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Adultery as an Offence: Elements and Decriminalization

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ABSTRACT

In monogamous societies, where a nuptial is outlined as an exclusive affiliation between two individuals, adultery is considered as unacceptable. Between the legal and ethical positions of adultery, the issue of whether or not adultery is a crime arises. The following research paper explores the legal and gendered interpretation of adultery, as well as analyses the inferences drawn by the court to abolish adultery as a criminal offence in India. The whole idea of this law was meaningless and it should be limited to be a ground for divorce because state should have no right to control someone's personal life the law was affecting personal liberty of a man committing Adultery and the woman giving her consent to him, it should be their own choice that who they want as a partner in their life and husband is not the owner of sexuality of a woman. This law encouraged gender biasness and made it look like that wife is answerable to her husband if she is having sexual relation with someone else, decriminalising of adultery was mandatory as the law did not support personal liberty and hence it was a contradicting law. The author have discussed about how it evolved and how it was important to decriminalise adultery as a criminal offence and it should only be limited to being a ground of divorce.

Keywords: Adultery, Decriminalisation, Evidence, Matrimonial Offence, Punishment, Divorce.

I. INTRODUCTION

(A) Adultery

The term adultery is derived from the word “*adulterium*” of Latin language, inferring voluntary sexual intercourse between a wedded being and an individual who is not their spouse. Infidelity, as an extramarital affair, is commonly viewed as abhorrent on religious, social, legal, or moral grounds. The concept of adultery exists in numerous societies and cultures, and although the sexual activities comprising the notion vary in terms of religious, social, and legal consequences, the impression of the same is fairly comparable in certain communities such as

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Islam, Judaism, and Christianity. A solitary performance of sexual intercourse is generally adequate to represent adultery, and a significantly long-term sexual relationship is often referred to as an affair.

Section 497 of the Indian Penal Code and Section 198 of Criminal Procedure Code defines adultery as “the arrangement wherein an individual has sexual intercourse with a woman who is the wife of another man, such intercourse not amounting to the offence of rape but lacking the consent or collusion of that man, is culpable of the transgression of adultery, and shall be penalized with imprisonment.” Furthermore, in a case of this nature, the wife shall not be indictable as an abettor. To summarize, adultery is the copulation of a man with a woman who is married to another man, without the consent of her husband when such act does not count rape. The term adultery, rather than extramarital affair, entails an ethical condemnation of the act as it transmits an implicit arbitration that the deed is immoral and wrong. In India, it was considered as a non-cognizable, non-bailable illicit offence, until the pertinent law was upended by the Apex Court of India on 27 September 2018². The adultery law was first challenged in 1951 by Yusuf Abdul Aziz in a case against the State of Bombay.³ Aziz, on trial for infidelity, challenged the Section 497 of the Indian Penal Code by contending that the particular section is incongruous to Article 14 (Right to Equality) of the Constitution of India. After losing the said case in Bombay, he approached the Supreme Court, where he reasoned that the construct of equality preserved in Article 14 and 15 is desecrated in the S 497, by conceiving that the transgression of adultery could only be perpetrated by a man and by the arrangement that the adulterous wife be not penalized even as an aide. While some contended that this provides a license to women to commit adultery, the court declared that no such constraint is being read into the clause, nor is there an agreement for a provision that prohibits punishment or is equivalent to a license to commit the felony of which penalty has been verboten. Although Article 15 of the Indian Constitution deals with Prohibition of Discrimination based on religion, race, caste, sex or place of birth, Article 15(3) authorizes the government to make distinct provisions for children and women, and was debated in the case, concluding with a declaration through Vivian Bose J that the exception provided by the following section is safeguarded by Article 15(3) of the Constitution.

After various attempts, in 2018, the Supreme Court of India ultimately bequeathed a historic verdict in the case of *Joseph Shine vs. Union of India*⁴ wherein it decriminalized the British

² Joseph Shine v. Union of India, AIR 2018 SC 4898.

³ Yusuf Abdul Aziz v. The State of Bombay, AIR 1954 SC 321.

⁴ Supra note 2

regal-era provision that made adultery an indictable offence under Section 497 of the Indian Penal Code, 1860.

(B) Historical Background of Adultery Laws

The laws on adultery date back to the code of Hammurabi, in which adultery was embraced in the seventh commandment. The punishment for committing the sin of adultery under this was drowning of the accused person. Adultery is a consensual sexual act between two adults where at least one of them is married to a third person. Adultery is considered wrong on moral, civil, as well as legal grounds. Adultery is seen as an offence in almost all the religious personal laws and is a reason for divorce. However, laws relating to criminalisation of adultery are seen far less than treating adultery merely as a civil wrong.

In India, criminalisation of adultery was first made known in the year 1860 under the British Raj. Adultery was not listed as an offence in the first draft of IPC released by the Law Commission of India in 1837. Lord Macaulay viewed adultery or marital infidelity as a private wrong between two parties and not a criminal offence. According to him an Indian woman is like a holy cow who can never do any wrong. It is the man who commits all the wrong and therefore, women are not to be punished for committing adultery as this would not only be a risk to the holy sanctity of the women but would also lead to breaking of the institution of marriage thereby leaving the family dysfunctional. The views of Lord Macaulay were, however, overruled by the other members of the Law Commission. Section 497 of the Indian Penal Code criminalised adultery making it a punishable offence. Section 497 is a pre constitutional law and at that time women did not have any rights independent of their husbands and were treated as chattel or “property” of their husbands. The law was derogatory towards women as it treated adultery as an injury to the husband of the women involved in adultery as it was considered as a “theft” of his property, for which he could proceed to prosecute the offender. The law objectified women. They were not treated as individuals on their own but in relation to a man.

(C) The Paradox with Section 497

Under the erstwhile segment condemning adultery, neither the husband could institute illicit proceedings against his wife who had an illegitimate relationship with another man, nor could the wife sue her husband who perpetrated the same offence with another woman. It was only the husband whose wife had been unfaithful with another man, who was considered as the victim. In the same way, it was the man who had committed adultery with another man’s wife and not the wife herself, who could be held culpable and consequently subjected to

incarceration up to five years, or fine, or both under Section 497. This reflected an abominable idea that the wife is the property of the husband and hence, she could not be physically “trespassed” upon without the husband’s consent. *This, in turn, elicits various socio-moral objections:*

- a. Primarily**, it designates that if the husband assents upon his wife engaging in sexual relations with a man not her husband, then it would not amount to a crime under this section. According to this law, the wife’s consent stood irrelevant and she could only take the aid of Section 376: Punishment for Rape, in case she had not consented to the sexual act.
- b. Next**, this segment would stand invalid if the man had sexual intercourse with a divorced or an unmarried woman. Additionally, the wife could not arraign the husband for the same. Thus, Section 497 proved to be inexcusable for both the husband as well as the wife.

(C) Decriminalization of Adultery

Due to the debatable interpretation of the law, in December 2017, the Supreme Court decided to acknowledge the public interest litigation which demanded the Court to amend or completely eliminate Section 497 in the Indian Penal Code.

In August 2018, as a conclusion of the *Joseph Shine* case, a bench of five judges of the Supreme Court overruled the previous verdicts on adultery and abolished Section 497 of the Indian Penal Code and S. 198 (2) of the Code of Criminal Procedure (1973) as unconstitutional. The decision was examined in the light of numerous sources such as the recommendations of the Law Commission, precedents of previous cases, as well as the position of adultery in other countries. The court eventually determined that Section 497 was in defilement of the Articles 14, 15 and 21 of the Constitution of India. Furthermore, the court pointed that the Right to Live with Human Dignity⁵ under Article 21 gives the right to not be subjected to public censure and punishment by the State except where absolutely necessary, deeming Section 497 as contradictory of Article 21 as well.

II. ADULTERY LAWS IN INDIA

The Section 497 of Indian Penal Code states that Adultery is a voluntary sexual intercourse among a married person and a consenting person who is not their spouse irrelevant of the

⁵ Francis Corallie v. Union Territory of Delhi, 1981 SCR (2) 516

marital status of the other person.⁶ However, adultery law in India criminalises it only when it is carried out by a married man with a woman who he knows of or has reason to understand to be another man's wife. A married man having illicit sexual relations with an unmarried, divorcee or widow woman does not come under the ambit of this law. Having sexual relations with a married woman having the consent of the husband of the said woman also does not amount to adultery. Almost all religions prohibit it and treat it was inexcusable. Surprisingly, this is not evident in the penal laws of all countries. However, the law says that it will be a ground for divorce as this act is hidden from the spouse.

For an act to amount to adultery, it must contain the following ingredients:

- (i.) There is sexual engagement between a married woman and with a man who is not her spouse;
- (ii.) The man who commits adultery and have sexual activity with the married woman should be aware of the fact that or has reason to understand that she is married to another man;
- (iii.) The sexual intercourse they have must take place without any coercion or pressure on the woman and she should consent that so that it won't be called as rape.
- (iv.) The sexual relationship should not be consented by the husband of the married woman and he shouldn't be aware about it.

Another law that deals with the subject of adultery is Section 198 of CrPC. It deals with the "person aggrieved". The husband of the woman indulged in adultery is treated as the person who is victim by the said act or in case of the absence of the husband.

(A) Criminal Procedure Code

“Section 198 - Prosecution for offences against marriage. — (1) Any Court shall not take cognizance of a crime punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person who's the victim:

(2) Any person other than spouse of the woman is not considered as aggrieved by Section 497 or Section 498 of the said Code: Provided that in the absence of the husband, some person who took care of the woman on his behalf at the time when adultery was committed may, with the leave of the Court, file a complaint on his behalf.”⁷

The offence of adultery comes under non cognizable offence as the police cannot make an arrest without a warrant and complaint must be filed by the aggrieved party. Also, it is a bailable

⁶ Indian Penal Code, 1860.

⁷ Section 198 of The Code of Criminal Procedure.,1973

offence. This offence of adultery is filed as complaint by the husband of woman with whom adultery is carried out. There can be a compromise and court can allow that if both the parties drop it.

(B) Problems with the Erstwhile Adultery Laws

1. Derogatory towards women

The Indian law on adultery is extremely sexist and derogatory towards women. It is seen as violation of one man's marital home by another, in which women are objectified as their consent doesn't matter. They are merely treated as property of man and not as an individual.

Marriage is seen as a pious institution in our society and thus preserving the sanctity of marriage is the liability of both husband and the wife, and not just one spouse. The first point of gender discrimination arises in the phrase "wife of another man". Here we don't talk of a woman as an individual but in terms of her relation to man i.e. his wife. It does not refer to the man as "husband of another woman". Women are treated as subordinate to man. Further, the law states that if the wife makes sexual relations with another married man with the consent or subversion of her husband then it does not qualify as a criminal offence. The language of this section gives the feeling that if the husband of the lady has given her consent to have relations outside of marriage then his wife's relation with a third man will not destroy the sanctity of their marital relationship which is not true.

The husband is shown as the "master" of his wife. It clearly declares that adultery is not an offence per se but is an offence only when the husband of the adulterer did not consent to it. It also states that the consent of the wife of the person convicted of adultery is not considered in deciding whether the husband has committed adultery or not.

This law is also discriminatory towards the wife of any man involved in adulterous relationship as she is not able to file a complaint against her husband for the same. Only the husband of the adulterous woman has the right to accuse the man with whom his wife had committed adultery. Engaging of a man in intercourse with an unmarried is also not considered as a criminal offence. The woman engaging in sexual activity with a third person other than her husband is exempted from criminal liability. Even though the relationship is consensual she cannot be prosecuted for committing adultery, only the adulterous man can be prosecuted.

The law does not consider the aspect of homosexuality. It only criminalises the involvement of two heterosexual people in the act of adultery. The court has decriminalised consensual non-vaginal sexual activities between adults and discussions have been carried out in the courts regarding matters like live-in relationships and secured the rights of the woman in a live-in

relationship to property of her partner. Therefore, the adultery laws should have included the aspect of homosexuality and criminalise engaging of a man in illicit relations with a married man.

Critics argue that this definition does not discriminate between men and women in holding them guilty of adultery to the controversy that this act only holds the male partner guilty of adulterous activity, which is not true because then the female will also be held guilty for having sexual relations with wife of another man but that is not the case.

2. Violation of Fundamental Rights⁸

Article 14 – Equality Before Law

Males and females are treated differently under Section 97 of IPC as women cannot prosecute their husbands for adultery nor the woman indulged in sexual activities with a married man who is not her husband subject to prosecution for adultery. No offence can be established if their consent of the husband of a woman who has committed adultery.

Article 15(1) – Prohibition of Discrimination

Article 15(1) restricts the State from discriminating only on grounds of sex. The offence of adultery discriminates between a married man and a married woman on the grounds of sex only as only the married male who has committed adultery can be prosecuted for it and not the woman with whom he has committed adultery. Only the husband of a woman who has committed adultery is considered to be aggrieved and not the wife of the man with whom she has committed adultery. She had no right to prosecute her husband.

Article 21 – Right to Life

Section 497 violates the dignity of a woman by creating undesirable distinctions based on gender stereotypes which conclude in indentation of the individual dignity of a woman.

III. ADULTERY AS GROUND FOR DIVORCE

Adultery is a ground for divorce under Hindu marriage act 1955, under the Indian Divorce Act 1869, Grounds for Divorce under the Parsi Marriage and Divorce Act, 1936 (Amendment 1988). Consensual sexual relationship between two adults of opposite sex who are not married to each other and at least one of them is married to a third person counts as the offence of adultery. Adultery is one of the principal grounds for matrimonial relief i.e. divorce.

Section 13(1)(i) of Hindu Marriage Act states that both partners are liable for adulterous

⁸ Part – III, Constitution of India.

offence. Unlike Section 497 of IPC, under this act the wife of the man who makes sexual relations to a woman other than his wife can file a complaint against him and ask for divorce. The husband of the woman who make sexual relations with any man who is not her husband can also file a complaint against her and ask for divorce on grounds of adultery.

However, the duty of proving that adultery has been committed by their spouse lies on the complainant. Since adultery is a crime of secrecy and darkness, direct confirmation of involvement in this act may not be possible. It can be tried to prove from circumstantial evidences. There are some certain case scenarios wherein adultery may be inferred such as staying together of a woman and a man in a hotel who are not marital partners and at least one of them is married to a third person. One act of adultery or infidelity is enough to constitute a matrimonial offence.⁹

Attempt to commit adultery and actually committing adultery are distinguished from each other. Committing adultery on part of either spouse constitutes for the ground of adultery whereas a pursuit to commit adultery will not be qualified as sufficient ground for judicial separation.

Under the present Indian Matrimonial Statues a single adulterous activity is enough to constitute ground of divorce which is different from the original Hindu Marriage Act under which the ground for judicial separation was living in adultery. One or two instances of lapse from virtue cannot amount to living in adultery, living in adultery means a continuous course of adulterous relationship over a significant period of time with repetition of acts of adultery with one or more persons.

(A) Direct and Circumstantial Evidence:

Proof of marriage is mandatory in both criminal and matrimonial misdemeanour of adultery. Direct proof is not easily available because of the secretive quality of the act and thus, is also not necessary. Circumstantial evidence is admissible by the courts in such cases. If the adulterous are proved to be associating in such footing that the sexual act may be inferred the court will be usually convinced that adultery has occurred.

The offence of adultery can be proved by:¹⁰

- Circumstantial evidences
- Contraction of venereal disease

⁹ Rajinder v Sarda AIR 1993 MP 142.

¹⁰ Legal Service India- Lawyers available at: legalserviceindia.com (Visited on March 18, 2021).

- By evidence as to no access and birth of a child during that period
- By evidence of visits to brothels and other such places
- Confession or admission of adultery by parties
- Preponderance of probability

It is understood that rarely the parties the parties will be caught in acts of adultery due to the secretive nature of the acts. Therefore, it is not necessary that direct evidence of adultery must be given as it is not easily available. However, circumstantial proof must be sufficiently strong and conclusive.

IV. ADULTERY AS MATRIMONIAL AND CRIMINAL OFFENCE

The Hindu Marriage Act of 1955 states adultery as an offence and provides divorce as a relief in such cases. Adultery was considered as criminal offence under Section 497 of the Indian Penal Code. The matrimonial offence of adultery is distinct from the criminal offence. In matrimonial offence of adultery when a person accuses his or her mate of adultery, the main target is not the individual with whom their spouse has committed adultery but their own spouse. The claimant is entitled to relief against the defendant in form of divorce when the respondent is proven guilty of committing adulterous crime. The individual with whom they had sexual relations is merely a co respondent in this case, and that too is not always compulsory.

Both under matrimonial law and penal law, adultery is considered as an offence against marriage as it defies the sanctity of the pious institution of marriage. So, it is necessary to establish the marriage was subsisting at the time of the act of adultery. In the matrimonial offence of adultery, it is also necessary to establish that the coitus was willingly indulged into by both the parties. In case the wife establishes that she was raped by the co respondent and the sexual relations were against her will, then the husband wouldn't be entitled to divorce as it does not amount to adultery.

Further, it is not essential to prove that the co- defendant had knowledge or reason to understand that the defendant was the wife or husband of the petitioner in case of a petition for dissolution of marriage on grounds of adultery. If the respondent had consensual sexual intercourse with the co respondent with the full knowledge that he or she was not the husband or wife, then the petitioner would be entitled to relief against the adulterous spouse. But if the wife can prove that she was unable to recognize the nature of the sexual act of adultery, the court would refuse a decree. The matrimonial crime of adultery is not committed if a person has sexual intercourse with a woman other than his wife by personating to be her husband. The petitioner will not be

entitled to in such a case.

Unlike the criminal offence of adultery as sated under Section 497 of the IPC, in matrimonial offence of adultery the wife of the man involved in adulterous acts is also designated to file a case opposing the husband on grounds of adultery and seek divorce for the same. Matrimonial offence of adultery is considered a civil wrong as opposed to its criminalisation under IPC. The man is not liable for penal action under matrimonial offence of adultery. The criminal offence of adultery under Section 497 of IPC prescribes a punishment of imprisonment up to 5 years or fine or both. The wife is not punishable for being an adulteress or even as an accomplice of crime. Only the man who engages in consensual coitus with a married woman is liable for any type of penal action and that too only on a complaint filed by the husband of the woman.¹¹

(A) A Comparative Study

International trends worldwide indicate that only a few nations still treat adultery as a criminal offense, though most nations retain adultery for the needs of divorce laws, Joseph Shine v. Union of India, 2018 SCC Online SC 1676. Over 60 countries within the world have done away with the laws of adultery.¹²

(i) United Kingdom: In the United Kingdom adultery is not a criminal offence as it was earlier. It is only treated as a civil wrong and can be used as grounds for divorce, however, it is also laid down that adultery cannot be treated as a ground for divorce if they have lived together as couple for six months after the infidelity was known.

(ii) Australia – In Australia adultery is not a criminal offence. Adultery is abolished as a ground for divorce in Australia and here under the federal laws which were enacted in 1994 sexual conduct between consenting adults is their personal issue throughout the country regardless of their marital status.

(iii) The Philippines – The Republic of Philippines is a conservative Christian majority. The Family Law in the country bans infidelity and adultery is a criminal offence. a woman is found deceiving her husband with having sexual relation with someone else under any circumstances. It is a punishable crime. A male on the other hand is charged with '*concubinage*' (keeping a mistress), the parameters for which may vary. This may require him to be living with his female partner other than wife, having relations under 'scandalous circumstances', or bringing the female partner into his marital home. Proposals have been raised in Philippines to decriminalize the oppressive law.

¹¹ Dwarka Bai v. Narain AIR 1953 Mad 792.

¹² Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

(iv) **United States** – Adultery is treated as an offence in 21 states in the United States of America. This is surprising given the progressive outlook of the nation. However, the laws vary from state to state like for example in the states of West Virginia, Colorado, New Hampshire laws related to adultery have been repealed but in other states of USA adultery is still an offence. While existing on paper, these laws are rarely invoked for sentencing and even when they are, the sentences remain limited to small fines, job terminations or demotions.

(v) **China** - In China, adultery is not an offense but can be used as a ground for divorce under Article 46 (3) of Marriage Laws of People’s Republic of China. Also, under Article 46, the aggrieved party can only plea for compensation against the wrong done to them.

(vi) **South Korea** - In 2015, South Korea struck down a law on adultery, which was almost like that of the adultery law in India, where it punished a person with prison time for two years or less for the offence of adultery. The court further laid down that the rationale behind striking down adultery law was because it violated self-determination and privacy.

(vii) **Saudi Arabia** - In Saudi Arabia practice of adultery is strictly prohibited and this is a punishable offense. Punishments include fines, arbitrary detention, imprisonment, flogging and in extreme cases, the death penalty.

(viii) **Pakistan** - In Pakistan, adultery is a crime under the Hudood Ordinance, disseminated in 1979. The law makes it mandatory for a woman making an accusation of rape to provide four adult male eyewitnesses of good standing (*tazkiyah-al-shuhood*) to “the act of penetration” as evidence to avoid being charged with adultery herself.¹³

V. DECRIMINALIZING ADULTERY

On September 28, 2018, the Supreme Court of India unanimously struck down Section 497 of IPC which related to adultery. The bench comprised of the then Chief Justice Deepak Misra, Justice Nariman, Justice DY Chandrachud and Justice Malhotra. The 158-year-old law of colonial era which was based on Victorian morality was struck down by the court stating that it regarded a woman as the property of a man. It was the second colonial-era law which was struck down by the Apex Court in the span of a month. Previously, it had overturned another 157-year-old colonial law which criminalised gay sex in India. Sections 497 IPC and 198(2) CrPC deal with the proceeding for filing a complaint in relation to the offence of adultery, are violative of Articles 14, 15(1) and 21 of the Constitution, and are therefore the need of decriminalization has been fulfilled.

¹³ India decriminalises adultery: A look at other countries where it is still a crime or not, available at: <<https://indianexpress.com/article/india/india-decriminalises-adultery-a-look-at-other-countries-where-it-is-still-a-crime-or-not-5376598/>> (Last Modified September 27, 2018).

(A) Object

The object of Section 497 is the preservation of sanctity of marriage. The society abhors marital infidelity.¹⁴ However, this object doesn't find favour with the Supreme Court. In Joseph Shine, the Court observed thus:

“... the ostensible object, as pleaded by the State, being to guard and preserve the sanctity of marriage, is not, in fact, the thing of Section 497 in the least ...”

It was further discovered that the sanctity of marriage is often utterly destroyed by a husband having sexual relations with any woman other than his wife or a widow which isn't penalised by the parliament. Also, if the husband consents or connives at the sexual activity that amounts to adultery, the offence isn't committed, thereby showing that it's not sanctity of marriage which is said to be protected and preserved, but a certain right of the male partner.

(B) Who Challenged the Law?

Joseph Shine, a 41-year-old non-resident Keralite living in Italy filed a Public Interest Litigation under Article 32 (Right to Constitutional Remedies) of the Indian Constitution. The application challenged the constitutionality of the offence of infidelity which was defined under section 497 of IPC. In a 45-page petition, Shine had liberally quoted American poet Ralph Waldo Emerson, women rights activist Mary Wollstonecraft, and former UN secretary Kofi Anna in order to emphasize his views on women rights and gender equality.

However, the ruling BJP opposed the petition and further insisted that adultery should continue to be a criminal offence. In support of their disagreement, they put forth the argument that Diluting adultery laws would impact the sanctity of marriages and making it legal would hurt the bonds of marriage leaving families dysfunctional.

(C) What did the Judges Say?

All the five judges of the bench were of the viewpoint that the law was archaic, unconstitutional and irrational. CJI Misra held that a husband isn't the master of his wife, women should be treated with equality alongside men.¹⁵ Justice Chandrachud held, the law sustains the subordinate status of females, refuses sexual autonomy, dignity and is predicated on gender stereotypes. Critics have called the law of adultery together that's staggeringly sexist, crudely anti-women and additionally violative of the proper to equality.

¹⁴ Malimath Committee, Report on Reforms of Criminal Justice System, March 2003, Vol 1.

¹⁵ Suchitra Mohanty, Malini Menon, India's top court decriminalizes adultery in landmark judgment, available at: <<https://www.reuters.com/article/us-india-court-adultery/indias-top-court-decriminalizes-adultery-in-landmark-judgment-idUSKCN1M71FW>> (Last Modified September 27, 2018).

The main concern of the law regarding adultery shouldn't be that of expectations of fidelity during a marriage is right or not or whether adultery promotes sexual freedom. The primary concern should preferably be whether a state can or should monitor a relationship between adults which is just too complex, sensitive and individual, and whether it's only for the courts to possess absolute interference in individual matters of couples.

(D) What was observed?

The laws related to adultery have been gender biased as rather than providing any relief to the women, it worsened the situation for them. As many times it has been seen that in most of the divorce cases the husbands have tried to use adultery as a ground to exempt themselves from paying maintenance to their wives. Also, the Supreme Court has examined that decriminalizing of adultery does not mean that it gives license to perform extramarital affairs. Rather if adultery is found to be a reason for commission of suicide by the spouses then it would lead to the prosecution of the other spouse committing the same.

Also, this section is discriminatory on the grounds of gender as under this section a wife cannot file a suit against the women with whom her husband is involved in adultery as under this section only the husband can file a suit against the male partner of his wife with whom she is engaged in adultery. So, as a result, this creates inequality among men and women.

As it was realized in the case of *Revathi v. Union of India*¹⁶ where the court had observed that a woman cannot file a suit for adultery as because firstly in the eyes of law a woman can never do such a wrong, it is the men who always do so. Moreover, the laws of adultery were drafted with the opinion that the women can never do any wrong it is the men who do so. As Lord Macaulay had once said that Indian women are a holy cow. Also, the framers of the code held that a husband should never prosecute his wife for adultery as because it would not only lead to a breakdown of the institution of marriage but would also lead to family disorganization.

(E) Have there been Previous Challenges to the Law?

It was in 1945 when a petitioner challenged the law for the first time, by putting forth the question of why a woman can't be punished for indulging within the crime of adultery outside her marriage and further said that such an 'Exemption was discriminatory'. Following this, the Supreme Court rejected the plea.

Since the petition of 1945, the Top Court has rejected similar pleas including the constitutional validity of the law. Similar pleas on adultery were rejected by the court in the years 1985 and

¹⁶ V Revathi v. Union of India and Ors., AIR1988 SC 835.

1988. The judge based his ideology on the concept that- “The stability of marriage isn't an ideal to be scorned”. In one among the cases, there was an instance where a wife had approached the court, demanding her right to file a complaint of adultery against her husband’s unmarried lover. The court while giving judgement on this case patronisingly described the plea as “Crusade by a woman against a woman”.

Later in 1971 and 2003 that two different panels on law reform suggested that its very gender biased law and females should also be held responsible for adultery. It had been contended that- A society always detests marital infidelity. Therefore, there's no good reason for not dispensing similar treatment for a wife who has sexual activity with a person outside her marriage. These words were put forth by the judge who had led the 2003 panel. One among the recent developments in this area was in 2011, where a court hearing another plea laid down that the law was facing criticism for “showing gender bias”.

(F) Consequential Effects of decriminalising the Law of Adultery in India

By striking off Section 497 of the Indian Penal Code, the Supreme Court assured the women of the nation that no one can come in their way of dignity and empowerment and put an end to an age-old discriminatory law.

- **Critics who favour positive consequences of legalising Adultery:** Critics voicing their opinion in favour of legalising adultery put forth the prospect that adultery was rightly decriminalised because it wasn't gender neutral. If two persons want to urge into consensual sex, it's no one’s concern to prevent them from doing so. In the 1950-55 when the Hindu Code bills and therefore the Dowry Prohibition Acts (1961) were passed, the favoured sentiment was that men are those who commit wrong and hence, there's a requirement to offer a special layer of protection for women’s condition as they were during a vulnerable condition within the society at that point. But now women are literate, independent, conscious of their rights, and hence, there's no need for such a law within the present scenario.

- **Critics who favour negative consequences of legalising Adultery:** In order to take care of a swift functioning of the society, there are few things which are important and marriage is one of them. It's considerably essential for society as it gives future generations a stable and caring environment. Adultery not only threatens but also destroys such an environment. Legalising adultery are often considered something that's influenced by the western acculturation, and here a crucial point to be taken note of is that the divorce rate within the western countries is 52% and still on an increase. So as to prevent India from following an

equivalent fashion it's very essential to not encourage extra-marital affairs which might get on an increase if adultery is decriminalised.

VI. CONCLUSION

Under the erstwhile Section punishing adultery, neither the husband could institute criminal proceedings against his wife who had had an illicit relationship with another man, nor could the wife sue her husband who committed like offence with another woman. It was only that man whose wife had been adulterous with another man, who was seen as the actual victim. Likewise, it was the man who had adultery with another's wife and not the wife herself, who could be held guilty and accordingly subjected to imprisonment up to five years, or fine or both under Section 497. This reflected an obnoxious idea that the wife is the wealth of the husband and hence she could not be physically trespassed upon without the husband's consent. This, in turn, raises many socio-moral objections.

1. **Firstly**, it indicates that if the husband consents upon his wife sleeping with another man, then it would not be considered an offence under this section. The wife's consent is irrelevant as far as said section is concerned, and she could only use the help of Section 376 (Punishment for rape) in case she had not consented.

2. **Secondly**, this section would not be attracted if the husband had consensual coitus with an unmarried or divorced woman, let alone the fact that the lady could not prosecute the husband for the same. It was as if the husband had a free licence to commit adultery with an unmarried or divorced woman. Thus, Section 497 was unjustifiable for both the husband as well as the wife.

3. The Supreme Court has declared 150 years old law on adultery as unconstitutional, which treats a husband as the master. The then judge of India declares, "The adultery law is bigoted and it offends the dignity of a woman," during this recent landmark judgement, the Apex Court directly blows the archaic and patriarchal law in our country. Supreme Court in *Joseph Shine v. Union of India* (2017) has clearly put down that the sweetness of the Indian Constitution is that it includes "I", "you" and "we". Court asserted that the binding nature of precedent shouldn't be allowed so as to retain the status of precedent or allowed to be diluted. Women can't be considered as a property of man within the modern progressive jurisprudential parameters and expansive constitutional vision. The provisions as contained under section 497 of IPC indicate that ladies are treated as subordinate to men.

4. It further states that when there's consent of the person to develop relationship outside the wedlock then there's no offence. The Court declares that husband isn't the master of wife.

Section 497 of IPC is completely and manifestly arbitrary and irrational because it confers a licence on the husband to deal with the wife, as he likes which is extremely excessive and disproportionate. The Apex court declares that autonomy, desire, choice and identity are the important aspects of the dignity of a lady. In this regard, the Apex Court refers the recent judgement *K.S. Puttaswamy and another v. Union of India* and others¹⁷ during which court confirms that right to privacy may be a fundamental right as prescribed under Article 21 of the Indian Constitution. The Court has recognised the conceptual equality and dignity of woman, which can't be curtailed. However, Section 497 of IPC curtails the dignity and equality of females because it's supported gender stereotypes and these sorts of stereotypes put a significant blow on the individuality and dignity of women, the Apex Court declared that there can't be a patriarchal monarchy over the daughter also as husband's monarchy over the wife. Male dominance is unacceptable in today's scenario. Moreover, the Supreme Court in asserted that adultery is often ground for civil issues like dissolution of marriage however, it can't be a criminal offence. Alongside Section 497 of IPC, section 198 of CrPC is additionally declared unconstitutional thereby decriminalizing the offence of adultery. *Justice D.Y. Chandrachud* asserted that "the history of Section 497 reveals that the law on adultery was for the merit of the husband, for him to call it his right of ownership over the sexuality of his wife. It had been aimed toward preventing the lady from exercising her sexual agency."

5. However, the judgement features a sort of impacts on the institution of marriage in India from which some are positive and a few are negative which can't be ignored. Decriminalisation of adultery would badly endanger the institution of marriage in India. Decriminalization will give licence to the married parties to line up an additional marital affair. The divorce cases will increase with such extramarital affairs, which might badly affect the longer term of their children and institution of marriage.¹⁸

6. Now, as Section 497 of IPC has been decriminalized it means that now commission of adultery is no more a punishable offense unless it leads to abetment of suicide. But the laws related to adultery in India has always been a part of controversy because of many factors like firstly it is gender biased then secondly under the previous laws only the husband can prosecute and not the wife. As a result, this had led to the materialization of the women and had reduced them to a simple object rather than being an individual. Also, the older laws were in conflict with the personal laws of many communities where polygamy is allowed. So, as a result, the

¹⁷ (2017) 10 SCC 1

¹⁸ K.D. Gaur, Indian Penal Code 804 (Universal Law Publishing Company, New Delhi, 6th ed., 2016).

previous laws on adultery were not sufficient and needed an amendment rather than eliminating it totally from the statute book.

7. On a comprehensive analysis of the verdict given in Joseph Shine's case, it is evident that the ruling is entirely in favour of the society and is not opposing to the institution of marriage. Through the representation of this judgment the court of law has not granted a license on the commission of infidelity but has only legalized it. Though not amounted to a criminal offence today, adultery stands to be a civil offence and acts a ground for legal separation or divorce. However, by means of scrapping down the practice of adultery as a criminal offence, the Supreme Court of India has upheld the principle of equality.

Thus, it can be fairly concluded that the paradox and irrationality formerly associated with the offence of Adultery has now been removed while the necessary civil consequences have been left untouched.¹⁹

¹⁹ Hindustan Times, available at: <www.hindustantimes.com> (Visited on April 26, 2021).