

# ADULTERY IN INDIA AND DIVORCE: ISSUES, CHALLENGES AND SOLUTIONS

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## ABSTRACT

Legal analysis of regulation of adulterous behavior of married persons under different legal systems demonstrate that the provision of adultery is greatly influenced by the social values of, "sexual morality," which existed at the moment of formulating the legal provision. In India, S. 497 of IPC had been drafted before a 150-year colonial period and, since from its inception, it has been whirling into debatable controversies on several accounts, such as its gender bias approach, reflecting cultural conflicts, questioning equality clause, and strong arguments have been raised either for its retention, modification, or complete deletion from penal statutes. This article has attempted to articulate these controversies from legal point of view in contemporary India. This article attempted to analyze adultery from its legal conceptual base, and proceeded to examine its effect, impact, and co-relation with other aspects such as marital ties, property claims, over the progeny, remarriage and divorce. The philosophy, object and justification of legal regulation of adulterous behavior of a person in society has been examined on time scale so as to make appraisal whether its retention, modification, or deletion is indispensable in the present context or otherwise. The article ends with addressing the legal dilemma of whether the legal regulation of adultery is still relevant, and, if it is, to what extent? The conclusion in this respect is self-explanatory.

**KEYWORDS:** Adultery, Women, remarriage, divorce, laws

## I. Introduction

The Supreme Court has issued a number of significant rulings over the past few months, including ones on the Sabrimala temple access issue, the antiquated adultery statute, the criminalization of politics, and the prohibition of associating Aadhar with services offered by for-profit organisations. The Supreme Court's hearings have also been live webcast, a first. We shall look at the legal defences offered for and against adultery in this cover story. In *Joseph Shine v. Union of India*<sup>1</sup>, which was decided on September 28, 2018, adultery as a crime was abolished after a petition against it was submitted. The petition contested the legal definition of adultery as it appears in Indian law. Other than India, many other nations have adopted a legal stance on adultery. In many states of the USA, adultery is a crime. Adultery is punishable by law in Pakistan, the Philippines, and Taiwan in Asia, however it is not in South Korea, Bhutan, Sri Lanka, or China.

Adultery is prohibited in monogamous communities, where marriage is viewed as an exclusive partnership between two people. This does not imply that people will not engage in extramarital affairs in spite of this moral disapproval. Therefore, the question of whether "adultery is a crime" arises between the moral and legal perspectives on adultery. Should men and women be treated differently by the law depending on what it considers to be a crime punishable by law? We will talk about how adultery is seen legally and according to gender in this cover story. The main problem is the claim of discrimination that the adultery statute upheld, and we'll also analyse the justification the court used to declare adultery to be a crime in India.

We'll start with a brief review of adultery from a legal standpoint, including how the legal system has defined adultery and how the Supreme Court has addressed it in the case at hand. It will cover the inconsistencies in the way that the government and the court interpret the term "adultery."

They also included two questions in their questionnaire that addressed the idea of decriminalising the service. Should adultery be criminalised at all? Should the offence be restricted to men alone, as in Section 497 of the Indian Penal Code? The fact that the law commission did not completely rule out the possibility of decriminalising the offence is evidenced by the fact that they discovered "opinion to be more or less equally divided between those who favoured the total abolition of the offence, those who favoured retention of Section 497 without change, and those who would have the section modified so as to make the errant wife punishable along with her paramour."

It is significant to note that Justice Anna Chandy, India's first female high court judge, cast a dissenting vote in favour of the repeal of Section 497, arguing that "it is the right time to consider the question of whether the offence of adultery, as envisaged in Section 497, is in tune with present-day notions of a woman's status within marriage."

## **II. Adultery Law issues in the past**

Being such a divisive topic, adultery has garnered interest from many sectors of society. We would concentrate on how the Government and the courts have viewed it.

Three different challenges of the rules' constitutionality as being discriminatory were brought before the Supreme Court, which three times maintained the requirements. According to the government, decriminalising adultery "would undermine the sanctity of marriage and the fabric of society as a whole." However, because a recent ruling ruled it to be unconstitutional, adultery is no longer a crime; instead, it can only be used as a reason for divorce.

<sup>1</sup> Criminal Writ Petition No. 214 of 2017

**(i) Indian laws against adultery**

Here is the plain wording of both sections: Section 198 of the Criminal Procedure Code and Section 297 of the Indian Penal Code.

**S 497: Adultery:**

Without the consent or connivance of the other man, a person who engages in sexual activity with a person who is and whom he knows or has reason to believe to be the wife of another man, and which does not constitute rape, commits the crime of adultery and is subject to a fine, either type of imprisonment for a term that may reach five years, or both. In this situation, the wife is not subject to an abettor penalty as well

**S. 198: Charges for crimes against marriage:**

(1) An offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) may only be brought before a court upon the complaint of a party who has been wronged by the offence:

Providing that...

(2) No person other than the woman's husband will be deemed to be harmed by any offence punishable under Section 497 or Section 498 of the said Code for the purposes of Subsection (1):

According to the law, adultery is the act of a married man engaging in sexual activity with a married woman while knowing that she is the wife of another man and without the other man's agreement. Then, that man's action did not constitute rape but rather the offence of adultery, for which the sentence might have been increased to five years in prison, a fine, or a combination of the two. What matters is that, with the woman's husband's permission present, this act was not unlawful. If the man had relations with unmarried women, divorcees, or widows, this behaviour could not be considered adultery. It's important to note that a woman could not file a criminal complaint against her husband for adultery and could not be found guilty of the crime. Only the woman's husband could start the process; if the husband wasn't present, his nominee could.

Both of the clauses were contested in the petition, which also sought to declare them to be unconstitutional.

(i) The Apex Court heard three cases involving adultery.

Three cases involving the arguments against adultery were brought before the Supreme Court, namely *Yusuf Abdul Aziz v. State of Bombay*<sup>2</sup>, *Sowmithri Vishnu v. Union of India*<sup>3</sup>, and *V. Revathi v. Union of India*, but never once was it requested that the sections (mentioned above) be declared unconstitutional, as was done in *Joseph Shine*



*v. Union of India*<sup>4</sup>.

Yusuf Abdul Aziz, who was accused of adultery and was on trial against the State of Bombay, contested Section 497 of the Indian Penal Code on the grounds that it violates the Constitution's Article 14 (Right to Equality). He petitioned the Supreme Court after his appeal in Bombay was denied. By thinking that adultery could only be committed by a man and by the need that the adulterous wife not be penalised even as an accessory, he claimed in SC that the S 497 violates the notion of equality entrenched in Articles 14 and 15. Some claim that this enables women to engage in adultery. The court did, however, rule that:

"We are unable to read any such restriction into the provision; and we are also unable to agree that a provision that forbids punishment is equivalent to a permit to commit the offence for which punishment has been forbid."

Discrimination based on religion, ethnicity, caste, sex, or place of birth is prohibited under Article 15. The government may create unique measures for women and children under Article 15(3). The court unanimously decided, through Vivian Bose J., that Article 15(3) of the Constitution protects the exception offered by this section. This was the issue raised by Article 15(3) in this case.

In the second case, *Sowmithri v. Union of India*<sup>5</sup>, it was argued that Section 497 creates an illogical distinction between men and women in the following ways, which are in violation of Article 14 of the Constitution:

- (i) Grants the husband the authority to bring charges against the adulterer but does not grant the wife the same authority to bring charges against the woman her husband had an affair with,
- (ii) Does not grant the wife the right to bring legal action against her husband for having an extramarital affair,

The husbands have a free licence under the law to have extramarital relationships with unmarried women because (iii) Does Not Include Cases Where The Husband Has Sexual Relations With Unmarried Women In Its Ambit.

One concern that was raised was whether a similar argument could be made by a man that this law also offers licence to women when the third argument was advanced in the Sowmithri case of the husband utilising this part as a licence.

<sup>2</sup> State of Bombay v. Yusuf Abdul Aziz, 1951(53) Bom LR 736

<sup>3</sup> A4 1985 Supplement SCC 137

<sup>4</sup> 1988 SC 835

Returning to the Sowmithri case, the court rejected the contention that S 497, which prevents women from bringing any legal action for adultery, violates Articles 14 and 15 of the Constitution for Women.

The third case is *V Revathi v. Union of India*, where the petitioner made the same claim as in Sowmithri, which we previously discussed, that the wife of an adulterous husband is barred from punishing her husband, but she also did not overlook the claim that the wife is also barred from bringing any legal action against the husband.

The court took into account S 497 and 192(3): referred to as a "legislative bundle" created to "deal with the offence committed by an outsider to the marriage unit who invades the peace and privacy of the matrimonial unit and poisons the connection between the two partners composing the matrimonial union. The two spouses are not given the means to use the criminal law as a weapon against one another.

The fact that the sanctity of marriage cannot be preserved by the prosecution of the outsider was a significant topic that was underexamined. The marriage between a husband and wife suffers after an act of adultery, and punishing the outsider is not the answer. Does it save the marriage, is the question that arises. The next line of action in such circumstances is to either try to make things right or to file for divorce with infidelity as the basis.

In *Joseph Shine v. Union of India*, arguments were made.

In the case *Joseph Shine v. Union of India*, for which judgement was reserved, the Apex Court invalidated the Adultery law. When a judgement is of public importance, it is reserved, meaning it won't be made public for a short period of time. In this instance, three petitions were presented. By Adv. Adv. Kaleeswaram (on behalf of Joseph Shine), Meenakshi Arora (on behalf of Partners for Law and Development), and Adv. Jayana Kothari (who is acting as a witness for the Vimochana trust). We shall address the frequent criticisms that have been voiced in these three.

(a) Representing the Petitioners

These three general objections to India's adultery laws were raised in three petitions:

- A violation of the Constitution's Articles 14 and 15.
- Privatization Infracton
- Marriage is sacred
- Articles 14 and 15 of the Constitution are breached, according to the petitioners, because adultery is solely defined as involving extramarital encounters involving married women and married men. The contested Section discriminates against one spouse who engages in an extramarital relationship based on that spouse's sex.

Privacy Invasion: When relationships between the parties are founded on mutual consent, adultery laws invade the private lives of those involved. Since the Puttuswamy ruling, privacy has been acknowledged as a basic right, and criminalising someone for engaging in a consenting adult relationship constitutes an infringement on that right.

- Sanctity of Marriage: The petitioner referred to the question of "what is sanctity of marriage" and "what is capable of destroying it" as dealt in previous judgement by Apex Court in Independent Thought v. Union of India where it struck down marital rape with a minor in order to refute the government's claim that "decriminalisation of adultery will erode the sanctity of marriage and of society at large."

In that instance, the Union of India argued the same thing, claiming that criminalising marital rape of minors would undermine marriage sacredness. According to the court, "The argument that "Marital rape of a child has the potential to destroy the institution of marriage cannot be accepted." The existence of divorce and judicial separation laws was argued in court. Although divorce and legal separation can both damage a marriage, neither of them has the power to end the "institution" of marriage or even the marriage itself. Although they both end in the dissolution of the marriage, this does not mean that marriage as a social institution is in danger. (Page 17 of Adv. Jayana Kothari's petition)

Additionally, that case invalidated marital rape with a minor by citing Articles 14, 15, and 21 of the Constitution—arguments that were also made in this case.<sup>6</sup>

<sup>6</sup> Union of India Counter Affidavit

#### (a) Speaking for the Respondents

In the current case, the government submitted a rebuttal affidavit in which it claimed that decriminalising adultery would damage the sanctity and loosen the marital bond<sup>6</sup>. However, in addition to stressing how decriminalising adultery would affect marriage, the government also needed to address its claim that the integrity of the marital tie would be damaged. Furthermore, there was no evidence to support this claim that decriminalising adultery would have any negative effects on marriage purity. In India, marriage is a public affair, so the government's Additional Solicitor General (ASG), Pinky Anand argued that the issue of adultery is a public issue as well. However, Justice Indu Malhotra questioned how a relationship between two adults, which is a matrimonial dispute, could be a crime against society.<sup>7</sup>

The decriminalisation of adultery was sought after because an act must be against society and have a negative impact on society in order to be declared a criminal offence. On the other hand, adultery solely affects and includes people and their families. Even the presence of family is insufficient to support restrictions on the family's private life.

This brings up a different topic, marital rape, in which both the sanctity of marriage and privacy have been questioned. It would be interesting to know if the government would bring up the sanctity of marriage once more if a petition opposing marital rape were to be brought up in the future. The topic



of marital rape has long been a source of contention. Because criminalising marital rape would spark much angrier debates and resistance than laws against adultery, the government has decided to avoid it.

The issue may be raised in light of Justice Chandrachud's statement that "One retains sexual autonomy even after marriage; the right to say "No" is not forfeited," which was reiterated in his ruling.

<sup>7</sup> Chandrachud. J: SC Reserving Decision. On September 27, 2018, a citation was made from <https://www.livelaw.in/adultery-affects-sanctity-of-marriage-asg-what-is-the-sanctity-when-the-husband-gives-consent-for-intercourse-asks-chandrachud-jsc-reserves-judgment>

### III. Joseph Shrine v. Union of India ruling

The Supreme Court bench, which includes Chief Justice of India Dipak Mishra, Justices A.M. Khanwilkar, Chandrachud, Nariman, and Indu Malhotra, unanimously upheld this decision, which unequivocally found India's adultery legislation unconstitutional.

#### (a) Reversing prior determinations of adultery and acknowledging discrimination

It acknowledges the "inherent double standard and treatment of women as men's property in it" that the adultery law has historically held. A husband's exclusive sexual access to his wife was violated by infidelity in Greco-Roman society, and the law permitted actions of retaliation.

It acknowledged the underlying prejudice against women in the sections and ruled that the adultery laws were against Articles 14, 15, and 21 of the Constitution. Additionally, it expressly rejects the judgements in Sowmithri Vishnu, Rewathi, and

W. Kalyani. The ruling notes on page 15 that "Revathi, like Sowmithri Vishnu, does not lay down the correct legal principle."

The court agrees with the petitioner's contention that women are treated as "chattel"s in adultery statutes because they are victims rather than free agents. Additionally, it declares that the wife is not the offended party and that the husband is free to treat her whatever he pleases.

According to the judgements in these cases, Sowmithri and Revathi were imprisoned on the basis of a formal sense of equality, which is distinct from a substantive notion of equality.

In that it promotes the idea that women are unequal partners in marriages and are unable to freely consent to a sexual act under a legal system that views them as the sexual property of their spouse, Section 497 is a denial of substantive equality. (Page 75)

It has been said that the verdict in Revathi is a repetition of **Sowmithri Vishnu**.

If adultery is considered a crime, it is acknowledged that the state has extensive power because it is stated that "Treating adultery as a crime, we are disposed to think,

would tantamount to the State entering into a real private realm." It admits that using punishment to make someone commit is ineffective. It also acknowledges that adultery "may not be the cause, but rather the result, of an unhappy marriage in certain cases"(Page 56).<sup>8</sup>

This understanding is welcome because it acknowledges the different dynamics that marriage as an institution involves in and of itself, where infidelity cannot always be viewed as immoral.

Furthermore, all four different judgements have used *K.S. Puttuswamy and others v. Union of India* 8 in order to underline "Privacy as a Facet of Article 21 of the Constitution" and restate this point.

In this case, the court's decision is based on the *Puttuswamy* judgement, which was rendered in that case and said that a privacy invasion must be justified under three conditions:

(i) Legality

(ii) Need as determined by a valid state interest, and

(iii) Proportionality, which guarantees a logical connection between the intended result and the method used.

Section 497 also "fails to meet the threefold requirement as it stands today and should be struck down," according to the legal scholar. Now, since *Chandrachud J.*, this acknowledgment may be used in a future debate on marital rape. also claims that

"The belief that a woman gives away her sexual agency when joining a marriage is implicit in attempts to prioritise the faithfulness of women in marriage. It is disrespectful to a woman's freedom and dignity for her to consent in advance to having sexual intercourse with her husband or to refrain from having sexual relations outside of marriage without her husband's consent. Such an idea has no place in a constitutional system.

<sup>8</sup> (2017)10SCC 1

This hypothetical situation may offer hope for the ongoing legal battle against marital rape in India. It blatantly refutes the long-held belief that women's "implied consent" in marriage serves as the basic foundation for Indian law's rejection of marital rapes as a crime.

#### IV. Conclusion

The government's argument that decriminalising adultery will undermine the sacredness of marriage may be a reflection of societal attitudes. The moral code that underpins civilization is subject to change over time and, in some cases, must. The breach of Articles 14, 15, and 21 that the adultery statute was causing has been acknowledged as a result of the adultery act being declared to be unconstitutional.



It is important to note that if reconciliation fails, there is a civil remedy (divorce) available, which has been acknowledged in this judgement, therefore it is not conceivable to label a consent-based act as illegal.

The government claimed that the "sanctity of marriage" would be compromised if adultery were made a civil offence, but the real question that needed to be addressed was whether doing so would come at any expense. Is the sacredness of marriage significant enough to justify tolerating the infringement of fundamental rights inside it? At least in terms of adultery legislation, the Supreme Court has ruled against.

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## REFERENCES

1. India Penal Code 1860
2. Code of Criminal Procedure 1973
3. Hindu Marriage Act 1955
4. Divorce Act of 1869
5. Dissolution of Muslim Marriages Act 1939
6. Parsi Marriage and Divorce Act 1936
7. Law Commission of India, 41st Report 1969
8. Law Commission of India, 42nd Report 1971
9. Law Commission of India, 154th Report 1996
10. Law Commission of India, 156th Report 1997