
WHY WAS ADULTERY UNCONSTITUTIONAL

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ABSTRACT

This article explores the constitutionality of Section 497, IPC and its inclusion into the penal code. Firstly, the article explains why the provision was added into the penal code despite not being a part of the first draft of IPC under Macaulay and explores the reasoning behind penalizing only men and not women. The article then explains how the provision discriminated against women by explaining its application in four different cases – adultery by wife, adultery by husband with a married woman, adultery by husband with permission of the husband of the married woman, and adultery by husband with unmarried woman. Further, the article analyzes the constitutionality of the provisions in light of the decision rendered by the Supreme Court in *Joseph Shine vs. Union of India*. The article also analyzes the interpretation of this provision by the Supreme Court of India in different cases until it got struck down in the *Joseph Shine* case.

Keywords: Adultery, Section 497, *Joseph shine*, chattel of men, Dignity of women, Sexual autonomy, Section 198 CrPC.

Introduction

Section 497 of the IPC punished a man who had sexual intercourse with the wife of another man. The law was meant to protect the institution of marriage and the offence of Adultery was considered to be an offence against marriage. It held the husband of such woman as the aggrieved person. The provision, however, did not punish the wife even as an abettor, even if it was her who has instigated the crime. But why was it so? The provision punished only the third person, the man other than the husband of the woman, who performed sexual intercourse with the woman. Why not the woman?

Now, what if the husband performs sexual intercourse with another woman? If the woman he has sexual intercourse with, is a married woman, the husband of that woman will be the aggrieved person and may prosecute the offender. But what about the wife of the offender? The law does not provide that the wife could be an aggrieved person too.

Further, what if the husband has sexual intercourse with an unmarried woman? No offence is attracted in such a case. The wife of the offender is not an aggrieved according to the criminal law. Does that mean that the wife of a male adulterer cannot be aggrieved of adultery and only a male person whose wife commits adultery is the one aggrieved?

Does this not imply that the wife of a person is his property? That the husband secures ownership over the sexuality of his wife? Is this provision not a reflection of the patriarchal mindset where the men are considered superior, and women, inferior? Does the provision satisfy Equality under Article 14 of the Constitution of India? Does it honour the dignity of women in compliance with Article 21?

In this article, we will analyze the constitutionality of Section 497 (Adultery) of the Indian Penal Code (IPC), 1860 and Section 198 of the Code of Criminal Procedure (CrPC), 1973 in light of the judgement given by the Hon'ble Supreme Court of India in *Joseph Shine vs. Union of India* (2018 INSC 898).

Understanding The Inclusion of Adultery in IPC

The first few questions that come to the mind is why did the lawmakers include such an offence into the penal code and what was their intent behind such an inclusion. Was this provision a

result of male chauvinism or a need of that time? Was this provision even included at first in the penal code or was it added later?

First draft of IPC did not include Adultery

The first draft of the Indian Penal Code was prepared by the First Law Commission, chaired by T. B. Macaulay and presented before the then Governor General in 1837. The IPC as framed in 1837 did not include 'Adultery' as an offence punishable under the Code. Macaulay reasoned this in his notes to IPC by stating:¹

1. That the laws for punishing adultery are inefficacious in India from preventing the husbands from higher classes from taking law into their own hands;
2. That scarcely any husband of higher class has approached the court in cases of adultery for redress against his wife or her gallant as they think that the punishment imposed by the law is too lenient and that such acts must be punishable by death;
3. That husbands who recourse in cases of adultery to the courts are generally poor men who do not complaint of wound to their affection or honour but rather demand reimbursement for the expenses of marriage and complaint of the loss of a menial who they cannot easily replace.
4. That the condition of women in India is different from those of England and France. They are married while still children. At a very young age, they are often neglected for other wives and share the attention of their husbands with several other women. To throw the weight of penal law on the already depressed wives by punishing their inconstancy, while the husbands are allowed to fill their zenana with women, would weaken who are already too weak and strengthen hands already too strong.

It was further stated that the penal code is not considered to be a body of ethics and that the legislature ought not to punish an act merely because it is immoral. For instance, the rich man who refuses a mouthful of rice to save a starving person from death is far worse than a hungry wretch who snatches and devours the rice; yet we punish the latter for theft, and not the former

¹ Thomas B. Macaulay et al., *A Penal Code: Prepared by the Indian Law Commissioners, and Published by Command of the Governor General of India in Council (1837)*.

for hardheartedness. If an act is not punished by the legislature, it does not mean that the legislature considers that act innocent.

Then why was adultery included?

T. B. Macaulay, chairman of the First Law Commission and the principal architect of the IPC, concluded that possible benefits from an adultery offence could be better achieved through pecuniary compensation and that penalizing the same would serve little purpose.

However, the Law Commissioners disagreed with Macaulay's views in the Second Report on the Penal Code on considering the views of various persons. They considered the following perspectives:²

1. Colonel Sleeman's opposition in his letters: The rich man dreads the disgrace of appearing in one court after another to prove, through witnesses, both male and female, his own shame and his wife's dishonour. The recourse he chooses is to poison secretly or with his wife's consent. The wife would rather take it than be turned out into the streets a degraded outcast. The seducer, however, escapes with impunity. The silence of the penal code will give a greater impunity to the seducer while the wives would be in 3 out of 4 cases be murdered or driven to commit suicide.
2. Mr. Livingstone's observations: That where the law refuses to punish the seducer, the injured party would choose to do it for himself, and commit the greatest of all crimes. Assaults, assassinations, and poisoning will be the consequence. By giving the aid of law to punish the offence, which they intend to avenge, such consequences would be less frequent.
3. Views of a Deputy Sherishtadar: That Adultery is not committed only in the cases where the man has multiple wives. In the cases where a man has only one wife and to whose happiness all attention is paid, often corrupt their chastity in consequence of immoderate lust.
4. Observation of the Sudder Court, Noth-Western Provinces: It was observed that the laws relating to adultery have been, in practice, very useful and well-suited enactment to the feelings of the lower classes of community. It has helped in restoring domestic harmony.

² Cameron, C. H., et. al., Elliott, D., *The Indian Penal Code as originally framed in 1837* (Higginbotham and Co., 1888)

On these observations, the Commissioners decided to not omit the offence from the Code.

Why only men, and not women, were punished?

When the Commissioners in the Second Report to the IPC decided to not omit the offence of adultery, they decided to render the male offender alone liable of the offence. This decision was made after considering the remarks made in a note to the first draft of the IPC by Macaulay where he emphasized on the condition of women in the country to be one of the reasons why adultery must not be penalized in India.

Macaulay had observed that the status of women in this country was unfortunately very inferior to that of women in England or France. They were often married off at a very young age and may be neglected in favor of other wives while still in their youth. A husband frequently divided his attention among multiple wives. To enact laws that punish a wife's infidelity while simultaneously allowing a husband to maintain a zenana filled with women is a path he was deeply hesitant to follow. According to him, "It would strengthen the hands already too strong. It would weaken a class already too weak."

It was further stated that "It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable and mutually beneficial"³

Thus, upon looking at the conditions of women, and considering that it is generally the man who seduces the woman for adultery, it was decided that the man only shall be punished and not the woman.

Understanding Constitutionality of the Provisions Related to Adultery

Adultery was included and the cognizance of the offence was limited to adultery with married woman. Only the man who seduces the woman was rendered liable under the definition of the offence and this decision was backed by the reason relating to the condition of the women in the country at that time. So, it is understood, that to punish only the man and not the woman was justified according to the situations of the time the Code was being framed. But, is this exclusion of women from being penalized still relevant according to the current scenarios?

³ *Supra note 1*

More than that, the fact that the offence of Adultery is an offence against the 'husband' when the 'wife' performs sexual intercourse with another man, and not an offence against the 'spouse' when their 'partner' performs sexual intercourse with another person regardless of the gender is worth being questioned.

The question regarding Gender Equality: Is woman a property of man?

We will look into four Cases to understand whether Section 497 treats women as property their husbands.

Case 1: When a wife indulges into a sexual relationship with a man other than her husband (without the consent or connivance of the husband), the husband is considered to be aggrieved and the paramour of the wife is liable for the commission of the offence of Adultery. This implies that the provision aims at preventing infidelity from the part of the wife so as to protect the matrimonial relationship between the couple. In cases of inconstancy of the wife, it cannot be denied that there is a wound on the love, care, affection, and honour of the husband.

But what about the wife?

Case 2: When the husband of a woman indulges into a sexual relationship with a "married woman" other than his wife (without the consent or connivance of his wife), the wife is not an aggrieved person in the eyes of the law. However, the offender would still be punished because the woman he has sexual intercourse with is a married woman, i.e., wife of another man. The husband of the adulterer woman is considered aggrieved in the eyes of the law. The offender will be punished not because of his inconstancy towards his own wife, but because the woman he has committed Adultery with is a wife of another man.

Case 3: When the husband of a woman indulges into a sexual relationship with a "married woman" other than his wife (without the consent or connivance of his wife), but he does so with the consent or connivance of the husband of such woman, the offence of Adultery is not attracted. The wife of the Adulterer is not considered to be an aggrieved person in the eyes of law. This means that a man is at impunity if he commits Adultery with a married woman with the consent or connivance of the husband of such woman.

Case 4: When the husband of a woman indulges into sexual relationship with an "unmarried woman" (without the consent or connivance of his wife), the wife of such man,

again, is not considered an aggrieved in the eyes of the Penal Code. Section 497 is not attracted in such cases, as an unmarried woman is not a wife of another man. To state in slightly different terms, an unmarried woman is not the 'property' of another man yet.

Thus, on analyzing the above cases and the applications of Section 497 of the IPC, it is clear that the offence of Adultery aims at preventing infidelity from the part of the 'wife' in a matrimonial relationship in order to secure her chastity. The provision does not aim at preventing infidelity on the part of the husband, a man is only punished if he causes the inconstancy of the woman of another man. In other cases, a husband may be inconstant towards his wife, and Section 497 is not attracted. Such exemptions are not present for a wife, the paramour of a wife is always punished, and whether he is married, unmarried, or the sexual relationship was with the consent of the paramour's wife do not matter.

This makes it clear that the provision views women as a chattel of men. Such laws are a result of the patriarchal mindset of society where men are considered to be superior. In the current world, legislations of such nature have no place, as they harm gender equality and dignity of persons.

It wouldn't be incorrect to say that Section 497 denies to women a right which is given to men, i.e., denial of the right to prosecute the adulterer husband or the woman with whom the husband commits Adultery.

The question regarding the Dignity of Women

The Constitution of India is founded on the essential values of Liberty, Dignity, and Equality. Human Dignity has been repeatedly considered to be constituted under Article 21 of the Constitution by the Supreme Court. Human dignity recognizes the autonomy of a person in making their sexual choices. Section 497 disregards the sexual autonomy of a woman.

Further, by not criminalizing woman, the law presumes that the woman is 'submissive' and 'naïve' which has no legitimacy in discourse of a liberal Constitution.⁴

When a provision of law provides for such a view of marriage where it treats a woman as her spouse's property, the Constitution cannot not allow it. When a married man engages into a

⁴ *Joseph Shine vs. Union of India*, (2018 INSC 898).

sexual intercourse with an unmarried woman, the wife of the man is not considered by law as a person whose dignity is affected. That a woman, by marriage, consents to have sexual relation only with her husband and consents to not have sexual relation outside marriage without the permission of her husband is offensive to her liberty and dignity.

Although the legislature intended to protect the sanctity of marriage by inserting Section 497 to the penal code, they invaded the dignity of women.⁵

The Interpretation of S.497 by the Supreme Court of India

The constitutionality of Section 497 and Section 198 were challenged in *Joseph Shine vs. Union of India* (2018). The five-judge bench, comprising of the then Chief Justice of India Deepak Mishra, R. F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra, JJ., unanimously struck down Section 497 of the IPC and Section 198 of the CrPC in its judgement. The court overruled the earlier judgements of the Supreme Court in *Sowmithri Vishnu vs. Union of India* (1985) and *V. Revathi vs. Union of India* (1988). Let us discuss the major cases relating to the provision.

Yusuf Abdul Aziz vs. The State of Bombay (1954 AIR 321)

The question before the Supreme Court in this case was that whether Section 497 of the IPC contravenes Article 14 (Equality before law) and Article 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) of the Constitution of India. The challenge was made as only a man could be held liable for adultery under Section 497 and a woman is not liable even as an abettor.

The court held that by excluding women from being penalized, Section 497 does not contravene Article 14 and 15 of the Constitution as it is saved by clause (3) of Article 15 itself. The court considered Section 497 as a Special Provision for women and children under Article 15(3).

Sowmithri Vishnu vs. Union of India (1985 AIR 1618)

The facts of the case are that the petitioner is a wife challenging the validity of Section 497 of the IPC. Her husband had filed a divorce petition in the court and the decree was granted in

⁵ *Id.*

favour of the husband on grounds of desertion. Further, the husband had also filed a petition against the paramour of the wife, alleging that the wife was living in adultery with her paramour. In response to this, the wife filed a writ petition challenging the validity of Section 497 on grounds that the said provision is violative of Article 14 of the Constitution.

The petitioners argued that the provision denies the right to the wife to prosecute the woman with whom her husband commits adultery; the provision does not confer the right to the woman to prosecute her husband who has committed adultery; the provision does not consider the cases where the husband has sexual relations with an unmarried woman giving him a free license to have extra-marital relations with unmarried woman.

The court, relying on the judgement delivered in *Yusuf Abdul Aziz vs. State of Bombay*, held that Section 497 is not violative of Article 14 of the Constitution. In reply of the first argument, the court stated that no constitutional provision is infringed by limiting the class of offender to men only, as in general, it is the man who is the seducer and not the woman. Further, it is the legislature to consider whether Section 497 should be amended in accordance to the transformation which the society has undergone with time.

V. Revathi vs. Union of India (1988 AIR 835)

The petitioner in this case argued that Section 497 discriminates against her on grounds of sex as it does not allow the woman to prosecute her husband who commits adultery. The argument was that whether or not the law allows the husband to prosecute the wife if she engages in sexual relations with another, the wife should be conferred the right to prosecute the husband if he commits adultery.

The court held that the law by not allowing the husband and the wife to prosecute each other in cases of Adultery provides them with a chance to either ‘make-up’ or ‘break-up’ with their matrimonial relationship rather than dragging each other in criminal court and sending each other to jail. The purpose of not allowing them to prosecute each other is to save the matrimonial relationship and to promote social good.

Joseph Shine vs. Union of India (2018 INSC 898)

The Constitutionality of Section 497, IPC and Section 198, CrPC were again challenged in the Supreme Court in this case.

The court held that Section 497 of the IPC and Section 198 of the CrPC are unconstitutional. The court also overruled the decisions of *Sowmithri Vishnu vs. Union of India* and *V. Revathi vs. Union of India*. It was observed that the limited ratio of the judgement of *Yusuf Abdul Aziz vs. The State of Bombay* merely refers to the last sentence of Section 497 which it upholds. It does not extend to upholding the provision in its entirety.

The court observed that the provision is manifestly arbitrary, has lost its rationale long ago, and has become utterly irrational in today's age. That it violates Article 14 and is a result of paternalistic notion of a woman being likened to chattel. It also violates Article 21 of the Constitution due to its invasion into the privacy and dignity of the woman. The law was also said to not respect the sexual autonomy of women.

Conclusion

At first glance on Section 497 of the IPC, it may look like a provision discriminatory against men as it does not punish the woman who engages into sexual intercourse outside marriage but only punishes the man even if it is the woman who instigates the offence. The woman is not punished even as an abettor. For this, the Law Commission of India in its 42nd report recommended that the man as well as the woman committing adultery should be punished with an imprisonment which may extend to 2 years or fine or both. The Commission believed that the 5-year punishment in the provision is unreal and should be reduced.

But, on a closer look, we come to know that more than being discriminatory to men, the provision discriminates against women. It ignores gender equality, dignity, sexual autonomy, and liberty. The provision, in fact, does not consider the sexual intercourse of a married man with a woman as Adultery if the woman was unmarried (i.e. not a property of another man) or if the husband of the woman has granted the permission for such relationship. The wife of the Adulterer has no remedy and she is not considered as a person whose dignity is affected. Only a husband whose wife has had intercourse outside marriage could be aggrieved of Adultery, not a wife whose husband has had intercourse outside marriage. This resulted into the provision getting struck down by the apex court in the 2018 case of *Joseph Shine vs. Union of India*.

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