
DECRIMINALISATION OF ADULTERY

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1. INTRODUCTION

This project work entails to elaborate upon the crime of adultery, relevant cases, its decriminalization and how the jurisprudence around it has revolved. In the Indian Penal Code of 1860, Adultery has been defined within **Section 497** and the provision is as follows: “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.¹” As it can be construed from the terms of the statutory provisions that it is quite discriminatory in nature and thus, had been in controversy for a long period of time. The term ‘adultery’ has originated from the French word ‘*avoutre*’, which has further evolved from the Latin verb ‘*adulterium*’ that basically meant to corrupt. The Penal Code was framed by the British colonialists and it had emanated from the concept of Victorian morality during which women were considered to be the property of men; the provision was a clear reflection of this. Even though the relationship was consensual, the offence, as per the provision, could be committed only by the adulterous man.

1.1. Scope of Research

This project work is devoted towards understanding the law of adultery in India since the making of the penal law, and the changes introduced post the judgement passed by the court in Joseph Shine case. Various other cases shall also be looked into where the constitutional validity of Section 497 was being checked. Lastly, the research would also be into the critique of the landmark judgement, if any.

1.2. Hypothesis

As has already been briefed, prior to the ruling in the landmark case, the law on adultery was archaic under the penal code and was discriminatory against men and women. Thus, the court upheld the principles of equality in ruling out section 497 as unconstitutional.

¹ The Indian Penal Code 1860, s 497

1.3. In brief

Adultery was decriminalized in the case of *Joseph Shine v. Union of India*², ruling it as retrograde in nature. The landmark ruling hailed as a victory for those who had been campaigning for women's rights. The colonial law criminalizing extramarital sex was considered to be a clear violation of the fundamental rights of women and was thus, sexist in nature. It was struck down by the unanimous decision of the court, as was very well quoted by the then Justice Deepak Mishra that, "A husband is not the master of his wife." However, in the case of *Yusuf Abdul v. State of Bombay*³, when the last statement of section 497 was challenged on the grounds of constitutionality, the constitutional bench in its order negative it by observing that it was a special provision for women and it was saved under Article 15(3). It was held that the basis of sex in this situation was a sound discrimination and cannot be held ultra vires. The same question arose in the case of *Sowmithri Vishnu v. Union of India*⁴, where all the constitutional grounds were being rejected by the court, and stated that the offence is against the sanctity of the matrimonial home, as an act which is committed by a man, generally. The reasons put forth by the court were both legally unsound and factually incorrect. Considering the point of matrimonial sanctity, then logically speaking it shall be observed by both the parties to the marriage. In today's times, it could not be understood that why a woman who defile the sanctity of marriage while committing such an offence should not be brought within the net of law. If it is an ideal to achieve the stability of marriages, fidelity is required from both the parties and not partially at the cost of one spouse. Additionally, in the case of *Revathi v. Union of India*⁵, the constitutional validity of section 497 was upheld by the court, stating that abrogation of that section would make it impossible to convict anyone of adultery and it is better from the point of view of the society that at least a limited class is punishable. Though, it was also affirmed by the court that the erring spouses do not have a remedy against each other but can file a divorce on the grounds of adultery. The act of 'adultery' has a wider connotation under civil law as compared to criminal law. Thus, on these

² 2018 SCC OnLine SC 1676

³ 1954 Cri LJ 886: AIR 1954SC 321: 1954 SCR 930

⁴ 1985 Supp SCC 137: 1985 SCC (Cri) 325

⁵ (1988) 2 SCC 72: 1988 SCC (Cri) 308

grounds arguments of the petitioner were rejected and section 497 was not obliterated.

It is strange to note how the law permitted a man to prosecute another man who had sexual relations with the wife of the former and in addition to this, it did not provide any rights to a wife to either prosecute her own husband or the other woman in which he was engaged. Sometimes, in certain cases it was held that the wife is a 'victim' and not an 'author' of the crime, however, it shall not be the case as far as the woman is a consenting partner to the act of sexual intercourse; else it would amount to rape as per section 375 of the IPC. The law commission studied the provision and recommended removal of exemption provided to wife from punishment so as to keep both the husband and wife on equal pedestal.

The landmark case is considered to be a huge victory for the upliftment of the status of women in the family and their status within marriages. It is unpleasant to note that in certain cases the offence of adultery had also been used as a "threat against women by their husbands". The supporters of the provision had advocated upon the fact that the preservation of this law is necessary for the preservation of social stability. It was even raised by certain strata of the society that the law could be amended to make it gender neutral and equal punishment for both men and women shall be introduced. However, the hon'ble Supreme Court had dismissed these concerns.

Reiterating the provisions of Section 497, it can be understood that the provisions denied and destructed a women's dignity and self-respect. It was an unequal law, which denied a women's right to sue her husband for an adulterous act nor can the wife be sued for such an act, thus, eradicating the status of women as a separate individual identity.⁶ Moreover, the court observed that the provision punishing an accused should be struck down as it was considered to be ultra vires to the Indian Constitution.

1.4. Status of the law worldwide

The status of the law against adultery was very different globally. For instance, with the passage of the Matrimonial Causes Act of 1923, adultery was made a

⁶ McDougall M, "India Strikes down Sexist Adultery Law: 'Husband Is Not the Master of the Wife'" (CNN September 27, 2018) < <https://edition.cnn.com/2018/09/27/asia/india-adultery-law-intl/index.html> > accessed November 8, 2022

ground for divorce, for both the partners, in England. In some measures, gender equality was being recognized between the spouses here so to say. However, in England it was always considered to be a civil wrong and not of penal nature.

1.5. Adultery Law in India

Pertaining to Indian traditions, it could be observed that a women's prime virtue was considered to be the mandate of her chastity. It was also closely associated with ensuring the purity of bloodline and retaining a husband's control over her sexuality. The first draft of the penal code did not include adultery as an offence as Lord Macaulay, who is considered to be the major person behind making of this law, considered marital infidelity to be a wrong of private nature and not criminal. However, his views had been overruled by other members of the Commission and their argument was that the existing remedy for the wrong under Common Law would be insufficient and inefficacious in nature. Non-treatment of adultery as a criminal offence, in their opinion, would give sanction to immorality. Their rationale behind not punishing a woman for the crime of adultery was that the plight of women in India was extremely deplorable.

In India, there was altogether a separate rationale behind adopting adultery as a separate offence. Till the year 1955, polygamy was permitted and it was not the subject matter of the offence to see that a married man is having sexual relations with an unmarried woman. Even it did not exist as a ground for divorce and as a result a married man could easily marry a woman with whom he had sex, at a subsequent point of time. Although, post 1955-56, monogamy was introduced and additionally adultery was made a ground for divorce in Hindu Law.⁷

1.6. Adultery and Rape

It is essential to understand the differences between the two offences even though both are related to sexual intercourse by a man with a woman.

| RAPE | ADULTERY |
|---|--|
| It can be committed on any women, married, unmarried, or any other. | It can be committed only on a married woman. |
| In certain cases, it might be committed by a husband against his | No adultery can be committed by a husband with his wife. |

⁷ Admin E, "History of Adultery Law in England and India" (*TheLawmatics* November 8, 2022) < <https://thelawmatics.in/history-of-adultery-law-in-england-and-india/> > accessed November 8, 2022

| | |
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| wife (the controversy around martial rape). | |
| The consent of the woman so raped is absent. | Consent of the married woman is present and it is a willing party. |
| The aggrieved party is the victim with whom the intercourse has been committed. | Here, the aggrieved party is the husband. |
| The consent of husband is immaterial in case of a married woman. | There shall be no offence in case connivance of the husband in there. |
| Here the primary object is to protect the woman. | Here it is to protect the right of husband over his wife. |
| It is a heinous offence. | It is considered to be less serious in nature. |
| The victim can file a complain in this case. | In this case, only the husband has the right to complain. |
| The crime of rape is very widely defined and here sexual intercourse is not necessary. | Sexual intercourse is necessary. |
| Minimum sentence has been prescribed. | It has not been prescribed. |
| Provisions of section 375 are more stringent (that talk about rape). | Provisions relating to adultery under section 497 have been declared unconstitutional and ultra vires. |

2. RELEVANT JUDGEMENTS

a) *Sowmithri Vishnu v. Union of India*⁸

In this particular case, the husband had filed a divorce on the grounds of adultery and desertion. While the divorce petition was pending, the husband had filed a complaint against a 'Dharma Ebenezer' in which he accused him of adultery. The wife in this case had requested for quashing of the charges on grounds that; it was a violation of Article 14, the right to reputation is

⁸ 'Supra' note 4

included within the right to life. The provision is silent on hearing the party whose reputation is being affected whose reputation is likely to be impacted by the result of the trial. The court had contemplated the law in a manner that the provision construed women as the victim and not the perpetrator of crime. Neither could she be punished, even as an abettor and not was she given the right to prosecute her husband for adultery. The crime was deemed to be committed by a man which was an attack against the sanctity of matrimonial home. Only the man is considered to be the perpetrator of the crime. Though it was acknowledged by the court in this case the law shall be reformed while taking the changing times in consideration but this thought at the same time was held to be a little vague in application as it might be a case where the woman who is seduced is actually a victim and not the abettor. Thus, the time yet was not considered to be ripe for changing the law and following it as is.

b) *V. Revathi v. Union of India*⁹

In this particular case, the constitutional validity of Section 198(2) read with 198(1) was challenged by the wife and the concerned provision allowed the husband of the adulteress to prosecute the adulterer but the wife of the latter did not have any recourse against her promiscuous husband. Reiterating the ratio of the Sowmithri case, the woman argued that the wife shall not be legally disabled from acting against her unfaithful husband. Denial of such a right was claimed by the petitioner's wife to be an 'obnoxious discrimination'. The statute did not enable the husband to take any action against the wife for committing adultery and defiling the sanctity of matrimonial relationship between them and nor did the wife had any right against her disloyal husband. However, the court held otherwise and held that when Section 497 of the IPC and 198(1) and 198(2) are read together constitute a package to deal with the wrongdoer which in this case is the outsider who has invaded the peace and privacy of matrimonial unit and poisoned the relationship between the partners. The partners are not armed to assault each other with tools under criminal law and so there is no

⁹ 'Supra' note 5

prejudice on grounds of sex. Thus, the provisions of CrPC were not considered to be subject to the accusation of discrimination against women. Finally, it was in the case of Joseph Shine that the rule was accepted to be obsolete.

c) *Joseph Shine v. Union of India*¹⁰

- **Facts:** In this particular case, Joseph Shine was a non-resident of Kerala and had filed a public interest litigation under article 32 of the Indian Constitution. The petition basically intended to challenge Section 497 of the IPC which talks about the offence of adultery and Section 198(2) of the Code of Criminal Procedure that deals with prosecution for offences against marriages, on grounds of constitutionality. The bare provision of 198(2) is as follows: “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.”

To precisely mention, it can be stated that the afore-mentioned provision of the CrPC specified that how complainant may file charges for the concerned offences and its sub-clause 2 stated that only a husband has the legal authority to file a complaint¹¹.

But before proceeding with further nuances of the landmark judgement some essentials regarding the law of adultery shall be understood.

- Certain specifications regarding the provisions of adultery are as follows:
 - a. It is a non-cognizable offence i.e. arrest cannot be made without a warrant;
 - b. It is a bailable offence;
 - c. It is compoundable by the husband of the wife with whom such act has been committed. There exists the option in such cases to record a

¹⁰ Sharma D and others, “Adultery [s. 497 IPC and S. 198(2) CrPC]” (*SCC Blog* May 16, 2021) < <https://www.scconline.com/blog/post/2019/02/21/adultery-s-497-ipc-and-s-1982-crpc/> > accessed November 8, 2022

¹¹ -, “Decriminalization of Adultery” (*Supreme Court Observer* June 20, 2022) < <https://www.scobserver.in/cases/joseph-shine-v-union-of-india-decriminalisation-of-adultery-background/#:~:text=Joseph%20Shine%2C%20a%20non%2Dresident,the%20Criminal%20Procedure%20Code%2C%201973.>> accessed November 8, 2022

compromised between the parties as defined under Section 320 of the CrPC;

- d. Only the husband shall be allowed to file a complaint;
- e. A wife is thus, disabled from prosecuting her husband for committing the act of adultery; and
- f. Even though the act is consensual still only the adulterous man can be convicted of the offence. The woman is exempted from any sort of criminal liability.

- **Legislative intent behind not treating the woman even as an abettor:**

The law contemplated women to be victims and not the perpetrators of crime. It thus, considered it impossible to charge a woman for adultery and prosecute her for the commission of the act. Thus, the crime of the woman cannot be prosecuted as held in *Kalyani v. State*.¹² She is totally immune to the act and such an exemption finds its roots from the prejudices surrounding women and the gender-skewed approach to marriage in India where the husband and wife do not stand on an equal pedestal. The code makers were driven by the rampant child marriages and the state of polygamy, at that time in India. Only a man was considered to be a seducer and wife just an unfortunate and passive victim. The philosophy behind the provision promoted goodwill between the spouses asking them to resolve the issue on their own rather than taking each other to the court.

- To bifurcate the provision of adultery in simple terms the following ingredients must be established which were laid down in the case of *Alamgir v. State of Bihar*¹³:
 - a. Sexual intercourse of a married woman with a man other than her husband;
 - b. Such man shall have known or had reason to believe that she is the wife of some other man, which does not include that identification of the husband is required by the accused;
 - c. Such an act should have taken place with the woman's consent and not amount to rape;

¹² AIR 2012 SC 497

¹³ AIR 1959 SC 436: 1959 Cri LJ 527

d. It must have taken place without the consent of the woman's husband. The key laws which were dealt with by the court in this case were inclusive of Adultery, Criminal Law, Gender Equality, Marriage, etc.

- **Judicial interpretation of the term 'Connivance':**

This term within the provision forms a major deciding factor. It implies the willingness to give consent to a conjugal crime, or a guilty conduct that is most likely to result into the commission of a crime. Simply stating, connivance is an act of understanding, thought and acquiescence. This terminology has its roots within the Latin phrase, '*Volenti non-fit injuria*', that is a willing mind is what is all required as held in the case of *Boulting v. Boulting*.¹⁴

- **Issues:**

- a. Whether Section 497 needs to be decriminalized?
- b. Whether exemption granted to married woman under 497 is violative of the right to equality under the Constitution?
- c. Whether the provision of Section 497 be made gender neutral by inclusion of women as offenders?

- **Court's Verdict:**

The case was initially heard by a three-judge bench and later on it was referred to a five-judge bench which comprised of the then Chief Justice Deepak Mishra, J. RF Nariman, AM Khanwilkar, DY Chandrachud and J. Indu Malhotra.

- a. It was noted by the Constitutional bench in this case that, "On perusal of this section it can be observed that it grants relief to the wife by treating her as a victim and only one is liable when the offence is being committed by both of them. Generally, the law proceeds with the object of gender neutrality, but this concept was absent in this provision."
- b. The center's response to the contentions were that diluting the law of adultery would impact the 'sanctity of marriage' and society detests marital infidelity.
- c. The absence of a woman's right to file a complaint was held to be violative of the constitutional mandate and arbitrary.

¹⁴ (1864) 33 LJ (P M & A) 33

- d. As far as the question of who can be prosecuted was considered the need for an adequate determining principle was strongly felt in the case.
- e. It was also observed that the provisions treat the woman as a chattel of her husband and is reflective of the social dominance of men.
- f. On the grounds discussed in the points above, the section was considered to be violative of **Article 14** (Right to equality) of the Indian Constitution.
- g. Further, it shall be noted that **Article 15(1)** states that the state shall not discriminate on the basis of sex, and it has been clearly violated as per the provisions of this section.
- h. In addition to this, it also violative of a woman's right of dignity, privacy and right to choose as enumerated under **Article 21** which enshrines the principles of right to life and liberty.

The court did acknowledge the fact that the law appeared to be based upon 'societal presumptions' and ruled that the husband could not be the master of his wife.

Thus, it was in this case that the court finally struck down Section 497 of the IPC, as being violative of articles 14, 19 and 21. It was also stated by the court that in light of protecting marriages from breakdown, the provisions punishing an accused for the offence should be held to be ultra vires to the constitution of India.

- **Critique:**

A critical appraisal of the judgement in the Joseph Shine case was stated that the decision has destroyed "dearest interests of the human race closely connected with the chastity of women and sacredness of nuptial contract" as had been envisaged by the code makers. It has indeed affected the sanctity of marriage adversely by virtually converting the sacred relationship into a contractual one between the parties. Thus, adultery now is legal, so to say, but still unethical. The institution of marriage is dependent on the mutual trust of the partners. The court is no more to interfere within the personal and moral lives of the people. Adultery is now merely treated as a civil mistake and the remedy for which lies alone in divorce.

However, it shall be noted that for stricter interpretation of law of adultery, proof of sexual activity was considered necessary to constitute the offence

but it was seldom to prove it through direct evidence. In *Ramachandra v Baburaj*¹⁵, it was stated that, “The narrative of seeing adultery through a keyhole is only an imagined one, and it cannot be believed.” It was difficult to determine the same from the facts and circumstances of the case in certain situations, and adultery cannot be inferred through vituperative decisions or one which are worthy of two or more interpretations, as affirmed in the case of *AS Puri v. KC Ahuja*¹⁶.

Moreover, it is to be noted that certain courts did give a retrospective effect to the judgement. The verdict in *A.S. Gauraya v. S.N. Thakur*¹⁷ was relied upon in which it was stated that the law declared by the Supreme Court applied to pending proceedings.¹⁸

3. CONCLUSION

The project work dealt with understanding the law of adultery, its interpretation through case laws and decriminalization of the same through the landmark judgement of Joseph Shine case. It can be very wisely concluded that section 497 is legally void as it refrains a woman from exercising her autonomy, dignity and privacy. It is essential to understand that sexual autonomy to one's body is a basic principle enshrined within Article 21 of our holy constitution. The appreciation of an individual's choice is a basic requirement. The archaic penal provision was a clear rejection of the fundamental equality of women as it treated them as unfair partners in marriage. In addition to this, the focus on the aspect of the consent of the husband is analogous to the state of subordination of women. It was also realized that adultery shall not be treated as a criminal offence but more as a private affair between the parties but it does exist as a ground for divorce. In today's time, women share an equal status in society and shall no longer be treated as property for their husbands. Thus, the rationale behind the provision was considered to be flawed and it is arbitrary in nature. If it allowed a woman to have a relationship with another man with the permission of her husband then it indeed failed to maintain the 'sanctity of marriage'. It did

¹⁵ (2009) 4 KLT 744 (Ker)

¹⁶ AIR 1970 Del 214

¹⁷ (1986) 2 SCC 709

¹⁸ Shukla S, “A Critical Analysis on Decriminalizing Adultery - IJLMH” (*International Journal of Law Management & Humanities* April 15, 2021) < <https://www.ijlmh.com/paper/a-critical-analysis-on-decriminalizing-adultery/> > accessed November 8, 2022

not provide any recourse to the 'other man' or in case of an affair with an unmarried woman or widow, etc.

It shall also be noted that although, a person is lawfully married the right to choose a sexual partner is within the right to sexual liberties of an individual and this right shall not be criminalized. It unconstitutional as it violated freedom. The right to independence was thus held to be an inalienable part of the right to life under article 21 which has been very widely interpreted over the years. The protection of sexual autonomy was recognized in the case of *Navtej Singh Johar v. Union of India*¹⁹.

The Malimath Committee Report of the year 2003 had also suggested changes to the law along with the 42nd Law Commission Report but it remained unchanged until the Supreme Court struck it down in the Joseph Shine case. The landmark judgement shall remain unquestionably influential in the evolution of jurisprudence of liberty. The state, thus, shall not enforce on individuals the moralistic binaries of right and wrong. Both the subjective and constitutional morality shall be bifurcated from each other.

¹⁹ W.P. (Criminal) No. 76 of 2016