1. Introduction:

Hunger and sex have been considered to be the primary needs of man from the primitive times. Even before human beings started regulating sex relationships, sexual intercourse by force or coercion was looked down upon leading to condemnation and in some society to a vendetta. When sex relationship came to be regulated in the civilized society with the establishment of the institution of marriage, a few more sexual intercourse related offences come into existence, even though prostitution and concubinage, and Polygamy were practised by man with some degree of moral condemnation but with impunity.\(^1\)

Paradoxically, a type of sexual intercourse with the consent of the woman is also an offence. It is when woman is a married person and she with her consent allows a man other than her husband to have sexual intercourse with her. This is called the offence of adultery. Though it is only the man who has intercourse with the married woman is guilty of the offence. Adultery is not a criminal offence in all societies, though it is in India. In England, it is merely a civil wrong. In almost all societies adultery is matrimonial offence giving rise to ground of divorce. The unique aspect of adultery is that, in criminal law, she commits no offence if she had consented to

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have sex with a person other than her husband. It is really strange development in law. It seems that since woman has been equated to a chattel or field and thus the man who commits adultery is an offender on the analogy of trespass the fall out of this aspect is that if, the husband agrees to the act or connived at it or gives his consent either express or tacit, no offence of adultery is committed.\(^2\)

It is said that sex is the rutting need, sexual intercourse brings the spouses, mentally and physically close, and sometimes, spiritually as well. Incongruity between the physical and psychological relationship of husband and wife widens the gap between them and if sexual reconciliation does not take place sooner or later, there is danger of the marriage being threatened by adultery.\(^3\)

Various studies have shown that wherever there are marked differences between the sexual activity of the spouses, adulterous tendencies set in the middle years of marriage. It is at this age that spouses start feeling disenchanted and seek new love. In modern society, there are plenty of men who keep themselves engaged in the evenings in parties, and establish temporary and often obsessive relationship with young, good looking girls to satisfy their sexual or Psychological needs. Since time immemorial, adultery has been a subject which evinces great interest. Novelists, playwrights and even scientists from diverse social set-ups have been obsessed by this subject.\(^4\) Kinsey's estimates show that about half of all married males have had sexual intercourse with woman other

\(^2\) Id. at 218-219.

\(^3\) Justice J.D. Kapoor, Laws and Flaws in Marriages, 24, (2002).

\(^4\) Ibid.
than their wives at some time or the other, while the proportion for married females is about half that for males.\textsuperscript{5}

The offence of adultery is now looked upon the same way in the case of both men and woman. In earlier times, the husband had a right to the consortium of the wife, and she was duty bound to give him her services and society in most circumstances. In modern times, the matrimonial relationship is characterised by complete reciprocity in respect of the rights and duties of the spouses. Now, too, there is a stigma attached to adultery, but views on adultery have changed and generally, it no longer entails the serious social consequences that it did in former times.\textsuperscript{6}

Adultery is a flagrant violation of a woman's dignity. The legal provisions and the social attitudes reinforce her subordinate status in society. She is the property of her husband and can not even fight independently to regain her lost prestige. Adultery is not an offence \textit{per se}. It is an offence only when it is without the consent and connivance of the husband.\textsuperscript{7}

(i) \textbf{Adultery: Historical perspective in India}

Barring few exceptions of tribal communities, the evolutionary development of family institution in India portrait patriarchal pattern, and thus, the permissible marital tie prescribe strict restriction on sexual behavior of married couple, especially of woman. The reflection of such normative

\begin{itemize}
  \item \textsuperscript{5} Kinsey: Sexual Behaviour in Human Males, 583, (1948); Sexual Behaviour in Human Females, 416 (1953).
  \item \textsuperscript{6} Supra note 3 at 25.
\end{itemize}
pattern in the sexual activities reflected in many incidences. Formation of permissible sexual relationship need social sanction and only monogamy, polygamy, polyandry types of sexual intercourse had social recognition. However, in few societies' practices like 'keep', 'slave keeping', 'Muta marriage' has also observed as a practice. Thus, one common, though not universal, feeling has been observed throughout the history about the adultery, that it is prohibited norms in one or the other form in every form of society.  

This is to be noted down that adultery shall be put on different aspects of criminal behavior than other crime mentioned under the penal statutes. Adultery does not have the grave effect on the society, or rather it does not pose threat to the peaceful existence of society as in the other cases of crime such as murder, dacoit, theft, grievous hurt, public tranquility, defamation, rape etc,. The similar is the thing about the punishment for adultery. It can be argued that the punishment to the person committing adultery is not and cannot be a remedy for a person aggrieved of adultery. The object of prosecution for adultery is more often to reach a settlement with the offender at the mercenary level and seldom to send the offender to jail. In fact this was the very reason why the offence of adultery did not figure in the very first draft. To this extent, the conditions are not appreciably different even today. The existence of Section 497 has no apparent affect on society. Acknowledging this most western

8. Exception to the legal definition of adultery has also been observed under Muslim personal law. The minor Muslim girl, if married before attending puberty, has option to deny the marriage and may have sexual relation with a person other than her husband by opting for 'option of puberty'. The sexual intercourse other than husband of such woman without consent does not amount to an adultery, as marriage of that woman itself is in question and as a principle, existence of marriage is basic requirement of adultery.
countries have decriminalised adultery. It is not a crime in most countries of the European Union, including Austria, the Netherlands, Belgium, Finland, Sweden and even Britain from whom we have borrowed most of our laws. In the United States, in those states where adultery is still on the statute books, offenders are rarely prosecuted.

Historically in India, ‘adultery’ had been considered as an anti-social activity and prohibited by law. However, the concept and understanding about the adultery in ancient period and modern period is little bit different, and punishment also differs. The ancient code of Manu merely provided for varying range of punishments for offence of adultery ranging from simple repentance to the ghastly burning of the offender. From the Manu’s thought it enough for a high caste man committing this offence with low caste woman to repent, it is reasonable to conclude that in Manu's views adultery is not *per se* an offence involving moral depravity. Hindu Matrimonial Laws do not make a single act of adultery as valid ground for granting divorce. Thus according to Manu, the relationship of upper caste man with lower caste woman is not adultery, but adverse was the case of adultery.

In India, the provision on ‘adultery’ under the penal statutes has gained controversy from its inception. The main architecture of Indian Penal Code, *Lord Macaulay*, was against the insertion of Section 497, in the original draft and wanted to keep it out of the purview of penal statutes. According to him, such inclusion will unnecessary and unwarranted and

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9. The reason for declaring ‘adultery’ as an offence is due to the reason that First Law Commission had drafted the first penal statutes in India based on the existing law at Britain, but modified it on the line of sociopolitical requirement prevailing in India at that time.

shall be left to the society to take care for. Therefore, the first proposed original draft of Indian Penal Code did not have any such provision. But it was included latter on. The enacted first penal legislation in India contained the offence of adultery which was put under Chapter XX that deals with the Offences Relating to Marriage. It contained four sections [494-498]. Thus the section as it was stand in the penal statutes prescribed that if a man, married or unmarried has voluntary and consensual sexual intercourse with a married woman, without the connivance of her husband, he would be criminal held liable for the offence of adultery.

The plain reading of this section clearly manifested the original prejudices in the mind of the framer of this section. Thus from the inception of Section 497, it was so drafted to make man guilty, and complete shield to the wife, even she may be the active participant in the commission of an offence. The further analysis of this section unequivocally conveys that a man alone can commit adultery and the woman (adulteress) is not liable even as an abettor. Whatever may be justification, or social necessity, this section clearly from its inception put this presumption on legislative agenda that whether the woman is a victim of adultery or is herself an adulteress, she is completely free of being penalized for offence of ‘adultery’.

The feminists also raise the objection on the Section 497 as it portrait prejudice of wife as property of her husband. According an argument has been raised that dubious as all the meanings of the word are, the one chosen in Section 497 of Indian Penal Code, 1860, entrenches male control over women. The inferences that can draw from this law are twofold. One that the man owns his wife sexually, and his consent is necessary to gain sexual access over her. Second,
the offence of adultery is legally equivalent to that of theft, the goods being the wife’s body. Women are therefore, denied agency, whether they themselves have committed adultery (as understood generally) or are married to men committing adultery.\textsuperscript{11} However, both these arguments are not tenable as Section 497 is the part of group of four Sections (494-498) which are related to marriage and does not fall in the category where theft and other offences fall.

It is pertinent to note that the original draft of Indian Penal Code, 1860, prepared by first Law Commission was silent about the offence of ‘adultery’. Lord Macaulay, who was unwilling to add the provision criminally the adultery as an offence, observed, 'There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives.'\textsuperscript{12} The basic objective of keeping ‘adultery’ out of the penal statute was the social norms which has already provided the values and norms which take care of such instances. The circumstances he referred to included child marriage and polygamy. Macaulay, hence, advised that it would be enough to treat it as a civil injury. Thus, framers of the Code did not include adultery as a crime; it was only after the recommendation of the Second Law Commission it was added to the Code.\textsuperscript{13}

Thus, it is on the record that the framers of the Code did not make adultery an offence punishable under the Code. But the Second Law Commission, after giving mature

consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code.\textsuperscript{14}

The Second Law Commission thought otherwise and said it would not be proper to leave the offence out of the Indian Penal Code, 1860, and suggested that only the man be punished, again keeping in mind the condition of women in the country.

The argument given that why the wife would not be punished has been provided as follows:

'Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attention of a husband with several rivals to make laws for punishing the inconsistency of the wife, while the law admits the privilege of the husband to fill his ‘zenana’ with woman, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women,

\textsuperscript{14} Ratan Lal and Dhiraj Lal’s Indian Penal Code, 2305, 29\textsuperscript{th} Edition, 2002.
we are not inclined to throw into a scale, already too much depressed, the additional weight of penal law.\textsuperscript{15}

Thus, in India, a wife is not punished as an adulteress or an abettor for the offence of adultery. It is only the man who has such unlawful sexual intercourse with married woman will be punished under Section 497, Indian Penal Code, 1860. Moreover, the wife of the adulterer has no \textit{locus standi} to file a complaint against her deviated husband. It is only the husband of the (adulteress) wife who can file a complaint and upon whose complaint the Court can take cognizance of the offence. This position of law regarding making complaint has been clearly provided under Criminal Procedure Code, 1973.\textsuperscript{16} Section 198(2), Criminal Procedure Code, 1973, treats the husband of the (adulteress) wife an aggrieved party and not the wife of the adulterer husband.

The object of making ‘adultery’ as an offence and restricting it to ‘Man’ alone was to deter ‘Man’ from taking advantage of woman starved of the love and affection of her husband and deter Man from having sexual relations with the wife of other man. Since men had the social sanction to maintain such relations and women were starved of the love and affection of their husbands, women were treated as the victims and not the authors of the crime. When Section 497 was enacted there were no codified personal and matrimonial laws like today but they were unequal and inoperative.\textsuperscript{17}

Apart from Indian Penal Code, 1860, there is one other penal legislation in India that regulate ‘Adultery’ in India. Ranbir Penal Code, 1932 especially applicable to the State of

\begin{flushright}
\textsuperscript{16} The Criminal Procedure Code, 1973, Section 198(2). \\
\textsuperscript{17} http://www.legalserviceindia.com/article/l291-Adultery.html visited on 23.01.2011
\end{flushright}
Jammu and Kashmir is one such legislation. It provides under Section 497 for the punishment for the offence of adultery.

It is important to note that a bill in 1972 as the Indian Penal Code (Amendment) Bill, 1972 suggested that special privileges granted to woman under Section 497 of the Code be done away with. However, the amendment of the section could not be carried out and law remains as it was when enacted in 1860. It is pertinent to mention here the recommendation of the Law Commission of India in its 42nd report regarding the provision of adultery in Indian Penal Code, 1860.

(ii) **Meaning of Adultery**:

In the Penal Code adultery is viewed primarily as an invasion on the right of the husband over his married wife. Adultery by itself is an anti-social and an illegal act: naturally any peace-loving citizen and any person of good morals would not like that adultery should be permitted to be indulged in before his very nose.

Adultery is an offence committed by a man against a husband in respect of his wife. It is not committed by a man who has sexual intercourse with an unmarried or a prostitute woman, or with a widow, or even with a married woman whose husband consents to it or with his connivance. 'Connivance' is a figurative expression, meaning a voluntary blindness of some present act or conduct, to some thing going on or before the eyes, or something which is known to be going on with no protest or desire to disturb or interfere with it.

Adultery is a secret act. Direct evidence of an act of adultery is extremely difficult.\(^{22}\)

Adultery is an act which requires the consent of both the parties. The male offender alone is liable to punishment and the married woman is not liable even as an abettor.\(^{23}\)

According to D. Tolstory, 'Adultery is voluntary sexual intercourse between a married person and a person of the opposite sex, the two persons not being married to each other'.\(^{24}\)

According to Raydon, 'Consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage'.\(^{25}\)

(iii) **According to Dharmashastra:**

The human character of the legislation of the Indian sages is seen by the fact that even for adultery they do not allow the husband to drive the wife out of the house and to abandon her. Gautma 22.35 prescribes that –

A wife who violates her duty of chastity must undergo a penance, but she should be kept under guard and be given food.\(^{26}\)

Yajnavalkya (1.70.72) declares –

As adulterous woman should be deprived of her authority (over servants), should be made to wear dirty clothes, should be given food just sufficient to enable her to


\(^{23}\) Ibid.

\(^{24}\) Supra note 3 at 26.

\(^{25}\) Ibid.

live, should be treated with scorn and made to lie on the ground (not on a cot), a woman becomes pure from adultery when she has her monthly period after that, but if she conceives in adulterous intercourse she may be abandoned and also when she is guilty of the murder of her foetus or of her husband or of some sin that makes her an outcast.'  

The Mitaksara on Yajnavalkya 1.72 draws attention to the text of Vasistha XXI. 12 'The wives of Brahmanas, Ksatriyas and Vaisyas who commit adultery with a Sudra may be purified by a penance in case no child is born (of the intercourse), but not otherwise' and remarks that the words of Yajnavalkya are to be understood in the same sense i.e. a wife is to be abandoned only if she be in adultery with a Sudra; and further that the abandonment consists in not allowing her to participate in religious rites and conjugal matters, but she is not to be cast on the streets; she is to be kept apart guarded in a room and to be given food and raiment (As stated in Yajnavalkya. III. 297).  

Vasthita XXI. 10 says that only four (types of) wives are to be abandoned viz. one who has intercourse with the husband's pupil and with the husband's guru, and especially one who attempts to kill her husband and who commits adultery with a man of degraded caste (like leather-worker).  

Narda (Stripumsa V. 91) says 'when a woman commits adultery her hair shall be shaven, she shall have to lie on a low bed, shall receive bad food and clothing and her
occupation will be the removal of sweepings of the husband's house.\textsuperscript{30}

Gautam 23.14, Shanti-parva 165.64 and Manu VIII. 371 are more harsh on a woman who has intercourse with a low-caste man, i.e. she is to be punished by the king with being devoured by dogs.\textsuperscript{31}

Veda Vyasa (II. 49-50) says that 'a wife' who is guilty of adultery should be kept in the house but void of her rights or associating in religious and conjugal matters and of her rights over property, and should be treated with scorn; but when she has had monthly course after the act of adultery (and does not repeat it) only, the husband should allow her the usual rights of a wife as before.'\textsuperscript{32}

Manu XI. 177 asks the husband to confine an exceedingly corrupt wife to one room and compel her to perform the penance\textsuperscript{33} prescribed for males in cases of adultery.\textsuperscript{34}

Under the English Law, if the wife commits adultery the husband’s obligation to maintain her ceases altogether unless he had connived at it or condoned it.\textsuperscript{35}

The following propositions can be deduced from the texts cited above.

(1) There is no absolute right of abandonment of wife in the husband on the ground of adultery.

\begin{itemize}
\item \textsuperscript{30} Ibid.
\item \textsuperscript{31} Ibid.
\item \textsuperscript{32} Ibid.
\item \textsuperscript{33} Penance will be lighter or heavier according to the caste of Adulterer.
\item \textsuperscript{34} Id., at 572.
\item \textsuperscript{35} Vide Halsbury’s Laws of England, 609, 610, Vol. 16 (Hailsham Edition).
\end{itemize}
Adultery is ordinarily an upapataka (a minor sin) and can be atoned for by appropriate penance undergone by the wife.

The wife who has committed adultery but has undergone penance is to be restored to all the ordinary rights of wives.

As long as the adulteress has not undergone penance, she is to be given in the house itself starving maintenance and to be deprived of all her rights as wife.

A wife, who commits adultery with a sudra or has had a child thereby, who is guilty of killing her foetus or of attempt to kill the husband or guilty of one of the deadly sins (Mahapatakas), is to be deprived of her right to participation in religious rites or conjugal matters and is to be kept confined in a room or in a hut near the house and to be given starving maintenance and poor apparel, even after she undergoes penance.

That wives who are not guilty of acts mentioned in Yajnavalkya 1.72, 111.297-298, Vas. 21.10 or 28.7 are to be given starving maintenance and residence near the house even if they do not perform penance.

Wives who are guilty of the acts mentioned in Yajnavalkya 1.72, 111.297-298, if they refuse to perform penance, are to be refused even starving maintenance and residence near the husband's house. The propositions about maintenance set out
here are accepted as modern Hindu Law by the courts in India.  

(iv) Dictionary Meaning of Adultery:

According to Encyclopedia Britannica, Adultery means, sexual relations between a married person and someone other than the spouse. Written or customary prohibitions or taboos against adultery constitute part of the marriage code of virtually every society. Indeed, adultery seems to be as universal and, in some instances, as common as marriage.

The definition of 'adultery' that occur in the dictionary is gender neutral, where, it may be committed by either of the sex. However, under most of the statutes, it gender favoured and mostly prescribe 'female adultery' which has been webbed around the married woman whose consensual extra-marital sexual involvement without the consent of her husband is an essential condition of adultery.

The dictionary meaning of 'adultery' is 'voluntary sexual intercourse of a married person with one of the opposite sex other than the husband or wife, as the case may be'.

According to Black's Law Dictionary, Adultery is defined as 'voluntary sexual intercourse between a married person and someone other than the person's spouse'.

According to Concise Law Dictionary, 'Adultery is the wilful violation of the marriage bed. Adultery is the offence of incontinence by married persons'.

39. Supra note 3 at 25.
In Wharton's Concise Law Dictionary, Adultery is defined as 'The sin of incontinence between two married persons, or it may be where only one of them is married, is which case it may be called single adultery to distinguish it from the other, which has sometimes been called double.'

(v) **Definition of Adultery** :

Section 497 of Indian Penal Code, 1860, reads as under:

> Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to be the wife or husband, as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape commits 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.

2. **Scope and Object of Section 497** :

Section 497, defines adultery and provides punishment thereof. Adultery is an offence committed by a third person by committing sexual intercourse with a wife of another person without his consent or connivance. This is the reason that this section makes it punishable and all classes of persons, irrespective of their caste, creed and colour, if they commit the offence to adultery, are governed by this section.

Section 497, are intended to protect the rights of the husband and those of the wife.

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43. Supra note 13 at 2452.
The object of the law under Section 497, is to inflict punishment on those who interfere with the sacred relation to marriage, the reason being that as adultery is an anti-social and illegal act, no peace loving citizen or person of good morals would like that it should be permitted to be indulged in before his very nose.

3. **Essential Ingredients of Section 497:**

Section 497, requires the following essentials:

(i) **There must be sexual intercourse:**

As has been observed before, the offence designated as adultery here consists in having carnal knowledge of a married woman with knowledge of that fact, without the consent or connivance of her husband. The section of course, assumes that the intercourse was had with the consent of the wife, for otherwise the offence would be rape and not merely adultery. Under Section 376, Indian Penal Code, 1860, penetration is held to be sufficient to constitute the sexual intercourse necessary to the offence of rape, and it is apprehended that penetration of the male organ is equally necessary to constitute the sexual intercourse necessary to the offence of adultery.

So where the wife went over to the shop of the accused to have sexual intercourse but was at once followed and entrapped before she could have connection, her act was held

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49. The Indian Penal Code, 1860, Section 376.
not to go beyond the mere stage of preparation.⁵¹ In another case, the accused was discovered with a married woman in a room but before he could hold sexual connection with her, her husband surprised them both, whereupon the accused was convicted of attempt to commit the offence of adultery, but the conviction was quashed on the ground that the act was not sufficiently proximate to the commission of the offence to constitute an attempt.⁵² This was also the view of the Madras Court in which Shephard, J., said: 'Adultery being an act which requires the consent of both the parties, it appears to be that for a man to be guilty of an attempt, it is not sufficient that he was found in a place in which adultery might have been committed and that he was minded to commit it. Because he was so minded and had entered the woman's room, it does not necessarily follow that, but for the interruption, the offence would have been consummated.⁵³

But this must not be understood to suggest that a person cannot be convicted by the offence of adultery unless he is surprised flagrant delicto. Indeed this is neither necessary not possible, the more so in view of the fact that the offence is by its nature committed in secrecy, and the woman is not likely to make disclosure disadvantageous to herself. The fact must be inferred from the surrounding circumstances of cohabitation or the like.⁵⁴

What is essential for the offence of adultery is proof of sexual intercourse. It is true that this can be rarely proved by

⁵¹. Paira Ram, (1902) P.R. No. 25.
⁵². Ghulam Mahomed, (1879) P.R. No. 31.
⁵³. Basavachary, (1889) 1 Weir 569.
direct evidence because precautions are taken to screen it from the view of other. But in evaluating the husband’s accusation against his wife of adultery the entire background and the context in which such accusation is made is highly relevant. When the parties concerned are sophisticated, conclusions can not be arrived at on the mere basis of opportunities for sexual intercourse, such an inference may be more readily possible when dealing with persons whose social mores are more rigid and less sophisticated. The fact of adultery has, therefore, to be inferred from the totality of circumstances that lead to it by fair inferred and as a necessary conclusion what those circumstances are cannot be laid down universally. Nonetheless, the circumstances must be such as should lead the guarded discretion of a reasonable and just mind to that conclusion; it is not to be reached by rash and intemperate judgment or upon assurance that are equally capable of two interpretations.55

For instance, if the accused trespasses into the apartment of a married woman and remains there sufficiently long to be able to consummate the act, the court would be justified in holding that he had achieved the purpose of his visit for which he had both time and opportunity and more could not be reasonably expected.56 Absolute certainty is not to be expected in such cases, any more than in divorce cases, as Birch J., said: 'To go further than this, and require

56. *Supra* note 50.
absolute certainty would go to the length of excluding altogether circumstantial evidence'.

A conviction for adultery is not illegal simply because the fact of the marriage is deposed to only by the alleged husband and the alleged wife.

(ii) Woman must be married:

The woman with whom connection is had must be married, that is to say; lawfully married to another, of which there must be strict and formal proof. The evidence of the husband or of the wife, or of both that they were married may, for this purpose, be quite sufficient. Indeed, the question whether two persons were married or not is a question of fact and not of law. But this view has been acceded to in other cases in which the courts seem to require stronger proof, the nature of which was, however not indicated. In one of these cases the court observed that under Section 50 of the Indian Evidence Act, 1872, marriage in such cases must be strictly proved in the regular way. But that section merely enacts that an opinion on that relationship is insufficient. It does not excluded it, not does it prescribed any special mode of proof, in the absence of which the court must be guided by those general principles which regulate the sufficiency of evidence, and it is apprehended that while the evidence of eyewitnesses

57. Ibid.
60. Subrayan, ILR Mad. 9; Syed Munir, 14 Nag. ILR 28.
61. Wadhawa v. Fatteh Muhammad, (1894) P.R. No. 5.
63. Act 1 of 1872.
64. Supra note 51.
to the marriage is in every case desirable,\(^6\) it is not the *sine qua non* of legal proof and the evidence of the married couple should suffice if it is believed in, especially if it was not assailed by the accused. Where the accused assails marriage it would, it would have to be proved that the woman was married in one of the approved forms of marriage or forms of marriage recognized as valid by the law and custom, governing the parties.\(^6\) Where the attendance of the caste people and the feast followed by cohabitation is in accordance with their custom, sufficient to validate a second marriage of a widow and the ceremonies of the first marriage are not necessary, it was held that Section 6, Hindu Widow’s Remarriage Act\(^7\) has no application.\(^8\)

Where a foreign marriage has to be proved, courts insist upon proof of its factum by independent evidence of its essential ceremonies, and its validity by the evidence of an expert.\(^9\) A woman is not the wife of a man within the meaning of Section 494 and 495, Indian Penal Code, 1860, if their marriage is voidable, as in the case of *Sunni* Mahommedans in whose case the wife has that option in certain cases. The question what constitutes marriage has been already considered. As pointed out there, marriage is an elastic term and is capable of different meanings. In England it means a monogamous marriage solemnized in accordance with the rites of the church or the rules of law. In non-Christian countries

\(^{65}\) Supra note 52.

\(^{66}\) *Tek Ram*, 1951 A.W.R. (H.C. (312).

\(^{67}\) Act of 1856.

\(^{68}\) *Tappo v. Emperor*, AIR 1937 Sind 42 at 43.

\(^{69}\) Povey Dears, C.C. 23 at 36; Savagez, 13 Cox, 178 Lindsay, 66 J.P. 505; Nabuib, (1917) 1K.B. 359 at 369. Dissenting from Newton, 2 Moo. B&R 503.
and as applied to non-Christian communities, it bears a different tests and its validity must be judged by applying different tests and in accordance with the lex loci by which it is regulated. This must depend upon the personal law of the parties, and the custom and usages of the caste to which the parties belong. So a *nikah* marriage is a well-recognized form of Mahommedan marriage and it will be sufficient to support a matrimonial offence whether of bigamy or adultery. So *Pat* marriages in the Maharatta community, and *sagai* marriages among the low caste Hindus such as the *Korio* of Bihar are customary, and a woman re-marrying could not be convicted of bigamy or of adultery. Indeed, in questions arising out of marriage relationship in this country with people of diverse races each following its own customs the question of custom is necessarily paramount, and therefore, by them the factum and validity of a marriage must be judged.

But, if there is a limit to domain of custom and if it is immoral and illegal, the courts are precluded from recognizing or giving effect to it. Such a custom was set up by the accused who justified his elopement with the prosecutor’s wife which had the effect of *natra* marriage with her and which he claimed to be sanctioned by usage, though the court had no occasion to go into that question. It is, however, evident that no court could tolerate an elopement though it may have become sanctified by the usage of caste and acquired an euphemistic appellation. The conversion of a Hindu wife to

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70. *Judoo*, 6 W.R. 60: 4 W.R. Cr.L.I.
72. *Bissuram*, 3 C.L.R. 410.
Mahommedanism does not \textit{ipso facto} dissolve her marriage with her husband; she cannot during his life time enter into a valid contract of marriage with another person. In \textit{Sayeda Khatoon v. M. Obadiah},\textsuperscript{75} it has been held that a marriage solemnized in India according to one personal law cannot be dissolved according to another personal law, simply because one of the parties has changed his other religion. Therefore, if an accused having reason to believe that the Hindu woman was the married wife of the complainant has sexual intercourse with her, he commits the offence under Section 497, Indian Penal Code, 1860.\textsuperscript{76}

Although the woman was not of legal age at the time of marriage, if she was old enough, under the statute or the jurisdiction, to enter into a lawful marriage at that time, her non-age is no defence in a prosecution for adultery.\textsuperscript{77}

As the law does not ordinarily presume death until an absence of seven years, a person who re-marries before the expiration of seven years, or who marries another whose spouse has not been absent for seven years, is guilty of adultery.\textsuperscript{78} The good faith of the parities being immaterial,\textsuperscript{79} but if such spouse has been absent for seven years, giving rise to the presumption of death, the crime of adultery is not committed although in fact the spouse is still living.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{75} 49 C.W.N. 745.
\item \textsuperscript{76} \textit{Gul Mohammad v. Emperor}, AIR 1947 Nag 121.
\item \textsuperscript{77} \textit{State v. Steward}, 193 P. 855: 57 Utah 224.
\item \textsuperscript{79} \textit{Commonwealth v. Mash}, 7 Metc. (Mass.) 472.
\end{itemize}
The one of the participants in the alleged act of adultery is an essential element of the crime,\textsuperscript{81} and in some jurisdictions adultery cannot be committed by a single person,\textsuperscript{82} particularly where the one charged is the woman.\textsuperscript{83} In another jurisdiction marriage of one of the parties is all that is necessary to sustain a conviction.\textsuperscript{84} As one of the parties must be married to another in order to constitute the crime of adultery, a person sustaining sexual intercourse with one who has been lawfully divorced is not guilty of adultery.\textsuperscript{85} To have this effect, however, the decree must have been granted by a court of competent jurisdiction\textsuperscript{86} and must not have been subsequently set aside.\textsuperscript{87}

A subsequent divorce and remarriage of the aggrieved spouse after making the complaint does not bar the prosecution of adultery.\textsuperscript{88}

(iii) \textbf{Knowledge and reasonable belief essential}:

But the fact the woman was married is not conclusive of the accused’s guilt for there still remains the equally material question whether the accused knew or had reason to belief her to be the wife of another man.\textsuperscript{89} This does not mean that the accused should know who the husband of the woman is, for all that is necessary is that he should know who the husband of the woman is, for all that is necessary is that he should know that she has a husband though the accused may not

\begin{itemize}
\item \textsuperscript{81} Miner \textit{v.} Peo, 58 111. 59.
\item \textsuperscript{82} State \textit{v.} Ellis, 112 A. 172: W.W. Harr. (Del.) 156.
\item \textsuperscript{83} O. Nell \textit{v.} O. Nell, 55 App. D.C. 40: 299 F. 914.
\item \textsuperscript{84} White \textit{v.} State, 74 Ala. 31.
\item \textsuperscript{85} State \textit{v.} Weatherby, 43 MC. 258: 69 Am. D. 59.
\item \textsuperscript{86} State \textit{v.} Fleak, 6 N.W. 689: 54 Lowa 429.
\item \textsuperscript{87} State \textit{v.} Whitcomb, 2 N.W. 970: 52 Lowa 85: 35 Am. R. 258.
\item \textsuperscript{88} State \textit{v.} Russell, 58 N.W. 915: 90 Lowa 569: 28 L.R.A. 195.
\item \textsuperscript{89} Supra note 58.
\end{itemize}
know him. Such knowledge may be gained in the case of Hindu woman by the outward insignia of married life by, the dress warn, the parting of hair, the application of red ochre in the part and on the forehead, the use of bangles and other ornaments, the application of turmeric on the hands and body, and, indeed, by numerous other indications which even a casual observer could not mistake. Similar signs are also visible in the case of Mahommedan females, though the indications in their case are not so well marked. Even women of other nationalities usually wear some token of their marriage, a wedding ring for instance but in their case the external symbols are still less marked. But in any case these indicia are significant though by themselves insufficient to impute knowledge in the accused.

Again, since Hindu and Mahommedan girls are by custom married before they attain puberty, a person cohabiting with a young woman of this class may be presumed to know that the chances are that she is married. At any rate, that fact may well give him reason to pause and inquire and, if he does not, he could not be acquitted of having had no reason to believe her to be a married woman. But this doctrine of presumption must not be pushed too far, for while it is true that young Hindu and Mahommedan girls are, as a rule, married, it is also true that some of them lose their husbands and pass through life, specially among Hindus, in a state of widowhood. But here again, there are telltale signs of widowhood, the shaven head or crooped hair, the absence of

90. Supra note 50.
91. Ibid.
92. Supra note 48 at 71.
bangles or ornaments, and a plain covering for body. But in the case of Christians the widow's weeds are not confined to the period of widowhood.

All the same, these, when present, afford a certain indication of single or married life which should put the accused upon inquiry.\textsuperscript{93}

But the presence of this knowledge or reasonable belief must be established by the prosecution. Since it constitutes the \textit{mens rea}, it follows that the prosecution must show facts from which the court could legitimately infer that the accused had reason to believe that the woman was married. If he was a friend of the family, or lived in the neighbourhood it is natural to infer such knowledge. But if he was a stranger then the prosecution may have to rely upon other circumstances such as, those indicated before.\textsuperscript{94}

\textbf{(a) Intent :}

The crime of adultery cannot be committed without a criminal intent,\textsuperscript{95} but the intent may be inferred from the criminality of the act itself.\textsuperscript{96} It is not essential in a prosecution against one of the parties to prove that both parties had a guilty intent.\textsuperscript{97}

\textbf{(b) Marrying person already married :}

Where one of the parties entering into a marriage has been previously married, they are bound to know or ascertain the law and the facts of the right to re-marry for themselves at

\begin{itemize}
\item \textsuperscript{94} Supra note 50.
\item \textsuperscript{95} \textit{State v. Goodenow}, 65 Me. 30.
\item \textsuperscript{96} \textit{Reynolds v. U.S., (Utah)} 98 U.S. 145 : 25 L.Ed. 244.
\item \textsuperscript{97} \textit{State v. Cutshall}, 14 S.E. 107 : 109 N.C. 764: 26 Am. S.R. 599.
\end{itemize}
their peril, and a sufficient criminal intent to commit adultery is conclusively presumed against them, in their failure to do so. However, a person who marries another under a mistake of fact as to the existence of his or her former marriage is not guilty of adultery, but continuance of such cohabitation after knowledge of the invalidity of the marriage constitutes adultery.

Where a husband remarried, in good faith, after a decree of divorce had been granted to him but before the entry of the decree, he was not guilty of adultery.

(iv) Consent or connivance of the husband:

Another requirement of law, and one which has also to be satisfied by the prosecution, is that the adultery complained of had not been consented to or connived at by the husband, this is necessary, for the offence is intended to preserve his bed unsullied, and if he elected otherwise, the law cannot help him against himself; valenti non fit injuria. This is a principle of other applicability, but it is equally applicable in this offence. And in this respect the rule here coincides with the English rule which holds the husband's consent to bar his action though his improper conduct not amounting to consent, goes only in the reduction of damages. On the same principle, a husband has no right to turn his wife away on account of her adultery at which he connived: he cannot complain of that to which he was a

98. Supra note 95.
100. Vaughan v. State, 3 So. 530: 83 Ala 55.
102. 'What is consented to cannot injure' in re C.S. Subramaniam, AIR 1953 Mad. 422: 1953 Cri.L.J. 765.
103. Supra note 50.
willing party.\textsuperscript{104} The term 'consent' is here intended in the wider sense at denoting a consent whether express or implied. It means a permission to the paramour of his wife to have connection with her. Such consent may be implied from the fact that he admitted the accused into a brothel of which his wife was an inmate, or that he presented her to him in accordance with a vicious religious custom of a certain sect which ordains that the first fruit of married life shall belong to the priest. The question of consent presents no difficulty. Such consent must, of course, be free and not brought about the anything prohibited in Section 90, Indian Penal Code, 1860. It may be given before or after the act, as consent subsequently given will at least amount to condonation of the acts, and it has in other respects the same legal effect.\textsuperscript{105} The consent of the woman can possibly be of no avail.\textsuperscript{106}

\textbf{(a) Consent to Intercourse :}

Ordinarily to constitute the crime of adultery as against the man, the consent of the woman to the carnal intercourse is not indispensable, but the offence may, as against him, exist, although the connection was effected by force and against her will,\textsuperscript{107} or was effected without her knowledge, as where the woman was drunk.\textsuperscript{108} However, according to some authority consent of the woman is an essential element in a prosecution of the man for adultery.\textsuperscript{109}

\begin{flushleft}
\textsuperscript{104} Duberby v. Gunning, 4 T.R. 651.
\textsuperscript{105} Wilson v. Glossory, 20 Q.B.D. 354.
\textsuperscript{106} Gul Mohammad v. Emperor, AIR Nag. 121 at 123: ILR (1947) Nag. 205: 48 Cr. L.J. 43: 228 I.C. 1
\textsuperscript{107} State v. Henderson, 50 N.W. 758: 84 Iowa 161.
\textsuperscript{109} O’Hern v. State, 159 P. 938: 12 Okl. Cr. 505.
\end{flushleft}
In order for the woman to be guilty of adultery, she must have consented to the act of intercourse.\(^{110}\)

### 4. Constitutionality of Law of Adultery:

In May, 1985 the Supreme Court by a division bench comprising the Chief Justice Mr. Y.V. Chandrachud, Mr. Justice R.S. Pathak and Mr. Justice A.N. Sen upheld the Constitutional Validity of Section 497, Indian Penal Code, 1860. In *Sowmithri Vishnu v. Union of India*,\(^{111}\) the Supreme Court was seized of the question of constitutionality of Section 497 of the Indian Penal Code 1860. It affirmed its earlier view in *Yusuf Abdul Aziz v. State of Bombay*,\(^{112}\) that this section is not unconstitutional. The court observed that Section 497, does not violate Article 14 on the ground that it makes an irrational classification between man and woman in that it confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband had committed adultery, and that it does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and that it does not take in cases where the husband has sexual relations with an unmarried woman with the result that a husband has a free licence under the law to have extramarital relationship with an unmarried woman. It does not offend Articles 14 and 15 on the ground that the wife with whom adultery is committed is saved from the purview of the section and is not punished as an abettor. Sex is a sound classification accepted under Article 15(3) of the constitution.


\(^{111}\) *AIR 1985 SC 1618*.

\(^{112}\) *AIR 1954 SC 321 at 322: 1954 Cri.L.J. 886.*
It is commonly accepted that it is the man who is the seducer and not the woman. The circumstances may have changed since the Indian Penal Code, 1860, was enacted, but the sole prerogative is that of the legislature to see as to whether the law requires any change and, if so, what and then do whatever it thinks should be done. Section 497, Indian Penal Code, 1860, does not violate Article 21 either because even though it is true that this section does not have a specific provision that the married woman should be heard but that does not justify the proposition that the woman has no right to be heard even when she makes a request to the court that she be heard.

Constitutionality of Section 497, was again challenged in V. Revathi v. Union of India. In this case, it was held that the philosophy underlying the scheme of Section 497, appears to be that as between the husband and the wife, social, goodwill be prompted by permitting them to 'make up' or 'break up' the matrimonial tie rather than to drag each other to the criminal court. 'Section 497, Indian Penal Code, 1860, and Section 198(1) Criminal Procedure Code, 1973, read with Section 198(2) Criminal Procedure Code, 1973, go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relations between the two partners. The community punishes the outsider, who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie developing an illicit relationship with one of the spouses subject to the rider that erring man alone can

113. Supra note 45.
be punished and not erring woman. There is no discrimination based on sex. There is no discrimination against the woman in so far as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of the law. In the ultimate analysis the law has meted out even handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other.'

In the case of *W. Ralyani v. State Tr. Inspector of Police & Another*,¹¹⁴ court held that a woman cannot be proceed against for the offence of adultery.

(i) **Right of the Woman to be heard in adultery proceedings:**

Right to life under Article 21 of the constitution includes the right to reputation, and, therefore, if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled to appear and be heard in that trial. Section 497, Indian Penal Code, 1860, does not contain a provision that the married woman with whom the accused is alleged to have committed adultery must be impleaded as a necessary party to the prosecution or that she should be entitled to be heard. But, in a case, where the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjective Criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and

¹¹⁴. 2012 (1) Apex Court Judgments 540 (SC).
immediately, by the decision of the court. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases.\textsuperscript{115}

(ii) Wife is not punishable as an abettor:

Under Section 497, Indian Penal Code, 1860, wife is not punishable as an abettor because authors of the code were of the view that Indian society is of different kind which may well lead a man to pause before he determines to punish the infidelity of wives.\textsuperscript{116}

The Supreme Court has held that Section 497, makes the man who commits adultery with another's wife punishable but the wife shall not be punishable as an abettor.\textsuperscript{117} She is the victim and not the author of the crime.\textsuperscript{118} It is, however, submitted that in case of adultery, the wife cannot be said to be a 'victim' inasmuch as she is a consenting partner. If there is no consent on her part, sexual intercourse by a man other than her husband would amount to rape within the meaning of Section 375 of the Code, punishable under Section 376, Indian Penal Code, 1860. Article 14 and 15 of the constitution of India thus read together validate the last sentence of Section 497, Indian Penal Code, 1860, which prohibits woman from being punished as an abettor of the offence of adultery.\textsuperscript{119}

\textsuperscript{115} Supra note 111.
\textsuperscript{117} Supra note 45.
\textsuperscript{118} Supra note 111.
It can be said that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the legislature of consider whether Section 497, should be amended appropriately so as to take note of the 'transformation' which the society has undergone. True, the Forty Second report of the Law Commission shows that there can be two opinions on the desirability of retaining a provision like the one contained in Section 497, on the statute book. However, the section can not struck down on the ground that it is desirable to delete it.\textsuperscript{120}

In the case of \textit{W. Kalyani v. State Tr. Inspector of Police and Another},\textsuperscript{121} accused committed intercourse with a married woman without the consent of husband of woman. In terms of Section 497, only a man can be proceeded against and punished for the offence of adultery, wife can not be punished even as an abettor. Mere fact of being a woman cannot be punished even as an abettor.

5. \textbf{Adultery under Personal Laws :}

(i) \textbf{Adultery Under Hindu Marriage Act, 1955.}

In most systems, adultery is a matrimonial offence or is a ground of divorce available either party to the marriage. A party having sex relationship outside the marriage, i.e., with a

\textsuperscript{120} \textit{Supra} note 111.

\textsuperscript{121} \textit{Supra} note 113.
person other than his or her spouse provides a ground of divorce to the other spouse.122

Section 13(1)(i) Under the Marriage Laws (Amendment) Act, 1976, the expression 'Living in adultery' has been dispensed with. It has been replaced by a simple requirement of adultery, that is, voluntary sexual intercourse with any person other then his or her spouse. Now, even a single act of adultery may constitute a sufficient ground for obtaining divorce. This amendment was necessary because under the unamended Act any cunning or watchful spouse, living a continuous life in adultery, could on sensing the intention of the other party to file a petition under the Act, discontinue the adulterous life temporarily and thus frustrate the object of the Act. Under unamended law it was essential for the petition to show that the opposite party is having sexual intercourse with a person other than the spouse, as a matter of usual indulgence. It was further necessary under Section 23(i)(b) to show that the petitioner has not been in any way accessory to it, and that he or she has not connived at or condoned it.123 The fact that the husband cohabited with the wife even after knowledge that she had been guilty of cohabiting with another person would be sufficient to constitute condonation.124 In the present clause the expression 'voluntary sexual intercourse' has been used. Therefore, the sexual intercourse by either of the spouses with a person other than his or her spouse must

122. Supra note 1 at 229.
be voluntary act. If one of the spouses is raped it cannot be said that there is voluntary intercourse.

Some cases on adultery decided by the Indian courts cannot be viewed without impugnment. In *P. v. P.*,\(^\text{125}\) where the wife was seen in a seminaked state in a hotel with a stranger, the court did not consider it sufficient to conclude adulterous relations of wife with the stranger. The court held that so long the act of cohabitation is not proved beyond doubt, Adultery cannot be concluded to be a ground for matrimonial relief. Similarly, where the husband is often found in company with the persons of ill-repute or with prostitutes or with ladies of immoral character, the court has held that these all facts are not sufficient enough to prove adultery on the part of the husband.\(^\text{126}\) In view of the circumstantial evidence as only mode of proof of adultery, the existence of such facts may be sufficient to conclude adultery and to provide a matrimonial relief to the other party. But the court has held otherwise, which may not be very correct approach. To constitute a ground for decree of divorce, the sexual intercourse complained must have taken place after the solemnization of marriage with the petitioner. Pre-marriage unchastity of the wife or pre-marriage sexual relation of the husband with some other woman is not a ground of divorce.

It is also necessary that such intercourse must be intercourse with a person other than his or her spouse. Therefore, intercourse with one of the wives of the pre-Act

\(^{125}\) AIR 1982 Bom. 498.  
\(^{126}\) *Das v. Das*, AIR 1982 MP 120.
polygamous marriage will not amount to extra-marital intercourse under this clause.¹²⁷

(ii) **Adultery under the Special Marriage Act, 1954:**

Adultery is a ground of divorce under the special marriage Act, 1954. Adultery is also a ground for judicial separation.¹²⁸ A specific allegation of adultery should not be made merely as a matter of course unless it is intended to make the actual charge of adultery; where the charge of reasonable belief in adultery is being put forward, what is required is a correct statement of the substance of the wife's case. A person who has committed adultery is, as a general rule, not entitled to obtain a decree for judicial separation. The reason is that to be entitled to the relief of judicial separation the petitioner must come to court with clean hands and be free from matrimonial misconduct. Thus where the wife was found guilty of adultery and the husband of both adultery and cruelty, it was held that the wife could not be granted a decree for judicial separation on the ground of her husband's cruelty. The husband's remedy by way of restitution will be barred if he is guilty of adultery and it is no answer to say he committed adultery after that of the respondent.¹²⁹ Section 27 of the Special Marriage Act, 1954, lays down the grounds for the dissolution of marriage. Section 27(1)(a) makes adultery as a ground of divorce.¹³⁰

¹²⁷. *Supra* note 123 at 85.
¹²⁸. The Special Marriage Act, 1954. Section 23(1).
¹³⁰. *Supra* note 128 Section 27(1) (a).
(iii) Adultery under the Dissolution of Muslim Marriage Act, 1939:

Under the Dissolution of Muslim Marriage Act, 1939 adultery as such is not a ground of divorce but husbands association with women of evil repute or leading an infamous life is a ground, though it is considered to amount to cruelty under the Act, it is akin to living in adultery. Lian or imprecation, i.e. false charge of adultery against the wife by the husband obtains dissolution of the marriage at the instance of the wife.\textsuperscript{131}

(a) False charge of Adultery and restitution of conjugal rights:

If a false charge of adultery is made, the wife would be entitled to the dissolution of the marriage. If the court is satisfied on the evidence that the charge is not true, a claim for divorce shall be allowed.\textsuperscript{132} Where criminal complaints under Section 497, Indian Penal Code, 1860, were already dimissed and a false charge of adultery was made and the husband could not prove it, dissolution of the marriage was allowed.\textsuperscript{133} The onus of proving that the charge was false is always on the plaintiff (the wife) and the suit would be decreed only if she established the falsity of the allegation against her chastity and not otherwise.\textsuperscript{134} But in a Pakistan case, it was


\textsuperscript{132} Ahmad Suleman v. Bai Fatima, AIR 1931 Bom. 76; ILR. 55 Bom. 160; Rahiman Bibi v. Fazil, AIR 1927 All. 56; Tufail Ahmad v. Jamila Khatun, AIR 1962 All. 570.

\textsuperscript{133} Mohammad Hussain v. Begum Jan, AIR 1927 Lah 155.

\textsuperscript{134} Mst. Balli v. Khair Din, AIR 1954 Pepsu 97.
held that the burden lies on the husband to prove that the charge is true.\textsuperscript{135}

A mere charge of adultery would not operate the talaq.\textsuperscript{136} A false charge of adultery may be a ground for refusing restitution even though it may not amount to a legal cruelty. Such a charge would be an item of ill-usage towards making up a sufficient answer to a claim for restitution.\textsuperscript{137}

(b) \textbf{Charge of Adultery and Criminal Law}:

The Muslim Law as to the charge of adultery, as already noted, is very strict and severe. Whenever a charge of adultery is made, the question in each case arises as to who should be awarded the specific punishment. If the charge is true, the women charged with adultery would be condemned to death, if on the other hand, the charge is proved to be false, the person making the charge would receive punishment of scourging with eighty strips.\textsuperscript{138}

(c) \textbf{Lian Charge of Adultery under Mohammedan Law}:

Adultery as such is not a ground for divorce for a Muslim wife. However she is entitled to divorce her husband on the ground of lian. The word 'Lian' literally means 'imprecation.' Mohammedan law provides very severe punishment for adultery and slander. \textit{The hadd} (or specific punishment) for adultery was stoning to death, if the wife was a \textit{moohsin} (i.e. if she was sane and adult and her marriage was consummated), the punishment was scourging with 100 stripes if she was not a \textit{moohsin}. According to the provisions of pure mohammedan


\textsuperscript{136} \textit{Jaun Bee Bee v. Shaikh Moonshee}, 3 W.R. 93.


\textsuperscript{138} \textit{Supra} note 48 at 170.
law, where a husband made an accusation of adultery against his wife, he was required to prove his charge by the testimony of four law-worthy witnesses, failing which he was to receive a punishment of 80 stripes for slander.\textsuperscript{139} This made the position one of considerable difficulty in cases in which such evidence was not forthcoming.

It was in order to mitigate this hardship resulting from the very severe punishment for adultery and the difficulty of obtaining evidence that the procedure of 'lian' was introduced. When a charge was made by the husband, the wife could ask the husband either to retract the charge (and thus incur the penalty of 80 stripes) or to confirm it by the technical procedure of mutual imprecations known as lian.\textsuperscript{140}

The Dissolution of Muslim Marriage Act, 1939, does not include 'adultery' specifically as a ground on which the wife may claim dissolution of marriage. But such ground is implied in the ground 'cruelty', that is to say, that the husband associates with women of evil repute or leads an infamous life, vide section 2 (viii)(b).\textsuperscript{141}

(iv) Adultery Under the Parsi Marriage and Divorce Act, 1936:

Section 32(d) of the Parsi Marriage and Divorce Act, 1936, makes adultery as a ground of divorce for both the husband and the wife. Any married person may sue for divorce on the ground that the other spouse has since the marriage committed adultery, or fornication or bigamy or rape or unnatural offence. Under the Parsi Marriage and Divorce Act,

\textsuperscript{139} Ibid.
\textsuperscript{140} Id., at 171.
\textsuperscript{141} Supra note 131 at 182.
1936, it had been worded differently, in parsi law, divorce will not be granted on the ground if the suit for divorce has been filed more than two years after the Plaintiff came to know of the fact.142

(v) **Adultery under Indian Divorce Act, 1869:**

Under Section 10 of the Indian Divorce Act, 1869, while the husband is entitled to a dissolution of marriage on the ground of the wife's adultery, the wife is not so entitled unless she proves that the husband's adultery is incestuous or is coupled with cruelty or bigamy or desertion. In other words, the husband is entitled to dissolution on the ground of adultery simpliciter on the part of the wife, but the wife is not so entitled unless some other matrimonial fault is also found to be super-added. In *Swapna Ghosh v. Sadananda Ghosh*,143 special Bench of the Calcutta High Court observed that such a provision was discriminatory. But surprisingly, the court did not hold the provision *ultra vires* the constitution.144 However, recently, in *Ammini E.J. v. Union of India*,145 holding the provision invalid, a special Bench of the Kerala High Court observed that so far as the ground of adultery was concerned husband is in a much favourable position when compared to wife since she has to prove adultery with one or other

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142. Parsi Marriage and Divorce Act, 1936, Section 32(d).
143. AIR 1989 Cal 1.
144. In *Dwarka Bai v. Nainan*, AIR 1953 Mad 792, Panchapakesa Ayyar J., gives the justification of provision thus; since the husband even by committing adultery 'does not bear a child as a result of such adultery and make it the child of his wife to be maintained by the wife,' 'the wife by committing adultery' may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child, and that this very difference in the result of the adultery may form some ground of justification for this differentiation.
145. AIR 1995 Ker 252.
aggravating circumstances. Evidently, this is a discrimination based purely on sex. That this provision is violative of Article 15 of the constitution. The court held that in qualifying words from the section are unconstitutional and thus wife can sue on the grounds of adultery, desertion and cruelty.

Thus under Section 10 of Indian Divorce Act, 1869, Adultery alone is not a sufficient ground for wife's petition for dissolution of her marriage. It must be coupled with other reasons enumerated in section 10, i.e. adultery coupled with desertion for two years or upwards.146

(a) **Adultery and Section 22 Indian Divorce Act, 1869:**

Only one form of adultery has been made punishable by Section 497, Indian Penal Code, 1860. It will be noted that under that provision a married woman is not guilty of adultery even as an abettor. If there is consent or connivance of the husband, then there will be no offence of adultery. There is no reason why this specialized definition of adultery should be extended to the interpretation of Section 32 of the Indian Divorce Act, 1869. It may be noted that under that section the husband may obtain a decree of judicial separation on the ground of adultery committed by the wife, though as we have seen under Section 497, Indian Penal Code, 1860, the wife will not be guilty of the offence of adultery under Section 497, Indian Penal Code, 1860.147 This itself shows that the narrow definition of adultery in Section 497, can not be applied to the interpretation of the terms of Section 22 of the Indian Divorce Act, 1869. Further, principle underlying the relief of judicial

147. *Supra* note 44 at 4595.
separation on the ground of adultery of the spouse, namely violation of the marriage bed, makes it immaterial whether the woman with whom the husband has sexual relationship is a married woman or not.\textsuperscript{148} The offence under Section 497, is against the husband with whose wife another man has committed adultery. However, wider considerations apply when a husband or wife seeks judicial separation or dissolution of the marriage on the ground of adultery. In the latter case, it is the violation of the marriage tie which is relevant.\textsuperscript{149}

(b) \textbf{Adultery and Section 23, Indian Contract Act, 1872:}

In England, adultery is not an offence under Criminal law, whereas in India it is. If the adultery past or future, is the consideration for an agreement entered into in India, this would make it not merely an immoral but an illegal agreement and the contract would be void.\textsuperscript{150}

6. \textbf{Adultery, Whether A Continuing Offence:}

Adultery is a continuing offence, so that a person once convicted of the offence may again and again be convicted of it if he is guilty of holding sexual intercourse after his conviction. Of course, his conviction for one act does not justify his repeating the very act for which he had been punished,\textsuperscript{151} but it undesirable that there should be successive prosecution.\textsuperscript{152} But in the case of \textit{Emaji} v.

\begin{itemize}
\item \textsuperscript{148} Ibid.
\item \textsuperscript{149} \textit{Samraj Nadar v. Abraham Nadachi}, AIR 1970 Mad 434.
\item \textsuperscript{150} \textit{Naraini (Smt.) v. Pyare Mohan}, AIR 1972 Raj. 25.
\item \textsuperscript{151} \textit{Emaji}, 1880 B.U.C. 150; Shankar Tulsiram, 30 Bom L.R. 1435 (adultery is not a continuing offence and to such cases Section 182, Criminal Procedure Code, 1973, does not apply).
\item \textsuperscript{152} \textit{Rewa}, 1941 NLJ 686.
\end{itemize}
Emperor, it has been held that a man who has been convicted of adultery, and continues to indulge in adulterous intercourse, would be liable to a second conviction for the fresh act. The Bombay High Court held the view that adultery is not a continuing offence, and every fresh act of adultery means a fresh conviction. In the case of Rewa, Nagpur High Court held that, it is undesirable that there should be successive prosecutions. Complaint by aggrieved person is necessary. In Ram Narayan v. Emperor, the accused was convicted under Section 498, Indian Penal Code, 1860, for enticing a married woman who was discarded by her husband and was staying with her brother who filed the complaint under Section 198 Criminal Procedure Code, 1973. In setting aside the conviction on the ground that the complaint was not validly made, their Lordships held that the complaint by brother was not competent under Section 198 Criminal Procedure Code, 1973 as the brother was acting on his own behalf and not under the authority of the husband. Therefore the conviction was held to be invalid.

It was held that a complaint by the husband was an essential requirement which cannot be dispensed with. If a criminal charge of adultery is to be preferred, a formal complaint of the offence must be instituted in the manner provided under Section 198, Criminal Procedure Code, 1973. It was further observed that the words 'on behalf' of the husband can not be said to be without any meaning. The

155. Supra note 152.
156. AIR 1937 Bom. 186.
object of Section 498, Indian Penal Code, 1860, is to protect the right of the husband and to maintain the sacred relations of marriage, but in some cases the husband may connive or consent to sexual intercourse of his wife by any other person. That being the design of the law, the husband may as well as choose not to file any complaint that would necessarily bring some amount of dishonour both for him and his wife, even though he may be aware of any instance of adultery of his wife. That being the position, the provisions of Section 198 Criminal Procedure Code, 1973, have to be strictly complied with. In this connection it may be noted that Section 320 Criminal Procedure Code, 1973, provides that husband can compound the offence under Sections 497 and 498, Indian Penal Code, 1860 and the authority has not been given in any other person even though he might have filed a complaint with leave of the court.  

(i) Living in Adultery:

Living in adultery, as stated in Section 13(1)(i) of the Hindu Marriage Act, 1955, or in Section 125 of the Code of Criminal Procedure, 1973, in matrimonial cases, has a different and wider meaning than 'adultery' in Section 497, Indian Penal Code, 1860.

In the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the original clause 'is living in adultery' has been substituted by the clause 'had voluntary sexual intercourse with any person other than his or her spouse by

amending Act, 1976. Thus the rigour of establishing 'living in adultery' has been lessened.\(^{162}\) It may, however, be noted that such amendment has not been effected in the Indian Divorce Act, 1869,\(^{163}\) or the Parsi Marriage and Divorce Act, 1936.\(^{164}\)

Under the present Indian matrimonial statutes one act of adultery is enough to constitute a ground of divorce. Under the original Hindu Marriage Act, the ground was 'Living in adultery.' 'Living in adultery' means a continuous course of adulterous relationship as distinguished from 'One or two lapses from virtue.'\(^{165}\) It has been defined to mean 'a course of adulterous conduct over some period with repetition of acts of adultery with one or more persons.'\(^{166}\)

7. **Distinction between Adultery and Rape:**

The following points of distinction should be borne in mind:

1. Adultery is an offence under Section 497, of the Indian Penal Code, 1860. It is an offence relating to marriage.

   Rape is an offence under Sections 375 and 376 of the Indian Penal Code, 1860. It is contained in Chapter dealing with Offence Affecting the Human body and is an offence relating to the person of the woman who is victim of rape.\(^{167}\)

2. In the case of adultery the consent of the woman is immaterial because the woman being married it is the husband who is actually the aggrieved party. In fact in

\(^{162}\) Section 13(1)(i).
\(^{163}\) Section 27(1)(a).
\(^{165}\) Section 10.
\(^{166}\) Section 32(D).
\(^{167}\) *Supra* note 116 at 837.
adultery woman is always a willing and consenting party to sexual intercourse.

But the offence of rape is committed against the will and without consent of the woman or it may be committed even with the consent if the girl is under sixteen years of age.\textsuperscript{168}

(3) Adultery is an offence against the husband.

Rape is an offence against the woman herself.

(4) Adultery may be committed only when the woman is married and not when she is not married. No offence of adultery is constituted where the husband consents to his wife having illicit relationship.

Rape may be committed on any woman whether married or unmarried. Where the woman is married and sexual intercourse is committed without her consent the offence is both rape as well as adultery.\textsuperscript{169}

(5) Adultery can not be committed by a husband with his wife, but rape can be committed by a husband in certain circumstances.\textsuperscript{170}

(6) Adultery is less serious offence but rape is a much more serious offence.

(7) In adultery, minimum sentence is not prescribed, but in rape, minimum sentence is prescribed in the Indian Penal Code, 1860, itself.\textsuperscript{171}

\textsuperscript{168} Ibid.

\textsuperscript{169} Id., at 838.

\textsuperscript{170} Supra note 13 at 2455.

\textsuperscript{171} Ibid.
(i) **Husband and wife both disabled from striking each other with the weapon of Criminal law:**

Section 497, Indian Penal Code, 1860, is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus 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.\(^{172}\)

8. **Proof of Adultery:**

To prove an allegation of adultery has been a major problem down the ages and the standard of the proof required is still a controversial subject. In the words of Joel Bishop, adultery, being 'a crime of darkness and secrecy', must be established by circumstances as it is often not possible to provide a direct proof. If the intercourse is proved by an eyewitness account or photographic evidence, the only defence available to the offending party is that it was either involuntary or under fear, force or fraud. Rather direct proof of intercourse is generally discarded and discredited as it smacks of manipulation, writing about the nature of proofs in the first edition of his book on divorce (Published in 1910), William Rayden, a celebrated jurist,\(^{173}\) observed:

'It will not be out of place to consider the nature of proofs which will satisfy that adultery has been committed: to succeed on such an issue, it is not necessary to prove the

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172. *Supra* note 45.
173. *Supra* note 3 at 36.
direct fact, or even a fact or adultery in time and place, for it is, rarely indeed that the parties are surprised in the direct act of adultery; and such evidence is apt to be disbelieved'.

In order to establish a charge under Section 497, Indian Penal Code, 1860, the prosecution must prove that –

(1) The accused had sexual intercourse (not amounting to rape within the meaning of Section 375, Indian Penal Code, 1860) with a woman.

(2) That such woman was married.

(3) That the accused knew, or he had reason to believe, that the said woman was the wife of another person.

(4) That the said sexual intercourse was without the consent or connivance of that another person, meaning thereby the husband of the woman and complainant in the case.

If the only direct evidence produced against the accused is found unreliable and untrustworthy and the other evidence on record is not sufficient to prove the charge of adultery, the accused is entitled to be acquitted.

(i) Direct proof rarely possible:

Direct proof of adultery is rarely possible. It does not, however, mean that bazaar gossip would prove adultery. There must be more evidence showing opportunity and desire

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174. Ibid.
176. Supra note 44 at 4602.
to commit the offence or access by the man to the woman, etc.\textsuperscript{180} What establishes an accusation of adultery is, among other matters, evidence of prior or subsequent acts of undue familiarity and opportunities for adultery in the context of other evidence of a circumstantial nature.\textsuperscript{181} Where there was considerable attachment between the woman and the accused and they slept in the same bed for 15 nights running, it was held that there was sufficient evidence to hold that sexual intercourse took place between them. The act of sexual intercourse is not committed in public or in the presence of witnesses.\textsuperscript{182} The admission of the accused coupled with the evidence of the witnesses to the effect that the two lived together as husband and wife, leads to the inevitable presumption that acts of adultery must have been committed.\textsuperscript{183} Where, the woman was seen alone in a naked condition with the accused who also was naked, it was held to have been clearly established that the accused was having sexual intercourse with her.\textsuperscript{184} Where a young man found, in the company of a young woman, whose husband was away, and had been, on more occasions than one seen together and in suspicious circumstances the prosecution version was accepted.\textsuperscript{185} However, no inference of adultery can be drawn from the mere fact of residence of the woman with her children in the house of the man with whom she is alleged to have committed adultery, such an inference can be drawn if it

\begin{itemize}
\item \textsuperscript{180} \textit{Ibid.}
\item \textsuperscript{181} \textit{Vedavalli v. MC Ramaswami, AIR 1964 Mysore 280, (1964) 2 Cri.LJ 686; Queen v. Madhub Chander, 21 WR (Cr) 13.}
\item \textsuperscript{182} \textit{EG Hunter v. Emperor 22 Cri.LJ 382; Davidson v. Davidson (1856) 164 ER 526, 4 WR (Cr) 590, RM Watson v. FN Watson, AIR 1926 Cal 703; Phillips v. Emperor, AIR 1935 Oudh 506, 36 Cri.L.J. 1298.}
\item \textsuperscript{183} \textit{Empress v. Kallychur Potial, 7 WR (Cr) 59.}
\item \textsuperscript{184} \textit{Chaman Lal Monga v. Haji Sabir Ali, 1973 Cri.L.J. 1249, 1254.}
\item \textsuperscript{185} \textit{Dova v. State, (1961) 2 Cri.L.J. 459 (Assam).}
\end{itemize}
is established that the man and woman used to occupy the same room, if not the same bed. Where the only evidence was a letter written most affectionately by the complainant’s wife to the accused, it was held that conviction on such evidence was bad.

(ii) Mere opportunity no proof; its nature important:

There was a time in our social history when a boy and a girl, going out unchaperoned, would become social outcasts. Given the consequences, when a girl did violate this social restriction, accusations of immorality lay on a sounder basis than they would today, given the present social standards. To rule that whenever a man and a woman have an opportunity to commit adultery, they do so, would be drawing not only upon the imagination, but is far from being in harmony with present day social standards.

No inferences can be fairly drawn from opportunity alone. But taken in conjunction with the conduct of the parties earlier, during or after the opportunity, it may become focal in arriving at a conclusion that adultery has taken place. Although inferences drawn from the nature of the opportunity are generally the basis for determining ‘adulterous’ disposition’, courts which have no moral yardstick other than the manners and behaviour of the society around them may refuse to infer misconduct.

(a) Marriage Not Consummated but wife Habituated to sex:

The marriage took place on January 16, 1966. The wife stayed with the husband only until the next day and the

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188. Savin v. Savin 218 La 754, 5150 2d 41 (151).
marriage was not consummated. She left her husband a day after the wedding and started living with her cousin from January 30. It was not known where she lived from January 17 to January 30. She stayed with her cousin until May 24, 1966. During this period and even earlier, she had been seen in the company of strangers (men) at various places. Her colleagues deposed that they had seen her leave the office in the company of strangers.

During the divorce proceedings, she was examined by a medical board on April 29, 1967 and found to be habituated to sex. It was contended on behalf of the husband that the above circumstances, coupled with the medical evidence, raised the presumption that she had an inclination for adulterous sexual life and she had ample opportunities to indulge in the same with strangers. The husband contended that since the marriage was not consummated and she was found to be habituated to sex, it showed that she had been living in adultery. He alleged that the fact that she had been living in the company of strangers and that she had not been living with her parents, made it even more clear that she had been leading an adulterous life.

The court, however, held that the evidence produced was insufficient to prove adultery on her part. Merely because she was found habituated to sex and seen in the company of strangers did not mean that she had been living in adultery. She may have been habituated to sexual intercourse before or even after marriage. But it was possible that she had not committed adultery and mere suspicion could not be admitted as evidence. There had to be something more than mere opportunity to prove guilt. In view of the modern conditions of life, the wife is likely to work and is likely to meet other men,
with whom she can be seen in public places. In this case, the wife may have lived with her female friends or some other relations, or even in a hotel by herself. The burden of proving guilt lies with the person alleging adultery, there being a presumption of innocence. The question here was not of the unchastity of the wife, but of her having committed adultery. The court held that there was no valid proof to show that the wife had been guilty of adultery even though the marriage had not been consummated, and she was found to be habituated to sex.\textsuperscript{190}

(b) \textbf{Intercourse must be voluntary Physically and Mentally:}

Intercourse must be voluntary, not only physically but mentally as well. This principle applies equally if a woman's consent is obtained by force, fraud or fear. Thus, a wife is not guilty of adultery if, by mistake, she has intercourse with a man who is not her husband and whom she believes to be her husband, or if she marries another man in the belief that her former husband is dead and, under this belief, lives in matrimonial cohabitation with such a man. If after a prolonged period of desertion by her husband, a wife marries again in good faith, without obtaining a decree of divorce, and continues to live with her second husband after the return of the first, she then becomes guilty of adultery in an action for divorce.\textsuperscript{191}

(c) \textbf{Act under the effect of drink or drug:}

It has been held that a wife is not guilty of adultery if she has consented to intercourse under the influence of alcohol taken under excusable circumstances, but she can not

\footnotesize{\textsuperscript{190} Chander Prakash v. Sudesh Kumari, AIR 1971 Delhi, 208.}
\footnotesize{\textsuperscript{191} Supra note 3 at 26-27.}
level a criminal charge (viz., rape or any other sexual
offences), on the plea that the act was allowed under the
influence of self-induced intoxication. Since the intercourse
should be voluntary physically as well as mentally, and should
not involve force, fear or fraud, consent under the influence of
intoxication, whether self-induced or otherwise, is no consent.
An act committed under the influence of intoxication is not
considered voluntary unless the woman can be shown to be
mentally involved in the Act.

In Bromley's opinion a wife should be excused if her
drinks were 'laced' without her knowledge, but not if she was
entirely responsible for her own situation. A more sound and
correct view was that taken by justice Hill in an unreported
case, Prior v. Prior: 'If the wife says that she was either
drugged or intoxicated when intercourse took place, she
cannot be excused, but if she was so intoxicated that she did
not know what had occurred and was not a consenting party,
then it would not be adultery at all.\(^{192}\)

(d) **Consent of Insane Person:**

If a person is so insane that he or she was ignorant of
the nature and quality of the act, he or she cannot be held
guilty of adultery. Similarly, if a person committing the act
does not know what he or she is doing, though it may be
wrong in terms of morality and blameworthy or culpable, he or
she cannot be held guilty of adultery.\(^{193}\)

(e) **Adultery in the Heart is not Adultery:**

A person may commit adultery in his/her heart by
fantasising or imagining somebody who is not his/her spouse,
but it is the physical act alone which is considered to be adultery.\textsuperscript{194}

\textbf{(f) Artificial insemination by donor other than husband:}

Since the essence of adultery is consensual sexual intercourse alone, it need not culminate in pregnancy.

The concept of adultery has undergone through examination since the development of modern medicine and the wide use of artificial insemination. The technique known as AID (not to be confused with AIDs, which is syndrome, whereas AID is artificial insemination device), by which a man other than the husbands the donor of semen, if accomplished without the husband's consent squarely presents the question of whether the operation constitutes adultery. It may be said that the consent of the husband is immaterial even if the husband consents, in case it is presumed that AID constitutes adultery, his consent would thus give rise to the charge of connivance. Unfortunately, the first and leading decision\textsuperscript{195} by the Canadian court held that if the wife submits voluntarily to artificial insemination, it amounts to adultery. Since AID involves neither physical contact nor penetration and, therefore, does not come within the ambit of sexual intercourse, it does not constitute adultery, whether with or without the husband's consent.\textsuperscript{196}

\textbf{(g) Rape on wife is not adultery, rape by Husband is}

The definition of rape remains the same in reference to adultery. The element of force, fear or fraud must be present. The offence of rape is a criminal offence. Since the essential element of adultery is voluntary sexual intercourse, the rape

\textsuperscript{\textit{Id.}, at 30.}
\textsuperscript{\textit{Supra} note 3 at 33.}
committed on a wife does not come within the ambit of adultery. On the other hand, if the husband rapes another woman, he is guilty of the offence of adultery. In 1884, the court granted a decree nisi to a wife whose husband had committed rape, although she herself had been found guilty of adultery earlier.\footnote{Supra note 3 at 29.} Proof of a single act of adultery is enough,\footnote{Rajendra v. Sharda, AIR 1993 MP 142.} proof of adultery is essential. Merely because wife remained \textit{ex-parte}, a decree of divorce cannot be filed.\footnote{Vijayan v. Bhanusundari, AIR 1995 Mad 166.}

\section{Adultery and evidence thereof:}

Adultery may be defined as consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage.\footnote{Supra note 43 at 66.}

It is not necessary that the other person should be a married person.\footnote{Samraj Nadar v. Abraham Nadachi, AIR 1970 Mad. 434 at 437.}

Under the Indian Penal Code, 1860, a married wife cannot commit adultery or the abetment thereof. The term 'adultery' is therefore to be understood in the light of social ideas of the community as being a serious breach of matrimonial tie.\footnote{M. Kanniappa v. Akilandamma, AIR 1954 Mad. 427.}

The next question is what should be the nature of evidence required for proving 'adultery'. By the very nature of evidence required for proving 'adultery'. By the very nature of the offence, direct evidence of adultery may not be available. That does not, however, mean that mere bazaar gossip or hearsay would prove adultery. There must be some evidence showing opportunity and desire to commit the offence or
access by the man to the woman. The evidence must satisfy the requirement prescribed in the definition of the word 'proved' in Section 3 of the Evidence Act, 1872.

(i) **Inferences of Adultery**: The offence of adultery may be proved by:

(a) **Bedroom Evidence**: 'They Don't Sing Prayers When They Share the Same Room'

Where the only evidence of adultery is that the spouse stayed at a hotel or boarding house with a woman or a man of whom nothing further is known, or were found in a bedroom, one may view the case with mere suspicion.

Bedroom evidence is commonly known as 'quasi-adultery'. Though it may not be necessary to prove a background of adulterous association, if it is proved by way of a hotel bill and by the fact that a person of the opposite sex and the spouse stayed in a bedroom together, it amounts to proof of disposition as well as of opportunity for committing adultery. The concept of inference of adultery when a man and woman who are not husband and wife have bedroom privacy was propounded way back in 1909, in a leading case, on the basis of the theory that they do not sing prayers there.

(b) **Husband took a woman to Hotel, Registered her as wife**:

Mr. Kerr had gone to Grand Central Station, where he met a woman who was not his wife as she came in on a train

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at about 3.30 P.M. Mr Kerr, who had his hand bag with him, took the woman, who also had hand baggage, to a hotel in a cab. He got themselves registered as 'George knight and wife, New Haven'. They were assigned a room upstairs and immediately went in to the lift and up, presumably to the room, taking their baggage with them. A witness waited in the hotel until midnight to see if Mr. Kerr came down, but did not see him. There was no description of the woman, nor of their demeanour towards each other.

It was inferred that not only was there an opportunity for adultery, but also, such bedroom, privacy was evidence of an inclination stronger than any act of affection between them at the station or in the cab. Did they register in a hotel as man and wife and retire to a bedroom? We have it of old that 'it is presumed, he saith not a paternoster there.'

(ii) Contracting Venereal Disease:

If a husband or wife is proved to have contracted a venereal disease (not from the wife or husband) during marriage, it is sufficient evidence of adultery. But at the same time, there should be no doubt left as to whether the disease was contracted before or after marriage. Earlier, it was held that if a spouse contracted such a malady long enough after marriage, it could not be a pre-marital infection, and this alone was enough to establish adultery. Now, however, some additional evidence is required. In the past evidence of a person going to a brothel used to lead to an inference of adultery, but these days, such evidence is not held to be absolutely irrefutable.

211. *Johnson v. Johnson* 14 Wend (N.Y.) 637 (1835),
In one case, a husband developed symptoms of tertiary syphilis after being married for twenty-two years. An inference of adultery was not deducible in view of the medical evidence that the incubatory period for tertiary syphilis might exceed twenty years.212

In the case of a person such as a tradesman, physician, mechanic or taxi-driver, who is called to houses of prostitution in the regular course of his business, an inference of adultery is not drawn without additional evidence.213

(iii) Birth of a child in spite of Non-access:

The traditional view was that when a child is born in wedlock, sexual intercourse has presumably taken place between husband and wife, until this presumption is countered by evidence proving that such sexual intercourse did not take place at any time when by such intercourse, the husband could, according to the laws of nature, be the father of the child. First, this view did not take into consideration the factum of 'non-access' as difficulties arose when a child was born in spite of non-access of the husband. Second, the recent invention of testing paternity, i.e., the DNA test has made the task easier.214

Non-access may be due to judicial separation or physical inability, for example, the husband may have been away, or become physically incapacitated or impotent. In that case, medical evidence is resorted to because of the distinction between an abnormal gestation period and one which is impossibly long or short.215

212. K. v. K. (Cases on Domestic Relations by Jacob & Goebel, 417).
214. Supra note 3 at 45.
215. Ibid.
(a) **Gestation period and premature birth:**

There have been cases in which the period between the occasion of intercourse and the birth of child has been 331 days, 346 days and 349 days but still, it was not proved that the birth was out of wedlock. In another case, a period of 340/321 days proved adultery. In premature birth, a gestation period of 174 days was not found to be impossibly short.

(b) **Mixing of races:**

In a most striking case from New Zealand, the child was a clear Mongoloid half-caste, though the husband and wife were both white. When the child was conceived the wife had been on intimate terms with a Chinese man, but the husband was unable to prove non-access and the presumption of legitimacy was applied. The theory of maternal impressions during pregnancy cannot be ruled out.

(c) **Conception despite contraceptive:**

In this case, the wife admitted that she had committed adultery at the time of conception, during which period, her husband was also having intercourse with her, but with contraceptives. When the child was born, the wife accepted it as not being her husband’s and left the name of the father blank when registering the birth. It was held that presumption was not rebutted and the child was legitimate. However, the marriage was dissolved due to the confession of adultery.

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222. (1955) 3 All ER 836 Div. ct.
(iv) **Indecent familiarities:**

If familiarity breeds contempt, indecent familiarity breeds an inference of adultery. Such familiarities, caresses and improper behaviour, together with evidence of an opportunity for adultery, may be sufficient to draw the inference that adultery has taken place.\(^{223}\) Some instances are: if the development of an attachment persists despite accusations of adultery by the spouse and his or her relatives; and if an association continues even after a divorce petition has been filed.\(^ {224}\)

(v) **Inference of penetration despite intact hymen:**

Evidence of penetration is essential for proof of adultery, but sometimes the problem arises that the woman with whom a husband is alleged to have committed adultery is found to be 'virgo intacta'. In such cases, the reasonable and natural inference is to be drawn from certain proved circumstances that penetration took place.\(^ {225}\)

When the two persons concerned have the desire to commit adultery and go very far indeed in their attempt to effect their purpose, but, in fact, do not effect it, the situation is doubtful. Some may find that it amounts to adultery, while others with traditional, Orthodox and sanctimonious views on marriage may not agree as penetration has not taken place. The latter hold that calling it adultery would be confusing an attempt with the act itself.\(^ {226}\) However, various kinds of sexual gratification might be obtained without rupturing the hymen. The main point is that an attempt at sexual intercourse should have been made. However, if there were evidence of


\(^{224}\) *Supra* note 3 at 47.

\(^{225}\) *Ibid*.

\(^{226}\) *Rutherford v. Richardson* (1923) A.C.
such acts of gratification and an attempt at intercourse, even though they may be inconsistent with penetration, they are not inconsistent with some lesser act of gratification, and it can not be doubted that a decree based on adultery might be issued, whatever view might have been taken in the past.  

10. Condonation of Adultery:

Section 497, Indian Penal Code, 1860, speaks only of connivance but not of condonation of the crime, but under the law of divorce, condonation has equally the effect of disqualifying the aggrieved spouse from complaining of the wrong. Condonation differs from connivance, in that it is a pardoning, remission or forgiveness of the adulterer after the act which has the effect of releasing the injury. The question may then arise whether it has equally that effect upon the injury viewed as a crime. It is no doubt true that since condonation does not imply acquiescence or antecedent negligence amounting to connivance, the act of the accused amounts to this offence as soon as it is committed, and that what is an offence does not cease to be an offence by any subsequent condonation on the part of the injured party unless such condonation amounts to a composition. In ordinary cases, the two are scarcely distinguishable since a person condones what he compromises and compromise implies condonation. If the condonation takes the form of a composition for money, the amount not paid but promised could not be recovered, because the object of the agreement being illegal, the agreement is altogether void as contrary to

law and public policy.\textsuperscript{230} If, therefore, that element disappears from the legal view of the subject there remains scarcely any difference between a previous connivance and a subsequent condonation. Moreover, since condonation disqualifies a person from obtaining a divorce, it is scarcely just that the doors of the criminals courts should be open to him when those of the civil courts are closed. The Punjab Chief Court appears to have proceeded upon this view in dismissing the husband's complaints when it appeared that he had after the act complained of and before filing the complaint, divorced his wife.\textsuperscript{231}

11. Damages for Adultery:

In Halsbury's Law of England, 2\textsuperscript{nd} Edition, Vol. 16, at Paragraphs 957 and 958 it has been observed: If a third person, without just cause, persuades or entices a wife to live apart from her husband, that person commits an actionable wrong for which the husband is entitled to recover damages.

'A husband may also maintain an action for damages for the loss of the society or services of his wife against a third person in respect of any other wrongful act whereby he is deprived of the benefit of such society or services.'\textsuperscript{232}

In \textit{Sobha Ram v. Tika Ram},\textsuperscript{233} it was observed that in such a case the husband is entitled to damages. Infringement of the absolute right to society of the wife by any other person is tort.

12. Conclusion:

It is time India takes a more modern view of itself. As one of the fastest growing countries in the world, it is

\textsuperscript{230} Gipps v. Gipps, 11 H.L.C. 1.
\textsuperscript{231} Hukam Din v. Allachi, (1879) P.R. No. 27.
\textsuperscript{232} Supra note 127 at 195.
\textsuperscript{233} ILR 58 All 903.
incumbent upon India to modernize its age-old laws to keep them in line with modern and progressive thoughts. India needs to align with Europe, rather than with the Islamic countries when it comes to social mores and laws that govern them. But really, is the population of India liberal enough for this? It is doubtful. The Sangh Parivar – the moral policeman of this country – are bound to oppose any move to delete this adultery provision. We have seen repeatedly that extremist Hindus (and of course the extremist Muslim as well) in India have repeatedly tried to keep India back in the dark ages. It’s very unlikely that they will support the deletion of adultery at all.

The real truth is that India is yet not ready to become a truly modern nation. There is a huge dichotomy within India. There is this very large orthodox population that still considers old fashioned laws a requirement to maintain the morality in the society. Large sections that dread and intensely dislike the changes overcoming society as a result of India’s global embrace. They would like India to remain puritanical... misunderstanding and intentionally misrepresenting the traditions to the people a large... that Indian ‘culture' doesn’t permit liberal thoughts. But it is understood society is changing and changing fast. There is a sizeable section of the society that wants India to get out of its dark past and move ahead into the world of more liberal nations... its probably not a majority today, but its only a matter of time before it becomes one.

It is true that the reasons which warranted for the exception of woman for the offence of adultery in the last century are no longer valid still however, the consequences of amending the definition of adultery to make women
punishable would be horrific. Merely because we have been able to give women the attention they deserve from their husbands does not mean women are being treated equally in every aspect socially. We live in a society where far from prosecution, even an allegation of a woman’s unfaithfullness is sufficient to reap havoc in her life. In case women are made punishable for adultery Section 497, Indian Penal Code, 1860, would become heaven for all husbands and in-laws wanting to get rid of their wives and daughter in-laws at the cost of the woman’s social status. Once a woman’s reputation is ruined she will become an easy prey for abuse by other men. The Legislature must understand that what is not equal can not be equalized by changing definition. Making a provision which makes a woman lose her reputation in Indian society is like killing the soul of the person while keeping only the body alive. In no case should such a murder be allowed.

Thus changing the definition of adultery to make women punishable under the name of gender parity will only give society a ground to defame women and increase the disparity of status further defeating the very purpose of the proposed amendment.

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