

## “Adultery Laws in India after Joseph Shine V. Union of India”

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Section 497 IPC reads 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. In such case the wife shall not be punishable as an abettor.

Punishment- Imprisonment of either description for a term which may extend to five years, or with fine, or with both. <sup>1</sup>

### What Is Adultery?

Section 497 of IPC defines Adultery. According to it a man is penalized for having sexual intercourse with a married woman without her husband's consent or knowledge. The consent of woman whether present or not was not a defense in the case of Adultery.<sup>2</sup>

There are five chief ingredients of an offence of Adultery:

- (1) Sexual Intercourse with a woman
- (2) Wife of another man
- (3) Must have known or the reason to believe that she was married
- (4) Sexual intercourse not amounting to the offence of rape
- (5) Without consent or knowledge of the husband

- Soumithri Vishnu V . Union of India<sup>3</sup>

In this case the constitutional validity of Section 497 was challenged. Following arguments were raised in the following case:

1. It confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery.
2. It does not confer any right upon the wife to prosecute the husband who has committed adultery with a woman other than his wife.

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<sup>1</sup><http://www.advocatekhaj.com/library/bareacts/indianpenalcode/497.php?Title=Indian%20Penal%20Code,%201860&STitle=Adultery>

<sup>2</sup> <https://www.indiatoday.in/india/story/what-is-adultery-law-how-ipc-section-497-is-anti-women-1343308-2018-09-19>

<sup>3</sup> 1985 AIR 1618, 1985 SCR Supl. (1) 741

3. It gives husbands free license under the law to have extra-marital relationship with other unmarried woman.
4. this section treats women as the property of men, as if they are owned by the male gender.

All of these arguments were dismissed by Justice Y. V. Chandrachud . He described all these arguments guided by a strong emotional appeal but they don't have any legal basis on which the case can be rested upon. The Honorable Court held that a law cannot be held Unconstitutional merely because it penalizes a man and not the woman.<sup>4</sup>

Justice Chandrachud also observed that the offence of Adultery can be committed only by a man and not an woman. Woman is always a victim in the offence of Adultery as she lacks agency to be a willing-full partner in it and she is dragged into the offence.

### **Joseph Shine V Union Of India<sup>5</sup>**

In this case the petitioner Joseph Shine, a Malayalee Hotelier in Italy filed a petition to challenge the constitutional validity of Section 497 of the Indian Penal Code and Section 198(2) of Code Of Criminal Procedure(CrPC).In this case the petitioner contented that if a married woman having sexual relationship with an unmarried man is "Adultery" then why a married man having a sexual relationship with an unmarried women does not account to the offence of "Adultery".<sup>6</sup>

The case was thendecided by the five judge bench consisting of Chief Justice Dipak Misra, Justice R F Nariman, Justice A M Khanwilkar, Justice DY Chandrachud and Justice Indu Malhotra with an unanimous decision of 5:0.

The Supreme Court in it's judgment found Section 497 infringing Article 14 and Article 21 of the Indian Constitution. The judges said that Adultery can still be a ground for civil issues such as divorce and dissolution of marriage but it cannot be a criminal offence anymore. The bench said that Section 497 violates right to equality as it creates discrimination between husband and wife ,as, there can be no prosecution against a married men having a sexual relationship with an unmarried female whereas, there can be prosecution against a unmarried male having a sexual relationship with an married female. The Court on the other hand also declared that it would also remain as a ground for divorce.

Justice Chandrachud said that Section 497 deprives and destroys women of dignity. CJI Dipak Misra mentioned that husband is not the master of his wife. Both of them have to be treated equally before the law. A woman can't be asked to think and behave in the way which society desires. It can't be the fact that if the society thinks that it is normal for a man

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<sup>4</sup> <https://www.indiatoday.in/india/story/adultery-law-justice-dy-chandrachud-overturms-another-judgment-by-father-yv-chandrachud-1350758-2018-09-27>

<sup>5</sup> [https://www.sci.gov.in/supremecourt/2017/32550/32550\\_2017\\_Judgement\\_27-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2017/32550/32550_2017_Judgement_27-Sep-2018.pdf)

<sup>6</sup> <https://www.livemint.com/Politics/0AJ04WhxjSNdEaLtUnrdDI/Joseph-Shine-adultery-law-crusader-says-he-is-happy-for-In.html>

to be in extra-marital relationship and if a married woman is in a extra-marital relationship it is a punishable offence. The court said that this kind of discriminatory nature of society can't be included in legislations. A law cannot be enacted on the basis of what society thinks, it has to be enacted on the basis of what is right and wrong and what has to be stopped in the society. It has to be enacted what is morally wrong not something which is wrong on the basis of gender. There should be no legislations made on the basis of religion, caste or gender. The court pointed out that Adultery is not the reason for failed marriages, rather it is the consequence of failed marriages. Marriage is based on equality between husband and wife where they both are equal before the law and the Constitution Of India. It would be the clear violation of the Fundamental Rights and the Constitution of India if they both are not provided with equal rights.

Why a men is always considered superior in a relationship to a woman? Why it is always from the female side that dowry is given? Why a women is always asked to leave her house after her marriage and go to her husband's house? These are something's which have been going in our society since ages. The woman may not be discriminated before the law but she is clearly discriminated before the society. Instead of the Supreme Court progress, India needs the mental progression of the society. Moreover, to constitute an act as a crime it must be carried on at a very large scale. But the issue of Adultery is something which is between the husband and wife, it is upon the discretion of both of them, and how they carry on their act's. This is not something which should be made public and which should be treated as a criminal offence. Adultery can be used as a defense for granting of divorce but it can't be a criminal offence. It is upon the discretion of each individual(the husband and the wife) that they want to keep sexual relationship with some other person or not.

Moreover, the stand of the central government on this case was quite pathetic. The govt. pleaded that striking down this section would put into danger the sanctity of marriage as the offence of adultery protects, safeguards and supports the institution of marriage. Family and Marriage is the future of the world there is no doubt about it. It is more important for the development of society. Pinky Anand, Additional Solicitor General for the Govt. of India submitted that Adultery must be retained as a criminal offence. She based her argument on the fact that adultery has the effect of breaking up the family which is the fundamental unit of the society. Section 497 is protecting the institution of marriage as well as social well-being. ASG also submitted that adultery is not an offence involving merely two people. It has an impact on the aggrieved spouse, children, as well as society. Any affront to the marital bond is an affront to the society at large. The act of adultery affects the matrimonial rights of the spouse, and causes substantial mental injury.

Adultery is essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society. It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law. But these kind of laws harm the

society more than they protect it. They instead of protecting the society harms it more. They don't let the society develop and do not let them convert into a progressive society, instead they can see one partner suffer in their so called institution of marriage and the other person can enjoy his extra-marital relationships.<sup>7</sup>

The judgment clearly stated that "A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity". The statement indicated that in a country like India the role and expectations of Women are deep rooted in the society. Supreme Court observed that women can not be forced to act per society's will. It is not necessary that if society wants to see each women as "Sati-Savitri" all the woman have to become it. It is upon the personal individual what will be his behavior and attitude towards life. No, Court of Law or a govt. can regulate the behavior of a woman towards his husband, family or the society.<sup>8</sup>

The judgment clearly stated that by criminalizing the offence of adultery the govt. and the court was directly interfering in the extremely private sphere of matrimonial life. The court said that this section is breach of Article 21 of the Indian Constitution as that article ensures a person right to privacy, dignity and personal liberty. Justice Indu Malhotra wrote in her judgment that the "The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life should be protected from public censure". She clearly stated that it is totally upon the individual to choose his/her sexual partner. She says that each person is mature enough to decide with whom he/she wants to do sexual intercourse and with whom he/she does not. Justice Malhotra also questioned that why it was a criminal offence since this long. She clearly stated that since it was a moral wrong and not an social wrong or public wrong which affected the lives of others it does not need to be constituted as an criminal offence. Adultery is essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society. It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law. The Petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage.

In August 1997, the law commission of India in its 156th report noted that the offence of Adultery is very limited in scope in comparison to the extent to which it is misused in civil proceedings(divorce proceedings). The law report said that this section gives upon the husband to prosecute the adulterous male but does not give any right to the wife to prosecute his adulterous husband. The law commission suggested an amendment to be made to

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<sup>7</sup><https://www.indiatoday.in/education-today/gk-current-affairs/story/section-497-adultery-law-scrapped-all-about-law-html-1350726-2018-09-27>

<sup>8</sup> <https://indiankanoon.org/doc/42184625/>

incorporate the concept of equality between sexes in a marriage. The proposed change was made to reflect the transformation of women's status in Indian society.<sup>9</sup>

### **Conclusion**

The Five judge bench of the Hon'ble Supreme Court Of India consisting of Chief Justice Dipak Mishra, Justices F.Nariman, Dr DY Chandrachud, AM Khanwilkar and Indu Malhotra in the case of Joseph Shine V Union Of India gave a very progressive judgment with an unanimous ratio of 5:0.

To struck down a 158 year old judgment that too on an unanimous decision shows how well has the Supreme Court of India understanding the need of the society and that what may be wrong morally need not be wrong before the law.

I don't know how this law has prevailed over the years, how can a husband stop his wife from having sexual intercourse with some other man but a wife cannot stop his husband from getting engaged in sexual intercourse with some other woman. This clearly demonstrates how the society of this country has been biased and dominated by men. Men around the country objectify women. They can't see a woman superior (or even equal) to them. In the institution of marriage why does always the girl has to leave her house and come to her husband's home, Why does the boy doesn't leaves his house and comes in his wife's home. This is something the society never notices. On questioning they say that this is what which has been going on from centuries. The supreme court should be congratulated on this very fact that it has accepted the mistake of the past supreme court judges and rectified it and found Section 497 to be violative of the Constitution Of India.

A person could be satisfied if the section would include both the husband and the wife, but being gender-biased clearly shows how the Indian judicial system has been gender-biased since the independence of the country.

Section 497 IPC treated wife as the slave of his husband. It gave the upper hand to the husband, in which the extra-marital affair of wife came under the offence of adultery whereas the extra-marital affair of husband did not came under the scanner. This section treated the wife as the property of his husband as if she was owned by his husband. The section clearly gave men the upper-hand in the institution of marriage in which one was superior while the other one was inferior. The petition was not for striking down the section. The petitioners argued either to make it gender-neutral in which both are liable or to scrap of the section. Moreover, Adultery is not the reason of failed marriages, instead failed marriages are the reason of adultery. Adultery is not done by a couple at first place, instead it takes place where there is no connection and understanding between the wife and the husband.

Hence, it is safe to say that the step of the Supreme Court to struck down Section 497 of IPC and Section 198(2) CrPC is a progressive judgment which is now unbiased on the basis of

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<sup>9</sup> <https://www.thehindu.com/opinion/op-ed/not-a-criminal-act/article22413886.ece>

gender. Instead of bringing down the institution of marriage it will help it to prosper more as there is no discrimination now in the institution of marriage and both the husband and wife are equally placed in this relation.

### References

1. [www.advocatekhaj.com/library/bareacts/indianpenalcode/497.php?Title=IndianPenalCode,%201860&STitle=Adultery](http://www.advocatekhaj.com/library/bareacts/indianpenalcode/497.php?Title=IndianPenalCode,%201860&STitle=Adultery)
2. <https://www.indiatoday.in/india/story/what-is-adultery-law-how-ipc-section-497-is-anti-women-1343308-2018-09-19>