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# Adultery: The Legal Perspective

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## ABSTRACT

*Section 497 of Indian Penal Code (IPC) titled adultery formed a sharp criticism and a platform of discussion after Supreme Court Of India declares Section 497 as unconstitutional by five -judge Supreme Court Bench headed by former Chief Justice Dipak Misra. The present article will deal with all the aspects of Section 497 and will try to articulate the controversies from a legal point of view in contemporary Indian Society. This paper attempted to analyze adultery from its legal view and to examine its impact and effects and co-relation with other aspects such as marriage, remarriage and divorce.*

**Keywords:** Legal, Marriage, Adultery.

## I. INTRODUCTION

Adultery has been defined as a consensual physical relation between two individuals who are not married to each other and either or both of them are married to someone else. Adultery is also known as the extra-marital affair and it is considered to be a sin in some Indian religions. The definition of adultery may vary but the basic theme is the sexual relationship outside the marriage. Adultery, therefore, signifies gender neutrality and it may be committed by either sex. In India, legal provisions under Indian Penal Code signify ‘Female Adultery’ where only the section considers adultery if occurs with a married woman only. Adultery proposes conditions for the commission of the act by the person when –

1. Either one or both of them are having living spouse and knowledge about it.
2. He or she has sexual intercourse and such sexual intercourse is voluntarily committed.

So, it can also be said as Adultery is an offence committed by a man against a husband in respect of his wife.

According to Raydon, ‘consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage

According to D.Tolstory, ‘Adultery is voluntary sexual intercourse between a married person and a person of the opposite sex, the two persons not married to each other.

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## **II. ADULTERY: HISTORICAL PERSPECTIVE**

Looking back to its history, adultery has ancient origin and was found in many other societies. The definition of adultery vary from religion and cultures but the concept is similar to almost all the religion. Historically, adultery has been considered a serious offence by many ancient cultures. Many cultures have regarded adultery as a crime. According to the ancient Hindu law, in ancient Greece and Roman Law, only the offending female spouse could be killed and the man was not heavily punished<sup>2</sup>. Historically in India, ‘Adultery had been considered an anti-social activity and prohibited by the law. But the concept of adultery is different in ancient times as compared to modern times. According to the ancient code of Manu, adultery is not an offence involving moral depravity. Adultery thus is a prohibited norm in one or other forms of society. The ancient code provided a different range of punishments for adultery ranging from simple punishment to the burning of the offender also. According to the common law, adultery takes place only when the woman is married and both parties are held liable.

## **III. DECRIMINALISING ADULTERY**

The Supreme Court of India declared the 150 year old colonial era law of adultery as unconstitutional and struck down the Section 497 of Indian Penal Code, 1860 along with Section 198 of Cr.P.C unconstitutional, decriminalizing the offence of adultery in *Joseph Shine vs. Union Of India*<sup>3</sup>. Previously the Supreme Court had upheld Section 497 IPC as constitutionally valid in the case of *Yusuf Abdul Aziz vs The State of Bombay*<sup>4</sup>. In *Yusuf Abdul Aziz*, the supreme court held that in granting immunity to women from criminal liability for adultery, Section 497 was a ‘special provision’ for the benefit of women and was considered valid despite of being discriminatory under Article 15(1). The offence of adultery applies only to a man committing adultery and the woman is not even called the ‘abettor’ or punished for the offence and the power to prosecute lies only with the husband of the woman. This provision clearly treats the husband of the ( adulteress) wife as an aggrieved party and not the wife of the adulterer husband. Section 497 on adultery was a shield to defend, not a sword to tear off the marital relationship. It does not provide any of the spouses to use it as a sword to tear off the marital relationship. Section 497 was unconstitutional as the very basis for criminalizing adultery was the assumption that a woman is considered the property of the husband and cannot have relations outside the marriage but the same restrictions did not apply in the case of the husband.

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<sup>2</sup> It is to note that Plato advocated that the elite class people shall use women in the society as a property. Even the Aristotle advocated similar argument for using wife by elite class people.

<sup>3</sup> *Joseph Shine vs. Union of India*

<sup>4</sup> *Yusuf Abdul Aziz vs State of Bombay*

Section 497 violates Article 14 and article 15 (1). Article 15 (1) prohibits the state from discriminating on the grounds only of sex. A husband is considered as an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not if her husband does the same. The offence of adultery discriminates between a married man and a married woman. Section 497 curtails the essential dignity that a woman is entitled to have on the basis of gender stereotypes which creates a dent in the individual dignity of the woman. The court has recognized sexual privacy as a natural right, protected under the constitution. To shackle the sexual freedom of women and allow the criminalization of consensual relationships is a denial of the right to privacy. Section 497 denudes a woman of her sexual autonomy in making its free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to limited autonomy on entering a marriage. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality. Section 497 is premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. Some feminists argue that position of the woman is demeaning and fails to recognize them as equally autonomous individuals in society.

#### **IV. CONCLUSION**

Section 497 is a pre-constitutional law. There can be no doubt that adultery is now a ground for divorce or for any kind of civil wrong including dissolution of the marriage. Adultery is basically associated with the institution of marriage. treating adultery as an offence would amount to the State entering into a real private realm. Adultery does not fit into the concept of the crime. So it's the far better option to leave it as a ground for the divorce.

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