

DUMPING AN ARCHAIC LAW

Relevant for: Indian Polity & Constitution | Topic: Judiciary: Structure, Organisation & Functioning

Following a series of landmark judgments delivered by the Supreme Court this month, it passed yet another remarkable decision on Thursday. It decriminalised the offence of adultery by holding Section 497 of the Indian Penal Code (IPC) unconstitutional.

As of few days ago, India was one of the few countries in the world that still considered adultery an offence. The appalling attribute of the Indian definition of this crime was that it did not punish the erring spouses, but instead punished the adulterous man, or rather 'the outsider', for having extra-marital relations with a woman who he knows to be married. It was only an offence if the husband had not consented to this relation, implicitly suggesting that the wife was the property of her husband. Hence, the husband was considered to be the "victim" of adultery and could file a case. The same recourse was, however, not available to the wife.

For any act to be a crime, it has to be committed against society at large. The main argument for retaining the criminal provision was that the outsider should be punished for breaching the matrimonial unit and that the law should mandate punishment for such a moral wrong. This violation was seen as a crime against the institution of marriage, thus justifying it to be a breach of security and well-being of society. Thankfully, and rightly so, this argument was unanimously dismissed by the bench. The court observed that the issue of adultery between spouses was a private matter, and could be a ground for divorce under civil law. It did not warrant the use of criminal sanction against any party involved. Moreover, no justification can be given by the state for penalising people with imprisonment for making intimate and personal choices.

Further, addressing the issue of making the penal provisions of adultery gender neutral, the court held that even then the matter was private, and anything otherwise would be a grave intrusion into the privacy of individuals.

In simple terms, as the law previously stood, in this offence, the victim would be the husband alone, whose property (i.e. the wife) was trespassed upon. Dismissing this regressive patriarchal notion of women being "chattels" of their husband, the court held that Section 497, as it existed, denied women ownership of their sexuality and agency over their own relationships. The court even relied on *K.S. Puttaswamy v. Union of India* to explain this deprivation of autonomy as a violation of their right to privacy and to live with dignity, thus violating their fundamental rights under Article 21 of the Constitution.

The adultery provision also violated the right to equality guaranteed under Article 14. The court observed that women were treated as passive entities, and possessions of their husband. The fact that the commission of the offence would have been in the absence of the husband's consent proved the inequality between the spouses. Section 497 consumed the identity of a wife, as an individual with rights as an equal partner to the marriage, tipping the scales to favour the husband. The court further explained: "Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III [of the Constitution] guarantees." Therefore, not affording both parties to a marriage equal rights and opportunities would be discriminatory and a violation of their right to equality.

Previous challenges to this provision claimed that exempting women under Section 497 from prosecution and being prosecuted was 'protecting' them and was in consonance with Article 15(3) of the Constitution that allowed the state to make laws for the benefit of women and children. This provision was made when bigamy was prevalent and Lord Macaulay, the drafter of

the IPC, did not find it fair to punish one inconsistency of the wife when the husband was allowed to marry many others. However, a fallacy in this reasoning was pointed out by the court — the law that takes away the right of women to prosecute, just as her husband had the right to proceed against the other man, could not be considered ‘beneficial’ and was, in fact, discriminatory.

It is surprising to see that even after the verdict many have opposed this decision of the Supreme Court, most countries around the world have done away with this practice. While the struggle for equality in many other spheres still continues, the decision to scrap this archaic law is definitely a step in the right direction.

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