

**EMPOWERMENT OF WOMEN AND ‘ADULTERY’ UNDER  
INDIAN PENAL CODE: THE SPECIAL NEED  
TO SAFEGUARD THE RIGHT OF A WOMAN  
AGAINST A WOMAN**

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**I. Introduction**

History is testimony to the fact that apart from few Vedic and Puranic instances, the Indian societies had treated women with inferiority. It was only after the independence that 1950 Constitution of India brought provisions of gender equality and certain beneficial provisions favoring women.<sup>3</sup> This prolonged ill treatment of women got its place even in penal laws of India under the offence of adultery under section 497 of Indian Penal Code 1860 (IPC) and section 198 of Criminal Procedure Code 1973 (CrPC). Adultery is not a new concept rather it had been in practice in all most all societies and every religion has condemned it on moral grounds. Under Indian laws only man can commit the offence of adultery and not the female. The adulterous female cannot be held guilty of the offence to the extreme that she can even not be considered as an abettor of the offence. The drafter of the IPC in 1860 were aware of the consequences of tampering with religious feelings and practices because of 1857 war of independence, so they maintained the *status quo* where women were considered the victim of adultery.

But now the situations have changed and our societies have matured. We talk and act for women’s dignity and empowerment. To a great extent we find women empowered where she is out powering male in all spheres of life be it education, research or say any profession including

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<sup>3</sup> Article 14 talks of equality of every person including women. Whereas Article 15 (3) provides for beneficial provision State may take favouring women and children which cannot be challenged against Article 14 on the ground of equality.

politics. Jurists as well as the Law Commission of India<sup>4</sup> have for a long time questioned the gender biased provision of offence under adultery of IPC because it not only depict women as chattels of male but also do not give equal right to the woman whose husband has committed adultery with another woman. Because under the law the woman whose husband has committed adultery, cannot sue the woman with whom he had committed it. So it is like safeguarding a woman at the cost of right of another woman.

## II. Empowerment of Women

The international women's day on March 8, 2016 was celebrated very enthusiastically all over the world including India. The Indian Prime Minister went extra miles by requesting the Chair in Lok Sabha to make it a day when women members are taking the charge of the House with maximum participation. As a result the House witnessed fair participation of women in raising issues and participating in discussions on various issues. India also boasts itself with the credit of having women at the helm of affairs in every field. They have graced and are still gracing the offices of President, Speaker of the Lok Sabha, Deputy Speaker of the Rajya Sabha, Cabinet ministers, Chief Ministers, judicial offices in higher courts and what not. They are elected members in Parliament, Legislative Assemblies and panchyats. It is aptly said that women are running the Indian banking industry as several heads of the banks are women.<sup>5</sup> Apart from this women are also safeguarding our borders and operating fighter planes of the Air Force<sup>6</sup> which at one point of time was suitable only for male. In terms of equality in paternal properties since 2005 the female child is given same right as the male child since her birth including the right to perform the pious obligations.<sup>7</sup> This not only brought equality of male and female child but is a stepping stone in empowering women.

No one can deny the fact that Indian societies have matured a lot and have tried to destroy most of the taboos hindering social progress and

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<sup>4</sup> The Law Commission of India, 42nd Report, 1971 available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf> (last accessed on 11 March 2016).

<sup>5</sup> Sreeradha D Basu & Rica Bhattacharya, 'Why Banking Mints the Most Women CEOs in India', THE ECONOMIC TIMES, October 4, 2013, available at [http://articles.economicstimes.indiatimes.com/2013-10-04/news/42718085\\_1\\_archana-bhargava-banker-magazine-kaku-nakhate](http://articles.economicstimes.indiatimes.com/2013-10-04/news/42718085_1_archana-bhargava-banker-magazine-kaku-nakhate) (last accessed on 11 March 2016).

<sup>6</sup> 'India to Get its First Batch of Female Fighter Pilots on June 18, Says Aroop Raha', Zee News, 8 March 2016, available at [http://zeenews.india.com/news/india/iaf-to-get-its-first-woman-fighter-pilot-on-june-18-2016-arup-raha\\_1863461.html](http://zeenews.india.com/news/india/iaf-to-get-its-first-woman-fighter-pilot-on-june-18-2016-arup-raha_1863461.html) (last accessed on 11 March 2016).

<sup>7</sup> Section 6 of the Hindu Succession Act 1956 (as Amended in 2005).

gender equality. What was wrong in 1860<sup>8</sup> may not be accepted as a wrong in 2016. The news paper of 12<sup>th</sup> August 2010 wrote that the Delhi High Court has said that a partner can walk-out of his live-in relationship without any legal consequence and people cannot complain of infidelity if one of them ditches, since both are adults.<sup>9</sup> The court went into saying that contract of living together ... is renewed every day by the parties and can be terminated by either of the parties without consent of the other party and one party can walk out at will at any time. Those who do not want to enter into this kind of relationship of walk-in and walk-out, they enter into a relationship of marriage where the bond between the parties has legal implications and obligations and cannot be broken by either party at will.”

Today ‘live in relationship’ is not a taboo and people can indulge in ‘kiss of love’ programmes openly in streets and roads. Students in universities openly protest against the patriarchal and rapist culture by pasting sanitary pads on the campus walls with feminist slogans over it.<sup>10</sup> Moving further even the Apex court of India does not find any problem with pre-marital sexes<sup>11</sup> which till very recently was of bitter taste for the society. The apex court have now also accepted the fact that with the passage of time society has accepted live-in relationship now and it does not attract any penal provision.<sup>12</sup>

This shows India is walking nicely on the path of women empowerment. But a very serious doubt is raised over empowerment when it comes to the question of law on ‘adultery’ under IPC which exists as an example of biasness against not only male but also against the fellow female. Thus it is also a question of balancing the rights of two females which until now is not redressed. Therefore in present time there is a need to bring change in the Section 497 of the IPC as it is based on gender inequality bringing women to a low status than man as well as giving no

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<sup>8</sup> Indian Penal Code was drafted this year. For the offence of adultery only male was held liable and the position is same even today.

<sup>9</sup> ‘No Legal Bond in Live-in Relationship, Says HC’, THE TIMES OF INDIA, 10 August 2010, available at <http://timesofindia.indiatimes.com/city/delhi/No-legal-bond-in-live-in-relationship-says-HC/articleshow/6284277.cms> (last visited on 10 March, 2016).

<sup>10</sup> Rituparna Chatterjee, ‘Photos: Now Jadavpur University Students are Putting up Feminist Messages on Sanitary Pads All Over Campus’, THE HUFFINGTON POST, 29 March 2015, available at [http://www.huffingtonpost.in/2015/03/29/jadavpur-sanitary-pads\\_n\\_6963680.html](http://www.huffingtonpost.in/2015/03/29/jadavpur-sanitary-pads_n_6963680.html) (last accessed on March 10, 2016).

<sup>11</sup> S. Khusboo v. Kanniammal and Ors., (2010) 5 SCC 600.

<sup>12</sup> Harish V Nair, ‘Live-ins now Acceptable in Society, Rules Supreme Court’, MAIL TODAY 24 July 2015, available at <http://indiatoday.intoday.in/story/supreme-court-acknowledges-live-in-relationships/1/453665.html> (last accessed on 11 March 2016).

remedy to the wife of male adulterer against the female involve in adultery with her husband.

### III. Adultery under the Indian Penal Code 1860

#### (i) Adultery:

Adultery has its origin in the Latin word *adulterium*. It is understood as a voluntary sexual action by a married person with another married or unmarried individual.<sup>13</sup> This is found in almost every society and all the religions and society condemns it. In fact, at least 14 presidents of the United States have committed adultery while in office.<sup>14</sup> First hanging of a married woman for adultery took place in 1643 in Massachusetts.<sup>15</sup> Still after a United Nations call to decriminalize adultery twenty one States of USA has the law for adultery.<sup>16</sup> "Thou shalt not covet thy neighbors' wife."<sup>17</sup> The seventh commandment is viewed by many as the first adultery law.<sup>18</sup> In fact, this biblical decree's emphasis on emotional sin, rather than the physical, could be viewed as support for more esoteric standards for adultery. In *Hatim Khan v. State*<sup>19</sup> the J&K High Court acknowledged that adultery by itself is an anti-social and illegal act: naturally any peace-loving citizen and any person of good morals would not like that adultery should be permitted to be indulged in before his very nose.

#### (ii) Sec. 497 of IPC

Adultery has been defined under the Indian Penal Code in these words: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished

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<sup>13</sup> K.I. Vibhute, "Adultery" in the Indian Penal Code: Need for A Gender Equality Perspective, (2001) 6 SCC (J) 16.

<sup>14</sup> Jennifer A. Herold, Journal of Law and Family Studies, A Breach of Vows But Not Criminal: Does Lawrence v. Texas Invalidate Utah's Statute Criminalizing Adultery?, 7 J. L. Fam. Stud. 253, 2005.

<sup>15</sup> Ibid

<sup>16</sup> Adultery Laws: Where is Cheating Still Illegal? THE WEEK, UK, 27 February 2015. Available at <http://www.theweek.co.uk/62723/adultery-laws-where-is-cheating-still-illegal>(last accessed on 11 March 2016).

<sup>17</sup> Exodus 20:17. A biblical definition of "Adultery" is "the lying with the wife of another man." Deuteronomy 22:22. Support for the premise that the Bible condemns emotional as well as physical adultery is seen in Matthew 5:28,

<sup>18</sup> 20 COMMENT 201, Hastings Communications and Entertainment Law Journal (COMMENT), SEX ONLINE: IS THIS ADULTERY? Fall, 1997.

<sup>19</sup> AIR 1963 J&K 56 at P. 58

with imprisonment of either description for a term which may extend to five years or with fine, or with both. In such case the wife shall not be punishable as an abettor”.<sup>20</sup>

So main ingredients of adultery can be as follows:

- a) Sexual intercourse must be committed with the wife of another man,
- b) The person must have knowledge or belief that the woman is married<sup>21</sup> and is the wife of another man,
- c) Such sexual intercourse must be without the consent or connivance of the husband<sup>22</sup>; and
- d) Such sexual intercourse must not amount to rape.

This provision under Sec. 497 of IPC is supplemented by Sec. 198 of the Criminal Procedure Code 1973 (CrPC). Both these provide the inequality of gender in marriage under Indian laws. It reveals that (i) man is a seducer and woman is merely his hapless or passive victim, (ii) he trespasses upon another man’s marital property, (iii) husband of the adulteress wife is an aggrieved party and he (in some cases a person who takes her care) is authorized to make a formal complaint, (iv) wife of the adulterer husband is not deemed to be aggrieved party and thereby is precluded from making a formal complaint against her husband or the adulteress woman and (v) a married man may seduce and establish sexual liaison with a widow, a divorcee or an unmarried woman which is equally capable of breaking the matrimonial home lives with impunity.<sup>23</sup>

### **(iii) Sexual intercourse must be committed with the wife of another man**

The M.P High Court said that according to the IPC adultery is as an invasion on the right of the husband over his married wife.<sup>24</sup> Adultery under the Code consists in having carnal knowledge of a married woman with knowledge of that fact, without the consent or connivance of her husband. The section assumes that the intercourse was had with the consent of the wife, for otherwise the offence would be rape and not merely adultery. Under section 376 of IPC, penetration is held to be sufficient to constitute the sexual intercourse necessary to the offence of rape, and it is apprehended that penetration of the male organ is equally necessary to constitute the

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<sup>20</sup> See, sec.497 of the Indian Penal Code, 1860.

<sup>21</sup> Bhagu Dhondi v. Emperor, 17 Bom. L.R.75.

<sup>22</sup> Munir v. Emperor, AIR 1926 All. 189.

<sup>23</sup> Yusuf Abdul Aziz v. State, AIR 1951 Bom 470.

<sup>24</sup> Chandra Chhattar Lodha v. Mst. Nandu, AIR 1965 MP 268.

sexual intercourse necessary to this offence.<sup>25</sup> So where the wife went over the shop of the accused to have sexual intercourse but was at once followed and entrapped before she could have connection, her act was held not to go beyond the mere stage of preparation.<sup>26</sup>

#### IV. Adultery and the Violation of Gender Equality

The constitution of India, 1950 in the Preamble provides Equality of opportunity and status. In the same line the Articles 14 and 15 strives to provide equality.

**Article 14:** The State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.

**Article 15:** Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

However Art. 15(3) gives some benefit to women and children by saying that “Nothing in this Art. shall prevent the state from making any special provision for women and children.

The constitutionality of Sec. 497 of the IPC was challenged as early as in 1951 in the *Yusuf Abdul Aziz v. State*<sup>27</sup> in the High Court of Bombay contending it violates Art. 14 and 15 as it is discrimination on the ground of sex because it operates unequally between man and woman because it brings responsibility only on men and not women. In this case the Chief Justice Chagla of Bombay High Court delved into the historical background of Section 497 and prevailing social conditions and observed:

“what led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in Sec. 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country.”<sup>28</sup>

The court upheld the validity of Sec. 497 of IPC on the ground that the Art. 15(3) of the Constitution provide for special provision for women therefore it is valid. This case went in appeal to the Supreme Court.<sup>29</sup> The

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<sup>25</sup> Madhub Chunder Giri, 21 W.R.13 as coated by Dr. Hari Singh Gaud in Indian Penl Code, vol. 4, p.4654, Law Publisher’s (India) Pvt. Ltd., 2006.

<sup>26</sup> Paira Ram, (1902) P.R. No. 25 as quoted in Hari Singh Gaur’s Indian Penal Code, vol.4, p.4655-4656, 2006.

<sup>27</sup> AIR 1951 Bom. 470

<sup>28</sup> AIR 1951 Bom. 470, para 5.

<sup>29</sup> Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930.

appellant contended that Sec. 497, by assuming that the offence of adultery could only be committed by a man and mandating a court that the adulteress wife be not punished even as an abettor, offended the spirit of equality enshrined in Art. 14 and 15 of the Constitution. This kind of immunity assured to the adulteress wife (even) for her willing participation in the adulterous sexual activity, it was argued, did amount to a sort of license to her to commit and abet the offence of adultery.

Vivian Bose, J., speaking for the Constitutional Bench of five judges did not accept these arguments of the appellant in the background of safeguards of Art. 15(3). He had the same notion as was of Chagla J. of the Bombay High Court. To the argument that Art. 15(3) should be confined only to provisions which are beneficial to women and should not be used to give them a license to commit and abet a crime with impunity, the Apex Court replied:

“we are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited.”<sup>30</sup>

The next case where the validity of sec. 497 of IPC was challenged is *Sowmithry Vishnu v. UOI &Anr.*<sup>31</sup> In this case the husband of the adulterous wife contended that Section 497 of the Penal Code is violative of Article 14 of the Constitution because, by making an irrational classification between man and women, it unjustifiably denies to women the right which is given to men. This argument was based on the following three grounds :

- (i) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;
- (ii) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and,
- (iii) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free licence under the law to have extra-marital relationship with unmarried women.

It was contended that Section 497 is flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'. It is urged that the section may, at first blush, appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of 'Romantic

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<sup>30</sup> Ibid, p.931-32

<sup>31</sup> AIR 1985 SC 1618.

Paternalism', which stems from the assumption that women, like chattels, are the property of men.

The court reject all the arguments on the background of Articles 14 and. 15(3) saying that “this position may have under gone some change over the years but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone. The Law Commission of India in its 42nd Report, 1971, had some recommendation but was not accepted by the legislature.” The argument of “romantic paternalism” meaning by traditional assumption that a woman is also the property of man therefore bringing it par with chattel was also rejected by the court.

The court also backed the validity of sec. 497 when the woman petitioner contended that in the background of recent interpretations of Art. 21 of the Constitution of India it includes right to reputation and the absence in Sec. 497 of the provision mandating the court to hear the married whom the accused has allegedly committed adultery violates her constitutional right of right to life under Art. 21. To it the Apex court said that the absence of provision mandating hearing the adulteress wife does not make the provision unconstitutional.

Again in continuance to it came *V. Revati v. UOI*<sup>32</sup> where the wife of the adulterer husband challenged the validity of Sec 198(2) which says that for the purpose of Sec. 198(1) no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Sec. 497 or Sec. 498 of the said code sec. 198(1) empowered the husband of the adulteress wife to prosecute the adulterer but does not permit the wife of an adulterer to prosecute her promiscuous husband. The petitioner wife argued that this kind of provisions are in contravention to the concept of gender equality enshrined in the constitution. But again the court upheld the validity of Sec.497 of IPC abd Sec. 198(2) of CrPC saying that both go hand in hand and deal with “an outsider’ to a matrimonial home. Thakkar J. observed:

“The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is why neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination

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<sup>32</sup> AIR 1988 SC 835

based on sex. While the outsider who violates the sanctity of the matrimonial home is punished a rider has been added that if the outsider is a woman she is not punished. There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law....in the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other.”

But this does not sound convincing when Thakkar J. says that the law has meted out even-handed justice. Two things are there:-

1. Woman cannot be punished for adultery, and
2. Bar on the wife of the adulterer to prosecute her unfaithful husband.

From the above mentioned cases it is clear that both man and woman have challenged the validity of Sec. 497 read with Sec. 198 of CrPC. Therefore the law is not suitable to both of them. On another hand what Hon'ble Thakkar J and other judges in previous cases forget to see is that while looking on gender discrimination they escaped looking individual discrimination done. Why someone shall suffer for the benefit of other. It is clear that in order to safeguard one adulteress woman we punish a naïve woman of the adulterer husband. What is her fault? Does it not give pain when she finds her husband as adulterer? So can we say that these laws are a beneficial legislation under Art. 15(3)? Can a legislation be called the beneficial legislation when the non culprit of that class is punished at cost of culprit? It is beyond the acceptance of any reasonable man. The Court in *Sowmithri Vishnu v. UOI*<sup>33</sup> has tried to hide it on the garb of policy matter and calling it the duty of legislature to take notice of it. But seeing the recent trend and positive activist role of the Apex Court certainly we expect better result from it.

Again as late as in 2011 in **W. Kalyani v. State through Inspector and Ors.**<sup>34</sup> Justice Aftab Alam speaking for himself and Justice R. M. Lodha held that although under criticism from some quarters for gender biased and putting married women at par with chattels, as per law under section 497 of IPC as it stands today, the appellants by virtue of being a woman cannot be

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<sup>33</sup> AIR 1985 SC 1618.

<sup>34</sup> Criminal Appeal No. 2232 of 2011 arising out of SLP (criminal) No. 648 of 2010. (2012) 1 MLJ (Crl) 546 (SC).

charged for the offence of adultery. Thus the Apex court is sticking to the same line of reasoning which it has accepted in earlier cases even after acknowledging the fact that this provision is criticized from certain quarters for being gender biased.

It is beyond doubt to say that adultery cannot be committed without a woman and that also with her consent because otherwise it will fall under the category of rape<sup>35</sup>. So if it is not a case of rape and is adultery, it means the woman is not victim but a beneficiary of physical satisfaction. Also the notion that only a man can be an outsider is completely wrong as a married woman is equally capable of invading a matrimonial home and giving a ground of divorce in that home. At the same time her matrimonial home is also at stake as her husband or for that matter any man in that situation will not live with an adulterous wife. Again when woman is not given right to prosecute her adulterous husband<sup>36</sup> then also it is unconvincing and irrational. Therefore at last these provisions of law prove to be discriminatory and also disadvantageous to the both man and woman but woman suffers more as it brings her status as of chattel and only man has exclusive right of his wife's sexuality but the converse is not true and woman has no such right.

#### **V. The Changes Required to Change the unjust Nature of the Law**

The reason why the wife will not be punished has been provided by framers of the Code 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 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**

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<sup>35</sup> Sec. 375 of IPC

<sup>36</sup> Sections 198(1) and 198(2).

**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>37</sup>

Now at the present time after 150 years of the framing of the Code, has not the education reached to the height required and society ready to grasp the changes so required without difficulty? And the answer is Yes. The Fifth Law Commission of India in 1971 through 42<sup>nd</sup> Report recommended removing the disparity by giving equal punishment to adulteress woman under Sec. 497 of the IPC. It also advocated reducing the punishment of 5 year imprisonment to 2 year. The recommended section 497 reads as follows:

**“497. Adultery;** if a man has sexual intercourse with a woman 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, **the man and woman** are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to **two** years or with fine, or with both.”<sup>38</sup>

But the Joint Select Committee substituted the above revised Sec. 497 by the following:

*“Whoever* has sexual intercourse with a *person* who is, and whom he *or she* knows or has reason to believe to be the wife *or husband as the case may be*, of another man, without the consent or connivance of that *other person*, such sexual intercourse **by the man** not amounting to the offence of rape, **commits** adultery, and shall be punished with imprisonment of either description for a term which may extend to five years or with fine, or with both.”<sup>39</sup>

Thus it is clear that both Fifth Law Commission and the Joint Select Committee have tried to bring equality between the two sexes and bringing equal culpability for man and woman for committing adultery. One of the members of the Fifth Law Commission Mrs. Anna Chandi observed that

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<sup>37</sup> Quoted in A Text Book on the Indian Penal Code by K. D. Gour at page 734 (2004, Ed.).

<sup>38</sup> Law Commission of India, Forty-second Report 1971: Indian Penal Code, para 20.18.

<sup>39</sup> Clause 199. The 1978 Amendment Bill lapsed due to dissolution of the Lok Sabha then.

“the wife being considered the husband’s property, the present provision reserves for the husband the right to move the law for pushing any trespass on it, while not giving the wife any corresponding right to complain against any transgressions on the part of or relating to her husband. Perhaps to make amends for this harsh discrimination, the present section provides that the wife should not be punished along with the trespasser. The removal of this exemption clause does not cause damage to the basic idea of the wife being the property of the husband. On the other hand, it merely restates the idea, and adds a new dimension to it by making not only the trespasser but the property also liable to punishment. This as noted before can hardly be considered a progressive step<sup>40</sup> and help empowering women with dignity.

The last attempt was made in 1997 by the Fourteenth Law Commission in its 156<sup>th</sup> Report on the IPC, and recommended that changes made in Sec. 497 shall be also made in Se. 198(2) CrPC.<sup>41</sup> Apart from this the Apex Court stick to the idea that it is policy matter and only legislation could bring change in the law could have been avoided by taking authority of Law Commission Reports and Joint Select Committee Report in deciding the cases giving equality to the gender.

## VI. Conclusion

Adultery has long been regulated in Asia. In ancient China, men could only take one wife.<sup>42</sup> They could have several concubines, however, who lived in the same family compound as the man and his wife.<sup>43</sup> The adultery laws of Korea and Taiwan both derive from Imperial Japanese legislation imposed during colonial rule. Section 183 of the Penal Code of Japan, enacted after the Meiji Restoration, made adultery an offense only for married women and their paramours.<sup>44</sup> With a slight change independent Korea made adultery a crime for both women and men.<sup>45</sup> But in 2015 the highest court of South Korea decriminalised adultery all together.<sup>46</sup> In most

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<sup>40</sup> Supra note 36, p.365.

<sup>41</sup> See Law Commission of India, 156<sup>th</sup> Report 1997: Indian Penal Code, para 9.46.

<sup>42</sup> Helen E. Fisher, ‘An Anatomy of Love: A Natural History of Mating, Marriage, and Why we Stray’, p. 79, W.W. Norton & Company, New York, 1994.

<sup>43</sup> Ibid

<sup>44</sup> Wilhelm Röhl, *History of Law in Japan Since 1868*, 623 (2005). The Meiji Restoration officially began with the restoration to power of the Meiji Emperor on January 3, 1868.

<sup>45</sup> Art. 241 of Korean Penal Code. Sec 1 reads as “a married person who commits adultery shall be punished by penal servitude for not more than two years. The same shall apply to the other participant.

<sup>46</sup> See, ‘South Korean Court Decriminalises Adultery’, BBC NEWS, Asia, 26 February 2015, available at <http://www.bbc.com/news/world-asia-31635747> (last accessed on 4 March 2016).

of the foreign countries adultery apart from being a ground for divorce, has been perceived as a criminal wrong against marriage. In these countries both the spouses are generally held criminally liable.

However the penal law in India for adultery is premised on the one-and-a half century old caste-based stratified social setting in the context of the traditional conservative property-oriented family ideology and sexual mores. It is also premised on a few outdated and moot assumptions of sexuality, sexual agency and unequal marital rights and obligations of the spouses. It, in ultimate analysis, unmistakably intends to protect the rights of the husband and not the wife. It is also bridled with deep-rooted obsolete assumptions predominantly premised on gender discrimination and the wife's sexuality. Such a law in 21<sup>st</sup> century undoubtedly seems to be inconsistent with the modern notions of the status of woman especially empowered women and the constitutional spirit of gender equality. Till 2016 society has seen a sea change as in **S. Khusboo v. Kanniammal and Anr**<sup>47</sup> the Apex Court clearly held that pre-marital sex is no offence and live-in relationship is valid in law. The court even asked the counsel to give one instance where these things have adversely affected him. Other changes such as 'kiss of love' live-in relationships as accepted norm, protesting against patriarchal notions through pasting sanitary pads on campus walls shows that our societies have changed a lot and women has been empowered a lot in comparison to what it was during independence.

Thus the existing gender discriminatory penal law of adultery, against this backdrop deserves a serious relook and revision to the effect that a person, male or female, who being married, has sexual intercourse with a female or a male (as the case may be) not his or her spouses without the or connivance of such spouse be made criminally responsible. Until this is done not only women will continue to be seen inferior to and man and considered his chattel but also two females *viz.* the adulterous one and the one whose husband is in adultery are treated unequally. This will always raise questions on dignity of women and as to when the woman whose husband is in adultery will be empowered against her husband as well as the adulterous female involved.

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<sup>47</sup> S. Khusboo v. Kanniammal and Ors., (2010) 5 SCC 600.