

ADULTERY: THEN AND NOW

Harshita Didel*

Adultery is voluntary sexual intercourse by a married person with someone other than his/her spouse. In India before 2018 adultery was a criminal offence under section 497 of IPC along with being a valid ground for divorce. The constitutional validity of the section has been time and again challenged in the court of law and upheld by the court until 2018. Section 497 of IPC was discriminatory on the bases of gender and violative of Articles 14, 15, and 21 as held by the SC in 2018. It considered women as the property of the husband and did not provide the same rights to women as provided to the men. Adultery is still a criminal offence in the armed forces. The provision governing the armed forces is different from section 497 and does not discriminate on the ground of gender. The armed forces have a different law governing them and hence do not affect the general society. Decriminalization of adultery is a step towards equal marital rights for women and breaking the chains of the patriarchal mindset.

Keywords: Adultery, Section 497 of IPC, Decriminalization of adultery.

INTRODUCTION

Adultery is voluntary sexual intercourse between a married person and a person other than his/her spouse. Adultery in India was a criminal offence under section 497 of the Indian Penal Code, 1860. Section 497 of IPC gives the definition of adultery 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 offence 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 cases, the wife shall not be punishable as an abettor’¹.

Section 497 of IPC did not provide a wife any right to prosecute her husband if he had committed adultery with another woman nor it gave the right to prosecute the woman with whom he had sexual intercourse. According to this section, adultery is committed by a man against a married man and only a man can be a victim or accused/culprit of adultery. Adultery

*BA LLB, SECOND YEAR, DR. B.R. AMBEDKAR NATIONAL LAW UNIVERSITY, SONIPAT, HARYANA.

¹ Indian Penal Code, 1860, Section 497

was provided as a valid ground for divorce under the Hindu Marriage Act 1955. The Marriage Law (Amendment) Act 1976 also provided adultery as a valid ground for divorce and either spouse can seek divorce on this ground. This act states that even a single act of voluntary sexual intercourse by either spouse with any person other than their partner constitutes a valid ground for divorce for the other spouse. In September 2018, the Supreme Court declared section 497 of IPC as unconstitutional and violative of Articles 14, 15, and 21 of the constitution.

HISTORY

Adultery has never been favoured by Hinduism and is established as a mortal sin. Hinduism regards marriage as a pious and sacred relationship whose sanctity should be upheld all the time, infringing it would lead to ruthless sin and bad karma. Ancient Hindu law was very strict against adultery; it had different punishments for married and unmarried women and for women of a different castes. Many Hindu mythological stories involve the act of adultery; the Manuscript even has a chapter on it. Back then; this sin was punishable with death. Adultery was provided as a ground for divorce only after the enactment of the Hindu Marriage Act in 1955. Before that, there was no provision for divorce among Hindus as marriage was considered as a sacred relationship that can't be broken and which continued even after death.

When the Indian Penal Code was being drafted, in the first report Lord Macaulay did not approve adultery as a provision. But later in the second report the president did not support his perception and concluded adultery to be a heinous crime and the offender to be liable for punishment and hence, section 497 was added in the IPC. Most of the countries back then had adultery as a criminal wrong against marriage apart from being a valid ground for divorce. Both of the spouses could be held criminally liable for the same however this was not the case with Indian Law, in our law, only a man could be held criminally liable for adultery.

Since independence, this law has been criticized for being unconstitutional and violative of Articles 14, 15, and 21 of the constitution. Since then, there have been many instances when this provision has been challenged but upheld by the court until 2018. The first-time constitutional validity of section 497 was challenged in 1951 by Mr. Yusuf Abdul Aziz, who was charged for adultery. In the case *Yusuf Aziz V State of Bombay*²; it was challenged on the ground that it is violative of Article 15 as it discriminates against men as it does not penalize women for the adulterous act. The Bombay High Court upheld the provision and said that the constitution

² Yusuf Aziz V State of Bombay, [1954], AIR 1954 SC 321

permitted special legislation for women under Article 15(3) and observed that it was due to the fact that in most cases women are the victim of adultery, but it did not provide women the right to file a case.

In the case, *Sowmithri Vishnu V Union of India*³ Section 497 of IPC was challenged on the ground that it was violative of Article 14 as it discriminated on the bases of gender and did not provide the same rights to women as provided to men and it assumes women as a property of the men. The court upheld the validity of the section and observed that declaring this section unconstitutional will give a free hand to adulterous acts and held that with the view of the society at least a section of class of adulterous relationship should be punishable by law. In the case *V Revathi V Union of India*⁴ Again the court held the validity of the section and said that the section does not allow either of the spouses to take criminal action against each other in case of an adulterous act to save the sanctity of the institution of marriage and hence is not discriminatory to any one of the gender.

The Justice Malimath Committee, 42nd Law Commission report, and 152nd Law Commission report also recommended amendments to the provision. In the 42nd Law Commission report, it was recommended to reduce the punishment for adultery under section 497 of IPC from 5 years to 2 years and also to include adulterous women liable for prosecution. The recommendations by this report were not implemented. In the 152nd Law Commission report, it was recommended to introduce equality between the genders in the provision for adultery. It reflected the societal change with regard to the status of a woman in society. The recommendations by this report were not introduced. In 2003 the Malimath Committee on reforms of the criminal justice system was formed. It recommended amending section 497 of IPC as 'whosoever has sexual intercourse with a spouse of any other is guilty of adultery.' These recommendations have not been considered. In 2018 the apex court in the case of *Joseph Shine V Union of India*⁵ held the section to be unconstitutional and decriminalized adultery.

Joseph Shine V Union of India Judgement

This judgement was passed by a five-judge bench of the supreme court led by the then Chief Justice of India Dipak Mishra in the case of *Joseph Shine V Union of India*. The other four justices were Justice D.Y. Chandrachud, Justice Indu Malhotra, Justice Rohinton Nariman,

³ *Sowmithri Vishnu V Union of India* [1985], AIR 1985 SC 1618

⁴ *V Revathi V Union of India* [1988], AIR 1988 SC 835

⁵ *Joseph Shine V Union of India*, [2018], AIR 2018 SC 4898

and Justice A.M. Khanwilkar. The Supreme Court by this verdict struck down the 158-year-old section 497 of IPC, regarding it as unconstitutional. Section 198 of the Criminal Procedure Code was also declared unconstitutional which dealt with the procedure to be followed for filing a complaint for adultery.

The petitioner contended that the section criminalizes adultery on the classification of sex alone nexus or object which has no rationale to be achieved. The wife's consent is immaterial and hence violates article 14 of the constitution. This provision is based on the notion that a woman is the property of the husband and if he gives consent then adultery is not committed. It violates article 15 of the constitution as it discriminates solely on the basis of gender by providing only men with the right to prosecute against adultery and under this provision only a man can be punished. It violates article 21 of the constitution as it undermines the dignity of a woman by not respecting her sexual autonomy and self-determination.

The counsel for the government contended that adultery is an offence that breaks family relations and there should be a deterrence to protect the institution of marriage. Adultery is an offence committed by an outsider with the full knowledge, to destroy the sanctity of marriage and it affects the relationships of the spouse, children, and society as a whole. Article 15(3) of the constitution provides the state right to make special laws for women and children. This article justifies the discrimination done on the bases of gender by this provision. This provision must not be declared unconstitutional as it will lead to harm to the sanctity of marriage.

The court held that the provision is not based on equality as it treats only the husband as an aggrieved person and gives the right to prosecute for the offence and no such right is provided to the wife. This provision treats women as the property of the husband and adultery is considered as theft of his property and if he gives consent or connivance, it does not make adultery an offence. It does not treat a woman as an offender and punishes only the third party. It did not provide a woman the right to file a complaint against an adulterous husband. The court held that such classification is arbitrary and discriminatory. The court held that the provision violates Article 14 of the constitution. It has no relevance in present times when women have their own identities and stand equal to men in every aspect of life.

The court held that this provision discriminates between a married man and a married woman and is a detriment to her on the ground of sex. It is based on the stereotype that the wife is her husband's property and he has control over her sexuality, this provision perpetuates that women

are passive and incapable of exercising their sexual freedom. This section is not protective discrimination as mentioned under Article 15(3) but it is grounded in patriarchy and paternalism hence, cannot be justified under this article. The court held that this provision is violative of Article 15(1) as it discriminates solely on the basis of gender and perpetuates the stereotype of controlling a wife's sexual autonomy. This provision gives the husband control over his wife's sexual autonomy as it permits adultery on the husband's consent and connivance.

The court held that women's dignity is of utmost importance which can not be undermined by a provision perpetuating gender stereotypes. This provision violates the right to dignity under Article 21 of the constitution. A crime is an offence that affects society as a whole whereas adultery is an offence that tantamounts to entering into the private realm. It may be committed by two consenting adults without anyone being a victim. The court held that it is better to leave adultery as a ground for divorce and not a crime as it is totally a private matter. The Supreme Court remarked that subjecting interpersonal relationships to the severity of criminal law by passing a judgement for a new, gender neutral adultery offence would infringe on the right to privacy of an individual guaranteed under Article 21 of the Indian Constitution. The court held that for adultery to be termed as a criminal one of the spouses must commit suicide in the course of events and in such cases the act of adultery would be considered as abatement to suicide and the other spouse would be held liable under Section 306 of IPC. The bench held that the law was archaic, arbitrary, and unconstitutional.

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ADULTERY AND THE ARMED FORCES

Recently Supreme Court admitted a plea filed by the central government to keep adultery a crime in the armed forces and review the 2018 judgement. In response to this plea, the bench headed by Justice R.F.Nariman, who was also on the bench that passed the 2018 judgement, requested the then Chief Justice of India S.A.Bobde to list this matter before a five judge bench as the 2018 judgement was passed by a five judge bench and to review the judgement the same strength constitutional bench is required. The Centre pleaded that the 2018 verdict decriminalizing adultery should not apply to armed forces where personnel can be cashiered from service on the grounds of unbecoming conduct for committing adultery with a colleague's wife. The petition filed by the Ministry of Defence said that the Army, the Navy, and the Air Force are a 'distinct class' governed by special legislations, the Army Act, the Navy Act, and the Air Force Act. Adultery under these three acts amounts to unbecoming conduct

and a violation of discipline. The provisions on adultery in these three laws do not discriminate between a man and a woman if found guilty of the offence unlike Section 497 of IPC.

Article 33 of the constitution gives the power to the government to modify the fundamental rights of the armed forces personnel, who function in a peculiar situation requiring utmost discipline. The government in its plea said that if adultery is decriminalized in the armed forces then when the army personnel is posted far away from their families there will always be a concern and fear in their minds about the family indulging in untoward activity. The Government said that if adultery is decriminalized in the armed forces the discipline necessary for the performance of the duty, crucial for national safety, would break down. The army personnel operate in a completely different environment than the civilians; they are in a branch of service unlike any other and can have some special provisions. They are subject to different acts and adultery can continue to be an offence in the armed forces without any changes for the civilians.

CONCLUSION

Adultery in India was a law based on patriarchy and paternalism. The provision considered women as the property of their husbands and did not provide them sexual autonomy. It considered women as a victim and the man as a seducer. It did not provide the women with the right to prosecute an adulterous husband. The provision discriminated solely on the bases of the gender of the individuals and violated the rights guaranteed under the constitution. The provision was based on the ancient gender stereotypes which have no place in today's society. The provision violated the right to equality of an individual guaranteed under the constitution. The law has no right to regulate with whom one sleeps and cannot force the spouses to remain loyal to each other because of the fear of criminal prosecution. The state has no right to monitor the relationship between two adults. It infringes on the right to privacy of individuals. The provision demeans the dignity of a woman and was based on the stereotype that woman belongs at home and does not have equal rights and opportunities as their male counterparts.

In the 21st century equality and liberalism are the most important aspects across the world. It is high time that the laws that are discriminatory against women and are based on patriarchy should be amended or repealed. The laws that have become redundant with time should be done with. Some laws were very important when they were implemented but with the passage of time has lost their importance due to the changing society, such laws should be repealed or

amended as per today's requirements. Today women are no longer behind the shadow of men whereas they have their own identities and are equal to men in every aspect of life. Today every individual regardless of their gender has sexual autonomy and adultery is a private matter in which courts have no right to interfere.

Supreme Court's decision to decriminalize the act of adultery and not amending the provisions of the IPC is very applaudable. Even if the provision was amended to make it gender neutral and criminalized both men and women as suggested by different reports and committees time and again would not serve the purpose as adultery is an extremely private affair related to the matrimonial realm and no one has the right to interfere in it. The 2018 judgement decriminalizes the act of adultery but leaves it as a valid ground for divorce, by doing so the court leaves it at the discretion of the spouse how they want to deal with the act of adultery. Many countries of the world have decriminalized the act of adultery leaving it only as a valid ground for divorce. It is held by the courts around the world that it is a private matter between the married couple and the state has no right to interfere in it.

The 2018 judgement of the Supreme Court declaring section 497 of IPC as unconstitutional is very crucial for the protection of women's marital rights and it also has many future implications. This judgement calls into question the constitutionality of two other prominent laws that infringe on women's rights. The first is the restitution of the conjugal rights which forces one of the spouses who has left the other house to return against her will. The second is the exception of marital rape, in which rape committed by the spouse does not amount to rape under criminal law. With the passing of time and changes in society, it is necessary to also change the laws according to the current situations and requirements. This judgement will help in striking down such laws against marital rights and will help to ensure greater equality, freedom, and independence within the private spheres of society. This decision should have been taken a lot earlier but as it is said it is never too late.