

# Decriminalisation of adultery: A socio legal analysis

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**Abstract:** *The current status of women in Indian was not as same during Pre-independence period also it can not deny that women have always been the victim of offences in society, Keeping in mind the adultery is one of such offence provided under section 497 of IPC which women can not be held responsible for guilty though she may seducer of offence. Second Women should not be treated as commodity or tool of the men to be used as and when required and the husband can not be a master of his wife as husband will give the consent in the matter of adultery. By taking on account of these facts the section 497 was itself a gender discrimination which is legally and ethically wrong. In other hand the present judgment of Supreme Court is not satisfactory in response to decriminalization of the offence instead of making gender neutral provision.*

**Key Words:** *Adultery, adulterium , adulterer*

## I. INTRODUCTION

It is to note that the provision of ‘adultery’ under Indian penal legislation has been a matter of biggest controversy since its inception. The current status of women in Indian was not as same as in the initial years of framing of Indian Penal Code. The Framers of the Indian penal code made provisions with reference to offence against women by keeping in mind the status of women at that time. It can not deny that women have always been the victim of offences in society. One such offence is Adultery which has been provided under Section 497<sup>1</sup> of IPC. Adultery means an act of committing sexual intercourse with married women who is someone’s wife without consent of her husband. This action leads the infringement of the rights of a husband towards his wife and hence in Indian regards it is an offence. The drafter of IPC<sup>2</sup> Lord Macaulay in his first draft of Indian Penal Code had not inserted section 497 of IPC which was remained silent. He was not favoured for inclusion and this shall be left to the society. Hence Maculay advised that it would be treated as a civil wrong rather criminal offence. Accordingly it was not included in Indian Penal Code as an offence. But the members of second law commission observed it would not be appropriate if it will not include in penal code as a criminal offence. Hence the members of second Law commission<sup>3</sup> recommended to add in penal code and suggested that only man should punished under this offence though women is equal liable. This was opined on the argument that though women are equal liable why only man will punished why not both. In this argument it was stated that the condition of the women

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<sup>1</sup> “Adultery.—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.”

<sup>2</sup> Indian Penal Code 1860

<sup>3</sup> Law commission of India second report on law relating to marriage and divorce in India, March, 1960 pp.63

of the country was not well as compared to the women in England and France. They further opined adultery is one of the grounds of divorce.

## II. Concept of Adultery in India (Section 497):

The term adultery has brought from the Latin word *adulterium* means sexual action voluntarily by a married person with another married or unmarried person. Section 497 of IPC stated that sexual intercourse between men whether married or unmarried with a married woman without the consent of her husband as an offence of adultery. If sexual intercourse between men whether married or unmarried with an unmarried woman or a divorcee or a widow does not come within the ambit of adultery. It seems the adultery as an invasion of the right of husband over his wife therefore it is treated as offence relating to marriage. The offence of adultery as stated under Indian Penal Code was scanned by judiciary number of times and was declared to be constitutionally valid every time. Adultery was considered as an offence from the date when it was inserted in the penal statute. The idea of declaring adultery as constitutionally valid was to protect the original intent of the framers of the Constitution.

## III. Judicial Response

For the first time in the year 1951 it was challenged the constitutional validity of Section 497 in the case of *Yusuf Abdula Aziz vs State of Bombay*<sup>4</sup>. Yusuf (adulterer) who was charged with an offence of adultery he argued that section 497 is violating the concept of equality which is given in Article 14<sup>5</sup> and 15<sup>6</sup> of Indian Constitution. By interpreting section 497 the offence of adultery could only be committed by a man but the adulteress wife can not be punished even she is an abettor. He also argued that an offence committed equally by man and women but punishment operates unequally by discriminating on the basis of gender which cannot be said to be an exception under Article 14. Further Article 15 of Indian constitution prohibits of discrimination by the state against any citizen on the basis race, religion, caste, sex and place of Birth. But the Bombay High Court held that Section 497 is constitutionally valid because it was drafted in penal law by keeping in mind the social conditions and societal oppressions against the women. Furthermore, the court said that the alleged classification between man and women is justified by the provision of Article 15(3)<sup>7</sup> which permits the State to make 'any special provision for women and children'. After that Yusuf Aziz filed an appeal in Supreme Court that such protection may allow the adulterer but the Constitutional Bench was not impressed of appellate and upheld the decision of Bombay High Court by saving Article 15(3) which women can not liable for the offence of adultery.

In October 2017 it was again challenged the constitutional validity of Section 497 read with section 198(2) of Code of Criminal Procedure in the case of *Joseph Shine vs Union of India*.<sup>8</sup> Joseph Shine filed public interest

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<sup>4</sup> AIR 1950 Bom.470

<sup>5</sup> "Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

<sup>6</sup> Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

<sup>7</sup> Nothing in this article shall prevent the State from making any special provision for women and children

<sup>8</sup> 31(2018)7SCC192

litigation under Article 32 of the Constitution. Section 198(2)<sup>9</sup> of Code of Criminal Procedure empowers the husband of adulteress to file a complaint for an offence of adultery further a married women could not bring forth a complaint under section 497 IPC when her husband engaged in sexual intercourse with an unmarried woman. The matter was referred to constitutional bench and petition was heard by bench of three judges headed by Chief Justice of India Sri Dipak Mishra where in it was noted that Section 497 grants relief to the wife by treating her as a victim. Further It is noted that when an offence is committed by both of man and women then one is liable for the criminal offence and another is pardon. Generally the criminal law proceeds on gender equality but in this said provision the concept of Gender equality is absent. Thereafter the matter was referred to five judge bench started hearing the matter from both side noted that section 497 violate the right to equality, secondly by including women as offender can be made gender neutrality<sup>10</sup>. Dealing with these law point observed that adultery can no longer be treated as an offence and adultery law itself arbitrary. Further the bench added women could not be treated as commodity as husband is not the master of his wife by leaving them to the discretion of their husband for giving consent in the matter of adultery. So section 497 is unconstitutional as it violates the Article 14 and 21 of the constitution of India hence a man having extra marital relationship with a married woman is no longer a criminal offence.

#### **International Context:**

The law of adultery is not uniform and it differs from country to country. It varies according to the Customs, religious norms, tradition and socio culture factors etc of the people. The law on adultery in different countries is furnished below:

1. Germany: If a marriage is dissolved due to adultery the guilty partner shall be punished with an imprisonment for a term of not less than six months subject to aggrieved party must file petition.
2. America (USA): According to the hybrid rule if either of spouse commits sexual intercourse with other person (third party), both parties are guilty of adultery. However some of the state of USA is not following this rule. These few states are not recognizing as Adultery is an offence.
3. South Korea: Adultery was an offence until 2015. After that the Constitutional court of South Korea decriminalized the adultery offence. The judges interpreted that adultery is a private affairs of the spouse.
4. Philippines: This country is a catholic dominated Christian country. So this country has a different legislation in response to adultery. The law gives punishment to married women only and not the adulterer who commits offence of adultery.
5. Malaysia: Adultery is not criminalized in Malaysia which is Muslim dominant nation does not make adultery as an offence under its penal legislation
6. Saudi Arabia (UAE) : In UAE where adultery is an offence and punished severely even up to death sentence.

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<sup>9</sup> "Prosecution for offences against marriage: 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."

<sup>10</sup> [www.scoobserver.clpr.org.in/court-case/constitutionality-of-adultery-law](http://www.scoobserver.clpr.org.in/court-case/constitutionality-of-adultery-law). Decriminalisation of Adultery, The Supreme Court Observer , Oct.11,2018,12:34 P M).

7. Pakistan: The Adultery is considered as a heinous crime so both man and woman punished which may extended to death sentence.

Most of the western countries Adultery is no more considered as an offence the European Union, including Austria, Netherlands, Belgium, Finland, Sweden, and even Britain, China as well adultery is not crime just a ground for divorce.

### **Findings and Discussion:**

The Supreme Court of India had given a vibrant judgment on struck down of Section 497 IPC. After coming the Judgment of Supreme court some of in favour of decision and some of argued the decision that it should have better if law can be amended instead of remove the law. The following are the issues framed to discuss in response to gender neutrality:

- i. Criminal Liability: In the offence of Adultery women cannot be held responsible for guilty because the societal perception that man is the always seducer of the offence though women may abettor towards this criminal act. Although man and women are equally involved in the offence the liability should also fix equally so that Section 497 provision shall have be a gender neutral law.
- ii. Rights to Sue: In case of offence of Adultery the husband of adulteress has the right to sue against the adulterer as the crime committed against the husband similarly rights should also given to the wife of adulterer to file a suit against the adulteress as the offence also committed against the wife of adulterer. So law shall be consider as gender neutral law.
- iii. Classifying of Women: The law classified the women I.e married women, unmarried women, divorced women and widow. The man who commits adultery with woman it is an offence whether committed against any married, unmarried, widow or divorced women irrespective of their classification otherwise it makes no sense of gender neutrality.

## **IV. Conclusion**

The present decision of Supreme Court cannot said to be justified for the reason the Adultery is no more considered as criminal offence and transformed into a ground of divorce and considered as a civil wrong. Ultimately it restored the opinion of Lord Maculay. According to Law commission women are exempted from punishment for adultery because of their deplorable condition. But in other hand the offence should have made gender neutral instead of decriminalisation accordingly the decision is criticized. Women should not be treated as commodity or tool of the men to be used as and when required. The husband can not be a master of his wife as husband will give the consent in the matter of adultery. If a man has done the same by taking the consent of her husband will not treated as adultery. Hence the provision itself was gender discriminating by giving authority to the husband for using of his wife which is legally wrong.

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