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Adultery Laws in India

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ABSTRACT

“Adultery is not necessarily the cause of an unhappy marriage, but often it is the result of an unhappy marriage”².

Adultery can be described as the act of a married person having a sexual relationship with a person besides the person's wife or husband of the opposite sex. Personal laws all over the world decry adultery and this is considered as a ground for divorce or separation. Even the Hindu Shastric laws, which did not allow for divorce, unambiguously rejected adultery. Adultery is established as being one of the reasons for divorce or judicial separation under present Indian personal laws³. The laws dealing with adultery were enforced by the Indian Penal Code in 1860 and its abolition was a big step towards gender neutrality. However, there still remains some laws which state otherwise but the judgement shows we're moving towards the right direction. An Indian lady, according to Lord Macaulay, is a holy cow who could never do any wrong. The man is the one who does all the wrongdoings. Besides, he believed that women could not be prosecuted for committing adultery as either this will not only be a challenge to women's holy sanctity, but it would also lead to a collapse of the institution of marriage, leading to general family disorganization⁴.

Keywords: Adultery, India, Gender, Equality, Criminal.

The word Adultery comes from the Latin word ad-ulterare. Basically, adultery involves sex between a person who is married and someone who is not their spouse. An adulterer is a married man who's had sex with a woman who is not his wife, whereas an adulteress is an adulterer of another man.⁵ 1860 was the period when women in India were regarded as the property of men, the Indian Penal Code was framed by the British, and the offense of adultery granted under s 497 is a direct reflection of this. One of the most contentious judgments passed in India in the past decade has been the adultery judgment passed by the Supreme Court of

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² De, Apratim. “Critical Study on Decriminalization of Adultery.” ILSJCCL, Indian Legal Solution Journal of Criminal and Constitutional Law, 15 Jan. 2019, journal.indianlegalsolution.com/2019/01/15/critical-study-on-decriminalization-of-adultery%EF%BB%BF-apratim-de/.

³ Gupta, Shivi. *Adultery and Divorce - Adultery Divorce Laws in India*. 30 June 2018, blog.ipleaders.in/adultery-and-divorce/.

⁴ *Supra* Note 2

⁵ Kanchan, T., & Nagesh, K. R. *Adultery and the Indian law*. Int J Med Toxicol Legal Med, 10(2), 26-29. (2008)

India on 27 September 2018⁶. Section 497's Strike down was a landmark step forward towards India's feminism movement. The laws of adultery originating through colonial times reflect how they were to subjugate women and reinforce patriarchy. However, with time the amendments of these laws show we are moving in the right direction.

In general, men have set a much higher level of sexual ethics for women in all structures than they even were ready to embrace, and Hindu society was no exception to this. They treated men who were accused of adultery with absolute leniency. Under Section 13(1) of the Hindu Marriage Act, 1955, adultery as a basis for divorce in India has been described as the act of having consensual sexual relations with someone who is not the respondent's spouse. Therefore, demonstrating that she/he was still married to the respondent and also that the respondent had consensual sexual relations with a person apart from him/her becomes important for the applicant.⁷ Under Shastric Hindu law although divorce was not accepted, in the most unambiguous words, adultery was damned long before. However, although adultery is no longer a punishable offense a solid ground for divorce, in a male-dominated society that we currently reside in where women are still discriminated against, in isolated rural communities, both polygamous marriages and child marriages also occur either due to misunderstanding of the law or because of long-standing religious customs results in the mockery of the Supreme Court and its judgments.

Adultery is a serious sin according to the Quran, and cannot be treated with the penalty of death, but they must earn one hundred lashes and be stoned to death. Fortunately, since the Constitution calls for the humane treatment of its people, this is no longer tolerated.

Christianity firmly forbids marriage which has been branded by all Prophets as impure, lustful, etc amongst other things, but having committed an adulterous act is deemed to be equal to homicide in Christianity. The claim to file a divorce for the commitment of adultery is extremely gender-discriminatory since the husband just needs to prove adultery upon on part of the woman to seek a divorce, while the wife must prove an additional marital crime such as cruelty, desertion, insanity, etc along with adultery. Thankfully, with respect to the case of *Ammini E.J. v. Union of India*⁸, The Kerala High Court ruled that a Christian woman who has to prove the crime of cruelty or desertion combined with adultery is violative of Section 21 of the Indian Constitution⁹ and has hence been scrapped and brought in a sense of equality.

⁶ Tamoghna Chattopadhyay, Siva Mahadevan, Karthik Chandrashekhar Pingle, *Adultery Judgement and its impact in India*, IJSRP 9(12) (2019)

⁷ *Supra* Note 3.

⁸ *Ammini E.J. And Etc. vs Union Of India (Uoi) And Ors*, AIR 1995 Ker. 252

⁹ *Supra* Note 3.

Throughout the history of adultery, one general, if not universal, the feeling has been found that in any form of culture there are forbidden norms in one or the other form.

It should be mentioned that for all adultery-related cases, there is no firm law that can be widely used. The court has the power, on its own merits and demerits, to handle each case.

The birth of adultery came not from the Common Law of England, but through the Bible. The Bible specifically mentions that any male who engages in sexual intercourse after marriage with any other woman is a sinner. The Adultery Statute was then approved in 1860, when the British Crown controlled India, as the British had followed the concept of the Bible in the Indian Penal Code.¹⁰ Section 497 has been in effect for 158 years and society has embraced it. Although the Supreme Court previously ruled that adultery can be seen as a basis for divorce, its position has now shifted significantly, which seems to contradict its judgment when the court appears to accept adultery as a grave sin.

Women were seen as the property of men by the statute of adultery and it was struck down for treating women as possessions rather than human beings. And the culture in which we exist has two sets of legal norms for determining sexual behaviours; one for males and one for females, granting a woman unrealistic values and confining her to a restricted field of action by an assumption of obedience. Since it damages the integrity of women, it regards the wives as the chattel of the husband and embarrasses their personal independence, the provision of adultery is abolished.¹¹

A man and a woman must be treated fairly, equal justice requires the right to select one's companion, and when the woman is openly able to have her personal autonomy, dignity and independence can be recognized. When talking about the purposes that adultery wanted, women's gains were not targeted at all. When the mischief rule is enforced in the case of adultery, the fundamental penal code determines the collection of offenses to deter mischief; the history of adultery shows it's for the benefit of the husband, for him to gain control over his wife's sexuality. It was supposed to deter the woman from expressing her sexual integrity. Therefore, Sec-497 was never meant to support women.¹² The provision could even actually be shown chained around stereotypical thoughts towards women and their subjugated role in marriage. It reveals the patriarchal foundations of the law of adultery and severely reduces the sexual autonomy of women who are given a subordinate role in marriage.

¹⁰ *Supra* Note 6.

¹¹ Bhatiani, Sheetal, "*DECRIMINALISATION OF ADULTERY: AN INSTANCE OF CONSTITUTIONALISING OF CRIMINAL LAW.*", (2018), NLUD, <http://14.139.58.147:8080/jspui/handle/123456789/326>

¹² *Supra* Note 11.

Adultery was criminalized in ancient times since polygamy was widespread and there had been no private laws to take care of it so adultery was classified as a prohibited sexual behaviour on moral grounds. The decriminalization of adultery in no manner affects the sanctity of marriage, as other laws are in place to enforce people's private sexual affairs. There is no justification for the state to meddle in private affairs. Adultery should also not be viewed as a public mistake, but rather as a private mistake and an individual's sexual choices should never be the government's problem.

In my personal opinion adultery is definitely not a crime. Yes, cheating is morally and ethically wrong and there's no law that can hold you guilty, but staying in an unhappy marriage may lead to you to endorse yourself in an extramarital affair. As one of the juries of the bench said it's not an actual consequence but a result of an unhappy marriage. Although it should be noted that this will have an impact on the institution of marriage and it is still a legitimate ground for divorce. From the view of a man, the Adultery Act had a cruel aspect. It discredited the importance of women and thus made them puppets in a man's life. Therefore, I fully endorse the Supreme Court of India's decision, but this will require some time to change when it comes to our society.

The abolition of Section 497 of the IPC, as an unconstitutional colonial provision by the Supreme Court in *Joseph Shine v Union of India*¹³. This is a big step towards a culture that is gender-neutral. Section 498 of the IPC, however, allows for the punishment of a man for enticing or separating a married woman from the custody of her husband. Section 497 and Section 498 of the IPC are remarkably close and the latter also makes it possible to sue a man for partaking in consensual sexual relations with the wife of somebody else.¹⁴ In *S Varadarajan v State of Madras*¹⁵. The Supreme Court recognized that Section 498 was enacted to promote a husband's rights over his wife. The above provisions are the product of an ancient and patriarchal approach that promotes the subjugation of women and the dominance of husbands in marriage. Joseph Shine indicates that the judiciary is geared toward liberalism, in which it aims to remove the sins of the past and lead society towards a stronger and fairer society.

History supports the notion that women were viewed as men's property and that sexual equality for women was secondary to men's freedom. The rule of adultery in India, however, is based

¹³ Joseph Shine V. Union of India (2018) 2 SCC 189

¹⁴ Agarwal, Varun, "A Gender-Neutral Society & Effective Decriminalisation of Adultery: The Unaccomplished Feats of India.", The RMLNLU Law Review Blog, Dec 2020, rmlnlulawreview.com/2019/01/04/a-gender-neutral-society-effective-decriminalisation-of-adultery-the-unaccomplished-feats-of-india/.

¹⁵ Varadarajan v. State of Madras, A.I.R. 1965 S.C. 942, 947.

on the caste-based sense of the conventional conservative property-oriented family philosophy and sexual mores that are 150 years old. It is also based on certain obsolete and baseless stereotypes regarding the spouses' sexual identity and unequal shared marital rights and responsibilities. It specifically aims, in the final result, to secure the interests of the husband and not of the wife.¹⁶ But with time the society has evolved and so has the law, or at least it's moving in the right direction. With social attitudes shifting, the position of the judiciary in constitutional interpretations and amendments is very important. Various Acts are passed to free women from the formerly ancient regime of isolation and subjugation and to ensure that in any walk of life they stand equal to men. Given that women are socially deprived and underprivileged compared to men, in most parts of India, their status certainly needs to be improved. And for a fair and just future, oppressive statutes need to be updated consistently. In India, until 1976, it was only when the partner was "living in adultery" that a petition requesting divorce on the grounds of adultery could be lodged, but now a petition can be filed on the grounds of adultery even when there was a single occasion of consensual sexual activity outside of the marriage.

¹⁶ Sharma, D., & Sharma, N, *Critical Analysis of Law of Adultery in India*,1(II) JMSJOURNALS, (2015).