ADULTERY: THE GENDER NEUTRALITY PARADOX

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ABSTRACT

Adultery is an invasion on the right of the husband over his wife, an extramarital affair. It is an offence against the husband. In other words, it is an invasion to the sanctity of matrimonial home and an offence committed by a man. The sexual intercourse between a married woman and a man with or without the consent of the woman is termed as adultery.

This research paper attempts to analyze adultery from its legal conceptual base, and proceeded to examine its effect, impact and changes brought by the recent judgements in the section which not only saved the “outsider” to the marriage from being accused criminally but also guarded the dignity and safety of the women in the society.
INTRODUCTION:

Adultery is an invasion on the right of the husband over his wife, an extramarital affair. It is an offence against the husband. In other words, it is an invasion to the sanctity of matrimonial home and an offence committed by a man. The sexual intercourse between a married woman and a man with or without the consent of the woman is termed as adultery.

Adultery is defined in Section-497 of the Indian Penal Code, 1860 as:

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to 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 a case the wife shall not be punishable as an abettor.”

The scope of adultery is limited to married woman only which means an adultery cannot be committed with: 1. Unmarried woman

2. A widow

3. A married woman when her husband consents to or connives at it

4. Divorced woman

For example, if Kumesh is married to Kangana and Kangana has an illicit affair with Rupesh, then Rupesh can be held liable for adultery. Although Kangana cannot be held liable for the same. Such differences due to gender is just not fair.

Section-497 from its commencement has been dealt with various disputes, controversies, debatable questions, contentions on several accounts such as gender bias approach, article 14, 15 and 21 being violated and strong arguments were raised for the modification or removal of the section.
HISTORY

The object for punishing a person for adultery was more often to reach a settlement with the offender at a mercenary level and provide him a term in jail. This is the reason why the offence of adultery was not recognised in the first conference, even now the ingredients of the section are not appreciable. The existence of Section 497 does not have a lot of importance and recognising this fact most of the countries have decriminalised the offence of adultery.

In India, adultery is considered as an ‘anti-social’ and ‘illegal’ act. The offence of adultery has been recognised in India from a very long time, the Hindu mythology also has seen adulterous offence for instance Lord Ram had banished her wife into the forest for the mere allegation of adultery. Even manuscript has talked about adultery and defines the ruthless punishment that should be given to the offenders, it was punishable by death or even worse.

Lord Macaulay, also known as the father of the Indian Penal Code, 1860 did not approve of the offence as a crime since it was an unnecessary and unjustified crime and thought should be left to the society to take the decisions on matters related to this. He wanted to keep the insertion of such an offence out of the purview of the penal statutes. Therefore, the first original draft of the Indian Penal Code did not have such a provision. But in the second draft, the members of the committee disapproved the view Lord Macaulay and concluded that the offence of adultery is a heinous crime and the offenders should be punished for the same. Hence, Section-497 was enforced in the Indian Penal code.

After insertion of Section-497, the section was challenged on many grounds as it was drafted to make only a man guilty of the offence and protected the woman on the basis that she is the victim of adultery in every case even when she might be the abettor herself. The question of equality was raised not only by men but also the females of the society because a woman here was treated as an object by men having patriarchal control over their body i.e., by taking the husband’s consent over the women to have sexual relations with her. The consent of the woman in this section is immaterial. Thus, it violated article 14, 15 and 21 of the constitution.
PRESENT SCENARIO

In the recent years many questions have been raised on the offence of adultery and it was in September 2018 that the Supreme Court decriminalised Section-497 and made it unconstitutional on the grounds that it did not only violate equality between genders but also questioned the dignity, independence of the woman and her own identity in the society. The misogynistic approach that men had over women was called out in this section.

In the recent times the courts have come up with landmark judgements and discussion on various topics that were considered taboo by the society like the concept of live-in relationship being highly appreciated by the society which also attempts to protect the rights of the women in such cases or striking down Section- 377 and allowing homosexuality between two consenting adults. This certainly called for change in the definition of section- 497.

*Joseph Shine Vs. Union of India*

On 28 September 2018, Joseph Shine filed a Public Interest Litigation under Article-32 of the constitution to challenge the constitutional validity of the offence of adultery under section-497 of the IPC. This judgment overruled all the past judgements which were of the view that adultery is a crime and the offenders should be punished. The question raised was whether adultery should be a crime or not. The court finally came to the conclusion that the section does not meet the requirement of being held criminally although it can be a ground for divorce.

The judgement given by the CJI, Deepak Mishra stated that women were not the property of the men and neither husband are their masters.

The section is also considered to made women lose their right to life and personal identity in the eyes of the society which eventually made them look like the subordinates of their husbands. The section also infringes equality between genders and makes only the men being punished for the extra-marital affair. Thus, this section alongside decriminalising section-497 of the IPC also
decriminalises section 198(1) & (2) of the CrPC, which allows the husband to bring charges against the man with whom his wife has committed adultery.

A criminal law is a one which affects the society as whole whereas, adultery is a personal issue which should be dealt personally. If the wife chooses to sleep with another man that does not make the outsider liable for criminal offence, it is the parties to the marriage who should either work on themselves or choose a getaway. Thus, adultery is no more a criminal offence, although it is still a ground for divorce.

PAST JUDICIAL PRONOUNCEMENTS

1. Yusuf Aziz Vs. State of Bombay

The offence of adultery was first questioned in 1951 in this case. The petitioner said that the law violated the fundamental right of equality guaranteed under article-14 of the constitution. But the plea of the petitioner was rejected by the High Court, then according to Section-226 of the constitution the petitioner approached the Supreme Court. Again, here he argued that the law was violative of the article-14 with article-15 of the constitution by making only the man liable for the offence of adultery and the woman cannot be the punished even as an abettor.

Article-15 deals with prohibition of discrimination based on religion, race, caste, sex or place of birth. It was Article-15(3) which was raised in this case which enables the government to make special provision for women and children. The court here said ““We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited.”

The court then declared that it is the man who is the seducer, and the woman. The woman can only be the victim and the author of the offence under Section-497. Like this, the SC observed that it is the man who should be held liable for the offence and keeps the women out of the purview of the offence.
2. *Sowmithri Vishnu Vs. Union of India* 

In this case, it was contended that the law is contrary to the article-14 of the constitution and that it was discriminatory between man and woman in the sense that it:

(i) Confers upon the husband the right to prosecute the adulterer but it does not confer a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery;  
(ii) Does not confer any right on the wife to prosecute the husband who has committed adultery with another woman and vice-versa;  
(iii) Does not take in its ambit the cases where the husband has sexual relations with an unmarried woman, with the result that the husband has free license under the law to have extra-marital affair with unmarried woman.

When the third argument was raised in this case, one question that was argued upon was if the man had free license to have an illicit affair with an unmarried woman, the same was being guaranteed to the woman as well.

In this case, the court observed that the offence was committed by the person, and not by the lady. The court further in its judgment said that, the husband and the wife cannot prosecute each other of the offence of adultery in order to protect the sanctity of marriage, although both of them still have the remedy against each other under the civil law on the grounds of divorce, Section 13(1a).

Thus, the petitioner plea was dismissed.
3. *V. Revathi Vs. Union of India*<sup>iv</sup>

Section-497 has been drafted in such a way that a man cannot prosecute her wife for committing adultery neither does it allow the woman to prosecute her husband for being disloyal to her. This scenario was developed in order to disable the husband and the wife to strike each other down. But the petitioner’s wife here contended that whether or not the law permits the husband to prosecute the wife, the wife cannot be legally disabled from prosecuting her husband to assail Section-198(2) of the CrPC which gives the right to the husband to bring charges against the adulterer who has committed adultery with her wife.

The same question was raised in Sowmithri Vs. Union of India, the court here said that when Section-497 of the IPC and Section-198(1) read with Section-198(2) of the CrPC, then we understand that it is the outsider who tires to break the matrimonial home and poisons their relationship. The community therefore punishes the only adulterer of the crime and subsequently does not allow the parties to the marriage to bring charges against each other on order to save the sanctity of the marriage. That is the reason why neither the husband can prosecute the wife nor the wife can prosecute her husband.

Thus, in the ultimate analysis by the court, it said that no discrimination has been practised in circumscribing the scope of Section-198(2) and treats both the husband and the wife equally. It also said that not including woman for the prosecution of adultery promoted social good and observed that the section was a shield rather than a sword.

The petition thus failed and dismissed.
CONCLUSION

According to me, decriminalizing adultery is a step towards ending patriarchy and protecting the dignity of the woman of the society since they are no more treated as the property of the men.

This section from the beginning consisted of definition which was indefinite as it punishes the man who had adulterous relationship with the married woman, but doesn’t punish the woman for the same act. Thus, it became violative on many grounds as we have discussed above.

However, adultery is still a ground for divorce which should have been the original scenario because the adultery was committed by either the husband or the wife in the relationship and should be dealt by the parties only, and not by making it a criminal offence and accusing the “outsider”.
References:

1. i 2018 SC 1676

2. ii 1954 AIR 321, 1954 SCR 930

3. iii 1985 AIR 1618, 1985 SCR Supl. (1) 741

4. iv 1988 AIR 835, 1988 SCR (3) 73

5. The Indian Penal Code, 1860 Bare Act

6. K.D. Gaur Textbook on Indian Penal Code

7. Sapnakumari, Adultery, Legal Service India Adultery - Legal Service India

8. Adultery - Legal Service India

9. nidhikhare.11, Gender Biasness in the Law of Adultery in India, Legal Service India Adultery in India - Legal Service India

10. Case Analysis: Joseph Shine v. Union of India (Adultery Is ... Adultery no longer a criminal offence in India - BBC News

12. The law on adultery is asymmetric | Hindustan Times

13. Adultery law violates the dignity of woman ... - The Hindu

14. Supreme Court strikes down adultery ... - The Times of India