

LEGALIZATION OF ADULTERY IN INDIA: A CRITICAL ANALYSIS

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ABSTRACT

This paper deals with the concept of adultery in India and its critical analysis. In this research paper the researcher had made a humble attempt to mention the current position of Adultery in India as well as its position before it was decriminalized in India. The research paper deals with the introduction on Adultery, which includes, etymology of word adultery and its definition. It also states the concept of adultery on global platform and provides how different countries perceived adultery. The historical overview of adultery and how it was perceived in the past is also discussed in the paper. It also states the recent trend on adultery, and how its gender biased nature violates the provisions of our Constitution. This paper includes the latest judgment of Joseph Shine Case which decriminalized adultery and lastly it deals with the critical analysis of decriminalization of adultery.

Keywords: Adultery, Legalized, Gender Biased

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INTRODUCTION

Etymologically, Adultery comes from the Middle English, from the old French word 'Adultere'. It is derived from the Latin word 'Adulterium' which means violation of conjugal rights. The actual meaning of the word Adulterium is 'Corrupt'¹. In common society, Adultery is also known as Infidelity or Extra Marital Affair. However, the literal, social and legal definitions of adultery are different, they are not same. Dictionary meaning of Adultery: According to the dictionary meaning, the word adultery means, when a married person have a sexual intercourse with other person who is nit his or her husband or wife. Therefore, according to its dictionary meaning, the concept of Adultery is gender neutral, it do not discriminate between men and women. thus, adultery can be committed either by men or women. According to the dictionary meaning of Adultery, there are three essentials which must be fulfilled in order to constitute the offence of Adultery.i). a husband or a wife must have a sexual intercourse with a person of opposite gender, who is not his or her wife;ii) the person committing adultery must have a living spouse and they must have knowledge that other person is a wife or husband of some other person;iii) both of them should have consented to such sexual intercourse out of their free will. Social meaning of Adultery.

According to the social meaning, adultery means, having a voluntary sexual intercourse with any person out of their marriage between two heterosexual persons. Both of them or any one of them must have a living spouse at the time when they commit such sexual intercourse.

From legal perspective, different countries have different definitions of Adultery. According to some countries, Adultery is deemed to have been committed when a wife has a sexual intercourse with a person. However, in many countries, adultery is deemed to have been committed when a woman voluntarily has a sexual intercourse with any man other than her husband and without the consent and connivance of her husband in other words if a husband gives consent that to his wife to have a sexual intercourse with any man other than him, in such case such sexual intercourse will not amount to Adultery.²Under the Indian law, the definition of Adultery has been provided under section 497 of Indian Penal code, 1860 as – section 497 of IPC provides that , Adultery is a consensual sexual cohabitation between two individuals, who are not married to one another but either of them or both of them are married to someone else. It is a moral crime and almost all the religions of the world consider it as a sin.

¹<https://www.merriam-webster.com/dictionary/adultery>

²<http://www.legalservicesindia.com/article/2191/Adultery.html>

OFFENCE OF ADULTERY: AN INTERNATIONAL PERSPECTIVE

On the Global platform, different countries have different opinion regarding the offence of Adultery. For example, In United Kingdom, Adultery was considered to be a crime against church and therefore it was not a part of common law. In western countries particularly in countries like – Finland, Belgium and Sweden adultery is not treated as a crime. In India, there has been a recent change in laws relating to Adultery, wherein from being a punishable and heinous crime, adultery has now been decriminalized. The institution of marriage in India is considered to be spiritual, communal and lawful authorization. Therefore, sexual communication outside marriage will be against this sexual institution of marriage.³

ADULTERY IN INDIA: A HISTORICAL OVERVIEW

The phrase Adultery can be traced back to Abrahamic times. But, long before the term adultery was originated, its concept was already into existence, the concept was in existence even before Judaism. Adultery was treated as a sin in almost all the civilization of the world. Judaism, which is one of the oldest civilizations, was against Adultery, they treated adultery as a sin. There are Ten Commandments in Judaism, which were given by lord to Moses, these commandments are recorded in old testament book, exodus. Out of these Ten Commandments, the seventh commandment states that - thou shalt not commit adultery. According to Christianity, as evidenced by St. Paul, Christianity condemns adultery. Adultery has been regarded as immoral and is regarded as a sin for both men and women.

In India too Adultery has been regarded as a sin from the time immemorial. In Manusmriti, punishment was given for offence of adultery. It prescribed punishment for people who were habituated with having sexual relations with other men's wives. In Dharma sutra also adultery was punished. In Apastamba Dharma sutra, adultery was regarded as a punishable crime. Punishment for adultery varied from caste to caste and class to class. People belonging to different class and caste were punished with different punishment for committing adultery. Thus, Adultery has been treated as an offence by number of countries. Even in India, Adultery was viewed as a serious crime however, it is no more a crime in India. Still, people who commits adultery face serious consequences, adultery often results in breakdown of marriage. It is still a ground of divorce in India.⁴

LEGISLATIVE PROVISIONS PERTAINING TO ADULTERY

In India the law relating to adultery was contained under section 13(1) of The Hindu Marriage Act, 1955 and under section 497 of the India Penal Code, 1860.

Civil Dimensions of Adultery: Adultery as a Ground of Divorce

Section 13(1)(i) of the Hindu Marriage Act, 1955, contains the provision relating to Adultery as a ground of Divorce in India. However, under section 13(1)(i) instead of the word adultery the concept of Adultery has been provided as a ground of Divorce. The petitioner has to fulfil the following essentials : (i) that after the solemnization of the marriage ; (ii) the respondent has voluntary sexual intercourse (iii) with a person other than his or her spouse. On the fulfilment of these conditions the court will pass the decree for divorce.

Amendment of 1976

Before the amendment of 1976, the word living in Adultery was used , which used to mean that the petitioner was required to prove the adulterous behavior of the respondent. A single isolated act of Adultery was not sufficient to dissolve the marriage. After the amendment of 1976 the word living in adultery was removed. Therefore, now even the single isolated act of marriage is fatal to dissolve the marriage.

- (i) After the solemnization of marriage : for the purpose of seeking divorce the petitioner has to prove that respondent has committed sexual intercourse after the solemnization of marriage. If the sexual intercourse takes place before the solemnization of marriage then it cannot be treated as a ground of Divorce.
- (ii) Voluntary : for the purpose of adultery the sexual intercourse must be consensual that is to say the respondent must have given the consent to the sexual intercourse. If there is no consent from the side of the respondent or if it was taken forcefully or under a mistake then in such case it will not be a ground of

³<https://www.bbc.com/news/world-asia-india-45404927>

⁴<https://en.wikipedia.org/wiki/Adultery#Hinduism>

- divorce as it will not amount to adultery. Therefore, if a rape is committed on a respondent's wife, the husband is not entitled to claim divorce on the grounds of adultery.
- (iii) Sexual intercourse : for the purpose of divorce on the ground of Adultery it has to be specifically proved that the respondent has done the act of sexual intercourse. Mere attempt to have sexual intercourse is not sufficient to constitute the offence of Adultery. The term sexual intercourse and an attempt to sexual intercourse are two different terms. Only a sexual intercourse will amount to adultery and not its attempt. The sexual intercourse is required to be with the person of opposite sex, if it is with the person of same sex then in such case it will not amount to adultery.
- In case of artificial insemination there is no sexual intercourse. Therefore, the artificial insemination will not amount to adultery and the marriage cannot be dissolved on the said ground. In the case cited as *Oxford v. Oxford*, 1921, the court held that the term 'sexual intercourse' is related to Adultery. If there is no sexual intercourse, then there will be no Adultery. In Case of Artificial insemination, in true sense there is no sexual intercourse if the wife gets artificially inseminated from some other person and with consent of her husband, this will not amount to the act of Adultery and thus it will not be a ground for divorce under this clause.
- (iv) With any person other than his or her spouse : if the respondent has a sexual intercourse with his own spouse then in such case it will not amount to adultery. Sexual intercourse must have been committed with a person other than his or her spouse. Therefore, if the husband is having sexual intercourse with his bigamous wife and that bigamous marriage is valid, then in such case the second wife is not having the status of spouse, in such case sexual intercourse with such wife will amount to adultery.

Degree of proof : section 13(1)(i) deals with the dissolution of marriage on the ground of adultery, as adultery is committed in secrecy therefore, in almost all the cases the adultery is to be proved on the basis of circumstantial evidences there is no direct evidences in relation to it. In the case of *Subbarama v. Saraswati*⁵ the Madras high court held that law favors preserving of marriage and does not favor dissolving matrimonial ties, therefore, in proving adultery which is based on circumstantial evidences high degree of probability is required to be proved by the petitioner and the burden cannot be discharged on the basis of preponderance of probability.

Therefore, in cases of adultery under Hindu marriage act, the adultery is to be proved on the similar footing as in the proof under criminal cases because it results in dissolving marriage which is not favored by law. In the case cited as *smt. Anandi devi vs Raja Ram*⁶, the court held that, in case of Adultery, in most of the cases there is no direct evidence. It has to be proved on the basis of circumstantial evidences. If the adultery is proved by the circumstantial evidences on the preponderance of the probabilities will cause hardship and it will become an easy weapon for dissolution of marriage.

In hotel bills and register cases of 1953, in England, the evidence of hotel bills was given in order to prove adultery by the respondent. The courts held that these hotel bills if proved merely prove the existence of opportunity to have sexual intercourse it does not prove that sexual intercourse was actually committed. These hotel bills can be one of the circumstantial evidences to prove adultery and cannot be the sole evidence to prove adultery.

Confession of adultery by the respondent: if the fact of adultery is admitted by the respondent in his examination in chief or cross examination, it will not ipso facto prove the commission of adultery by the respondent. In matrimonial cases in order to avoid collusive litigations the confessions are not treated as conclusive evidence, therefore the petitioner has to give the additional evidences in order to prove that respondent has committed adultery.

Matrimonial bars: In case of adultery, under section 23, generally three matrimonial bars are applicable which are as follows: (i) condonation (ii) accessory (iii) connivance.

- (1) Condonation: If the act of adultery is condoned by the petitioner then in such case petitioner cannot claim divorce on the basis of it. For the defense of condonation, the following essentials are required to be fulfilled:
- (a) in condonation apart from forgiveness there must be restoration of marital obligations between the spouses. If there is merely the forgiveness on the part of the petitioner and not restoration of the marital obligations then in such case it will not apply as a matrimonial bar and it can be the basis of dissolution of marriage. (b) the

⁵ 1957(Mad 85)

⁶ AIR1973 Raj94, 1972 wln525

condonation must be on the basis of full and true information. If the information provided is incomplete or is not true then in such case it will not amount to a valid condonation.

- (2) Accessory: The term accessory means the person who is partner in crime. If the petitioner has in any way given the consent to the respondent to commit adultery or the petitioner has in any way voluntarily participated in the adulterous act by the respondent then in such case it will be termed as accessory by the petitioner and the petitioner cannot claim the dissolution of marriage on the ground of adultery.
- (3) Connive: The term connive means ignoring something. If the petitioner voluntarily ignores the act of adultery by the respondent then as per section 23 in relation to that particular act the petitioner cannot claim divorce. It has to be noted here that merely remaining silent cannot be termed as connivance. The silence is different from ignorance. In case of ignorance there is an element of implied consent whereas in the case of mere silence there is no implied consent.

Therefore, any marriage which was solemnized whether before or after the enactment of Hindu Marriage act, may be dissolved by seeking divorce on the grounds of Adultery. The application for divorce may be presented either by husband or by wife. The decree for divorce may be passed on the grounds that either husband or wife had sexual intercourse with any person other than their spouse after the solemnization of their marriage.⁷

Criminal Dimensions of Adultery (Section 497 IPC)

The provisions relating to Adultery were mentioned under section 497 of The Indian Penal Code, it provided that when a person has a sexual intercourse with any woman whom he knows or has a reason to believe, that she is a wife of another man and without the consent and connivance of her husband, commits the offence of Adultery, such sexual intercourse must not amount to rape. The punishment prescribed for committing the offence of Adultery was either imprisonment which may extend to five years, or fine or both. Wife is not made punishable. The main essence of this section is that only male offender has been made punishable.⁸ Section 498 of the code of criminal procedure also deals with the provisions of Adultery, according to section 198, The court shall not take the cognizance of the offence of Adultery unless such complaint has been made by the husband of a woman. However, if the husband of such woman is absent then such complaint may be made by a person who is authorized to take care of the woman on behalf of her husband. Such person may make a complaint on behalf of woman's husband with the leave of the court.⁹

But, recently Adultery has been decriminalized in India, but still people who commit adultery are not seen with respect in the society as adultery violates the social norms which an individual must follow. Since the last 158 years adultery was treated as a crime in India, it was in the year 2018 when five judges of the supreme court struck down section 497 IPC and 198(2) of Crpc. In the landmark judgment of *Joseph Shine v. Union of India*, the honorable Supreme court held that section 497 of IPC violates articles 14, 15 and 21 of the Indian constitution.

JUDICIAL RESPONSE PERTAINING TO ADULTERY IN INDIA

In India, the law relating to Adultery had been a topic of controversy since a very long time. One of the important cases in which Adultery law was criticized in India is the case cited as *Yusuf Aziz v. State of Bombay*¹⁰, the law of Adultery was challenged for the first time in this case on the grounds of being violative of article 14 and article 15 of the Indian Constitution. It was argued that section 497 discriminates between men and women as only men are made punishable for committing adultery. The section does not treat men and women equally. It was contended that punishing only men and not women gives women a license to commit adultery. However, in the year 1954, the court pronounced its judgment and held that section 497 was completely valid and does not violate the provisions of Articles 14 and 15 of the Indian constitution. Therefore, in this case, the Adultery laws were held to be valid. The Supreme Court held that a woman is not a seducer; it is a man who is the seducer. The Supreme Court held that in the offence of adultery a woman is always a victim and never an abettor. Therefore, it was held by the honorable Supreme Court that section 497 of IPC does not violate article 14 and article 15 of the Indian Constitution.

⁷ Dr. Paras Diwan, *Modern Hindu Law*, (21 ed. 2012)

⁸ Indian Penal Code, S. 497 (1860).

¹⁰ AIR 1951 Bom 470, (1951) 53 BOMLR 736, ILR 1952 Bom 449

The other important case pertaining to Adultery in India is the case of *Sowmitri Vishnu v. Union of India*¹¹. In this case the court held that in order to make the laws even stricter, it is not required to make women punishable for the offence of Adultery. The court also made it clear for not involving women within the purview of section 497. The reason behind not treating women as an adulterer was to secure the sacredness of marriage. Thus, neither husband nor wife were allowed to prosecute each other. It was contended that, unmarried women should also be included within the purview of section 497, however the supreme court rejected this contention and held that an unmarried woman should not be brought within the purview of section 497.

The case of *V Rewathy v. Union of India*¹², is an important judgment pertaining to law of Adultery in India. In this case the Supreme Court held that the reason behind not providing punishment for women in Adultery cases is to promote the social good. Adultery law, according to the Supreme Court, is a "shield rather than a sword." By limiting the scope of Section 497 to men, the court found that the existing adultery legislation did not violate any constitutional provisions. Therefore, in this case the Supreme court held that section 497 of IPC read with section 198 of Crpc are constitutionally valid and stated that under the said provision neither wife nor husband can punish each other for the offence of Adultery, however only an outsider is punished under this section. Therefore, in this case it was held that section 497 read with section 198 are constitutionally valid and does not violate articles 14 and 15 of the Indian Constitution.

There are significant legal perspectives in relation to the concept of Adultery.

1. The Law Commission of India Report of 1971 (42nd report): This report recommended that women shall also be made punishable for committing Adultery and also reducing the punishment for adultery. It recommended that punishment shall be reduced to two years of imprisonment instead of five. However, these recommendations were not given effect.
2. 152nd Law commission report: This report recommended that the adultery must be made gender neutral and both man and a woman must be made equally liable for committing Adultery. It also recommended for recognizing the status of women in society. These recommendations were also not accepted.
3. The Malimath Committee on Criminal Law Reforms of 2003: This committee recommended that the provision - whoever has sexual intercourse with the spouse of another, shall be amended. Therefore in these reports it was recommended that the provisions of section 497 should be amended and shall be made gender neutral and both men and women should be made equally punishable for the offence of Adultery. Finally, the offence of Adultery was decriminalized in India, in the landmark judgment of *Joseph Shine v. Union of India*¹³.

In the important judgment of *Joseph Shine v. Union of India*, the Hon'ble Supreme Court of India decriminalized the law of Adultery which was prescribed under section 497 of IPC. In this case the Supreme court struck down section 497. The bench comprised of four judges: Justice Dipak Mishra; Justice Chandra chud; Justice Nariman; Justice Malhotra. Petitioner, Joseph shine filed a petition under article 32, he challenged the legality of section 497 of IPC, and section 498 of Crpc, as being violative of Article 14, 15 and 21. Petitioner contended that the law of adultery in India is discriminatory and do not treat both the genders equally. He contended, adultery law degrades the dignity of a woman.

Petitioner argued that section 497, criminalizes adultery only on the basis of sex, which is not rationale. A wife's consent is irrelevant as a result it is violative of article 14. That the rule is founded on the woman is the husband's property. According to section 497, adultery is not committed if the husband gives his consent. The provisions of section 497 of IPC are gender discriminatory because, it exclusively gives men the authority to prosecute for the offence of adultery. This provision violates article 15 of the constitution of India. The petitioner argued that this provision is unlawful, because it degrades women's dignity by failing to respect her sexual dignity. It violates article 21 of the constitution of India. Petitioner contended that section 497 of IPC and section 198 of Crpc must be repealed.

The issues raised were whether the provisions of Adultery under section 497 of IPC are arbitrary and discriminatory and against the provisions of Article 14 of the constitution of India? Whether section 497 considers women as a property of men, and thus discriminates between men and women and is violative of article 25? Whether the provisions of section 497 of IPC degrade the dignity of women and is violative of article 21 of Indian constitution? Whether criminalizing of Adultery is a legal intrusion into an individual's private life?

¹¹1985 AIR 1618, 1985 SCR Supl. (1) 741

¹²1988 AIR 835, 1988 SCR (3) 73

¹³2018 SC 1676

The court observed that¹⁴ to declare the legislation or its sub-legislation unconstitutional, the manifest arbitrariness test should be applied. Any law which is proved to be arbitrary shall be overturned. The provisions of section 497 are said to be arbitrary because under this section only husband has a right to prosecute and he is recognized as an aggrieved person but the wife is not provided with any such right. Under this section, women is considered as a man's property and the offence of adultery is regarded as the offence of theft of property of a man as the section states that if a husband gives his consent or connivance then such sexual intercourse does not amount to adultery. No provision is made to punish a wife, she is not treated as an offender. This discrimination is unfair and has no significance in today's modern society. Thus, provision of section 497 violates Article 14 of the Indian constitution.

The court further observed that Section 497 discriminates between men and women on the grounds of sex. The Indian law on adultery is based on a notion that a man has a complete control over his wife's sexuality and that a wife is treated as a property of her husband. Women are perceived to be incapable of exercising their sexual autonomy. Women are not penalized for committing adultery. Thus, it is argued that section 497 benefits the women. Therefore, article section 497 violates article 15 of the Indian constitution, which prohibits discrimination on the basis of sex. It was also observed that Section 497, degrades the dignity of the women therefore it violates article 21 of the constitution of India. Article 21 provides that no person shall be deprived of his or her personal liberty except according to the procedure established by law. Under section 497, sexual intercourse with a wife of another man, with consent of the husband is not considered as adultery. This completely degrades the dignity of women as she is regarded as a puppet of her husband. In recent times both men and women are treated equally and fundamental rights enshrined in our constitution also provides that there shall be no discrimination. According to article 21, dignity of women is important it cannot be sabotaged by the provisions of section 497 which their dignity is degraded. Crime affects the society at a large however adultery is a type of crime which only has an impact on the parties concerned. The offence of adultery is a type of crime which has no victim and it is committed with consent of both the parties. The punishment of adultery is up to 5 years of imprisonment. In the opinion of the court it is not required. Even if the adultery will be made gender neutral, it is still a private matter of the parties involved thus it should not be treated as a crime. It shall only be a ground for seeking divorce. Thus, the Supreme Court of India, in the year 2018, struck down the law of adultery and held that adultery is not a criminal offence however it is still a civil wrong and a valid ground for seeking divorce.

A CRITICAL ANALYSIS:

As the law of Adultery has been decriminalized in India, this decriminalization may lead to increased number of cases of adultery. Section 497 of the Indian Penal Code, which provides that adultery is a criminal offence, had a deterrent effect to some extent. People with fear of getting punishment refrained from committing adultery, as in western countries where adultery is not a crime, the number of people indulged in adultery are more as compared to countries where adultery is not a crime. In my opinion, instead of completely decriminalizing adultery, it should have been made gender neutral. Both men and women should be made equally liable and punishable for committing adultery. Our country is adopting western culture thereby doing away with their own values. This step of decriminalizing adultery will lead to deterioration of the concept of sacrament of marriage in India and adopting western culture and concept. It was argued in many cases that law on adultery mentioned under section 497 of IPC violates the provisions of Indian Constitution, as it discriminates on the basis of sex and dignity of women is not given any importance. Which was also wrong, as it was believed that an Indian woman can do no wrong therefore; she can never commit the offence of adultery. It was considered that it is a man who is an abettor and only man can commit adultery. Section 497 only punished men for the offence of adultery. This provision was definitely against Articles 14, 15 and 21 of the Indian constitution. Thus, section 497 would have been made gender neutral instead of completely decriminalizing it.

THE OFFENCE OF ADULTERY: SOME RECENT TRENDS

In India law relating to adultery has been introduced by Indian Penal Code, 1860. Lord Macaulay, viewed Indian women as an innocent being, he compared Indian women to a holy cow, and according to him Indian women cannot do any wrong and thus she cannot commit Adultery. Thus, According to him, women should not be punished for the offence of adultery. This would not only jeopardize the sacredness of women, but it would also jeopardize the

¹⁴<https://indiankanoon.org/doc/42184625/>

institution of marriage. In India: There has been a recent change in India on Laws relating to Adultery. From being regarded as heinous and punishable crime, adultery has now been de criminalized. In many countries across the world adultery is regarded as a crime till date while in many countries it is not a crime. Countries where Adultery is a crime are Bangladesh, Nepal, Afghanistan, Pakistan, Indonesia, United States of America. Countries where adultery is not a crime: Japan, Australia, New Zealand, Brazil, Denmark, France, India

It can be concluded that the Adultery is regarded as a criminal offence in India since the past 150 years. Even in Manusmriti, Dharma sutra and Apastamba, the punishment was prescribed for Adultery. From the very beginning the marriage in India is regarded as a sacred union of husband and wife and whole foundation of marriage is based on trust and love between both. Therefore, when any of the partner commits adultery, the whole trust gets broken which in turn leads many problem in marital life. Sometimes it results in the breakdown of marriage. Even if somehow, marriage is preserved, the whole trust between husband and wife gets broken and the same relation or trust which the parties shared earlier is never restored. In the year 2018, in the landmark judgment of *Joseph Shine v. Union of India*, the Supreme Court struck down section 497 IPC and held that section 497 was violative of articles 14, 15, and 21 of the Indian Constitution. As they discriminate between men and women. Moreover, on deep interpretation of section 497, it becomes clear that women were treated as a property of their husband. Thus, on these grounds the Supreme Court of India struck down section 497 of IPC which is appreciated as a step in the right direction to further the idea of Justice in the Indian Criminal Justice System.

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