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Decriminalization of Section 497 of the Indian Penal Code, 1860

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ABSTRACT

The word "Adultery" comes from the Latin word "Adulterium", which alludes to committing sexual acts with individuals besides their partners. In India, identity has been defined under Sec. 497 of the Indian penal code, 1860. The Indian Constitution protect's the guaranteed fundamental rights as reflected in it. In a country like India, where the socio-legal standing of women has undergone a new paradigm, the legislature and judiciary shall change the laws to provide women the same status as men in society. Adultery was a pre-colonial crime that enforced under the IPC, 1860, and it persisted in the nation until it was decriminalized by the Supreme court in Joseph Sine v. Union of India². India is a diverse nation home to several distinct faiths, castes, civilizations, dialects, conventions, and customs, among other things - marriage is a sanctity of the society. The current study will focus on the case law Joseph Sine v. Union of India and will also cover the aspects related in the judgments.

KEYWORD: *Adultery, IPC, marriage, decriminalization, fundamental rights*

INTRODUCTION

Sec. 497 of the Indian Penal Code, 1860 defines adultery as "*Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery,*". Adultery is a criminal offence and

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² *Joseph Shine v. Union of India* 2018 SC 1676.

committing such offence shall be imprisonment up to 5 years or fine or both.

Ingredients of Sec. 497

1. There must be a married woman.
2. A person committing the crime must have a sexual relation with that married woman.
3. Before having sexual relations with that woman, the man should know the fact, that she is the lawfully married or wife of another person.
4. Without the consent of her husband.
5. Adultery is not justified by a woman's consent.

Under this Sec. an exclusive right is given to the husband to file a case of adultery against a person who had sexual relation with his wife and not against the wife. In Hindu marriage act 1955 the large created a restriction of marriage to one wife only. Adultery is not prosecutable. In Muslim and Hindu law, adultery is grounds for divorce and judicial separation.

“In such case the wife shall not be punishable as an abettor”

Only the man who engaged in sexual activity with another man's wife are guilty of the crime. Women cannot be punished as an abettor. Instead, man is considered to be a seducer. The only person who could report infidelity was the husband. The wife of an adulterer has no such privilege.

EARLIER JUDGEMENTS ON ADULTERY

In the case of *Yusuf Abdul Aziz v. State of Bombay*³, due to its alleged violations of Articles 14 and 15, Sec. 497's constitutionality has been contested. The 3-judge bench upheld the validity of Sec. 497. It is a special provision implemented for women under Article 15(3).

In the case of *Sowmithri Vishnu v. Union of India & Anr.*⁴, whether Sec. 497 of the IPC was constitutional was challenged. The provision stands partisan as it forbids a woman from asserting her rights against a woman whose husband has had an affair. The three-judge bench, in this case, upheld the constitutionality by making the justification that it should be the legislature, not the courts, and affirmed the legality by broadening the concept of the offense. The punishment is reasonable since the crime of sabotaging a family. According to the court, only men may perpetrate such offences.

In the case of *V. Revathi v. Union of India*⁵, the court maintained the constitutionality of Sec. 497 in this case, which prohibits both husband and wife from penalizing for adultery and hence is not prejudiced. It only penalizes an individual who attempts to undermine the sacredness of marriage. Reverse discrimination is therefore taking place, favoring her rather than being "against" her.

In both cases, it has been challenged to the discriminatory and violative type of Art. 14 and 15 (i) of the Indian constitution. As per the SC, Sec. 497 has been drafted to safeguard the interest and privacy of the adulteress. Further, the SC said it is for the Parliament of India to amend the Sec.; otherwise, it is valid. As the held the provision for the beneficial

³ 1951(53) Bom LR 736.

⁴ *Sowmithri Vishnu v. Union of India & Anr* 1985 AIR 1618.

⁵ *V. Revathi v. Union of India* 1988 AIR 835.

interest of women. It only punishes an outsider, who invades the matrimonial sanctity.

In the case of *Joseph Shine v. Union of India*⁶, Joseph Shine filed a writ petition under Art. 32 contesting the constitutionality of Sec. 497 of the IPC r/w Sec. 198 of the Cr. P.C. since it violates Art. 14, 15, and 21. According to the petitioner, the adultery provision was arbitrary and based on gender. As per the petitioner, this provision infringes on a woman's dignity. To hear the petition, a constitutional bench was formed.

The issues regarding this section-

1. Sec. 497 is arbitrary and violative of right to equality as it is not gender-neutral and reflects the social dominance of men.
2. It deprives it is violative of the fundamental right to privacy under Art. 21 of the Constitution.
3. Sec. 497 violates Equality under Art. 14 given in the constitution.
4. Places husband and wife at the unequal pedestal in marriage.

Respondent's Arguments

The respondents contended that the CRPC must remain adultery as a crime because it has the impact of destroying the family, which is a basic social institution. The husband, child, and society are all impacted by adultery. The respondent argued that Art. 15 Clause 3 prevents all discrimination in favor of women. Art. 15(3), which gives states the authority to enact specific legislation for women and children, prevents the provision's discrimination. This provision exempted them from punishment.

⁶ *Joseph Shine v. Union of India* 2018 SC 1676.

Judgment

The Doctrine of Coverture, which contends that a woman loses her identity and legal rights upon marriage, is the foundation of Sec. 497, which violates a woman's basic rights. It undermines the idea that women are unequal in marriages and cannot freely consent to a sexual act, which rejects substantive equality. Sec. 497 is a denial of substantive equality. Thus, it violates Art. 14 of the Constitution. It violates the fundamental constitutional rights to sexual autonomy, independence, and privacy that are enshrined in Art. 21 of the Constitution. Protection or discrimination under Art. 15 clause 3 is not valid.

Sec. 497 of IPC considers women as subordinate to their husbands. Holding this provision i.e. Sec. 497 as unconstitutional the former Chief Justice Deepak Misra said, that “*a husband cannot be master of his wife*”.

Justice D.Y. Chandrachud said: “*Sec. 497 destroys and deprives a woman of her autonomy, dignity and her identity. A woman loses her voice, autonomy after entering marriage and manifest arbitrariness is writ large in Sec. 497. The law deprives married woman the agency of consent. Sec. 497 offence sexual freedom of women*”.

In Justice R F Nariman opinion, Sec. 497, which deals with adultery, is an obsolete piece of legislation. Justice R. F. Nariman agrees with Chief Justice of India, Justice Khanwilkar, that Sec. 497 violates women's rights to equality and equal opportunity.

CJI & Justice Khanwilkar : “*We declare Sect 497 IPC and Sec 198 CrPC dealing with prosecution of offences against marriage as unconstitutional*”.

Sec. 198 of CrPC. Prosecution for offences against marriage. The wife is not considered as an 'aggrieved person' under Sec. 198. The provision does not protect the sanctity of marriage. It only protects the proprietary

rights of the husband. Sec. 198(2) of Cr.P.C. shall make the constitution to the provisions of Sec. 497 that pertain to the adultery offence.

CJI: *“Adultery might not be cause of unhappy marriage, it could be result of an unhappy marriage. As Sec. 497 manifestly arbitrary the way it deals with woman. Adultery can be grounds for divorce but not a criminal offence.”*

In 2018, in this case, adultery was held unconstitutional as it is a clear violation of fundamental rights. Later in 2021, *“Decriminalizing Adultery May Cause Instability in Armed Forces As Personnel Stay Away From Family’: Centre Seeks Clarification Of Joseph Shine Judgment.”* Additional Solicitor General Madhavi Divan said: *“Unlike the IPC offence of adultery under Sec. 497, which is based on patriarchal notions, the Armed Forces take action for misconduct even against women officers. The Armed Forces law is completely gender-neutral”*.

CONCLUSION

With Sec. 497, the husband becomes the aggrieved person and the lady the victim. Even if the law changes and gives women the same protection against adultery as men, it is still secluded. Since it is held unconstitutional, adultery can now constitute grounds for divorce. The impact of the judgment has expanded the horizons of individual liberty and gender parity. Indeed, it is ideal to recognize adultery as a reason for divorce. But adultery already jeopardizes marriage, eroding its very foundation. Marriage should be protected as a sanctity in society. Adultery should thus be considered a crime. It can be argued that the law hasn't prevented adultery from society as it is critical to protect the marriage institution. And fear of the law prevents people from engaging in adultery. And we should rely on law. Laws cannot be blamed for failures as to how they were enforced, but rather how they are implemented.

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