

The Antiquated Adultery Laws in India

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Introduction

The word “adultery” originates from the Latin word “*adulterāre*”, which means to pollute or defile. As per Merriam Webster’s dictionary² adultery is defined as, “Voluntary sexual intercourse between a married person and someone other than that person's current spouse or partner”. Since this act is voluntary in nature, it is also known as an extra-marital affair or infidelity. Almost every culture across the world mentions adultery where it is considered as a sin and is a punishable offence in many religions. It was objectionable not only on religious grounds but also on social, moral and legal grounds.

The first divine law that addresses adultery as an offence was the Bible,

*“Leviticus 20:10 - And the man that committeth adultery with [another] man's wife, [even he] that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death.”*³

Under Hinduism, adulterous relationships were considered a moral sin. As given in to Vishny Purana 3.11: “A man should not think incontinently of another’s wife, much less address her to that end; for such a man will be reborn in future life as a creeping insect. He who commits adultery is punished here and hereafter; for his days in this world are cut short, and when dead he falls into hell.”

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² Merriam Webster, Merriam-Webster’s Dictionary of law¹⁵ (Linda Picard Wood, J.D., 1st Indian Edition 2005).

³ King James Bible, *Bible Verses about Adultery and Divorce*, Leviticus 20:10, <https://www.kingjamesbibleonline.org/Leviticus-20-10/>.

Adultery is also a ground for divorce and judicial separation under Hindu personal laws.

Under Islamic law adultery is considered the most atrocious and dreadful sin. Adultery in Islamic law is known as *Zina*. It includes pre-marital sex as well as extra-marital sex. The punishment for this is given in Hadith, it includes being stoned to death, known as *Rajm* or severe flogging.

Adultery has been defined 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.”⁴

If we look at Section 497 given in the Indian Penal Code⁵, it is different from the actual definition of adultery. On comparing the both one can examine that there is a difference in the applicability of the offence. On one hand, both men and women are equally accountable for committing the offence, whereas under the Indian Penal Code, it is only men who are held accountable and punished as per the provisions.

This section has always been challenged on the basis of its constitutional validity. It was on 27th September 2018, however that Section 497 of the Indian Penal Code was officially struck down by the Supreme Court of India in its landmark judgment in the matter of *Joseph Shine v. Union of India*⁶. The then Chief Justice of India, Justice Dipak Misra overruled the

⁴ The Indian Penal Code, 1860, No. 45, 2019 (India).

⁵ The Indian Penal Code, 1860, No. 45, 2019 (India).

⁶ *Joseph Shine v. Union of India*, (2018) S.C.C. 1676 (India).

earlier three judgments and examined the various flaws in the given section, which eventually resulted in the decriminalization of the said section.

This paper aims to examine the existing law on adultery and address the question surrounding the flaws that led to its decriminalization in India.

Methodology

The research methodology used in this paper is doctrinal research. The use of secondary data sources has been done. These include analysis of various research papers, journals, publications, legislations and judgments. This method was used to examine the flaws as it is important to look at all the previous judgments to understand the evolution in thinking of the court. Also various journal articles and research papers were studied to get views from different perspectives and to get a better grasp on the concept. To ensure that the data was reliable and to add credibility, it has only been taken from legitimate and authentic publications and websites such as Jstor, SCC, Lexi Advance, manupatra and Westlaw.

Evaluation of Section 497

Lord Thomas Macaulay drafted the Criminal Code of India, known as the Indian Penal Code in 1860. Adultery from the very beginning has remained a point of contention. Lord Macaulay was against the insertion of a section on adultery from the first draft⁷ itself. He did not feel the need for this section as according to him the such issues should be left with the society to deal with. However, it was subsequently included in the Indian Penal Code.

⁷ Macaulay's Draft Penal Code (1837).

The main objective of this section was to protect and preserve the sanctity of marriage. The ingredients of this section, that are essential to constitute adultery as a crime are:

- The first essential element is that the man should have sexual intercourse with a married woman.
- The woman must be married, that is she should be the wife of another man. It is important to note that unmarried woman, widow or women living in a live-in relationship will not be considered as married women.
- It is also important that the man should have the knowledge or have reasons to believe that the woman is married.
- Another element is that it should not be committed with the consent or connivance of the husband. In other words, in a situation where the husband had given the consent or was aware of the fact that his wife is committing adultery and he did not take any steps to prevent it, it will not be considered as adultery.
- And lastly, one of the primary elements is that the consent of the woman should be taken. The sexual intercourse should only take between two consenting adults.

However, this law had faced a lot of criticism on various grounds. The existing adultery law was not only violative of the grundnorm, that is the Constitution of India, it is also objectionable from moral and feminist point of view. As portrayed by Peralita Narain in her article *Justifications of Adultery law*⁸, where according to her, the primary three perspectives through which the law was criticized were the moral aspect of the law, the position of women represented by this law and the justification given of preserving the marriage.

⁸ Peralita Narain, *Justifications of Adultery law*, Manupatra.

The first justification given by her was through a moral perspective. While we know that adultery is wrong from a moral point of view, the law also violates the ground that when men and women are equally involved, it is wrong for only men to get punished. Another perspective was of breach of trust. According to her Section 497 should be struck down as it violates the fundamentals that are mutual trust and faith in a marriage. The last perspective was through a feminist point of view. It was recommended by the fifth Law Commission⁹ that the provision given to women on not being prosecuted for adultery should be removed. Many other sources including the fourteenth law commission also recommended criminalizing women adultery. Therefore, through this perspective also Section 497 of the Indian Penal Code be struck down as it treated women as chattel belonging to their husbands.

International Jurisprudence

As the society everywhere is rapidly evolving and adapting to new rules and changes brought via human rights and social conflicts, adultery is not considered a crime in some countries. This change has happened recently in the 20th century. The international organizations are advertising abolition of criminal laws against adultery. The United Nations has also suggested to struck down discriminatory adultery laws against women.

Different countries provide different laws in relation to adultery. In some countries, it is an offence, whereas in others it is not. Also in countries where it is an offence, both men and women are considered equally liable; whereas in some cases for example in India, the law denotes 'female adultery', where it is considered as adultery only if it is occurs with a married woman.

⁹ M.C. Setlvad, *Fifth report on British Statues Applicable to India*, Law Commission of India, 1957 May 11.

Some of the countries where it is not a crime include the United Kingdom, where adultery can only be used as a ground for divorce and is not regarded as a crime. In Turkey, adultery was regarded as illegal until the year 1996, when it was struck down from the Turkish Penal Code 1926 on the grounds of being discriminatory between men and women. Adultery is not considered a crime in Australia and it has also removed adultery as a ground for divorce under The Family Law Act of 1975¹⁰. It is also not a crime in any of the countries in Europe. In 2011, Mexico's senate also abolished the adultery laws. Until 1947 Japan's laws on adultery were similar to the law mentioned in the Indian Penal Code, and only the husbands could file the complaint. However, no it is only treated as a ground for divorce under the Civil Code of Japan¹¹. Even in China it is not a crime, however it can be a ground for divorce. On 26th February, 2015¹², South Korea also decriminalized adultery and the Constitutional Court of Korea struck down Article 241, which provided for the offence as it was found being violative of Article 17 of the Constitution that protected right to privacy.

However, there in certain countries adultery not only is unapproved by the society, but it also carries a criminal label to it¹³. These include, Saudi Arab, where it is considered as 'zina' and the punishment for the same is fine, imprisonment, severe flogging and in some cases death. It is also considered as a crime under the State law in 17 out of the 50 states of the United states, however the punishment varies¹⁴. Canada is another country where it is considered as a criminal offence under Section 172 of the Criminal Code of Canada¹⁵ as well as a ground for

¹⁰ The Family Law Act 1975, Act 189, Part XV Section 120 (2012) (Australia).

¹¹ Civil Code, 1896, (Japan), Article 770 (1) Only in the cases states in the following items may either husband or wife file a suit for divorce: (i) if a souse has committed an act of unchastity;...

¹² Adultery Case, 27-1 (A) KCCR 20, February 26, 2015, (S. Korea).

¹³ Joseph Shine v. Union of India, Para 7.1.

¹⁴ Ibid.

¹⁵ Criminal Code of Canada, 1985, Section 172, (1) Every person who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of

divorce¹⁶. Adultery in Malaysia is regarded as a punishable criminal offence for the Muslims, however for the non-Muslims, it is a civil wrong¹⁷ and a ground for divorce. It also allows either spouse to claim damages from the adulterer or the adulteress. And it is still a crime in Taiwan.

Judiciary's Earlier Stand

On a plain reading of Section 497, one can evidently observe the prejudices present in it. However, the court got the first opportunity to examine it in the case of *Yusuf Abdul Aziz v. State of Bombay*¹⁸ wherein this section was challenged on the grounds of inequality. The issue that was raised was that why can men file a complaint and women cannot file a complaint for adultery. However, the Bombay High Court held that such distinction is permitted under Article 15(3) of the Constitution as it permits the state to take special measures for protecting women and children. The court unanimously held that no right was infringed by the fact that in the given section only men could commit adulterous acts. Also, the appellant could not come under the purview of Article 14 and 15 of the Constitution as he was not the citizen of India.

vice, and by doing so endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) an offence punishable on summary conviction.

¹⁶ Divorce Act 1968, (Canada), Section 8(1) A court of complete jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage. (b) Spouse against whom the divorce proceedings is brought has, since celebration of the marriage, (i) committed adultery...

¹⁷ Law reform (Marriage and Divorce) Act 1976, (Malaysia), Section 58 (2) a petition under (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.

¹⁸ *Yusuf Abdul Aziz v. State of Bombay*, A.I.R. 1954 Bom. 321 (India).

The Supreme Court of India the case of *Sowmithri Vishnu v. Union of India*¹⁹, a case where the gender neutrality of the law was challenged on the basis of Article 14 and 21 of the Constitution, the three judged benches held the following:

- According to Section 497, the husband has the right to file a complaint about the adulterer, however, the wife has no right to do the same to a woman adulterer. The Supreme Court felt that it did not violate any constitutional provision. The wife can only file a civil complaint for separation on the husband.
- It was also held that a wife has no right to prosecute her husband who has committed adultery. Even though it considered men to be the ones who had committed the crime and the women with whom they had committed were only considered as a 'victim' to the crime²⁰.
- The Supreme Court also held that to satisfy the conditions for Section 497, it was important that the husband must have sexual relations with a married woman. As the law did not want to provide men with the options of having illicit relations with an unmarried woman.
- The Supreme Court in reference to this case stated,

“The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in s. 497 is considered by the legislature as an offence against the sanctity

¹⁹ *Sowmithri Vishnu v. Union of India*, A.I.R. 1985 SC 1618 (India).

²⁰ *Id.* Para 8.

of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law.”²¹.

Constitutional Flaws

It violates Article 14 of the Constitution²², that is Right to Equality.

The first and the most prominent flaw in Section 497 of the Indian Penal Code is that it is not a gender-neutral law. It is biased in the sense that according to this section, as given above, the wife cannot prosecute the woman adulteress, however the husband can prosecute the man who has committed the offence of adultery with his wife. And so, the provision gives no relief to wives in criminal law, whereas it equips the husband with a power, making the wife less powerful than him.

As given in the above stated case of *Sowmithri Vishnu v. Union of India*²³, the court considers women to be the victim of the crime and not was the author of the crime. This reasoning is based on the logic that, “the psychological belief of considering oneself helpless, lacking power to overcome the situation and in a need of some external agency to take them out of the situation.” And thus, it was a duty conferred upon the state to protect the powerless, which in this case are the women. Another justification given by the court is that the society holds the ‘outsider’ responsible for breaking the matrimonial tie between the couple. Therefore, the law violates the natural justice which hold fundamental importance in our Constitution given in Article 14 by providing different treatment to men and women.

²¹ Ibid.

²² Article 14, Constitution of India

²³ Supra at 11.

The given section does not come under the purview of Article 15(3) of the Constitution.

According to Article 15(3), the state is permitted to make special legislations in order to protect the interest and uplift a certain stratum of the society, that is women and children.

In the given section, the framers gave a pretext of ‘protective discrimination’ and framed a legislature that was discriminatory to women. However, this was not the aim of the Article 15(3). As Prof. K.T. Shah²⁴said in reference to the provisions being made for the minority strata of the society that,

“this discrimination is in favour of particular classes of our society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps. Those, I think may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens may be established. It is *only* intended to safeguard, protect or lead to their betterment in general; so that long-range interests of the country may not suffer.”

The justification that come from the framers is that the mere intention was to safeguard and protect women. However, Section 497 snatched the right to prosecute away from women’s hands and that cannot be considered as making a beneficial legislation for them. Thus, we can say that Section 497 of the Indian Penal Code, does not come under the purview of Article 15(3).

It contradicts Article 21 of the Constitution that is Right to Privacy

Article 21 of the Constitution promises right to liberty and personal liberty. This article, also protects the right to privacy. The justification that was often received by the petitioners was that the matters of two adults should be protected under right to privacy.

²⁴ Constituent Assembly of India Debates (proceedings), Vol. VII, 1948 Nov. 29.

However, this right provided to the citizens is not an absolute right. It is subject to reasonable restrictions. Therefore, personal matters between two people in reference to adultery will not be included in right to privacy under Article 21 of the Constitution.

Analysis of the Latest Judgment

It is imperative to remember that this code was framed in 1860, a time when women were considered inferior to men and patriarchy prevailed intensely. So much that a woman was not given the power to complain against his adulterous husband. However, in today's time, women have become powerful and a part of that credit must go to our judicial system for enforcing and amending laws that were derogatory for a woman.

One of which is when the Supreme Court of India overruled a 158-year-old law in a landmark judgement of *Joseph Shine v. Union of India*²⁵ given by the five-judges bench consisting of the then Chief Justice of India, Dipak Misra, Justice Indu Malhotra and Justice R.F. Nariman, Justice D.Y. Chandrachud and Justice A.M. Khanwilkar.

In October 2017, Joseph Shine of Kerala had filed a Public Interest Litigation challenging the constitutional validity of Section 497 of the India Penal Code and Section 198(2) of Code of Criminal Procedure.

The court held that since Section 497 is a pre-constitutional law that was enacted in 1860, it needed to be tested on the anvil of the Constitution²⁶. Hence it addressed each flaw one by one.

Section 497 was first tested on the anvil of Article 14 of the Constitution. After examining, the court was of the opinion that any legislation that treats people in similar situations

²⁵ Joseph Shine v. Union of India, (2018) S.C.C. 1676 (India).

²⁶ Ibid, para 12.

differently or it discriminates only on the grounds of sex, has to be struck down as being violative of not only Article 14 but also Article 15 of the Constitution. As they are considered as the primary articles against discrimination and arbitrariness. Another reasoning given in this case was that although Article 14 prohibits class-based legislations, it is not against the formation of reasonable classification. Therefore, it held that a legislation that strips women of the right to prosecute is not a gender-neutral law as it is discriminatory against women and is violative of Article 14.

In regard to the second flaw that was present in the given section was addressed by the Supreme Court as Article 15(3) of the Constitution allows the State to make certain special provisions for the protection and upliftment of a certain class of the society. However, the given section cannot be considered to be included in the purview of this article as it cannot be considered as being beneficial for that class of society. Special provision has to be made to benefit women and children in the socio-economic domain, and promote equality among men and women in that domain. And a law deprives women of their right to prosecute cannot be entitled as a beneficial law and hence should be struck down.²⁷

While addressing the third flaw the court held that even though Article 21 included right to privacy and personal liberty, it is not an absolute right. It is subject to reasonable restrictions. The court also held that the state must justify the invasion of privacy on reasonable grounds. These grounds have been given in the landmark judgement of *Justice K.S. Puttaswamy & Anr. V. Union of India & Anr.*²⁸ “(i) Legality, which postulates the existence of law; (ii) Need, defined in terms of a legitimate state interest and; (iii) proportionality,

²⁷ Ibid, para 12.3.

²⁸ Justice K.S. Puttaswamy & Anr. V. Union of India & Anr,(2017) 10 S.C.C. 1.

which ensures a rational nexus between the object and the means adopted.”. Therefore, as Section 497 fails to fulfil these three criteria, it should be struck down²⁹.

Therefore, in the current scenario, all the previous judgements have been overruled by the judgment in *Joseph Shine v. Union of India* and adultery as per Section 497 of the Indian Penal Code, 1860 has been decriminalised.

Conclusion

The decriminalisation of Section 497 of the Indian Penal Code, 1860, was one of the most progressive steps taken by the judiciary of India. The judiciary saw the effects the provision was having on the dignity and respect of the women, where it was regarded as unequal and inferior to men. The Supreme court was right in holding that a section that advocates oppression of a class of the society, which in this case were women, is unacceptable in the eyes of law. Indeed, it is important to ensure that no justification should be considered for the law to secure a place in the Indian Penal Code. The Supreme Court also held that such a discriminatory law cannot take cover under pretence of ‘protective discrimination’.

Hence, it was struck down by the Supreme Court of India on the grounds of being violative of Article 14, 15(3) and 21 of the Constitution of India. Therefore, it can be said that the antiquated adultery law has been congruously laid to rest by our judiciary.

As Malala Yousafzai rightly said, “We cannot all succeed when half of us are held back.” Thus there is no doubt that this judgment marks a clear step towards a brighter and a better tomorrow for India.

²⁹ Joseph Shine v. Union of India, para 15.