



Obliterating the Offence of Adultery in India: An Exemplar of Constitutionalizing the Criminal Law

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Abstract: The law on Adultery given in the Indian Penal Code provides that only a man is punishable for the offence of adultery and the woman involved in the crime is a victim. Thus, it prohibits a man from having sexual intercourse with someone else's wife without the consent of her husband. Ever since the offence was initially drafted by Lord Macaulay in 1860, this unreasonable provision was under scanner but it continued to survive for last century and a half sans any libertarian changes. Various efforts from different quarters were continuously made for the reconsideration of such arbitrary provision. Eventually, in 2018, the Supreme Court of India came up with a momentous decision by holding the offence of adultery as unlawful and unconstitutional and struck off the superfluous Section 497 of the Indian Penal Code.

Keywords: Marriage, Property, Adultery, Discriminatory, Gender Neutral

1. Introduction

The Indian Constitution is a compassionate, magnificent and gigantic instrument which encompasses the vigorous inclusiveness and it has been further nourished by the judicial creativity and sensitivity by gradually evolving the notion of golden triangle of fundamental rights. The equality of treatment of all human beings including male, female and other genders is the benchmark of justice. Every law enacted by the parliament and the state legislatures must qualify the test of constitutionality. If a law is ultra-vires, then the judiciary has power to review such a law and declare it to be null and void in the interests of justice.¹ The law on adultery was incorporated in the Indian Penal Code, 1860 and it hold good for a long time. But with the progressive developments all around mobilized by the rights activists, this law lost its significance and hence place in the Code.

¹ Article 13, Constitution of India 1950



2. Critical Analysis of the Offence of Adultery under the Substantive and Procedural Law of India

The Indian Penal Code, 1860 and the Criminal Procedure Code, 1973 contains provisions dealing with the offence of adultery and the procedure for prosecution of offences against marriage respectively.

a. The Indian Penal Code, 1860

The Indian Penal Code, 1860 provides that “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.”²

b. The Code of Criminal Procedure, 1973

The provisions of the Code of Criminal Procedure, 1973 dealing with the prosecution for offences against marriage provides that “no Court shall take cognizance of an offence punishable under Chapter XX (Offences related to Marriage) of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence.”³ It further states that “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.”⁴

The wife does not have any right to file prosecution for adultery against her adulterous husband, though this privilege is reserved exclusively for the husband of the adulterous woman. Thus, the wife of the man involved in the adulterous relationship has no recourse to take any action, but the husband of the woman involved enjoys the right to prosecute. Thus, a case of adultery can be filed only by a man and that too against another man who is allegedly been involved in the

² Section 497, Indian Penal Code, 1860

³ Section 198 (1), Code of Criminal Procedure, 1973

⁴ Section 198 (2), Code of Criminal Procedure, 1973



adulterous relationship with former's wife. Neither a woman can be prosecuted and punished for adultery, nor a case of adultery can be filed by a woman. Alternatively, only a man can be prosecuted and punished for the offence of adultery, and the case of adultery can be filed only by a man. Such an archaic law discriminates both against a man and a woman.

3. Recommendations for Reforms in the Existing Law on Adultery in India

The offence of adultery was not based on any intelligible differentia because it had done an unreasonable classification between a man having sexual intercourse with a married woman and another man having sexual intercourse with an unmarried woman. Though the law was silent about instances where a man had sexual intercourse with a divorced woman or a widow. Due to such inconsequential and expendable provision, the human rights activists advocated for the repeal of Section 497 of the IPC in the interests of society in general and matrimonial relationships in particular.

a. Law Commission of India

Under the Chairmanship of Mr. K.V.K. Sundaram, the Fifth Law Commission of India (1968-1971) recommended that the offence of adultery provided under Section 497 of the Indian Penal Code, 1860 is required to be revisited and revised.⁵ After a careful consideration and much discussions, the Law Commission opined that the exoneration of the wife from penalty for the offence of adultery under Section 497 of IPC should be removed. It further observed that the maximum punishment of 5 years imprisonment for adultery is unjust and it should be reduced to 2 years. With these required alterations, the Commission concluded that the offence of adultery should be kept intact in statute book. Accordingly the Commission endorsed the revision of Section 497 of IPC as, "if a man has sexual intercourse with a woman 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, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to 2 years, or with fine, or with both."⁶

⁵ Law Commission of India 42nd Report, June 1971 available at https://lawcommissionofindia.nic.in/report_fifth/

⁶ Ibid at Page 327



Unfortunately, the recommendations of the Law Commission failed to gather consensus and the older provision continued to exist.

b. Justice V.S. Malimath Committee on Reforms of Criminal Justice System

The Ministry of Home Affairs, Government of India constituted a Committee on Reforms of Criminal Justice System under the Chairmanship of Justice V.S. Malimath and it had also recommended that the provision of adultery should be altered to make it more equitable.⁷ The Law Commission observed that “a man commits the offence of adultery if he has sexual intercourse with the wife of another man, without the consent or connivance of the husband. The object of this provision is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man.” Therefore, it was suggested that Section 497 I.P.C should be appropriately altered as “whosoever has sexual intercourse with the spouse of any other person is guilty of adultery....”⁸

If a man can be penalized for adultery under Section 497 of IPC for having sexual intercourse with another man’s wife, then it is equally logical that a woman should also be punished for having sexual intercourse with another woman’s husband. Hence, Section 497 of the Indian Penal Code regarding offence of adultery should be amended to include the wife who has sexual intercourse with a married man, by replacing the words “whosoever has sexual intercourse with the spouse of any other person is guilty of adultery”.

The stern efforts of the Committee for reconstructing the criminal justice system of India by making the offence of adultery gender-neutral proved to be futile and inefficacious.

4. Judicial Journey towards the Decriminalization of Adultery in India

The Indian law on adultery came up for interpretation and deliberated before the Court on various occasions. Initially the Courts were of the opinion that the legislators had introduced Section 497 in the IPC with some objectives and therefore it should be kept intact in the statute

⁷Justice V.S. Malimath Committee on Reforms of Criminal Justice System Report March 2003 available at https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

⁸ Ibid at Page 190, 290 and 291



book. Later, the Courts realized that the society is not static, rather dynamic and therefore the laws should also be periodically amended, altered, modified and repealed so as to cater to the needs of the contemporary society. Therefore, the courts reversed its stand by holding the law on adultery to be unconstitutional.

In *Yusuf Abdul Aziz v State of Bombay*,⁹ the Supreme Court held that Section 497 of IPC does not encroach upon Articles 14, 15 and 21 of the Indian Constitution solely on the ground that only a man is guilty for the offence of adultery and not the woman who had identically engaged in perpetrating the offence. The wife has been kept out of the scope of offence and she is not accountable even as an abettor. The Court based its decision on the ground that the state is empowered to make special provisions for the protection and benefit of women under Article 15 (3) and therefore, a reasonable classification can be done based on sex. The Court observed that the safeguard provided to women in the offence of adultery is an affirmative provision saved under Article 15 (3) of the Constitution and it cannot be considered as prejudicial and discriminatory at all.

Further, in the case of *Sowmithri Vishnu v Union of India*,¹⁰ it was contended that Section 497 of IPC is a blatant specimen of 'legislative despotism, gender discrimination and male chauvinism'. But the Supreme Court once again hold that Section 497 of IPC do not constrict any of the fundamental rights guaranteed by the Constitution of India. The consent of the women in the offence of adultery was regarded as irrelevant because it is generally believed that the man is the seducer and the women is the innocent victim. The Court also stated that the mindset of the people has undergone a gradual change, but in such a situation the legislature is expected to take a final call to see whether any amendments in the existing law is required to be done or not.

Once again, the Supreme Court uphold the validity of Section 497 of the IPC in the case of *V. Revathi v Union of India*,¹¹ and rejected the contention that law on adultery is unconstitutional. The Court observed that this provision is not susceptible to the allegation of antagonistic

⁹*Yusuf Abdul Aziz v State of Bombay*, AIR 1954 SC 321

¹⁰*Sowmithri Vishnu v Union of India and another*, AIR 1985 SC 1618

¹¹*V. Revathi v Union of India and others*, AIR 1988 SC 835: (1988) 2 SCC 72



prejudice and inequity. It is an occasion of reverse discrimination, not against the woman, rather in her favour.

In *W. Kalyani v. State through Inspector of Police and another*,¹² recognizing the gender disparity in the offence of adultery under Section 497 of IPC, the court observed that “the provision is currently under criticism from certain quarters for showing a string gender bias for it makes the position of a married woman almost as a property of her husband.” But the Court held that in terms of the law as it exists, only a man can be punished for the offence of adultery and the consent of the women is of no significance.

In the meanwhile, a nine-judge Constitution Bench of the Apex Court in *K.S. Puttaswamy and another v Union of India*,¹³ declared that the right to privacy is a fundamental right embodied within Article 21 of the Constitution of India. The Court observed that privacy protects the autonomy of the individual and acknowledges the individual’s capability to supervise indispensable aspects of life.

In the celebrated case of *Joseph Shine v. Union of India*,¹⁴ Joseph Shine, a 41-year-old non-resident Keralite businessman living in Italy, filed a Public Interest Litigation (PIL)¹⁵ in December 2017 in the Supreme Court of India challenging the constitutional validity of the Indian adultery legislation and demanding for its repeal. He contended that it violated Articles 14, 15, and 21 of the Constitution of India because it solely held men accountable for extramarital affairs and treated women as objects. A three-judge Bench of the Supreme Court comprising of *Chief Justice Dipak Misra*, *Justice AM Khanwilkar* and *Justice RF Nariman* held that law on adultery shall be announced unconstitutional because it is arbitrary, unreasonable and violative of the fundamental rights of citizens. A critical analysis of the phraseology of Section 497 infers that the very basis of the crime vanishes if the permission of the husband is proved. The individual identity of a woman is dented by laying emphasis on the concurrence or the acquiescence of the husband. This commensurate to inferiority and servitude of woman upon whom an equal status has been conferred by the Constitution. The criminal liability for

¹²*W. Kalyani v. State through Inspector of Police and another*, (2012) 1 SCC 358

¹³*K.S. Puttaswamy and another v Union of India*, (2017) SCC 1

¹⁴*Joseph Shine v. Union of India*, 2018 SCC online SC 1676

¹⁵ Article 32 of the Constitution of India



adulterous actions is based on the antagonism existing between constitutional morality and the idea of societal morality combined with patriarchal mindset regarding subservience of women.

The law on adultery is not only infringing the right to equality protected under Article 14 of the Constitution, but it is also violative of Article 15 as being discriminatory and biased on the grounds of sex. The offence of adultery punishes only a man for having sex with a married woman but it accords absolute impunity to the woman engaged in the sexual relationship with a man other than her husband. The law on adultery is violative of Article 15 because it not only generates an unreasonable classification among the male and female on the basis of sex, rather it perpetuates an unequal treatment amongst the males though belonging to the same sex. A married man involved sexually with an unmarried woman is not liable under the present law on adultery, but if the same man gets indulged with a married woman, then he would be at the peril of encountering a penalty for adultery. Thus, there is a disparity and inequity in the treatment meted out to a male on the basis of the marital status of the woman. The law on adultery also encroaches upon the fundamental right to privacy enshrined in Article 21 of the Constitution of India.

Adultery law was drafted by Macaulay way back in 1860 on a faulty assumption that woman is the property of a man and husband enjoyed exclusive right over the wife's body. The adultery if committed with the permission of husband of erring woman then it will no longer be treated as an offence. Thus, the underlining notion was not to illegalize the physical engagements outside marriage relation, but to restrict the infidelity of wife without her husband's approval. As in the offence of trespass, no one is allowed to enter upon the property of the other without owner's consent, similarly in the offence of adultery, no man is permitted to have sexual intercourse with a woman without her husband's consent thereby considering a woman to be a chattel of man. Adultery is considered as an offence specifically against the husband and not against the matrimonial home.

5. Adultery Persists as a Civil Wrong and a Factor for Dissolution of Marriage in India

Though adultery is no longer a criminal offence in India, but it is still considered as a civil wrong and a ground for judicial separation and divorce.



a. Special Marriage Act, 1954

This legislation provides that “a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.”¹⁶ Also “on the grounds of adultery, a petition for judicial separation may be presented to the district court either by the husband or the wife.”¹⁷

b. Hindu Marriage Act, 1955

This enactment categorically say that “on a petition presented by either the husband or the wife, any marriage may be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.”¹⁸ Further “either party to a marriage may present a petition praying for a decree for judicial separation on the grounds of adultery.”¹⁹

c. Muslim Law

Under the Islamic law, there are two categories of divorce, namely, Judicial divorce and Extra-judicial divorce. The extra-judicial divorce can be further subdivided into three kinds, namely by the husband (Talaq, Ila and Zihar), by the wife (Talaq-i-tafweed and Lian) and by mutual agreement (Khula and Mubarat). In lian, if the husband alleges wife with false charges of adultery or unchastity amounting to character assassination of wife then she has the right to ask for divorce from husband. In the case of judicial divorce, if the husband treats wife with cruelty by associating her with women of evil repute or leading an infamous life then she shall be entitled to obtain a decree for the dissolution of her marriage.²⁰

d. Christian Law

The law relating to divorce of persons professing the Christian religion is regulated by the Divorce Act, 1869. It provides that “on a petition presented to the District Court either by the

¹⁶ Section 27 (1) (a) Special Marriage Act, 1954

¹⁷ Section 23 Special Marriage Act, 1954

¹⁸ Section 13 (1) (i) Hindu Marriage Act, 1955

¹⁹ Section 10 Hindu Marriage Act, 1955

²⁰ Section 2 (viii) (b) Dissolution of Muslim Marriage Act, 1939



husband or the wife, any marriage may be dissolved on the ground that since the solemnization of the marriage, the respondent has committed adultery.”²¹

Further, “the petitioner shall make the alleged adulterer or adulteress a co-respondent in a petition for dissolution of marriage presented by a husband or wife on the ground of adultery. The court may excuse the petitioner from this requirement on certain grounds, first, that the wife, being the respondent is leading the life of a prostitute or the husband, being respondent is leading an immoral life and that the petitioner knows of no person with whom the adultery has been committed; second, that the name of the alleged adulterer or adulteress is unknown to the petitioner although the petitioner has made due efforts to discover it; third, that the alleged adulterer or adulteress is dead.”²² Also “the husband or wife may obtain a decree of judicial separation on the ground of adultery.”²³

e. Parsi Law

The existing law states that “any married person may sue for divorce on the ground that the defendant has committed adultery since the marriage.”²⁴ But “a divorce shall not be granted on this ground if the suit has been filed more than 2 years after the plaintiff came to know of the fact of adultery.”²⁵ Also “a suit for judicial separation may be filed by any married person on the ground of adultery.”²⁶

6. Conclusion

After surviving for roughly 159 odd years, the law on adultery finally died its death due to the infinite and eternal efforts of the human rights activists. The Hon’ble Supreme Court of India in its historic verdict delivered in 2018 declared Section 497 of the Indian Penal Code, 1860 as unconstitutional thereby ending the centuries old master-property relationship in the marriage, where a husband is considered to be the master and the wife as his property. It has given an impetus for the protection of the individuality of women by making marriage in India gender-

²¹ Section 10 (1) (i) Divorce Act, 1869

²² Section 11 Divorce Act, 1869

²³ Section 22 Divorce Act, 1869

²⁴ Section 32 (d) Parsi Marriage and Divorce Act 1936

²⁵ Ibid Proviso

²⁶ Ibid Section 34



neutral. This maiden judgement of the Apex Court had once again fueled the efforts towards providing gender equality in India and promoting women empowerment. Henceforth, the adultery is removed as a criminal offence though it will continue to be a civil wrong and is still a base for divorce available to both the parties in the marriage.

The State shall endeavor to incorporate gender-neutral language in the legislative enactments. No Law can be made on the assumption that only one of the sexes (male) is the perpetrator and the other sex (female) is always a hapless victim. The need of hour is to change the retrogressive and orthodox outlook and acknowledge the fact that crimes can also be committed against men and that women can be perpetrators as well.