



ADULTERY AND CRIME

By Jayashree Deshpande
From CMR Law School

In order to understand the meaning of criminal justice, one must understand the meaning of the word crime. The definition of the word crime is a debatable issue. There are many definitions given by many of the scholars. According to Blackstone “an act committed or omitted in violation of public law forbidding or commanding it”.

According to Kenny “crimes are wrongs whose sanction is punitive and in no way remissible by a private person, but remissible by crown alone, if remissible at all”.

Crime is an act which completely blows the mind of the society, in case of serious offences. Whereas an act which is less serious the impact on the society is not as much as in the case of serious ones.

In the ancient times there was no distinction between the civil wrongs and the criminal offences. So, crime is an act which harms the individual and also to some extent the society, the act is termed as CRIME. As the society is made up the individuals, crime can also be termed as a conduct against the society. In early Rome, any conduct which harmed the society, which is destructive in respect of the interests of the people and also which is punishable by the sovereign power i.e. the STATE was termed to be a crime. And when these crimes were taken to the court, it was termed as “criminal proceeding”.

“Even in gravest and least grave forms of crimes there was no legal distinction between the crimes. These crimes were generally classified as a) treasons b) felonies c) misdemeanors. For the guilt of even the slightest share was regarded as so heinous that it was needless to distinguish it from still deeper shades”¹ The crime can be committed either by an individual or a group of individuals. And hence, the question as to what is liability of the offenders and who should be considered as the principal offender arose. Therefore the offenders were categorized as A) principle in the first degree. B) Principal in the second degree. C) Accessory before the fact. D) Accessory after the fact. The accessories were left free as the principle offender fled the country, had pardon or died. This system was relaxed through series of legislative enactments.

The different kinds of laws are a) Substantive laws and procedural laws b) public law and private law c) civil law and criminal law. Whereas procedural law provides for the procedure to be followed when a suit is filed before the court, substantive law defines the rights and obligation of an individual. Examples of substantive laws in India are: INDIAN PENAL CODE, LAW OF CONTRACTS, PROPERTY LAW etc. Examples of procedural laws in India are: CRIMINAL PROCEDURE CODE, CIVIL PROCEDURE CODE, LAW OF EVIDENCE etc.

ADULTERY IN OTHER COUNTRIES

It is interesting to know that in most of the western countries adultery in itself is not an offence. This has been following from 19th century. In earlier times for the persons who



committed adultery were subjected to severe punishments, such as mutilation, capital punishments or with tortures. This punishment was not only for women who were indulged but also for women.

When speaking about adultery, there have been many contentions on decriminalizing the same. In most of the European nation, commission of adultery is not an offence. In other words it means, the countries have decriminalized adultery. Many argue that, criminalization of sexual relations between the consenting adults is the violation of right to privacy. Even though there is decriminalization, it may have legal consequences i.e. to say it may become a ground for divorce.

LAWS AROUND THE WORLD:

Adultery is more of complications, as each one has different views about the same. While some say that it must be legalized and the others say in contrary to that. When we think about in depth, it becomes clear that there are many consequences of the said offence. one such act may be that, adultery may result in honor killing. There must not be any differences between a man and a woman as these both have been equally involved in the said act. **Provisions in penal codes often do not treat women and men equally and establish harsher rules and sanctions for women,**¹As said earlier, adultery is not an offence or that it has been decriminalized in many countries and some of those countries include:

- a) SOUTH KOREA. Earlier in this country adultery was an offence which attracted a punishment with description up to two years' imprisonment. Later it revoked the

said law. There has been an issue regarding the revoking the law. The supporters of the law say that it is paramount to keep the families together.

- b) In European countries like, Italy, Portugal, Greece, Belgium, Switzerland, and France etc.
- c) In most of the communist countries adultery was not a crime. In countries like Paraguay, Chile, Argentina Brazil, basically the Latin American countries have decriminalized adultery.

Talking about the countries which criminalizes adultery, includes:

- a) Even in countries following ISLAMIC LAW, such as PAKISTAN, SAUDI ARABIA, and SOMALI prohibits the practice of adultery which they term as "ZINA".
- b) U.S.A: adultery is still illegal across 21 states in America.
- c) ARIZONA: adultery is punishable up to 30 days imprisonment.
- d) FLORIDA: imprisonment up to two months and fine of \$500.
- e) NEWYORK: imprisonment up to three months.
- f) MISSISSIPI: "shall be fined in any sum not more than \$500 each, imprisoned in the country jail not more than six months".¹
- g) NORTH CAROLINA: can send to slammer for anywhere from six months to a year, or fine up to \$500 to \$1000.

ADULTERY IN INDIA

With the Supreme Court giving its verdict on triple Talaq, which was discriminative in nature, the time has come to take into view



another law, which is adultery. India has also made adultery an offence and also a ground for obtaining divorce. This right has been given both to husband and wife but in case of the punishment only a man is subjected to punishment.

It is important to note the fact that, even though adultery is not a serious offence in many countries it is considered to be sin and it plays a chaos in the lives of the people thereof. Indian society considers marriage to be a sacramental relationship between a man and a woman and it is believed that their relationship is knotted for seven births. In such a scenario if adultery is decriminalized or made legal the essence of the marriage would diminish. Whatever may be the extent of development in the Indian society, there are people who still believe in various customs and traditions. Such kind of an act affects the society particularly Indian society adversely.

ADULTERY AND HINDU LAW

Adultery has been defined as 'having voluntary sexual intercourse' with a person other than the spouse.¹ The word "adultery" has been derived from the Latin word "adulterium" and considered to be a sin by all religions. Under marriage laws (Amendment) 1976, the expression "living in adultery" has been dispensed with. This means to say, either of the spouse shows before the court that the spouse has been living in adultery for a continuous period, he or she can approach the court for divorce. Adultery is such an act which happens behind the four walls, and it is an arduous process to prove the same. Hence this complexity has been lessened by the amendment act in 1976, which says, even a

single instance of adultery is sufficient to constitute as a ground for divorce.

The essentials to constitute adultery as a ground for divorce,

- a. The sexual intercourse complained must have been taken place after the solemnization of the marriage.
- b. That the sexual intercourse must be with the person who is other than the spouse of his/her.

In a case the wife was seen in a half-naked position in a hotel with a stranger, the court held that unless it is not proved beyond reasonable doubt, adultery cannot be used as a ground for obtaining matrimonial relief. In this case, the court did not consider the above act to be sufficient for a person to obtain divorce¹.

In another case, the wife used to normally be absent from the house. Once she was found in company with others. The facts also provide that she was also found in a hotel room with those strangers. The husband filed divorce petition before the court. The court granted the decree of divorce¹.

ADULTERY AND MUSLIM LAW IN INDIA:

Under Muslim law, "Adultery is defined as sexual intercourse by a person whether man or woman, with someone to whom they are not married."¹ It has been always said that extra-marital physical relationship between a man and a woman, diminishes the value of the marital bond and also that it has been condemned by ALLAH in religious books of Muslims the QURAN.



In Muslim law adultery is termed as “ZINA” which is an Arabic term. Under muslim law ZINA has been termed as a heinous crime and that the offenders must be punished harshly. **“Do not go near adultery. Surely it is a shameful deed and evil, opening roads to other evils.” “Say, ‘Verily, my Lord has prohibited the shameful deeds, be it open or secret, sins and trespasses against the truth and reason’.**¹

Brutal punishments are given to the offenders. According to Islamic law adulterers are stoned to death. **“When adultery and promiscuous behavior becomes rampant in a nation Allah will expose them to His chastisement and He will send upon them such (strange) diseases that their own ancestors never heard of.”**¹ It is indeed very interesting to make a point that Islam stands for sexual purity. Islam also considers that physical contact with a person other than the spouse is regarded as sinful. For Muslims Quran is the ultimate source because people believe that it has the integrity by ALLAH. The point to be observed is that, under Muslim law any person who is indulged in “ZINA” or the offenders are subjected to stoning (RAJM). They would be given the death by stoning. Quran prescribes flogging as a punishment. In other words trashing or belting the offenders. Another interesting point is that, Quran never mentioned the word “STONING” or “DEATH BY STONING”.

Verse24-2 says: "The woman and the man guilty of adultery or fornication flog each of them".¹

8805 says: "A married man from the tribe of Bani Aslam who had committed

illegal sexual intercourse and bore witnesses four times against himself was ordered by the Prophet (s.a.s.) to be stoned to death".¹

By observing all the above the points, it can be said that adultery i.e. “ZINA” is sinful act for which the punishment are as prescribed in QURAN. Even though the marriage in a Muslimus termed to be a contract, it is said to be of sanctity. People believe in the customs and traditions which had been following since decades may be with few changes. These changes may be because of development of the society. When people involve in act of adultery, their families will have to face off many issues arising as a consequence of the same.

ADULTERY AND IPC

It is indeed an interesting topic and which is a debatable issue. Adultery is referred to as a crime and is punishable under IPC, 1860. S. 497 of the code defines adultery and also prescribes the punishment for the same.

S.497: "whoever has sexual intercourse with a person who is and whom he knows or has reasons 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 the imprisonment of either description of a term which may extend to five years, or with fine, or with both. In such cases the wife shall be punishable as an abettor".

What draws the attention of this section is that, this section punishes only a man and not woman even the consent of hers has been taken. This section lays emphasis on



having an extra-marital sexual-intercourse with a married woman. So it can be said that adultery is an offence committed by a third person against a husband with respect to wife. This section also points out that, the adulterer must know whose wife the woman is but it is sufficient for him to have knowledge that the woman is a married woman. The section provides that wife is not punished as an abettor. From the plain reading of the section, it is evident that only a man can be proceeded and punished for the offence. Hence, the mere fact that the person is a woman she exonerated and is also immune from any kind of punishment and also that she cannot be proceeded or tried in the court.

The essential ingredients of this section are:

- a. Sexual intercourse by a man with a woman, who is and whom he knows or reasons to believe or has reasons to believe to be a wife of another man;
- b. The sexual intercourse must be without the consent of her husband
- c. Such sexual-intercourse must not amount to rape.

The public humiliation of a woman by stripping and beating her was a punishment adopted in a village in Kharagpur district for adultery¹.

As talked earlier, many countries criminalize the act of adultery. In the set of those countries include INDIA. Specialty about this law is that only men are punished for the act of adultery even though the consent of the wife of is obtained. Adultery may not be a serious crime in many of the western countries, but in country like India it is considered to of a serious kind. It can be observed that the law holds the woman to be

the property of her husband. In this section physical relationship with an unmarried woman or a widow is not valid, and also that, if the consent of the husband is taken, it does not amount to adultery.

One may think that what might be the intention of the framers of the code. The intention one can think about may be that, at the time of enforcement of this code, polygamy was deep rooted in the society. This section is biased on the basis of gender. When an analysis is made we can understand that, it not only discriminates against men, but also against the woman. Under this section the husband of the unfaithful wife can sue the man with whom she slept with. Woman can neither file a case against her unfaithful husband nor can she be proceeded on the grounds of adultery. She is free from all of it.

Section 198 of the Code of Criminal Procedure, 1973, says only the husband of the married woman, who had sexual intercourse with another man, could file a case against the male who indulged in the act with her¹.

Even though there is modernization in the society, the cases of adultery hit culture and traditions of the country. The main aim of this section is to deter the offenders by way of punishment.

In the modern times, women have grown up in all the fields and have also shown that they are not less than men around. Men and women are equal in as respects and should be treated as the same. Whether managing home affairs or handling and managing the company, or being an entrepreneur, she has



been consistently doing a great job. And it is much appreciable.

Where there is a time where men and women are treated to be equal why not in the case of punishments for the crime committed by them. It was the time for judiciary, to look up to the section 497 of IPC regarding the discrimination between men and women.

CONSTITUTIONALITY OF SECTION 497 OF IPC

A case came to the court contending that there was a violation of the fundamental rights as enshrined in Art 14 and 15 of the Indian constitution.

YUSUF ABDUL AZIZ V. STATE OF BOMBAY.¹

The appellant was prosecuted for adultery under 497 of IPC. This judgment was delivered by Bose J. the issues that came up to the court was that whether Section 497 of the IPC violative of Art 14 and 15 of the constitution of India.

The Supreme Court said that Art 14 reads out that “State shall not deny to any person equality before law and equal protection of law”¹. Article 15 (1) and (2) prohibit the state from discriminating any citizen on ground of *any religion, race, caste, sex, place of birth or any of them.*

The Supreme Court said that on reading Art 15 (3) it overlooks the above articles. This article provides that “Nothing shall in this article prevent the state from making any special provisions for women and child.” In this regard this section is a special law which is mainly made for the protection of women.

JUDGEMENT: the appeal was rejected. This section was not violative of the fundamental rights guaranteed.

SOWMITRI VISHNU V. UOI.¹

Even in this particular case the contention was that, this section was violative of Art 14, which provides for equality before law and equal protection of law. They also contended that there was an irrational classification of men and women. The court in its judgment said “The legislature is entitled to deal with the evil where it is felt and seen most”. The court also held that “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”....

Sub- section (2) of section 198 of CrPC provides that, 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 Penal Code".¹

The important line said by the court was that it is the man who is the seducer and the woman. It also said that it was for the legislature to take a call upon.

JUDGEMENT: held not violative of Art 14 and 15 and the petition was dismissed.

CONCLUSION:

The law of adultery is not less crime than crime of house breaking. There is always a debate on that the ADULTERY as crime should be decriminalized. In India the marriage between man and a woman is considered to be sacrament one. There is religious sentiment which is being attached to it. If at all it is being decriminalized there



would not be any value to the concept of marriage and religious sentiment attached to it would be completely destroyed. Though in modern times people have less faith in the concept marriage the sacrament attached to it would remain the same.

Coming to the violation of this section, it does not only violate the rights of a man but also to that of a woman. While in respect of a man, only he can be prosecuted and not the woman with whom he had slept. In respect of a woman, a) it provides a man to prosecute the other man with whom his wife had slept, but not vice-versa. b) it does not provide a right to a woman, to prosecute her husband, with whom he had slept with c) this section does not takes into consideration the cases in which the husband had a extra-marital affair with an unmarried woman or a widow.

There is the criminalization of this offence to deter the offenders. There are punishments prescribed so as to alert the people of the society. It is interesting to know that the supreme court has taken in to consideration about the section.

6. HINDU LAW by AGARWAL.
7. MAHOMEDEAN LAW by MULLA.
8. KENNY'S OUTLINE.

II. WEBSITES REFERRED:

- A. <https://indiankanoon.org/doc/449750/>.
- B. ¹ <https://www.youthkiawaaz.com/2015/10/adultery-law-in-india/>.
- C. <http://www.advocatekhaj.com/library/lawareas/divadultery/6.php?Title=Adultery%20Divorce&STitle=Adultery%20Islam>.

BIBLIOGRAPHY

I. BOOKS REFERRED:

1. The HOLY QURAN
2. CONSTITUTION OF INDIA by DD BASU.
3. CONSTITUTION OF INDIA by J.N PANDEY.
4. THE INDIAN PENAL CODE by MISHRA.
5. CRIMINAL PROCEDURE CODE by