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The price of adultery

The Indian law on adultery, drafted more than a century ago, makes it a punishable offence for men alone. The recent proposal to punish women too has generated much debate. Shoma A. Chatterji looks at the archaic law in the light of changing social mores

How fair is the National Commission for Women's (NCW) stand against the Union Government's attempt to amend Section 497 of the Indian Penal Code regarding the reverse gender bias contained in the country's age-old law on adultery? It is proposed to include women within the purview of Section 497 as against its present rules that expressly state that a married woman cannot be punished even as an abettor in a case of adultery. Whether the woman is a victim of adultery or is herself an adulteress, she is completely free of being penalised for her misdemeanour. Should this bias continue into 2007?

The question is a tough one to answer. The bonds of marriage have a religious, social and legal sanction in India. Thus, any sexual liaison that defies this bond spells noncompliance with social norms. It is a violation of the sacred marriage vows religiously and morally held to be sacrosanct and is punishable under the laws of

the land. Bigamy for all non-Muslims is a crime vide Section 494 of the IPC. Why should women remain immune to the law today?



Illustration by Aditi Chahar

What is adultery

Section 497 of the Indian Penal Code (IPC) defines "adultery" thus: "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 498 is stated as "Enticing, taking away or detaining a married woman." The ingredients of this offence are:

- Any person, man or woman, must entice another woman;
- He must know that the woman is the wife of another man;
- He must entice her from the person who is in charge of her and takes care of her;

- The enticement must be within the intention that she should have illicit intercourse with another person;
- Any person who conceals or detains any woman with that intent will also be punished.

Feudal mindset

The punishment for the offence is imprisonment up to a period of two years or fine or both. In 1959, Justice Gajendragadkar said that Section 498 was an anomaly in modern times. He opined that 'detention' is a crime for the man never mind whether the woman has consented or not because, according to the Supreme Court, the gist of the offence committed by the adulterous man is 'not intended to protect the woman from unlawful enticement and detention' but is actually intended to protect her 'husband's exclusive right' over his wife. Thus, the law clearly shows that the adulterous man must be punished because, by detaining and enticing another man's wife, he is depriving the 'husband of custody and control over his wife'. Thus, in effect, keeping women beyond the purview of the law is actually to 'benefit the husband' so that he can regain custody and control over his wife by getting the adulterous man punished.

This also implies that the wife who had consented to an adulterous relationship does not have the freedom to come out of her marriage and make a new life with her new partner even if she is oppressed in her present one. In other words, this suggests that she is brought back to the husband she wants to leave but fails to because the legal statutes, by simply ignoring her because she is a woman, force her to stay in a marriage she may not want to remain in. Adultery committed by an Indian woman, across boundaries of language, culture, education and economic status, may often be more a question of seeking security and self-esteem than love or sex beyond the parameters of marriage. It might perhaps be a search for confidence and self-assurance which a boring marriage to an indifferent spouse has destroyed.

Another clause in Section 498 states that the adulterous man (other than the husband of the woman) should "entice" her from the person who is "in charge of her and takes care of her." This assumes that no married woman is capable of taking charge of her own life and taking care of herself. Granted that this may have been true in 1847 but it is certainly not true in 2007.

Gender bias

In 1985, Nalini Chidambaram and Seita Vaidalingam, two lawyers, challenged the law on adultery drafted in 1860. They argued that this 'protective' provision in the IPC was sexually discriminatory and therefore, unconstitutional. Their charge was based on the fact that this law was drafted more than 100 years ago when men could have many wives and some of them were neglected in favour of others within the *zenana*. Times have changed. No woman who participates in an adulterous relationship either through consent or by active involvement should be allowed to remain beyond the purview of the law.

The lawyers added that including women within the law would actually help women to free themselves from a marriage where the husband has committed adultery with another woman. It would offer her the choice of avoiding the social stigma that is attached to the wife of an adulterous husband, not only in her marital home, but also in her natal one. Alternately, if she has entered into an adulterous relationship with a man, immunity from penal action would not necessarily ensure her freedom from greater torture and humiliation within her own home by the members of her own family. A case in point is Aparna Sen's path breaking film *Paroma*, where the adulterous housewife (Rakhee) is ostracised within her own home when they learn about her affair through some revealing photographs published in an international magazine!

Four years after the Justice Malimath Committee suggested a radical change in the law on adultery in 2003, things remain pretty much the same. This Committee recommended amendments to the provisions of the IPC that disallow prosecution of women for offences under the law.

Psychobabble

Psychology has a completely different story to tell. Psychologist Lucy Gray says that there is no single person on earth who does not have an extra-marital relationship – be it sexually or mentally. "If anybody denies it, he/she is either a hypocrite or not worth it." In the dictionary of psychology, adultery is neither a sin nor a sacred act. "It is more a matter of body than of the heart. It is first and last, a satisfaction of the sexual urge. Sexual fidelity is not the same as love. An adulterer may be as genuinely in love with his spouse as she is in love with him," says Mahesh Gandhi, homeopath-psychiatrist who specializes in anxiety disorders.

Psychologists attribute compatibility or drive orientation as vital tools for a successful marriage. A partner with a predominant sex drive would be a terrible mismatch for a partner bereft of such feelings. Economic, emotional and intellectual incompatibility could also lead to marital disharmony and adultery. Different social upbringing could throw up differences in the values each partner holds for permissive behaviour and sexual taboos and unless they arrive at a common understanding about each other's needs and adjustments, problems are bound to follow. Sublimation of an instinctual drive like sex requires tremendous exertion of will few are capable of. Adultery, therefore, could be a healthy and natural outlet for many.

Prohibitions and taboos on adultery, written or customary, are a part of the marriage code virtually in every society. Adultery seems to be as universal and, in some instances, as common as marriage itself. The attitude may differ from culture to culture. Under the ancient Hindu law, marriage was an indissoluble sacrament. Not even a wife's adultery unattended by degradation could sever the marital tie and dissolve the marriage. According to the modern Hindu code, divorce will be granted to either offended party, but not for occasional violations.

Libertarian view

Marriage, today, as a man-woman relationship, has evolved from a socially useful and effective institution into a free-floating, personal relationship. Curious strains of feminism, individualism and vaguely Marxist influences have conspired to 'privatise' marriage into just another set of choices. The libertarian view that governments have no entitlements to pry into the private lives of their citizens, much less regulate them, is a concept that finds favour with young couples of the 21st century. Yet, it is inconsistently libertarian, as true libertarianism would insist that individuals also pay for the consequences of their choices.

The principle of equality before the law requires the revision of the existing law on adultery by including both partners within its scope. It should include both the man and woman in an adulterous relationship because adultery means departure from marital fidelity and both partners in a marriage are equally responsible for any violation of marriage vows. At the same time, every immoral act cannot be considered a crime because there are areas in which legal provisions and moral doctrines may not coincide and may even be in conflict. If legal and moral doctrines appear to be in conflict because principles of morality are changing, it is necessary to bring about amendments and revisions in the old legal principles to fit into changing moral doctrines.

Making of the code

According to Macaulay's Code, the first draft of the Indian Penal Code framed in 1837, adultery was not a crime in India either for men or for women. His argument was that in the social infrastructure that existed in those times, the secondary and economically dependent position of women was not conducive to punish adulterous men. So far as women went, Macaulay's argument was that considering the social *purdah* among Hindus, especially among aristocratic, high-caste and affluent families, the question of adultery among women did not arise. Besides, Macaulay was convinced that since polygamy was an everyday affair at that time, the wife was socially conditioned to accept her husband's adulterous relationship. She neither felt humiliated nor was it a culture shock for her.

The Law Commission of India under the British rule declared adultery a crime committed only by men. The law on adultery was drafted in 1860. It did not agree with Macaulay's stance that any punishment for adultery would be detrimental for the dependent wife and would threaten the unity of the family. The Law Commission's stand was based on the premise that adultery struck at the very core of the family unit, eroded all close ties within the family, and all that the family as society's basic social unit stood for. However, the Commission maintained that only male offenders would be punished under this law. Women offenders would be kept beyond the purview of the legal machinery. This was based on the reality that women were already living in humiliating and oppressive conditions within the family.

42nd Law Commission, 1973: In view of the changed status and position of women since the days of Macaulay, "there is hardly any justification for not treating the guilty pair alike." It suggested that the sexist disparity in the law on adultery be removed by bringing women within the scope of the law. Another suggestion made was to reduce the previously fixed duration of imprisonment for men from five years to two years. Facts reveal that the 1847 Law Commission's stand on the wretched position of women was not wrong because between 1847 and 1973, a span of 126 years, few men, if at all, were imprisoned for adultery. Though women were kept beyond the legal implications of adultery, few of them dared to take their adulterous husbands to court. Women's immunity from any penalisation for adultery had not, in any way, contributed to a rise in their social, economic or legal status. So, where was the point of penalising men alone and keeping women outside the purview of the law?

NCW response

The Justice Malimath Committee, assigned the task of suggesting reforms in the criminal justice system of the country, in 2003 suggested the suitable amendment of Section 497 of the IPC to the effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery." The Committee expressly stated: "The object of this Section (Section 497 of the IPC) 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)."

Recently, the Centre asked the National Commission for Women, (a statutory body for women in the Indian Union established under specific provisions of the Indian Constitution) to review Section 497, which does not envisage prosecution of the wife by the husband for adultery. The NCW, however, has struck down this recommendation to revise the law and bring women within its ambit.

In response, it has made the following observations:

- Adultery should be converted from a criminal offence, as it currently stands, to a civil offence.
- This should be done only after a national consensus on the issue.
- Women should continue to remain free from criminal action for adultery, as they now are, because they are always victims and can never commit any crime.
- Section 198 of the Criminal Procedure Code should be amended in order to allow women to file complaints against unfaithful husbands and prosecute them for their promiscuous behaviour.