



ADULTERY LAWS IN INDIA : AN ANALYSIS

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Adultery, in its literal sense, means a consensual physical association between two individuals who are not married to each other and either or both are married to someone else having living spouse. Adultery, also known as 'infidelity' or 'extra-marital affair', is certainly a moral crime and is thought-out a sin by almost all religions. There is however, difference in the literal, social and legal definitions. The dictionary meaning of 'adultery' connotes voluntary sexual intercourse of a married person other than his or her spouse. Thus, the dictionary meaning of 'adultery' signifies gender neutrality and it may be committed by either of any sex. It proposes three conditions for commission of 'adulterous' act by the person when— (i) He or she has a sexual intercourse with opposite sex (ii) Either one or both of them are having living spouse and knowledge about it. (iii) Such sexual intercourse is voluntarily committed From social point of view, 'adultery' means an extra-marital voluntary sexual intercourse between heterosexual persons either or both of them are married having living spouse. The legal definition of adultery varies from country to country and statute to statute. While at many places adultery is when a woman has voluntary sexual intercourse with a person other than her husband, at other places adultery is when a woman has voluntary sexual intercourse with a third person without her husband's consent. In India, the legal provision under penal statutes signify the 'female adultery' where only the section consider adultery if occur with married woman only.

Historical Perspective

In India, the provision on 'adultery' under the penal statutes has gained controversy from its inception. The main architecture of Indian Penal Code, Lord Macaulay, was against the insertion of such section in the original draft and wanted to keep it out of the purview of penal statutes. According to him, such inclusion will unnecessary and unwarranted and shall be left to the society to take care for. Therefore the first proposed original draft of Indian Penal Code did not have any such provision. But it was included latter on in 1860 and sec 497 was enacted in its present form.

As per clause 199 of the Indian Penal Code Amendment Bill, 1976 section 497 read as :
"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 as 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. Though, the section still remains unchanged.

Is The Section 497 Reasonable Enough?

The cognizance of this offence is limited to adultery committed with a married woman, and the male offender alone has been made liable to punishment. Thus, under the code, adultery is an offence committed by a third person against a husband in respect of his wife. It is not committed by a married man who has sexual intercourse with an unmarried woman, or a woman whose husband consents to it.

Questions of Law that arises are:

1. Why has the code brought only the men in its ambit? Why have women received this perquisite of not being brought under the ambit of the code?
2. Is the section in this code not violative of Article 14 (which guarantees equality to all before the law) and Article 15 (that the state shall not discriminate on the basis of sex) ?
3. Why should adultery be a criminal wrong? Should it not be a civil wrong?

4. Why should a man be guilty of adultery only when he has a sexual intercourse with a married woman? Does having an intercourse with an unmarried woman make him less guilty of breaching his wife's trust?

Article 14 of the Constitution guarantees equality to all before the law or equal protection of the laws within the territory of India. Thus both men and women involved in the commission of adultery should have an equal standing before the law, as both have been equally. Therefore, the section stands in violation of the fundamental right enshrined in part III of the Constitution. Though the article is circumscribed by the clause which states that the "restriction imposed by reason of a statute, however, can be upheld in the event it can be held that the person to whom the same applies, forms a separate and distinct class and such classification is reasonable one based on intelligible differentia having nexus with the object sought to be achieved". The prompt question is then how can we call the section violative of Article 14 if a piece of legislation, in this case being Indian Penal Code, can be upheld in which the section expressly provides for only the man to be held guilty and henceforth be punished for it.

A Code or statute so enacted must have a sound reason backing it. A statute or a law made should be in coherence with some logic. A statute can not be imposed on people in the absence of logic. Where the equality enshrined in Article 14 is of wide import, it shouldn't be, very conveniently restricted by the reason of a statute.

In *Sowmithri Vishnu v Union of India*, it was contended that section 497 was violative of Article 14 of the Constitution as it unjustifiably denies to women the right which is given to men as it,

- i) Conferred 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
- ii) Does not take in its ambit the cases husband has sexual relations with unmarried women, with the result that the husbands have a free license under the law to have extramarital relationships with unmarried women.

The petitioner had also argued that the right to life includes the right to reputation and therefore if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled appear and to be heard in that trial and since sec 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is bad as violating a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is bad as violating Art. 21 of the Constitution. The Supreme Court rejected these arguments and held that section 497 does not offend either article 14 or Article 15 of the Constitution. The Court observed “Indeed the section provides expressly that the wife shall not be punishable even as an abettor. No grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried ladies. It only makes a specific kind of extramarital relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks, or perhaps, invites a civil action by the wife for separation.

Regarding the second ground for section 497 to be unconstitutional, namely, that it violates Article 21 of the constitution, the court held, “We have no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in section 497 cannot render that section unconstitutional as violating Article 21.

The authors of the code observed that the conditions of the women of this country is unhappily, very different from that of the women in England and France, they are neglected for other wives while still young. We aren't so visionary as to think of attacking, by law, an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. The time has now come for a reform in this section as the constitution drafters didn't have a women's escape from punitive measures in mind.

Another question of law is that why is adultery a criminal wrong? Why shouldn't it be a civil wrong? Before the Marriage Laws (Amendment) Act, 1976, came into force, “living in

adultery” was a ground of divorce. On the other hand, a petitioner could obtain a decree of judicial separation, if he could show that his spouse, after the solemnization of the marriage, had sexual intercourse with any person other than his spouse. Now, adultery simpliciter has been made ground of divorce as well as of judicial separation. The present clause has been worded thus- “has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.

It is a moral wrong and should be civil wrong and hence should be governed by provisions of civil law. The punitive action should be of nature which punishes the soul and conscience of the guilty. Attraction towards other women because of an unexciting marriage is common. The fear of corporal punishment has not yet been instilled in the minds of the people because still adultery is a common scenario in many metros and even villages.

Conclusion

Adultery isn't such a grave crime for which one gets a sentence of 5 years (maximum). As long as it serves as a basis of getting divorce, makes a man feel morally guilty, hurts his conscience, the punishment has been given, divorce will serve as the punishment. Imprisonment may further destroy his social and family life and may bring defamation along. It also scars the minds of the children as they may not even understand why the father has been imprisoned. The next fact in question is that why is adultery not said to be committed when act of consensual sex is done with an unmarried woman or a widow? Are the consequences of such an act different? Will the fact that he has not had a sexual intercourse with a married woman make him less morally guilty? Has he not done injustice to his wife and family? Will this not amount to breach of trust or will the wife accept it calmly? Will she forgive him?

In 2006, National Commission for Women turned down proposals for amending section 497. The commission does not think that by merely prescribing punishment for women by amending section 497, marriage can be protected or saved. In its recommendations forwarded to the Government, which asked it to review section 497, the NCW stated that considering the relatively socially unempowered position of women, no amendments have been suggested.

It is the law not encouraging adultery in the minds of women by this defect in the section? Its not necessary that women is always a victim of such crime and not the author of it. A female

too may have an urge to step outside her holy matrimony; otherwise an act of non consensual sex shall amount to rape. The time has now come when all these questions must be answered. Vague and illogical laws shouldn't find a place in society. It will make the subjects distant from the rulers and create instability in the legal system.

Thus the forgoing legal analysis of provision related to 'adultery' under penal statutes clearly defines the substantive and procedural requirement and lay down that S. 497 has been drafted differently. It can further be stated that it leads to several illogical absurdity. The drafter of the provision itself appeared to be in dilemma and at the present context it appeared to be more irrelevant. As the time passes, and as the feminist jurisprudence making the women more empowered, the provision that imbibe the protectionary prejudice attitude towards this class loosing its relevance. Therefore, in the modern context such prejudice provisions needed to be brought on the line of gender neutrality. In the modern era when the society is too liberal with the sexual offences and gender equality is order of the day, the provision of adultery has opened for debate. It fails to answer several questions and leads to serve hardly any proper purpose. Thought, too some extent, the gender neutral version of the provision of adultery as recommended by Mallimath Committee and Law Commission would be appeared to be more logical, incidental, relevant and able to serve better purpose, but looking to the various context, social reality, it may be said that its complete deletion from the penal statutes serve better purpose. In the modern society, penal statutes must be kept beyond the reach of that civil matter, specially family matter, where such provision are misused, misunderstood and hardly effective. Thus it can be concluded that provision on 'adultery' under the different legislative packages has ideology to promote marital harmony, strengthen marriage institution, provide opportunity to husband to punish outsider, provide a chance to both spouse to forgive and forget, and in turn, also form one of the basis for dissolution of marriage under personal laws. Therefore, the legislative package in present form also protects the women considering her victim in the male dominated society. In the light of above conclusions, this article has achieved the analysis of the concept of 'adultery' and its various facets, historical, philosophical, jurisprudential, the causative rational that why the adultery as a legally prohibited act, development and nature of act of adultery, the rational for making it prohibited by the society at given moment of time with penal modality of the legislative package on adultery. At the same time it has been understood that 'adultery' either as legally prohibited or permissible act is deeply influenced by the value system especially the value determining 'sexual morality' in society. As the 'morality' as such is a relative phenomenon,

it changes according to time, place and society. It has been evidently proved that the attitude of the society towards the adultery as an act has become liberal as compare to traditional age-old society. Today, 'live-in' Adultery – A conceptual & Legal analysis 43 has not been taken as 'shock or surprise' and government is also in mood it legally recognized it. Therefore, there is also need to have a second look to the provisions relating to 'adultery' in India, and better way to decriminalize it and make it only as a civil wrong. No doubt that court has used such discretions many a time to put marital interest over the individual interest. However, it is the legislature who should frame the clear policy and provisions. It is their exclusive domain, which shall not proper to be substituted by judicial law making.

References

1. Reports of the Law Commission of india, Universal Law Publishing Co. Vol 5, 42nd Report- India Penal Code, pg. 42. 288
2. Ratanlal and Dhirajlal, Indian Penal Code, 30th edn, pg 913
3. Gangoli Geetanjali, Indian Feminisms : Law patriarchies and violence in India, Ashgate Publishing Company USA, 1st Ed.2007. pg. 61
4. Gaur K.D., Indian Penal Code. Eastern Law Publication, 2nd Ed. Pg. 388.
5. Paras Diwan, Modern Hindu Law, 18th edition, pg 157
6. Bharat Heavy Plates & Vessels Ltd. vs Sreeramachandra Murthy (1988) IILLJ 22 AP [para 11]
7. Legal and Constitutional History of India, 2001 Reprint, page 379.
8. Recommendation of V.S. Committee Chaired by Justice V.S. Mallimath; "The Report of the Committee on Criminal Justice Reforms"; 2002; Para 117. The committee has however, recommended for modification of S. 497 of IPC to bring it on the line of gender neutrality.
9. Chandra Bahadur Subba vs State And Anr, 1978 CriLJ 942 [para 3]