

“Section 497 of IPC: Revisited and Reconsidered”

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Abstract

Section 497 of the Indian Penal Code, 1860 deals with Adultery as a penal offence in India. This law was designed, in the times when women were a class oppressed, with most having no independent source of income, when marriage itself did not afford them any legal rights and divorce came at a very hard price with enormous social stigma. This idea is clearly embodied in the following Note, by **Lord Macaulay**, Draft Penal Code;

“Though we well know that the dearest interest of the human race is closely connected with the chastity of women 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 determined to punish the infidelity of wives. The condition of women of this country is unhappily, very different from that of the women of England and France; they are married while they are 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 women, is a course which we are most reluctant to adopt. We are not visionary as to think of the law, an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to slow, but we trust the certain, operation of education and to time. But while it exists, while it continues to produce its never-failing effects on happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional, weight of the penal laws...it would strengthen hands already too strong. It would weaken a class already too weak.”¹

Thus, came into being the following Section 497 of the Indian Penal Code, 1860;

Adultery.—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

¹ Lady Trevelyan (ed.), *The Miscellaneous Works of Lord Macaulay*, Volume 4 pg. 310 (Universal Library Assoc, Philadelphia, 1900).

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.²

However, changing times, have brought with them a change in attitudes and view of people. And so far as the issue under discussion is concerned, various contentions have come up, which not only represent the present idea but also offers a critical overview of the 158-year-old law as it stands even today.

Key Words: Section 497, evaluation, rationale for decriminalisation.

Introduction

Humans are said to be intellectual beings, who have the capability of learning, perceiving, reasoning and understanding. This idea seems to hold true in most walks of life, however when it comes to our personal and social lives, we cannot help but be emotional beings, driven by our wants and wishes. Likewise, the concept of marriage, practically stands for a union of two people who agree to have a commerce for the procreation of children and bringing up of children, and for a lasting cohabitation. But that is just the conceptual notion, for marriage is a lot more than that, it is a companionship of two equally important people, as rightly stated in the case of *Roopa Reddy v. Prabhakar Reddy*³, 'Marriage is a union of two hearts. Success of it depends on the edifice built with the mutual trust, understanding, love, affection, service and self-sacrifice. A successful marriage therefore, can be formed only when both the parties to it willingly come together.'⁴

As in the words of *Henry Swinburne*, 'it is a present and perfect consent which alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one, nor the other, the essence of matrimony, but consent only'⁵. However, like utopia, a perfect marriage is also a dream, for, we all tend to face ups and downs in our relationships. And when such instances of disruption take a more serious form, they are identified as either, domestic violence, harassment for dowry, cruelty, desertion.

Another very much prevalent practice which endangers the spirit of a healthy marriage is that of infidelity, better known as *Adultery*. There are several causes for which a partner goes or can go out of marriage and indulge in sexual intercourse with some other person, like loneliness, communication barrier, lack of love and affection, a poor sexual relationship and lack of intimacy⁶. This article focuses on the penal law in India which defines and penalises the acts of adultery, and its relevance considering the principles of criminology and the present Indian scenario.

² Section 497 of Indian Penal Code, 1860, available at: <https://indiankanoon.org/doc/1833006/> (Visited on August 20, 2018).

³ AIR 1994 Kant 12, 19.

⁴ *Smt. Rachna Jain vs Shri Neeraj Jain*, (2005) DLT 365, II (2006) DMC 410 (para 18).

⁵ Quoted in H.K. Saharay, *Laws of Marriage and Divorce* (Eastern Law House, Calcutta 1984).

⁶ *Balku v. Emperor*, AIR 1938 All. 532.

Overview to ‘Adultery’ as a criminal offence in India

Preceding the enactment of the Indian Penal Code (hereinafter IPC), *Adultery* was not an offence in India. In fact, the state was such that women, were not only an oppressed class but also one that was greatly at disadvantage so far as the matters of personal lives and family were concerned. They were significantly dependant on their male counterparts for survival, and so it is quite clear that they were not in the position to speak up for themselves or to take a stand for their rights. So, when the idea of the enactment of a Codified Penal Law came up, a matter also under consideration was that of the condition of women in light of the very prevalent practice of polygamy and adultery in the Indian society. Lord Macaulay, to this opined that, “*considering the social purdah among Hindus, especially among aristocratic, high-caste and affluent families, the question of adultery among women did not arise but, since polygamy was an everyday affair at that time, the wife was socially conditioned to accept her husband's adulterous relationship. She neither felt humiliated nor was it a culture shock for her.*” Therefore, it was more or less evident that the subordinate and economically unstable position of women was not favourable to punish adulterous men⁷. The Law Commission of India under the British rule consequently declared adultery a crime, making however, only men as the offenders who could be punished for the offence. The law makers then believed that, ‘adultery struck at the very core of the family unit, eroded all close ties within the family, and all that the family as society's basic social unit stood for. The exclusion of women from the category of offenders was based on the reality that women were already living in humiliating and oppressive conditions within the family.’⁸

The advent of societal, academic and cultural change, however, brought with it the change in perspectives toward this law, and one of the major landmarks in the history of it was the case of *Sowmithri Vishnu v. Union of India and Anr*⁹, which challenged the constitutionality of Section 497 of IPC, before the Apex Court. The said challenge was based on the premise that the law made unreasonable classification between women and men, thus being violative of Article 14¹⁰ as well as Article 21¹¹ of the Indian Constitution. The three main contentions raised in support of violation of Article 14 were:

- 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;
- Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and,

⁷ Macaulay's Code, the first draft of the Indian Penal Code framed in 1837.

⁸ *Sh. Sandwip Roy vs Sh. Sudarshan Chakraborty*, CrI. M.C.No.3026 of 2004

⁹ 1985 AIR 1618, 1985 SCR Supl. (1) 741

¹⁰ Article 14 of the Indian Constitution, “Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”

¹¹ Article 21 of the Indian Constitution, “Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.”

- 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 license under the law to have extra-marital relationship with unmarried women.

It was, thus, contended that Section 497 of the IPC was flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism', inasmuch as the provision contained in section was a kind of 'Romantic Paternalism' which stemmed from the assumption that women, like chattels, are the property of men.

The argument supporting Article 21 of the Constitution proceeded on the premise that the right to life includes the right to reputation and, therefore, if the outcome of a trial is , to affect the reputation of a person adversely, he or she might be entitled to appear and be heard in that trial. It was the submission that if the accused is held guilty of adultery, it would tarnish the reputation of the wife of the convict as well, but she was not given any right to be heard.

However, these contentions and arguments failed to make a positive impact at the Apex Court and the petition stood dismissed. And it was quoted that, "though it is true that the erring spouses have no remedy against each other within the confines of Section 497 of the Penal Code, that is to say, they cannot prosecute each other for adultery, each one has a remedy against the other under the civil law, for divorce on the ground of adultery. 'Adultery' under the civil law has a wider connotation than under the Penal Code. If we were to accept the argument of the Petitioner, Section 497 will be obliterated from the statute book and adulterous relations will have a freer play than now. For then, it will be not possible to convict anyone of adultery at all. It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationship is punishable by law. Stability of marriage is not an ideal to be scorned."¹²

After this judgment there were though several cases which came up, questioning and challenging the law, but the Courts repeatedly upheld the Constitutionality of it, stating that the law sought to protect the rights of women. And was Constitutional within the ambit of Article 15 (3) of the Indian Constitution. However, issue again came up in 2003, with the recommendation of the **Justice Malimath Committee**. The jest thereof was that, 'When a man can be punished for having sexual relations with another man's wife, the woman should also be liable for punishment.'¹³The Committee expressly stated that, "The object of Section 497 of IPC is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband)." In tune with this a recast of Section 497 of the IPC was suggested, as "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery".¹⁴

¹² *Sowmithri Vishnu v. Union of India and Anr.*, 1985 AIR 1618, 1985 SCR Supl. (1) 741

¹³ K. Deepalakshmi, "The Malimath Committee's recommendations on reforms in the criminal justice system in 20 points", *The Hindu*, January 17, 2018.

¹⁴ *Smt. Rachna Jain vs Shri Neeraj Jain*, (2005) DLT 365, II (2006) DMC 410 (pg. 1967).

The National Commission for Women however, did not support this view but rather suggested that adultery should be converted from a criminal offence to a civil offence. It also added that Section 198 of the Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.) be amended in order to allow women to file complaints against unfaithful husbands and prosecute them for their promiscuous behaviour. Thus, whereas one extreme view is that not only Section 497 should remain on the statute book but its scope should be enlarged to include the woman as well who was complicit in the act of sex, the other extreme view is to totally abrogate this provision from the penal statute and make it only a civil wrong.¹⁵

Interestingly, a more recent Committee, headed by Prof. N.R.Madhava Menon, to make suggestions regarding the amendments in the criminal law, also suggested removal of Section 497 from the statute book. The Panel opined that, ‘by treating an adulterer as a criminal actually becomes an obstacle in any rapprochement between husband and wife, besides making the accused vulnerable to extortionist policemen.’ The recommendation further goes like this:

*“There is a universal tendency to put down all types of anti-social conduct with the use of criminal sanctions without examining the use of possible alternative means of social control and without studying the impact of such step on the status of criminal justice in the Country. There is a view that police is not the appropriate agency to enforce such laws which provide opportunities for corruption and harassment of innocent persons. Tort action may remedy the injury and civil disabilities can deter persons from such conduct...”*¹⁶

Present notion of the law enshrined in Section 497 of the Indian Penal Code

In light of the brief of the historical development concerning the penal law on adultery and the changing views of the nation, it is evident that it is high time that this 158-year-old law, so enshrined in Section 497 is revisited and reconsidered. In support of this view, certain survey reports are as follows:

- According to a survey conducted in 2014 by *Ashley Madison*, a global dating website for those who are married or are already in a relationship which then recently launched in India, collected responses from over 75000 respondents in ten cities, of whom 80 percent were married, and came up with the result that 76 percent of Indian women and 61 percent of men don’t think infidelity is a sin or immoral. Also, interestingly over 80 percent of those surveyed had arranged marriages. And a good number of people say that they have never been caught having an affair (81 percent men and 92 percent women). Even if some of them did get caught, for up to 77 percent of men and 62 percent of women, the discovery didn’t lead to divorce.¹⁷
- Another survey conducted by *Gleeden.com*, a dating site for married individuals, gives information on how seeking for new encounters outside marriage is no more a taboo in

¹⁵ Ibid.

¹⁶ Ibid. (pg. 1973).

¹⁷ “Most Indians feel infidelity not a sin: Survey”, *The Times of India*, December 2,2014.

India. Having been conducted on more than 6600 members (3512 men and 3121 women), from 19 to 25 July 2017, the survey shows that contrary to popular belief, women are not averse making the first move to seek new encounters outside marriage. In this survey, notice was taken of the vast difference in scenarios past and present, as how women today have come up and spoken up about extramarital encounters, and that majority of the respondents, both male and female, have no qualms in accepting that these encounters are more about satiating the urge for physical intimacy than developing a platonic relationship.¹⁸

Furthermore, in practice, the conviction rate in adultery cases is “next to zero, because most cases are filed for the purpose of securing a divorce and are not pursued beyond that.”¹⁹ Thus, it stands undeniable that the aforesaid law as it stands today, is not capable of effectively fulfilling any of its objects, whether it is to save women from the shame of being an adulterer, nor is it capable to hold together the health and sanctity of a matrimonial home as the honourable parliamentarians suggest.

In other words, the philosophy behind criminalisation of adultery, as per the framers of the Indian Penal Laws was to protect the rights of women, and rightly so considering the times and circumstances back then. However, as expected by the law makers then, with the social as well as educational evolution, the conditions are no longer the same. Today women are not only leading ladies of their homes but are also seen as equally adequate candidates to lead the nation itself, and considering the growing women’s empowerment phenomena it is not right that a law so demeaning by way of its nature be upheld, in the name of ‘beholder of the sanctity of marriage’, when truthfully, it rests only with the man and woman, tied together in matrimony to save it or break it.

Conclusion

As for the laws pertaining to Adultery and its criminalisation in India, it has become imperative that the same is reconsidered. Because considering the changing circumstances, economic and social, of the people of the nation, the growing impact of western culture, it is not only practiced but has become a somewhat unsurprising behaviour even in India. And thus, the need of the hour, is rather, as quoted by the Apex Court in the case of *V. Revathi v. Union of India*, is the promotion of social goodwill between the husband and the wife, by permitting them to ‘make up’ or ‘break up’ the matrimonial tie rather than drag each other to the criminal courts. They can either condone the offence in a spirit of ‘forgive and forget’ and live together or separate by approaching a matrimonial court and snapping the matrimonial tie securing divorce²⁰.

¹⁸ “Women often initiate extramarital affairs. Here are some surprising facts about infidelity in India”, *Hindustan Times*, August 01, 2017.

¹⁹ Amala Dasarathi, “Section 497 and 498 of the IPC on adultery laws are dusty Victorian remnants”, *Firstpost*, Jul 01, 2016

²⁰ AIR 1988 SC 835: 1988 CrLJ 921: (1988) 2 SCC 72

Conclusively, Section 497 of the Indian Penal Code, 1860 is an archaic law, which seems unrefined not only in light of the present societal outlook but also in comparison to the current matrimonial laws which provide a much wider definition to adultery, as a ground for divorce. Also, it is not unto the law to protect and safeguard the sanctity of marriage, but the husband and the wife themselves. And legislating on every aspect of a citizen's life or enforcing legislative wishes through coercive governmental measures is not a way to establish an ethical way of living, instead at times such approach may even destroy the privacy of citizens and even condenses citizens to an infantile state²¹. And as rightly observed by *Kim Jung-Beon*, a specialist on family law, the law though is said to be grounded in a belief that adultery challenges the social order and damages families, but practically today, it is a piece of outdated legislation that represents state overreach into people's private lives. Therefore, even if Adultery should be condemned as immoral, the state power should not intervene in individual's' private lives.²² And, no matter how inflexible the social setup may seem, the provision is *quite archaic and especially, when there is a societal progress*. Thus analysed, it is appropriate that the earlier judgments be reconsidered regard being had to the *social progression, perceptual shift, gender equality and gender sensitivity*.²³ For ultimately it is the institution of marriage, and the individual safety of the parties to the matrimony that shall hold primacy. Lastly, as rightfully quoted by Roscoe Pound, "*Law in action is determined chiefly by public opinion. The law, thus, does not consist in the statutes alone and may change while the statutes remain constant.*"²⁴

²¹ Editorial, "Keep Off Bedrooms: People live, love, marry, divorce, make choices. Decriminalising adultery is the necessary choice", *The Times of India*, July 16, 2008.

²² "South Korean court decriminalises adultery by striking down 'outdated' law", *South China Morning Post*, February 26, 2015.

²³ *Joseph shine v. Union of India Writ Petition (Criminal) 194/2017*.

²⁴ Quoted in Roscoe Pound, "*Criminal Justice in America*", (New York: Hold: 1930).