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## Adultery and its Constitutionality

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### Abstract

Marriage is deemed essential for moksha under the Hindu religion. Marriage is also an essential thing for running descent or a legitimate generation. Marriage is a sacred union in Indian society. Marriage is based on the respect and trust of the spouses when any spouse commits sexual intercourse outside the marriage it breaks the sacredness of the marriage. Instead of being the cause of failed marriages, adultery was a symptom. The legality of adultery is unknown to many individuals. Adultery is characterized as a married person's willing sexual activity with a partner other than his or her spouse. In different countries and under different laws, adultery is defined differently. Indian Criminal Code, 1860, Section 497: Adultery is a crime in India; as a result, laws are connected to this section. I will now discuss the origins of the notion of adultery, how it has been used throughout history and some of the prior judgments made in this area. Religion-specific punishments apply when adultery is committed. After this, the influence of this legislation on society and its decriminalization are two factors that are not as beneficial to society. Finally, the most recent assessment of whether this law is beneficial to society or not may be learned by reading this.

**Keywords:** Adultery, marriage, sexual intercourse, legislation, discrimination

### Introduction

Marriage is an institution that strongly depends on spouses' dedication, fidelity, and loyalty. Marriage has been elevated to a hallowed role across all nations and religious traditions. As a result, if either spouse engages in adultery, they are not only breaching their pledges to one another but are also jeopardizing the marriage's purity.

The guy who performed the act of adultery was earlier found guilty of the crime, and it was declared that the married lady was the hapless victim of adultery, free from "criminal culpability". Also, it was asserted that the adulterous guy was disloyal to the married man and that a sexual relationship was exclusively his responsibility.

However, the Supreme Court abolished adultery because it violates women's fundamental rights and views them as the husband's personal property after Joseph Shine filed a Public Interest Litigation under Article 32<sup>[2]</sup> of the Indian Constitution challenging the constitutionality of the offense.

Even though adultery is no longer a crime and is still grounds for divorce under both Hindu and Muslim personal law, the purpose of this paper is to legally inform the spouse about the legal remedies that are available to him or her and the existence of legal procedures in India that could be taken against his or her spouse if they commit the offense.

### Adultery definition

The Latin word "Adulterium," which refers to extramarital sex and is deemed unacceptable on social, religious, moral, or legal grounds, is the source of the English word "adultery". Adultery was described as consensual sexual activity between a married person and someone other than their present spouse or partner in the Merriam-Webster dictionary.

### According to religion, adultery

India is a nation renowned for its variety and togetherness. The religious emotions of all peoples are equally honored in our secular nation. Every religion has unique principles and goals. Nonetheless, nearly every faith is particularly judgmental of adultery in this regard. Although many religions hold diverse perspectives on adultery, the fundamental idea is universal. Adultery is viewed as a sin in every religion. Nonetheless, different religions may have different methods of punishment. Given that it offends the sacred sensibility of every faith, it is seen as delinquent conduct.

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It has always been viewed as a sin, not just from a religious or legal standpoint but also from a spiritual standpoint.

According to traditional Hindu viewpoints, adultery degrades family values and leads to social unrest. Hinduism views marriage as a sacrament that lasts for seven subsequent births and requires the fidelity of both partners. It is assumed that they only have sexual contact with their spouse.

Fornication, adultery, and rape are all prohibited acts in Islam and are regarded as Zina. Zina is charged with a crime in the Quran because of the sanctions set out by God. The penalties can include crucifixion, hand amputation, public whipping, and public stoning to death. According to the Quran, a person who commits adultery shall be death by stoning.

As per Bible, adultery is a sin that both males and females should die for committing it. Adultery is viewed as immoral, unethical, and bad for society.

According to Buddhism, having sex outside of marriage is a sin that causes further suffering. The third of the five essential commandments from which one must abstain in Buddhism is adultery.

Judaism, one of the oldest religions, stipulates that both adulterers and adulteresses are subject to the death sentence.

### **Sections 198(2) of the CrPC and Section 497 of the IPC's constitutionality**

#### **Section 497 of IPC -Adultery:**

The crime of adultery entails engaging in sexual activity with a person who is and whom he knows or has reason to believe to be the wife of another man, which does not amount to the crime of rape. This activity is punishable by either type of imprisonment for a term that may extend to five years, by a fine, or by both. In this case, the wife's complicity won't result in punishment.

#### **Section 198 CrPC-Prosecution for offenses against marriage**

1. According to Criminal Procedure Code 1973 Section 198, no Court shall take notice of a crime punishable under Chapter XX of the Indian Penal Code (45 of 1860) unless upon a complaint submitted by any person aggrieved by the offence.
2. No person other than the woman's husband shall be considered to have been injured by any offense punishable under Section 497 or Section 498 of the said Code for the purposes of subsection (1); provided, however, that in the husband's absence, someone who was responsible for the woman's care at the time the offense was committed may, with the Court's permission, file a complaint on his behalf.

Under section 497 of IPC 1860, only a male who commits sexual intercourse with a married woman can be prosecuted by that woman's husband but if the husband gives consent and connivance to the act then he cannot prosecute that male.

#### **Issues/questions**

1. The issue was whether this provision is a violation of Articles 14 and 15(1) of the Indian constitution.
2. Whether this provision is a violation right of individual sexual autonomy and individual identity as per Article 21 of the Indian constitution.

The first time question related to the constitutionality of adultery was raised on the ground of violation of Articles 14 and 15(1) of the Indian constitution before the hon'ble supreme court (4-judge bench) in the year 1954 in the case of Yusuf Abdul Ajj Vs Bombay, it is held that it is not an unreasonable classification as it is a special provision for woman and is protected under Article 14 r/w article 15(3) of Indian constitution.

Again the same question was raised before the hon'ble Supreme Court (3-judge bench) in the year 1985 in the case of Sowmithri Vishnu vs Union of India, hon'ble Y.V Chandruchud reiterated the same point as Yusuf Abdul Ajj Vs Bombay.

The same points were reiterated in the case of W. Klyani Vs State, Through the Inspector of Police 2012 Supreme Court. In the year of 2018 again the question was raised whether section 497 IPC is against the essence of ARTICLES 14, 15(1), AND 21 of the Indian constitution before the 5 judge bench in the case of JOSEPH SHINE V. UNION OF INDIA, Chief Justice Dipak Misra delivered the judgment and held that Section 497 of IPC and 198(2) of criminal procedure code is unconstitutional as it is against the essence of Articles 14, 15(1) and 21 of Indian constitution.

#### **The principles behind the judgment are the following:**

1. It is violate of Articles 14 and 15(1) and is an unreasonable classification.
2. Every person has his or her sexual autonomy and that freedom does not get restricted merely because one has gotten married. A woman has the freedom to choose her sexual partner even after marriage whether that person is her husband or any other person. Even after her marriage, she retains her identity and her sexual autonomy.
3. In section 497 IPC it is provided that if adulterous intercourse has been done with the consent and connivance of the husband then the accused will not be liable. Thus it appears that the woman is considered to be chattel (property) of the husband i.e. if he consents then she can get into an adulterous relationship otherwise not. But a woman has her autonomy and therefore cannot be considered a husband's property.
4. An adulterous relationship cannot lead to criminal liability but is a civil and moral wrong. Still affected party can claim divorce on grounds of adultery as the relationship of marriage is based on trust and oneness. When any spouse made any illicit relationship outside the marriage it shattered the soul and mind of the other partner it may be causing nervous shock, so the affected party can claim compensation under TORT.

#### **Suggestions**

Because the IPC is so old, we may alter anything that violates our fundamental rights. Through my study, I learned what adultery actually meant under the law. Prior to the ruling in Joseph's case, it was seriously unlawful. Now that adultery is no longer a crime, equality must be protected. But consider the section 497 offense if it applies to both men and women.

That situation will also play out because we are only allowed to bring lawsuits against third parties and cannot file lawsuits against any spouses. There are many issues that are highly contentious, but I believe that the IPC has to be amended to include an offense for adultery. If either spouse

commits adultery, that spouse will be held legally responsible for the consequences, not the third party.

### Conclusion

The decision in this case is important for both the preservation of women's matrimonial rights and any potential follow-up effects. In the context of family and home, all the judges concurred that a woman had the right to autonomy, physical integrity, and individual choice. The decision to legalize adultery raises concerns about the legitimacy of two more well-known statutes that restrict the rights of women. One of them is the restitution of conjugal rights, which compels a spouse who has left the other home to return against her choice; the other is the exemption for marital rape, which states that rape committed within the context of a marriage does not constitute rape in terms of criminal law. And if a proof is shown, it might be considered aiding in the suicide of any disgruntled spouse who kills themselves as a result of a life partner's adulterous relationship. Simple adultery cannot be a criminal unless it falls within Section 306.

Marriage is not a common type of contract, despite being both a civil contract and a sacrament. So, the decision of whether to punish one spouse if they engage in adultery should be left up to the husband and wife. Making provisions for the regulation of a private, personal transaction like marriage under criminal law is unjustified.

Even if adultery is a basis for divorce, the parties must come to an agreement and avoid criminal prosecution since it is impossible for the party who committed adultery to receive justice through criminal prosecution. Because of this, adultery is no longer a crime in the majority of western nations, and even in those where it is, the prosecution is not always the best option.

The behaviors of the men engaging in sexual relationships with married women were socially acceptable at the time when adultery was recognized as an offense under the IPC, leaving the married ladies empty of love and devotion. Moreover, there were no defined personal or marital laws during the period. This is the reason that adultery was made a crime in order to safeguard the interests of women. Despite the fact that the clause was intended to safeguard women's interests, it did not grant them the right to complain about their unfaithful spouse.

Only in 1955 did the Hindu Marriage Act become law and include adultery as a basis for divorce. As time has passed and monogamy has become more common, women have started to carve out separate identities in society and are no longer seen as property. As a result, the necessity to criminalize adultery was gradually becoming obsolete and serving the opposite of the intended goal. Hence, the Supreme Court of India's decision to decriminalize adultery is commendable and will serve as the cornerstone for preserving women's autonomy and physical integrity in the future.

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