

**JOSEPH SHINE OUTSHINES S.497 IPC: REVISITING THE LAW ON ADULTERY IN  
INDIA.**

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**ABSTRACT:**

This paper deals with the outshining vis-à-vis the repealing of the law on Adultery that was envisaged under section 497 of the IPC vide the decision laid down in the landmark case of Joseph Shine v Union of India in 2018. The much outdated, outmoded, sexist piece of law embedded with gross inequality in the treatment of genders in terms of punishment as well as culpability needed to be struck off since time immemorial. However, as the saying goes, better late than never as long as the sanity and prudence of human judgment prevails without bias and arbitrary discretions. The authors welcome this change and hail the Hon'ble apex court in breaking the clutches of the age old victorian mores of the cliché understanding of sexuality to give way to more refreshing, rational and logical grounds in the pronouncement of a judgment in lines with time, societal conditioning and impartial outlook towards genders.

**Key Words:** adultery, IPC, Section 497, amendment, Joseph Shine

A journey of a codified law that transcended generations and withstood the test of time not necessarily for the quality of its codification but more due to the apocalyptic patriarchal underpinning that thwarted the progressive ideology of the human race. A journey from J Y.V. Chandrachud to J Dhananjaya Chandrachud: Law is dynamic and somewhere 'generations' define the law.

Marriage, in India, is understood as a sacrosanct union of man and woman for the purposes of procreation, economic interdependence and socialization of children.<sup>1</sup> This relationship creates specific and definable obligations for spouses towards each other. The most prevalent form of marriage in India is the institution of monogamous marriage. In that context, adultery is primarily a violation of the sacred duties of a spouse.

Adultery is an act of voluntary sexual intercourse between a married person and a person who is not their

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<sup>1</sup>Ranjana Kumari, INDIAN MARRIAGES-ECONOMIC INDEPENDENCE AND CHANGING POWER RELATIONS, 92 (Gavin W. Jones, 2004).

spouse.<sup>2</sup> This definition is simple enough and may seem conclusive. But adultery has been defined differently in different societies and legal jurisdictions over different periods of time. For example, ancient Hindu law defined adultery as sexual intercourse between a married woman and a man who is not her spouse, targeting married women.<sup>3</sup> In the state of South Carolina adultery is only committed when it is a habitual act or through repeated sexual intercourse.<sup>4</sup> Common to all societies where monogamous marriage as an institution exists, is the need to regulate sexual conduct of married persons. The purported aim of such criminal sanctions is to promote marital and family stability, to protect the rights of spouses over each other, and to prevent pregnancy outside of marriage.<sup>5</sup>

In India, adultery has a broader construction under civil law as opposed to criminal law. Under criminal law, adultery is committed by a person who engages in consensual sexual intercourse with a married woman.<sup>6</sup> Under civil law, which is codified in the various personal laws of different religions such as the Hindu Marriage act<sup>7</sup>, Special Marriage Act<sup>8</sup>, The Divorce Act<sup>9</sup>, Parsi Marriage and Divorce act<sup>10</sup> adultery can be committed by both husband and wife. The consequences under civil law are that adultery is a ground for divorce. On the contrary, criminal law only punishes the person who engages in sexual intercourse with the married woman. Civil law remedies seek to resolve the issue between the parties in the marital union whereas criminal laws places the blame for the adulterous action upon an outsider to the marriage.

The provision that criminalizes adultery in India is part of the Indian Penal Code, drafted in 1860 under the chairmanship of T.B. Macaulay and subsequently Sir John Romilly.<sup>11</sup> It is necessary to understand the historical conception of adultery in England. Adultery has not been a crime in England since 1857<sup>12</sup>, it has always been defined akin to a tort of conversion or trespass to property. In 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife was "the highest invasion of property" and claimed, in regard to the aggrieved husband, that "a man cannot receive a higher provocation".<sup>13</sup> This conception of the wife as the 'property' of her husband is conspicuous in section 497 of the IPC and section 198(1) read along with 198(2) of the Crpc.

In the first draft of the Indian Penal Code, Sir T.B Macaulay opposed the criminalization of adultery on the following grounds; first, such a law is ineffective in preventing acts of violence by men against their wives or paramours. Secondly, the interest of the man is in preventing the wife from leaving the marital union and to protect his own reputation none of which is accomplished by criminalizing adultery.<sup>14</sup> The second Indian law commission focused on the necessity to protect morality and decency and hence suggested that adultery be criminalized. Only the adulterous man was to be punished because, according

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<sup>2</sup> P.S.A. Pillai & K.I. Vibhute, P.S.A. PILLAI'S CRIMINAL LAW, 544, (LexisNexis, 11<sup>th</sup> ed., 2014)

<sup>3</sup> Laws of Manu, V, 154; VIII, 371.

<sup>4</sup> *Adultery Laws: where is cheating still illegal?*, in THE WEEK, February, 27, 2015, <http://www.theweek.co.uk/62723/adultery-aws-where-is-cheating-still-illegal>.

<sup>5</sup> Debra B. Bergoffen, *Marriage, Autonomy, and the Feminine Protest*, HYPATIA JOURNAL OF FEMINIST PHILOSOPHY 18-35 (1991)

<sup>6</sup> Section 497, Indian Penal Code 1860.

<sup>7</sup> Section 13(1)(i), Hindu Marriage Act, 1955.

<sup>8</sup> Section 27 (1)(a), Special Marriage Act, 1954.

<sup>9</sup> Section 10(1)(i) of The Divorce Act, 1869.

<sup>10</sup> Section 32(d) of the Parsi Marriage and Divorce Act, 1936

<sup>11</sup> M.P. Jain, *OUTLINES OF INDIAN LEGAL HISTORY*, 15, (N.M. Tripathi.1984).

<sup>12</sup> Ann Summer Holmes, *The Double Standard in English Divorce Laws, 1857-1923*, 20(2) LAW AND SOCIAL ENQUIRY 601, 605 (1995).

<sup>13</sup> Samuel H. Pillbury, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER*, 154, (New York University Press 1998).

<sup>14</sup> MACAULAY'S DRAFT PENAL CODE, NOTE Q (1837); *as cited in* The 42nd Report of the Law Commission of India, (1971).

to the drafters due to the inferior position of women in society they could not be held accountable for their actions.<sup>15</sup>

### **Section 497: An Analysis**

In order to fully understand the implications of the criminal law on adultery in India, it is necessary to delve into the section that imposes this sanction. The section criminalizing adultery reads:

“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.”<sup>16</sup>

“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”

Section 497 limits the offence to adultery to sexual acts between a married woman and a man who is not her husband. Adultery committed by a man with an unmarried/widowed woman is not be punished under the substantive penal law of India.

“Without the consent or connivance of that man”

If a man consents to sexual intercourse between his wife and another man, the crime of adultery has not been committed. This reduces the status, dignity and moreover the existence of the wife to a mere chattel of the man, a mere possession he may dispose to another’s use. Possession is established when a person has the right to use certain property and may also transfer this right to another person.<sup>17</sup> This provision extends this right of possession to a husband over his wife.

“Sexual intercourse not amounting to the offence of rape”

The act of rape against a wife would not amount to the offence of adultery. The necessary implication is that the offence is only committed when there is consensual sexual intercourse. Therefore, only the adulterer is held liable for a crime that both parties consented to.

“In such case the wife shall not be punishable as an abettor”

Abetment is defined under section 107 of the Indian Penal Code. Abetment may be an action that instigates a person to commit a crime; it may be a conspiracy to commit a crime or it may be an intentional aid or illegal omission to commit a crime.<sup>18</sup> In the case of adultery a woman commits the offence of abetment by intentionally aiding the doing of that thing. The offence of abetment is committed by the expression of consent for sexual intercourse. Section 497 prevents the punishing of women for the offence of adultery even as abettors. This stems from the presumption that a woman’s consent is not free and is cultivated by the adulterer. Thereby, the woman by law is incapable of being a seductress who cannot even try to lure a man into carnal intimacy.

In furtherance to the substantive provision defining the ambit of adultery within the Indian Penal Code, section 198 of the Code of Criminal Procedure ostensibly provides an exception to the general rule that any person aware of an offence is at liberty to report it pertaining to crimes against marriage. Looking deeper, section 198(2)<sup>19</sup> prevents any person other than the husband to report a crime under section 497.

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<sup>15</sup> SECOND REPORT ON THE DRAFT INDIAN PENAL CODE (1847), pp. 134-35, cited from, Law Commission of India,

<sup>16</sup> Section 497, Indian Penal Code, (1860).

<sup>17</sup> Syed Shamsul Huda, PRINCIPLES OF THE LAW OF CRIMES, 303, (Eastern Book Company, 1982).

<sup>18</sup> Section 107, Indian Penal Code, 1860.

<sup>19</sup> Section 198(2), Code of Criminal Procedure, 1973 reads :

(2) 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.

Furthermore, any person who has care of the wife in the absence of the husband may also report the crime under section 497. No corresponding right exists for the wife. Consequentially, the law effectively prevents the wife or any other person from bringing a case of adultery under the criminal law against the husband.

### JUDICIAL INTERPRETATION

The Supreme Court had on multiple occasions upheld the constitutionality of the criminalization of adulterous relationships as contained in the Indian Penal Code. The following decisions have time and again upheld that the provision is not gender discriminatory and is in the best interests of marital and family stability.

In *Yusuf Abdul Aziz v. State of Bombay*<sup>20</sup> the first constitutional challenge was presented under article 14<sup>21</sup> and article 15<sup>22</sup> to the criminalization of adultery under the Indian penal code. The court reasoned that the lack of punishment for women was justified under Article 15 (3)<sup>23</sup>. Article 15(3) permits the State to make laws for special protection of women and children.<sup>24</sup> The court's reasoning can be contended on three grounds, first, article 15(3) is a positive law which must not be construed to protect one from being punished for a 'crime' committed with mens rea or abetted through consent. Secondly, not punishing an individual for a crime is against the principle of individual autonomy. Criminal laws have been justified by holding individuals responsible for the actions they take. The normative element behind doing so is that without recognizing individuals as capable of independent agency they could hardly be regarded as moral persons.<sup>25</sup> Thirdly, as per section 198(2) a woman is debarred from prosecuting her husband for the crime of adultery. This is evidently against the principle of equality before the law.

These challenges were raised in a new light in *Sowmithri Vishnu v. Union of India*<sup>26</sup>. In this case the petitioner sought the quashing of the criminal complaint against the adulterer on the grounds that section 497 is unconstitutional. It was submitted that section 497 unfairly discriminated against women for three reasons, the husband has a right to prosecute the adulterer, no criminal liability exists for a man engaging in a sexual relations with an unmarried/widowed woman, and a wife cannot take action against her husband under criminal law.<sup>27</sup> The court rejected these arguments against the constitutionality of section 497 by relying upon a literal interpretation of the section and shifted the burden upon the legislature to consider a change in the law.<sup>28</sup>

An important observation by the honorable court was that criminalizing adultery prevents, to a certain extent, adulterous relationships in society. Criminalizing adultery may promote marital stability. The flaw in such a presumption can best be expressed by a hypothetical example presented in the judgement. 'A' the husband colludes with 'B' to commit adultery with his wife to get rid of her.<sup>29</sup> In the proceedings

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<sup>20</sup> *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SC 321 [*hereinafter* *Yusuf Abdul Aziz*].

<sup>21</sup> THE CONSTITUTION OF INDIA, 1950, art. 14 reads:

Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India..

<sup>22</sup> THE CONSTITUTION OF INDIA, 1950, art. 15 reads:

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>23</sup> THE CONSTITUTION OF INDIA, 1950, art. 15(3) reads:

Nothing in this article shall prevent the State from making any special provision for women and children.

<sup>24</sup> *Yusuf Abdul Aziz*, at para 5.

<sup>25</sup> D.N. MacCormick, *LEGAL RIGHT AND SOCIAL DEMOCRACY* (1982), 23-4.

<sup>26</sup> *Sowmithri Vishnu v. Union of India*, 1985 SCC (Cri) 325 [*hereinafter* *Sowmithri Vishnu*].

<sup>27</sup> *Sowmithri Vishnu* at para 5-6.

<sup>28</sup> *Sowmithri Vishnu* at para 7.

<sup>29</sup> *Sowmithri Vishnu* at para 5-6.

that ensue the reputation of the wife is assailed. A provision to protect women in fact may cause much more harm to their reputation. On the other hand, as a remedy exists in civil law, allowing divorce on grounds of adultery may in fact cause less harm to the woman's reputation. Secondly, criminal action in such a matter places blame for a breach of marital vows on a third party. The focus shifts from a relationship between two individuals to punishing an outsider for an apparent violation of 'rights' over the wife.

In *V. Revathi v. Union of India*<sup>30</sup> a constitutional challenge was raised against sections 198(1) and 198(2) of the Code of Criminal Procedure. These sections disable the wife from prosecuting her husband for the crime of adultery. Furthermore it allows a person who had care of the woman in the absence of the husband to file a case of adultery under section 497. The honorable court upheld the constitutionality of criminal law on adultery. The husband, as per section 497, cannot bring criminal action against his wife. The wife on the other hand cannot bring criminal action against the husband as per section 198 (1) read with 198(2) of the criminal procedure code. Thus, the court reasoned that the law was not gender discriminatory and promoted stability in the family unit. There was a recognition that a civil remedy, divorce, exists for the act of adultery that the husband or the wife may use against each other.<sup>31</sup>

In 2017 the Supreme Court issued an order to place the matter of the constitutionality of section 497 of the Indian Penal Code and section 198(1) and 198(2) of the Code of Criminal Procedure before a 5 judge bench through *Joseph Shine vs Union of India*<sup>32</sup>. The grounds on which this order has been passed are, the lack of gender neutrality, presence of equally 'guilty' parties only one of whom is punished, and the fact that if the consent or connivance of the husband is present adultery is no longer a crime.

#### **WHY THE ACT OF ADULTERY REMAINED DE-CRIMINALISED?**

The aim of de-criminalizing adultery has been justified as serving a two-fold purpose. The primary purpose is to protect the institution of marriage and preventing any other individual from violating the sanctity of marriage.<sup>33</sup> The secondary purpose is to promote the institution of monogamous marriage.<sup>34</sup> The law that operated in India along with the presence of gender inequality would nullify any such claims. The approach here is to first understand marriage as an institution and its needs; secondly the essentials of the principles behind justification of criminalization of any conduct are not fulfilled in the case of adultery. Lastly, the constitutional challenge to adultery must be placed in the context of the right to privacy and bodily autonomy.

Marriage as an institution establishes relationships between two consenting adults. It must be primarily perceived as a contract.

The elements of a contract under section 10 of the Indian Contract Act are: free consent, parties must be competent to contract, the contract must be for a lawful object with lawful consideration and not expressly declared void.<sup>35</sup> These conditions are fulfilled as a valid marriage subsists between competent parties who come together by their consent. The aim of a marriage is not unlawful. Consideration under the Indian Contract Act may not necessarily be monetary. The consideration in this case is the actions of both parties in their roles as husband and wife which do have value in the eyes of law. For example, the act of living together or the provision of maintenance may form valid consideration.

Adultery as an action is in breach of the contract that subsists between two parties. A remedy for a breach

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<sup>30</sup> *V. Revathi v. Union of India*, (1988) 2 SCC 72 [*hereinafter* *V. Revathi*].

<sup>31</sup> *V. Revathi*, at para 5.

<sup>32</sup> *Joseph Shine v. Union of India*, (2018) 2 SCC 193.

<sup>33</sup> Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, CHICAGO JOURNAL OF INTERNATIONAL LAW, 2001.

<sup>34</sup> *Id.*

<sup>35</sup> Section 10, Indian Contract Act, 1872.

of contract must not be present under criminal law. This is because restitution in the case of adultery must not mean shifting blame to a third party who is not party to the contract. In the case of a marriage, the focus should be on repairing relations between parties, an aim which cannot be fulfilled by criminal law.

### **WHICH CONDUCT SHOULD BE CRIMINALISED**

The aim of any punishment under criminal law may be either retributive or preventive or both.<sup>36</sup> Punishing adultery as a crime does not serve either of these purposes. Retributive punishments aim to cause proportionate harm to the wrongdoer. Such an approach does not achieve justice but confirms injustice.<sup>37</sup> In this sense, punishing adulterers under criminal law only harms family stability. An understanding inherent in criminalization of any undesirable conduct is that it is a measure of last resort. The law's most coercive and condemnatory techniques should be reserved for the most serious invasions of interest.<sup>38</sup> A purely utilitarian view would posit that if the harm can be prevented by a different, more beneficial approach there is no reason for the criminalization of said conduct. In the case of adultery, there exists a remedy under civil law there is no reason for declaring and punishing adultery under criminal law.

Adultery as an act in Indian society is seen as morally reprehensible primarily because of the sanctitude of marriage. Yet, in terms of the harm caused, the exception under section 198(2) would suggest that only the spouse is aggrieved. This indicates that it is a private wrong and is committed against the spouse. The remedy is present under civil law and criminalization is not preventive because punishment does little to deter adults in a marital union from consenting to sexual relations.<sup>39</sup> In light of this, non punitive disposals of the offender are often better at preventing a recurrence.<sup>40</sup> Non-punitive actions that exist in case of adultery are its condition as grounds for divorce.

### **CONSTITUTIONAL ARGUMENT**

The right to privacy in India under article 21 of the Constitution of India stipulates that Sexual privacy is an integral part of right to privacy. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation the home and sexual orientation.<sup>41</sup> It is possible to argue that the state may extend its reach into the lives of citizens and their sexual conduct in light of promoting marital stability. Such an argument falls apart if a recognition is made of the right to bodily autonomy recently recognized by the honorable Supreme Court in *Common Cause (A regd. Society) v. Union of India*<sup>42</sup>. The right to bodily autonomy entails a right to make decisions for oneself without interference. Furthermore, if such a decision does not cause active harm to others there is no reason to place punitive sanctions on its commission. In the case of adultery, the wrongdoing is a deeply personal decision that causes harm only to the spouse who has the right to seek a remedy under civil law.

The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution.<sup>43</sup> In criminal proceeding for the crime of adultery, the reputation of the wife would be negatively affected because of the patriarchal structure of society and the norms women are expected to follow. Even if the law were so amended to punish women for the crime of adultery, it would

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<sup>36</sup> Glanville Williams, *LEARNING THE LAW*, 1-065, (Thomson Reuters, 14<sup>th</sup> edn. 2016).

<sup>37</sup> Andrew Ashworth, *PROPORTIONATE SENTENCING*, (2005).

<sup>38</sup> D. Husak, *OVERCRIMINALISATION*, 95-101, (2008).

<sup>39</sup> Global Sex Survey 2005, as sourced from

<http://web.archive.org/web/20080430082451/http://www.durex.com/cm/gss2005Content.asp?intQid=943&intMenuOpen=> (last accessed on March 06, 2018).

<sup>40</sup> *Supra*, at 38.

<sup>41</sup> *K.S.Puttaswamy v. Union of India*, (2017) 10 SCC 1.

<sup>42</sup> *Common Cause (A regd. Society) v. Union of India*, Writ Petition (Civil) No. 215 of 2005.

<sup>43</sup> *Deepak Bajaj v. State of Maharashtra and Anr.* (2008) 16 SCC 14.

disproportionately affect women. In such a scenario, there is no question but to decriminalize adultery. The right to engage in consensual sexual activity qualifies as fundamental so that the government may not interfere with that right unless it has compelling justification. The seminal case of *Lawrence v. Texas*<sup>44</sup> provides a standard of what may qualify as a compelling justification for the state to intervene in the realm of private sexual conduct. When an act is committed without coercion and without coercion, there is no defensible reason as to why the state must interfere in it. This is because an action without coercion or coercion does not create unequal relations or unlawful harm leaving the aggrieved party with no remedy. These conditions are not present in the 'moral' wrongdoing of adultery.

### PROPOSALS FOR REFORM

The Law Commission of India, as early as in 1971 recommended that the exemption of the wife from punishment for committing adultery be removed from Section 497 IPC. It also felt that an imprisonment for a term up to five years (stipulated in Section 497) is "unreal and not called for in any circumstances". This suggestion by the Law Commission of India was regarded as a progressive move.<sup>45</sup> The Fourteenth Law Commission of India, in its 156th Report on the Indian Penal Code, endorsed, with minor modifications, the proposal for reform recommended by the Joint Select Committee.<sup>46</sup> It also stressed that changes suggested in its revised Section 497 IPC be made in Section 198(2) CrPC.<sup>47</sup>

These recommendations do not take full cognizance of the complexity of the law on adultery. In strictly jurisprudential terms, the essence of adultery is comparable to trespass to property. The husband is seen as the 'owner', the wife as the 'property' and the adulterer as the 'trespasser'. It hardly seems progressive to punish the 'trespasser' as well as the 'property'.<sup>48</sup> A much more desirable and practical approach is to decriminalize adultery while retaining its position as a grounds for divorce under family law. This proposition for change has been echoed in the report of the United Nations working group on discrimination against women.<sup>49</sup> The working group proposed the decriminalization of adultery because the criminal law on adultery disproportionately affects women. Furthermore, the working group emphasized that the criminalization of sexual conduct amongst adult individuals lies in contravention to the right to privacy under the international covenant on civil and political rights.

### A DETAILED ANALYSIS OF THE JOSEPH SHINE CASE: THE WATERSHED

A Public Interest Litigation was filed by Joseph Shine, a non-resident Keralite to the Supreme Court of India under Article 32 of the Indian Constitution which challenged the constitutional validity of the offence of adultery under Section 497 read along with Section 198(2) of the Criminal Procedure Code, 1973.

By the virtue of Section 497, culpability was imposed on the man who engaged in sexual relationships with a woman who is married, and such women were completely exempted from prosecution. Section 198(2) of CrPC laid down the procedural aspect for the husband who may file a complaint for the offence of adultery against the other man.

The most concrete and relevant issues that were raised in this case are as follows:

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<sup>44</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>45</sup> Forty-Second Report, Indian Penal Code. June, 1971. Government Of India, Ministry Of Law.

<sup>46</sup> One Hundred fifty sixth Report, Indian Penal Code. June, 1971. Government Of India, Ministry Of Law.

<sup>47</sup> *Id.*

<sup>48</sup> *Supra*, at 45.

<sup>49</sup> Office of the United Nations High Commissioner for Human Rights, BACKGROUND INFORMATION ON THE STATEMENT ISSUED BY THE WORKING GROUP ON DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE, 18 October 2012.

- i. Whether the provision of adultery as under IPC is arbitrary and violative of Article 14 of the Constitution of India?
- ii. Whether the provision of adultery as under IPC encourages gender-based discrimination and infringes the basis as under Article 15 of the Constitution of India?
- iii. Whether the provision of adultery as under IPC infringes into the dignity of a woman and compromises with it through the denial of her sexual autonomy and right to self-determination?
- iv. Whether criminalising the provision of adultery as under IPC is a direct interference in the private domain of an individual?

The counsel for the Petitioner had contended that criminalising the provision of adultery as under IPC only on the basis of gender has no rational nexus and is violative of Articles 14 and 15. This provision was also regarded to sabotage the sexual autonomy of the woman thus infringing Article 21.

The counsel for the Respondent contended that such an offence should exist to protect the sanctity of marriages in India and also a direct reference was made to Article 15(3) which confers power to the State to make special laws for women and children.

The test of constitutional arbitrariness was applied to assess the invalidation of the law. To address this first issue, the Court had referred to *E.P. Royappa v. State of Tamil Nadu* (1974) and *Shayara Bano v. UOI* (2017). This classification was inherently found to be extremely arbitrary as the husband is only given the right to prosecute by virtue of Section 198 of CrPC and the woman is not treated as an offender and is completely absolved. It is also based on the concept that if express consent is given by the husband, it would not be constituted as an offence as the woman is being considered the property of the husband. During modern times, these provisions have no relevancy as women stand equal to men in every situation and this is a clear violation of Article 14.

With references to the cases of *Government of Andhra Pradesh v. P.B. Vijayakumar* (1995) and *Independent Thought v. UOI* (2017), Section 497 was considered as violative of Article 15(1) as it discriminates on the basis of gender and stereotypes the sexual autonomy of women.

It also violates Article 15(3) as Section 497 does not bring in protective discrimination but promotes patriarchy through law.

The Court had adverted to the cases of *S. Puttaswamy & Anr v. UOI & Ors* (2017) and *Common Cause v. UOI & Ors* (2018) and stated that forced fidelity by curbing sexual autonomy of the woman is the antithesis to the fundamental right to dignity and equality under Article 21 and thus is constituted to be unconstitutional in nature. Treating women as victims demean their individuality as it gives the man complete control over her sexual freedom and questions her identity and individuality.

The court had held that adultery is an offence that may be committed by two consenting adults and involves entering into the private domain of individuals. When there is a pre-existing complication in a conjugal tie, the sanctity of a marriage cannot be saved by the inclusion of a provision such as adultery. The court also opined that punishing a third party by perceiving the husband as an aggrieved person and the woman as a victim does not seem fair in the eyes of law. It should be considered a private matter among the individuals and adultery, therefore, must only be considered as a legitimate ground for divorce and not a punishable offence. Section 198(2) of the CrPC containing the chapters with regards to prosecution of the offence of adultery is also held to be unconstitutional.

This verdict laid down by the Supreme Court became a landmark judgement as it led to sexual anarchy giving women the right to their individuality and sexual autonomy. It also completely negates the concept of proprietary rights of a husband over his own wife and acknowledges the right to privacy of every individual including the parties to a marriage. With this provision being struck down, the sole objective

of the Court was to focus on empowerment of women in criminal law.

#### **CONCLUSION**

Adultery is seen as morally wrong and a threat to a monogamous marriage. The approach under the penal law in India was riddled with loopholes and did not solve its purpose. The failures of the law on adultery are many. Firstly, women are not punished for a 'wrongful' act that they consent to. This idea is rooted in the idea of ownership. Women also do not have a right to use criminal law against their husband or his paramour. Furthermore this penal provision allows the state to extend its reach into the sexual activity of consenting adults. These are in gross violation of the right to privacy as well as the right to equality. As the remedy for adultery exists under civil law, in the presence of such grave flaws there is no justification for interference through criminal law.

The criminal law on adultery in India is based on considerations of law makers from a century ago and fails to take cognizance of the changes in modern India. In a changed social climate it is impractical to rework the provision as it stands. The tenable response should be to decriminalize adultery while retaining it under civil law which has successfully been resolved by the vision of CJ Deepak Mishra, J Khanwilkar, J Nariman, J Chandrachud and J Indu Malhotra by way of outshining the criminal law provision pertaining to adultery with the aid of the judgment in the Joseph Shine precedent.