

Judgement on Adultery is Danger to Sacramental Marriages

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Abstract

Adultery has been a very controversial topic it is one among the few problems now mentality of individuals are changed, they are coming out of conservation mentality although this is not a new thing it also persists in ancient era. Where Ravana abducted Sita and Sita had to face Agnipariksha to prove her chastity. People use to go to Kotha to quench sex. Out within these a hundred and fifty years when the codifications of the legal code. There has been a large change within the society ladies aren't any longer thought about to be the personal chattel of her husband. During the post -PC amount, variety of Acts are enacted to alleviate ladies from the hitherto ancient system of seclusion and subordination and to assure then a standing equal to men in each walk of life. Ladies are participating altogether activities of the event of the country and also the social approach to a girl has modified to a positive notion. Such a law in 21st century looks outdated with the trendy notions of the standing of women and also the constitutional spirit of gender equality. The penal provision of criminalization adultery violates the constitution that features equal justice for all and would not discriminate on the grounds of sex. It violates Article-14 (Equality before law), 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) and 21 (protection of life and personal liberty) of the constitution of India regarding it petition was filed by Joseph Shine challenging Section-497 of the Indian Penal Code which leads to prosecution of a man in an adulterous relationship with a married woman, but let's off the women, honorable Supreme Court has declared the judgment regarding it making no body liable for this act but providing the ground for divorce.

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1. INTRODUCTION

In many jurisdiction adultery is considered as an offence it is against public morals and mistreatment of the marriage relationship. Historically adultery has been regarded as a very serious and heinous crime, but the modern society has liberal view about it. The process of urbanization, industrialization and population explosions have brought about new tensions, problems and changes in the society, which have affected the institutions of marriage and aspects related to it. So it is necessary to inquiry the new approaches and developments that have take place with regards to the offence of adultery, which directly affects the institution of marriage it is penalized under the Indian Penal Code.

The constitutionality of Section-497 of the Indian Penal Code was challenged before the Supreme Court in YUSUF ABDUL AZIZ Vs THE STATE OF BOMBAY (1954). A constitutional bench held that section-497 did not violate the right to equality as enshrined in Article-14 and 15 of the constitution. Sex in a second classification and although there can be no discrimination on such account the constitution itself provided for special provisions with regard to women and children. Thus, Articles-14 and 15 read together validate Section-497 of the Indian Penal Code. In 1847, the Law Commission of India was given the responsibility of drafting a new penal code. The commission rendered liable only the male offender keeping in mind "the condition of the women in this country" and the law's duty to protect it.

- As far back as 2006, National commission for women recommended that adultery be decriminalized.
- All European countries have decriminalized adultery and so have many parts of Latin America.
- In 2015, South Korea followed Suit. Now, only few Asian Countries still criminalize adultery these are Taiwan, the Philippines and India.

The prime question is : should someone face criminal action for stepping outside the bounds of matrimony? That's what Indian law still holds. It punishes the male partner for trespassing on another main's property, namely his wife.

The adultery law was in the Spotlight recently when C. Channiah, resident of Hyderabad's Shivaji Nagar, pressed adultery charges on police constable after discovering him in bed with his wife. Channaiah first locked up his wife and the constable, Madhusudan Reddy, in the bedroom and then raised an alarm. He alleged that the affair had been going on for several months. Reddy has been arrested U/S- 497 of the Indian Penal Code and could face up to 5 years imprisonment in the charges are uphold by the court. His willing lover, though, need not fear the law, since it does not apply to an adulterous woman.

Reddy has been unlucky enough to be caught in the claws of one of India's more archaic laws. Section 497 treats extra-marital affairs as crimes. More precisely, it sees it as a theft of a men's wife. The woman's own agency and rights are ignored.

Infact, it only applies to situation where the wife commits adultery. The wrong husband can invoke Section-497 against his wife's sexual partner. But if the situation was reversed and the husband had committed an infidelity with an unmarried woman, his wife had no power to more the law. She faces criminal liability if his lover is married and her husband files a complaint. One of India's most famous cases of marital infidelity and courtroom drama is that of navy

commander K.M. Nanavati, who shot dead his wife Sylvia's lover, the businessman Prem Ahuja. While Nanavati face prosecution for murder, Sylvia did not. That 1950's crime of Passion was the reason India abolished the Jury System. That case has inspired several Bollywood movies, the most recent being Rustom.

But over the years, it has been widely recognized that the law is patriarchal and discriminatory and out of touch with contemporary society. And yet, it lingers on, in the Indian Penal Code. In 1951 Yusuf Aziz challenged it's constitutionality, but Bombay High Court upheld the section, saying that the constitution has such special legislation for women. In 1971, the fifth law commission recommended changes in the provision, including making the law gender neutral and reducing the prison term from 5 to 2 years. Those recommendations were also ignored. In 2006, the National Commission for women rightly recommended that adultery be decriminalized. Perhaps the reason it has not been erased from the state books because there is no political will or public pressure to do so, with question of morality enmeshed in the matter. In our opinion, adultery should be treated as a will misdemeanors, not a criminal one, we can't treat adultery as a crime, says Prof. Mary E. John from the Centre for Women's Development Studies.

Section- 497 read as follows- Adultery- 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 offences 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.

This section punishes the offence of adultery committed with a married woman without the consent or connivance of her husband. The main feature of this offence is that the male offender alone has been made punishable.

This offence is committed by a third person against a husband in respect of his wife. If an act of sexual intercourse takes place between a married man and an unmarried woman or with a widow or with a married woman whose husband consents to it, this offence shall not be deemed to have been committed. It is not required for an offence under this section that the offender should know whose wife the woman is but he must know that she was a married woman.

In **Smt. Sowmithri Vishnu Vs Union of India**, it was contended that Section-497 is violative of Article-14 and 15 of the constitution on the ground the it makes an irrational classification between men and women in that.

1. It confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery.
2. It does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.
3. It does not take in cases where the husband has sexual relation with an unmarried woman with the result that the husband's have as it was, a free license under the law to have extra marital relationship with unmarried woman.

But the Supreme Court rejected these arguments and held that it cannot be said that in defining the offence of adultery, so as to restrict the class of offender to men, any constitutional provision

is infringed. It is commonly accepted that it is the man who is seducer and not the woman. The court further observed that this position may have started seducing men but it is for the legislature to take note of this transformation and amend section-497 appropriately.

It was further contended that since section-497 does not contain provision for the constitution freedom of personal liberty. In connection with this question the court observed that this section is not violation of Article-21 because, although this section does not contain provision for hearing of a married woman with whom the accused is alleged to have committed adultery but if she makes an application in the trial court that she should be given opportunity of being heard, she would be given that opportunity. Neither Substantive nor adjective criminal law bars the court from affording a hearing to a party which is likely to be adversely affected by the decision of the court directly or indirectly.

Ingredients-The following ingredients are essential for this offence-

- Sexual intercourse by a man with a woman who is or whom he knows or has reason to believe to be the wife of another man.
- Such sexual intercourse must be without the consent or connivance of the husband.
- Such sexual intercourse must not amount to rape.

1- Take, entices or detains any woman- Taking entices does not mean influence by the accused to induce the wife to leave her husband. There must be some influence operating on the woman or co-operating with her inclination at the time the final step is taken by the woman or causing separation from her husband. Taking a woman with the consent of her husband or of the person who has the care of her is not taking under this section. The fact that the woman accompanied the accused of her own free will does not diminish the criminality of the act.

A person is said to have enticed women when he persuaded her to leave her husband's house. Thus, the act of enticement involves some active persuasion or use of moral force by accused so that woman may leave her husband or the person having the care of her, of her own. For an offence under this section taking or enticing away of wife is not necessary. If the accused has concealed or detained her with intent that she may have illicit intercourse with another person, he would be guilty under this section.

2- From any person having the care of her on behalf of that man- In **Ram Narayan Kapur's** case Bombay High Court observed that where the brother of a married woman who had eloped with the accused lodged a complaint against the accused for an offence under this section, no action was taken by the court because it was not shown that he had the husband's authority to take care of her. Therefore, taking or enticing must be from the lawful authority of the husband or of any person having the care of her.

3- The woman must be married- The woman enticed away must be the wife of another man. The enticement of a woman, whose marriage is void is not indictable under this section. A husband who discarded his wife for many years and recognized her as free person to go wherever she liked has no ground for complaining under this section if she is enticed away by another man from her father's house where she lives. Taking away such a woman cannot be an offence under this section.

4- Accused must know that the woman was married- for an offence under this section it is not enough that the woman was married, its is also necessary that the accused knew that the woman

was married. The expression "Such woman" used in this section, does not mean such a woman as has been so enticed away but means such a woman whom the accused knows or has reason to believe to be the wife of any other man.

5- Intention- In order to satisfy a charge under this section it is necessary that the accused could be said to have detained the woman and to have detained her with intent that she may have illicit intercourse with him. The persuasion, allurements or blandishments necessary to make out such detention must be with intent to have such illicit intercourse. In a case Allahabad High Court has taken the view that sexual intercourse between the woman and any person or other than the person to whom she had been married, during the life time of her husband would be illicit within the meaning of this section. Under this section conviction would not be bad merely because the husband connived at the taking away or concealing of the wife.

6- Wife cannot be punished as abettor- In case of adultery wife is not punished as an abettor. Therefore it would be inconsistent to punish her as an abettor of the minor offence mentioned in this section.

Adultery is different from rape-Rape may be committed on any woman whether married or unmarried. Where the woman is married and sexual intercourse is committed without her consent, the offence is both rape as well as adultery.

There are some more points of distinction between adultery and rape as follows:

- Adultery is an offence under section- 497 of the Indian Penal Code it is an offence relating to marriage.
- Rape is an offence defined under section- 375 and 376 of the code. It is contained in chapter dealing with offence affecting the human body and is an offence relating to the person of the woman who is victim of rape.
- In the case of adultery the consent of the woman is immaterial because the woman being married it is the husband who is actually the aggrieved party. In fact in adultery woman is always a willing and consenting party to sexual intercourse.
- But the offence of rape is committed against the will and without consent of the woman or it may be committed even with the consent if the girl is under 16 years of age.
- Adultery is an offence against the husband. Rape is an offence against the woman herself.
- Adultery may be committed only when the woman is married and not when she is not married. No offence of adultery is constituted where the husband and consents to his wife having illicit relationship.

Adultery, where a continuing offence-Every act of sexual intercourse amounts to an offence of adultery and if a person has sexual intercourse with a woman several times, it cannot be said that the offence is continuing. According to Nagpur High Court. It is undesirable that there should be successive prosecution. Complaint by aggrieved person is necessary. Under this section the court shall take cognizance of the offence only upon a complaint can be made by the person. Who has been entrusted with the care of the woman with prior permission of the court. Where the husband is illicit or lunatic or is unable due to sickness to make a complaint it can be made section 199 Cr.P. Code or section 198 (2), Cr.P. Code 1973.

Where a charge for adultery under this section is definite as regards to the place where offence was said to have been committed but specific dates cannot be proved on which sexual intercourse

took place, according to Calcutta High Court it is sufficient to specify the period within which offence was alleged to have been committed cannot be ignored. It must be taken into account in determining the punishment.

Need for Amendment-Amendment is required because S-497 includes some loopholes that is, it only punish the conduct of the man who commits such a crime even if voluntarily conduct of the wife involved.

Second, those wife remain helpless whose husband engages in such an offence with another woman.

No marriage or alliance can take away one's right over one's own body. Therefore, while the law on adultery as it is today in the Indian Penal Code is discriminatory on the ground of sex, the very existence of adultery in the criminal statute is violative of the fundamental right to life and to live with dignity. These issues will therefore remain unaddressed even if the court reads down sec-497 and gives women also the right to send their husbands to court. This section will have to be struck down to do justice to the very notion of human life and dignity.

Why punish married men alone for adultery- asks S.C.

Recently the S.C. agreed to examine the constitutional validity of a 15 year-old, 'gender discriminatory' provision in Indian Penal Code.

Which punishes a married man for adultery for consensual sexual relation with another man's wife.

A bench of chief Justice Dipak Mishra and Justice A.M. Khan wilkar and D.Y. Chandrachud sought the centre's response in four weeks to a PIL by Joseph Shine from Kerala who is employed at Trento in Italy or why a married man alone and not the consenting wife of another should be hauled up.

What persuaded the S.C. to examine the constitutional validity of what it felt might be an archaic provision was the clean chit given to the woman, irrespective of her role in the adulterous relationship, as also Counsel Kaleeswaram Raj's argument that as per sec- 497 no offence of adultery is committed if there was consensual sexual relation between an unmarried man and an unmarried woman, an unmarried man and a married woman and between a married man and an unmarried woman.

The bench said "Prima Facia, on a perusal of sec-497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them. One is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption."

Ordinarily, criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim in all circumstances" While leaving the adulterous married man to face the grand of the law, the CJI led bench said.

The Apex Court's constitutional approach also stumbled upon another abenation in sec- 497, which provided that it is not adultery if a married man had sexual relationship with a married woman with her husband's consent or connivance. The bench said: "it is perceivable from the language employed in the section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really

creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamount to subordination of a woman when the constitution confers equal status."

S.C. Says adultery law looks pro-women but is anti-women hurts it may go.

The S.C. has observed that the anti-adultery provision in law was anti-woman in a deep patriarchal sense as it was not an offence if the husband were to consent or connive in it.

"The law seems to be pro-women but is anti-women in a grave ostensible way. As if with the consent of the husband, wife can be subjected to someone else's desire,"-a five-judge bench led by CJI Deepak Mishra observed. In its prima facie- remarks, the bench said that Sec. 497 and Sec. 198 (2) of the Cr. P.C. should not stay in the statute book as a crime.

The court was reacting to arguments that the adultery had ceased to be an offence in most countries.

The petitioners urged the court not to strike down the law only on the ground that it was discriminatory against men.

Sec. 497 did not violate the right to equality as enshrined in Article 14 and 15 of the constitution. Sex is a sound classification and although there can be no discrimination on such account, the constitution itself provides for special provision with regard to women and children. Thus, Article- 14 and Article-15 read together validate Sec. 497 of the IPC.

In 1847, the law commission of India was given the responsibility of drafting a new penal code. The commission rendered liable only the male offender keeping in mind "the condition of the women in this country" and the law's duty to protect it.

Landmark Judgment by The Supreme Court- Supreme Court scrapped the 150 years old adultery law. Reading out the Judgment CJI Deepak Mishra clearly stated that equality is the need of the hour. He also added that time has come when the husband should not be considered the master. "Adultery cannot and should not be a crime. It can be ground for divorce, a five judge bench led by outgoing Chief Justice of India Dipak Mishra said. He said that the adultery law was against right to equality and life. Justice D.Y. Chandrachud Spoke up against patriarchy and gender equality to strike it down."

5 Points made in Judgment

- **Section- 497 is arbitrary-**Throughout the Judgment, it was pointed out that the nature of Section- 497 is arbitrary. For one it does not preserve the sanctity of marriage for a husband can give consent to let his wife have an affair with someone else. Rather, the judgment points out, it serves to preserve the proprietary rights a husband has over his wife. Moreover, the wife cannot file a complaint against her husband or his lover. There are no provisions to deal with a married man having an affair with an unmarried woman or a widow.
- **Woman cannot be forced to act as per society's will-** The second page of the judgment clearly states, "A woman cannot be asked to think as a man or as how the society desires such a thought is abominable, for it slaughter her case identity."
- In a society like India, the role and expectations of woman are deeply rooted in society. So it is revolutionary for the Supreme Court to observe that woman cannot be forced to act as per society's will. It is not nuanced enough to take into account what kind of marriage it was or why one partner cheated.

- **Wife is not husband's property-** The judgment adds and it is time to say that a husband is not the master. Equality is the governing parameter. Activists had slammed Section 497 saying it was totally "male- friendly" and that as long as it existed it perpetuated the idea the wife was the husband's property.
- **It is against Article-14, 15 of constitution-** A-14 guarantees equality to every citizen in India and A-15 states that no one can be discriminated on the basis of religion, race, caste, sex, etc. The court observed that the very nature of sec-497 was in contravention to this as it saw woman as subordinates of men and went against the constitution of India.
- **Why should adultery be a criminal offence?** The judgment makes it amply clear that by criminalizing the act, the law was entering an extremely private sphere that of matrimonial life. According to Article 21 of the constitution, everyone is guaranteed dignity and personal liberty, but by making adultery a criminal offence, individuals would be deprived of dignity and privacy. "The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life should be protected from public censure".

Indu Melhotra wrote in her judgment, thus questioning why it is a criminal offence at all. She added that since adultery was a moral wrong and not a public wrong which affected the lives of scores of where it didn't deserve to be classified as a criminal offence.

2. COMMENTS OF DIFFERENT PEOPLE

Senior CPI- M leader **Brinda Karat** hails the verdict and said at the same time the aggrieved wife of an adulterous husband can take recourse to laws against cruelty and also for compensation under the Domestic Violence Prevention Act.

Delhi Commission for Women Chair person Swati Maliwal said I am totally disagreeing with SC on adultery. They have given license to married couples for adulterous relationship what is sanctity of marriage then?

Instead of making 497 gender neutral criminalizing it both for women and men they have decriminalized it totally! Anti-women decision.

Delhi Commission for women Chief Swati Maliwal disagreed with the Supreme Court judgment on adultery and launched a study on its effect on women. She said that the commission receives thousands of complaints from women whose husbands are in adulterous relationships and they have been abandoned by them. These women are left to starve and fend for themselves and their children with no support from the husbands, she said. The commission launched recent survey in the wake of this judgment to ascertain the problem faced by women whose husbands are in adulterous relationships and the impact of the SC judgment on them. It has also asked for opinions from the public.

Maliwal stated, "By decriminalizing adultery the Supreme Court has given an open general license to the people of this country to have illegitimate relationship while being married. SC should have made the law gender-neutral by criminalizing the adulterous relationships by men as well as women."

Instead they have decriminalized the act of adultery itself. "In our Patriarchal Society, the sense of entitlement of men makes them put the blame on the woman and claim to be in an unhappy marriage. In such a scenario decriminalizing adultery adds tremendously to their pain. I invite

those in favour of the judgment to please visit the commission once and interact with these victims. A large part of our society has been neglected today in this judgment she said."

Congress MP and president of women's wing Sushmita Dev tweeted, "Excellent decision to decriminalize adultery. Also, a law that does not give women the right to sue her adulterer husband and can't be herself sued if she commits adultery is unequal treatment militates against her status as an individual separate entity."

Senior Supreme Court lawyer Prashant Bhushan called the verdict a fine judgment. He tweeted, "Another fine judgment by the SC striking down the antiquated law in Sec 497 of penal code which treats women as property of husbands and criminalizes adultery (only of man who sleeps with someone's wife.)" Adultery can be ground for divorce but nor criminal.

NCW Chief Rekha Sharma-I welcome this judgment by the Supreme Court. It was an outdated law which should have been removed long back. This is a law from British era. Although the British had done away with it long back, we were still stuck with it.

Lawyer of the petitioner. It is a monumental judgment. I am extremely happy with the judgment. The people of India should also be happy. Says lawyer of the petitioner Raj Kattishwaram.

Decriminalization of adultery will critically endanger the institution of marriage. Not only does it run the risk of fostering extra marital affairs, the emergence of divorce as the way out will catalyze the break-up of marriages leaving little-children in the lurch.

Decriminalization of adultery is not a good step but Sec. 198 of the code of criminal procedure, 1973. Which prohibits views from filing adultery complaints. Should be struck down.

Sec. 497 should be made gender-neutral and Sec. 198 of Cr. P.C. which violated A-14 of the constitution of India because they fail the test of reasonable classification as they carve out arbitrary classifications in favour of the husband. The section created an arbitrary classification between an aggrieved husband vis-a-vis an aggrieved wife.

Further, it also created an arbitrary classification between married and unmarried women, thereby violating the fundamental right to equally under A-14 of the constitution of India.

Sec. 198 of the Cr.P.C. also violated A-15 of the constitution which prohibits gender- based discrimination. It was also inimical to the right to life under Article-21 of the constitution. It was a retrograde provision that demonstrated the failure of the state to provide equal justice under the Directive principles of state policy.

- It creates an offence against men only not against women.
- It creates an arbitrary classification between married women and unmarried women.
- The impugned provisions violate Article-15 of the constitution of India and cannot be accorded any protection under A-15 (3).

Adultery Judgment Opinion-Adultery is not a crime now and it will destroy the very foundation of marriage Sec. 497 of Indian Penal Code 1860 and Sec. 198 of code of criminal procedure 1973 as gender neutral and not unconstitutional under the adultery law, only the husband of the woman had the right to file case against the man with whom she commits adultery but this law would not prevail now.

What about the future of children born out of such marriages?

There will be breakdown of marriage and the future of children born from such marriages will be affected. Hon'ble Supreme Court has strike down the Sec. 497 of Indian Penal Code read with Sec.

198 of Cr.P.C. just because woman had no right to prosecute, but it should have laid down the remedies for children who will be affected because of such adulterous relationships.

Right to prosecute under Sec. 306 of Indian Penal Code 1860 if suicide is committed by a spouse. Hon'ble Supreme Court clearly understands that adulterous relationships would cause disruption in society, but then too it has strike down the Sec. 497. Supreme Court has stated that if any of the spouse would commit suicide because of the adulterous relationship by the other spouse, then one would be able to prosecute under Sec. 306 which relates to abetment of suicide. This would mean that suicide case in marital disputes will increase now. Supreme Court could at least direct the government to add adultery as an offence under section 498(A) of the Indian Penal Code.

Parliament should take steps immediately. For now on, the only remedy available to a man or woman who finds his partner to be in an adulterous relationship would be to go for divorce. Hon'ble Supreme Court should have thought that this decision would end up the institution of marriage.

Parliament will need to take some steps immediately to rectify the damage done by the Supreme Court in adultery verdict.

3. CONCLUSION

It is now summed up by saying that Hindu marriage in a sacrament not a contract. In sacrament marriage husband always act are as a protector of wife so he has right over her. Also wife cannot say that who is he to have right over her body she has right to maintain relation outside the wedlock as it is said by the court also. Judges has followed the western view because in western countries marriage are not sacrament they are contract and in contract marriage divorce process is very liberal, they get divorce and go for other marriage but in our country divorce person in not liberal it is quite rigorous. According to the court if wife in having an extra-marital affair then husband can go for divorce but will destroy the whole family where will the children from such marriage go in spite of providing ground for divorce court should provide the punishment for both. But this kind of Judgment will create havoc in society so many suicide cases will arise because husband will take benefit of it by putting fraud allegation on wife of having extra marital affair and it will result in breakdown of marriage and the future of children will be affected so court should also provide remedies for such children attached because of such adulterous relationships.

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