

## ADULTERY WITHIN THE FRAME OF GENDER JUSTICE: TIME TO RECONSIDER.

\*KAMLAKAR TANAYA PRAMOD

### 1. INTRODUCTION

“Infidelity raises profound questions about intimacy.”- Junot Diaz<sup>2</sup>

Fight for rights of the women may be difficult to trace in history but it can be stated certitude that there were lone and vocal voices at many times raising voices for rights of women and equal treatment. Initially, in 1792, in England, *Mary Wollstonecraft* in “A Vindication of the Rights of Women” advanced a spirited plea for claiming equality for, “the Oppressed half the Species”. Status of women in different human societies of the world is different. Gender justice, if simply put, refers to equality between the sexes. Gender justice is correlation of social, economic, political, environmental, cultural and educational factors. These are the pre requisites of achieving gender justice. In almost all the present and contemporary societies, it is discriminatory and prejudicial. Nearly all human societies in different parts of the world are male-dominated. *Aristotle’s* answer to the question, who rules the State-is the man, but why does he control and why not woman? Because woman are naturally inferior. They are meant for procreation. Man provides the form, woman the matter for this man.<sup>3</sup> Thus it indirectly clarifies the procreation and sexual needs of man. However, on the other hand, the basic theme of adultery is sexual relations outside marriage. It is an anti-social and illegal act. It consists in having carnal knowledge of a married woman with knowledge of the fact that, without the consent or connivance of her husband.<sup>4</sup>

This paper thus attempts to examine the position of wife which has not been discussed under this provision and that it lacks in the agency of bringing charges under this section. Thus, such problems faced by the women in society should be given due weightage and the laws should aim at safeguarding their interests thus marching towards gender equality.

### 2. NEXUS BETWEEN RELIGIOUS MYTHS AND ADULTERY IN CONTEMPORARY SOCIETY:

The fantasy no longer always recalls the toxic ending which the ancient adulterous tale possessed the lovers, having once consummated their love, being condemned to die or, perhaps, to wander the earth, homeless.<sup>5</sup> Hinduism does not favor extramarital relationships. Hindu law books are very severe against adultery, not only for moral reasons but also for social reasons. They consider that it would lead to confusion of castes, degradation of family values and social disorder. In olden days women from upper castes were barred from moving in society freely. In Christianity throughout the Old Testament, adultery is forbidden in the Ten Commandments, and punishable by death. In the New Testament, Jesus preached that adultery was a sin but did not enforce the punishment, reminding the people that they had all sinned. Saint Paul put men and women on the same footing with regards to marital rights.<sup>6</sup> Extramarital sex was an activity that the Church attempted to suppress and punish whenever possible. Communicating this message was not easy. One way to do so was through the penitential literature. A married man caught in adultery with a neighbors wife or daughter not only had to do penance for a year but forego intercourse with his own wife during that period.<sup>7</sup> Islam stresses that sexual relations should be restricted to the institution of marriage in order for the creation of the family, and secondly as a means to protect the family, certain relations should be considered

prohibited outside of marriage. Thus, when we try to view adultery in ancient society, it was mainly focusing on preserving the laws favouring the institution of marriage thereby protecting the interests of male counterparts. However, with the growing reformative states of the society, many laws are reframed in order to give due regards to the situations faced by women. Thus, there is an immense need to have equilibrium between the ancient concepts of chastity with that of respecting the female opportunities of claiming rights as far as adultery is considered.

### 3. ADULTERY UNDER PENAL CODE: INDIAN SCENARIO

It is pertinent to note that the original draft of IPC prepared by first Law Commission was silent about the offence of adultery. Lord Macaulay, who was unwilling to add the provision criminalising the adultery as an offence, observed, “ 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.”<sup>8</sup>The Second Law Commission thought otherwise and said it would not be proper to leave the offence out of IPC and suggested that only the man be punished, again keeping in mind the condition of women in country. Thus, Section 497<sup>9</sup> of The Indian Penal Code, 1860 deals with the offence of adultery.

To understand this offence, the highlighting ingredients of this section are:

- i. The adulterer must have had sexual intercourse with the wife of another man.**
- ii. The adulterer must have had knowledge or must have had enough reason to believe that the woman is the wife of another man.**
- iii. The adulterer must have had sexual intercourse that did not amount to rape.**
- iv. The adulterer must have had sexual intercourse without the consent of or connivance of the husband.**

The married woman must be above the age of 16 and a consenting party to the sexual intercourse. It is necessary for the married woman to willfully have sexual intercourse with that man. If she does not consent to the act, it would amount to rape and not adultery. Hence this is the basic distinction between adultery and rape.

### 4. JUDICIAL PRONOUNCEMENTS:

Certain judicial decisions have highlighted the issue of equality in the cases of adultery as in the case of *Sowmithri Vishnu v. Union of India*<sup>10</sup>, it was contended that Section 497, being contrary to Article 14 of the Constitution, makes an irrational classification between women and men as it: (i) confers upon the husband the right to prosecute the adulterer but it does not confer a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery, (ii) does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and (iii) does not take in its ambit the cases where the husband has sexual relations with unmarried women, with the result that the husbands have a free license under the law to have extramarital relationship with unmarried women. The Supreme Court rejected these arguments and ruled that Section 497 does not offend either Article 14 or Article 15 of the Constitution. The Apex Court also brushed aside the argument that Section 497, in the changed social “transformation” in feminine attitudes and status of the woman in a marriage, is a flagrant instance of “gender discrimination”, “legislative despotism” and “male chauvinism”, by opining that it is for the legislature to take note of such a “transformation” while making appropriate amendments to Section 497. Later in *V. Revathi*

*v. Union of India*<sup>11</sup> after realising that the section also does not permit the husband of the adulteress wife to prosecute her for her infidelity and recalling the ratio of Sowmithri Vishnu case, she asserted that whether or not the law permits the husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her unfaithful husband. It is obvious that no adultery can be committed unless a woman is a consenting partner. The judicial perception that only man can be “an outsider”, who has potential to invade the peace and privacy of the matrimonial unit and to poison the relationship between the unfaithful wife and her husband, therefore, seems to be, with due respect, less convincing and unrealistic. Evidence, too, of a course of treatment over a long period of time has been held to prove that adultery was committed at some undefined times during that period; in such cases as these it cannot be asserted that the act of adultery was proved beyond all reasonable doubts, in the sense in which that phrase has been interpreted.<sup>12</sup>

#### **5. REASONS FOR REVISING SECTION 497 OF ADULTERY:**

There are 3 situations if one observes the provision under 497:

1) If the Unmarried Man has sexual intercourse with the Married Woman, the adultery happens and husband of the married woman can file complaint against unmarried man. However, a married man cannot file complaint against his wife as she has immunity in the eyes of law.

2) If the married man has sexual intercourse with the married woman or vice versa the offence of adultery happens. In this case the husband of married woman can file complaint against married man, but he cannot file complaint against his wife. At the same time, the wife of adulterous married man does not have remedy, despite her husband is involved in the adulterous act. Thus, in between both, the married pair, in either case of adultery, only adulterous husband does not have any remedy to prosecute her husband.

3) If the married man has sexual intercourse with the unmarried woman, the adultery does not take place as section only prescribe the adulterous act with married woman. In this case the wife of adulterous husband does not have any remedy, despite her husband involves in sexual relation with stranger.<sup>13</sup>

Section 497 leads to certain absurdity on logical ground. As it only provides the key to take initiative of ‘adultery’ in the hand of husband, only he can decide whether to proceed or not, but his choices to take action against the person involve in adulterous act is also limited and he can only proceed against the outsider, not against the wife. On the other hand, the wife has been given complete immunity; therefore she cannot be prosecuted for the act of adultery.

The state recognises adultery as a crime. Such recognition can be said to raise speculation as the act of adultery involves two fully grown adults, who are capable of making rational decisions, affecting their personal lives, participating in consensual sex. In the light of the above mentioned statement the question as to whether such an act poses threat to the society as a whole and warrants a punishment of imprisonment for a period of 5 years, arises.

The strict sanctions for the crime of adultery, give rise to a valid debate on whether criminal punishment is mandates as a deserving punishment for adultery. The basis on which the concept of criminalising adultery rests is that it deters the adulterer from committing the crime again. This was an apparent attempt to counter the notion that most laws have been made to a man’s advantage. The claim of the legislators is that on enactment of such stringent laws, wives are not depriving of their husband’s attention, and no extramarital relation can be maintained without there being a legal action

for the same.

Personal laws that didn't exist in their present form previously, have now become more operational, thereby putting both men and women on the same level. Therefore, the objective with which adultery had been criminalised is now being obsolete. The act of marriage is dealt with under personal laws. Under Hindu Marriage Act, 1955, adultery is recognised to be a valid ground for divorce and thus forming an appropriate civil remedy for adultery. It seems unnecessary that criminal law must be used to provide an added form of sanction for the same. Inspired by the spirit of equality the Fifth Law Commission and the Joint Select Committee have thus shown their inclination to the equality of the sexes by recommending equal culpability for the "man" as well as the "woman" for committing adultery.<sup>14</sup>

Mrs Anna Chandi, one of the distinguished Members of the Fifth Law Commission, voicing her reservations about the revised Section 497 suggested by her other colleague Law Commissioners, observed: "The wife being considered the husband's property, the present provision reserves for the husband the right to move the law for punishing any trespass on it, while not giving the wife any corresponding right to complain against any transgressions on the part of or relating to her husband."<sup>15</sup> Perhaps to make amends for this harsh discrimination, the present section provides that the wife should not be punished along with the trespasser. The removal of this exemption clause does not cause damage to the basic idea of the wife being the property of the husband. On the other hand, it merely restates the idea, and adds a new dimension to it by making not only the trespasser but the property also liable to punishment. This, as noted before, can hardly be considered a progressive step."<sup>16</sup>

## 6. CONCLUSION:

The crucial question that arises for deliberation is: Have the women been able to reap the benefits provided for them under the Constitution of India? The answer, unfortunately, is not encouraging. One of the greatest fears seems to lie at the bottom of every objection of the full freedom and equality of woman.<sup>17</sup> Many radical thinkers still at times declare that "Woman's crowning glory is motherhood" but the realm of nature of blind impulse is to respect this crown. Though over centuries it has been believed and marriage has always been considered as the building block of the society and its sanctity is accepted and respected in all societies and across all cultures, adultery is one such crime which can shatter this notion. As long as this serves as a basis of getting divorce, makes a man feel morally guilty, hurts its conscience, the punishment has been given divorce will itself serve as the punishment. In ultimate analysis, the penal law of adultery in India is premised unmistakably to protect the rights of the husband and not of the wife. It is also bridled with deep-rooted obsolete assumptions predominantly premised on gender discrimination and wife sexuality. Such a law in 21<sup>st</sup> century undoubtedly seems to be inconsistent with the modern notions of the status of women and the constitutional spirits of gender equality.

### (Endnotes)

- 1 \* Student of LL.M (2016-2017); Savitribai Phule Pune University (Department of Law)
- 2 Virginia Vitzthum, *Junot Diaz's Pro-Woman Agenda*, available at <http://www.elle.com/culture/books/reviews/a14353/junot-diaz-interview/> last seen on 16/7/2017.
- 3 Okin, Susan Moller, *Women in Western Political Thought*, Princeton University Press, New Jersey, 69-71(1979)
- 4 M' Clarence vs. M Raicheal, AIR 1964 Mys 67.
- 5 Annette Lawson and Colin Samson, *Age, Gender and Adultery*, The British Journal of Sociology, Vol. 39, No. 3 409-440 (1988).

- 6 Vern L. Bullough, *Medieval Concepts of Adultery*, Vol. 7, No. 4, *Arthurian Adultery*, 5-7(1997)
- 7 Ibid 5
- 8 Comment on the draft of first Law commission Report KD Gaur, *Indian Penal Code.*, 388 (2<sup>nd</sup> Ed).
- 9 **Section 497 Indian Penal Code, 1860** : Adultery- Whoever has sexual intercourse with a person who is and whom he knows or has a reason to believe to be 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 which may extend to five years, or with fine, or with both. In such cases, wife shall not be punishable as an abettor.
- 10 AIR 1985 SCC 137
- 11 AIR 1988 SC 835
- 12 DC Potter, *The Burden of Proof in Adultery Cases*, *The Modern Law Review*, Vol. 11, No. 3, 344 (1948)
- 13 Chowbe, Vijaykumar Shrikrushna, *Adultery- A Conceptual and legal Analysis* (2011)
- 14 Fifth Law Commission Report available at <http://lawcommissionofindia.nic.in/reports/185threport-partii.pdf> last seen on 18/7/2017
- 15 K I Vibhute, "Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective available at [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=5&do\\_pdf=1&id=941](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=941) last seen on 18/7/2017
- 16 Note by Mrs Anna Chandi, Law Commission of India, Forty-second Report: *Indian Penal Code.*, P.365.
- 17 Mary Sokol, *Bentham, Law and Marriage: A Utilitarian Code of Law in Historical Contexts*, 101.(1981)