

# **The Law Relating to Adultery: A Critical Evaluation in Present Social Context**

By

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# The Law Relating to Adultery: A Critical Evaluation in Present Social Context

*[Abstract: Adultery had been brought under punishment nearly 150 years ago under the Penal Code 1860 where women were exempted from any penal liability. Though many provisions of the Code had been amended during the span and demand of time, the provisions of adultery remain unchanged. The relevant legal provisions appear to be unconstitutional but the judicial interpretations are still in favour of them. This article measures the provisions of adultery from legal and social perspective of 21<sup>st</sup> century. It is explored that the law of adultery is not only defective but also induces the extra-marital sexual relationships. Apparently the law protects the women but because of its weakness, the law makes the women more vulnerable in society and also deprives them of legal protection. After analysing the issue from each and every corner, the article rationally establishes the necessity of amendment of the Code].*

**Key words:** Adultery, Women's exemption, Constitutional provisions, Court's judgement, women's interest

## 1. Introduction

'Marriages are made in heaven.' Over centuries this has been believed and marriages have always been considered as the building block of the society and its sanctity has been accepted and respected in all societies and across cultures. But the cosmopolitan societal environment and approach, excessive tendency on capitalism, the breakdown of family bondage, lack of skills and motivation to solve the problems of conjugal life drive the spouses to drift away from their marriage and start searching for a new partner in whom they find happiness and satisfaction. Though the laws of Bangladesh uphold the sacredness of the matrimonial tie and punish the intruders, there remain many lacunas and loopholes. The penal provision of adultery is one of them.

The purpose of this research article is to review the penal provision of adultery as stated under section 497 of the Penal Code 1860 (hereinafter referred as the PC). The punishment of adultery was codified more than 150 years ago considering the vulnerable position of

women under the social structure of the erstwhile Indian sub-continent. Though the society has undergone through many historical, political, economical and value-based development within this long period of time, surprisingly the penal provision of adultery remains stagnant in the same place. Law is an ever changing dynamic subject. Any law, if it fails to keep pace with the changing times becomes obsolete. Hence, there is a need to revisit and review the present provision of the Penal Code dealing with adultery and bring the necessary changes.

The objective of the article is to achieve the following goals:

1. To represent the existing provision of adultery under the Penal Code of 1860.
2. To find out the reason of immunity of woman from the charge of adultery.
3. To address such debated issue of exemption from the legal point of view and under the present social context.
4. To recommend the necessary amendments which the researcher deems fit in the backdrop of 21<sup>st</sup> century.

The readers of the article will get an in-depth analysis on this issue and the judicial standings regarding it. The judicial decisions have been criticised in this article to rationalize the proposal for amendment of this section 497 of the PC. By this way the readers will find out the necessary arguments for defending the changes as demanded in this article.

The whole article has been devised into few parts. For better understanding, it has been discussed under different numbered and sub-numbered lists. It starts with an introduction which covers the justification, goals, objectives and outcomes of this article. It also briefs the chapterisation of the article. The second part has elaborated the statutory meaning and ingredients of adultery. The third part, being the backbone of this article, evaluates the statutory punishment of adultery under the social, philosophical and legal context. This part critically analyses those judicial decisions which have guaranteed the immunity of women from any penal liability for the offence of adultery. A social argument has also been presented in this part in order to prove that this exemption, in reality, humiliates the women rather than honour them. The fourth part advocates for necessary reforms on the basis of the present 21<sup>st</sup> century social development and proposes the amended punishment for adultery. The fifth and final part of the article concludes by summarizing the total discussion

and opines that the law of adultery under the PC is genuinely gender biased and must be revisited and reformed.

## **2. Adultery: Meaning, ingredients and complainants**

### **2.1: General definition**

Generally, adultery refers to the illegitimate relationship with the opposite sex; sexual intercourse between individuals who are not married to each other. The term 'adultery' has its origin in the Latin term '*adulterium*'. The term comes from the words 'ad' (towards) and 'alter' (other).<sup>1</sup> At the time of its origin, it referred exclusively to sex between a married woman and a man other than her spouse. Under the Common Law, the crime of fornication consisted of unlawful sexual intercourse between a married woman and a man, regardless of his marital status is adultery. Almost every religion condemns it and treats it as an unpardonable sin.<sup>2</sup> However, this is not reflected in the penal laws of countries.

### **2.2: Legal Definition of Adultery**

Section 497 of the Penal Code 1860 perceives a consensual intercourse between a man, a married or unmarried, and a married woman without the consent or connivance of her husband as an offence of adultery. The section states:

*"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 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 punished as an abettor."*<sup>3</sup>

The offence is committed only by a man who has sexual intercourse with the wife of another man without her husband's consent. However, it is not necessary that the other person is

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<sup>1</sup> Jovan Payes, "Adultery and the Old Testament",

<http://biblicalfaith.wordpress.com/2008/06/12/adultery-and-the-old-testament/> accessed 12.06. 2013

<sup>2</sup> Encyclopaedia Dictionary of Religion (The sisters of St. Joseph of Philadelphia 1979)

<sup>3</sup> s 497 of the Penal Code 1860

married.<sup>4</sup> Adultery is an offence which is committed by a third person against a husband in respect of his wife and of which a man can alone be held liable for the offence.<sup>5</sup> Adultery is considered to be an invasion to the right of the husband over his married wife.<sup>6</sup> The law of adultery is not applied on a woman and has been expressly provided that the woman cannot be held for abetment of the offence. The object of the law is to inflict punishment on those who interfere with the sacred relation of marriage, and the legislature also considers it to be an offence against the sacred matrimonial tie.<sup>7</sup> It is commonly accepted that it is the man who is the seducer and not the woman, and it is considered as an anti-social and illegal act by any peace lover and citizen of good morals who would not like anyone to be indulged in such acts before their nose.<sup>8</sup>

### 2.3: The Ingredients of Adultery

The essential ingredients of adultery are:

1. There must be sexual intercourse with the consent of the woman;
2. the penetration must be sufficient to constitute sexual intercourse necessary to the offence;<sup>9</sup>
3. knowledge and reasonable belief that the woman is married to another man and that marriage should be lawful;
4. the husband of the woman had not consented or connived for the sex with his wife;<sup>10</sup>
5. and the husband has complained about the sexual intercourse.<sup>11</sup>

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<sup>4</sup> *Samraj Nadar v Abraham Nadachi*, AIR 1970 Mad. 434, 437.

<sup>5</sup> *Gansapalli Appamma v Gantappali Yeliayya*, (1897) ILR 20 Mad 470.

<sup>6</sup> *Chandra Chhitar Loha v Mst. Nandu*, AIR 1965 MP 268, 269.

<sup>7</sup> *Re Rathna Padayachi*, AIR 1917 Mad 220; *V. Revathi v Union of India*, AIR 1988 SC 835; See also, Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System 190 (2003) ("Criminal Justice" hereinafter), [http://www.mumbaipolice.org/%5Carchives\\_report%5Cmalimath%20committee%20report.pdf](http://www.mumbaipolice.org/%5Carchives_report%5Cmalimath%20committee%20report.pdf) accessed 09.10.2013

<sup>8</sup> *V. Revathi v Union of India*, AIR 1988 SC 835; See also, *Hatim Khan v State*, AIR 1963 J&K 56.

<sup>9</sup> Hari Singh Gour, *4 Penal Law of India* (Law Publishers (India) 11th ed 2009) 4654-55 See also, Section 376, Explanation of Indian Penal Code, 1860

<sup>10</sup> *Nurul Haq Bahadur v Bibi Sakina and others* 1985 BLD 269

<sup>11</sup> *ibid* pp. 4656-61

## **2.4: Person Entitled to Make Complaint on Adultery**

A husband alone is authorized to make a complaint on adultery.<sup>12</sup> An offence of adultery can be charged only against a male and based on a complaint by a husband and nobody else. In absence of husband a charge of adultery can be brought with the leave of the court by somebody who had the care of the woman on his behalf at the time when such offence was committed.<sup>13</sup> Provided that, where such husband is under the age of 18 years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.<sup>14</sup> A wife cannot make a complaint against her husband for his 'illicit lady-friend'.<sup>15</sup>

## **3. Punishment of Adultery and Its Justification under Social and Legal Context**

### **3.1: Punishment of Adultery**

The punishment for adultery is a jail term of maximum five years or with fine or both. Only the male offender is punishable under this section and the adulterous wife cannot be punished not even as an abettor.

### **3.2: The Philosophical and Social Reason for Keeping the Woman Outside from Punishment:**

In order to find out the philosophical and social reason of this exemption, one needs to look back the time of codification of this Code. The framers of the Code i.e. the first Indian Law Commission comprising of Lord Macaulay, J.M. Macleod, G.W. Anderson and F. Millet, did not deem fit to put infidelity in the First Draft of the Indian Penal Code. Reviewing facts and opinions collected from all the three Presidencies about the feasibility of the criminalisation of adultery, Lord Macaulay concluded:

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<sup>12</sup> 1974 Cri LJ 117

<sup>13</sup> s. 199 of the Code of Criminal Procedure 1898

<sup>14</sup> *ibid*

<sup>15</sup> *W. Kalyani v State Tr. Inspector of Police & Anr* (2012) 1 MLJ (Cri) 546 (SC)

*"It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes - those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury."<sup>16</sup>*

The 2<sup>nd</sup> Law Commission of 1853 headed by Sir John Romilly, however, took a different view. Disfavouring the Macaulian perception of adultery, but placing heavy reliance upon his remarks on the status of women in India, they concluded:

*"While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q', regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment."<sup>17</sup>*

The authors also defended themselves by quoting that

*"Though we well know that the dearest interests of human race are closely connected with the chastity of women and the sacredness of 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 attentions of husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women is a course which*

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<sup>16</sup> *Macaulay's Draft Penal Code* (1837), Notes, Note Q, pp. 90-93, cited from, Law Commission of India, Forty-second Report: Indian Penal Code (Government of India, 1971), para 20.13.

<sup>17</sup> *Second Report on the Draft Indian Penal Code* (1847), pp. 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, (Government of India, 1971), p. 365

*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 the penal law.”<sup>18</sup>*

It is explicit from the views of the authors of the Code that they have exempted the wife from the charge of adultery considering the philosophical perspective and the social fragility of a wife during the middle of the nineteenth century. There was a common tendency of polygamy and child marriage. The difference of ages between the spouses was even more than 40 years. The wives were treated as a property and they were thought as a product bought for procuring son. There were limited chances to education and for earnings for a woman.

Though the situation has changed now-a-days, few experts still advocate on this provision. They opine that though except Mohammedans no community can now practise polygamy, nor is child marriage legal, yet as a matter of fact Hindu women are still socially discriminated in a male dominated society. Polygamous marriages, child marriages and accusation of adultery against her character still take place in outlying rural areas either due to ignorance of law or due to the long prevailing social practices. Therefore, it may feel that the change of female life style is not perhaps too right and the wife who is seduced is really the victim and not the author of the crime. In this background, perhaps time is not yet ripe to punish women for adultery.<sup>19</sup>

### **3.3: Justification of Exemption of Wife in Present Social Context and from Legal Point of View:**

As the male offender alone has been made liable to punishment and the wife has been exempted from any criminal liability, the section has created huge criticism from different aspects of law. Jurists opine that the provision under section 497 of the Penal Code is unconstitutional and gender biased. Moreover, it goes against women’s interest more than it

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<sup>18</sup> Ratanlal & Dhirajlal “ *The Indian Penal Code*” ( 33<sup>rd</sup> edn 2012 LexisNexis Butterworths, India) 1011

<sup>19</sup> *ibid*

serves their interests. The women's rights activists today say that the law relating to adultery is premised on the outdated notion of "marriage". The law, according to them, is not only based on the husband's right to fidelity of his "wife" but also treats "wife" merely as a chattel of her husband. Such a gender-discriminatory and proprietary-oriented law of "adultery", they argue, is contrary to the spirit of the equality of status guaranteed under the constitution.

### **3.3.1: Punishment of Adultery from Legal Point of View**

The punishment of adultery under s. 497 of the Penal Code has been challenged from legal point of view. It is considered that the exemption of wife violates the constitutional provisions of the country in the following ways:

#### **3.3.1.1: Violation of Constitutional Provisions**

The contention which can be presented at first is that the section 497 of the PC is unconstitutional as it violates Articles 27, 28, 31 and 34 of Bangladesh constitution.

Article 27 has guaranteed all citizens of Bangladesh the equality before law and the equal protection of law in the country. Article 28 ensures that

*The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. Women shall have equal rights with men in all spheres of the State and of public life. No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.*<sup>20</sup>

Article 31 says:

*To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no*

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<sup>20</sup> Article 28 (1-3) of Bangladesh Constitution

*action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.*<sup>21</sup>

and Article 34 of the constitution prohibits forced labour by declaring that all forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.<sup>22</sup>

### **3.3.1.2: Judicial Standings as to Violation of Constitution**

The initial important discussion regarding the constitutional validity of this section was held in the case of *Yusuf Abdul Aziz v The State of Bombay and Husseinbhoj Laljee*<sup>23</sup>. In this case, section 497 was challenged to be *ultra vires* the Articles 14 and 15 of the constitution of India (as similar as Articles 27 and 28 of Bangladesh constitution).

It is thought whether the section would be at loggerheads with Article 14 of the constitution, which guarantees the right to 'equality before law', on account of the fact that it leaves out the woman adulterer from the purview of punishment while punishing her male lover, arose.<sup>24</sup>

The Supreme Court of India held that Article 14 is a general provision and should be read keeping in mind the other provisions which sets out exceptions to fundamental rights. However, such thoughts were laid to rest due to the presence of Article 15(3) of the Constitution (as similarly provided in Article 28(3) in the constitution of Bangladesh), which states that '*Nothing in this Article (i.e. Article 15 as a whole) shall prevent the State from making any special provision for women and children*'.

Though the petitioners argued that this clause is made only for the benefits of the women and not for giving licence for committing or abetting crime, however, the Court held that they cannot see any restrictions as such; nor they agree that the section tantamount to a licence

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<sup>21</sup> Article 31 of Bangladesh Constitution

<sup>22</sup> Article 34(1) of Bangladesh Constitution

<sup>23</sup> AIR 1954 SC 321.

<sup>24</sup> Avik Ghatak, 'Section 497 (Adultery) of the Indian Penal Code - The MYTH and the REALITY' online journal: LAWYERSCLUBINDIA <http://www.lawyersclubindia.com/articles/Section-497-Adultery-of-the-Indian-Penal-Code-The-MYTH-and-the-REALITY-4876.asp> accessed 25.09.2013

to commit the offence of which punishment has been prohibited.<sup>25</sup> The Court finally held that Article 14 and 15 when “read together validate the impugned clause in section 497 of the Indian Penal Code”.<sup>26</sup>

In the case of *Sowmithri Vishnu v Union of India*<sup>27</sup> the Supreme Court held that the section 497 did not violate Article 14 or Article 15 of the Indian Constitution on the grounds that:

1. 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. The Supreme Court considered this to be a policy of law, and while defining the offence of adultery if the offence is restricted to men is not a violation of any constitutional provision.
2. Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman. The Court said that the law is that the wife who is involved in an extra-marital sexual relationship is not a author of a crime but is a victim and the legislature considers it to be offence against the sanctity of a matrimonial home, and the offence is generally considered to be committed by a man. The procedure of law and the definition itself speaks for who have the right to prosecute whom.
3. 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 extramarital relationship with unmarried women. The Court said that the law does not give freedom to men to have illicit relations with unmarried women, it only made a specific kind of extra-marital relation as an offence which it considered to be most seen and common. The husband can be booked under civil procedure by wife for separation. It is *for the law makers to reform the penal law as per modern times* and it doesn't offend Article 14 or 15 of the Constitution of India.<sup>28</sup>

In the case of *V. Revathi v Union of India*<sup>29</sup> the constitutional validity of s. 198(1) read with s. 198(2) of Criminal Procedure Code, 1973 had been called into question by a wife. The

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<sup>25</sup> *Yusuf Abdul Aziz v The State of Bombay and Hussein bhoy Laljee* AIR 1954 SC 321.

<sup>26</sup> *ibid* 321

<sup>27</sup> *Sowmithri Vishnu v Union of India* AIR 1985 SC 1618.

<sup>28</sup> *ibid* at 1620-1621.

<sup>29</sup> *V. Revathi v Union of India* AIR 1988 SC 835.

petitioner wife contended that since the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband. The petitioner asserted that in so far as and to the extent, s. 198(2) of the Code of Criminal Procedure 1973 (Cr.P.C) operates as a fetter on the wife in prosecuting her adultery husband, the relevant provisions is unconstitutional on the ground of obnoxious discrimination.<sup>30</sup>

Upholding the constitutionality of s. 497 of the PC and s. 198 (2) the Cr.P.C, the apex court said that the law does not allow either of the spouses to prosecute each other under criminal law; a husband is not permitted because the wife is not treated an offender in the eye of law. The wife is not permitted as section 198(1) read with section 198(2) does not permit her to do so. Moreover there is “reverse discrimination” in favour of women and there is no discrimination against women so far as she is not allowed to prosecute her own husband.<sup>31</sup>

Such judicial reasoning, in ultimate analysis, unfortunately endorses the patriarchal, property-oriented and gender-discriminatory penal law of adultery. It conveys that a man is entitled to have exclusive possession of, and access to, his wife's sexuality, and a woman is not eligible to have such an exclusive right and claim over her husband! She is, therefore, not entitled to prosecute either her promiscuous husband or the "outsider woman" who has poisoned (or helped her promiscuous husband to do so) her matrimonial home. The Apex Court, thus, failed to have a deeper insight into the gender-bias law of adultery.

### **3.3.2 Criticisms of the Law and the Court’s Judgements:**

#### **3.3.2.1: It violates Article 27 of Bangladesh Constitution**

The section 497 is purely gender biased because of the following grounds:

- a. It does not allow the wife to prosecute the woman with whom her husband has adulterated though it allows the husband to prosecute the man who did adultery with his wife.

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<sup>30</sup> ibid at 837.

<sup>31</sup> ibid at 838.

- b. It permits the husband to prosecute his disloyal wife but the wife cannot lawfully prosecute her disloyal husband.
- c. It has exempted the wife from all types of criminal liability.

The law has considered woman to be a victim not as author of the crime.<sup>32</sup> This very notion of victimhood lies on “the psychological belief of considering oneself helpless, lacking power to overcome the situation and in a need of some external agency to take them out of the situation.”<sup>33</sup> The State enhances the state of powerlessness and impotence which is central to the ideology of victimhood through this kind of legislation.<sup>34</sup>

The contention of the Honourable Court is that the community punishes the “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.”<sup>35</sup>

However, the Court misses out the point that the wife has no relief in criminal law though the same provision is given to the husband, and in a case where the woman is unmarried the woman cannot be prosecuted altogether. This can be seen as a violation of natural justice which is fundamental to the constitution.

### **3.3.2.2: Section 497 does not Come under the Purview of Article 28(3)**

The framers of the constitution believed that in the middle of the twentieth century no one would discriminate on the ground of sex. However, it is clearly seen that the legislature is clearly making discrimination on the grounds of sex on the pretext of giving “protective discrimination” to the women. The special treatment given to the women under cl. 3 of

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<sup>32</sup> *Vishnu*, AIR 1985 SC at 1621.

<sup>33</sup> Amartya Bag, *Psychology and Politics of Victimhood: A Case Study of Dalits in India* 4 (Term Paper, KIIT University, 2009), online at <http://ssrn.com/abstract=1409054> (visited Jan 24, 2010).

<sup>34</sup> *ibid* at 11-12.

<sup>35</sup> AIR 1985 SC at 1618.

Article 28 should be restricted to such cases which must be related to some features or disability which are so peculiar that it differentiates women from men as a class.<sup>36</sup>

The equality clauses in the constitution were framed on the basis of the American Constitution. Therefore, to ignore the background is like not only violating the basic norms of comparative constitutional law but violating the basic principles of interpretation of the constitution.<sup>37</sup> The American Supreme Court has stated that where both the sexes are on equal footing and discriminations to a particular sex as a class would be like denying the equal protection clause as enshrined in the constitution; - “the very kind of arbitrary legislative choice [is] forbidden by the Constitution.”<sup>38</sup> Even any kind favour may it be positive or negative to the women for “administration convenience” would be repealed or struck down as discriminatory and unconstitutional.<sup>39</sup>

In fact, the intention behind such inclusion is to safeguard, protect or lead to the betterment of women in general; not to give a licence for abetting or committing an offence. Even the Supreme Court did not agree that the section tantamount to a licence to commit the offence of which punishment has been prohibited.<sup>40</sup>

The Court said that an argument like making both man and woman held liable for adultery is not permissible as this is a policy of law.<sup>41</sup> An example put forward by the Honourable Court that “why the offence of robbery should be punishable with imprisonment for ten years under section 392 of the Penal Code but the offence of adultery should be punishable with a sentence of five years only : 'Breaking a matrimonial home is not a less serious crime than breaking open a house'.”<sup>42</sup> However, if we put the example in this way and check whether it makes discrimination that “let the offence of robbery committed by a woman be not punished and the robbery committed by a man is punished for 10 years”. Can this be called a gender equal law as such, if breaking the matrimonial home is considered to be a more heinous crime than robbery, why a woman cannot be prosecuted for the offence? The

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<sup>36</sup> Durga Das Basu, *Commentary on the Constitution of India* at 1796 (Wadhwa 8th ed 2007); See also, *Srinivasan v. Padmasini*, AIR 1957 Mad 622

<sup>37</sup> *State of U.P. v Deoman*, AIR 1960 SC 1125, 1131 See also Basu, *Commentary on the Constitution of India* at 1796

<sup>38</sup> *Reed v Reed*, (1971) 404 US 76, 77.

<sup>39</sup> *Frontiero v Richardson*, (1973) 411 US 677, 690.

<sup>40</sup> *Abdul Aziz*, AIR 1954 SC at 322.

<sup>41</sup> *Vishnu*, AIR 1985 SC at 1620.

<sup>42</sup> *ibid*

question of policy of law does not apply here as the law is discriminatory on the face without any valid, satisfactory reason for such laws.<sup>43</sup>

The underlying law at the present situation considers only men as offender, as a class; but the women are not physically or socially in such situation that they are incapable of committing the offence of adultery. Further, both the sexes are on an equal footing in committing the offence of adultery, therefore, this kind of legislation are discriminatory and arbitrarily protecting the women. The Section 497 of the Penal Code is nothing but a violation of the equality clause of Bangladesh constitution.

### **3.3.2.3: Contradiction with Article 31**

The provision under 497 of the PC is also contradictory to Article 31 of Bangladesh constitution. According to this Article, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The right to life includes the right to reputation and therefore if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled to be appeared and to be heard in that trial. Since s. 497 does not contain a provision that the woman/wife must be pleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is as bad as violating the constitution.

It is here that the doctrine of reasonability steps in. Is the section 497 reasonable enough? A code or statute so enacted must have a sound reason to back it. A statute or a law should be in coherence with some logics. A statute cannot be imposed on people in absence of logic. Where the life, liberty, body and reputation have been protected in Article 31, it should not be very conveniently restricted by reason of a statute.

### **3.3.2.4: Scope to Violate Article 34**

Another vital question will arise whether in Bangladesh the married woman is legally allowed to enter into a sexual relation with anyone else with the permission of her husband. This section creates a scope for the husband to compel their wife to enter into illicit relationship for monetary benefit. This is against Article 34 of the constitution of Bangladesh because no

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<sup>43</sup> Amartya Bag, Adultery and the Indian Penal Code: Analysing the Gender Neutrality of the Law (KIIT University - KIIT Law School June 20, 2010) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1627649](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627649) accessed 25.06.2013

one can be subjected to forced labour like forced prostitution. By interpreting section 497 of the PC, the existence of such discrimination is unexpectedly found. By exempting the wife from the penal liability, the section has created the scope for the husband to compel her wife to involve into an illicit relation without any hassle.<sup>44</sup>

### **3.3.3: Against the Interest of Women**

However, section 497 'is not' in favour of women at all or at the most, it goes against women's interests more than it serves their interests, because.<sup>45</sup>

1) No wife can bring to justice the lover of her husband. But a husband can, with the help of this section, persecute his wife's lover.

2) If a married man is having an affair with an unmarried woman or a divorcee or a widow, it shall not be treated as adultery under this section. Even if a man is having an affair with a married woman, it shall not be treated to be a crime under this section, if the husband of the woman consents to it or if the affair is carried out with his connivance. This effectively means that husbands can freely indulge in having extramarital affairs with spinsters, widows, prostitutes or even married women directly or indirectly.

3) Women cannot file a case of adultery against their husbands under this section, even if he is having an extramarital affair with a married woman. On the other hand, the husband of an adulterer wife can not only file a case of adultery against his wife's lover and bring him to justice, under this section, but can also file for a divorce from his wife, on the ground of adultery, if the charges brought under this section, are proved.

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<sup>44</sup> Syeda Afroza Zerin and Md. Harun Reza, 'Dissection of Penal Liability: Is it discriminatory', (The Daily Star, Dhaka) <http://www.thedailystar.net/law/2012/02/01/index.htm> accessed 30.06.2012

<sup>45</sup> Avik Ghatak, 'Section 497 (Adultery) of the Indian Penal Code - The MYTH and the REALITY' online journal: LAWYERSCLUBINDIA <http://www.lawyersclubindia.com/articles/Section-497-Adultery-of-the-Indian-Penal-Code-The-MYTH-and-the-REALITY-4876.asp> accessed 25.09.2013

4) Last but not the least, the section does not even provide any provision which enables the court to hear the woman against whom the husband brings charges of having indulged in an extramarital affair.

Though the men's rights activists have portrayed this section as a pro-women and anti-men provision merely because of the fact that an adulterer wife is not punished for adultery and it is the man with whom she was committing the adultery who goes behind the bars. Basically, this section humiliates the women as a class and keeps them away from legal protection.

#### **4. Proposal for Legal Reform:**

In most part of European Union, including England, Austria and Italy adultery is not considered to be a criminal offence anymore.<sup>46</sup> In United States of America the law of adultery varies from one State to another; however after the decision in *Lawrence v. Texas*<sup>47</sup> by U.S. Supreme Court the validity of adultery law is under debate.<sup>48</sup> Though, Islamic countries like Afghanistan, Nigeria, Pakistan, Yemen, Sudan, Saudi Arab and Iran have provisions for death penalty as the maximum punishment for adultery but the concept is deeply rooted in the traditional, religious view of *Shariah*.<sup>49</sup>

However, the penal law of adultery in Bangladesh is grounded on the one-and-a-half century old caste-based stratified "social setting" in the context of the traditional conservative property-oriented familial ideology and sexual mores. It is also premised on a few outdated and moot assumptions of sexuality, sexual agency and unequal mutual marital rights and obligations of the spouses.<sup>50</sup> It, in ultimate analysis, unmistakably intends to

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<sup>46</sup> Ruth A. Miller, *The Limits Of Bodily Integrity: Abortion, Adultery, And Rape Legislation In Comparative Perspective* at 122-23 (Ashgate 2007)

<sup>47</sup> 539 U.S. 558.

<sup>48</sup> See, IPC Rep at 325 (cited in note 36); See also, Christopher Scott Maravilla, *Prosecuting Adultery under the Uniform Code of Military Justice after Lawrence V. Texas* (self-published manuscript, 2007), <http://ssrn.com/abstract=1003689> accessed 15.09.2013

<sup>49</sup> Daniel Ottosson, *Legal Survey On The Countries In The World Having Legal Prohibitions On Sexual Activities Between Consenting Adults In Private* (2006), [http://www.ilga.org/statehomophobia/LGBcriminallaws-Daniel\\_Ottosson.pdf](http://www.ilga.org/statehomophobia/LGBcriminallaws-Daniel_Ottosson.pdf) accessed 09.08.2013; See also Hugo Hotte and Geneviève King Ruel, *A Comparative and Legal Analysis of the Cambodian Law on Monogamy* (2007), <http://ieim.uqam.ca/IMG/pdf/etude-de-cas-hotte-king.pdf> accessed 09.08.2013

<sup>50</sup> K.I. Vibhute "Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective (2001) 6 SCC (Jour) 16 <http://www.ebc-india.com/lawyer/articles/2001v6a3.htm> accessed on 07.10.2013

protect the rights of the husband and not of the wife.<sup>51</sup> It is also bridled with deep-rooted obsolete assumptions predominantly premised on gender discrimination and the wife's sexuality.

Considering the social, historical and religious norms, section 497 should not be removed from the PC but it is recommended that both the man and the wife should be made guilty as there is no valid justification “for not treating the guilty pair alike”. The punishment for adultery should also be scaled down from the maximum punishment from five years to two years as the existing punishment is “unreal and not call for in any circumstances”. The recommended section is as follows:

“Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to believe to be the wife or husband as the case may be, of another person, such sexual intercourse 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.”

## 5. Conclusion

Within these 150 years after the codification of the Penal Code, there has been a huge change in the society; women are no longer considered to be the chattel of her husband. During the post-PC period, a number of Acts have been enacted to relieve women from the hitherto traditional system of seclusion and subordination and to assure them a status equal to men in every walk of life. Women are taking part in all activities of the development of the country and the social approach to a woman has changed to a positive notion. Such a law in the 21st century undoubtedly seems to be inconsistent with the modern notions of the status of women and the constitutional spirit of gender equality.

The penal provision of adultery as it stands today violates the constitution that includes equal justice for every citizen and would not discriminate on the grounds of sex. The

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<sup>51</sup> See generally, Ratna Kapur & Branda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage, 1996); Ursula Vogel: "Whose Property? The Double Standards of Adultery in the Nineteenth Century Law", in Carol Smart (ed.): *Regulating Womanhood: Historical Essays in Marriage, Motherhood and Sexuality* (Routledge, London, 1992); and S.P. Sathe, *Towards Gender Justice* (RCWS, SNDT Women's University, Bombay, 1996). Also see *Alamgir v. State of Bihar*, AIR 1959 SC 436 (439).

“special provision” clause for women cannot be extended so as to create arbitrary discretion for such discrimination by the legislature, as in the case of adultery. The section 497 of the PC which deals with adultery needs to be declared unconstitutional.

The amendment proposal if granted by the competent authority will ensure the gender equality and deepen the nuptial relationships between the spouses. Similarly, the husband/wife of the errant spouse should not only be allowed to seek divorce from the other life partner but also to initiate legal proceedings with a view to fixing criminal liability of the "outsider" for wrecking the marriage. Such changes are required to translate the contemporary ‘social transformation’ assuring equality to women and the constitutional spirit of gender equality into a reality.