



A CRITICAL EVALUATION OF GENDER NEUTRALITY UNDER ADULTERY LAW: COMPARING INDIA AND ISLAMIC COUNTRIES

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ABSTRACT

Adultery is a very old concept and therefore, its legal interpretations are formed keeping in mind the social status of a woman in the country along with other prevailing personal laws of different religions to protect sexual morality.

At the time in which this concept was formulated in legal books till date, it is also under scrutiny due to various reasons such as its being a gender-biased law and had violated various rights such as equality and thereby, was always questioned to be either changed, repelled or get removed because with the kinds of flaws it was formulated.

Thus, in this paper, I would discuss how far and under which aspects gender neutrality if at all is maintained under Adultery not only in India before it got decriminalized but I will compare the situation with the Islamic countries that still consider it as a sin.

This paper has attempted to include the history, judgments, flaws, etc. regarding the concept of 'adultery' through examples and various other interpretations. The paper also ends with the question regarding whether adultery should be decriminalized or it should be amended if its basis was to preserve the institution of marriage and for that first, it has to be made gender-neutral.

INTRODUCTION

My topic for this paper is "*A Critical Evaluation of Gender Neutrality under Adultery Law: Comparing India and Islamic Countries*", where I would be comparing India where adultery has been decriminalized in the year 2018 with countries governed by Islamic laws where to date adultery is considered as a crime and sin. Adultery in its basic meaning can be shortly defined as "an illicit sexual relation that is outside a marriage" which is different from a legal perspective. Here I will discuss how the punishment given in these Islamic countries is very harsh and different from the ones which were given in India when adultery was a crime. Along with the reasons behind disparity of one country to not see such a law as gender-neutral and therefore, decriminalized this archaic law whereas, on the other hand, the countries that consider it still as a crime mainly Islamic ones do so because it is a crime whose punishment is given by their god and in no way it can be excluded.

To consider an act as a crime or to put it under the definition of crime is something based on the motive, act, and a guilty mind, not something that is determined by the gender of the next person this is what is done under adultery where under the garb of genders punishments are prescribed and where there is a requirement of consent there can be no differentiation based on a person's gender.



So, in this paper, I would be discussing how the law that was created to save the institution of marriage but in reality led to the violations of basic rights of both genders in different ways and proportions.

RESEARCH QUESTIONS:

1. What is the history behind ‘Adultery’?
2. How and why the concept of Adultery in India changed with time?
3. How many times the gender- neutrality of Section 497 was questioned? What were some suggestions given to change it?
4. Is Adultery Gender- Neutral in Islamic law governed Countries?

1. THE HISTORY BEHIND “ADULTERY”

The history of adultery is different in various parts of the world. Somewhere, it is a civil wrong, but in some places is a criminal law punishable with death by stoning mainly in Islamic country, but some countries do not consider adultery as a crime as it does not affect the 'state' at large.

The term that is said to have an Abrahamic origin, and predates Judaism is a concept in various societies with differences. And though, indeed, the idea of adultery changes with the changing society at different places but some similarity is seen in religions such as Islam, Christianity, Judaism, and somewhat Hinduism also has a similar view over it.

Though not at all places adultery is seen as a crime but it can lead to divorce in marriages because at various places the institution of marriage has to be kept pure that becomes impure by such activities that hamper the

functioning of the society at large. Not only their permission is depended upon preserving the institution of marriage as in history there is much proof of sanctions on adultery that included only heterosexual sex because it leads to the birth of a child and other unnatural sex never became the part of adultery but was prohibited under different sects and rules.

Now talking about how some countries that see adultery as a factor that makes the institution of marriage impure by a stranger. Like if we talk about some Islamic countries like Pakistan, Saudi Arabia, Iran, etc. where adultery is known as ‘Hena’ and is treated as a heinous crime where both man and woman can be given punishment which can extend up to death sentence.

But there are also some countries for example Europe, Germany that considers it as a civil wrong because of the notion that it never really affected the state but only those respective families, and therefore, the punishment is up to maximum imprisonment of six month². And also in many tribes of Africa it is not even socially restricted because their open sex is common and therefore, it cannot be considered as any type of an offense.

When we talk about the ancient aspects of adultery in Greece and Roman law then it was something different because there only the offending female partner can be given the punishment of death but not to the husband and here the strict laws could be only applied if the female partner was married and if a man is having this relationship with her slave or

¹ Dr. Vijaykumar Shrikrushna Chowbe, Adultery – A conceptual & legal analysis (June 3, 2011), <http://dx.doi.org/10.2139/ssrn.1856991>.

² Thea Dunne, A brief and dirty history of adultery law, (Aug 8, 2018), A brief and dirty history of adultery law | by Thea Dunne | Medium.



an unmarried woman then these laws cannot be attracted. Somewhat same was the case in Judaism where only if 'she' is married then only this law will apply but both the offenders will be held equally liable unlike the case in Greece and Roman law³.

Even in the bible adultery is considered as a sin where both should be punished with death as there this crime is related to sins that will reach to god and he will punish the ones who indulge in such acts. But then also these crimes are committed, as even in the bible it is mentioned that to look at a woman with lustful intentions is equal to adultery at heart⁴. But with the advent of time and changing society the meaning of what constitutes a crime changes.

Now, if we look at the historical aspect of adultery in India it was always considered as an anti-social element. Moreover, the prohibition was made taking into account the prevalent patriarchal preferences in the country where in a marriage the control of even the sexual behaviour was stricter for women than for men.

- Also, if we talk about the various holy books of Hindus such as the manasmriti which talks about, 'who indulge in such activities to be given serious punishments like banishment that can lead to some amount of fear in the public and they will think twice before being part of such crimes'. The Dharmasutras that is a book related to the dharma of Hindus also mentions the same about this offense where in the Apastamba Dharmasutra the punishment for the offense is written to be based on the caste and class of both the male

and female who have involved in the adulterous act⁵. Whereas in the Gautama Dharmasutra the man who gets involved in these acts should observe two years of celibacy, and if he does this with the wife of a Vedic scholar then the same but here three years of celibacy to wash off his sins.

Thus, what is evident from the historical to the recent period of adultery is clear that the meaning and consequences of adultery around the world are different in every society in religion. But what seems common in half of them was the biased laws and regulation towards men, where the female offender was treated with more harsh punishments but there are also some examples which treated both the offenders with the same lens

2. CRIMINALIZATION OF ADULTERY

Before talking about how and why adultery got decriminalized in India we need to first understand why was it in the first instance considered to be a criminal offense. According, to the history of adultery and its context from the ancient to the modern world it was considered a shame among many religions in India, and thereby, mainly to protect the sanctity of marriage it was made an offense so that marriages that are considered sacred in India remain in its purest form.

But if we look at the first proposed original draft of the Indian Penal Code whose father Lord Macaulay was not of the view to include adultery as a criminal offense and was in favor of it to be a civil offense if at all it has

³ Supra note 1, at 11.

⁴ Jack Wellman, What Is The 7th (Seventh) Commandment In The Bible? What Christians want to

know, what is the 7th (Seventh) Commandment in the Bible? (whatchristianswanttoknow.com).

⁵ Supra note 1, at 11.



to be considered anything because his opinion depended upon that such activities should be a lookout of the society and to be controlled by the same people⁶. As well as due to other norms that were prevalent in India like child marriage and polygamy there was no need of putting such an act as an offense whose entire purpose will be defeated by different means.

It was after the second law commission that adultery was added as an offense by Section 497 of IPC⁷ under Chapter 20 of "The offenses related to marriage"⁸. Where what Section 497 says is the main reason why this section was decriminalized which was considered as a sin and shame. So, the section, in other words, can be defined as *"Adultery or extramarital affair or infidelity is an offense where a man has sexual intercourse with another man's wife of which he has the reason to believe or he knew that she was a wife of another man and he still indulges in such an act without the consent of that man, but such intercourse should be with the consent of the female otherwise it will amount to rape and thus, the adulterous man will be guilty of the offense of adultery, punishable for a term not less than five years, or fine, or with both but in the case, the wife will not be an abettor"*

Also, when in 1860 IPC has enacted the vast population in India was of Hindus and at that time there was no divorce law as marriage was considered as a ritual in Hindus but at the same time, Hindu men could marry any number of women when finally post 1955-56 The Hindu Code Bill was passed by which a

Hindu can marry only once and also adultery was finally considered as a ground for divorce⁹.

Then comes the question that what was the reason behind the gender-biased section 497. In the dictionary, the meaning of adultery is way different in the way it was inserted in the IPC, since by ordinary meaning adultery *'as a sex between a married person and someone outside their marriage that is who is someone else's wife or husband'*.

But there are certain reasoning behind the said section regarding why women are protected under it was due the condition of women in our country and then it becomes the duty of the law to protect her and also it is the duty of a good man not to punish the infidelity of her wife because the sole purpose of the law was not to destroy marriage by taking each other's partner in the courtroom as it will hamper the entire family and that's the reason why the husband of the adulterous wife cannot file a complaint against her and the sad part is that the aggrieved woman is not given this right to file any complaint against her adulterous husband.

- This stand was taken up in the case of *V. Revathi vs Union of India & Ors*¹⁰ where the Apex Court was of the view that the essence of Section 497 was to give a chance to the married couples either to make their marriage work or break the tie by filing for divorce but not to put each other in jail as it will impact not only the family but also the children. As

⁶ Supra note 1, at 13.

⁷ Section 497 of The Indian Penal Code, 1860.

⁸ Supra note 1, at 13.

⁹ Dhananjay Mahapatra, Why was Adultery law enacted in 1860, why it had to go now, The Times of India, Sept 28, 2018.

¹⁰ 1988 AIR 835, 1988 SCR (3) 73.



the spirit should be to forgive and forget and if not then to file for divorce.

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S. N O	Persons involved in sexual intercourse	Adultery committed or not?	Who can sue?	Who can be sued?	Who can not be sued?
1.	1.MM+ MW	ADULTERY	Husband of MW	MM	MW is immune
2.	2.UM+ MW	ADULTERY	Husband of MW	UM	MW is immune
3.	3.MM+ UW/DW	NO ADULTERY	No one	The section does not apply here	No one
4.	4.UM+ UW/DW	NO ADULTERY	No one	The section	No one

MM= Married Man
 MW= Married Woman
 UM= Unmarried Man
 UM= Unmarried Woman
 DW= Divorced Woman

The so-called law that is said to be made to preserve the institution of marriage was flawed on various grounds as to why the consent of a husband is required after mentioning that the consent of the woman is necessary? How a marriage can be protected by just punishing the male and giving immunity to the female wherein all other criminal offenses such levy is not available and should not be gender-sensitive? The control over a woman on her body is complete that is not dependent upon the say of a man and in the same way if a woman by her consent involves herself in such acts then why between two consenting adults only one is punished and the other is treated as a victim¹¹.

¹¹ Madhav Raje, Adultery: To be or Not to be? , Medical Journal of Clinical Trials & Case Studies (May 22, 2019), Adultery_To_be_or_Not_to_be.pdf.



The grounds under which criminalization of adultery was done show again that in marriage the male dominance is always higher and in the society patriarchy prevails. The issue of adultery and the way it was dealt with in the section does not remove the fact that it was against the rights over one's body but also related to the right to live with dignity and freedom which should be gender-specific.

DECRIMINALIZATION OF ADULTERY IN INDIA

With time, every law needs certain changes, as well as some laws, needs to be repealed because it hampers the growth of the society as it does not match with the prevailing beliefs and notions. Adultery was made a criminal offense at a time and with a view that the status of women in the country is not so good and, therefore, if we punish her under this section then it will further deteriorate her status in the society because adultery was always considered as a social crime and women were not treated as an abettor because of the social stigma that may arise with it as it is the duty of man to protect the sexual morality of her wife.

But if we look at 21st century India it is not the same as the ancient time when the status of women was more in danger. Today if we look around we could see that the notion that women are the property of her man is changing because today the norms and values of the society have changed which cannot accept those laws which treat women as a tool¹². And it can be said that with the

evolution of time women know their rights and are aware that laws are there for their rescue and preservation of marriage cannot be done by simply punishing one individual if the act has the consent of two adults.

Even The National Commission on Women was of the view that women under this section are treated as a chattel by inserting phrases like 'without the consent of her husband' which puts up a question that if a woman is required to give consent then why the consent of her husband is required because the right over one's body is more than the yes or no of her man and the commission was also of the view that adultery should be a civil wrong and not a criminal offense¹³.

Finally due to various flaws that were present in the section a Public Interest Litigation was filed by a 41- year old Joseph Shine in December 2017 which challenged the constitutional validity of Section 497 of The Indian Penal Code under which adultery was a criminal offense¹⁴. The case was referred by Chief Justice Dipak Mishra from a three-judge bench to a five-judge constitution bench which consisted of Hon'ble Chief Justice Dipak Mishra, and Justice R.F. Nariman, Justice Indu Malhotra, Justice A.M Khanwilkar, and Justice D.Y Chandrachud. Wherein they did agree that the law is outmoded and was unjustifiable. There were various grounds upon which the law was decriminalized such as it treated women as the property of men by depriving a woman out of privacy, autonomy, and dignity as she

¹² Mohanish Parikh and Devarsh Shah, *Adultery in India: From discriminatory to gender- neutral law, Indian Review of Advanced Legal research (July 28), Adultery in India: From Discriminatory to Gender-Neutral Law* (iralr.in).

¹³ Supra note 1, at 16.

¹⁴ Joseph Shine vs Union of India, 2018 SC 1676.



is not free enough to freely consent for a sexual act and it required the connivance of her husband which clearly is gender stereotyping and against various articles such as Article 21¹⁵, Article 14¹⁶ and also violates Article 15¹⁷ which talks about non-discrimination as the notion of 'man is a perpetrator and woman is a victim does not hold good in the present scenario'¹⁸.

It was also said that a crime is something that affects the entire state at large but when one looks at the section of adultery is more of a personal issue but would continue as a civil offense for taking divorce but not as a criminal offense. Section 497 is highly arbitrary as it does not even give a chance to the wife to file any sort of criminal prosecution against her husband¹⁹.

The judges were also of the view that not only this section attracts various flaws but at the same time, it also puts a question that whether a state or a court can or should have a say in such complex personal relations or it should be left to the couples to decide what they want by making it a civil offense where they have the option to break or make the marriage by filing for or not filing for divorce.

Though the PIL wanted a gender-neutral law regarding Section 497 the judges were of the view that it is highly arbitrary, biased, archaic, and violates personal liberty and thus they decriminalized Section 497 by stating it

to be unconstitutional and should be a ground for divorce on 27th September 2018²⁰.

3. QUESTIONING GENDER – NEUTRALITY OF SECTION 497:

There were many cases where the gender neutrality of these very laws was questioned but various reasoning's were given to uphold the section as it was for protecting the institution of marriage.

As in the case of *Yusuf Abdul Aziz v The State of Bombay and Husseinbhoj Laljee*²¹ where Section 497 of IPC was challenged as it was ultra vires of Article 14 and Article 15 of the Indian constitution as the petitioners were of the view that the section if made was for the benefit of women and not for giving them a license for indulging in such acts. But the Supreme Court stated that Article 14 is a general provision and thereby, should be dealt with and read with other exceptional provisions provided under fundamental rights like Section 15 (3) of the Indian Constitution. Moreover, the judges did not agree that the sections give any such thing as a license for committing such kinds of crimes, and therefore, there is no restriction under this section.

In the case of *Sowmithri Vishnu v Union of India*²² the Hon'ble once again on various grounds held that the section does not violate of Article 14 and Article 15 of The Indian Constitution as:

¹⁵ Article 21 of The Indian Constitution, 1949.

¹⁶ Article 14 of The Indian Constitution, 1949.

¹⁷ Article 15 of The Indian Constitution, 1949.

¹⁸ Lakshita, Decriminalization of Adultery in India, Legal Service India, Decriminalization of Adultery In India (legalserviceindia.com).

¹⁹ Sudhir Mishra, Should Adultery be a crime? , The Hindu, Dec. 22, 2017.

²⁰ Aryan Mohani, Decriminalization of adultery in India, Decriminalisation of Adultery in India - BnW Journal.

²¹ AIR 1954 SC 321.

²² AIR 1985 SC 1618.



1. Though Section 497 only gives the right to prosecute the adulterer to men and does not confer the same right to the woman to file any criminal complaint against the adulterous woman with whom her husband indulged in such an act. And the Supreme Court said it to be a policy of law as to give this right to only men does not violate any constitutional provisions.
2. Although if the section does not give the right to the woman to punish her adulterous husband it is for keeping the sanctity of marriage as said by the Supreme Court because in such a case the woman is treated as a victim and not as an abettor and the crime is said to be only done by the man and the law itself speaks who can sue and who can be sued.
3. At last, the court was of the view that since, Section 497 does not include cases where the husband indulged in a sexual relationship with an unmarried woman but it did not mean that it gave a free license to men to indulge in such acts more often but it has only included those scenarios which are more common where a husband can be booked under a civil case by her wife and therefore, the law does not violate Article 14 and Article 15 of The Indian Constitution.

• **WHAT WAS WRONG UNDER THESE JUDGEMENTS?**

The main two cases which I discussed above that were before the one which led to the decriminalization of adultery also proposed the same things for which the law was later itself called arbitrary. But now I'm going to discuss how it in reality violated different articles of the Indian Constitution:

A. THE SECTION VIOLATES ARTICLE 14 OF THE INDIAN CONSTITUTION:

It clearly violates Article 14 as it does not give the right to a woman to prosecute the other woman with whom her husband was involved in the adulterous act but on the other hand, gives this right to the husband to prosecute the man with whom his wife was in an adulterous relationship which signifies the gender biases of the law.

The law considered the woman as a victim with itself denotes a notion of someone who is helpless and needs an external agency for their rescue. Though the court was of the view that the law very well protects marriage as it punishes the 'outsider' who tries to destroy the marriage which according to this section is only the 'man'²³.

Even though if it does not give the option to the spouses to drag each other to jail but on the other hand the court ignores the fact that though this law is said to be biased towards woman the same is true with the woman as even she cannot file any complaint if her husband was involved in a sexual relationship with an unmarried woman as she cannot be booked for the same and the husband is also free because it does not constitute adultery where there is an involvement of an unmarried woman giving a more free hand to men to indulge in illicit relationships with an unmarried woman because wife's hand are tied under this.

B. SECTION 497 DOES NOT COME UNDER ARTICLE 15 (3) OF THE INDIAN CONSTITUTION:

²³ Amartya Bag, Adultery and the Indian Penal Code: Analysing the Gender Neutrality of the Law, SSRN-id1627649.pdf.



When one talks about the exception given for women and children under Article 15 (3)²⁴ it has to be understood to be made for the betterment of women who are not on equal footing with men due to various past sufferings, mistreatments and is a 'protective discrimination' with special provisions for women and children to safeguard their interest so that their rights are well established for their betterment so that even the interests of the country are not hampered as such²⁵.

Therefore, the intention is very clear as to why such an article was included in the constitution that is for the upliftment of women and not for giving them a permit to indulge in criminal activities as in no way involving oneself in criminal activity will lead to their improvement as punishments for criminal acts cannot be based on gender between two consenting adults. As both men and women are on equal footing because when one looks at present time then one cannot state that the social and physical conditions of woman are not same with men making them victims of adultery and not an abettor, therefore, this section only discriminately protects the woman and thus it is against equality written in our Indian Constitution and in no way comes under the ambit of Article 15 (3) of the constitution made solely for the uplifting the status of the woman.

- Thereby, the stand of the Hon'ble court regarding Section 497 was seen through a different lens keeping in mind the age-old status and preferences of the society which was even pointed by other committees which try to bring in some amendments regarding

the section which could in reality worked to save the sanctity of marriage by protecting it and not rather making certain changes that treat two consenting parties one as a victim and other as an abettor.

- **SUGGESTIONS FOR REFORMS UNDER SECTION 497:**

Not only the PIL which finally was able to point out the flaws of the section and the law was repelled there were also some earlier reforms that tried to make certain changes in the section to make it more acceptable in the changing society.

- The report which pointed out some changes was the 2nd Law Report in its 5th Law Commission and said that the section should not be removed from the penal code but should be altered in a way to be more precise and appropriate²⁶. By making both the man and the wife guilty for the said act as they are equally responsible for the same because it involves the consent of the woman also, therefore, punishment through gender should be removed and also the commission was of the view that the punishment that is awarded in the section is of five years which is arbitrary and is not so in consonance of the act, thereby it can be reduced from five years to sentencing both the abettors for two years of punishment.

Thereby, the defined section 497 as: *“Adultery or extramarital affair or infidelity is an offense where a man has sexual intercourse with another man's wife of which he has the reason to believe or he knew that she was a wife of another man and he still indulges in such an act without the consent of that man, but such intercourse should be with the consent of the female otherwise it will*

²⁴ Article 15 (3) of The Indian Constitution, 1949.

²⁵ Supra note 23, at 20.

²⁶ Supra note 23, at 21.



amount to rape and thus, the adulterous man and woman both will be guilty of the offense of adultery, punishable for a term which may extend to two years, or fine, or with both”.

- However, the Indian Penal Code (Amendment) Bill, 1978 did agree to change the section but not the same as the commission report intended as Clause 199 of the draft bill stated that²⁷, “*Adultery or extramarital affair or infidelity is an offense where a man has sexual intercourse with another man's wife of which he has the reason to believe or he knew that she was a wife of another man and he still indulges in such an act without the consent of that man, but such intercourse should be with the consent of the female otherwise it will amount to rape and thus, commits adultery will be punished with imprisonment for a term not less than five years or with fine, or with both”.*
- Though the changes were not passed in the legislature and it also differed from the law commission report as firstly, it was not gendered specific about punishment as well as the term for punishment was five years with fine or with both and, not two years.
- Even the Committee on Reforms of Criminal Justice System which was headed by Justice V.S.Malimath in the year 2003 was also of the same view regarding Section 497 that adultery in the society is treated with same disgust by both the genders then there is no requirement of making it gender-specific in criminal laws for that matter in any law and if this was accepted then it could make both male and female an equal abettor in this section.

²⁷ Supra note 23, at 21.

4. ADULTERY IN ISLAMIC COUNTRIES

In Islam, they have laws that contradict each other as in the case of penal laws and in Islam, “Zina” that is adultery and fornication is a sin which makes a person weak in being committed to their religion and is only done by a person who lies, is untrustworthy and according to them is not aware of Allah.

For them in Islam to maintain their chastity is a great concept and therefore, the laws there have always talked about to walk in the right path because to control oneself from such desires is a great deal as it shows their love towards their god and if they ever wish for a reward from him then their purity should be maintained.

They have even forbidden acts such as unethical exchange of looks between opposite sex, exchange of immoral words, etc. is also considered as a sin so, which clearly shows that adultery is a huge thing in Islam and thereby, strict punishments are also mentioned for both men and women.

In their Quran, it is written in verse 60:12 that women have pledged to Allah that they will not indulge in any illicit sexual intercourse and have also asked their God to forgive them. As far as punishment is mentioned it is given in verse 24:2 that both the male and female who have indulged in such an act have to whip each other with hundred stripes if they are unmarried but if such an act is done by a married couple then its punishment is death by stoning and both these punishments are given by their Allah as they claim²⁸.

²⁸ Fornication and Adultery: Major Sins in Islam, Islamweb.net (April 7, 2019), Fornication and Adultery Major Sins in Islam (islamweb.net).



Though regarding the punishment given to married couples is debatable as many say that it is not mentioned anywhere and it is a Jewish concept that is death by stoning and it was adopted later on but it is not a punishment by their god as they have changed this punishment with hundred lashes as it is a very harsh punishment for such an act as stated by many scholars but still it is practiced in many Islamic governed countries till now²⁹.

But as far as this is concerned it is also mentioned in verse 4:15 that if a woman if found a part of an illicit sexual relationship then for proving the same you ought to bring four witnesses who have themselves seen the act and can narrate the same and if four witnesses are available then the woman was put in a dark house until death itself takes her with it or something, as decided by their god³⁰, happens with her which is also said to be done to keep her safe from further shame and for men they were given more bodily punishments if found guilty.

And if for that matter four witnesses are there and they at all lie about the chastity of that woman and the ones who were disobedient they had to be lashed with eighty whips and in future they cannot be a part of it and cannot testify given under verse 24:4³¹. As the laws regarding testimonies are very strict in Islam as well it is also considered that to bring four eyewitnesses is not an easy task to prove someone guilty of an adulterous act.

Moreover, in Sharia law, it is also stated that if an unmarried woman or a widow gets pregnant then she is assumed to be part of an illicit relationship only if she cannot prove it if she can prove that she was raped and if she falsely claims this then she will be guilty of a stricter punishment as she lied about her claim.

Now, I'm going to discuss some countries governed by Islamic Laws to get a clear picture of how the punishments are given if someone is involved in an illicit sexual relationship which will clear the question regarding gender neutrality under this law with reference to Islamic countries.

1. SAUDI ARABIA: If we talk about the punishment regarding adultery in Saudi Arabia it follows what is written in their Quran that is if married couples are found involved in such an act then both will be stoned to death which is the harshest punishment in Islam and that also means that there is no levy regarding both the genders whatsoever³².

While if unmarried male or female are found a part of adultery then both of them whoever is found guilty will be lashed hundred times. The difference in the punishment for married and unmarried people is because unmarried ones who not have any lawful means to satisfy their sexual desires like the married ones have and thereby, it is also said that this is one of the reasons why in Islam they are more inclined in marrying their children at an early age so that there are fewer chances of

²⁹ Dr. Asma Lamrabet, Is 'stoning' punishment for adultery in India? , Asma Lamrabet (Nov, 2016), Is "stoning" the punishment for adultery in Islam? (asma-lamrabet.com).

³⁰ Supra note 28, at 24.

³¹ Supra note 28, at 24.

³² Steve, What is the punishment for adultery in Saudi Arabia? , LISA, What is the punishment for adultery in Saudi Arabia? - Life in Saudi Arabia.



people getting involved in such sins as per their understanding and belief.

2. **IRAN:** If we now talk about The Islamic Republic of Iran where adultery is a capital punishment with well-defined articles for its punishment and execution in the Islamic Penal Code of Iran. Where, Article 63 defines, *“that adultery is an intercourse between a man and a woman which is unlawfully called 'haraam'.* But only under certain exceptions like if the person was not under coercion to perform the act (Article 67), if the act is carried out by persons who are sane enough to know about their activities (Article 64), if there is a situation where one party believes that the said act is legitimate but the other party knows that this act is illegal, then the one who was aware has to be only punished (Article 65), or if both man and woman can prove that they got involved in such an act because they were unaware of the same then their punishment could be nullified (Article 66)³³.

The punishment for each of the different parties involved in the act of adultery differs in the kind of their punishment for example if it involved old couples then the punishment is whipping before stoning both of them as per Article 84 of their Penal Code or if adultery is done in coercion then killing of the one who performed such act on other deliberately³⁴.

But still stoning is a punishment there meted to those who come under that degree of punishment and for death by stoning there are

also separate provisions regarding how a woman or a man should die by this act. Like under their Article 104 the size of the stone should not be that big that the abettor dies by one or two strokes and not also small enough that it only gives them small wounds which signify the degree of torture and pain that has to be inflicted upon them³⁵.

Also, the body of an adulterous man has to be buried till his waist and for an adulterous woman up to her chest and then they have to be stoned as per the guidelines (Article 102)³⁶. And regarding throwing of stones, it is given that if they are found guilty by or their confession then the first stone is thrown by the Sharia judge and then by others but if they are found guilty by four eyewitnesses then first by them and then by the judge as per Article 99 of the Islamic Penal Code of Iran³⁷.

3. **AFGANISTAN:** Death by stoning or lashing as a punishment for adultery in Afghanistan is debatable as some claim that death by stoning is going to be a part of the new draft in Afghanistan whereas, some claim that these are all disputed news.

- Earlier in 2015, even Amnesty International condemned the act of lashing a woman for the offense of adultery in public and in presence of police and other officials which got huge media coverage when it was publicized on the news channels that is no less than an act done by the Taliban's and set a very poor example³⁸. This act of torture leads to shame

³³ Iran: Code of punishment for Adultery in Islam, (May 8, 2007, 23:00), Iran: Code of Punishment for Adultery in Iran | Women Reclaiming and Redefining Cultures (wluml.org).

³⁴Ibid.

³⁵Ibid.

³⁶Ibid.

³⁷ Id at 26.

³⁸ Amnesty International Condemns Afghan punishment for 'Adultery', Radio free Europe Radio



and disgust and is an unlawful punishment said Horia Mosadiq, who is an Afghanistan researcher in Amnesty International.

- Also, there was another incident of a 19- year old woman who was stoned to death for adultery in the same year 2015 which was carried out by the Taliban in a village controlled by them in Afghanistan³⁹. The locals said that she was stoned to death because she ran away with someone she loved against her family's wishes but on the other hand, the man with whom she ran was lashed and not stoned to death. The provincial authorities' hands were tied as they could not do anything as the village was under the control of the Taliban for more than three years.

So, these were three examples of Islamic laws governed countries which follow the punishment of stoning and flogging as a punishment for adultery even though many scholars claim that it is unlawful to stone someone to death by saying that it is the command from their Allah even after many claims that it was not written anywhere in the Quran.

- **IS THE LAW GENDER-NEUTRAL HERE?**

If we talk about gender neutrality under adultery in Islamic Countries what we could see is something much more than just gender here. Even though it is claimed that the Quran does not distinguish between genders for the offense of adultery as it's punishment is something that is a command of God and that cannot be based on gender.

But if we look at some examples like in the case of Afghanistan there is serious Human Rights Violation of Women in the name of love. Also here there are many situations where women can be punished for the offense of adultery if she gets pregnant when she is unmarried or a widow and it has to be proved by her that she was raped which shows that Muslim countries do take advantage of adultery laws against women because if she cannot prove it, then the man is set free.

So alongside it being a gender-biased law that has to be gender-neutral if it at all wants to put adultery as a criminal offense but also it has to keep in mind the kinds of punishment that it incorporates for such activity that is flogging and death by stoning which cannot be considered as a lawful punishment even said by Human Rights Organizations and needs to be repelled from every country that follows such inhumane punishments in the name of their god.

CONCLUSION

So after various research papers, articles, books, etc. what I came to understand about adultery is that it was always considered by some section of people to be against society, and thereby, they consider it to be decriminalized on various grounds such as because of its arbitrariness, it's a matter of personal affair that can be taken care by the spouses, etc. While some were also of the view that it has to be continued as a criminal offense because it was against their god and was a sin which cannot be accepted and therefore, they sanctioned harsh punishments for the same.

liberty (Sept. 2, 2015, 17:28 GMT), Amnesty International Condemns Afghan Punishment for 'Adultery' (rferl.org).

³⁹ Jethro Mullen, Women stoned to death in Afghanistan over accusation of adultery, CNN, Nov. 14, 2015.



But with the changing time and society, one needs to make changes in the laws that were made keeping in mind for say the status of woman or to protect the purity of marriage in respect of the ancient time. In my knowledge, the purity of marriage cannot be protected until and unless the section treats both the consenting adults equal and demands for equal punishment.

The provisions in India like this section were made to protect the low status of women which the section in reality did not and was also biased that led to its decriminalization which is better than to bring justice on the grounds of genders.

But when I compared it with the Islamic countries like Saudi Arabia, Iran, and Afghanistan though it portrays to be gender-neutral as it gives the same kind of punishment to both male and female when I got deeper into understanding the provisions it was gender-biased towards men because of the few examples I stated in my paper above. Thus, in the end, what I can conclude is that after studying about both the countries that are India that has decriminalized adultery and some Islamic countries that still consider it as a sin I believe that it is better to decriminalize a section if the amendment is not an option rather than still seeing it a crime with the harshest punishments that are violating the rights of women in the name of love and violating human rights of both man and woman.
