

Adultery no more a crime- Why?

On September 27, 2018 a five-member bench of the Supreme Court headed by CJI Deepak Misra passed a remarkable judgment in *Joseph Shine vs Union of India* by declaring Section 497 of Indian Penal Code 'Unconstitutional'. From that day there are various positive and negative remarks flooding in the news and on social media in relation to this judgement. Through this article we will try to explain that why and in what manner the Apex court made this unprecedented judgment. All the bench members were unanimous in their decision.

Through the above judgment SC overruled its previous decision made in *Yusuf Abdul Aziz v. State of Bombay*, *Sowmithri Vishnu v. Union of India* and another, *V. Revathi v. Union of India* and others and *W. Kalyani v. State through Inspector of Police* and another.

This article will explain the position in a summarised manner only.

Let us first understand the legal position before the judgment and the relevant section applicable:

1. Section 497 IPC - *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, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.*
2. Section 198 of CrPC provides for prosecution for offences against marriage. Section 198(2) states – *For the purposes of sub-section (1), no*

person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed, may, with the leave of the Court, make a complaint on his behalf.

The Bench indicated that three grounds of challenge were addressed before this Court (i) while Section 497 confers a right on the husband to prosecute the adulterer, it does not confer upon the wife to prosecute the woman with whom her husband has committed adultery; (ii) Section 497 does not confer a right on the wife to prosecute her husband who has committed adultery with another woman; and (iii) Section 497 does not cover cases where a man has sexual relations with an unmarried woman. The Petitioner submission before this Court was that the classification under Section 497 was irrational and 'arbitrary'. Moreover, it was also urged that while facially, the provision appears to be beneficial to a woman, it is in reality based on a notion of paternalism "which stems from the assumption that women, like chattels, are the property of men."

The Hon'ble Court held that on perusal of Section 497, one will find that the provision grants relief to the wife by treating her as a victim as she cannot be held liable as abettor. Therefore, the general presumption that criminal law based on gender neutrality stands absolved here. Moreover, the language employed in the section that the fulcrum of the offence is destroyed once the consent or connivance of the husband is established. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master, which was prevalent when the penal provision was drafted. This

tantamount to an unambiguous subordination of women against from men and are in violation of Article 14 and 15 of the Constitution.

It is interesting to note here that Section 497 does not bring within its purview an extra-marital relationship with an unmarried woman or a widow. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. On the one side, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. On the other side as per Section 198 (2) it does not consider the wife of the adulterer as an aggrieved person. Thus, the offence and deeming definition of an aggrieved person both are absolutely and manifestly arbitrary. The Court stated if we take a closer look on both the provisions then on the one hand it protects a woman by not making her as abettor and on the other, it does not protect the other woman. Therefore, rationale of the provision suffers from the absence of logicity of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

The Apex court also included some shlokas from the scriptures which specifies in relation to the dignity of the women in any civilized society.

The Court concluded that the offence of adultery was treated as injury to the husband, since it was considered to be a 'theft' of his property, for which he could prosecute the offender. The said classification is no longer relevant or

valid and cannot withstand the test of Article 14 and liable to be struck down on this ground alone. The Hon'ble court further added that *"A law which deprives women of the right to prosecute is not gender-neutral as provision of Section 497 deprives the wife of adulterous husband to prosecute him for marital infidelity which makes it ex facie discriminatory against women and thus violative of Article 14. What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic. The historical background in which Section 497 was framed, is no longer relevant in contemporary society. It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a "victim", and the male offender is the "seducer"."*

Another contention in favour of Section 497 states that Article 15(3) is an enabling provision which permits the State to frame beneficial legislation in favour of women and children and to protect and uplift this class of citizens does not hold any legality as a legislation which takes away the rights of women to prosecute cannot be termed as 'beneficial legislation'. Moreover, the purpose of Article 15(3) is to further socio-economic equality of women and cannot operate as a cover for exemption from an offence having penal consequences.

The Court explained that the previous decisions of them was based on the provision under Article 15(3) of the Constitution which states that 'Nothing in this article shall prevent the State from making any special provision for women...'. However, in the current petition the Petitioner argued that the provisions of the above clause should be confined to provisions which are

beneficial to women and cannot be used to give them a licence to commit and abet crimes. The Court made a remark for previous judgment and stated “*We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.*”

In a detailed judgment of over 200 pages the Court highlighted the position of adultery in various countries around the world and emphasized that many of the countries had abolished adultery as criminal offence. The fact that in the first draft of the IPC released by the Law Commission in 1837 did not include ‘adultery’ as an offence as Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties and not a criminal offence is also stated in the judgment. The Hon’ble court also mentioned the opinion of the various Law Commission (42nd Report of Law Commission of India in June 1971; 156th Report of Law Commission of India in August 1997 and in March 1993 the Malimath Committee on reforms of Criminal Justice System) who have highlighted on various aspects of Section 497 and the need for relook on its provisions in the current frame of the society.

The Petitioners have also contended that right of privacy guaranteed under Article 21 would include the right of two adults to enter into a consensual sexual relationship even though it outside marriage as the choice of a partner with whom she could be intimate, falls squarely within the area of autonomy over a person’s sexuality. Like every right, right to privacy is also not an absolute right and is subject to reasonable restrictions when legitimate public interest is involved but invasion to privacy by the State must be justified on the basis of law that is reasonable and valid. The Hon’ble Court elaborated that Section 497

must meet the three-fold requirement as set out in K.S. Puttuswamy (retd.) & Anr v. UOI for any invasion privacy by the State which are (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. The Court held that Section 497 as it stands today, fails to meet the three-fold requirement and must therefore be struck down.

Another aspect which is to be analysed by the Court was whether adultery should be treated as criminal offence or not. On this issue, the respondents alleged that though adultery is an act committed with the consent of the two individuals nevertheless it violates the sanctity of the marriage. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulteror and the adulteress, it impacts the growth and well-being of the children, the family, and society in general, and therefore must be subject to penal consequences. One of the members of bench alleged that throughout history, the State has regulated various aspects of the institution of marriage like age to marry, legal recognition to marriage, inheritance, succession, judicial separation, adoption etc. as all these areas of private interest impacts upon society and public well-being as a whole. However, in contrary to the above contention she stated that, *“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 through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the ‘best interest’ of the individual.”* She stated further that *“The right to live with dignity includes the right not to be subjected to public censure and*

punishment by the State except where absolutely necessary. In order 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 view of the above circumstances it was held unanimously by all the members of the bench that:

- (i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution. However, there can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage and hence Section 497 hold a valid ground for divorce.
- (ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.