



Decriminalization Of Adultery In India

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Abstract

Adultery is defined in general as the act of a married person having sexual relation with someone who is not legally their wife. Adultery was criminalised under Section 497 of the Indian Penal Code. Adultery is an affront to a husband's right of control over his wife. A man who violates the sacredness of marriage commits a misdemeanour. This is a peculiar and unlawful deed. The Supreme Court has found that restricting the class of wrongdoers to males alone when charging adultery does not constitute a violation of the class of wrongdoers. The Supreme Court previously determined that Section 497 of the Indian Penal Code did not violate Article 21 of the Indian Constitution¹. However, the Supreme Court recently declared the adultery statute as invalid that deems the man to be his wife's master. It diminishes a lady's dignity. The Court determined that the woman's husband was not her master. Section 497 of the IPC is manifestly and completely arbitrary and unreasonable in that it grants an unconstrained, very unjust husband unlimited authority over his wife. This article aims at understanding the various aspects for which adultery is been decriminalized in India and the scope for the new trends within the legislation.

Key Words: Adultery, Sexual relation, decriminalize, Indian Penal Code.

Introduction

Sexual encounters with another person are referred to as "adultery" in the English language, which comes from the Latin word "adulterium." Adultery is defined as consenting sexual contact with another man's wife without the consent of the other guy. It is also defined as engaging in any type of consenting sexual interaction² with a partner other than one's husband with the consent of the couple. "According to a five-

¹Dr. Balasaheb Sonajirao Garje. (2020). AN ASSESSMENT OF STATUS OF PERSONAL LAWS IN INDIAN CONSTITUTION. *PalArch's Journal of Archaeology of Egypt / Egyptology*, 17(5), 1617-1624. Retrieved from <https://archives.palarch.nl/index.php/jae/article/view/7693>

²Dr. Shailender Singh. (2020). CONCEPTUAL FRAMEWORK RIGHTS OF SEXUAL MINORITIES IN LAW. *PalArch's Journal of Archaeology of Egypt / Egyptology*, 17(5), 1641-1648. Retrieved from <https://archives.palarch.nl/index.php/jae/article/view/7696>

judge bench of the Supreme Court of India, Sections 497 of the Indian Penal Code, 1860, and Section 198(2) of the 1973 Criminal Procedure Code were unconstitutional under Indian law." Section 497 of the Indian Penal Code of 1860 dealt with adultery, whereas Section 198 of the Criminal Procedure Code of 1973 dealt with the prosecution of weddings³ and other ceremonies.⁴ In India, adultery is defined as "whoever has sex with someone whom he knows or has reason to believe that a man's wife is, without the consent or connivance of that man, an offence not equivalent to rape, is guilty of adultery, and is to be punished with imprisonment of any one description for a term that might have been extinguished." Until then, anyone who had sexual relations with a man's wife was considered guilty of adultery. On the other hand, because she was married, she was free from the punishment, whereas her boyfriend was not. For their part, adulterous companions of married men did not face the same legal repercussions as those who were not married. J. Dipak Misra observed in the judgement that "it is time to say that (a) the husband is not the master of (his) wife." The bench went on to state that Section 497 treats a married woman as if she were a commodity to be purchased by her husband. The legislation was enacted in the 1860s, at a period when our country was wreaking havoc on the British people. The observations on adultery can be traced back to the Hammurabi code, which mentions adultery in commandment number seven. Henry VIII of England used it to divorce Catherine Howard. Adultery is an adulterous relationship that is never ethical. It is an extramarital affair that is wrong on social, moral, religious, and legal grounds. Such a partnership will always be deemed a flawed relationship since it violates established standards and calls into question the morality of society as a whole. Marriage was regarded as a sacred institution, and infidelity was used as a form of punishment for its violation. For a long time, many civilizations believed adultery to be a grievous sin, resulting in harsh penalties such as capital penalty, amputation, torture, and other forms of punishment. In religion, Hindus and Christians regard marriage as a holy connection, and the sin of adultery is unforgivable in God's sight. Adultery is considered a violation of Dharma in Hinduism.⁵ "Those who commit adultery, both men and women, should be laughed at 100 times," the Holy

³Kumar, Dr. J., & Mahajan, Dr. K. (2020). Understanding the Problem of Early Marriage and Its Consequences. *Mukt Shabd Journal*, (2347-3150).

⁴Kala, N. B., and A. Anuradha. "The Social Impact of the Supreme Court Ruling on Adultery in India: An Analysis." *IUP Law Review* 9.3 (2019).

⁵Bajpai, G. S. "Decriminalisation of Adultery." Available at SSRN 3200823 (2018).

Quran says. The Indian Law Commission⁶, which established the Indian Penal Code in 1837, did not include adultery as a felony in the Indian Penal Code. Adultery or marital infidelity, according to Lord Macaulay, was a private matter between the couples and not a criminal offence. However, the other members of the Law Commission overruled Lord Macaulay's judgments in *Joseph Shine v. India's Union*. The Ten Commandments, which the Lord gave to Moses on Mount Sinai, include the seventh commandment, "Thou shall not commit adultery," as mentioned in the Old Testament Exodus book. As stated in St. Paul's Letter to the Corinthians, adultery is considered wicked and a sin for both men and women. Manusmriti, too, punished people who had affairs with the wives of other men with horrifying punishments that were followed by exile. The Dharmasutras speak in a variety of tones. In Apastamba Dharmasutra, adultery is a felony, with the severity of the punishment varying according to the man's and woman's class or caste. The prime aim in the article is to understand the aspects depending upon which such an old crime of adultery has been decriminalized in India.

Objective of the study

The primary aim of the study is to understand the transformation within the adultery law in India and the reasons for its decriminalization. This article focuses on comprehending the issues following which the criminal practice of adultery in India has been decriminalized by the verdict of the court. Further the concept of adultery is elaborated within the purview of different personal laws followed in India.

Research Methodology

The methodology used in the study is qualitative and doctrinal approach that has been used in the study in order to understand the analysis of the legal issues governing the amended legislation. This article includes critical analysis of the issues for which the act of adultery that was considered as a crime in India for the past 158 years has been decriminalized. With the usage of various primary and the secondary sources such as legislations, cases and books the analysis within the article is made. It explores the legislation governing water pollution in research in more detail. As a result of the study of constitutional provisions relating to foreign treaties and their impact on municipal law, the changes in those legislation have been studied extensively. There have all been international treaties, bilateral treaties and other documents on this issue. For example, government publications, textbook chapters, committee reports, academic journals and case studies were included.

⁶SRIVASTAV, Dr. A. K., & JAIN, Dr. S. (2007). A Comparison of Barcoding and RFID Technologies in Practice. *International Journal of Research*, VIII(2236-6124).

Law for Adultery in India

In contrast to the country's sexual harassment statutes, which rely on women's cooperation, the 158-year-old adultery legislation failed to respect women's will⁷. Even if the wife consented to the conduct, women cannot be punished under the law, but a husband can sue a man who has sex with his wife. If, on the other hand, a husband has an affair, neither he nor his wife can be pursued. As it merged with an individual, Indian adultery law took on the dignity of women. The act punished a male who was suspected of having an affair with a married woman, but it did not apply to women. Women have rarely been punished for adultery since they are considered innocent victims. In the perspective of the law, she had no individual life and was considered her husband's property. The legislation has been supported by the fact that marriage is a holy body that was purportedly violated by a holy man, and thus only by the person who was punishable. Later, during the proceedings challenging the constitutionality of Section 497 of the IPC, Dipak Misra, then-President of the Supreme Court of India, stated, "It is up to the couple concerned to protect married couples." If one fails, the other is granted a legal remedy (divorce law). In a failed marriage, where is the "public good" question? The Supreme Court declared in 1985 that "the seducer is normally the male, not the woman," and that gender-neutralizing the legislation would allow for "a women-on-a-woman cruise."⁸ This section (section 497 of the Indian Penal Code, 1860) outlined consequences that might include a five-year prison sentence, a penalty, or both. This phrase does not penalise the wife even if she is an abettor.

According to the Code of Criminal Procedure, an adulterous wife is not entitled to maintenance. A support order may be rescinded if proof of her living in adultery is provided. However, living in adultery is not the same as committing adultery once. "Enticing your wife away from you in order to commit adultery with her is punishable under sections 498 and 497 of the Indian Penal Code. Section 497 of the Indian Penal Code 1860 contains the following key ingredients." A person must have sex with another man's wife; the person must know or have reason to believe that the woman is another man's wife; the husband did not grant sexual activity approval or connivance; and this type of sexual intercourse is not a rape offence.

Adultery is not absolved by a woman's agreement or request.

No court shall be made aware of the offence (adultery) under Section 198 of the 1973 Code of Criminal Procedure unless a woman's wife or, in the absence of the husband,

⁷Dr. Jai VirPratap Sharma (2021) CONCEPTUAL FRAMEWORK ON HISTORICAL ASPECTS OF STATUS AND REPRESENTATION OF WOMEN IN INDIA. Elementary Education Online, 20 (3), 2045-2051. doi:10.17051/ilkonline.2021.03.237

⁸GN, Pooja. "Joseph Shine v/s Union of India." Available at SSRN 3874400 (2021).

another person who cared for the wife on behalf of the husband complained with the court's authorization if an adultery was committed at the time.

The lady was probably not punished because of the patriarchal view of a woman as her husband's possession, and there was no recourse available for a wife when her husband committed adultery because this section ("section 497 of the Indian Penal Code, 1860") dealt with men and women separately. "Section 497 of the Indian Penal Code of 1860" was declared unconstitutional in "Abdul Aziz vs. State of Bombay in 1954", and the sex classification is reasonable, and the state may make special provisions for women and children in accordance with "Article 15(3)" of the Indian Constitution, and thus is not unconstitutional. According to Section 497 of the Indian Penal Code of 1860, the prosecution was contesting the conviction because: It is a personal, not a public concern.

- Adultery must be proven beyond a reasonable doubt.
- This is based on inconclusive evidence.

Adultery is both an unrecognised crime (the police officer cannot arrest the offender without an arrest warrant) and a rescue crime. It's also a heinous crime, made worse by the adulterer's husband. According to Section 198(2) of the 1973 Code of Criminal Procedure, only the husband has the authority to submit an accusation against a person who commits adultery with his wife; however, if his husband commits adultery with another wife, the wife cannot file an indictment.

Decriminalizing Adultery

In December 2017, Joseph Shine, a 41-year-old Indian businessman living in Italy, filed a Public Interest Litigation with the Supreme Court of India, asking for the repeal of the adultery legislation. Comparing section 497 to section 198 of the Indian Penal Code, he believed it violated Articles 14, 15, and 21 because it solely held males accountable for extramarital affairs and treated women as objects. This started as a false PIL. The petitioner claims the clause criminalises adultery solely based on sex classification.⁹ Wife consent is irrelevant. As a result, it breaches Article 14. A lady is her husband's property, according to him. Adultery is not committed when the husband consents or conspires. The petitioner claims the clause is illegal because it breaches Article 21 by disrespecting a woman's dignity and sexual autonomy. In October 2017, José Shine, a non-resident Keralite, launched a public interest litigation in **Joseph Shine v. Union of India**. Adultery was charged under Section 497 of the Indian Penal Code (1860) and Section 198(2) of the Code of Criminal Procedure (1973). Section 497 of the Indian

⁹Kala, N. B., and A. Anuradha. "The Social Impact of the Supreme Court Ruling on Adultery in India: An Analysis." IUP Law Review 9.3 (2019).

Penal Code of 1860 punishes adultery by requiring the wife's consent or knowledge. For an offence under sections 497 and 498 of the Indian Penal Code of 1860, a complainant may submit a charge under section 198(2) of the Criminal Procedure Code.

The issues include:

1. Does the adultery clause in Article 14 discriminate?
2. Is it true that the adultery provision fosters the idea that women are male property and violates Article 15 by sex discrimination?
3. Is it demeaning to a woman's dignity to deny her sexual autonomy and autonomy?
4. Constitutes it true that punishing adultery is a legal invasion of a person's privacy?

A five-judge court led by Chief Justice Deepak Mishra declared Section 497 of the Indian Penal Code, 1860, unconstitutional. The Supreme Court then overruled the Statute four times in a row, stating that a husband cannot be his wife's master. The primary points raised in the decision are:

1. Arbitrary article 497 As the judgement shows, Section 497 is subjective. The "sanctity of marriage" is violated if a husband allows his wife's infidelity with another man. The decision focuses on preserving a husband's "own rights" over his wife. Also, a wife cannot sue her spouse or partner. There are no rules for dealing with a widow or a divorced woman.
2. It is not viable to ask a woman to think like a man or as society expects. Unpleasant because it destroys one's core identity. "In India, women's obligations and expectations are strongly established."¹⁰ Determining that women cannot be coerced into acting in conformity with social expectations is significant.
3. Husbands don't own wives. So, the judge declared the master is not a spouse. Aim for equality." Abolitionists decried Section 497 as "male-friendly" and reaffirming the notion that a woman was the husband's property for life. Affecting "the exclusive belongings of the man," adultery was once considered the "greatest possible trespass of property," similar to robbery. According to Section 497, women are subordinate to men since men are complicit or participate. It's as though she's a gossip. It treats women as men's property, subject to the master's will. As such, it depicts the social supremacy that existed when *Joseph Shine v Union of India* was published.
4. The Indian Constitution's Articles 14 and 15 guarantee equality to all indigenous peoples and ban discrimination based on religion, ethnicity, caste, gender or any

¹⁰Bajpai, G. S. "Decriminalisation of Adultery." Available at SSRN 3200823 (2018).

other characteristic. The Court ruled that Article 497's very character contradicted this, seeing women as men's subordinates, thereby violating the Indian Constitution.

5. The court ruled that by criminalising the behaviour, the legislation invaded a deeply intimate part of married life. Adultery is a crime under Article 21 of the Constitution, which guarantees everyone's integrity and personal independence. According to Justice Indu Malhotra's judgement, "the sovereignty of a person in the most private areas of life to make his or her own decisions regarding his or her sexuality should be defended against public contempt." She also argued that adultery was a moral and societal blunder that affected the lives of hundreds of people.
6. Infringement of women's dignity and Article 21 - Article 21 deals with individual dignity. Section 497 seriously damages women's inherent dignity by highlighting gender-based invidious inequities. Also, a spouse's complicity or permission is a proof of women's inferiority. This violates Article 21 of the Constitution.

Adultery, however, is still grounds for divorce in India. In the meantime, personal family laws will take care of the rest. Adultery as a cause for divorce in 2019 cannot be considered unless the accused adulterer is charged.

Adultery as a ground of Divorce

Adultery is a legal cause for filing for divorce if one of the partners commits it. Adultery happens when a person has sexual relations with the spouse of another. This occurs when individuals who are not married engage in sexual activity. Because it is consensual, it could be deemed infidelity or an extramarital affair. Morality is critical in marriage, which is why both husband and wife must be devoted.¹¹ When one partner has an affair, the other partner becomes unfaithful to their spouse. Divorce is a difficult process; thus, before filing, consider the repercussions of life after divorce. In India, divorce is still stigmatised by the individual's family¹², with the implication that a lady divorced by her husband leads a less fortunate life than her spouse. In India, the majority of women are unable to assist financially. If the couple had children, the children would suffer the most. If one adult partner confronts the other in front of the children, forgiveness is preferable than litigation.

¹¹Bandyopadhyay, Suparna. "The Supreme Court of India and Social Transformation with Special Reference to Adultery." (2020).

¹²Singh, S., & Kumar, Dr. S. (2021). A Study of the Factors Affecting Practice of Family Planning Methods in Rural Areas of Agra District, Uttar Pradesh, India. *The Journal of Oriental Research, Madras*, (0022-3301).

Personal Family Laws

Hindu Marriage Act of 1955 and Special Marriage Act of 1954

Section 13(1)(i) of the Hindu Marriage Act and Section 27(1)(a) of the Special Marriage Act provide that a divorce may be granted by you if your spouse had consenting sexual contact with someone else after the marriage was solemnised. If you do not desire a divorce, you can petition the court for a judicial divorce based on your spouse's adultery.¹³ After the decree, you are not required to cohabit with your partner. It allows you to evaluate the situation and decide whether to divorce. If you don't live with your husband for a year, you can file for divorce.

Muslim Law

If a Muslim husband cheats on his wife, he can divorce her at any moment. However, if a husband transferred his divorce power to his wife, she can divorce him. This is called Talaq-i-tafweez. According to Section 2(viii)(b) of the Muslim Marriage Act of 1939, a wife may file for divorce in any other situation.

Christian Law

It is governed by the 1869 Christian Divorce Code. "Any marriage, whether solemn or not, may be dissolved by a husband or wife requesting the District Court to do so on the grounds that the respondent has committed adultery since the marriage solemnizations." Despite efforts, the petitioner cannot identify the adulterer. The adulterer has died. You can file for judicial separation based on your wife's adultery under Section 22 of the Divorce Act.

Parsi Law

The Parsi Marriage and Divorce Act regulated Parsi marriage and divorce. If a divorce suit is filed within two years of the adultery being discovered, it constitutes a divorce cause under Article 32(d). All grounds for divorce are grounds for judicial separation under Section 34(d) of the Act. Adultery is thus a basis for judicial separation in Parsi Law.

Conclusion

In conclusion it is stated that the Supreme Court has argued that the Act treats women unfairly as men's property and infringes fundamental rights, the legal ground for divorce continues to be adultery. Additionally, it might be interpreted as a legitimate restriction on sexual autonomy, meaning that sexual autonomy is subject to allowable limits. Additionally, the Supreme Court noted that while adultery may give rise to civil difficulties like as divorce, it is not a criminal offence. While adultery is not always the

¹³Azhar, Sameena. "Recent changes in gender and sexuality policy in India: A postcolonial analysis." ICGR 2019 2nd international conference on gender research. Academic Conferences, Roma Tre University, 2019.

cause of a failed marriage, it is frequently the aftermath of one. “In conjunction with Section 497 of the IPC, it was determined that Section 198 of the Criminal Procedure Code was unconstitutional, thus decriminalising adultery.” Justice DY Chandrachud demonstrates that the adultery statute was meant to benefit the husband by allowing him to claim his wife's sexuality as property. Its purpose was to deter the lady from sexual behaviour. As a result, if one of the two women breaks the marriage's purity, the legal system supervises the process of separation rather than the control with which one should sleep. Additionally, criminalising a couple's loss of trust in their marriage will not result in their pleasure or have an effect on society's social behaviour. Numerous laws in India prohibit these rights, including domestic rights restoration and marital rape. Decriminalizing “Section 497 of the Indian Penal Code, 1860”, could have a cascading impact. It can be described as anything that places a legitimate constraint on sexual autonomy, meaning that sexual autonomy is restricted in some way.

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