

ADULTERY – A SOCIAL PROBLEM

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ABSTRACT

In India, decisions about what should be decriminalised or criminalised don't appear to be founded on recognised rules of criminal law. As a result, it causes a lot of misunderstanding, and the majority of the conversation in this area revolves around assumptions and personal beliefs. This essay focuses on the Supreme Court's proposal to decriminalise adultery in some circumstances in order to test the hypothesis. The author Vladimir Nabokov once observed that adultery "is a most conventional means to rise above the ordinary." Although the bad character associated with adultery mostly originates from regressively archaic conceptions of betrayal, it forces one to reconsider the beliefs surrounding sexual exclusivity. Adultery that is committed openly and with everyone's approval, however, is treated differently in today's society.

INTRODUCTION

Adultery has been a subject of controversy for a long time. Historically, it has been viewed as a social and moral issue and in some cases, even as a criminal offence. However, in recent times, there has been a shift in attitudes towards adultery, and many countries have decriminalized it. In this research paper, we will discuss the decriminalization of adultery and its implications. We will explore why many countries have chosen to decriminalize it and what factors have contributed to this change. Additionally, we will look at the social, moral, and legal implications of adultery's decriminalization.

India's 158-year-old adultery legislation was ruled illegal by the Supreme Court of India. The word "Adultery" comes from the Latin word "Adulterium," which refers to having sex with someone other than one's own spouse. Adultery is typically defined as having sexual contact, voluntarily, with another man's wife. Adultery is defined as engaging in any kind of consenting sexual interaction between a married person and a person who is not their spouse. Section 497 of the Indian Penal Code, 1860 and Section 198(2) of the Criminal Procedure Code, 1973 were both declared unconstitutional by a five-judge Supreme Court of India panel. Adultery was

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addressed in Section 497 of the Indian Penal Code of 1860, and prosecution for offences is addressed in Section 198 of the Criminal Procedure Code of 1973.

HISTORY OF ADULTERY

Adultery has been viewed as a moral and social issue for centuries. In many cultures and religions, it has been considered a sin, and in some cases, it has been punishable by death. In ancient Rome, adultery was considered a crime, and both parties involved could be sentenced to death. In medieval Europe, adultery was also viewed as a crime, and it was punishable by public humiliation, flogging, or imprisonment.

During the 19th century, adultery was criminalized in many countries, including the United States, where it was a criminal offence in some states until the 1970s. In the United Kingdom, adultery was a criminal offence until 1857, when the Matrimonial Causes Act was passed, which allowed couples to obtain a divorce on the grounds of adultery. In modern times, attitudes towards adultery have changed. Many countries have decriminalized it, and it is no longer viewed as a crime in most parts of the world. However, adultery remains a contentious issue, and it continues to be a subject of debate in many countries.

According to Justice R. F. Nariman, all prehistoric civilizations penalised adultery. The Seventh Commandment, "Thou shall not commit adultery," is found in the book of Exodus of the Old Testament and is part of the 10 Commandments given to Moses on Mount Sinai in Judaism, another ancient religion. As demonstrated by St. Paul's letter to the Corinthians, adultery is viewed as sinful and a sin for both men and women in Christianity. Manusmriti, a law from ancient India, also provides for expulsion after a penalty that causes horror for individuals who are addicted to having sex with other men's wives. The Dharmasutras talk in a variety of tones. Adultery is considered a felony in the Apastamba Dharmasutra, and the punishment varies based on the class or caste of the man and woman.²

REASONS FOR DECRIMINALIZATION

There are several reasons why many countries have decriminalized adultery. One of the main reasons is that adultery is viewed as a private matter between two consenting adults. Many

² <https://www.thoughtco.com/history-of-adultery-laws-4163919>, (JAN 12 2018)

people believe that the government should not interfere in people's personal lives and that the state should not have the power to criminalize private conduct between adults.

Another reason for decriminalization is that criminalizing adultery is seen as a violation of human rights. Adultery laws have been used to discriminate against women, and they have been used to justify honour killings and other forms of violence against women. Criminalizing adultery has also been used to justify state surveillance of individuals' private lives, which many people view as a violation of privacy rights. In addition, many people argue that criminalizing adultery is ineffective in preventing adultery. Adultery is a personal choice, and people will engage in it regardless of whether it is illegal or not. Moreover, criminalizing adultery may have unintended consequences, such as pushing it underground, making it more difficult to detect, and increasing the risk of sexually transmitted infections³.

SOCIAL AND MORAL IMPLICATIONS

The decriminalization of adultery has significant social and moral implications. It reflects a shift in attitudes towards personal autonomy and privacy rights. Decriminalization has also been seen as a way to reduce discrimination against women and to promote gender equality. However, the decriminalization of adultery has also been criticized for promoting infidelity and undermining the institution of marriage. Some people argue that adultery is harmful to marriages and families and that decriminalizing it sends the wrong message to society. They argue that the government should promote traditional values and that adultery should be discouraged, rather than legalized⁴.

LEGAL IMPLICATION

The decriminalization of adultery has legal implications as well. In many countries, adultery was considered a crime, and people could be sentenced to prison or fined for engaging in it. Decriminalizing adultery means that people can no longer be prosecuted for it. However, decriminalizing adultery does not mean that it is legal. Adultery can still have legal consequences, particularly in cases.

³ <https://thediplomat.com/2018/04/why-adultery-should-be-decriminalized/>, (APRIL 2018)

⁴ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)32125-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)32125-9/fulltext)

LAW UNDER ADULTERY IN INDIA

The Indian Penal Code, 1860, section 497, states that "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, and such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery," is the legal definition of adultery.

According to this law (section 497 of the Indian Criminal Code, 1860), the penalty was five years in prison, a fine, or a combination of the two. The wife was not penalised under this law, not even for aiding and abetting. In *Yusuf Abdul Aziz v. State of Bombay*, 1954, it was determined that section 497 of the Indian Penal Code, 1860 is valid and that the classification based on gender is reasonable. Additionally, it was determined that the State may make special provisions for women and children under Article 15(3) of the Indian Constitution, so it is not unconstitutional.

Section 497 of the Indian Penal Code, 1860, contains the following essential elements:

- A person must have engaged in sexual activity with another man's wife.
- A person must know or have reason to suspect that the other man's wife is the subject of the sexual activity.
- The woman's assent or willingness is not an acceptable defence for the crime of adultery.
- The husband has not given his consent or connived in any sexual activity.

According to section 198 of the Criminal Procedure Code, 1973, no court shall take cognizance of the offence (adultery) under this section except upon a complaint made by the woman's husband or, in the event that the husband was not present, by another person who was responsible for caring for the woman on the husband's behalf and who made the complaint with the court's permission if the adultery was committed at that time.

There was no provision for the wife to seek redress if her husband committed adultery because section 497 of the Indian Penal Code, 1860, only discusses punishing the other man who has a sexual relationship with his wife. This patriarchal perspective may have contributed to the lack of punishment for the woman under section 497 of the Indian Penal Code, 1860, which views the woman as the husband's property.

Prosecution was challenging under section 497 of the Indian Penal Code of 1860 because:

- It is a private matter and not a matter for the public.
- There must be concrete evidence of adultery.
- On circumstantial evidence, this is based.

Adultery is a non-cognizable offence (a police officer cannot arrest the accused without an arrest warrant) and a bailable offence. Also, it is a punishable offence that gets worse if adultery is committed against the husband. According to section 198(2) of the Criminal Procedure Code, 1973, only the husband is permitted to file a charge against a person who has an affair with his wife; but, if the husband has an affair with another woman, the wife is not permitted to file a charge.

ADULTERY IS NOT A CRIMINAL OFFENCE IN INDIA

In *Joseph Shine v. Union of India*, 2018, a five-judge court declared sections 497 and 198(2) of the Criminal Procedure Act, 1973, to be unconstitutional and invalid.

Union of India v. Joseph Shine, A non-resident Keralite named Joseph Shine filed a public interest lawsuit in October 2017 in accordance with Article 32 of the Indian Constitution. The petition contested the legitimacy of the crime of adultery under sections 198(2) of the Criminal Procedure Act, 1973 and 497 of the Indian Penal Code, 1860.

By punishing those who engage in sexual activity with another person's wife without that person's knowledge or agreement, Section 497 of the Indian Criminal Code, 1860 made adultery a crime.

An offence committed in violation of sections 497 and 498 of the Indian Penal Code, 1860, can be charged under section 198(2) of the Criminal Procedure Code, 1973.

ISSUES

1. Does Section 497 of the Indian Criminal Code, 1860 violate fundamental rights and are therefore unconstitutional?
2. Whether or whether Section 198(2) of the Criminal Procedure Code, 1973 violates fundamental rights and is therefore unconstitutional.

Section 497 of the Indian Penal Code, 1860 and Section 198(2) of the Criminal Procedure Code, 1973 were both unanimously overturned on July 27, 2018, by a five-judge panel of the Supreme Court of India because they violated Articles 14, 15, and 21 of the Indian Constitution.

SUPREME COURT VERDICT ON JOSEPH SHINE VS UNION OF INDIA

Section 497 of the Indian Criminal Code, 1860, which makes adultery a crime, was deemed unconstitutional and repealed by a five-judge Supreme Court panel led by Chief Justice of India Deepak Mishra. Section 497 of the Indian Criminal Code, 1860 was declared unconstitutional by the court, which was composed of Chief Justice Deepak Mishra, Judge R.F. Nariman, Justice D.Y. Chandrachud, Justice A.M. Khanwilkar, and Justice Indu⁵Malhotra. "We pronounce sections 497 of the Indian Penal Code, 1860 and section 198(2) of the Criminal Procedure Code, 1973 dealing with the prosecution of offences against marriage as unconstitutional," declared Chief Justice of India Deepak Mishra and Justice Khanwilkar.

According to the Supreme Court of India, section 497 of the Indian Criminal Code, 1860, is being repealed due to its obvious arbitrariness. Since section 497 of the Indian Criminal Code, 1860 solely punishes men and not women, it is obviously arbitrary and as such, it is unconstitutional. Article 14 of the Indian Constitution deals with the right to equality. Section 497 of the Indian Criminal Code, 1860, which sees women as the husband's personal property and violates their dignity, is illegal since it conflicts with Article 21 of the Indian Constitution, which deals with the protection of life and personal liberty. Sciences

The Indian Constitution forbids the State from discriminating only on the basis of sex under Article 15(1). The wife is not regarded as an aggrieved person under the adultery legislation if the husband engages in sexual activity with another woman, but only the husband is considered an aggrieved party if the wife engages in sexual activity with another male. The clause violates Article 15(1) of the Indian Constitution since it is discriminatory.

"Husband is not the master of woman," remarked Chief Justice Deepak Mishra. Adultery is no longer a crime, he said, because "any system treating a woman with indignity draws the wrath of the Constitution.

"Old concepts of male being culprit and woman being victim no longer hold good," Judge R.F. Nariman stated. Only men are found guilty of adultery under Indian law; women are not. This

⁵ <https://blog.ipleaders.in/decriminalisation-of-adulter/>, (NOV 12 2019)

is blatantly discriminatory towards men and violates articles 14 and 15 of the Indian Constitution, which forbids discrimination based on gender.

"Controlling a woman's sexuality undermines her autonomy and dignity," stated Justice D.Y. Chandrachud. Since the wife does not lose her freedom or control over her sexuality at the time of marriage or even afterward, she is still free to explore her sexuality outside of marriage as well. Section 497 of the Indian Penal Code, 1860, which deprives a woman of her sexual freedom, violates the principles of privacy and dignity outlined in Article 21 of the Indian Constitution. It may be morally reprehensible, but this issue is decided by the husband and wife jointly; it may be a civil case and cannot be a criminal, according to Judge Indu Malhotra.

ADULTERY GROUND FOR DIVORCE

Adultery has a recognized meaning in marital law and is a legitimate basis for divorce, meaning that if one partner engages in adultery, it is sufficient to cause one to file for divorce. When a person engages in sexual activity with the spouse of another, or when two individuals engage in sexual activity while not married to one another, an adulterous relationship is established. Given that it is a consenting connection, it is also possible to refer to it as an extramarital affair or infidelity. Morality is highly important in marriage, which means that both the husband and the wife must be faithful to one another. Nevertheless, when one partner has an adulterous relationship with another individual, it indicates that the other partner is not faithful to their spouse.

Life becomes more challenging after divorce, thus before filing for divorce, one must consider the effects of divorce and what life would be like after divorce. In a nation like India, divorce is still socially stigmatized because the person's family still does not accept it. If a woman is divorced from her husband, her life will be far harder than her husband's. The majority of women in India are unable to support themselves financially. The children of a separated couple suffer the most, thus it is preferable to forgive their spouse rather than take him or her to court if adultery is committed in front of other people.

A Husband Is Not The Master Of His Wife

The court's decision is based on the idea that women should no longer be viewed as the property of their husbands or fathers. They should be given every chance to express their views because they are on an equal footing with everyone else in society.

Section 497 Is Absolutely And Manifestly Arbitrary: It gives permission for the husband to treat his wife anyway he pleases, which is completely excessive and disproportionate, making it obviously arbitrary and irrational. The woman is not permitted to bring any legal action against the husband under Section 497 of the IPC.

A Violation Of Women's Human Rights

Although adultery may be considered a matrimonial offence, it should not be considered a criminal offence subject to penalties, incarceration, or even death. It violates women's privacy rights and the International Covenant on Civil and Political Rights to treat adultery as a crime. Additionally, it violates the CEDAW's ban on family-based discrimination.

Definitions of adultery in criminal law appear to be gender-neutral and forbid adultery by both men and women. Nevertheless, in reality, women and girls are disproportionately targeted when adultery is made a crime. In our 2012 position paper, we examine the idea of adultery and how the criminalization of it allows violence against women to go unpunished. The study also identifies successful strategies and gives instances of nations that have decriminalised adultery, addressed discrimination against women, and upheld women's rights.

LEGALITY OF ADULTERY

Adultery, according to Black's Law Dictionary, is when a married person engages in sexual activity voluntarily with someone who is not the offender's spouse or partner. In general, it can be said to be sexual activity between a married man or woman and a person they are not married to, or, to put it another way, it can be said to be willing sexual activity between a married person and someone who is not their present spouse or partner. While it is true that even one act of sexual activity is deemed adultery, this was once widely believed to be a crime punishable by harsh punishments such as torture, amputation, or even death.

Yet, it is also important to highlight that in previous times in India, Rome, or Greece, women who committed adultery were punished equally, and often more severely than men, and that the dictionary's definition of adultery holds both men and women equally responsible for the stated conduct. ³ In the past, women were not treated equally to men in society and had a disadvantage in the legal system, but as time went on, adultery became more of a gender-neutral offence, and while men were punished for it by being tortured, banished, or deprived

of their property, women were also subjected to humiliation, beatings, lashings, and other forms of corporal punishment.

Even in ancient times, adultery was greatly despised in India for social and moral reasons. The crime was punishable by death by stoning or hanging, and the women were labelled as "vyabhicharini" and punished in addition to losing respect and sanctity in society.⁵ Most of the criminal and civil laws that apply in India today were passed during the British colonial era in accordance with the social conditions that prevailed at the time. However, a few of these laws' provisions have been altered, and a few new ones have been added, to help them keep up with changing times and societal norms.

Although women in 19th-century Britain were treated unfairly and were frequently seen as the property of their husbands, "adultery" was never made a felony under any criminal or common law. The Divorce and Matrimonial Causes Act, 1857, which eventually abolished the tort known as "criminal conversation" and made it a basis for divorce, at most, labelled it as such.⁶ As a result, when Lord Macaulay initially established the Indian Criminal Code, 1860, he did not list "adultery" as a crime under it and was of the opinion that an adultery offence might be punished through the payment of compensation.

It is noteworthy that the Law Commission of India discovered in its 42nd Report in 1971 that the majority of people were in favour of keeping the provision under the IPC, 1860 after carefully examining the laws of the United States of America (hereinafter referred to as USA), the United Kingdom (hereinafter referred to as UK), Germany, etc.⁹ The Law Commission did advise that Section 497 be kept in the Code, but that it be amended so that both men and women who commit adultery are subject to punishment, which can include up to two years in prison, a fine, or both.¹⁰ Ironically, the aforementioned recommendation was rejected. Moreover, once more pushing the inclusion of adultery in its.

CASE LAWS

Yusuf Aziz v. State of Bombay: In this case, the adultery legislation was first contested in 1951. The petitioner argued that Articles 14 and 15 of the Constitution's guarantee of equality were infringed by the adultery legislation. Three years later, in 1954, the Supreme Court decided that Section is generally recognised to state that the seducer is a male rather than a

woman. The Court ruled that women could only commit adultery as a victim and not as an offender under Section 497.

Sowmithri Vishnu v. the Indian Union: The Supreme Court ruled that the clause does not discriminate between men and women, i.e., that a definition that excludes some people does not automatically constitute discrimination. It is not in violation of Articles 14 or 15. To preserve the purity of marriage, the Court ruled that males were not permitted to bring adultery charges against their wives. Women could not be permitted to bring charges against their spouses for the same reason.

Union of India v. V. Revathi: The Supreme Court ruled that it was for the greater welfare of society not to prosecute women in adultery cases. It gave the couple an opportunity to patch things up and maintain the marriage's integrity. The Supreme Court noted that the adultery statute acted more as a shield than a weapon.

In addition to the judgements mentioned above, there were two other significant viewpoints about adultery law. The Malimath Committee on Criminal Reforms of 2013 and the Law Commission of India Report of 1971 (42nd report) both proposed amending the adultery statute. Both argued in favour of gender-neutralising Section 497 of the IPC.

Adultery is a crime that expresses prejudice. It is mostly based on the notion that a woman is a man's property. We come to the conclusion that only a man can commit adultery after analysing Section 497 and considering different observations made by the Supreme Court and High Courts. Because she is viewed as a victim and not the perpetrator of the crime because she is married and lacks an entity, the married lady who engaged in the action is not punished as an adulteress⁶. The part discredits the woman's capacity for free choice and makes no mention of the reasons why she engaged in adulterous behaviour. This is most often a result of the woman⁷ being degraded and treated as an object or as inanimate property with nearly transferable rights.

Joseph Shine V/S Union Of India (2017) – The Case In Which Supreme Court Struck Down The Law Relating To Adultery: Joseph Shine submitted a petition contesting the legality of Section 497 in December 2017. The petition was referred to a five-judge

⁶ <https://www.legalserviceindia.com/legal/article-1140-decriminalization-of-adultery-in-india.html>

Constitution Bench, which was made up of Dipak Mishra and Justices R F Nariman, A M Khanwilkar, DY Chandrachud, and Indu Malhotra, after the three-judge panel, led by the then-Chief Justice of India, Dipak Mishra, acknowledged that the law appeared to be antiquated. The Court had noted during a prior hearing of the case that some cultural presumptions appeared to constitute the foundation of the law. The Court overturned the statute and ruled that the husband is not the wife's master in four distinct but concurring opinions. Adultery is still a civil offence, though. It may serve as a basis for divorce.

CONCLUSION

The Supreme Court declared a 150-year-old legislation on adultery that views the husband as the master of his wife unlawful. The adultery ban is arbitrary and insults a woman's dignity, says India's then-chief justice. The Apex Court has recently issued a landmark decision that clearly criticizes our nation's antiquated and patriarchal legal system. The Indian Constitution is beautiful because it includes "I," "you," and "us," according to the Supreme Court in the Joseph Shine case. In the expansive constitutional vision and contemporary progressive jurisprudential framework, women cannot be seen as the property of men. Furthermore, it states that there is no offence when the guy gives his approval for a relationship to proceed outside of marriage. According to the Supreme Court, autonomy, desire, choice, and individuality are crucial facets of a woman's dignity.

The Supreme Court of India cites the 2017 ruling in *K.S. Puttaswamy v. Union of India and Others*, in which the court ruled that the right to privacy is a basic right protected by Article 21 of the Constitution. The concept of a woman's equality and dignity has been acknowledged by the court and cannot be restricted. Furthermore, the Supreme Court ruled that adultery cannot be a crime but can be a basis for civil concerns like divorce. An unhappy marriage may not be the direct cause of adultery, but adultery may be the outcome of an unhappy marriage.

Together with Section 497 of the IPC, Section 198 of the CrPC was also found to be unconstitutional, decriminalising adultery as a crime. The history of Section 497, according to Judge DY Chandrachud, shows that the legislation on adultery was intended for the benefit of the husband, allowing him to secure control over the sexuality of his wife. It was intended to restrict the woman's ability to exercise her sexual agency.