

**A CRITICAL IMPACT ANALYSIS OF ADULTERY LAW  
DECLARED IN THE CASE LAW BY THE APEX COURT  
IN JOSEPH SHINE V UNION OF INDIA ON 27  
SEPTEMBER, 2018 WRIT PETITION (CRIMINAL)  
NO. 194 OF 2017**

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**Abstract**

*Offence of Adultery Law has been decriminalized in India, by the Supreme Court's Judgment in the above mentioned verdict. Now the Concept of Adultery remains in civil law only. It is a ground for Divorce in various personal laws. Judge makes law interstitially, and fills in the gap(s) left by the legislature. They decide the Constitutionality of a particular legal provision and declare the law as per the changing time and State Policy. Adultery, abrogated from the Statute book, actually affect the overall personality of the young children as in absence of an integrated family, their overall growth gets stunted. To have a flourishing State, there should be an orderly community consisting of peaceful, nurturing, supportive families. Thus an offence like Adultery should not be totally abrogated but be kept in continuation and changes like, Gender-neutrality, equality, applicability to the living together Couples, even if they are not lawfully married; should be initiated.*

**Keywords:** *Adultery, Constitution, Offence, Civil Liability, Children.*

The Adultery law mentioned in the Chapter XX of the Indian Penal Code has recently gone through a sea change. Section 497 of the Indian Penal Code, the substantive provision was in the following form-

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

The Constitutionality of the Section 497, the Indian Penal Code, was challenged as early in 1951 in the Yusuf Aziz case<sup>1</sup>. The Apex Court held that section 497 is not infringing the Article 14, Article 15(1) and 21 of the Indian Constitution. The grounds of challenge(read should be) in this case were-This Criminal law provision used to give protection to a married woman only. (Under lined); If husband provides consent or connivance, it will not amount to Adultery. (Under lined); The wife can't be punished as an Abettor. (Under lined).

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<sup>1</sup> AIR 1951 Bom 470.

Thus all these grounds where wife is treated as property of the husband or wife's no culpability (Wife is not an Abettor) in the crime of Adultery and the protection given to a married woman only, were challenged.

This challenge was negated by the Court citing Article 15(3) of the Indian Constitution, where State shall make Special Provisions for women and Children.

Once a substantive provision is challenged, the related procedural provision also comes under scrutiny.

Section 198 CRPC provides- "Prosecution for offences against marriage.

(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860 ) except upon a complaint made by some person aggrieved by the offence: Provided that-

(a) Where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister or with the leave of the Court, by any other person related to her by blood, marriage or adoption].

(2) For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."

Thus we examine the above mentioned procedural section and find that women cannot be the complainant of the crime- Adultery and any person on her behalf related by blood, adoption and marriage can make criminal Complaint.

If this procedural section 198CRPC<sup>2</sup> is examined, we find, according to the Court that legislative judgment of the status of women is a bit parentalistic in nature; despite women having their autonomy. The

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<sup>2</sup> Criminal Procedure Code.

procedure of making a complaint by woman under section 198 CRPC is curtailed and she is classified with minor and lunatic; who need a Guardian.

The Apex Court, in this case law says that Provision of Section 497 Indian Penal Code and Section 198 CRPC cannot be saved by Article 15(3) of the Indian Constitution, because Constitution provides for power of the State to make affirmative law in future after the Constitution has come into existence.

State as defined by the Court means Parliament, State Legislature, Executives, Court and Local and other authorities, as per Article 12 of the Indian Constitution.<sup>3</sup>

But the Apex Court omitted to stress on the fact that in one hand a married woman can't be prosecuted for the crime of Adultery but she also has no right to prosecute or lodge complaint against a Man or Woman. Thus what law takes away in one hand, gives in by another hand. We have to remember the statement of famous Jurist Aristotle that- treat like people alike and treat different people differently. Women are different from Men and the yardstick of difference is not only Male standards. Men are different from Women too.

But we have to examine that State namely India, is a body corporate and it had presence even before the Constitution came into existence. As for example, India was a party to UN Charter even in 1945. India was party to Universal Declaration of Human Rights.<sup>4</sup> The fundamental rights in the Constitution were heavily influenced by the Natural rights recognized in the U.D.H.R and the structures like legislative lists and formation of federal and provincial legislature under the Indian Government Act, contributed to the existing quasi- federal frame work of the Constitution of India.

The transfer of power from British India was through Indian Independence Act, 1947 passed by the British Parliament. There was creation of two dominions- India and Pakistan, and their Constituent Assembly were given the power to create Constitution.<sup>5</sup> The Bengal

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<sup>3</sup> See A.R. Antulay v R.S. Nayak AIR 1988 SC 1531. Court cannot pass an order or issue a direction which would be violative of fundamental rights of citizens, it can be said that the expression "State" as defined in Article 12 of the Constitution includes judiciary also.

<sup>4</sup> In *Kesavananda v. State of Kerala* (AIR 1973 SC1461), As per Justice Sirci, (AIR 2011 Jour171)-Article 51(d) of the Indian Constitution has been relied upon to introduce and implement various international instruments particularly the U.D.H.R. And the two covenants on the Political and Civil Rights and the Economic, social cultural Rights in the interpretation of the fundamental rights. The Court have held that by virtue of this Article international instruments, particularly those to which India is a party, become part of Indian Law so long as they are not inconsistent with it. Therefore they can be very well relied upon and enforced.

<sup>5</sup> Indian Independence Act, 1947. - Legislation.gov.uk  
<https://www.legislation.gov.uk/1947/pdfs/uk>

Sec. 1-(i) As from the fifteenth day of August, nineteen hundred and forty -Seven, two independent Dominions shall be set up in India, to be known respectively as India and Pakistan.

Province was divided in two provinces, East-Bengal and West- Bengal. The State, West-Bengal Continued as a full- fledged State of Union of India even today.

Though by the provision of Article 395, Indian Constitution, Independence Act and Indian Government Act,1935 were repealed (Apart from the Abolition of Privy Council Jurisdiction Act, 1949), still some law enacted and declared by Competent Authorities continued its existence through Article 372(1)<sup>6</sup> and Article 13(1)<sup>7</sup> of the Constitution, as they were not against Part –III of The Indian Constitution. As for example, in the case law -Dharmodas Ghose v MohoriBibee <sup>8</sup>(Decided by the Privy Council), the declaration “Minor’s Contract is Void” is still valid and persuasive in nature for the Indian Courts.

During the rule of British India, some laws were in existence, like Widow Remarriage Act, Hindu Women Rights to Property Act,<sup>9</sup> which were nothing but special ameliorative legislations in favour of Women. These laws were continued as they were not against part III of the Constitution. Thus Article 15(3) is nothing but an enabling provision and a continuous process followed from the past, directing the State to “ENACT” laws which are Women Friendly. As for example, The Sexual Harassment of Women at Workplace Act, 2013, Equal Remuneration Act etc which were “ENACTED” after the Indian Constitution came into place.

Union of India as defined in the Indian Constitution is nothing but a “State Succession” from British India. It means substitution of one State by another over a territory. It signifies transfer of rights and duties from one international artificial personality to another in consequence of the territorial change. The Vienna Convention on Succession of States in Respect of likewise Treaties 1978 defines State succession likewise by

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Sec-8. (1) In the case of each of the new Dominions, the powers of the legislature of the Dominion shall, for the purpose of making provision as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion and references in this Act to the legislature of the Dominion shall be construed accordingly.

(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by subsection (2) of this section and the orders therein referred to, operates to limit the power of the legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature.

<sup>6</sup>Article 372- Continuance in force of existing laws and their adaptation(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

<sup>7</sup> Article 13(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

<sup>8</sup> ILR(1903)30 Cal 539(PC)

<sup>9</sup> As per Section 3 of the Act, the widow will have a limited interest in her estate.

stating under Article 2(1) (a) as the replacement of one State by another in the responsibility for the international relation of territory.<sup>10</sup>

### **Impact of Adultery in the Society**

Family is a unit of the State<sup>11</sup>. If family gets affected, State also become weak. Till now Women's economic capacity is lesser than their male counterpart in India.<sup>12</sup> Thus a family impacted because of the earning male has a promiscuous affair, the children get affected (Their Education, Psychology, values are affected). The Penal Law of Adultery should be either gender neutral or should take in its ambit the third sex, married, unmarried-Man and Woman, Widow, Widower as offender or abettor. The children of Void and voidable Marriage have to face various social and legal challenges in their life.

Though illegitimate children will be protected as legitimate as provided in the Hindu Marriage Act, Sec-16. (Legitimacy of children of void and voidable marriages.—(1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

But in reality they (Children of Void and Voidable marriage) face a cynical attitude of the society. They suffer from inferiority complex. They also will not have the right to inherit ancestral property of a family.<sup>13</sup>

Section 13 of the Hindu Marriage Act, provides- Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party— 1 (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; XXXXX

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<sup>10</sup> Dr. H.O. Agarwal, The International Law and Human rights. Chapter 13, State Succession , P-190.

<sup>11</sup> Article 16, Universal declaration of Human Rights- 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

<sup>12</sup>[http:// m.economicstimes.com](http://m.economicstimes.com). Visited on 31/1/2022.

Indian women earn 19% less than Indian Men. The share of Women's participation at work was around 36% in 2021, compared to 64% by men.

<sup>13</sup> Hindu Marriage Act, Section 16(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

This is a civil liability of a Man or Woman causing Adultery; it is same in other personal laws also. As for example, Under Indian Divorce Act, Section 10, Adultery is the ground of Divorce for Christian Community. However Adultery has not been defined by the legislature. The Christian law of inheritance in India is regulated by the Indian Succession Act, 1925. The Indian Succession Act (ISA) only recognizes kinship,<sup>14</sup> therefore adopted and illegitimate children are excluded from the ambit of the Act. (Other than Testamentary Succession)<sup>15</sup> Christian law provides for equal inheritance rights to sons and daughters only if they are born from a valid marriage. 'Child' under Indian Succession Act does not include illegitimate child. The Personal Laws Amendment Act, 2019 is also silent about the Christian Illegitimate child's proprietary right.

However, The Central Adoption Resource Authority enables prospective Indian Parents and Couples to adopt abandoned Child or Child in conflict with law or child in need of Care and Protection, under the Juvenile Justice Act. Thus the Adopted Child will get all the rights of the biological child. Thus the Married Parents/ Couples need to look after such child, without engaging in promiscuous behavior.

Under Section 32(d) of the Parsi Marriage and Divorce Act, Adultery is also a ground of Divorce. But here also Adultery is not defined. Under section 3 of the Act it is provided that, "(1) No marriage shall be valid if— (a) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or (b) such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest; or (c) in the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not) who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. (2) Notwithstanding that a marriage is invalid under any of the provisions of sub-section(1), any child of such marriage who would have been legitimate if the marriage had been legitimate if the marriage had been valid, shall be legitimate."

There is no existing provision in the Indian Succession Act, about the Illegitimate Parsi Children born out of the adulterous relationship, the right to succeed the property.<sup>16</sup> As per the provision of the Section 3(2) of the Parsi Marriage and Divorce Act, the Illegitimate Children (Other than

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<sup>14</sup> Section 24 of the Indian Succession Act, (Kindred and consanguinity-Kindred or Consanguinity is the connection or relation of persons descended.

<sup>15</sup> See section 76 of the Indian Succession Act. Illustration (iii) The testator bequeaths his property "to A and B, the legitimate children C". C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate. (Part-VI, Testamentary Succession, Chapter VI, Of the Construction of Wills, Indian Succession Act, 1925.

<sup>16</sup> See Indian Succession Act, Part- V (Intestate Succession), Chapter III, Special Rules for Parsi Intestate.

Children born out of Adulterous relation) shall have equal Right to succeed as per right of the legitimate child. The illegitimate Parsi children can be given, property by implementing Part VI, Testamentary Succession, Chapter- VI (Of the Construction of Wills).

The Amendment of Personal Law Act, 2019 is also silent about the Parsi Illegitimate child's proprietary right.

Adultery in Muslim Personal Law and its impact:- There is compatibility of the punishment of zina (adultery or fornication), with modern ideas concerning personal freedom, and in particular sexual freedom. From various verses of the Qur'an it is inferable that punishment for zina was at first a sort of tazir that is deterrence and it became a "hadd," that is fixed punishment. Later, the form of fixed punishment started to vary according to the marital status of the culprit. This is agreed upon by all the Muslim jurists with the exception of the kharajite group of al-Azariqa, and some contemporary jurists, who denied that stoning to death was the punishment for married offenders claiming that stoning had been amended by the revelation of the Qur'an (24:2).<sup>17</sup>

The Muslim Personal Law Shariat Application Act, 1937 in section 2, provides various types of Divorce illa, zihar, lian ,khula and mubaraat and it can be enforced by the Husband and Wife on fault grounds (read Adultery) of each other. The triple talaq is abrogated by the law "ENACTED" by the Indian Parliament (THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019.) The Supreme Court, on 18<sup>th</sup> May, 2017, had declared Triple Talaq as unconstitutional.

In Muslim law, an illegitimate child is considered as a child of nobody. The father's right of guardianship extends only to his minor legitimate children. He is not entitled to the guardianship or the custody of his illegitimate minor children. The mother is also not a natural guardian, even of her illegitimate minor children but she is entitled to their custody.<sup>18</sup> It seems that Muslims too, like other communities can adopt a child under the provisions of Juvenile Justice Act,( Central Adoption Resource Authority), and irrespective of existing personal law.

Under the Special Marriage Act, 1954, any Indian Citizen can marry another as per section 4 of the Act. Adultery is a ground of Divorce under this Act,<sup>19</sup> but not covered under section 24 (Void Marriage) and 25(Voidable Marriage) of the Special Marriage Act. Thus a child born out

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<sup>17</sup> The punishment for adultery in Islamic law and its application ..<https://www.tandfonline.com/doi/pdf>

<sup>18</sup> <https://blog.ipleaders.in/General> visited on 29/1/2022.

<sup>19</sup> Section 27 of the Special Marriage Act, 1954.

2 [(1)] Subject to the provisions of this Act and to the rules made there under, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent— 3 [(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

of the Adulterous relation is illegitimate.<sup>20</sup> As per section 26(3) of the Special Marriage Act, illegitimate children will get the property of their parents. But enabling provision of the Section 26(1) and (2) of the Special Marriage Act is not applicable for a child born out of Adulterous relation. This civil liability should be included in the Penal- Adultery law also. We know that civil liability can be included in the Penal law, as per Section 43 in The Indian Penal Code- “Illegal”, “Legally bound to do”. —The word “illegal” is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be “legally bound to do” whatever it is illegal in him to omit. The institution of Marriage was further diluted by section 2f of the Protection of Women from Domestic Violence Act, 2005, where relationship in the “Nature of Marriage”<sup>21</sup> was recognized. These gave recognition of rights of living-together partners, but the application of Adultery concept should also be impliedly recognized in such cases. A partner having sexual intercourse with a person other than the partner causes infidelity and thus should be punished by the Penal law and liability in the nature of damages and separation of the tie between them. The Child of such tie called as relationship in the nature of the marriage should get some economic protection from the economically strong partner. Ideally a pre-nuptial registered agreement/Civil contract related to every important aspects of life including maintenance of children should be thrashed out. Infringement of the conditions may evoke damages and separation.

### **Conclusion**

Human being lives in a community. To protect the moral fabric of the community, family, - institutions like marriage or other marriage like associations should be protected. Children as immature Human, the future resource of the State, need nurturing parents. The concept of intergenerational equity of care and protection provide sound and thriving Human race.<sup>22</sup> If offences against marriage or marriage like institutions take place, apart from the Quarreling spouses/couples, the child gets affected. Their mental and physical growth gets stunted. Though in many Countries, Penal provisions for Adultery are abrogated, but it can be assumed, that for benefit of a child, institution like Marriage should exist. Society recognizes individual’s rights but it should be balanced with duty to the community and State also.

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<sup>20</sup> Not covered under section 26 of the Special Marriage Act, which give illegitimate children the status of legitimate children.

<sup>21</sup> See CRLJ March 2017 Vol. 123 Part 1407, Journal-61. (For the test of relationship in the “Nature of Marriage.”

<sup>22</sup> Young Parents look after the Children and in old age they are looked after by their Children. This Practice continues in almost every culture.