

THAT the equality before the law of both sexes, provided for in articles 14 and 15 of the Indian Constitution is little more than a myth has effectively been demonstrated in several studies undertaken by activists and social workers. One of the more glaring examples of discriminatory legislation is provided by section 497 of the Indian Penal Code (IPC) which defines the offence of adultery. The punishment for the offence is also prescribed in the section—five years' simple imprisonment and/or fine. It is rather surprising, therefore, that the blatant, almost absurd, chauvinism of the section has escaped the attention of those who are concerned about such blemishes on our legal system.

Section 497 is one of the six sections in chapter XX of the IPC, entitled "Of Offences Relating to Marriage." A first reading of the section is revealing. "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 cases the wife shall not be punishable as an abettor."

The several legal implications of this section have been clarified in a rather disturbing judgment of the supreme court: Smt Sowmithri Vishnu versus Union of India and another, decided by a division bench consisting of chief justice Chandrachud and justices R.S. Pathak and Amarendra Nath Sen on May 27, 1985. (SCA 1985(1) Vol.1 No. 21, June 2-9, pages 960 to 964.) Before discussing them in detail, we might have a brief look at the circumstances of the case in which the supreme court was called upon to pronounce its views.

The subject matter of the writ petition arose in connection with a divorce petition filed by Smt Sowmithri Vishnu which was

## LAW

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# Blatantly Discriminatory

## —The Law On Adultery

followed by a counterpetition filed by her husband. The wife's plea was that divorce be allowed on the sole ground of desertion, already established in a previous court finding. The husband invoked also the additional ground of adultery and, during the pendency of the divorce proceeding, filed a criminal complaint against his wife's "paramour", alleging adultery under section 497 of the IPC.

Smt Vishnu filed a writ petition before the supreme court to quash the criminal proceedings. During the pendency of the petition, divorce was granted on the sole ground of desertion. The supreme court, while delivering its verdict, dismissed the writ petition, opining that since the divorce had already been obtained on the ground of desertion, "no useful purpose will be served by enquiry into the adulterous relationship", but it also quashed the criminal proceeding, a rather contradictory conclusion. While doing this, it made certain comments of far reaching importance on the constitutional validity of section 497 and elucidated what the section implied for women as a group.

Adultery, in the eyes of the criminal lawyer, is not what it signifies in ordinary parlance. It does not denote mere extramarital relations; it refers specifically only to sexual intercourse by a man, unmarried or married, with a married woman. The implications of this definition are as follows:

1. Only a man can commit adultery. The married woman who is also involved in the adulterous relationship is not punishable even as an abettor. In the eyes of the

criminal lawyer, she is considered, in the words of the supreme court itself, merely as "a victim", not as "the author of the crime." She is a nonperson, she is simply ignored.

Nothing that she does on her own can break the sanctity of the marriage. Her passive consent to the advances of a man other than her husband would alone be one of the determining factors to establish the crime. The section negates the free will of the woman and does not concern itself with the intentions behind her act.

The one fact that becomes abundantly clear as we analyse the section is that the women whose lives are affected by the crime of adultery—the aggrieved wife if the adulterer is married and the adulterous wife—are not deemed to be interested parties in the act or in its criminal consequences, because woman as such is looked on as an object, a piece of property, the rights in which are almost transferable!

2. Adultery is not committed if a married man has sexual intercourse with an unmarried woman. The supreme court, while elucidating the section, remarked that the intention of the legislature while enacting it was to treat the offence as one committed against the sanctity of the matrimonial home. But any analysis will make it evident that what is intended is not the sanctity of family life at all. For that sanctity would be violated if either of the parties to the marriage indulged in extramarital relations. The legislation treats the relationship between man and woman as one of owner and owned. The argument

of the sanctity of family life has only been smuggled in as an afterthought to cover up what is patently a pernicious, inequitable distinction between the sexes.

The section is meant to punish the adulterer because he has laid hand on another man's property. Hence, sexual relationship with an unmarried woman is not deemed adultery at all. For an unmarried woman does not belong to anybody. She is like freehold land where anyone may range, even a married man! But once a man's claim has been staked out, fenced and demarcated, it becomes identified as his private property and all other men are clearly told "hands off"!

This explains also why the legislature lays such emphasis not only on the adulterer's knowledge of the fact that the woman he has relations with is married, but also on the consent or connivance of the husband at the act. The section in its present form raises several possibilities which do not seem to have been tested before the courts as yet. We might enquire what the legal position would be if a woman who has sexual intercourse with a man does not reveal that she is married. In that case, he could not be convicted of adultery. But would she be liable to be prosecuted under section 420 for cheating? If the answer to this is "yes", it would imply that a married woman, but not a married man, ought to go around with a billboard indicating "married" so that men on the prowl who would like to avoid criminal prosecution could make their selection from the legally approved group.

Besides, an adulterous relationship indulged in with the permission or assistance of the husband is not punishable as adultery. This again reveals the woman as property syndrome. To offer an analogy: the use of a piece of property can be offered by the owner to anyone and the enjoyer does not violate his proprietary right. In the same manner, a husband could give the right to enjoy his wife to another man without violating his ownership rights over the wife's attributes. Of course, if this is done without the wife's

consent, it would amount to rape.

That the idea of woman as property is deeply ingrained in the minds of those who make and those who interpret the law is clear when the supreme court compares the offence of adultery with that of robbery and points out that it could be argued that "breaking a matrimonial home is not less serious a crime than breaking open a house." The ultimate legal position is that an adulterous relationship with a married woman is criminally punishable as adultery only if it is indulged in without her husband's connivance.

3. No corresponding right to prosecute the husband's paramour exists for the aggrieved wife. She is by no means



considered an equal party in this property contract called marriage. She is evidently the owned. And no right to her husband's body is violated if he indulges in extramarital relations. For, according to

husband whose property right is violated can prosecute a trespasser, a wife, not having any ownership right over her husband, cannot have any recourse under criminal law against her husband's paramour. Only the other woman's husband, if she is married, can proceed against the offender for having strayed into his pastures. So much for the sanctity of family life that the section allegedly preserves.

If this seems patently discriminatory and hence violative of the constitutional right to equality of the sexes embodied in articles 14 and 15, this is not the opinion of the supreme court. Its position is as follows: "Who can prosecute whom for which offence depends firstly on the definition of the offence and secondly upon the restrictions placed by the law of procedure on the right to prosecute." And even if the definition of the offence and the law of procedure are based on what appears to be an antiquated and blatantly discriminatory attitude towards women, such laws have a right to continue on the statute book till the legislature in its wisdom votes to get them removed.

Several of the statements of the honourable judges are revelatory of the kind of thinking that is engrained in the minds of those who make and interpret the law for women today. They say, for example: "It is commonly accepted that it is the man who is the seducer and not the woman." And they view the argument of

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***Do you know that a wife cannot prosecute her husband or his mistress for adultery?***

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section 198(1) of the Criminal Procedure Code, 1973, no court can take cognisance of an offence punishable under chapter XX of the IPC except on a complaint made by some person aggrieved by the offence. Section 198(2) provides that for the purpose of subsection (1) "no person other than the husband of the woman shall be deemed to be aggrieved by an offence punishable under section 497" of the IPC. The chilling truth, then, is that while the

the advocate for the writ petitioner that sexual relationship of a husband with an unmarried woman should also be comprehended within the definition of adultery only as "a crusade by a woman against a woman."

But even while laying down implacably the doctrine of the sexual ownership of women by men, the court in its wisdom has exercised its prerogative by quashing the criminal proceeding instituted under

section 497 while refusing to allow the petition itself.

The above discussion should be enough to convince most people that section 497 of the IPC is an anomaly on our lawbooks which ought to be redrafted or dropped. If we take the view that the mores of Indian society are not the same as those of the west and that, therefore, a criminal section dealing with offences against marriage like adultery should remain on the statute book, we could opt for a revised version of section 497. But we ought then to clarify what we mean by the relationship of marriage and fit the offence to the requirements of the relationship. Looking at marriage as a contract between adults who promise to be sexually faithful to each other during the currency of the marriage, any violation of that contract ought to be made punishable. The punishment ought, however, to fall on the parties to the contract who break its terms and not on the intervening third parties who might also be involved in the adulterous



a limited class of adulterous relationship is punishable by law. Stability of marriage is not an ideal to be scorned." Stability, but at whose cost? There is no move to reinforce stability by restraining the husband, save where he violates the right to property of another husband, although in today's society it is a man who is far more likely, by inclination and by opportunity, to have adulterous

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### *This law treats a married women as her husband's property*

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relationship. The husband as well as the wife ought to be liable to prosecution for straying outside the marriage bond. All those who have wilfully connived at the offence could be made abet-tors as in the case of any other criminal offence. This would set right the present anomalous legal situation.

The Law Commission, in its 42nd report in 1971, had suggested that the section be amended. But it only wanted to make the woman who had sexual relations outside marriage also punishable. If the amended section 497 suggested by the Law Commission is accepted it would mean merely that the married woman ought not to have extramarital relations; both she and her lover could be criminally prosecuted. But no such prosecution is possible for a married man, provided he restricts his adventures to unmarried women. The supreme court has itself opined in this context: "It is better from the point of view of the interests of the society that at least

relationships, particularly with unmarried women.

The second alternative is to take a wider view, to ask why what is essentially a violation of a social contract ought to be retained at all in the criminal lexicon. A different definition of adultery and a different remedy are available under civil law; these ought to suffice to tackle what is an infringement of a civil relationship. It may be remembered here that Mrs Anna Chandy, Law Commission member, gave a dissenting opinion and opted for the deletion of the section, on the ground that "it is the right time to consider the question whether the offence of adultery as envisaged in section 497 is in tune with our present day notions of women's status in marriage." This opinion of the learned exjudge cannot but be endorsed. It is to be hoped that this opinion will prevail and a campaign will be launched to get this infamous provision erased from our criminal law. □

### **Demand For A Ban**

ON April 7, 1986, Stri Shakti Sanghatana, Saheli, Chlngari, Dr Shyam Naraag, Dr Kamala S. Jayaiao, Dr Devayani Dangoria, Dr A. K. Vasudevan, Dr Ramana Dhara, and Ms Vimal Balasubramanian filed a writ petition in the supreme court against the use of an injectable contraceptive in family planning programmes by the health ministry, and the Indian Council of Medical Research in Andhra Pradesh. The supreme court has issued notice to the respondents.

The contraceptive is Net-Oen, an injectable form of the female hormone, progesterone. The government plans to introduce it into the family planning programme in a big way. The drug is to be injected every two months. It has caused menstrual chaos in 90 percent of Indian women to whom it was administered.

The drug is not to be given to women who have jaundice, cancer, and several other conditions. Given the present state of health services in India, the primary health centres are not equipped to screen women, to administer the injection in a safe manner or to deal with complications, if any. Hence, the petitioners feel that the potential hazards of the drug do not justify its use in the mass family planning programme.

The petitioners have asked that all further experiments on Indian women with this drug be stopped and the drug be banned for use in India.

—Saheli

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