

**CONSTITUTIONAL VALIDITY OF THE PROVISION OF
ADULTERY IN THE IPC: A THOROUGH ANALYSIS OF THE
ORIGIN & HISTORY OF SECTION 497 OF THE IPC**

Muskan Srivastava & Saman Asif

School of Law, KIIT University, Bhubaneswar

This article defines adultery which is a voluntary sexual intercourse of the spouse with another person and also differentiates it from the definition of adultery in The Indian Penal Code in which it is an offence committed by a man with a married woman against her husband. It discusses the roots where adultery was classified as an offence in different religions like Hinduism, Christianity and Islam. Section 497 of the Indian penal code is discussed in detail which includes ingredients and scope of this section. Here it is discussed how adultery is a barrier for married couples in upholding their matrimonial vows. The article critically analyzes the current provision adultery in the Indian Penal Code and identify it to be constitutionally invalid on valid grounds that it violates Article 14, Article 15 and Article 21 of the constitution. Through the analysis it has been observed that there is a need to amend this law as per the change in the socio- economic status of the woman since the law was initially framed in the 19th century which is supported by a survey which was conducted among 150 people of an area.

INTRODUCTION

Marriage has been a sacred tie since the union of man and woman got recognition in the society. The origin, concept and purpose of marriage can be traced in religious books. Different religions define marriage and the duties of husband and wife towards each other differently. According to the Veda , marriage is a union between a masculine and feminine entity with commitments to pursue *dharma* (righteous way of living), *artha* (possessions), *kama* (physical and other desires) and *moksha* (the liberation) in unison.¹ In Bible it is said that the god instituted marriage as a covenant between one man and one woman, a lifelong union of two partners created in God's image to govern and manage the earth for him. The concept of marriage in bible was first recognized with the union of Adam and Eve. Eve was created from the ribs of Adam so that he could share his deepest thoughts, desires and together they can build and raise a family.² On the other hand Buddhism and Islam share completely different views on marriage. In Quran marriage is a legal contract between a

¹ Paras Diwan, *Law of Marriage and Divorce* 15 (Universal Law Publishing Co., Delhi, 5th edn., 2008).

² What is marriage? by Graemme Marshall, available at: <https://lifehopetruth.com/relationships/marriage/what-is-marriage/> (Visited on November 16, 2017).

man and a woman. Both the groom and the bride has to consent the marriage, and the consent obtained has to be freely on their own will. In Islamic law marriage is known as *nikaah* an Arabic word which originally means “sexual intercourse”. Islamic marriage has been defined as a civil contract, the objective of which are two:

- i. legalization of sexual intercourse
- ii. procreation of children³

While the Buddhist views regarding marriage is comparatively liberal, they consider marriage as a secular affair and not a sacrament.

“Chains do not hold a marriage together. It is threads, hundreds of tiny threads, which sew people together through the years.” - Simone Signoret⁴

The concept of marriage derived from different religions, gives paramount importance to loyalty of husband and wife towards each other. The word ‘Loyalty’ includes dedication, honesty and most importantly not developing any sexual relation with any person other than their spouse. Contrary to what is expected from a husband and wife, some partners are not able to remain loyal to each other in all ways, consequently they end up destroying their marriage. One of the most common cause of this destruction is *Adultery*.

Adultery is defined as ‘a consensual sexual intercourse between a married person and a person of the opposite sex during the subsistence of marriage’.⁵ This extramarital sexual intercourse willfully and maliciously interfere with marriage relations and violates the conjugal rights . The word adultery is derived from the old french scholarly from *adultere* which literally means “violation of conjugal faith.”

HISTORY OF ADULTERY AS AN OFFENCE

The history of Adultery can be traced from the treatment of adultery as an offence in different religions and before any code of law was formed in any country, the laws were based on the religious beliefs of the people. Historically many cultures have considered adultery a heinous crime, for which punishments were often severe in nature like death penalty, mutilation and torture, usually the woman were the only ones charged for the act but in some places men were also held liable for the act. Manusmriti was the eternal code of conduct of ancient Indians and the general public followed it religiously which say - “day and night woman must be kept in dependence by the males of their families and if they attach themselves to sensual enjoyments they must be kept under ones control.”⁶ Hinduism

³ Paras Diwan, *Law of Marriage and Divorce 22* (Universal Law Publishing Co., Delhi, 5th edn., 2008).

⁴ <https://www.brainyquote.com/topics/marriage> (Visited on November 16, 2017)

⁵ David Hay (ed.), *Words and Phrases Legally defined Volume 1 76* (Lexis Nexis Butterworths, New Delhi, 4th edn.)

⁶ Hinduism and Adultery, available at www.advocatekhaj.com/library/lawareas/divadultery/1.php?Title=Adultery%20Divorce&STitle=Hinduism%20and%20adultery (Visited on November 16 ,2017).

has always strictly condemned adulterous liaisons and considered it a moral sin. Individuals who have been involved in illicit or treacherous relationships had to face a lot of public disrespect and humiliation. As Hinduism considers marriage to be a sacrosanct association, it becomes necessary to maintain the purity of marriage and to uphold marital vows.

In Islam, The Quran says “And do not approach unlawful sexual intercourse (*zina*). Indeed, it is ever an immorality and is evil as a way”⁷ Christianity is one of the major religion of the world with having highest number of believers. Therefore Christianity views on adultery must have played an important role in shaping the history of adultery as an offence. For Christians adultery is a sin of a married man having sexual relations with anyone other than his wife or a married woman having sexual relations with anyone other than her husband. Christianity believes that the marriage should be held in honour by all and the marriage bed should be kept undefiled, for God will judge fornicators and adulterers⁸. The word ‘Marriage bed’ can be interpreted as the sexual relation between husband and wife, keeping it undefiled means not developing any sexual relation with any one else.

PRESENT LAW RELATING TO ADULTERY IN INDIA

Section 497 of The *Indian Penal Code, 1860* defines Adultery as:

“Whoever has *sexual intercourse* with a *person* who is and whom he know 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 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 wife shall not be punishable as an *abettor*.

The ingredients establishing the offence of adultery are as follows:

i.) *Sexual intercourse must be committed with the wife of another man-*

Proof of sexual intercourse is essential for the commitment of the offence of adultery. It is true that this can be rarely proofed by direct evidence because precautions are taken to screen it from the view of others. But in evaluating the husband’s accusation against his wife of adultery, the entire background and the context in which such accusation is made is highly relevant. When the parties concerned are sophisticated, conclusions cannot be arrived at only mere basis of opportunities for sexual intercourse, such an inference may be more readily be possible when dealing with persons whose social image is less sophisticated. The fact of adultery has, therefore, to be inferred from the totality of circumstances that led to it, by fair inference and as a necessary conclusion. What those circumstances are cannot be laid down universally . Nonetheless, the circumstance must be as such should

⁷ The Quran 17:32

⁸ What does bible says about Adultery?,available at :
www.christianbiblereference.org/faq_adultery.htm (Visited on November 17, 2017)

lead the guarded discretion of a reasonable unjust mind to that conclusion.⁹It is not to be reached by rash and intemperate judgement or upon assurances that are equally capable of two interpretations. Prosecution has to prove sexual intercourse and further that the accused knew that the lady was lawfully wedded wife of the complainant.¹⁰The fact that that wife has been found in a restaurant cabin with her blouse and brassiere unhooked and the alleged adulterer holding her breasts in his hands is not by itself sufficient to prove adultery. It is possible that it was preliminary step to adultery but it cannot be said that the incident proved adultery.¹¹

ii.) *The person must have knowledge or belief that the woman is married and is the wife of another man-*

This does not mean that the accused should know who the husband of the woman is, for that is necessary is that he should know that she has a husband though the accused may not know him. But the presence of this knowledge or reasonable belief must be established by the prosecution. Since it constitutes mens rea, it follows that the prosecution must show facts from which the court could legitimately inferred that the accused had reason to believe that the woman was married. If he was a friend of the family, or lived in the neighbourhood it is natural to infer such knowledge. But if he was stranger then the prosecution may have to rely upon relevant circumstances.¹² When the accused had neither the reason to believe the concerned woman to be the wife of someone, nor there is any proof of sexual intercourse, charge of adultery is not made out.¹³

iii.) *Such sexual intercourse must be without the consent or connivance of the husband-*

Another requirement of law, and one which has also to be satisfied by the prosecution, is that the adultery complained of had not been consented to or connived at by the husband, this is necessary, for the offence is intended to preserve is bed unsullied, and if he elected otherwise, the law cannot help himself. Here the principle of *volenti non-fit injuria* applies.¹⁴Applying the same principle if the husband has connived at the act of his wife, he cannot later turn her away for the act in which he was a willing party. Consent of the husband can be expressed or implied, the consent can be obtained before the commission of the act or after the act as consent subsequently given will at least amount to condonation of the acts, and it as in other respects the same legal effects¹⁵

iv.) *Such sexual intercourse must not amount to rape-*

⁹ Hari Singh Gaur, *Penal Law of India volume 4* 4656 (Law Publishers, Allahbad 11th edn., 1998)

¹⁰ *A.S. Puri v.. K.L Ahuja* (AIR 1970 Del 214).

¹¹ *P. v. P.* (AIR 1982 Bom 498).

¹² Hari Singh Gaur, *Penal Law of India volume 4* 4659 (Law Publishers, Allahbad 11th edn., 1998).

¹³ A.N. Saha *Criminal Reference* 1681 (Eastern Law House, Kolkata, 6th edn.,2009).

¹⁴ *C.S Subramaniam v. Unknown* (AIR 1953 Mad 422)

¹⁵ Hari Singh Gaur, *Penal Law of India volume 4* 4660 (Law Publishers, Allahbad 11th edn., 1998)

The offence of adultery by its very nature connotes that it is sexual intercourse between two consenting adults, the woman although married must be a willing partner to the sexual intercourse. Here the consent of the married woman is of primary importance to constitute the offence of adultery and not rape. However, if the accused has sexual intercourse without the consent of woman, it would amount to rape which is a much graver offence and he will be punished under section 376 of the Indian Penal Code. Here the consent or connivance of the husband is immaterial.¹⁶

SCOPE OF THE SECTION 497

The scope of this section is limited to the act of a man alone. That is to say, adultery is limited only by a man who has sexual intercourse with the wife of another man without the other man's consent or connivance.¹⁷ The crime of adultery is a crime of one man against the another man, here the offender is the third party. The case against the other man is instituted only when the husband complains regarding the same, else there is no action taken. In the act of adultery 'husband' is the victim whose marital right is violated by the another man who engages himself in sexual intercourse with his wife. Wife is not held liable for the act of adultery even as an abettor, which discharges her from all the guilt of the act in which she equally participates. The contemplation of the law is that the wife, who is having an illicit relationship with another man, is a victim and not the author of the crime. A woman cannot be charged and prosecuted for committing adultery. She is completely immune to the charge of adultery.¹⁸ The offence of adultery is not committed by a married man who has sexual intercourse with an unmarried woman, or with a widow, or with a prostitute, or even with a married woman whose husband consents to it. Under this section wife can neither file a criminal suit against her husband nor against the 'other woman'. The reason of not including such act within the definition of "adultery" is that it will be a crusade by a woman against a woman.¹⁹

ADULTERY: A GROUND FOR DIVORCE IN INDIA

Adultery is one the principal grounds of matrimonial relief. One act of adultery is enough to constitute a matrimonial offence. An attempt to commit adultery must be distinguished from adultery and will not of itself be a sufficient ground for judicial separation.²⁰ There are various causes for which a partner goes out of a marriage and indulge in sexual intercourse with some other person, like loneliness, communication barrier, lack of love and affection, a poor sexual relationship and lack of intimacy. When a partners commits an act a adultery, probably do not contemplate the effects of this act has on them and their partner as it might be in the heat of the moment. The partner committing the adultery may

¹⁶ Dr K I Vibhute (ed.), *P S A Pillai's Criminal Law* 551 (Lexis Nexis , Gurgaon, 12th edn.)

¹⁷ KD Gaur, *Criminal Law Cases and Materials* 637 (Lexis Nexis, Haryana, 7th edn., 2013).

¹⁸ *W Kalyani v. State through Inspector of Police* (AIR 2012 SC 497).

¹⁹ *Sowmithri Vishnu v. Union of India* (AIR 1985 SC 1618).

²⁰ Asutosh Mookherjee, *Marriage, Separation and Divorce* 190 (Kamal Law House, Calcutta, 4th edn., 2008).

go in intense guilt and depression and in certain cases the betrayed partner may also use violence to seek revenge from their spouse or the sexual partner of their spouse.²¹ When such act of adultery is committed the respective partners might not want to continue their marriage and would probably seek for divorce so they can free themselves from an unwanted relationship. Therefore, one can seek divorce under the provisions of different personal laws in India, under section 15(1) of The Indian Divorce Act, 2001, Under Section 13 (I) of The Hindu marriage Act, 1955, under section 32(d) of The Parsi Marriage and Divorce Act, 1936 and under section 27 (i) of Special Marriage Act, 1954.

CONSTITUTIONAL VALIDITY OF SECTION 497 OF THE INDIAN PENAL CODE

The constitutional validity of this section has been challenged in several cases and Women's rights activists have also time to time again opposed the retention of the provision relating to adultery. The provision, though are purportedly enacted for protecting women and make only the man in more circumstances liable, in fact only help reiterate the social belief that women are weak, have no mind of their and hence, must be protected by men. The definition of adultery in The IPC is in fact most offending to the concept of equality of sexes guaranteed under Article 14 and Article 15 (1) of the constitution. If a man has sexual intercourse with a married woman, without the consent or connivance of her husband, then he commits adultery. A reading of the section itself clearly shows that the entire essence of the offence is that the wife is the property of the husband and such property cannot be trespassed upon or encroached upon by another man, without the consent of the man concerned. It treats women as no better than chattels. It is obscurantist to say the least, for first, it gives power to the husband over the body of the women as much as, if the husband gives his consent or connives with the person and gives permission to have sexual intercourse with his wife, the offence of adultery is not committed. Secondly, the man alone who has had intercourse with the married woman is punished. This has been justified on the laudable ground that women are weak and hence should be protected. It negates the woman as a thinking, discriminating and responsible person capable of taking responsibility for her actions. If the purpose of the provision is to protect unwitting, gullible women, it is strange as to why the provision does not make sexual intercourse by a married man with an unmarried an offence. In such a situation, both the wife of the man and the unmarried women are victims of the male dominated patriarchal society, and a man should equally be punished in a situation like this. Further, the husband alone has a right to prosecute the man who has adulterous relationship with the man. On occasions more than one, the constitution *vires* of section 497 was challenged in the Supreme Court on the ground, inter alia, that it:

i) By making only a man responsible for adultery and mandating a court that the adulteress wife be not punished even as an abettor discriminates in favour of women and against men

²¹ *Balku v. Emperor* (AIR 1938 All 532)

only on the ground of sex, and thereby goes against the spirit of equality embodied in the constitution.;

ii) By conferring upon the husband the right to prosecute the adulterer but not conferring a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery and her husband who has committed adultery with another woman, makes an irrational classification between women and men.

However, the Supreme Court rejected all the arguments advanced against adultery to uphold its constitutional *vires*. It opined that 'adultery', which deals only with 'an outsider' to matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit, is a beneficiary provision for a woman. The apex court also ruled that Section 497 does not violate the gender equality clauses - **Article 14 i.e., Equality Before Law, Article 15 i.e. Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth and Article 21 i.e. Protection of Life and personal Liberty** of the Constitution.²²In *Sowmithri v. Union Of India* it was stated that the law does not provide freedom to husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being an offender. The Legislature is entitled to deal with evil where it is felt and seen most :A man seducing the wife of another.²³Section 497 also violates article 21 as it restricts one's liberty to make decision of their own body.

CONCLUSIVE ANALYSIS

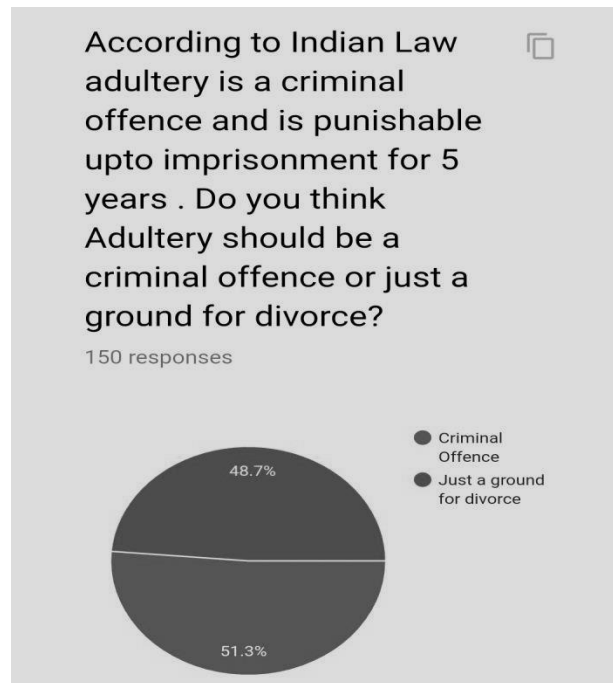
Adultery has been prevalent in the society as an offence against marriage from time immemorial. It originates as an offence from beliefs and practices of different religions and the same can be observed in religious books. The partner committing adultery hurt their partner by breaching their matrimonial ties and they consequently damage their matrimonial home. All the ingredient of adultery must be present to constitute it as a criminal offence in section 497 of the Indian Penal Code, (45 of 1860). Section 497 of The Indian Penal Code, has various drawbacks as it has a very limited scope. A survey was conducted among people of different backgrounds, which included aspiring Lawyers, Law professors, Engineers, Doctors etc. Questions were raised about the current provision of adultery in The Indian Penal Code, that pointed out the drawbacks of this section and also challenged its constitutional validity.

Following are the results obtained from the survey:

1.

²² Dr K I Vibhute (ed.), *P S A Pillai's Criminal Law* 552 (Lexis Nexis , Gurgaon, 12th edn.)

²³ *Sowmithri v. Union Of India* (AIR 1985 SC 1618)



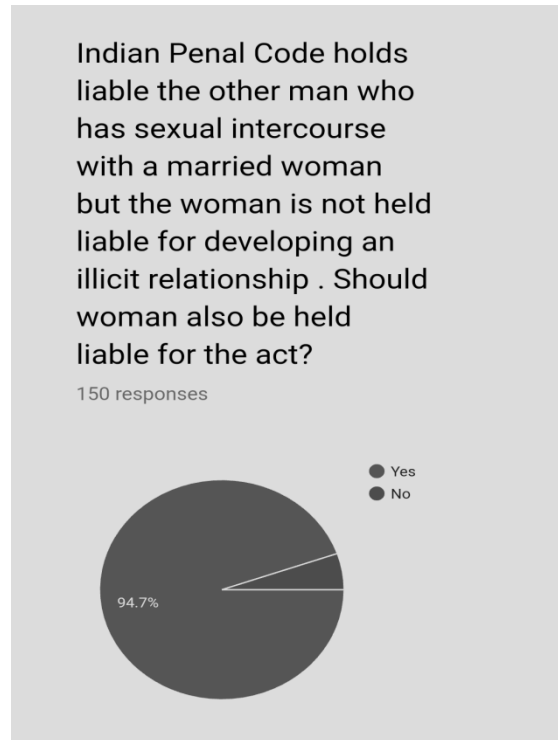
As observed from the above statistic, majority of people still believe that adultery should be a criminal offence in India but, there is a considerable percentage of people who opined that adultery should just be a ground for divorce. This clearly shows that there are people who don't think this section should be a part of the Indian Penal Code.

The reasons due to which adultery should not be a criminal offence is that a person has the right to life , right to bodily autonomy according to provision of fundamental rights established in The Indian Constitution²⁴ but, making the act of adultery a criminal offence is taking away the right to control on one's own body. If two individuals are having consensual sexual intercourse with each other, then they are indulging in this activity at their own will which is not harmful to either of them, the only damage being caused here is that the matrimonial tie is being broken, but in the case of non- consensual sex, forced sexual intercourse i.e. rape where the damage is not only being caused to the body of the woman but her self-esteem is being harshly damaged leading her in a state of mental trauma, depression and affects her entire life. Ironically the consequences of rape is of much higher intensity than the consequences of adultery but, there is not much difference in the grievousness of the punishment. By keeping only the difference of two years in both the offences, this law reduces and mocks at the harshness and the inhuman act that is involved in the offence of rape.²⁵

²⁴ The Indian Constitution ,1949 (Act 101 of 1949)

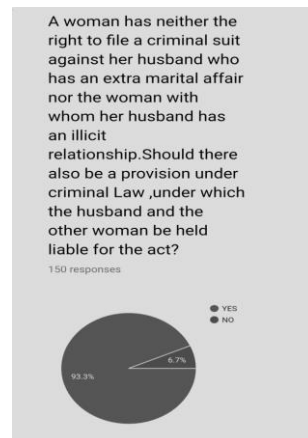
²⁵ Indian Penal Code,1860 (Act 45 of 1860)

2.



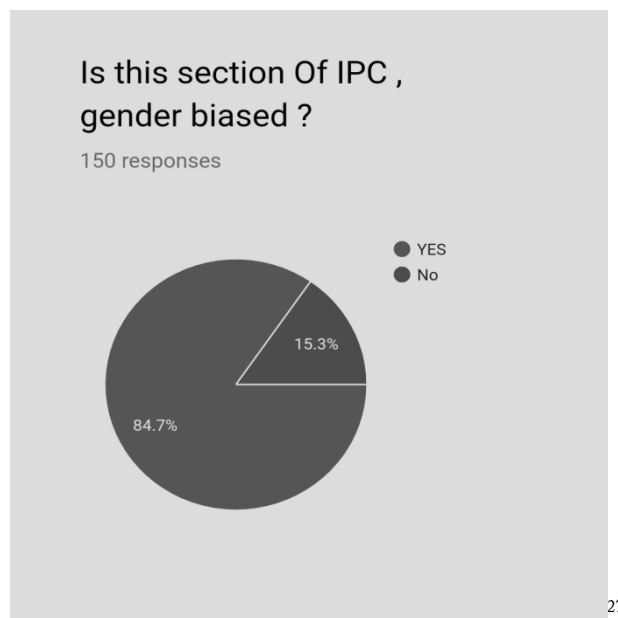
As per the above statistic 94.7% of the people believes that the married woman who has an illicit relationship should also be held equally liable for her act. The reason being it is the duty of the spouse to protect their matrimonial home. If any of the partner breaches their matrimonial ties, they are more at fault than the third person because they have the knowledge of the consequences of their action from which the intention can be presumed. Therefore it can be established that there is *mens rea* and *actus reas* on the part of the spouse, the two essentials that constitute a crime.

3.



As observed above 93.3% of the people agreed that there should also be a provision that makes husband and the other woman equally liable for the act of adultery. The reasons being that the section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'. It was urged that the section may, at first blush, appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of 'Romantic Paternalism' which stems from the assumption that women, like chattels, are the property of men.²⁶

4.



The above statistic clearly depicts that 84.7% of the people believes this section to be Gender biased. This section violates the provision under Article 14 and Article 15 of the Indian Constitution. It promotes irrational classification between men and women. India has always been a patriarchal society, where the position of man has always been higher than that of the woman and the section 497 act as a fodder to this patriarchal mentality. The section in the name of protecting woman which our society thinks to be a woman who is docile, incapable of thinking and making her own decision takes away her right of making her husband and the other woman liable for the act and also by not holding her accountable for her act offends her capability of being a rational human being

²⁶ *Sowmithri v. Union Of India* (AIR 1985 SC 1618)

²⁷ Adultery in India, available at : <https://docs.google.com/forms/d/1EWOYNITYIJJJ1-CQU6V38K4HP3UNQnRWzWqYYM4WIGg/viewanalytics> (Visited on November 20,2017)

While keeping in mind the change in the socio-economic background of the men and women in the present society, the Law makers must reconsider the reasons for which this law was framed the way it is. In the 19th century the authors of the code had observed that the condition of the women in this country is, unhappily very different from the women of England and France; they are married while still children: they are often neglected for other wives while still young. They share attention of husband with several rivals. To make laws for punishing the inconsistency 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. We are not so visionary as to think of attacking, by law, an evil so deeply rooted in the manners of the people of this country as polygamy. **We leave it to the slow, but we trust the certain, operation of education and of time.** But while it still exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law.”²⁸ It has been one fifty seven years since this Law was framed, and now after one and a half century the status of women has undergone a drastic change. Keeping in mind the growth in the literacy rate and the change in the socio-economic status of the women, the present law makers must either decriminalize the act of adultery as it has been abolished from countries like Singapore, Hong Kong and Malaysia or make necessary amendments in this section likewise the provision of adultery in the Penal Code of Korea and Greece.²⁹ The section 497 can be amended in the following way-

“Whoever has sexual intercourse with a person whom he knows or has to reason to believe to be the spouse of another person, without the consent or connivance of that person, is guilty of the offence of adultery and is punishable with imprisonment of either description for a term which may extend to five years or with fine, or with both”

²⁸ V.R. Manohar and Dr. Avatar Singh (eds.), *Ratanlal and Dheeraj Lal's The Indian Penal Code* 1011 (Lexis Nexis Butterworth, Nagpur, 2010)

²⁹ KD Gaur, *Criminal Law Cases and Materials* 637 (Lexis Nexis, Haryana, 7th edn., 2013).