

## **SAGA OF ADULTERY LAW IN INDIA**

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### **INTRODUCTION**

Indian Penal Code has a provision on Adultery. According to the same Adultery is defined as, “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>1</sup> In laymen terms adultery is an offence involving sexual intercourse with a man’s wife without his consent. Law of Adultery in itself is archaic. The roots of such laws can be found in Ur-Nammu which is the oldest code and recognized concepts of law for the very first time. It is named after a Sumerian King Nammu who is credited with establishing the third dynasty of Ur. According to the code, “If a man violates the right of another and deflowers the virgin wife of a young man, they shall kill that male”<sup>2</sup> and “If the wife of a man followed after another man and he slept with her, they shall slay that woman, but that male shall be set free.”<sup>3</sup> However in Indian Penal Code there was no punishment for wife, according to the code of Ur-Nammu it is a capital offence and if wife turns out to be adulterous then punishment is to be death penalty. Ingredients of Adultery are that there needs to be sexual intercourse between parties. Proving sexual intercourse between parties is locus classicus to section 497 of Indian Penal Code. If there was no sexual intercourse and the act was just at preparatory stage then provisions in relation to adultery are not attracted. The adulterer must have the knowledge or sufficient grounds to believe that adulterous woman is a lawful wife of another man. Marriage

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<sup>1</sup> Section 497 of Indian Penal Code.

<sup>2</sup> Verse 6 of Code of Ur-Nammu.

<sup>3</sup> Verse 7 of Code of Ur-Nammu

between aggrieved man and his wife should be valid in the eyes of law and lastly consent of the man was not to be obtained prior to such intercourse.

## **RELIGION AND ADULTERY**

One of the grounds on which adultery is justified is religion. Adultery is viewed as immoral and an offence against marriage. Natural law advocates for just laws and any law which is immoral is no law. If the act of adultery is passed through the moral filter of natural law then it shall be an act worthy of punishment of highest order. The 7<sup>th</sup> commandment specifically prohibits adultery.<sup>4</sup> The punishment for committing adultery for adulterer and adulteress is death penalty.<sup>5</sup> Bible has several other references to adultery and out rightly deems it to be immoral. According to Manu, if women were to be left alone, they might succumb to evil temptations which might tear families apart. According to him men must guard their women and keep a check on them. It prescribes strict code of conduct for men in relation to keeping women in check.<sup>6</sup> Unlike Islam and Christianity, Marriage in Hinduism is considered to be a holy communion and is not considered to be a contract. An act like adultery violates sanctity of marriage as an institution which ends up breaking it apart. Reference to adultery is also found in Bhagavad Gita<sup>7</sup>, and Vishu Purana.<sup>8</sup> Punishment for adulterous act according to Manusmriti is fines, lashes or death penalty. In Islam, both man and woman are punished for an offence of adultery. Punishment prescribed in Quran for adultery is flogging the parties involved for a total of 100 times each.<sup>9</sup> Religion regards adultery as a serious offence and punishment prescribed for the same is grave ranging from flogging to death penalty. It wouldn't be incorrect to deduce that one of the reasons as to why adultery was made an offence under the Indian Penal Code is because of orthodox Christian upbringing of Lord Macaulay. However, the author is of the opinion that laws should not be tested on the threshold of religion,

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<sup>4</sup> Exodus 20:2-17 NKJV

<sup>5</sup> Leviticus 20:10

<sup>6</sup> Manu:9.14-15

<sup>7</sup> *Bhagavadgita* 1.41-43

<sup>8</sup> Vishu Purana 3.11

<sup>9</sup> Quran (24:2)

especially in a democracy like India wherein diversity prevails. It cannot be denied that all the major religions in India stand on common footings when it comes to the act of Adultery.

## **CONSTITUTION AND SECTION 497**

The law of adultery as envisaged in the Indian Penal Code is inherently flawed. It is blatantly violative of Article 14 of the Constitution of India that talks about equality before law and equal protection of laws. Wives can seek no remedy when it comes to prosecuting under the law. It is only a married man who can charge paramour of his wife under section 497. If a married man were to have an extramarital affair with an unmarried woman, wife of such man cannot bring an action against the husband under adultery laws nor can she prosecute such woman. The law treats woman as an object or slave at the command of her husband. Man, standing guard to his wife is given an opportunity to bring the adulterer to books while the same rights are denied to wife which is a manifestation of patriarchal mindset. Such misogynistic reflections in laws of the land mar democracy and are a blotch on Constitution. In the case of **Yusif Abdul Aziz vs. State of Bombay**<sup>10</sup>, the question was if the law of adultery is violative of Articles 15 and 16 of the Constitution of India to which the court replied in negative. The court stated that women and children had the privilege of having special laws passed by the Parliament under Article 15(3) of the Constitution. The reasoning itself is flawed because the judgement has shown men in bad light concluding that men are seducers and women are seduced. A law under which women cannot be charged, which was the point of controversy in this judgement, nor can she prosecute highlights sex discrimination jurisprudence which has been a problem in India. How is this law protecting the interests of women if one were to justify it on the grounds of Article 15 (3)? It was only in the case of **Sowmithri Vishnu vs. Union of India and Another**<sup>11</sup>; the court observed that law of adultery stems romantic paternalism and treats women as chattels of men. In the case of **Joseph Shine vs. Union of India**<sup>12</sup>, Supreme Court stated that adultery law is unconstitutional. The idea of portraying stereotypes as

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<sup>10</sup> AIR 1954 SC 321

<sup>11</sup> AIR 1985 SC 1618

<sup>12</sup> WP(Crl.)No.194/17

protection was discussed in the judgement. This practise is referred to as romantic paternalism. In the case of **Dothard vs. Rowlinson**<sup>13</sup> the question was whether women were denied opportunity of employment by barring them to apply for the post of prison guards. The argument from the state was state was that presence of women might invite sexual misconduct from inmates. In his dissenting opinion Justice Marshal stated that women being considered as sex objects and being denied opportunity owing to risk of depraved behaviour of inmates were nothing short of an age old stereotype. In the same way men being able to charge paramour of his wife is a manifestation of women being a slave or chattel of her husband. Such laws make men seem like protectors to women which is grossly irrational. Another example of romantic paternalism would be prohibiting women from wearing a particular kind or type of clothing because it might provoke men. Laws should focus on curbing uncalled behaviour irregularities and not perfectly legal actions which might trigger such unruly responses. Court in its judgement correctly stated that denying women a right to bring an action under the law of adultery is not only violative of Article 14 which is right to equality but also is violative her right to dignity under Article 21.

## **ERRORS IN ADULTERY**

In the case of **K.Puttaswamy and Anr. Vs. Union of India**<sup>14</sup>, the Supreme Court stated the right to privacy is a fundamental right under Article 21 of the Constitution of India. In that very judgement apex court also talked about right to autonomy and self-determination. Right to autonomy also includes sexual autonomy which would mean that one has an absolute right over his own body and can enter into sexual relationships with another with consent. Sexuality is an inalienable personality trait under right to choice; sexual autonomy and right to reproduce are well protected under Article 21 of the Constitution of India. Two consenting adults can engage in intercourse and the state has no business peeping into their bedrooms. According to the author the problem with adultery was that of unprincipled criminalization. State while criminalizing an act has a huge onus of responsibility on its shoulders. It should be kept in mind that criminal sanctions are direct expression of state's will on its citizen. This involves curtailing of offender's liberty which is of utmost importance. Criminalization should be

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<sup>13</sup> Dothard vs. Rowlinson (1977), U.S Supreme Court

<sup>14</sup> Writ Petition (Civil) No 494 of 2012

governed of solid data and harm caused to the society owing to such behaviour. Criminalizing an activity on cultural aspirations can never be a good enough argument because of which offence of adultery being against the ethos of Indian traditions was rejected. Author has discussed as to how according to various religion act of adultery is referred to as immoral. One needs to understand the difference between constitutional morality and societal immorality. Society might consider an act to be immoral but that does not means that act is immoral in accordance of the Supreme law of the land. Constitutional Morality was recently discussed by Justice D.Y Chandarchud in the case of **Navtej Johar vs. Union of India**<sup>15</sup>. He stated that its not morality imposed by majority that should be considered but constitutional morality that should be kept in mind while framing laws. Constitutional morality believes in core principles of constitutional democracy. It is upholding the values on the lines of rule of law and abhorring mob rule. Just because society approves of a conduct does not make it legal or at least the law makers should not take such approvals in account and make laws solely on such approvals. A democracy having its constitution should treat the same as over and above any traditional and cultural customs or opinions. Every law should be tested on the pedestal of constitution which has been a precedent. Adultery law was an outdated muscle show of patriarchal and chauvinistic beliefs which ultimately met its fate. Institution of marriage should be respected and an apt punishment for adultery would be the risk of civil action by the spouse. Marriage is governed by personal laws and remedy to adultery is adequately prescribed under the same. According to the Hindu Marriage Act of 1955, Adultery happens to be a ground for divorce. Marriage is concluded between two individuals who have attained the age of majority and are of sound minds. This implies that they are capable of taking decisions rationally. If one of the spouses ends up having sexual intimacy with a third party with consent then such act should not be criminalized and civil remedies under personal laws can be opted for. Personal laws under criminal law should not be merged. Protection of Women against Domestic Violence Act of 2005 can also be utilized. Section 3 of the act defines domestic violence and any act which is detrimental to the mental health of victim also constitutes domestic violence. Section 498A of Indian Penal Code has provisions in relation to mental cruelty as well. There are various reasons as to why a spouse might turn adulterous and one of the most common reasons being bad marriage. Argument that decriminalization of adultery gives a free pass to men to have physical intimacy outside of marriage is illogical. A woman was never punished under

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<sup>15</sup> W.P (crl) No. 76 of 2016

adultery laws, which do not mean it incentivized her to have sexual relations outside of her marriage. Crime is committed against a state and offence of adultery is such, which can only be committed against another spouse which happens to be a private affair. According to Code of Criminal Procedure of 1973,<sup>16</sup> “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.”, Code of Criminal Procedure also talks about wife, if adulterous, is not entitled to maintenance under section 125 of the same. Personal laws by and large have placed men and women on equal footings and the status qua with regards to same should not be disturbed.

## **CONCLUSION**

Immorality and Illegality are two different dominions. Everything which is considered to be immoral is not necessarily illegal. Consumption of alcohol and pork is illegal in Islam but is not illegal if one has obtained legal drinking age. Consumption of beef is considered to be a sin in Hinduism but is not illegal if consumed in states that do not prohibit its sale. Initial ideas of morality are always drawn from religion. It is an individual’s religion which determines what is right or wrong, how one should lead his life, etc. how far is it viable to make laws or frame policies on the notions of morality? Morality is a very subjective belief which can be questioned on various instances. Homosexuality has been looked down on but recently the Pope announced that everyone has the right to love irrespective of one’s sexual preferences. Recent Supreme Court’s decision on decriminalizing section 377 met with nationwide protests from right-wing religious extremist outfits calling it an attack on traditional fabric of the country. The larger question is who has an authority to decide what is moral or immoral? What attacks traditions and ethos of the country? Conduct of a spouse might not be moral according to the society but can be perfectly legal. Lack of understanding of the most basic rights in the country is the biggest obstacle to inclusive and gender neutral democracy. The focus should be shifted from morality to legality. It’s high time we broke free from shackles of orthodox beliefs

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<sup>16</sup> Section 198(2) of Code of Criminal Procedure 1973

having no logical backing and explanation and move to reasoned policy making, not making majority opinions the only criteria to ascertain criminality of a particular act. With constitution in our hearts and scientific temper in our minds, we should march towards a more inclusive and safe democracy.

