

BURNISHED LAW JOURNAL

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TITLE: ADULTERY IN INDIA- ETHICAL OR UNETHICAL?

THEME: INDIAN PENALCODE, 1860 AND CODE OF CRIMINAL PROCEDURE, 1973

Marriage in usual parlance means the social as well as the legal union of two individuals, generally a man and woman into a legitimized relationship in the eyes of society. These two individuals after the wedlock are regarded as Husband and Wife, spouses or life partner to each other. This union also signifies that now they both are socially and legally tied to each other in terms of having responsibilities of their families and children equally, both partners holds certain rights along with a few obligations and duties which needs to be fulfilled when required. The impetus and behoof of marital arrangement is to vindicate the sexual relations of spouses emanating and then later ensuing in the birth of their offspring's. Marriage is also perceived as a sacred bond that advances with the essence of trust, faith, love, understanding, intimacy and commitment for life. Intimacy like other elements is too essential for leading a quintessential marriage, especially in context of today's time demand.

However, if sporadically the marriage requisites are being challenged and tested at the time of shattering the boundaries of its modesty. These boundary walls are so established for the partners to stay committed to each other in every aspect of their married life. Crossing over these moral and lawful peripheries results in the acrimony and can even terminate a happy ongoing marriage. It doesn't mean that the person once tied up in a matrimonial knot cannot perpetuate his or her social life; they can unquestionably do that but yes that can't be extended to make love with someone else. Infidelity is moral, social, religious and legal wrong because it disparages the sanctity of pious bond shared by the two life partners. Different jurisdiction treats it differently as per their rules and regulations. Several countries and cultures have criminalized the act of adultery in purview of claiming it against the religious values of human relations, punishment for which is very serious in nature. But the Indian adultery law is dissimilar to other country laws and is originally derived from the British rule period¹.

Adultery is extracted from the Latin verb, "adulterium", meaning contamination of matrimony bond; listed under the section 497 of Indian Penal Code and section 198(2) of CrPC. In simple elucidation, it is avowed as establishing the sexual intercourse by an already married man outside

¹ Soutik Biswas, *Adultery no longer a criminal offence in India*, BBC News, Sept. 27, (2018).

his marriage with another married woman who isn't his wife without or with the consent of her husband. The man keeping something up the sleeves from another woman's spouse is alleged to have committed the crime of adultery under this provision and he thereafter can be awarded with the punishment for five or more years or else he can be even made to pay penalty for the same. On the other hand, woman who's involved with this man is not held guilty for the act. She is not even considered abettor for the same.

In seldom cases, where the husband of a woman with whom another man has forged ahead sexually is if in connivance with him, don't bother to interfere in their actions. This cuckold husband when consents to the extra-marital affair of his wife with another man, paradoxically it is not considered as a crime of adultery. Is it the justice which we wish to see in our country? The answer is straight no. Secondly, only a man is described as an adulterer and it is presumed that he has seduced the wife of another man and as a consequence, the wife consented to do sex with him. How could it be claimed with so much assurance that a woman can be only seduced by that man, she can also give her personal consent to the man? She too have personal sexual choices in her life which can't be overlooked by our patriarchal society, isn't it? This is only a true picture of male- dominating society filled with biased laws against the woman.

This section is read along with section 198(2) and is completely capricious in nature as it belittles the worth of a woman in sacrificial union of marriage, where a husband enjoys a clear dominance over his wife preferences in aspect of her sexual desires which should be instead her own wish. Thirdly, it can be observed that only a man is accused of infidelity but not the woman, why? Well there is no answer to this query. Fourthly, why the woman consent is not regarded as important as of man? This evidently shows that the wife can never go averse with her husband choice and she is his property, not more than his chattel.

The issue with this section 497 is been ventilated since many years. The legal campaign started with the case of Yusuf Abdul Aziz v. The State of Bombay², a complaint was filed against the appellant for charge of adultery, after which he went to Bombay HC to determine its constitutional validity. The decision was against him but the HC granted him a certificate under articles 132 (1) (c)³ and 134 (1) of the Indian constitution⁴. The main contention in this case was

² Yusuf Abdul Aziz v The State of Bombay, A.I.R. 1954 S.C. 321 (India).

³ INDIA CONST. art. 132(1), cl. (c).

that the section 497 of IPC infringes the fundamental rights assured in Article 14⁵ and 15⁶ of the men because the woman is exempted from criminal liability under this section, although she is equally culpable as the man is. Further, it gives credit to woman for embroiling into adulterous relationships. The SC said that Section 497 was valid and it didn't encourage any women to commit adultery. It was observed that forming a special provision for women to escape liability was valid and safeguarded under Article 15(3) for women and children. Moreover, the Supreme Court in year, 1954, explained through the reason that "it is commonly accepted that it is the man who is the seducer, and not the woman." The SC stated that women could only be a victim of adultery and not a culprit under this section. The appeal got dismissed as the appellant was not a citizen of India and hence he could not invoke the validity of section 497 of IPC.

The next case was of *Sowmithri Vishnu v. Union of India*⁷, when the petition for divorce was already pending before the HC, the husband filed a complaint against another man, under section 497. The petitioner filed a writ petition to quash the charges of adultery on the basis that the section 497 is unconstitutional and violates his rights under Article 14 and 15. Another fact, it makes a distinction between the right conferred to men and woman. The Supreme Court in this case observed that the woman should not be treated as aggrieved party and become a culprit in crime of adultery as it is a crime performed by one against another man. It was explained that neither the husband nor the wife can prosecute each other in case of adultery as it breaks the sanctity of their marriage. Further, argument was rejected that the unmarried woman should not be prosecuted for adultery. One of the argument laid down was that if an unmarried man enters into adulterous relationship with another married woman, he becomes perpetrator, vice-versa, an unmarried woman is not held liable for doing the same, even though they both disturb the "sanctity of marriage". The SC also held that bringing a question on an unmarried woman related to adultery would bring a war between the two women⁸.

Third case was, *V. Revathi v. Union of India*⁹, SC observed that not prosecuting a woman is a "social good" as it protects and makes purity of marital bond unscathed. The Court further explained that the section 497 acts as a "shield rather than a sword" and it does not infringe any

⁴ INDIA CONST. art. 134.

⁵ INDIA CONST. art. 14.

⁶ INDIA CONST. art. 15.

⁷ *Sowmithri Vishnu v Union of India*, (1985) A.I.R. 1618, (1985) S.C.R. Supl. (1) 741.

⁸ *Bharat, Law of Adultery in India*.

⁹ *V. Revathi v Union of India*, (1988) A.I.R. 835.

right of men. Besides these three judgments, there were two other important legal perspectives in connection to existing adultery law. Even the Law Commission of India Report (1971) and the Malimath Committee on Criminal Law Reforms (2003) strongly recommended for amending the adultery law. Both of them requested for framing the section 497 as gender neutral law.

All of the above three judgments were overruled by the judgment delivered in the landmark case of Joseph Shine v. Union of India. Joseph shine¹⁰, Italy based businessman, a non-resident of Kerala, filed a PIL under Article 32 of Indian Constitution¹¹. He challenged the constitutionality of the offence committed under the Section 497 of IPC read along with Sec 198(2) of the CrPC. He kept few contentions before the Court, first was that the 150 years old colonial laws are no more relevant in this contemporary era? Further it violates the Article 14 and 15 of both men and women as this arbitrary law discriminates the party on the basis of their marital status. It solely criminalizes on the basis of just sex, other factors are not even given a thought about. Right to privacy under Article 21 is violated under this law as two adults are doing what they want to and they can't be prided by anyone. Most importantly, law compels to idolize a woman as subordinate of his master, called husband. As the choice of consent by husband is likely to be taken as very determining factor in concluding whether it was an act of adultery or not? Man is targeted as 'seducer' and woman as 'victim' of adulterous act. How far is this justified in relation to women's rights? Even sometimes, husband makes the picture of his wife as "unchaste", for escaping from maintenance at the time of divorce. This means that the wife has to prove her chastity before the Court.

Supreme Court, finally on October, 2017 declared the section 497 as unconstitutional because it causes a miscarriage of justice to men and especially to women. The bench of five judges of SC, mainly delivered by Justice Dipak Misra and Justice Khanwilkar, stated that the involvement of men in approving the act is itself an act of treating a woman like an object which can be twisted as per their convenience. Further, it could be the ground for asking divorce but can't be contemplated as "criminal offence". However, BJP government had criticized this, insisted that adultery should remain a criminal offence only because "Diluting adultery laws will impact the

¹⁰ Joseph Shine v Union of India. Joseph shine, (2018) S.C. 1676.

¹¹ INDIA CONST. art. 32.

sanctity of marriages. Making adultery legal will hurt marriage bonds;" additionally, "Indian ethos gives paramount importance to the institution and sanctity of marriage"¹².

At the end, the burden of taking the marriage for long is on the shoulders of both husband and wife, if they can't do that, this will surely happen. No one can stop that. But if there is adulterous act done by either or both of them then it should not be viewed as something immoral. If there is consensus between them, nothing is wrong. Living together happily is a choice, not helplessness. Law should not bind them in ties of moral and religious ties, but rather a practical approach is highly needed.



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¹² Michael Safi, *Adultery is not a crime, India's Supreme Court rules*, Sept. 27, (2018).