

A VICTORIAN REMNANT: AN ANALYSIS OF SECTION 497 OF THE IPC

Deepak Singh¹

ABSTRACT

"Results are what you expect, consequences are what you get"- Anonymous
Marriage has been regarded as a sacred bond between Husband and wife. Both the partner are expected to be loyal to each other to preserve the sanctity and sacred nature of the marriage. However the most damaging offence, which can unsettle a normal married life is adultery. Adultery is a crime punishable with up to five year, or fine or both under s.497 of the Indian Penal Code. The section was incorporated with an intention to save gullible woman from the clutches of man who were considered to be a seducer by the drafters who incorporated adultery in the code. However over 160 years have gone by but the section still stood the test of time despite leaps India has taken in almost every sphere. The paper begins analysing the offence of adultery and attempts to trace its historical origin. Then I move to the substantial portion by considering constitutional dimensions of s.497 and comparing attitude towards adultery in different countries. I then move to analyse how adultery in the code discriminates both the genders violating Constitutional provisions and arguing that why state should not criminalize adultery inviting the mighty sanction of the state in private realms of life which is blatant violation of privacy within the four walls of a castle of a common man.

I. INTRODUCTION

From very early times marriage was a well-established institution and held a very high place among the Aryans in India as amongst some other ancient people like Romans and the Greeks.² In the Vedic period, the sacredness of the marriage tie was repeatedly declared and

¹ NATIONAL LAW UNIVERSITY ODISHA

² 1 EDWARD JAMES RAPSON, THE CAMBRIDGE HISTORY OF INDIA 89 (Cambridge University Press) (1922).

women held in high honour.³ Marriage as an institution was recognised by all civilized nations from early times.⁴ The concept of marriage demands prerequisite of loyalty towards one's spouse. The husband and wife are expected to be loyal to each other to preserve the sanctity and sacramental nature of the marriage. On the contrary of what is expected of husband and wife, some partners are not able to remain loyal to each other and consequently they end up destroying the marriage. The most damaging offence, which can unsettle a normal married life is adultery.⁵ The word, like the word "adulteration", is derived from a Latin root which originally means "mixing or degrading or counterfeiting". Adultery is 'a consensual sexual intercourse between a married person and a person of the opposite sex during the subsistence of marriage'.⁶ Adultery, both extramarital and extra dyadic, is a significant problem that seriously affects many relationships.⁷ Adulterous relationship is condemned by all the civilised societies in the world. However the adultery in other civilized countries seems to be at a different footing that in Indian which invidiously discriminates between both the genders on the basis of sex.⁸ The offense as postulated in the provision makes only a man (other than the husband) having sexual intercourse with a married woman without the consent or connivance of the husband liable. The term 'consent or connivance' used in the provision reflects that the essence of the provision is destroyed if there is a consent or connivance of the husband. It creates the dent on the identity of a woman and subordinate to her dignity. On the other hand, a man who commits the offence i.e., having sexual intercourse with the wife of another man is punishable while the woman who is a party to the act and is also an abettor is left scot-free.⁹ Also a woman cannot prosecute her husband nor with whom he had sexual intercourse.¹⁰

The flaw in the section has remained intact and the definition of adultery in s.497 remains as it was when enacted in 1860. It has come into light recently when the Supreme Court in *Joseph Shine v. Union of India*,¹¹ has issued notice to the centre asking if the provision which prescribes the punishment for adultery for up to five years, or fine of both, be declared *ultra*

³ *Kamini Devi v. Kameshwar*, A.I.R 1946 25 Pat. 58.

⁴ 1 M.N SRINIVASAN, COMMENTARY ON HINDU LAW (5 ed., Delhi Law House) (2010).

⁵ PROF. (DR.) G. RAJASEKHARAN NAIR, GENDER JUSTICE UNDER INDIAN CRIMINAL JUSTICE SYSTEM (Eastern Law House) (2011) [hereinafter "Gender Justice"].

⁶ 1 DAVID HAY, WORDS AND PHRASES LEGALLY DEFINED VOLUME 1 76 (4th ed., Lexis Nexis Butterworths, New Delhi) (2007).

⁷ Sarah Schonian, *Perceptions and Definition of Infidelity: A Multimethod Study*, UNLV., Dec.2013.

⁸ The Indian Penal Code, Act No. 45. § 497 (1860).

⁹ Gender Justice, *supra* note 4.

¹⁰ The Criminal Procedure Code, No. 2, Acts of Parliament. § 198(1), (1974).

¹¹ *Joseph Shine v UOI*, WP (CrI.)No.194 of 2017.

vires for “being unjust, illegal and arbitrary and violative of citizens’ fundamental rights.”¹² A detailed-analysis of the section would show the discrimination meted out to both the genders egregiously violating Article 14, 15 and 21 of the Indian Constitution on the basis of inequality, sex and right to life and dignity.

This paper will focus on detailed-analysis of offence of adultery in India. The paper is divided into six parts. *First* the paper will deal with the historical outlook of the section 497. *Second* the paper will deal with the adultery as it stands in IPC. *Third* the paper will analyse the constitution dimensions of the provision. *Fourth* the paper will draw a comparative comparison of attitude towards adultery in different jurisdictions. *Fifth* the paper will argue the discrimination meting out to both the genders under Constitution of India. *Final* the paper will argue as to why state should not criminalize adultery.

II. HISTORICAL OUTLOOK

The concept of *covertures* is inherited from English Common Laws. Under the doctrine of covertures, a woman was legally considered the chattel of her husband, his possession.¹³ In the words of great English jurist William Blackstone: the very legal existence of wife is suspended during the subsistence of a marriage and her rights are incorporated into that of her husband; under whose wing, protection, and cover, she performs everything.¹⁴ Under covertures, a wife simply had no legal existence. She became, in the words of the Seneca Falls Declaration of Sentiments, “*civilly dead*.”¹⁵ Woman were simply conceived of as a belonging to man, akin to the concept of property and so any interference with her person would outrage man’s instinctive sense of property, and would at once arouse jealousy.¹⁶

An infidel wife was subjected to ostracism worse than that faced by the unfaithful man.¹⁷ Despite this, adultery was never considered a crime in common law or statute but only her

¹²Prof. G.S. Bajpai & Priya, *Decriminalization of Adultery*, LIVELAW (Feb.7, 2009, 8:15), <http://www.livelaw.in/decriminalisation-of-adultery/>.

¹³ Married Women’s Property Act, 45 & 46 Vict., c. 30, Acts of Parliament (1882).

¹⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-445 (1765-69).

¹⁵ 1848 Seneca Falls Declaration of Sentiments, *Joan Hoff, Law, Gender & Injustice: A Legal History Of U.S. Women* (1991).

¹⁶ Vern L. Bullough, *Medieval Concept of Adultery*, Vol. 7, No. 4 JSTOR. 5-6 (1997) [hereinafter, “Medieval Concept”].

¹⁷ Ann Summer Holmes, *The Double Standard in English Divorce Laws*, LAW AND SOCIAL ENQUIRY (1995).

legal rights were stripped off and vested in husband during the subsistence of a marriage.¹⁸ The offence of adultery was merely a criminal trespass on the property of husband. As one is not expected to trespass on someone else's property, in the same way one is not expected to have sexual intercourse with someone else's wife without the consent or connivance. Thus it might be the reason the section did not find its place in the first draft prepared by Macaulay. Lord Macaulay, the genius mind behind the drafting did not incorporate adultery as an offence under the code.¹⁹ He concluded that punishing adultery would serve little purpose and it could be achieved through giving compensation in most cases.²⁰ But the Second Law Commission tasked with finishing the Code, after having made deliberations on the subject, came to the conclusion that it was not advisable to exclude this offence outside the purview of the code.²¹

The Indian Law Commissioner tasked with preparing final draft justified the inclusion of Adultery in the code.²² There have been several Law Commission Reports dealing with subject of Adultery.²³ The 42nd Law Commission in its report compared the attitude of criminal law towards adultery in USA, UK, France and Germany. The Law Commission posed two question to itself (a) should adultery be punishable at all, (b) if so, the offence be limited to men only as in section 497 and found that there had been divergent opinion among the policy makers, judges and lawyers. It resolved that reasons which weighted with the Indian Law Commissioners in exempting the wife from punishment by and large no longer valid, and there is no justification, whatsoever for not treating the guilty pair alike.²⁴ The Law Commission noted that: *“some of us are personally inclined towards recommending repeal of the section, we think on the whole that the time has not ripe yet come for making such a*

¹⁸Equality, Property and Marriage, ROY ROSENZWEIG CENTER FOR HISTORY AND NEW MEDIA, <http://chnm.gmu.edu/courses/omalley/120f02/america/marriage/>.

¹⁹ Q MACAULAY'S, DRAFT PENAL CODE, (1837).

²⁰ *Id.*

²¹ RATANLAL & DHIRAJLAL'S, THE INDIAN PENAL CODE (31st Ed. 2009).

²² “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 to a humane man 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 England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy 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.”

WALTER MORGAN & ARTHUR GEORGE MACPHERSON, THE INDIAN PENAL CODE (ACT XLV OF 1860): WITH NOTES, 438 (1863). [hereinafter, "Walter Morgan"]

²³ 156th Report, *Indian Penal Code Volume II*, LAW COMMISSION OF INDIA (1997), <http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf>.

²⁴ 42nd Report, *Indian Penal Code*, LAW COMMISSION OF INDIA (1971). [hereinafter, "42nd Report"].

change in the existing position".²⁵ The commission having been inclined to repeal the section did not recommend repeal of the section but recommended amendment: woman should also be brought within the purview of s.497, and reduction of sentence from five to two years.²⁶

The same stand was also taken by committee formed under the tutelage of Justice V.S Malimath to revamp the criminal system favoured gender-parity in law and further suggested: "*S. 497 should suitably be amended to include both the genders within its purview*".²⁷ The crime of adultery is considered no less serious than as breaking open a house²⁸ in the Indian society which abhors the marital infidelity.²⁹

III. ADULTERY UNDER INDIAN PENAL CODE

Section 497 of the Code deals with the offence of Adultery:

*497. "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 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."*³⁰

The cognizance of this offence is limited to adultery committed with a married woman and male offender alone has been made liable to punishment. A man having sexual intercourse with a married woman is an essential ingredient of the offence.³¹ Under the code, adultery is committed by a third person against a husband in respect of his wife. As we have seen above that the woman were considered to be chattel of husband. So husband has been treated as her 'owner' who has ownership over his wife akin to the concept of property owner who has possession over his land, car *et cetera*. Another feature of adultery is that a wife who has sexual intercourse outside the wedlock is left scot-free and cannot be prosecuted as a

²⁵ *Id.* at 325.

²⁶ *Id.* at 327.

²⁷ Amnesty International India, *The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights* (2003), <https://www.legal-tools.org/doc/70d1c6/pdf/>.

²⁸ *Sowmithri Vishnu v. Union of India*, A.I.R 1985 S.C. 1618.

²⁹ The Indian Penal Code (Amendment) No. 98. (2017).

³⁰ The Indian Penal Code, Act No. 45. § 497 (1860).

³¹ 4 HARI SINGH GOUR, PENAL LAW OF INDIA 4556-57 (11th Ed., Law Publishers, Allahabad) (1998).

principal or an abettor. Nor she can prosecute her husband for adultery.³² Punishment has been prescribed only for the third party in respect to a married woman and a married woman is never guilty of adultery under the purview of s.497 of the code. Another aspect which makes this section replete with inconsistency is that if there is consent or connivance of the husband, then adultery ceases to exist.³³ It is to be kept in mind that sexual intercourse with an unmarried woman, prostitute or widow is not adultery.³⁴

To constitute an offense of adultery, the following ingredients must be established:

1. The person must have knowledge or belief that woman is married and wife of another man;³⁵
2. Sexual Intercourse must be committed with the wife of another man;³⁶
3. Such sexual intercourse must not amount to rape.³⁷
4. Such sexual intercourse be without the consent or connivance of the husband;³⁸

IV. CONSTITUTIONAL VIRES OF SECTION 497

There have been several occasions wherein the constitutionality of adultery has been challenged. Woman's activists have also opposed the retention of the provision relating to adultery in the penal code time and again. On occasions more than once,³⁹ the constitutional vires of s. 497 was challenged in the Supreme Court on the grounds. The first case in which vires of s. 497 was challenged in the Supreme Court was *Abdul Aziz v. State of Bombay*,⁴⁰ wherein the appellant contended that s.497 violated Article 14 & 15 of the constitution on the ground that only men are punishable whereas woman are left scot free. The appellant who was being prosecuted for adultery relied on the portion of Article 14 & 15 which states that State shall not discriminate on the basis of sex. However the court held that sex is a sound

³² *V. Revathi v. Union of India*, A.I.R 1988 S.C. 835.

³³ *Samraj Nadar v. Abraham*, A.I.R 1970 Mad. 434.

³⁴ *Liberty Cinema v. Commissioner, Corporation of Calcutta* A.I.R 1959 Cal. 45.

³⁵ *Brij Lal Bishnoi v. State* (1996) Cr.L.J. 4286 (Del).

³⁶ *WJ Phillips v. Emperor* A.I.R 1935 Oudh 506.

³⁷ PSA PILLAI'S, CRIMINAL LAW (12th ed. 2014) [hereinafter, "PSA PILLAI"].

³⁸ *Pothi Gollari v. Ghani Mondal* A.I.R 1963 Ori 60, (1963).

³⁹ *Yusuf Abdul Aziz v. State of Bombay* (1954) S.C.R 930; *Sowmithri Vishnu v. Union of India* A.I.R 1985 S.C. 1618; *V. Revathi v. Union of India* A.I.R 1988 S.C. 835.

⁴⁰ *Abdul Aziz v. State of Bombay* (1954) S.C.R 930.

classification and although there can be no discrimination in general on that ground, the constitution itself provides for special provision in the case of woman and children. No doubt the court endorsed the view taken by the final drafters of the Penal code and held it constitutional. Over the period of time, both the genders have shown that S.497 is discriminatory to both the sex in some sense. Again, in *Sowmithri Vishnu v. Union of India*,⁴¹ wherein the petitioner who was being prosecuted filed a petition challenging the vires of s. 497 on the ground that it makes irrational classification between man and woman and it unjustifiably denies the woman the right which is given to men. The court entertained the petition on the ground that 30 years had gone by since the decision in *Yusuf Abdul Case* came and thought of revisiting it. However the Court having accepted that erring spouses do not have remedy against each other did not obliterate the s. 497 from the statute book. The Court looked at it from the prism of society and held, that at least a limited class of adulterous relationship must be punishable by law and stability of marriages is not an ideal which is to be scorned.

The vires of s.497 was again challenged in *R. Revathi v. Union of India*,⁴² wherein the petitioner who was the wife of the husband who had committed adultery filed a petition on the ground that s. 497 of the Code violates the constitution as it discriminates her on the ground of sex. The primary contention of the wife was that since husband could prosecute the male offender who has sexual intercourse under 198 Criminal Procedure Code but the wife cannot prosecute her offending husband for the offence of adultery punishable under s.497 of the code. The petitioner wife further contended that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband. The court held the provision to be intra vires stating that social good will be advanced by permitting the couple to reconcile the matrimonial tie rather than to drag each other in the criminal court.⁴³

The courts examining the *vires* of s.497 did not pay heed to the societal changes which have taken place since the section was incorporated. The provision which was purportedly enacted for the benefits of the woman and make only the men in most circumstances culpable, in fact only help reiterate the social belief that women are weak, have no understanding of their own which can very well be seen from the provision which considers wife a chattel of the

⁴¹ *Sowmithri Vishnu v. Union of India* A.I.R 1985 S.C. 1618.

⁴² *V. Revathi v. Union of India* A.I.R 1988 S.C. 835.

⁴³ *Id.*

husband. It is to be noted that the Hon'ble Apex Court made an observation in the case of *W. Kalyani v. State of Tr. Inspector of Police and Another*,⁴⁴ wherein it accepted that s.497 is facing criticism from several quarters for showing gender-bias as it makes the position of a married woman property of her husband.

The courts over the time has held s. 497 *intra vires* constitution on the ground that the state can make laws under Article 15(3) for woman and children. However It only amounts to subordination of the woman. It creates a dent on the dignity of the women who are considered a property and husband her lawful owner.

V. INDIA AND OTHER JURISDICTIONS

Since the time immemorial, Adultery was considered as a sin whether it was committed by a married man or a married woman and both the gender were equally punishable for adulterous acts.⁴⁵ Most of the civilized countries have either abolished adultery from their penal code, barring few Islamic countries or eliminated double standard of punishing only one gender. Most of the countries have retained it under Divorce laws.

1. KOREAN CRIMINAL CODE

In Korea, unlike India (s. 497, IPC), the offense of adultery can be committed both by husband and wife and both are equally punishable.⁴⁶ However recently the Constitutional Court of North Korea declared with 7:2 that Article 241 which criminalizes adultery is *ultra vires* to the constitution ending the decade-long debate of whether the state is justified in criminalizing adultery.⁴⁷

⁴⁴ *W. Kalyani v. State of Tr. Inspector of Police and Another*, A.I.R. 2012 S.C.C 1358.

⁴⁵ Medieval Concept, *supra* note at 15.

⁴⁶ Korean Criminal Code came into force on 3rd October, 1953.

⁴⁷ Sayuri Umeda, *South Korea: Criminal Provision on Adultery Held Unconstitutional*, LIBRARY OF CONGRESS (Mar.25, 2015), <http://www.loc.gov/law/foreign-news/article/south-korea-criminal-provision-on-adultery-held-unconstitutional/>.

2. ENGLAND AND FRANCE

In the United Kingdom, adultery was an ecclesiastical crime not a part of the common law.⁴⁸ Therefore, Adultery is not an offense in the United Kingdom. It is not punishable in most of the European countries. There are some countries which mildly punish adultery. In France, a wife guilty of committing adultery can be punished for the period ranging from three months to two years of imprisonment. The sentence is put to an end if the husband agrees to take his adulterous wife. The adulterer is punishable similarly.⁴⁹

3. GERMANY

In Germany, the offence of adultery is viewed as a conflict between husband and wife and is punished mildly as in other European countries. The laws of Germany prescribes that if a marriage is broken as a result of adultery, then the guilty spouse as well as guilty partner is punishable with imprisonment for a term of not less than six months, but prosecution is to be set in motion by the aggrieved spouse by means of a petition.⁵⁰

4. PAKISTAN AND ISLAMIC COUNTRIES

Adultery is considered a heinous offence in Pakistan and both the man and woman are dealt sternly. For instance Arifa, 25, who dared to stand to her family and fell in love with the man she loved was dragged in a busy street in Karachi at a gunpoint and murdered.⁵¹ Both individuals can be killed if caught *flagrante delicto* in Pakistan. In 1987, a Pakistani Court of Sessions sentenced a couple to be buried up to their necks and stoned to death in public for committing adultery.⁵²

5. MALAYSIA, SINGAPORE AND HONG KONG

Malaysia which is a Muslim predominant country, adultery is not an offence under its penal code due to influences of Singapore and Hong Kong where adultery is not an offence.

⁴⁸ Carotti v. State, 42 Miss. 334, 346 (Miss. Err. & App. 1868).

⁴⁹ 42nd Report, *supra* note at 23, pg 325-26.

⁵⁰ PSA PILLAI *supra* note at 36.

⁵¹ Yalda Hakim, *How Pakistan's women are punished for love*, THE BBC NEWS (Dec. 12, 2014), <http://www.bbc.com/news/world-asia-30400690>.

⁵² Hindustan Times, (November 10, 1987, p 11 Delhi Edn.)

6. PHILIPPINES

It is interesting to observed that Philippines which is a Catholic dominated Christian country, it is the married, and not her husband who is liable for adultery.

7. GREECE

Both men and woman are equally liable for punishment in the Greek Penal Code. A woman, unlike Indian cannot escape from liability. Article 35 of the Greek Penal code states:⁵³

A spouse who commits adultery and the offending partner shall be punished by imprisonment for not more than one year. Prosecution shall commence only upon the complaint of the injured party.

Almost all the civilized countries have enacted progressive legislations. They have either deleted it from statue book or brought both the genders at par by making both men and woman punishable for the offence of adultery. S. 497 should be deleted from the statute book as it is inconsistent with the modern notion of the status woman who are free-thinkers and not dependent on male paternalism. It is also opposed to woman's natural rights and obligation under marriage. It is the high time that woman should also be brought within the purview of s.497 if not obliterated.

VI. INVIDIOUS DISCRIMINATION

Over the time courts have accepted that s. 497 basically discriminates on the ground of sex but on the other hand the courts have held that the state can make laws for the benefit of woman and children under the mandate of the constitution. This view has been endorsed by the courts to justify the retention of s. 497 in the statute book.⁵⁴

The s. 497 faces challenges at three levels as it violates Article 14 on the ground of equality but also discriminatory on the basis of sex under Article 15 and Right to life and dignity under Article 21.

⁵³ The Greek Penal Code, § 357.

⁵⁴ Yusuf Abdul Aziz v. State of Bombay (1954) S.C.R 930; Sowmithri Vishnu v. Union of India A.I.R 1985 S.C. 1618; V. Revathi v. Union of India A.I.R 1988 S.C. 835.

1. ARTICLE 14

Article 14 of the Constitution states that state shall not deny to any person equality before the law or the equal protection of the laws within territory of India.⁵⁵ Equality is a dynamic concept with many facets and dimensions and it cannot be "*cribbed, cabined and confined*" within traditional and doctrinaire limits.⁵⁶ However the definition of Adultery in the IPC is the most offending to the concept of equality of sexes under the Constitution. The provision makes illogical, unfair and unjust classification between man and woman and denies the woman the right conferred on men. Adultery in the code discriminates woman on three grounds: (1) The woman cannot prosecute her husband for adultery as this right is only given to men;⁵⁷ (2) the woman cannot prosecute the woman with whom her husband has sexual intercourse; and (3) the husband has *carte blanche* to have sexual intercourse with unmarried woman which is not taken into account under section 497 of the Code. It reflects the male chauvinism rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.⁵⁸ The Hon'ble Supreme Court has time and again held that if classification is illogical, unjust and unfair, such classification is unreasonable.⁵⁹

2. ARTICLE 15

Article 15 of the Constitution states that no discrimination shall be meted out on the basis of sex *et cetera*.⁶⁰ The s. 497 of the code categorizes the two sexes i.e., men and woman and put both the genders unequally on a different footing. The Article 15 discriminates both the sexes on three grounds; (1) The man who has sexual intercourse with an unmarried woman has not been made an offence; (2) the man having sexual intercourse with a married woman is an offence; (3) men have been given power to prosecute the offender and lodge the complaint but the same rights have not been given to a woman which egregiously discriminates on the ground of gender. Further woman have right to elimination of gender-based discrimination as has been held by the Hon'ble Supreme Court.⁶¹

⁵⁵ INDIA CONST. art. 14.

⁵⁶ E.P. Royappa vs. State of Tamil Nadu and Anr, A.I.R 1974 SC 555.

⁵⁷ The Criminal Procedure Code, No. 2, Acts of Parliament. § 198(1), (1974).

⁵⁸ Frontiero v. Richardson, 411 U.S. 677 (1973).

⁵⁹ Deepak Sibal v. Punjab University (1989) 2 S.C.C 145.

⁶⁰ India Const. art. 15.

⁶¹ C Masilamani Mudliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil, (1996) 8 S.C.C 525.

3. ARTICLE 21

The subordination of woman's dignity by treating her like a property afflicts her Right to life and liberty under Article 21 of the Constitution. The Right to life with dignity is included in right to life and personal liberty.⁶² The provision s 497 in the code prescribes that once the consent or connivance of a husband is present, the offence of adultery cease to exist. This amounts to blatant subordination of woman's life and dignity who is treated as a property under the provision. It is not open to any person to violate her person as and when he wishes. She is entitled to have her person protected if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.⁶³ Recently Hon'ble Supreme Court in *Anuj Garg v. Hotel Association of India*,⁶⁴ while dealing with the Punjab Exercise Act, 1914 observed that "*Instead of prohibiting women employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. Any other policy inference from societal conditions would be oppressive on the women and against the privacy rights*".

The crucial consideration is that a woman's right to privacy, bodily integrity and dignity should be respected. The autonomy of a woman and her control over her body is an integral part.⁶⁵ The woman should not be merely treated as a property, encroachment of which will arm husband to take action against the adulterer.

VII. SECTION 497: A VICTORIAN REMNANT LEFT BY THE BRITISHERS?

Before the IPC was drafted adultery was not an offence in India either for men or women. The English law also had no provision to criminalize adultery. Adultery was only ecclesiastical crimes.⁶⁶ It was for this reason Lord Macaulay did not include it in his first draft. However the Second Law Commission added the provision to it. The Law Commission noted that the then prevalent social infrastructure and the economically and secondary dependent position of woman were not conducive to punish adulterous women. Further, the authors noted that, that a wife was socially conditioned to accept her husband's adulterous

⁶² Danial Latifi v. Union of India, (2001) 7 S.C.C. 740.

⁶³ State of Maharashtra v. Madhukar Narayan Mardikar, (1991) 1 S.C.C. 57.

⁶⁴ Anuj Garg v. Hotel Association of India A.I.R 2008 S.C. 663.

⁶⁵ Suchita Srivastava v. Chandigarh Administration, (2009) 9 S.C.C. 1.

⁶⁶ Medieval Concept, *supra* note at 15.

relationship as polygamy was an everyday affair. She neither felt humiliated nor was it a cultural shock for her. The Law Commission incorporated adultery an offence in the Penal Code punishing only the adulterous men, leaving woman, who, in their opinion, were already living in oppressive conditions and humiliated within the family.⁶⁷

The Indian Law Commissioner justified the incorporation of s. 497 in the code by saying:

*"There are some peculiarities in the state of society in this country, which may well lead a humane man to pause, before he determines to punish the infidelity of wives. The condition of the woman in this country is unhappily very different from that of the woman of England and France. The woman in this country are married while still children. They are often neglected for other wives while still young. They share the attention of husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenans with woman, is a course which we are most reluctant to adopt"*⁶⁸

The incorporation of s. 497 may have been done with a view to protect unwitting, gullible woman in the pre-independence period. However over 160 years have passed since s. 497 was adopted but no attention has been paid to the societal changes India has undergone over the years. The view that men are seducer and woman are victims have played reasonable consideration for courts for justifying the retention of s.497 in the code.⁶⁹ This position has changed over the years due to prohibition of polygamy as wives in pre-independence era were starved of love and affection from their husband due to having numerous wives and could easily fall into trap of a man who were viewed as a seducer and woman as victim. Mrs. Anna Chandy who was member of Indian Law Commission in its 42nd report voted for the deletion of s. 497 on the ground that "it is the apposite now to consider the question whether the offence of adultery as envisaged in Section 497 is in tune with our present day notions of woman's status in society".⁷⁰

In this connection one jurist has observed: "Probably this kind of discrimination was made by the law because the law wanted to protect the interest of the weaker party, the woman."⁷¹ However today the role of an woman is considered as a thinking, responsible person capable

⁶⁷ PSA PILLAI *supra* note at 36.

⁶⁸ Walter Morgan, *supra* note at 21.

⁶⁹ Sowmithri Vishnu v. Union of India, A.I.R 1985 SC 1618.

⁷⁰ *Id.*

⁷¹ K.N. CHANDRASEKHARAN PILLAI: GENERAL PRINCIPLES OF CRIMINAL LAW 86-87 (2ed. 2011).

of taking responsibility of her action. Giving special emphasis on the role of woman today, Alex De Tocqueville in the Democracy in America stated that: "*If I were asked ... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women.*"⁷²

The orthodox concept of the wife is that she is expected to be *Ardhangini, Bharya, Dharampatni, Anugamini*. It implies that woman has to follow her husband as a property. This concept of wife and expectations from her to subject to husband's wishes has undergone a radical change with education and high literacy in woman and with recognition of equal rights for woman has reinforced the argument that woman is no more considered as a weak sex but a strong, self-dependent. She is a partner in marriage with equal rights and status with the husband.⁷³

The Country embarked on the socio-economic modernization which led to the change of position in society and woman are no more considered as a property but a free-liberal, independent, thinker and strong. The legislature should delete the remnant left by the Britishers in the Indian Penal code.

VIII. WHY STATE SHOULD NOT CRIMINALIZE ADULTERY?

What is obscene can also be alluring, of course, not all things that is alluring need be obscene. Pornography, has always had the character of allure, that is, it is "designed entirely and plausibly to induce sexual excitement in the reader and observer." But we should call a work of pornography obscene only when we wish "to endorse some offense as the appropriate reaction to it."⁷⁴ Conducts which results in causing verifiable harm to another should be the subject-matter of state sanction.⁷⁵ State interference in citizen's behaviour may be justified when it is reasonably necessary to prevent unreasonable risk or harm to parties other than the

⁷² KENNETH C. GARDNER JR., TRAVELS ON THE ROAD OF AMERICA, iUniverse (2015); Also Quoted in Charu Khurana and Ors v. Union of India, A.I.R 2015 S.C. 839.

⁷³ R Prakash v. Sneha Lata, A.I.R 2011 Raj. 269.

⁷⁴ Stanley C Brubakerz, *Book review: Offense to Others. by Joel Feinberg*, UMLS Rev., Vol. 3:608 (1986).

⁷⁵ Abhinav Sekhri, *The Good, The Bad and The Adulterous: Criminal Law and Adultery in India*, 10 Socio-legal review, 49-50 (2014).

person interfered with.⁷⁶ More concisely, the need to prevent harm to parties other than the perpetrator is always held to be appropriate ground for legal sanction.⁷⁷

John Stuart Mill argued in his book *On Liberty* that the only kind of conduct that the state may rightly criminalize is conduct that causes harm to others.⁷⁸ The state seems to justify criminalizing Adultery on the principle of Legal Moralism. It may be morally legitimate for the state to prohibit certain types of conduct that cause neither harm nor offence to anyone on the grounds that such actions cause evils of other ("free-floating") kinds.⁷⁹

American Philosopher Joel Feinberg in his ambitious project evolved principles to determine what sorts of behaviour state ought to criminalize.

1. HARM TO OTHER PRINCIPLE

This theory propounded by Joel Feinberg implies the criterion of 'seriousness'.⁸⁰ The harm (physical or emotional) inflicted other than the perpetrator should be serious in nature justifying state's intervention, otherwise without specifying the limit, virtually every type of human conduct can affect the interest of other inviting state sanctions. However in Adultery, no physical harm is caused to the husband by the act of his wife other than the perpetrator. The emotional harm suffered by the husband can well be compensated by ground for divorce or Judicial Separation rather than dragging the sacred relationship in the court of law, further creating animosity between the spouse.

2. OFFENCE TO OTHER PRINCIPLE

It implies that it is reasonably necessary to prevent hurt or offence (as opposed physical harm) to others.⁸¹ In Adultery, the offence is not caused to the husband but rather it ventures into offensive relationship between husband and wife which can very well be resolved through Civil compensation e.g., Matrimonial Laws.

The concept of "personal sovereignty" is the notion that there is a domain in which individual's own choice must reign supreme.⁸² Individual's rights should lead to the private remedies in law such as divorce laws, not grounds for intervention of state sanction. Thus Criminalizing adultery is free-floated kind of offence without exhibiting sufficient cause for criminalizing it on the ground of Legal Moralism in the present context.

⁷⁶ 1 JOEL FEINBERG, HARM TO OTHERS 11-12 (Oxford University Press) (1987). [hereinafter, "Joel Feinberg"].

⁷⁷ *Id.*

⁷⁸ JOHN STUART MILL, ON LIBERTY (Batoche Books, Kitchener 1859) (2011).

⁷⁹ Joel Feinberg, *supra* note at 69. pg 27.

⁸⁰ *Id.*

⁸¹ *Id.* pg. 12.

⁸² 3 JOEL FEINBERG, HARM TO SELF, 87-88 (Oxford University press) (1984).

IX. CONCLUSION

The U.S Supreme Court Judgment in *Olmstead v. United States*⁸³ in which Brandeis, J. said in his dissent that : "*the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone.*"

Adultery in most of the countries have either been repealed or have passed into desuetude. The primarily consideration for incorporating adultery in Indian Penal Code was to protect gullible, unwitting wife from men who were seducer. However s. 497 has remained same in the light of societal progress we have made in every sphere for over 150 years. The need of the hour is to revisit the legislation pertaining to the adultery and make it more progressive by either repealing it or making both the husband and wife equally punishable for adultery as in the case of most of the civilized countries in the world. Individual should have a reason to resist transgression from state in his personal life which gives scope for arbitrariness. The wedlock is faltered when the private moment of four-walls is dragged into public space; court of law and inevitably involves mud-slinging which mars the relationship between the spouses and thwarts prospects of amicable resolution. The offence of adultery, once committed results in embittering the relationship and destroys the wedlock. The state, instead of providing substantive right to punish the adulterer resulting in 'break up' between husband and wife should 'make up' by allowing it as a ground for divorce but not by harassing spouses. The Hon'ble Apex Court dealing with the issue should take a progressive stand keeping in view the legislation of other countries.

⁸³ *Olmstead v. United States*, 277 U.S. 438 (1928).