



## THE IMBALANCED EDIFICE OF SECTION 497 IPC

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*This article has been written by considering the heated issue of adultery which is still being heard by the Hon'ble Supreme Court in Joseph Shine case. The article covers the history as to why the concept of adultery was introduced as an offence and the earlier objective of the law makers behind this offence. The scope and ingredients of Section 497 IPC have been discussed in detail. The authors have tried to explain how the flaws in this section have disrupted the balance created by the concept of marriage. The article also questions the constitutional validity of this section on the grounds of Article 14, 15 and 21. The article enlists numerous cases wherein adultery has been challenged and the observations given the Courts. The current status of the law of adultery in other countries has also been discussed. Lastly the need to amend this section as per the societal needs of 21<sup>st</sup> century and inculcating the concept of equality and personal liberty have been encapsulated.*

**“Adultery.—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 offense of rape, is guilty of the offense 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.”**

S. 497 of Indian Penal Code read along with S. 198 (2) of CrPC<sup>1</sup> can be said to be bound by the shackles of the archaic law. Adultery is an invasion on the right of the husband over his wife. In other words, it is an offence against the sanctity of the matrimonial home and an act which is committed by a man<sup>2</sup>. It is an anti-social and illegal act. It consists in having carnal knowledge of a married woman<sup>3</sup> with knowledge of that fact, without the consent or connivance of her husband. To constitute adultery, sexual intercourse is a necessary ingredient.<sup>5</sup> The laws made dates back to 18<sup>th</sup> C or more and reasoning behind the incorporation of such laws were the customary practices and traditions prevalent at that time. As we know that women cannot be prosecuted under this section, because when this law came into being polygamy was deep rooted in the society and women shared the attention of their husbands with several other wives and extramarital relations. Women were treated as victims of the offence of adultery as they were often starved of love and affection from their husbands and could easily give in

<sup>1</sup> For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

<sup>2</sup> Olga Thelma Gomes V. Mark Gomes, AIR 1965 Cal 451

<sup>3</sup> Dalip Singh V. Rex AIR 1959 Cal 451

<sup>4</sup> M'Clarance V. M.Raicheal AIR 1964 Mys 67

<sup>5</sup> Munir V. Emperor AIR 1947 Nag 121



to any person who offered it. The provision was therefore made to restrict men from having sexual relations with the wives of other men.

Since then the society has transformed a lot and women are now given equal status with men. As well in the present scenario polygamy is illegal and monogamy is practiced. The object of the making adultery an offence and restricting it to men alone was to deter them from taking advantage of women starved of love and affection. The scope of the offence under the section is limited to adultery committed with a married woman, and the male offender alone has been made liable to be punished with imprisonment which may extend up to five years, or fine or with both. The consent or the willingness of the woman is no excuse to the crime of adultery.<sup>6</sup>

But still this part of the section is retained and justified by the courts again and again as in *Yusuf Abdul Aziz case*<sup>7</sup>, Justice Vivian Bose said that exempting women from being punished is in tune with Article 15(3) of The Constitution of India, which allows legislature to make such 'special provisions' which are 'beneficial to women'. This has never been the intention of the constitutional makers to bring in the criminal exemption under the purview of Article 15(3)<sup>8</sup>.

The assumption that women are incapable of committing adultery is irrational and perverse. This kind of institutional

discrimination was strongly repelled by courts in *Charu Khanna & Ors. V. Union of India and Ors.*<sup>9</sup>. When men and women are on equal footing, discrimination against a particular sex would offend Article 14 and 15 of the Constitution of India.

S. 497 suffers from the vices of irrationality, arbitrariness and perversity. This section shows the existence of male chauvinism and the patriarchal society. Earlier women were treated as chattels of men and hence the provision portrays their helpless situation wherein if the husband consents to the intercourse of wife with another man it's no more an offence of adultery as well as the women cannot register complaint against their husband as this section is confined to a single situation of adultery and generally can be said as an offence against man. Wives of those men committing adultery are also equally aggrieved by the adulterous act. Excluding her from the purview of initiating criminal prosecution has no rhyme or reason. She is situated in the same position as an aggrieved husband whose wife has committed adultery. Such an exclusion is unjust, illegal and arbitrary and violative of Ar. 14, 15 and 21 of Constitution of India.

Sexual intercourse with married women with the consent of her husband is exempted from the ambit of the provision. The essential premise of the provision is that women are property of men and every married woman is look-out of her husband. The provision conceives a marriage between woman and man as a master-servant relationship.

<sup>6</sup> Gul Mohammad V. Emperor AIR 1947 Nag 121

<sup>7</sup> Yusuf Aziz v. State of Bombay AIR 1954 SC 321

<sup>8</sup> Article 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children.

<sup>9</sup> 2015(1) SCC 192



The very significant case to be discussed in detail is *Sowmitri Vishnu V. Union of India*<sup>10</sup> whose brief facts were Sowmithri and Vishnu were the wife and husband. Disputes arose between them. She went away from the matrimonial home, and had been living with one Dharma Ebenezer. She filed a divorce petition before the District Judge on the grounds of desertion.

While the proceedings were pending, the husband filed a criminal case under Section 497 against Dharma Ebenezer for adultery with his wife. The trial Court gave the divorce on the ground of desertion. The husband appealed to the High Court contending that the divorce was granted on the ground of desertion but it should be on the ground of adultery.

If the divorce is granted on the ground of adultery, Dharma Ebenezer should have been punished under the offence of adultery. Wife appealed to the Supreme Court challenging the validity of Section 497.

While appreciating the arguments of the petitioner-appellant, the Supreme Court upheld the retention of Section 497. It observed that the Section 497 does not show any discrepancy between male and female. In fact, it protects the wrong-doer-wife, who is also accomplice with adultery. Section 497 clearly exempts the wife. The framers of the Code, and Law Commission observed the social and economical structure of the society and family institution. In our society, when a wife of a person enters into sexual intercourse with a third person, it is a civil death to the husband. Hence this peculiar

right is given to the husband. Moreover the Section imposes the liability upon the third person, who has sexual intercourse with another's wife, not upon the wife. The framers of Code strongly believe that it is the man to seduce the woman, but not woman. If the Section 497 is re-defined the right of action to the third person's wife, several Sections of the Code shall have to be re-structured. If a married man enters sexual relations with any unmarried girl or widow, there are several other remedies available to the wife of that husband. Section 497 does not infringe the provisions of Articles 14 or 15 of the Constitution. The Supreme Court stating the above dismissed the Writ Petition and also quashed the complaint under Section 497 of the husband, opining that as there was no use to inquire into the matters of adultery, as the trial Court already granted divorce

The offence of adultery as defined is gender biased not only to men or women but both of them equally. Only men can be punished for this offence and women cannot file complaint against the husband or against his paramour due to legal restrictions. The existing law glorifies gender bias and this is something that women and men find distasteful. Thus there's the only way they can punish each other is by opting out of the marriage that is by divorce, they cannot prosecute each other because as courts annexed in 1988, *V. Revathi V. Union of India*<sup>11</sup>, a two-judge Bench, denied gender discrimination in the fact that only the adulterer-man is punished and not the wife who consensually entered into the adulterous relationship.

<sup>10</sup> AIR 1985 SC 1618; (1985) Cr LJ 1302

<sup>11</sup> AIR 1988 SC 835



“The community punishes the “outsider” who breaks into the matrimonial home and violates the sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses. 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 why neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail,” Justice M.P. Thakkar wrote.

As well The National Commission for women recommends that adultery should be made merely a civil wrong and the Supreme Court impliedly agrees that husband and a wife should not strike each other with the weapon of criminal law. Making provisions in Penal law to regulate civil contracts and particularly the contract of marriage, which is private and personal, is unwarranted. But the parties to the marriage themselves have ruined its sanctity by having relationship with 3<sup>rd</sup> person thus when they themselves do not wish to be together in bond of marriage with each other why are courts bound to maintain the sacrosanctity of marriage when both of the parties are consenting adults to the act.

When the law was written 150 years ago, women were seen as an oppressed class in need of protection. But what kind of protection in this which regards them as man’s property? If women can become the Prime Minister and Chief Ministers, why can they be held equally responsible for their actions in the same way men are? Let both the partners to the crime share the blame equally as in the case of Germany, France and Jammu and Kashmir under the Ranbir Penal Code. In this regard the Jammu

and Kashmir State Ranbir Penal Code, 1932, Section 497<sup>12</sup> is more progressive. It makes the errant wife punishable along with her paramour.

In the year 1971, the 42nd Law Commission Report analyzed various provisions of Indian Penal Code and made several important recommendations. One of them was to remove the exemption provided for women from being prosecuted and to reduce the punishment for the offence from 5 years to 2 years. The Indian Penal Code (Amendment) Bill, 1972 suggested that the special privileges granted to women under S. 497 of the Code be done away with.

In the year 2003, a Committee headed by Justice V. S. Malimath was constituted to consider measures for Bar & Bench revamping the Criminal Justice System. In the report submitted by the Committee, in the Chapter “Offense against Women” under the subhead “Adultery: Section 497 IPC” it is stated: The society abhors marital infidelity. Therefore there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man. The Committee therefore suggests that Section 497 of the I.P.C should be suitably amended to the effect that “whosoever has sexual intercourse with the spouse of any

<sup>12</sup> 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 a case the wife shall be punished as an abettor.



other person is guilty of adultery". However, the amendment of the section could not be carried out and the law remains as it was when enacted in 1860.

It is for the legislature to consider whether section 497, IPC should be amended appropriately so as to take note of the transformation which the society has undergone. Both the married man and the woman in a matrimonial wedlock are the sufferers here. The wife cannot be prosecuted for the wrong she committed and on the other hand a wife cannot prosecute her husband for this offence. The misbalance and a narrow minded approach is clearly reflected in the current law on adultery.

The constitutional validity of Section 497 IPC has been challenged many times and is still being heard by the Hon'ble Supreme Court in *Joseph shine V. Union of India*<sup>13</sup>, this case is still under the consideration of constitutional bench of Supreme court. Herein a writ petition is filed challenging the constitutional validity of S. 497, IPC and 198(2) CrPC, are prima facie unconstitutional on the ground that it discriminates against men and violates Article 14, 15 and 21 of the Constitution of India.

The entire essence and meaning of this section revolves around come certain facts that –

- 1) Wife is the property of the husband who does or does not want anyone to trespass into this property. If the husband permits any outsider to encroach upon this property

then the offence is not committed. The motive of the section to protect women is sadly recommending that women were and still are weak, have no conscious and mind of their own and thus need men to protect them.

- 2) The section only punished the man who has had sexual intercourse with the married woman. The sexual intercourse in the case of adultery is an act not amounting to rape and is generally a consensual act by both the partners. This is unjustified both logically and legally as a married woman can take responsibility of her actions and has the knowledge and consequences of her act. It is discriminatory towards the man who took consent of the woman who participated in the sexual act. This section though was thought of as a woman-centric section to protect the helpless and wives who as assumed earlier were influenced very easily however, the current scenario is completely different and now woman can misuse this. This section is offending the very concept of equality as enshrined in Article 14 and 15.
- 3) Article 21 confers the right to life and personal liberty to every citizen irrespective of their caste, sex, race, religion, place of birth etc and it is pertinent to mention that it applies irrespective to the status of marriage i.e. every wife and every husband has the right to live according to their choices and have the right to take their own decisions. Section 497 restricts a married woman's liberty to take decision of her body and if the husband consents on her behalf even if she does not consent to the same, she has no

<sup>13</sup> 5 January, 2018. WP(Crl.) 194/17



remedy. It restricts her personal liberty<sup>14</sup> of choice and taking independent decisions and leaves her no less than a property of her husband.

This indicates that the question of constitutional validity of S.497 does hold some water and can be challenged on the grounds of Article 14, 15 and 21 which weaves and runs as a golden thread to the Constitution of India.

When the sexual intercourse takes place with the consent of both the parties, there is no good reason for excluding one party from the liability. Before being referred to a larger bench the court was of the opinion that the provision seems quiet archaic and especially when there is societal progress. It was as well annexed that the previous landmark cases like Sowmithri Vishnu , Yusuf Abdul Aziz case etc need to be reconsidered regard being had to societal progression, perceptual shift , gender equality and gender sensitivity.

The criminal law of adultery varies from country to country. It differs according to the religious norms and attitudes of the people and many other factors. The law relating to criminal adultery in United States reveal three major formulations viz. the Common law view; the canon (a law or body of laws of a church); the hybrid view. According to the common law view, adultery takes place only when the woman is married and both husband and wife are liable. Under the canon law, adultery is a voluntary sexual intercourse of a married person with a person other than the

offender's husband or wife and only the married person is held guilty. According to the hybrid rule, followed in twenty states in the United states, if either spouse has sexual intercourse with a third party, both transgressors are guilty of adultery. Finally, eight states held both transgressors guilty, if the woman is married but if the woman is single only the man is guilty. Six states do not punish adultery at all.<sup>15</sup> Adultery is not a criminal offence in the United Kingdom. It is punishable, though mildly, in some European countries for instance in France where wife guilty of adultery is punished for a period ranging from 3 months to 2 years however the husband may put an end to her sentence by agreeing to take her back. The adulterer is punishable similarly. In Pakistan, adultery is viewed as a heinous offence and both the man and the woman are subjected to punishment which may extend to death sentence.

While keeping in mind the present scenario of 21<sup>st</sup> century where equality and gender neutrality has been prevalent and also looking at the socio-economic conditions of men and women which are reaching on equal level, it is essential to re-consider towards the amendment of this section and make it gender-neutral and make 'persons' liable for their actions per se and not in the capacity of husband or wife. Also since marriage is wedlock of both the spouses which have equal rights and liabilities towards each other therefore both of them should have the right to prosecute the other in case of a wrong which is 'adultery'.

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<sup>14</sup> Simone Weil, "Liberty, taking the word in its concrete sense consists in the ability to choose"

<sup>15</sup> Law Commission of India, 42<sup>nd</sup> Report (1971) 323-328