



ADULTERY IN INDIA

By Surabhi Chhabra

From Vivekananda Institute of Professional Studies

INTRODUCTION

India is a land of culture and religion. Marriage is considered as the union of two souls and is a sacramental union. In that family, where the husband is pleased with his wife and the wife with her husband, happiness will assuredly be lasting.¹ However, the concept of adultery is not an alien concept in Hinduism and has been recognized, but frowned upon, since ancient times. To commit to adultery is a sin as it destroys the holy union. Anybody who commits such an act, whether the husband or wife, would jeopardize their relationship. Therefore, adultery has been made a ground for divorce.

In India, the law of adultery has gone through substantial changes. The Indian Penal Code was drafted in 1860, the time when women were considered subordinate to men and men controlled their rights. The society considered woman to be the property of man. The crime of adultery was instituted under the Act of 1860 under section 497, consisting of various loopholes. Hence, the laws were vague and inadequate to meet the demand for justice. To meet the present-day scenario and to be at par with the society, it was necessary to restructure the adultery law in India. However, it continues to be a topic of controversy and debate.

¹ Manu Smriti, III, 60.

² The Indian Penal Code, 1860 (Act 45 of 1860), s. 497.

WHAT IS ADULTERY?

In ordinary terms, when a man has sexual intercourse with the wife of another man, and the act does not amount to rape, it is called adultery. In legal sense, the term adultery has been defined under the Indian Penal Code, 1860. 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.² The man could be married or unmarried. The section further provides for imprisonment of maximum 5 years, with or without fine. Therefore, to prove the offence of adultery, the following needs to be proved:

- There must be an act of sexual intercourse,
- The sexual intercourse must have been committed by a man with a woman who is the wife of another man,
- The man having sexual intercourse must have knowledge or must have such reasons to believe that the woman is the wife of another man,
- The act of sexual intercourse must not amount to rape, and
- The sexual intercourse must be without the consent or connivance of the woman's husband.

However, the section does not hold the wife guilty of any offence. It explicitly mentions that the wife shall not be punishable as an abettor.³ Even though the wife has consented for the act as much as the man, she will be held innocent. Adultery is an offence against the sanctity of the matrimonial home and an

³ Ibid.



act which is committed by a man.⁴ The husband can only prosecute the man who had sexual intercourse with her wife. Therefore, adultery is an offence against the husband of the wife.

ADULTERY AS A GROUND FOR SEPARATION

Adultery, being an offence under the Indian penal code, is also a ground for divorce.

Under Hindu Law, the Hindu Marriage Act, 1955 recognizes adultery as a ground for divorce. Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.⁵ To avail divorce on this ground, it is, however, essential that a valid marriage subsisted at the time of the offence of adultery.

Under Christian law, the parties do not obtain a decree for divorce, however the marriage can be dissolved on ground of adultery under the Indian Divorce (Amendment) Act, 2001, where either the husband or the wife may present a petition to dissolve the marriage on the ground that the respondent has committed adultery.⁶

Under the Muslim law, where men get substantial right under Muslim Personal Laws, The Dissolution of Muslim Marriages Act, 1939 recognizes a woman's right to obtain a decree for the dissolution of her marriage on the ground that her husband

associates with women of evil repute or leads an infamous life.⁷ This amounts to cruelty towards the wife.

The Special Marriage Act, 1954 recognizes adultery as a ground for divorce where a petition may be presented by either 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.⁸ Adultery as a ground for matrimonial relief is gender neutral as it recognizes both the wife and the husband's right to present a petition to claim relief. It does not assume one gender as the victim.

IS THE LAW OF ADULTERY DISCRIMINATORY UNDER THE IPC?

Whether the law of adultery is discriminatory has been a topic of debate. The wife is held innocent and is not punishable for the offence of adultery, even though she consents for the sexual intercourse. The offence of adultery is committed by two persons. To constitute this offence, one of the essential requirements is that the sexual intercourse must not amount to rape. Hence, it is a consensual act. However, the law has always presumed the wife to be innocent.

The leading case for this is Yusuf Abdul Aziz v The State of Bombay⁹, where the Supreme Court upheld the validity of Section 497, IPC. The question raised was whether section 497 contravenes articles 14 (right to equality) and 15 (Prohibition of discrimination) of the Constitution of India. The wife should be punishable as much as the husband. The court

⁴ Olga Thelma Gomes v. Mark Gomes, AIR 1959 CAL 451.

⁵ The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 13(1)(i).

⁶ The Indian Divorce (Amendment) Act, 2001 (Act 51 of 2001), s. 10(1)(i).

⁷ The Dissolution of Muslim Marriages Act, 1939 (Act 8 of 1939), s. 2(viii)(b).

⁸ The Special Marriage Act, 1954 (Act 43 of 1954), s. 27(1)(a).

⁹ AIR 1954 SC 321.



held that section 497 did not contravene articles 14 and 15 as article 15(3) itself allows the state to make special provisions for women. Therefore, the wife can be excused within the purview of article 15(3) and section 497 cannot be said to be ultra vires.

The reason for exempting the woman to be guilty and punishable despite being a consenting party stems from the abusive culture towards women prevalent in India from the beginning. Some cultures in India still do not believe in equality between men and woman, and the guilty woman would be treated with the most inappropriate manner.

If the wife is not punishable even as an abettor of the crime, then the wife of the adulterer does not have the right to bring a legal action against the adulteress. This explicitly poses discrimination against the aggrieved woman, since the husband of the adulteress can prosecute the adulterer. This is because of the assumption of the legislature that no person other than the husband of the woman shall be deemed to be aggrieved by any such offence.¹⁰

The Indian judiciary has upheld the constitutionality of section 497 with respect to this issue in the case of *Sowmithri Vishnu v. Union of India*.¹¹ Referring to *Yusuf Abdul Aziz v The State of Bombay*¹², it was held that Section 497 does not offend article 14 of the Constitution and the woman cannot be prosecuted by the aggrieved woman as “it is commonly accepted that it is the man who is the seducer and not the woman.” Section 497 excludes women from the purview of the offence. The Court held the legislature responsible for such provisions and cleared that it is for the legislature to meet the need

for any changes. Therefore, the wife of the adulterer cannot prosecute the other woman.

NO CRIMINAL ACTION AGAINST THE GUILTY SPOUSE

The offence of adultery is an offence against the husband of the wife and the man is the criminal. The husband can prosecute only the adulterer and not his own wife. Similarly, the wife of the adulterer cannot take a criminal action against her guilty husband. To assume that only the husband of the adulteress is the aggrieved person is simply turning a blind eye towards the wife of the adulterer. The wife is ignored as a victim.

However, this was reiterated in the case of *V. Revathi v. Union of India*.¹³ The Supreme Court, upholding the constitutionality of Section 497, IPC with section 198(2) CrPC, held that the law is not discriminatory in nature. It does not allow the two spouses to bring any legal action against each other. The intent of the legislature behind this is to allow the spouses to reconcile. It is an opportunity for the two to mend things between them. The court stated that “adultery law should be seen as a shield rather than a sword.”

EFFORTS TO AMEND THE LAW RECOMMENDATIONS OF 42ND LAW COMMISSION REPORT

It recommended amendment in section 497 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

¹⁰ The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 198(2).

¹¹ AIR 1985 SC 1618.

¹² Supra note 9.

¹³ AIR 1988 SC 835.



imprisonment of either description for a term which may extend to two years, or with fine, or with both.” The amendment to the section was recommended to fulfil two objectives-

1. To make the law gender neutral. The man and wife together should be held guilty of the offence as there is no reason why the woman should be kept out of the purview of this section, being a consenting party.
2. To reduce the punishment from five years to two years, in order to make it a less heinous crime.

THE MALIMATH COMMITTEE REPORT, 2003

The committee recommended the law on adultery to be gender neutral. It proposed the following amendment in section 497- “Whoever has sexual intercourse with the spouse of any other person is guilty of adultery.” Thus, not only the man but the adulteress is also made guilty under the said provision.

THE UNITED NATIONS WORKING GROUP ON LAWS THAT DISCRIMINATE AGAINST WOMEN.

The United Nations Working Group on Laws That Discriminate Against Women in 2012 recommended to decriminalize adultery law. To treat adultery as a crime will eventually lead to discrimination and violence against women.

However, all attempts to replace the existing provision remained fruitless.

A LANDMARK DECISION

The intention of the legislature, through section 497, was to prevent the act of adultery and to provide the appropriate punishment to

persons committing such offence. When the IPC was drafted, the position of women in the society was worse than it is today. Keeping this in mind the law, till 2018, was biased towards women. The assumption that “the man is always the seducer” has been carried on since beginning and has been reiterated by the Supreme Court in various judgements. However, does this law ensure justice in this present time?

One of the significant yet necessary rulings of the Supreme Court has been in the case of *Joseph Shine v. Union of India*.¹⁴ In this landmark judgement, the Apex Court struck down section 497, IPC and decriminalized adultery, also stating that it is still a valid ground for divorce. The reasons for striking down this section have been raised issues in the previous cases.

The section was held to be archaic and constitutionally invalid. Adultery becomes an offence if the wife has sexual intercourse outside her marriage without the consent or connivance of her husband. However, it does not fall into the category of a criminal offence if she does it with his consent. This simply shows that women are subordinate to men. It will encourage the mindset of treating women as property of men. Section 497 does not match the present status of the society and is violative of articles 14 and 21 of the constitution. Article 21 guarantees protection of life and personal liberty and women being treated as chattel violates their fundamental right to personal liberty.

The law is discriminatory in nature. The woman is held innocent, whereas the man is solely responsible for the offence. On the other hand, it does not allow the wife of the

¹⁴ 2018 SC 1676.



adulterer to prosecute the adulterer and the adulteress. This way, there is gender bias as well as gender discrimination towards women. The law punishes only the adulterer, violating the right to equality. The Apex Court also held section 198(2) of crpc arbitrary and unconstitutional.

The major ruling of the Court was to decriminalize adultery, and striking down of section 497, IPC. The Supreme Court overruled its previous judgements and further held, “adultery does not fit into the concept of a crime. There would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to be left as a ground for divorce.” To intrude in the privacy of the married couple violates their right to privacy under article 21. The offence of adultery does not affect the society and is a private matter, hence it does not require state’s intervention into the private realm of the couple.

CONCLUSION

The act of adultery does not only destroy the marriage, but also affects the life of the spouse in significantly. It is considered immoral in all religions. Even though it is immoral, the Apex Court has finally held that a marriage between two people demands privacy. The bold step of revising the law of adultery under the IPC was much awaited till the Joseph Shine Case, as it was vague and arbitrary in many forms. However, whether decriminalizing it is the solution is still not very clear and understandable.

Adultery is not a criminal offence anymore but still a ground for divorce. Many societies of India do not consider divorced women to be women of repute. In fear of being humiliated and cornered by the people, many women will not prefer divorce from their husband, and the husband will continue his

affair without being called a criminal. This will promote extra marital affairs. To experience this torture will eventually lead to mental disorders or maybe, suicide. Men too can be a victim of this.

However, declaring section 497 as unconstitutional has eliminated the discrimination and biasness, but there is still the need to review the law in order to protect the sanctity of marriage in India.

