

CRITICALLY ANALYSE PROVISIONS OF ADULTERY IN INDIAN CONTEXT

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INTRODUCTION

Adultery is derived from a French word, about that has evolved from the Latin verb, “adulterium”, means to corrupt[1]. Adultery is defined as the consensual extramarital sexual relationship that is considered objectionable on social, religious and, moral and earlier on the legal grounds as well.

Though adultery is decriminalized, it still exists as a delinquent act as it violates social norms which an individual is believed to be followed.

Since the last 158 years, it was treated as a crime but after the verdict of Hon’ble Supreme Court in Joseph Shine v. Union of India, adultery is decriminalized and remained merely a civil wrong rather criminal offence. There were two major contentions for the decriminalization of adultery. They were:-

This section provided husbands with the right to prosecute their wives’ adulterer while wives were deprived to complain against the adulteress of their husbands.

The section was ignorant on the matter of the adulterous act of the husband.

ADULTERY ACCORDING TO RELIGION

India is a country known for its unity in diversity. Our country is a secular country where sentiments of all the religions are equally respected. Every religion follows its own views and objectives. However, in the matter of adultery more or less every religion is highly critical. Different religions have different views on adultery but the core view remains the same. In every religion, adultery is treated as a crime. However, the forms of punishment may vary among religions. It is treated as a delinquent act as it violates the religious sentiment of every religion.

Since time immemorial it is considered to be a sin not only on the religious or legal ground but on the spiritual ground as well.

- **Traditional Hindu** views regarding adultery are that it creates disorder in the society and degradation of family value. In Hinduism, marriage is a sacrament, believed to be for seven consequent births, where both the spouses are supposed to be loyal to each other. They are believed not to have a sexual relationship other than their spouse.
- **According to Islam**, adultery, rape, and fornication which are unlawful are considered as Zina. According to the Quran, Zina is huded crime for what punishments are fixed by god.
- The punishments range from amputation of hands and crucifixion to public lashing to public stoning to death. In particular to adultery, according to Quran, an adulterous person should be stoned to death[2].
- **According to the Bible**, adultery as a sin deserving death for both men and women. Adultery is treated as unethical and immoral and evil for the society.
- **According to Buddhism**, sexual intercourse outside wedlock is a sin that increases sufferings. In Buddhism, adultery is the 3rd of the five fundamental precepts that one must refrain.
- **According to Judaism**, which is one of the ancient religions, there is a provision of the death penalty for both adulterer and adulteress.
- **Adultery according to law**

In India, Section 497 of Indian Penal code (IPC) 1860, defined adultery 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 a case, the wife shall not be punishable as an abettor”.

In 2018 section 497 was struck down by Supreme Court in the case Joseph Shine v. Union of India unanimously by the constitutional bench of five judges comprising of Justice Deepak Mishra, Justice Ajay Manikar Khanwilkar, Justice Rohinton Nariman, Justice D.Y.Chandrachud and Justice Indu Malhotra. It was also held that in that matter if any aggrieved spouse commits suicide, based on the evidence could be treated as an abetment to suicide attracting section 306 of Indian Penal Code (IPC). However, though section 497 got decriminalized, it continued to be treated as valid ground for divorce according to the pronouncement of the then Chief Justice Deepak Mishra and justice A.M.Khanwilkar in the instant case.

In the instant case, petitioner was Mr. Joseph Shine, a hotelier from Italy, though he was personally unaffected by the law. His petition was accepted in the view of the locus standi (right or capacity to bring an action or to appear in a court) in Public Interest Litigation (PIL) cases with an objective of welfare of the society and to bring justice in the society.

The petitioner argued that the law deprives women of the fundamental right to sexual autonomy. While government, on the other hand, argued it as an essential element to maintain the sanctity of marriage, although also recognized section 497 as discriminatory against women and proposed to make the offence of adultery as gender-neutral.

In the case it was held that criminalization had restricted the following rights of women:

- Right to sexual autonomy as provided under Article 21(Right to life) of the constitution.

- Right to sexual expression as provided under Article 19(Right to freedom) of the constitution.
- Right to equality as provided under Article 14(Right to equality) of the constitution.
- Right against discrimination as provided under Article 15(Right against discrimination) of the constitution.
- Interference of state in personal matters of an individual. However, this applies for both men as well as women.

The then Chief Justice of India Hon'ble Justice Dipak Mishra and A.M Khanwilkar held that section 497 of IPC creates differences on the basis of gender stereotypes that create a dent indignity of women. They also stated that the emphasis on the consent of the husband that amounts to the subordination of women. Also, it violates Article 21 of the Constitution. According to them, adultery is not a crime but they said that adultery is better to be left as a ground for divorce. Thus, they declared Section 497 of IPC unconstitutional and also declared Section 198 of Cr.PC in relation to the offence of adultery as unconstitutional.

According to Justice Nariman, Section 497 of IPC read with Section 198 of Cr.PC 1973 is violative of Article 14, 15(1) & 21 of the constitution of India.

Justice D.Y.Chandrachud stated that Section 497 lacks determining principle to criminalize consensual sexual intercourse and is manifestly arbitrary. He also stated that Section 497 creates the subordinate status of women in marriage and society and thus violates Article 14 of the Constitution. He also stated that Section 497 is gender stereotype about the role of women and thus, in turn, violates Article 15 of the Constitution. He also stated that Section 497 of IPC also violates Article 21 of the Constitution as it does not provide dignity, liberty, privacy and sexual autonomy.

Justice Indu Malhotra stated Section 497 as being violative of article 14, 15 and 21 of the constitution[3]. According to her,

“A legislation that perpetuates such stereotypes in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the

Constitution. There is, therefore, no justification for the continuance of Section 497 of the IPC as framed in 1860, to remain on the statute book.”

Thus, the 5-Judge constitutional bench of the Hon’ble Supreme Court unanimously struck down Section 497 of IPC as being violative of the golden triangle of the Constitution ie, articles 14, 19 and 21 of the Constitution.

This section was also gender-biased as it forbade women from being punished as only men were punished for an adulterous relationship. Also, the section treated women as victims even though both men and women were the equal parties of the act.

Due to the decriminalization of section 497, women can no longer be treated as the property of their husbands. Before decriminalization, if the consent of the husband of a married woman was obtained, the act was not then termed as adulterous. Thus, section 497 objectified the status of women in society and also violated the provisions of the constitution.

The most significant effect of decriminalization was the removal of section 198(2) of Civil Procedure Code (CPC) which stated that:

“For the purposes of subsection (1), no person other than the husband of the woman shall be deemed to be aggrieved by an 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.”

Before decriminalization, women were deprived of the right to file a case against the adulterous act of the husband if involved with another woman.

The Hon’ble court also looked upon the precedents before arriving in the decision, like *Sowmithri Vishnu v. UOI* 1985[4], *Yusuf Abdul Aziz v. The State of Bombay* 1954[5] and *V. Revathi v. UOI* 1988[6]. Though these cases were dismissed by the then Hon’ble judges

making adultery a criminal offence definitely these cases paved the way of decriminalization in the case Joseph Shine v. UOI.

In the case of Yusuf Abdul Aziz v. State of Bombay[7], 1954, the petitioner questioned whether section 497 of IPC ultra vires Article 14 & 15 of Constitution. It was held that Section 497 of IPC does not violate any article of the Constitution. But petitioner put forth some points which were taken in Joseph Shine's case as the offence of adultery can only be committed by man but in absence of any provision to the contrary the woman would be punished as abettor but he last sentence of Section 497 of IPC prohibits it as,

“.... in such case the wife shall not be punishable as abettor”.

The judge dismissed the case by stating the significance of Article 15(3) of Constitution.

In case Smt. Sowmithri Vishnu v. UOI, 1985[8], several points were criticized, like, Section 497 confers husband the right to prosecute the adulterer but does not confer any right to wife to prosecute the woman with whom her husband has committed adultery. A man whether married or unmarried if has a sexual relationship with a married woman is termed as adultery but this very Section 497 of IPC does not take account of cases where the husband has a sexual relationship with unmarried woman, thus paving a way to give free license under the law to have an extra-marital relationship with unmarried women. Thus, assuming women like chattel or the property of men.

Adultery as a ground of divorce

Supreme Court suggested that adultery could be a ground of divorce and carry civil penalties, but not a criminal offence.

According to the Hindu Marriage Act, 1955 Section 13(1), any voluntary sexual intercourse with a person who is not the spouse, is a ground for divorce. Section 10 of the Hindu marriage Act, 1955 defines adultery as a ground for judicial separation.

Section 22 of the Indian Divorce Act made the provisions of judicial separation on the ground of adultery.

The Special Marriage Act, 1954, stated that if a person had voluntary sexual intercourse outside the wedlock, is a valid ground for divorce.

CONCLUSION AND SUGGESTIONS

According to me, decriminalization of adultery is a constructive step towards a progressive society by striking down the law which deprived the dignity of women. It is a deviant behaviour as it is unethical and immoral as it violates the sanctity of the institution of marriage which is believed to be a sacred institution of society.

However, this is just in the halfway. Our country still has to cover a long way in order to eradicate discrimination and to ensure gender equality. I am of the opinion that society should also rise from the patriarchal mindset.

In order to ensure the sanctity of marriage which according to me is a necessity in every aspect whether being religious, legal or spiritual, everyone should be more careful and sensitive towards the institution of marriage and family system as it is the fundamental unit of society.

NEED TO REFORM ADULTERY LAW IN INDIA

During the past decade or more, laws relating to women have been given more teeth. Existing laws have been strengthened and many new ones like The Protection of Women from Domestic Violence Act, 2005 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 have been enacted. In the aftermath of the unfortunate December 16, 2012 gang rape case in Delhi, sweeping changes were made in the Indian Penal Code vide. The Criminal Law Amendment Act, 2013. Besides giving many new sections to the code, punishment for rape laws were enhanced with even death penalty¹ being added in one of the sections relating to the offence. Other provisions relating to women in the Indian Penal Code

include sections 3542 , 4973 498A4 , 5095 . Laws of all kinds have been prone to misuse and in this case women centric laws are no exception. All laws to protect the women from violence⁶ , and rightly so, in the past few years have seen a steep rise in instances where the criminal law was set in motion at the drop of a hat even when there was no requirement. Laws relating to marriage (section 498A) have been grossly abused. False and frivolous complaints are many times filed leading to a harrowing time for husbands and in-laws. Even the Law Commission of India had recognized this in its 243rd Report. Also recently, on 21-07-2017, the Delhi High Court in *Geeta Sharma vs Govt. of NCT of Delhi*⁷ in clear and unequivocal terms deplored the practice of women terming consensual sex as rape and setting the criminal law in motion stressing on the need for a clear demarcation between rape and consensual sex. 1 Sec 376E: Punishment for repeat offenders 22 Assault or criminal force to a woman with intent to outrage her modesty. 3 Adultery 4 Husband or relative of the husband of a woman subjecting her to cruelty 5 Word, gesture or Act intended to insult the modesty of a woman. 6 Physical, mental or other kinds of violence 7 CRL.L.P. 137/2017 and CRL.M.A. 4027/2017 LatestLaws.com However, there is an intrinsic difference between other laws and provisions and section 497. While the purpose of the former is noble and the only thing required is to prevent misuse to ensure rectitude, law relating to adultery in India is inherently gender biased. It criminalizes a man's immoral conduct by branding it as sinful, but absolves an unchaste woman of any criminal culpability in case she establishes relations outside marriage, thus putting a premium on her unethical conduct. Many times voices have been raised against it with the Supreme Court refusing to relent in the only landmark judgment⁸ on this point. Another unsuccessful passing attempt was made in *W. Kalyani vs. State* (Criminal Appeal No 2332 of 2011). Adultery Laws in India: Need for Reforms Women empowerment has gained momentum during the last few years. Social security to women, protection against harassment, various types of crime ranging from mild to heinous have been given a just reply in the form of stringent laws by way of amendments. Other new laws to protect women⁹ from domestic violence, subjugation and torture have been enacted. Legislative enactments to protect, provide social security and other benefits to confer on them a life of dignity and protection and from systemic vulnerabilities and exploitation have to be backed by the state in a justified form/way. However, the equality principle emanating from Article 14 of the Constitution have also to be given a way and accord to keep the balance and prevention of misuse. Laws are agents of social change, regulators of conduct, and apostle of reforms. The desirable condition is to harmonize

the above for a peaceful society. Deviations from the above principles results in disbalance in social harmony ranging from moderate to blatant. Equality implies absence of discrimination. Social security measures to safeguard and provide protections against deviations in the form of exceptions must not be based on populism, weaning away from sound principles of rationality and logic. Various types of legal protections against violations have been accorded by law and its enforcement instrumentalities ranging from penalties, fines and sanctions to incarceration. Laws that have a moral approbation are mostly regulators of conduct. 8 Yusuf Abdul Aziz vs State of Bombay 1954 AIR 321 9 Protection of women from Domestic Violence Act, 2005. LatestLaws.com Protection of women through legal measures in cases of crime against them have mostly resulted in incarceration to give a stern message against vulnerable exploitations. This is in a sense a right measure for social and legal protection. However, law relating adultery in India¹⁰ is a clear and marked departure from the above, canons of ethics, and legal principles. Adultery is a crime involving one of the partners in a marriage to have extra marital relation or relations outside marriage without the consent of other partner. It is extramarital sex that is considered objectionable on social, religious, moral or legal grounds. A single act of sexual intercourse is generally sufficient to constitute adultery, and a more long term sexual relationship is sometimes referred to as an affair.¹¹ The Oxford Learners Dictionary defines adultery as: sex between a married person and someone who is not their husband or wife. The offence of adultery defined above and constructed within the given definitions is the cheating of one married partner by the other by having consensual illicit relations with a person outside the marriage without the consent or knowledge of the married partner. Adultery in the Indian Penal Code, 1860 is defined in section 497 and is unique in the sense that it absolves the woman with all liability or criminal culpability. The section has been 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 which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.” The role of law as a facilitator and enabler is for social progress, parity and harmony.

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