

Metamorphosis: From an Extensive to an Evolutionary Constitution: Case Comments

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Abstract

The Research Paper Consist of case comments of the recent cases of Supreme Court in which the Constitution of India either defines or orientated in new ways. The Supreme Court of India which have power of judicial review, entertained certain number of cases which directly affect the lives of the people. The Joseph Shine V. Union of India the stated that section 497 of IPC was challenged before the court, in the Navtej Singh Johar V. Union of India section 377 of IPC was challenged before the court. These both sections have a very high impact on the people lives in India. The government is also not fulfilling the desires of the citizens in the country, and then they have to urge their problem before the Supreme Court for the remedies. The constitution of India was made in 26-Nov-1947 till now our constitution faces so many challenges; the rigidity of the constitution must be maintained by the government and legislature is entitled to make amendment by adding, substitution, Omission or in any other form. After the passage of the time any laws were made with the respect of that time only, the makers of the laws were not aware of the fact that the future implications of the laws. Then in any law there is provision of adding something or repealing something. The government will face certain consequences when he dares to changes the constitution or any implication of law is not well as compared to the general part. The powers must have some centre of attraction by which they used similar manner and provide equality to all.

Keywords: Judicial review, government, amendment, Omission, consequences, constitution

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JOSEPH SHINE V. UNION OF INDIA 2018 SCC Online SC 1676

Bench: Dipak Misra, C.J. and A.M. Khanwilkar, R.F. Nairman, Dr. D.Y. Chandrachud and Indu Malhotra, JJ.

In Writ Petition (Criminal) no. 194 of 2017 Section 497 IPC and Section 198 Cr.P.C. was challenged in Supreme Court of INDIA with respect to woman dignity.

“497. 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.”

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“198. Prosecution for offences against marriage.

(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that

(a) Where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him

to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under 1 section 494 or section 495] of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption].

(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.

(3) When in any case falling under clause (a) of the proviso to subsection (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to subsection (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code, where such offence consists of sexual intercourse the a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.”

Section 497 of IPC provides punishment for adultery. When a constitutional court faces such a challenge, namely, to be detained, by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different ,more so ,where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution [1]. In the petition it was challenged that Section 497 of IPC abridges the independence of woman under Article 14, 15(1), and 21 of Indian Constitution (hereby refers has Cons.). As this Section was binding the individuals adults from having sexual intercourse of their choice after their marriage; which was violating of fundamental rights of the individuals so there was a great need of challenging of Section 497 of IPC, so that right can be given to the individuals of which they have right to have acquired as it is our concern and privacy to do things which gives right to us under Indian constitution.

Facts

The brief facts of the case are: the petitioners challenged Section 497 of IPC r/w Section 198 of Cr.P.C. The petitioners seek that Section

497 is the violative of Article 14 [2], 15(1) [3], 21 [4] of Indian Constitution. Criminalization of adultery has even laid to deception in daily life. The law said a married man could be imprisoned if he has sexual relations with a married woman without of the consent of her husband. It also prevented a wife from prosecuting her husband or the woman with whom he was having extramarital relation. These clauses vacuumed out the agency of a woman to be a willing participant in sexual relations, a discriminatory practice.

Issue

1. Whether criminalization of Section 497 of IPC is violation of Article 14, and 15(1) of the Indian Constitution?
2. Whether Prosecution under Section 497 of the IPC abridges the right guaranteed under Article 21 of Indian Constitution?
3. Whether Article 15(3) saves Section 497 of IPC?

Judgement Summary

To constitute an offence of adultery the following ingredients must be established, viz.,

1. Sexual intercourse must be committed with the wife of another man.
2. The person must have knowledge or has reason to believe that the woman is the wife of another man.
3. Such sexual intercourse must be without consent or connivance of the husband.
4. Such sexual intercourse must not amount to the offence of the rape

In Yusuf Abdul Aziz [5], the Supreme Court observed that Section 497 IPC is not ultra vires under Article 14, 15, and 21 of the constitution on the ground that it is only the man, who is held liable for adultery and not the wife with whom adultery is committed. The wife is also saved from the purview of the Section and is not punished as an abettor.

In Shayara Bano v. Union of India [6], Nariman, J., held that one part of their judgement contradicts another part rather; if one act of parliament is already under challenged should not have been disposed by this court.

In Joseph Shine v. Union of India [7], Supreme Court held that Section 497 is the

violative of Article 14 [8], 15 [9], and 21 [10] of Constitution and overruled the decision of Yusuf Abdul Aziz. It is held that Section 497 of IPC doesn't bring within its purview an extramarital relationship with a woman or a widow. The provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Human dignity is beyond definition. It may at times defy descriptions [11]. It is discernible that the court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution [12]. There can be many a situation and we do not intend to get into the same. It is different from an offence committed under section 498-A or any violation of the protection of women from domestic violence act, 2005 or, for that matter, the protection conceived under section 125 of Cr.P.C or sections 306 or 304B or 494 IPC. Treating adultery an offence, we are disposed to think, would tantamount to the state entering in to a real private realm.

We are absolutely conscious that the parliament has the law making power. We make it very clear that we are not making law or legislating but only stating that a particular act, i.e., adultery does not fit into the concept of crime [13]. The purpose of referring to the aforesaid authorities is to highlight how adultery has not been granted separate exclusive space in the context of sections 306 and 498-A IPC [14]. While reading the ingredients of section 497 IPC that a married man, who has sexual intercourse with unmarried women or a widow, does not commit the offence of adultery. Also, if a man has sexual intercourse with a married woman with the consent or connivance of her husband, he does not commit the offence of adultery. The consent of the woman committing adultery is material only for showing that the offence is not another offence, namely, rape [15]. Our constitutional jurisprudence has recognised the inseparable

relationship between protection of life and personal liberty with dignity [16]. Therefore the Supreme Court of India ruled that section 497 of IPC, 1860-r/w section 198 of the CrPC, 1973 are violative of Articles 14, 15(1), and 21 of the Constitution of India are struck down as being invalid.

Commentary

The Section 497, before the judgement was only punishing man for the offence of adultery and was saving the women from any kind of punishment which was obviously not fair but the judgment now neither punishes the husband nor the wife of another man for the offence of adultery. From the perspective of law, the judgement is well supported with Articles 14, 15(1), and 21 of the Constitution of India. As to whom we choose or what purpose; it should belongs to our concern, and nothing to do with anyone else. Who the hell is someone else to come and question us on our freedom, and violate our right to privacy too. Even our constitution gives us this right to choose our partner of our choice. As its every individual right that his personal liberty won't get violated and should be taken care of. So, every person's right of choosing their partner should be on their consent. And what before the judgment was that it was discriminating man and woman by giving punishment to one and leaving one side which was removed after the judgment and from now both will be judged on equal grounds showing equality among man and woman. It is even right that why one be forced to live in a relation which one don't want to be and such a relation is similar to nothing and that's why the person move to some other person with whom he/she is comfortable with to have a relationship. So, that the further life can be lived in a better manner of which both the persons free consent are also available. It's now their right to do so and the state even won't interfere in that as state can't interfere in one personal liberty and equality. It is supportive from my side but what makes the difference or the thing which can be horrible is that the impact of this judgement on the society and on the people living in the society. How this judgement will affect their daily life and what could be the future of this lets try to take a look on that. What this judgement tells and how the people

have interpreted it lets take a look on that too. This judgement only tells that if a man has made sexual relationship with the wife of another man with the consent of both the partners then no one among the partners will be punished from now. Yes, it will of course increase the grounds for divorce but again it's on their part that if they want to keep the relation or broke the relation and move on to a new one. As, it is not a kind of relationship which can be kept under pressure because it needs full consent and willingness to stay as a husband and wife for the whole life. And those who don't want to stay together they can have the way of divorce. Now, coming to the part of how the society have interpreted the judgement like that the people have been given the person to have relationship with the wife of another man and they won't be punished which is also true but how this will impact the society is that; as we are moving to a modern era so things are going to be more complicated. Persons won't be now stick to one particular relationship because they will think that what's the need of it now, just what will matter is that free consent of both the partners at the time of having the relationship. The people will destroy the houses of each other and no one will be happy; yes for the time being they can be but for the rest of the life they can't be because they will get bored of each other soon and whenever the conflict will arise without trying the best to settle it they will move out for a new relationship and will repeat again and again and slowly will become habitual of it and this is not bad. This is not good because the purpose of this judgement was not this; the purpose of giving this judgement was that the people should remain happy and they should be given full right even after their marriage to choose or change their partner but mostly what people will interpret it as fun and playing with the lives of people and increase level of crime rates as compared to now. As, now also people are doing the same thing, they are just misrepresenting the things as always they used to do things in which they get fun. So, if they or the people as a whole will correctly interpret the judgement and will find the real purpose behind giving the judgement then it will be beneficial to everyone and the purpose will also get fulfilled and people could make the best use of their rights and duties

which have been provided to them and the society will keep improving; as society constitutes with peoples, the way the people will react and behave the society will move in that manner only.

NAVTEJ SINGH JOHAR V. UNION OF INDIA **(2018) 10 SCC**

In this case, the constitutionality of the section 377 was challenged before the apex court. Section 377 stated that Unnatural Offences: Whosoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment of life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable for fine. S.s 377 IPC so far as it criminalises consensual sexual acts between adults of whatever sexual orientation. Ramifications of, held, go far beyond the assimilation of homosexuals of LGBT community or anyone similarly situated, is not only about guaranteeing a minority their rightful place in the constitutional scheme, but speaks equally of the vision of the kind of country we want to live in and of what means for the majority.

Facts

Issue of Constitutionality of S.377 IPC so far as it criminalises consensual sexual acts between homosexual adults of LGBT community or anyone similarly situated. Constitution of India Arts. 21, 14, 15 and 19 Right to sexual Identity, Sexual Orientation, Sexual freedom, Sexual Autonomy, Sexual Privacy, Sexual Expression, Choice of Sexual Partner and sexual health declared to be part of fundamental rights emanating from Arts. 21, 14, 15 and 19.

As per the Judgement of Hon'ble Supreme Court stated that, so far as it penalises any consensual sexual relationship between two adults, be it homosexual (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman).

Issue

1. Whether criminalization of Section 377 of IPC is violation of Article 21, 14,15 and 19 of the Indian Constitution?

2. Whether Prosecution under Section 377 of the IPC abridges the right guaranteed under Article 21 of Indian Constitution?
3. Whether Article 15(3) saves Section 497 of IPC?

Judgement Summary

Gender identity is inalienable and connected with human rights and the constitutionally guaranteed right to life and liberty with dignity. It lay stress on judicial recognition of such rights as an inextricable component of Article 21 of the Constitutions and decries any discrimination as that would offend article 14, the "fon juris" of our constitution [17]. When the state has no compelling reason to continue an existing law i.e., Section 377 of IPC which penalises same sex couples who cause no harm to others, it is clear that articles 14, 15 ,19 and 21 have all been transgressed without any legitimate State rationale to uphold such provision.

Article 15 prohibits the state from discriminating against any citizen on the grounds of religion, race, caste, sex or place of birth. The object of this provision was to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature.

Section 377 of IPC and Unreasonable and disproportionate and violative of ART. 19(1)(a) of the Constitution. It violates the freedom of expression including right to choose sexual partner. It imposes unreasonable restriction on LGBT community by making carnal intercourse between consenting adults in private a criminal offence.

There are two aspects of the opinion of Dr. D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High

Court, *inter alia*, observed that the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultra virus of provisions of Articles 14 [18], 15 [19] and 21 [20] of the Constitution. The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity. After the privacy judgment in *Puttaswamy* (supra), the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in *Suresh Koushal* (supra), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in *Suresh Koushal* (supra), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. The expression "against the order of nature" has neither been defined in Section 377 IPC nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements

includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it "against the order of nature". Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in *Maneka Gandhi* (supra) and other later authorities. Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC. The decision in *Suresh Koushal* (supra), not being in consonance with what we have stated hereinabove, is overruled.

Commentary

In the nearly 500-page judgment on the constitutionality of Section 377, the then Chief Justice of India Dipak Misra and Justice AM Khanwilkar noted:

"If anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC."

It has been submitted that Section 377's legislative objective of penalizing 'unnatural sexual acts' has no rational nexus to the classification created between procreative and non-procreative sexual acts, and is thus violative of Article 14 of the Constitution of India. Section 377's legislative objective is based upon stereotypes and misunderstanding

that is outmoded and enjoys no historical or logical rationale which renders it arbitrary and unreasonable. The Court made it explicit that where an Act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14.

Sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. Therefore, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.

Without going to the generality of the provision of Section 377 IPC, we are now dealing with the term of the social impact of the judgement. In India the land of the culture here we find each and every social dimension, which create a strong we feeling the government has been criticised for making any disadvantageous issue. The section 377 IPC criminalising the same sex carnal intercourse, IPC was made by the Britishers in the 1860 at that old period of time with comparing now a days the time are changed the living arena as well as the standard of the people has been changed. Law changed according to time and place. The people nowadays are living in the modern time, their mindset has been totally changed at that arena. The social equity is now a days are main theme of the modern democracy, if we are talking about the role of the Indian judiciary, it is not only limited to the providing just a judgement on the basis of the appellate court but as the final interpreter and custodian of the constitution the apex court have duty to protect the fundamental and the natural rights of the citizens, either that particular community belongs from majority or minority group in our country. At present time the caste politics plays an important role in the formation of the government at different level, the politically will of the country is not shows such enormous power to take certain decisions in the favour of the minority people.

The rule of law defines as “The government elected by majority and runs by together” but unfortunately the political system of our country is not able to fulfil the demands of the citizens. Due to gradually down in the performance of the government, the people started believing in the Supreme Court that judiciary will here to protect the rights of the citizens which were guaranteed by the constitution of India. In last certain years which have been developed that the Supreme Court decided each and every case either it belongs from the general people or it belongs from the day by day working of the government. As the same in this case the Apex court protected the right of the minority citizen by passing the judgement and declares section 377 of IPC null and void. Section 377 has been vehemently opposed by human rights activists because it criminalises consensual homosexual relationships. The most common jurisprudential justification given for criminalising homosexuality is that the State can dictate what morality is and has the power to punish acts which are immoral. The basic argument in favour of laws to regulate moral behaviour is that the State has an interest in preserving the traditional morals of people. Our society has always endeavoured to regulate sexual behaviour. The law must be concerned with some moral values and cannot allow people to abuse their rights, liberty and freedom in any manner whatsoever. According to Mill’s Harm Principle, state and society would have no right in curbing the consensual homosexual acts done privately. The Constitution of India respects the diversity and it would never intend to discriminate people on the basis of their sexual orientation just because of the public morality. “Public morality has a huge role to play in shaping law. But, right to life and dignity have a higher standing and doing something unnatural is not a valid reason to infringe upon this right”. In the last two decades, LGBT activism played a major role in creating awareness on the issue. In 2006 writer Vikram Seth released a public letter demanding that the “cruel” law be struck down. Section 377 is the biggest affront to the dignity and humanity of a substantial minority of Indian citizens. So if we believe that like all heterosexual married couples, homosexuals too should have the freedom to engage in

intimate sexual acts without being subject to state harassment, then this law needs to go. The simple logic being that the Constitution cannot know or tolerate classes and there cannot be a law which is based on pure animus towards one section of the community [21]. The decriminalisation of sodomy will contribute directly to restoring the dignity of homosexuals.

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