

903



**SRI DHARMASTHALA MANJUNATHESHWARA
LAW COLLEGE & CENTRE FOR
POST GRADUATE STUDIES & RESEARCH IN LAW**
MANGALURU - 576 003.

BAAC Re-accredited B++ CGPA 2.9

Sponsored by:

Sri Dharmasthala Manjunatheshwara Educational Society (R.), Ujire, D.K.

Legal Opus

Issue No. 12
July 2019



LEGAL OPUS

Issue 12 | July 2019

<i>Content</i>	<i>Page No.</i>
<i>One Nation One Election; Legal and Constitutional Issues</i> <i>Dr. Tharanatha</i>	1
<i>Enforcing Resolution 47 to settle the Kashmir Dispute - A Review</i> <i>Mr. Santhosh Prabhu and Mr. Sumith Suresh Bhat</i>	7
<i>Debt Bondage: Law and Enforcement Issues</i> <i>Dr. Gagan Krishnadas and Dr. Ramesh</i>	14
<i>International Regime Relevant to Climate Change and Renewable Energy</i> <i>Mrs. Chandralekha V. and Dr. T. R. Maruthi</i>	23
<i>An Analysis on Media Ethics and Guidelines of Press Council of India</i> <i>Mrs. Shubhalakshmi P.</i>	32
<i>Multiculturalism - A Boon or A Bane to the Minorities?</i> <i>Dr. Annapoorna Shet</i>	42
<i>JUXTAPOSING- The Indian Scenario of players and Legal aspects of Sports</i> <i>Mrs. K. Vinutha</i>	50
<i>Health under British India & the Committees to Protect Right to Health</i> <i>Mrs. Reshma</i>	57
<i>Bayer V Natco: An Example of use of Lexibilities in the trips agreement.....</i> <i>Mr. Dipa Gautalair</i>	68
<i>An Assessment of the Labelling Regulations in the Indian Food Industry</i> <i>Mrs. Jayamol P. S.</i>	77
<i>Relevance of Professional Ethics in Modern Legal Practice</i> <i>Mrs. Sharika Rai</i>	88
<i>Indian Judiciary and Social Justice in India</i> <i>Mr. Ravindra K. Rajputh</i>	94
<i>Online Shopping - Security Issue and Defective Service</i> <i>Mr. Karthik Anand</i>	101
<i>Problem of Women in Unorganised Sector : Special Ref. to State of Gujarat</i> <i>Ms. Vaishakhi Thaker</i>	107
<i>Safeguarding the Dignity of Women Under Criminal Law</i> <i>Miss. Shantika U. M.</i>	116
<i>Judicial Approach towards the Medcio Negligence Cases</i> <i>Mrs. Deepa Salian</i>	123
<i>Legalperson under Transfer of Property Act- A Legal Dimension</i> <i>Mr. Rakshith B. V.</i>	133
<i>The Principle of Idea-Expression Dichotomy in Copyright Laws</i> <i>Anuttama Ghose</i>	141
<i>Global Brand Building and Legal Framework</i> <i>Mr. Roopesh</i>	151
<i>Making Food a right for all in India: Myth or Reality</i> <i>Ms. Grishma Soni</i>	
<i>The Law of Adultery in India</i> <i>Mr. Maheshchandra Nayak</i>	



THE LAW OF ADULTERY IN INDIA

Maheshchandra Nayak ¹

The law of adultery as it stood in India punished only man, and assumed that in all cases 'man is the seducer' and the woman, who is an equal participant was viewed as a victim. There have been numerous debates about the discriminatory stance of the provision. The insistence of the National Commission for Women and the report of the Madhav Menon committee & the 42nd Report of the Law Commission of India, have breathed a new lease of life into the dying controversy. The law relating to adultery as existing under section 497 of Indian Penal Code, 1860 has been criticized ever since it's inclusion. We can trace its origin to the chastity belt which was widely prevalent in Europe in the 15th & 16th centuries. Its validity both on constitutional grounds as well as philosophical grounds has been challenged time and again.

Law of Adultery as it stands in India².

In India the law of adultery was punishable under section 497 of the IPC, but originally the framers of the code did not make it so. It was the Second law Commission which after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code. Adultery figures in the penal law of many nations and some of the most celebrated English Lawyers have considered its omission from the English Law as a defect. Section 497 provides : "Whoever has sexual intercourse with a person who is and whom he known 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 not be punishable as an abettor.

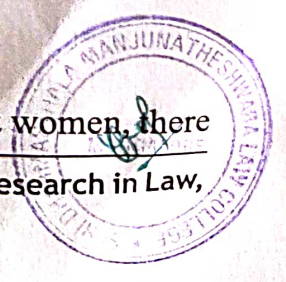
The Law Commission has limited the cognizance of this offence to adultery committed with a married woman, and the male offender alone has been made liable to punishment.

The Problem

Prima facie when unequal treatment is meted out by the law to men & women, there

¹ Assistant Professor, SDM Law College and Centre for P G Studies and Research in Law, Mangaluru

² Section 497, Indian Penal Code, (45 of 1860)



166 906
is an inherent flaw in such a law. This section makes the offence punishable for the man who is not married to the woman but not the woman. To punish the man severely and to let the woman go who was an equal partner scot free is unreasonable on the face of it. It is discrimination that for the same act the man becomes the manifestation of evil but the woman goes unpunished. The married woman's husband is the victim.

The consent or the willingness of the woman is no impediment to the application of this section, and, as generally happens, she is quite aware of the purpose for which she is an assenting party to it.

Considering the present day situation and the vast transformation which the society has undergone, blindly assuming that 'man is the seducer and not the woman' would be a dangerous proposition. In most cases the boot is on the other leg these days in a variety of cases. The law makes an irrational classification between man and woman, in restricting the class of offenders to men, where a married woman is an equal partner. It violates constitutional provisions enshrined in Articles 14, 15 & 21.

The justification taken by the Framers of the Code, and lobby for retaining this aberration is that owing to the atypical social conditions, it would not be just & proper to punish women equally, as they were a subjugated and exploited lot, and I am constrained to say that it was to a certain extent applicable in that era, now bygone.

The IPC, when it took form in 1860, was silent on the punishment for adultery with Lord Macaulay observing, "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 rationale & the circumstances he referred to included child marriage and polygamy. Macaulay, hence, advised that it would be enough to treat it as a civil injury.

The framers of the code believed that if the women did the deplorable act it was pressured by their social and private conditions in life. Hence they were actually not at fault and taking into account their already depleted station in life they should not have been held liable at least in the eyes of the law.

Judiciary on Law of Adultery:

In 1951, one Yusuf Abdul Aziz challenged the constitutional validity of the provision. However, Chief Justice of the Bombay High Court M C Chagla had upheld the provision saying the Constitution permitted such special legislation for women. It was held in this case that this section does not contravene any of the fundamental rights laid down in the Constitution of India, and therefore it is not bad or void under Articles 13.³

³ Yusuf Abdul Aziz AIR 1951 Bom 470 .

The Supreme Court observed that adultery is a wrong against the sanctity of the matrimonial home. Thus charges are pressed against the outsider who breaks the said sanctity. The woman, in cases of adultery, is considered the victim of a seducer. It appears that the court believes that the man has an unstoppable seductive charm and the woman is helpless against it. The evil that is punished by the law, in the mind of the court, is that of seduction of a woman by another man. According to the court the woman is considered to be the victim. Thus the court held that the law was non discriminatory and not violating the right to equality. Thus the court upheld the constitutional validity of the section 497. The court also opined that by not allowing the spouses to prosecute each other the law offers a chance to the spouse to make-up. It was further held that "Section 497 is not violative of Articles 14, 15 & 21 of the Constitution ⁴.

It is humbly submitted that the court erred in its judgment.

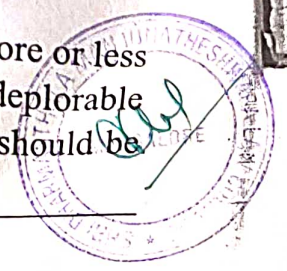
We must keep in mind that these reasons and defenses were given decades ago. The most important reason for debate to get re-ignited is the drastic change in the social status of women. Gone are the days when women were a suppressed or subjugated lot. The practices of sati, child marriage, polygamy, etc, have been done away with. Today there are laws against these evils and also laws providing effective relief against heinous acts such as domestic violence, dowry and other evils. Most professional colleges have a quota for women. Thus women today are in no way inferior to men or suppressed and are at par with the opposite sex. The effective implementation of these laws and other women friendly provisions in the constitution ensures that women, today, have an edge in the society. All this has resulted in them gaining the power of choice. They can no longer be classified as victims in cases of adultery.

What needs to be done ?

It is pertinent to note here that The 42nd Law Commission Report ⁵ has suggested to substitute section 497 of the IPC. The substituting provision is "S. 497. Adultery - 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, of 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".

The Malimath Committee on Criminal Justice Reforms has re-iterated more or less the same argument, that men and women being equally partners in the deplorable act, should be made to stand at the same footing, and equal treatment should be meted out to them both.

⁴ Sowmithri Vishnu v. Union of India, AIR 1985 SC 1618.
⁵ The Law Commission of India, 42nd Report, Para 20.17; p. 326



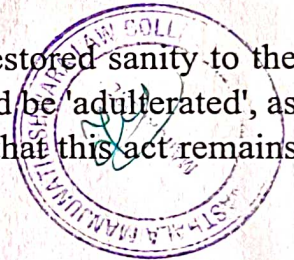
On August 8, 2018 a five judge bench comprising justice Dipak Mishra, R.F. Nariman, D.Y. Chandrachud, Indu Malhotra and A.M. Khanwilkar pronounced the verdict that adultery is only going to be a ground for divorce. It can also be a part of civil law involving penalties but it shall not remain a criminal offence. This decision was given after an Indian businessman Joseph Shine filed a public interest litigation challenging the constitutional validity of Section 497, IPC.

If the husband consented or connived in the commission of the act, it was not an offence in the original Code. A married man consenting or conniving in the act of intercourse by his wife with another man is not as rare as it appears. The section clearly laid down that there would be exceptions to punishing a man who had intercourse with a married woman.

The Supreme Court in Sowmithri Vishnu case clearly said that a married man having intercourse with a woman other than his wife would not be punishable. His wife had no criminal remedy but only a civil one in the form of divorce.

Conclusion

The judgment of the Supreme Court on August 8, 2018 has restored sanity to the debate on adultery. It was shameful that a married woman could be 'adulterated', as if she was a commodity belonging to her husband. It is good that this act remains only in the civil law and is no longer a crime.



* * * * *

909



**SHRI DHARMASTHALA MANJUNATHESHWARA
LAW COLLEGE & CENTRE FOR
POST GRADUATE STUDIES & RESEARCH IN LAW
MANGALURU - 575 003.**

