

**Adultery: A Top- Down Approach Which Made Law Unconstitutional**

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**Abstract**

Laws are driving forces for protection of rights and are working on the basis to regulate rules and regulation. The substantive law deals with area of crime, which were drafted by Lord Macaulay in form of Indian Penal Code 1860. In this research analysis on have talked about crime against women with respect to Adultery have been discussed in detail manner. The study has been conducted from judicial perspective on grounds of constitutionality finding place under Article 14, 15 and 21 and humanity. The Supreme Court judgment which later change the stance to make adultery unconstitutional by Joseph Shine v. Union of India case. These laws create around 160 years -ago a drafted, but with time change in society has led Indian judiciary have taken some positive aspect in dealing issue related to crime against women.

**Key Words:** Substantive Laws, Constitutionality, Indian Judiciary

## 1. INTRODUCTION

India saw a welcoming judgement coming on 27<sup>th</sup> September 2018 regarding a struggle for removing Section 497 of Indian Penal Code. The Honourable Supreme Court abolish Section 497 of IPC thus ending the war against adultery. After hearing both the parties in matter of Joseph Shine v. Union of India<sup>1</sup>, the five- judge bench of Supreme Court unanimously agreed to scrap that had been prevalent from 158 years.

The 5- judge bench was headed by Chief Justice Dipak Misra, and include four other Hon'ble judges: Justice A Khanwilkar, Justice RF Nariman, Justice DY Chandrachud and Justice Indu- Malhotra. In ruling in favour from petitioner name Joseph Shine and thereby resulting in repeal the Section 497, the apex Court overturned famous judgement where legal authority was challenged with respect to Constitution, patriarchy and outdated laws.

### 1.1 ANALYSIS OF ADULTERY

Adultery has derived its meaning from Latin verb adulterum which comes out to be corrupt. It explains us that a person male has sexual intercourse with wife of another without having the permission or consent from the women husband is knows as adultery<sup>2</sup>.

In India adultery was constitutional before 2018 and was enshrined under IPC Section 497- “Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to believe to 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 wifeshall [not] be punishable as an abettor”.<sup>3</sup>

Section 198[2] “For the purposes of sub-section [1], no person other than the husband of the woman shall be deemed to aggrieved by any offence punishable under Section 497 or Section- 498 of the said Code: Provided that in husband and some person who had care of

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<sup>1</sup> 2018 SC 1676.

<sup>2</sup> K.L Vibhuti, Adultery in IPC: Need for gender equality perspective [2001] SCC[CJ] 16

<sup>3</sup> Indian Penal Code 1860.

the woman on his behalf at time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.”<sup>4</sup>

## 1.2 HISTORY

It is pre-constitutional law of 1860 where males were in dominant position and women had no right and they were considered a property of husband thus adultery as an act was considered theft over the property by the offender. During the time when Code was prepared Lord Macaulay was not in the opinion to include the act of adultery being a criminal act prepared as per report of Law Commission of India in 1837<sup>5</sup>. Then when code drafted in 1860 it defined adultery as offence under Section 497 of IPC 1860.

## 1.3 ELEMENTS OF ADULTERY: SECTION 497 IPC 1860

1. There should be sexual intercourse between a man or third party [male] and married female who is not her husband as per marital status.
2. The other men had intercourse with should be knowing or have any reason for believing that the person with whom he had intercourse is wife of another man:
3. The consent should be attached with the nature of intercourse otherwise it will fulfil the criteria of Rape under Section 375 of IPC.
4. The course of intercourse is without the consent of husband.

## 2. PREVIOUS RULING OF THE COURT

### 1. Yusuf Abdul Aziz v. State<sup>6</sup>

The first instance when the controversial law had been challenged was as early as in the year 1951, in the case of Yusuf Aziz vs State of Bombay.<sup>7</sup> The petitioner had contended that Section 497 of IPC violated the rules of equality guaranteed in articles 14 right to equality and 15[3] discrimination of women on special grounds the Indian Constitution and hence should be scrapped. The main contention in this case was that the governing adultery law, discriminated against men by not making women equally

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<sup>4</sup> Supra

<sup>5</sup> 1<sup>st</sup> Law Commission Report 1837 recommendation

<sup>6</sup> [1954] SCR 930

culpable in an adulterous relationship. It was also argued that adultery law gave a license to women to commit the crime. 3 years later however, i.e. in the year 1954, the Apex Court held that section 497 did not give women the right to commit adultery. Special provision for women is permissible under article 15(3) of the constitution. Furthermore, the judgment held that man is presumed to be the common seducer. A woman can only be the victim of adultery, not the perpetrator of the crime.

2. The second instance when the section was challenged happened in the year 1985 in the case of *Sowmithri Vishnu versus Union of India*<sup>8</sup>. In this case the prime contention of the prosecution was that the law was partial towards women and that women should also be brought under the purview of section 497. Even the classification between men and women is violative of equality given in Constitution under Article 14.
  - a. Here men are allowed to prosecute person who committed adultery but not women
  - b. Section 497 does not the wife power to get her husband prosecuted if husband has committed adultery

The Apex Court however held that bringing such an unmarried woman in the ambit of adultery law under Section 497 would mean a crusade by a woman against another woman. Hence the law should remain as it is and time has changed so law will be amended appropriately.

3. The third case challenging the adultery law was in the year 1988 during the case held in **V Revathy versus Union of India**.<sup>9</sup> The was challenged by the wife whose husband committed adultery under Section 198[2] of Cr. P.C upholding its view on the matter in the previous two occasions, the court held that not including women in prosecution of adultery cases promoted “social good”. It offered the couple a chance to “make up” and keep the sanctity of marriage intact. The court also cited that the law was a shield and not a sword. Even Justice Thakkar said 1. Women cannot be prosecuted for adultery 2. Bar on wife is because it develops unfaithful relationship.
4. The fourth occasion of challenge was in **W. Kalyani v State through Inspector**<sup>10</sup>. Here going through the judicial opinion Justice Lodha and Justice Aftab pointed out

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<sup>8</sup> [1985] Supp SCC 137

<sup>9</sup> [1988] 2 SCC 72

<sup>10</sup> [2012] 1 SC 358

that that what ever court is doing is under the precedence that have been held by the apex court and in case Parliament is there to bring new law into demonstration.

## 2.1 Analysis of Joseph Shine Vs Union Of India<sup>11</sup>

The case was filed under PIL, Supreme Court to hear the validity of Section 497 of IPC read with Section 198 of Cr. P.C. where the petitioner argued that these sections are violative and breaching the constitutional protection guaranteed under Article 14, 15 and 21. It is carrying social stigma which discriminate women on the grounds of gender, consent for women is equal as that of married husband, women right to her own body and to make decision on her own.

The apex court discussed over 18 question such as-

### 1. Who may file complaint?

It was seen only husband of women can file complaint but in case some person may file complaint on behalf of husband under Section 198[1] of Cr. P.C then also whom court deems fit. Women cannot take her stand to file complaint for herself.

### 2. Women right to file Complaint?

Women has no right to file complaint if his husband commits adultery.

### 3. Who may be prosecuted?

Here also why only adulterous man is alone guilty and why not adulterous women.

### 4. Women treated as property of Husband?

If the act is committed it is considered trespass over the property of female and her husband has full right over it. In simple manner to suffice no consent= no offence it was because when IPC was drafted condition of women in society was stereotyped.

### 5. Does Section 497 violative of Article 14?

Men and women are treated equally as far constitution says equality before law but not here in the case as adultery is projected.

### 6. Section 198[1] violative of Article 14?

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<sup>11</sup>ibid

Neglecting the women to aggrieved person for filing complaint is act towards injustice. The rationale behind equality seems subjugated.

7. Violation of Article 15[1]?

The adultery as grounds sees which sex you belong then grant right here women being at loggerhead due to gender which they are born.

8. Violative of Dignity under Article 21?

The society has created stereotype on basis of consent. As everyone is same in eyes of

9. Everyone has his /her own choice Right to Privacy?

The constitution has regarded sexual privacy as natural right, sharing intimacy is private right of personal so thus female must have sexual freedom.

10. Married women agency and depend upon husband?

Here we see adultery committed by person is liable and women has protection under the act but with social stigma is attached which works detrimental to her. To maintain the fidelity of husband the man has power to attach criminal sanction.

11. Women of her sexual autonomy Section 497 denudes?

Women consent is what taken by male husband the women dignity is not above her husband wish.

12. Adultery is opposed to Constitutional Morality?

Equality for all and non-discrimination of all member of the society

13. Premised on Sexual Stereotype?

Feminist scholar has criticized the condition of women

14. Breakdown of marriage?

Adultery has led breakdown of marriage due to reason

15. Case of Pending divorce proceeding?

Marriage breakdown will result women cannot go back to her husband if process of divorce is going on then she cohabits without another it will led to separation

#### 16. International Treaty

Very few nations consider adultery unconstitutional.

#### 17. Whether to treat Adultery ground of divorce?

Can the married couple plead as ground to take divorce and break their bond in some cases taking advantage of other spouse?

#### 18. Why Supreme Court is waiting for legislation to take call on Adultery?

Cessante rational legis cessat ipsa lex = where reason of law ceases the law also ceases so Supreme Court should struck this foul play.

### 2.1.2 Analysing the judgement with respect to Constitutionality

The apex court observed that while the threat of criminal prosecution does indeed have deterrent effect on any action which has such implications, it is not supposed to be prejudicial to any gender. While article 15(3) does grant the state the right to make special laws for women, such rights shouldn't grant exemption for what would be a criminal offence for her counterpart.<sup>12</sup>

Furthermore, the court observed that the law treats women as a commodity of her husband. The husband can prosecute the man she had intercourse with, and she is helpless to defend her though the intercourse was voluntary. Also, while a husband can extract vengeance on the man who had sexual intercourse with his wife, the wife can do nothing to a husband who has intercourse with another woman. This gives the men literally the right to have intercourse with unmarried women, but the woman enjoys no such benefit, despite being personally exempted from the scope of the section. Thus, the law, while on face is prejudicial towards men, it is in the depth prejudicial towards women. The law treats the women as a commodity or product of her husband. This is at the same time disgraceful and insulting for the women.

To quote the words of Justice D.Y. Chandrachud, "a law which fails to uphold the dignity of an individual, is a law that should cease to be".

CJI Dipak Misra commented that upon perusal of the documents and upon hearing the contentions of both the parties, it seems a wise decision to scrap the prevailing adultery

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<sup>12</sup> The Constitution Of India, 1950

law. However, while writing the order, he had commented that it shouldn't be misinterpreted that this was entertaining adultery or that this made committing adultery any less of a crime than it had been before. Adultery shall remain to be a valid ground for divorce and all courts should view it with the same rigor in case of matrimonial issues.

However, the 5-judge bench unanimously agreed that for all the reasons mentioned above, with due regard to the previous cases and with regard to many other cases cited in the order, the existing law incriminating adultery was discriminating, prejudicial, derogatory and vexatious in nature and should thus be repealed.

### **3. SHORTCOMINGS OF SECTION 497 OF INDIA PENAL CODE**

Apparently, the section sounds unfair, since a man having consensual intercourse with the wife of another person can be penalized under this section, but the woman he had intercourse with is spared of any consequences. The purpose of this section is to keep the sanctity of marriage intact. However, this section does nothing to penalize a man for having intercourse with an unmarried woman, though that disturbs the sanctity of marriage equally. Also, the section does nothing to prevent the wife from having intercourse with another man (married or unmarried). The man having such intercourse may have to face consequences, but the woman is exempted.

While this is apparently prejudicial to the man having such intercourse, it is also prejudicial to the woman having intercourse with such man, since the husband of the woman can prosecute the man she had intercourse with, and the woman was helpless to save the man though she had voluntarily had sexual intercourse with that man.

Citing this point, Justice Indu Malhotra quoted:

“ Thus, the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus, both the husband and the wife are disabled from striking each other with the weapon of criminal law. The petitioner wife contends that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband”

### **4. CONCLUSION**



Section 497 is violative of Article 15 of Indian constitution as a married man who has an affair with an unmarried woman is not prosecutable under the existing adultery law while the same man if indulges in such activity with a married woman would be at the risk of facing a prosecution. There exists an inequality in the treatment depending upon the marital status of the woman.

Further, it also indirectly discriminates against women by holding them to be the “property” of their husbands, for it does not consider adultery an offence if done “with the consent of the husband of the woman”.

Now situation is changing society is matured and we talk of women should be promoted they are not less than boys every aspect there is neck to neck competition either it is education, sports, profession at office working day and night to serve family; so, why such difference? The decision of doing adultery unconstitutional is stepping stone in direction to promote justice and fair treatment of all. This can be step to move away from patriarchal steps developed during colonial time with the passage of time.

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