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JOSEPH SHINE VS UNION OF INDIA: END OF ANOTHER VICTORIAN ERA LAW *

Abstract: The year of 2018 has been the year of Constitutional Morality, where several landmark judgments upheld the principles of the constitution. The recent judgment of Joseph Shine v. Union of India is one such precedent laid down where the penal provision of Adultery was decriminalized. This article explores the reasoning behind striking down of Section 497 of Indian Penal Code, where the court said it is ‘manifestly arbitrary, violates right to equality, dents individuality of women’. This article further underlines how the law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. In furtherance of this objective of the article, Concluding part of the article through careful analysis is aimed at providing a comprehensive picture that how being antithetical to the constitutional guarantees of liberty, dignity, and equality, Section 497 does not pass constitutional muster.

Keywords: Adultery, Women, Discrimination, Judiciary, Constitution.

Introduction: The year 2018 can be said as the year of ‘Constitutional Morality’. The meaning of the word Constitutional morality is, the morality based on the Constitution and the principles of the Constitution. Morality at the other hand means obligations and virtues of an individual or public at large but it may differ from person to person. With the unique history of archaic laws, Section 497¹ is a gender-stereotyped provision and is no longer needed in progressing society like ours. It is an archaic provision ridden with gender discrimination and treats women as the chattel of their husbands and subordinate to them. The provision on the face may appear that it favors the women but it is kind of ‘Romantic Paternalism’ and treats women as property and harms their dignity. The

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¹ Indian Penal Code, 1860, S 497.

Supreme Court in the last year has functioned effortlessly to uphold the ideals of Constitutionalism by going beyond the principles which are followed widely by the people of society and they had a very strong belief in them. The case of *Young Indian Lawyers Association v. State of Kerala*² is a true example of the same. A religious custom which was followed from a very long time, which bars women of the menstruating age to enter the Sabrimala temple because Lord Ayappa was 'Naishtika Brahmachari'. But the Hon'ble Supreme Court ruled against the temple authorities and has permitted everyone to enter the temple irrespective of their gender and age thereby promoting the Constitutional Morality and the principle of equality. Similarly in the recent landmark judgment of *Joseph Shine v. Union of India*³ which ruled against the Union of India decriminalizing the penalty provision of adultery and upholding the constitutional morality as the provision suffered from many irregularities which were against the fundamental rights as enshrined under Part III of the Constitution of India. The journey of Law of adultery starts from the time when Lord Macaulay drafted the penal code.

Lord Macaulay in his draft refused to make adultery an offence. He emphasized that adultery must be treated merely as a civil injury. He was of the view that adultery or marital infidelity was a private wrong between the parties and not a criminal offence⁴ and the civil remedy is sufficient for the aggrieved party.⁵ According to Lord Macaulay, "*The population seems to be divided into two classes- those whom neither the existing punishment nor any punishment which we should feel justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury.*"⁶ He established by his reasons that there is no need to make the act of adultery a penal offence. The reason that the law commissioners presented to make the act a punishable offence is that "*the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract. They felt*

² Writ Petition (Civil) No. 373 of 2006.

³ 2018 ALLMR (Cri) 4065.

⁴ Law Commission of India, 156th Report on the Indian Penal Code (Vol. 1), para 9.43, page 169.

⁵ Macaulay's Draft Penal Code (1837), Note Q.

⁶ Law Commission of India, 156th Report on the Indian Penal Code (Vol. 1), para 9.43, page 169.

that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women is a course which we are most reluctant to adopt”⁷. Given the condition of women at that time, the act of Adultery was added as an offence under the Indian Penal Code. This clearly shows that it was not the marriage which they wanted to protect; the main reason was to control the wife and to ensure that the men do not punish their wives on their own for the infidelity done by them. Therefore, the said object of the provision of adultery which is to protect and preserve the sanctity of marriage is not its object at all. The society was patriarchy ridden and the provision was also the result of the mind of people of this patriarchal society. But the society has undergone enormous changes in the last few years and now it is time for the transformation in the legal system of India. The laws which still promote and stand by the patriarchy in 21st-century results in creating discrimination are not needed in the developing society because laws like these inhibit and curb the growth of the people and the country.

Implications of The Judgment

In the previous judgment dealing with Adultery, *Sowmithri Vishnu v. Union of India*⁸, the constitutionality of section 497 of the Indian Penal Code was challenged but the court failed to comply with the ideals of the Constitution. The opinion of four judges in the case of *Justice K.S Puttaswamy v. Union of India and others*⁹ was that “*the society evolves and so must the constitutional doctrine. The institution which the constitution has created must adopt flexibility to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty, and dignity of woman.*” Hon’ble Justice Dipak Misra said in the judgment of *Joseph Shine* that criminalizing adultery would be a regressive step for the Supreme Court, which has repeatedly emphasized on bringing transformation in the

⁷ A Penal Code Prepared by The Indian Law Commissioners, And Published By Command Of The Governor General Of India In Council 91-93 (G.H. Huttman, The Bengal Military Orphan Press, 1837).

⁸ AIR 1985 SC 1618.

⁹ (2017) 10 SCC 1.

society and the transformative and dynamic nature of the Constitution. Coming to the judgment of *Joseph Shine v Union of India*, the five-judge bench comprising of Justice Dipak Misra, Justice D.Y Chandrachud, Justice Khanwilkar, Justice Indu Malhotra and Justice R.F Nariman unanimously struck down the provision of Adultery under the Indian Penal Code, thereby decriminalizing Adultery. Section 497 was the penal provision of Adultery which was arbitrary and discriminatory. The provision gave the right to sue neither the husband nor the paramour of the husband to the wife of the adulterous man. And on the other hand, the right to sue the paramour of the wife was given to the husband. The provision mentioned that the wife cannot be punished even as an abettor of the crime which creates a distinction between the men and women. Men were considered as the author of the crime and women were treated as the victim of the crime. Therefore, the provision section 497 suffered from gender discriminations and violated Article 14 that is right to equality, enshrined under the Constitution of India. Further, Section 497 of the Indian Penal Code violates Article 21 of the Constitution of India on three grounds. Firstly, it treats women as the property of their husband. The language of the provision mentions the consent of the husband but the consent of the wife is not taken into purview at all. The object of the provision according to the state is to protect and preserve the sanctity of marriage but in reality, the object clearly appears to ensure that husband retains control over his wife's sexuality and therefore sexual relation by a man with another man's wife came to be considered as theft of the husband's property. Lord Keith said that "*marriage in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband*"¹⁰. The adultery law dented the individuality of the women and treated them as 'chattel of husbands'. The fact that the provision treats women as a property destroys the reputation and dignity of the women as a human being and an equal partner in marriage which is against the provision of Article 21.¹¹ The expression 'life' in Article 21 does not connote merely physical appearance or animal existence but it also includes the right to live with human dignity.¹² Human Dignity is an integral part of the constitution and a human being as well. Reflections are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21)¹³. The provision of adultery, Section 497, treated women as a chattel of her husband; therefore

¹⁰ R v. R, [1991] 4 All ER 481 at p. 484.

¹¹ Constitution of India, Art. 21.

¹² *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, 1981 AIR 746.

¹³ *Justice K.S Puttaswamy (Retd.) and another v. Union of India*, (2017) 10 SCC 1.

it needed to be struck down. Merely being married does not take away the individuality of a woman, she should be treated as an individual and not as the wife of her spouse. The statutory provision belonging to a patriarchal past which violates and demeans the dignity of a woman falls contradicting to the modern constitutional doctrines and against the existing constitutional morality that is why the provision had to be struck down on the very same grounds. The court over time has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same by creating invidious distinctions based on gender stereotypes which create a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamount to the subordination of women. So, “there is no hesitation in holding that the same offends Article 21 of the Constitution of India. Secondly, the provision does not give them the right to personal liberty and thirdly, takes away their right to privacy. According to Hon’ble Justice D.Y. Chandrachud, sexual autonomy cannot be regulated by anyone other than the person himself. He held in the landmark judgment of *Joseph Shine v. Union India*¹⁴ that section 497 only recognizes the sexual autonomy of men and completely denies it to the women. And also, the wife of the adulterous husband could only avail civil remedies from the husband and can sue neither the husband nor his paramour but the husband has explicit right to sue the paramour of his wife. Hon’ble Justice Dipak Misra, in the very recent landmark judgment of *Navtej Singh Johar v. Union of India*¹⁵ discussed ‘Autonomy’. He said “*Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He / She can surrender his/her body willfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also recognition of quintessential facet of humanity in a person’s nature. The autonomy establishes identity and the said identity, in the ultimate eventuate becomes a part of dignity in an individual. Dignity is special to man/woman who has a right to enjoy his/her life as per the constitutional norms.*”¹⁶ The state has no right to intrude in personal matters of a person. The Constitution of India protects consensual intimacies as a personal affair and hence, it completely depends on a person how they want to exercise their sexual autonomy. The state has no right to enter the bedroom of a person. Adultery laws are an intrusion in the personal lives of people where the

¹⁴ 2018 ALLMR (Cri) 4065.

¹⁵ (2017) 10 SCC 1.

¹⁶ *Navtej Singh Johar v. Union of India*, (2017) 10 SCC 1.

relations between the parties are based on mutual consent. Privacy has been recognized as our fundamental right by the nine-judge bench, unanimously in the case of K.S Puttaswamy¹⁷. Punishing a person for a relationship which is with mutual consent is the invasion of the same. The court has observed that each individual is guaranteed the freedom in determining the choice of one's partner, and any interference by the state in these matters would have a serious chilling effect on the exercise of the freedoms guaranteed by the constitution¹⁸. Therefore, Section 497 violated Article 21 as it treated women as chattel, harmed their dignity and invaded in personal liberty and privacy of two people. Therefore, the recent judgment given by the Hon'ble Court on decriminalizing the adultery is for the best of the contemporary society like we are living in.

Adultery does not promote immorality in the Society.

According to the renowned legal jurist, Lord Herbert Lionel Adolphus Hart, there are personal morality man is a part of society and cannot live without society but not every immoral act must be legally punished. He was against Homosexuality and adultery being penalized. Each and every person has different morals. What maybe be moral for one person may not moral for another. His view was accepted by the majority and was followed. Also the act of person is not causing any harm or injury to any other person, that act should not be criminalized.

If one see the implications of the adultery the act of adultery does not harm any person outside the marriage. It does not affect any other person. It only harms others only to the extent that the cause of offence resulting from mere thought that individual might be engaging in such activities and that such 'harm' is not constitutionally protective by the state. Therefore, adultery does not cause a legally or judicially cognizable harm on others. There is no reason for the state to interfere with it. To further substantiate the statement, according to Andrew Ashworth and Jeremy Horder in their commentary titled 'Principles of Criminal Law' stated that there are three elements of criminalization of an act, which are:

1. Harm
2. Wrong Doing
3. Public element

¹⁷ *Justice K.S Puttaswamy (Retd.) and another v. Union of India*, (2017) 10 SCC 1.

¹⁸ *Shafin Jhan v. Asokan K.M.*, 2018 SC 343.

These are required to be proved before the state to classify a wrongful act as a criminal offence. And in the case of adultery, there is no damage or injury caused to any outsider. Therefore, the public element is absent in the scenario. For an act to be an offence it has to be against the public but in this case, adultery is an act in private and does not hurt the public and hence should not be criminalized on the same basis. According to a renowned jurist J.S. Mill's harm principle, he states that "the only purpose for which power can be rightly exercised over the member of a civilized community against his will is to prevent harm to others"¹⁹. The only person who is affected by the act is the spouse of the adulterous person. And for that, there are civil remedies available in the family laws of each religion and even the Special Marriage Act. Adultery is the ground to file divorce against the spouse, and thus remedy can be used by the aggrieved person. There is no reason to make the act of adultery penalized. Hon'ble Justice Indu Malhotra, in the recent judgment of *Joseph Shine v. Union of India*²⁰, stated "*that to determine what conduct requires state interference through criminal sanction, the state must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the state.*" In the case of adultery, the civil remedy is sufficient as it gives the right to the spouses to dissolve their marriage if the other spouse is not loyal to them. As per the words of Mahatma Gandhi, 'An eye to an eye will make the whole world blind'.

The Supreme Court in the case of *Joseph Shine* also referred to a case of Supreme Court of Namibia, where it was held that Adultery is not the cause of the breakdown of marriage but the consequence of the breakdown of the marriage. Therefore, there is no need to force two people in a relationship and punishing the person with a criminal penalty for the same when the civil remedy is sufficient. The irony lies in the fact that in our country where women are worshipped as 'shakti', the atrocities are committed against her in all sections of life. The elimination of gender-based discriminations is one of the fundamentals of the constitutional edifice of India. The constitution empowers the state to adopt measures of positive discrimination in favor of women for neutralizing the cumulative discriminations and deprecations' which women face.

¹⁹ Mill John S., Chapter I: Introductory, on Liberty, Published London" Longman Roberts, & Green co., 1869, 4th edition.

²⁰ 2018 ALLMR (Cri) 4065.

Nexus between Adultery and Marital Rape

Adultery is an act with mutual consent. And it is considered to be an immoral act. While on the other hand marital rape is against the will and consent of the person and is still accepted by the people of the Indian Society. In the case of *Independent Thought v. Union of India*²¹ only the marital rape of the wife who is up to the age of 18 years is criminalized. And it is still widely criticized on the basis that the state should not try to intrude the bedroom of two people. Marital rape being such a grave act is not objected by the people. But adultery is objected to being destroying the sanctity of marriage. This is the hypocrisy inhabited just to follow the patriarchal society's footsteps.

Conclusion

Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, a few decades back, got the stamp of serene approval may have to meet be removed with the flow of time and growing constitutional precepts and progression in society. It is advisable to remember what John Stuart Mill had observed: The legal subordination of one sex to another is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect equality, admitting no power and privilege on the one side, nor disability on the other. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. Hon'ble Justice Indu Malhotra in *Joseph Shine Vs Union of India* said that Section 497 infringed on the right to sexual self-determination and privacy. The period when wives were invisible to the law and lived in the shadows of their husbands, has gone away a long time back. A legislation that supports and maintain such stereotypes in relationships, and keep in existence the discrimination is a clear violation of fundamental rights. The recognition of adultery law as unconstitutional shows that finally the inherent discrimination in adultery law has been removed but we hope that this judgment will make a path for challenging more discriminatory laws in the Indian legal system.

²¹ AIR 2017 SC 4904.



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