

OVERVIEW OF SECTION 497 ON ADULTERY

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ABSTRACT

Adultery is a criminal offence and is committed by a third person against a husband in respect of his wife and of which a man can be held criminally liable for the offence. It is an offence under section 497 of Indian Penal code, 1860; under which wife doesn't come under the ambit of the offence and only the man is liable for committing the offence of adultery for a period of five years. The Supreme Court recently noted that section 497 is anti-women and archaic and is gender biased and not gender neutral. The paper starts by giving a brief introduction on adultery. The second part of the paper talks about constitutional validity by various judgments by Supreme Court. Followed by criticism of the present law and analyses whether it violates article 14, 15 and whether article 497 comes under the preview of article 15(3). The fourth part of the paper discusses the recommendation made by various committees and whether section 497 to be decriminalized. The paper concludes by analysing the necessity for amendment of section 497 of the Indian Penal Code.

INTRODUCTION

The term "adultery" has its origin in the Latin term *adulterium*. It is understood as a voluntary sexual action by a married person with another married or unmarried individual.¹ Adultery can basically be defined as "when a married person has sex with someone other than his or her spouse. But in many situations where the spouses agree beforehand that one or both spouse will seek to sexual pleasure outside marriage, these sorts of marriages are called open marriages."²

Section 497 of IPC defines what adultery is as "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.

This section is very limited in scope as compared to the misconduct of adultery as understood in divorce proceedings. The offence is committed only by a man who has sexual intercourse with the wife of another man and without the latter's consent and connivance. The wife is not punishable for being an adulteress, or even as an abettor of the offence for which the man can be sent to jail for five years. If married or unmarried man has sexual intercourse with an unmarried woman or a divorcee or a widow, does not come within the ambit of "adultery".

Adultery is a crime from ancient time followed by the medieval and the modern time, from time to time the law regarding adultery has been changing. In the past the wife would be held liable for the offence but the present and the modern law the wife is not guilty but the man who is committing adultery is brought under the ambit of section 497 of Indian Penal Code.

The Hindu law books reflect the discriminatory approach and gender bias. They condemned adulterous relationships and those who indulged in it, but the punishments were particularly harsh in case of women. The higher the caste of the woman and lower the caste of man, the greater was the severity of punishment.

¹ Available at

http://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=941

² Michael Bieber, *Encyclopaedia of sex and gender*, (2003)

In ancient India, where another person commits adultery the wife would be abused or killed by the husband whereas the abettor was only punished in monetary terms.

An incident in Mahabharata where Indra comes to Gautama's ashram in the disguise of a Brahmin, and when the sage is away, takes his form and asks Ahalya to have sex with him. It is not clear whether she recognises the god, but there is room for doubt, because she states that "her husband's' desire for sex during the day is unlike him. After the adultery committed, Gautama orders his son Cirakarika to kill his mother, and leaves for the forest, where he repents for his hasty decision. He blames Indra for polluting his wife because of his passion. "My wife is thus in no way a culprit in the crime. The son ponders and concludes that a woman is not guilty if she has not consented to the act of adultery willingly; that women are physically weak and have to submit to the desires of men. So if a man leads a woman to adultery, the woman is not to blame."³

*According to Vishnu Purana verse 3.11 it states that "A man should not think incontinently of another's wife, much less address her to that end; for such a man will be reborn in a future life as a creeping insect. He who commits adultery is punished both here and hereafter; for his days in this world are cut short, and when dead he falls into hell."*⁴

According to *Manusmriti chapter 8 verse 357* defines what is adultery as "Offering presents to a woman, romping with her, touching her ornaments and dress, sitting with her on a bed, all these acts are considered adulterous acts." and *verse 358* explains on what amounts to adultery as "If one touches a woman in a place (which ought) not (to be touched) or allows (oneself to be touched in such a spot), all (such acts done) with mutual consent are declared (to be) adulterous"⁵.

In Jainism under *Acarangasutra verse 2.61* expresses that "A wise man has nothing to do with lust. Lust is nothing but death, and lack of it is serenity. How can one who perceives this indulge in wanton behaviour?"⁶

³ Available at <https://www.dailyo.in/arts/ahalya-indra-purana-hindu-mythology-ramayana-mahabharata-sujoy-ghosh-lord-rama/story/1/5173.html>

⁴ Available at <https://www.unification.net/ws/theme059.htm> (*hereinafter* Ancient Definition)

⁵ Available at https://www.hinduwebsite.com/hinduism/h_extramartial.asp

⁶ Ancient Definition, *supra* note 4

Under Buddhism *Sutta Nipata 123* describe adultery as “Whoever has illicit affairs with the wives of his relatives or friends, either by force or through mutual consent, he is to be known as an outcast.”

In Rabbinic law it deserved death penalty, so that the condemned adulteress was only sent away and prohibited from re-joining either her husband or her paramour.⁷

Islamic law has considered adultery has one of the most serious offences, known as *Hadd* offence, and also adultery has been specified as offenses in the Quran. Under verse 17.32 of Quran explained adultery as “Approach not adultery: for it is a shameful deed and an evil, opening the road to other evils.”⁸

Jesus has also defined adultery as “Adultery includes any married man who has sex outside marriage. Under *Judaism and Christianity Leviticus 18.22* it states that “You shall not lie with a male as with a woman; it is an abomination.”⁹

CONSTITUTIONAL VALIDITY ON SECTION 497 GIVEN BY SUPREME COURT

Immediately after the commencement of the Constitution of India, Section 497 IPC was assailed on the ground that it goes against the spirit of equality embodied in the Constitution. In 1951, one Mr Yusuf Abdul Aziz¹⁰, charged with adultery, contended before the Bombay High Court that Section 497 IPC is unconstitutional as it, in contravention of Articles 14 and 15 of the Constitution, operates unequally between a man and a woman by making only the former responsible for adultery. It, thereby, he argued, discriminates in favour of women and against men only on the ground of sex. Recalling the historical background of Section 497 and the then prevailing social conditions and the sexual mores oppressive to women, and the unequal status of women, the High Court of Bombay upheld the constitutional validity of the provision. Chagla, C.J., observed: "What led to this discrimination in this country is not the

⁷ Michael Bieber, *Encyclopaedia of sex and gender*, (2003)

⁸ Ancient Definition, *supra* note 4

⁹ Ancient Definition, *supra* note 4

¹⁰ Yusuf Abdul Aziz vs The State Of Bombay, 1954 AIR 321

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 Section 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country." The Court also opined that the alleged discrimination in favour of women was saved by the provisions of Article 15(3) of the Constitution which permits the State to make "any special provision for women and children". Yusuf Abdul, on appeal to the Supreme Court argued that Section 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 Articles 14 and 15 of the Constitution. Such 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 licence to her to commit and abet the offence of adultery. Vivian Bose, J., speaking for the Constitutional Bench was not impressed by the appellant's interpretation of Section 497 as well as of Articles 14 and 15. His Lordship, like Chagla, C.J., relying heavily upon Article 15(3), held that Section 497 is a special provision made for women and therefore is saved by clause (3) of Article 15. To the argument that Article 15(3) should be confined only to provisions which are beneficial to women and should not be used to give them a licence to commit and abet a crime with impunity, the Apex Court responded: "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 licence to commit the offence of which punishment has been prohibited." More than three decades after the Supreme Court's pronouncement in Yusuf Abdul Aziz case, constitutional vires of Section 497 came to be reagitated in *Sowmithri Vishnu v. Union of India*.¹¹

It was contended that Section 497, being contrary to Article 14 of the Constitution, makes an irrational classification between women and men as it:

1. Confers upon the husband the right to prosecute the adulterer but it does not confer a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery,
2. Does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and

¹¹ Smt. Sowmithri Vishnu vs Union Of India & Anr, 1985 AIR 1618.

3. Does not take in its ambit the cases where the husband has sexual relations with unmarried women, with the result that the husbands have a free license under the law to have extramarital relationship with unmarried women.

The Supreme Court rejected these arguments and ruled that Section 497 does not offend either Article 14 or Article 15 of the Constitution. The Apex Court also brushed aside the argument that Section 497, in the changed social "transformation" in feminine attitudes and status of the woman in a marriage, is a flagrant instance of "gender discrimination", "legislative despotism" and "male chauvinism", by opining that it is for the legislature to take note of such a "transformation" while making appropriate amendments to Section 497. The argument that Section 497 is a kind of "romantic paternalism" premised on the traditional assumption that a woman, like a chattel, is the property of man, was also rejected by the Court. The woman petitioner also argued that the right to life, as interpreted by the Supreme Court in the recent past, includes the right to reputation and the absence in Section 497 of the provision mandating the court to hear the married woman with whom the accused has allegedly committed adultery violates her constitutional right to life under Article 21. Assuming that the right to be heard is concomitant with the principles of natural justice and believing that a trial court allows the married woman to depose her say before it records adverse findings against her, the Apex Court held that the absence of a provision mandating hearing the adulteress wife in Section 497 does not make the section unconstitutional.

However, one may find it difficult to convince himself about the rationale of the disability of the "wife" of the adulterer to prosecute her unfaithful husband. In *V. Revathi v. Union of India*¹² this disability was relied upon by a wife to challenge the constitutional propriety of Section 198(2) read with Section 198(1) CrPC, which, as mentioned earlier, empower the husband of the adulteress wife to prosecute the adulterer but does not permit the wife of an adulterer to prosecute her promiscuous husband. Probably realising that the section also does not permit the husband of the adulteress wife to prosecute her for her infidelity and recalling the ratio of *Sowmithri Vishnu* case, she asserted that whether or not the law permits the husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her unfaithful husband. Such a statutory provision, which is premised on gender discrimination in

¹² *V. Revathi vs Union Of India & Ors*, 1988 AIR 835.

contravention of the gender equality guaranteed in the Constitution, is, the petitioner wife argued, unconstitutional as it amounts to an "obnoxious discrimination".

Upholding the constitutionality of Section 497 IPC and Section 198(2) CrPC, which according to the Court "go hand in hand and constitute a legislative packet" to deal with "an outsider" to the matrimonial unit who invades the peace and privacy of the matrimonial unit, Thakkar, J. of the Apex Court 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. ... 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. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. 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."

The constitutional validity of Section 497 is upheld ostensibly on the impression that it is favourable to the woman as it keeps her out of the purview of criminal law. Such an approach is predominantly premised on a set of moot assumptions pertaining to female sexuality and the inability of the higher judiciary to appreciate current social "transformation". The Court, time and again, asserted that it is for the legislature to take cognizance of the social "transformation" and not for it. It is obvious that no adultery can be committed unless a woman is a consenting partner. The judicial perception that only a man can be "an outsider", who has potential to invade the peace and privacy of the matrimonial unit and to poison the relationship between the unfaithful wife and her husband, therefore, seems to be, with due respect, less convincing and unrealistic. "An outsider woman", can, like "an outsider man", be equally capable of "invading" the matrimonial peace and privacy as well as of "poisoning" the relationship of not only her own matrimonial home but also that of her paramour.

Similarly, the judicial opinion that Section 198(1) read with Section 198(2) CrPC, disqualifying the wife of an unfaithful husband for prosecuting him for his promiscuous behaviour, with due

respect, is unconvincing and illogical. 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-biased law of adultery.

CRITICISM OF THE PRESENT LAW

This is on the basis of the assumption that all women are seductive, just as all snakes bite; but the man is culturally responsible. Knowing that all women are seductive, the male adulterer is at fault when a woman is allowed to do what she is naturally inclined to do. In myths, on the other hand, the woman is almost always to blame and is cursed, mutilated or killed.¹³

Section 497 of IPC has been similarly to Roman law and Mahabharata. In Roman law where it states that "A wife commits adultery when she has sex with any man other than her husband. If the woman is not married, it is not adultery, though there may be penalties for her actions¹⁴". In Mahabharata it states that "That woman is physically weak and has to submit to the desires of men. So if a man leads a woman to adultery, the woman is not to blame."¹⁵

The feminists in India today say that the Indian 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 of India.

¹³ Available at <https://www.dailyo.in/arts/ahalya-indra-purana-hindu-mythology-ramayana-mahabharata-sujoy-ghosh-lord-rama/story/1/5173.html>

¹⁴ Encyclopaedia of sex and gender (pg-16)

¹⁵ Available at <https://www.dailyo.in/arts/ahalya-indra-purana-hindu-mythology-ramayana-mahabharata-sujoy-ghosh-lord-rama/story/1/5173.html>

Section 497 conveys that the adulteress "wife" is absolutely free from criminal responsibility. She is also not to be punished for "abetting" the offence. Section 497, by necessary implication, assumes that the "wife" was a hapless victim of adultery and not either a perpetrator or an accomplice thereof. Adultery, as viewed under IPC, is thus an offence against the husband of the adulteress wife and, thereby, an offence relating to "marriage".

Section 198 of CrPC mandates the court not to take cognizance of adultery unless the "aggrieved" husband makes a complaint. Section 198 (1) reads as "no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the court, make a complaint on his behalf."

Section 497 IPC read with Section 198 CrPC, thus signifies the unequal status of "husband" and "wife" in the institution of marriage in India. It declares that:

1. Man is a seducer and the married woman is merely his hapless and passive victim,
2. He trespasses upon another man's marital property i.e. his wife by establishing a sexual liaison with the married woman with her consent but without the consent or connivance⁴ of her husband,
3. Husband of the adulteress wife is an aggrieved party and he (in some cases a person who had care of the married woman when the adultery was committed), therefore, is authorised to make a formal complaint,
4. Wife of the man, if he is married, who had consensual sexual intercourse with another woman, married or unmarried, is not deemed to be an aggrieved party and thereby is precluded from making a formal complaint against either her husband or the adulteress woman, and
5. A married man, with impunity, may seduce and establish sexual liaison with an unmarried woman, a widow, or a divorcee even though such a sexual link is equally potential to wreck the marriage between him and his wife.¹⁶

¹⁶ Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930.

RECOMMENDATION MADE BY VARIOUS COMMITTEES AND WHETHER SECTION 497 TO BE DE-CRIMINALIZED

The major two committees how have recommended changes under the section 497 of Indian Penal Code is the law commission of India and the Malimath committees.

Under the first law commission which was set up in 1834 under Sir Thomas Macaulay, did not include adultery under Indian Penal Code as a criminal offence and instead it wanted to be civil offence that is a matrimonial offence. His reasons for not including was that “ we considered whether it would be advisable to provide a punishment for adultery, and in order to enable ourselves to come to a right conclusion on this subject we collected facts and opinions from all the three presidencies. The opinions differ widely. But as to the facts there is a remarkable agreement.” The following positions were fully established;

- i. Firstly, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of prevailing injured husbands of higher classes from taking the law into their own hands.
- ii. Secondly, that scarcely any native of the higher classes even has recourse to the courts of law in a case of adultery for redress against either his wife, or the gallant.
- iii. Thirdly, that the husbands who have recourse in case of adultery to the courts of law are generally poor men whose wives have run away, that these husbands seldom gave any delicate feelings about the intrigue, but think themselves injured by the elopement, that they generally complain not of the wound given to their affections, not of the stain on their honor, but of the loss of a mental whom they cannot easily replace, and that generally their principal object is that the women may be sent back.¹⁷

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

¹⁷ Law Commission of India, 42nd report, 325 (1971) [*hereinafter* “LCIR 42”]
(<http://lawcommissionofindia.nic.in/1-50/report42.pdf>)

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.¹⁸

Hence during the drafting of Penal Code Sir Thomas Macaulay wanted adultery merely as a civil injury. However, in the second law commission, which was headed by Sir John Romilly disagreed with the views of Sir Macaulay and prescribed that “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.”¹⁹

There was a major reform was made under the 42nd law commission report in 1971 which stated that even women should be added under the ambit of section 497 of IPC. It had revised the section as follows “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 the 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.”²⁰

Mrs Anna Chandi, in the 42nd law report observed: "The wife being considered the husband's property, the present provision reserves for the husband the right to move the law for punishing 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."²¹

¹⁸ LCIR 42, *Supra* note 4

¹⁹ LCIR 42, *Supra* note 4

²⁰ LCIR 42, *Supra* note 4

²¹ LCIR 42, *Supra* note 4

In 2003, Justice Malimath Committee had recommended a radical change in the law on adultery, it stated that the law should not be gender biased but gender neutral and likewise the wife who is part of the act should also be punished as the abettor.

The recommendation sort to bring changes under the present adultery law and thus suggested that “Section 497 of the Indian Penal Code regarding offence of adultery be amended to include wife who has sexual intercourse with a married man, by substituting the words "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery.”²²

The National Commission for Women in 2006 strongly opposed the Centre’s move to give effect to this recommendation, pointing out the ground reality of women’s lives and suggested it should be retained only as a matrimonial offence entitling the parties to claim divorce and suggested it to be de-criminalized.²³

Should it be De-criminalized?

Adultery is a criminal offence than a civil offence is because it is offence against the society and it is the duty of the state to take action, regardless of the desire of the offended spouse or spouses. The reason for adding section 497 in Indian Penal Code is that married couples should not go against the marriage norms and maintain the bonds between them. Under Hindus it is believed that “marriage is a sacred relationship, which extends over several lives. The sanctity of marriage should be maintained and upheld all the times. The marriage vows are meant to ensure that both spouses would perform their obligatory duties to uphold dharma and remain faithful to each other.”²⁴ The logic behind such a position is that marriage is a foundational social relationship, and the act of adultery weakens the society as a whole.

The Commission did, however, recommend an amendment for removal of the exemption from liability for women, and reduction of sentence from five to two years. The Report does not indicate what led the Commission to think abolishing adultery as *radical*, nor does it furnish any justifications.

²² Available at <http://www.pucl.org/Topics/Law/2003/malimath-recommendations.htm>

²³ Available at <http://ncw.nic.in/frmlnewlaws.aspx>

²⁴ Available at https://www.hinduwebsite.com/hinduism/h_extramartial.asp

Thus, we find that India follows the dominant thought of considering adultery laws necessary to safeguard the sanctity of marriage. The section 497 of IPC should not be de-criminalize rather it should make into consideration the recommendation made by the committees.

CONCLUSION

The article concludes that there has been a huge change in the Indian society; women are no longer considered to be the chattel of her husband. The law as it stands today violates the Indian Constitution that includes equal justice for every citizen of India. The section 497 of the IPC which deals with adultery needs to be amended and it needs to include women under the section 497 of IPC. Suggestions from the various Law Reform Committees also give a hint that essentially this section should be amended and the changes need to be brought as soon as possible. The policy makers should immediately repeal the current law on adultery based on the suggestions from the various committees to give just and equal justice to the citizens of India under article 14. Adultery should not be decriminalized as the reason behind it is that married couples should not go against the marriage norms and maintain the bonds between them.

The legislation has to understand that these changes are required to translate the contemporary "social transformation" assuring equality to women and the constitutional spirit of gender equality into a reality. The legislation has also need to take in consideration the 42nd law commission report and Malimath report on including women under section 497 of IPC. And thus this section needs amendment as soon as possible given by various committees.