Adultery: Love or the Backstab

Jigyasa Agarwal[1] and Yashika Varshney[2]

Abstract:

The main objective of this paper is to analyze concept of gender neutrality in context of section 497 of the Indian Penal Code, 1860 which deals with adultery. Adultery in India was an offence committed by a third person against husband in respect of his wife, for which only men can be held liable. Adultery is voluntarily sexual intercourse between married women and men who is not husband of wife. It is also termed as extramarital sex by Married women. In our society, it is considered objectionable on social, religious and moral grounds. As we know that, Supreme Court ruled, adultery is no longer a criminal offence. The court however clarified that adultery will be ground for divorce. Our society is not ready to accept, as all around the corner voices condemning this judgment concludes that this provision need to be made gender neutral, both men and women must be punished for the act of adultery. On other end people argue because a woman is not the property of men hence Supreme Court rightly held section 497 unconstitutional. Adultey seems to be one of the most painful sins in any marriage; decriminalization of adultery may result in other offences. If bigamy under section 494 of IPC is gender neutral than why not adultery. This paper also evaluates constitutional validity of section 497 under the purview of articles 14 and also its being saved by Article 15(3). Paper also throws some lights on our neighboring countries i.e., Bangladesh, Iran, Nepal and many more countries in which adultery is still a crime.

"Throw Some Mercy on Your Partner"

Keywords: Adultery, Gender-neutral, Decriminalization of adultery.

[1] Student, Banasthali Vidyapith
[2] Student, Banasthali Vidyapith

INTRODUCTION

"MARRIAGES ARE SUPPOSED TO BE MADE IN HEAVEN". As in our country, society and culture marriages play a very important role. But in present time there is increase in breakdown of marriages. There are many causes of breakdown of marriages and one of the causes is 'Adultery'.

The word "adultery' drives from the French word 'avoutre' which has evolved from Latin verb 'Adulterium', which means 'to corrupt' it also originates from 'ad' means 'towards' and 'alter' means 'other' which combine meaning is feeling towards other. And it means that a wife corrupting the martial bond with her husband by having a relationship outside the marriage.

Section 497 of Indian Penal Code, 1860, states that 'whosoever 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 extent to five years, or with fine, or with both, in such case the wife shall not be punishable as an abettor'.

Ingredients of section 497

- Sexual intercourse by a man to the women who is and 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.

Adultery is an offence which is committed by a third person against a husband in respect of his wife and of which a man can alone be held liable for the offences[3]. Adultery is considered to be

[3] *Gansapalli Appalamma v. Gantappali Yeliayya*,(1897) ILR 20 Mad 470

CC BY-NC 4.0

an invasion to the right of the husband over his married wife[4]. The 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[5]. It is not necessary that the adulterer should know whose wife the woman is, provided he knew she was a married woman[6]. The wife shall not be punishable even as an abettor this section does not allow the wife to prosecute the husband for adultery[7]. The law has considered woman to be a victim not as author of crime.

In addition to this, *Section 198 of the Code of Criminal Procedure* gives only the husband the right to file a case against the man involved in the act of adultery. In Joseph shine case, struck down the section 497 of IPC along with section 198 of Cr.P.C. as unconstitutional. We argued that section 198 0f the Cr.P.C. violated article 14 of the Indian Constitution because they fail test of reasonable classification in favor of the husband. The section created an arbitrary classification between an aggrieved husband and aggrieved wife, thereby violating the fundamental right to equality under Article 14 and also violated Article 15 of the constitution, which prohibits gender-based discrimination. So, here need to make amendment in this section also. It also should be gender neutral where both husband and wife have right to file a case against who involved in the act of adultery.

The constitutional validity of this section has been challenged in the court on the ground that it violated the fundamental rights of the man under Article 14 of the Indian Constitution. And this section does not come under the purview of Article 15(3) of the Indian Constitution which provides special provision for woman because in this section there is no need to make special provision for woman because woman herself gives willing consent for a conjugal offence.

As the title "LOVE OR A BACKSTAB" means either you love or do unfair things that are said to hurt the reputation of your spouse.

Adultery takes away the light from the face of happy spouse.

SUPREME COURT STANDINGS

[4] *Chandra Chhitar Loha v. Mst. Nandu*, AIR 1965 MP 268, 269
[5] Ratanlal & Dhirajlal, *the Indian Penal Code* 33rd edition lexis nexis
[6] *Madhub Chunder Giri, (*1873**)** 21 WR (Cr) 13
[7] *Sowmithri Vishnu v. Union Of India*, 1985 Cr LJ 1302 (SC)

CC BY-NC 4.0

Adultery is no longer a crime, the Supreme Court ruled. The judgment by a five-judge Supreme Court bench headed by Chief Justice Dipak Mishra has overturned the previous three rulings on the matter.

If someone "lives in adultery", the partner can file for divorce. The law became defunct on *27 Sep 2018* by Supreme Court of India. The Supreme Court called the law unconstitutional because it "treats a husband as the master".

Under Section 497 of the Indian Penal Code (IPC) Adultery was an offence and a convict could be sentenced to five-year-jail term. Section 497 defined adultery as an offence committed by a man against a married man if the former engaged in sexual intercourse with the latter's wife.

Law had come under sharp criticism for treating women as possession of men. An Italy-based Indian businessman *Joseph Shine,* who hails from Kerala, filed a Public Interest Litigation (PIL) last year challenging IPC Section 497. He contended that the law is discriminatory regarding peoples gender.

PREVIOUS SUPREME COURT JUDGMENT

The adultery law first came under challenge in 1951 in the *Yusuf Aziz versus State of Bombay and Husseinbhoy Laljee*[8] case. Petitioner contended that the adultery law violated the fundamental right of equality guaranteed under Articles 14 and 15 of the Constitution. 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 said that making a special provision for women to escape culpability was constitutionally valid under Article 15(3) that allows such a law.

The next important judgment regarding adultery law under Section 497 came in *Sowmithri Vishnu versus Union of India*[9] case of 1985. The Centre has cited this judgment in its 2018-affidavit to back Section 497 of the IPC.

[8] AIR 1954 SC 321
[9] AIR 1985 SC 1618

CC BY-NC 4.0

In Sowmithri Vishnu case, the Supreme Court held that women need not be included as an aggrieved party in the name of making the law even handed. It also explained as to why women should not be involved in prosecution in the cases of adultery.

The Supreme Court held that men were not allowed to prosecute their wives for the offence of adultery in order to protect the sanctity of marriage. For the same reason, women could not be allowed to prosecute their husbands. The judgment retained the offence of adultery as a crime committed by a man against another man.

In the next big case--*V Revathy versus Union of India*[10] of 1988--on adultery law, the Supreme Court held that not including women in prosecution of adultery cases promoted "social good". It offered the couple a chance to "make up" and keep the sanctity of marriage intact.

Besides the three Supreme Court judgments, there were two more important legal views in connection with adultery law.

The Law Commission of India Report of 1971 (42nd report) and the Malimath Committee on Criminal Law Reforms of 2003 recommended amendment to the adultery law. Both argued to make Section 497 of the IPC gender neutral.

VIEWS REGARDING JUDGMENT

As the judgment came, many people give their views on this particular topic. Some are against with that and some are in favor. As the views regarding to the judgment are:-

- Advocate O.P. Saxena, as in total he is disagree with the Supreme Court's judgment that families are the essential buildings blocks of civilization. Adultery on the contrary is objectionable on social, moral, religious, and legal grounds. The impugned judgment lacks clairvoyance. Mr. Saxena questioned very logically that if everybody has sex with everybody else, there is no saying who is the daddy[11]?

[10] AIR 1988 SC 835
[11] Lawyers update, November 2018

CC BY-NC 4.0

- Supreme Court lawyer, K.C. Kaushik and Dr. Chopra both pointed out almost the same thing and that is the issue of inheritance and succession of children with disputed paternity[12].
- Advocate Navin Kumar Jaggi, and his Mansimran Singh syal, agree in totality that the cultural heritage of India, as an inclusive society is of paramount importance for the social health and the Indian society. They also agree that the concept of marriage as a monogamous entity holds a prime status and is treatment with the highest sanctity. Monogamous marriage is one of the social masterpieces of the Indian culture for centuries, but the recent judicial pronouncement may not have the treacherous effect of ruining a pious institution, though to some extent, it may dilute its effectiveness. They are of the view that the section 497 of IPC was required to be suitable amended instead of being struck down[13].
- Swati Maliwal, chairperson of Delhi Commission for women said, "I totally disagree with the Supreme Court judgment on adultery. The judgment is anti-women. In a way, you have given an open general license to the people of this country to be in marriages but at the same time have illegitimate relationship."

As we are in India which is a secular country in which we have to consider various religions so, we must go by the lateral principles let down by our holy books:-

The *Hebrew Bible* or Old Testament prohibits adultery in the sixth of the ten commandants (exodus 20:14). In *Islam* both woman and man will be punished for adultery. Quran says, 'the fornicates and the fornicator scourge you each one (with) a hundred stripes. And let not pity for them withhold you from enforcing the sentence of Allah, if you believe in Allah and the last Day, Quran (24:2)." According to *Manusmriti*, chapter: viii, Verse: 371-72, "when a woman, proud of her relations (or abilities) deceives her husband (with another man) then the king should (ensure that) she be torn apart by dogs in place much frequent by people. And the evil man should be burnt in a bed of red hot iron."

[12]Lawyers update, November 2018
[13]Lawyers update, November 2018

CC BY-NC 4.0

As adultery refers to the intended sexual relationship between a married person and the person rather than his or her spouse. Same as *Bigamy* also refers to the act of marrying again, while the first marriage is valid. So, both are conjugal offence and both are also taken as a valid ground for divorce then why adultery is decriminalized. Adultery should also be gender neutral as bigamy which covers under section 494 of Indian Penal Code, 1860.

Cheating on your spouse is like throwing away a diamond and picking up fools.

REPERCUSSION OF DECRIMINALIZING ADULTERY

Indian criminal law explicitly criminalizes acts that deceive a person. Criminal law everywhere in the world treats as a custodian of the moral principles of society, protecting a society's historical roots while leading it towards a developed social order. If we start questioning laws to our personal rationale, it would lead to chaos. The intention behind criminalizing adultery in the past day was to dissuade the adulterer from committing such a crime again. So if court decriminalizes adultery, adulterer get motivated to commit this painful sin again and again which results in increasing in crime and due to this divorce cases will be increasing. Now there is no criminal fear in people they are easily get attract with other one without any fear due to which society ethics get hamper and obstruct the moral principles of society, historical roots and values of marriage which is sacrament in nature.

Striking down of the provision adultery would tantamount to decriminalizing the offence of adultery, thereby eroding the piety of marriage and the fabric of society at large. Removing the deterrence would encourage adulterous behavior with deleterious social consequences.

Any step toward decriminalizing the offence in the interim would be detrimental to " Indian ethos which gives paramount importance to the institution and sanctity of marriage".

While the judgment effects directly on the marriages in India, the adverse fallout cannot be ignored. In a country beset with rising divorce rates and cases of marital infidelity, the decriminalization of adultery will critically endanger the institution of marriage. Not only does it

CC BY-NC 4.0

run the risk of fostering extramarital affairs, the emergence of divorce as the way out will catalyze the breakup of marriages, leaving little children in the lurch.

The court should not decriminalized this section but should made some amendments as those who commit adultery either wife or husband both are held liable for this offence this not be on the basis of sex because here ,there is no violation of Article15 (3) of Indian Constitution. Because if this section get decriminalized the adulterer become motivate to do this more and through this its direct impact shown on wife or husband of an adulterer because there is no need to have one sex over other . It hampers the sentiments of a wife or husband who are in marriage which is more sacraments in nature. So we have to LOVE ONE ANOTHER NOT ANOTHER ONE. That's why it should be amended not decriminalized.

Adultery prohibits the democracy of love.

INTERNATIONAL ASPECTS

Now, A look at other countries where adultery is still a crime or not. In *Taiwan*, adultery is a criminal offence that is punishable by up to one year in prison, with penalties applying to both sexes. The *Philippines* is one among the Asian countries where the practice of adultery and concubinage is a crime because both are deemed "*Crimes against Chastity*" under the Revised Penal Code of the Philippines. Countries governed by *Islamic law*, including Saudi Arabia and Somalia, all strictly prohibit fornication outside marriage. Adultery is still considered a crime in 20 states of the United States.

In china, adultery is not regarded as a crime but can be a ground for divorce. South Korea, in 2015 was the latest country that decriminalized adultery. Having an affair outside the marriage is not illegal in any European country and Australia.

Countering the International Law who supports Adultery, Additional Solicitor General Pinky Anand contended, we are in India. We must go by the lateral principles of our society. She also said that judgment of foreign jurisdictions which had set aside adultery as a criminal offence should not be taken into account and the instant matter has to be decided on social conditions prevalent in India.

CC BY-NC 4.0

Taking into consideration the effects on society, principles of our holy books, development in other developed and progressive countries and the suggestion from the committee's adultery should not be decriminalized but should be gender neutral.

CONCLUSION

Conclusion that there has been huge change in the Indian Society; women and men both are equal before law under Article 14 of the Indian Constitution. The special provision under article 15(3) for women cannot be extended as to create arbitrary discretion for such discrimination by the legislature, as in the case of adultery. So, there is need to make section gender neutral rather decriminalized it which means for committing this conjugal offence, adultery both sexes shall be held liable. You choose to be one person, be with that person. If you all of a sudden start to look elsewhere than its time to end it. Don't deceive, disrespect and ruin another person's life because you are selfish. ADULTERY IS WRONG. You are hurting a lot of people with your selfishness. Both sexes are on an equal footing in committing the offence of adultery so both shall be held liable.

"THROW SOME MERCY ON YOUR PARTNER"

CC BY-NC 4.0