INDIAN CONSTITUTIONAL AID ASSOCIATION

ANALYSIS

LEGAL STANDPOINT ON ADULTERY

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INTRODUCTION

Adultery was challenged by Joseph Shine back in 2017 and there were numerous discussions about whether the law was valid or not. On one hand, a section of the people of India believed that decriminalizing the section would affect the culture and the sanctity of marriage. On the other hand, the opinions were revolving around the issue of the law being skewed, sexist and the foundation of the law was disrespectful towards women. The 158-year-old, archaic, Victorian moral-based law is more about treating women as 'property of their husbands. The act of adultery is unethical and it breaches the trust of a person and the marriage, but should the person be sent to jail for that?

Before 2018, extramarital affairs or adultery was considered and established to be a crime under section 497 of the Indian Penal Code which reads: 497...."*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.*"

Adultery, therefore, means having a sexual relationship while being married, with someone else but its application is restricted to a man who has consensual sexual intercourse, with the wife of another man, without his consent. A woman, according to this provision, is blameless and a victim.

LEGAL STANDPOINT

Section 497 was a pre-constitutional law, enacted in 1860. At that point in time, women had no rights independent of their husbands and were treated as chattel or "property" of their husbands. Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a "theft" of his "property", for which he could proceed to prosecute the offender. The first draft of the IPC released by the Law Commission of India in 1837 did not include "adultery" as an offence. Lord Macaulay was of the view that adultery or marital

infidelity was a private wrong between the parties and not a criminal offence[1]. This was an archaic law based on the mindset that women can be treated as chattels. Therefore, this was a bad law right from the inception and has been challenged in the Supreme Court since 1954 but was only decriminalized in 2018.

On the face of it, it seems like this provision was made "for women" but it enforces a construct of marriage where one partner is to cede her sexual autonomy to the other, therefore being antithetical to the fundamental rights guaranteed by the Constitution of India. This law was founded on the notion that a woman, by entering into marriage, loses her voice, autonomy, and agency, moreover, this law ensured the husband's control over the sexuality of his wife. It is a glaring example of how women were perceived to be and the mindset of the people of India at that time. An unethical, but a completely personal decision was criminalized by this provision which subsequently denied an individual bodily autonomy by placing a penal restriction on the act of choosing a sexual partner, violating the fundamental right of privacy, and creating a gap between men and women.

A close friend of Petitioner in Kerala committed suicide after a woman co-worker charged him with malicious rape, after which this petition was filed to protect Indian men from wrongly being punished by a vengeful woman or their husbands for extramarital relationships. The petitioner, therefore, filed a PIL under Article 32 of the Indian Constitution was filed by Joseph Shine, challenging the constitutionality of adultery as an offence under Section 497 of the IPC read with Section 198(2) of the CrPC that talks about offences relating to marriage. The respondents in the case stated that decriminalizing this section will lead to the destruction of the sanctity of marriage has a very illogical thought behind it. By criminalizing this act, the women are all the more burdened with the compulsion of upholding that family, keeping it together. This is indirectly forcing the wife to stay in the marriage. This view was rejected by a five-judge bench of the Supreme Court of India, namely Justice Deepak Misra, Justice A.M. Khanwilkar, Justice D.Y Chandrachud, Justice Indu Malhotra, and Justice R.F. Nariman and the bench struck down section 497 of the Indian Penal Code and held that the offence is unconstitutional, it violates Article 14, 15, 21 of the Constitution of India and the dignity of a woman, her right to privacy and denudes her sexual autonomy. struck down this law as a crime and continued it as a civil wrong, making it a

ground for divorce only.

The view taken by the Supreme Court is in sharp contrast with the observation made in the matter of Sowmithri Vishnu v. Union of India 1985 A.I.R. 1618, wherein the Court held that men are not allowed to prosecute wives to protect the sanctity of the marriage and for the same reason, women are also not allowed to prosecute their husbands. Former CJI Dipak Misra summarized the issue by observing that "*Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said act should be made a criminal offence, especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would be tantamount to punishing people who are unhappy in marital relationships, and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make the distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness*."[2]

LAW AND MORALITY

From the perspective of the Hart, Devlin debate started in the 1960s, deciding whether the law should enforce morality, Professor Hart and Lord Devlin debated about what the law 'ought' to be and whether morality should be enforced by law to form a good society[3]. Jurisprudence analyses what would be the best form of law to form a civil society where both individual liberty and normative goals are practiced. Should the aim of law be primarily focused on the protection of individual liberty or, instead, the normative goals aimed at the good of civil society? The laws in any society should not only be focused on normative goals it should also protect individual liberty. Professor Hart discussed the connection between crime and sin and to what extent should the law be concerned with the enforcement of morals and the punishment for immorality. According to Devlin, there are certain moral principles

aimed at the good of civil society and a breach of those morals is a social offence. Regarding these issues, Lord Devlin put forward three questions.

1. First 'Does society have the right to pass judgment regarding morality? Ought there to be a public morality, or are morals always a matter for private judgment?'[4]In Devlin's view, public morality exists. A civil society does have the right to pass moral judgments and morality is not always a matter of private judgment.
2. Devlin's second question was that if society has the right to pass judgment does it also use the law as a weapon to enforce it? Devlin said society does have a right and a civil society uses the law to preserve morality to safeguard social morals[5]. Civil society has an indefinable right to legislate against internal or external damages. Further, Devlin thought about how moral judgment in civil society should be considered. To consider public morals the law is not looking for true belief but what is commonly believed by individuals in civil society as a whole.
3. The third question is whether the weapon of law should be used in all cases or some cases? If not in all cases what should be in mind? Devlin realizes that citizens cannot be expected to social judgments on every aspect of their lives. Therefore, there must be a balance between normative goals in civil social and individual interest. It is difficult to suggest how the balance ought to be struck. However, Devlin believes there are certain principles that legislators should bear in mind when enacting the law and enforcing morals. Before a civil society does things beyond the limits of tolerance judgment has to be purposeful where any action is dangerous. The legislature should also remember that the limits of tolerance often shift but that does not always mean that the standard of morals will also shift but the extent to what society will tolerate may be limited. Devlin explained moral standard changes from generation to generation so the law should intervene slowly striking a balance between individual liberty and the normative goals aimed at the good of civil society bearing in mind as to what morality changes with time. While Professor Hart's approach is more idealistic and belonged to a different time, due to the level of rigidity attached to its theory, Professor Devlin's approach is more futuristic and flexible with the changing times and scenarios

In context to Adultery and the Supreme Court striking down the Adultery Law in India, we

understand that Delvin's theory of law, stating that certain breaches of morals are a social offence and not a criminal one and do not deserve penalization, has been upheld by the bench that delivered the historical judgment of Joseph Shine v. Union of India. The Court believed that "*The notion that a woman is 'submissive', or worse still 'naive' has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to the equality and destructive of the dignity of the woman*"

The three-judge bench, led by former CJI Dipak Misra was of the view that it's time to bring focus on the rights of women. Before the Joseph Shine judgment, Section 198 of the Code of Criminal Procedure, 1973, stated only the husband of the married woman, who had sexual intercourse with another man, could file a case against the male who indulged in the act with her. This petition had also challenged this section of CrPC. In India, adultery is still a ground for divorce under Section 13 (1) of the Hindu Marriage Act, 1956. It means that a woman can have sexual intercourse with many men and the husband can file a complaint against all those men and not the woman whereas, if the husband has sexual intercourse with many women, the wife cannot file a complaint against anyone on the grounds of adultery.

Adultery was enacted around 158 years ago, the mentality and theories behind the provisions of this law are not a practical approach in this century. The law also mentioned that without the consent or connivance of that man which means that this is a crime only if you don't have the "permission" of your husband. This penal provision was based on gender stereotypes about the role of women. It's illogical to say a sexual act is not an offence if it's done with his (husband's) consent. When the court decided to strike this section down by decriminalizing adultery, the bench proved that India has progressed and such absurd, gender-biased laws have no space in our country anymore.

CONCLUSION

In a democratic society, one cannot impose morals in the name of laws and make private affairs a crime. Making only men prosecutable or for that matter, only men having the power to complain can in no way preserve the sanctity of marriage. Marriage is a private affair between two people and if we start subjecting laws to our rationale, it would lead to chaos, as

a counter-narrative would always exist. As stated by Justice Indu Malhotra during the hearings of the case, "*A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore ex facie discriminatory against women, and violative of Article 14. Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything unreasonable, discriminatory, and arbitrary*."

References

[1] Devika, "Adultery [S. 497 IPC and S. 198 (2) CrPC]", available at: https://www.scconline.com/blog/post/2019/02/21/adultery-s-497-ipc-and-s-1982-crpc/

[2] Joseph Shine v Union of India (2019) 3 SCC 39

[3] What Would Be the Best Form of Law in Order, Law Teacher (July 31, 2021, 10:00 A.M) https://www.lawteacher.net/free-law-essays/jurisprudence/what-would-be-the-best-form-of-law-in-order-jurisprudence-law-essay.php#ftn16

[4] What Would Be the Best Form of Law in Order, Law Teacher (July 31, 2021, 10:15 A.M) https://www.lawteacher.net/free-law-essays/jurisprudence/what-would-be-the-best-form-of-law-in-order-jurisprudence-law-essay.php#ftn16

[5] Stephen S. Owen, Henry F. Fradella, Tod W. Burke, Jerry W. Joplin, Foundations of Criminal Justice, Oxford University Press (July 31, 2021, 11:00) https://global.oup.com/us/companion.websites/9780195387322/chapter3/summary/