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“RIGHT THEORY DISCOURSE: ANALYSIS OF JUDGMENTS IN JOSEPH SHINE CASE”

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Introduction

Theories of rights explain the nature, origin, and significance of rights in a variety of ways. “The theory of natural rights describes rights as belonging to nature; the theory of legal rights recognizes rights as belonging to law; the historical theory of rights declares rights as products of traditions and customs; the idealistic theory, like the theory of legal rights, relates rights only with the state; and the social welfare theory of rights regards rights as belonging to society and

should be exercised in the interest of both the individual and the society.”

There are various right theories, as follows:

(i) Natural Rights

In the seventeenth century, Thomas Hobbes,¹ John Locke², and Jean-Jacques Rousseau³ were the primary proponents of the doctrine of natural rights. Following the development of the social contract theory, these contractualists held the belief that men enjoyed inherent rights in the state of nature, and that these rights were ascribed to individuals as though they were the basic characteristics of men as persons. Accordingly, the contractualists maintained that the rights are inalienable, imprescriptible, and indefeasible in the face of adversity.

(ii) Legal Rights

The terms “theory of legal rights” and “legal theory of rights” both refer to the same concept. The idealist theory of rights, which aims to situate rights as the creation of the state, can be thought of as a shortened form of the theory of legal rights, which is another name for the same thing. It is possible to list the names of Bentham, Hegel, and Austin as proponents of these types of hypotheses. They believe that rights are conferred by the state, and that rights are a claim that the state provides to the people by the power of its authority. The essential characteristics of these theories are as follows: “(i) rights are neither prior nor anterior to the state because it is the state that is the source of rights; (ii) the state lays down a legal framework that guarantees rights and that it is the state that enforces the enjoyment of rights; and (iii) because the law creates and sustains rights, when the content of the law changes, the substance of rights changes as well.” There are several ways in which views that assert that rights are derived from the state are attacked and criticized. The state, in fact, guards and preserves our rights; it does not, as the proponents of these ideas would have us think, grant us these rights. As long as we accept the notion that rights are a product of the state, we will have to concede that the state has the ability to grant and take away rights at whim. Obviously, such a viewpoint would elevate the state to the status of ultimate power. In such a situation, we would only be able to exercise the rights that the state would want to provide to us.

(iii) The Historical Theory of Rights

¹ THOMAS HOBBS, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL (1651).

² JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690).

³ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

When it comes to prescriptive or historicist theories of rights, they believe that the state is a product of an extensive historical process. Traditions and conventions, according to this view, are the source of rights. People have a right to whatever they have exercised or enjoyed over an extended period of time, according to conservative Burke's prescriptive theory, which he championed. All rights are derived in this manner through the process of long-term monitoring. Traditions and customs acquire the status of rights as a result of their regular and continuous use. Although Edmund Burke's opinions on the issue stretch back to the 18th century, sociologists have since adopted them.

(iv) Social Welfare Theory

The social welfare theory of rights is predicated on the premise that rights are required for the existence of social welfare. The argument goes that the state should recognize only those rights that improve social welfare. While contemporary proponents of social welfare theory include Roscoe Pound and John Chafee, Bentham is often regarded as the idea's most famous 18th-century exponent. According to this view, "society creates rights inasmuch as they are founded on consideration of the common good: rights are the conditions of social good, which implies that demands that are inconsistent with the general welfare and so rejected by the community do not become our rights."

Problem Profile

Surprisingly, few authors have offered a sympathetic description of what they mean when they refer to human rights practice. It is frequently referred to as a complicated collection of political and legal practices. Some prefer the term "discourse," but fail to define what that discourse entails. Contrary to popular belief, legal theorists are used to the concept of practice, and more precisely, normative practice. After all, law is a normative practice in which abstract moral concepts collide with social circumstances, creating tension and effect. As already known, law plays a vital role in providing the rights to people which they deserve. It becomes pertinent to align social and moral claims with legal claims in order to bring law and order along with the ideals of justice, equity and good conscience.

According to the author, the purpose of this study is to examine the correct theory and how it is reflected in the decisions or case of Joseph Shine case. The study goes on to address various parts of right theory that have been raised in those situations, as well as critically critique those discussions in greater depth. The author also wishes to provide recommendations and discuss

the likely consequences of such decisions in the future.

Research Methodology

Within the scope of this study, the author will examine a variety of primary and secondary sources pertaining to right theory, as well as examine two key decision of Joseph Shine Case - in depth. There will be an examination of many opponents of this theory, as well as a comparison of these two judgments to determine significant parts of judicial proclamation in favour of right theory and the discourse of Indian courts in this regard. The author will also examine several articles and legal frameworks upon which the aforementioned judgments have been rendered, as well as how they connect to the correct theoretical framework.

Research Questions/ Hypothesis

The author shall research on the following research questions:

Research Question 1: What is right discourse theory, what are its criticisms and supporters?

Research Question 3: What is the relevance of right theory in Joseph Shine Case Judgement?

Background of the cases and judgement

Joseph Shine filed a writ petition under Article 32 of the Constitution⁴, contesting the validity of Section 497 of the Indian Penal Code⁵ read with Section 198 of the Criminal Procedure Code, on the grounds that it is in violation of Articles 14, 15 and 21 of the Constitution. Initially, this was a PIL against adultery that was filed. He stated that the provision for adultery was arbitrary and discriminatory on the basis of gender, and that it should be repealed. It was argued by the petitioner that such a statute is demeaning to the dignity of a woman. The petition was heard by a constitutional bench of five justices.

Joseph Shine, a non-resident Keralite, filed a public interest lawsuit according to Article 32 of the Constitution in October 2017. The petition questioned the validity of the crime of adultery under Section 497 of the Indian Penal Code read with Section 198(2) of the Criminal Procedure Code.

Adultery is criminalized by IPC Section 497, which places the blame on a man who has

⁴ INDIA CONST. art. 32.

⁵ The Indian Penal Code, 1860, § 497, No. 45, Acts of Parliament, 1860 (India).

intercourse with another man's wife. Adultery was a capital offence punished by up to five years in jail. Women were excluded from criminal prosecution, even consenting participants. Additionally, a married woman cannot submit a case under article 497 of the IPC if her spouse had intercourse with another woman. This was in reference to section 198, par. 2 of the Criminal Procedure Code, which establishes the procedure for the applicant to pay fees for offences punishable under IPC sections 497 and 498.

The intervener Vimochan was represented by Jayna Kothari, Executive Director of CLPR. She argued against a legislation criminalising adultery, citing the Supreme Court's recognition of a basic right to privacy in the *Puttaswama case*. She contended that the right to an intimate relationship constituted a constitutionally protected feature of privacy.

Section 497 was unlawful because it was based on the premise that a woman was her husband's property and could not have partnerships outside marriage. The spouse, however, was exempt from the same limitations. By discriminating against married women and promoting gender stereotypes, paragraph 497 undermines women's rights to privacy and independence. The appellant relies on the following paragraph of Article 15.

The state makes no distinction between citizens on the basis of their sexual orientation. They overlook, however, that it is subject to the operative clause (3): nothing in this article precludes the state from enacting specific measures for women. The provision in question is an unique provision meant for women, which is why it is included in clause (3).

Clause (3), it has been contended, should be confined to advantageous measures for women and cannot be used to authorise them to conduct and commit crimes. We cannot read this limitation into the clause, nor can we accept that a statute preventing fines equates to a permission to conduct a crime for which there is no consequence.

The Court held that section 497 is illegal and violates Indian Constitutional articles 14, 15, and 21, and that section 198 (2) of CrPC is invalid in its application to section 497 IPC.

In *Yusuf Abdul Aziz v. State of Bombay*⁶, the Bombay High Court's division bench concluded

⁶ 1954 AIR 321

that section 497 of the Indian Penal Code does not contradict Indian Constitutional Articles 14, 15, and 21.

The court concluded in *Sowmithri Vishnu v. Union of India and Anr.*⁷ that women should also be penalised for adultery.

Adultery has been decriminalized in a few of nations worldwide, however it remains the primary cause of divorce in certain circumstances. Section 497 of the IPC is a breach of the basic right to equality guaranteed by art. 14, namely, fair processes before the law that further protect women from prosecution; also, section 497 violates the individual's right to privacy guaranteed by art. 21 of the Indian Constitution. The court had stated during the case's prior hearing that the statute seemed to be founded on certain "social beliefs." The court questioned the rule and stated that a husband could not own his wife in four distinct but convergent trials.

For the purposes of declaring the law or any sub-legislation illegal, the court concluded that the test of manifest arbitrariness should be used. Any law that is proved to be arbitrary will be repealed. Section 497 of the Criminal Code precludes women from being prosecuted as abettors. It is said that this provision is advantageous to women, and that this provision is protected by Article 15(3)⁸. Article 21 of the Constitution protects an individual's dignity as well as his or her right to private sexual life. A crime is defined as an offence that has an impact on the entire community. While adultery is a criminal offence, it is also considered to be the act of intruding into someone's private life.

Arguments of parties pertaining to right theory

- Petitioners in the Joseph Shine Case contended in their petition for review that the historical context on which this statute was established in the British era was outdated and that it was no longer applicable in modern times. Section 497 of the Indian Penal Code and Section 198(2) of the Criminal Procedure Code contravene Article 14 of the Constitution. Discrimination on the basis of gender has no reasonable connection to the goal that the legislation is attempting to achieve in the first instance. Woman who learns that her husband is having sexual relations with another woman does not have the right to make a complaint with the appropriate authorities. Another reason is to demonstrate

⁷ 1985 AIR 1618

⁸ India Const. art, 1950, art. 15, cl. (3).

that women are protected under this law because she is not even considered an abettor. This demonstrates the male chauvinistic behaviour of society and the fact that women generally do not know what they are doing and do not have a clear understanding of what they are doing. Moreover, according to the petitioner, a crime is only committed under this statute if the husband is concerned about his wife having sexual relations with other men; if the husband has given his assent, no crime has been committed. This suggests that women are some type of chattel, and that they do not even have total authority over their own bodies, as is commonly believed. Additionally, the petitioners asserted that this regulation is a violation of Article 21 of the Constitution, which states that two adults who have sexual relations with each other are protected by the Right to Privacy. Because it also takes away a woman's right to prosecute, such legislation cannot be characterized as benefit legislation under Article 15(3) of the constitution.

- The respondents, on the other hand, claimed that the Right to Privacy is not an absolute right and that it is susceptible to some reasonable constraints. A person who is having sexual relations with another married individual outside of the marriage does not have the right to be protected under Article 21 of the Constitution. This provision is justifiable under Article 15(3) of the constitution due to the fact that it is specifically designed for the advantage of female citizens. Adultery as a felony is considered to be morally repugnant by the majority of people in society. Its abusers are subject to legal consequences. This act is a blatant violation of the sacredness of the institutions of marriage and the family. Consequently, Section 497 serves as a safeguard for society against immoral behaviour that is incompatible with the institution of marriage, as defined by the Constitution. As a result, it should not be declared invalid.

Relevance of the judgement

A civil wrong, adultery, the Court stated is still a valid basis for divorce, even if it is no longer considered a criminal offence under the law. As far as criminal offences against the community were concerned, adultery was considered to be a private problem. The Court ruled in its judgement to criminalize adultery that a husband and wife should be able to make an arrangement based on their own personal judgement following an act of adultery.

In their decision, Justice D. Misra and Justice A.M. Khanwilkar stated that treating adultery as a crime breaches the excessive seclusion of the marital sphere. It is important to distinguish adultery from other types of offences like domestic abuse, failure to give support, and filing a

complaint for a second marriage since the latter types of offences are designed to serve different goals inside a marital union. According to him, adultery violated two aspects of Article 21 of the Constitution, namely the dignity of a married pair and the right to privacy of the couple.

Citing a case from the United States Supreme Court helped Justice D.Y. Chandrachud clarify how adultery affects one's right to privacy. Women's sexual dominance conceptions based on patriarchal concepts of sexual dominance have no place in our constitutional system, which recognises the inherent dignity and individuality of every person. In *Navtej Singh Johar v. Union of India*⁹, the court used the case as an example to demonstrate the importance of sexual autonomy as a component of individual liberty, to demonstrate the indignity that an individual experiences when acts within their personal sphere are criminalised on the basis of regressive social attitudes, and to emphasise that the right to sexual privacy is a natural right that is fundamental to liberty and dignity. Using the case of *K.S Puttaswamy v. Union of India*¹⁰, D.Y. Chandrachud emphasized that “law must reflect women's status as equal partners in marriage, entitled to constitutional protections of privacy and dignity; and that a life of dignity necessitates the protection of the “inner recesses of the human personality” from “unwanted intrusion.” Throughout his decision, he emphasized the crucial role of sexual autonomy as a virtue that is required for life and personal liberty under Article 21 of the Constitution.” Section 497, in his opinion, restricts sexual freedom and degrades the dignity of women.

It is not necessary, according to Justice I. Malhotra, to preserve a married person's freedom to participate in consenting sexual interactions outside of marriage, as provided by Article 21 of the constitution. As a result, she believes that criminal penalties should be used to preserve this individual's freedom to make sexual decisions in the most private aspects of their lives from public ridicule and condemnation. Therefore, in light of Article 21, she decided that Section 497 did not meet the three-part test for invasion of privacy established in the *Puttaswamy case*.

The decision is a source of enormous joy for formerly repressed sexual minorities. It provides deliverance on two levels: it decriminalizes gay interactions while also providing protection from abuse and vilification at the hands of law enforcers. Additionally, it protects sexual minorities from a variety of medical illnesses by bringing their plight to the authorities' attention. As Justice Michael Kirby said, the fundamental reason for the high prevalence of

⁹ Navtej Singh Johar vs. Union of India, AIR 2018 SC 4321 (India).

¹⁰ K.S Puttaswamy vs. Union of India, 2017 10 SCC 1 (India).

HIV/AIDS among homosexuals is the state's callous attitude toward the welfare of sexual minorities.

The verdict also addresses the proximate issue of health by decriminalizing consensual sex between gays and transsexual people. As the PUCL and prominent gay rights activists observed, one of the impediments to addressing the spread of sexually transmitted diseases among homosexuals was the criminalization of homosexual activity, which rendered any progress toward sexual education of sexual minorities a latent violation of the law. With criminalization history in the rearview mirror, it may now be able to address the exponentially expanding danger of HIV/AIDS with effective preventative measures and proper education about sexual behaviors.

The second aspect of the court's ruling that really protects the essence of civil freedoms is the removal of potential for misuse by authorities. Prior to the judgement, sexual minorities had a long history of government-sanctioned discrimination. Sexual assault and money extortion were often the lot of gays and transsexual people. The inhumanity of such deeds was heightened further by the fact that the claimed guardians were the actual perpetrators of violence and abuse. Section 377, as a result of the court's decision, cannot be used as an abuse tool by law enforcement authorities. Thus, one may argue that the verdict freed India's sexual minorities on a variety of ways.

Apart from the judgment's social ramifications, the judgment's constitutional implications provide important material for consideration as well. The court determined that the challenged statute violated a number of basic rights enshrined in Part III of the constitution. Significant developments result from the judgement, including the extension of equal protection of the laws to sexual minorities, the recognition that discrimination directed at them violates the right against discrimination, and the inclusion of sexual preferences within the ambit of the right to life and personal liberty. Each of them will be scrutinized separately by the author.

Thus, it is clear that, in light of the aforementioned verdict, the repercussions of the Delhi High Court's decision in *Naz Foundation v. Government of the National Capital Territory of Delhi*¹¹ are not restricted to the citizens of Delhi, but also to the sexual minorities across the country.

¹¹ 160 DLT 277.

The judgement in *Joseph Shine v. Union of India*¹² is a commendable endeavor and exemplifies transformative justice. The court repealed sections 497 of the Indian Penal Code and 198(2) of the Criminal Procedure Code, thereby criminalizing adultery. The aforementioned clauses are discriminatory in that they provide no provision or right for a woman to prosecute her husband for adultery, and they do not penalize a woman who commits adultery, even as an accessory. This judgement has been challenged since it renders adultery unpunishable and has ramifications for marriage and family social structures.

Rights theory - relevance

The history of Section 497 demonstrates unequivocally that the law of adultery always favours the husband, allowing him to retain control over his wife's sexual connection. Thus, the part has never been skewed toward the benefit of women. As a result of this rule, if a person engages in sexual relations with the wife of another man and the husband of that lady grants his approval to the relationship, that person will not be prosecuted with adultery. This clearly illustrates how women are seen as objects in the possession of their husbands, as shown by the phrase.

*Sowmithri Vishnu v. Union of India*¹³, another landmark case, various challenges were brought before the court, and they were based on the following three grounds. Section 497 does not grant a woman the opportunity to exhibit women with whom her husband has engaged in adultery.

In addition, this clause does not grant the woman the right to bring a legal action against her husband for the act of adultery.

This rule does not apply to situations in which a spouse is suspected of having sexual contact with an unmarried woman or women.

Using a strict reading of the word, Justice Chandrachud held in this judgement that adultery could only be committed by males, and that women were thus barred from committing the crime. He went on to say that the case had failed to deal with the fundamental issue, which was constitutional Jurisprudence, which had provided guidance on the legality of Section 497 of

¹² 1676 SCC (SC:2018).

¹³ 1985 AIR 1618.

the Constitution.

The Court of Appeal in the *Joseph Shine case* made a significant step forward by throwing down Sections 497 of the Indian Penal Code and 198(2) of the Criminal Procedure Code, both of which were aimed at preventing gender discrimination. First, it denies women the ability to sue an adulterous husband, and second, it does not penalise an adulterous wife even though she is a “co-conspirator.” Both of these provisions are discriminatory. Furthermore, this ruling has set the wheels in motion for the notion of transitional justice.

The ruling has created a legal dilemma in the area of adultery law by proclaiming adultery to be a crime that is not punishable by law. Those who oppose the ruling claim that it takes away remedies open to any spouse whose partner has committed adultery with another person. One of the most effective methods of dealing with persons who commit adultery is to punish them. Following the 42nd Law Commission report, adulterous women should be accused and the sentence decreased from five to two years in prison. Unfortunately, this was not accomplished. The conclusion is that this must be carefully enforced to make folks fearful and think twice before taking any action.

There is also no indication in the court's ruling as to how this decision could affect societal institutions such as marriage or the children born into such unions or who are associated with similar situations in other parts of the world. The outcome is that regulations aimed at protecting the child born as a result of the connection should be implemented.

Conclusion and Suggestions

The term “rights” refers to social claims that are important for the development of the human personality. These are personal to the individuals and offer the circumstances necessary for them to be themselves. They are social in nature: they are bestowed by society and safeguarded by the state. Individuals cannot be deprived of them by the state. They are indicative of a certain period in society's development. As society evolves, the nature and content of rights change as well. Theories of rights represent a skewed understanding of their meanings, origins, and nature. Natural rights theory is valid inasmuch as it emphasizes that rights are natural since they are in the nature of social claims. Similarly, the legal theory of rights is true inasmuch as it establishes the state as the guardian of our rights.

The law must evolve in tandem with the shifting ideas and beliefs that characterize a developing society. Law must take into account the changing nature of society, and it must be consistent with the evolving notions and ideologies of the periods in which it is being practiced. The interpretation process of the law must be used to meet the needs of the present time period. It is not just about equal access to the law, but also about equal exposure to the law that is meant by equality before the law. This is one of the grounds adopted by the five-judge panel of the Supreme Court of India, which recently declared Section 497 of the Indian Penal Code unconstitutional, after it had been in effect for 158 years and had criminalized adultery. However, it will take time for the fundamental reasoning of the decision, as well as its actual spirit, to get fully assimilated into the existing social composition. To put it another way, the judgement is an attempt to overcome the conflict that exists between societal morality and individual freedom. The Supreme Court has elevated the notion of individual liberty above the concept of societal morality, laying the framework for a more individualistic approach to judicial decision-making in the future. This verdict will remain one of the most significant in the history of Indian individual rights and constitutional governance, notwithstanding the possibility that it could be overturned by a legislative action.

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