

JOSEPH SHINE V. UOI: A FEMINIST JURISPRUDENTIAL APPROACH

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ABSTRACT

The Supreme Court has struck down 158-year-old legislation based on victorian morality law in its landmark judgment in the present case. Adultery is no longer punishable as a crime under IPC as the said provision was considered to be violating Article 14, 15 and 21 of the Indian constitution. Furthermore, the institution of marriage is sacred and based on the mutual trust between the spouses. The SC, therefore, did not want to interfere in this private sphere of an individual. The rule laid down by this judgment will treat adultery only as a civil wrong and form a ground for divorce. I will critically analyze this judgment from a jurisprudential view of the feminist school basing my contention on the state's commitment not to discriminate on the basis of sex.

ABOUT THE CASE

Facts and Procedural Background

In December 2017, Joseph Shine had filed a petition questioning the validity of Section 497 of the Indian Penal Code. The petition was referred from a three-judge bench headed by Justice Dipak Mishra to a five-judge bench for deciding the validity and constitutionality of the provision.

The question regarding the constitutional validity of Section 497 of IPC and Section 198(2) of CrPC has been advanced before the Supreme Court through numerous cases.

In the case of *Yusuf Abdul Aziz v State of Bombay*ⁱ the appellant was prosecuted for committing adultery. He challenged the law before the High Court to determine its constitutional validity but the case was decided against the appellant.

Justice Chagla observed the assumption that was associated with Section 497. He said that the underlying idea of this law considered the wife as a property of her husband, which is emphasized by the fact that the offense is cognizable on the consent of the husband.ⁱⁱ But this premise does not hold well in the present legal scenario. The question that was raised was why the wife is not punished under this section as it violates Article 14 of the Indian Constitution. The court reasoned that protection has been provided to the wife under Article 15(3) of the Indian Constitution.

On tracing back, the roots and reasoning behind this provision it can be made out that the legislation was made to serve the husband to treat his wife as an object and exercise control over his sexual affairs. It surfaces the gender stereotypes and the subordinate role of women to men in the past.

Section 497 does not provide the right to the husband or the wife to bring an action against their spouse who committed adultery. Nor does it punish married men who have sexual relations with an unmarried woman. This issue arose in *Sowmithri Vishnu v Union of India*ⁱⁱⁱ. At first instance, the provision seems to be for the benefit of women but a deeper interpretation and study of the history will unearth the paternalism behind this legislation where a woman was treated as the slave. Quoting from the judgment, "...It is commonly accepted that it is the

man who is the seducer and not the wife. The position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 should be amended appropriately to make note of the 'transformation' which the society has undergone...^{iv}

This judgment had failed to capture consider the modernization of society where the legislation needs to be redrafted in gender-neutral terms.

Different reasoning was provided in *V Revathi v UOI*, where the court noted that as neither of the spouses can bring an action, therefore this section cannot be considered to be unconstitutional on the grounds of sex.

Issue

1. Whether or not Section 497 of the Indian Penal Code, 1860 is unconstitutional being unjust, illegal, arbitrary and violative of fundamental rights?

2. Whether or not Section 198(2) of the Code of Criminal Procedure, 1973 is unconstitutional being unjust, illegal, arbitrary and violative of fundamental rights?

Judgment

The judgment went onto discuss the origin of adultery as a crime under the common law. The doctrine of coverture treated the husband and her wife as a single legal identity where the women could not take the fundamental decisions of her life without the consent of the husband. This itself diluted the individual existence of a woman and consolidated it with that of her husband.

In the 17th century, some development took place taking into regard the needs of a wife whose husband had deserted her. The concept of Criminal Conversation was considered a tort and a husband could claim damages from the man who has sexual intercourse with his wife.^{vi} However with the passing of Matrimonial Causes Act, 1857 in England, the previous wrong was abolished and husband could claim damages from the adulterer in a petition for divorce. The Matrimonial Causes Act, 1923 made adultery ground for divorce for both parties.

Considering the historical background in India, the Indo- Brahmanic traditions considered the chastity of women to be her prime virtue and test of her purity.^{vii} The first draft of IPC in 1857 did not include adultery as an offense considering it to be a private wrong. However, on a detailed discussion, it was pointed out that the existing remedy under the common law was insufficient. The second draft of IPC took into consideration that the pecuniary compensation to the husband would be less important than the opinion of society. If such action is not included as an offense the husband would punish his wife by torturing her and disrupting public peace. In this backdrop Section 497 was included in IPC, punishing the male offender with imprisonment not exceeding a period of 5 years and imposing a fine payable to the husband.

In pursuit of reforming the existing orthodox provision, it was recommended by the 42nd Law Commission report to make the adulterous women equally liable for committing the offense and reduce the punishment to 2 years of imprisonment.^{viii} An amendment to incorporate equality of sexes was suggested by the Law Commission of India in its 156th report.^{ix} It would reflect the change in the status of women in society. The Malimath Committee in March 2003 demanded equal rights for wife but reasoned that the object of the provision is to preserve the sanctity of marriage and abhor marital infidelity.^x Thus it suggested that Section 497 of IPC should be amended to- “—whosoever has sexual intercourse with the spouse of any other person is guilty of adultery...”^{xi}

However, the sad reality was that none of the recommendations provided by various committees were implemented.

Various jurisdictions around the world have decriminalized adultery including New York, Japan (only a ground for divorce), South Africa and South Korea. However, it continues to be an offense in various states of USA, Canada, and the Islamic law in Malaysia punishes adultery as a crime.

As a concluding remark, the irregularities identified in Section 497 were:

1. Only the male offender is punishable. The woman who is at equal fault is barred exclusively on the basis of gender.

2. No right has been given to the wife whose husband has committed adultery. Section 198(2) of CrPC provides right only to the husband to prosecute the adulterer.
3. A married man having sexual intercourse with an unmarried/ divorced woman does not constitute adultery under the code.
4. If the husband consents to the relationship between a married man and his wife, it will not constitute adultery.

Article 14 provides for equality but allows a reasonable classification for distinction provided that the classification is rational and meets the objective which the legislation is trying to achieve. No rationality can be sought by discriminating based on sex between two consenting adults. Such kind of legislation reflects the age-old myth that women were the husband's property and had no individual rights. Thus, this classification is not relevant and contrary to Article 14 of the Indian Constitution.

Article 15(3) of the Indian Constitution empowers the state to form special legislation for women, in order to uplift them. But the act of adultery is committed consensually between adults and thus such law cannot be covered under this article.^{xii}

Further, Article 21 provides the right to privacy to individuals in matters of intimate affairs. The invasion by the state is required to be (i) legal, (ii) needful and (iii) proportional.^{xiii} Section 497 does not meet the three-fold requirement. Where the civil remedy for the act is sufficient, a criminal sanction to the act is not warranted.^{xiv}

Therefore, in the light of the above-mentioned facts and circumstances, Section 497 of IPC is struck down as it violates Section 14, 15 and 21 of the Indian Constitution. Section 198 (2) of CrPC is also unconstitutional to the extent it applies to the offense of adultery.

DISCURSIVE ARGUMENT

“I have considered, thus far, the effects on the pleasures and benefits of the marriage union which depend on the mere unlikeness between the wife and the husband: but the evil tendency is prodigiously aggravated when the unlikeness is inferiority.”^{xv} - John Mill

A liberal feminist scholar, John Mills, believed in the equality of both the sexes so that both can develop and function freely. He considered marriage a partnership of the equals where wife cannot be treated as slave of husband and has an equal role in participation and leadership. He believed in the concept of similarity of powers, equality and reciprocal superiority, paving a path for development for both the individuals in a marriage. The provision was discriminatory in a way by treating sex as a ground for disqualification to bring an action against the husband. Subordination of women to men is a chief cause of hindrance in the development of the society. The law of adultery, by providing the right only the husband to invoke Section 497 of IPC, treated women as the chattels of the men, having no sexual autonomy and right over their own body. Such a law surfaces the age-old set of prejudices against women who were oppressed which hold no good in modern times.

The legislation clearly treated women as an object. Going by Martha Nussbaum's concept of 'objectification' of humans she discussed seven qualities, namely, instrumentality, lack of autonomy, fungibility, inertness, violability, absence of subjectivity and ownership.^{xvi} Section 497 of IPC denied the autonomy to women to bring an action against their husband and the adulterer. It was only the husband on whose consent the offense of adultery could be established. Section 198(2) of CrPC denied a woman inherent power of action and resistance, thus being inert. Such kind of legislation showed that wife was treated as the slave and property of husband and the law existed for the husband's benefit to secure ownership over the sexual relations of his wife.^{xvii} The experience and emotions of wife were not taken into account, thus denying them subjectivity and reflecting the dominance of husband that was common when the provision was drafted.^{xviii} It destructs the sanctified personal space of body and mind thus being violative of guarantee of equality by constitution. Such kind of legislation has objectified women negatively, qualifying more than half of the qualities as mentioned, being inconsistent with respect for the wife's humanity. Humanity can be understood as Kant described it, i.e.,

rational nature of humans and capacity to choose rationally. In contemporary times, when women are educated and advanced, they must have the right to prosecute the adulterer. Therefore, judgment can be considered as a good initiative as it put forward the idea of transformative justice.

However, by making the practice of adultery not punishable, it takes away the remedy available to any spouse, other than divorce, when their partner indulges in adultery. This to a little extent seems to endanger the institution of marriage. Tracing it back to history, preservation of the sanctity of marriage was one of the purposes of enacting this legislation. The strong foundation of a marriage is trust and fidelity rested upon by husband and wife in each other, and such an act of adultery damages it. Diluting the law on adultery will be detrimental to the matrimonial bond^{xix} and tend to increase the vulnerability of commission of crimes related to adultery.

If adultery is no longer an offense then why is ‘voluntary sexual intercourse with any person other than his or her spouse, after the solemnization of the marriage’^{xx} provided as a ground for divorce?

The Supreme Court in *Govt. of Andhra Pradesh v P Laxmi Devi*^{xxi} observed, “Adjudication must be done within the system of historically validated restraints and conscious minimization of the judges’ preferences.”^{xxii} Criminal law keeps alive the essence of the historical roots and morals of the society.^{xxiii} It is acceptable for the law to transform with the present needs of the society but the fact that the sanctity of marriage is affected due to commission of adultery cannot be denied.

Adultery being a matter of private concern, doesn't only affect the spouses, but also the families associated and their children. The judgment did not provide the remedy for the child born a result of the adulterous relationship or affected due to it.

Although various jurisdictions around the world have decriminalized adultery, India, being a conservative nation cannot adjudicate on the theory of western countries. The socio-economic conditions prevailing in the nations also need to be taken into consideration.

The legislature is considered to be the best judge for what is beneficial for the citizens by whose suffrage it has come into existence.^{xxiv} Considering the social, historical and religious norms, it would have been balanced if the provision was amended instead of being declared unconstitutional. However, Section 198 of CrPC has been rightly struck down to the extent that it prevented women from filing complaints against adultery. Section 198 violated Article 14 of the Indian Constitution as it created arbitrary classification which cannot be justified. It also violates Article 15 by discriminating on the grounds of sex. It portrayed the failure of the state to provide equal justice, thus being rightly struck down.

CONCLUSION

The Indian society has witnessed a whale of changes since the codification of the Indian Penal Code. The status of women has elevated and social approach towards them has changed positively. Various laws and legislations have been implemented to unchain women from the shackles of gender bias and subordination to men. Natural law school propounds that “*Lex Injusta Non Est Lex*”, that is, an unjust law is no law at all. The constitution of India also considers reasonableness and non- arbitrariness as its hallmark. The law concerning adultery was surely inconsistent with the contemporary notions of status of women and the basic structure of the Indian Constitution which celebrates gender equality. Although with the decriminalization of adultery the empowerment of women and the protection of their dignity has been assured but the decision still remains questionable. On the basis of observation, I still suggest that amendments in the law would have been a more balanced approach, not only assuring the equality and liberty of women but at the same time creating a deterrence effect for the adulterer.

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^v V Revathi v. Union of India, AIR 1988 SC 835.
^{vi} Joseph Shine v. Union of India, AIR 2018 SC 4898.
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