Adultery under the indian penal law family essay

Law

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ADULTERY

A Provision Redundant in Penal Law in Changed Legal and Social ContextAdultery means voluntary sexual intercourse of a married person other than with spouse. The legal definition of adultery however varies from country to country and statute to statute. While at many places adultery is when a woman has voluntary sexual intercourse with a person other than her husband, at other places adultery is when a woman has voluntary sexual intercourse with a third person without her husband’s consent. Though the modern trend is to decriminalize adultery; historically, many cultures have regarded adultery as a crime. Jewish, Islamic, Christian and Hindu traditions are all unequivocal in their condemnation of adultery. In most cultures both the man and the woman are equally punishable. However, according to ancient Hindu law, in ancient Greece and in Roman law, only the offending female spouse could be killed and men were not heavily punished. In India the offence of adultery is punishable under Sec. 497 of the Indian Penal Code, 1860 (hereinafter referred to as ‘ the Code’ or ‘ IPC’). Sec. 497 of the Code defines ‘ Adultery’ as follows:" 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."[1]As it stands, this Sec. makes only men having sexual intercourse with the wives of other men

without the consent of their husbands punishable and women cannot be punished even as abettors. The Report of the ‘ Malimath Committee’ on Criminal Justice Reforms and the 42nd Report of the Law Commission of India recommended redefining Sec. 497 to make women also punishable for adultery. The Central Government accordingly has sought the views of all the 30 states in the country regarding the implementation of the said recommendations. This paper attempts to establish the redundancy of Sec. 497 in the light of Personal and Matrimonial laws and changing social conditions subsequently making a case against amending and for completely deleting Sec. 497 from the IPC.

AN ANALYSIS OF SECTION 497

Sec. 497 penalizes sexual intercourse of a man with a married woman without the consent of her husband provided that such sexual intercourse does not amount to rape. That is, it draws a distinction between consent given by a married woman without her husband’s consent and a consent given by an unmarried woman. It does not penalize the sexual intercourse of a married man with an unmarried woman or a widow or even a married woman when her husband consents to it. In case the offence of adultery is committed, ‘ the husband cannot prosecute his unfaithful wife but can only prosecute her adulterer’. However, since the offence of adultery can be committed by a man with a married woman only, the wife of the man having sexual intercourse with other unmarried women cannot prosecute either her husband or his adulteress. What is interesting here is that the Sec. itself expressly states that the unfaithful wife cannot be punished even as an abettor to the crime. The offence of adultery therefore is an offence

committed against the husband of the wife and not against the wife. The Constitutionality of Sec. 497 was challenged before the Supreme Court under Article 14 on the grounds that it makes an arbitrary discrimination based on sex in the cases of Yusuf Aziz , Sowmithri Vishnu and V. Revathi . In the case of Yusuf Aziz the Court ruled that the immunity granted to women from being prosecuted under Sec. 497 was not discriminatory but valid under Article 15 (3) of the Constitution. In the cases of Sowmithri and V. Revathi it was held that it is the policy of the law to not to punish women for adultery and policies could not be questioned. Secondly, that it was not contemplated for a husband and a wife to strike each other with weapon of criminal law. And that adultery therefore was an offence against the matrimonial home and not either against the wife or the husband. It must be mentioned here that all of the above decisions of the Supreme Court had restricted their scope to the determination of Constitutional validity of Sec. 497 as it stands. They should not be taken as an authority over the question whether Sec. 497 is required at all. Adultery cannot be committed without a woman’s consent. Yet, the Sec. burdens man alone for the offence. Though the reasons for this may be justifiable, the woman here is always treated as a victim of the offence. Hence, this Sec. does not contemplate a situation where the same married woman has sexual intercourse with more than one person other than her husband without her husband’s consent. It is highly implausible that even in such a situation the woman would always be the victim and not the person who provokes the offender for the crime. No doubt that the law, as it stands, is inadequate.

WHY WOMEN ARE NOT PUNISHED FOR ADULTERY?

The offence of Adultery did not punish women but still existed in the code because at the time the enforced law was enacted polygamy was deep rooted in the society and women shared the attention of their husbands with several other wives and extramarital relations. Women were treated as victims of the offence of adultery as they were often starved of love and affection from their husbands and could easily give in to any person who offered it or even offered to offer it. The provision was therefore made to restrict men from having sexual relations with the wives of other men and at the same time to restrict their extra marital relations to unmarried women alone.

WHY THE SUPREME COURT HAS ERRED?

Considering the limited question of Constitutional validity before it the object of Sec. 497, as stated above, was never brought before the Supreme Court. The decisions of the Court therefore have erred to the limited extent of holding adultery as an offence against the matrimonial home. If adultery had been a matrimonial offence neither the husband would have had the freedom to indulge in neither extra-marital sexual relations with unmarried women nor the consent of the husband of the wife when she had sexual intercourse with other men would make any difference in its constitution. Adultery therefore is not an offence against the matrimonial home but against the husband himself. The way a person is not expected to enter on the property of the other without his consent, another man is not expected to have sexual intercourse with someone’s wife without his consent. It uses

the same analogy that is used for the offence of trespass. There is no doubt then that this Sec. treats a woman like a man’s chattel.

CHANGING SOCIAL CONDITIONS!

Polygamy in all religions except Muslims, who are legally allowed to have four wives, has ceased to exist and become illegal. Men now have only one wife who has no rivals for her husband’s love and affection. Today, not only a person having two wives can be prosecuted for bigamy but his second marriage is void ab-initio. Unlike the past when it was required to prove that the husband " lived in adultery" to obtain a divorce, even a single instance of sexual intercourse with anyone other than the spouse entitles the other spouse for divorce. Now, wives are not deprived of their husband’s love and care and spouses can hardly maintain any polygamous or extramarital relations without inviting any legal action. Even the definition of adultery in civil law is much wider in scope than in criminal law. The personal laws, which did not exist in the present form at the time this law was passed, have not only become operational but also given somewhat of a level playing field for both, the husband and the wife. Naturally, these factors have made the then object of Sec. 497 obsolete.

WHY WOMEN SHOULD NOT BE PUNISHED EVEN NOW?

The object of the amendment to punish women for adultery is not clear. It may either be the fact that the reasons which warranted for the exception of women for the offence of adultery in the last century are no longer valid or to bring gender parity in the present law. In either case the amendment would defeat the purpose. It is true that the reasons which warranted for the

exception of women for the offence of adultery in the last century are no longer valid still however, the consequences of amending the definition of adultery to make women punishable would be horrific. Merely because we have been able to give women the attention they deserve from their husbands does not mean women are being treated equally in every aspect socially. We live in a society where far from prosecution, even an allegation of a woman’s unfaithfulness is sufficient to reap havoc in her life. In case women are made punishable for adultery Sec. 497 would become haven for all husbands and in-laws wanting to get rid of their wives and daughter in-laws at the cost the woman’s social status. Once a woman’s reputation is ruined she will become an easy prey for abuse by other men. The Legislature must understand that what is not equal cannot be equalized by changing definitions. Making a provision which makes a woman lose her reputation in Indian society is like killing the soul of the person while keeping only the body alive. In no case should such a murder be allowed. Thus, changing the definition of adultery to make women punishable under the name of gender parity will only give society a ground to defame women and increase the disparity of status further defeating the very purpose of the proposed amendment.

DECRIMINALIZED ADULTERY

Marriage is both, a sacrament and a civil contract and the society has certain notions about the same. Yet, it is not a standard form contract. The spouses are and should be at a liberty to choose their own terms of the contract. Therefore, whether they allow each other to have or maintain sexual relations with third parties should be at the sole discretion of the parties

alone. The National Commission for women recommends that adultery should be made merely a civil wrong and the Supreme Court impliedly agrees that husband and a wife should not strike each other with the weapon of criminal law. Making provisions in Penal law to regulate civil contracts and particularly the contract of marriage, which is private and personal, is unwarranted. Punishment to the person committing adultery is not and cannot be a remedy for a person aggrieved of adultery. The object of prosecution for adultery is more often to reach a settlement with the offender at the mercenary level and seldom to send the offender to jail. In fact this was the very reason why the offence of adultery did not figure in the very first draft. To this extent, the conditions are not appreciably different even today. The existence of Sec. 497 has no apparent affect on society. Acknowledging this most western countries have decriminalised adultery. It is not a crime in most countries of the European Union, including Austria, the Netherlands, Belgium, Finland, Sweden and even Britain from whom we have borrowed most of our laws. In the United States, in those states where adultery is still on the statute books, offenders are rarely prosecuted.

CONCLUSION

The object of making adultery an offence and restricting it to men alone was to deter men from taking advantage of women starved of the love and affection of their husbands and deter men from having sexual relations with the wives of other men. Since men had the social sanction to maintain such relations and women were starved of the love and affection of their husbands women were treated as the victims and not the authors of the crime. When Sec. 497 was enacted there were no codified personal and

matrimonial laws like today but they were unequal and inoperative. Over the years polygamy has become illegal while monogamy has become prevalent. Today the personal laws are equal, operative, effective and efficient. The definition of adultery in matrimonial laws is much wider in scope that the definition of adultery as a crime. To practice polygamy or have extramarital relationships without attracting civil action is almost impossible. Women have begun to establish their own identity in the society and are no more treated merely as their husbands' chattel. There are no reasons to retain adultery as an offence in the penal code. Our personal laws are sufficient to take care of adultery as a civil wrong.