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Ph: +918255090897 Website: journal.lawmantra.co.in

E-mail: info@lawmantra.co.in contact@lawmantra.co.in

# INDIAN LAW ON ADULTERY AND ITS ADULTERATION*

## Introduction

When Yasmeen Hassan, the Global Director of *Equality Now*, a group of activists against violation of women's rights, was asked about the stance of Sharia Law on adultery, she goes thus - "the issue here is not of criminalization of adultery per se but the use of so called Sharia Law on fornication and adultery to *oppress* and *intimidate* women and to uphold *patriarchal* and *misogynistic* social systems."[1]

As discriminatory and dangerously conservative the Sharia Law might be on adultery, the law in India is, principally and unfortunately, no less. The way the Indian law on adultery views married women as property of their husbands and the way the Lords of law are obscuring and callously misleading in their judgments is very much similar to the Sharia law in the Middle Eastern countries and very far from the progressive law on the same in the European nations.

This paper would like to present a much ignored but an important analysis of judgments given by different courts of law in India in cases pertaining to adultery and then address the question of whether adultery as an offence has outlived its penological appropriateness.

Let us first understand the relevant provisions of law before we leap to the said analysis. Section 497 of the Indian Penal Code says, *"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 of 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."*

Section 198 CrPC 198(1) says, *"No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by*

* **Mr. Pratheek Maddhi Reddy, BBA LLB, Jindal Global Law School, Haryana.**

[1] Thalif Deen, Adultery Law Unfairly Target Women, U.N. Says; Inter Press News Agency, Oct 24 2014; http://www.ipsnews.net/20012/10/adultery-laws-unfairly-target-women-u-n-says/

*the offence"* and 198(2) – *"For the purpose 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* (IPC)*."*

A concise description of the aforementioned would look like this – Adultery is an offence committed by a man against a husband with regard to his wife. The contentious points in this law are precisely expressed by Nalini Chidambaram, the counsel representing the petitioner in what is going to be the most important case in our study, *Sowmitri Vishnu v Union of India*[2] before the Supreme Court in the year of 1985.

The petitioner challenges the law on adultery as unconstitutional due to the unreasonable discrimination that it imparts in the following ways,

1. A husband is considered an aggrieved party by the law if his wife engages in an extra-marital sexual intercourse with another man, but the wife is not, if her husband does the same.
2. The wife has no right to punish her adulterous husband. (Nor does the husband have any right to punish his adulterous wife – will be discussed subsequently)
3. Section 497 does not consider cases of husbands having sexual relations with an unmarried woman (for there can be no aggrieved husband), the consequence being a free licence under the law for them to have such relations.

Ms. Chidambaram further condemns this law as a result of legislative despotism and 'romantic paternalism'.

The judgment was given by a three-judge bench comprising Y. V. Chandrachud CJ, R. S. Pathak and Amarendranath Sen, JJ. The court begins by saying that, for it has been thirty years since this law has been discussed by the court, it would like to examine the current position.

It finds the claims to have a strong emotive appeal but no legal basis. The judgment says that a "wife involved in illicit relation, is the victim and not author of the crime," and adultery is "an act which is committed by man, as it generally is." "It is the man who is the seducer."

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It is quite preposterous how easily without any rational basis, the court makes these claims. Section 375(2) of IPC clearly states for rape to take place, there should be no 'consent' on part of the woman. An act constitutes adultery only if it is not rape. This by itself means adultery requires consent of the wife. When such consent is present, in what way can such a wife be a victim and not author of the crime?

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[2] 1618, AIR, SCR Supl. (1) 741, 1985

How can it be an act committed by man alone even after the consent of the woman? Is the law assuming that even a married woman is incapable of thinking and taking responsibility for her own actions?

Justice Chandrachud makes an argument that since adultery is already a ground for claiming divorce under law, the man is anyways punished; for he has to face the threat of divorce from his wife. But the court doesn't realise that in most cases, where the husband could intentionally venture outside his marriage sexually, divorce is in fact what he would desire. It could hardly be anything but a punishment. The argument of divorce by the court answers in no way the question of the irrational classification on grounds of sex.

When presented with the problem of S. 497 not containing a provision for hearing the married woman with whom the accused is alleged to have committed adultery, the judgment says that though the section does not contain such provision, there is nothing barring the woman to be heard at the trial. But, when S. 497 does not even consider the woman to be a necessary party to the prosecution, to what extent would her hearing be valued, in such prosecution.

Above all this, what is more absurd is that the courts says "if these arguments are allowed, several provisions of the penal law may have to be struck down because they do not go far enough in their definition or prosecution of punishment."

So the contention has finally been drained into matter of majority – of bad laws over the good. Should this not be a reason to rewrite the defective laws rather than justify their defectiveness by the fact that many other laws too are such?

In spite of referring to the 42nd report of the law Commission, 1971 that suggested punishment for the wife, and to the then member of minority in legislature voting for deletion of S. 497, Mrs. Anna Chandi's statement that it was the right time to consider the question whether the offence of adultery is in tune with the present day notions of married women, the court ended being content with the law, faulty as it is.

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*Yusuf Abdul Aziz V State of Bombay*[3] in the Supreme Court in 1951 is one of the first Indian cases that discussed the law on adultery. It was a constitutional bench and a short judgment. The question before the court was that S. 497 of the IPC is violative of articles 14 and 15 of the Indian Constitution.

[3] 321, AIR, SCR 930, 1954

The petitioner points towards the words, "in such case the wife shall not be punishable as an abettor" as unconstitutional for the statement makes an irrational discrimination between men and women. Article 14 says, "The state shall not deny to any person equality before the law or the equal protection of the laws… on grounds of sex…" and 15(1), "The state shall not discriminate against any citizen on grounds of… sex…"

In reply, the court points towards Article 15(3) which states – "Nothing in this article shall prevent the state from making any special provision for women and children," and that thus, this provision validates such discrimination by IPC. When contended that such a discrimination by 15(3) should be for the benefit and not detriment to women and children, **the court effortlessly as to why,** replies that it doesn't read any such restriction.

Using this as a precedent, another case *Bashir Mohammed and Anr. V Peer khan* before the Rajasthan High Court in 1972 decided the question of whether the words, "the wife shall not be punishable as an abettor" are unconstitutional. It makes the same argument that under Article 15(3) such resrtiction is constitutional. As to the reasonability in the discrimination, Justice L. Mehta says that the proviso cannot be confined only to discrimination beneficial to women and children.

The judgment says, "the provision which prohibits punishment does not tantamount to licence to commit an offence." But, in absence of any other law that punishes the act, why would such a provision not act as a "licence to commit an offence"?

Further, It is asinine that in both these and other similar cases on adultery law, the judges, even a constitutional bench, did not find any necessity of a discussion over intelligible differentia meaning difference capable of being understood in material sense and reasonable nexus, which means that there must be rational nexus between the classification and the objective attempted to achieve.[4]

Based on this, the judge further reasons that since a wife is not punishable as an abettor under S. 497 IPC (adultery), so can she not be treated as an abettor of the minor offence under S. 498 (Enticing or taking away or detaining wth criminal intent a married woman) of the same act.

Whether such a conclusion regarding S. 498 is valid or not is question irrelevant to the present issue, but the reasoning is. This conclusion arrived at using a premise that is unconstitutional and until and unless the judiciary comes forth and proclaims it as so, there will be similar considerations which would follow.

[4] Vol 2, DD Basu, Commentary on the Constitution of India; 8th edition 2007, Art. 14 p. 1427

In the case of *V. Revathi v Union of India & Ors.,*[5] before the Supreme Court in the year 1988, Ms. Seita Vaidilingam, the advocate representing the petitioner raises the claim - in the words of Justice M. P. Thakkar, who seems to be an aficionado of weaponry, "a constitutional gun" has been pointed at the 198 CrPC which does not consider a wife to be an aggrieved party in cases of adultery by the husband.

The judge uses the case of *Sowmitri Vishnu* as a precedent and delivers a judgment against the claim. Perhaps this is what John Roberts, the Chief Justice of United States meant when he said, "Judges have to have the humility to recognize that they operate within a system of precedent,…"[6]

A more inane and risible argument that the court comes up with is that, since an adulterous man and not the woman is punished, it is actually reverse discrimination, favourable to women. First of all, if upliftment of women is the objective, such kind of discrimination by violating their own rights and legal considerations, does not constitute reasonable nexus.

For the same, there can be many other kinds of attempts made but definitely not a provision of a loophole or a vent for them to misuse unhindered. Moreover, the court does not realise that by making a woman incapable of being an abettor in such an act, following these lines of thought, the law is concluding, so can she not be an aggrieved party. What kind of benefit, if at all, is being discussed here?

But, in the judgment, one valid reasoning is that when the petitioner asserted for her right to sue her adulterous husband (which should imply a husbands right too, in a case where the wife is adulterous, to sue such wife), Justice Thakkar replied, "…[The law] permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus, both the husband and the wife are disabled from striking each other with the weapon of criminal law."

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Here, the court by not allowing the spouses to prosecute each other, the law offers a chance for them to make up and importantly, unlike in every other aspect of the adultery law, there is no discrimination on basis of sex with regard to this.

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[5] SCR (3) 73, AIR, 835, 1988

[6] Steve Andrews; Baseball, Literature Culture: Essays 2006-2007; Clearing the Field of Play; p 49

There have been cases like these from as old as *Yusuf Abdul Aziz v State of Bombay* and *S. Varadarajan v State of Madras*[7], 1964, where Justice Madholkar unabashedly mentions that sections like S. 497 and S. 498 are for protection of the husband and not the wife, to cases as recent as *W. Kalyani v State Tr. Insp. Of Police & Anr.*[8] in 2011, where the Supreme Court has remained unreasonably positivistic that without a trace of hesitancy regarding treatment of women by law as property of husband, since the law says a wife cannot prosecute, the judgment too went along.

Historically, adultery often incurred severe punishments like capital punishment, mutilation and torture, usually for the woman.[9] During the times when Shakespeare used the word cuckold in his works, as someone who gets horns on his head because his wife is adulterous, someone who could not secure his marital property, society was extremely discriminatory towards women and strong male chauvinism prevailed.[10]

The encyclopedia of Diderot and d'Alembert (1751) regarded adultery as the most cruelest of all thefts.[11] Ba'al in Hebrew, a word for 'husband' used throughout the Bible, is synonymous with 'owner'.[12] English Lord C J John Holt, in 1707 stated that a man having sexual relations with another man's wife was "highest invasion of *property*" and that "a man cannot receive a higher provocation."[13]

In India, it is during the times when polygamy was prevalent rampant that the Indian Penal Code had been drafted. A man held many wives and some were left neglected in the Zenana in favour of others.[14] The matrimonial home was sacred and whoever defiled this sanctity was to be punished under the law. The very meaning of the word adultery in its origins is 'to corrupt' as in adulteration. This is precisely what Justice M. P. Thakkar means when says in *Revathi v Union of India & Ors.,* "the community punishes the outsider who breaks into the matrimonial home."

The social reality has changed overwhelmingly and women have moved on from the time when societies considered them as vessels or child bearing machines. Yet, the law on adultery remains unchanged since 1837 when the code was drafted. It still accepts the stereotype that, "women are weak" which leads to the assumption that a man is always a seducer and the married

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[7] SCR (1) 243, AIR, 942, 1965

[8] 1 MLJ (Crl) (SC) 546 (2012)

[9] Vol. 1; Hector Davies Morgan, The Doctrine and Law of Marriage, Adultery and Divorce; p 480
[10] William Shakespeare, Antony and Cleopatra; Act 1 Scene 2;
Williams, Janet "Cuckolds, Horns and Other Explanations" BBC News (4 July 2009)
[11] "Adultery" 2009-04-18 quod.llb.umich.edu.
[12] Strassman, B.I. 'The Function of Menstrual Taboos Among the Dagon: Defense Against Cuckoldry?' Human Nature 2: p 89-131; 1992
[13] Samuel H. Pillsbury, 'Judging Evil: Rethinking the Law of Murder and Manslaughter' p 149
[14] Vol. 8; Thomas Babington Macaulay, 'The Works of Lord Macaulay Complete'; p 175

woman, a passive victim of the ordeal. At the time when women are fighting for property rights, it is mortifying that this law treats them as property.

Amidst cases like *Baldev Singh & Ors. v State of Punjab*[15], where Justice Markandey Katju could consider the case being very old and the rape victim being married with children, special and adequate reasons to let go off the accused; and the infamous *Phul Singh v State of Haryana*[16] where the legendary Late V. R. Krishna Iyer could describe a rape with language such as "temptingly lonely prosecutrix", "having fulfilled his erotic sortie," "lust loaded criminality," and the rapist being "overpowered by sex stress in excess," it is not surprising that the judicial conscience towards law being violative of rights of women in shamefully low.

But, at least regarding adultery, in the recent case of *Sh. Sandwip Roy v Sh Sudharshan Chakraborty*[17]*,* before the Delhi High Court in the year 2007, though the court arrived at the same positivist incorrect conclusion, it has been sensible enough to give due weight to different studies and perspectives like historical perspective, the Law Commission of India's report, National Commission of Women's views, Justice Malimath Committee and N. R. Madhava Menon Committee's perspectives, the psychological studies on adultery, etc.

"The Law Commission of India in its 42nd report given in the year 1973 recommended inclusion of women as well. This recommendation was justified on the basis of changed status and position of women. It suggested that the sexist disparity in the law on adultery be removed by bringing women within the scope of the law."

In 2003, Malimath Committee on reforms of the criminal justice system, constituted by Home Ministry in 2000, submitted its report to the government in 2003, which suggests inclusion of women too as offenders under S. 497 IPC and that it should be recast as "whosoever has sexual intercourse with the *spouse* of any other person is guilty of adultery." It further states that the object of this section is to preserve the sanctity of marriage and that society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband).

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And now, the following analysis by the judgment comments on the second concern of this paper i.e. whether adultery needs to remain a criminal offence at all.

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16 SCR (1) 589, AIR 249, 1980

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Regarding the initial stages of drafting of the code, the judgment goes so - "Interestingly, before the Indian Penal Code was enacted under the British Rule, adultery was not a crime in India either for men or for women. This is stated in Macaulay's Code which was the first draft of the Indian Penal Code framed in 1837. Macaulay's argument was that in the social infrastructure that existed in those times, the secondary and economically dependent position of women was not conducive to punish adulterous men. So far as women are concerned, his opinion was that considering the social purdah among Hindus, especially among aristocratic, high-caste and affluent families, the question of adultery among women did not arise. Besides, Macaulay was convinced that since polygamy was an everyday affair at that time, the wife was socially conditioned to accept her husband's adulterous relationship. She neither felt humiliated nor was it a culture shock for her. However, the Law Commission of India under the British rule declared adultery a crime committed only by men. In that recommendation of the Law Commission, the law on adultery was drafted in 1860 making only men as the offenders who could be punished for adultery. It did not agree with Macaulay's stand that any punishment for adultery would be detrimental for the dependent wife and would threaten the unity of the family. The Law Commission's stand was based on the premise that adultery struck at the very core of the family unit, eroded all close ties within the family, and all that the family as society's Page 1971 basic social unit stood for. The exclusion of women from the category of offenders was based on the reality that women were already living in humiliating and oppressive conditions within the family." – so the other extreme view than what has been talked about previously in this paper is that the section has to be struck down from the criminal statute and be only a civil wrong (note that the sexual bias is very well capable of remaining after this too).

Prof. N. R. Madhava Menon Committee, another committee appointed by the government to suggest amendments in criminal law, advised removal of the section from IPC altogether. The reason given is that treating adultery as a criminal offence will lead to the accused being subjected to "extortionist police" and would culminate in an obstacle for rapprochement between the husband and wife.

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The National Commission for Women, a statutory body for women in the Indian Union established under specific provisions of the Indian Constitution, was against the idea of inclusion of wife, and making the offence only civil wrong just like the Law Commission and the Madhava Menon Committee. [Absolutely biased as it is towards women, in adultery still as a crime, opposite to all the discrimination that has been dealt till here, the commission says that irrespective of whether a husband can sue the wife or not, the wife should be able to prosecute the adulterous husband since women are always victims and can never commit any crime.]

Quite unconventional and commendable, the judgment considers what psychologists have to say too – "Psychology has a completely different story to tell. Psychologist Lucy Gray says that there is no single person on earth who does not have an extra-marital relationship - be it sexually or mentally. "If anybody denies it, he/she is either a hypocrite or not worth it. In the dictionary of psychology, adultery is neither a sin nor a sacred act. It is more a matter of body than of the heart. It is first and last, a satisfaction of the sexual urge. Sexual fidelity is not the same as love. An adulterer may be as genuinely in love with his spouse as she is in love with him." Though this might seem to be too progressive for the Indian society, because on the contrary, those psychologically and physiologically settled to monogamous relationship are in majority with the Indian notion of matrimonial home and its sanctity still firmly existing, it does illustrate to certain extent as to where the society is moving towards.

In countries like Japan[18], Mainland China[19], Australia[20] and in all the European countries, including United Kingdom, conservative as it generally is known to be, adultery is not a crime. In South Korea, in as recent as February 2015, adultery was dropped from its criminal statutes. The court found it too much of a private matter to be intervened by the state.[21] On the other hand, there are countries like Pakistan, Saudi Arabia, Somalia, Sudan, etc., where the same is punishable by 'lapidation' or stoning.[22]

In one such country, when the state ordered stoning to death for the offence of adultery, a weekly magazine cynically pronounced, "If this law is enforced, the country will run out of stones."[23] Durex's Global Survey found that 22% people worldwide agreed they had extra marital relations.[24] United Nations bodies charged with identifying ways to eliminate discrimination against women, joint statements by UN Working Group have all said adultery should no more be a criminal offence.[25]

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[18] 'Analysis of South Korea's Adultery Law'; LawTeacher.net.; November 2013; http://www.lawteacher.net/free-law-essays/constitutional-law/analysis-of-south-koreas-adultery-law-essays
[19] Marriage Law of People's Republic of China, 1980; Article 32
[20] Human Rights (Sexual Conduct) Act, 1994; Sect 4
[21] 'South Korea Legalises Adultery' The Guardian; 26-2-2015; http://www.theguardian.com/world/2015/feb/26/south-korea-legalises-adultery
[22] Rhiannon Redpath, 'Women Around the World are Being Stoned to Death. Do You Know the Facts?' Policy.mic; 16-10-2013; http://mic.com/articles/68431/women-around-the-world-are-being-stoned-to-death-do-you-know-the-facts
[23] Thalif Deen, Adultery Law Unfairly Target Women, U.N. Says; Inter Press News Agency, Oct 24 2014; http://www.ipsnews.net/20012/10/adultery-laws-unfairly-target-women-u-n-says/
[24] Durex; 'Global Sex Survey' 2005
[25] "Adultery should not be criminal offence at all," says UN expert group on women's human rights"; United Nations Human Rights, Office of the High Commissioner for Human Rights; Geneva, 18-10-2012; http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12673&LangID=E

Statistics in India show that 28% in conservative Chennai[26], 40% in Mumbai, 32% in Kolkata, 20% in Hyderabad, 22% in Delhi, 27% in Bangalore and similar percentages in other cities in India admit to extra-marital affairs.[27] What is more staggering is the this rate of infidelity is increasing at 30-50%.[28] Such statistics point towards the growing acceptance of adultery in the society as a whole or at least that the condemnation is not so severe as to inflict criminal punishment on the adulterer.

Besides the sexual discrimination by the law, examining the statistics, social views, realities nationally and internationally and the legal reasonings produced, this paper concludes that it is time this law is struck down from Indian criminal statutes. Section 497 of the Indian Penal Code has outlived its criminal jurisprudential relevance and should be restricted to only civil statutes and applicable to law on divorce and other such, as it already exists now.

Recall the following words by Martin Luther King, Jr. written in the judges library of Middlesex Guildhall, Supreme Court the United Kingdom[29] –

***"Injustice anywhere is a threat to justice everywhere."***

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. 'Statement by the United Nations Working Group on discrimination against women in law and in practice'; United Nations Human Rights, Office of the High Commissioner for Human Rights; Geneva, 18-10-2012; http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&

[26] Anjali Chhabria, "Secrets and Lies"; India Today; 26-10-2007
[27] Paresh Binhari Lal, 'The Antiquated Shackles of Adultery (An Analysis of the Flaw in the Law and a Discussion on the Pros and Cons of Different Recommendations to Reform the Law of Adultery); Legal Service India,
[28] Anjali Chhabria, "Secrets and Lies"; India Today; 26-10-2007
[29] Toby Lovett, 'Court Adjourned! Behind the Scenes at the Supreme Court', UKSC Blog, 1-6-2015; http://ukscblog.com/14351/