 14 of the Indian constitution.

- The second issue was that section 497 of i.p.c discriminates against a married woman and a married man on the ground of sex.
- This provision is formed on a stereotype that the control of women's sexuality lies in the hands of the husband and views women as the property of their husbands.

- Saved by article 15(3), this provision protects women from not getting punished as an abettor. The purpose of inserting clause 3 in article 15 of the Indian constitution was to save women from the notion of patriarchy and ensures equality between men and women. Hence, it is considered protective discrimination. But this provision of i.p.c is rooted in the notions of paternalism and patriarchy, and can't be considered as protective discrimination.

Thus, by citing the judgements like Independent Thought v/s Union of India³⁵ and Government of Andhra Pradesh v/s P.B. Vijayakumar³⁶ the court said that section 497 of i.p.c is discriminatory and violates article 15(1) due to its discriminative approach on the basis of gender.

Sexual Privacy and the dignity of a person are guarded and protected by article 21 of the Indian constitution. And like men, women also have the right to live with dignity and privacy. By citing judgements of K.S. Puttaswamy v/s Union of India³⁷ and Common cause v/s Union of India³⁸, the court held that:

- This section of i.p.c makes women a puppet of men as it states that if a woman is coming into a sexual relationship with the connivance or consent of the husband then it would not be considered an offence of adultery, taking away her sexual autonomy.
- The dignity and sexual autonomy of a woman are as equal as that of a man, and also in State of Madhya Pradesh v/s Madan Lal³⁹ the court said that a woman's dignity is a vital piece of her immortal self and non-perishable character.

³² W. Kalyani v. State through Inspector of Police and another, 2012 1 SCC 72.

³³ E.P. Royappa v. State of Tamil Nadu, 1974 AIR 555.

³⁴ Shayara Bano v. Union of India, 2017 9 SCC 1.

³⁵ Independent Thought v. Union of India, AIR 2017 SC 4904.

³⁶ Government of Andhra Pradesh v. P.B. Vijayakumar, 1995 AIR 1648.

³⁷ K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

³⁸ Common Cause v. Union of India, AIR 2018 SC 1665.

³⁹ State of Madhya Pradesh v. Madan Lal, 2015 7 SCC 621.

Court noted that connivance or consent, mentioned in section 497 of i.p.c, commensurated to women's subordination.

- As far as issue 4 is concerned, any act mentioned in i.p.c as an offence can affect the whole society.
- Although this section aims to safeguard the sanctity and purity of marriage, we can't deny the fact that adultery can be committed due to pre-existing disturbances in marriage. And a third person is punished for the offence of adultery which, in the opinion of the court, is not required.
- The court observed that it is a private matter and left the provision of adultery only for divorce and decriminalizes it.

Hence, section 497 of i.p.c was struck down by the Supreme Court which held that civil wrongs can be considered valid grounds (including divorce).

A. Ratio Decidendi

The court observed that section 497 of i.p.c safeguards the interest of a woman and protects her from getting punishment as a wrongdoer. And this provision is protected in article 15(3) of the Indian constitution which saves women from the notion of paternalism and patriarchy but this provision of i.p.c is rooted in the notions of paternalism and patriarchy, and can't be considered as protective discrimination.

Sexual Privacy and the dignity of a person are guarded and protected by article 21 of the Indian constitution. This section of i.p.c makes women a puppet of men as it states that if a woman is coming into a sexual relationship with the connivance or consent of the husband then it would not be considered an offence of adultery, taking away her sexual autonomy. Back then when the Indian Penal code was made/drafted thinking and mentality of the people about women were not as progressive as it is now. But in today's time thinking regarding

women has changed and these kinds of laws couldn't persist in Indian society.

B. Obiter Dicta

This section of i.p.c is rested on the notion that the wife is the property of the husband and if she has a sexual relationship with other men then it is considered a theft of the husband's property. She can have an extramarital affair after the connivance or consent of the husband (as stated in the provision of adultery).

VI. Opinions of the Author: Conclusion

At last, I have two dissenting opinions in my mind which I would like to discuss with you

Opinion 1 - In western countries, Infidelity or Adultery is more common in society as compared to India. And as we are moving towards the western culture or civilization, cases regarding adultery also increasing. The decision of the court regarding this matter should be criticized as this decision opens the door to committing this offence without any worry or fear. In today's time, there has been an increase in cases of infidelity or adultery. More than 50% of Indian women and men are having extramarital affairs and around 61% of men and 76% of women don't even consider it as a wrongful act or immoral or corrupt, according to surveys conducted by India Today, Outlook and Madison⁴⁰ respectively. If this goes on then the institution of marriage may get weak and the sanctity and purity of marriage will ruin. In my opinion, there is no need of decriminalizing the provision of adultery. Instead of decriminalizing it, we can make some amendments to the existing law like; we can grant punishment to both men and women who commit the crime of adultery. This would be equality in the real sense. Marriage in every religion is a significant part of human life and it must be safeguarded and protected.

Opinion 2 - In the modern 21st century where the ideology of liberalism and the concept of

⁴⁰ SHONEE KAPOOR, <https://www.shoneekapoor.com/adultery-in-india/> (last visited on Mar. 22, 2023).

equality are prevailing in society, there are laws, which are discriminatory in nature, that still exist in our society. With the passage of time, many laws in India have become superfluous, including adultery. Adultery is discriminatory in nature and it also degrades women's dignity. This provision was inserted in the i.p.c back then because, at that time, the notion of paternalism and patriarchy was prevailing in Indian society, and due to this women doesn't have any opportunities or rights equal to men.

But in recent times, women are equal to men so the decriminalization of adultery is the right decision taken by the court. The court shouldn't interfere with the private matter of two adults. Every individual has their own sexual autonomy and constraining or hampering with it would be considered a violation of the principles of the constitution. This should have been decriminalized long ago by the legislature but now it has been done by our judiciary. Many countries all around the world have decriminalized the provision of adultery due to its private nature, as I have already told you above. One thing we have to keep in our mind is that adultery is committed because of an unhappy marriage. So if two individuals are not happy together then they should part ways, and for this, there should not be any punishment. They should be left in their personal sphere, providing them with the autonomy to move on with civil wrongs, if they want.

Another significant factor which we have to keep in our mind while discussing the topic of adultery is that it is not accepted/adopted in Indian society till today. Society views everything from a moral perspective and according to it, adultery is a morally corrupt practice and must be ended. Nevertheless, we should follow the morals and values as proposed or embedded in our Indian constitution. The basic feature of the constitution is Rule of law and as a citizen of India, we should accommodate ourselves to the changes done by the Supreme Court or the Apex Court in the existing laws.

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