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# **ADULTERY:** **AN ANALYSIS OF THE JOURNEY FROM** **CRIMINAL TO CIVIL LIABILITY**

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## **Abstract**

The legal analysis of the law regulating adultery in India in the past 150 years portrait that it was much influenced by societal norms and morality. The formidable patriarchal Indian society had deprived women of their long-lost dignity. Moreover, the criminal justice system deliberately brought the privacy of a married couple to courts and censured it publicly. This article attempts to analyze the journey of Indian women to regain their dignity. It aims to justify the unethical nature section 497 of the Indian Penal Code once possessed and what rationality the Supreme Court of India followed to struck down the gloomy legislation as unconstitutional. The conclusion is self-explanatory and suggests for a more tolerant society to eradicate gender inequality to meet the urge of an egalitarian society.

## **INTRODUCTION**

This humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being. she is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the subject, he is the absolute-she is the other.

- Simone de Beauvoir

The golden principle of gender equality is enshrined in the Indian Constitution in its preamble, fundamental rights, fundamental duties and directive principles. It not only grants equality to women but also casts a duty on the State to adopt measures to strive for gender equality. The sad reality is such lofty ideals are still a far-fetched dream for almost every religion and region of

India and vast areas still suffer from gender inequality in some form or the other and there is hardly any law seen for women in such areas. Gender inequality can appear in many distinct forms, it has diverse faces. It gives rise to multitude of problems in itself. Gender inequality of one type tends to encourage and institutionalise gender inequality of some other type.<sup>1</sup> Hence, the task to combat gender inequality becomes even more tough. The bitter reality is this-

“The report noted that reported cases of crimes against women rose 83 percent between 2007 and 2016, where there were four cases of rape every hour. In addition, India has the most child brides in the world — around a third of all girls are married before their 18th birthday — and its own government estimated earlier this year that there are 63 million “missing” women in the country because of sex-selective abortion, as well as 21 million unwanted girls.”<sup>2</sup>

I do not deny the fact that this status is hugely healthier now, as compared to some hundred years ago and even before, but still however unwantedly there are some facets which lacks any growth or development. Section 497 of the Indian Penal Code for that matter has been struck down as unconstitutional by the Supreme Court of India in 2018 after a long-fought battle by Indian women, who were nothing but their husband's property and subjected to theft by any other man. Sanctity of marriage is duly recognised by every civilised society and since adultery corrupts the divine nature of marriage it is punishable since ancient ages. However, people had diverse views regarding recognising the offender, some condoned women some did not, it has been gender biased ever since. Such views are discussed at length in this article. As the society progresses the societal norms progresses along. Just as a human grows his nutritional need grows with him, he cannot survive merely on milk like an infant does. Similarly, as the society grows or I should rather say develops, its norms have to develop simultaneously. Hence it was very dull to live with section 497 of Indian Penal Code, 1860, in such fast developing age. After the decades of arguments and counter arguments it was finally settled that how irrational the said provision was. I can never deny that it was not a need for the Indian women at some point of time considering the status they held in society. But as of now the ambience is much different and such law is nothing but arbitrary which violates equality, dignity and liberty.

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<sup>1</sup>AMARTYA SEN, *THE ARGUMENTATIVE INDIAN* 220 (Penguin Book 2006).

<sup>2</sup> Annie Gowen, *India ranked world's most dangerous place for women, reigniting debate about women's safety*, THE Washington Post, June 27, 2018.

## THE BALANCE BETWEEN LAW AND MORALITY

The roots of morality are deeply embedded in law. The two phenomena are so infused that it becomes awful to ignore any one when the other exists. Law and morality have been complimentary since the very existence of every civilisation so far existed. However, the Positivists strongly upheld that law has nothing to do with morality, rather law is what the sovereign commands whether moral or immoral for that matter. But this contention of the Positivists is evidently the major criticism of the Positivist school of Jurisprudence. Morality is a universal phenomenon; it is recognised by every religion and region. Although it would be correct to say that time has significantly influenced morality but it has ever existed. The history is evident of vast examples how morality has evolved since time immemorial. What constitutes morality for us presently, was not so 200 years earlier. Indeed, the credit goes to political and social reforms that we have gone through during the course of time. And yes education of course can't be neglected in what constitutes morality for us presently. I would like to share a very decent example of how morality has evolved with time. Ever since man has come into existence, he has his own definition of morality. Prehistorically, man slaughter was no offence it was rather a rule of life called "survival of the fittest". For that era morality was to live and protect oneself by any means. But with the passage of time the concept of morality we now have is very diverse and man slaughter is now a culpable offence throughout the globe. This was just one example to mention the history shares lot more.

However, in spite of the significant relation law and morality shares, it brings me great despair to see how morality is ignored by legal institutions these days. Though one might find heaps of writings and research articles on various contemporary legal issues but in my eyes majority of the authors fails to see them through the lens of morality. And that is why my interest grew further in writing this article not only from the perspective of gender bias but morality pertinently.

Law had revolved around morality since time immemorial. Both are dynamic in nature and had developed simultaneously with the society. As of course the ultimate object of every civilisation has been development of mankind. If we talk about what law is today the first thing which comes to every mind is the constitution perhaps, and going further into it the right to equality, life and liberty, freedom of speech etc. or to say every fundamental right which is enshrined in the Indian Constitution. And the fact cannot be denied that while drafting the constitution every legislator has had that touch of morality at the back of their mind. I shall now move from legislators to

Indian Judiciary and how they have exercised their wide discretionary powers to balance law and morality. When statutes award custody of minor children to that parent most likely to further the best interest of the child, award citizenship only to those applicants possessed of good moral character, and deport those convicted of crimes of moral turpitude, they explicitly require judges to make moral decisions in the course of their making legal decisions.<sup>3</sup>

Historically speaking adultery is seen as a sin in the society in almost every religion existed on earth. The offenders were punished for the offence ever since. Almost all ancient civilisations punished both the adulterer and the adulteress there was no gender bias in prescribing the punishments. The Code of Hammurabi (18th century BC) in Babylonia provided a punishment of death by drowning for adultery. In ancient Greece and in Roman law, an offending female spouse could be killed, but men were not severely punished. The Jewish, Islamic, and Christian traditions are all unequivocal in their condemnation of adultery. The culpability of both men and women is more explicitly expressed in the New Testament and the Talmud than in the Old Testament or the Qur'ān. In strict interpretations of Islamic law, or Sharī'ah, men and women are equally liable to harsh punishments for adultery (Arabic: *zinā'*; properly, any extramarital sexual intercourse), including death by stoning—a punishment still applied in the early 21st century in some countries, including Iran and Afghanistan.<sup>4</sup> Punishing adultery is universally accepted and is being practised since ages in some form or the other. Evidently, the nature of punishments has significantly civilised. The barbaric punishments are not prescribed in the modern times may be because of the vast emergence of human rights except a few countries. In Islamic countries, such as Saudi Arabia, Iran, Egypt, etc. also like Pakistan, adultery is punished severely. In Islamic Countries including Pakistan, adultery is an offence called 'Hena' for which the punishment of stoning has been prescribed by putting a married adulterous woman under the ground up to shoulder.<sup>5</sup>

It is pertinent to mention here that morality has expressively evolved due to various factors like human rights regime, feminism, education and the progressive nature of society as the nature of marriage has raised from sacramental to contract. Marriage has not remained a sacramental bond but has also become a contract (as consent is important as per the Hindu Marriage Act, 1955) and

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<sup>3</sup> Michael S. Moore, *Four Reflections on Law and Morality*, 48 Wm. & Mary L. Rev. 1527(2007).

<sup>4</sup> Jeannette L. Nolen, *Adultery sexual behaviour*, ENCYCLOPAEDIA BRITANNICA (Feb., 09, 2009) <http://www.britannica.com/topic/adultery>.

<sup>5</sup> Dr. Vijaykumar Shrikrushna Chowbe, *Adultery – A Conceptual and Legal Analysis*, SSRN (June, 03, 2011) [https://articles.ssrn.com/sol3/articles.cfm?abstract\\_id=1856991](https://articles.ssrn.com/sol3/articles.cfm?abstract_id=1856991).

the greatest contribution being the ideals of liberty and equality.<sup>6</sup> Since marriage is a civil contract, adultery thence should only attract civil consequences like divorce as no legitimate state interest is involved here which justify the use of criminal justice system.<sup>7</sup>

## FROM THE PERSPECTIVE OF FEMINISM

Feminism is both an intellectual commitment and a political movement that seeks justice for women and the end of sexism in all forms. Motivated by the quest for social justice, feminist inquiry provides a wide range of perspectives on social, cultural, economic, and political phenomena.<sup>8</sup> The growing advent of feminist approach have turned to be a greater boon for all the women throughout the world. The feminist movement has brought about some drastic changes in the society namely greater access to education, equitable pay with men, women's suffrage to name a few. It has consistently uplifted the status of women in different facets in every society. Section 497 was the best example to state the impoverished condition of women in Indian society. According to that provision a man can be punished for adultery but a woman was rather a victim in spite of being a potential partner in the crime. And the reason behind this highly logical provision was even more surprising to me. The States' rationale behind this provision was the belief that a woman is merely a chattel, she is nothing more than a property of his husband. My intention here is not to underestimate the sanctity of marriage but curbing the individuality of a woman merely because of the marital ties is not reasonable in my eyes. Feminism is often misunderstood by a number of people and a wide number of people have a misconception that feminism is man hatred, but it isn't about man hatred or women empowerment. But feminism is a wider idea and, in its core, it is about equality and gender neutrality.

The feminists have consistently raised the objection on the S. 497 as it portrait prejudice of wife as property of her husband. The inferences that can be drawn from this penal provision are twofold. One that the man owns his wife sexually, and his consent is necessary to gain sexual access over her. Second, the offence of adultery is legally equivalent to that of theft, the goods being the wife's body.<sup>9</sup>

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<sup>6</sup> DR. PARAS DIWAN, MODERN HINDU LAW 66-68 (Allahabad Law Agency, 24<sup>th</sup> ed. 2019).

<sup>7</sup> Faizan Mustafa, *Not a criminal act*, The Hindu, Jan. 11, 2018.

<sup>8</sup> McAfee Noelle, *Feminist Philosophy* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June, 28, 2018) <https://plato.stanford.edu/archives/fall2018/entries/feminist-philosophy/>.

<sup>9</sup> GEETANJALI GANGOLI, INDIAN FEMINISMS: LAW PATRIARCHIES AND VIOLENCE IN INDIA 61, (Ashgate Publishing Company, 2007).

It is pertinent to mention that the original draft of IPC by First Law Commission was silent about constituting the offence of adultery. Lord Macaulay, was unwilling to add the provision criminalising adultery as an offence, observed, “There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives.”<sup>10</sup> Certainly, the objective behind keeping adultery out of the purview of the penal statute were the social norms prevalent in Indian patriarchy.

The Second Law Commission headed by John Romilly did not agree with Macaulay and section 497 was constituted in The Indian Penal Code hence recognising adultery as an offence. However, women were not within the square of punishment unlike men due to their deplorable condition. Here are some words of the Second Law Commission throwing light on the status of women –

“Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attention of a husband with several rivals. To make laws for punishing the inconsistency of the wife, while the law admits the privilege of the husband to fill his ‘zenana’ with woman, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of penal law.”<sup>11</sup>

In my opinion peculiarities which are referred above are child marriage, polygamy and of course the *sati prath* which are so deeply rooted in the Indian society that made the condition of women

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<sup>10</sup> K.D. GAUR, COMMENT ON THE INDIAN PENAL CODE 388, (Eastern Law Publication, 2013).

<sup>11</sup> K.D. GAUR, A TEXT BOOK ON THE INDIAN PENAL CODE 734, (Eastern Law Publication, 2004).

disgraceful that they were left with no option but to feel pity on women. Perhaps the last few lines above (“we leave it to the slow.....operation of education and of time”) were consistently ignored by the forth coming Law Commissions and as per my analysis the objective behind these words was the decriminalisation of the said provision with the advent of education, women empowerment and pertinently the growth of morality, as law and society are dynamic. Undoubtedly the women of our country have went through a long journey since existence until 2018 when the said provision was finally decriminalised by the Hon’ble Supreme Court of India.

## LEGAL DIMENSION OF 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.”<sup>12</sup>

The interpretation of the section reveals several challenges to the society, it was not compatible with the developing society. First and the foremost drawback was that is highly gender sensitive. The language on the face of it shows that only a man can be punished and not the woman. Surprisingly, woman was kept on a footing of a victim, and it is very improbable to believe in the 21<sup>st</sup> century. Adulterous woman was immune from any kind of punishment. Second, it must be committed when the man knows or has reason to believe that the woman is wife of another man, that implies the existence of marriage is essential here. This now raises a question that if a man has sexual intercourse with a woman who is not married, will he be culpable for the offence? Third, the consent of the wife must be free otherwise it will amount to rape. Now this is something which appears very unsound to me, does this not gives a privilege to woman to have sexual intercourse outside her marriage and without even being punished for the same. This clearly shows that the woman was a well active party in the act and nothing happened out of his will and consent. Fourth, this section laid down who can prosecute and who can be prosecuted and only the husband of the woman can prosecute the offender(man). That means if a married man had sexual intercourse with another woman who is the wife of some other person then the wife of the adulterous man cannot be a complainant of the offence. These are only some legal challenges the rest are discussed throughout this article. Comprising all such challenges paved

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<sup>12</sup> Indian Penal Code, 1860, No.45,(India).

way to the Supreme Court to finally struck it down as unconstitutional in 2018 in the case of Joseph Shine v. Union of India<sup>13</sup>. Also, it is pertinent to mention that if we go into the constitutionality of the law it is violative of article 14,15 and 21.

“Section 497 IPC makes two classification. Who can prosecute and who can be prosecuted. Law that perpetuate stereotypes and institutionalises discrimination is unconstitutional. Section 497 IPC is violative of Articles 14, 15 and 21 of the Constitution and therefore struck down.”<sup>14</sup>

## PRESENT POSITION

Sanctity of marriage is duly recognised by every civilised society and adultery corrupts the divine nature of marriage. When parties to a marriage lose their moral commitment, it creates a permanent dent in the relationship and this should solely depend upon the parties how they deal with the situation. The privacy which the relationship holds should not be shattered publicly in the courts by the State. The theories of punishment whether reformatory or deterrent could hardly save the situation. Hence it should be left to the parties to the marriage whether they want to protect the sanctity of their matrimonial alliance or they want to breakdown such unhappy marital relationship. The parties can seek divorce on the ground of adultery if either of the spouse commits even a single act of adultery.<sup>15</sup> But presently they can't bring a criminal case against the adulterer only civil liability is attached to adultery post judgment of Joseph Shine v. UOI.<sup>16</sup> Adultery is no more treated as an offence thence appropriately section 198 of CrPC which dealt with the procedure for filing a complaint in the said offence was also declared unconstitutional. The procedural provision has no validity in the absence of the substantive procedure.

## CONCLUSION

“The law is the witness of our moral life. Its history is the history of the moral development of the race.”

- Justice Oliver Wendell Holmes

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<sup>13</sup>Joseph Shine v. Union of India (2018) SCC OnLine SC 1676 (India)

<sup>14</sup>*supra* note 13

<sup>15</sup> Hindu Marriage Act, 1955, No.13, Acts of Parliament, 1955 (India).

<sup>16</sup>*supra* note 13

According to me here he is trying to call for more tolerance and a visionary approach for the growing and the advancement of the liberal lifestyles. Sexual attitudes are more liberal presently, compared to when Sir Macaulay drafted the Indian Penal Code. Physical intimacies are purely a reflection of choice, and considering it as a criminal act which calls for punishment and further humiliation in the society is a vibrant denial to one's dignity. In my view, adultery like other offences do not affect the society at large, it only hinders a happy marital relationship therefore owing to the privacy of the matter and other reasons as discussed it only attracts civil liability as a ground for bringing the marital tie to an end. Punishing a third party, who is not a party to the marriage somewhere lacks rationality as it fails solve the purpose of restoring the moral commitment a marital bond holds. Punishment hardly brings any relief to the aggrieved and to the strained relationship. However, I do not say that adultery is a moral act, it is still seen immoral in the society but gender neutrality is more moral and required today. The cardinal values of our constitution like equality, dignity and liberty should not be overlooked in any context, and such provision which deliberately rejects a woman's dignity and liberty is nothing but an arbitrary assertion. The provision lacked reasonability in many aspects as stated above, and another unreasonable aspect which I want to bring to notice is that it not only keeps the two genders on unequal foothold but also discriminates amongst the women itself. On the one hand it excludes the adulteress from any kind of punishment and only her counterpart is punished, while on the other hand woman whose husband commits adultery is excluded from the pool of complainants. The society needs to be more tolerant and other gender biased laws which are prevalent in India should be again scrutinised like in the case of adultery. Eleanor Holmes Norton contends that only continuing and diligent effort will ensure the pursuit of policies for affirmative action and comparable worth, both of which are necessary if women are to obtain equal justice. In my opinion such laws lack any reasonable classification and makes gender inequality more rampant in our country. It is morality which makes a law worthy and serves the interest of the society and morality lies in equality, dignity, liberty and tolerance. And in my view the development in law has to keep pace with the moral development of every society.