

## Critical Analysis of the Law of Adultery in India <sup>1</sup>

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*A gender biased law.*

The law of adultery as it stands in India punishes only man, and assumes that in all cases 'man is the seducer' and the women, who is an equal participant is viewed as a victim. There have been numerous debates about the discriminatory stance of the provision, The insistence of the National commission for women and the report of the Madhav Menon committee & the 42<sup>nd</sup> Report of the Law Commission of India, have breathed a new lease of life in the dying controversy. The law relating to adultery as existing in the Indian penal code under section 497 has been criticized ever since it's commencement. Its validity both on the constitutional grounds as well as philosophical grounds has been challenged time and again. But the law still stands as it is.

### **LAW OF ADULTERY AS IT STANDS IN INDIA.**

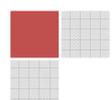
In India the law of adultery is punishable under section 497 of the IPC, but originally the framers of the code did not make adultery an offence punishable under the Code, it was the **Second law commission** which after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code. Adultery figures in the penal law of many nations and some of the most celebrated English Lawyers have considered its omission from the English Law as a defect.

Section 497 <sup>2</sup>provides : **"Whoever has sexual intercourse with a person who is and whom he known 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**

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<sup>2</sup> Section 497, Indian Penal Code, (45 of 1860)



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

The law commissioners have limited the cognizance of this offence to adultery committed with a married woman, and the male offender alone has been made liable to punishment.

### **THE PROBLEM.**

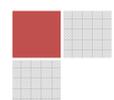
Prima facie unequal treatment is meted out by the law to men & women, there's an inherent flaw, It makes the offence punishable for men but not the wife, to punish the man severely and to let the women who was an equal part to go scot free is unreasonable on the face of it, it is discriminatory that for the same act the man becomes the manifestation of evil but the woman still is considered to retain her virtues and is treated as a victim.

It is unexplainable that for the same wrongful act the man is presumed by the law to have a mens rea while no such presumption is attributed in reference to the woman.

The consent or the willingness of the woman is no impediment to the application of this section, and, as generally happens, she is quite aware of the purpose for which she is quitting her husband and is an assenting party to it.

Considering the present day situation and the vast transformation which the society has undergone, Blindly assuming that '**man is the seducer and not the women**' would be a dangerous proposition, the boot is on the other leg these days, in a variety of cases. The law makes an irrational classification between man and woman, in restricting the class of offenders to men, where women or wife is an equal partner, it violates constitutional provisions enshrined in Articles 14,15 & 21.

The **Justification** taken by the Framers of the Code, and the retentionists lobby for this aberration is that owing to the atypical social conditions, it would not be just & proper to punish women equally, as they were a subjugated and exploited lot, and I am constrained to say that it was to a certain extent applicable in that era, now bygone.



The IPC, when it took form in 1860, was silent on the punishment for adultery with Lord Macaulay observing, "**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 Rationale & the circumstances he referred to included child marriage and polygamy. Macaulay, hence, advised that it would be enough to treat it as a civil injury.

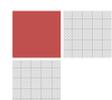
The framers of the code believed that if the women did the deplorable act it was pressured by their social and private conditions in life. Hence they were actually not at fault and taking into account their already depleted station in life they should not have been held liable at least in the eyes of the law.

**SUPREME COURT ON LAW OF ADULTERY** : In 1951, one Yusuf Abdul Aziz challenged the constitutional validity of the provision. However, Bombay high court chief justice M C Chagla had upheld the provision saying the Constitution permitted such special legislation for women, it was held in this case that this section does not contravene any of the fundamental rights laid down in the Constitution of India, and therefore it is not bad or void under Articles 13.<sup>3</sup>

The Supreme Court observed that adultery is a wrong against the sanctity of the matrimonial home. Thus charges are pressed against the outsider who breaks the said sanctity. The woman, in cases of adultery, is considered the victim of a seducer. It appears that the court believes that the man has an unstoppable seductive charm and the woman is helpless against it. The evil that is punished by the law, in the mind of the court, is that of seduction of a woman by another man. According to the court the woman is considered to be the victim. Thus the court held that the law was non discriminatory and not violating the right to equality, thus the court upheld the constitutional validity of the section 497. The

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<sup>3</sup> Yusuf Abdul Aziz AIR 1951 Bom 470 .



court also opined that by not allowing the spouses to prosecute each other the law offers a chance to the spouse to make-up, it was further held that “Section 497 is not violative of Articles 14, 15 & 21 of the Constitution.”<sup>4</sup>

It is humbly submitted that the **court erred in its judgment.**

We must keep in mind that these reasons and defenses were given decades ago.

The most important reason for debate to get re-ignited is the drastic change in the social status of women. Gone are the days when Women were a suppressed or subjugated lot, The practices of sati, child marriage, polygamy, etc, have been done away with.

Today there are laws against these evils and also laws providing effective relief against heinous acts such as domestic violence, dowry and others. Almost all professional colleges has a quota for women. Thus women today are in no way inferior to men or suppressed, and are at par with the opposite sex. The effective implementation of these laws and other women friendly provisions in the constitution insures that women, today, have an edge in the society. All this has resulted in them gaining the power of choice. They can no longer be classified as victims in cases of adultery.

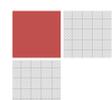
### **WHAT NEEDS TO BE DONE ?**

It is pertinent to note here that The 42<sup>nd</sup> Law Commission Report<sup>5</sup> has suggested to substitute section 497 of the IPC, the substituting provision is “**S. 497. Adultery – 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 person, 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**

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<sup>4</sup> Sowmithri Vishnu v. Union of India, AIR 1985 SC 1618.

<sup>5</sup> The Law Commission of India, 42<sup>nd</sup> Report, Para 20.17; p. 326



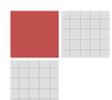
**shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both”**

The Malimath Committee on Criminal Justice Reforms has re-iterated more or less the same argument, that men and women being equally partners in the deplorable act, should be made to stand at the same footing, and equal treatment should be meted out to them both.

## **CONCLUSION**

In light of the above critical analysis, it is very much apparent & beyond doubt, that the prevailing law is not in consonance with the changed times, the law is neither socially apt nor does it stand to the principles of equality, from absolute conservatism to absolute liberty, the social fabric of our country has undergone a drastic change. It is high time that Recommendations made by the Justice Malimath Committee and the 42<sup>nd</sup> Report of the Law Commission be taken into consideration religiously, and necessary amendments be made to Sec. 497 IPC, so as to do away with the irregularities, and in the interest of doctrine of equality.

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A Critical Analysis of the Law relating to Adultery in India.

