



## STRIKING DOWN OF SECTION 497 OF IPC: AN ANTI-WOMEN OR PRO MALE LAW; A DISSECTION OF A 158 YEAR OLD LAW

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### ABSTRACT

Adultery, a social concern whose occurrence can be outlined as coequality with the existence of marriage as an institution. This is a critical issue since it postures a severe threat to the sanctity of marriage. There is a dreadful need to address this issue since with a passage of time mentality and demands of the Indian society which is remarkably known for its conservatism is shifting. Through this paper, we have tried to trace the progression of this offence and social beliefs and reactions towards this act. We have also analysed how different religion, as well as regions around the globe, treat this act, and further a comparison is being made with UK and Iran's culture and society. For further recognition, revealing study of United Nation's report on adultery is also presented. Efforts are made to find out the intention behind crafting this law and making it female friendly and further comparative analysis is also done demanding the change in colonial-era law. Through this research series of events and committee formed with regards to adultery is being discussed. Attempts are being made to probe the existing Indian laws for adultery and latest judgement decriminalising adultery as a crime.

To analyse the effect of the latest ruling on the Indian societies particular hypothetical analysis is being made with different situations and further its effect on dependent

and independent wife are also analysed. The Constitutionality of Section 497 is dissected in the light of previous to latest apex Court Judgements.

**Keywords:** Adultery, Social Beliefs, UN Reports, Section 497 Of IPC, Various Committee, Hypothetical analysis, Joseph Shine case law.

### I. INTRODUCTION

*“There exists no culture in which adultery is unknown, no cultural device or code that extinguishes philandering.”<sup>1</sup>*

Adultery is not an unfamiliar word nor a bizarre activity rather an act grown all way with human civilisation. The only matter of contention is that the word is not clear to all in several aspects its definition and meaning, the law against it or the actual implication of the law in view of tremendously changed society in recent scenario.

Adultery, also known as ‘infidelity’ or ‘extra-marital affair’, is certainly a moral crime and is thought-out a sin by almost all religions. There is, however, difference in the literal, social and legal definitions<sup>2</sup>. The dictionary meaning of ‘adultery’ connotes voluntary sexual intercourse of a married person other than his or her spouse.<sup>3</sup>

<sup>1</sup> Helen Fisher, *Helen Fisher Quotes*, BRAINY QUOTES (Jan 06.2018, 10:05 AM).

<sup>2</sup> The definition of ‘adultery’ that occur in the dictionary is gender neutral, where, it may be committed by either of the sex. However, under most of the statutes, it gender favoured and mostly prescribe ‘female adultery’ which has been webbed around the married woman whose consensual extra-marital sexual involvement without the consent of her husband is an essential condition of ‘adultery’.

<sup>3</sup> “The Concise Oxford Dictionary of Current English”; Sixth Edn; Oxford University Press; p. 15.



As per the legal definition - (Sec 497) 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 the offence of adultery, and the guilty shall be punished with imprisonment of either description of a term which may extend to five years, or with fine, or with both. In those cases, the wife shall not be punishable as an abettor.

Although under Indian law the wife or the abettor of the crime is not punished. In this much-debated topic which is marked by tussle of rights amongst the male and female activists claiming the tilt towards the particular gender has led to significant changes in this law.

Supreme court on 5th January 2018 in *Joseph Shine vs Union of India* decriminalised the act of adultery as an offence in India. However, it remains a ground for divorce which leads to polarity in the concept of adultery laws and its consequences. This concept leaves the layman in bafflement as to whether it is a socially accepted act or an act contradicting the cultural scenarios. Through this paper, efforts are made to detangle the polar aspects of adultery law in India.

### 1. HISTORICAL PERSPECTIVE

The term adultery has an Abrahamic origin, though the concept predates Judaism and is found in many other societies. Though the definition and consequences vary between religions, cultures, and legal jurisdictions,

the concept is similar in Judaism, Christianity, and Islam.<sup>4</sup> Hinduism also has a similar concept.<sup>5</sup>

Adultery is not a new act in society. Since the age of Old Testament or ancient Indian era of Great laws of Manu, adultery is a matter of consideration. Historically it was rigorously condemned and punished, usually only as a violation of the husband's rights.<sup>6</sup> In Jewish land, the penalty for adultery was stoning for both partners- if they act despite warnings by two independent witnesses.<sup>7</sup>

### 2. ADULTERY IN A DIFFERENT RELIGION

The history of Adultery can be traced as always been as a sinful offence in different religions. The initial laws were based on the religious sentiments of the people. If we consider history adultery was treated as an severe offence for which severe punishments like the death penalty, mutilation and torture were given, mostly the woman were the victims charged for the act, but in some places, men were also held liable for the act. Manusmriti was the enduring code of conduct of ancient Indians, and the general public regarded it religiously which say - "day and night woman must be kept in dependence by the males of their families and if they attach themselves to

<sup>4</sup> Dr. Vijaykumar Shrikrushna Chowbel Ph.D, *Adultery – A Conceptual & Legal Analysis*, MMCIJ, Sep- Oct 2000, at 14.

<sup>5</sup> Ibid 4.

<sup>6</sup> Kanchan T and Nagesh KR, *Adultery and the Indian law*, TLLM., 28 Jan, at 21.

<sup>7</sup> Payne-James J, *Forensic Medicine: Clinical and Pathological Aspects*, GREENWICH MEDICAL MEDIA LTD, Aug 14, 2003 at 31-35.



sensual enjoyments they must be kept under one's control.”<sup>8</sup>

In Hinduism, it has always strictly disciplined adulterous liaisons and considered it as a moral sin. Individuals who have been involved in illicit relationships were to encounter a lot of public disrespect and chagrin. As Hinduism considers marriage to be a religious connection, it becomes imperative to maintain the purity of marriage and to brace marital vows. In Islam, The Quran says “And do not approach unlawful sexual intercourse (zina). Indeed, it is ever an immorality and is evil as a way”.<sup>9</sup>

Christianity is one of the dominant religion of the world. Therefore Christianity views on adultery must have played an imperative role in the history of adultery as an offence. They believed that the marriage should be held in trust by all and the marriage bed should be kept pure, for God will assess fornicators and adulterers.<sup>10</sup> The word ‘Marriage bed’ can be described as the sexual relationship between husband and wife, keeping it undefiled means not developing any sexual relationship with anyone else.

### 3. ADULTERY: IN JAMMU & KASHMIR

<sup>8</sup> Manu, *Hinduism and Adultery*, AVJK (Dec 14, 2019, 11:04 AM), at [www.advocatekhaj.com/library/lawareas/divadultery/1.php?Title=Adultery%20Divorce&STitle=Hinduism%20and%20adultery](http://www.advocatekhaj.com/library/lawareas/divadultery/1.php?Title=Adultery%20Divorce&STitle=Hinduism%20and%20adultery).

<sup>9</sup> The Quran 17:32.

<sup>10</sup> Leitch Cliff, *What Does the bible Says About Faith?*, CLFF (Jan 22, 2014), at <https://www.christianbiblereference.org/Copyright.htm>.

In a state of Jammu and Kashmir, it is evident that laws were far more progressive as compare to India since back to the date when the crime of adultery was punishable only against males in India, in Jammu and Kashmir makes the errant wife punishable along with her paramour an abettor. The question of constitutionality of sec 497, i.e. whether it is ultra vires of the constitution is as much as it exempted the wife from being punishable as an abettor and thus infringed the provisions of articles 14 and 15 of the constitution, has crept up sometimes before the courts but it, has been upheld even by Supreme court<sup>11</sup>(AIR 1985, SC, 1618)<sup>12</sup>.

## SUPREMO AMICUS

### INSERTION OF ADULTERY UNDER THE PENAL CODE

In India, the provision on ‘adultery is given under Indian Penal Code, under section 497. This provision of adultery was questionable from its inception as the architecture of this code, i.e. Lord Macaulay was himself against the insertion of such section in the original draft and wanted to keep it out of the purview of penal statutes. His perceptive was that this section would unnecessarily and unwarrantably burden the society to take care of additional non-criminal activities. However, it was included later on.

The enacted first penal legislation in India contained the offence of adultery which was put under Chapter XX that deals with the Offences Relating to Marriage. It contained four sections [494-498]. Thus the section as

<sup>11</sup> Chakraborty R, Parikh Sand Mishra, *The Principles Of Medical Jurisprudence, Medicine Forensic Science, DNA Test & Toxicology*, CT, 13(2007).

<sup>12</sup> Smt. Sowmithri Vishnu vs Union Of India & Anr, AIR 1985, SC, 1618 (India).<sup>12</sup>.



it was standing in the penal statutes prescribed that if a man, married or unmarried has voluntary and consensual sexual intercourse with a married woman, without the connivance of her husband, he would be criminal held liable for the offence of adultery. The plain reading of this section clearly manifested the original prejudices in the mind of the framer of this section. Thus from the inception of S. 497, it was so drafted to make a man guilty, and complete shield to the wife, even she may be the active participant in the commission of an offence.

The further analysis of this section unequivocally conveys that a man alone can commit adultery and the woman (adulteress) is not liable even as an abettor. Whatever may be justification, or social necessity, this section clearly from its inception put this presumption on legislative agenda that whether the woman is a martyr of adultery or is herself an adulteress, she is entirely free of being penalised for an offence of 'adultery'.

#### 5. ARGUMENT BY FEMINIST ACTIVISTS

This law portrays wife as property of her husband. Accordingly, an argument has been raised that dubious meaning of all the words in Section 497 of IPC entrenches male control over women. There is a twofold inference that can be drawn from this section. One that the man owns his wife sexually and his consent are 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. Women are, therefore, denied agency, whether they themselves have committed

adultery (as understood generally) or are married to men committing adultery.<sup>13</sup>

#### 6. ORIGIN AND DEVELOPMENT

In the draft of Indian Penal Code, the offence of Adultery was put as an offence as the creator Lord Macaulay himself was not in favour of the insertion of the provision and was of the opinion that if adultery made 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>14</sup>

The primary objective of keeping 'adultery' out of the penal statute was the social norms which have already provided the values and norms which take care of such instances. The circumstances he applied to included practice of child marriage and polygamy which was prevalent in those era. Macaulay, therefore, suggested that it would be enough to treat it as a civil injury. Thus, framers of the Code did not included adultery as a crime; which was further added on the recommendation of second law commission. Thus it is evident to note that in the first law commission it was not considered as an offence however in the Second Law Commission, after giving mature thinking to the matter, proceeded to the conclusion that it was not prudent to exclude this offence from the Code.<sup>15</sup>

<sup>13</sup>GANGOLI GEETANJALI, INDIAN FEMINISMS : LAW PATRIARCHIES AND VIOLENCE IN INDIA 61(1<sup>st</sup> ed. 2007).

<sup>14</sup>GAUR K.D, INDIAN PENAL CODE 388(2<sup>nd</sup> ed. ).

<sup>15</sup> C.K. THAKKER AND M.C. THAKKER, RATANLAL & DHIRAJLAL, 2 LAW OF CRIMES 2710 (26<sup>th</sup> ed, BHARAT LAW HOUSE)(2007).



The second law commission supported the section keeping in mind the situation of women in the country, and they gave the following arguments;<sup>16</sup>

The argument given that why the wife would not be punished has been provided as follows: — “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 a 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 individual, operation of education and of time. However, 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>17</sup>

<sup>16</sup> RATAN LAL AND DHIRAJ LAL, INDIAN PENAL CODE (ENLARGED EDITION) 2305(29th ed.), (2002).

<sup>17</sup> GAUR K.D., INDIAN PENAL CODE 734(2<sup>nd</sup> ed. ).

Thus, in India, a wife is not punished as an adulteress or an abettor for the offence of adultery. It is only the man who is punished for the crime of adultery; the wife of the adulterer has no locus standi to file a complaint against her deviated husband. It is only the husband of the (adulteress) wife who can file a complaint and upon whose complaint the Court can take cognisance of the offence. This position of law regarding making a complaint has been explicitly provided under Cr. P.C Section 198(2), Cr. P.C. treats the husband of the (adulteress) wife an aggrieved party and not the wife of the adulterer husband.

### SUPREMO AMICUS

THE INTENTION BEHIND KEEPING SECTION 497

The object of making ‘adultery’ as an offence and restricting it to ‘Man’ alone was to deter ‘Man’ from taking advantage of a woman starved of the love and affection of her husband and deter Man from having sexual relations with the wife of another man. Since men had the social sanction to indulge in those relationships and women were deprived of the love and warmth from their husbands, women were negotiated as the victims and not as the authors of the crime. When Section 497 was implemented there were no codified personal and matrimonial laws like today, but they were unequal and inoperative.<sup>18</sup>

However, S. 497 provides immunity to the wife despite she portrays to be actively involved in ‘adulterous’ act. The provision

<sup>18</sup> VaradDeore, *A Provision Redundant in Penal Law in Changed Legal and Social Context* LEGAL SERVICE INDIA, (Jan 23, 2011, 10:04 AM), <http://www.legalserviceindia.com/article/1291-Adultery.html>.



relating to ‘adultery’ has been so drafted to protect the family as an institution, protection of woman from dominated class and prevent any damage to either spouse due to the ‘adultery’ which has already hampered the ‘faith’ amongst them. In **V.Revathi**<sup>19</sup> case Apex Court had to express its view about the object of a penal provision of ‘adultery’.

First of all, it has to be conjectured that S. 497 on ‘adultery’ is a shield to defend, not sword to tear off the marital relationship. It does not provide any of the spouses to use it as a sword to settle account against each other. Therefore, the law relating to ‘adultery’ under Indian Penal Code has been drafted and designed in such a way that a husband cannot prosecute the wife for defiling the sacredness of the matrimonial tie by indulging in adultery. Thus the law does not permit either the husband of the wife to sue his wife or the wife to sue the offending husband for being deceitful to her. Thus both the husband and wife are disabled from striking each other with the weapon of criminal law.<sup>20</sup>

The underlying object of the S. 497 of IPC is to promote the interest of marriage institution. S. 497 of the IPC, 1860 does not enable either Husband or wife to send each other to jail.<sup>21</sup>

Another probable object of a provision on ‘adultery’ is that it has been designed to protect the interest of the children. Perhaps it is as the children (if any) are protected from

the trauma of one of their parents being imprisoned at the instance of the other parent. Whether one does or does not subscribe to the wisdom or philosophy of these provisions is of little consequence. For, the Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law.

#### 8. INDIAN PENAL CODE (AMENDMENT) BILL, 1972

When by virtue of amendment bill an effort was made to make woman equally liable for the offence of adultery, 42nd Law Commission headed by John Romily opposed the opinion by stating that women at that time were at a deplorable situation, hence letting women out of this crime.

#### 9. JUSTICE MALIMATH COMMITTEE (2003)

This committee favoured the preservation of marriage and further showed its support for making the law gender neutral.

#### 10. NATIONAL COMMISSION FOR WOMEN (2006)

This commission supported for the decriminalisation of the adultery and further asked for the amending the provisions of CrPc for making the wife is also competent for filling complaint of their adulterous husband.<sup>22</sup>

#### 11. JURISPRUDENTIAL ANALYSIS OF ‘ADULTERY.’

<sup>19</sup>V. Revathi v. Union of India & others, AIR 1988 SC 835.

<sup>20</sup> Ibid 20 (para 5,6)

<sup>21</sup> Ibid 20.

<sup>22</sup>Faizan Mustafa, *Marriage is a civil contract — adultery or divorce should have only civil consequences*, T(JANUARY 11, 2018 ,12:02 AM) , <https://www.thehindu.com/opinion/op-ed/not-a-criminal-act/article22413886.ece>.



To understand the need and utility behind inserting the offence of adultery, it is essential to understand the modality of the legislative framework. There are certain dots that can be joined to understand its true essence. Firstly, it has been placed under Chapter XX of the IPC describing 'Of offences relating to marriage'. Thus the four sections 494 to 498 (including 498A) are related with marriage. Thus, the close scrutiny of these provisions clearly revealed that the provisions are so drafted to preserve the sanctity of marriage institution. May it be bigamy, adultery, cruelty or criminal abduction of wife, all provisions are drafted keeping the central theme in mind focusing the marriage institution, its preservation, protection and promotion of harmony. Society abhors marital infidelity. The object of Section 497 of the IPC is to preserve the sanctity of marriage.<sup>23</sup>

Yet another object underline the offence of 'Adultery' and not punishing woman but still existed in the code because at the time when the law was enacted, polygamy was deeply rooted in the society and woman shared the attention of their husbands with several other wives and extramarital relations. A woman was treated as victims of the offence of adultery as they were often deprived of love and warmth from their husbands and was easily give in to any person who offered it or even offered to offer for it. The provision was therefore made to restrict Man from having sexual

relations with the wives of other man and at the same time to restrict their extramarital relations to unmarried women alone.<sup>24</sup>

## 12. HYPOTHETICAL ANALYSIS

### **Hypothetical Situation:**

Where Section 497 is administered as it is without any amendments:

Since section 497 steers no punishment to the wife who is involved in physical intercourse with the third person, and further, the law says that only if done without husband's consent its amounts to a crime of adultery.

Thus from these clauses, few hypothetical situations can be modelled:

### **Hypothetical Situation 1:**

A husband might force her wife to have sex and fall in illicit relations with his boss or colleague for mere promotion or some other benefits.

### **Hypothetical Situation 2:**

A husband might use her wife as a prostitute and might force her to make illicit relations with other men.

In both the hypothetical situations the apathy of wife is vulnerable since in both the cases wives couldn't complain by virtue of section 198(2) of CrPc and further the humiliation of wife will remain inaudible due to hollow section which will not make it as an offence merely because here the consent of the husband is involved.

<sup>23</sup>Recommendation of V.S. Committee Chaired by Justice V.S. Mallimath; "The Report of the Committee on Criminal Justice Reforms"; 2002; Para 117. The committee has however, recommended for modification of S. 497 of IPC to bring it on the line of gender neutrality.

<sup>24</sup>VaradDeore, *A Provision Redundant in Penal Law in Changed Legal and Social Context* LEGAL SERVICE INDIA, (Jan 23, 2011, 10:04 AM), <http://www.legalserviceindia.com/article/1291-Adultery.html>.



### 13. LACK OF GENDER NEUTRALITY

Since only husbands are held liable according to the previous law. On more profound analysis of this, one could decode that if adulterous women procure children by that man then that children will be regarded as a legitimate child, this was further proved in *Shivakumar vs Premvathi*.<sup>25</sup>

### 14. PROBABLE AFTER EFFECTS OF STRIKING ADULTERY AS CRIMINAL OFFENCE

Let us try to probe the new law and its impression on women belonging to both the categories, i.e. Independent as well as dependent women

#### 1. For Dependent Women

Since according to section 497 only male involved in adultery is punishable so on a practical note although it is a ground for divorce, a dependent woman will fail to gather the nerve to claim for it despite knowing it. Henceforth this will lead to toxify the sacred matrimonial bond and failing to serve the purpose of bonding the marriage.

#### 2. In case of Independent Women

Although they can file for divorce but again there is an inferior ratio seen since it leaves a disturbing effect in the life of the children. Also, further by decriminalising something it implies that act is not criminal and anything that's not criminal is not wrong too. Hence it leaves the sacred matrimonial bond at the worst terms.

#### Other Effects of decriminalising

There can be other effects too, one could be disintegration of families, and distorted physiological minds of kids whose parents involve in these activities and some of them may even develop criminal minds to take revenge from their parents since this act is no more a crime but anyhow leads to the harmful effect to the family lives. Also, making this act not punishable may destroy the holiness of sexual rights of legal partner and therefore lead to toxification of the marriage institution.

### 15. CONSTITUTIONAL VALIDITY OF SECTION 497

The constitutional validity of this section has been challenged on several occasions by petitioners as well as a women rights activist. The section making only men liable supports the old age patriarchal society concept that women are weak and not capable of taking charge of their actions and hence must be protected by men. The section is most offending to the Art 14, Art 15(1) and Art 21 of the constitution.

On several occasion the constitutional vires of the section was challenged in the supreme court, in the following grounds:

1) In this consensual act where both the individuals contribute to the act, only men are held liable for the act whereas women despite being abettor in a certain case are not held liable. This goes against the spirit of equality.

2) Further granting only husband right to file against the adultery and not the women draw discriminative boundaries between men and women.

However, the Supreme Court before its ruling in *Joseph Shine vs Union* case

<sup>25</sup> Shivakumar vs Premvathi, AIR 2004 Kant 146(India).



rejected all the arguments advanced against adultery to uphold its constitutionality vires. The apex courts ruled that section 497 does not violate the gender equality under clauses; Art 14, Art 15 and Art.21 of the constitution.

The Supreme Court in *Yusuf Abdul Aziz vs State Of Bombay*<sup>26</sup> held that section 497, IPC is not ultra vires. It does not offend Article 14 and 15 of the Constitution of India, 1950. The reasoning given was sex is a sound classification accepted under article 15(3) of the Constitution. The same was reaffirmed in *Sowwmithri Vishnu v Union of India*<sup>27</sup>. Similarly in *V. Revathi v Union of India and Ors.*<sup>28</sup> The Apex Court declared that section 497 had been formulated to prevent a husband from filing a suit against his wife for committing adultery. Therefore, neither the law permits the husband to bring an action against offending wife, nor the wife can initiate a suit against the offending husband for being disloyal to them.

In *Dwaraka Bai v. Nainan*<sup>29</sup>, the High Court of Madras decided that Article 15 was not contravening the law which discriminated between men and women in requiring desertion and cruelty, besides adultery, when a woman wanted to divorce her husband.

#### 16. ADULTERY LAWS IN INTERNATIONAL PANORAMA.

<sup>26</sup>Yusuf Abdul Aziz vs State of Bombay, AIR 1954 SC 321.

<sup>27</sup>Sowwmithri Vishnu v Union of India, AIR 1985 SC 1618.

<sup>28</sup>V. Revathi v. Union of India & others, AIR 1988 SC 835.

<sup>29</sup>Dwaraka Bai v. Nainan AIR 1953 Mad 792.

*The Adultery has been defined as a criminal offense in some countries as well as mere a matrimonial civil wrong in others. When it comes to comparing the adultery laws in India versus other countries, the Indian laws nowhere matches with any other country. Almost every country had the penal laws for the offense of adultery. Later on, with the passage of time certain amendment took place which struck down this law of adultery. The legal consequences of committing adultery have varied according to place, community values, the historical era and prevailing ideology. One of the big reason for such changes because those laws were strongly against women's rights. Here is the succinct of adultery laws of the different country mentioned below:*

#### 1. United Kingdom (UK):

*In the Earlier, UK was also a country of penalising the guilty of adultery. It all started way back in the early century era of the country. The act of adultery between a married woman with other men than her husband was the serious crime in England. in 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife was "the highest invasion of property" and claimed, in regard to the aggrieved husband, that "a man cannot receive a higher provocation". Even the honour killing was done by the family member if they found the woman suspect of adultery. Later on, the adultery was abolished in 1857. Adultery was decriminalized then after.*

#### 2. Iran:



*In a Muslim country like Iran, Adultery is defined as a serious breach of the criminal breach. It is capital punishment in the Islamic Republic of Iran and punishable by flogging, hanging and stoning. Iran penal reads adultery as:*

“Article 63 - Adultery is defined as the intercourse between a man and a woman whose intercourse is inherently forbidden “haraam”, even if it is from behind, other than those cases where the person has had a doubt [i.e., mistaken identity].

Article 64 – Adultery is punished when the adulterer is mature\*, sane, and acting by free will and is also aware of the offense and its punishment.

Article 65 – If a man or a woman is aware that the intercourse with the other party is forbidden, and the other party is not aware, thinking that the intercourse is legitimate, then only the party who has been aware that the intercourse is forbidden shall be sentenced to the punishment.<sup>30</sup>

#### 17. UN GUIDELINES ON ADULTERY LAWS.

United Nations has released the Guidelines under which the issue of calling governments in order to repeal the criminalizing the adultery raised. UN mentioned that the laws made with respect to act of adultery is not gender neutral. After a closer analysis to these laws which criminalize the act of adultery was found that they are discriminatory in nature and gender biased. It was found that strictness is majorly deliberated upon the women

<sup>30</sup>The Islamic Penal Code of Republic Iran, Book II, Section 1, Chapter 1, Article 63 - 65.

whereas it is more liberal on the side of man. A tragic example was reported by UNICEF: a 13-year-old Somali girl, Aisha Duhulow, was stoned to death in a stadium of spectators in Kismayo on 27 October 2008 after having been found guilty of adultery. Reports indicate that she had been raped by three men while travelling on foot to visit her grandmother in the war-torn capital, Mogadishu. Following the assault, she sought protection from local leaders, who then accused her of adultery and sentenced her to death<sup>31</sup>.

The UN Working group analysis the early laws of the various country. In their report, they submitted that adultery as a criminal offense violates women’s human right. The very reason for such report through UN Human Rights is because there is gender-based discrimination with women. If the laws were made properly with no biasedness and with gender equality, then there won’t be such report by UN.

#### 18. CONCLUSION

The Hon’ble Supreme Court of India has been decriminalized the offense of adultery. Adultery is no more a criminal offense in India. In the case of *Joseph Shine v. Union of India*<sup>32</sup>, SC has unanimously struck down the Sec. 497 of Indian Penal Code as it was arbitrary and unreasonable on the part of the woman, also only a male can be prosecuted for the offense of adultery. However, adultery still remains one of the grounds for

<sup>31</sup>Report from UN Office of the SRSG for Children and Armed Conflict (Press release published on 07 Nov 2008, OSRSG/081107

<sup>32</sup> Joseph Shine v. Union of India Writ Petition (Criminal) No. 194 of 2017.



the divorce in India under Hindu Marriage Act, 1955<sup>33</sup>.

Now when we talk about the sec. 497. Two question raise per se. First, Whether the clause has given under Sec. 497 of IPC is justified? Second, whether decriminalizing the offense of adultery is justified considering India's environment, ethics, old Manu's, and even present scenario. India's rank is 130 out of 189 countries in the latest human development ranking released by the United Nations Development Programme (UNDP)<sup>34</sup>. India's population is more than 1.3 billion<sup>35</sup> & out of which approx. 68% lives in rural areas<sup>36</sup>. India is still a developing country. India is not ready for such huge changes which openly allows people to have the extra-marital relationship. Instead of decriminalizing, India was in much need of the amendment in the Sec. 497 of IPC.

It's not like I am advocating the stoning or mutilation of adulterers like they do in Afghanistan but there should be a law governing over such acts of the people, a law to protect the marriage of two individual. The consequences of this act of adultery not only affect the two individual but also gives mental agony to the rest of the members of the family i.e., children and parents of the parties concerned. People get seriously pissed off if even a boyfriend or girlfriend cheats on them, but to do it within

a marriage is to break vows said in front of dozens of the witness. In my knowledge marriage is the biggest social & societal ceremony in one's life. How could a husband or wife bear the news that their spouse is cheating and has affection and sexual relation to some else? It is quiet expected to hear the provocation crime then after. As happened in the landmark case of *K. M. Nanavati vs The State of Maharashtra*<sup>37</sup>. The court can stop someone to prosecute other for the offense of adultery but how would court stop someone to do the provocation crime takes place due to the act of adultery. No one actually can stop it because here asking for the divorce is not a serve of the justice for the victim, not at all. Divorce would only help to proceed their life with his/her adulterers' partner. All the consequences then after would be bear by the victim only.

This whole discussion leads to the answer of the above mentioned two questions. Answer of the first question leans towards No. The clause has given under Sec. 497 of IPC were not justified at all. And answer of the former question also lean towards No, which says that decriminalizing the offense of adultery is not justified instead of which Sec. 497 of IPC i.e., adultery should have been amended and be framed as it come to the conclusion that

- a. "anyone either husband or wife, does the offense of adultery without the permission of other spouse, he or she be prosecuted for the crime of adultery."
- b. The adulterer partner involving in the act of adultery shall be prosecuted if he or

<sup>33</sup> Sec. 13(1)(i) of The Hindi Marriage Act, 1955 (Act 25 of 1955).

<sup>34</sup><http://www.in.undp.org/content/india/en/home/sustainable-development/successstories/india-ranks-130-on-2018-human-development-index.html>

<sup>35</sup> <http://worldpopulationreview.com/countries/india-population/>

<sup>36</sup>[http://censusindia.gov.in/Census\\_And\\_You/area\\_and\\_population.aspx](http://censusindia.gov.in/Census_And_You/area_and_population.aspx)

<sup>37</sup> *K. M. Nanavati vs The State of Maharashtra* 1962 AIR 605.



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she is aware of the fact of others marital status.

By amending the particular clause, it will firstly protect the marriage or will make the adulterer party think before committing such an act. Secondly, it will serve the justice for the victim party for sure.

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