

A STUDY ON DECRIMINALIZATION OF ADULTERY LAW IN INDIA

¹KALPANA

¹Assistant Professor, Dewan Law College, Meerut. U.P.

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ABSTRACT

The Indian Penal Code as enacted in the year 1860 contained the infamous Adultery law under section 497. The universal definition of Adultery is the voluntary sexual Intercourse by a married person with a third person, other than his/her spouse. The legal definition of Adultery varies from statute to statute and from country to country. Many religions across the world including Hinduism, Christianity, Islam, and Judaism have condemned Adultery and criminalized it. However, the modern trend has inclined towards decriminalising it. The law relating to Adultery under Indian Penal Code is 158 years old, which was laid down by the British colonial administration. In 2018, Adultery law has been declared as unconstitutional by the Supreme Court of India in *Joseph Shine versus Union of India*, on the ground that it violated Article 14, 15 and 21 of the Indian Constitution. The Judgement by a five-Judge Constitution bench of Supreme Court, headed by Honourable Chief Justice Dipak Misra has overturned the previous three rulings on the matter. Adultery is no longer a crime under Indian Penal Code. Section 198 of The Criminal Procedure Code 1973, which allowed a husband to bring a prosecution under section 497 of Indian Penal code 1860, was also struck down as unconstitutional. The researcher through this article tries to find the answers of the following major questions:

1. Whether diluting Adultery law will impact the sanctity of marriage?
2. Whether under the former law wife was considered as commodity of the husband?
3. Whether the former law on Adultery was discriminatory and give a license to women to commit Adultery?

There are many more such questions, which remain unanswered.

Keywords: Adultery, unconstitutional, decriminalising, prosecution, condemned, statute.

INTRODUCTION

The term adultery is derived from the old French word, word 'avoutrie', which in turn evolved from a distinct latin verb, 'adulterare', which means 'to corrupt'. Generally speaking, adultery is a consensual sexual relationship between someone who is married and a person they are not married to (who may or may not be married to someone else). Marriage and family are often considered as the basis of every society. Adultery has been a part of the human existence for as long as there has been marriage. The word adultery is especially used in a religious context, in which it is often considered a sin.

Section 497 of the Indian Penal Code, 1860 Had 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 case the wife shall not be punishable as an abettor.

Section 497 stated that any man who has sexual intercourse with a married woman, without the permission of her husband, he had committed a crime. The man accused of adultery could be imprisoned for maximum of five years, and even made to pay a fine.

The Indian law on adultery dictated that the woman could not be punished as an abettor. Instead, the man was considered to be a seducer. The law stated that only the husband can file a case of adultery and that too against a man with whom his wife has illicit relationship.

This law discriminated against men by not penalising women in an adulterous relationship. This law is also discriminatory against women, because while a married man can file a case on adultery, a married woman cannot file a case against the husband or against the woman with whom her husband has illicit relationship.

Section 198(2) of the Criminal Procedure Code, 1973, contained the procedure regarding the action that can be taken by the husband whose wife has illicit relationship with another man, without his permission or knowledge.

Section 198(2) of the Code of Criminal Procedure, 1973

According to section 198(2) of the code, no person other than the husband of the woman shall be deemed to be aggrieved by any offence of adultery punishable under section 497 and any offence enticing, etc. a married woman punishable under section 498 of the Indian penal code 1860. However, in the absence of the husband, some person who had care of the woman on his behalf at the time when such offense was committed, may, with the leave of the court, make a complaint on behalf of the husband.

Section 497 of Indian penal code used to be read with section 198(2) of the criminal procedure court, 1973, in the matters of prosecution for committing the offence of adultery.

RESEARCH QUESTIONS

1. In *Joseph Shine versus Union of India*, what was the rule on adultery before the landmark ruling by the Supreme court
2. Whether diluting adultery law will impact the sanctity of marriage?
3. Whether under the former law wife was considered as commodity of the husband?
4. Whether the former law on adultery was discriminatory and give a license to women to commit Adultery?

ADULTERY – HISTORICAL PERSPECTIVE

The women and children were considered as the most deprived class in the history of Indian society. The condition of women was pathetic and they were dependent on men even for their livelihood. Adultery law, a pre constitutional - Law, was enacted in the year 1860. Women at that time had no right independent of their husband. Women were treated as “chattel” or “property” of their husbands. Therefore, adultery was considered as a crime against the husband since it was considered a “theft” of his property, for which he could prosecute the offender.

In 1837, the law commission of India did not include adultery as an offence in the first draft of the Indian penal code. Lord Macaulay, who was the principal initiator of the Indian penal code was against possibility of considering such a section in the underlying framework. He felt that such inclusion was unnecessary and baseless and that marital infidelity should be left to the community to be taken care of. Later on, considering the condition of the women in the society the second law commission recommended inclusion of adultery law in Indian penal code. It was included thereafter. The law on

adultery in India remains undiscussed for many years. As the country is developing, society is growing and adopting the western culture, the cases of adultery have eventually increased over the period of time. This matter can be discussed through study of the case laws, which emerged before the courts over the period of time.

Judicial Progress Leading to Decriminalising of Adultery in India

Yusuf Aziz Verus State of Bombay:

- This was the first case in which adultery law was challenged, Mr. Yusuf Abdul Aziz, the petitioner, charged with adultery and contended before the Bombay High Court that section 497 IPC is unconstitutional as it is in contravention of article 14 and 15 of the Constitution of India.
- The major argument before the court was that section 497, which governs adultery law, discriminates in favour of women and against men only on the ground of gender.
- Considering the historical background of section 497 and the prevailing social conditions and unequal status of women in the society, the High Court of Bombay upheld the constitutional validity of the provision.
- The court also opined that the alleged discrimination of the favour of women was saved by the provisions of article 15(3) of the constitution, which permits the states to make any special provision for women and children.
- The petitioner filed an appeal in the Supreme Court under article 132 of the Indian Constitution contesting the judgement of the Bombay High Court. But the appeal was dismissed and it was observed by the Honourable Supreme Court that article 14 read with article 15 clause 3 validates section 497 of the IPC. It was also stated that women could only be victim of adultery and not the perpetrator of the crime under section 497.

SOWMITHRI VISHNU VERSUS UNION OF INDIA

- The next important judgement regarding validity of adultery law under section 497 in 1985, in Sowmithri Vishnu vs Union of India case.
- In this case woman filed a petition for divorce against her husband on the ground of desertion. The trial court dismissed the petition and held that it was actually the wife who has deserted the husband.
- After this ruling the husband filed for divorce on two grounds that his wife had deserted him and secondly that she was having extra marital sexual relationship, i.e; adultery.
- Both the contentions of the husband were accepted by the trial court and a decree of divorce was granted.
- The husband also filed a petition against the person with whom his wife had committed adultery.
- The judgement made by the honourable supreme court of India in this case upheld the constitutional validity of section 497 of Indian Penal Code, which made adultery a culpable offence.
- The Supreme Court also rejected the- argument that unmarried woman should be brought under the purview of adultery law
- The Supreme Court also held that men who were not allowed to prosecute their wives for the offence of adultery in order to protect the sacramental character of marriage. In addition, wives were not allowed to prosecute their husbands for the same reason.
- This judgement of court retained the offence of adultery as a crime committed by a man against another man.

V.REVATHI VERSUS UNION OF INDIA

- In 1988, the next big case which came into light on adultery law was v.revathi versus union of India.
- The petitioner challenged the validity of section 198,CRPC, which permitted only the husband to sue the adulterer.
- Upon hearing the parties, the Apex Court held that the intent of legislature behind such provisions is to promote "social good" in a marriage. This provided an opportunity to the couple to "make-up" and preserve the sacramental character of marriage.
- The court held that section 497,IPC and Section 198,CRPC go hand in hand and constitute a statutory package to deal with the offence committed by an outsider of the matrimonial bond, who invades the peace and privacy of the matrimonial unit.

- As a result of above mentioned judicial pronouncement, it can clearly be concluded that many petitions were filed to make the law gender neutral but the courts protected the women and did not consider them even an abettor.

RECOMMENDATIONS OF MALIMATH COMMITTEE

In March 2003, the Malimath committee on reforms of criminal justice system was constituted by the govt. of India, which considered comprehensive measures for revamping the criminal justice system.

Joseph versus Union of India

- In December 2017, Joseph Shine, an Italy based Indian businessman, filed a public interest litigation, challenging section 497,IPC. He contended that the law is discriminatory.
- The Apex court referred the matter to a five judge constitution bench, which included the Then Chief Justice of India, Dipak Misra, Justice R.F. Nariman, Justice D.Y. Chandrachud, Justice Indu Malhotra and Justice A.M. Khanwilkar.
- In four independent and favourable verdicts the court overruled the clause and declared that the husband should not be considered as the master of his wife. However, adultery remains a civil offence as a ground for dissolution of marriage under Hindu Marriage Act 1955, Under section 13(1)(A). The then Chief Justice of the Supreme Court of India said that the law on adultery is arbitrary and undermines the dignity of the woman.

CONCLUSION

The Supreme Court of India ruled that adultery laws are unconstitutional. This article concludes that there has been a big change in Indian society and that wives are no longer considered as property of their husbands. The way of thinking of societies are embedded in morality that changes with time to some degree. Legally, we need to ensure that gender-neutral language is used in our laws and both the sexes are equally protected. Laws should not be based on the presumption that only one of the sexes is the perpetrator and the other, a helpless victim.

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