

## A Revisit to Sec 497 IPC & The Role of Judiciary in Enhancing Women's Dignity

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### Abstract

*Sec 497 IPC reads, whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, under section 497 IPC the wife shall not be punishable even as an abettor. On closer examination, it was found that the provision contained in the section is a kind of romanticizing paternalism which stems from the assumption that women, like chattels, are the property of men. The attempt of this paper is to critically examine that Section 497 IPC is not gender neutral. The married women might have willingly participated in adultery but the clear classification that she will be exempted goes against the facets of equality. Apart from being sexist, sec 497 IPC also dented the individuality of men. The paper will finally conclude with some suggestions.*

**Key words:** Gender, adultery, women, patriarchy, equality

### Introduction:

When Draupadi was staked after Yudhishthira lost at the game of dice the pertinent question she asked him, Am I a Chattel to stake her in the game of dice. And was she therefore slave to the Kauravas? This question of the wife belonging to the husband as a property was relevant in the context of sec 497 IPC, which speaks of the Victorian morality mindset on the law of adultery.

Sec 497 IPC reads as 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. This section makes an irrational classification between men and women<sup>1</sup> because:

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1. It confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband had committed adultery;
2. It does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and
3. It does not take cases where the husband has sexual relations with an unmarried woman with the result that the husbands have as it were, a free license under the law to have extra marital relationship with unmarried woman.

In an affidavit to the Supreme Court, the Ministry of Home Affairs sought the dismissal of a plea challenging the validity of the penal law on adultery saying sec 497 supports, safeguards and protects the institution of marriage. The apex court had referred the PIL challenging the constitutional validity of the adultery law to the constitution bench. The PIL has been filed by one *Joseph Shine*<sup>2</sup> under Article 32 of the Indian Constitution. The petition challenged the constitutionality of the offence of adultery under sec 497IPC read with sec 198(2) Cr.P.C. The Apex Court had earlier sought Centre's stand on PIL which pointed out that man can *only* be punished for having consensual sex with the wife of another man. And therefore is unconstitutional as it is violating Article 14, 15 and 21 of the Indian Constitution as claimed by the petitioner.

### **Past Supreme Court Judgments on Adultery:**

The adultery law had come up in court thrice in the past, in 1954, in 1985, and in 1988. In 1954, the SC rejected that Section 497 violated the right to equality. In 1985, it said that women didn't need to be included in the law as a party which can make complaints. In 1988, the Supreme Court said that the adultery law was a 'shield rather than a sword'<sup>3</sup>.

### **The Problems underlying Sec 497 IPC and the question of Gender Inequality:**

The following are the essential ingredients for the offence of adultery.

1. Sexual intercourse by a man with a woman who is or whom he knows or has reason to believe to be the wife of another man.
2. Such sexual intercourse does not constitute the offence of rape.
3. Such sexual intercourse must be without the consent or connivance of the husband.

A perusal of the adultery law says that it is neither gender sensitive nor a gender neutral one. This is because the law calls for the man to be punished in case of adultery, but no action is suggested for the woman. As per Section 497, a woman whose husband has had sexual intercourse with another woman cannot file a complaint because the law makes no such provision for her. Moreover, the adultery law in IPC reduces women to an object because no consent of the married woman is required for a man to have sexual intercourse with her. As per Section 497, if the woman's husband agrees, the act is not a

crime. This is the reason many have called this law an anti-women law.<sup>4</sup>

The constitutional validity of sec 497 IPC was first challenged in *Yusuf AbdulAziz v. State of Bombay*<sup>5</sup> on the ground that it is violative of Articles 14 and 15 of the Constitution of India, 1950. But in this judgement, the constitutional validity of sec 497 was upheld wherein the Bombay High court effectively laid the basis on Art 15(3), which empowers the state to make special provisions for women and child for justifying the specific provision and orientation in terms of protecting woman as victim. Same was the opinion in *Sowmithri Vishnu v. Union of India*<sup>6</sup>, wherein the court upheld the validity of sec 497 IPC as a necessity to save the institution of marriage.

*First* on reading the bare sec 497 IPC, it is understood that women are treated as subordinate to men in as much as it lays down that when there is connivance or consent of the man, there is no offence. These words in the section, has the tendency to treat woman as a chattel, as the property of the (her) man and totally subservient to the will of the master. It was a reflection of social dominance that was prevalent when the penal provision was drafted.

*Second* there are other loopholes in Sec 497 IPC<sup>7</sup>. It does not bring within its purview an extra marital relationship with an unmarried woman or a widow. Also what if the woman has two different sexual orientation? What if a married woman who had sexual intercourse with wom-

an who is already married? Is it not adultery then? Would then the provision of Sec 497 IPC apply? Sec 497 IPC thus suffers from the absence of logicity of approach and therefore it suffers from the vice of Article 14 of the constitution being manifestly arbitrary. With these questions at hand it is equally important to look sec 377 IPC. It thus follows that there is a serious question of gender equality which needs to be raised. The SC many a times in earlier decisions succinctly held that arbitrariness is a doctrine distinct from discrimination<sup>8</sup>. Further the Supreme Court in *Maneka Gandhi v. Union of India*<sup>9</sup> firmly held that the principle of reasonableness, both legally as well as philosophically, is an essential element of equality which pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.

*Third* the General Clauses Act, specifically says, that the masculine includes the feminine, thus enabling 'he' to be written instead of a he or she.<sup>10</sup> So it is only with respect to this provision of Sec 497 IPC that he is only a he and not a she. It says that if you have sex with another woman without the consent or connivance of that man than it shall amount to adultery and therefore the marriage system breaks down. So what happens to the marital system when it happens with the consent of a husband is not clear.

Fourth, it is important to mention here that the court has recognized the sanctity

and privacy of marital relationship in which case it becomes important to raise a question as to how then the state has become a party to marriage, to make it an offence in sec 497 IPC? To be an offence state must have a character, where state must have a role. What could then be the role of the state? Now this is a consensual situation or a consensual relation which does not amount to rape. In other words this is not a sexual offence but a willing marital offence. So at multiple levels this provision militates the Article 14, 15 and 21 reducing the women to the status of a victim and reduces the woman to the husband's property where his consent is needed is actually patriarchal. Ancient notion of man being the perpetrator and woman being victim of adultery no longer holds good. Sec 497 IPC institutionalized discrimination and perpetrates subordinate nature of woman in a marriage.

The test of *intelligible differentia* fails when sec 497 says that the sanctity of marriage is not hurt if a married man has sexual intercourse with an unmarried woman, as it only implies manifest arbitrariness<sup>11</sup>. Sec 497 fails to abide by the standards of honesty in so far it exempts a man from criminal prosecution who has engaged in sexual intercourse with a married woman if the same transpires with the consent or connivance of the said married woman's husband. This consent attaches misconduct or unscrupulousness to the act. Sec 497 is not only dishonest but also absurd to the extent it legalizes the act of adultery if committed with the consent or connivance of the husband of the woman

who is a party to the act. This connivance of the husband put the wife in a subjugated position as it makes her consent immaterial and this amounts to gender discrimination.

#### **Right to Privacy and sec 497 IPC:**

In *Puttaswamy v. Union of India*<sup>12</sup> the Supreme Court were expansive in their endorsement of privacy as a fundamental right. The Supreme Court hold that the call of the present time is to consider right to privacy, as an inherent fundamental right embedded in part III of the Constitution of India, subject to reasonable restrictions<sup>13</sup>. This right to privacy includes the right to sexual privacy also. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.<sup>14</sup> Dignity is the core which

unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance.

**Whether Sec 497 IPC protects the institution of marriage:**

Marital adultery is a marital offence, therefore should be regarded only as a matrimonial offence, the remedy for which may be sought in divorce or separation. And this remedy is available to anyone, man or woman, committed with a married or a single person. The issue of adultery should be viewed as a breach of trust and be treated as a civil wrong rather than as a criminal offence.

Marital demeanor or if somebody is not loyal to marriage, feel cheated can take recourse to divorce or separation but to say that the institution of marriage will not be destroyed if the man have sexual intercourse with a single woman or to say it will not amount to adultery if she indulged with the other person with his connivance is not only archaic, but it amounts to moving away from today's criminal jurisprudence, where the philosophy is not to treat women as a belonging or a property of the husband. It's not saving or destroying marriage one way or the other. It is just a provision which can be used to beat the wife. Criminality should not be attached in this kind of a position but should be attached to provisions like sec 498A<sup>15</sup>, sec

304B<sup>16</sup> which talks of cruelty<sup>17</sup> and dowry death.

The National Commission for Women (NCW) in 2006 wanted this provision to be decriminalized and recommended suitable amendments to Section 198(2) of the Criminal Procedure Code, which then disqualifies the wife of an unfaithful husband from prosecuting him for his promiscuous behaviour.

The Law Commission Report, 1973<sup>18</sup>, suggested that the sexist disparity in the law on adultery be removed by bringing women within the scope of the law. Even in 1985, Nalini Chidambaram and Seita Vaidalingam, two lawyers, challenged the law on adultery drafted in 1860. They argued that this 'protective' provision in the IPC was sexually discriminatory and therefore, unconstitutional.<sup>19</sup>

The Justice Malimath Committee, in 2003 suggested the suitable amendment of Section 497 of the IPC to the effect that 'whosoever has sexual intercourse with the spouse of any other person is guilty of adultery.' The Committee expressly stated, 'the object of Section 497 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).'

**Difference between Sec 497 IPC Sec 498A and 304B IPC:**

There is criminality in Sec 498A and sec 304B of IPC unlike sec 497 IPC.



Matrimonial cruelty in India is a cognizable, non bailable and non compoundable offence. Sec 304B was enacted to combat the menace of dowry deaths. It was introduced in the code by the Criminal Law Amendment Act, 1983 (Act 46 of 1983). By the same Act section 113-A has been added to the Indian Evidence Act to raise presumption regarding abetment of suicide by married woman which reads as when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Both the section substantially differs from sec 497 IPC where the situation is consensual.

### **Institution of marriage, Gender equality and Role of the State:**

Marriage under most personal laws is the union between a male and a female to the exclusion of all others for procreation of children and legalizing sex. Whether marriage is to be treated as a sacrament or a contract depends on the personal law under which the marriage takes place. In either case there is no disputing fact that it is both husband and wife who owe an obligation to either of them. But in context to sec 497 IPC, it is the third party who owes an obligation to the husband and wife and this makes no sense at all.

Regarding the role of the state, when someone is indulging in a sexual inter-

course with full consent of each other, why should state intervene and penalize that act, punishing only the husband and exempting the wife even though she was the abettor. The state in fact has a role to play only when the element of consent is missing and transactions between them must result to physical or reputational harm. In this case there is a man A, who is the husband of the woman B and there is another man C. Since A and B are husband and wife they are therefore the insider to the marriage and C is an outsider. Asking C to respect the sanctity of marriage and not to interfere with the marriage is where the state is going beyond its mandate. This is where the state with all its might has the Victorian mindset.

On the aspect of equality and gender specific laws there is no doubting the fact that whenever there exist a problem or a discrimination, Art 15(3) is specifically used to come out with a remedial mechanism to right the particular wrong and to set the balance right to ensure the people have a level playing field and equality is created in the real sense.

### **Divorce whether against Indian Ethos:**

The Hindu Marriage Act, 1955 has introduced vital and dynamic changes in the Hindu Law of marriage and Divorce. It lays down clear provisions for divorce only under certain circumstances.<sup>20</sup> But Marriage Laws (Amendment) Act, 1976 has introduced certain significant changes, like divorce by mutual consent which

affected the sacramental character of Hindu marriage. A spouse can now file a divorce case when he/she is subjected to any kind of mental and physical injury that causes danger to life, limb and health. Marriage is already a civil contract under Muslim personal law. To say marriage as an institution is without an exit option will be to say that divorce does not exist, which is not the case now. Divorce was not there as an option for earlier generations of Hindu people.

Divorce is necessary option for those stuck in unhealthy, dangerous, or toxic marriages. In situations of physical, mental, emotional and sexual abuse, divorce can be the light at the end of the punishing tunnel that was a dysfunctional marriage.<sup>21</sup> Why to choose sufferings and unhappiness when there is option to choose peace outside the marriage. Everybody is entitled to take their own decision. Therefore only by striking down sec 497 IPC, we will be inconsistent with Indian ethos.

### **Conclusion:**

The only way to deal with adultery is to strike it down as archaic, patriarchal having chauvinistic undertones, absolutely treating it as a belonging, otherwise guilty of theft. The suggestions forwarded by Malimath Committee to bring reform in adultery law is even more archaic and absurd as it says make both of them criminally liable. Whereas keeping in pace with today's criminal jurisprudence it should not be a criminal offence as it is already a civil matrimonial offence in most enactment, for most religions, in most communities and that's what it should remain. We must move with time. That decriminalizing adultery gives a clean chit to an adulterous marriage or a marriage without morals or if you don't have this provision the institution of marriage will fall does not hold good. How strong or weak the institution of marriage is not upheld by the one pillar of criminalizing or decriminalizing adultery. The sanity of marriage does not depend on sec 497. We need gender sensitive and not gender neutral laws. Sec 497 IPC is not even gender neutral for that purpose.

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<sup>2</sup> Joseph Shine v. Union of India (2018) SCC 1676

<sup>3</sup> India Today, September 27, 2018, available at <https://www.indiatoday.in/education-today/gk-current-affairs/story/section-497-adultery-law-scrapped-all-about-law-html-1350726-2018-09-27> (last visited on February 25, 2019)

<sup>4</sup> ibid

<sup>5</sup> AIR 1954 SC 321

<sup>6</sup> AIR 1985 SC 1618

<sup>7</sup> The Times of India, September 28, 2018. Available at <https://timesofindia.indiatimes.com/india/adultery-no-longer-a-criminal-affair-supreme-court-rules/articleshow/65987102.cms> (last visited on February 24, 2019)

<sup>8</sup> Royappa v. State of Tamil Nadu (1975) 1 SCC 485; A.L Kalra v. Project Equipment Corporation (1984) 3 SCC 316

<sup>9</sup> (1978) 1 SCC 248

<sup>10</sup> The General Clauses Act, 1987

<sup>11</sup> The Constitution of India, Art. 14

<sup>12</sup> (2014) 6 SCC 433

<sup>13</sup> Usha Ramanathan, "Future of Freedom" *The Frontline*, January 18, 2019

<sup>14</sup> The Wire, August 27, 2017. Available at <https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy> (last visited on 23rd February, 2019)

<sup>15</sup> Sec. 498A IPC says, whoever being the husband or the relative of the husband of a woman, subjects her to cruelty shall be punished with imprisonment for a term, which may extend to three years and shall also be liable to a fine. The main objective of section 498A of I.P.C is to protect a woman who is being harassed by her husband or relatives of husband.



- <sup>16</sup> Sec 304B (i) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called dowry death, and such husband or relative shall be deemed to have caused her death.

Explanation: For the purpose of this sub-section, dowry shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(ii) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

- <sup>17</sup> For the purpose of this section, ‘cruelty’ means: a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demands for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

- <sup>18</sup> Law Commission of India, 42<sup>nd</sup> Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition) : A Suggested Legal Framework (Report No. 242, August, 2012).

- <sup>19</sup> Shoma A. Chatterji, Law on Adultery: Is protecting the sanctity of marriage the wife’s responsibility, July 13, 2018. Available at <https://www.thecitizen.in/index.php/en/NewsDetail/index/7/14369/Law-of-Adultery-Is-Protecting-the-Sanctity-of-Marriage-The-Wifes-Responsibility> (last visited on 23 rd February, 2019)

- <sup>20</sup> The Hindu Marriage Act, 1955 sec 13

- <sup>21</sup> The Necessity of Divorce, available at <https://mensdivorce.com/necessity-divorce/> (visited on February 25, 2019)