

# Law of Adultery in India- A Comparative Study

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## I. INTRODUCTION

In a country like India marriage and family are regarded as a basis of society. Adultery has been a part of human society for as long as there has been existence of marriage. Marriage is more precisely a personal factor as it includes a relationship between two human beings who wilfully decide to cohabit with each other for their remaining lives. Now the concept of adultery rises when one of the partner/spouses has extra marital affair with another and the same is objectionable by the other spouse. Adultery literally means sex between a married man and woman with someone who is not his husband or wife.

Adultery can be defined as consensual extra-marital sexual relationship which is considered objectionable on social, moral and religious grounds. Adultery was not an offence prior to enactment of Indian Penal Code but after enactment of penal code Adultery was made a punishable offence which had provision of punishing only 'men' who are guilty of Adultery. In the year 1954 the law of Adultery was first challenged asking why women are not punished for the offence making the provision discriminatory. After this incident too different cases came up where similar issue of discrimination by the provision of Adultery was dealt with by different courts but was not taken seriously. The western countries like Finland and Sweden do not consider Adultery as a punishable offence but prior to landmark ruling India do considered Adultery as a heinous offence which should be punished.

In India we have Indian Penal Code which contains different offences for which punishment is prescribed on the basis of gravity and nature of the offence committed. Section 497 of Indian Penal code contains provision for the offence of Adultery. Prior to 2018, Adultery was a criminalizing offence for which punishment of maximum 5 years was prescribed. After the landmark ruling in the case of *Joseph Shine vs Union of India*, Adultery is no longer a criminal offence in India. Adultery is just one of the grounds of obtaining divorce with no penal provision.

Adultery is an act which most of the times have no eye witnesses and becomes difficult to prove adultery in the court of law. What becomes relevant in the cases of adultery are the existing circumstances which raises a suspicion regarding an act of adultery.

## II. HISTORICAL PERSPECTIVE

In India we have Hindu Marriage Act which governs the marriage as well as divorce provisions according to which any Hindu spouse who wants to perform his marriage or take divorce should comply with the necessary provisions given in Hindu Marriage Act. Prior to Hindu Marriage Act, 1955 Adultery was just an offence under penal code and no provision was in existence concerning grounds for taking divorce. But after the enactment of Hindu Marriage Act adultery was included as one of the grounds for taking divorce. The reason behind adultery not being a ground for divorce were as under-

1. Before the enactment of the Hindu Marriage Act of 1955, Hindus did not have any provision for divorce since marriage was considered a sacrament in ancient times. Since there was no law for divorce, the provision for adultery as a ground for divorce was not present.
2. Another reason was that in ancient times, a Hindu man was allowed to marry any number of women and indulge in sexual intercourse with them. Therefore, a provision for punishing the husband for indulging in sexual intercourse was pointless since the man could eventually marry the woman with whom he had sexual relations.

The law of Adultery was first challenged in the year 1951 in the case of *Yusuf Aziz* in the High Court of Bombay. The reason behind challenge for Adultery was it being violative of Articles 14 and 15 of the Constitution of India. The petitioners in this case contended that Section 497 of IPC discriminated against men by not penalising women in an adulterous relationship. The court held that Section 497 of IPC is constitutionally valid under Article 15(3) of the Indian Constitution. Even after the case of *Yusuf Aziz*, there was ambiguity regarding the adultery law in India. The overall view of the Judiciary till now seems to protect the women from prosecution in the cases of adultery with the main

object of protecting the sanctity of marriage.

### III. SCOPE AND APPLICATION

- The offence of adultery as defined under Section 497 IPC is considered against the sanctity of the matrimonial home by the Legislature. The Penal code is so designed that a husband cannot prosecute the wife for acting against the sanctity of marriage by committing adultery. For the offence of adultery under Section 497 it was necessary to prove that the woman with whom accused had sexual intercourse was the wife of another man.
- Now, after analysing the definition from beginning to end, we find the very second line of this section mentions the phrase 'wife of another man.' And here appears the very first point of gender discrimination. This phrase gives an idea that a married man having sexual relations with an unmarried woman will not be guilty of committing adultery under section 497 of IPC. The Penal code also makes it clear what does the expression 'wife' exactly cover. The expression wife means legally and validly married wife.
- The most crucial aspect is that the Section does not provide any punishment for the unfaithful wife and only provides for the punishment to the man who indulged in sexual intercourse with the married women.
- It is also very clear from various judicial opinions that where an unmarried woman has sexual intercourse with some person, she cannot be said to be living in adultery as the main ingredient is the woman should be married.
- Also, the courts from time to time cleared both concepts of Adultery and Rape where prime ingredient which differs is the 'consent' which if absent amounts to rape but if committed with consent can be termed as adultery

We live in a society where women are considered at a higher position and any act showing disrespect towards women considered immoral in society. The Legislature must understand that what is not equal cannot be equalized by changing definitions. For a valid justification it can be said that our Indian Constitution permits reasonable classification under Article 15 but not any kind of discrimination. We can link the same situation here in the case of adultery where women are given different treatment as non-prosecution was allowed for women but in the case of men if adultery proved than he would be prosecuted and punished according to the punishment prescribed in Indian penal Code.

### IV. BURDEN OF PROOF

Adultery from its original nature is a secret act. Direct evidence of an act of adultery is extremely difficult. When one of the spouses intends to prosecute other partner for an offence of adultery in a court of law under Section 497 IPC the question arises as to how can the offence be proved in the court and on whom will burden of proof lies? In matrimonial cases where offence under Section 497 IPC is alleged the burden of proof remains on the person making allegations of adultery.

### V. STATISTICAL ANALYSIS IN INDIA

The author will be discussing statistical analysis of extra-marital relationships in India with the help of below given points. This research was conducted among 1,525 Indian married individuals between the age of 25 and 50, across Delhi, Mumbai, Bengaluru, Chennai, Hyderabad, Pune, Kolkata and Ahmedabad. Gleeden, an online dating app which arrived in India in April 2017, reported eight lakh subscribers in the country and after the landmark judgement of decriminalising adultery in the year 2018, this site also expressed its opinion on the same. According to Gleeden, the judgment in Joseph Shine Case was also seen as a move against patriarchy and gender inequality.

The app now has over 600,000 users aging between 34-49 years and the data they provide about extra marital affairs is eye-opening.

1. 90% of Indian marriages are still fixed by families and only 5% of the couples marry for love.
2. 49% of married people in India confessed of having had an intimate relationship with someone other than their spouse.
3. Almost 46 to 47% have been indulged in casual sex and one-night stands.
4. 53% of Indian married women admitted having already had an intimate relationship outside their marriage.
5. Indian women seem particularly open-minded about infidelity, especially when it involves romance. And such

dating apps provide an open platform to such individuals who are indirectly forced to indulge in.

#### VI. WHY ADULTERY IS ON RISE IN INDIA?

To understand the answer to this question we have to keep in mind the economic makeup of our society. Earlier men and women had defined roles. Men would earn the bread for daily living and women would take care of the house. Another factor was that no matter how your in-laws or husband treats you, you had no option but to stay with them. So basically, women had no financial independence, no freedom and no support to run out of marriage. On the other hand men were taught to take care of the family, old parents and not to do anything which will destroy the family and home. In India it was also considered that parents are the best judge to choose life partners for their respective children. This is how society worked in past and Adultery was considered a taboo.

Times changed gradually and women started stepping out for jobs and education. On the other hand, men who had already been prone to working at job place or even long distance from their home started getting easy access to modern outgoing women at workplace or elsewhere. Both men and women after marriage have certain expectations from their respective partners which differ from couple to couple. Now, when these expectations are not fulfilled by the partner intentionally or un-intentionally it leads to unsatisfied matrimonial life. In most of the cases it results in Adultery. The most drastic change in modern day society is that adultery is no longer considered as immoral or sinful activity by today's individual.

Recent studies also revealed that most of the couples' loose interest for sex with their partner which leads to stress and this triggers the need to have an extra-marital affair in turn committing adultery. Digital applications like 'Tinder' help married spouses to commit adultery by providing easy access towards exciting sexual encounters. So, it would be right in saying that, 'women are as adulterous as men.'

#### VII. ADULTERY AND CONCEPT OF MORALITY IN INDIA

Each person has a different set of moral values. What I consider correct might not be considered so by others. There are certain things that our ancestors did and followed for the sake of humanity and its goodness. Having a single partner was one of them. But the situation has changed now. Views of the society has also changed. *Adultery is a mortal sin and no one can deny this fact but criminalizing someone for having consent full sex is wrong and is also somewhere discrimination of fundamental rights.*

As we all know that India is considered for its moral values since ancient times. The Vedas, Puranas, holy books all depict the moral values or the moral duties of a human being which was considered as mandatory to lead a perfect & happy life. But according to present day scenario things have been changed a lot when we talk about morality. In India adultery was a criminal wrong because according to paradoxical concepts, the women were deemed to be the lifetime partner of a man as property and were forced to maintain and keep up the relationship with her husband irrespective of her desire.

The author intends to focus on the story named 'Aftermath' wherein the concept of adultery is explained perfectly. The Book of Adam and Eve is believed to be the work of an unknown Egyptian writer. Pinning down the date of the original writing is difficult, but many believe the Book of Adam and Eve was written a few hundred years before the birth of Christ.

Adam's and Eve's eyes were opened when they sinned against God. Everything changed when they sinned. Before the sin, the fruit from the tree of the knowledge of Good and Evil looked good to eat and good to make one wise. The enticement or temptation warped their perspective of the tree and the commandment of God was buried by their perhaps emotionally charged mind-set at that time. They ate, and everything changed.

The same thing happens when adultery happens, at least in some cases. Everything seemed right until the deed is done, so to speak. Suddenly, the husband or wife realizes that what was done was wrong in fact very wrong. Not only was it wrong, but it cannot be undone.

The man or woman may ask, "Did it really make my relationship better or fill the hole in my relationship?" At this point, they may resolve to never do that again and then work really hard to do something about their marriage. On the other hand, the experience may have been so fulfilling that he/she seeks to do it again. The interesting thing is that all of this could have been avoided if the couple had established and maintained a healthy sex/intimacy life. There would be

no need to eat elsewhere if there is plenty of food in your own kitchen.

Adultery is indeed a moral wrong, as the marriage ceremony is a pure and trustworthy relationship between husband and wife and it is always a sin to have sex with another person outside the marriage, betraying trust and love. Although the apex court has declared the adultery laws unconstitutional but millions of peoples still believe it to be a criminal offense rather than just a moral wrong.

### VIII. JUDICIAL PRECEDENTS

#### **Yusuf Abdul Aziz vs. State of Bombay AIR 1951 BOMLR 736**

##### **Facts of the case-**

Yusuf Abdul Aziz, a foreigner was charged under Section 497 of the Indian Penal Code. He challenged the constitutional validity of Section 497 because it violated the fundamental right to equality guaranteed under the Indian constitution as it does not make women equally culpable in an adulterous relationship. He contended that Section 497 only punishes a man and the woman goes scot-free as it has provision for punishment for a male offender only & the wife is not punishable as an abettor which is against the fundamental right to equality mentioned under Article 14 of the Constitution of India.

##### **Issues before the Court-**

1. Whether Section 497 of the IPC violates Article 14 & 15 of the Indian Constitution & hence is ultra vires the constitution?
2. Whether a Non-Indian Citizen can invoke the fundamental right mentioned under Article 15(1) of the Indian Constitution?

##### **Judgement**

The Bombay High Court held that "Section 497 does not contravene any of the fundamental rights laid down in the Constitution and therefore it is not bad or void under Article 13 of the Constitution. It was observed that the offence defined under Section 497 was not intended to operate upon women at all so there is no question of the law operating unequally between men & women. Hence, the Court could not accept the contention related to the violation of violate Article 14.

It was also held that, the fundamental right guaranteed under Article 15(1) can only be invoked by Indian citizens as per the Constitution, however, he clarified that even a non-citizen may rely on any of the fundamental rights to bring it to the notice of the Court that a particular law being in violation of the fundamental rights is bad, inoperative and no penal consequence can follow, from the breach of such a law.

##### **Author's view-**

The judgement by the Bombay High Court in the case of Yusuf Aziz was based on the application of law in the prevailing circumstances at that time. The Judiciary after reading the provisions under Articles 14 and 15 was of the view that concerned provision of Adultery under Section 497 IPC was not constitutionally void. According to the author the judiciary did not even take the liberty to make recommendations to the legislative organ of the central government to review this law. It can be said that the case of Yusuf Abdul Aziz posed the right questions to the judiciary but at the wrong time which resulted in dismissal of petition on the above-mentioned criteria. It can be concluded that the adultery law when it was enacted might have been relevant but with changing times the law was neither socially applicable nor does it stand to the principles of equality.

#### **V. Revathi vs Union of India & Others 1988 SCR (3) 73**

##### **Facts of the case-**

The Petitioner in the present case challenged the validity of clauses 1 and 2 of Section 198 of Criminal procedure Code as it permitted only the aggrieved husband to sue the adulterer. The aggrieved wife can neither sue her disloyal husband nor the adulteress. Neither can the aggrieved husband sue his disloyal wife. In simple words woman can neither sue nor be sued in the offence of Adultery.

**Law Point** – Whether clauses 1 and 2 of Section 198 Criminal Procedure Code stands constitutionally valid?

**Judgement-**

The Hon'ble Court after hearing the contentions from both the sides held that, admittedly under the law, the aggrieved husband whose wife has been disloyal to him, has no right under the law to prosecute his wife as the very definition of adultery says that only a man can commit adultery, not a woman.

**Anandram vs Smt. Laxmi Bai 2018 3 DMC 780**

**Facts of the case-**

The Petitioner and Respondent in the present case are husband and wife. The marriage between them was performed in the year 1984. Respondent that is Smt. Laxmi Bai started living separately from the appellant from the year 1986. The Appellant moved an application under Section 13 of the Hindu Marriage Act against the respondent on the grounds of desertion and adultery being committed by the partner. It was stated in the application that the respondent never resided continuously with the appellant and she had physical relations with some other person prior to the marriage with the appellant, because of which a child was born within 7 months from the date of performance of marriage.

Respondent started living with some other man without informing her husband at his house. The appellant also tried to bring back his wife, but she did not come back. While the wife was residing separately, she became pregnant and respective child was born on 30<sup>th</sup> June 1989.

**Law Point –**

Whether birth of child while leaving separately proves Adultery?

**Judgement-**

After closely scrutinizing the evidence led by both the parties, it appears that the birth of child was within 7 months of marriage, which is disputed, but it is not disputed that respondent left the appellant on 18/06/1986. After the admission made by the respondent that she was not living with the appellant since 18/06/1986 it clearly attracts the provision under Section 13(1)(I) of Hindu Marriage Act, 1955.

**Author's view-** After going through the facts of the case as well as the contentions made by both the parties it is prima facie evident that the concerned wife in this case has left her husband's house without any intimation from 18<sup>th</sup> day of June 1986 and after that she never returned to her husband's home. This shows that the wife had already deserted her husband way before in the year 1986. The same was considered by the Court and granted relief under Section 13(1)(I) of the Hindu Marriage Act, 1955.

The author would like to consider one minor yet important fact that in the above judgement the Court has granted relief of divorce to the appellant husband against his wife but has said nothing about prosecuting the respondent under Section 497 IPC.

**Mahesh Patel vs State of Chhattisgarh**

**Facts of the case-**

F.I.R was lodged by the prosecutrix a married lady aged about 23 years alleging in it that her marriage was solemnized with a person named Amar Singh at her village Siyarinala and after marriage she was residing with her husband at Barkai. The allegations made by the prosecutrix is that the accused being a tailor by profession from her village and had came to her in-laws house, had a dinner with her husband and slept along with her husband on the same cot, whereas she was sleeping on the floor of the said room itself. Around 11 p.m. the accused committed sexual intercourse with her and while he was doing the said act, the prosecutrix was under the bona-fide belief that it was her husband committing sex with her, but the moment when she came to know about the fact that it his not her husband, she raised her voice and her husband immediately rescued her.

On the next day the villagers of the concerned village were called and the accused confessed about commission of offence in front of the villagers and the report was lodged. After investigation charges under Section 376 and 506 IPC and Section 3(1) of SC/ST Act were framed by the learned Special Judge against the accused.

Relying on the above facts the learned trial court has acquitted the accused of the offence under Section 376(1) and 506(2) of Indian Penal Code but convicted for a minor offence under Section 497 IPC and sentenced him for rigorous imprisonment of 5 years. The accused in the concerned case had preferred an appeal against the judgement given by the sessions court.



**Law point**

Whether in absence of any complaint by the husband of the prosecutrix, the accused/ appellant can be convicted under Section 497 IPC?

**Judgement-**

After analysing the contentions from both sides as well as the definition of Section 198 Cr. P.C which says, no court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code, except upon a complaint made by some person aggrieved by the offence, the report has never been lodged by Amar Singh, the husband of the prosecutrix. The husband of the wife while delivering his statements has supported the police case but the court cleared its view that this cannot be treated as a complaint as defined under Section 2(d) of Criminal Procedure Code and therefore action cannot be taken under Section 497 IPC and the accused/appellant cannot be punished for that offence.

**Joseph Shine vs Union of India AIR 2018 SC 4898**

**Facts of the case-**

In 2017, Joseph Shine, an Indian citizen living in Italy, filed a petition in public interest under Article 32 challenging the constitutional validity of Section 497 of the Indian Penal Code, 1860, which dealt with the criminal offence of adultery and Section 198(2), Code of Criminal Procedure, 1973 (CrPC) which provided that no person other than the husband of a person accused of adultery would be deemed to be aggrieved by the commission of an offence under Section 497 or Section 498 of the IPC.

**Law Point-**

Whether Section 497 of Indian Penal Code read with Section 198(2) Cr. P.C. violates Article 14, 15 and 21 of Indian Constitution?

**Judgement-**

The Court held that Section 497 was archaic and constitutionally invalid as it stripped a woman of her autonomy, dignity and privacy. It opined that the impugned provision resulted in the infringement of a woman's right to life and personal liberty by supporting an idea of marriage that subverted true equality by applying penal sanctions to a gender-based approach to the relationship between a man and a woman. The Court reaffirmed sexual privacy as a natural right under the Constitution. The Court noted that adultery would remain a civil wrong and a valid ground for divorce and although it is no longer criminalised.

Justice Deepak Mishra opined (for himself and Justice A.M. Khanwilkar) that treating adultery as a crime was an intrusion into the extreme privacy of the matrimonial sphere. Criminalising adultery, in his opinion, offended two facets of Article 21 of the Constitution, namely, the dignity of husband and wife, and the privacy attached to a relationship between the two.

**IX. CONCLUSION**

According to the author the definition of Adultery as given under Section 497 IPC is discriminatory in nature as it discriminates between a man and a woman. According to the then law of adultery only the man committing adultery can be prosecuted and not the woman which was discriminatory in nature. This was one of the lacunae faced by the provision of Adultery going against Article 14 and 15 of the Constitution of India. Whenever the Judiciary had to decide on the constitutional validity of Section 497 IPC the main factor which the court always considered was right to life given under Art 21 of the Constitution as right to life also includes privacy and dignity as most crucial facets.

It can be said that the case of Yusuf Abdul Aziz posed the right questions to the judiciary but at the wrong time which resulted in dismissal of petition. According to the author, the adultery law when it was enacted might have been relevant but with changing times the law was neither socially applicable nor does it stand to the principles of equality. Till 2018 there were numerous times when the provision of Adultery was challenged in the Courts but it took the landmark case of *Joseph shine vs Union of India* in the year 2018 to actually decriminalise adultery from the statute.

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