THE GOOD, THE BAD, AND THE ADULTEROUS: CRIMINAL LAW AND ADULTERY IN INDIA

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Adultery is a crime in India, punishable with up to five years imprisonment under Section 497 of the Indian Penal Code, 1860. When you took this fact in, perhaps like me your first reaction was outrage at the State's apparent intrusion into the seemingly private sexual realms of life. Such prudes, those Legislators: imposing their moral compass on the unsuspecting citizenry. In truth, it is a bit more complicated, though I argue that the initial assessment is not far off. The paper begins considering principles guiding criminalisation of conduct, to determine whether some principled justifications exist for criminalising adultery. I then move to the substantive section of the paper: arguing that Section 497 must be repealed by the Legislature, for inter alia perpetrating invidious discrimination between sexes.

I. INTRODUCTION

Adultery, the act of being sexually unfaithful to one's spouse, has been common in human society for as long as one remembers. Why do we humans[1] find it difficult to be faithful to our spouses? The most interesting answer I found to that question came from an evolutionary approach to adultery,[2] but thankfully such vexed questions of human unfaithfulness do not trouble us here. What concerns us is how society treats adultery.

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1 I stress upon the human, but adulterous practices have been found in other animals as well. The adulterous relationships in birds have been well documented. *See*, JARED DIAMOND, RISE AND FALL OF THE THIRD CHIMPANZEE 77-78 (1992).

2 *Id.,* 71-83.

The commonness of adulterous relationships is matched only by their condemnation by society. The degree of this condemnation varies depending upon where one might be living. In the U.S.A., several state laws criminalise adultery although no federal statute creates such an offence.[3] Offences can also be found in many Asian countries: Taiwan, Philippines, Saudi Arabia,[4] and of course, India.[5]

Jurisdictions vary in how they prosecute adultery: adultery charges may require more than a single act of infidelity; definitions may exclude unmarried parties from the offence and only subject the married party to criminal liability; the law may exempt female paramours restricting liability for the male.[6] Cutting across most jurisdictions is a requirement to seek prior consent from the aggrieved spouse before launching prosecution.[7] The targeting of women through these measures owing to their generally more dependent social position has buttressed notions that adultery laws further a starkly male objective of punishing the wife, considered little more than chattel, for creating doubts of paternity and lineage.[8]

3 The states of Idaho, Utah, Arizona, Kansas, Oklahoma, Minnesota, Wisconsin, Illinois, Michigan, Mississippi, Alabama, North Carolina, South Carolina, New York, Florida, Georgia, Virginia. *See*, *New Hampshire votes to Repeal Anti-Adultery Law*, USA TODAY, April 17, 2014, http://www.usatoday.com/story/news/nation-now/2014/04/17/anti-adultery-laws-new-hampshire/7780563/.

4 *Adultery Laws: where is cheating still illegal?*, *in* THE WEEK, February, 27, 2015, http://www.theweek.co.uk/62723/adultery-laws-where-is-cheating-still-illegal.

5 Section 497 of the Indian Penal Code 1860 [IPC] reads:

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.

6 Martin Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 JOURNAL OF FAMILY LAW 45, 51-52 (1991). Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions after Lawrence v. Texas*, 39 SUFFOLK UNIVERSITY LAW REVIEW 837, 838 (2005).

7 *See*, Seigel, *supra note* 6, at 51 (providing a list of various State laws requiring consent to prosecute); Article 239, Criminal Code (Taiwan) (which again falls under a Chapter entitled "Offences against Family and Marriage"); Article 334, Revised Penal Code (Philippines); Section 198(2), Code of Criminal Procedure, 1973 [*hereinafter* "Cr.P.C."].

8 Siegel, *supra* note 6, at 46; *Viator*, *supra* note 6, at 840-43; Diamond, *supra* note 1, at 80-81.

There seems adequate historical support for such claims. In India, the laws of *Manu* did not punish an adulterous husband and required a wife to always remain reverent to her 'master'.[9] In the West, adultery met Biblical condemnation,[10] and subsequently both the Barbarians[11] and Romans[12] considered adultery as a private wrong suffered by the husband. Though adultery was only briefly a secular offence in England,[13] the Common Law recognised the "*obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate heir into his family.*"[14]

Today, legislators in most of these jurisdictions do not attempt justifying adultery offences, or any offences for that matter, by presenting the objective as one of securing paternal lineage. The renaissance brought an influx of liberal thought into the process of criminalisation, which now forms the basis of our understanding of the subject. Thus, it becomes important to reconsider on what footing laws criminalising adultery stand. A caveat before we proceed: since this discussion is not the crux of this paper, I provide only a bare-bones engagement with the nuances of criminal theory.

II. WHAT MAKES A CRIME?

How do we decide certain conduct should be labelled criminal? Few principles have managed to attain the widespread acceptance which the 'Harm Principle'[15] has ever since Mill postulated it as being a core constituent of a libertarian society. I understand this principle to mean that only conduct which results in causing verifiable harm to another should be the subject of state sanction.[16] The longevity of this principle must in part be attributed to its vagueness:

9 CHARLES JEAN MARIE LETOURNEAU, THE EVOLUTION OF MARRIAGE, 220-222 (Havelock Ellis ed., 1911).

10 Siegel, *supra* note 6, at 46.

11 Jeremy Weinstein, *Adultery, Law, and the State: A History*,38 HASTINGS LAW JOURNAL 195, 197 (1986).

12 *Id.,* at 200-1.

13 Viator, *supra* note 6, at 840.

14 CHARLES TORCIA, WHARTON'S CRIMINAL LAW 210, at 528 (15th ed., 1994). *See also* Viator, *supra* note 6, at 841.

15 JOHN STEWART MILL, ON LIBERTY 12 (1859).

16 *See also*, Joel Feinberg, *Debris From the Hart-Devlin Debate,* 72(2) KURT BAIER FESTSCHRIFT 249, 250 (1987); *See* JOEL FEINBERG, HARM TO OTHERS (1984).

the idea of *harm* is so subjective that different persons could populate the contents of this principle in a manner they deemed fit.[17]

Can we justify adultery by placing it in the prism of the harm principle? The conduct in question is marital infidelity of either spouse. What harm does it bring, and to whom? The near-universal restriction on prosecutions requiring private complaints seems to indicate the spouse is the aggrieved party. Which still leaves one to consider, what *harm* is done to the other spouse by marital infidelity? My potential wife may harm me by repeatedly reminding me of my failed academic career, but curbing her nagging by labelling it a crime would be unreasonable by any yardstick of standards. My private rights should logically proceed to the creation and enforcement of *private* remedies such as divorce, not grounds for engaging the might of state sanction.

Perhaps recognising the difficulties in justifying an offence of adultery by projecting it as means to enforce private rights, most states in fact present this as a means to safeguard the institution of marriage.[18] Marital infidelity is considered *morally* abhorrent by society and the moral rights of the aggrieved spouse along with society's interest in marriage warrant protection, thereby requiring state sanction. Is this a legitimate ground to criminalise conduct? Yes, for today it is widely accepted that one among the several factors guiding criminalisation is morality.[19] But this comes with obvious concerns of overreach, reflected well by the debates between Professor Hart and Lord Devlin in the aftermath of the Wolfenden Committee Report of 1958.[20] Liberal theorists such as Professor Hart today hold a position that "*not everything in a person's morals should be the concern*

17 This is well borne out by the reams of literature on the subject. Consider, for instance, JOEL FEINBERG, HARM TO OTHERS, (1984); R.A. DUFF, ANSWERING FOR CRIME 141-42 (2007); Graham Hughes, *Morals and the Criminal Law*, 71(4) YALE LAW JOURNAL 662 (1962); Sir Patrick Devlin, *Morals and the Criminal Law*, *in* THE ENFORCEMENT OF MORALS 1, 17 (1959); H.L.A. HART, LAW, LIBERTY AND MORALITY 51 (1963).

18 Section 497 in the IPC is placed within the Chapter titled "Offences against Marriage".

19 NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY 29 (1984); JOELFEINBERG,HARM TOOTHERS*supra* note 16; Peter Cane, *Taking Law Seriously: Starting Points of the Hart/ Devlin Debate*, 10(1/2) JOURNAL OF ETHICS 21 (2006).

20 Sir Patrick Devlin, *Morals and the Criminal Law*, *in*THEENFORCEMENT OF MORALS 1, 17 (1959); H.L.A. HART, LAW, LIBERTY AND MORALITY 51 (1963).

of the law, only his disposition to violate the rights of other parties."[21] But this still remains far from legal moralists like Lord Devlin, who consider moral wrongfulness *sufficient* for criminalisation regardless of other factors.[22]

Regardless of the theoretical justifications, must we resort to the criminal law to protect these notions of the 'sanctity of marriage' for society? The grave consequences attached to criminal sanctions have led many to argue that these should be considered coercive means of the last resort. When we have private remedies for the warring spouses – adultery is valid grounds for divorce – why also create an *offence*? Persuasive though this logic may be, legislators across the globe have paid scant attention to the last resort principle.[23] The burgeoning list of socio-economic offences on statute books reflects the converse principle may well be in operation.

Thus, although roots of adultery offences are ecclesiastical, they have some basis in modern principles of criminalisation as well which recognise morality as part of the process. These are not merely means for enforcing sexual monogamy in marriage, but recognise sexual fidelity as an integral part of marriage. The freedom to enter private sexual relations is seen as subservient to the larger social good of promoting and safeguarding the institution of marriage. By deterring individuals from engaging in conduct potentially harming a marital relationship, these laws protect the sanctity of marriage, considered a valuable social good.

III. Criminalising Adultery in India

Is this the reason why the IPC criminalised adultery? Well, 19th century Britain considered married women to be chattel of their husbands in law,[24] and a promiscuous wife was subjected to ostracism far worse than that faced by the unfaithful man.[25] But despite this, adultery was never a crime either by statute or common law. In its heyday, adultery was a tort (labelled "criminal conversation"),

21 Feinberg, *Debris*, *supra* note 16 at 259.

22 Duff, *supra* note 17, at 84.

23 Douglas Husak, *The Criminal Law as Last Resort*, 24(2) Oxford Journal of Legal Studies 207 (2004).

24 *See e.g.,* Married Women's Property Act, 1882 (45 & 46 Vict., c. 30).

which also was abolished in 1857.[26] Thus, the idea of making adultery criminal was in fact quite alien to the framers of the IPC.

Lord Macaulay, instrumental in the early drafting process, gave due consideration to the possibility of criminalising adultery in India. He concluded it would serve little purpose. For him, the possible benefits from an adultery offence would be better achieved through pecuniary compensation in most cases. He accepted that for the other cases the law could never provide a satisfactory solution in dealing with marital infidelity given the sacramental nature of marriage.[27] Those involved with finalising the IPC disagreed and gave us Section 497. Although one can trace their justification for exempting women from liability under the Section,[28] it is difficult to find their reasons for criminalising adultery in the first place. Consequently, one must turn to the experience of various committees and the courts in their dealing with Section 497 for assistance in determining the intent behind criminalisation.

In one of its more ambitious projects, the Law Commission of India undertook a comprehensive revision of the IPC, culminating in the 42nd Report

25 Ann Summer Holmes, *The Double Standard in English Divorce Laws*, 1857-1923, 20(2) LAW AND SOCIAL ENQUIRY 601, 605 (1995). The author suggests another reason for the partiality, that adultery of the wife would cause confusion in determination of the heirs to the property and thus deserves stricter punishment.

26 *Id.*

27 MACAULAY'S DRAFT PENAL CODE, NOTE Q (1837); *as cited in* The 42nd Report of the Law Commission of India, INDIAN PENAL CODE, 324 (1971). The Law Commissioners did credit the idea of exempting the wife under Section 497 IPC to Lord Macaulay, who stressed on the deplorable condition of women in India. *See*, LAW COMMISSION OF INDIA, 42ND REPORT: INDIAN PENAL CODE, 325 (1971). [*hereinafter* "LCI 42nd Report"].

28 "Though we well know that the dearest interests of the human race are 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 to a humane man to pause, before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy 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."

Sir Walter Morgan & Arthur George Macpherson, THE INDIAN PENAL CODE (ACT XLV OF 1860): WITH NOTES, 438 (1863).

by that Commission.[29] The Report provided information about the legislative history of Section 497, and offered a comparison with the position in France, England, and the United States of America.[30] The Commission posed itself questions not dissimilar to the ones we are focusing upon here: doubting both the criminalisation of adultery *per se* and its particular manifestation in Section 497.[31]

After casting grave doubts over the purported benefit of criminal actions for adulterous conduct, the Commission noted that "*though some of us were personally inclined to recommend repeal of the section, we think on the whole that the time has not yet come for making such a radical change in the existing position*".[32] The Commission did, however, recommend an amendment: removal of the exemption from liability for women, and reduction of sentence from five to two years.[33] The Report does not indicate what led the Commission to think abolishing adultery as *radical*, nor does it furnish any justifications.

The Amendment never occurred, but the thought was followed up in the next attempt at revising the IPC which culminated in the 156th Report of the Commission.[34] Here, the observations made in the 42nd Report were reiterated along with quoted excerpts from the decision of the Supreme Court in *Sowmithri Vishnu* v. *Union of India*,[35] where the Court observed any changes to Section 497 must originate from the Legislature and not the Court.[36] In a proposal which it believed reflected the "'*transformation' which the society has undergone*",[37] the Commission suggested removing the exemption from liability for women while retaining the five year imprisonment.[38] Again, we are not beneficiaries of any received wisdom from the Commission on why *this* change was considered reflective

29 LCI 42nd Report, *supra* note 27.

30 LCI 42nd Report, *supra* note 27, at 325-26

31 LCI 42nd Report, *supra* note 27, at 326.

32 LCI 42nd Report, *supra* note 27, at 326.

33 LCI 42nd Report, *supra* note 27, at 327.

34 Law Commission of India, 156th Report: Indian Penal Code (1997). [*hereinafter* "LCI 156th Report"]

35 Sowmithri Vishnu v. Union of India, (1985) Supp. SCC 137 [*hereinafter* "Sowmithri Vishnu"].

36 *Sowmithri Vishnu*, at para 7.

37 LCI 156th Report, *supra* note 34, at 172.

of the supposed transformation. These amendments warranted corresponding procedural tweaks[39] to remove the bar against women from initiating prosecutions. However such proposals never appeared in either the 41st Report (which led to the 1973 Cr.P.C.)[40] or the 154th Report which reviewed the Cr.P.C. 1973,[41] rendering the commitment to any change rather dubious.

Over time, there have been other Committees constituted to consider the issues of criminal justice and law reforms. In 2003, the Committee on Reforms of the Criminal Justice System [Malimath Committee] published its Report.[42] It maintained support for the Law Commission proposals to not repeal the offence, but to equate liability for the sexes,[43] for it observed: *object of the Section 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)*".[44] A decade has passed since this Report, but there has been no activity in the Legislature to incorporate its proposals.

Thus, we find that India follows the dominant thought of considering adultery laws necessary to safeguard the sanctity of marriage. "*Society abhors marital infidelity*" indirectly implies society approves of monogamy and marital fidelity, thus justifying the employment of state sanction against those who threaten these virtues. The peculiarity of the Indian offence is the exemption for women from liability, which has been consistently sought to be removed. The exemption together with procedural restrictions on who can initiate proceedings, has led to the view that only *outsiders* to the marriage must be deterred though the criminal law. The spouses can be left to their own devices.

38 LCI 156th Report, *supra* note 34, at 171-2.

39 LCI 156th Report, *supra* note 34, at 172

40 LAW COMMISSION OF INDIA, 41ST REPORT: CODE OF CRIMINAL PROCEDURE, 1898 (1969). [*hereinafter* "LCI 41st Report"]

41 LAW COMMISSION OF INDIA, 154TH REPORT: CODE OF CRIMINAL PROCEDURE, 1973(1996).

42 REPORT OF THE COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM (2003).

43 *Id.*

44 *Id.*

IV. Courts and Section 497

Section 497 IPC together with Section 198 Cr.P.C. criminalises adultery seemingly to enforce a particular moral position and preserve the institution of marriage by deterring outsiders from destabilising it through wanton sexual feats. This is what the Legislature and Committees tell us, but is this how the offence is viewed by the courts which decide prosecutions brought under Section 497 IPC? Here, I separately consider the decisions of the Supreme Court and the High Court.

1. Supreme Court

Since independence, three decisions of the Supreme Court have considered challenges to the constitutional *vires* of the adultery provisions. Mr. Yusuf Abdul Aziz challenged the exemption from liability made for women under Section 497 IPC, arguing the same was contrary to Article 14 of the Constitution. Having lost at the Bombay High Court,[45] he moved the Supreme Court, and five judges gave the decision in *Yusuf Abdul Aziz* v. *State of Bombay*.[46] The Court unanimously held that the exemption for women was protective discrimination safeguarded under Article 15(3) of the Constitution. Importantly, Mr. Aziz did not impugn the validity of the offence itself.[47]

The next landmark decision was *Sowmithri Vishnu*, delivered by a bench of three judges in 1985. Here, the Petitioner expanded the scope of arguments to impugn the validity of Section 497 as being contrary to Articles 14 and 21 of the Constitution, furthering notions of women as mere chattel.[48] The Court remained unconvinced, and saw these arguments as falling in the realm of policy rather than law.[49]

But this did not stop the bench from engaging with the arguments, providing us with a unique insight into how three judges of the Supreme Court viewed matters of marriage and sexuality. Repelling the contention that exempting women

45 Yusuf Abdul Aziz v. State of Bombay, 1951 (53) Bom LR 736.
46 Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930 [Supreme Court of India].
47 Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930.
48 Sowmithri Vishnu, at para 5-6.
49 Sowmithri Vishnu, at para 7.

from liability violated the equality guarantee, the Court observed that "*it is commonly accepted that it is the man who is the seducer and not the woman*".[50] For the judges, exempting women conveyed the message that "*the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime*".[51] The peculiar structure behind the offence was understandable, because it was an "*offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law*".[52] In consonance with this idea, the Court quashed the adultery complaint since the complainant husband had obtained a divorce from his allegedly adulterous wife.[53]

In *V. Revathi* v. *Union of India*,[54] the Petitioner expanded the scope of her arguments to assail the validity of restrictions placed under Section 198(2) Cr.P.C.,[55] which allow only the husband to initiate a prosecution for adultery committed by his wife and her paramour. In dismissing the Petition, the Court considered Section 497 IPC together with Section 198(2) Cr.P.C. as a "*legislative packet*"[56] designed to "*deal with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit... It does not arm the two spouses to hit each other with the weapon of criminal law.*"[57] Ultimately, the Court concluded that "*even handed justice*" was meted out to both parties.[58]

The Supreme Court thus largely supports the logic offered by Legislature and Committees, putting forward the view that the offence seeks to safeguard the institution of marriage from outsiders. The Court has also explained away the

50 Sowmithri Vishnu, at para 7.
51 Sowmithri Vishnu, at para 8.
52 Sowmithri Vishnu, at para 8.
53 Sowmithri Vishnu, at para 13.
54 (1988) 2 SCC 72 [*hereinafter* "V Revathi"].
55 V Revathi, at para 2-3.
56 V Revathi, at para 5.
57 V Revathi, at para 5.
58 V Revathi, at para 5.

apparent discrimination practised by the provisions, holding that the particular mechanism is based on the twin premise of (i) women being victims and not aggressors, and (ii) preventing the couple from resorting to the criminal law for resolving the disputes.

There are some things that the Supreme Court fails to explain though. For instance, if the offence is about the community protecting the matrimonial home, why restrict prosecutions to private complaints only by the husband of the woman? Further, how can we explain the *proviso* to Section 497, which deems that any sexual intercourse with the wife *with consent or connivance of her husband* is not considered an offence? Ignore this, and the fact that the Court offers no evidence whatsoever to support its rather sexist and generic statements, and you have a convincing alternate argument constructed to repel the opposition which portrays the offence as a relic of romantic paternalism.

2. High Courts

The High Courts of India preceded the establishment of the Supreme Court by around ninety years. This, along with the obviously larger sample set of cases has meant a greater variety of issues have been discussed at this level of the Indian constitutional courts. Upon searching databases for decisions on adultery, one encounters a great deal of case law on the issue of adultery as grounds for divorce. Courts have held consistently that the narrow definition under Section 497 IPC could not be imported for these purposes.[59]

Consider first the issue of consent and connivance alluded to above. Admittedly, if I had my hypothetical wife's consent before I cheated on her, it would not be adultery. But her consent is immaterial here; the section makes material *my* consent to another man for his sleeping with my wife. Now, if we consider this in the backdrop of the consistent theme of women being the victims in adulterous relationships, one would assume the court would insist upon some concrete proof of consent. A slightly taut analogy may also be drawn here with

59 MT Carunya v. S Joseph Chellappa, (1996) 1 MLJ 409; Olga Thelma Gomes v. Mark Gomes, AIR 1959 Cal 451; Samaj Nadar v. Abraham Nadachi, AIR 1970 Mad 434.

the issue of consent in rape cases, where the court insists upon strict proof.[60] In cases under Section 497 though, we find courts readily infer existence of consent from circumstances.[61] In 2007, the Gauhati High Court inferred consent on part of a husband who left his wife alone with her eventual paramour who was a tenant in his house![62]

Making consent of the husband material for prosecution lends greatly to an argument that the offence is merely an enforcement of his rights over the wife, contrary to the views of the Supreme Court. The Bombay High Court has on different occasions expressly approved the view that Section 497 only furthers the husband's private rights. In *Re Shankar Tulshiram Navle*,[63] the Court held that "*adultery is an infringement of the rights of the husband towards his wife, and when the offender has once been convicted or acquitted of the offence of adultery, which consisted of one sexual intercourse, he cannot with impunity commit another offence of adultery under Section 497*." More significantly, in *Yusuf Abdul Aziz* v. *State of Bombay*, Chief Justice Chagla observed:

> Mr. Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that this offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, we hope, when women were looked upon as property by their husbands.[64]

While such direct remarks are not ubiquitous, they significantly damage the assumptions which the Supreme Court proceeded to lay bare in *Sowmithri Vishnu*. Those assumptions of Section 497 furthering community interests of protecting are further dented if we look at how the courts placed great importance upon form over substance when faced with adultery cases. Convictions have been quashed over the procedural defect of the complaint not having been filed by the

60 Kaini Rajan v. State of Kerala, (2013) (9) SCC 113, at para 12.
61 Krishna Chandra Patra v. Tanu Patra, II (1992) DMC 20.
62 Rajesh Choudhary v. State of Assam, II (2007) DMC 735.
63 Re Shankar Tulshiram Navle, (1928) 30 BOM LR 1435.
64 Yusuf Abdul Aziz v. State of Bombay, 1951 (53) Bom LR 736.

aggrieved husband as required by Section 198(2) Cr.P.C.[65] although such an irregularity does not vitiate trial under the Code.[66] It is possible to argue that the refusal to let a conviction stand for a mere procedural defect belies how important the offence is considered by society. However, courts have held such restrictions on initiating prosecutions as sufficient grounds to quash proceedings in other contexts,[67] rendering such an argument open to criticism.

Although adultery has been an offence since 1860, the Law Commission in its 42nd Report observed how prosecutions have been few and far between.[68] The peculiarity of the "*legislative packet*" for adultery has proved a tool for harassment at the hands of irked husbands. While the husband files for divorce against the wife, Section 497 serves as a weapon against the paramour. Courts are cognizant of this; the High Courts have quashed adultery prosecutions citing *mala fides* borne out from the delay,[69] or from the clear lack of material evidence.[70] Thus, even perversely the provisions only serve to further the vested interests of the husband.

V. Distilling the Sound from the Noise

By now, it is clear that there is some dissonance between the purported objective behind Section 497 IPC and how it is being implemented. The purported objective of safeguarding the marriage seems to have been lost in the implementation of what essentially appears to be a tool for husbands to enforce their supposed rights. Here, I question both these objectives. I argue that there exists no empirical data to support the former, and absent such data it cannot be made the basis for criminalising conduct. Such data seems to support the latter disguised objective, which is strongly questioned on grounds of being squarely unconstitutional as per Part III of the Indian Constitution.

65 Sureshchandra Vadilal Shah v. Shantilal Shankarlal, 1968 Cri LJ 117; Mahesh Patel v. State of Chhattisgarh, Crl App No. 01/2005 dated January 11, 2011.

66 Sections 460- 461, Cr.P.C., 1973.

67 Aniruddha Bahal v. C.B.I, 210 (2014) DLT 292.

68 LCI 41st Report, *supra* note 40, at 326.

69 Krishna Chandra Patra v. Tanu Patra, II (1992) DMC 20.

70 Sandwip Roy v. Sudarshan Chakraborty, 2007 (98) DRJ 109.

1. Where is the Proof?

The offence under Section 497 admittedly serves to further a particular moral position. But how does one prove a position is moral? For Professor Dworkin, this conclusion requires reasons and not mere feelings of disgust *per* Lord Devlin.[71] Adultery must also be subjected to the same critical test requiring reasons to deem private consensual sexual activity within adults immoral and not condemn it because of long held prejudices. The reason offered is that it violates the "*sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses.*"[72] Does this transgress the 'seamless web' of the *common morality* of society today?

The 42nd Law Commission Report considered abolition of the offence *too radical* a change and called for a revision of s. 497.[73] The Malimath Committee Report of 2003 stated that "*society abhors marital infidelity*"[74] and recommended the retention of adultery within the penal code with revisions;[75] and these suggested changes were branded "radical" by news items,[76] Echoing Hart and Dworkin's response to legal moralists,[77] one must insist upon these detractors to provide the data upon which their assertions of society "abhorring" adultery are made. Unfortunately, no material is provided. Absent this data, how can we *criminalise* such conduct? This basic flaw in the arguments of Lord Devlin is uncannily repeated. Adulterous relationships may certainly be considered immoral by some, but different moralities coexist in our pluralistic society.[78] This appears to be the position today regarding adultery in India, and thus, the claim that adultery violates a *common* or a *public* morality does not stand.

71 Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75(6) YALE LAW JOURNAL 986, 995-1001 (1966).

72 V Revathi, at para 6.

73 LCI 41st Report, *supra* note 40, at 326.

74 COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REPORT Vol. 1, 190 (2003).

75 *Id.*

76 Shoma A. Chatterji, *The Price of Adultery*, THE TRIBUNE (January 20, 2007), http://www.tribuneindia.com/2007/20070120/saturday/main1.htm.

77 Dworkin, *supra* note 71; H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35(1) UNIVERSITY OF CHICAGO LAW REVIEW 1-13 (1967).

78 Hart, *id.*, at 12-13.

In fact, there is sufficient data across jurisdictions to suggest the contrary. Numbers from 2005 reveal the importance of sexual fidelity in marriage is no longer a preset notion with almost 15 percent people believing so.[79] In India, one may begin with the Delhi High Court which in 2007 cited psychologists who believe that "*there is no single person on earth who does not have an extra-marital relationship-be it sexually or mentally*."[80] Further, the rarity of prosecutions under Section 497[81] is indicative of the way in which society looks at the idea of enforcing this morality.

Here a useful comparison may be drawn with South Korea. In 1953, South Korea joined the list of countries criminalising adultery.[82] The justifications were similar to India: the offence sought to render particular acts of sexual self-determination subservient to societal interests.[83] Prosecutions were also limited by complaints from aggrieved spouses,[84] though no comparable exemption for women existed. Contrary to the Indian experience though, enforcement remained highly active: prosecutors had detained more than 35,000 people since 1985 on adultery charges.[85] On 26 February, 2015, the Constitutional Court of South Korea struck down the provisions criminalising adultery.[86] The reasons behind this were twofold: (a) lack of any public consensus supporting criminalisation of adultery, and (b) falling deterrence visible from the decline in actual prosecutions

79 Durex Global Sex Survey 2005, as sourced from http://web.archive.org/web/20080430082451/http://www.durex.com/cm/gss2005Content.asp?intQid=943& int Menu Open= (last accessed on May 06, 2015).

80 Sandwip Roy v. Sudarshan Chakraborty, 2007 (98) DRJ 109, at para 18 (Delhi High Court) [*hereinafter* "Sandwip Roy"].

81 LCI 41st Report, *supra* note 40, at 326.

82 Article 241, Criminal Act 1953, *available at* http://www.law.go.kr/lsSc.do?menuId=0&subMenu=1&query=%ED%98%95%EB%B2%95#liBgcolor4

83 Sayuri Umeda, *South Korea: Criminal Provision on Adultery held Unconstitutional*, LAW LIBRARY OF CONGRESS: GLOBAL LEGAL MONITOR , March 24, 2015, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404353_text

84 *South Korean Court to Rule on Making Adultery Legal*, THE GUARDIAN, February 26, 2015, http://www.theguardian.com/world/2015/feb/26/south-korean-court-to-rule-on-making-adultery-legal.

85 Jeyup Kwaak 'South Korea Legalises Adultery', WALL STREET JOURNAL, February 26, 2015, http://www.wsj.com/articles/south-korea-legalizes-adultery-1424935118.

for adultery as well as the severity of social censure.[87] Thus, the law was seen as harshly restricting individual autonomy and privacy without furthering the objectives of safeguarding marriage. Perhaps, it is time for a similar review in India?

2. Purporting Invidious Discrimination

Few deny that construing the adultery provisions as tools to further private rights of husbands at the expense of their wives is contrary to the basic constitutional guarantees of equality. Absent the alleged justification of protecting the 'sanctity of marriage', there is "*no legitimate state interest which can justify its* [the state's] *intrusion into the* personal *and private life of the individual*."[88]

The Supreme Court has constructed a rationale to explain what appears at first blush to be a set of peculiar and discriminatory provisions, stating that it protects the sanctity of marriage from outsider, but also from within. But there is an unexplained leap of logic in the rationale *qua* Article 14. How can the Court justify discrimination suffered by one class, i.e. married women, by turning to the discrimination meted out to another class, i.e. their husbands/paramours? Not only this, the private complaint required in India effectively empowers another individual based on his status to restrict the decisions another individual makes pertaining to her private sexual life, constituting an apparent violation of Article 21.

The notion that women are victims of adultery thus requiring the *beneficial* exemption under Section 497 is an oft-repeated assertion which is scarcely critically examined. Do women require this benefit? Feminists would argue such an

86 2009 Hun-Ba 17, (February 26, 2015) [Constitutional Court of South Korea], http://www.ccourt.go.kr/cckhome/comn/event/eventSearch TotalInfo.do? change Event No=2009%ED%97%8C%EB%B0%9417&viewType=3&searchType=1

87 Sayuri Umeda, *supra* note 83.

88 Lawrence v. State of Texas, 539 U.S. 558 (2003). This decision ushered in scholarship considering whether the various state laws criminalizing adultery in the U.S.A. would consequently be rendered unconstitutional. *See*, *e.g.* Viator, *supra* note 6; Cass Sunstein, *What did* Lawrence *hold? Of Autonomy, Desuetude, Sexuality and Marriage*, UNIVERSITY OF CHICAGO JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 196 (2003).

interpretation of the position of women is demeaning and fails to consider them as equally autonomous individuals in society.[89] Further, upon chasing the argument we find that this idea of *benefit* comes from comments made in 1837 by Lord Macaulay on the "*the condition of women in this country*".[90] Thus, this conception of benefit is in fact the imposition upon women in independent India of views held by British men from nearly two hundred years ago. Such enforcement of antiquated social mores has met recent judicial criticism. In 2007, the Supreme Court declared a Punjab law prohibiting women from serving alcohol in the state unconstitutional.[91] Notably, it observed that this criteria "*having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century*".[92]

Criminalising adultery can perhaps be justified as an effort on behalf of the state to be in line with an *aspirational morality* represented by sexual fidelity in marriage; however it has been proven to be an ineffective means of achieving the same. Perhaps, as observed in the Report prepared by the Madhava Menon Panel,[93] attention may be turned to other means to realise this aspirational morality rather than resorting to the criminal law for this purpose. Thus, it appears Lord Macaulay is having the last laugh, for more reasons than one.

VI. Conclusion

This essay questioned the criminalisation of adulterous behaviour, in theory and practice. I questioned the argument that adultery disrupted a *common morality*. Criminalising conduct, solely on this basis, was again rather improper. A questionable theoretical platform was found complemented by statutory provisions which severely punished adulterous conduct of a particular kind. However, these appear seemingly contrary to gender equality, and despite approval by the Supreme Court their constitutional validity remains suspect. More importantly, data revealed

89 *See generally*, S. Mayeri, *Reconstructing the Race Sex Analogy*, 49 William & Mary Law Review 1789 (2008).

90 LCI 41st Report, *supra* note 40, at 326. *See also*, *Yusuf Aziz* [Bombay High Court].

91 Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1.

92 *Id*.

93 *Sandwip Roy*, at para 20.

how the offence of adultery has been quite ineffective in achieving any social control in terms of preserving the sanctity of marriage.

The Law Commission in its 42nd Report sought to remove the exemption for women and make the law gender neutral.[94] The Malimath Committee Report agreed as it failed to see the rationale in retaining the 'benefits' to women.[95] These changes would rid the Supreme Court decisions of their moorings though, as spouses would no longer be "*disabled from striking each other with the weapon of criminal law*."[96] Perhaps after that, adultery would finally be reconsidered as an offence. Such private, consensual actions are not within the domain of criminal law and criminalising such conduct remains unwarranted.

94 LCI 41st Report, *supra* note 40, at 327.

95 COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, at 191.

96 V. Revathi, at para 4.