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2nd Year, BBA LL.B.**DECriminalISATION OF ADULTERY****Abstract**

Adultery shows a conflict between social pressure and individual struggle for happiness. Adulterers have always suffered from society's disapproving attitude towards them. In India, adultery is criminalised under Section 497 IPC. As per criminal law in India, offence of adultery is directed only at the outsider' who violated the sanctity of the matrimonial home when the outsider is a man. Thus, it amounts to gender-based discrimination in law. In my opinion, continuance of this law in present day, demands extensive reforms and amendments. Adultery section 487 was stated to be unconstitutional by the Apex court in 2018 and it was Decriminalised.

Keywords

Adultery, Criminal law, India, unconstitutional, Decriminalised.

Introduction

Adultery is a crime committed by a third party against a husband in relation to his wife, and a man alone can be held guilty, implying that it is a violation of a husband's rights towards his wife, and the law of this nation considers it an offence. The purpose of the law is to punish those who interfere with the sacred relationship of marriage, because adultery is an illegal act, and no peace-loving citizen or person of good morals would want it to be permitted to be practised. That this section makes it punishable and all classes of persons Irrespective of there class, colour , religion etc. ,this was stated by the honourable justice Tudball in EG Hunter V emperor¹.

¹ 22 Cr LJ 382.

Family and Marriage are regarded as a very sacred relationship in the society and sometimes the concept of adultery varies from different sections of society in some it is regarded as very taboo but some people's thinking it is reasonable to be with someone else if the marriage is not going well.

“Whoever looks at a women to lust after her has committed adultery with her in his heart”- JESUS CHRIST, these sacred words were said by Jesus Christ himself .

Section 13(1)(i) of HINDU MARRIAGE ACT 1955², is also adultery but is very different and has a wider scope than what adultery is defined under IPC.

The Catechism of the Council of Trent defined adultery as the pollution of the marriage bed in the sixteenth century. If a married man has intercourse with an unmarried woman, he breaches the integrity of his marital bed; and if an unmarried man has intercourse with a married woman, he defiles the sanctity of another's marriage bed, which is a “crime against marriage,” according to legal authorities. Although the concept of “adultery” appears to change in almost every legal system, the constant element is sexual intercourse outside of marriage in some form or another.³

Section 497 of the Indian Penal Code

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, such sexual intercourse not amounting to rape, is guilty of adultery and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or writ. In such a scenario, the wife is not punished as an abettor.

This section requires the following essentials: -

1. A man's sexual intercourse with a woman who is and knows or has reason to think is the wife of another man.
2. Such sexual encounters must take place without the husband's knowledge or permission.
3. Such sexual encounters must not be construed as rape.
4. Complaint by person aggrieved is necessary under section 198 Cr.PC⁴

Punishability of wife in adultery

In the case of adultery the man who had illicit intercourse with someone else's wife was only punished and the woman irrespective of the fact that the illicit intercourse was with her free will or not had a complete immunity to the charge of adultery.

² Chanda V Nandu AIR 1963 J and K 56, (1963) 2Cr LJ 621

³ Adultery. available at: <http://en.wikipedia.org/wiki/>

⁴ Prosecution for offences against marriage.

As IPC prohibits women from being punished as an abettor of the offence of adultery as said by the justice.in the case of YUSUF ABDUL AZIZ V State of bombay⁵, because of this fact the argument that the section 497 of IPC which defines adultery contradicts the Article 15 of the constitution⁶, the constitution is not violated by section 497 and 498⁷ because the constitution itself provides a special provision for children and women in its clause 3 of Article 15.

Section 497, IPC cannot be said to be violative of article 14 of the Constitution on the ground that it makes an irrational classification between men and women in that.

- section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery.
- section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.
- section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free license under the law to have extra-marital relationship with unmarried woman⁸

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Decriminalisation of this section from the IPC

On 27th July 2018 a 5 judge bench decriminalised 497 and 498 of the IPC by overruling the Judgement of Sowmithri Vishnu⁹, Vishnu Revathi¹⁰ and Yusuf Abdul Aziz case, the bench accommodated Chief Justice Dipak Misra, Justice Nariman, Justice Chandrachud and Justice Malhotra. The section were decriminalised on the ground that it violates Articles 14¹¹, 15 and 21¹² of the constitution. The learned Advocate Jayna Kothari Argued in the case that there was a presumption that a woman is the property of the husband and cannot have relations outside of marriage. The husband, on the other hand, was not subject to the same limitations. Section 497 breaches married women's rights to privacy and liberty by discriminating against them and perpetuating gender stereotypes.

This Landmark Judgement was passes in the case of Joseph V. The Union of India¹³, in which Joseph shine a non-resident keralite had filed a public interest litigation under section 32 of the constitution, the petition challenged the constitutionality of the section 497 of the IPC.

⁵ AIR 1954 SC 321, 1954 Cr LJ 886;

⁶ Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁷ Enticing or taking away or detaining with criminal intent a married woman.

⁸ Book R A Nelson's Indian Penal Code Volume 4 chapter 20 page 4005.

⁹ V union of India Air 1985 Cr LJ 1302.

¹⁰ V union of India (1988) 2 SCC 72

¹¹ Equality before law.

¹² Protection of life and personal liberty.

¹³ 2018 SCC OnLine SC 1676.

Adultery as a ground for divorce

Adultery despite of being struck down by the Apex court is still used as a ground for divorce under section 13(1)(i) of the H.M.A. because in the 2018 judgement the court decriminalised section 497 and 498 of the IPC but section 13 of the HMA is a provision for divorce in which means it was never a punishable offence under HMA and unlike the adultery in IPC section 13 HMA is not gender specific so the argument of violation of article 15 is not present in HMA.

What is media's take on the judgement

When the judgement was passed that adultery is no more a criminal offence then many big media house published various articles regarding the judgement

- **BBC news¹⁴** :- BBC on 27th September 2018 published an article in which they appreciated the v verdict and the article answered many questions like who challenged the law?, What dis the adultery law say?, What did the judges say?, Where else adultery is a criminal offence ? Etc. The article also had attached many tweets of famous personalities who were supporting the verdict.
- **Hindustan Times¹⁵** : - the Hindustan Times also published an article on 28th September 2018 titled “Decriminalisation of adultery is the first of many steps” in the article they talked about the judgement and how the judgement was challenged by Joseph.

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Conclusion

We believe that the entire dispute revolves on an improper usage of the term “adultery” in the judicial system. Adultery, in its true sense, is an offense against one's spouse, a breach of trust, and a breach of one's home, and thus the offense of adultery, as it is, is not covered under S. 497 IPC at all, as neither the adulterer husband nor the adulteress wife, as the case may be, are punishable. However, the law stipulates penalty for a third party who is indirectly involved in the violation, and that is only a male paramour for a breach in the sanctity of the married house. The offence committed by men and females is seen differently under criminal law, with a discriminating attitude against married female (wife) and her paramour.

With shifting societal attitudes, the role of the judiciary in interpreting the constitution and amendments is essential. Given that the female is socially impoverished and weak in the majority of the country, as recognized by the Hon'ble Supreme Court, her position must be enhanced. The female (wife) should have the same right as the male (husband) to sue the female adulteress for breach adultery in the sanctity of her married home.

¹⁴ Link for the article: <https://www.bbc.com/news/world-asia-india-45404927.amp> by Soutik Biswas

¹⁵ Link for the article: https://www.hindustantimes.com/analysis/decriminalisation-of-adultery-is-the-first-of-many-steps/story-twhdBreDAwXsNd1brGSUUI_amp.html by Gautam Bhatia

As a result, this discriminatory statute must be changed. A public debate should be organized, and a consensus should be reached on this discriminatory statute. The issue of the wife's dignity and rights as an individual, which are jeopardized by S. 497 IPC, must be addressed. The section making adultery a criminal offense should thus be repealed or modified in light of women's equality and dignity.

"It seems most unfair for a man to require from a wife the chastity he does not himself practice".¹⁶



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¹⁶ Codex Justin. Digest, XLVIII, 5-13; lecky, History of European Morals; II, 313.