



Decriminalization of Adultery law in India: An Analysis

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ABSTRACT

Freedom is the most precious thing that needs to be protected at all cost. Freedom can be physical, mental and social or of any other kind which must not be gender specific. Our constitution grants such freedom as a matter of rights to every citizen enshrined under it. India is a diverse country having people of the various religions and dialects with diversity of crimes. Some of the crimes are social taboo whether some of the crimes are vibrant in nature. Adultery is more likely is treated as the social taboo in our country where there is a concept of morality in the matrimonial bond. Marriage in India is a religious ceremony and a sacramental contract. Indian culture is growing quickly to accomplish the developing targets which western societies took a very long time to accomplish. Subsequently, Indian culture is progressively turning out to be open in sexual conduct, attitude and sexual values in the public. Decriminalization of the adultery under penal law is a recent issue and it is drawing attention from the law thinkers as it indicates toward the need of changing the Macaulay code, in order to fit it according to present day scenario.

Adultery in India was earlier placed under Section 497 of Indian Penal Code, 1860 which carry punishment of five years and fine, although which Supreme Court had decriminalized in verdict of *Joseph Shine v. Union of India*¹. A Constitutional Bench comprising five judges, led by the then Chief Justice of India Dipak Mishra, unanimously struck down Section 497 of the Indian Penal Code, 1860. It was held that offence of adultery is clearly arbitrary and archaic. Supreme Court on analysing the various aspects of the provisions contained in section 497 (Adultery) of IPC held that it in contravention of the right to equality and equal opportunity guaranteed by the constitution to

women irrespective of gender. The Supreme Court bench also said that adultery would continue to be treated as a civil wrong and can be ground for dissolution of marriage.

Supreme Court on decriminalizing the adultery law left it only the ground of divorce and judicial separation and thus making it the wrong of civil nature where no punishment is administer for a wrongful act. The law on adultery has knocked the door of Supreme Court many times but before this verdict of Joseph Shine, legality of adultery law always triumphed and remained valid till date. But the verdict of Joseph Shine added a new chapter on the right of equality as the then Chief Justice Dipak Mishra remarked adultery law as “anti-women”. The petition was challenging the law of adultery as of being against the scheme of equality protected by the Constitution. Dipak Mishra heading the constitutional bench, hearing the challenge to the adultery law struck it down giving leverage to women. In this paper, researcher will see the decriminalization of the adultery by the supreme court is done on what context and being a social taboo, does it hold any decriminalization effect on the society or not. Study will elaborate the social and legal analysis of the decriminalization effect of the adultery law in India.

I. INTRODUCTION

The Supreme Court has struck down 158 years old Section 497 of the Indian Penal Code, 1860 which criminalizes adultery and declared it unconstitutional. Chief Justice Dipak Misra while writing judgment on the law of Adultery remarked, “Any provision of law affecting individual dignity and equality of women invites wrath of constitution. It's time to say that husband is not the master of wife. Legal sovereignty of one sex over other sex is wrong”. The judgment held Section 497 of penal code to be “manifestly arbitrary”.

¹ 2018 SCC Online SC 1676



In October 2017 a writ petition was filed by a nonresident Keralite challenging the constitutional validity of Section 497 of Indian Penal Code, 1860² and Section 198(2) of Criminal Procedure Code, 1973.³ This PIL (Public Interest Litigation) was filed under Art.32 of the Indian Constitution.⁴Section 497 of Indian Penal Code, 1860 give a way to criminalize the offence of adultery by thrusting criminal liability on a person who, without the consent of husband, involves in sexual intercourse with a married woman. Adultery was punishable with a maximum imprisonment of five years. Women including as consenting parties were exempted from prosecution. Further, married women cannot bring forth a complaint under Section 497 of Indian Penal Code, 1860 even when her husband indulged himself in sexual intercourse with an unmarried woman. The petitioner further contended that the provisions under Section 497 of Indian Penal Code, 1860 violates the fundamental rights under Articles 14, 15 and 21 as enshrined under the Indian Constitution. When a sexual intercourse took place with the consent of both parties, there is no reason for excluding one from liability. It further discriminates women by holding an erroneous presumption that women are property of men.⁵ As '*Right to privacy*' inherently inscribes sexual privacy as its one of the integral parts, Section 198 (2) of Criminal Procedure Code, 1973, excluding women from prosecuting husband for engaging in adultery also infringes the Articles 14, 15 and 21 of the Constitution of India.⁶

But the plea presented by the respondents was holding the contrary opinion regarding adultery. As the opinion adduced by the respondents regarding the consensual sexual relationship outside marriage is an attack on the institution of marriage and protection under Art. 21 is not warranted under the offence of adultery. It was contended by the respondents that right to privacy and personal liberty not being absolute rights, when public interests are main concern, the reasonable restrictions may be imposed on them. A protective cover under Article

15(3) is given in the favour of women for the protection from any form of discrimination.

Supreme Court had pronounced this landmark verdict on 27th day of September, 2018. The significance of the judgment on the law of adultery does not lie on the fact that it done away with patriarchal law which was arbitrary and archaic, but its consequential effects also paved way for a progressive future of the society. Law on adultery was a part of colonial creative Indian Penal Code of 1860 which "*asymmetrically*" criminalized adultery i.e. only the man who engaged in adultery could be punished and not the woman. Additionally, the right of the prosecution for adultery vested with the husband; whether he had "*consented*" or "*connived*" in the adulterous act.⁷

Here discrimination also exists in the provisions of Criminal Procedure Code, 1973 where Section 198(2) of the procedure code gave right only to husband to prosecute the culprit. But wife has no right to file the complaint against her husband or against the woman with whom her husband was involved in adultery. So this provision also found to gender biased as only men are provided with the right and there is nothing for the women. In short a man can file the case against the offender who is male and woman can never file a complaint and can never be prosecuted in the case on the grounds of adultery. So there found to be a lot of disparity in the law.

This set of odd conditions together constituted a near-perfect storm of patriarchy. The husband is authorized to bring a prosecution against the "*other man*" (but not if he "*consented*" to the relationship) shows that ownership over a woman's body passes from her father to her husband after marriage. The woman has no independent personality but is assumed to be personality of her husband, for the purposes of law as well as society. Exempting the adulterous wife from criminal proceedings seems to be based on the idea that the man is the allurer while the woman is sexually subservient in a relationship, hence it is unjustified to punish someone for something who is not responsible for that. Both these presumptions were

² Indian Penal Code, 1860 (Act No. 45 of 1860), s. 497.

³ Criminal Procedure Code, 1973 (Act No. 2 of 1974), s. 198(2).

⁴ *Supra* note 1.

⁵ *Ibid.*

⁶ *Ibid.*

⁷G.S. Bajpai and Priya, "Decriminalization of Adultery" available at: <https://ssrn.com/abstract=3200823> (Last visited on Nov. 06, 2019 at 12:30pm).



features of Victorian law and morality, which was the embedded in Indian Penal Code of 1860.⁸

Seeing historical record, it had been accepted by the courts also. The Bombay High Court acknowledged that the section was premised on the assumption that women were chattels of the husband.⁹ The Supreme Court itself remarked a few decades after this, it was generally the man who acted as a seducer.¹⁰

With all this in background, it was an easy task for the Constitution Bench to unanimously strike down the section as unconstitutional. The concurring opinions authored by the Chief Justice Dipak Mishra, Justice RF Nariman, Justice DY Chandrachud, and Justice Indu Malhotra had consensus on a view that adultery law was grounded on “gender stereotypes”. Consequently, it had infringed the core Constitutional concept of equality i.e. Article 14 of the Constitution (equal protection of laws) and Article 15(1) (non-discrimination on the ground of sex). The immunity provided to women from culpability was not an advantage, but a presumption that confined and restricted them. The court went a step further and held that exposing interpersonal relationships to the harshness of criminal law would extend to transgression into the right to privacy.¹¹

The judgment of the Supreme Court is also important for the further implications. The Supreme Court judges were unmistakably holding unambiguous view for giving prominence to woman’s right to personal, autonomy bodily integrity and individual choice. This personal autonomy to a woman not merely ranging against the State, but also encompassing the context of family and home. This questioned a number of our laws that actively deny these rights. They primarily questioned the restitution of conjugal rights, as it authorizes the courts to intervene in the marital relationship in which one of the spouses who has left the matrimonial house of the other spouse and “direct” the same to return into the company of the other spouse even against the will or consent. Another law which was also intruding the right to personal autonomy was questioned i.e. the marital rape, which plainly discard the applicability of

criminal law and says any intercourse within the marriage will not be considered as rape. Therefore, in the opinion of Hon’ble Supreme Court the decriminalization of adultery may have a ripple effect that goes beyond its immediate context and serves as a launch pad for greater freedom, equality, and independence within private sphere.¹²

MEANING AND NATURE OF ADULTERY

Adultery is defined as the sexual intercourse between a married woman and a man other than the husband outside the marital bond. Hence, it directly hits the institution of marriage. Nature of adultery is little confusing because of uncertainty in the definitional dimensions. The point of uncertainty is whether both parties to the adultery should be held liable for all purposes, matrimonial as well as criminal or only male partner should be held liable. The common synonyms for adultery are ‘unfaithfulness’, ‘having an affair’ or ‘cheating’. Earlier, it was also known as ‘criminal conversation’. Etymologically, the origin of the term is traced from the Latin word ‘*adulterare*’ which means to commit adultery.

In India, the offence of adultery is defined under Section 497 of the Indian Penal Code, 1860 which states:

“Whoever has sexual intercourse with a person who is and whom he knows or has a 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 the offence of Adultery.”

On bare reading of this section, we find the second line of the section leads ‘wife of another man’. It is the central point reflecting specific discrimination on the basis of marital status. This phrase reflects an anomalous idea that for committing adultery, anyone has to involve sexually with the wife of other person, and the person having sexual intercourse with an unmarried woman or a widow will absolve his criminal liability under the law of adultery. Adultery as a penal offence could be found in IPC under the chapter titled ‘offence relating to marriage’. The reason of its being instituted in such chapter for being desecrating the

⁸*Ibid.*

⁹*Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SC 321.

¹⁰*Ibid.*

¹¹*Supra* note 1.

¹²Shivanshu K. Shrivastva, “Decriminalization of Adultery: Not a licence to be Adulterous” II *HNLU Student Bar Journal* 45 (2017).



marriage and attacking and destroying the sacredness of a marital relationship. But as per the sanctity of the marital relationship is concerned, it is the obligation which lies on both the spouses and not merely on woman. But the bare reading of the section 497 of the IPC shows that if the husband connives or consents for committing adultery by wife the sanctity of marital the relationship remains intact, which is ridiculous and arbitrary. It reflects the use of wife as a commodity. Moreover, this adultery law also goes one step further to discriminate the spouses as partners in a marital relationship as it has not incorporated 'husband of another woman' consequently not permitting the woman as partner in a relationship outside marriage, which makes no sense and susceptible to the charge of adultery.¹³

The next distressing phrase of this section, 'without the consent or connivance of that man' represents a woman as a chattel. It shows that adultery will be considered as an offence if it is committed without the consent of the husband. If the husband in a marital relationship either connive or consent to such sexual relationship, it absolves the liability of person as an adulterer. But the other aspect of the same case shows that the consent of the wife of same person involving in the adulterous relationship is not taken into consideration while deciding the guilt for adultery. Therefore, this provision unmistakably discriminatory for devaluating the consent of wife of adulterer while deciding the guilt of adulterous husband.¹⁴

As the opinion in support if this view was that the inheritance of children naturally alters if a child is born out of a sexual relationship outside marriage. But the consent of the husband makes it a complicated case. But going other way around, if the wife consented for sexual relationship outside marriage for procreation of children, then this argument appears unwarranted. If it is about the procreation of children for a married couple then the consent of wife is to be of equal importance for an extra marital sexual intercourse. Moreover if the opinion of court goes as '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'¹⁵ then it makes no sense not to take the consent of wife into account for deciding the guilt for disloyalty in the marital relationship..

Examining the final component of this section 'in such case the wife shall not be punishable as an abettor' we find the other discriminatory aspect of adultery. This absolves the criminal liability of adulterous wife not even as an abettor. In support of this the Supreme Court held that woman is neither the seducer nor the author of the crime but the victim.¹⁶ However, this opinion does not found a basis considering the present societal setup.

The nature of adultery has created some dilemma to the policy makers. It is important whether a single act should be regarded as sufficient to constitute adultery or if a person is living in adultery should be regarded as adulterer. A single act of sexual intercourse constitutes the offence of adultery punishable under Section 497 of IPC. However it is very difficult to prove adultery in the absence of direct evidence. Moreover, there may be several acts of adultery. Some offences are likely to be committed for committing adultery and it may also be responsible for provocation in committing serious offences, such as culpable homicide, murder, etc. Criminal elopement which is an independent offence under the Indian Penal Code, 1860¹⁷ may also be committed in many cases. Similarly, in order

¹³K. I. Vibhute. "Adultery in the Indian Penal Code: Need for a Gender Equality Perspective", 6 SCC (J) 16-19 (2001).

¹⁴*Ibid.*

¹⁵Y. Y. Chandrachud and V. R. Manohar, *Ratanlal and Dhirajlal's The Indian Penal Code* 913 (Lexis Nexis publication, Noida, 30th edn., 2006).

¹⁶*Ibid.*

¹⁷Indian Penal Code, 1860 (Act No. 45 of 1860), s.498 deals with criminal elopement and states: whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.



to commit adultery there may be involvement of criminal trespass also.¹⁸

Adultery in a society carries multidimensional nature. Its civil, criminal and matrimonial perspectives cannot be overlooked. It includes sexual intercourse with a married woman with her consent. If the sexual intercourse is committed without the consent, it adds up to the offence of rape defined under section 375 of Indian Penal Code, 1860.¹⁹ Consent makes the difference

between adultery and rape. Adultery is a sin and different from other sexual offenses. With the progression of time society is also developing a lenient approach toward the adultery. It also involves many psychological issues e.g. emotional problems, social prestige, social abhorrence etc. A tolerant attitude is developing in the society as the Indian society is increasingly becoming liberal and open because of many developments taking place in the society.

Examining the ‘adultery’ in various religions, regions, cultures and various legal setups we find it has diverse consequences to such offence, but the conceptualization is same in different religions i.e. Hinduism, Christianity, Judaism and Islam.²⁰ The dictionary defines ‘adultery’ as “voluntary sexual activity between a married man and someone other than her husband” and term comes from the words “ad” (towards) and “alter” (other).²¹ So adultery is extramarital sexual affair that is considered objectionable on social, religious, moral or legal grounds. Though what sexual activities constitute adultery varies, the concept exists in many cultures. Here one thing is worth noticing that the concept of marriage came into existence for various purposes i.e. legalizing sexual relationship and giving it a moral and societal outlook, protection of individuals property even after death and to devolve it to its legal heirs, loyalty and trust in a sexual relationship. The desire of the man to retain his property throughout life and to

¹⁸Criminal trespass means entering into the property of another with the intention to commit an offence. S 441, Indian Penal Code defines criminal trespass as: whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property or, having lawfully entered into or upon such property unlawfully remains therewith intent thereby to intimidate, insult or annoy any such person or with intent to commit an offence, is said to commit Criminal Trespass.

¹⁹Indian Penal Code, 1860 (Act No. 45 of 1860), s.375,

Rape. A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

(First) -Against her will.

(Secondly) -Without her consent.

(Thirdly) - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) -With or without her consent, when she is under sixteen years of age. Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

²⁰Encyclopedia Britannica online, “Adultery” Britannica.com (Last visited on Oct. 27, 2019 at 11:30am).

²¹Merriam- Webster’s Dictionary of Law, 1996.



devolve it to its legal heirs was only possible if it could be ensured if the parentage is ascertained and inheritance to be devolved in the same bloodline. But the extra marital sexual intercourse might trouble in ascertaining the actual parentage. The adulterous relationship is likely to lose the 'purity of bloodline' consequently the children procreated because of such relationship will alter the chain of inheritance of the property.²² That is why such extra marital sexual relationship was incorporated as an offence in the IPC as adultery. Therefore, the incorporation of adultery as an offence was not only to protect the institution of marriage to ascertain the parentage of child so that property is to be secured and inherited by actual heir, but the concern was the protection of conjugal relationship also.

II. HISTORY OF ADULTERY

Adultery as a sin has a long history. The offence which is associated with marriage requires to be looked from historical perspective. During the ancient Hindu period, it was prevalent. Mohammedan period saw an upsurge as there was an open show of lustful sexual behaviour. The rulers maintained 'Haram'²³ to satisfy their sexual lust and enjoyment. In English period, offences against sex including adultery were present and increased following the increasing impact of western liberal values, urbanization and industrialization. The changing moral values, introduction of western standards, cessation of adultery and homosexuality between consenting adults as offence in some countries are largely responsible to increasing incidents of adultery and other sexual offences.

Dharamsashtras and Manu explained that the home and the family are the bed rock of the society and woman is a person on whom the sanctity of home and household life rests. Thus wife should be kept at home and should not be exposed to the rough and independent life. She should always be taken care of by someone as by her father in her girlhood, by her husband in her youth, by her son in her old age.²⁴ This means that the emphasis was on

subordination and dependence of woman. Impliedly, it meant that an independent public life might subject her to sexual indiscipline.

In medieval India, polygamy was prevalent in different classes of the society. The travelers like Alberuni, Hamilton who visited India during this period found that "Hindus take one wife and never divorce her till death except for the cause of adultery" but for Mohammedans the law was, "marry whatever woman you like, either three each or four each." Domestic unhappiness and immorality were the factors for adultery. The Sikh Gurus and social reformers treated adultery as most heinous crime. 'Approach not another woman's couch either by mistake or even in dream.' The love with another's wife may be perilous. Ala-ud-din issued orders providing punishments for adultery, such as stoning to death, castration, cutting of nose. Jahangir also admired the fidelity of Hindu women who would not allow hand of any unlawful person to touch their chastity and would rather burn themselves in flames.²⁵

When East India Company came to India, substantive criminal law was Mohammedan criminal law and cases were tried and decided according to it. There were many other local laws which were specifically applicable to the territory of provinces. In 1860, Mohammedan criminal law ceased to be the law of land and it was replaced by Indian Penal Code, 1860, which is still law of land.²⁶

It may be noted that after independence offences against women have increased. Adultery is no exception to it. It can be well demonstrated by the fact that prostitution is increasing day by day.²⁷ Women have become more liberty oriented and the population of working women is also increasing. The Law Commission of India in its 42nd report during the year 1971, recommended inclusion of women in Section 497 of Indian Penal Code, 1860. Law commission's recommendation was based on the revolutionary change in the standing of the woman in the society. The Commission suggested that to eliminate the gender discrimination the woman should be brought under the scope of

²²E.g., U.S. Code, Title 21, Chapter 1: Adulterated or Misbranded Foods or Drugs.

²³ It is a kind of sexual act outside the marriage bond, which is forbidden by Islamic law.

²⁴V. Raghvan, *The Manu Samhita, Social and Cultural History of India* 87 (Concept Publication, New Delhi, 2nd edn., 1998).

²⁵ P. N. Chopra, *Some Experiments of Social reforms in Medieval India* 208 (1996).

²⁶ *Ibid.*

²⁷Santosh Kumar Mukherji, *Prostitution in India* 12 (Inter-India Publication, 2nd edn., 1986).



law.²⁸ Before travelling through the historical landscape of adultery, it is of paramount importance to look closely at why adultery was being criminalized and why such kind of such behaviours were devoid of social sanctions and fell under prohibited forms. The social conditions have changed and the society is moving towards liberalism with prime importance given to individual rights. Therefore, we need to equip ourselves with the historical overview and look into the social factors, which made us in a position to contest its criminalization today.

Adultery implies willful sex of a married individual other than his/her companion. Adultery is a type of extra conjugal sexual affair. It implies the offence which is committed by persons wilfully entered into a conjugal relationship legally and violates the obligations therein. However, such lawful meanings of adultery change its meaning and nature in different legal systems. Basically, adultery means any wilful sexual intercourse outside the wedlock by any spouse. This concept is introduced in various nations and various legal systems in various contexts. Somewhere it is of criminal nature and somewhere civil.

Section 497 of Indian Penal Code, 1860 is the first and only type of legal provision which earlier dealt with adultery in Criminal Law. Section 198(2) of the Criminal Procedure Code contained the process for filling the complaint under the Section 497 of Indian penal Code, 1860. Both of these sections are now decriminalized by the Supreme Court and now no more applicable. Meaning thereby is that penal sanctions over the offence of adultery have been removed by the apex court of the country and now it is the civil offence under the matrimonial statutes. The only remedy available for the offence of the adultery is the divorce and judicial separation in which it acts as the ground.

Having a glance on history of adultery, the offence of adultery was prohibited in the past. During Vedic age, it was a sinful act and then came the codification by Jurist Manu in '*Manusahita*' which prescribed various kinds of punishments for the offence of adultery in the ancient India. We have tales of God Indra who is involved in the act of adultery and Religious Scriptures also contain hints of adultery. In medieval period, with the advent of Muslim invaders in India, nation got new code of conduct from their Rulers and now adultery watched

under these rules and regulations set by Rulers of various states or provinces. During the same time polygamy got common in the society by different religious class. At that time, adultery was still prohibited act, yet in practice. Then British Rule came to India and British enacted the penal code for country where they penalize the offence of adultery. Earlier they were not in view of adding the provision of adultery to Penal Code of 1860. But at last the provision was added to the code and made it criminal offence under Section 497 of Indian Penal Code, 1860. For establishing the criminal liability under section 497 of IPC, the sexual intercourse should have been committed with a legally wedded woman outside the wedlock. While sexual intercourse with a prostitute, unmarried lady or a widow is sheltered from the scope and the applicability of this section.

After independence, various committees and commissions raised contentions against this colonial law. This law knocked the door of various High Courts of country for its validation but every time this colonial validated by courts. Supreme Court has taken into consideration various cases for upholding the validity of Section 497 of Indian Penal Code, 1860 and recently in the year 2018 held it is constitutionally invalid in *Joseph Shine* case. Now in present scenario, the offence of adultery lost its criminal nature and considered as civil wrong only. Apex court of the nation has decriminalized it and now it is just a ground for judicial separation and divorce only.

LAWVIS-A-VISMORALITY

Law is the reflection of society and its values. The morality that binds the society is reflected in the criminal code. Mostly the crimes found their genesis in the morality. No society is devoid of morals and values. Society sometimes got influenced by the changing times and deviate from morality which are known as immoral or unethical conducts. In order to maintain the public peace, the state regulates these deviated behaviours and places it in the category of crimes. Not all moral wrongs are legal wrongs. There cannot be a penal sanction for every moral wrong because it will encroach upon the individual rights. Hence, the equilibrium between law, morality and rights should be maintained. Therefore, the scope of criminal law must not be limited to public interest (political security, public order, etc.) but also to private interest (physical integrity, sexual autonomy, etc.). According to Emile Durkheim, there are two types of moral values, which some people '*may hold*'

²⁸Law Commission of India, "42nd Report on Indian Penal Code, 1860" (June, 1971).



(consistent with the continued strength and integrity of a given society) and the values which people 'must hold'. In his view the latter values form the subject-matter of enforcement.²⁹

The criminalization of certain immoral act is necessary to regulate the deviated conducts in the society but the criminalization has to be in tune with the constitutional values and principles. When criminal law fails to maintain the harmony in the society, then constitutional law comes into motion. Constitutional law interprets the original legislation, seek the intent behind that legislation and conclude whether that legislation is valid in the present form or not. Same is occurred in the case of adultery law. It is having been said that "*Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended by a spacious, social-science approach, not by pedantic traditional legalism.*"³⁰

III. LEGISLATIVE APPROACH

We found that the bare definition of the adultery as mentioned in Section 497 of Indian Penal Code, 1860 is in contradiction with the Constitution of India. It found violative of Article 14, Article 15, Article 19 and Article 21 of the Constitution. Article 14 contain the provisions for the equality under it whereas the Article 15 contain the provisions for the non-discrimination on the basis of the sex. The provisions of the adultery law here contain discriminations against the woman as it bars the women from lodging complaint against the adulterer as found in Section 198(2) of the Criminal procedure Code, 1973. Article 19 contains the right to sexual expression which is private right of the person. Article 21 of the constitution contains the right to sexual autonomy. Decriminalization should to be based on these articles of the constitution as seen by the study.

Talking about the civil remedies for the offence of the adultery, commonly acts as ground for divorce and judicial separation under various matrimonial laws. Hindu matrimonial laws contain the provision of the divorce and judicial separation as discussed in the chapter whereas same is found for Parsi under legislations. In case of Muslim,

adultery is not found to be ground for divorce and judicial separation under their legislation. It may be due to the fact that Muslim married to three to four times during their life and wife is generally susceptible for her husband relation with other woman.

The offence of the adultery is classified as criminal offence under the Section 497 of Indian Penal Code, 1860 and the procedure for the lodging the complaint under the provisions of the Section 198(2) of the Criminal Procedure Code, 1973. The offence is required to be proved by the circumstantial evidence which is hard to establish. Researcher found a situation where a man 'A' is the husband of 'B', have adulterous relation with 'D' the Wife of a man 'C'. In this case, on analyzing the sectional provisions, 'D' can prosecute the 'A' but the 'B' has no right to lodge the complaint. This is clearly a discriminatory against the 'B', wife. Moreover, there is deterrence in the matrimonial lives of both the couple which can be resolved by them, but penalizing the one closes the door for the coming back again into normal martial bond.

The Supreme Court has decriminalized the adultery law declaring Section 497 of Indian penal code, 1860 and Section 198(2) of the criminal procedure code, 1973 unconstitutional as these sections are against the soul of the Constitution of India. Court held that criminalizing the matrimonial offence can never bring harmony to the family as well as to the society. Every individual in the country is granted with the certain fundamental rights and these sections do not seem to be in relation with these rights. Earlier the Section 497 of the Indian penal Code, 1860 contain a lot of ambiguity as it was made for the benefit of the woman of the society and in present scenario it was found not worthy of it. In fact, the process so defined to lodge the complaint in the offence contains a lot of ambiguity and clearly keep the woman aside from filling any complaint in any manner. Yet the apex court held the civil liability in the offence and consider it as the ground for the divorce and judicial separation as already there in the statutes, keeping its matrimonial aspect in mind. In context to decriminalization of adultery law in India, it can be said that the Supreme Court has attempted well in the present situation and judgment is according to the present sentiments of the society leading to the liberalization. The verdict of the Joseph Shine case came into limelight again when review petition was filed against the judgement before the constitutional full Bench headed by Chief Justice of India, Sharad A. Bobde. The review Bench dismissed the review petition upholding the

²⁹ Lon. L. Fuller, *The Morality of Law* 106 (2nd edn., 2009).

³⁰ *State of Kerala & Anr. v. N.M. Thomas & Ors.*, (1976) 2 SCC 310.



Bench decision on 24th June, 2020 remarking that the review petition was not having the substantial ground to be entertained and dismissed the petition.³¹ As the judgment of Joseph Shine case was well founded on the constitutional principles of equality, privacy and personal liberty, therefore the Supreme Court again upheld the verdict rejecting the review on the verdict.

IV. CONCLUSION

There are various judgments under the ambit of Section 497 of Indian Penal Code, 1860. There occurs a different trend in prosecuting the offender. On studying the judgments, it is found that it is difficult to prove the offence of the adultery before the court as adultery is proved by the circumstantial evidences and there must be corroboration of the acts in regard to the offence. The burden of proof lies on the complainant to prove the same. The ingredient of the section needs to be proved specifically. Breaking the section into two ingredients, first, woman must be married one and second one, consent and connivance of the husband is important in the case to prosecute the offender. Court has stated in the case of the *Samuel Bahadur Singh v. Smt. Roshni Singh and Anr.*³² That every case has their own circumstances which need to be proved in the court for the conviction of the accused. *Subrata Kumar Banerjee v. Dipti Banerjee*³³ case talks about the implied consent of the husband. Here court held that the act of the husband speaks itself and these acts amount to the consent by the husband in the whole act of offence. *Rajeev Baburao*³⁴ speaks about the clear proof of the adultery. Court held in this case that there must be clear testimony of the complaint in regard to the facts and circumstances. *M. Chinna Karuppasamy v. Kanimozhi*,³⁵ court held obligation for the divorced woman not to go with in relation with third person after divorce which is reasserted by the Justice

Chandrachud in *Joseph Shine v. Union of India*³⁶. There are many other cases also discussed in the chapter which assert different kinds of judgment over the adultery law.

Taking a glance over the constitutionality of the section *Yusuf Abdul Aziz v. State of Bombay*,³⁷ *Sowmithri Vishnu v. Union of India*,³⁸ *V. Revathi v. Union of India*,³⁹ *W. Kalyani v. State through Inspector of Police and another*,⁴⁰ cases are associated with the constitutional validity of the Section 497 Indian Penal Code, 1860, however in all of these cases Section 497 of Indian Penal Code, 1860 stand affirmed on analyzing it as per the norms of the Constitution. But in the case of *Joseph Shine v. Union of India*⁴¹ Supreme Court held it criminally invalid. In this landmark judgment court found that matrimonial offense is offense against the individual and not against the society, so there need not be criminalizing it. Supreme Court further declaring the Section 497 of Indian penal Code, 1860 and Section 198(2) of the Criminal Procedure code, 1973 as unconstitutional, remarked it with a civil remedy and made the offence of adultery just the ground of divorce and judicial separation only. Indeed it is already act as ground for divorce and judicial separation under the matrimonial law in India. Justice D.Y. Chandrachud, in his separate view, termed Section 497 of penal code as a “codified rule of patriarchy”. He remarked while delivering the opinion on the colonial law that mere decriminalizing the offence of adultery does not render society to indulge themselves in adulterous relation, but let the morality governs it not the law. Decriminalizing it does not permit licence to have adulterous relationship. Justice Rohinton Nariman, as a separate opinion in concurring judgment holding that adultery is not a crime, said Section 497 of penal code made a husband the “licensor” of his wife’s sexual choices. He held the view that there

³¹ Editorial, “SC dismisses review petitions challenging 2018 verdict on adultery” *Hindustan times*, Jun. 24, 2020.

³² AIR 1960 MP 142.

³³ AIR 1974 Cal 61, 77 CWN 944.

³⁴ AIR 1996 Mad 262, 1996 (2) CTC 22, (1995) IIMLJ 492.

³⁵ CRL. RC. (MD) No.142 of 2012.

³⁶ 2018 SSC online Sc 1676.

³⁷ AIR 1951 Bom 470, 1954 SCR 930.

³⁸ AIR 1985 SC 1618.

³⁹ AIR 1988 SC 835.

⁴⁰ (2012) 1 SCC 358. See also, *Krushna Chandra Patra v. TanuPatra*, II (1992) DML 20; *Rajesh Paul Chaudhary v. State of Assam*, II (2007) DML 735 & *Sandevip Roy v. Sudarshan Chakraborty*, 2007 (98) DRJ 109.



exist the morality in the field of matrimonial bonds and let that morality governs that bonds besides criminalizing it. Bench contains a positive view regarding the matrimonial institutions and tried to cover any infringement in the institutions, let it be a civil offence. Justice Indu Malhotra, reading her opinion, held that Section 497 of penal code is based on the Doctrine of Covertures. This doctrine, not recognised by the Constitution, holds that a woman loses her identity and legal right with marriage, is violative of her fundamental rights.

The provision of adultery in the penal statute is the reflection of the social dominance of men in prevalent 150 years. Treating adultery as an offence is tantamount to the State, peeping into the private sphere of the society. The basic idea behind decriminalization was the protection of bodily autonomy and privacy, therefore it was now treated as a ground for divorce only. It is surprising to see that even after the verdict many have opposed this decision of the Supreme Court, while most countries of the world have done away with this practice.

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