



Socio-Legal issues in decriminalizing Adultery – A Study

* Dr. S. Madhuri Paradesi

Associate Professor, Department of Law
Sri Padmavati Mahila Visvavidyalayam

Abstract: *Indian society treats women with great honour and dignity. The circumstances existed at the time of drafting of Indian Penal Code, 1860 with reference to socio, economic, cultural, educational and political aspects were completely different at present. From the ancient period, women were the worst sufferers of the offences committed by both men and women, as ours is a male dominated society. Anthropologists believe that the “Institute of marriage came into existence from 4350 years ago. The institution of marriage dates back from 2350 B.C, in Mesopotamia. The primary purpose of marriage was to bind one woman to one man, and thus guarantee that a man’s children were truly his biological heirs. The Vedas speak of “gracious smiling Women” and they regard the love of husband and wife and the motherhood of a woman with a profound sense of sanctity.*

Introduction:

The word adultery is derived from the French word “avouter”, which has evolved from the Latin verb “adulterium”, which means “to corrupt”. The concept of wife corrupting the marital bond with her husband by having a relationship outside the marriage was termed as “adultery”.

¹According to Manusmriti, “When a woman, proud of her relations deceives her husband (with another man) the King should ensure that she be torn apart by dogs in place much frequented by people. In Islam both woman and man will be punished for adultery.

Bible also prohibits adultery.

As per the Ranabir penal code of Jammu & Kashmir, both the perpetrators are punished. In order to protect matrimonial sanctity, IPC has made adultery as one of the offences relating to marriage and defined adultery under section 497 of IPC as Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be wife of another man, without the consent or connivance of that man, such sexual intercourse not

amounting to rap, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for term which may extend to five years, or with fine, or with both². In such case, the wife shall not be punishable as an abettor. Adultery, under sec.497 has the following elements: Illicit intercourse by a man with a married woman of another person, not being rape, without the consent or connivance of the husband of that woman.

The Constitutional validity of Section 497 of IPC was challenged in Bombay High Court in 2011, by Mr. Deepak Mirwani, on the ground that it has not relevance, as the right to have physical relations with a consenting party emanates from the “Right to Life”. The Court observed that there is no need to amend the proviso, as it would harm the society. The issue on adultery has come before the Supreme Court in a form of a public interest litigation filed by Joseph Shine challenging Sec.497, adultery, of Indian Penal Code contended it to be discriminatory and to punish both man & women alike for adultery.³ A PIL has been filed by an Italy based Indian business man, who hailed from Kerala, challenging sec 497 of Indian Penal Code

*Associate Professor Sri Padmavati Mahila Visvavidyalayam

¹. Lawyers update, January, 2018, at page no. 15

². Prof. S.N. Misra, Indian Penal Code, 13th edition, 2017, Central Law Agency, Allahabad. at page no.909.

³ WRIT PETITION (CRIMINAL) NO. 194 OF 2017.

contended it to be discriminatory and also sec 198 of Criminal code that allows the aggrieved husband to file a complaint and the aggrieved wife of a man in adulterous relationship. The petitioner also challenges the constitutional validity of arts 14, 15 and 21 in view of sec 497 of Indian penal code.

In its landmark judgement SC ruled out that Adultery is not a criminal offence and strike down a century old law drafted by Macaulay during British period, an antiquated colonial era. A five judge bench admitted the law to be archaic, headed by CJI Deepak Mishra and Justices R.F. Nariman, A.M. Kanwilkar, DY. Chandra Chud and Indu Malhotra.

The aim of this article is to critically analyse the judgment on decriminalization of adultery and proposing the introduction of unbiased definition of adultery by adding a new clause to Sec. 497.

The court has observed that the law on Adultery is based on certain social presumptions and declared that husband is no longer the master of his wife. Wife is not the property, commodity or chattel of the husband. Equality is the governing parameter as per Article 14 of the constitution. The very nature of Adultery means a woman is the subordinate to man. Sec. 497 of IPC enters into an extremely private sphere of matrimonial home by depriving the dignity and privacy of individuals. Hence it violates Article 14, 15 and 21 of the constitution. Justice Indu Malhotra says that adultery is committed in a private place. It depends on Doctrine of coverture whereby a woman loses her identity and liberty. Therefore, the Constitution will not recognize such doctrine.

The autonomy of an individual to make his or her choice with respect to sexuality in the most intimate spaces of their life should be protected from public censure. It is a moral wrong rather than a criminal offence. Both the parties are not benefited of the act, as one is the victim and another is punished. There is not rational. This provision is the reflection of the time when it was drafted. Woman cannot be expected to act as per the expectation of man because Patriarchal control over the woman is unacceptable.

Adultery is a consensual act. Further, if the husband consents to the act, it is not offence at all. It was observed that, this provision appears that

wife is chattel or property of the husband. The consent of the woman is immaterial. The two parties involved are the husband and the male adulterer, by not making woman a party to it, basing on the consent and knowledge of the husband. On the other hand reverse is not the case. The woman cannot prosecute her husband and the adulterer who cheated her.

In case the Adultery law expects spouse to be loyal to each other, which is a command, which gets into the realm of privacy. Man being the seducer and woman being the victim no longer exists. To attach criminality to something happening within the four walls of privacy is wrong. Any law which affects individual dignity, equally of women in a civilised society invites the wrath of the Constitution. Sexual autonomy of a woman cannot be compromised. It is her right. And any condition cannot be imposed on her. Adultery might not be the cause of unhappy marriage but it could be the result of one.

There may be cases where Adultery is a consequence of broken marriage. Couple would have been staying apart for decades waiting for a divorce decree, and the husband could foist a case off Adultery on his estranged wife to trouble her paramour. In view of the above, the Supreme Court has struck down Sec. 497 of IPC but sec 306 will remain in force, which penalizes the husband for when his wife commits suicide for the adultery by her husband.

Contentions of the petitioner: The PIL, petitioner Shine Joseph had challenged the validity of Sec. 497 of Indian Penal Code, terming it discriminatory and violative of under art 14 (Equality before law), 15 (Prohibiting discrimination on the grounds of religion, race, caste, sex or place of birth) and 21 of the Constitution (protection of life and personal liberty) as it only punishes the man while protecting the woman, even if both are equal participants in the act as Adultery is a consensual act.

Sexual relation of a man with an unmarried woman should also be compounded within the definition of adultery and if the paramour of married woman is guilty of adultery, why not the unmarried girl having illicit relation with a married man not be punished. The petitioner has also sought the reconsideration of three earlier judgements

upholding the validity of sec 497 of IPC and 198 of Cr.P.C. The petitioner claims that while law is supposed to be gender neutral, sec 497 of IPC is prejudicial against man.

State's contention: It is a public wrong which causes mental, physical injury to the spouse, children and the family. It is an intentional act which impinges on the sanctity of marriage and sexual fidelity encompassed in the marriage, which forms the backbone of the Indian society. Hence, classified as an offence in the exercise of Constitutional powers. During the marriage couple chant different mantras which itself give the sacramental sanctity to the marriage. Protecting marriage is the responsibility of the couple involved.

Issues put before Hon'ble Supreme Court:

The law makes distinction between paramour having sexual intercourse done with married women without consent of her husband, and the husband of a woman having sexual relationships with unmarried woman or widow. Only paramour of the wife will be punished for adultery.

The law is gender discriminatory, where husband and wife cannot prosecute each other for out of marriage relations, but only the paramour of the married woman is penalised. The law grants immunity to the women.

Adultery law is violative of Art.14, 15 and 21.

It is not in consonance with the changing conditions. Today instead of polygamy, monogamy is prevailing i.e., one man for one woman except in Islamic religion. The PIL seeks changes in law based on sexual equality praying women too be liable for the offence of adultery.

Analysis of Judgment: Adultery as an offence under Sec.497 of Indian Penal Code which was scrapped along with Sec.198 of Criminal Procedure Code totally, and retained Sec.306 of IPC by punishing the adulterer who abets suicide by the aggrieved spouse if the spouse commits suicide in this context by the five Judge Bench by over turning three previous rulings that had upheld the law viz., ⁴ Yusuf Aziz v. State, the court ruled

that the immunity granted to women from being convicted U/s 497 was not discriminatory but valid under Art. 15(3) of the Constitution. ⁵V Revathi v. Union of India the court held that sec 497 of Indian penal code is so designed that a husband cannot prosecute the wife for defiling the matrimonial tie by committing adultery. This law permits neither the husband nor the wife to prosecute each other.

Sowmitri Vishnu v. Union of India and Anr the court held that the contemplation of the law evidently is that the wife, who is involved in an illicit relation with another man is a sufferer and not the abettor of the crime. ⁶The five judge bench comprised of CJI. Deepak Mishra, and justices RF Narimon, A.M.Kanwilkar, DY Chandrachud and Indu Malhotra.

Family is the foundation of the society. Adultery will spoil the civilisation on religious, moral, social, cultural and legal aspects, leading to destructive activities, divorces and offences. X As per Saxena, the essential purpose behind monogamous institution of marriage has been the certainty of "Paternity" and "Guarding of the nest". To cite an example, Rohit sharma has filed a paternity suit, in High Court of Delhi claiming that his father is Mr. N.D. Tiwari, but he has been considered to be the son of Bipin sharma for almost 30 years. D.N.A test proved that Rohit was born to T.N. Tiwari. When adultery is legalised by the Supreme Court, more and more births of illegitimate children is the likely consequence. It complicates the issue of inheritance and succession. The quote by court that "All historical perceptions should evaporate and their obituaries be written", be condemned because, all laws are designed and made on the basis of the existing traditions and culture and the existing social norms. The institute of marriage is based on high sanctity in Indian culture and is one of the vital social masterpieces. A bonding behaviour also boosts sensitivity, love and affection on medical grounds, leading to social health and survival of Indian society.

Court has ignored the apathies of victims of the offence. They cannot take legal action now on the adulterers. In fact, the judgement has taken away the husband's right to prosecute the adulterer.

⁵ AIR 1988 SC835

⁶ AIR 1985, SC 1618

⁴ AIR 1954 SC321

Women were restricted to marry a single husband under all systems, globally in order to ensure the purity of blood and legality of the children. On the whole, the judgement has embarked on judicial activism and imaginary, for dealing with such a sensitive subject is a policy matter to be decided by the legislature. In a way the judgement liberated the people of this country from the bonding of marriage and have out of marriage relationship.

Conclusion: It is illogical to say that sexual act with the consent of the husband is not an offence. Nobody has a right to enter into an adulterous relationship irrespective of the consent of the husband. The penal provision on Adultery is needed to save the sanctity of marriage. Philological effects on next generation have to be considered. The changed circumstances from the drafting of Indian Penal Code, due to westernization, women are empowered in all respects and have sufficient mental maturity. They are getting high qualification, are engaged in all the fields, getting good salaries. Despite all these, people have wide access to different apps in internet like face book, what's up, you tube, Instagram etc. It leads to more criminality in humanity. There is every possibility of intimacy being developed easily between man and woman, irrespective of marital status. Person is a slave of illicit relation out of marriage; it is senseless since adultery plays a temporary role in once life, causing suffering to oneself. It is difficult to implement law in social relationships. It is relevant in the context of the Supreme court judgement regarding decriminalization of adultery. Adultery now has to be seen in terms of new notions of freedom and consent. The court has to respond to this new discourse or otherwise sound law is archaic or futile.

In the judgement, matter of privacy has been given Importance rather than morality. Instead of upholding impartiality by decriminalizing the offence, it is encouraging the animal side of the human beings what message this judgement is going to give to the society. Is it giving license to illegal relationships out of marriage.

As per Kenny, crimes are created by the states. Offence as per IPC is that which is punishable by law. If one of them fails, divorce is the civil remedy available to the other. But it is not the solution. Development of the country basically depends on

the society, which itself depends on the family relationships. In India, the development of women is not at the same level with reference to awareness, socio-economic and religious and cultural aspects. Women are dependent on their husbands in all respects. In such circumstances, scrapping of adultery cannot have a positive effect on the society. It must be implemented step by step. Further, Adultery is a different from rape, where the consent of the woman makes no offence. Whereas in case of adultery the consent or connivance of the husband make no offence. There by women are dependent on their husband on all respects.

It is difficult to implement laws in social relationships. Adultery must be taken from the view point of the present position of woman in the society. Adultery now has to be viewed not in terms of a chattel but in terms of new notions of freedom and consent. The court has to revisit this new dimension, to make the adultery law more effective. It is the responsibility of the State to regulate the people through law and order. As a policy matter legislature has to take an active part in redefining Adultery law by deleting the words consent and connivance of the husband in the definition part and punish both the parties alike as it is a consensual act by adding a new clause to Sec 497 of Indian Penal Code. Therefore either the judiciary has to revisit the judgement sue motto, or the legislature has to redefine the Adultery law, because illegal relationship out of marriage is an offence effecting public peace, order and morality at large. Otherwise limiting Adultery to civil remedy by making it as a ground for divorce will not have a preventive and deterrent effects which are the basic theories of criminal law.

It can therefore be concluded that adultery is one of the burning social issues that needs criminalization of both the parties in interest of the society, for the very object of criminal law is to regulate peace and order in the society and not to provoke animal instinct in human beings. The definition should be recast by the extending the ambit of the adultery so that both the man and woman should be punishable for the offence of the adultery.

Suggestions:

- Instead of decriminalizing the offence of adultery, IPC requires drastic changes in this regard as has been done in law relating to rape.
- The offence of adultery must be redefined, criminalizing both the man and the woman, because it a consensual act. This ensures equality as per article 14 of the Constitution.
- While the offence of robbery is punishable with 10years, why not adultery with breaks the entire family and in turn the society as a whole be punished?
- A stringent punishment must be imposed for the adultery, which will have a preventive and deterrent effect on the offender and the prospective offenders.
- Awareness camps should be conducted to enlighten the people regarding the adverse effects of adultery.
- Government must have a control over social media and ban the sites which provoke and instigate immoral and illegal activities.