

## **Decriminalisation Of Adultery In India**

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### **ABSTRACT**

Adultery is a criminal offence. It is crime against marriage. Adultery means wilful sexual intercourse by a man with another spouse without consent of her husband. This paper mainly focuses on the in depth study of the offence of adultery or its decriminalisation. Apart from this, we enumerate different aspects of adultery and its punishment in different countries. The researcher has also made an attempt to enlighten the readers about the historical background of adultery. Further, Section 497 of IPC read with section 198 (2) Crpc has been enumerated and interpreted with the help of recent judgements. Section 497 is even interpreted as a gender biased provision in the Indian Penal Code. This section makes illogical difference between male and female. This paper also talks about the ingredient of adultery and also the procedure of it which is given under section 198(2) of Crpc. And finally it deals with the reason behind the decriminalisation and what issues court considers making this section unconstitutional.

**Keywords:** -Adultery, offence against marriage, unconstitutional, law, punishment.

### **INTRODUCTION**

The term adultery is derived from French word 'avouter' which has evolved from Latin verb 'adulterium' which mean extramarital sex. It is an offence against marriage. The general meaning of adultery is sexual relation outside marital wed-lock. Adultery has been defined as physical relation between two individuals who are not married to each other and either or both

are married to someone else. The dictionary meaning of adultery is voluntary sexual intercourse of a married person other than his or her spouse.<sup>1</sup>

The idea of adultery is as old as the organisation of marriage. In ancient India, Adultery was considered as a criminal offence and it must be restricted by law. There were various types of punishments for offence of adultery. In manusmriti, 'The husband to confine an exceedingly corrupt wife to one room and compel her to perform penance'.<sup>2</sup>

In ancient time, if adultery was committed by any women it was treated as sin. In Vedas, Puran, and Shastras a proper punishment were mentioned for those sin. But in Kaluga, it was as crime rather than sin. In view of Dharmashastra, On that era a women who committed adultery should be deprived of her authority and should be made to wear dirty clothes, should be given food which enable her to live but if she conceives from such relation then she may be abandoned.

According to Black's Law Dictionary,<sup>3</sup> Adultery is defined as 'voluntary sexual intercourse between a married person and someone other than the person's spouse'. Adultery is the wilful violation of the marriage bed.

According to Encyclopaedia Britannica,<sup>4</sup> 'Adultery means sexual relations between a married person and person of opposite sex, the two persons not being married to each other.

### **Dennis v. Dennis<sup>5</sup>**

In this case it was emphasises that nothing else other than penetration constitute the offense of adultery.

### **Sowmithri Vishnu v. Union of India and others<sup>6</sup>**

It was contended that section 497, IPC is violating articles 14 and 15 of the constitution on that ground it makes an illogical classification between male and female. In this case, the Apex court observe that this position might have undergone some change over the years that women may have started seducing men but it is for the law making body to transform or amend section 497 of IPC appropriately.

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<sup>1</sup>'The Concise Oxford Dictionary of Current English'; Sixth Edn; Oxford University Press; p. 15.

<sup>2</sup>P.u.kane, History of Dharmashastra, 571, vol II, part I, SCC edition, 1974.

<sup>3</sup>Eighth Edition (Reprint) 2004.

<sup>4</sup>[http:// www. Britannica.com/EB checked /topic /6618/ adultery](http://www.Britannica.com/EBchecked/topic/6618/adultery) visited on 25.05.2011.

<sup>5</sup>(1955) 2 All.E.R. 51.

<sup>6</sup>1985Suppl SCC 137.

**Section 497: - An evaluation**

497. 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.

Section 497 does not give ideal definition of adultery. Basically in adultery it was an incursion over a husband's property that is his wife or spouse. This section somehow limits the scope of

| Sr.No | Persons involved in sexual intercourse | Whether offence of adultery meets out? | Who can sue? | Who can be sued?        | Who cannot be sued? |
|-------|----------------------------------------|----------------------------------------|--------------|-------------------------|---------------------|
| 1.    | MX + MY                                | Adultery                               | Husband of Y | MX                      | MY- immune          |
| 2     | UX + MY                                | Adultery                               | Husband of Y | UM                      | MY- immune          |
| 3.    | MX+ UY+DY                              | No adultery                            | Nobody       | Section does not apply. |                     |
| 4.    | UX+UY+DY                               | No adultery                            | Nobody       | Section does not apply. |                     |

adultery.

Note: - MX = Married man, MY = Married woman, UX = Unmarried man, UY = Unmarried women, DY = Divorced woman.

This section basically deals with punishment of adultery. As we know that in Hindu religion marriage is sacrament and this offence somehow against the sanctity of conjugal right that's why this offence is also considered as an anti-social act. The consent and willingness of that woman shall not have any legal status. It is an offence committed by a man against a husband in respect of his wife. It means that the wife shall not be punishable as an abettor or co-accused.

Under this section 497 provided that the aggrieved husband, with the leave of the court makes a complaint against the accused. However, the consenting women shall not entitle to make a complaint against the accused.

As we started earlier that this offence is committed by a man who has sexual intercourse with the wife of another man and without the latter's consent and connivance. Hence, the sexual intercourse is an essential ingredient for committing this offence. In case if the man taking consent or connivance of the husband of that married women then in this case section 497 of IPC shall not be attracted.

Section 198 (2) of Crpc 1973 specially provides that, No person other than the husband of the women shall be treated as aggrieved by offence of adultery under section 497 of IPC. Some person, who had taken care of the woman, with the leave of the court, shall make the complaint against the accused.

In year 1972, the IPC (Amendment) act 1972 was proposed that this privileged conferred on the woman as regard to offence adultery must be abolished keeping in view the transition of the Indian society and change in socio- legal as well as ethical norms with the advancement of time and progressive approach, but this suggestion did not muster the required support and therefore had to dropped.

When the law was written 150 years ago, women were seen as oppressive class in need of protection because they were deemed as their men's property and therefore the offence of adultery must reflect discrimination. It rests in the larger part on the India that a woman is the property of his men.

### **INGREDIENTS OR ESSENTIALS OF SECTION 497**

Physical intimation between a male and a female who is not married with each other but such female must be spouse other man. The man who has sex with the married lady must know that she is the spouse of another man. Such sex must happen with her assent i.e. it not fall under the rape. Sexual intercourse with the married lady must happen without the assent of her better half.

### **POSITION OF ADULTERY IN DIFFERENT COUNTRIES**

The Law of adultery varies from nation to nation. It isn't uniform. It differs according to religion, norms, attitudes and other factor.

**IN USA** - It reveals that three major formulating law of adultery. In precedent based law, when a man and married woman in an adulterous relation then both will be liable and punished. In custom based law, it is a voluntary sexual intercourse other than his husband or wife then both the man and woman will be punished. As indicated by the half and half guideline, followed in twenty states in the United States, if either mate has sex with a third party, the two offenders are liable of infidelity. In any case, infidelity is definitely not a criminal offence in the United Kingdom.

**IN GERMANY** - If divorce is taken on the ground of adultery, the partner who is in that adulterous relation is punished with imprisonment not less than 6 months.

**IN PAKISTAN** - It is seen as a heinous crime. Both man and lady were punished who is in adulterous relation.

**OTHER COUNTRIES** - In Malaysia, Singapore, Hong Kong adultery isn't an offense under the penal code. In Philippines, the wife is liable for adultery but the man is not punished for adultery.<sup>7</sup>

### **CONSTITUTIONAL VALIDITY**

There were various cases where constitutional validity of the section 497 had been challenged.

#### **Yusuf Abdul Aziz v. State of Bombay<sup>8</sup>**

In this case, Yusuf Abdul Aziz challenged the section 497 of IPC. He said that this sec of IPC is violating Article 14 (Right to Equality) of the Constitution. Bombay court does agree with his contention and the observation of court was does not in his favour. Then he went to Supreme Court, he said that right to equality is violated by section 497 of IPC and it is also misuse of Article 15 (3) because this section only punished the man for adultery but it does not punish the lady who is in adulterous relation. The court declares that we can't add such limitation to the proviso; nor are we ready to concur that this provision gives license to commit the offense.

#### **Sowmithri v. Union of India<sup>9</sup>**

In this case, it was said that the section 497 of IPC was against the article 14 of the Constitution. It makes illogical difference between man and women. The male partner have right to sue the

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<sup>7</sup> www.sci.gov.in

<sup>8</sup> 1951 (53) Bom LR 736.

<sup>9</sup> 1985 Suppl SCC 137.

man who is in adulterous relation with his partner but the female partner is not given the right to sue the female who is in adulterous relation with her partner. It also doesn't take in its ambit the situations where the spouse has sexual relation with unmarried ladies, which mean that the husbands have a free permit under the law to have extramarital association with unmarried ladies. The court saw that the assent of the women in section 497 is not so important. This section does not make illogical classification between male and female. It normally seen that the male is a seducer not the female. It does not contradict with the fundamental rights. The position may have experienced some change throughout the year; however it is for the law making body to change section 497 according to the changes in the society.

**V Revathi v. Union of India<sup>10</sup>**

In this case, petitioner also show the same contention that section 497 is violating the fundamental right and it is against the right to life. The female spouse is not punished for the offense and she has also not the right to sue against the woman who has adulterous relation with her husband. The court considered section 497 along with 198 (2) as a law making body intended that the offense is done by stranger to the wedding unit who attacks the harmony and protection of the marital unit and toxin the relation between the two life partner.

**Joseph Shine v. Union of India<sup>11</sup>**

In this case, 158 years old law were struck down. Before this case this offense is considered as criminal offense. Joseph shine is a non-resident keralite. In October 2017, public interest litigation filled under Article 32 of the Constitution. He challenged the constitutional validity of section 497 of IPC read with section 198(2) of the Crpc. It was his contention that section 497 of the IPC is discriminatory in nature. He believes that this is somehow a gender bias law. The section 497 of IPC does not define adultery, it only provide punishment for adultery which may extended for the term of 5 years or fine or both. This section basically means that the sexual intercourse with that female without consent and connivance of her male partner such sexual inter course does not amount to rape. In this section we see two aspects against the woman: - (a) her consent is not so important. (b) Her privacy is violated by her husband who is somehow violating her fundamental right which is given under article 21.

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<sup>10</sup>1988 SC 835.

<sup>11</sup> Writ Petition Criminal No. 214 of 2017.

In this case, section 497 declares unconstitutional by apex court. In context of section 497 wife should be treated as a personal property of his men. Under this section, female partner has no right to sue her husband who is in the adulterous relation. If we read section 497 with section 198(2) we find the conclusion in which only male spouse and who take care of her shall have right to complaint no other person has right to initiate such criminal proceeding.

The court struck down section 497 because it violates article 14, 15 and 21 of the Constitution. It also held that section 198(2) of Crpc will be illegal.

The court while making section 497 unconstitutional takes following issues: -

The self-sufficiency of a person to settle on their decision as for his/her sexuality is the most close decision of life and ought to be shielded from open reproach through criminal assault.

A wrong culpable with criminal approval must be an open wrong against the general public.

Section 497 is a pre constitutional law and it was enacted in year 1860. This law was framed by foreign law making body.

The right to live with dignity incorporates that the right not to be exposed in public and state should provide punishment for that but state may provide civil remedies for that. The law of adultery is contradictory to freedom, pride and fairness.

The 42<sup>nd</sup> law commission report also recommends amending the section 497 of IPC and making equal punishment for both male and female. The law commission also in his 156<sup>th</sup> report recommend to amend the section 497 of IPC. The Malimath committee also suggest to reform the section 497. National commission for women 2006 also recommend to make suitable change in the section 497 of IPC.

## **CONCLUSION**

As we know that the IPC was enacted in the year 1860. The law relating to adultery was 150 years old law. In that era women were treated as the commodity or property of the man. In mean while we talked about 497 of IPC. It simply means that when a person had committed a consensual intercourse with married women without the consent of her husband he had committed adultery which means that the consent of the women is invalidate. But if consent had taken by her husband then he had not guilty of adultery.

Previously, in various landmark judgements i.e. Sowmithri Vishnu case and Yusuf Abdul Aziz the apex court said that it is for the law making body to change or make amendment according to the changes in society. But later in Joseph shine case the Supreme Court overruled his own decision and held that section 497 of IPC is discriminatory in nature. It also violate article 14, 15 and 21 of Indian Constitution. The court also stated that section 497 should be decriminalised because these stereotypes section would amount to gender discrimination and inequality in our society. And further court stated that the adultery can be the grounds for dissolution of marriage but it cannot be a criminal offence, justice DY Chandrachud asserted that ‘the history of section 497 reveals that the law of adultery was for the benefit of the husband, for him to secure ownership or the sexuality of his wife it was aimed at preventing the women for exercising her sexual agency.’<sup>12</sup>

However, this judgement had great impact in our society regarding the sanctity of the marriage and also it will provide license to the spouses having extramarital affair which would increases the divorce cases which will badly effect to the futures of their child’s and institution of marriage.

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<sup>12</sup> [www.SCCOnline.com](http://www.SCCOnline.com)