

## Section 498, Penal Code (Act 574): An Antiquated Law?

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### Abstract

The above article is about section 498 of the Malaysian Penal Code. Section 498 reads ... "Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man; from that man; or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years, or with fine or both ...". It is about an archaic offence which entails in depriving the husband of his proper control over his wife for the purpose of illicit intercourse. Any disposition or consent or willingness on the part of the wife is perfectly immaterial to the guilt of the accused. Thus the literature of this article revolves around this antique provision; and how not or whether not to abolish it or maintain or amend it.

### I. Section 498

#### A. Introduction

Section 498 of the Malaysian Penal Code is *in pari materia* with Section 498 of the Indian Penal Code. In fact, the Malaysian Penal Code evolved from Indian Penal Code 1860. It was the British who imposed the Straits Settlements Laws on the then Malaya way back in the 19<sup>th</sup> Century. It must be noted that the Indian Penal Code, which became the model penal law throughout British colonies in Asia and Africa was drafted at a time when women were perceived as the property of their husbands. Women were seen as mere passive agents whose primary duty was to bear children and manage the household. They were perceived not to have any self-agency or rational mind of their own. A married woman was thus subordinated to her husband on the assumption that she was under his 'protection' as he was expected to be liable for her civil and criminal wrong doings.

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### B. *The Provision*

By section 498 — "whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man; from that man; or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years, or with fine or both ...".

The above provision is evidently intended for the protection of husbands, who alone can institute prosecutions for the offences thereunder. The gist of the offence under this section consists of depriving the husband of his proper control over his wife for the purpose of illicit intercourse. Any disposition or consent or willingness on the part of the wife is perfectly immaterial to the guilt of the accused.<sup>1</sup>

The provisions of section 498 are intended to protect the rights of the husband and not those of the wife. The policy underlying section 498 may sound inconsistent with the modern notions of the status of women and of mutual rights and obligations of the parties under marriage. The courts, however, are not concerned with the said policy.<sup>2</sup>

Section 498 is a provision which protects the rights of the husband and *prima facie* the consent of the wife to deprive her husband of his proper control over her would be irrelevant and immaterial.

### C. *The Explanation*

The section requires three elements to be proved:

1. Taking or enticing away or concealing or detaining the wife of another man from (a) that man, or (b) any person having the care of her on behalf of that man;

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<sup>1</sup> Alangir AIR [1959] SC 436; [1959] Cri LJ 527 (SC); Hossaini Methar AIR [1937] Cal 460; [1937] 38 Cri LJ 986 (Cal).

<sup>2</sup> Alangir AIR [1959] SC 436; 439; [1959] Cri LJ 527 (SC).

2. Knowledge or reason to believe that she is a wife of another man;  
and
3. Such taking, enticing, concealing or detaining must be with intent that she may have illicit intercourse with any person.<sup>3</sup>

The expression “takes or entices away” does not include taking of a woman with the consent of the person who has the care of her.<sup>4</sup> Taking does not mean taking by force or mean something different from enticing.<sup>5</sup> If the accused personally and actively assists the wife to get away from her husband’s house or from the custody of any person who was taking care of her on behalf of the husband; this would amount to taking.<sup>6</sup> There must be some influence emanating from the accused and operating on the woman or co-operating with her inclination — some act or assistance — in order to constitute taking.<sup>7</sup> “Taking away” of a married woman implies that there is some influence, physical or moral, brought to bear by the accused to persuade the wife to leave the husband. There must be some influence operating on the woman, or co-operating with her inclination at the time the final step is taken which causes a severance of the woman from her husband, for the purpose of causing such step to be taken.<sup>8</sup> All that is required is that if any person “takes away” another man’s wife with the intent that she may have illicit intercourse with him, then the offence is completed. The word “takes” must be given a meaning somewhat similar to the word “entices” which follows it. If the accused persuaded the woman to leave her husband’s house, the act would amount to enticement. If the accused arranged any conveyance for the woman, the act would amount to taking away the woman from the husband’s house.<sup>9</sup> “Enticing” implies some blandishment or coaxing. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. It is nonetheless

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<sup>3</sup> *Ibid.*

<sup>4</sup> Ganesh Ram AIR [1920] Pat 522; [1920] 21 Cri LJ 139 (Pat).

<sup>5</sup> *Jnanendra Nath Dey v Kshitish Chandra Dey* AIR [1935] Cal 677; [1936] 37 Cri LJ 28 (Cal).

<sup>6</sup> *Ibid.*

<sup>7</sup> Hossaini Methar AIR [1937] Cal 460; [1937] 38 Cri LJ 986 (Cal).

<sup>8</sup> Mahadeo Rama AIR [1943] Bom 179; [1943] 44 Cri LJ 584 (Bom); *Ramaswami v Raju* AIR [1953] Mad 333; [1953] Cri LJ 607 (Mad).

<sup>9</sup> Chhotey [1955] ALJ 894.

taking; although the advances and solicitations proceeded from the woman and the accused had for some time referred to yield to her request.<sup>10</sup> The fact that the woman accompanied the accused of her own free will does not diminish the criminality of the act.<sup>11</sup> If in point of fact the husband had previously to the accused's alleged act of taking or enticing away the woman, turned his wife out of his house; it cannot be said that, under such circumstances, she was taken from her husband within the meaning of the section which evidently contemplates that the woman should be at the time living under the protection of her husband or someone acting on his behalf.<sup>12</sup>

It is the enticement or taking away from the husband and not the enticement to any person which constitutes the offence. If, therefore, it is clearly proved that a man has enticed the woman away from her husband's control with intent that she may have illicit intercourse with any person, and she has actually left her husband's control without any definite intention to return or with the intention to remain away from her husband's protection indefinitely; the offence is complete as regards the person who has so enticed the woman; who may, as a matter of fact; not be her paramour at all; but same third person, even though the woman and her paramour should never meet at all.<sup>13</sup> For the purpose of a conviction under this section there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him, or an intention that she should remain away indefinitely.<sup>14</sup>

This section states that ... the woman must be the wife of another man. If the marriage is voidable then this section does not apply.<sup>15</sup> If a particular union between two persons is recognized as marriage, then the taking or enticing away the woman from a party to such union will amount to an offence under this section.<sup>16</sup>

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<sup>10</sup> Kumarasami [1865] 2 MHC 331; 1 Weir 569.

<sup>11</sup> *Parappa Sidram Kerlati v Dundawwa* [1982] MLJ (Cr) 56 (Karn); [1980] Cri LJ (NOC)85 (Karn); *Narayan Chandra v Kamalakshya Das* [1984] Cri LJ (NOC) 101 (Cal).

<sup>12</sup> Mihan Sing [1883] PR no. 15 of 1883 at p 26.

<sup>13</sup> Gaman [1899] PR no. 9 of 1899.

<sup>14</sup> Ahmad AIR [1918] Lah 346; [1918] 19 Cri LJ 441 (Lah).

<sup>15</sup> Bulanda [1910] 11 Cri LJ 664.

<sup>16</sup> Aslop AIR [1930] All 834; [1931] 32 Cri LJ 315 (All).

In a situation where the accused enticed away a woman, who was the illegitimate daughter of a Brahmin father and Bania mother and who had married a Bania, it was held that the accused was guilty as such a marriage was recognized by the caste to which the husband belonged and was not invalid according to Hindu Law.<sup>17</sup>

Where by custom a marriage with a widow is valid and the accused abducted a woman so married with knowledge of the marriage, it was held that he was guilty of an offence under this section.<sup>18</sup>

In general; according to the Muslim Law, if a woman marries before the expiry of “*iddah*” the marriage is null and void. Where a woman had married her husband’s brother during her “*iddah*” and subsequently married the accused, it was held that the accused had committed no offence under this section.<sup>19</sup> A Muslim marriage is considered to have been dissolved on one of the parties to that marriage renouncing the faith of Islam. Where the wife of a male Muslim, who had neglected and abandoned her, after renouncing her religion and accepting the faith of the accused, left her father’s house accompanied by the accused and began to live with him, it was held that as the woman had ceased to be the wife of the male Muslim, the accused was at liberty to take her away from the house of her father without committing an offence under this section.<sup>20</sup> When a wife, who was deserted by her husband, went of her own free will, to live with another man, a conviction under this section was set aside; as there was no enticing or taking away.<sup>21</sup>

The gist of the offence in section 498 is the intention. The intention must be that the woman should have unlawful intercourse with a person. A person who entices away a married woman from her husband’s house with intent that he may dispose of her in marriage to someone else commits an offence under this section, because sexual intercourse between the woman and any other

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<sup>17</sup> Madan Gopal [1912] 34 All 589, Anandaw AIR [1927] Ran 261.

<sup>18</sup> Gobindu AIR [1919] Lah 199; [1919] 20 Cri LJ 554 (Lah).

<sup>19</sup> *Isa v Ranam* [1911] 13 PLR 258; [1912] 13 Cri LJ 136.

<sup>20</sup> Karan Singh AIR [1933] All 433; [1933] 34 Cri LJ 869 (All).

<sup>21</sup> Pochun Chung [1865] 2 WR (Cr) 35; Pahlawan AIR [1915] Lah 461; [1915] 16 Cri LJ 216 (Lah).

person to whom she has thus been given in marriage, during the life time of her husband, would be illicit intercourse within the meaning of this section.<sup>22</sup> When a procurer induced a married woman of twenty to leave her husband, and the facts showed that the wife had made her deliberate choice and was determined, of her own free will to leave her husband and become a prostitute was found guilty of enticing away a married woman under this section, for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the accused interposed.<sup>23</sup>

The word "detains" in this section means, by deprivation and according to the ordinary use of the language; "keeps back". The keeping back need not necessarily be by physical force; it may be made by persuasion or by allurements and blandishments. When the wife of the complainant had left the house with the revisionist and the revisionist did not allow her to accompany the uncle of the complainant when he wanted to take her with him and there was evidence to show that the revisionist was concealing and detaining the complainant's wife at his house, his conviction under section 498 would be proper.<sup>24</sup>

The use of the word requires that should be something in the nature of control or influence which can properly be described as a keeping back of a woman. To constitute detention, proof of some kind of persuasion is necessary.<sup>25</sup> It cannot be said that a man detains a woman if she has no desire to leave and on the contrary wishes to stay with him.<sup>26</sup> The word "detention" is *ejusdem generis* with enticement and concealment. It does not imply that the woman is being kept against her will but there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her husband.<sup>27</sup> The words "conceals or detained" are intended to be applied to the enticing or inducing a wife to withhold or conceal herself

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<sup>22</sup> Naurarg AIR [1915] All 120; [1915] 16 Cri LJ 315 (All).

<sup>23</sup> Srimotee Paddae [1864] 1 WR (Cr) 45.

<sup>24</sup> *Adikanda Samal v Madhahananda Naik* AIR [1980] SC 1729; [1980] SCC (Cri) 108.

<sup>25</sup> Mahiji Fula AIR [1933] Bom 489; [1934] 35 Cri LJ 376 (Bom); Chanda Ram AIR [1953] Pun 263; [1953] Cri LJ 1802 (Pun).

<sup>26</sup> Ramnarayan Kapur AIR [1937] Bom 186.

<sup>27</sup> *Prithi Missir v Harak Nath Sung* [1937] 1 Cal 166.

from her husband; and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife, for the purpose of illicit intercourse, is the gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of, allurements and blandishments.<sup>28</sup> Detention does not necessarily imply that it is against the consent of the person detained. When a married woman left her husband's house and went to another man's and lived with him as his wife, it was held that the man with whom she lived had committed an offence under this section.<sup>29</sup> If a man keeps the wife of another under his protection in a house, he detains her within the meaning of this section.<sup>30</sup>

The word "detain" means to keep back and consequently implies some positive act on the part of the person accused of detaining. It may be brought about even by blandishments and allurements, something akin to 'enticement'. There must be either physical restraint or some influence exercised by the accused on the mind of the woman; inducing her to keep away from her husband. But when a woman of her own free will desires to keep away from her husband and to stay with the accused, there can be no detention in any sense of the word.<sup>31</sup> It is said that the word 'detention' in the context of this section must mean keeping back a wife from her husband or any other person having the care of her on behalf of her husband with the requisite intention. Such keeping back may be by force; but it need not be by force. It can be the result of persecution; allurements or blandishments which may either have caused the willingness of the woman, or may have encouraged, or co-operated with, her initial inclination to leave her husband. Detention must mean keeping back a wife from her husband or any person having the care of her on behalf of her husband with the requisite intention. The words "such woman" do not mean such woman as has been so enticed away as mentioned in the section, but means such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular

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<sup>28</sup> Sundrara Dass Tevan [1868] 4 MHC 20; Weir 571; Mohammad Aslam Khan AIR [1937] Lah 617; [1937] 38 Cri LJ 576 (Lah).

<sup>29</sup> [1872] 7 Mad Jur 133.

<sup>30</sup> Bansarsi Raut AIR [1939] Pat 432; [1938] 39 Cri LJ 952 (Pat).

<sup>31</sup> *Bhopan v Chotey* AIR [1949] All 23; [1949] 50 Cri LJ 82 (Lah).

intent defined in the section is one of the offences made punishable under the section.<sup>32</sup>

J. Straight in commenting section 498 said that:

A wife living in her husband's house, or in a house lived by him for her occupation, and at his expense, is, during his temporary absence, living under his protection so as to bring the case within the meaning of section 498. ... Provided of course, that he (accused) knew, or had reason to know, that she was the wife of the man from whose protection he took her, or on whose behalf the person from whom he took her, and also provided that he took her with the intent specified in the Act. To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code.<sup>33</sup>

The mere fact that the woman was seen outside the accuser's house is not sufficient.<sup>34</sup> In order for this section to be used successfully, the prosecution must prove:

- i. that the woman in question is the wife of another man;
- ii. that she was under the care of her husband or of someone having the care of her on behalf on his behalf;
- iii. that the accused took her or enticed her away from her husband, or that other person, or concealed her or detained her;
- iv. that the accused know, or had reason to believe, that she was the wife of another man; and
- v. that the accused did as above with intent that she might have illicit intercourse with some person.<sup>35</sup>

The Code does not exonerate a man merely because there is connivance by the husband.<sup>36</sup> The main ingredient of the offence is taking or enticing away the wife from the husband by a person. The prosecution has to necessary prove that the accused has taken the wife from her husband with criminal

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<sup>32</sup> Bipad Bhanjan Sarkar AIR [1940] Cal 477.

<sup>33</sup> Per Jackson and JJ Glorer, in *Mutty Khan v Mungloo Khansama* [1866] 5 WR (Cr) 50.

<sup>34</sup> Deonandan AIR [1920] All 33; [1920] 21 Cri LJ 383 (All).

<sup>35</sup> As explained previously.

<sup>36</sup> *Ganesh Ram v GyanChand* AIR [1920] Pat 522; [1920] 21 Cri LJ 139 (Pat).



intent. Though the wife's complicity is immaterial, the section will not be attracted if she eloped with the accused in collusion. Thus, the wife is a material witness. Non-examination of the material witness would highly affect the case of the prosecution and the acquittal would be proper.<sup>37</sup>

## II. Antiquated and Primitive Connotations

### A. *An Antiquated Baggage in Modern Times*

A man owns a dog. One day his neighbour walks by, sees the dog and thinks to himself—“Hey, this is a nice creature. I like it”. So he dangles a bone in front of the dog and lures it away. Outraged by what has happened, the owner sues the neighbour for “enticing away” his dog.

If one were to substitute the dog in the story with a woman and one would get what section 498 of the Penal Code is all about.

### B. *Issues, Questions, and Reforms*

Why section 498 an issue to be targeted at? Based on the story above, one would quickly ask— which married person, man or woman, would want to be equated with being ‘owned’ and incapable of making decisions, so as to be easily lured away? Thus, upon reading and analysing the section, it would lead us to conclusions and inferences, that the said section is discriminatory against and constitutes an insult to women; that an adult married woman is unable to think for herself, that married women are incapable of making decisions and, to add insult to injury, what the section really is saying is that husbands have the right to control their wives where sexual intercourse is concerned.

This is ironic! Malaysia, as a nation, has women ministers, members of parliament, university chancellors, CEOs, employers, professionals, and a woman bank governor. The country and society at large, entrust women to make important decisions at work, but when it comes to law governing

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<sup>37</sup> *Natarajan v Ramanujam* [1997] Cri LJ 389 (Mad).

themselves, in particular their bodies, they are denied the right to do so. Women at large would agree and believe that the women's sexuality and bodies belong to themselves; and as such, it is much appreciated that all laws that put their bodies and sexuality in the hands of men, family and society must be abolished.

Having section 498 embodied in the Penal Code (the law), is an insult to a woman's intelligence, since subtly, it denotes that women are easily enticed and so gullible. Having said that, it is also construed that because of their stupidity, women need a law to 'shelter' them from men with dubious and ill intentions. It would not be wrong to say that this section clearly insults the intelligence of women and signifies that women are easily enticed and so naive as to be seduced.

Another pertinent factor to note regarding section 498 is that only men who takes or entices away a married woman may be charged under this section and not vice versa. Women who take or entice married men will not be charged under this provision. This will not go down well with the women since some of them have had an experience of their men, being taken away by other woman or women.

Section 498 infers that an adult married woman is unable to think for herself. In assuming that married women are incapable of making decisions, the law is also silent in the issue of consent. In the end what the provision really is saying is that husbands have the right to control wives where sex is concerned. This section simply put, it is about a man enticing, taking away or detaining with a criminal intent, another man's wife. As discussed earlier, loud and clear, section 498 pertains to "whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any persons having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person or conceals, or detains with that intent any such woman". The section provides for the offender to be punished with imprisonment for a term which may extend to two years, or fined or both.

The question so far has not been why the penalty does not seem to be as harsh as the offence appears to be or why should any married woman be running into another man's arms when she already has a 'good' husband. Yet

the law allows the husband to drag another male to court on his believe that his wife has been seduced by another man under this section. Seduction in this context is the process of deliberately enticing a person to engage in some sort of sexual behaviour. Seduction, seen negatively, involves temptation and enticement, often sexual in nature, to lead to someone astray into a behavioural choice they would not have made if they were not in a state of sexual arousal. Such law is archaic and outdated and no longer has a place in contemporary society. It is a total affront to women to suggest that they can be so easily seduced and enticed and so stupid enough to be enticed for illicit sex.

This law was framed in the 'old days' when married women were enslaved to and by their husbands. A crime was therefore committed when someone enticed or detained a man's wife and 'took' what was rightfully his. This law needs to be reviewed and discarded because presently having sex with a married woman is not illegal but enticing her away from her husband is. At the moment, there is no provision under the Penal Code and Criminal Procedure Code in Malaysia to punish a married man for having an affair with a single woman and vice versa. This means that adultery as a misconduct itself is not a criminal offence in this country.

It would well be accepted that section 498 be deleted as it demeans women, violates their dignity and denies them the ability to decide for themselves. This deletion of this law is timely, and since there is no crime of enticing a married man, equally there should not be a crime of enticing a married woman either. Hence, it is appropriate to demand that the Penal Code and Criminal Procedure Code be amended to improve the law.

It would not be too harsh to suggest reform that this law be stashed away for the reason that it curbs the women's freedom and stifle their intelligence. One would argue that, in this age and day, it would be shocking and surprising that 'this law' still exists; and that 'this law' is saying that when a woman enters into marriage, they will be objects of their husbands and does not have their own say in their personal life; thus the calls for 'this law' to be expunged from the Penal Code are salutary and justified.

To say that section 498 was stated to protect women is an understatement. There are many laws in our country that fare better in protecting

women compared to the Penal Code. True, the intention of this law is to protect women but if so this code should not only be confined to women; it should include men as well. After all, marriage is not a one-sided contract. The law is there to protect women and not to be abused by husbands or men who have unscrupulous intention; thus it should be revised.

Though, there was a memorandum urging the government to abolish Section 498,<sup>38</sup> but nothing has come out of that. Subsequently, the same issue was brought up again in October 2009, but, alas, it was answered again in the negative and, to add insult to injury, it was said that “the Government had no intention of abolishing the law as it is an isolated case”.<sup>39</sup> True, the law can be an isolated provision and section but one must not forget, that, ‘this law’ is man-made and when ‘this law’ is stirring up and causing problems and not helping anyone in particular, it is not a good law, and ‘a bad law is a bad law’, whether it is used once or a hundred times.

The state should not criminalize acts that may be perceived to have caused a marriage to break down. After all, if two adults are deemed capable of deciding to get married, shouldn't the state leave them to decide if, and how their marriage should continue? There are already laws such as the Law Reform (Marriage and Divorce) Act 1976 (Act 164), that contain adequate provisions for matters relating to divorce, custody, and maintenance, among others, thus providing sufficient recourse for the aggrieved party. If the state wants to get involved, it should be in cases where there is clear violation of the rights of a partner, as in the case of domestic violence and, in particular, marital rape, which is still not regarded as an offence in Malaysia.<sup>40</sup>

On the argument that section 498 is necessary in order to protect women and keeps them safe, one should note that there are already existing penal provisions (for kidnapping,<sup>41</sup> abducting, wrongful confinement<sup>42</sup> and wrongful

<sup>38</sup> Year 2005, the Joint Action Group for Gender Equality (JAG), comprising Awam, Empower, SIS, WAO and the Women's Centre for Change submitted it.

<sup>39</sup> Insight, Starmag, Sunday 15 November 2009 at p 6.

<sup>40</sup> Though section 375A Penal Code (Act 574) was inserted through Act A1273, but the provision touches on an offence by husband causing hurt in order to have sexual intercourse. This is not the offence of marital rape per se.

<sup>41</sup> Penal Code (Act 574); sections 359, 360, 361, 362, 364, 365, 366, 367, 368.

<sup>42</sup> *Ibid*, sections 339, 340, 343, 344, 346.

restraint) under the Penal Code which are sufficient to ensure that justice is served in the case where a woman is concealed or detained against her will.

### **III. Conclusion**

Minor and light it might sound, but the very presence of section 498 in the Penal Code has a great and serious effect and impact on gender sensitivity and equality. Section 498 discriminates against the female gender, especially the “wives’ group”, make them feel stupid (though not), fragile, that needs the help of ‘the law’ for protection; throughout their lives, the minute they enter into a marriage. Awkward it may seem but, alas, when a male entices a wife of another, it is illegal and an offence under the Penal Code and this is not a joke! Illogical, unfair and antiquated it may sound but it seems that section 498 is staying in the Penal Code for quite a while until and unless the ‘male gender’ dominated and biased group with authorities and power, cares, listens, and is gender sensitive, thus enabling them to see and realise what archaic law we have in the country and its presence does not lessen or help protect the female gender but in fact oppress, suppress and ridicule them even more. With this condescending observation, it would help very much that if the executives and legislators wake up and listen to the ‘injured’ parties though isolated ‘the law’ may be, change in thinking and attitude, expedite the disposal of such archaic law from our Penal Code.

