

Adultery, a Ground for Disruption and Dissolution of Hindu Marriage : A Plea for Rationalisation

*R. Jaganmohan Rao**

MARRIAGE IS the nucleus of family which is the basic foundation of any society. Successful marriage is the result of a happy and harmonious living of the wife and husband without any infringement of the oaths of marriage and matrimonial obligations, which in turn is based on the realisation of mutual respect, fidelity and faith by the wife and husband. When once these basic tenets of conjugal life are either battered or bruised by either spouse, the very institutions of marriage and family would be threatened with the danger of disintegration and disorganisation. Sexual fidelity and matrimonial loyalty can never be divided or pledged to a person other than his or her spouse. Adultery is a serious matrimonial offence affecting the principles of fidelity and matrimonial loyalty, and is capable of tottering the very foundations of marriage and family. It means consensual sexual intercourse between a man and a woman one of whom is married to a third person. It is nothing but a grave breach of mutual trust, and betrayal of confidence by one spouse, against the other. In all legal systems, adultery is a ground for dissolution of marriage or at least a potential source of disruption of happy matrimony. Under the Hindu Marriage Act, 1955 simple or a single act of adultery is only a ground for judicial separation, and adultery of graver type called 'living in adultery' is a ground for divorce.

The following issues concerning adultery, are proposed to be examined in this paper :

- (i) What constitutes adultery under English and Hindu matrimonial law ?
- (ii) How the terms 'adultery' and 'living in adultery' are to be interpreted within the framework of the Hindu Marriage Act ?

*M.A., M.L., Lecturer, College of Law, Andhra University, Waltair (A.P.).

- (iii) Whether the clauses concerning adultery under the Hindu Marriage Act require to be amended for purposes of clarity and easy interpretation.
- (iv) How to prove adultery :

What constitutes adultery is a matter of discussion and debate among scholars, courts and jurists. The term 'adultery' is derived from the French word "*adultereare*" which in turn stands for "*ad ulterreare*". It originally meant "mixing, degrading or counterfeiting". It also means alter from other or change to something different. It is defined as the sexual intercourse between man and woman either of whom is married to a third party.¹ If both the persons engaged in sex act are married, it becomes double adultery, and it becomes single adultery when the woman is married. It consists of a breach of either sex of marriage vows and fidelity to the spouse and violation of the marriage bed.² In all authorities, adultery is defined as the sin of incontinence between two married persons or it may be when only one of them is married.³ From common law point of view, it means and includes sexual intercourse by man, married or single, with a married woman other than his wife. This is more of a criminal law viewpoint than of a civil law. This has been enlarged by statutes so as to include "sexual intercourse by a married person with some person not his or her husband or wife."⁴ In fact the term is neither clearly defined under English law nor under Indian law. However, in English divorce law, it is understood to mean the willing or voluntary sexual intercourse between a husband or wife with one of the opposite sex, while their marriage subsists. It is thus regarded as a serious matrimonial offence involving the breach of faith committed by one spouse in violation of the marriage vows and fidelity of the terms of contract of marriage.

Adultery in criminal law is different from adultery in matrimonial law. In the former, it can be committed only by a man with another woman knowing fully well that she is the wife of somebody else, whereas in the latter, it can be committed either by a woman or a man. It is immaterial whether the offender is a male or female. It is a violation of the marriage

1. Defined in Funk and Wagnalls, *New Standard Dictionary*.

2. Fowler and Coulson, *I Short Oxford Dictionary on Historical Principles*.

3. Thomas Tomlins, the *Law Dictionary*, London; *American and English Encyclopedia of Law* 747, (2nd ed. 1920).

4. *American Jurisprudence*, s. 118 at 278 (2nd ed. 1966).

bed which may be committed either by the husband or wife. Hence, it has wider scope in matrimonial law than in criminal law. It consists not in moral turpitude of the act of sexual intercourse, but mainly in the voluntary surrender of the reproductive organs to another person by the guilty person to the service of or enjoyment of that person other than his or her spouse.⁵ The essential ingredient of adultery is that it should be the result of voluntary sexual intercourse, and hence, all involuntary acts like rape, sex act under the influence of any drug or insanity or as a result of coercion, use of force or fraud do not come within the purview of the term 'adultery'.⁶ Another important ingredient is that it is a penetrative act. Unless and until some penetration, complete or partial, of the female organ by the male is established, it cannot constitute adultery in English law. The test of penetration prescribed by some courts in English law has given a new meaning to the term 'adultery' and rules out all acts of sexual gratification unaccompanied by at least some degree of penetration of male organ into the female organ.⁷ In order that it should be a ground for divorce the respondent must have had a sexual intercourse with some one other than the petitioner since the celebration of marriage.⁸ In addition to that, it must also be proved by the petitioner that he or she can no longer be able to live with the respondent spouse.⁹ Broomley defines adultery as sexual intercourse between two persons of whom one or both are not married to each other.¹⁰ One of the most modern definitions of adultery is given by Rayden, according to which, adultery may be defined as consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, married or unmarried during the subsistence of a valid marriage between the two parties. In order that an act should constitute an act of adultery, there must be at least partial penetration of the male organ into that of a female. Mere attempt to commit or failure to commit it, must not be confused with the act itself, and any act of lesser sexual gratification will not amount to adultery.¹¹ For constituting adultery, it is immaterial whether the marriage is consummated or not, and the motives and intentions to commit adultery are equally

5. Orde, J., in *Oxford v. O.*, 15 *Ont. L.R.* 22 (1921).

6. *Raydon on Divorce* 189 (12th ed. 1974); *Latey on Divorce* 102 (1973); Tolstoy, *The Law and Practice of Divorce* 28 (6th ed. 1967).

7. *Dennis v. Dennis*, 1955 All E.R. 51; *Rutherford v. Richardson*; (1923) A.C. 1, Raj Kumari Agrawala, *Matrimonial Remedies under Hindu Law*, 172 (1st ed. 1974).

8. *Matrimonial Causes Act*, 1955 s. (1) (i) (a) (i).

9. The recently passed *Divorce Reform Act*, 1969 s. 2(1) (a) requires the petitioner to prove that he or she is not able to live with the other spouse for proving irretrievable breakdown of marriage between the two parties.

10. Broomley, *Family Law*, 92 (1966).

11. *Rayden on Divorce*, 190 (1974).

irrelevant. But the inception of it or the repetition of it are material elements for judging the gravity of the offence.¹²

II

In India the law regarding adultery is different from that of the English. Under the Indian Penal Code only a man is guilty of adultery and it constitutes an offence under criminal law, if a man has sexual intercourse with the wife of another, other than that of an unmarried, widowed, or divorced woman. However, in Hindu matrimonial law, both the wife and husband can be guilty of adultery, the meaning of which is presumed to be the same as in English law. But mere act of adultery would not be sufficient for divorce in Hindu law, it would only entitle the party to get judicial separation, but not divorce. The former is only a milder and less serious form of remedy than the latter. For divorce, the Hindu Marriage Act, requires the proof of "living in adultery" under section 13 (1) (i) of the Act, which is more serious in form than mere a casual act of adultery. This term seems to have been taken from section 488 of the Code of Criminal Procedure, 1898 in which it was used as a defence for wife's right to claim maintenance from her husband. Further, in English law, nothing short of actual sexual intercourse will amount to adultery. Mere kissing, amorous letters, attempt to sexual intercourse without penetration would not be sufficient to charge a person with adultery.¹³ Similar situations in Indian law might lead to the charge of adultery in view of Hindu customs, manners and Hindu standards of morality.¹⁴

The *smrithikaras*, like Manu, described adultery as a deadly sin which could only be expiated by performing 'ξovrata' or a 'chandrayana'.¹⁵ Brihaspati¹⁶ classified adultery into three categories viz., (i) adultery by force; (ii) by deception; and (iii) by a voluntary sexual intercourse. It is the third one that is recognised in the modern family law, and the other two are excluded from the purview of adultery in the modern sense. *Shastrakaras* also explained it in three degrees, as the three stages of its commission to indicate the gravity or seriousness of the offence. In the first degree, it includes man

12. *Woolf v. Woolf*, (1931) All E.R. 134-145.

13. *Hamerton v. H.* (1828) 2 Hag. Ecc. 8 at 14; *V.C. Chamers* (1930) 46 T.L.R. 269-270.

14. P.K. Virdhi, *The Grounds for Divorce in Hindu and English Law*, 67 (1972).

15. *Manu*, VII, ss. 352-53.

16. *Brihaspati*, 28-2-5.

meeting a woman at a lonely place, talking to her, casting amorous glances and smiling at her. In the second degree, it would include the acts of sending perfumes, garlands, fruits, wines, *etc.*, and conversing with her secretly. Adultery in the third degree, which is of the highest order, would include a man and woman sitting on the same bed, making love to each other by kissing and embracing, *etc.*¹⁷ Similarly, if a man touches a secret part of the body of a woman with her consent, it amounts to adultery. In the same manner, if a man is found with a woman, each holding the other's hair or when he has visible signs of dalliance, or if he is found removing her clothes knot, or the cloth over her breasts, *etc.*, or conversing with her at an improper time and place, or sitting with her in suspicious circumstances, it constitutes adultery of the highest order.¹⁸ From this, it is clear that the offence of adultery is given entirely a different interpretation so as to cover all immoral, unethical acts, voluntary or involuntary, related to sexual life of the wife and husband, and also the preliminary or preparatory acts of adulterer or adulteress like the amorous gestures, kissing and embracing are also considered as part of the adulterous conduct. Thus, the *shastric* law seems to have laid much stress upon the intentions and motives of the parties also, their preparatory conduct, and behaviour before committing an act of adultery, which is taken into serious consideration by the Hindu law givers for fixing up the guilt of adultery on a particular person.

Moreover, as the practice of polygamy and concubinage were at that time socially accepted, and legally recognised, the old law of Hindu marriage regarded the adulterous life of either spouse with a sympathetic and humanitarian attitude.¹⁹ In fact, the traditional law ignored the moral lapses on the part of a Hindu husband, but even a single lapse of virtue on the part of a wife was taken seriously. For instance, an unchaste or adulterous, arrogant, erring wife could be easily forsaken,²⁰ or kept separately by providing starving maintenance. The *shastric* law, while showing sympathy towards women in general when compared with the present law, was also invidiously discriminatory between husband and wife and was unkind to women only. However, in one sense, the *shastric* law could also be regarded as liberal and sympathetic to women, as it directed the Hindu husbands to take back their adulterous wives if they repented and returned to them.²¹ This direction was, however, more honoured in the breach than in practice.

17. Gajanandh Jha, *Hindu Law and its Resources*, 476.

18. *Ibid.*

19. J.D.M. Derret, *A Critique of Modern Hindu Law*, 354 (1970).

20. D.N. Mitter, *The Position of Women in Hindu Law*, 651 (1913).

21. *Supra* note 12 at 354.

III

Mutual faith and understanding between wife and husband are the *sine quo non* for a happy matrimony and for the successful conjugal life. When once the faith or confidence is betrayed by either spouse, it amounts to an offence of adultery in matrimonial law. Adultery involves the betrayal or breach of faith of the oaths of marriage. Both legally and morally adultery has been regarded as the most serious matrimonial offence. In Indian conditions, it is very likely to impair seriously the mutual confidence of the parties rendering thereby the conjugal life of the spouses difficult if not impossible.²² A simple, or single act or acts of adultery is a ground for judicial separation under section 10(1)(f) of the Hindu Marriage Act, which means suspension of conjugal life for a temporary period of time. But a series of acts or repeated adulterous conduct of either spouse amounting to what is called 'living in adultery', is a ground for divorce or permanent breakdown of marital tie under section 13(1)(i) of the Hindu Marriage Act.²³ Such a distinction and demarcation between the two remedies almost on the same ground seems to be arbitrary and undesirable.²⁴ In almost all other laws of marriage, adultery is mostly a ground for dissolution of marriage only. But under the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 it is a ground for both judicial separation as well as divorce.²⁵

The Hindu Marriage Act nowhere defines either adultery or 'living in adultery'. In fact, the use of the word 'adultery' is simply avoided under section 10(1)(f) in which only the word 'sexual intercourse' is referred. It is sufficient if a single lapse of virtue or more than one or two such lapses in order to entitle the petitioner to get judicial separation under section 10(1) of the Act, but for divorce, even if a number of acts have been committed it would not be sufficient. Divorce can only be obtained when the respondent is guilty of 'living in adultery'. The lack of clarity in these two clauses and the avoidance of the word 'adultery' in section 10(1)(f) have given rise to different distorted interpretations of these two clauses thereby giving rise to serious difference of opinion among scholars, writers and courts. However, Parliament seems to have intended that a single act of infidelity to the marriage bond would not be a sufficient ground for relief by way of a decree for divorce.²⁶ It is very interesting to examine when, and under what circumstances, the conduct of a spouse amounts to adultery and 'living in adultery' under the Act.

22. Law Commission, *Fifty-ninth Report*, 66 (1974).

23. Hereinafter it will be referred as the Act.

24. This was supported by the Law Commission in its *Fifty-ninth Report*, 56. The commission is of the view that in view of the commission's decision to make the grounds of divorce liberal, it is unnecessary to make specific mention of the grounds for judicial separation.

25. Read ss. 23 & 27 of the Special Marriage Act, 1954.

26. *Supra* note 22 at 67.

Section 10(1)(f) of the Hindu Marriage Act contains various grounds on proving any one of which or more than one, a Hindu spouse is entitled to get judicial separation. Judicial separation or separation of bed and board (*means et thoro*) means only the disruption or suspension of conjugal life for a temporary period of time. Failure to comply with the decree of judicial separation or failure to have resumption of cohabitation either by the wife or husband for a period of two years or more would automatically entitle the other spouse to get divorce.²⁷ Hence, the objective of this remedy seems to provide an opportunity for reconciliation between the quarrelling spouses before preparing themselves for a final showdown or breakdown of marital tie permanently. If no reconciliation is made possible, judicial separation in all probability would lead to divorce. It is in this sense judicial separation may be described as a half-way house to divorce. The legal consequence of this remedy is that the holder of it has no longer any obligation to have sexual intercourse with the other spouse.

It is significant to note that the word 'adultery' is not used in section 10 (1)(f) of the Act. Whatever be the intention of law makers in avoiding the use of the term 'adultery', the meaning of the clause has given rise to some difference of opinion among scholars, writers and courts. Section 10 (1) (f) reads "that the respondent has, after the solemnisation of marriage, *sexual intercourse with any person other than his or her spouse*". (emphasis added). From the language used in this clause, it appears that this clause is capable of being interpreted to include not only voluntary or consensual sexual intercourse but also involuntary acts of intercourse like rape within the meaning of the term 'sexual intercourse'.²⁸ The natural meaning of this clause includes a simple or single act of adultery which may or may not be continuous or necessarily subsisting at the time of petition for judicial separation.²⁹ While distinguishing between voluntary and involuntary acts of sexual intercourse, Paras Diwan raises a doubt whether the legislature intended to cover both the consensual and nonconsensual acts of sexual intercourse under this clause.³⁰ If this opinion is to be accepted, it covers all acts of sexual intercourse, whether it is the result of rape, fraud, undue influence or coercion so as to constitute a ground for judicial separation. For no fault of the respondent spouse, the other spouse can easily get away with the remedy by abstaining from marital obligations.

27. Read s. 13(1A) (i) of the Hindu Marriage Act.

28. Paras Diwan, *Modern Hindu Law*, 147-148 (1974).

29. Raj Kumari Agrawala, *Matrimonial Remedies Under Hindu Law*, 173 (1974).

30. *Supra* note 28 at 147-148.

Many others are of the view that a reasonable construction should be given to the clause. According to some, this clause only includes single act or acts of adultery but not any cases of involuntary sexual intercourse. For instance, Raghavachari argues that the term 'sexual intercourse' itself implies only intercourse with consent. Then only it amounts to adultery³¹, not otherwise. He categorically states that rape and other acts of sexual intercourse by one with the opposite sex which are the result of force, fraud, mistake or undue influence, would never come within section 10(1) (f).³² Further, a woman in darkness under the impression that the man in action was her husband, or she was made to agree to the act by her doctor under the mistaken belief that it was operation, or when the act itself was done under anaesthetic influence would not amount to adultery. From this it is clear that section 10(1) (f) must be interpreted rationally, and reasonably so as to cover all cases of voluntary acts of sexual intercourse done with all mind and heart by a respondent, but not every kind of sexual intercourse. Such act or acts have a complete or at least partial penetration of the male organ into the female organ. It is evident that the Act makes a departure from the concept of adultery under *shastric* law and goes very near to the concept enunciated under English law. Although no direct evidence can be produced but it can easily be inferred from a strong circumstantial evidence. Mere kisses, huggings and embraces would not be sufficient under the clause.³³ This clause would not also attract the case of a husband married under old law having more than one wife if he had sexual intercourse with more than one wife because polygamy was recognised in that law and a husband cannot be said to have sex act "with any one other than his or her spouse" in law that was there in force.

However, it appears that if a husband or wife whose marriage is void, *ab initio* under section 11 of the Hindu Marriage Act, has sexual intercourse with the other spouse of a void marriage, it amounts to adultery, and the petition by the other spouse for judicial separation is maintainable. Similarly, a man or woman finding the first marriage void by virtue of prohibited degrees of relationship or the rule of *sapinda* relationship in violation of clause (iv) and (v) of section 5 of the Hindu Marriage Act, marries again validly with another person, but still retains contact with the previous spouse of a void marriage, would be guilty of adultery within this clause and the petition by the wife or husband of the second marriage is maintainable.³⁴

31. Raghavachari, *Hindu Law* 1027 (6th ed. 1970). Even in English law adultery means only consensual sexual intercourse excluding all involuntary acts.

32. *Id.* at 1027.

33. *Ibid.*

34. *Supra* note 31 at 1028.

Derret is of the opinion that the 'sexual intercourse' must be given a natural meaning which includes only the normal sex act or acts between the spouses. The adulterous conduct or the meaning of adultery under section 10(1) (f) is only narrowed down so as to distinguish it from the term 'living in adultery' which is of more serious type of adultery for which the most serious punishment would be imposed on the guilty spouse by dissolving his or her marriage with the petitioner.³⁵ So 'adultery' under section 10(1)(f) must be understood to mean only a simple or single act or acts of adultery as to constitute a ground for judicial separation which is only a milder and less serious type than that which is required for divorce. It must be more serious form of adultery involving series of acts of adultery or a course of regular conduct on the part of respondent to constitute a ground for divorce.³⁶ It may be for this reason that the use of the word 'adultery' was specifically avoided by the draftsmen of the statute because 'adultery' generally implies a conduct rather than a single act which has been committed by accident under peculiar circumstances. The opinion of Derret seems to be a better and sound opinion with which any one, who cared for rationality and reasonableness, has to agree without any hesitation.

All sorts of confusion and distorted interpretations to clause (1) (f) of section 10 can be thus avoided by giving reasonable construction and rational interpretation to the meaning of this clause. It may also be suggested that, for a single lapse of virtue as a result of circumstances surcharged with emotion and excitement without a corrupt mind on the part of a spouse, may not be regarded as a ground for judicial separation and courts are advised not to jump into an immediate conclusion in such situations. Such a rational consideration is all the more necessary by courts, in view of the changing conditions of the modern society. This cannot, however, be regarded as a general rule, but only an exception under certain peculiar cases which have to be decided by the courts themselves.³⁷

IV

Section 13 (1) (i) of the Hindu Marriage Act provides that, a petition may be submitted either by the wife or husband for a decree of divorce on the ground that the other spouse 'is living in adultery'. The

35. J.D.M. Derret, *Introduction to Modern Hindu Law*, 219 (1963).

36. *Ibid.*

37. *Supra* note 22 at 67.

This view of the author may not be acceptable to many as it goes against the recommendation of the Law Commission which has suggested that only a single act or acts of adultery would be sufficient ground for judicial separation as well as divorce.

use of the term 'is living in adultery', has been subject to different interpretations. It appears from the language of the clause that it contemplates, more serious and continuous course of adulterous conduct on the part of the respondent, and such conduct must have been proved since the solemnisation of marriage till such time when the petition for divorce is submitted. Why the term 'is living' is used in the clause? Why not the word 'adultery' is used? What is the intention of the legislature in clubbing the word 'adultery' with the term 'is living'? What date is to be taken into consideration? Is it the date on which the petition is submitted? Or is it the date on which the decree is granted? More than any thing else, the real issue is at what stage one has to fix the moment at which adultery takes the form of 'living in adultery'. These are some of the issues that agitate the minds of scholars, writers and judges very much while interpreting the term 'living in adultery'.

According to some scholars, the words 'is living in adultery' should not be given a strict or literal interpretation. Grammatically, of course, the term 'is living' does not mean 'was living'. As this clause implies a course of adulterous conduct which a party must be proved to be guilty of since the solemnisation of marriage to the date of the petition, a strict interpretation of this clause would enable a wise and cunning spouse to escape from the operation of this clause, having actually committed a serious form of adultery, by just stopping such conduct for one or day or two days before the date of the petition for divorce.³⁸ Such interpretation is capable of leading to very peculiar situations in which courts may not be successful in fixing up the guilt upon the spouse alleged to have committed the offence so easily and accurately. Whatever be the intention of Parliament a reasonable and rational construction must be given to the term 'living in adultery'. This was supported by Derret who is of the view that there is no hard and fast rule as to the length of time for which the guilty spouse must have lived with the adulterer or aduttes. The establishment of an apparently persistent sexual relationship or association between the participants in the act of adultery must be a sufficient ground for divorce under section 13(1)(i). The intention of Parliament is only to give a reasonable meaning to the term 'living in adultery'. This would be defeated if a narrow legalistic interpretation is given to the term.^{38a}

The real difficulty is, however to relate the adulterous life with the date of the petition for divorce. Most of the scholars, writers and jurists are unanimously of the view that 'living in adultery' cannot be proved easily beyond all reasonable doubts. It can only be inferred from circumstances under which the parties are said to have been guilty of adultery. As it is the general policy of the law of marriage among Hindus to

38. *Supra* note 35 at 229.

38a. *Supra* note 35,

discourage divorce, the law makers must have made it deliberately difficult to prove adultery within the term 'living in adultery'. This makes it clear that the Hindu Marriage Act envisages the possibility of reconciliation and maintenance of morality and Parliament might have intended to avoid easy divorces by prescribing the grounds like 'living in adultery', the proof of which is very difficult.

Thus, the motive for prescribing the condition of 'living in adultery' as the ground for divorce is to give reasonable opportunity to the parties to get reconciled as the single act of adultery can be condoned by either party before it gets deepened in 'living in adultery'.³⁹ For getting a remedy of judicial separation it is sufficient if the petitioner establishes a single act of adultery after marriage on the part of the respondent spouse, whereas for divorce, it is not sufficient even if a number of adulterous acts or stray acts of adultery are proved so as to come within the purview of the term 'living in adultery',⁴⁰ which means a continuous course of adulterous conduct till the time of the petition. How such a conduct can be proved beyond all shadow of doubt, is the billion dollar question that defies a clear cut answer. However, some have come forward with the view that the term implies a sense of continuation of the guilty conduct till such time when the petition for divorce is submitted.⁴¹ Paras Diwan says that such a conduct can be proved only when the continuity of adulterous association coupled with the frequency of acts of sexual intercourse can be established in a particular case. In cases like husband keeping a concubine, or wife becoming a concubine to somebody else, or the husband's or wife's habitual visits to houses of ill-repute, it can easily be established that these are the cases of 'living in adultery'.⁴² But how to prove such type of conduct in the court of law so easily beyond the pale of any doubt. This is the real difficulty.

Further the linking of the adulterous conduct to the date of petition is another difficulty, if one resorts to strict interpretation of the clause. If this opinion is to be accepted, the petitioner spouse has to establish that the respondent spouse is guilty of a continuous course of adultery without any break whatsoever. Does this mean that it should be proved that the respondent spouse must have had series of acts of continual sexual intercourse without any interruption up to the date of the petition for divorce. The legislature would not have even contemplated such a piquant situation. Instead, it must have used the term to denote the gravity of the offence to constitute a ground for divorce, and to distinguish it from a simple or single act of adultery which is a ground for judicial separation. Therefore, the term

39. *Supra* note 14 at 67.

40. *K. Jaganmohan Rao v. Swaroop*, (1972) 2 M.L.J. 77.

41. *Supra* note 29 at 173.

42. *Supra* note 28 at 148.

'living in adultery' must be given a reasonable construction so as to mean only a more serious or grave form of adultery on the part of the adulterer or adulteress, after marriage, but not a continuous course of adulterous conduct since the time of marriage till such time when the petition is submitted. The clause requires an amendment, so as to include 'adultery' only, but not living in adultery. Rationality and reasonableness should prevail over the absurd or unreasonable and distorted interpretations to the clause.

V

Courts are also influenced by the same kind of interpretation as discussed above. The term 'is living' does not mean 'was living'.⁴³ So past adulterous conduct of the guilty spouse even after marriage would not be covered within the meaning of the term 'is living in adultery'. For instance, the Bombay High Court, in *Rajani v. Prabhakar*⁴⁴ observed that the period in which the spouse was leading an adulterous life must be very closely related, in view of proximity of time, to the date on which the petition was submitted. The proximity of time must be so related to the date of petition that the petitioner or the court has had fair chance of believing that the respondent spouse is living in adultery at the time when the petition is submitted. However, regarding the duration of unchaste conduct, the court ruled out an over-circumscribed, or narrow interpretation for explaining the term 'living in adultery'. In this case the court held that the respondent wife is not guilty of living in adultery, as no evidence could be proved to the effect that she continued to live in adultery till such time when the petition was submitted. She was only guilty of adulterous conduct intermittently for some time in 1952 and for some other time in 1953, which constituted only past adulterous conduct, and so it does not come within the meaning of the term 'living in adultery'.^{44a}

The Punjab High Court added further complication to the situation in *Budha Singh v. Amar Kaur*.⁴⁵ The court observed that it is necessary that the adulterous conduct of the respondent spouse should continue not only till the date of petition but also till such time when the decree for divorce is granted. This view is irreconcilable. The facts of the case, however, proved it otherwise as the evidence showed that only a single act was committed three years before the petition was submitted, and the party would be entitled to judicial separation only. Regarding proximity of the date and the period of unchaste conduct, a marginally reasonable period of gap may be allowed by courts between the date on which the adulterous conduct might have been stopped by a particular spouse and the date on which the petition is actually submitted. It may be a week or fifteen days, or at the most one month marginal

43. *Pattavee Ammal v. Mannikn Goulen*, A.I.R. 1967, Mad. 254.

44. A.I.R. 1958 Bom. 264.

44a. *Ibid.*

45. A.I.R. 1962 Punj. 144.

period must be allowed between the two dates. Otherwise, from proximity of time point of view it is very difficult to relate the period of adulterous conduct of the guilty spouse and the date of petition for divorce. Such a marginal period has to be decided by the courts themselves depending upon the circumstances and necessity of the situation in a particular case. Such a period would act as a 'safety valve' to the petitioner spouse so as to prevent a cunning and wise respondent spouse, who is actually guilty of serious matrimonial misconduct, to escape from the operation of the clause (1) (i) of section 13 of the Act, or else the clause must be suitably amended in order to obviate all these difficulties in interpretation. If nothing is done, it is very difficult to decide at what stage exactly a respondent spouse's conduct amounts to 'living in adultery'⁴⁶ unless such a spouse is a debauch, or a notorious adulterer or adulteress. However, black and impure the conduct of a spouse may be, it will not come within section 13 (1) (i).⁴⁷ Even if pregnancy is the result of such conduct or child is born as a result of such conduct, it may not come within the pale of the term 'living in adultery'.

However, in Indian conditions, in view of peculiar customs and traditions, the theory of reasonable opportunity and proximity of time has been adopted by courts to determine the questions of adulterous conduct. For instance, *Devyani v. Kantilal*,⁴⁸ a Hindu wife petitioned for divorce on the ground of her husband 'living in adultery' with another woman. According to the wife, her husband started living with that woman when once she left the Karim Building in Bombay. When his wife questioned him, he started beating her and treated her cruelly. The husband's version was that he had no adulterous conduct with that woman to whom he was only a paying guest, and his wife was also friendly towards her. It was admitted that he was taking food in the house of that woman as a paying guest when his wife left the house, and started living with her parents. But he refused to admit that he had any sort of adulterous life with her. During that period he used to sleep in the lobby except during rains when he has to go inside and sleep. He also contended that mostly he visited that woman's house with his wife but never alone. However, the court held that he was guilty of living in adultery because there was reasonable opportunity for him to have adulterous life with the woman charged with adultery. From this it is clear that mere opportunity would be sufficient ground for presuming the possibility of intercourse without adequate proof of 'living in adultery'.⁴⁹ In *Subbarama v. Saraswati*,⁵⁰ it was observed that English decisions, though provide a very

46. S.V. Gupte, *Hindu Law of Marriage* 194 (1961).

47. *Supra* note 29 at 174.

48. A.I.R. 1963 Bom. 98.

49. *Supra* note 14 at 68.

50. A.I.R. 1964 A.P. 308.

useful guide for basic principles, they cannot be extended to Indian cases where the moral, social and cultural outlook of Hindus are entirely different from that of the English. Yet in another peculiar case, *Rajalingam v. Lingayya*,⁵¹ the husband petitioned for divorce on the ground that his wife is 'living in adultery' with another man. He produced the photographs of his wife with co-respondent in a compromising pose. Despite the evidence that it was only the result of trick photography, strangely enough, the court held, that the wife was living in adultery. Such decisions are very dangerous in the sense that they would encourage cunning husbands to get rid of their innocent wives by resorting to such methods of manipulation and trickery.

From the above discussion it is clear that the interpretation of clause (1) (i) of section 13 of the Act is very difficult to define and it must be reasonably and rationally interpreted. Courts, in this regard must not be clogged by construction or interpretation which can only be justified in alien conditions, but not in the Hindu conditions of life.⁵² It may be suggested that the same act or acts of adultery may be sufficient ground for both judicial separation as well as divorce as in the case of sections 23 and 27 of the Special Marriage Act, 1954.⁵³ The better opinion seems to be that which leaves much discretion to the matrimonial courts to grant the remedy of judicial separation or divorce depending upon the gravity and seriousness of the offence committed, and also the relevant circumstances of a particular case, or else the clause must be suitably amended so as to include only the word 'adultery' as common ground for both judicial separation or divorce, and the court be given discretion to grant the relief according to the merit of the case. This view has been supported by the Law Commission in its *Fiftyninth Report* on the Hindu Marriage Act, and it has been also unanimously accepted by all the participants in the Seminar on the Hindu Marriage Act, and Special Marriage Act held under the auspices of the Indian Law Institute, New Delhi.

VI

How to prove adultery is a delicate and ticklish issue, as no clear answer can be found easily. Adultery may be proved either, directly or indirectly, through direct evidence, or through a strong circumstantial evidence. But proof of it through direct evidence is an impossibility as adultery is a

51. A.I.R. 1967 Mad. 85.

52. S. Venkataraman, *Matrimonial Reliefs under Hindu Law*, XXII S.C.J. 135 (1959).

53. See ss, 23 and 27 of the Special Marriage Act.

secretive sexual intercourse which will never be committed by the parties to it without sufficient precautions. Thus, it is highly improbable to prove it directly by evidence unless it is supported by a strong and convincing circumstantial evidence.⁵⁴ Even if direct evidence is adduced, courts would look at it with disregard and suspicion. As a matter of general rule, adultery can only be proved by presumptive proof based on circumstantial evidence, or by the evidence of access or non-access between the parties alleged to have committed the offence, or by evidence of respondent's visits to brothels or sometimes, by relying on admissions and confessions of the petitioner or respondent, if such admissions or confessions are corroborated by some other reliable piece of evidence, and the facts of a particular case. Very rarely, courts would act upon such evidence uncorroborated by the facts of a particular case.⁵⁵ Courts are called upon to pronounce a decree of divorce or judicial separation only after being fully satisfied beyond reasonable doubt as to the commission of a matrimonial offence,⁵⁶ and on being convinced of the fulfilment of all ingredients of the offence of adultery said to have been committed in a particular situation. Matrimonial courts must also have regard, while exercising the discretion, not only towards the rights and liabilities of the parties but also to the interest of the society, public policy and public morality.⁵⁷

Despite all this, courts find it very difficult to prove adultery. For instance, in English law, to constitute adultery as a ground for divorce, there must be sufficient proof to the effect that there has been at least partial penetration of the male organ into the female organ. Mere attempt to commit the act would not be sufficient, and an act of sexual gratification short of penetration would not amount to adultery.⁵⁸ No one can prove whether there is complete or partial penetration in a particular case objectively, and hence, one must have recourse to subjective approach or presumptive proof through circumstantial evidence. In other words, actually, it is not necessary to establish penetration directly of the male organ into the female organ, it has to be inferred from such circumstances in which a man and a woman are in physical juxtaposition conversing with each other in an atmosphere surcharged with suspicion and secrecy.⁵⁹

Generally courts in India also follow the same reasoning, and the standard of proof also is the same. But, when once they start applying

54. *Kelly v. Kelly*, 5 Beng. LR. 71.

55. *Smith v. Smith*, (1917) 49 I.C. 305.

56. *Preston Jones v. Preston Jones*, (1951) 1 All E. R. 124; *White v. White*, A.I.R. 1958, S.C. 441.

57. *Agnes v. Ashley*, A.I.R. 1964 Cal. 28, at 29.

58. *Raydon on Divorce* (11th Edn.) 1971 at 178.

59. Browne and, Latey *The Law and Practice in Divorce and Matrimonial Causes* 103.

English principles and decisions to Indian situations, while deciding upon the cases of adultery, they must necessarily have regard to the conditions in India, particularly the conditions of Hindu society, its social structure and the values of life—familial or matrimonial—cherished by Hindu spouses, their habits, status and their behaviour, before finally deciding upon the question of adultery. For instance, it would not be unreasonable to infer adultery from a fact situation in which the respondent and co-respondent stayed in one house for a long time conversing with each other in suspicious circumstances in which they have had an adequate opportunity to indulge in sexual intercourse.⁶⁰ English courts would not have regarded the same situation as a case of adultery. In an English case a man and a married girl in a hotel room made all preparations for committing adultery, and still denied to have committed an act of adultery. The wife in this case gave a statement that she and her friend made all preparations but failed to do the act because of some reason or the other.⁶¹ The court believed it, and held that the wife was not guilty of adultery. If that case were to be decided in India, Indian courts would have definitely declared that woman guilty of adultery.

As the chance of proving adultery directly are very rare since it is an offence of secrecy and seclusion, mere opportunity and access to commit adultery would not be sufficient unless it is supported by strong inclination on the part of the parties involved in a particular case. The circumstances of a case must be such that can afford a *'prima facie'* case for adultery and the courts must also be fully convinced to the effect that there is something more than mere opportunity and access to commit the offence.⁶² Therefore, in all cases of adultery, courts have to infer it from the surrounding circumstances in which the parties moved at that moment, undue familiarity between them, their confessions or admissions, if any, existence of suspicious, questionable and improper behaviour, strong inclination to commit the act on the part of the man and woman alleged to have committed the act of adultery.⁶³ Indian courts are thus directed to have regard to the peculiar customs, habits, status of the parties, their general disposition, social and religious background of the community to which the parties belonged before fixing upon the guilt on any particular spouse. For that matter, proof of any matrimonial offence must be beyond all reasonable doubts, which means such proof that precludes every reasonable hypothesis except that which supports it. It need not reach certainty, but it must carry a high degree of probability. Evidence of opportunity is not at all sufficient unless circumstances are such

60. *Samuel Bahadoor v. Roshni Singh*, A.I.R. 1960 Mad. 142.

61. *England v. England* (1952) 2 All E.R. 784.

62. *Supra* note 58 at 184.

63. *Subbarama Reddiar v. Saraswati*, A.I.R. 1967 Mad. 85.

that led to an irresistible conclusion to the effect that the alleged offence must have been committed in such circumstances.⁶⁴ Even if such circumstances from which adultery can be inferred cannot be indicated uniformly and universally as they are varied and diversified depending upon the character, manners, and the general disposition of the parties indulging in an act of adultery.⁶⁵

VII

From the above analysis of the issues regarding proof of adultery, it is clear that no hard and fast rule can be laid down as to which situation and circumstances can afford good proof of adultery. Each case has to be judged from its own facts and circumstances in which it has occurred. The evidence adduced in such cases must be of such character that would induce the guarded discretion of a reasonable and just man to conclude that no other inference other than adultery can be drawn from it.⁶⁶ Further more, the circumstances from which adultery is interred must have relevance to local socio economic conditions of the society in which the parties lived. Courts in India must also have regard to social taboos and cultural mores of the society. The behaviour, manners, status, general conduct and disposition of the parties are also relevant for consideration before matrimonial courts decide upon the issues concerning adultery. Some judges have gone to the extent of warning Indian courts not to follow the English decisions beyond certain limit without having regard to the conditions in India since the conditions in this country are entirely different from those in the western countries.⁶⁷

The foregoing analysis of juristic, judicial and scholarly opinions on adultery makes it very clear that it is very difficult to ascertain the clear meaning of adultery and to prove the same within the framework of clauses (1) (f) of section 10, and (1) (i) of section 13 of the Hindu Marriage Act. Unlike in the other systems of matrimonial law, the Hindu law of marriage makes a clear distinction between the act of adultery as a ground for judicial separation, which results in only a temporary disruption of conjugal life, and adultery, which must be more serious and habitual in character, as a ground for dissolution of marriage or permanent breakdown of marital tie. The legislature seemed to have made it purposely difficult to prove 'living in adultery' under section 13 (1) (i) in order to discourage easy divorces among

64. *Bipinchandra v. Prabhavati*, A.I.R. 1957 S.C. 176; *Lakshman v. Meena*, A.I.R. 1964 S.C. 40; *Pushpa v. Rathashyam*, A.I.R. 1972 Raj. 260.

65. Mulla, *Principles of Hindu Law* 671 (13th ed. 1970).

66. *Bhagwati v. Sadhu Ram*, A.I.R. 1961 Punj. 181; *Pushpa v. Radheshyam*, A.I.R. 1972 Raj. 260.

67. For instance, Chief Justice Ananta narayana gave such a warning to courts in India while deciding the case of *Subbaramareddiar v. Saraswati*, A.I.R. 1967 Mad. 85.

Hindus as a matter of general policy, and in view of the philosophy underlying the Act. However, the lack of clarity and the absence of a simple word 'adultery' in section 10 (1) (f) and the use of the term 'living in adultery' in section 13 (1)(i) made matters unnecessarily complicated giving rise to all sorts of distorted interpretations by courts as well as scholars. Courts have been confronted with great difficulties particularly, in interpreting the term 'living in adultery', and parties in most of the cases have found it very difficult to prove it beyond any reasonable doubt and failed to get the remedy even in genuine cases. The wording of these two clauses is susceptible to raise any number of doubts if one fails to give a fair and reasonable construction to them. The judicial practice also shows clearly the kind of confusion and conflict in ascertaining the clear meaning of adultery particularly under clause (1) (i) of section 13. Finally, the recommendations of the Law Commission are worth consideration in this regard.

The commission has recommended that a single act of adultery would be sufficient to grant a decree for divorce. It has also suggested the deletion of specific mention of grounds under section 10 (1) of the Hindu Marriage Act, in view of the commission's decision to liberalise the law of divorce and to do away with all the maximum periods, prescribed in the statute for divorce.⁶⁸ While agreeing with the commission's views in general, the present writer suggests that the courts in India may be given discretion to grant a suitable remedy, judicial separation or divorce, depending upon the gravity of the situation, seriousness of the offence committed, and the circumstances of each case that comes up before them, on the same grounds enumerated under section 13 of the Hindu Marriage Act, cruelty and desertion be added as grounds for divorce under section 13 in such case section 10 of the Act has to be removed completely from the statute book. In view of the recent trend of the government's policy to liberalise the law of divorce,⁶⁹ and the changing conditions and values of life in the present society, it is necessary that whatever loopholes or lacunae that are there in the Hindu Marriage Act, must be plugged, and suitable amendments to the relevant sections of the Hindu Marriage Act must be made. For that matter, it is expedient to revise all laws concerning marriage and matrimonial reliefs so as to meet the new challenges posed by the present urban industrial and technocological society in which we are living.

68. Law Commission, *Fifty-ninth Report* 56-67 (1974).

69. Recently an amendment Bill to the Hindu Marriage Act, 1955 which is before Parliament makes it very clear that the trend in law is towards liberalising divorce under the Act. The Indian Express, 20th November, 1974. The Law Commission's decision to liberalise the law of divorce was supported unanimously by all the participants in the Seminar held under the auspices of the Indian Law Institute, New Delhi in the month of February, 1975.