
CONTEMPLATING ADULTERY AS OFFENCE IF THE PARADOX AND GENDER BIASES ARE REMOVED

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ABSTRACT

The Hon'ble Supreme Court of India, in the case of *Joseph Shine v. Union of India*¹ rendered a landmark judgment decriminalising the 150 years old statutory provision that declared the commission of the act of adultery as a criminal offence punishable under Section 497 (Part XX) of the Indian Penal Code, 1860.

The erstwhile provision dealing with adultery was drafted in a highly biased and paradoxical manner, which was contrary to the purpose that it intended to serve. It was against the dignity of both husband and wife. Section 497 prosecuted the adulterous man who committed adultery with another man's wife while an adulterous woman was immune from all criminal liability and could not be prosecuted even as an abettor. This was clearly an unreasonable classification that the judiciary erroneously overlooked for decades. Similarly, the section was also against the dignity of women because it objectified women as their husbands' property since the husband's consent to a third person for sleeping with his wife would not constitute the offence under the said section.

In this research paper, the author has discussed the absurdity associated with the erstwhile statutory law on adultery in light of the paradoxical and gender-biased provisions contained therein. The author has also proposed a draft provision as a possible substitute to the provision contained under Section 497 of the Indian Penal Code, in case the legislature happens to consider re-criminalising adultery in the future by amending the said provision so as to remove the absurdity.

KEYWORDS: consensual, decriminalization, criminalization, unconstitutional, gender bias.

¹ 2018 SCC OnLine SC 1676

INTRODUCTION TO ADULTERY

The term “adultery” can be defined as an act of consensual sexual intercourse between a married person and another person who is not his or her legal spouse (whether married or not). It is also called ‘extra-marital affair’, especially in common parlance.

The commission of adultery by a spouse is considered an unlawful act committed against the other spouse and it is a valid ground for divorce in nearly all personal laws². However, its position under the criminal law varies from country to country. Whereas the meaning of the term ‘adultery’ is almost identical in all personal laws, there is no universally accepted definition of the same in the criminal laws prevalent in different countries. Some countries have criminalised the act of adultery while in some countries adultery is not a punishable offence. Likewise, the quantum of punishment for the offence of adultery varies from country to country. Some countries have prescribed simple penalties for the offence of adultery while some have more stringent punishments including capital punishment. Among those countries, the minimum punishment prescribed for adultery is payment of fine whereas the maximum punishment prescribed is death penalty. The quantum of punishment prescribed by the laws of various countries depends on how each country and its citizenry perceive the commission of adultery and also how the term has been defined in the statutory laws of those countries. Particularly in India, the archaic definition of adultery as laid down under the colonial-era criminal law³ was much peculiar. On one hand, the civil law of India considers adultery as an act which is committable by both the husband and wife and similarly the aggrieved party (technically the victim) may be either of them. On the other hand, the criminal law recognised only the husband as the adulterer who could be punished for adultery and never the wife even if the latter had committed the very same act. In case of a married man, adultery was punishable only when it was committed by him with a woman whom he knows or has a reason to believe to be the wife of another person. This provision did not apply to a married man who engages in sexual intercourse with an unmarried woman. Likewise, if the woman with whom the husband has engaged in a physical relationship is already divorced or a widow, then the provision of adultery under the criminal law would not be attracted. Furthermore, the section excluded from the definition of adultery the sexual intercourse between a third person and a

² S. 13(1)(i), The Hindu Marriage Act, 1955; S. 10(1)(i), The Divorce Act, 1869; S. 27(1)(a) The Special Marriage Act, 1954; S. 32(d) Parsi Marriage and Divorce Act, 1936.

³ S. 497, Indian Penal Code, 1860.

married woman if it happened with the approval of the woman's husband (which is *ipso facto* immoral and may lead to the possibility of forced prostitution by the husband).

In this era when we talk about gender equality and have debates over the sine qua non of enacting gender-neutral laws, we need to have an open deliberation over the act of adultery and the possible impact of its decriminalisation on the marital bond of couples and the society at large.

OFFENCE OF ADULTERY UNDER INDIAN PENAL CODE:

Adultery is in the nature of a private act; therefore direct evidence of the commission of adultery is seldom available. In absence of direct evidence, the allegation of adultery may be proved by the discovery of circumstantial evidence. For instance, if the husband or wife is caught with another person of the opposite sex in an objectionable position in a private place such as a hotel room then it may be concluded that adultery was committed. Thus, like other offences and civil wrongs, adultery can be deduced in some situations from the other suspicious facts concerning the sequence of events.

For more than 150 continuous years, adultery had been a part of the Indian Penal Code under Section 497 in Chapter XX dealing with '*offences relating to marriage*'. This section under the Indian Penal Code was fundamentally enacted to secure the sanctity of the institution of marriage by punishing the man who commits adultery with another man's wife. This was the reason why adultery had been placed under the chapter concerning offences relating to marriage. However, the provisions laid down therein suffer from various absurdities that actually defeat the very purpose behind the enactment of this section.

Section 497 reads 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.”

The paradox and gender biases under Section 497

Under the erstwhile section punishing adultery, neither the husband could institute criminal proceedings against his wife who had committed sexual intercourse with another man, nor could the wife prosecute her husband who had committed the same act with another woman. It was only that husband whose wife had been adulterous with another man, who was considered the actual victim. In the same way, it was the man who had committed adultery with another's wife and not the wife herself, who could be held guilty and accordingly subjected to the punishment of imprisonment up to five years, or fine or both as prescribed under Section 497. Thus, the wife had a sort of licence to engage in an extra-marital affair with any man regardless of the latter's marital status and she was immune from criminal prosecution and conviction. Furthermore, the section provided that the husband could give consent to a third person to have sexual intercourse with his wife, and upon such consent, that third person would not be liable for the offence of adultery. This reflected the idea that the wife is the property of the husband and hence she could be physically trespassed with the husband's consent. This, in turn, raises many socio-legal objections:

Firstly, it indicates that if the husband gives his consent to another man to sleep with his wife, then it would not amount to an offence under this section. The wife's consent is irrelevant as far as this section is concerned, and she could only take the help of Section 376 (punishment for rape) in case she had not consented to the act. This might have possibly resulted in a number of forced prostitution cases by a few needy and greedy husbands as the husband had the authority to give consent to another man to sleep with his wife.

Secondly, this section would not be attracted if the husband has had sexual intercourse with an unmarried or divorced woman. It was necessary that the woman with whom the husband had engaged in a sexual intercourse was married in order to prosecute the husband. It was as if the husband had a free licence to commit adultery with an unmarried or divorced woman or a widow.

Thirdly, neither the husband could prosecute his wife for committing adultery nor the wife could prosecute her husband for committing adultery. The only remedy they had against each other in case one of them was guilty of adultery was to seek divorce or judicial separation under the personal law governing their marital relationship (this is still the case after the decriminalisation of adultery). Hence, the section did not punish the adulterous spouse who was responsible for defiling the sanctity of the marriage institution and only punished a third party with whom the adulterous spouse had engaged in a sexual intercourse.

Fourthly, the wife could, in no case, be held guilty even if she was the adulteress. The section clearly states that the adulteress "wife" is completely immune from criminal liability. The last sentence of this section expressly mentions that the wife shall not be prosecuted even if she aids and abets the offence of adultery. Much worse than in the case of husbands, it was as if the wife had a free licence to commit adultery with any male person whether the man is married, unmarried or divorced and she would not be held liable in any case whatsoever. Hence, the section was also grossly biased against the husbands. Thus, the gender bias under this section was against both men and women and it would be wrong to assume that the section was biased only against the wife.

Fifthly, it was only the husband who could file a criminal case against the man with whom his wife had committed adultery. The wife could not similarly prosecute the woman with whom her husband had committed adultery. This was against the fundamental right to equality⁴.

With regard to the above points explaining the paradox and gender biases associated with the Section 497, it is evident that the said section dealing with the criminalisation of adultery was unjustifiable and totally against the dignity of both the wife and the husband.

DECRIMINALISATION OF ADULTERY

'Decriminalisation' is one such term that is often misunderstood. What is meant by decriminalisation is that the act is no longer a criminal offence. The act may still exist as a civil wrong if it was already a civil wrong and if the judgment or legislation decriminalising it has not expressly mentioned that the act shall also not be a ground for a civil action.

The previous stand of the court:

Time and again the constitutional validity of Section 497 of the Indian Penal Code has been challenged. Earlier the Supreme Court held that decriminalising adultery would imperil the sanctity of marriage which may adversely affect the society.

In one of its earliest judgments on adultery in the case of *Yusuf Abdul Aziz v. State of Bombay*⁵, the Hon'ble Supreme Court upheld the constitutional validity of Section 497 of the Indian Penal Code. This was the first time when a petition was filed in the court challenging the

⁴ Art. 14, the Constitution of India.

⁵ AIR 1954 SC 321

constitutional validity of the offence of adultery. It was contended by the petitioner that Section 497 was against the spirit of the equality clause enshrined in the Constitution of India. However, the Supreme Court rejected these contentions of the petitioner.

In *Sowmithri Vishnu v. Union of India*⁶, the Supreme Court observed that adultery is not violative of the Constitution, and the consent of the wife is irrelevant. However, this case is significant in that it led to the development of the factors that eventually resulted in the decriminalisation of adultery. Similar views were expressed by the court in *V. Revathi v. Union of India*⁷ wherein the petition was dismissed on similar grounds.

Although in *Sowmithri Vishnu*'s petition the court maintained the validity of the said section, the court nevertheless accepted the fact that the archaic notion that it is the man who is always the seducer in the cases of adultery and never the woman may have changed with the ever-changing society. This suggested that it was for the legislature and not the judiciary to consider whether the society has actually undergone any such change and to make necessary amendments in the section if required.

Present stand of the court:

Finally in the case of *Joseph Shine v. Union of India*⁸, a constitutional bench of five judges of the Supreme Court of India overruled its previous judgments wherein the court had upheld the constitutionality of adultery. The provision of adultery as a criminal offence was considered outdated, irrational as well as unconstitutional by all the five judges. The bench, therefore, struck down Section 497 of the Indian Penal Code, 1860, and S. 198 (2) of the Code of Criminal Procedure, 1973, as unconstitutional. Since both of these Acts are part of the criminal law, therefore it clearly indicates that the court has only decriminalised the offence of adultery and the commission of adultery still exists as a ground for civil action. For instance, divorce⁹ or judicial separation¹⁰ can still be prayed in court and the maintenance right of the wife can still be forfeited¹¹ if adultery is proved.

⁶ AIR 1985 SC 1618

⁷ AIR 1988 SC 835

⁸ 2018 SCC OnLine SC 1676

⁹ S. 13(1)(i), The Hindu Marriage Act, 1955; S. 10(1)(i), The Divorce Act, 1869; S. 27(1)(a) The Special Marriage Act, 1954; S. 32(d) Parsi Marriage and Divorce Act, 1936.

¹⁰ S. 10, The Hindu Marriage Act, 1955.

¹¹ S. 125(4), The Code Of Criminal Procedure, 1973; S. 25(3), The Hindu Marriage Act, 1955.

The decision to decriminalise adultery was taken considering several sources like judicial precedents and the current position of adultery under the criminal laws prevalent in various other countries. The court eventually concluded that Section 497 was in violation of Articles 14, 15 and 21 of the Constitution of India. Some jurists and academicians have welcomed the judgment and are of the viewpoint that the decision is in favour of society and not against the institution of marriage. Others are displeased with their contention that it will actually hamper the institution of marriage.

The court in this case further noted that the right to live with human dignity under Article 21 of the Indian Constitution embraces the “right not to be subjected to public censure and punishment by the State except where absolutely necessary”. Therefore, Section 497 was also violative of Article 21 since it directly interferes in the private lives of the individuals.

ALTERNATIVE PROVISION FOR ADULTERY

The decision to decriminalise adultery will have a variety of effects on the institution of marriage, some of which are favourable while others may potentially have a detrimental impact on the marital relationship and on the society at large. The decriminalisation of adultery will tend to endorse and increase the cases of adultery, as the adulterous spouse would know that the maximum legal consequence of his conduct would be divorce and never a criminal conviction. With the resultant increase in the number of cases of adultery, the rate of divorce may potentially rise, damaging and weakening the sanctity of the marriage institution in the long run.

One of the characteristics of law is that it changes with the change in the needs and the collective consciousness of the society. A law that has existed for a time long and which no longer serves the purpose behind its enactment should be repealed. Similarly, if the need for the reintroduction of a law that was repealed earlier is felt in the future, then it should be reintroduced to serve its purpose. Adultery is one such law that has both positive and negative perspectives and the arguments on both sides are significant enough. Given the fact that adultery is still a civil wrong and a ground for civil action still exists, it might happen that the legislators in India would consider reintroducing adultery as a criminal offence in the future. For this, like in cases of a few laws struck down by the judiciary in the past, the Parliament may consider making necessary amendments in the controversial section so as to remove the

gender biases and the paradox contained therein which greatly influenced the judgment decriminalising adultery.

In the event of such consideration by the legislators of this country to again criminalise adultery, the author of this research paper humbly proposes the following draft provision as a possible substitute to the former provision under Section 497 of the Indian Penal Code dealing with the offence of adultery:

“Section 497 – Adultery: Whoever engages in consensual sexual intercourse with another person who is and whom he or she knows or has reason to believe to be the wife or the husband of another man or woman, as the case may be, notwithstanding the consent or connivance of his or her spouse, commits the offence of adultery. The person committing adultery and also the adulterous spouse, whether he or she is the husband or the wife of the aggrieved person, shall be punished with simple imprisonment for a term which may extend to three years, or with fine, or with both.

Explanation 1: In this section, the expression “adulterous spouse” shall refer to the spouse who has engaged in sexual intercourse with a person other than his or her legal spouse.

Explanation 2: The expression “aggrieved person” shall refer to the spouse whose husband or wife, as the case may be, has committed the offence of adultery with another person.

Explanation 3: A single instance of consensual sexual intercourse with a person other than his or her legally wedded life wife or husband, as the case may be, is enough to constitute the offence of adultery.”

The author is of the view that the above proposed provision as an alternative to the former one would bring the following changes so as to remove the paradoxes and gender biases associated with the formerly existing provisions under section 497:

- 1) In the proposed provision, both the husband and wife would be equally liable for punishment if the offence of adultery is committed by either of them. The former contentious provision wherein only the husband could be prosecuted for adultery (if he engages in sexual intercourse with a married woman) is removed.
- 2) In the former provision, only the third person and never the adulteress wife could be prosecuted for adultery if the sexual intercourse between the third person and the wife

was consensual. Similarly, the adulterer husband was not liable if the sexual intercourse was committed by him with a widow or an unmarried or divorced woman. In these two conditions, the adulterer spouse was exempted from criminal liability under the former provision if adultery was committed by them. Now in the proposed provision, the adulterer spouse would also be liable for prosecution in all cases along with the third person.

- 3) The objectionable provision that if the husband gives his consent to another man to sleep with his wife then it would not amount to adultery is removed in this proposed section. Now the consent of both the husband and wife is irrelevant in the commission of the offence of adultery.
- 4) Since adultery was also criticised on the ground of the harsh maximum punishment prescribed in the formerly existing provision, the proposed provision seeks to reduce the maximum punishment for adultery to three years of simple imprisonment (in place of *“imprisonment of either description for a term which may extend to five years”*.)
- 5) In the former provision for adultery, it was only the husband who could file a criminal case against the man with whom his wife had engaged in an extra-marital affair. The wife could not similarly prosecute the woman with whom her husband had committed adultery. This inequality has been sought to be removed in the proposed section, wherein both the husband and wife can equally prosecute the third person as well as their own spouse for committing adultery.

In light of these points, it is humbly submitted that if adultery is ever reconsidered for re-criminalisation by the legislators of this country, then it ought to be done only after removing all the controversies and biases of the former provision in the manner the legislators deem fit.

CONCLUSION

Law is a dynamic subject that keeps evolving with the development and expansion of society. Any law that does not evolve (through necessary amendments) with the change in society risks the chance of becoming obsolete and no longer serves the purpose behind its enactment. As a result, the erstwhile provision of the Indian Penal Code dealing with the provision of adultery was reviewed by the Hon'ble Supreme Court and eventually struck down as unconstitutional being violative of certain fundamental rights.

On a comprehensive reading of the judgment given in Joseph Shine's case, it becomes evident that the Hon'ble Supreme Court has neither endorsed extra-marital affairs nor has it given any

licence for adultery. By rendering this judgment, the court has not licensed the commission of adultery, as was wrongly interpreted by some people including a few news sources, but the court has only decriminalised it. Adultery still exists as a civil wrong in the same form and the court has maintained the status quo with respect to the filing of a suit for divorce or judicial separation on the ground of adultery. Thus, it can be fairly concluded that the paradox and irrationality formerly associated with the offence of adultery have now been removed while the necessary legal consequences under the civil law have been left untouched.

As we are aware of the fact that the law changes with the change in our dynamic society, thus, if in the future the legislators of this country find the need to reintroduce adultery as a criminal offence, then the draft proposed by the author of this research paper for a gender-neutral adultery law may be taken into consideration.