

ADULTERY- NO LONGER A CRIMINAL OFFENCE IN INDIA

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OVERVIEW

India being a traditional country, its culture is rich and among the oldest. Indian society has a character of patriarchal system since age old time. Men have always been treated superior to the women. Majority household decisions were taken by the male member of the family be it regarding their daughter or wife. Earlier, women were not given any rights and they were completely dependent on their husbands. This in turn made the society consider them as a 'personal property' men can own and control. The offence of adultery is mentioned in section 497 of the Indian Penal Code. It was considered as a criminal offence against husband by another man using his wife as a property of his own. This section says that if a man commits sexual intercourse with a wife of another man, he will be charged with adultery. The offence of adultery permitted only the husband of a woman to complain against the offender but same right was not granted to a wife of the man. This section was scrapped down by the Supreme Court in the case of Joseph Shine Vs. Union of India and was held to be discriminatory as it was violative of article 14, 15 and 21 of the Indian constitution which speaks about liberty and equality in the eyes of law

This article focuses on the position of adultery back when it was considered as a criminal offence and various judgements and reasons that led the Honorable Supreme Court to strike down section 497 of the Indian penal code. Adultery now, is not a criminal offence but it is considered to be one of the valid grounds for divorce under Hindu Marriage Act, 1955.

ABOUT ADULTERY (SECTION 479- INDIAN PENAL CODE, 1860)

Adultery is committed when a married person commits a voluntary sexual intercourse with someone other than their lawfully wedded spouse. The term adultery comes from the words 'ad' (towards) and 'alter' (other) combined in the Latin term, *adulterium*. "Halsbury's Law of England (10th Ed.) states the legal definition of adultery as, for the purpose of relief in matrimonial jurisdiction, adultery means consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other spouse."ⁱ

Adultery is described in section 497 of the Indian Penal Code 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."ⁱⁱ

Section 497 of the Indian penal code only held men liable for the offence of adultery and the wife could not be punished even as an abettor. If a married woman and a man committed adultery, the husband of the married woman could bring an action against the latter for having a sexual intercourse with his wife but this could not be done by the wife of a married man in a similar situation. A woman who believed her husband to be having a sexual relationship with other women could neither bring an action against the woman nor her husband. The person held liable for committing adultery was to be punished with imprisonment for up to five years or with fine, or with both.

The wife, under section 497 of the Indian penal code was not allowed to bring an action against her husband which made her position almost as a property of her husband. On the other hand, section 497 defining adultery was said to be favoring women by not holding her as the offender. "The mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence."ⁱⁱⁱ

Talking about the constitutional validity of section 497, “a writ petition was filed by the petitioner for quashing a complaint filed against him for adultery on the ground that the provision which creates the offence of ‘adultery’ that is section 497 of the Indian penal code is unconstitutional because it makes an irrational classification between men and women, it unjustifiably denies to women the right which is given to men. Further the Supreme Court pointed out that section 497 does not expressly hold the wife liable even as an abettor. The observation of the law is such that wife, who is involved in illicit relationship with another man, is the victim and not the author of the crime.”^{iv}

Thus, it is evident that section 497, in some cases served as an advantage to women while as a disadvantage in other.

It was considered necessary that the complaint of adultery is filed by the husband of the woman or by any such person who had care of such woman on her husband’s behalf at the time when such offence was committed. If the husband was a minor, lunatic or was suffering from any such sickness which disabled him to make a complaint, some other person on his behalf could make a complaint.

The most important ingredients^v for the offence of adultery are:

1. The accused has sexual intercourse with a woman;
2. Such woman was married;
3. The accused knew or had reason to believe it;
4. The connection was held without the consent or connivance of the husband.
5. Such sexual connection so held must not amount to rape.

As can be read from ingredients of adultery a man committing adultery with a married woman must have the knowledge about her legal matrimonial bond. If he commits sexual intercourse with an unmarried woman or a widow, he would not be liable for the offence of adultery. Similarly, if the husband consents to his wife having sexual intercourse with another man it would not amount to adultery. The sexual intercourse must be a willing act of man and a woman and it should not fall under the offence of rape.

“Section 497 of the Indian penal code and section 198(1) read with section 198(2) of the Criminal procedure code (Cr. P.C.) go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit.”^{vi} According to Section 198 (1) read with section 198(2) of Criminal procedure code only the aggrieved person could file a complaint whereas it prohibited the wife (if aggrieved) to do the same. The offence of adultery is a non- cognizable offence which means the accused cannot be arrested without an arrest warrant. It is a bailable offence and compoundable by the husband (aggrieved). Section 320 of the criminal procedure code talks about compounding of offences wherein court can record a compromise between the parties and drop the charges against the accused.

For the offence of adultery to be proved, the legality of the marriage has to be proved between the husband and the wife with whom adultery was committed. A mere statement of the complainant (one who files the complaint) that the woman concerned is his legally wedded spouse is not sufficient.

ADULTERY AND BIGAMY

Bigamy is defined under section 494 of the Indian Penal Code. Bigamy is said to have been committed when a person marries for the second time during the lifetime of his/her spouse. Bigamous marriage is void in the eyes of law. A person committing Adultery cannot be said to have committed Bigamy. In the offence of adultery, sexual intercourse becomes a very important element to be taken into consideration whereas in bigamy the existence of sexual intercourse stands irrelevant. Bigamy takes place the moment a person marries for the second time during the subsistence of his first marriage. A person can be exempted from having committed the offence of adultery if their spouse consents to it but a person committing bigamy attracts the offence under section 494 of I.P.C. irrespective of whether the second marriage was consented by their spouse or not. The offence of bigamy is a severe offence. It is a non- bailable and attracts 7 years of imprisonment whereas adultery was a bailable offence and attracted 5 years of imprisonment.

ADULTERY AND RAPE

The very definition of adultery says that the said sexual intercourse must not fall under the offence of rape. This makes it clear that the sexual intercourse must be voluntary and should not be forced onto the person involved. Rape as defined in section 375 of the Indian Penal Code means unlawful sexual intercourse with another person without his/her voluntary consent. The very fact that differentiates adultery from rape is existence of lawful marriage. Rape may be committed on any women whether married or unmarried whereas for the offence of adultery to take place, the lawful wedlock between husband and wife is necessary. Adultery was said to be an offence against the husband, while rape is an offence against the woman herself. Adultery was not a severe offence as rape, the punishment for the offence of rape is ten years imprisonment which may extend to life imprisonment, or fine or both. The offence of rape is a cognizable offence.

ADULTERY: CHALLENGED PREVIOUSLY

The offence of adultery was challenged in the following cases:

- Yusuf Abdul Asif Vs. State of Bombay (10 March, 1954)
- Smt. Sowmithri Vishnu Vs. Union of India & Anr. (27 May, 1985)
- V. Revathi Vs Union of India & Ors. (25 February, 1988)

Prior to 2017, the year in which Joseph Shine petitioned to struck down section 479 of the Indian Penal Code, the offence of adultery was challenged in the above-mentioned cases.

The case of Yusuf Abdul Asif Vs. State^{vii} of Bombay was the first case filed in the year 1951 challenging adultery as a criminal offence. In this case the appellant was being prosecuted for adultery. In the said case the law of adultery was challenged for being violative of article 14 and 15 of the Indian constitution. It was held by the court that section 497 of IPC is not unconstitutional and it is valid under section 15(3) of the Indian constitution that says nothing in article 15 shall prevent the state from making any special provision for women and children.

The court further added that it is the women who is the victim and hence, cannot be a perpetrator.

In another case of Smt. Sowmithri Vishnu Vs. Union of India & Anr.^{viii} Supreme Court held that the sanctity of marriage should be protected and husband and wife, both should not be entertained as a complainant with respect to Adultery. Even in this case the court held that a women will not be held liable for the offence of adultery but a man would be held liable and penalized for the same.

Similarly, in the case of V. Revathi Vs. Union of India & Ors.^{ix} the court held that the rationale behind not holding a woman liable is to protect the sanctity of marriage and promote social good.

DECRIMINALIZATION OF ADULTERY

Section 14 and 15 of the Indian constitution talks about equality to every citizen irrespective of their gender, caste, race etc. Taking this into consideration, Section 497 was highly criticized for being arbitrary and discriminatory.

In October 2017, a 41-year-old Indian businessman from Kerala named Joseph shine, filed a petition in the Supreme Court to strike down the law with respect to adultery. In his argument he said that adultery as a crime only discriminates against men and holds them liable for extra marital relationship. This law treats woman like objects, he added.

“Married women are not a special case for the purpose of prosecution for adultery. They are not in any way situated differently than men” his petition said. Mr. Shine also said that the law indirectly discriminated against women by holding an erroneous presumption that women are the property of men.”^x

Since marriage is a sacrament wherein groom and the bride promise each other lifetime commitment; the ruling BJP government opposed the petition made by Mr. Joseph Shine. They

argued that diluting adultery laws will adversely affect the purity of marriage therefore adultery should continue to be a punishable criminal offence under the Indian penal code.

“The first draft of the IPC released by the Law Commission of India in 1837 did not include ‘adultery’ as an offence. Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties, and not a criminal offence. The views of Lord Macaulay were overruled by the other members of the Law Commission.”^{xi}

In the landmark judgement of *Joseph Shine Vs. Union of India*^{xii} the Honorable Supreme Court on 27th September 2018 struck down section 497 of the Indian Penal Code, 1860 which spoke about adultery and concluded adultery as not being a criminal offence punishable under this section. Adultery was the law which was introduced during the time of British and there was a need to do away with such century- old law that discriminated against the society on the basis of gender which was violative of article 14, 15 and 21 of the Indian constitution. Article 14 of the Indian constitution talks about right to equality and grants to every person the equality before law or equal protection of laws within the territory of India. Article 15 of the Indian constitution secures every citizen from discrimination of any sort on the basis of caste, class, sex, gender, religion, place of birth. While section 21 of the Indian constitution talks about right to life and personal liberty. Every individual has a right to make his/her own decisions, the law cannot be granted the power to do so.

The decision was made by the five- judge bench namely chief justice Dipak Misra who wrote an opinion on the behalf of Justice Khanwilkar and himself. Justice Rohinton Nariman, Justice DY Chandrachud and Justice Indu Malhotra.

To summarize their opinion, then chief justice Deepak Mishra speaking for himself and for justice Khanwilkar observed that adultery is a private marital issue hence cannot be criminalized and punishable. In his words ‘Husband cannot be wife’s monarch and treat her like his property’.

Justice Rohinton Nariman, son of late Fali Sam Nariman who is known as the living legend of law distinguished between bigamy and adultery and said that since law punished the person

indulging in bigamy similarly it punished the third party in the case of adultery as it was meant to protect the proprietary interest of man in his wife.

Justice DY Chandrachud simultaneously held the same and said that section 497 discriminates by depriving both the parties of marriage the right to equality.

While Justice Indu Malhotra concurred with Chief Justice Misra's opinion "She stated, '[the] times when wives were invisible to the law and subordinate to their husbands had long passed.' She emphasized that laws cannot deny women equal societal status."^{xiii}

The five- judge bench unanimously struck down article 479 of the Indian penal code for being violative of article 14, 15 and 21 of the Indian constitution; thereby decriminalizing adultery.

Section 198(2) of the Criminal Procedure Code which contains the procedure for prosecution under chapter XX of the Indian Penal Code was held to be unconstitutional only to the extent that it is applicable to the offence of Adultery under section 497.

ADULTERY: CIVIL OFFENCE AND A VALID GROUND FOR DIVORCE

In the case of Joseph Shine V. Union of India, the court further suggested that Adultery cannot be categorized as a criminal offence; but as a civil offence it could be a valid ground for divorce and carry civil penalties.

In the year 1860, when Indian Penal code was enacted, the Hindus had no law of divorce as marriage was considered to be a sacrament and a lifetime commitment between husband and wife. Until 1955, a Hindu man could marry any number of women. It is therefore why a married man having sexual intercourse with any number of unmarried women was not seen as an offence. Such age- old law does not seem to be in existence since the time Hindu code came into action. Now according to Hindu Marriage Act 1955, having more than one wife is held to be a criminal offence of Bigamy and punishable under the Indian Penal Code and adultery is

considered to be a valid ground for divorce under section 13 of the same. Special Marriage Act, 1954 also recognizes adultery as a valid ground for divorce.

Adultery is considered wrong in personal laws of almost every religion. Dissolution of Muslim Marriage Act, 1939 allows the wife to sue her husband if he associates with another women. Similarly, The Indian Christian Marriage Act, 1872 also has a provision for judicial separation on the grounds of adultery.

POSITION OF ADULTERY IN OTHER COUNTRIES

Countries that are governed by Islamic law such as Pakistan, Afghanistan, Saudi Arabia etc. Strictly prohibits adultery and attracts punishment. “Human rights organizations argue that in several Muslim nations, adultery laws are often used against women who have been raped and under such legislation, the burden of proof is on the woman to provide evidence that she was assaulted.”^{xiv} In US, 21 states prohibit adultery. Some of the states consider it as a minor wrongdoing while in some states offenders are punished with imprisonment. South Korea struck down the law of Adultery in the year 2015 holding it violative of privacy and self-determination. Adultery is a crime in Taiwan as well as in Indonesia. “According to the Indian lawyer Kaleeswaram Raj, more than 60 countries in the world have done away with the law of adultery.”^{xv}

CONCLUSION

Offences like Adultery and Bigamy are against the purity of marriage but we see it happening around us quite often. Earlier women were not aware of their rights and hence such offences were being suppressed. But now women are educated, independent and know about their rights which in turn makes them fight for the same. Economically and educationally backward sections of the society lack knowledge about this hence such offences are not brought to the attention of authorities. The whole and sole reason for this is fear of being abandoned by the

partner. Rise of awareness and protection to the victims especially those coming from backward classes is of utmost importance. Along with food, shelter and clothing, the idea of decent and dignified living should also be implanted into the minds of people.

A person is free to make personal decisions as he/she pleases and no law should intervene with it, taking this into consideration the offence of adultery was decriminalized making it a valid ground for divorce and not a punishable offence. The law provides provision in the form of divorce for anybody whose partner stands disloyal to them.

The Indian television shows portray numerous instances involving adultery, extra marital affairs, cheating and bigamy. And it is on us, the audience on how to interpret it. Such offences exist in the society and hence it needs to be brought into the limelight. Large population of the nation are attracted towards television shows and highlighting such issues can make them aware about the same. This in turn will help the society to know about the legality and illegality of certain issues happening in their surroundings, how to deal with the same and also when to walk away from toxic, unethical relationships.

ENDNOTES

ⁱ Kunal Basu, *Adultery as a ground for divorce*, SLIDESHARE (Aug. 13, 2020, 1:34 PM), https://www.slideshare.net/shantanu_leo/adultery-law-in-india

ⁱⁱ Dr. S.R. MYNENI, *LAW OF CRIMES* 747 (2nd ed. 2014).

ⁱⁱⁱ *W. Kalyani v. State Thro' Inspector of Police and another*, (2012) 1 SCC 358

^{iv} *Smt. Sowmithri Vishnu v. Union of India & Anr.*, 1985 AIR 1618, 1985 SCR Supl. (1) 741

^v Dr. S.R. MYNENI, *LAW OF CRIMES* 747 (2nd ed. 2014).

^{vi} Dr. S.R. MYNENI, *LAW OF CRIMES* 747 (2nd ed. 2014).

^{vii} *Yusuf Abdul Asif v. State of Bombay*, 1954 AIR 321, 1954 SCR 930

^{viii} *Smt. Sowmithri Vishnu v. Union of India & Anr.*, 1985 AIR 1618, 1985 SCR Supl. (1) 741

^{ix} *V. Revathi v. Union of India & Ors.*, 1988 AIR 835 SCR (3) 73

^x Soutik Biswas, *Adultery no longer a criminal offence in India*, BBC NEWS (27 September 2018), <https://www.bbc.com/news/world-asia-india-45404927>

^{xi} Devika Sharma, *Adultery [S. 497 IPC and S. 198(2) CrPC]*, THE SCC ONLINE BLOG (Aug. 13, 2020, 11:59 AM), <https://www.sconline.com/blog/post/tag/joseph-shine/>

^{xii} *Joseph Shine v. Union of India*, 2018 SC 1676

^{xiii} SUPREME COURT OBSERVER, <https://www.scoobserver.in/court-case/constitutionality-of-adultery-law>, (last visited Aug 13, 2020).

^{xiv} THE WEEK, <https://www.theweek.co.uk/62723/where-is-adultery-is-still-illegal> (last visited Aug. 16, 2020)

^{xv} Diva Rai, Laws related to Adultery in India, iPleaders (Aug. 16, 2020, 10:48 AM.), <https://blog.iplayers.in/legalising-adultery-in-india/>

