CHAPTER-IV

SEXUAL OFFENCES RELATING TO MARRIAGE

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AN OVERVIEW

The awareness regarding sexual offences against women has been only around few kinds of sexual offending like rape and sexual abuses or sexual exploitation. Even only rape finds an express mentioning in the Indian Penal Code, 1860 as the only sexual offence. It finds its place under the heading sexual offences in Chapter XVI which deals with offences affecting human body. Does this mean rape is the only offence what the author of the code could perceive as sexual offence? Obviously there remain other offences which are in essence sexual offence in the true sense of the term. It has been observed earlier that consent which plays a significant role in the determination of whether a particular sexual conduct is a sexual offence or not. Thus there remains an area where sexual access may be gained by the people by inducing a belief of lawful marriage, in fact when there was no marriage at all in the eye of law. Sexual access may be gained by going through a fraudulent ceremony of marriage. In either case the person would gain sexual access and commit sexual intercourse with the woman victim who is unaware of the legality of the marriage.

There remains another area where the victim gives the access to her body to a person without knowing that he is already married. In all these cases it is always the woman victim losses her precious thing.[1] In some cases she losses even more than what is lost by a victim of rape. She looses her virginity, she looses her faith and confidence reposed in the person. In some cases she is left with the children born to them and the person is releases himself from all responsibility. In all this cases the elements are common; one her consent in that relation which legalizes[2] sexual intercourse which was obtained by fraud or deceit and sexual intercourse which was the intention of the offender. In all this cases she becomes victim because of her sex and because of the sexual desire of the offender. The present chapter therefore would make a through study on the offences which have been kept under in Chapter XX of the Indian Penal Code, 1860, under the heading offences relating to marriage, and examine them as sexual offences against women where they are essentially a sexual offence.

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[1] Her virginity.
[2] Or at least implies.

Every society tries to protect the institution of marriage which besides serving so many purposes implies sexual intercourse and legalizes it. This being the only legal mode whereby the civilized society recognizes sexual intercourse between two a person, sexual relationship out side marriage is criminalized most part of the world leaving certain countries. The criminal law which was handed to us by the Britisher's now applicable in our country declares sexual relation out side marriage as an offence though in a peculiar form. Sexual intercourse by a person with a married woman which is known as adultery has already been omitted from the penal law in England.

But in India it is applicable with all sorts of its peculiarities. An attempt has been made to examine the provision from a gender neutral point of view as well as form the point of view of sexual offences against women. Apart from these the present chapter examines the present legal policy with regard to the sexual offences relating to marriage from the socio-economic point of view and consequences of the continuance of such policy.

A. UNLAWFUL OR DECEITFUL MARRIAGE

a) Cohabitation Caused by a Man Deceitfully Inducing a Belief of Lawful Marriage

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage is a punishable offence under the Indian Penal Code, 1860.Under section 493 of the Code, every person who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

This section punishes a man either married or unmarried who induces a woman to become, as she thinks, his wife, but in reality his concubine.[3] The form of marriage ceremony in our country depends on the race or religion to which the person entering into the marriage belongs. When races are mixed, as in India, and religion may be changed or dissembled, this offence may be committed by a person falsely causing a woman to believe that he is of the same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which according to the law under which she lives, is valid.[4]

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[3] Ratanlal & Dhirajlal. "The Indian Penal Code," 28th Edition, Reprint .(Wadhwa & Company. Nagpur. 1999), p. 665.

[4] Id: See also Bodhisatwa Gautam v Subhra Chakraborty (1992) SCALE 228.

Deceitfully causing a false belief in the existence of a lawful marriage and cohabitation or sexual intercourse with the person causing such belief are the two essential ingredients required to be proved in order to make a person liable under the section. The essence of the offence under section 493 consists in the practice of deception by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him even though, infact, it is not so.[5] To prove deception it must be conclusively established that the petitioner either dishonestly or fraudulently concealed certain facts, or make false statement knowing to be false. In **Sammun v State of M P**,[6] it was held that, where the accused promising to marry the woman and passing her to others as his wife does not come under the ambit of section 493 IPC. In **Moideenkutty Haji and others v Kunhikoya and others**,[7] it was held that where the allegation was that though the parties were not husband and wife they had sexual union late hours in the night for a pretty long time, and what was alleged in the complaint was only a promise to marry in future, and there was the further allegation that one day they went for registering the marriage, but the petitioner ran away from there and even thereafter she was submitting herself to him regularly for liaison, these facts could not at any rate attract section 493 IPC. In **Amruta Gadial v Trilochan Pradhan and another**,[8] a man and a woman exchanged garlands, the man promising to marry formally, and had sex as a result of which the woman became pregnant. It was held that the exchange of garland did not amount to falsely inducing the woman to believe that she was married to the man, therefore section 493 is not attracted.

It can be seen that in all the aforesaid cases the accused could not be held liable under section 493 IPC, as there was no element of deception, yet in all these case the element of cohabitation or sexual intercourse was present. One may assume that the cohabitation or sexual intercourse in the above cases was not the result of the deception caused by the alleged accused. But these things are regularly happening, and sometimes the victim also becoming pregnant and totally helpless. If one gives a deeper insight in these cases one can see that there were either a breach of promise to marry or if not at least some course or conduct which led woman victim to believe that the accused will not leave her and as a result the victim allowed the accused a free access over her body. Consequently the accused cohabited with the woman victim. Thus this section can not protect this kind of victims, instead, it is because of this provision the accused

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[5] Raghunath Pandey v State AIR 1957 Ori 198.
[6] 1988 CrLJ 498.
[7] AIR 1987 Kerala, 184, FB.
[8] 1993 Criminal Law Journal 1022 (Ori).

is exonerated from liability as because the offence contemplated in section 493 has been produced and placed as an offence against marriage and it requires the element of deception and resulting cohabitation. Further this section leaves a pertinent question as to whether this section can punish a person if he contracts a marriage, which later turns out to be illegal? It is submitted that to cover the aforesaid situations it is necessary to amend the section by widening its range to cover more area like the above. We may think of creating another offence whereby breach of promise and its resultant cohabitation would become a punishable sexual offence against women.

It may be noted that in **Kartick Kundu**'s case,[9] the court made it clear that the offence under section 493 IPC may also be punished as rape under Clause (4) of section 375 IPC. But this will also not cover the aforesaid cases as because this clause makes it an offence of rape when one commits sexual intercourse (fourthly) with her (victim's) consent, when, the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.[10] **Bodhisatwa Gautam v Subhra Chakraborty,**[11] involved a situation of this kind where the Supreme Court held that rape is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, normally, the right to life contained in Article 21.

b) Fraudulent or Mock Marriage

i) The Offence Defined

Marriage ceremony fraudulently gone through without a lawful marriage by a person is punishable under the Indian Penal Code 1860. Under section 496 of the Code whoever, dishonestly or with a fraudulent intention goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. In other words it may be said that section 496 of the Code punishes fraudulent or mock marriages.

Section 496 applies to cases in which a ceremony is gone through which would in no case constitute marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage, or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose.[12]

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[9] 1967 Criminal Law Journal 1411 (Cal).

[10] See Clause Fourthly of section 375 of the Indian Penal Code, 1860.

[11] (1996) 1 SCC 490.

[12] Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition, Reprint , (Wadhwa & Company, Nagpur,1999), p. 672.

ii) The Ingredients

This section requires two essentials: a) dishonestly or with a fraudulently going through the ceremony of marriage and b) knowledge on the part of the person going through the ceremony that he is not thereby lawfully married. In **K C Chakraborty and another v Emperor,**[13] it was held that to constitute the offence of fraudulent marriage , the prosecution must prove that the accused knew that there was no valid marriage and he had gone through a show of marriage with a fraudulent or ulterior motive. In this case the accused by representing that he belonged to a higher Brahmin class and married a woman of higher Brahmin class. The marriage resulted in the excommunication for the woman from her own caste. The man was charged under section 109[14] read with 496 and section 419[15] read with section 34 and section 496 and convicted by the trial court. But on an appeal the Calcutta Court set aside the conviction under sections 109 read with section 496 and affirmed the conviction under section 419 read with section 34 of the Indian Penal Code.

iii) Section 493 and 496 of the IPC

The two sections are somewhat alike.[16]The difference appears to be that under section 493 deceptions is requisite on the part of the man, and cohabitation or sexual intercourse consequent on such deception. The offence under section 496 requires no deception, cohabitation, or sexual intercourse as a sine qua non, but a dishonest or fraudulent abuse of the marriage ceremony. In the latter case the offence can be committed by a man or woman, in the former, only by a man.

iv) Section 494 and 496 of the IPC

An offence under section 494 is different from an offence under section 496 IPC. If the accused intends that there should be valid marriage and honestly goes through the necessary ceremonies during the life time of the other spouse, then it may be a case under section 494 of the Code. But if the accused only intends that there should only be a show of marriage and dishonestly and fraudulently goes through the marriage ceremony knowing fully well that he is not legally married thereby, there is an offence under section 496 of the Code.[17]

It is to be noted that where the second marriage is performed fraudulently, complaint can be made by the person so deceived and not by the first regular wife.[18] Where the accused married for the second time during the pendency of special appeal against the decree of divorce in violation of section 15

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[13] AIR 1937 Cal 214 (FB).
[14] The section deals with the offence of abetment.
[15] The section deals with the offence cheating by false personation.
[16] Id.
[17] Kailash Singh,v State, 1982 Criminal Law Journal 1005 (Raj).
[18] Ibid.

of the Hindu Marriage Act 1955 but without concealing the fact of pendency of the appeal from the girl or her parents, no conviction could be entered under section 496, IPC, as the act of the accused was neither dishonest nor fraudulent.[19]

B) ENTICING OR TAKING AWAY OR DETAINIG WITH CRIMINAL INTENT A MARRIED WOMEN

a) The Offence Defined

Under our Penal Code enticing or taking away or detaining with criminal intent a married woman is a punishable offence. Section 498 of the Indian Penal Code 1860 therefore says that whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. In other words section 498 punishes a person who takes away, entices, conceals or detains a married woman with intent that she may have illicit intercourse with any person[20]

b) Ingredients

There are three ingredients of this section. The ingredients are;

i) The offender must take or entice away or conceal or detain the wife of another person from such person or from any other person having the care of her on behalf of the said person.

ii) He must know or had reason to believe that the woman is the wife of another person; and

iii) The taking, enticing, concealing or detaining of the woman must be with intent that she may have illicit intercourse with any person.

It is clear that if the intention of illicit intercourse is not proved the presence of the first two ingredients would not be enough to sustain the charge under section 498 IPC.[21] Sections 361 [22] and section 366,[23] of the IPC may be

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[19] Prassanna Kuman v Dhanalaxmi, 1989, Criminal Law Journal 1829 (Mad).

[20] K. D. Gaur, "Criminal Law: Cases and Materials," 3rd Edition, (Butterworths, 1999), p.-611.

[21] . D. Gaur, "Criminal Law: Cases and Materials," 3rd Edition, (Butterworths.1999), p-613.

[22] Section 361 reads: Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

[23] Section 366 reads: Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion,

compared with this section which may come into operation when the former two sections fail to apply, but only in respect of a married woman.

c) Section 366 and section 498 of the IPC

For an offence under section 366 there must be kidnapping or abduction as defined by the Code, while under section 498 there need be no compulsion or deceit, but the woman must be a married woman. Under section 366 the intention of the person kidnapping or abducting is to compel the woman afterwards to marry any person against her will, or to force or seduce her afterwards to illicit intercourse. Section 498 applies to cases where the object of the taking, or enticing it that the woman may have illicit intercourse with some other person, even though, as generally happens, she is quite aware of the purpose for which she is quitting her husband, and is assenting party to it.[24] From the above it appears that mere elopement with an adult unmarried woman is no offence as because the law leaves this area. Again, an offence punishable under section 498 is a minor offence as compared with an offence punishable under section 366 of the IPC.

d) Section 498 Makes the Wife, the Property of the Husband

It is to be noted the offence under section 498 IPC has been designed to protect the interest of the husband, as it is only the husband who can institute the prosecution proceedings for offences committed under this section.[25]The gist of the offence under this section consists in the deprivation of the husband of his custody and his proper control over his wife with the object of having illicit intercourse with her.[26] Even the consent of the woman does not give the accused any protection from the mischief of this section if the accused by his action and conduct, though not directly, had encouraged the woman, to leave her husband's place. A reading of the cases **Alamgir and another v State of Bihar**,[27]**Adikan Samal v Madhabanada**,[28] **Ram Narain**,[29] and **Narayan Chandra Das**,[30] also

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induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

[24] Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition, Reprint (Wadhwa & Company,Nagpur,1999), p 675: Also note that in the case of adultery the wife can not be punished as an abettor. It is therefore inconsistent to punish her as an abettor of the minor offence mentioned in section 498 IPC: See Phalla v Jiwan Sing (1871), PR No 6 of 1871; Mohun v Gunsham,(1871),PR No 6 of 1871.

[25] As per section 198(2) of the Code of Criminal Procedure, 1973, it is only the husband who can initiate proceedings.

[26] Bhola Nath Mitter , (1924) 51 Cal 488, Cited from Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition, Reprint ,(Wadhwa & Company,Nagpur, 1999), p 675.

[27] AIR 1969 SC 346.

[28] 1973 Criminal Law Journal 1735 (Orissa).

[29] 1982 Criminal Law Journal,NOC 179 (ALL).

[30] 1984 Criminal Law Journal, NOC 101(Cal).

brings out the proposition that as the object of this section is to protect the right of the husband, it is no defence to plead the willingness on the part of the wife to stay away from the husband or lack or direct evidence of enticement or illicit intercourse. On these matters direct evidence is hardly possible and an inference regarding these had to be drawn from the conduct, facts, evidence and circumstance of the case.

When construed in this way one must see that this section also leaves a possibility of punishing an innocent where the married woman voluntarily leaves her husbands place for some or other reasons and stays away from him and takes the shelter of an innocent person. The innocent man may be prosecuted as because the married woman's consent is immaterial for the purpose of this section. The law contained in section 498 IPC thus ignores the entity of the wife. It may be submitted that in view of the change in the general outlook and social status of woman and emphasis for equal rights and obligations for both husbands and wives a rethinking of the legal policy in this regard is called for.

C) BIGAMY

a) Bigamy Defined

Marrying again during the lifetime of husband or wife is an offence under our Penal Code. Section 494 of the Indian Penal Code 1860, therefore, contemplates that whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

However this section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction. Nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within the time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.[31] Section 495 of the Indian Penal Code,1860 says that whoever commits the offence defined in section 494, having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description which may extend to ten years; and shall also be liable to fine.

[31] Exception to section 494 of the Indian Penal Code, 1860.

It may therefore, be said that any person, who having a husband or wife living, marries another in any case in which such marriage would be void by reason of its taking place during the life time of such wife or husband, commits the offence of bigamy and shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. The scope of the section is comprehensive and it is applicable to members of all communities living in India, for instance, for Hindus,[32] Christians,[33] Parsis,[34] and Muslim women; except Mohammedan males, who may marry and have up to four wives at a time according to the Muslim Personal Law.[35] To avoid the hardship in genuine case, the section has made two exceptions when bigamy is not punishable;(a) if a person marries after the first marriage having been declared void by a court of competent jurisdiction, or (b) the former spouse has been continually absent for seven years and has been unheard of by the other party.[36] It is also to be noted that there must be at the time of second marriage a previous valid and subsisting marriage. If the first marriage is not a valid marriage, no offence is committed by contracting a second marriage.[37]

Section 495 is an aggravated form of the offence of bigamy. Where there is concealment of the fact of a former marriage from the person with whom the subsequent marriage is contracted; the punishment under section 495 may extend up to ten years of imprisonment and fine.[38]

b) Bigamy and Discrimination in Law

The law as it is contained in sections 494 & 495 of the Indian Penal Code 1860 is applicable to members of all communities living in India, for instance, for Hindus,[39] Christians,[40] Parsis,[41] and Muslim women; except Mohammedan males, who may marry and have up to four wives at a time according to the Muslim Personal Law. The expression in section 494 of the Code that "whoever, having a

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[32] Section 17 of the Hindu Marriage Act 1955 states: Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provision of section 494 and 495 of the Indian Penal Code .1860 shall apply accordingly: Also note that Hindus include Sikhs,Jains and Buddhists vide Article 25 Explanation II to the Constitution of India.

[33] See Christian Marriage Act 1872.

[34] See Parsi Marriage Act 1936.

[35] K. D. Gaur, "Criminal Law: Cases and Materials," 3rd Edition, (Butterworths,1999), p-603.

[36] See Exception to section 494.

[37] See AIR 1963 Himachal Pradesh 16.

[38] Ibid.

[39] Section 17 of the Hindu Marriage Act 1955 states: Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provision of section 494 and 495 of the Indian Penal Code, 1860 shall apply accordingly: Also note that Hindus include Sikhs, Jains and Buddhists vide Article 25 Explanation II to the Constitution of India.

[40] See Christian Marriage Act 1872.

[41] See Parsi Marriage Act 1936.

husband or wife living, marries *in any case in which such marriage is void by reason of its taking place during the life of such husband or wife,"* makes it dependent on the personal laws of the parties. Consequently it discriminates between different communities. The result is that it is applicable to all with the exception of Mohammedan males.

In **State of Bombay v Narasu Appa Mali,**[42] where an anti bigamy law was questioned on the ground of Article 14 and 15 for excluding Muslims to practice monogamy and permitting them to continue polygamy. The court held that Article 14 does not lay down that any legislation that the state may embark upon must necessarily be of an all-embracing character. The state may rightly decide to bring about social reform by stages and the stages may be territorial as they may be community wise. From these considerations it follows that if there is a discrimination against the Hindus in the applicability of anti bigamy law, that discrimination is not only based upon ground of religion. Equally so, if the law, with regard to bigamous marriages is not uniform the difference and distinction is not arbitrary or capricious but it is based upon reasonable grounds. Article 15(1) further emphasizes the fact that any discrimination which is based only on ground of religion, race, caste, sex or place of birth can never be reasonable one, but assumes that there may be discrimination on other grounds. This the case of this kind as the court emphasized and Article 14 is not offended by the anti-bigamy law. It is not obligatory for the state always and in every case to provide for social reform and welfare by one step. So long as the legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it can not be said that Article 14 is offended. The legislature may have thought that Hindu community was riper for the reform in question. It was for the legislature to take into account the social custom and beliefs of the Hindus and other relevant considerations before deciding whether it was necessary to provide for special provisions in dealing with bigamous marriages amongst them.

Even the above expression which requires that the second marriage must be shown to be void for applicability of section 494 does not apply to all Hindus uniformly because of custom. **In Surajmani Stella Kujur (Dr) v Durga Charan Hansdah,** [43] the marriage of the appellant filed a complaint in the Court of Chief Metropolitan Magistrate, New Delhi, stating that her marriage was solemnized with the respondent according to the Hindu rites and customs. Alleging that the respondent had solemnized another marriage with accuse no 2, the complainant

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[42] AIR (39) 1952 Bom 84.
[43] (2001) 3 SCC 13.

pleaded that the accused husband not having obtained any divorce, his action was in contravention of section 494IPC.It was conceded by the appellant that the parties are tribals and governed by their tribal custom and usage. The complaint was dismissed by the trial court holding "there is no mention of any such custom in the complaint nor is there evidence of such custom. In the absence of pleading and evidence reference to book alone is not sufficient." The High Court held that in the absence of notification in terms of section 2(2) of the Hindu Marriage Act no case for prosecution for the offence of bigamy was made out against the respondent because the alleged second marriage can not be termed to be void either under the Act or any alleged custom having the force of law. On an appeal the Supreme Court observed that:

> *"Where parties are governed by any custom, it has to be shown that the custom renders the second marriage null, ineffectual and non est. Mere pleading of existence of a custom stressing monogamy is not enough. Whether appellant nevertheless entitled to maintenance, succession and other benefits must be decided by filing separate suits."*[44]

As between the Mohammedan males and females one can see the resultant discrimination that the law is applicable to Mohammedan women whereas it is not so in the case of Mohammedan males as they can marry four wives at a time. Even among the Mohammedan women the law is not uniformly applicable when one sees that a nikah marriage or sagai or pat[45] marriage falls within the purview of this section; but not jinghara.[46]

c) The Contrast that Public Law Dependent on Civil Law

Our law relating to bigamy bears an unusual and uncommon feature which is not generally seen in case of other public law. The uncommon and unusual feature is that it is dependent on the civil law namely personal law of the parties. The expression civil law in the present context refers to both substantive as well as procedural law relating to the private rights of citizens in relation to each other and is distinguishable from the public law, such as international law, or revenue law and even criminal law where one of the parties is the state.[47] Civil law thus relates to various aspects of personal relations, such as, contracts, property, marriage and inheritance and the like and this was the meaning of civil law given

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[44] Ibid.: See, Para 14.

[45] Karsan Goja: Bai Rupa, (1864) 2 BHC (CrC) 117 : Cited from Ratan Lal & Dhirajlal, "The Indian Penal Code," 28 Edition, Reprint,(Wadhwa & Company, Nagpur,1999), p-667.

[46] Gifal v Phio,(1888) PR No. 25 of 1888 : Cited from Ratan Lal & Dhirajlal, "The Indian Penal Code," 28 Edition, Reprint,(Wadhwa & Company, Nagpur, 1999), p-667.

[47] D. Basu, "Commentary on the Constitution of India," 7th Edition, Vol- E, (Kamal Law House,1991), p-155.

by one of the authors of the Constitution, **Shri Alladi Krishna Ayyar**.[48]It is pertinent to mention here that the constitution says that our country is secular state.[49] The criminal law has nothing to do with the personal law of the parties as because it is secular in nature- this is generally accepted by almost all jurisdictions with the exception of certain Muslim countries.[50] Further more the Constitution in its directive policy of the state mandates that the state shall endeavour to secure for the citizens a uniform civil code through out the territory of India;[51] and also the constitutional obligation to abide by the constitution and respect its ideal and institutions; to renounce the practices derogatory to the dignity of women.[52] With all these contrasts one sees three common things; a) the lack of political courage, b) the fear of losing Muslim votes, c) stiff opposition from the radicalists, d) the thinking of state within the state and its tolerance by the polity and e) the cold storage of uniform civil code.

d) Bigamy and the Judicial Behaviour

i) Second Marriage Must be Void by Reason of its Taking Place During the Life of the Husband or Wife.

For the applicability of section 494 IPC it is necessary to prove that the second marriage is void by reason of its taking place during the life of the husband or the wife. If the marriage is not a valid one according to the law applicable to the parties no question of its being void by reason of its taking place during the life of the wife or the husband of the persons arises. This proposition was laid down by the Supreme Court in **Bhaurao Shankar Lokhande v State of Maharashtra**,[53] where the Court observed the following:

> *"To constitute an offence of bigamy the marriage must have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the purpose that the parties be taken to be married will not effect a marriage between them. Where the ceremonies performed are not prescribed by law or approved by custom, the marriage is not a valid marriage and so it is no marriage in the eyes of law to hold a person liable under section 494."*[54] .

The second marriage must be shown to be void for applicability of section 494 therefore. But this does not mean that if the second marriage is void under the personal law of the parties, section 494 would apply, rather it has to be proved that the second marriage is void by reason of being taking place during

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[48] See Constituent Assembly Debates, vol 7, at p-549.
[49] See the preamble of the Constitution of India.
[50] With the exception of certain Muslim countries.
[51] Article 44 of the Constitution of Inda.
[52] See Article 51A of the Constitution of India.
[53] AIR 1965 SC 1564.
[54] Ibid.

the life of such husband or wife.[55] In other words it must be born in mind for the applicability of section 494 IPC that the real reason for the voidness of the second marriage is the subsisting of the first marriage.

ii) Proof of Second Marriage

Admission of marriage by the accused is not evidence of it of it for the purposes of proving marriage in an adultery or bigamy case.[56] Thus where the second Hindu marriage was not proved by showing saptapadi and homam, the mere production of a marriage certificate under section 16 of the Special Marriage Act, 1954 would not be sufficient to prove that the second marriage performed validly by performing all the essential ceremonies of a valid marriage. The mere fact of subsequent registration of the second marriage does not prove the validity of the second marriage held in **Baby Kar v Ram Rati**.[57] In **Priya Bala Ghosh v Suresh Chandra Ghosh**,[58]where the second marriage was performed according to the Arya Samaj Custom and it was pleaded that accordingly only three and half rounds of sacred fire were complete the marriage but it was held that without sapatapadi the marriage was not complete. The Supreme Court further observed that:

> *"The admission of accused can not in law be treated as evidence of the second marriage having taken place, in adultery or bigamy case; and that in such cases it must be proved by the prosecution that the second marriage as a fact has taken place after the performance of the essential ceremonies."*[59]

These decisions are bound to be criticized on many grounds as it shows the mere observance of the law with flaws. Perhaps the courts were obliged to take the view they have taken in aforesaid cases because of the expression "solemnized" in section 7 of the Hindu Marriage Act,1955 and the inhibition contained in section 50[60] of the Indian Evidence Act 1872 which forbids taking into consideration even the opinion of a person with special means of knowledge to show that two persons were always received and treated as husband and wife by their friends and relatives so far offences under 494 and 495 of the IPC is

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[55] Sarala Mudgal v union of Inida (1995) 3 SCC 635.
[56] AIR 1966 SC 614.
[57] 1975Cr LJ 836 (Cal) : See also Chandra Bahadur, 1979 CrLJ 942(Sikkim).
[58] (1971) 1SCC 864.
[59] Ibid.
[60] Section 50 reads as: When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the exercise of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on that subject, is a relevant fact. Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act 1869, or in prosecutions under sectios 494,495,497 or 498 of the Indian Penal Code 1860.

concerned.[61] No answer is coming from the legal policy or the judiciary what if one deliberately keeps a small lacuna, e.g, instead of taking the seven steps, takes only six steps while celebrating the second marriage. In such a case he can easily avoid the penalty prescribed by these sections even though by doing so he will be ruining the lives of two girls. This was what exactly happened in **Raj Kumari Kalawati**,[62] where in a case of bigamy the court came to the conclusion that the second marriage was invalid as one of the two essential ceremonies of the customary marriage were not performed. The court held that having so concluded the court could not proceed to convict the accused under section 494 of the IPC. This also reflects to what extent the present law relating to bigamy deserves to be blamed as a bad law. If one compares our law relating to bigamy as interpreted by the courts, the British law appears to be a shade better than our laws relating to bigamy,[63] Under the British law, whoever being validly married goes through a ceremony of marriage with another person during the life time of his or her spouse commits the offence of bigamy. It does not matter even if the second ceremony turns out to be invalid on grounds of other than bigamy.[64] If we are to effectively root out polygamy, we must amend section 494 in such a way that any one who goes through a form of marriage during the lifetime of his or her spouse will come within the mischief of the offence of bigamy.[65] We have also to delete from the proviso to section 50 of the Indian Evidence Act 1872, the last portion which says "or in prosecutions under sections 494, 495 497 or 498 of the Indian Penal code."[66] It is also felt that section 493, 494, 495 and 496, IPC, which have an element of cheating in them and affect unsophisticated rural women more than women in urban areas, should be made cognizable so that these poor women could get justice without being required to engage lawyers at their own cost.[67]

It is heartening that the courts are also changing their view point. In **Indu Bhagya Natekar v Bhagya Pandurang Natekar**,[68] the court held that it is not correct to say that in every case of bigamy, unless the second marriage can be proved by bringing in the evidence of the performance of ceremonies itself, a

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[61] R. Dev, "Offences Against Women," 1985 Criminal Law Journal, at pp 9-16: See also Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition, Reprint ,(Wadhwa & Company,Nagpur, 1999), p. 668.

[62] 1992 CrLJ 1373 (All).

[63] Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition, Reprint , (Wadhwa & Company,Nagpur,1999), p. 668.

[64] The British law is contained in section 57 of the Offences Against Persons Act 1881:

[65] Supra note 63 at p. 668.

[66] A similar recommendation was made by the National Committee on the Status of Women.

[67] Supra note 61 : See also Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition, Reprint ,(Wadhwa & Company, Nagpur, 1999), p. 668.

[68] 1992 Criminal Law Journal, at p. 601 (Bom).

conviction under section 494 is virtually impossible. The accused can still be convicted even if there is other reliable evidence to establish the charge. Of late in Gopal Lal v State of Rajashtan,[69] the Supreme Court also came out with this proposition that charge of bigamy is not effected by the validness of the second marriage under section 17 of the Hindu Marriage Act 1955, consequently one can not say that the second marriage being void section 494 IPC will have no application. But then the recent trend of the Highest Court shows that it is moving in opposite direction. In Santi **Deb Berma, Appellant v. Smt. Kanchan Prava Devi, Respondent,** [70] where the accused had been alleged to have contracted a second marriage, during the subsistence of his former marriage. Both the parties were Hindus. Performance of saptapadi could not be proved by the prosecution. The High Court convicted the accused for bigamy. On an appeal the Supreme Court held that no plea that accused's marriage was performed as per custom which dispensed with saptapadi. Oral evidence and letters to effect that accused and his alleged second wife were living as husband and wife is not sufficient to draw inference as to performance of ceremonies essential for valid marriage, therefore the accused is entitled to be acquitted.[71]

iii) Device to Bypass the Anti Bigamy Law

To by pass the anti bigamy law certain people started the practice of back door bigamy by converting to another religion to get the benefit of the personal law which is based on some particular religion. This type of practice can be traced back to late eighteenth century India.[72] In **Re Ram Kumari,**[73] where a Hindu wife became converted to the Muslim faith and then married a Mohammedan, it was held that her earlier marriage with a Hindu husband was not dissolved by her conversion. She was charged and convicted of bigamy under Section 494, of the I.P.C and also that there was no authority under Hindu Law for the proposition that an apostate is absolved from all civil obligations and that so far as the matrimonial bond was concerned, such view was contrary to the spirit of the Hindu law. In **Nandi alias Zainab v. Crown,**[74] where Nandi, the wife of the complainant, changed her religion and became a Mussalman and thereafter married a Mussalman named Rukan Din. She was charged with an offence under Section 494, of the Indian Penal Code. It was held that the mere fact of her conversion to Islam did not dissolve the marriage which could only be dissolved

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[69] (1979) 2 SCC 170: AIR 1979 SC 713.
[70] AIR 1991 SC 816.
[71] Ibid, Para 6 & 7.
[72] As per only the reported cases.
[73] (1891) ILR 18 Cal 266.
[74] ILR (1920) 1 Lahore 440: (AIR 1920 Lahore 379).

by a decree of Court. **Emperor v. Mt. Ruri,**[75] was a case of Christian wife. The Christian wife renounced Christianity and embraced Islam and then married a Mohammedan. It was held that according to the Christian marriage law, which was the law applicable to the case, the first marriage was not dissolved and therefore the subsequent marriage was bigamous.

Smt. Sarla Mudgal v. Union of India and Others,[76] is the well known case where the Supreme Court considered four petitions which were filed under Article 32 of the Constitution and disposed of together since they relate to the legality of contracting a second marriage by a Hindu husband after embracing Islam.[77] The common questions for consideration before the Apex Court were:

a) whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise second marriage?

b) Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continue to be Hindu?

c) Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code?

After examining a number of cases,[78] where one of the partners, either husband or wife after renouncing their original religion embraced another faith and contracted a second marriage, the Court said:

> *"It is, thus, obvious from the catena of case law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses' converts and the other refuses to do so. Where a marriage takes place under Hindu Law the parties acquire a status and*

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[75] AIR 1919 Lahore 389

[76] 1995 SC 1531: (1995) 3 SCC 635.

[77] Petitioner 1 is the President of "KALYANI" – a registered society, which is an organisation working for the welfare of the needy families and women in distress. Petitioner 2, Meena Mathur was married to Jitendra Mathur on 27 February 1978. Three children were born (two sons and a daughter) of the wedlock. In early 1988 Jitendra solemnized a second marriage with one Sunita Narula alias Fatima after they converted to Islam and adopted Muslim religion. According to the petitioner, conversion of her husband to Islam was only for the purpose of circumventing the provision of section 494. Petitioner 3 Geeta Rani married to Pradip Kumar according to Hindu rites in 1988 and thereafter ran away with one Deepa and after conversion to Islam marries her. It is stated that the conversion of her husband to Islam only for the purpose of facilitating the second second marriage.Petitioner 4 Susmita Ghosh was married to GC Ghosh on 10th May 1984 who on 20 April 1992 asked his wife for a divorce(mutual) and told her that he had embraced Islam and would soon marry one Vinita Gupta. The petitioner moved the court that her husband be restrained from entering into a second marriage. Rather interestingly Sunita alial is also the petitioner in Writ Petition 347 of 1990. She contends that she along with Jitender Mathur who was earlier married to Meena Mathur embraced Islam and therefore got married. A son was born to her. She further states that after marrying her, Jitender Prasad, under the influence of her first Hindu wife gave an undertaking on April 28, 1988 that he had reverted back to Hinduism and had agreed to maintain his first wife and the three children. Her grievande is that she continues to be Muslim, not being maintained by her husband and has no protection under either of the personal laws.

[78] Re Ram Kumari (1891) ILR 18 Cal 266; Budansa v Fatima (1914) 22 IC 697; Nandi alial Zainab v Crown AIR 1920 Lah 379; Sayeda Khatoon alial A M Obadiah (1945) 49 Cal WN 745.

certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage."[79]

As regards the contention that a convert to Islam and his or her non Muslim is governed by Muslim personal law and not by Hindu law the Court said that:

"A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, I.P.C. The second marriage of an apostate-husband would also be in violation of the rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry against without getting his earlier marriage under the Act dissolved. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as such would be void."[80]

The observation of the court that matrimonial dispute between the apostate and his first wife can not be decided on the basis of personal law but on the basis of justice, equity and good conscience is really commendable as it would go long way in ameliorating the plight of the Indian women resulting from imbalance and lacuna in some of our laws.

As regards the plea advanced by the accused that having embraced Islam, one can have four wives irrespective of the fact that his first wife continues to be Hindu, their Lordship held that such an argument is untenable and said that:

"It is obvious from the various provisions of the Act that the modern Hindu Law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under Section 13, of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate

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[79] 1995 SC 1531, para 14.
[80] Ibid, Paras. 23 &24.

would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the provisions of the Act and as such would be non est."[81]

In this above case the Apex Court went on to assert that this type of practice of back door bigamy is violative of justice, equity and good conscience. It also stressed the need of having a uniform civil code and observed:[82]

"Ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. 'But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression.' Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalize the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about the comprehensive legislation in keeping with modern day concept of human rights for women. The government may also consider feasibility of appointing a Committee to enact Conversion of Religion Act, immediately, to check the abuse of religion by any person. The law may provide that every citizen who changes his religion cannot marry another wife unless he divorces his first wife. The provisions should be made applicable to every person whether he is a Hindu or a Muslim or a Christian or a Sikh or a Jain or a Buddhist. Provision may be made for maintenance and succession etc. also to avoid clash of interest after death. This would go a long way to solve the problem and pave the way for a unified civil code."[83]

iv) Bigamy and Irrational Punishment

The present legal policy relating to bigamy punishes an offender with imprisonment of either description for a term which may extend to seven years, and also fine.[84] When the fact of former marriage is concealed by the offender, he may be punished with imprisonment of either description for a term which may extend to ten years, and also fine.[85] It is not clear what amount of fine that may be imposed on the offender. It is to be noted that the offender of the offence of bigamy virtually destroys the life of two different women. If these women have

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[81] Ibid, Para 17.

[82] Id: The court , while allowing the petitions, asked the Government through the Prime Minister to have a fresh look at Article 44 of the Constitution and endeavour to secure for the citizens a uniform civil code throughout the territory of India vide constitutional mandate under Article (para 36). The courts directive for a uniform civil code evoked a lot of resentment amongst the Muslim and finally the court left the matter to the good sense of the government for its implementation.

[83] Id: As per Justice R.M Sahai, Paras 45,46, 47.

[84] Section 494 of the Indian Penal Code 1860.

[85] Section 495 of the Indian Penal Code 1860.

their children then the problem becomes more for them. In the Indian condition where a woman is totally dependent on the husband, one can see the misery of the women concerned in such cases. We must also admit the fact that economic dependence on the husband makes their case worse; irrespective of the fact whether she is the first or the second wife. Another problem is that the first legally wedded wife gets the property of the husband. The husband can be sent to jail and fined under the present legal policy. But this would not console the victim of bigamy. The present policy is also silent as to what amount of fine may be imposed and also whether it shall be handed over to the victim or victims. The present legal policy in this regard may therefore, be described as accused centric as because it fails to take account the miseries of the victims of bigamy, especially their economic plight. The present policy also operates with the assumption as if there is one victim i.e. the first wife.[86]

It is submitted that here we should think of introducing compensatory jurisprudence, to ameliorate the misery of the victims, the first as well as the second wife. Compulsory registration of marriage and pre-registration verification of the male person is also suggested as a measure of prevention of the recurrence of the offence. Uniform Civil Code with regard to marriage, divorce, inheritance has been suggested by many including our judiciary. But until that stage arrives we may opt for economic sanction against the offender. The policy may also prescribe for the attachment of the valuables and properties and rational distribution of the same among the victims of bigamy. In order to attract Section 494 IPC the prosecution has to prove that the second marriage was validly performed as per the customary rights of either party under their personal laws. If there is any lapse in following the customary rules, the second marriage would be regarded as void. It is not always easy to prove long after the marriage that all the rituals were duly performed. Thus the second wife will be denied the right to receive maintenance. To overcome these practical difficulties a suitable provision be incorporated to the effect that if the man and the wife were living as husband and wife for a reasonably long period they shall be deemed to have married in accordance with customary rites of either party thereto.[87] This shall be rebuttable presumption and the finding shall not be binding in civil proceedings.

D) ADULTERY

a) Definition

[86] The whole policy indicates that it is the first wife who is entitled to the properties of the husband.
[87] The same was the recommendation of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, vol.1, March 2003, Para 16.2.1.

The origin of the term 'adultery' may be traced back to 15th century. The word owes its origin in the Latin term 'adulterium.' The Oxford English Dictionary says that adultery is voluntary sexual intercourse between a married person and a person who is not their spouse.[88]Adultery is generally defined as consensual sexual_intercourse by a married person with someone other than their lawful spouse. In many jurisdictions, an unmarried person who is sexually involved with a married person is also considered an adulterer. The common synonym for adultery is infidelity as well as unfaithfulness or in colloquial_speech, cheating.[89] The sexual partner of a person committing adultery is often referred to in legal documents (especially divorce_proceedings) as a co-respondent, while the person whose spouse has been unfaithful is often labelled a cuckold; originally, the latter term was applied only to males, but in more recent times women have been characterized in this way too. However adultery figures in the penal law of many nations,[90] and some of the most celebrated English lawyers have considered its omission from the English law as a defect.[91]

It may be noted that the framers of the Code initially did not make adultery an offence punishable under the Code. Lord Macaulay did not consider it proper to put infidelity in his First Draft of the Indian Penal Code. He therefore concluded that:

> *"It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes- those whom neither the existing punishment not any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil wrong."*[92]

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[88] The Oxford Dictionary, tenth edition, third impression, 2000, at p-18.

[89] Wikipedia, the free encyclopedia: For details see, http://en wikipedia.org/wiki/adultery.

[90] Historically adultery has been subject to severe sanctions including the death penalty and has been grounds for divorce under fault-based divorce laws. In some places the method for punishing adultery was traditionally stoning to death. In the original Napoleonic Code, a man could ask to be divorced from his wife if she committed adultery, but the adultery of the husband was not a sufficient motive unless he had kept his concubine in the family home. In many jurisdictions (Austria, Korea, Switzerland, Taiwan), adultery is still illegal, but enforcement of the laws is often uneven. In places where adultery laws are actually enforced, wives are often punished more harshly than husbands; in some case being considered guilty of adultery even when they have been raped. This has been alleged to happen in Nigeria and Pakistan.

[91] Ratanlal & Dhirajlal, "The Indian Penal Code," 28th edition reprint, (Wadhwa & Co. Nagpur, 1999), at p-673

[92] Macaulay's Draft Penal Code (1837), Notes, Q pp. 90-93, cited from, Law Commission of India, 42nd Report: Indian Penal Code (Government of India) 1971, Para 20.13.

A different view was taken by the Law Commissioners in their Second Report on the Draft Penal Code, where they observed that:

> *"While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q', regarding the condition of women in this country, in difference to it, we would render the male offender alone liable to punishment."*[93]

Section 497 of the Indian Penal Code defines adultery and makes it a punishable offence. The section reads as follows:

"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."[94]

Sexual intercourse by a man with a women who is and whom he knows or has reason to believe to be the wife of another man, such sexual intercourse without the consent or connivance of the husband and such sexual intercourse is not amounting to rape, etc, are the requirement of the section.

b) Adultery and Discrimination in law

The cognizance of the offence of adultery is limited to adultery committed with a married woman, and the male offender alone has been made liable to punishment. In consonance with this policy a provision was kept in the Criminal Procedure Code which mandates a court not to take cognizance of adultery unless the aggrieved husband makes a complaint.[95] Under the Indian Penal Code, adultery is an offence committed by a third person against a husband in respect of his wife. It is not committed by a married man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it or with a married woman whose husband uses his wife in the trade of prostitution.[96]

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[93] Second Report on the Draft Indian Penal Code (1847), pp. 134-135, cited from, Law Commission of India, 42nd Report, p. 365.

[94] Section 497 of the Indian Penal Code,1860.

[95] See section 198(1) of the Criminal Procedure Code 1973 says that no court shall take cognizance of an offence under Chapter XX of the Indian Penal Code 1860, except upon a complaint made by some person aggrieved by the offence: Further section 198(2) of the same Code says that no person other than the husband of the women shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the Indian Penal Code 1860.

[96] Ratanlal & Dhirajlal, "The Indian Penal Code," 28th edition reprint, (Wadhwa & Co, Nagpur, 1999), p-673.

The Code makes it clear that the wife shall not be punished as an abettor. As to the question why the wife should not be punished as an abettor of adultery the authors of the Code observed that:

> *"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 a human being 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 the women of England and France; they are married while still children: they are often neglected for other wives while still young. They share the attention of a 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 exists, while it continues to produce it's 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."*[97]

Our legal policy relating to adultery which is incorporated in section 497 of the Indian Penal Code and section 198 of the Code of Criminal Procedure 1973[98] signifies the unequal status of husband and wife in the institution of marriage in India.[99] This policy declares that man is a seducer and the married woman is merely his helpless and passive victim; he trespasses upon another man's marital property that is his wife by establishing a sexual relation with the married woman with her consent but without the consent or connivance of her husband.[100] It also gives immunity to a married man, who may seduce and establish sexual liaison with an unmarried woman, a widow or a divorcee, as because in that case he will not be considered guilty of adultery. Although this type of sexual link is equally potential to wreck the bond of marriage between him and his wife and therefore the policy itself may act like a boomerang and destroy one of its chief object i.e, the matrimony

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[97] Note Q at p-175.

[98] See section 198(1) of the Criminal Procedure Code 1973 says that no court shall take cognizance of an offence under Chapter XX of the Indian Penal Code 1860, except upon a complaint made by some person aggrieved by the offence: Further section 198(2) of the same Code says that no person other than the husband of the women shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the Indian Penal Code 1860.

[99] K. I. Vibhute, " 'Adultery' in the Indian Penal Code: Need for a Gender Equality Perspective," (2001) 6 SCC (Jour) 16.

[100] Id.

Section 497 of the Indian Penal Code, then reflects the above perception of the authors of the Code, which makes way for the double discrimination in favour of the women by making only the husband guilty of the offence at the same time not envisaging the prosecution of the wife by the husband for adultery. This heavy dose of discrimination in the form of section 497 came to be assailed on the ground that it was against the spirit of the constitution. It was argued that section 497 is in contravention of Article 14 & 15 of the Constitution, operates unequally between a man and a woman by making only the former responsible for adultery. It therefore, discriminates in favour of women and against men only on the ground of sex. This was the contention made by the defendant who was charged with adultery in **Yusuf Abdul Aziz v State,**[101] where he challenged the constitutional validity of the above section. The Bombay High Court taking a sympathetic and charitable view of the weakness of women in this country upheld the constitutional validity of the provision.[102]Not satisfied with the decision the defendant filed an appeal[103] in the Supreme Court and contended that 'such an immunity assured to the adulteress wife even for her willing participation amounts to a sort of licence to her to commit and abet the offence of adultery'. In other words Article 15(3) of the Constitution should be confined only to provisions which are beneficial to women and should not be used to give them a licence to commit and abet a crime with impunity. To this argument the Supreme Court responded in the following words:

> *"We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment is prohibited."*[104]

Section 497 IPC does not envisage the prosecution of the wife by the husband for adultery. This policy of the Code was legally opposed in the year 1985 in **Sowmithri Vishnu v U.O.I,**[105] It was contended that section 497 being contrary to Article 14 of the Constitution, makes an irrational classification between men and women as because it: a) it confers upon the husband the right to prosecute the adulter but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery, b) it does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, c) it does not take in its ambit the cases where the husband has sexual relations with unmarried women, or a divorced women, with

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[101] AIR 1951 Bom 470.
[102] The Bombay High Court considered the historical back ground and the then prevailing social conditions, and the sexual mores oppressive to women and the unequal status of women.
[103] Yusuf Abdul Aziz v State of Bombay, 1954 SCR 930.
[104] Id at 931-932.
[105] AIR 1985 SC 1618: 1985 Suppl SCC 137.

the result that the husbands have a free licence under the law to have extramarital relationship with unmarried women or divorced women. However the court said that this argument can not be sustained because such argument goes to the policy of the law and not to its constitutionality unless while implementing the policy any provision of the constitution is infringed. In defining the offence of adultery so as to restrict the class of offenders to men only, no constitutional provision is infringed. Section 497 can not be struck down on the ground that it is desirable to delete it.[106] While holding this the Supreme Court observed that:

> *"Section 497 does not envisage the prosecution of the wife by the husband for adultery.....Indeed, the section provides expressly that the wife shall not be punishable even as an abettor. No grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently is that the wife, who is involved in an illicit relationship with another man is a victim and not the author of the crime. The offence of adultery as defined in section 497, is considered by the legislature as 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 law.....Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extramarital relationship an offence, the relationship between a man and a married woman the man alone being the offender. An unfaithful husband risks, or perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal with evil where it is felt and seen most: A man seducing the wife of another."*[107]

This is no sound logic because no adultery would be committed unless a woman was a party to it. The observation reflects the tradition of judicial restraint which was operative in the mind of the learned Judge and therefore was reluctant to assume the role of a law maker. If the section had become outdated, it was for the legislature to change it has been the observation of the court which may be termed as an evasive answer. Invalidation of this section by the court would have had the effect of de-legitimating the ideology of women's subordination.[108] The hold of patriarchal philosophy and narrow conception of judicial function seems to have influenced the mind of the court. Men and women are biologically different and therefore they need different treatment. Here the different treatment was not

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[106] 1985 Suppl SCC 137.
[107] AIR 1985 SC 1618.
[108] S.P. Sathe, "Gender, Constitution and the Courts," in Amita Dhanda and Archana Parashar(ed) "*Engendering: Essays in honour of Lotika Sarkar*," Edited by, Eastern Book Company, 1999, at p128-129.
[108] Ibid.

because of their biological difference but due to a gender biased perception of their sexuality.[109]

It was argued on behalf of the petitioner that women, both married and unmarried have changed their life style over the years and there are cases where they have wrecked the peace and happiness of other marital homes the court further observed that:

> *"We hope this is not too right but an under inclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitude, for good or bad, may justly engage the attention of law-makers when reform of penal law is undertaken. They may enlarge the definition of adultery to keep pace with the moving times. But until then law must remain as it is. The law, as it is, does not offend either Article 14 or Article 15 of the Constitution."*[110]

When it was pointed out that section 497 does not take cases where the husband has sexual relation with an unmarried woman the Court said that merely because section 497 does not take cases where the husband has sexual relation with an unmarried woman, it would not become unconstitutional. The women petitioner also argued that the right to life, as interpreted by the Supreme Court in the recent past, includes the right to reputation and the absence in section 497 of the provision mandating the court to hear the married woman with whom the accused has allegedly committed adultery , violates her constitutional right to life under Article 21.The court admitted that although the reputation of a married woman is adversely affected if a man is alleged to have committed adultery with her, but the argument that in absence of a provision in section 497 for hearing the woman or impleading her as a necessary party to the prosecution the section would be violative of Article 21 can not be accepted.[111] If the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. The right of hearing is a concomitant of the principle of natural justice, though not in all situations. The right can be read in to the law in appropriate cases. The court however accepted that though the erring spoused have no remedy against each other within the confines of section 497 of the Penal Code, that is to say, they can not prosecute each other for adultery, each one has a remedy against the other under the civil law for divorce of the ground of adultery. Adultery under the civil law has a wider connotation than under the Penal Code.[112]

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[109] Ibid.
[110] Ibid.
[111] AIR 1985 SC 1618: 1985 Suppl SCC 137.
[112] Id.

The above mentioned rationale given by the Apex Court with regard to the disability of the wife of the adulterer to prosecute her unfaithful husband is less than convincing to many people. The constitutional validity of section 497 which disables the wife from prosecuting the husband has been called into question by a wife by way of a petition under Art. 32 of the Constitution in **Revati v U.O.I**,[113] in the year 1988 where, not only the option to 'make-up' or 'break up' but also the right to 'haul up' the erring husband before a Criminal Court was claimed by the aggrieved wife irrespective of the fact that the husband of an erring wife does not have a corresponding right. The anguished wife also claimed that the conscience of the 'equality' clause should not be appeased. The petitioner argued that to deny her the right to prosecute her offending husband for the offence of adultery punishable under S. 497, Penal Code, is to violate the Constitution by discriminating against her on the ground of her sex. The provision which disables the wife from prosecuting the husband for such an offence is embodied in S. 198(I) read with S. 198(2) Criminal P.C., 1973, which carves out an exception to the general rule that any one can set the criminal law in motion.

Section 497, Penal Code, is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and wife are disabled from striking each other with weapon of criminal law.[114]While holding this the Supreme Court observed that:

> *"The philosophy underlying the scheme of S. 198(2), Cr.P.C. and S. 497, I.P.C., appears to be that as between the husband and the wife social goodwill be promoted by permitting them to "make up" or "break up" the matrimonial tie rather than to drag each other to the Criminal Court. They can either condone the offence in a spirit of "forgive and forget" and live together or separate by approaching a matrimonial Court and snapping the matrimonial tie by securing divorce. They are not enabled to send each other to jail. Perhaps it is as well that the children (if any) are saved from the trauma of one of their parents being jailed at the instance of the other parent. Whether one does or does not subscribe to the wisdom or philosophy of these provisions is of little consequence. For, the Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law."*[115]

The Court further observed that:

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[113] (1988) 2 SCC.72: See also AIR 1988 SC 835.
[114] AIR 1988 SC 835: See Para 3.
[115] Ibid at Para 4.

"Section 497, Penal Code and S. 198(1) read with S. 198(2), Criminal P.C., go hand in hand and constitute legislative packet 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. The community punishes the "outsider" who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring "man" alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is not why the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination based on sex. While the outsider who violates the sanctity of the matrimonial home is punished a rider has been added that if the outsider is a woman she is not punished. There is thus reverse discrimination in "favour" of the woman rather than "against" her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman in so far as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated an offender in the eye of law. The wife is not permitted as S. 198(1) read with S. 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practiced in circumscribing the scope of S. 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer. Thus, S. 198(2) is not vulnerable to the charge of hostile discrimination against a woman."[116]

c) An Evaluation of the Legal Policy and Approach of the Judiciary

Viewed against this back drop one must admit that section 497 of the Indian Penal Code reflects the perception of the Framer of the Draft Indian Penal Code 1847, who eventually disfavoured the Macaulian perception of adultery.[117] The Feminists in India today argue that our law relating to adultery is premised on the outdated notion of 'marriage'. The law, according to them, is not only based on the husband's right to fidelity of his 'wife' but also treats 'wife merely as a chattel of her husband. Such a gender-discriminatory and proprietary- oriented law of adultery is contrary to the spirit of the equality of status guaranteed under the constitution of India.[118] Even the judicial decisions had so far been supportive of this out dated legal policy. Women were not made punishable as because it is

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[116] Ibid at Paras 5 & 6.
[117] K. I. Vibhute, "Adultery' in the Indian Penal Code: Need for a Gender Equality Perspective," (2001) 6 SCC (Jour) 16.
[118] Ibid.

commonly believed that man is the seducer and it is woman who is not the abettor rather victim of the offence. It may be submitted that this is really no argument because no adultery would be committed unless a woman was a party to it. If the purpose of the law was to punish conjugal infidelity, any kind of illicit sexual behaviour should have been made punishable.[119]

The constitutional validity of section 497 has been upheld by the court ostensibly on the impression that it makes a protective discrimination in favour of women and keeps her out of the purview of criminal law. Such judicial reasoning in the ultimate analysis unfortunately endorses the patriarchal property oriented and gender discriminatory penal law of adultery. The criminalization of adultery in India is discriminatory on its face and violates Articles 3 and 26 of the ICCPR guaranteeing equality under and equal protection of the law.[120] It conveys that a man is entitled to have exclusive possession of and access to, his wife's sexuality. It also betrays the idea that a woman is not eligible to have such an exclusive right and claim over her husband. She is therefore, not allowed to prosecute either her promiscuous husband or the woman outside their matrimony who has poisoned their matrimonial home. This also indicates that the judiciary has failed to have a deeper insight into the gender-biased law of adultery. Our legal policy as well as the approach of the higher judiciary is predominantly premised on a set of moot assumptions pertaining to female sexuality and is also reflective of the inability of the higher judiciary to appreciate current social transformation.[121]

Adultery has been made a ground for divorce as well as for judicial separation in matrimonial law.[122]In matrimonial law the ground of adultery can be invoked by either of the spouses and it is clearly related to conjugal fidelity. If a spouse is not faithful, the other spouse has a right to put an end to the marriage. The provision of the matrimonial law accords equal treatment to both the parties. One may thus aptly put a question as to what was the necessity to provide a penal section against adultery.[123]

Manu, the ancient law giver made the both party guilty of the offence of adultery by prescribing that when a woman, arrogant because of the eminence of her relatives and her own feminine qualities, becomes unfaithful to her husband, the king should have devoured by dogs in a public square frequented by many. He should have the male offender brunt upon a heated iron bend; they should

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[119] S.P. Sathe, "Gender, Constitution and the Courts," in Amita Dhanda and Archana Parashar (ed) *Engendering: Essays in honour of Lotika Sarkar*, (Eastern Book Company, 1999), pp.128-129.
[120] International Convention on Civil and Political Rights, 1966.
[121] Supra note 119.
[122] Paras Dewan, "*Modern Hindu Law*," Eleventh Edition, (Allahabad Law Agency,1997), p.137.
[123] Supra note 119, at p.128.

stack logs and burn up that villian there.[124] The present legal policy failed to take up the clue of bringing both the parties within the ambit of law.[125]The present legal policy tries to keep the woman out of the jaws of adultery by not punishing the married woman even if she commits it or abets it. Unmarried woman and divorced woman are also kept outside the ambit of law as because it can be committed only against the married women. Our judiciary also on several occasion upheld the validity of such policy. It must be noted that our legal policy relating to prostitution followed the same path of keeping the prostitute outside the ambit of law to a great extent by not punishing them except when they carry on the profession in the vicinity of a public place. The resultant consequence can be seen that prostitution could not be contained. We may also think of the situation where a man is caught in a while he was committing sexual intercourse with a women with her consent. Suppose woman pretends to be the wife of another man or her husband is not interested in her and therefore is less interested in filing a complaint. Under which law, the man will be booked? [126]The Court went on to assert that it is for the legislature to take cognizance of the social transformation and not for it. In this regard it may be submitted that the court has failed to adopt the meaning of penal statute to changing social milieu. It failed to realize that Indian Penal Code fabricated in the imperial foundry well over a century ago has not received anything but cursory parliamentary attention in the light of the higher values of the National Charter which is a testament of social justice, right to life, equality. So the court must permeate the Penal Code with exalted and expanded meaning to keep pace with constitutional values and the increasing enlightenment of informed public opinion.[127] A nineteenth century text, when applied to twentieth century conditions, cannot be construed by signals from grave. So, when the legislature fails the court can not deny its duty to innovate beyond the law.

d) Adultery & Proposal for Reform

The fifth Law Commission recommended that the exemption of the wife from punishment for committing adultery be removed from section 497 of the Indian Penal Code. It also expressed its feeling that an imprisonment for a term up to five years is unreal and not called for in any circumstances. The recommended section 497 reads as:

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[124] Patrick Olivelle, "Manu's Code of Law- A Critical Edition and Translation of the Manava Dharmasastra," .(Oxford University Press,2005) at p. 186.

[125] This not going to suggest that both should be punished accordingly.

[126] Assuming that she can not be charged for prostitution in the absence of certain elementary evidence, i.e,she is not offering sex for gain.

[127] See V. R. Krishna Iyer in Rajendra Prasad v State of UP (1979) 3 SCC 646 at p 668 &674.

"Adultery: If a man has sexual intercourse with a woman 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, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."[128]

The fifth Law Commission and the Joint Select Committee[129] inspired by the spirit of equality, recommended equal culpability for the man as well as the woman for committing adultery. The Joint Select Committee therefore revised section 497 and proposed for the substitution with the following:

"Whoever has sexual intercourse with a person who is, and whom he or she knows or has reason to believe to be the wife or husband as the case may be, or another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape, commits 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."[130]

For reasons best known to them, neither the Law Commission not the Joint Select Committee has shown any sensitivity to the equally pertinent traditional proprietary rights of the husband over his wife and to the subordination of woman in the Indian family institution.[131] Recently the Fourteenth Law Commission[132] in its 156th Report on the Indian Penal Code endorsed with minor modifications the proposal for reform recommended by the Joint Select Committee. It also emphasized that the changed suggested in its revised section 497 IPC be made in section 19(20 of the Code of Criminal Procedure 1973.[133]

Suggesting a radical change in the law on adultery, the Justice **Malimath** Committee for reforms in the criminal justice system has recommended amendments to provisions of the Indian Penal Code that disallow prosecution of women for the offence. According to the present law, only a man can be prosecuted for the offence of adultery with the woman being granted immunity from proceedings on account of her position in society. However, the Committee's report seeks to end, what has often been referred to as the gender bias in the

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[128] Law Commission of India, Forty Second Report: Indian Penal Code, 1971 at p-365.
[129] Joint Select Committee was approved by the Rajya Sabha.
[130] Clause 199.
[131] K. I. Vibhute, " *'Adultery' in the Indian Penal Code: Need for a Gender Equality Perspective*," (2001) 6 SCC (Jour) 16.
[132] Law Commission of India, 156th report: Indian Penal Code, 1997, Para 9.46.
[133] Ibid at Para 9.46: Also note that the IPC (Ammendment) Bill 1972 recommended for the inclusion of women under section 497 but such an amendment could not be carried out as the Bill lapsed.

law, by recommending similar treatment of both men and women in such cases. The Committee in its report submitted to the Centre observed the following:

> *"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),"* [134]

It therefore suggested that "section 497 be suitably amended to the effect that whosoever has sexual intercourse with the spouse of any other person is guilty of adultery."[135] However, the **Malimath Committee** report is silent on another controversial provision of section 198(2) of the Code of Criminal Procedure 1973, which says that prosecution in such cases shall be initiated on the complaint of the husband of the adulterous woman.

The present policy which provides for the punishment of the adulterous husband with imprisonment which may extend to five years or with fine or with both, consequently a guilty husband if convicted would be sent to jail and fined and his innocent wife would suffer for no offence. This is because of the Indian condition of the society as most of the women in our country economically still dependant on the husband. So the present legal policy which on the one hand protects the rights of the husband over his wife by punishing the adulterous man also hits indirectly though severely the innocent wife of the adulterous man if he is married. This policy of protecting one's rights at the cost of another who had no role in snatching those rights needs serious rethinking. It may be submitted that the provision of section 497 are inconsistent with the modern notions of the status of woman and of the natural rights and obligation under marriage. In fact, western countries and lately Malaysia and Singapore have abolished adultery from their Penal Code. There are two way outs in this regard; one is the deletion of section 497 or the second is the rationalization of the whole legal policy.

It may be submitted that a long-term relationship such as marriage will not operate efficiently without sanctions for misconduct, of which adultery and bigamy are two is examples. Efficiency in marriage, as in partnership, requires that there be a proper legal remedy for adultery, and bigamy. The present policy which punishes the offender of these offences with imprisonment along with fine or without fine, is only accused centric and fails to address the problem arising out of these offences which the victim or victim or even the issues of the victim of these offences suffers. It is suggested that in case of adultery both the parties who are involved in adultery must be brought with in the ambit of law by making

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[134] Report of the Committee on Reforms of Criminal Justice System. Vol. 1. March 2003. Para 16.3.1.
[135] Ibid at Para 16.3.2.

both liable. Secondly in the case of bigamy both the woman should be seen as a victim of the crime. In both the adultery and bigamy each individual woman should be allowed to initiate proceedings whether civil or criminal. One policy which seems clearly beneficial from the point of view of wealth maximization, and perhaps freedom and virtue as well would be to allow people to opt into adultery/bigamy penalties via prenuptial agreements.[136] The law could be written to allow people to opt into tort, criminal, or contract as they are now free to opt into certain kinds of financial arrangements. For civil damages, it would merely require dependable government enforcement of premarital contracts, without judicial discretion to ignore them as marriage-related. The argument is the same as for contract enforceability in general: it permits a disjunction of mutual performances and encourages reliance on future performance. The Wife should be allowed to initiate punishment of a fine, which would be paid to the wife and is variable depending on the amount of damage. The Wife may also be allowed to alienate her right to initiate punishment, if certain kind of financial arrangement is reached between her and the offender or offenders. Tort and contract law exist to provide recourse for private injuries, when one person inflicts damage on another. It would seem well suited to adultery, and bigamy.

E) A Sum Up

1. It is may be submitted that most of the offences relating to marriage, namely a) cohabitation caused by a man deceitfully inducing a belief of lawful marriage (section 493, IPC) b) marriage ceremony fraudulently gone through without a lawful marriage by a person (section 496, IPC), c) marrying again during the lifetime of wife (Section 494) d) enticing or taking away or detaining with criminal intent a married woman (Section 498) e) sexual intercourse by a person with a married woman knowing ly that she is the wife of another person(section 497IPC) are in essence sexual offences against women. In all the first three cases consent plays a very significant place though law does not take any such notice. In all these cases the consent of the victim is obtained to certain act which either implies or legalizes sexual intercourse. The purpose of the offender in all these cases is to gain sexual access. The offender therefore in the first case inducing a belief of lawful marriage (infact when there was not marriage at all in the eye of law) or goes through a fraudulent ceremony marriage in the second case. And in the third case he gains sexual access

[136] Eric Rasmusen, " An Economic Approach to Adultery Law," February 16, 2001: For details see. http://Php.indiana.edu/~erasmuse/@ Articles/Unpublished/adultery.pdf.

by marrying victim. However the victim may or may not have the knowledge that the offender is having the spouse of an earlier marriage. In all the above four cases the offender if successful would gain sexual access and commit sexual intercourse with the woman victim who is unaware of the legality of the marriage. In the first three cases it is always the woman victim losses her precious thing. In some cases she losses even more than what is lost by a victim of rape. She looses her virginity, she looses her faith and confidence reposed in the person. In some cases she is left with the children born to them and the person is releases himself from all responsibility. In the first three cases the elements are common; one her consent in that relation which legalizes sexual intercourse which was obtained by fraud or deceit and sexual intercourse which was the intention of the offender. In all the above four cases she becomes victim because of her sex and because of the sexual desire of the offender as such these offences are nothing but in essence sexual offences against women. In the last case namely adultery the offender is not required to gain sexual access through some fraud, deception or marriage and obviously there they are the consenting party to the sexual intercourse. But since law prohibits sexual intercourse outside marriage and chief element being the sexual intercourse, the offence in essence becomes a sexual offence. However, all this offences has been kept under Chapter XX of the IPC which deals with offences relating to marriage. This does not affect or alter the very nature of the offence; they are essentially sexual offences against women.

2. Section 498 punishes a person who takes away, entices, conceals or detains a married woman with intent that she may have illicit intercourse with any person. The policy of the law seems to protect the interest of the husband, as it is only the husband who can institute the prosecution proceedings for offences committed under this section. Even the consent of the woman does not give the accused any protection from the mischief of this section if the accused by his action and conduct, though not directly, had encouraged the woman, to leave her husband's place. When construed in this was one must see that this section also leaves a possibility of punishing an innocent where the married woman voluntarily leaves her husbands place for some or other reasons and stays away from him and takes the shelter of an innocent person. The innocent man may be prosecuted as because the married woman's consent is immaterial for the purpose of this section. The law contained in section 498 IPC thus

ignores the entity of the wife and makes her the property of the husband. It may be submitted that in view of the change in the general outlook and social status of woman and emphasis for equal rights and obligations for both husbands and wives a rethinking of the legal policy in this regard is called for.

3. Our law relating to bigamy bears an unusual and uncommon feature which is not generally seen in case of other public law. This is because 494, IPC makes the offence dependent on the personal laws of the parties. The result is that it is applicable to all with the exception of Mohammedan males. Even it does not apply to all Hindus uniformly because of custom. If one deliberately keeps a small lacuna, e.g., instead of taking the seven steps, takes only six steps while celebrating the second marriage, he can easily avoid the penalty prescribed by the sections even though by doing so he will be ruining the lives of two women. In order to attract Section 494 IPC the prosecution has to prove that the second marriage was validly performed as per the customary rights of either party under their personal laws. If there is any lapse in following the customary rules, the second marriage would be regarded as void. It is not always easy to prove long after the marriage that all the rituals were duly performed. To overcome these practical difficulties a suitable provision be incorporated to the effect that if the man and the wife were living as husband and wife for a reasonably long period they shall be deemed to have married in accordance with customary rites of either party thereto. This shall be rebuttable presumption and the finding shall not be binding in civil proceedings.
4. In a number of cases admissions of marriage by the accused was not considered as evidence of it for the purposes of proving marriage in an adultery or bigamy case. Thus mere observance of the laws of evidence with flaws led to injustice to many women.
5. The present legal policy relating to bigamy punishes an offender with imprisonment of either description for a term which may be seven to ten years, and also fine. The present policy also operates with the assumption as if there is one victim i.e., the first wife although the offender of the offence of bigamy virtually destroys the life of two different women. Both these women invariably dependent on the offender. The present legal policy in this regard therefore, may be described as accused centric as because it fails to take account the miseries of the victims of bigamy,

especially their economic plight. The present policy also operates with the assumption as if there is one victim i.e, the first wife.

6. A woman in a second marriage is not entitled to claim maintenance as in law a second marriage during the subsistence of the first marriage is not legal and valid. Such a woman though she is de facto the wife of the man in law she is not his wife. Quite often the man marries the second wife suppressing the earlier marriage. In such a situation the second wife can't claim the benefit of Section 125 for no fault of hers. The husband is absolved of his responsibility of maintaining his second wife. This is manifestly unfair and unreasonable. The man should not be allowed to take advantage of his own illegal acts. Law should not be insensitive to the suffering of such women. Therefore the definition of the word 'wife' in Section 125 should be amended so as to include a woman who was living with the man as his wife for a reasonably long period, during the subsistence of the first marriage.
7. Compulsory registration of marriage and pre-registration verification of the male person would be a good measure of prevention of the recurrence of the offence. Uniform Civil Code with regard to marriage, divorce, inheritance has been suggested by many including our judiciary. But until that stage arrives we may opt for economic sanction against the offender. The policy may also prescribe for the attachment of the valuables and properties and rational distribution of the same among the victims of bigamy.
8. Our legal policy relating to adultery which is incorporated in section 497 of the Indian Penal Code and section 198 of the Code of Criminal Procedure 1973 signifies the unequal status of husband and wife in the institution of marriage in India. This policy declares that man is a seducer and the married woman is merely his helpless and passive victim; he trespasses upon another man's marital property that is his wife by establishing a sexual relation with the married woman with her consent but without the consent or connivance of her husband. It also gives immunity to a married man, who may seduce and establish sexual liaison with an unmarried woman, a widow or a divorcee, as because in that case he will not be considered guilty of adultery. Although this type of sexual link is equally potential to wreck the bond of marriage between him and his wife and therefore the policy itself may act like a boomerang and destroy one of its chief object i.e., the matrimony.

9. Not only has the legislative policy viewed male as a seducer, the judiciary have confirmed it by its pronouncement. Truly the whole law of adultery implies that; a) it confers upon the husband the right to prosecute the adulter but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery, b) it does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, c) it does not take in its ambit the cases where the husband has sexual relations with unmarried women, or a divorced women, with the result that the husbands have a free licence under the law to have extramarital relationship with unmarried women or divorced women. d) It also betrays the idea that a woman is not eligible to have such an exclusive right and claim over her husband. It must be submitted however that the Apex Court's reasoning "in defining the offence of adultery so as to restrict the class of offenders to men only, no constitutional provision is infringed and that Section 497 could not be struck down on the ground that it is desirable to delete it," defies the rules of prudence and the reason itself. This is because no adultery would be committed unless a woman was a party to it and that here the different treatment was not on the basis of biological difference but due to a gender biased perception of sexuality. 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. In this regard it may be submitted that the court has failed to adopt the meaning of penal statute to changing social milieu. It failed to realize that Indian Penal Code fabricated in the imperial foundry well over a century ago has not received anything but cursory parliamentary attention in the light of the higher values of the National Charter which is a testament of social justice, right to life, equality. So the court must permeate the Penal Code with exalted and expanded meaning to keep pace with constitutional values and the increasing enlightenment of informed public opinion. A nineteenth century text, when applied to twentieth century conditions, cannot be construed by signals from grave. So, when the legislature fails the court can not deny its duty to innovate beyond the law.
10. The criminalization of adultery in India is discriminatory on its face and violates Articles 3 and 26 of the ICCPR guaranteeing equality under and equal protection of the law.
11. The present policy which also provides for the punishment of the adulterous husband with imprisonment which may extend to five years or

with fine or with both. Consequently a guilty husband if convicted would be sent to jail and fined and his innocent wife would suffer for no offence. This is because of the Indian condition of the society as most of the women in our country economically still dependant on the husband. So the present legal policy which on the one hand protects the rights of the husband over his wife by punishing the adulterous man also hits indirectly though severely the innocent wife of the adulterous man if he is married. This policy of protecting one's rights at the cost of another who had no role in snatching those rights needs serious rethinking. It may be submitted that the provision of section 497 are inconsistent with the modern notions of the status of woman and of the natural rights and obligation under marriage. Efficiency in marriage, as in partnership, requires that there be a proper legal remedy for adultery, and bigamy.

12. The present policy which punishes the offender of these offences with imprisonment along with fine or without fine, is only accused centric and fails to address the problem arising out of these offences which the victim or victim or even the issues of the victim of these offences suffers. In both the adultery and bigamy each individual woman should be allowed to initiate proceedings whether civil or criminal. The law should make way for the adoption of the system of 'plea bargaining' which would allow settlement of cases between the accused and the victim through various measures including compensation or some financial arrangements.

13. Our stand on criminal justice system should not be meek and weak but positive and powerful from the perspective of victim's sufferings. Our perspective in such offences should be against punitive cruelty form victims socio-economic position and because oftentimes the present policy is curative futility.