

## Not a criminal act

There are striking similarities between the offence of 'theft' and 'adultery' under the Indian Penal Code. *Encyclopedia of Diderot & d'Alembert*, Vol. 1 (1751) also equated adultery with theft: "adultery is, after homicide, the most punishable of all crimes, because it is the most cruel of all thefts."

In 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife amounted to "the highest invasion of property." Most societies abhor marital infidelity. Our Supreme Court too held that breaking a matrimonial home is no less serious a crime than breaking into a house and refused to strike down Section 497 of the Indian Penal Code (IPC), under which men can be prosecuted for adultery.

On January 5, a three-judge bench headed by the Chief Justice of India agreed to re-examine the validity of criminalising adultery in the light of progress made by society.

Under Section 497, a wife cannot prosecute her husband or his lover for violating the so-called sanctity of a matrimonial home as the husband is not her exclusive property but a husband and only a husband can prosecute his wife's paramour under Section 198(2) of the Code of Criminal Procedure, 1973. Moreover, if the husband has an affair with an unmarried woman, divorcee or widow, an offence of adultery is not made out against anybody.

In effect, Section 497 of the IPC punishes only the man for stealing another man's property, i.e. his wife. The court treated Section 497 as a special provision made by the state in favour of women in exercise of its powers under Article 15(3) of the Constitution (*Yusuf Aziz v. State of Bombay*). The court also upheld the validity of the adultery provision by saying only an 'outsider' is liable and this exemption is basically a "reverse discrimination in favour of women" (*Revathi v. Union of India*). Since both husband and wife cannot prosecute each other, an archaic adultery law was held as constitutionally valid.

Manu justified heavy penalties for adultery, including "death punishment... provided the convict is not Brahmin." What were the punishments prescribed for wives who violated conjugal fidelity? The attitude towards erring wives, like the current law, was far more sympathetic than that towards unfaithful men. Islamic law too prescribes 100 lashes for adultery, defining it in extremely narrow terms, i.e. actual intercourse outside marriage.

It also has put the impossible conditions of proof under which four witnesses of the act must testify. Moreover, if four witnesses do not testify, then the person making such an allegation against another person and witnesses who testified will be given 80 lashes and their evidence will never be accepted in future. But both men and women are to be punished under Hindu and Islamic law. Judaism and Christianity too punished adultery with capital punishment.

Why did the British exempt women while drafting the IPC? In fact, the first Law Commission that drafted the IPC, and under Thomas Babington Macaulay, did not include adultery as a crime and preferred to have it only as a civil wrong. The second Law Commission headed by John Romilly did not agree with Macaulay but spared women from punishment for adultery due to their deplorable condition. Much water has flowed under the bridge since 1860, when the IPC came into force, with education, women empowerment and outlawing of polygamy.

Today, adultery is no more a criminal offence in most European countries. In the U.S., adultery is generally punished in some states only if committed habitually or with public notoriety. But in countries such as Saudi Arabia, Yemen and Pakistan, adultery continues to be a capital offence.

The 42nd report of the Law Commission (1971), with some hesitation, recommended retention of adultery provision as in its view, the time was not yet ripe to repeal it but it did recommend making the law gender neutral and reduction of punishment of imprisonment from five years to two years. In its 156th report, the Law Commission (1997) favoured the legislative initiative in reforming adultery law but, surprisingly, the commission preferred retention of five years imprisonment.

The Justice Malimath Committee (2003) too strongly favoured preservation of matrimonial sanctity and thus justified retention of a gender neutral adultery law. In 2006, the National Commission for Women recommended that adultery be decriminalised.

With individual autonomy and choices being recognised as an integral part of the right to privacy, there is no justification in retaining a dated adultery law.

Marriage being a civil contract, its breach either in adultery or divorce, including triple talaq, should have only civil consequences as no legitimate state interest is involved here which may justify the use of the criminal justice system. The Supreme Court should remove adultery from the statute book as living together is already legal. Merely making it gender neutral will not suffice.

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