

# **NEED TO REFORM ADULTERY LAW IN INDIA**

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## **Introduction:**

During the past decade or more, laws relating to women have been given more teeth. Existing laws have been strengthened and many new ones like The Protection of Women from Domestic Violence Act, 2005 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 have been enacted.

In the aftermath of the unfortunate December 16, 2012 gang rape case in Delhi, sweeping changes were made in the Indian Penal Code vide. The Criminal Law Amendment Act, 2013. Besides giving many new sections to the code, punishment for rape laws were enhanced with even death penalty<sup>1</sup> being added in one of the sections relating to the offence. Other provisions relating to women in the Indian Penal Code include sections 354<sup>2</sup>, 497<sup>3</sup> 498A<sup>4</sup>, 509<sup>5</sup>.

Laws of all kinds have been prone to misuse and in this case women centric laws are no exception. All laws to protect the women from violence<sup>6</sup>, and rightly so, in the past few years have seen a steep rise in instances where the criminal law was set in motion at the drop of a hat even when there was no requirement. Laws relating to marriage (section 498A) have been grossly abused. False and frivolous complaints are many times filed leading to a harrowing time for husbands and in-laws.

Even the Law Commission of India had recognized this in its 243<sup>rd</sup> Report. Also recently, on 21-07-2017, the Delhi High Court in Geeta Sharma vs Govt. of NCT of Delhi<sup>7</sup> in clear and unequivocal terms deplored the practice of women terming consensual sex as rape and setting the criminal law in motion stressing on the need for a clear demarcation between rape and consensual sex.

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<sup>1</sup> Sec 376E: Punishment for repeat offenders

<sup>2</sup> Assault or criminal force to a woman with intent to outrage her modesty.

<sup>3</sup> Adultery

<sup>4</sup> Husband or relative of the husband of a woman subjecting her to cruelty

<sup>5</sup> Word, gesture or Act intended to insult the modesty of a woman.

<sup>6</sup> Physical, mental or other kinds of violence

<sup>7</sup> CRL.L.P. 137/2017 and CRL.M.A. 4027/2017

However, there is an intrinsic difference between other laws and provisions and section 497. While the purpose of the former is noble and the only thing required is to prevent misuse to ensure rectitude, law relating to adultery in India is inherently gender biased. It criminalizes a man's immoral conduct by branding it as sinful, but absolves an unchaste woman of any criminal culpability in case she establishes relations outside marriage, thus putting a premium on her unethical conduct.

Many times voices have been raised against it with the Supreme Court refusing to relent in the only landmark judgment<sup>8</sup> on this point. Another unsuccessful passing attempt was made in *W. Kalyani vs. State* (Criminal Appeal No 2332 of 2011).

### **Adultery Laws in India: Need for Reforms**

Women empowerment has gained momentum during the last few years. Social security to women, protection against harassment, various types of crime ranging from mild to heinous have been given a just reply in the form of stringent laws by way of amendments.

Other new laws to protect women<sup>9</sup> from domestic violence, subjugation and torture have been enacted. Legislative enactments to protect, provide social security and other benefits to confer on them a life of dignity and protection and from systemic vulnerabilities and exploitation have to be backed by the state in a justified form/way.

However, the equality principle emanating from Article 14 of the Constitution have also to be given a way and accord to keep the balance and prevention of misuse.

Laws are agents of social change, regulators of conduct, and apostle of reforms. The desirable condition is to harmonize the above for a peaceful society. Deviations from the above principles results in disbalance in social harmony ranging from moderate to blatant.

Equality implies absence of discrimination. Social security measures to safeguard and provide protections against deviations in the form of exceptions must not be based on populism, weaning away from sound principles of rationality and logic.

Various types of legal protections against violations have been accorded by law and its enforcement instrumentalities ranging from penalties, fines and sanctions to incarceration. Laws that have a moral approbation are mostly regulators of conduct.

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<sup>8</sup> *Yusuf Abdul Aziz vs State of Bombay* 1954 AIR 321

<sup>9</sup> Protection of women from Domestic Violence Act, 2005.

Protection of women through legal measures in cases of crime against them have mostly resulted in incarceration to give a stern message against vulnerable exploitations. This is in a sense a right measure for social and legal protection.

However, law relating adultery in India<sup>10</sup> is a clear and marked departure from the above, canons of ethics, and legal principles.

Adultery is a crime involving one of the partners in a marriage to have extra marital relation or relations outside marriage without the consent of other partner.

It is extramarital sex that is considered objectionable on social, religious, moral or legal grounds. A single act of sexual intercourse is generally sufficient to constitute adultery, and a more long term sexual relationship is sometimes referred to as an affair.<sup>11</sup>

The Oxford Learners Dictionary defines adultery as: sex between a married person and someone who is not their husband or wife.

The offence of adultery defined above and constructed within the given definitions is the cheating of one married partner by the other by having consensual illicit relations with a person outside the marriage without the consent or knowledge of the married partner.

Adultery in the Indian Penal Code, 1860 is defined in section 497 and is unique in the sense that it absolves the woman with all liability or criminal culpability. The section has been defined 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 which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”*

The role of law as a facilitator and enabler is for social progress, parity and harmony. Any provision of law which derogates from the above will per se appear bizarre and absurd.

Loyalty and allegiance are essential attributes for binding relationship and any erosion thereof would erode and break these essential social and moral forces.

Marital bliss is not a lifelong affair and things start taking routine shape with the gradual passage of time. Two persons tying the nuptial knot should have the reasonable foresight and

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<sup>10</sup> Defined in Section 497 of The Indian Penal Code, 1860

<sup>11</sup> Wikipedia, the Free Encyclopaedia.

deemed understanding that with informality and responsibility creeping into the matrimonial life, petty quarrels and squabbles are bound to arise and adjustments to such things should become a natural offshoot. Routine affairs should not become an excuse to deceive loyalty and allegiance and in turn find a passage to vent out the boredom in having temporary pleasures to cheat the legal bondage by boosting illegality. Minor dissatisfactions should not give passage to finding solace in having illegitimate relations outside marriage and should not outweigh the confidence and satisfaction which one derives from matrimonial life.

With respect to matrimony, their weightage increases, as it is an institution which demands greater responsibility of one partner towards the other coupled with the requisite freedom for a lasting relation. The tying of nuptial knot under the personal laws backed by the legal framework further cements the bond.

The wording, framing and language of section is fundamentally flawed. It appears that legal authorities weigh character on gender scales and a legal presumption in case of morality not being gender neutral is drawn. The female counterpart in a marital relationship is deemed pious and a social branding of the unchastity is thrust upon the man.

Fundamentally weak laws give the advantageous an upper edge to exploit its shortcomings to the detriment of other. Empowerment of women through legislations is necessary. But provisions like these are per se wrong, are heavily disbalanced and disturb the social cohesion.

It is in explainable 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.<sup>12</sup>

The provision of adultery in the Indian Penal Code emboldens the woman to put a premium on her unethical conduct. Law being heavily biased on her side it encourages the woman to find solace from minor marital discords, petty squabbles and quarrels to boost her unchastity by having extra marital relations outside marriage being fully aware the legislation itself has given her the power and right to go scot free in by giving deemed consent to her immoral character.

On the other hand it aggravates frustration in the disgruntled male counterparts/husbands and a sense of haplessness even after becoming aware of the immorality of her wife. It may, in turn culminate in more divorce cases being filed on the part of the husband having no other legal remedy to rectify the legal lacuna.

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<sup>12</sup> Critical Analysis of the Law of Adultery in India: A gender biased law, Bharat Chugh, Student, BA LL.B (Hons) 4<sup>th</sup> Year, Faculty of Law Jamia Millia Islamia

Unchastity as a characteristic cannot be biased. It should not be prone to subjective distortions of law against any allegations howsoever genuine they might seem.

As a man can be punished under section 497 of IPC for adultery, for having sexual intercourse with a wife of another man it stands to reason that wife should likewise be punished if she has sexual intercourse with another married man.<sup>13</sup>

The only landmark judgment in which Supreme Court<sup>14</sup> upheld the validity of the section stating *“Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned in section 497 of the Indian Penal Code”*.

Constitutional provisions making special provisions for women and children<sup>15</sup> are welfare measures and enabling provisions mandating the state to enact legislations for the advancement of women and children. It does not, however, presume to do so in any way or manner that may negates the principles of law, constitution, encourages immorality or heavily favours or disfavours one or goes against the provisions of Article 15 (1).

Differential treatment does not per se amount to violation of Article 14 of the Constitution and it violates Article 14 only when there is no reasonable basis and there are several tests to decide whether a classification is reasonable or not and one of the tests will be as to whether it is conducive to the functioning of modern society.<sup>16</sup>

Section 497 of the Indian Penal Code has been challenged again and is to be heard by a Constitution bench of the Supreme Court.

The law relating to adultery as it stands today heavily disfavours the men and it is gender biased. From time to time unsuccessful voices have been raised against it to amend the section. It is time to take a relook at the section.

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<sup>13</sup> Committee on Reforms of Criminal Justice System- Vol I, Dr. Justice V.S. Malimath, pg. 290

<sup>14</sup> Yusuf Abdul Aziz vs. The State of Bombay 1954 AIR 321

<sup>15</sup> Article 15 (3), Constitution of India

<sup>16</sup> Transport and Dock Workers Union vs. Mumbai Port Trust 2011 AIR SCW 220