

Offence of Adultery under IPC: A Critical Evaluation

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INTRODUCTION

Adultery is an offence involving encroachment over right of a husband against his wife. In simple words, it's an offence against the sanctity of the matrimonial relationship/ ties, which is always committed by a man⁴⁹. It is an anti-social & illegal act. It consists of person having knowledge about the fact of the female being the legally wedded wife of any other person and such tie being subsisting at the time of sexual intercourse between the accused and the aforesaid female. It is also necessary that such act must be carried on without having the consent of husband of such female or without connivance of such husband⁵⁰. All together sexual intercourse is an important ingredient⁵¹ to constitute such offence.

Under **Indian Penal Code, 1860**, the scope of the offence of adultery has been limited by making it a gender specific offence, i.e. the offence of adultery can only be done by a male. However, on the other hand, its scope has been increased by making the consent of women being irrelevant and being no excuse to the crime of adultery.

MEANING OF TERM "ADULTERY"

The term has been defined in various aspects by different sources, some of which are as :-

According to MERRIAM WEBSTER :-

Adultery is a voluntary sexual activity (as sexual intercourse) between a married man and someone other than his own wife or between a married woman and someone other than her own husband.

According to LEGAL DICTIONARY :-

Voluntary sexual relations between an individual who is married and someone who is not the individual's spouse.

Adultery is an offence which is injurious to public morals. The mistreatment of marital ties has been historically regarded as legal Wrong. However, it had not always been considered as crime. In 15th and 16th century, adultery was punishable as a crime only by the courts established by church only on moral grounds in Europe. There have been a great diversity among the laws of different nations in respect of adultery as an offence and there had been inherent lack of uniformity apparent upon. Law of different nations with respect to the offence of adultery, for e.g., in some countries, both the parties involved in sexual intercourse amounting to adultery are liable if they both are married. However, according to some other statutes, such sexual intercourse is an offence only if such woman is married.

OBJECTIVES OF MAKING LAWS AGAINST ADULTERY

Although different countries have propounded different objectives to achieve by making laws against adultery but some of the common objectives are:-

- Prevention against illegitimacy of children.
- Prevention against diseases.
- To safeguard the general community morals.
- To preserve the marital ties and institution of marriage.

ADULTERY UNDER INDIAN PENAL CODE :-

SECTION-497:-

Under I.P.C, Sec 497 provides punishment for the offence of adultery. Adultery is an offence committed by a man, against a husband in respect of his wife. It is an invasion over the right of husband over his wife. It is an offence of matrimonial home. In India, marriage have a sacramental nature and when the law was written around 150 years ago, women were seen as an oppressed class in need of serious protection. Woman was considered as man's property. It is considered as crime and is punishable

⁴⁹ Olga Thelma Gomes v. Mark Gomes, AIR 1959 Cal 451

⁵⁰ M'Clarence v. M. Raicheal, AIR 1964 Mys 67

⁵¹ Munir v. Emperor,(1925) 24 ALJR 155

offence in almost all the religions. It has been one of main reason for dissolution of marriage. It is covered under Ch-20 in I.P.C. which deals with essential crimes related to marriage.

Ingredients for constituting the offence of adultery

To constitute the offence of adultery, following ingredients must be established:-

1. Sexual intercourse must be there by a person with woman.
2. Such woman must be wife of another.
3. The person:-
 - (a) Must have knowledge that she is wife of another person.

Or

 - (b) Must have reason to believe that she is wife of another person.
4. Sexual intercourse must not amount to rape.
5. Sexual intercourse must be done:-
 - (i) W/o consent of the husband of such woman.
 - (ii) W/o connivance of the husband of such woman.
- (a) **Sexual intercourse :-**

The word “sexual intercourse” means penetration of penis in to vagina of a woman. The extent of penetration, how so ever small, is irrelevant even the penal vaginal. Interface is sufficient to construct liability under this offence⁵².

(b) Wife:-

Here the term “wife” includes only legally wedded wife of a person. Also marriage must be subsisting at time of sexual intercourse takes place. If such marriage is void or is voidable and has been avoided by the party at whose option it is voidable then, such an act of sexual intercourse does not amount to adultery. It is not committed by a person, who has sexual intercourse with an unmarried woman or a prostitute woman or with a widow. If marriage has been dissolved, it does not amount to adultery.

Adultery:- A gender specific offence

The term “Gender Specific “means that the offence can be done by or can be done against the person of

specific gender only. Section 8⁵³ of Indian Penal Code provides that he and its derivatives includes both male and female i.e. it only recognize two genders:-

- i Male
- ii. Female

But Hon’ble supreme court in the case of

NALSA VS UNION OF INDIA⁵⁴

“Recognizes” third gender as “TRANSGENDER”.

The offence of adultery under IPC is limited in its scope as compared to the divorce proceedings including the misconduct of adultery. It has been made as gender specific in terms of person against whom offence can be committed, as it provides that it can only be done against a woman. If an unmarried woman has done sexual intercourse with a married man then it doesn’t amounts to adultery i.e. under IPC only a woman is covered under the purview of the term “Victim”. Woman is not punishable for being an adulteress or even as an abettor of the offence, despite being the consenting party to the crime.

In the term of “Accused”, i.e. the person by whom the offence of adultery can be done, the scenario remained quiet blurred prior to the year 2013. But in 2013, S.C. came up with a question whether a woman can be made liable for sexual intercourse with a married man.

In

PRIYA PATEL VS STATE OF MADHYA PRADESH⁵⁵

Supreme court, while answering to the above question clarified that only a person who is biologically capable of penetration can be made and should be made liable under this offence as Sec. 497 of IPC includes “Sexual offence” only as a penal-vaginal interface. Hence, woman being biologically incapable of sexual intercourse can’t be made liable under Sec 497 of I.P.C.

(c)- Sexual intercourse must be done either with knowledge or with reason to believe that she is wife of another person:-

Here, the term “knowledge” includes the lack of mental awareness expected from a person of ordinary prudence under same circumstances and background as that of the accused.

“Knowledge” is nowhere defined under I.P.C. It is comparatively a state of lower level of mental

⁵² The same situation as was under Section 375 prior to the Act 13 of 2013

⁵³ General explanation

⁵⁴ Writ prtion (CIVIL) NO.604 of 2013

⁵⁵ (2006) 6 SCC 2635

awareness in comparison to “intention” to do act. In such circumstance, the brain of person is working in normal conditions. It means awareness is there on part of accused about the probable consequences of the act he is doing but he do not have desire to achieve such consequences.

In Emperor vs M.T.DHIRAJIA

Court developed presumption that everybody is attributed with certain degree of knowledge i.e. every sane is presumed to have certain degree of knowledge.

The term “Reason to believe” is defined u/s 26 of the act 60 of 1860 as = “A person is said to have reason to believe a thing if he had sufficient cause to believe that thing and not otherwise.

(c) Sexual intercourse must not amount to Rape.

Here the act of sexual intercourse must not amount to rape u/s 375 & 376 of IPC i.e. it must not be covered under any of the seven headings provided under the aforesaid sections.

If the sexual intercourse is covered under any of such criterion provided u/s 375, then it will qualify for being punished u/s 376 instead of sec.497 of IPC.

In simple words, there must be unequivocal consent of the woman participating in the act of sexual intercourse while,

- (i) She is in a state of considering the nature and consequences of the act for which she is providing consent.
- (ii) She has completed the age of 18yrs at time of providing consent.
- (d) Sexual intercourse is done without consent or connivance of husband of such woman.

The word “without consent” is defined u/s 90⁵⁶ of IPC as including :-

- I. When no consent is taken.
- II. When consent is vitiated one i.e.
 - a. When consent is taken from a person who has not attained the age of 12yrs.
 - b. When consent is given by a person of unsound mind i.e. a person who at the time of giving consent is incapable to know the :-
 - Nature of act, OR

- Whatever he is doing is wrong or contrary to law
- a) when consent is taken from a person who is intoxicator at the time of giving consent whether voluntary or involuntary leading into a state where he is unable of knowing the nature of act or whatever he is doing is wrong or contrary to law.
- b) When consent is taken from a person by putting him under fear of injury as defined u/s 44 of IPC
- c) When consent is obtained under misconception of fact.

The term “Connivance” means when husband himself is providing a helping hand to the accused, for example – guarding at door at the time when his wife is having sexual intercourse with the accused.

Constitutionality of sec 497 IPC:-

In **YUSUF ABDUL AZIZ**, the S.C observed that section 497 IPC is not ultra-virus under articles 14,15 &21 of the constitution on the ground that it only the man who is held liable for adultery and not the wife with whom adultery is committed. The wife is saved from the purview of the section and is not punished as an abettor. Held sex is reasonable and sound classification accepted by the constitution which provides that state can make special provisions for woman and children vide article 15 clause 3 of the constitution.

Practical aspect of the offence: THE AMENDMENTS NED-DED:-

The present scope of the offence of “Adultery” is not appropriate to cover all the possible situations that can arise owing to the increase in cases of lesbians etc. The present law is not in a position to protect the of husband to fullest as in the case of lesbians as well as transgender also, the right of the husband is encroached to the same extent as that in case of a male performing the act of sexual intercourse. Hence, the scope of the offence must be extended by accepting the same interpretation of the word “SEXUAL INTERCOURSE” as is made in case of section 375.

Prior to 2013 only penal vaginal penetration was within the domain of word sexual intercourse extend of penetration how slight it may be was sufficient. Even penal vaginal interface was considered as sufficient but in

⁵⁶ General exceptions

SAKSHI VS UNION OF INDIA⁵⁷

Discussion was there to include all kinds of penetration into domain of word sexual intercourse like penal vaginal, penal urethra, penal oral, penal anal, object vaginal etc. But hon'ble Supreme Court didn't make it a law.

But after 2013, the Anti-Rape laws amendments were inacted i.e. Act 130 of 2013, the meaning of word sexual intercourse was expanded to the following :

1. Penal vaginal penetration or penal urethra or penal anal or penal oral penetration.
2. Application of mouth to vagina, urethra or anus of woman.
3. Insertion of object into vagina, anus or urethra.
4. Insertion of any part of body (except penis) in to vagina, urethra or anus of a woman.
5. Manipulation of any part of body of a woman for causing vaginal, urethral or anal penetration.

Case of woman and child as an accused if above discussed interpretation is accepted:-

Post 2013, Anti-Rape law amendment increased the domain of word sexual intercourse as previously discussed. In the light of that discussion, the person who is capable of sexual intercourse must include a woman or a child above the age of 7yrs but below 12yrs who have acquired sufficient maturity to consider nature and consequences of his act or whatever he is doing is wrong or contrary to law.

CONCLUSION:-

Adultery is an offence which is injurious to public morals. The mistreatment of marital ties has been historically regarded as legal Wrong. However, it had not always been considered as crime. In 15th and 16th century, adultery was punishable as a crime only by the courts established by church only on moral grounds in Europe. There have been a great diversity among the laws of different nations in respect of adultery as an offence and there had been inherent lack of uniformity apparent upon law of different nations with respect to the offence of adultery, for e.g., in some countries, both the parties involved in sexual intercourse amounting to adultery are liable if they both are married. However, according to some other statutes, such sexual intercourse is an offence only if such woman is married.in this paper, various aspects of the law relating to the adultery has been critically analysed.

⁵⁷ Writ petition (Crl.) 33 of 1997

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