



ADULTERY IN INDIA; A CRIME OR A CHOICE

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ABSTRACT

One of the most fascinating thing about law is that it changes, unfortunately the same holds true for love. When Natalia Ginzburg said "no adultery is bloodless", the blood probably meant the blood of the matrimonial home. India through its penal code punishes for adultery with imprisonment. However, the conundrum is that why are men punished for adultery against the supposed husband's right over his wife and women aren't over the wives right over their men. Moreover, why must a penal provision for something personal and intimate between two consenting individuals exist. Through this research paper, the authors wish to elaborate on the criminal ramifications for adultery as well as adultery rightly being a ground for divorce in India. An analysis of the 'adultery Laws' existing the world over has also been discussed. Taking into view the past, coupled with the in-depth study of the present and a peek into the future, it is most humbly submitted by the authors that, adultery must not be a crime and if it must, the law must follow the basic tenants of equality.

INTRODUCTION

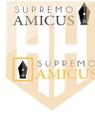
Mark Twain once said that there are two kind people, one those who have seen the Taj Mahal and the other, who haven't. Similarly, there lies a fine line of distinction is following customs and following them blindly. Unfortunately, in our country we find more people belonging to the latter description. Our laws are a demonstration of the same.

"Adultery" is one such condemned practice, which is known to break households worldwide and in a country like India where marriage is considered sacramental, such a practice is quintessentially taken to be of an unchaste nature. It can be defined as, "an invasion on the right of the husband over his wife. In other words, an offence against the sanctity of the matrimonial home and an act which is committed by a man."¹ This clearly corroborates to the parochial thinking that prevails in our society which takes into consideration only very little of what actually exists in reality.

Through this paper, we would like to critically analyse the Adultery laws in India and compare them with other countries so as to conclude with reasonable amendments to be brought in to keep pace with the the changes in society.

The position of women in India has gone through a significant change over the last few decades but surprisingly the law

¹ Olga Thelma v. Mark Gomes, AIR 1959 CAL 451



makers, to their convenience seek to see only the apparent changes brought in by certain recent developments and fail to recognise the radical reformations taken place with regard to the psyches of women in today's day and age.

Currently, as mentioned earlier, Adultery is a punishable offence under section 497 of the India Penal Code and a ground for Divorce as per the Hindu Marriage Act. However, the interesting factor that lies is that adultery is a punishable offence only for the lover of the female indulging in the same as it is considered to be a wrong against the husband.

The court pointed out in *Mirapala Venkata Ramana v. Mirapala Peddiraju*² that casting aspersion against a woman that she is unchaste woman, that too a married woman with children, is a very serious thing and unless there is cogent evidence beyond any pale of doubt, such a finding should not be recorded. Further in *Vishnu v. UOI*³ it was held that adultery is considered as an offence against the sanctity of the matrimonial home and hence, those men who defile the sanctity, are brought within the clutches of law for punishment.

Both of these above-mentioned cases are assertions made by our learned judiciary based on the current law which penalises adultery as an offence for the lover of the wife only and does not even punish the woman as an abettor. Now the question that arises is that a progressive society

like ours still believes that it is always the man who acts as a seducer and not the female or is it just a camouflage created with the protection of Article 15 of the constitution to protect the image of woman created by society.

Quoting the makers of the Indian Penal code provided the following explanation for not punishing the wife, "Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of nuptial contract, we cannot but feel that 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. The condition of women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for otherwise while still young. They share the attention of their husband with several rivals. To make laws for punishing the consistency 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. We are not so visionary so as to think of attacking by law, an evil so deeply rooted in the manners of the people of this country as polygamy...but while it exists, while it continues to produce its never-failing effects on the happiness of respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law."⁴

² AIR 2000 AP 328 at 330

³ 1985 SC 1618

⁴ Draft penal code, Note Q, P.175. See supra n.35, P.1933-34



In contrast to the above however lies the Indian mythology which depicted a different side that exists to a woman as well, the seducer. One of such characters was of the Apsaras, which would provide pleasure to both men and the Gods, amidst them the most famous being Urvashi(Uras-heart, Vashi- one who controls) who married and stayed with an already married king. Not to forget Shurpanakha, Ravana’s sister who was sent to entice Laxman by her very own brother. If we say that our law derives its sources from the customs and traditions which have been followed meticulously from time immemorial then where do practices like *Niyogya* in which women were to sleep with another man to get impregnated get placed in this century? Unfortunately love triangles of all kinds exist in India today, but as written by Manu in the Manusmriti and also in the epics Ramayna and Mahabharta, a man is allowed several marriages and relationships to maintain pleasure without being condemned but the other side to the coin is to be considered as a dark secret not to be disclosed to protect the sanctity of the woman and thus the only person to be punished in this love triangle is her lover. Clearly, Indian law makers need to Adult about Adultery.

ADULTERY AS A CRIME IN INDIA

Sanctions are necessary to create a sense of deterrence amongst prospective perpetrators and curb the rate of crimes, however there shall be an application of the rule of reason by the lawmakers while deciding which acts bear the nature of an offence and need to be punished and

which acts fall under the scope of a civil wrong.

In India, Adultery is a crime as provided under the Indian Penal code under section 497, which reads as;

“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.”

The above section limits the scope of Adultery and makes it punishable only for the man which can be deemed as a highly erroneous decisions of the law makers. Lord Macaulay however did not include the same in the original draft of the penal code.

Reasons recorded by the same are:

- Firstly, the existing laws for the punishment of adultery were altogether inefficacious for the purpose of preventing injured husbands of the higher class from taking the law into their own hands.
- Secondly, scarcely any native of the higher classes ever had recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant.



- Thirdly, the husbands who had recourse in case of adultery to the courts of law were generally poor men whose wives had run away, and these husbands seldom had any delicate feelings about the intrigue, but thought themselves to have been injured by the elopement and considered their wives as useful members of their small households., They generally did not complain of the wounds given to their affections, neither of the stain on their honour but of the loss of a menial whom they could not replace and generally their principle object used to be to send the woman back to the household or at least be reimbursed for the expenses of the marriage.⁵
- Sexual intercourse with the wife of another man;
- The paramour must have knowledge or reason to believe that the woman is the wife of another man;
- The same shall be committed without the consent or connivance of the husband;

Herein, connivance is the willing consent to a conjugal offence or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed.⁶

- It shall not amount to the offence of rape

Interestingly enough, the wife cannot be punished even as an abettor in the act of infidelity as the makers of the code felt that position of women in India is highly pitiful already and more of such disgrace was uncalled for. Also, there is an apparent reasoning to this that the Indian society professes, that a woman cannot be the seducer, it is always the man who seduces the woman to act in an unchaste manner. It was held in *Yusuf Abdul Aziz v. State of Bombay*⁷, section 497, IPC is not ultra vires under articles 14,15,21 of the constitution on the ground that it is only the man, who is held liable for adultery and not the wife with whom adultery is committed. The wife is saved from the purview of the section and is not punished as an abettor. Held that sec is a reasonable and sound classification accepted by the constitution, which provides that state can make special provisions for women and children vide article 15 clause 3 of the constitution.

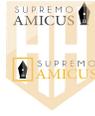
However, the opinion of the law commissioners on the same differed. They felt that adultery shall not be omitted from the code but its cognizance shall be limited, also they felt that the wife could of the affected party could be put on stage along with her paramour for granting a decree of divorce simultaneously while her lover gets punished with either imprisonment or fine. Although the same was never accepted and we find the crime of adultery in the Indian Penal code worded as mentioned above.

Based on the definition of adultery provided in the current Indian Penal Code, the following constitute as essential ingredients:

⁵ 42nd Law commission report, pg. 324.

⁶ Stroud's Judicial dictionary, Vol I

⁷ AIR 1954 SC 321



Further in *Smt. Sowmithri Vishnu vs Union Of India & Anr*⁸ it was held that, *“The law, as it is, does not offend Art. 14 or 15 of the Constitution. The offence of adultery by its very definition, can be committed by a man and not by a woman: The argument of the petitioner really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Where such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. Such arguments go to the policy of the law, not to its constitutionality, unless while implementing the policy, any provision of the Constitution is infringed. Therefore, it cannot be accepted that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. However, it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone.”*

However, with regard to where India stands today on the global map, it is very clear that such stereotypical peculiarities need to be ruled out even if it acts against the interest of women, in order to procure equality for all.

In order to compliment the mundane section of the Indian Penal code, Section

198 sub clause 2 of the code of criminal procedure 1973 reads as:

“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.”

Just like the French or the American or the British, all forms of love triangles exist in India but only one is considered to be an “adharna” which our code recognises and punishes. Unfortunately, the law makers forgot to recognise the rights of the wife of the lover or paramour, he who is conceded to be the perpetrator of the only victim in this act of infidelity, “The Husband” of the wife indulging in such an act. The supreme Court, in *V. Revathi v. UOI*⁹, observed that in case of an offence of adultery or enticing a married woman no person other than the husband of the woman shall be deemed to be aggrieved person. However, in the absence of the husband, some other person who has care of the woman on his behalf at the time of commission of such offence may, with the permission of the court, make a complaint on his behalf.

With the current judgment of the Supreme Court recognising the right to Privacy as a fundamental right, right to

⁸ AIR 1985 SC 1618

⁹ (1988) 2SCC 72



relationships is definitely an ancillary vein of the same and should be identified as that. There are a million reasons for sparks to rise up in a matrimonial home which act as a catalyst for either of the partners to venture out of their sacred bond. It shall be their personal outlook as to how they wish to deal with the same. State interference in this is highly inappropriate and hence, Adultery shall not be a crime under the Indian Penal Code, but merely shall prevail as a ground for divorce.

ADULTERY AS A GROUND FOR DIVORCE

To cheat on your spouse, is probably the worst thing one can do to their matrimonial home and it utterly destroys the sanctity of marriage. Under all personal laws in India, adultery is a ground for divorce. Section 13(1) (i) of the Hindu marriage act and Section 27(1)(a) of the special marriage act talk about this say” Has, *after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse” is a ground for divorce,*

Muslim marriages act, though does not expressly talk about adultery being a ground of divorce, however, if a husband “associates with a woman of evil repute or leads an infamous life” under, section 2 (viii) (b) of the Muslim marriages act it amounts to cruelty which is a ground of divorce. Further, In *Kalim Uz Zafar Shaikh Hasan v Razia Kalim Shaikh*,¹⁰ the Hon’ble court held that both mental and

physical cruelty caused would amount to cruelty under the provisions of Muslim marriage act. Adultery thus being mental cruelty is indeed a ground for divorce.

The Divorce act prior to the amendment of 2001 was discriminative, as a husband could divorce his wife for adultery alone, a wife could not, she had to prove her husband is guilty of more than adultery such as incest or cruelty or bigamy etc. This position changed after the land mark case of *Ammim v Union of India*¹¹, in which A special bench of the Kerala High Court held that the ground of adultery was way more favourable to men than to the wife as she not only has to prove adultery but also has to prove another ground. Such discrimination is purely on the basis of sex and hence, violates Article 15 of the Constitution. The court held that since the words “*coupled with*” are several and liable, it should be struck down as it is ultravires of Articles 14 and 21 of the constitution.

The Amended Section 10(1)(i) of The Divorce Act of 1869 (as amended in 2001) reads, “*Any marriage solemnized, whether before or after the commencement* of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent has committed adultery.*”

Thus, In the matter of divorce the law isn’t discriminatory vis-à-vis adultery

¹⁰ (2001) 1 DMC 420

¹¹ AIR 1995 Ker 252



being treated as a crime. If a husband is found to have had sexual intercourse with a woman other than his wife, the wife then has the right to divorce her husband and vice versa.

SEXUAL INTERCOURSE

For adultery to be a ground for divorce, sexual intercourse is essential. What is understood by various statutes and some judgments is that a carnal union between the adulteresses is essential and thus a mere attempt for the same does not amount to adultery.

It was held in *Subramma v. Saraswati*¹² that to activate the clause for adultery as a ground for divorce, some penetration, however brief most take place, however, and full penetration isn't necessary. "If an unrelated person is found alone with a young wife after midnight, in her bedroom, in an actual physical juxtaposition unless there is some explanation forthcoming for this which is compatible with an innocent interpretation, the only interpretation that a Court of law can draw must be that the two were committing an act of adultery together." the act of adultery once committed is enough for a ground for divorce and it is not essential that the husband or wife be living in adultery. However, before the amendment to Hindu law in 1976 the law was that if a spouse was "*living in adultery*", the other side could claim divorce

The sexual intercourse above spoken about must be consensual, and thus of course, rape of a woman, would not provide her husband with a ground to file for divorce.¹³ However, it is in fact interesting to note, that sex if done under the influence of liquor or drugs or for that matter under the belief that the sexual partner was his or her spouse, it will not amount to adultery.

BURDEN OF PROOF

As held in *Bipin v Prabha*¹⁴ and various other cases subsequently, the petitioner must bear the burden of proving that the respondent committed adultery beyond reasonable doubt. Earlier the definition of "beyond reasonable doubt" in the case of adultery used to be very strict. However, now the certainty behind the allegation has changed to high degree of probability. This was elaborated in *Mallika v. D.S. Rajendaran*¹⁵, where the Hon'ble court held, in modern law, adultery may also be proved by preponderance of evidence. Moreover, adultery is of the nature where it is very difficult to adduce evidence of direct nature and if adduced it is often looked at with suspicion, moreover, the evidence should be such that a reasonable man must not reach any other conclusion.

INTERNATIONAL POSITION

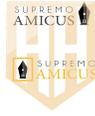
Indian criminal adultery law is very similar to the Jewish biblical law as per which adultery is defined as sexual

¹² (1966) 2 MLJ 263

¹³ *Redpath v, Redpath* (1950) 1 ALL ER 600

¹⁴ AIR 1957 SC 176

¹⁵ AIR 1995 Mad 100 also held in *Sari v. Kalyan* (AIR 1980 CAL 374)



intercourse not between a woman and a married man but between a man and married woman.¹⁶ Furthermore the penalty is directed against the married woman and not against her co-respondent. The United Nation has issued a call to Governments to repeal laws criminalizing adultery¹⁷. Closer to home the Indonesian government held adultery not to be a crime. Taking a look around,

Europe

Adultery as a crime does not exist anywhere in Europe. Criminal law for the act of adultery is only found in the history books in Europe, Romania in 2006 became the last country to denounce any sort of criminal prosecution for the same. However it would also be wrong to paint a pretty picture of the same without any context. It was only in the late 20th century that most European countries finally abolished adultery as a criminal offence. Historically speaking, in Scandinavian countries adultery has often resulted in execution of the woman involved. England, which is often called the main source of law in India hasn't had Criminal adultery under English Law since 1857, when the offence of 'criminal conversation' ('crim con') was abolished. It has safe to thus say, that Europe is "adult about adultery".

¹⁶ "And the man that committed adultery with another man's wife, even he that committed adultery with his neighbor's wife, the adulterer and the adulteress shall surely be put to death." (Lev. 20:10).

¹⁷ See "Joint Statement by the United Nations Working Group on discrimination against women

USA

In United States of America, because of the very nature of federalism, the states have the power to legislate. This means there is no one law in America and different states have a different take on any topic. On Adultery 21 out of the 50 states believe and have criminal laws for the offence of adultery. Amongst them in some USA states, if one of them is married to someone else, both people are guilty of adultery if one of them is married to someone else. In other USA states, the rule only applies to a married woman. Moreover, some states punish for a single act of adultery and in others, the adultery must be an ongoing act. An overview of some of the states and the punishment as prescribed by law for the offence of adultery has been given below: As per Section 14 of the General Laws of the commonwealth of **Massachusetts**, adultery is considered a felony with a fine of up to \$500 and a maximum jail sentence of two years.¹⁸

The offence of adultery can result as per §21-871 of the Penal code of **Oklahoma**, can result in maximum fine up to \$500 and jail time up to 5 years.

In **Idaho**, adultery comes in the chapter of "sex offences" and could lead to the

in law and in practice" of 18 October 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>



imprisonment for a period up to 3 years or a hefty fine of \$1000¹⁹ Both **North**²⁰ as well as **South Carolina** has the act of adultery as a crime in their statutes, and both states prescribe a jail period exceeding 6 months.

In **Alabama** as per, the Code of Alabama²² it is provided, ‘if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offense, be fined not less than \$100, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. On the second conviction for the offense, with the same person, the offender must be fined not less than \$300, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than 12 months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary or sentenced to hard labor for the county for two years.

However, the criminal prosecution for adultery is rare in United States of America, and adultery is often used as a ground of divorce.

ASIAN SUB-CONTIENT

Adultery is punished severely in Pakistan, and even in the recent history

stoning and lashes are seen especially after the Huddod ordinance i.e. the Islamic Penal Code which was introduced in 1980. Rape in fact, is considered a sub-category of adultery and women have been punished for being raped too.

Laws in Saudi Arabia, which are based in strict Islamic Sharia laws, provide for severe and harsh punishment for the crime of adultery and often the punishment is stoning to death of the adulterer.

It is interesting to note that the section and Law in the Bangladesh Penal Code for the offence of adultery is exactly the same as in India.²⁰

In 2015, the Constitutional Court of South Korea’s struck down a 62-year-old statute outlawing adultery under which violators faced up to two years in prison.

The nine-member bench ruled by seven to two that the 1953 law was unconstitutional. “Even if adultery should be condemned as immoral, state power should not intervene in individuals’ private lives,” said presiding justice Park Han-Chul. Unlike, other countries the trials for the offence of adultery were not uncommon in South Korea, in fact in the period between 2009-2015, more than 5,500 cases of adultery were seen in the courts.

¹⁹ TITLE 18, CRIMES AND PUNISHMENTS.CHAPTER 66, SEX CRIME 18-6601.

²⁰ § 14-184. Fornication and adultery.

²¹ SECTION 16-15-70./ Title 16 /CHAPTER 15/ ARTICLE 1

²² Section 4184



DENOUEMENT AND RECOMMENDATIONS

“Adultery is an evil only inasmuch as it is a theft; but we do not steal that which is given to us.”- Voltaire

Voltaire has very well defined in a contentious yet conspicuous manner the practice of Adultery, however its interpretation lies in the eyes of the beholder. For Indian lawmakers “custom and tradition convenience” has always been of top most priority and therefore, Adultery exists as an offence punishable under the code in its current disposition.

As authors of this paper, we would however like to offer the following suggestions;

A. Adultery as a gender-neutral offence

The law commission in its 42nd report introspected over the existence of the provisions relating to adultery and after conducting a survey with various learned men came to the conclusion that it would be too radical to arbitrarily just remove the provision, however what must be done is that it shall be made gender neutral and the woman who is in all forms an abettor shall be put on the stand along with her lover to be punished, on the same lines the commission recommended that the provision shall be revised as :

“497. Adultery – If a man has sexual intercourse with a woman who is, and whom he knows or has reasons to believe to be the wife of another man, without the consent or connivance of the man, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”²³

Unfortunately, the above recommendation was not taken into consideration and the impending law still punishes just the paramour and not the wife. With the change in our society and changing roles of females, this is no more a ground for mere adaptation to change but has become a necessity in order to keep pace with equality. There lies no reasonable doubt that our constitution guarantees the state to make certain provisions favoring women arbitrarily without any justifications but herein, there shall be only partial justice if only one of aficionado is punished and the other is let off. There are various other fields which have been scorned off by the law makers which need the cure of law in order to nurture the bud of equality for it to blossom into democracy, Adultery however isn’t one of those.

The Supreme Court on 8th December 2017 admitted that the adultery law in India was Victorian and dusty. The order said that women were treated as the husband’s property. The court admitted a

²³ Law commission of India, 42nd Report, Indian Penal Code, 1971



petition to drop adultery as a criminal offence from the Penal Code. “Time has come when the society must realise that a woman is equal to a man in every respect,” the Supreme Court recorded in its five-page written order. The court has asked the government to spell out its stand on the petition from a Kerala-based activist. Earlier verdicts had upheld the existing provision and left it to Parliament to amend the law that had not touched this law for decades. This indeed points towards a new beginning with respect to this out-dated law

B. Adultery, just as a ground for Divorce

When the law commission recommended that the provision relating to Adultery shall be modified in their 42nd report, they also suggested a revision in the term for punishment.

“497. Adultery – *If a man has sexual intercourse... the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*²⁴

Punishment was reduced from a term of 5 years to 2 years as the former was considered unreal and not called for. The report containing this recommendation is almost five decades old, enough time has surpassed and in this pendency of time, the fight with the circumstances has been

superseded by the changing roles, more accountability and potent individualities.

Inherently, Adultery is society is accepted no more as a crime but as amusement, being a consequence of a banal marriage. All that is required for is a reflection of this change of mind sets in our books of law.

As per the Hindu marriage act, as explained earlier, Adultery lies as a ground for divorce and can be used at the discretion of both the husband and the wife whoever falls as a victim to the clutches of Adultery. Most countries treat Adultery as a civil wrong, a ground for divorce punishable with the inevitable consequence of separation from the respective spouse as a consequence of cheating on them. It’s no doubt a radical change but one that has been long due.

To conclude, as Paulo Coelho says, we have to find a middle path, where there is neither joy nor suffering, only profound peace, our laws and regulations shall exhibit and manifest on the same.

²⁴ Law commission of India, 42nd Report, Indian Penal Code, 1971