

ADULTERY- THE JOURNEY FROM ITS CRIMINALISATION TO DECRIMINALISATION

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ABSTRACT

Adultery is one of the burning issues in India. It may not be a serious crime, but it does play chaos in the lives of the people concerned. Our Indian society is more conservative and expects an individual to be loyal and faithful towards his/her spouse. A person who is committing an adulterous act is always aware of the fact that he or she is violating the basic norms of the institution of marriage and that of society.

Although the modern trend reflects towards the decriminalization of adultery, historically, many cultures have regarded adultery as a crime. From the social point of view, 'adultery' implies having extra-marital, voluntary sexual intercourse between heterosexual persons either or both of them are married having a living spouse. The term adultery has an Abrahamic origin, though the concept predates Judaism and is found in many other societies. Though the definition and consequences vary between religions, cultures, and legal jurisdictions, the concept is similar in Judaism, Christianity, and Islam. Hinduism also has a similar concept.^[1] The article discusses the effectiveness of Section 497 of the Indian Penal Code (hereinafter, IPC) 1860 which has now been decriminalized in India in the landmark judgment *Joseph Shine v. Union of India (2018)*^[2].

INTRODUCTION

The word 'adultery' has been derived from the French term '*avoutré*', which itself has been evolved from the Latin word '*adulterium*', meaning 'to corrupt'^[3]. Adultery means committing voluntary sexual intercourse of a married person other than with his/her spouse. The legal definition of adultery however varies worldwide, owing to different legal regimes and legislative outreach. Adultery was traditionally regarded as a ground for divorce in the North American and Western nations. However, in most of the European nations, adultery does not constitute a ground of divorce in itself and the spouses must rather testify that the offense of adultery by one of them has resulted in the 'general breakdown' of their marital unity. In

fact, in Britain, adultery is merely a civil wrong and not a criminal offense. Even, in Malaysia and Singapore, adultery is not punishable under law.

While at many places adultery is committed when a woman indulges in voluntary sexual intercourse with a person other than her husband, at other places like in the Philippines, adultery is committed when a woman has voluntary sexual intercourse with a third person without her husband's consent and thus the woman faces penal accusations as well for the offense of 'cheating on her husband'. Many countries like Saudi Arabia, Iran, Philippines, South African nations like Sudan, Nigeria, Somalia, and interestingly 20 States of the USA, still follow the concept of denoting the act of 'Adultery' as a crime.

In Saudi Arabia, the punishment for committing adultery is 100 lashes for adultery man, whereas the adulteress woman is stoned to death after being convicted of adultery. The reason for such harsh punishments being granted to the culprits is that Saudi Arabia follows the Sharia law, which prescribes strict punishments for such crimes. Jewish, Islamic, Christian, and Hindu traditions are all unequivocal in their condemnation of adultery. In most cultures, both the man and the woman are equally punishable. However, according to ancient Hindu law, in ancient Greece and Roman law, only the offending female spouse could be killed and men were not heavily punished.^[4]

The Indian Penal Code was framed by the Britishers in 1860 which was the time when women in India were considered the property of the men and the offense on adultery given under Section 497 was a clear reflection of the same. Though the Chief architect of the IPC, Lord Macaulay was against the insertion of adultery as a penal offense under the code due to its unwarranted inclusion, it nevertheless got added afterward. Adultery is an act of having sexual intercourse outside marriage.^[5] Under the provision of Section 497, only a man (adulterer) could be held guilty for committing the offense of adultery, whereas the woman (adulteress) was completely shielded against such accusation, even though she may be an active participant in the commission of the offense.

According to Section 497 of the Indian Penal Code, 1860, Adultery is 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 offense of rape, is guilty of the offense 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 a case, the wife shall not be punishable as an abettor.”^[6]

HISTORICAL BACKGROUND

It is surprising to note that one of the great philosophers of ancient times, Plato has advocated that the elite class shall use women in society as property or chattel. Even his disciple, Aristotle, also advocated this argument and contemplated that women are responsible for the procreation of children and must ensure the patriarchal cycle for tracing ancestry by barring themselves from getting engaged in sexual intercourse with a man other than her husband.

The history of women being bonded in age-old traditions and customs is not confined to a particular region, culture, or civilization. For a long period, women have faced oppression from their counterparts. Gender biased laws were one of those miseries which women were helpless about. Though the contemporary legal provisions in many developing and developed parts of the world promote gender neutrality, women from ancient and medieval India did not have such privilege. The erstwhile adultery laws also reflected gender biasness, where the adulteress women were punished and adulterer men were set free. Thus, old adultery laws portrayed the idea that women were ‘property’ of men and being passive objects, they can be ‘enticed away’. During the 18th century B.C., the offense of adultery was penalized with rigorous punishments like that of death by drowning under the Code of Hammurabi in Babylonia. Under the Greek empire and Roman law, the adulterer men were set free whereas women committing such a crime had to face the punishment of death.

The adultery law dates back to the Roman legal regime, which highly influenced the Common law and Modern Civil law. Roman law considered adultery as ‘having sexual intercourse with another man’s wife’. In Common law, the act of adultery was not a crime *per se* but husbands were allowed to divorce their wives based on adultery as a ground. In India, when the IPC was drafted, the nation was under the reign of Britishers and thus the laws were framed as per their whims. Lord Macaulay, who drafted the IPC, did not approve to put ‘infidelity’ or ‘extra-marital affair’ as a ‘crime’ in his First Draft of the Code. Reviewing facts and opinions collected from the Presidencies of Bombay, Madras, and Calcutta about the feasibility of the criminalization of adultery, he categorized the population into two classes. According to him, one such class would be of people for whom no amount of punishment can satisfy as a measure

for retribution, while the other class would be of people for whom even pecuniary compensation would be enough to mitigate the injury caused.

In the words of Lord Macaulay, "*There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives.*"^[7] The basic objective of keeping 'adultery' out of the penal statute was the social norms that have already provided the values and norms which take care of such instances. The circumstances he referred to included child marriage and polygamy. Macaulay, hence, advised that it would be enough to treat it as a civil injury. Thus, framers of the Code did not include adultery as a crime; it was only after the recommendation of the Second Law Commission it was added to the Code.^[8]

In the Second Law Commission report, a different view was taken by the drafters and disapproving the proposition of Lord Macaulay on the concept of adultery, the report concluded in the following words:

"While we think that the offense of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q', regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment."^[9]

BURNISHED LAW JOURNAL

The idea outlined in the remarks of the above report was reflected under the provision of Section 497 of the IPC. However, the fate of this provision witnessed was doomed because it got recurrent criticism on the ground of being against the principles of 'equality' enshrined under the Constitution of India. Hence, immediately after the commencement of our Constitution, Section 497 of IPC was censored on the ground that it goes against the spirit of equality and thus, its constitutional validity was questioned.

The following cases outline the timeline of how the law on 'Adultery' has been questioned frequently:

Yusuf Aziz v. State of Bombay, 1954^[10] The question of declaring Section 497 as unconstitutional came before the court for the first time in this case. It was alleged that the law is sexist as it criminalizes only a man and not a woman. The brief facts of the case are as follows:

In 1951, one Mr. Yusuf Abdul Aziz, charged with adultery, contended before the Bombay High Court that Section 497 IPC is unconstitutional as it, in contravention of Articles 14 and 15 of the Constitution, operates unequally between a man and a woman by making only the former responsible for adultery. Three years later in 1954, the Supreme Court ruled that Section 497 was valid. It held that Section 497 did not give a license to women to commit adultery. The judgment observed that making a special provision for women to escape culpability was constitutionally valid under Article 15(3) that allows such a law. Moreover, in an interesting observation, the Supreme Court said in the judgment that "it is commonly accepted that it is the man who is the seducer and not the woman." The Supreme Court stated that women could only be a victim of adultery and not a perpetrator of the crime under Section 497.[\[11\]](#)

The observation and approach of the Supreme Court in this judgment was gender-biased if taken from the perspective of constitutional morality and modern society. The apex court itself has gone through lengths of judgments and modified its perception in the recent judgment of *Joseph Shine*[\[12\]](#) where it took a different approach.

1. *Sowmithri Vishnu v. Union of India, 1985*[\[13\]](#)

In this case, the Supreme Court observed that "*The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in Section 497 cannot render that section unconstitutional as violating Article 21.*"

The court held that women need not be included as an aggrieved party in the name of making the law even-handed. It also explained why women should not be involved in prosecution in cases of adultery. The Supreme Court held that men were not allowed to prosecute their wives for the offense of adultery to protect the sanctity of marriage. For the same reason, women could not be allowed to prosecute their husbands. The judgment retained the offense of adultery as a crime committed by a man against another man. The Supreme Court also rejected the argument that unmarried women should be brought under the purview of the adultery law. The Supreme Court held that bringing such an unmarried woman in the ambit of adultery law under Section 497 would mean a crusade by a woman against another woman.

1. *V Revathy v. Union of India, 1988*[\[14\]](#)

This was the case where the constitutional validity of Section 198 (1) and 198 (2) of the Criminal Procedure Code (hereinafter Cr.P.C) was challenged before the apex court. The said provision allows the husband of an adulteress wife to prosecute the adulterer but does not allow the wife of an adulterer husband to prosecute her promiscuous husband, therefore leading to a gender-biased provision of criminal law.

In the words of the Supreme Court, *“As between the husband and the wife social good will be promoted by permitting them to 'make up' or 'break up' the matrimonial tie rather than to drag each other to the criminal court. They can either condone the offense in a spirit of 'forgive and forget' and live together or separate by approaching a matrimonial court and snapping the matrimonial tie by securing a divorce. They are not enabled to send each other to jail.”*

1. **Joseph Shine v. UOI (Decriminalization of Section 497)**

The case which changed the whole concept of adultery as a penal offense with an approach of Constitutional morality came before the Supreme Court in the form of a Public Interest Litigation by a businessman. The facts of the case are:

In October 2017, An Italy-based Indian businessman Joseph Shine, who hails from Kerala, filed [public interest litigation](#) under [Article 32](#) of the Constitution. The petition challenged the constitutionality of the offense of adultery under [Section 497](#) of the IPC read with [Section 198\(2\)](#) of the Cr.P.C as the law had come under sharp criticism for treating women as possession of men. The Petitioners claimed that Section 497 of the IPC is a clear violation of the right to privacy of the people involved. The criminal offense of Section 497 creates an undue intrusion into the personal lives of the people involved, which violates Article 14, 19 and 21 of the Constitution of India. The violation of the right to privacy and the right to life cannot be made without due process and compelling state interest. Moreover, Section 497 of the IPC plays no role in destroying the institution of marriage and the decriminalization of adultery would be incapable of destroying it. The decision to marry or continue to remain married for any reason remains an innately personal, private, and intimate choice, core to individual personal liberty.

India's Supreme Court has ruled that adultery is no longer a criminal offense in 2018 in this judgment. Striking down the 158-year old British colonial-era law, the five-judge bench unanimously declared that section 497 of the IPC was “archaic, arbitrary and unconstitutional”.

It was observed that *“Thinking of adultery from the point of view of criminality would be a retrograde step. This Court has traveled on the path of transformative constitutionalism and, therefore, it is inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.”* In the words of the former Chief Justice, Deepak Misra, speaking on behalf of the bench, *“It is time to say that a husband is not the master of his wife, it is time to say that a husband is not the master of his wife.”*

CONCLUSION

The judgment of *Joseph Shine* effectively articulates how Section 497 violates fundamental rights such as Article 21 of the Indian Constitution and why such an archaic provision must stand decriminalized from the Penal code. The court observed that *“Section 497 IPC effectively creates invidious distinctions based on gender stereotypes which create a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamount to the subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution.”*

The recent judgment is reflective of the idea that our Judiciary has very aptly succeeded in striking a balance between Constitutional and popular morality. It is indeed important to ensure that in the quest for attaining a majoritarian goal, we do not lag in achieving our constitutional goals. The Judiciary, as a pillar of safeguarding the rights of citizens, has time and again ensured, scrutinizing its judgments and over-ruling the precedents, that the rights of individuals in no case be compromised on the cost of popular morality.

The court also highlighted the gender-biased nature of Section 497 and observed that *“Section 497 is premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. The notion that women are victims of adultery and therefore require the beneficial exemption under Section 497 has been deeply criticized by feminist scholars, who argue that such an understanding of the position women is demeaning and fails to recognize them as equally autonomous individuals in society. Effectively, Indian jurisprudence has interpreted the constitutional guarantee of sex equality as a justification for differential treatment: to treat men.”* Therefore, the decriminalization of the erstwhile offense of adultery was a *sine qua non* in the journey of ensuring and upholding Constitutional morality.

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- [1] ‘Adultery- Sexual Behaviour’, Encyclopedia Britannica Online, available at <https://www.britannica.com/topic/adultery>
- [2] *Joseph Shine v. Union of India*, (2018) SCC 1676.
- [3] *The New International Webster’s Comprehensive Dictionary of the English Language*, Deluxe Encyclopedic Edition, Trident Press International (1996 Edn.).
- [4] Vijaykumar Shrikrushna Chowbe, *Adultery – A Conceptual and Legal Analysis* (2011), SSRN, available at <https://ssrn.com/abstract=1856991>.
- [5] K.D Gaur, *Indian Penal Code*, Universal Law Publishing, (5th Ed.2014).
- [6] *Ind. Penal Code*, sec. 497 (1860).
- [7] Comment on the draft of first Law Commission Report, Gaur K.D., *Indian Penal Code*, EASTERN LAW PUBLICATION, (2nd Ed. P. 388).
- [8] Ratanlal & Dhirajlal, *Law of Crimes*, BHARAT LAW HOUSE (2007) (26th ed., p.2710).
- [9] Second Report on the Draft Indian Penal Code (1847), p. 134-135, Law Commission of India, forty-second report (p. 365).
- [10] *Yusuf Aziz v. State of Bombay*, 1954 AIR 321.
- [11] *Ibid.*
- [12] *Supra note 1.*
- [13] *Sowmithri Vishnu v. Union of India and Another*, (1985) Suppl. SCC 137.
- [14] *V. Revathi v. Union of India and Others*, (1988) 2 SCC 72.



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