"Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective

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1. 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. Almost every religion condemns it and treats it as an unpardonable sin1. However, this is not reflected in the penal laws of countries. Nevertheless, all the legal systems invariably do recognise it as a ground for seeking divorce from the errant spouse.

Section 497 of the Indian Penal Code (IPC) perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman without the consent or connivance of her husband as an offence of "adultery". A sexual link between a married or unmarried man and an unmarried woman or a divorcee or a widow, therefore, does not come within the ambit of "adultery". It also holds the man and not the (adulteress) "wife" of another man, who has been unfaithful to her husband, solely responsible for the sexual liaison. IPC, it seems, views "adultery" as an invasion of the right of the husband over his wife and therefore puts it under Chapter XX: "Of Offences Relating to Marriage".

However, the feminists in India today say that the Indian law relating to adultery is premised on the outdated notion of "marriage".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.

It is proposed to evaluate the present law on adultery in the light of the contemporary notions of "marriage" and mutual obligations of "wife" and "husband" arising thereunder. The proposal for reform would also be examined.

2. ADULTERY AND GENDER EQUALITY: LEGISLATIVE PARADIGM AND RATIONALE

2.1 Criminal policy: evolution and rationale

Lord Macaulay did not deem it fit to put infidelity in his 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, he concluded:

"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."2

The Law Commissioners in their Second Report on the Draft Penal Code, 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."3 Section 497 of the Penal Code reflects the above perception and defines "adultery" thus:

"497. Adultery.â€"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 punishable as an abettor."

Section 497 unequivocally conveys that the adulteress "wife" is absolutely free from criminal responsibility. She is also not to be punished (even) 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".

It is in consonance with this approach that Section 198 CrPC mandates a court not to take cognizance of adultery unless the "aggrieved" husband makes a complaint. It runs as under:

"198. Prosecution for offences against marriage.â€”(1) No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860), except upon a complaint made by some person aggrieved by the offence: Â ***

(2) For the purposes of sub-section (1), 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: (i) man is a seducer and the married woman is merely his hapless and passive victim, (ii) 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, (iii) 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, (iv) 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 (v) 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 wife5.

2.2 Adultery and the constitutional spirit of gender equality: judicial perception

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 Aziz, 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 Constitution6, 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 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."7 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 Court8 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 an 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 (comprising M.C. Mahajan, C.J., Mukherjea, S.R. Das and Ghulam Hasan, JJ.) 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 159. 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."10

More than three decades after the Supreme Court's pronouncement in Yusuf Abdul Aziz case5, constitutional vires of Section 497 came to be reagitated in Sowmithri Vishnu v. Union of India5. It was contended that Section 497, being contrary to Article 14 of the Constitution, makes an irrational classification between women and men as it: (i) 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, (ii) does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and (iii) 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 licence

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 India5 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 case5, 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 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."11

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.

2.3 Adultery and gender equality: proposals for reform

The Fifth Law Commission of India, as early as in 1971 recommended that the exemption of the wife from punishment for committing adultery be removed from Section 497 IPC. It also felt that an imprisonment for a term up to five years

(stipulated in Section 497) is "unreal and not called for in any circumstances". The recommended Section 497 reads as:

"497. Adultery.â€”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."12 However, the Joint Select Committee substituted the above revised Section 497 by the following:

"Whoever has sexual intercourse with a person who is, and whom he or she knows or has reason to believe to be the wife or husband as the case may be, of another 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 shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."13 Inspired by the spirit of equality the Fifth Law Commission and the Joint Select Committee have thus shown their inclination to the equality of the sexes by recommending equal culpability for the "man" as well as the "woman" for committing adultery.

Surprisingly, however, for reasons best known to them, neither the Law Commission nor the Joint Select Committee has shown any sensitivity to the equally pertinent traditional proprietary rights of the "husband" over his "wife" and to the subordination of woman in the Indian family institution. Mrs Anna Chandi, one of the distinguished Members of the Fifth Law Commission, voicing her reservations about the revised Section 497 suggested by her other colleague Law Commissioners, 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."14

It is pertinent to note that recently in 1997 the Fourteenth Law Commission, in its 156th Report on the Indian Penal Code, endorsed, with minor modifications15, the proposal for reform recommended by the Joint Select Committee. It also stressed that changes suggested in its revised Section 497 IPC be made in Section 198(2) CrPC16.

The Apex Court, curiously, did not attach any judicial significance to the proposal for reform recommended by the Fifth Law Commission and of the Joint Committee approved by the Rajya Sabha. It could have justifiably relied upon these proposals to inject gender equality in the adultery law. But it preferred to assert, time and again, that it is for the legislature to take cognizance of the social "transformation" and the changed values as they involve questions of "policy of law".

3. CONCLUSION

In most of the foreign jurisdictions, adultery, apart from being a ground for divorce, has been perceived as a criminal wrong against marriage. Similarly, in these jurisdictions, both the spouses are generally held criminally responsible for their extramarital sexual intimacy.

However, the penal law of adultery in India is premised 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. It, in ultimate analysis, unmistakably intends to protect the rights of the husband and not of the wife17. It is also bridled with deep-rooted obsolete assumptions predominantly premised on gender discrimination and the wife's sexuality. 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. During the post-IPC 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.

The existing gender discriminatory penal law of adultery, against this backdrop, deserves a serious relook and revision to the effect that a person, male or female, who, being married, has sexual intercourse with a female or a male (as the case may be) not his or her spouses without the consent or connivance of such spouses be made criminally responsible. Similarly, the spouse of the errant spouse be allowed not only 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. The latest proposals for reform of the Fifth and the Fourteenth Law Commissions of India deserve serious and immediate attention of the legislature18. Such changes are required to translate the contemporary "social transformation" assuring equality to women and the constitutional spirit of gender equality into a reality.

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- Encyclopaedia Dictionary of Religion (The Sisters of St. Joseph of Philadelphia, 1979). Return to Text
- 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. Return to Text
- Second Report on the Draft Indian Penal Code (1847), pp. 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, id., p. 365. Return to Text
- The term "connivance" implies knowledge of, and acquiescence in the act. Toleration of the extramarital relation of his wife by the husband also amounts to connivance. It is not merely negligence or inattention but a voluntary blindness to the intimacy. Connivance of the husband is made necessary, for the offence of adultery is intended to preserve his bed unsullied, and if he elected otherwise, the law cannot help him against himself. See In re C.S. Subramaniam, AIR 1953 Mad 422. Return to Text
- See generally, Yusuf Abdul Aziz v. State, AIR 1951 Bom 470; Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930; Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137; and V. Revathi v. Union of India, (1988) 2 SCC 72. Return to Text
- Article 14 mandates the State not to deny any person equality before the law and the equal protection of the laws within the territory of India. It mandates that every law that the State passes shall operate equally upon all persons. While Article 15, inter alia, prohibits the State from making discrimination on grounds only of sex. Return to Text
- Yusuf Abdul Aziz v. State, supra fn 5 at p. 472, para 5. Return to Text
- Yusuf Abdul Aziz v. State of Bombay, supra fn 5. Return to Text
- See ibid., at p. 932. Return to Text
- Ibid., pp. 931-32. Return to Text
- V. Revathi v. Union of India, supra fn. 5 at pp. 76-77, para 5. Return to Text
- Law Commission of India, Forty-second Report: Indian Penal Code, supra fn 2, para 20.18. Italicised words denote the recommended changes. Return to Text
- Clause 199. Both the Law Commission and Joint Select Committee tried to ensure equality of the sexes. The 1978 Amendment Bill lapsed due to dissolution of the Lok Sabha then. Return to Text
- See note by Mrs Anna Chandi, Law Commission of India, Forty-second Report: Indian Penal Code, supra fn 2, at p. 365. Return to Text
- See Law Commission of India, One Hundred Fifty-sixth Report: Indian Penal Code (Government of India, 1997), para 9.46. Return to Text
- Ibid., para 9.47. Return to Text
- See generally, Ratna Kapur & Branda Cossman, Subversive Sites:Feminist Engagements with Law in India (Sage, 1996); Ursula Vagel: "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). Return to Text
- See K.I. Vibhute, " 'Rape' and the Indian Penal Code at the Crossroads of the New Millennium: Between Patriarchist and Gender Neutralist Approach", Journal of the Indian Law Institute (January-March 2001, In Press). Return to Text