ABOLISHMENT OF SECTION 497: LEAVING SUBSERVIENCE BEHIND

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The Supreme Court unanimously struck down Section 497 of the Indian Penal Code stating that it was violative of Articles 14,15 and 21 of the Indian Constitution. Section 497 held the man whom the wife of another man had sexual intercourse with, accountable for the offence of adultery. This law was demeaning, discriminating and arbitrary in its very essence as it was based on women being someone else's property. It identified women as a chattel rather than an individual. It also considered only the husband as the aggrieved party. The same law, however, did not apply in the case of the husband having sexual relations outside marriage and women were not allowed to prosecute their husband and his paramour. The questioning of the validity of this law and the judgment that followed is historic as it strengthens women's position and underscores their dignity and autonomy in the eyes of law and the society.

"It is time to say husband is not the master of wife. Any provision treating women with inequality is not constitutional," said Justice Misra while delivering the historical judgment that jettisoned the archaic section 497 of the Indian Penal Code[1] dealing with adultery, hence making it unconstitutional.

The human society is pre-dominantly patriarchal and this deep-rooted patriarchy stems from the fact that for a significantly long period of time women have been treated as a second citizen and not as an equal. Laws too, are a reflection of the society, wherein, the societal construct has been such which peremptorily demanded and in the years that followed, expected subservience from women, so much so that in the seemingly progressive 21st century, absolute equality between men and women seems elusive. Section 497 further cemented women's position as a property and had been in practice well into the 21st century. In the instant case itself, the matter was being dismissed as being discriminatory against men. The judgment gives at least a higher and well-deserved if non-definitive status to women of an individual than that of a chattel. It is commendable that the rampaging activism in this era is focused on gender equality.

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[1] The Indian Penal Code Act, 1860 Act No. 45 of 1860. Drafted by Lord Macualay.

The adultery judgment is being considered as a trailblazer for the revolutions happening or yet to happen to bring about a change in the Indian judicial system so that women can endorse themselves as an individual without the barrier of obscure laws that question their integrity. Such regressive and demeaning laws further patriarchal perception of women. The judgment along with Triple Talaq judgment and the petitions against marital rape show us how this thought-process has evolved and come a long way; simultaneously the delay and the voices of dissent coupled with bigoted opinions remind us that we still have a long way to go.

Section 497 read, "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 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 is manifestly arbitrary. It creates a dent on the individuality of women." The panel observed while delivering the judgment. The major flaw in this law, amongst several, was that it only recognized the husband as the aggrieved party and a woman, if faced with the same situation would not be allowed to prosecute her husband for the offence of adultery. Cases in which, the husband prosecutes his wife's adulterer, the punishment for the same would only be inflicted upon the man whom the woman had an adulterous relationship with as women were only considered as the victims in the occurrence of the said crime and not its perpetrator or abettor. The law denuded women of their judgment and reduced their status to that of a chattel. With the abolishment of Section 497, the parties will still be held accountable for the act but they won't be punished as it is no longer an offence and the woman's involvement will not be classified as complacency and ignored on account of being objectified.

The background of adultery law in India has had a very long and enriching journey dating back to the 1800s. Justice Rohington F Nariman[2] said almost all ancient civilizations punished the sin of adultery and Hammurabi's Code of 1754 BC prescribed death by drowning as punishment for the offence, be it by the wife or the husband.

[2] Dhananjay Mahapatra, why was adultery law enacted in 1860, why it had to go now, TIMES OF INDIA (Jan. 21, 2020, 10:04 am) https://m.timesofindia.com/india/why-was-adultery-law-enacted-in-1860-and-why-it-had-to-go-now/

In Judaism, another ancient religion, the Ten Commandments delivered by the Lord to Moses on Mount Sinai contains the seventh commandment- thou shall not commit adultery- set out in the book of Exodus in the Old Testament.

In the religion of Christianity, adultery is condemned as immoral and a sin for both men and women, as evidenced by St. Paul's letter to the Corinthians.

In India, Manusmriti[3] provided punishment for those addicted to intercourse with other men's wives "by punishment which cause terror, followed by banishment", Justice Nariman further enunciated, "The Dharmasutras speak with different voices. In the Apastamba Dharmasutra, adultery is punishable as a crime, the punishment depending upon the class or caste of the man and the woman. However, in the Gautama Dharmsutra, if a man commits adultery, he should observe a life of chastity for two years; and if he does so with the wife of a Vedic Scholar, for three years."

"In Islam, in An-Nur, namely Chapter 24 of the Quran, verse 2 reads as follows, "The adulteress and the adulterer, flog each of them with a hundred stripes, and let not pity for them detain you from the obedience to Allah, if you believe Allah and the last day, and let a party of party of believers witness their chastisement."

Moving forward to the 17th century England, adultery was only a ground for divorce but became a capital offence in Cromwell's puritanical regime in 1650, only to be overturned and nullified as soon as King Charles II came back to restore monarchy in the kingdom of Great Britian, who refused to make adultery a penal offence in the first draft of the Indian Penal Code prepared by Lord Macualay.

Of the adultery law establishment in India, Justice Nariman said, " In 1860, when the Penal code was enacted, the vast majority of the population of India, namely Hindus, had no law of divorce as marriage was considered to be a sacrament. Equally, a hindu man could marry any number of women until 1955 according to the Hindu Marriage Act.[4]

It is therefore, not far-fetched to see as to why a married man having sexual intercourse with an unmarried woman was not the subject matter of the offence. Since adultery did not exist as a ground for divorce in law, and since a man could marry any number of women among Hindus, it was clear

[3] The Manusmriti is an ancient legal text which was used to formulate Hindu Law by the British Colonial government.
[4] The Hindu Marriage Act, 1955, Act No. 25 of 1955.

that there was no sense in punishing a married man for having sex with an unmarried woman as he could easily marry her at a subsequent point in time. Two of the fundamental props or bases of this archaic law have since gone. Post 1955-1956, with the advent of the 'Hindu Code', so to speak, a Hindu man can marry only one woman, and adultery has been made a ground for divorce in Hindu law."

Before the breakthrough with this iconic judgment, many attempts were made to abolish this patriarchal adultery law. There are three distinct judgments that stand out.

The adultery law in India first came under challenge in 1951 in the Yusuf Aziz v. State of Bombay.[5] Petitioner contended that the adultery law violated the fundamental right of equality guaranteed under articles 14 and 15 of the Indian constitution.[6] The dominant argument in the court hearing was that section 497, governing adultery law, discriminated against men by not holding women equally accountable and culpable in an adulterous relationship. It was also argued that adultery law gave a license to women to commit the crime.

Three years later in 1954, the Supreme Court ruled that section 497 was valid. It held that section 497 did not give a license to women to commit adultery. The judgment said that making a special provision for women to escape culpability was constitutionally valid under article 15 (3) which allows such a law.

Moreover, in an interesting remark, the Supreme Court said in the judgment that "it is commonly accepted that it is the man who is the seducer and not the woman." The Supreme Court stated that women could only be a victim of adultery and not a perpetrator of the crime under section 497.

The above argument was made to reject the contention that the adultery law was discriminatory against men. However, despite declaring women as "victim only" in the occurrence of the crime of adultery, the court did not allow them to file a complaint.

The next significant judgment regarding adultery law came in the case Sowmithri Vishnu v. Union of India, 1985.[7] In this case, the Supreme Court held that women need not be included as an aggrieved

[5] Yusuf Abdul Aziz v. The State of Bombay 1954 A.I.R 321.
[6] INDIA CONST. art. 14 and 15.
[7] Smt. Sowmithri Vishnu v. Union of India & Anr, 1985 AIR 1618.

party in the name of making the law even handed. It also explained as to why women should not be involved in prosecution in the cases of adultery.

The Supreme Court held that men were not allowed to prosecute their wives for the offence of adultery in order to protect the sanctity of marriage. For the same reason, women could not be allowed to prosecute their husbands. The judgments retained the offence of adultery as a crime committed by a man against another man.

The Supreme Court also rejected the argument that unmarried women should be brought under the purview of the adultery law.

The argument was that even if an unmarried man establishes adulterous relationship with a married woman, he is liable for punishment, but if an unmarried woman engages in sexual intercourse with a married man, she would not be held liable for the offence of adultery, even though both disturb the sanctity of marriage. The Supreme Court further held bringing such an unmarried woman in the ambit of adultery law under section 497 would mean a crusade by a woman against another woman. The ambiguity related to adultery law remained unsolved.

The third and final significant judgment came in the case of V Revathy v. Union of India, 1988.[8] The Supreme Court held that not including women in prosecution of adultery cases promoted social good. It offered the couple a chance to make up and keep the sanctity of marriage intact. Supreme Court observed the law to be a "shield rather than a sword ". The court ruled that the existing adultery law did not infringe upon any constitutional provision by restricting the ambit of section 497 to men.

All these upholding judgments of the adultery law were finally struck down by the judgment given in the Joseph Shine v. Union of India, 2018.[9]

An Indian businessman based in Italy named Joseph Shine, who hails from Kerala, filed a Public Interest Litigation challenging section 497 of the Indian Penal Code, contending that the law is discriminatory. The petition argued that adultery law was biased in the idea of a woman as property of man.

[8] V. Revathi v. Union of India, 1988 AIR 835.
[9] Joseph Shine v. Union of India, 2018. Petition filed under article 32 of the Indian Constitution.

The judgment given in this case overturned the three previous rulings by the Supreme Court.

There have been contentions against the judgment, attempts to justify Section 497. There have been arguments asserting that striking down this law goes against the principles on which the foundation of marriage as an institution was perceived and that it does not hold the sanctity of marriage. The court in its defense, observed," Where is the sanctity of marriage when the husband can consent for his wife to indulge in sexual intercourse with another man?" The court maintained that adultery may not be the cause but the result of an unhappy marriage. And rightly so, when both facets of a coin have been the reason for a marriage to fall apart, it is absurd to put the onus for the same only on one of them. It is time that the society realizes that the brunt of patriarchy is being borne not only by women but also men. It is time that people realize that women too have the agency to take decisions on their own.

Another legal view to adultery was the Law Commission Report of 1971[10] and the Malimath Committee[11] on criminal law reforms of 2003 which recommended amendment to the adultery law. Both of them argued in favour of making section 497 gender neutral.

Following the SC intervention, adultery is now a civil matter between individuals. But, Section 306 of the Indian Penal Code can still be invoked if a suicide results from adultery. Also, although the adultery judgment takes a leap forward to restore women's agency, the principle of monogamy, one of the pillars of marriage cannot be overlooked. The apex court contended that adultery would continue to serve as a ground for divorce.

Justice D.Y. Chandrachud said that the offence of bigamy under section 494 of the Indian Penal Code is gender neutral and women would also be held liable. There have been other arguments in favor of the law on grounds of morality but upright repugnancy does not always make for a justified argument. Further, Advocate Meenakshi Arora stated that, "The jurisprudence behind adultery was no different. The object was not to protect bodily integrity of women but to protect man's control over wife's sexuality."

[10] Law Commission Report, 1971. 42nd report of the law commission on Jun. 2. On the Indian Penal Code.
[11] Malimath Committee of 2003 provided recommendations regarding the adultery law by reviewing sec. 497 of the IPC and sec. 198 of the CrPC.

"It seems most unfair for a man to require from a wife the chastity he does not himself practice."[12] It is commendable that the court has been objective in its decision regarding adultery and has addressed and highlighted issues relating to women's dignity and underpinned their privacy and autonomy. This judgment reinforces equality which was subverted due to the notion of marriage adopted by the lawmakers at that time. The judgment further paves the way criminalizing marital rape. During the proceedings of the case D Y Chandrachud stated that," The right to say 'no' should be there after marriage as well." The striking down of the 158 year old colonial era law is a progressive step as summarized by this articulate quote from the magazine, political weekly[13], "the main concern is not whether the expectations of fidelity in a marriage are right or wrong, or whether adultery denotes sexual freedom. It is whether the state can and should monitor a relationship between adults that is too complex, sensitive and individual for it to be capable of doing in a just manner."

[12] Codex Justin, Digest, XLVIII, 5-13; Lecky;History of European Morals.
[13]Economic and Political Weekly, a magazine that deals with current social issues plaguing the country.