

JOSEPH SHINE V. UNION OF INDIA: A TRANSFORMATIVE STEP WITH CHALLENGES AHEAD

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Abstract

Indian Penal Code was made much before our constitution, that constitution which empowers every citizen with equal rights. Hence there are various provisions which have element of stereotypes and needs to be struck down. Rarely this has happened that a provision has been struck down, but adultery verdict, Joseph Shine v. Union of India is a monumental change in step to constitutionalising criminal law. This is because often this connection is overlooked. This comment analyses the Joseph Shine judgment and argues that this judgment paves way to transformative constitutionalism and protects fundamental right to privacy of matrimonial sphere. Also this paper discusses various challenges which will arise especially after this judgment and suggests possible solutions to them.

Keywords: Joseph Shine Case, Adultery, Indian Penal Code, etc.

Introduction

*Joseph Shine v. Union of India*¹ is a writ petition filed which challenges the constitutional validity of section 497 of IPC which makes adultery a criminal offence, and prescribes a punishment of imprisonment up to five years and fine.

It reads as: *Adultery: "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"*.

The Supreme Court has struck down this 158 year old provision and held that this provision is constitutionally invalid. This judgment has undergone various criticisms as well as appraisals; bird eye view will not help in understanding the impact of judgment. Researcher has tried to critically analyze the judgment keeping in view all the latest judgment which has been pronounced by honourable Supreme Court.

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1 *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 783.

“A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom- To develop her personality to the full as a man. When she marries, she does not become the husband’s servant but his equal partner. If his work is more important in life of the community, hers is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals”.

These lines from the judgment by Justice Misra gives clear idea that wife is not servile to husband instead she is equal and should be equally respected in matrimonial sphere. Our country talks about women empowerment, their freedom but at various stages women are invisible to law. And one such provision is Section 198 of the Code of Criminal Procedure, 1973 which prevents wives from filing complaints against adultery.

Procedural Background

The question of the constitutional validity of Section 497 of the Indian Penal Code and Section 198 of the Criminal Procedure Code has arisen before the Supreme Court multiple times. *Yusuf Abdul Aziz v. State of Bombay*² was the first case on constitutionality of adultery provision. However hon’ble court held that this provision was saved by clause (3) of Article 15 of the Indian Constitution which provides for special provisions in the case of women and children.

Then in another landmark case, *Sowmithri Vishnu v. Union of India*,³ where it was held that *Matrimonial home is a sacrosanct home, nurtured by love of husband and wife and whoever tries to break this sanctity is punished by law. Moreover law does not want husband and wife to hit each other with weapon of criminal offence. And hence this law is even handed justice.*

After that came, *V. Revathi v. Union of India*,⁴ where it was held that this section doesn’t discriminate on the ground of sex but still various questions were left unanswered. This is because at first blush this legislation appears to women empowering but is actually blot on dignity of women, as it considers women as chattel. And *Joseph Shine v. UOI* knocked on the doors of hon’ble court on the issue of unconstitutionality of section 497 of IPC.

2 *Yusuf Abdul Aziz v State of Bombay*, 1954 SCR 930.

3 *Sowmithri Vishnu v. Union of India and another* SCC 137: AIR 1985 SC 1618.

4 *V Revathi v. Union of India*, (1988) 2 SCC 72.

Archaic Laws in the Progressive Society : A Direct Discrimination against Women

There were times when women were a chattel, invisible to law and were hidden by the shadows of her husband. But gone are the days when women were subjugated and servile to men. Today ideologies are changing and it's well said, "*in a changing society law must march in tune with the changed ideas and ideologies*". Hence empowering judgments like triple talaq judgment have proved that Women will not suffer on whims and fancies of the husband.

In this provision that is section 497 of the IPC, women were treated like a chattel. This section was a denial of substantive equality in that it reinforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse. Moreover they did not have right to file a complaint against the husband and consent of the husband was given more importance than her respect and status. These grounds actually make this provision as an archaic law.

Check on Constitutional Validity of Archaic Provision

The beauty of our Indian Constitution is that it ensures equal rights to all and aims to protect downtrodden, marginalized as well as minorities. Such a compassionate document nurtured with judicial sensitivity has developed golden triangle of fundamental rights. These rights need to be protected but when a woman is treated unequally by the law and when her status is subordinate to the partner, when she has no legal representation then such law violates Article 14 and 21 of the Indian Constitution.

Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Moreover the law which had got approval few decades back does not mean cannot be changed with changing times. 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. And hence on these grounds this law got quashed by the honourable Court in Joseph Shine case.

Dignity of a woman is a part of her nonperishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honor which matters the most. It is sacrosanct. But cases have shown that women were being considered chattel, they did not have freedom on their own sexual agency. This is actually a blot on the society, as such a provision by itself challenging her dignity, violating her right to life.

Moreover in *E.P. Royappa v. State of Tamil Nadu*,⁵ it has been clearly laid down an arbitrary law stands the wrath of Article 14 of Indian Constitution. And this penal provision stands arbitrary and hence the Apex Court by quashing this provision has given justice to a wife who had been compromising with her individual dignity from ages and suffocating in a marital knot.

Intrusion in Privacy of Matrimonial Sphere: Criminalization of Offence

This Judgment is also a progressive step in a country where privacy is a fundamental right. The *KS Puttuswamy*⁶ case has actually laid down privacy as a facet of Article 21 and has laid immense stress on dignity. Criminalization of adultery and adultery provision per se was not just hampering dignity of women but also men's also. Although marriage is a societal approval but relationship between two is a completely private affair and I personally feel that the state should not interfere in it especially in a country where privacy correlates to dignity.

Moreover, the offences like domestic violence and bigamy which also are attached with a penal provision are actually different. Adultery is an extremely a private act of the matrimonial sphere. Moreover, adultery was made an offence to create deterrence but has actually not protected women instead has degraded the status of marriage and women. Adultery should continue to be a matrimonial offence, because infidelity by the partner shakes the rock of a building. But the law commanding and penalizing the culprit is barbaric in present times when there is a believe that dignity is like a sound that is not heard which, has its sound, it is natural and human.⁷ And on following International trends worldwide like South Korea and Guatemala have also strike down such provisions on criminalization of adultery as they intrude into privacy of marriage.

5 *E.P. Royappa v. State of Tamil Nadu* 1974 4 SCC 3.

6 *K.S. Puttaswamy and another v. Union of India and others* 2017 10 SCC 1.

7 *Common Cause (A Registered Society) v. Union of India and another* (2018) 5 SCC 1.

Doctrine of Principled Criminalization

Malhotra J. in the Joseph Shine Judgment observed that *for something to be a crime has to be a public wrong*. She meant that the State must follow the minimalist approach in the criminalization of offences. And when we put adultery on this scale, we find that adultery does not cause a legally or judicially cognizable harm hence; there is no reason for the State to interfere with it.

Even on point of homosexuality, I feel that we are tending towards a path of transformation as decriminalization of Section 377 also fosters the principle that state should act as an enabler of rights instead of being an intervener. Hence, these judgments have contributed to constitutional jurisprudence in shape of doctrine of Principled Criminalization.

The belief that excessive interference of state with marital relationship can destroy the institution of marriage holds true when the offences are like adultery and Triple Talaq, where there is no harm to bodily integrity of a wife, but offences like marital rape need to be criminalized. Marital Rape is a disgraceful offence that has scarred the trust and confidence in the institution of marriage. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually and hence violative of Article 21 of Indian Constitution.

Hence, thinking of adultery from the point of view of criminality would be a retrograde step. This Supreme Court has travelled on the path of transformative constitutionalism and, therefore, it is *'absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression'*. Hence, to treat adultery as a crime would be unwarranted in law.

And to bolster this argument I would like to refer Section 377 judgment,⁸ which paved way for doctrine of progressive realization of rights. Also triple talaq judgment which held that Constitutional democracy of India cannot conceive of a legislation which is arbitrary and upheld that *"statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine"*⁹. The Sabrimala verdict which held that Notions of "purity and pollution", which stigmatize individuals, have no place in a constitutional order¹⁰ and allowed entry to women in temple is another epitome

8 *Navtej Singh Johar v. Union of India, WP (Crl.) No. 76/2016.*

9 *Shayara Bano v. Union of India; (2017) 9 SCC 1.*

10 *Indian Young Lawyers Assn. v. State of Kerala, 2018 SCC OnLine SC 1690.*

that shows that constitutional democracy is to transform the society progressively and inclusively.

But as seen the legislative attempt to criminalize triple talaq has more demerits than merits. It actually has victimized women and has failed to meet the main purpose that is empowerment women against pernicious practices like triple talaq. Similarly after this adultery judgment there are various challenges and obstacles which can hinder the aim. This is because after decriminalization of homosexuality as well as adultery, homosexual relations in matrimonial home under the nose of wives can actually destroy the peace of the marriage. But as always Parliament has aimed at ensuring welfare of women by effective legislation, now rest this pivotal responsibility on this pillar of democracy. After all *“The legislature is the best judge of what is good for the people by whose suffrage it has come into existence.”*

Impact of this Decision: Challenges Ahead

This judgment is considered to be a progressive step taken by our Indian Judiciary. This step is a step towards transformation. However, still Indian society is not prepared for this progression, on a bird eye view everything seems emancipating and transformative but reality cannot be ignored.

Rights of Children Born out of Adulterous Relations

Family is a private sphere, which is not just confined to husband and wife, it also comprises of children who need to be nurtured by love of both mother as well father. This progressive judgment will invite huge number of live-in-relationships under the nose of spouse. Live-in-relationships have been recognized by Supreme Court in recent judgment, *Nand Kumar v. State of Kerala*¹¹ but when it comes to rights of children out of such marriage or maintenance of spouse the law is very silent on all that.

The Impact of Adultery on children and their future

Previous to Joseph Shine judgment, adultery was a criminal offence but now it is not and hence no more a deterrence to extra-marital affairs. This affair of a husband or wife not just destroys the peace of home but also questions the bringing up of a child. A child who comes to know of such affairs of his parents is ostracized from society; his entire life turns into a big

¹¹ Nandakumar v. State of Kerala, 2018 SCC OnLine SC 492.

question. A child who is a victim of his parents' divorce is bereaved of love and affection, which is but natural to deviate and leads to increase in juvenile delinquency.

This above Para, discussed the plight of a child who is out of a legitimate relation, we can't ignore miseries of child out of live-in or not from valid marriage, who is labeled as illegitimate. Adulterous relations make such innocent to struggle in society, who doesn't have a legitimate father name, neither any share in family and further to extend no right even in family coparcenary. He or she has to bear the brunt of the illegitimate relations of their parents.

In a transformative judgment, *Revansidappa v. Mallikarjun*,¹² Supreme Court held and recognized rights of illegitimate child: *A child needs facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.* But still there is no substantive law on rights of such children, which actually has become need of hour especially after adultery verdict and recognition to live in. This demands change in personal laws of various religion especially Hindu religion where section 16 of Hindu Marriage Act, 1955 and Hindu Succession Act completely ignore rights of such children.

Need for Recognition of Rights of Paramounts which are Now Denied under the Law

If we are talking about children, we cannot ignore the rights of their mother. Women under Section 125 of CrPC and in personal laws even have been given rights like maintenance but women in such relations are labeled by society as women of easy virtue, they are slut shamed and completely ignored. In leading cases, like *Vidhyadhari v. Sukharna Bai*,¹³ a woman who lived with the man for his entire life was not given right. So Indian Judiciary if has adopted the path of transformative constitutionalism, it has to pave way for all these issues as well, because a peaceful home is not which has food to eat but where every member is happy and recognized. Hence rights of such women should even be recognized, who either by choice or circumstance was with a man who was already of someone else's. This is because already after decriminalization of adultery, we have failed protect a marriage, so why reduce a paramount to indignity and economic degradation.

¹² *Revansiddappa v. Mallikarjun*, (2011) 11 SCC 1.

¹³ *Vidhyadhari v. Sukharna Bai and Ors* 2008(1) UJSC 0224, *Rameshwari Devi v. State of Bihar*, 2000 (1) P.L.J.R 493.

Preparedness for Homosexual Infidelity in Marital Relations

Another Issue for which Indian Judiciary has to prepare is homosexual relations combined with adultery, especially after decriminalization of section 377 of the IPC. A wife who finds her husband in relation with another man, will not just be traumatized but also has to prepare herself for divorce, especially when most of the religion defame divorce and consider it as a disgrace. If article 21 gives personal liberty to the choice of sexual orientation, it needs to prepare society also for that liberty. This is because even today our personal laws govern us and hegimonise our various actions.

Conclusion

A matrimonial home has to prepare for such drastic changes which our Indian Judiciary has paved for us. Though they are drastic but not devastating, they just need preparedness from society as definition of morality, values, relations are changing parallel with personal liberty.

Joseph Shine is progressive judgment by Indian Judiciary. This judgment has restored the dignity of a woman previously denied by an archaic law. However marriage is not a knot of two individuals, it is a beginning of many relations. Undoubtedly, this judgment has improved the position preexisting in a matrimonial home. But decriminalization, will also lead to lose deterrence and abuse of pious knots of marriage. Simply to put, children, associated to this relation will have detrimental effect and subsequent children born outside nuptial knots also have to face wrath of dogmatic society. But amendments in laws as suggested above can actually help in pave a way to liberalized society which Honorable Supreme Court has imagined.