

Inherent Gender Bias in Adultery Law in India: A Critical Evaluation



Law

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ABSTRACT

Adultery to a common man would mean having illicit relationships with the opposite sex. In other words, having any sexual relationship with anyone other than one's spouse (wife) would amount to adultery to a body politic. Adultery is a crime in many countries and even in India too. Law of adultery as it stands in India punishes only man, and assumes that in all cases 'man is the seducer' and the women, who is an equal participant is viewed as a victim. The law makes an irrational classification between man and woman, in restricting the class of offenders to men, where women or wife is an equal partner, it violates constitutional provisions of equality enshrined in Articles 14, 15 & 21. This paper critically evaluates the existing provision and suggests that in changing social dimensions where women are no less than men, they must also be criminalized for the same act of adultery as a copartner.

Introduction

The term "adultery" has its origin in the Latin term *adulterium*. Adultery is defined under law as a consensual physical correlation between two individuals who are not married to each other and either or both are married to someone else. It is the intentional violation of the marital bed and the offence of incontinence by those persons entered into the bond of marriage. The actual definition of adultery may vary in different jurisdictions but the basic theme is sexual relations outside marriage. Adultery, also known as infidelity or extra-marital affair is certainly a moral crime and is thought-out a sin by almost all religions.

The western world and particularly few western countries like UK, Finland, Belgium, Netherland and Sweden doesn't treat adultery as a crime but the Indian jurisdiction considers adultery as a punishable and heinous crime. The union of marriage has a spiritual, communal and lawful authorization in India. Hence, a sexual liaison that flouts this sacred bond implies rebelliousness with common customs. Adultery may not be a serious crime but it does play chaos in the lives of the people concerned.. It is a breach of trust as well as infringement of the holy marital promises, conscientiously and ethically held to be revered and does carry a punishment under the decree.

Adultery law the world over has had interesting historical roots and is a criminal offense in numerous countries like US, Switzerland, India and in many Islamic countries with punishments ranging from small fines to even death penalty in some countries.

The roots of these laws can be traced to one of the earliest law codes known, the **Code of Ur-Nammu (ca. 1900-1700 BC)**. Verse 6 of the Code states that 'If a man violates the right of another and deflowers the virgin wife of a young man, they shall kill that male', and verse 7 states, 'If the wife of a man followed after another man and he slept with her, they shall slay that woman, but that male shall be set free.' And this has been a recurring theme in every law that follows.

The Indian legal Backdrop

In India the law of adultery is punishable under section 497 of the Indian Penal Code, 1860 but originally the framers of the code did not make adultery an offence punishable under the Code, it was the Second law commission which after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code.

Section 497 of the IPC says:

"497. Adultery — 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."

Now when one can say that adultery has been committed:

- i) There must be sexual intercourse with the consent of the wife and the penetration must be sufficient to constitute sexual intercourse necessary to the offence, (so if the wife goes around with 100 men and kisses them, the husband cannot initiate a case for adultery)
- ii) Knowledge and reasonable belief that the woman is married to another man and that marriage should be lawful and
- iii) The husband who has complained of the adultery had not consented or connived the act (If the husband and her wife has consented for threesome, wife swap, go ahead and enjoy it – it's not an offence)

The dilemma of the existing legal scenario

Prima facie unequal treatment is meted out by the law to men & women, there's an inherent flaw, It makes the offence punishable for men but not the wife. To punish the man severely and to let the women who was an equal part to go scot free is unreasonable on the face of it, it is discriminatory that for the same act the man becomes the manifestation of evil but the woman still is considered to retain her virtues and is treated as a victim.

It is unexplainable that for the same wrongful act the man is presumed by the law to have a *mens rea* while no such presumption is attributed in reference to the woman.

In our country it is assumed when the topic is 'SEX' women are the victims. I ask why? Why is that we tend to think that they don't do it for their own guilty pleasure but do it under pressure, under some obligation and is always somehow being victimized in this scenario?

What is the rationale behind not punishing the woman? Probably a patriarchal perspective of seeing the woman as infantile and incapable of making a decision about her sexual behavior or she is a property owned by her husband; a property that has been tampered with.

While attempting to understand the reason why such an absurd law exists, one must understand how the law sees marital relationships and women in general. Marriage as a patriarchal institution and, has and is seen as a way to establish social and personal control over a woman. Adulteration is a term that describes any form of mixing of impurity. For example, mixing water in milk is adulteration of milk. Similarly, marriage as an institution is a way of establishing blood-line purity for the husband. In terms of casteist purity, religious purity or anything else the husband might think about. This ensures that the property wielding male passes on property to his heirs. Adultery though,

would mean that this lineage would be affected and the external male 'adulterates' his blood line by having sexual intercourse with his wife and the husband would be burdened with the 'blood of another man'. This is why intercourse with the consent of the husband is not criminalized as the husband clearly knows the lineage involved.

The basic rationale behind criminalizing adultery is to protect the sanctity of the institution of marriage. But unlike other countries, the law in India is biased against men inasmuch as a woman cannot be prosecuted for adultery even when she is an abettor that is why she is not liable.

A famous example is that of Indian Navy Commander KM Nanavati who shot dead businessman Prem Ahuja on April 27, 1959 for his illicit relationship with his wife Sylvia. While Nanavati faced prosecution, Sylvia went scot free.

In 1951, one Yusuf Aziz challenged the constitutionality of Section 497 of the IPC but the Bombay High Court upheld its validity, saying the Constitution has such special legislations for women. In 1971, the Fifth Law Commission recommended changes in the provision but these were never implemented.

The Justice Malimath Committee, which was tasked with suggesting reforms for the criminal justice system, had in 2003 suggested changes to make Section 497 gender-neutral. "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),"

In the recent past the legislature, it seems, has preferred to maintain the status quo rather than taking a reformist position. The Supreme Court also through its various decisions upheld that sec.497 is constitutionally valid.

Conclusion

I do not question the intellect of the people who formed this law but I do question the intellect of those are following it. It was made years ago. It probably suited the situations but tell me ARE YOU READY TO LIVE IN AN ERA BYGONE?

Gone are the days when Women were a suppressed or subjugated lot, the practices of sati, child marriage, polygamy, etc, have been done away with. The most important reason for debate to get re-ignited is the drastic change in the social status of women.

Women today are in no way inferior to men or suppressed, and are at par with the opposite sex. The effective implementation of the protective laws and other women friendly provisions in the constitution insures that women, today, have an edge in the society. All this has resulted in them gaining the power of choice. They can no longer be classified as victims in cases of adultery.

The law should be gender-neutral and it should be possible to prosecute women in suitable cases. It is high time we change this law because it is based on the concept that women are chattel and, therefore, can commit no offence. If a man commits (adultery) it's a crime and if a woman commits adultery, it's not. This cannot go on. The gender bias in the law must be done away with.

Just recently , Justice SN Dhingra of Delhi High Court said : " We are living in an era of equality of sexes . The Constitution provides equal treatment to be given irrespective of sex , caste and creed . Does this concept of equality not apply in case of adultery also? Is women a child, baby , an insane or suffers from some other infirmity that anyone can easily take her for a ride ? Even if she is highly educated then also she is granted blank cheque of having free sex and not being held liable and face punishment for the same! This is most despicable, to say the least. A crime is a crime .If women can be punished for murder, theft and other offences then why not for adultery also? Time has come when this gross injustice perpetrated on men alone is rectified suitably and necessary amendments be made to Sec. 497 IPC, so as to do away with the irregularities, and in the interest of doctrine of equality.

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