

STATUS OF S.498 OF IPC POST-JOSEPH SHINE

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The paper is an attempt to bring to light Section 498 of the Indian Penal Code, 1860. The Indian Penal Code is a versatile piece of work by English lawmakers. However, some of the portions of the said code are not in tune with the present times. Since independence, the crime of adultery has been challenged in the Apex Court. However, the issue matured during the tenure of CJI Dipak Mishra who declared that the Court is not bound by precedence and that it should diverge from tradition to accommodate the current liberal mindset. The Joseph Shine case was about the constitutional validity of Section 497 of the Indian Penal Code. It is contended that the former is a corollary of the latter. The article has relied on the judgement of the CJI only, out of the five-judge Bench. Section 497 infringes on a woman's right to self-determination, arbitrarily punishes a third person, and enters a very private sphere of husband and wife. The line of thought in that judgement has been borrowed and Section 498 has been analysed in that light. This Section presents the adultery law in disguise and needs to be struck down.

Keywords - Section 498, IPC, Joseph Shine, Adultery.

INTRODUCTION

After the enactment of the Charter Act of 1833, a Law Commission was appointed under the chairmanship of TB Macaulay in 1834. The objective of the Commission was to create a uniform criminal law for the whole of British India. The first draft penal code was submitted on 2nd May 1837. The Commission took inspiration from the French Penal Code and the Code of Louisiana. Another report was submitted on 24th June 1847. The final code was prepared and read out in the Legislative Council on 28th December 1856, and on 1st March 1887. The code was published in the Calcutta Gazette in January 1857 and JJ's consent was obtained on 6th October 1860. It was again published in the Calcutta Gazette on 20th October 1860. 1st May 1861 was supposed to be its date of enforcement. However, it got postponed to 1st January 1862.

Except for a few amendments through the history of more than one hundred fifty years, the code has been a versatile piece of work catering even to the present day affairs of men.

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However, with the advent of science and technology, and especially in the fast-connected world using mobiles, computers, and the internet, societal shifts are visible and some course correction is felt at times. Sometimes, some new statutes are enacted for new crimes such as Cyber Crimes, say, economic offences which were alien to the society during the conception of the Code.

In this article, we are going to critically examine one specific section of the code, Section 498, which reeks of the male dominated societal mindset during the colonial period. It relates to the Chapter XX of the Code, which defines offences relating to marriage. It is to be noted that the procedure to be followed in complaints relating to this Chapter is laid down in Section 198 of the CrPC.

SUMMARY OF JOSEPH SHINE¹ CASE

In Joseph Shine's case, the validity of Section 497 of the IPC was challenged in a writ petition filed under Article 32 of the Constitution of India. Initially, the case was heard by a three-Judge Bench looking at the case in the light of previous authorities such as Yusuf Abdul Aziz v. State of Bombay², Sowmithri Vishnu v. Union of India³, V. Revathi v. Union of India⁴, and W. Kalyani v. State through Inspector of Police⁵. The question whether Section 497 was unconstitutional on the grounds that it discriminates against men and violates Articles 14, 15, and 21 of the Constitution of India, was examined by the Supreme Court in the above mentioned cases. Also, it alleged that Section 198(2) of the CrPC was violative of Articles 14, 15, and 21 of the Constitution of India as it excludes women from prosecuting anyone engaging in adultery, even their husbands. Some highlights from the past are as follows:

- For the first time in 1954, Section 497 was challenged in the Yusuf Abdul Aziz case, on grounds that it exempted women from being prosecuted under the Section. The Supreme Court said that the exemption to women falls under Article 15(3) of the Constitution of India.
- In 1985, Section 497 was taken up again for consideration of its validity in the Sowmithri Vishnu case and again the section survived.

¹ *Joseph Shine v Union of India* [2018] SC 4898

² *Yusuf Abdul Aziz v State of Bombay* [1954] AIR 321 (SC)

³ *Sowmithri Vishnu v Union of India* [1985] AIR 1618 (SC)

⁴ *V Revathi v Union of India* [1988] 2 SCC 72

⁵ *W Kalyani v State through Inspector of Police* [2011] 1 SCC 358

- In 1988, in the V Revathi case, section 497 of the IPC along with Section 198(2) of the CrPC were challenged together. The challenge was repelled relying on the Sowmithri Vishnu case.
- However in 2011, in the W Kalyani case, Supreme Court remarked, “the provision is currently under criticism from certain quarters for showing a strong gender bias, it makes the position of a married woman almost as a property of her husband.”

Alongside the historical cases relating to Section 497, various legislative and administrative organs of the Government of India as well as those outside India were at work on the same lines. Some significant developments are as follows⁶ :

- In 1971, the 42nd Law Commission Report analysed the Indian Penal Code and made many important recommendations, one of them being related to Section 497. It recommended reducing the sentence from five years to two years and removing the safety provided to women from being prosecuted under the section.
- In March 2003, the Committee of Reforms of the Criminal Justice System published its Report. In Volume I, again it was suggested to remove the exemption allowed to women from being prosecuted under Section 497. The Report suggested amending the said Section as “whosoever has sexual intercourse with the spouse of any other person is guilty of adultery...”
- In 2012, a UN Working Group (established by the Human Rights Council, Geneva in 2010) urged countries to decriminalize adultery as an offence.
- The Supreme Court of South Korea in 2015, struck down its version of adultery law, stating that the law violated the principle of excessive prohibition and infringed on people's right to self-determination and privacy, and freedom of privacy.
- In 2016, the President of India called for a revision of the Indian Penal Code and to remove provisions that have become obsolete.

The matter was then referred to a larger Bench of five Judges, where three Judges held Section 497 of IPC and 198 of CrPC as unconstitutional, one Judge held Section 497 of IPC and 198(2) of CrPC as unconstitutional, and finally, one Judge spoke against only Section 497 of IPC.

IMPORTANT TAKEAWAYS FROM THE JUDGEMENT

⁶ *Joseph Shine v Union of India* [2018] SC 4898

The Joseph Shine judgement was a watershed moment in the field of Gender Justice. We have a lot to gain from the viewpoints of the honorable Judges, and the authorities cited therein. The mood for Judicial reformation and activism has been set, breaking away from the shackles of precedents when the changing times demand. Here are some relevant parts of the judgement by CJI Dipak Mishra(also on behalf of AM Khanwilkar, J) which shall be sufficient to serve our purpose :

- After analysing the four cases mentioned above, Article 14 of the Constitution of India was discussed, regarding how the arbitrariness of State action leads to breaking the rule of law. In *SG Jaisinghani v Union of India*⁷, the Court held that the absence of arbitrary power is essential for establishing rule of law. Discretion is allowed by the executive and legislature. This rule of law means taking decisions that are predictable, by applying known rules and principles, and the citizen should know where he stands. If a decision is taken without any principle or rule, it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. Further, where discretion is absolute, man has always suffered. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes, “.....means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful...”. Thus, it is established that **arbitrariness is the basis of declaring laws unconstitutional**.
- On reading Section 497, we find that there is no offence as long as there is consent or connivance of the husband. This treats the woman as a mere chattel, a property belonging to the man and subservient to his will. It reflects the male dominance of the era when the provision was drafted. Section 198(2) of CrPC read with this Section 497, implies that only the husband(or any person in whose care he left his wife) of the wife indulging in adultery can be the aggrieved person, whereas the wife whose husband is engaged in adultery can not be the aggrieved person. Further, if the husband gives consent, the other man having illicit intercourse with the former's wife, will not be found an offender. This again creates a problem as it does not allow the third person's wife to commence criminal proceedings against her wife. Thus, it protects the woman, and on the other hand, does not protect the other woman. Thus, from para 23 of CJI's

⁷ *SG Jaisinghani v Union of India* [1967] 2 SCR 703

judgement, **“The 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 dignity of women and concept of gender equality, exclude page 31, include pg 32. lord Dennings pg37. After that, the CJI dwelt upon the topic of gender equality and the dignity of women. He cited many scriptures from the past to present day case law. According to Lord Keith declared in *R v R*⁸ that in modern times, marriage is declared as a partnership of equals, and the wife must not be any longer the subservient chattel of the husband. Also, Lord Denning echoed the same feeling in *The Due Process of Law*⁹. Overall, it was sufficiently shown that after various periods of suffering in silence, women are to be treated as equal to men in today's age, and any person feeling otherwise does not belong to this society. **“36...there cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance.”**
- In *KS Puttuswamy's*¹⁰ case, it was laid down that privacy was a facet of Article 21 of the Constitution of India and stressed the dignity of an individual, and remarked that liberty is a broad word containing privacy as a subset. All liberties can not be exercised in privacy, yet some can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. Although privacy has not been couched as an independent fundamental right, constitutional protection of privacy cannot be bypassed. The individual experiences freedom of thought, to believe in what is right, and freedom of self-determination only when his mental integrity meets privacy. “In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.”
- After the analysis of human dignity and the right to privacy, the CJI came to the conclusion that the Court has recognised the equality and dignity of women, and Section 497 curtails the same by creating distinctions based on gender stereotypes and dents the dignity of women. Also, the elements of consent or connivance are tantamount

⁸ *R v R* [1991] UKHL 12

⁹ Lord Denning, *The Due Process of Law* (Butterworths 1980) 212

¹⁰ *Justice KS Puttuswamy v Union of India* [2017] 10 SCC 1

to the subordination of women, and therefore **Section 497 offends Article 21 of the Constitution of India.**

- The CJI then illuminates the nature and definition of crime and the question is raised if adultery can be treated as a criminal offence. Adultery is a very private matter involving the husband wife couple and another outsider. Although marriage is a social institution, CJI remarked that adultery stands on a different footing from the offences of domestic violence, demand for dowry, filing complaints for second marriage, and non-payment of maintenance. Further, he held, “...**adultery does not fit into the concept of a crime.** We may repeat at the cost of repetition that if it is treated as a crime, there would be an immense intrusion into the extreme privacy of the matrimonial sphere.” Adultery being treated as a crime will offend two facets of Article 21 of the Constitution of India, which are the dignity of husband and wife, and the privacy of their relationship.
- Another fact is that the law cannot be expected to keep the couple bound in the matrimonial commitment by imposing criminal liability. It is a moral obligation of the partners to maintain fidelity to each other, and Courts cannot direct the spouses on this private matter. Any punishment, either deterrent or reformatory, shall not save the marriage. It depends on the partners to forgive and live together, or seek divorce.
- When adultery hits a marriage, it may be that an unhappy marriage is a cause for a partner resorting to adultery, or adultery is the reason for the unhappy marriage. If the case is that mentioned prior, i.e. a person resorted to adultery outside of marriage because of dissatisfaction in marriage, it shall be a wrong committed by law by punishing any of its participants. The law would indiscriminately punish the persons in a marriage as well as those who are not in a marriage. And this shall be manifest arbitrariness.
- It is to be noted that adultery has been decriminalised in many parts of the world such as China, Japan, Australia, Brazil, and other West European countries. Further, in English jurisprudence, from which we owe our law, has never regarded adultery as a crime except for a period of ten years during the reign of Puritanical Oliver Cromwell.

ANALYSIS OF SECTION 498 OF THE INDIAN PENAL CODE, 1860.

Section 498 reads as follows: “Enticing or taking away or detaining with criminal intent a married woman.—Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having

the care of her on behalf of that man, with the intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.” Here we examine the Section in light of the observations made in the Joseph Shine case.

- This Section first mentions the taking away, enticing, detaining, or concealing of a married woman from the husband, or any person (taking care of the wife on his behalf). Sections 359 to 369 of the Indian Penal Code deal properly with the acts mentioned here with the liberty to include any minor, woman, or man regardless of their marital status, and regardless of the fact that they are under any person's custody or guardianship.
- When a major person is not under anyone's guardianship, custody, or care, and the state provides the person with all the fundamental rights in the Constitution, why restrict the free will of a married woman alone to the care of her husband, or his agent? This is arbitrary in the sense that it restricts the rights of a married woman alone, and thus offends Article 14 (equality before law), 15 (prohibition of discrimination based on sex), 19(1)(d) (to move freely throughout the territory of India), 19(1)(e) (to reside and settle in any part of the territory of India).
- The intention of taking away, enticing or concealing, or detaining the married woman must be for the woman to have illicit intercourse with any person. The intercourse may not be with the consent of the woman, in which case it shall be taken care of by Section 376 of the Indian Penal Code.
- If however, the intercourse takes place with the consent of the woman, the society or the State is nowhere qualified to give the woman a license or deny her to engage in such acts. Such acts on her part may serve to desecrate her marriage, but not her rights to self-determination, and right to privacy. Thus again, it infringes on the rights to privacy, of the married woman.
- This Section indirectly enforces the adultery law of Section 497 by mentioning illicit intercourse. Thus it must not be allowed to stand given the fact that Section 497 is already struck down.
- Given that the rights have been conferred on the woman to decide her fate irrespective of her marital status, it is arbitrary on the part of lawmakers to fix criminal charges on the person who assists her in her endeavors that breach the matrimony. The Section

takes for granted the woman to be a property of a man, and assumes that she can be carried or enticed away without her own free will and it allows the husband to prosecute a third person out of their marriage, but not his own wife. The protection given to the wife is not the question here, however, the third person open to the prosecution by the husband is arbitrary and must be declared unconstitutional.

- The procedure to be followed in cases of a complaint under Section 498 was provided for by Section 198(2) of the CrPC, which provided that only the husband, or anyone under whose care the husband left his wife, can give the complaint against the third person with whom the wife chose to leave. This has already been declared unconstitutional. Now, in absence of the Section 198(2) of the CrPC, it is a question of law as to who is authorised to file a complaint and against whom? Earlier the complainant was supposed to be the husband (or anyone authorised to take care of his wife) keeping in mind the fact to keep at bay any busybody who gets unnecessarily entangled in the family matters of others. However, the Section is now open to all and sundry to come forward to disturb the extremely private family issues and lodge complaints against any person with whom the wife wishes to interact or spend time, irrespective of the fact if such action on the part of the wife is validated by the husband or not. The third person with whom the wife leaves is also open to prosecution by his own wife, or his own family members in absence of the Section 198(2) of the CrPC, thus infringing on the right to privacy of that third person.

Journal of Legal Research and Juridical Sciences

CONCLUSION

Thus in the above paragraphs, a sincere effort has been put forth regarding the fact that Section 498 is an offspring of the colonial mindset during which the Indian Penal Code was drafted. It treats the woman as the chattel of man, and like recently struck down Section 497, allows the woman free movement and decision-making subject to her husband's approval, and any person is free to take her away if the husband permits. It also enforces Section 497 in disguise. Judicial review of Section 498 must be taken up in the changing times and in the light of the cases such as *Joseph Shine*, *Navtej Johar*¹¹, and *KS Puttuswamy*.

¹¹ *Navtej Johar v Union of India* [2018] AIR 4321 (SC)