

Adultery: Provision to Protect or Discriminate

By Adil Khan and Abhilasha Mittal¹

Abstract

Adultery generally means voluntary sexual intercourse between a married person and a person who is not their spouse. Adultery had been brought under punishment nearly 150 years ago under the Penal Code 1860 where women were exempted from any penal liability. Since then, various amendments are made in the code, but the law on adultery remains intact. This law apparently protects the women, but in reality, it leaves them in a more vulnerable situation and deprives them from any legal protection. As women are exempted from any liability, it is considered discriminating against men. Whether biased against women or men, India's adultery law is seriously messed up and needs to be debated. This article analyses the legal provisions of adultery and measures it from a 21st century social and legal perspective. After analyzing all sides of the issue, it rationally establishes the law to be defective and suggests amendment of the Code.

Keywords: Adultery, Indian Penal Code, Women, Society

¹ Students, B.A. LLB, Jindal Global Law School, O.P Jindal Global University, Sonapat (HR)

Introduction

The term 'adultery' has its origin in the Latin term 'adulterium' that comes from the words 'ad' (towards) and 'alter' (other).² It is generally defined as the illegitimate relationship between two people of opposite sex, who are not spouses of each other. The pre-requisite for this activity is at least one of them should be married to someone else. The sexual intercourse between the two parties involves is voluntary and consensual.

It is widely accepted that adultery is a sin or a wrongdoing that should not be exercised by any married individual. However, whether the offence is treated criminally or in a civil nature differs from one country to another. In other words, adultery is a criminal offence in various countries but is also only a ground for civil matters like divorce or child custody in other countries.

Historically also, many cultures have considered adultery to be a very serious crime and often incurred severe punishment, usually for the woman and sometimes for the man, with penalties including capital punishment, mutilation, or torture.³ It was an extra marital sex, which was considered objectionable on social, religious, moral, or legal grounds. For example, the Roman law that influenced both, the Common and the Modern Civil Law, distinguished between the illegitimate sexual relation of a married woman and that of a married man, but only considered the former for adultery. Therefore, adultery was defined as the sexual intercourse with another man's wife. Thus, it made no difference whether the man with whom the married woman is having illegitimate relationship is single or married, either one would be adultery. On the other hand, married man's sexual intercourse with a single woman was not considered as adultery. Although the concept of Roman Law is more influential in common law, adultery was not considered as a crime.⁴

In India, adultery is a criminal and punishable offence under Section 497⁵ of the Indian Penal Code. This is because marriages are considered as pure and sacred in the Indian society. These marital bonds between two people are seen as building blocks of the society since centuries. Therefore, for the effective and peaceful functioning of the society, its sanctity needs to be preserved.

² Jovan Payes, *Adultery and the Old Testament*.

³ Hector Davies, *The Doctrine and Law of Marriage, Adultery, and Divorce- Exhibiting a Theological and Practical View*.

⁴ *SAGE Journals- The Journal of Criminal Law* Vol 42, Issue 2, (1978).

⁵ Section 497 of the Indian Penal Code, 1860 - "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".

Since the emergence of independent India, men and women have been committing infidelity, however in recent years, more number of spouses have been seen diverting from their marital ties and not being honest in a marriage. This has happened due to increasing cosmopolitanism, globalization and capitalism in the country. Internal factors like lack of motivation to make a marriage successful, low tolerance and adjusting characteristics and absence of communication and reconciliation skills have also contributed to increasing numbers of the crime in issue.

There are certain essential ingredients that need to be fulfilled for an act to be an offence of adultery in India. They are-

1. There must be a sexual intercourse with the consent of the woman;
2. The penetration must be sufficient to constitute sexual intercourse necessary to the offence.
3. Knowledge and reasonable belief that the woman is married to another man and that marriage should be lawful
4. The husband of the woman had not consented or connived for the sex with his wife
5. The husband has complained about the sexual intercourse.

The Code also states that adultery is a crime committed by a man with the wife of another man without her husband's consent. It is thus defined as a crime committed by man to another man. Adultery is an offence, which is committed by a third person against a husband in respect of his wife and of which a man can alone be held liable for the offence⁶. Adultery is considered to be an invasion to the right of the husband over his married wife.⁷ In adultery, consent of the wife has no role while consent of the husband is considered essential to constitute adultery as a crime. The wife should be married or should be a spouse of a man. However, it is not necessary that the other person is married.⁸

The objective of the law is to punish the intruder who tries to enter the sacred matrimonial life of the husband and wife. Man is always considered as the seducer who compels the wife of another man to drift from her existing matrimonial tie. It seeks to protect women and does not apply to them by saying that "the wife shall not be punishable as an abettor". Thus, a man even though the wife herself was consensually

⁶ *Gansapalli Appalamma v Gantappali Yeliayya*, (1897) ILR 20 Mad 470.

⁷ *Chandra Chhitar Loha v Mst. Nandu*, AIR 1965 MP 268, 269.

⁸ *Samraj Nadar v Abraham Nadachi*, AIR 1970 Mad. 434, 437.

involved in establishing an extra marital tie or having sexual intercourse with that man will solely commit the crime of adultery.

Objective of the Study

1. To understand the definition and scope of adultery as an offence.
2. To understand the gender specificity of the law that makes adultery a criminal offence in India.

Literature Review

In India, the laws of Manu did not punish an adulterous husband and required a wife to always remain reverent to her 'master'. In the West, adultery met Biblical condemnation, and subsequently both the Barbarians and Romans considered adultery as a private wrong suffered by the husband.⁹ In 19th Century Britain, a married woman was considered to be a chattel of their husbands in law and a prurient and promiscuous woman were subject to ostracism which was much more than what an unfaithful man faced.¹⁰ Even in the countries where an orthodox interpretation of Islamic Shariah Law was practiced, the adulterous wife was subjected to the harshest punishments of that time. Because of being unfaithful and lascivious, women committing adultery were stoned to death. It is hard to think that despite of all the history of women always being subjected to the punishment for adultery, a sudden change occurs in the thought process of the authors of the Code and exempts women from any liability in the cases of adultery. The question, which arises in the first instance, is that why adultery is even considered as a crime.

Abhinav Sekhri in his paper titled "The Good, the Bad and the Adulterous: Criminal Law and Adultery in India", boldly criticizes the idea of labelling adultery as a crime. He enquires upon the question of when something is considered as a crime. He analyses Mills theory of Harm Principle¹¹ and says the only conduct, which results in causing verifiable harm to another, should be the subject of state sanction.¹² He opines that just because marriage infidelity is considered socially abhorrent and breaks the sacramental ties of trust and marriage; it doesn't give it a legitimate ground to receive state action. He also basis his

⁹ Abhinav Sekhri, *The Good, the Bad and the Adulterous: Criminal Law and Adultery in India NLS Socio Legal Review*, National Law School of India University.

¹⁰ Ann Summer Holmes, *The Double Standard in English Divorce Laws, 1857-1923*, 20(2) *Law and Social Enquiry*, 601, 605 (1995).

¹¹ John Stuart Mill, *Harm Principle*.

¹² Joel Feinberg, *Debris From the Hart-Devlin Debate*, 72(2) *Kurt Baier Festschrift*, 249, 250 (1987)

contention on the theories of Liberal theorists such as Professor Hart¹³ who held the position that “not everything in a person’s morals should be the concern of the law, only his disposition to violate the rights of other parties” Regarding his stance on criminalizing adultery, he concludes by saying that, “My private rights should logically proceed to the creation and enforcement of private remedies such as divorce, not grounds for engaging the might of state sanction.”¹⁴ He thus appeals for private remedies in the cases of marriage infidelity thereby making adultery as a ground for divorce without any penal punishments.

Just as adultery was treated like a tort in Britain, Lord Macaulay in its earlier days of drafting IPC was against the view of criminalizing Adultery. For him, the possible benefits from an adultery offence would be better achieved through pecuniary compensation in most cases. Due to his consideration of the sacramental nature of marriage, he always thought that law could never provide any satisfactory solution in cases of marriage infidelity. Reviewing the feasibility of criminalizing Adultery in India, Lord Macaulay commented that; “It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes - those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury.”¹⁵

Thus, the First Law Commission headed by Lord Macaulay was never in the favors of criminalizing adultery. It was due those people involved in finalizing IPC that adultery today is considered as a crime. Exploring the intent of the drafting committee of the IPC to exempt from any liability is farfetched when no sufficient justification is found in criminalizing adultery in the first place.

The 2nd Law Commission headed by Sir John Emily took a different approach which countered the Macaulian approach of exempting Adultery as a crime. The status of marital

¹³ Professor Lon Fuller Hart, Political Theorist and Academician.

¹⁴ Abhinav Sekhri, *The Good, the Bad and the Adulterous: Criminal Law and Adultery in India*, NLS Socio Legal Review - National Law School of India University.

¹⁵ Macaulay's Draft Penal Code (1837), Notes, Note Q, pp. 90-93, cited from, *Law Commission of India, Forty-second Report: Indian Penal Code* (Government of India, 1971), para 20.13.

relationships and conditions of women in marriage in India at that time were observed and the principle that it is the duty of the law to protect the suppressed was applied. The commission conclude that; "While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman and considering that there is much weight in the last remark in Note 'Q', regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment."¹⁶

To defend this proposition of the 2nd law commission, reliance was also placed on the comments on the then Barristers at law, Sir Walter Morgan & Arthur George Macpherson in their book, *The Indian Penal Code (Act XLV of 1860): With Notes*. The two authors commented: "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."¹⁷

In order to dig upon the philosophical and sociological reasons behind the relief provided to women in this law, it can be inferred from the views of the authors of the code that women were only treated as victims of the offence of adultery because the practice of polygamy and child marriage were deep rooted in the society.

However, the exemption given to the women, did not actually work out for the benefit for the women. Parvez Ahmed and Rihanna Parveen, Professors of Law in Dhaka University, Bangladesh in their paper titled "The Law Relating to Adultery: A Critical Evaluation in the Present Social Context" commented that, "section 497 'is not' in favour of women at all or at the most, it goes against women's interests more than it serves their interests, because; No wife can bring to justice the lover of her husband. But a husband can, with the help of this

¹⁶ Second Report on the Draft Indian Penal Code (1847), pp. 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, (Government of India, 1971), p. 365.

¹⁷ Sir Walter Morgan & Arthur George Macpherson, *The Indian Penal Code (Act XLV of 1860): with notes*, 438 (1863).

section, persecute his wife's lover. Also, if a married man is having an affair with an unmarried woman or a divorcee or a widow, it shall not be treated as adultery under this section. Even if a man is having an affair with a married woman, it shall not be treated to be a crime under this section, if the husband of the woman consents to it or if the affair is carried out with his connivance. This effectively means that husbands can freely indulge in having extramarital affairs with spinsters, widows, prostitutes or even married women directly or indirectly. Women also cannot file a case of adultery against their husbands under this section, even if he is having an extramarital affair with a married woman. On the other hand, the husband of an adulterer wife can not only file a case of adultery against his wife's lover and bring him to justice, under this section, but can also file for a divorce from his wife, on the ground of adultery, if the charges brought under this section, are proved. Last but not the least, the section does not even provide any provision which enables the court to hear the woman against whom the husband brings charges of having indulged in an extramarital affair.¹⁸

All this show that this section though drafted for the benefit of the women and to protect women cannot serve to achieve what the authors of the code wanted to seek. Instead of giving them any legal protection, it again leaves them in a vulnerable position. Their rights are hampered due to the limited application of this section.

Case Study

In 1951, Yusuf Aziz¹⁹ had questioned the constitutional validity of Section 497 in the Bombay High Court but the Court upheld the section. In 1971, the Fifth Law Commission suggested some changes in the section. One of them was to convert this law in a gender-neutral law. The other was to reduce prison time from five years to two years. Clearly, since the law has no changes, the recommendations were ignored.

In 2006, National Commission for Women suggested that adultery should be decriminalized completely. There are several countries in the world where adultery is not a criminal offence and therefore the arguments and justifications behind this decision should be at least looked and taken into consideration. Furthermore, if the Indian judiciary decides to keep adultery as a criminal offence due to the sanctity the concept of marriage holds in India, at least the law could be made a gender neutral law.

¹⁸ Parvez Ahmed and Rihanna Parveen, *The Law Relating to Adultery: A Critical Evaluation in Present Social Context* (2016).

¹⁹ *Yusuf Aziz v State of Bombay*, 1954 AIR 321.

From the cases like *Sachindranath Chatterjee v Nilima Chatterjee*²⁰ in 1969 to *P. Mohandas Panicker v K.K. Dakshayani*²¹ in 2005, it can be observed in mostly all adultery issues that the women involved have either been left out of the case without a trial or have been tried but acquitted due to lack of sufficient evidence. This practical reality of the law therefore gives us food for thought i.e. whether the law should exist as a criminal offence or whether it should be decriminalized.

Recently, the Chief Justice of India declared filing of a PIL questioning the validity of Section 497.²² This decision has been assigned to a constitutional bench of the Supreme Court. Though this can be treated as some progress made by the Indian judiciary to work towards betterment of the people, there is still time for the proper implementation and analysis of the new decision that would be taken by it.

Methodology

The paper has analyzed the law on adultery in India that makes it a criminal offence. While analyzing the law, the paper tries to lay down the grounds of constitutional invalidity of the law through the Articles 14 and 21. The paper also analyzes various case laws to understand the mindset of the judges and their decisions with respect to male and female culprits.

Discussion

Section 497²³ of the IPC which deals with adultery makes it a punishable offence for the men involved in the act, however, the women are neither treated as an 'adulteress' nor as an abettor. Women have always been punished with stoning or burning in other parts of the world for committing this immoral offence of adultery but women in India have been exempted from any liability because they are seen as victims of the seduction of the males. Furthermore, women are always seen as the property of the husbands and when another man trespasses on that property, he should be liable and not the wife.

²⁰ *Sachindranath Chatterjee v Nilima Chatterjee*, AIR 1970 Cal 38.

²¹ *P. Mohandas Panicker v K.K. Dakshayani*, Appeal no. 15 of 2006.

²² Section 497 of the Indian Penal Code, 1860 – "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."

²³ *Supra*

Section 198²⁴ of the Code of Criminal Procedure supports the provisions of the statute by stating in its clauses that no person other than the aggrieved husband, or a guardian in his absence, can bring the case of adultery in the eyes of law. The fundamental rights enshrined in the Constitution of India are given utmost importance in an Indian citizen's life. These rights, though are subject to restrictions, deem to have the overriding power over all other rights. Yet, the courts are ignoring these violations of the fundamental rights by the statute that makes adultery an offence along with its provisions. Article 14 (Right to Equality) and Article 21(Right to life and personal liberty) are the two fundamental rights that are breached by this section. Right to equality clearly means that every gender, religion, caste, culture or creed is equal before law. However, when we analyze this right with the statute through case laws, it can be concluded that the wives of the perpetrator husband do not get the same rights as the husbands of the perpetrator wives. The wife of the perpetrator husband is not even able to complain against him if the adulteress is unmarried, divorced or widowed. Furthermore, the statute clearly states that the married woman who has committed such adultery will not be criminally liable, though her husband will have civil remedies against her.

This discrimination was first clearly noticed and observed in *KM Nanavati v. State of Maharashtra*.²⁵ Nanavati was being tried for the murder of a man who had slept with his wife but the wife was not being prosecuted for sleeping with another man in the first place. The *Yusuf Abdul Azeez*²⁶ case tried challenging the statute by stating that it excludes women from any kind of liability as an abettor. It also argues that this statute is indirectly giving a license to the women to commit adultery. The *Sowmithri Vishnu*²⁷ case in 1985 and *V. Revathi v. Union of India*²⁸ case in 1988 again challenged this decision. The counsel for the wife argued that this statute makes an irrational classification of gender and reaffirms that women are the property of their husbands.

²⁴ Section 198 of the Code of Criminal Procedure, 1974 – "(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that-

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."

²⁵ *K. M. Nanavati vs State Of Maharashtra*, 1962 AIR 605.

²⁶ *Yusuf Abdul Aziz vs The State Of Bombay*, 1954 AIR 321.

²⁷ *Smt. Sowmithri Vishnu vs Union Of India & Anr*, 1985 AIR 1618.

²⁸ *V. Revathi vs Union Of India & Ors*, 1988 AIR 835.

The court has responded to these issues by stating that it is best to not punish the women to keep the sanctity of marriage and matrimonial home alive. The matrimonial is a sacred place in our traditions and it is the outsider man who has entered to unbalance it. Therefore, he should be should be penalized.²⁹ Furthermore, article 15(3)³⁰ of the Constitution of India also gives the State the right to make special provisions for the benefit of women and children and this provision is enlisted under the benefitting category by the state.

They also said that sex is sound classification and hence, allows for special provision. Furthermore, it argued that mere restrictions on the fundamental rights do not indicate licensing of the offences. The court decided that since man is always the seducer and the woman is always the victim, she isn't considered the author of the offence. Furthermore, if times have changed, the legislature should be approached to change the law. It can hence be concluded that the judicial standing on the violation of Article 14 of the Constitution is negative and supports this inequality in claims and penalization justifying it through the restrictions allowed for the benefit of women and children.

Article 21 of the Constitution, which is right to life and personal liberty, is the second fundamental right that is infringed by this offence, This article includes right to privacy that has been recognized as a necessary right for man's peaceful and content living.³¹ Marriage is the most sacred and private relationship between two people. When an act affecting this relationship is made an offence, it shakes the entire (3) Nothing in this article shall prevent the State from making any special provision for women and children foundation of marriage as it becomes impure and public. Sexual intercourse is a personal decision that every human has a right to take but when the law makes this an offence; it is directly questioning the personal capacity of the person, which is against his right to privacy.

When a husband or a wife steps out of his/her marriage and has sexual intercourse with a third person, it can be indicative of the fact that such husband or wife is not happy in his/her marriage. It can be argued that divorce should be the solution to unhappiness rather than adultery; however, the delay in judicial decisions contributes in making the parties choose otherwise. Penalizing adultery merely stops that one person from committing the act. It is neither arising deterrence amongst the public nor discouraging them from committing the

²⁹ *Yusuf Abdul Aziz vs The State Of Bombay*, 1954 AIR 321

³⁰ Article 15(3) of the Indian Constitution, 1950 -Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

³¹ <https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time>.

same offence.³² Secondly, the Supreme Court legalized live in relationships between men and women in 2010.³³ By criminalizing adultery, the courts are conflicting with this decision thereby refuting the women in live in relationships the rights of a wife.

Fundamental rights are given for the upliftment of people and avoidance of any discrimination by the State. It is agreed that certain restrictions are required on these rights for the smooth functioning of a democracy like India. However, if for every violation of the fundamental right, the clause allowing restrictions would be put forward, people will not only lose faith in the State, they will also become restless and begin revolting. That situation would then defeat the purpose of Article 15(3) entirely.

Conclusion

With the establishment of adultery as a criminal offence in the Indian Penal Code, 1860, the fundamental rights of the individuals are being infringed. The gender inequality created not only infringes the fundamental right to equality but also reduces fear and a chance of reformation in the minds of female culprits. Secondly, the trial of this issue as an offence in the court will publicize it that would jeopardize the integrity and sanctity of the marital and of the person involved in the offence. Therefore, the legislature should try to make the law a gender-neutral law that would ensure punishment for both the parties involved whether a male or a female. It should also try to make the hearings of the adultery cases private hearings so that the parties who weren't at fault but victims of their partners' actions could be saved from public scrutiny and humiliation.

³² <https://www.youthkiawaaz.com/2015/10/adultery-law-in-india/>.

³³ *Lata Singh v. State of U.P. & Anr.*, AIR 2006 SC 2522