

## **8. Decriminalization of Adultery with reference to Joseph Shine Case**

By: Chirag Ahuja

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### **i. Abstract**

Adultery was defined as an offence under the Indian Penal Code, 1860. It punishes the male offenders who have committed sexual intercourse with the wife of another man without the consent of her husband. In this offence only the male person was liable. This act was committed by the third person against a person with respect to his wife. This means that if a married man and an unmarried woman or the widow or the consent of the husband is there, then it would not amount to adultery. It was not required for the adulterer to know she whose wife woman is and she is a married woman it should be known by him.

Supreme court has amended its 158 years old law of Adultery in its recent judgement in case of Joseph Shine vs Union of India. The judgement overruled the earlier judgements which criminalized the offence of adultery. Now it has become legal and not ethical though. Marriage involves with the confidence of two partners with their trust and loyalty to each other. The court stepped back to interfere in the lives and personal matter of each other and considered adultery as a civil wrong and a matter to seek divorce.

The Writ petition was challenged under section 497 of IPC and section 198 (2) of CrPC which is a Public Interest Litigation.

Section 497 becomes the prima facie which discriminates the men and violates Article 14, 15 and 21 of the constitution and thus Article 497 was held unconstitutional. When the sexual intercourse takes place with the consent of both the parties then there was no good in exempting one from the liability and criminalizing the other one. The sexual privacy is part of the right to privacy, thereby section 198 becomes the violation of article 14, 15 and 21. The consensual relationship outside marriage might breakdown the marriage and that would not be protected anyhow under the Article 21. The right to privacy and liberty is not the absolute one and thereby is the subject to reasonable restrictions.

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## 1. Introduction

Before the enactment of the Indian Penal Code, Adultery was not considered as an offence in India both for men and women. Nor it was included in the Penal Code first draft. Though, it was added by the Second Law Commission. It was noted by the Law Commissioners that the prevailing social infrastructure and the dependent economical position of women were not in the favor of punishing the adulterous men. It was noted that the wife was to be considered for accepting her husband's adulterous relationship as his right. She must not feel humiliated and must not be a shocking culture for her.

Law Commissioners added adultery in the Indian Penal Code as an offence which punishes only the male offenders leaving the women who already are considered as the humiliated member living under the unkind conditions within family.

In the recent judgement under the case of Joseph Shine vs Union of India, the Supreme Court struck down the Victorian Morality law on Adultery which was 158 years old. The judgement has overruled all the previously held judgements.

With this judgement, along with the pros come cons. Though Adultery has now become legal but it is not ethical. The custom of marriage depends on the confidence of partners upon each other and now Court has stepped its foot back from interfering in the lives of the people whether personally or morally. Now Adultery is only a civil wrong which has only become the remedy for seeking a divorce.

## 2. Essentials for Offence of Adultery

For the commitment of the offence of Section 497 of IPC, it requires the following essentials:

- **Sexual Intercourse:** There must be a sexual intercourse between a male person with a married woman other than the wife of himself.

- **Married Woman:** The offence of adultery involves a married woman who indulges herself in intercourse with another man. Without marriage living with another man and having children with him would not be an offence of Adultery.
- **Knowledge:** To commit the offence of Adultery, there must be the knowledge for the crime, where the man must know that she is married or has a reason to believe that she is married to another man.

### 3. Case Laws

The question about the validity of the IPC section 497 and Cr.P.C. 198 arose in front of court a multiple time.

In the case of Yusuf Abdul Aziz vs State of Bombay<sup>123</sup>, the appellant was prosecuted for the offence of adultery under section 497 of IPC. When the complaint was filed, the husband of the wife appealed to the High Court of Bombay to conclude the constitutional validity of Article 228. The challenge was addressed in front of Court. It stated the challenge on the prohibition on treating the wife as an abettor as it was considered as the violation of the Article 14<sup>124</sup> of the Constitution of India. There the Court held that it was safeguarded by Article 15 (3)<sup>125</sup> of the Indian Constitution.

In another case of *Sowmithri Vishnu vs Union of India*<sup>126</sup>, 3 challenges were put in front of Court. First, that section 497 gives the husband right to file a complaint on another person with whom his wife is in adultery but does not give the right to the wife to file a complaint on a married woman if her husband is committing the offence of adultery with her. Secondly, the wife does not get the right to file a complaint against her husband for being in adultery with other woman and third that it does not contain offences against the married woman and unmarried woman. Under this, the Chief Justice, Chandrachud said by the definition the crime of the adultery can be committed by the only man and not by the woman and to make it gender-

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<sup>123</sup> 1954 AIR 321

<sup>124</sup> Equality before law and equal protection of law

<sup>125</sup> State has the power to make certain provisions for children and women

<sup>126</sup> 1985 AIR 1618

neutral is the job of Legislative. The judgement says that it is the man who is the seducer and not the woman. The position has undergone through various changes over the years and it is Legislature who considers that the Section 497 should amend or not.

In another case of, V. Revathi vs Union of India<sup>127</sup>, the court noted that the section 497 does not allow the husband of the offending wife to prosecute her and also does not give the right to wife to prosecute him and thereby no spouse has the right to charge against the disloyalty and therefore this section doesn't discriminate on the ground of sex.

#### **4. Joseph Shine Case Analysis**

##### **Facts**

Joseph Shine a citizen of Kerala filed public interest litigation on October 2017 under the Article 32 of the Constitution. The petition challenged the constitution of adultery as an offence under the Section 497 of IPC which is read with section 198 (2) of the CrPC, which discriminates men and violates the Article 14, 15 and 21 of the Constitution of India. The reason behind this writ petition was to protect the Indian men from the offence and punishment of extramarital affairs by the act of the wives of a husband who is in adultery with the other man. The petitioner i.e. Joseph Shine has a close friend who has committed suicide because of the malicious rape charges by a woman.

This case was brought to the Hon'ble Supreme Court of India through a writ petition under Article 32 of the Constitution of India with the PIL which challenges the validity of Section 497 of IPC. It was opposed as it is the violation of the Fundamental Rights under Article 14, 15 and 21.

Section 497 of IPC states: Adultery is an offence, where a person has sexual intercourse by knowing that the woman is the wife of another man and without the men's consent, that intercourse would amount to the offence of Adultery and would not amount to the offence of

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<sup>127</sup> 1988 AIR 835

rape and shall be punished with the imprisonment which can extend to 5 years or with fine or both, where the wife will not be held as an abettor.<sup>128</sup>

Section 198 (2) of CrPC states: No person other than the husband of a woman shall be deemed to be an aggrieved for the offence punishable under Section 497 or 498 of IPC, provided in the absence of him, the person who had the care of the woman on his behalf with the grant of the court can file a complaint on his behalf.<sup>129</sup>

Section 497 of the IPC was challenged, which criminalized the adultery by the imposition of culpability on man who engages sexual intercourse with the wife of another man's wife.

The crime of adultery was punished with a maximum punishment of 5 years imprisonment. The consenting parties and women were exempted from the prosecution. And a married woman could not file a complaint under section 497 when her husband is in a sexual relationship with another woman. This was in the view of the CrPC section 198 (2) which specified for the charges of the complaint under Section 497 and 498.

## **Issues**

Validity of Section 497 arose on the 3 grounds:

1. That it is the violation of the Fundamental rights of Article 14, 15 under the Constitution of India.
2. It violates the right to life and right to privacy under Article 21.
3. Section 198 (2) of CrPC contains prosecution procedure under the 10<sup>th</sup> chapter of IPC which shall be unconstitutional to the extent which applies to the offence under IPC section 497 of IPC.

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<sup>128</sup> Section 497 in The Indian Penal Code

<sup>129</sup> Section 198 in The Code Of Criminal Procedure, 1973

The petition wanted to address certain problems under Section 497:

- To make Adultery law gender-neutral as the law only punished the male offender and no action against woman offenders were taken.
- As per the section, no woman can file a complaint against her husband for being in adultery with another woman as there is no such provision.
- Women were treated as an object under the law of adultery as if the husband agrees it would not amount to an offence under the act of adultery covered under Section 497.

### **Judgement**

Joseph Shine filed a petition in December 2017 challenging the validity of Section 497. The 3 bench judge was headed by the CJI of India, Dipak Mishra and referred the petition from a five-judge Constitution bench, admitting the validity of law to be archaic<sup>130</sup> which comprises of CJI Dipak Mishra and Justices DY Chandrachud, R F Nariman, Indu Malhotra and A M Khanwilkar.

While hearing the previous matters the court always seem to be based on taking decisions with societal presumptions. The court struck down the law through 4 separate and concurrent judgements and declared that the husband can't be master of the wife.

The judgement was held as:

- **Section 497 is constitutionally invalid and archaic.**

IPC Section 497 trespasses the privacy of the women and also deprives their Fundamental Rights including the Right to liberty and life. Article 21 covers sexual autonomy in it as it talks about personal liberty in it. In a commitment to the relationship, there must be companionship

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<sup>130</sup> Antiquated or outdated



for the same element and they must respect each other's decision. Both husband and wife should treat each other with dignity, equality and must respect sexual autonomy of both.

Section 497 deprives the woman Right to Equality as they didn't get the free consent for their sexual act and more likely to be considered as an object for sex for their spouse. It thereby violates Article 14 and 15 of the Indian Constitution. Thus, it is gender stereotype as it provides women to have her husband's consent to indulge in sexual acts which shows that men are superior to women and thus offends Article 21 of Indian Constitution.

- **Section 497 to be no longer a Criminal Offence**

In the judgement, it was stated that a crime is something which is committed as a whole to the society whereas adultery is more likely to be a personal issue. Treating Adultery as a crime would be more likely for a state to violate the private life of individual and thus Adultery doesn't seem to be a crime and more likely to invade privacy sphere of the marriage. But it continues to be a civil wrong and a ground to seek divorce. After Adultery is committed the decision lies upon the husband and wife to decide as it involves something upon their discretion. It has become a challenging situation in front of the court under different scenes which has led the court to come to this stage and thus declaring Adultery as a crime would be an injustice towards the system.

- **A Husband cannot become the master of his wife.**

The judgement states that a woman cannot be considered as a property of their father or husband any more. They must be given equal status in society and they must have got all the rights equal to that of a man.

- **Section 497 is Arbitrary**

Through this judgement, it was stated that the Adultery crime under Section 497 is arbitrary. It doesn't preserve the holiness of marriage as for a husband it can allow his wife to have an affair with someone else. This points out more towards the proprietary rights of a husband over his wife. Moreover, wife doesn't get the right to file a complaint towards her husband or his affair with someone as there is no provision for the same under Section 497.<sup>131</sup>

### **Rationale**

The provision under Section 497 and Section 198 (2) has a lot of loopholes:

- I. Firstly, the case of Adultery can be brought by the only husband of the adulterous wife. And in his absence, it can be brought by a person taking care of his wife at the time of the offence only with the approval of the court.
- II. Women cannot file the complaint as according to the provision, no person other than the husband can be the aggrieved party.
- III. Husband's consent decides whether the offence has occurred or not.
- IV. The wife who is being in Adultery won't be punished in any circumstance even as an abettor.
- V. The only person who will get punishment under this offence will only be the paramour of his wife.

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<sup>131</sup> Available at: <https://www.thenewsminute.com/article/centre-says-women-too-should-be-punished-adultery-should-it-be-crime-85083>

Due to these loopholes, it was held that the law of Adultery is gender-biased and does not cover many circumstances and cases of Adultery. Section 497 stated that the offence of Adultery can only be committed by the wife and not by the husband.

1. This section punishes only the male offenders for the Adultery as an offence.
2. There was no provision of offence where a married man involves in a sexual relationship with an unmarried woman as it only criminalizes the offence with intercourse with the married woman.
3. Whole of the scenario depends upon the consent of the husband as it means that woman can after taking the consent of his husband can have an affair which would no longer be an offence of Adultery.

The argument was based upon the violation of the Fundamental Rights of Article 14 and 15 of the Constitution for the following reasons:

1. It's clear discrimination as only male offenders were punished and women were exempted from being an offender. Though Adultery involves the participation of the woman and man but only men were penalized for the offence and women were given immunity. Thereby, violates the equality provision under the Constitution as it is discrimination for men.
2. The law also discriminates against a woman as men were given sexual autonomy to have extramarital affair only with an unmarried woman. And also, at the same time restricts woman for indulging themselves in any other sexual relations.

The law only penalizes the third person to the marriage, where the person was involved with a married woman. It was considered that the women were treated as a property of the husband and thereby, such person was treated as a trespasser and was punished for the offence.

## 5. Conclusion

The criminal Adultery law in India was covered in Section 497 of IPC. The decision that the Supreme Court takes is the one of its kind is landmark judgement which overruled all the previous judgements. The provision under the IPC before the judgement stated that the husband cannot prosecute his wife for breaking the sacredness of marriage by being in adultery with another man. The law didn't allow the husband to prosecute either husband or the wife for being in adultery. And the law doesn't give the remedy to the woman whose husband is in Adultery with the other woman which is against the violation on gender-based grounds.

India has a rich and diverse culture which is unique on its own. Western culture has great significance in influencing its culture on Indian families. Though the lifestyle is changing, the western culture brought itself with lots of pros and cons. The marriage failing rate has risen.

Dale Carpenter<sup>132</sup> commented it by saying that people live complex life. They fell in love, lie cheat and drink and none of which makes them less entitled as said by Justice Kennedy<sup>133</sup> to respect the private lives of individual.

The law was challenged multiple times but it was unchanged as we can see in the cases of Yusuf Abdul Aziz vs State of Bombay, V. Revathi vs Union of India or Sowmithri Vishnu vs Union of India.

Hence, in Joseph Shine vs Union of India, the Apex Court struck down the offence of Adultery which is about 158 years old and said that it is unconstitutional and held that it violates the Fundamental Rights of Article 14, 15 and 21 under the Indian Constitution. Supreme Court with the reference of Article 21 stated that:

Right to privacy is the absolute right of a person and is deeply connected with the individual's dignity and they must get the right to make their own decision.

The judgement took a great initiative and struck down the 158 years archaic law of Adultery covered under the Section 497 of IPC along with CrPC section 198(2) as both of these sections were gender-biased and were based upon the discriminative classification against the women.

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<sup>132</sup> American Legal commentator and professor of Law

<sup>133</sup> American Jurist who was also an Associate Justice in United States of America's Supreme Court

The provision was discriminative with 2 ways, firstly that women were not given right to prosecute her adulterous husband and secondly it does not punish wife as abettor for being in adultery.

This judgement put an idea of transformative justice. Though the judge has put a significant effort in providing equality and justice but it also increased Adultery as it has become non-punishable and it is no longer an offence now. But the judgement has been criticized as it infringes the remedies which were available to spouses when any partner indulges themselves in adultery.

The judgment does seem to be silent on the effects of the social institution like that in marriage and along with the children born from such a relationship.

Now though Adultery is no longer a Criminal offence and is not punishable but it has become a ground to seek divorce because of lack of commitment between the partners.

India has a rich and diverse culture which is unique on its own. Western culture has great significance in influencing its culture on Indian families. Though the lifestyle is changing, the western culture brought itself with lots of pros and cons. The marriage failing rate has risen.

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