

Laws in Relation to Consent and Punishment for Adultery: A Critique on the Treatment of Men and Women in Trial

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Introduction

Almost every religion condemns 'adultery' and treats it as an unpardonable sin,¹ so does the society. The religious and social temperament has not been entirely reflected in the penal laws of Bangladesh. In Bangladesh, the offence of adultery is punishable crime under section 497 of the *Penal Code*, 1860. This section makes only men having sexual intercourse with the wives of other men without the consent of their husbands punishable and women cannot be punished even as abettor. It seems to be a gendered section in favour of women. This section violates the principle of equality under the provision of Articles 27 and 28(2) of the Constitution of Bangladesh. Marriage, as a man-woman relationship, has evolved from a socially useful and effective institution into a free-floating, personal relationship.² The principle of equality before the law requires the revision of the existing law on adultery by including both partners within its scope. The bonds of marriage have a religious, social and legal sanction in Bangladesh. Any sexual liaison that defies this bond spells noncompliance with social norms.³ It is a violation of the sacred marriage vows religiously and morally held to be sacrosanct and is punishable under the laws of the land.⁴ Whether the woman is a victim of adultery or is herself an adulteress, she is completely free of being penalized for her misdemeanour under Bangladeshi Law. This paper attempts to focus on the weaknesses of section 497 of *Penal Code* (PC) in the light of

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¹ Vibhute, K.I. 2001. "Adultery' in the Indian Penal Code: Need for a Gender Equality Perspective", available at <<http://www.ebc-india.com/lawyer/articles/2001v6a3.htm>>, last accessed on 15 March 2011; Some of the ideas have been developed in this article from the article of Vibhute, K.I. (2001).

² Shams, Shamsuddin. (ed.). 1991. *Women Law and Social Change*, New Delhi, Ashish Publishing House, at p. 293.

³ 'The Price of Adultery', available at <<http://www.tribuneindia.com/2007/20070120/saturday/main1.htm>>, last accessed on 25 December 2010.

⁴ *Ibid.*

Bangladesh Constitution and the different aspects of inequality in case of adultery under Bangladeshi laws. This article is analytical in nature. As there is no case law in regard to adultery in Bangladesh, some cases of India have been discussed here.

Concept of Adultery

Adultery⁵ is a form of extramarital sex. It is sexual infidelity to one's spouse. It originally referred only to sex between a woman who was married and a person other than her spouse.⁶ Adultery is illegal in some countries. The interaction between laws on adultery with those on rape has and does pose particular problems in societies that are especially sensitive to sexual relations by a married woman and man.⁷ The difference between the offences is that adultery is voluntary, while rape is not. The term adultery has an Abrahamic origin, though the concept predates Judaism and is found in many other societies. Though the definition and consequences vary between religions, cultures, and legal jurisprudence, the concept is similar in Judaism, Christianity, and Islam. Hinduism also has a similar concept.⁸ In the traditional English common law, adultery was a felony. Although the legal definition of "adultery" differs in nearly every legal system, the common theme is sexual relations outside of marriage, in one form or another. Fornication and adultery are both included in the Arabic word '*zina*'. *Zina* indicates any *haram* (prohibited) act, whether the act was sexual intercourse or a look, talk, touch, or desire that is related or may lead to elicit sexual relations. *Zina*, as a legal term, has a more specific meaning because there are legal implications related to it. In its legal meaning *zina* is 'the voluntary sexual intercourse outside marriage. Thus, any sexual relationship, which fits this definition, is legally *zina* and deserves the application of a major legal penalty. According to Bangladeshi Law, if a man makes sexual intercourse with a woman and he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the

⁵ 'adultery', *Encyclopaedia Britannica Online*, available at <<http://www.britannica.com/EBchecked/topic/6618/adultery>>, last browsed on 27 December 2008, as said: 'Whoever as sexual intercourse with a person who is and whom he knows or has a reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor'.

⁶ 'Definition of Adultery', available at <<http://dictionary.reference.com/browse/adultery>>, last retrieved on 20 December 2010.

⁷ For example, Pakistan and Saudi Arabia.

⁸ See above note 5.

offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor.⁹ The object of the law is to inflict punishment on those who interferes with the sacred relation of marriage, and the legislature as well considers it to be an offence for one who interferes in the sacred matrimonial home.¹⁰ It is commonly accepted that it is the man who is the seducer and not the woman, and it is considered as an anti-social and illegal act by any peace loving and citizen of good morals, who would like any one to be indulged in such acts before their nose.¹¹

Analysis of 'Adultery' under Bangladeshi Laws

Complainant

The sexual intercourse between a man and an unmarried woman or a divorcee or a widow, does not come within the definition of 'adultery'. Adultery is restricted here to a particular type of sexual intercourse. It also holds the man and not the adulteress wife of another man, who has been unfaithful to her husband, solely responsible for the sexual liaison.¹² Under the PC, adultery is an offence committed by a third person against a husband in respect of his wife and of which a man can alone be held liable for the offence.¹³ Thus the husband of adulteress wife along is competent to file the complaint for a charge under section 497 and it is only when he is absent that the persons who is in care of the women may file such complaint on behalf of the husband with leave of the court.¹⁴ This assumes that no married woman is capable of taking charge of her own life and taking care of herself. Granted that this may

⁹ Section 497, *The Penal Code*, 1860.

¹⁰ Bag, Amartya. 2010. 'Adultery and the Indian Penal Code: Analysing the Gender Neutrality of the Law', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627649, last accessed on 25 March 2011; *V. Revathi v Union of India*, AIR 1988 SC 835; See also, Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System 190 (2003) available at http://www.mumbaiipolice.org/%5Carchives_report%5Cmalimath%20committee%20report.pdf, accessed on 9 September 2009.

¹¹ *Ibid*; *V. Revathi v Union of India*, AIR 1988 SC 835; See also, *Hatim Khan v State*, AIR 1963 J&K 56.

¹² See above note 1.

¹³ *Gansapalli Appalamma v Gantappali Yeliayya*, (1897) ILR 20 Mad 470; see above note 10.

¹⁴ Section 199, *The Code of Criminal Procedure*, 1898; Section 498, *The Penal Code*, 1860.

have been true in 1898¹⁵ but it is certainly not true in 2011. If adultery is committed, the husband cannot prosecute his unfaithful wife but can only prosecute her adulterer.¹⁶ However, since the offence of adultery can be committed by a man with a married woman only, the wife of the man having sexual intercourse with other unmarried women cannot prosecute either her husband or his adulteress.¹⁷ The greatest injustice is done when a woman finds herself totally helpless in either prosecuting her husband or the other woman. Neither the aggrieved husband nor wife may initiate proceedings against their irresponsible spouses.¹⁸

Punishment

According to the PC, adultery is an act of which only a man be guilty of. What is interesting here is that the section itself expressly states that the unfaithful wife cannot be punished even as an abettor to the crime.¹⁹ This provision shows that a married wife cannot commit adultery. The offence of adultery therefore is an offence committed against the husband of the adulteress and not against the wife of the adulterer.²⁰ The cognizance of the offence under section 497 is limited to an adultery committed with a married woman, and the man alone had been made liable to punishment. It focuses the *prima facie* unequal treatment between men and women. The adulteress man and woman, both are equally liable for committing adultery, but law penalises the man but exempts the woman from criminal responsibility. It appears discriminatory that for the same act the man becomes the manifestation of evil but the woman still is considered to retain her virtues.²¹ The responsibility of upholding the purity of the matrimonial home lies on both the spouses rather than an outsider for involving in an extra marital

¹⁵ In 1898, *The Code of Criminal Procedure* was enacted.

¹⁶ Basu, N.D. 1951. *The Indian Penal Code*, Fifth Addition, Calcutta, S.C. Sarker and Sons Ltd, at p. 772.

¹⁷ See above note 2, p. 290; See also, 'A Provision Redundant in Penal Law in Changed Legal and Social Context', available at <<http://www.legalserviceindia.com/article/I291-Adultery.html>>, last accessed on 15 March 2011.

¹⁸ See, 'The Antiquated Shackles of Adultery' available at <<http://www.legalserviceindia.com/article/I17-Adultery.html>>, last accessed on 15 March 2011.

¹⁹ 'A Provision Redundant in Penal Law in Changed Legal and Social Context', available at <<http://www.legalserviceindia.com/article/I291-Adultery.html>>, last accessed on 15 March 2011.

²⁰ *Ibid.*

²¹ *Ibid.*; See also *Encyclopedia Dictionary of Religion* (The Sisters of St. Joseph of Philadelphia, 1979).

affair. When a woman makes an illicit relationship, denying this responsibility, she is equally responsible for breaking the matrimonial alliance and commits an equal offence to that the man who entices her. Breaking a matrimonial home is not less serious a crime than breaking open a house'.²² No adultery can be committed without the consent of women. But according to section 497, only a man can be an outsider, who has potential to invade the peace and privacy of the matrimonial unit and to poison the relationship between the unfaithful wife and her husband, therefore, seems to be, with due respect, less convincing and unrealistic.²³ An outsider woman can, like "an outsider man", be equally capable of invading the matrimonial peace and privacy as well as of poisoning the relationship of not only her own matrimonial home but also that of her paramour.²⁴ Thus she should be treated as an abettor under section 497 of the PC.

Victim

According to section 497 of the PC, there is no criminal responsibility of adulteress wife for committing adultery and a wife of adulterer has no right to file any case against her husband or adulteress wife. It assumes that the wife is a hapless victim of adultery and not either a perpetrator or an accomplice thereof.²⁵ Adultery, as viewed under PC, is thus an offence against the husband of the adulteress wife and, thereby, an offence relating to marriage.²⁶ It is laid down in section 198 of the *Code of Criminal Procedure (Cr.PC)*, 1898 that no court shall take cognizance of an offence under section 497 of PC except upon a complaint made by the husband of the adulteress wife. If husband of adulteress wife is treated as a 'victim' or 'aggrieved person' according to section 198 of Cr.PC, why the wife of the adulterer cannot be treated as a victim? If a man has more than one sexual relations during his married life, the wife has to do nothing but to tolerate her husband's behaviour.²⁷ She becomes the silent receiver of the incident for patriarchal social system. If the fact of the husband's adultery becomes public it is the woman who is blamed by others who allege that she is not capable of tightly binding the husband under her feminine control.²⁸ Again, the trauma and emotional damage

²² See above note 10; See also Constituent Assembly Debates of India. Vol. VII at p. 655.

²³ See above note 1.

²⁴ *Ibid.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ All, Salma. (ed.). 2002. *Violence against Women in Bangladesh, 2001*, Dhaka, BNWLA, p. 29.

²⁸ *Ibid.*

suffered by the wife of an adulterous male is equal to that of the husband of an adulterous woman, yet while the husband has been given the right to bring action upon the man breaking the purity of his home, the wife is denied such a right.²⁹ Section 497 of the PC read with section 199 of the Cr.PC, thus signifies the unequal status of husband and wife in Bangladesh. The offence of adultery did not punish women but still existed in the Code because at the time the law was enacted, polygamy was deep rooted in the society and women shared the attention of their husbands with several other wives and extramarital relations.³⁰ Women were treated as victims of the offence of adultery as they were often starved of love and affection from their husbands and could easily give into any person who offered it or even offered to offer it.³¹ The provision was therefore made to restrict men from having sexual relations with the wives of other men and at the same time to restrict their extra marital relations to unmarried women alone.³² At present, this concept is not applicable for provision of *the Muslim Family Laws Ordinance, 1961*, which has strongly restricted polygamy.³³ Provision of polygamy is now prone to be abused, while monogamy has become prevalent.³⁴

Consent

The phrase 'without the consent or connivance of that man' mentioned in section 497 which clearly indicates that adultery is not an offence per se but is an offence only when the husband of the adulterer did not consent to it and also that the consent of the wife of person convicted of adultery is not considered in deciding whether her husband has committed adultery or not.³⁵ This once again discriminates between the two sexes by not considering the consent of the wife of the person convicted of adultery in deciding whether her husband who had sexual relations outside marriage is guilty of the offence of adultery or not.³⁶ To sustain a

²⁹ See, 'The Antiquated Shackles of Adultery', available at <<http://www.legalserviceindia.com/article/117-Adultery.html>>, last accessed on 20 March 2011.

³⁰ See, 'A Provision Redundant in Penal Law in Changed Legal and Social Context', available at <<http://www.legalserviceindia.com/article/1291-Adultery.html>>, last accessed on 15 March 2011.

³¹ *Ibid.*

³² *Id.*

³³ Section 6, *The Muslim Family Laws Ordinance, 1961*.

³⁴ Islam, Zahidul. "Restricting Polygamy in Bangladesh", *The Daily Star*, 28 April 2007, p. 22.

³⁵ Khare, Nidhi. 2010. 'Gender Biasness in the Law of Adultery in India', available at <<http://www.legalserviceindia.com>>, last accessed on 28 March 2011.

³⁶ *Ibid.*

conviction under this section the complainant must not only prove that the accused had sexual intercourse with his wife but also the fact that the act was done without his consent and connivance.³⁷ To convict a man, adultery is not sufficient to prove that he was found at a place where adultery might have been committed and that he was inclined to commit it. Where the husband surprised the woman in a room with the accused before he could have sexual intercourse, it assumes that the act was not sufficiently approximate to the commission of the offence to constitute an offence. Section 497 draws a distinction between consent given by a married woman without her husband's consent and a consent given by an unmarried woman.³⁸ It does not penalize the sexual intercourse of a married man with an unmarried woman or a widow or even a married woman when her husband consents to it.³⁹ Though the section burdens man alone for the offence, but it is true that adultery cannot be committed without a woman's consent. The reasons for this may be justifiable, the wife of the adulterer here is always treated as a victim of the offence.⁴⁰ Hence, this section does not contemplate a situation where the same married woman has sexual intercourse with more than one person other than her husband without her husband's consent.⁴¹ It is highly implausible that even in such a situation the woman would always be the victim and not the person who provokes the offender for the crime.⁴² Section 497 of the PC perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman without the consent or connivance of her husband as an offence of adultery. If husband gives consent, then it cannot be treated as 'adultery' according to this section. A man who has sexual intercourse with an unmarried woman, or with a widow, or divorced woman or even with a married woman whose husband consent to it does not commit adultery. It results that husbands have, as it were, a free license under the law to have extramarital sexual relationship.⁴³ It reflects that

³⁷ The term "connivance" implies knowledge of, and acquiescence in the act. Toleration of the extramarital relation of his wife by the husband also amounts to connivance. It is not merely negligence or inattention but a voluntary blindness to the intimacy. Connivance of the husband is made necessary, for the offence of adultery is intended to preserve his bed unsullied, and if he elected otherwise, the law cannot help him against himself. See *In re C.S. Subramaniam*, AIR 1953 Mad 422.

³⁸ 'A Provision Redundant in Penal Law in Changed Legal and Social Context', available at <<http://www.legalserviceindia.com/article/I291-Adultery.html>>, last accessed on 15 March 2011.

³⁹ *Ibid.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See above note 10.

Bangladeshi law encourages prostitution. If husband gives consent, prostitution is allowed. It creates a tendency of the husbands that they think 'wife' as a source of income. Therefore, many married women are forced to make sexual intercourse with different persons for money. Women are victimized for this situation.

Equality under Constitutional Provisions

According to Bangladesh Constitution, there could be no question of law operating unequally. The mischief aimed at under section 497 is only against men and not against women. Again the law has so provided that for the purpose of this section the wife shall **not** be deemed to be an abettor at all. In the definition of who is an abettor an exception is carved out and that exception is in favour of women. So, it has contended that the section contravenes article 27 and 28(2) of the Constitution of Bangladesh. Article 27 provides that all citizens are equal before law and are entitled to equal protection of law, and Article 28(2) provides that women shall have equal rights with men in all spheres of the state and of public life. These Articles, in substance, mean that every law that the state passes shall operate equally upon all persons, and the question is whether section 497 does not operate equally upon all persons. After the commencement of the Constitution of Bangladesh, section 497 of the PC goes against the spirit of equality embodied in the Constitution. In contravention to Articles 27 and 28(1) of the Constitution, section 497 operates unequally between a man and a woman by making only the former responsible for adultery. This section is gender biased mainly on the grounds that it does not allow the wife to prosecute the woman with whom her husband has adulterated though it allows the husband to prosecute the man who has adultery with his wife. The law has considered woman to be a victim not as author of the crime.⁴⁴ It, thereby, argued, discriminates in favour of women and against men only on the ground of sex.⁴⁵ Furthermore, there is no provision in the Cr.PC for hearing the wife for an offence under section 497 of PC. This absence of statutory provision is also premised on gender discrimination in contravention of the gender equality guaranteed in the Constitution.

Positive Discrimination

Bangladesh Constitution guarantees positive discrimination in favour of women. Article 28(4) states that nothing in this Article shall prevent the state from making special provision in favour of women or children or for the advancement of any backward section of citizens. Recalling the

⁴⁴ Shams, Shamsuddin. (ed.). 1991. *Women Law and Social Change*, New Delhi, Ashish Publishing House, at p. 291; AIR 1985 SC at 1621; See above note 10.

⁴⁵ See above note 1.

historical background of Section 497 of the PC, the High Court of Bombay upheld the constitutional validity of the provision. In 1954, Chagla, C.J., observed:⁴⁶

What led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in section 497, a position in law which takes a sympathetic and charitable view of the weakness of women in this country. The Court also opined that the alleged discrimination in favour of women was saved by the provisions of Article 15(3) of the Constitution which permits the State to make "any special provision for women and children.

The discriminations are in favour of particular classes of our society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps.⁴⁷ Those may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens may be established.⁴⁸ It is only intended to safeguard, protect or lead to their betterment in general; so that long-range interests of the country may not suffer.⁴⁹ In the Judgment of a case in 1985, Indian Supreme Court said:⁵⁰

The special treatment given to women under the Constitution should be restricted to such cases which must be related to some features or disability which are so peculiar that it differentiate women from men as a class. The intention of the framer of the Constitution is clear that they included this clause to safeguard, protect or lead to the betterment of women in general; they have not intended to keep it to give a licence for abetting or committing an offence. An argument like making both man and woman liable for adultery is not permissible as this is a policy of law.

Upholding the constitutionality of section 497 of the PC and Section 199 of the Cr.PC, which according to the Court "go hand in hand and constitute a legislative packet" to deal with "an outsider" to the

⁴⁶ Yusuf Aziz v. State of Bombay AIR 1954 SC 472; see above note 1.

⁴⁷ Bag, Amartya. 'Adultery and the Indian Penal Code: Analyzing the Gender Neutrality of the Law', available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627649>, last accessed on 25 March 2011; see also Constituent Assembly Debates of India. Vol. VII at 655.

⁴⁸ *Ibid.*

⁴⁹ *Id.*

⁵⁰ Sowmithri Vishnu v Union of India, AIR 1985 SC at 1620.

matrimonial unit who invades the peace and privacy of the matrimonial unit, in 1988, Thakkar, J. of the Supreme Court observed:

The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. There is thus reverse discrimination in favour of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar 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 law. The wife is not permitted as section 199(1) read with section 199(2) of the Cr.PC does not permit her to do so. 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.⁵¹

To date the Supreme Court of India has upheld section 497 of PC inspite the fact that 150 years has passed from the date of the enactment of the PC of it. In the present context of social development the policy of law must be changed. The reason of not penalising an adulteress woman under section 497 is no more valid and satisfactory today. The underlying law at the present situation considers only men as offender, as a class. Both the sexes are on an equal footing in committing the offence of adultery, this kind of legislation are discriminatory and arbitrarily protect women. Section 497 of PC is nothing but violative of the equality clause under Bangladesh Constitution. When a wife is caught committing adultery, the community responds harshly; the women's neighbours gossip about her, men make indecent proposals to her, family members refuse to socialize with her, and she is treated badly by everyone. The community generally stands by as the husband tortures and sometimes even murders the wife.⁵² The husband, in almost all cases physically tortures her and abandons her by way of *talaq*.⁵³

Inversely the society is very harsh upon the adulteress woman. Furthermore, adultery is a flagrant violation of women's dignity. The legal provisions and the social attitudes reinforce her subordinate status in society. She is the property of her husband and cannot even fight

⁵¹ *V. Revathi v Union of India* AIR 1988 SC 835; see above note 1.

⁵² Ali, Salma. (ed.). 2003. *Violence against Women in Bangladesh, 2002*, Dhaka, BNWLA, p. 19.

⁵³ *Ibid.*

independently to regain her lost prestige. It is also premised on a few outdated and moot assumptions of sexuality, sexual agency and unequal mutual marital rights and obligations of the spouses. It, in ultimate analysis, unmistakably interids to protect the rights of the husband and not of the wife⁵⁴. It is also bridled with deep-rooted obsolete assumptions predominantly premised on gender discrimination and the wife's sexuality.⁵⁵ Such a law undoubtedly seems to be inconsistent with the modern notions of the status of women and the constitutional spirit of gender equality in Bangladesh.

Suggestions

It is clear that only man is presumed by the law to have a *mens rea* while no such presumption is attributed in reference to the woman for the same wrongful act.⁵⁶ According to the Constitution, all persons and things similarly circumstanced should be treated alike in both the privileges conferred and liabilities imposed. But in case of adultery, law achieves is only placing a deterrent on the man while the other party to the affair is not brought within the legal restrictions.⁵⁷ The arguments for leaving adulteress wife beyond punishment are many. According to the light of Islamic law, both, men and women are punished for adultery.⁵⁸ Islamic law established culpability equally to both sexes; one must answer a very basic question about the resulting punishment. If adultery is seen as a crime, the provision of one hundred lashes to both the adulterer and adulteress is ostensibly fair. Furthermore the wife of the adulterer man cannot use section 497 to bring an action against either her unfaithful husband or the women involved with her husband, while the husband of an adulteress wife can bring an action against the man

⁵⁴ See generally, Kapur, Ratna. and Cossman, Branda. 1996. *Subversive Sites: Feminist Engagements with Law in India*, New Delhi, Sage Publication; Ursula, Vogel. 1992. "Whose Property? The Double Standards of Adultery in the Nineteenth Century Law", in Carol Smart (ed.): *Regulating Womanhood: Historical Essays in Marriage, Motherhood and Sexuality*, Routledge, London; and Sathe, S.P. 1996. *Towards Gender Justice*, Bombay, SNDT Women's University; also see *Alamgir v State of Bihar*, AIR 1959 SC 436 (439).

⁵⁵ Bhatnagar, J.P. 1998. *Law Relating to Women and Their Rights*, New Delhi, Ashoka Law House, p.184-196; also see above note 1.

⁵⁶ 'The Antiquated Shackles of Adultery', available at <http://www.legalserviceindia.com/article/I17-Adultery.html>, last accessed on 20 March 2011.

⁵⁷ *Ibid.*

⁵⁸ *Hadith Malik*, 493:1528; Surah 17 Verse 32, *Al Quran*; Surah 24, Verse 30, *Al Quran*; *Al Quran*, 24:2; *Al Quran*, 4:15; *Al Quran*, 4:16; *Sahih Muslim* Chapters 623, 680, 682 and *Hadith Malik*, 493:1520; *Hadith Muslim*, 680; *Hadith Muslim*, 682; *Hadith Malik*, 493:1520; *Hadith Malik*, 493:1524; *Hadith Malik*, 493:1530; *Sahih Bukhari*, 11:2073.

involved in the affair.⁵⁹ Adultery is a ground for divorce under the *Hindu Marriage Act*,⁶⁰ the *Special Marriage Act*,⁶¹ the *Parsi Marriage and Divorce Act*,⁶² and under the *Indian Divorce Act*.⁶³ So, according to these acts, the spouse who engages in extra-marital intercourse is guilty of adultery. Under the *Dissolution of Muslim Marriages Act, 1939*, adultery as such is not a ground for divorce, but if the husband "associates with women of evil repute or leads an infamous life," it amounts to cruelty to wife and she can sue for divorce on that ground.⁶⁴ This seems sometimes akin to living in adultery. But none of these enactments, except the *Parsi Marriage and Divorce Act*,⁶⁵ confers any such corresponding right on the husband to dissolution of marriage for extra-marital sexual relations maintained by the wife. According to above discussions, the provision of adultery should be amended to enable the wife to file a suit against the adulteress husband. Section 198 of the Cr.PC should be amended in order to allow women to file complaints against unfaithful husbands and prosecute them for their promiscuous behaviour. Any kind of sexual intercourse between man and woman should be prohibited. The exemption of the wife from punishment for committing adultery should be removed. It is also felt that an imprisonment for a term up to five years is "unreal and not called for in any circumstances".⁶⁶ This punishment should be increased as exemplary punishment. Section 497 should read as follows:⁶⁷

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 ten years, or with fine, or with both.

⁵⁹ See above note 56.

⁶⁰ Section 13(1)(i), *The Hindu Marriage Act, 1955*.

⁶¹ Section 16 and 17, *The Special Marriage Act, 1872*.

⁶² Section 32 (d), *The Parsi Marriage and Divorce Act, 1936*.

⁶³ Section 10, *The Indian Divorce Act, 1869*.

⁶⁴ Section 2 (9) (b), *The Dissolution of Muslim Marriage Act, 1939*.

⁶⁵ Section 32 (d), *The Parsi Marriage and Divorce Act, 1936*.

⁶⁶ See above note 1.

⁶⁷ Inspired by the spirit of equality, the Fifth Law Commission and the Joint Select Committee have thus shown their inclination to the equality of the sexes by recommending equal culpability for the "man" as well as the "woman" for committing adultery. (See, Committee Chaired by Justice V.S. Malimath; *The Report of the Committee on Criminal Justice Reforms*, 2002, Delhi, India, Para 117).

Conclusion

Adultery is basically an act of having sexual relations outside marriage and section 497 of PC has showed that it is not gender neutral.⁶⁸ The sexual intercourse between a man and an unmarried woman or a divorcee or a widow, does not come within the definition of 'adultery'. The husband of adulteress wife along is competent to file the complaint for a charge under the section 497 of PC, but the wife of adulterer husband has no right to file a case for the same charge against her husband or against the adulteress wife. Therefore adultery is an offence committed against the husband of the adulteress and not against the wife of the adulterer. If husband of adulteress wife is treated as a 'victim' or 'aggrieved person' according to section 198 of Cr.PC, the wife of the adulterer should be treated as a victim. On the other hand, the husband cannot prosecute his unfaithful wife but can only prosecute her adulterer under section 497 of PC. According to this section, an unfaithful wife cannot be punished even as an abettor to the crime. It shows that a married wife cannot commit adultery. The phrase 'without the consent or connivance of that man' mentioned in section 497 of PC discriminates between the two sexes by not considering the consent of the wife of the person convicted of adultery. A man who has sexual intercourse with a married woman whose husband consent to it does not commit adultery. It encourages prostitution in Bangladesh. Adultery should be treated as a crime for all and the discrepancies should be amended. The law as it stands today violates the Constitution that includes equal status for every citizen and would not discriminate on the ground of sex. The 'positive discrimination' clause for women under Article 28(4) of Bangladeshi constitution cannot be extended so as to create arbitrary discretion for such discrimination by the legislature, as in the case of adultery. Section 497 of PC had been drafted in a time and era where conservatism was the norm. It belongs to a past that laid great stress on morals and where sex in itself was a taboo. In that era an illicit relationship could not have been imagined about and hence it was befitting that adultery with the given definition in section 497 of PC was a crime. Today the changed views of the society have started raising questions on the law of adultery. When section 497 of PC was enacted there were no codified personal and matrimonial laws like today, moreover those were treated as unequal and inoperative.⁶⁹ Today the

⁶⁸ Khare, Nidhi. 2010. 'Gender Biasness in the Law of Adultery in India', available at <<http://www.legalserviceindia.com>>, accessed on 28 March 2011; see also *M. Alavi v T.V. Safia*, AIR 1993 Ker 21.

⁶⁹ 'A Provision Redundant in Penal Law in Changed Legal and Social Context', available at <<http://www.legalserviceindia.com/article/l291-Adultery.html>>, last accessed on 15 March 2011.

personal laws are equal, operative, effective and efficient. The definition of adultery in matrimonial laws is much wider in scope than the definition of adultery as a crime.⁷⁰In the light of the above reasons it is lucent that there is a need for amendments in the law and it needs to be reconsidered. Women should also be made liable for the offence and the law should be made sterner. According to the light of Bangladesh Constitution, women should be punishable with men and should have the right to file a case for adultery in order to ensure equality.

⁷⁰ *Ibid.*