

|LAW AUDIENCE JOURNAL|
|VOLUME 1|SPECIAL ISSUE|JULY 2019|ISSN (0): 2581-6705|
|INDEXED JOURNAL|IFI VALUE (2018): 2.06|

|LAW AUDIENCE JOURNAL®|

|VOLUME 1 & SPECIAL ISSUE|

|JULY 2019|

|ISSN (0): 2581-6705|

EDITED BY:

LAW AUDIENCE JOURNAL'S

EDITORIAL BOARD

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“DECriminalIZATION OF ADULTERY: A DRAGONIAN TO THE INSTITUTION OF MARRIAGE.”

**Authored By: Mr. Pranav Kaushal, School of Law, Bahra
University Shimla Hills.**

Email Id: 18pranavkaushal@gmail.com.

Published At: www.lawaudience.com.

I. PROLOGUE:

“A crime is a wrong which affects the security of well-being of the public generally so that the public has an interest in its suspension. A crime is frequently a moral wrong in that amounts to conduct which inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made criminal by Parliament simply because it is a criminal process rather than civil which offers the more effective means of controlling the conduct in question.”¹

Adultery to be an offence or not has always been an elusive question that has plagued the centuries over years. What would be the ultimate solution? Is it to give importance to the demands of few or test the whole section which treats adultery as an offence against the bedrock of those principles which are in accordance with the Constitution of India? The gravamen of the offence of adultery is the injury caused to the spouse, family structure and society and the encapsulation of the offence of adultery is under Section 494 and Section 497 of the Indian Penal Code. The genesis of the adultery states that man transformed itself from unsocial individual to a social being.

The factors which transformed the man into social being were the fear and reciprocity. As human beings more and more social and civil being, the limitation of actions on human beings were increased. Whenever any individual has acted in an unrestrained manner or acted in an unsocial manner he came in conflict with the other members of the society. So in order

¹ HALSBURY’S LAWS OF INDIA, CRIMINAL LAW I 102-03 (Volume 10, 2013).

to avoid the conflict: laws, rules and regulations came into being so as to enforce them and with that the need for the existence of authority to enforce all these also become quintessential. In uncivilised society, there was no criminal law and the result was that every man was liable to be attacked in his person and property at any time by anyone. The person attacked either was empowered or was the person who fails to resist pressure or some other negative forces. The ecclesiastical roots of adultery offences have some basis in the modern world of criminalization where morality has been recognised as a part of the process.

The provision meant only for enforcing sexual monogamy in the marriage but also recognises sexual fidelity which has been considered as the essential part of the marriage. By deterring an individual from engaging in such a conduct that potentially harms the marital relationship; the law of adultery protect the sanctity of marriage considered a value of social good.²

According to the Wolfenden Report³, the society as well the law has given freedom of choice to the each and every member of the society in terms of private morality if the act does not involve corruption, exploitation and does not disrupt public peace and order. As long as the freedom of choice does not suffer from the ambit of vices, nor the law or the state has the right to object it. The action of choosing a partner or living in the adulterous relationship does not come under the freedom of choice principle as the choice that is exercised is violative or in contrast to the rights of the innocent spouse. The right to privacy extends in the matter of marriage, procreation, family relationship, education and thus, in this way the adulterous relationship is not protected under the sphere of the right to privacy.⁴

The right to choose a sexual partner outside the marriage is not free from the impediment. One of the most important tenets in marriage is the right of the spouse to the sexual fidelity. Even the harm principle also states that the only actions that can be averted are the one that creates and cause harm. In simple words, it states that the person can do whatever he wants to

² Abhinav Shekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Social Legal Review, Volume 10, 49-50 (2014), (May 27,2019, 10:00 AM), <http://www.sociolegalreview.com/wp-content/uploads/2015/12/The-Good-the-Bad-and-the-Adulterous-Criminal-Law-and-Adultery-in-India.pdf>.

³ Brit. J Vener Dis, The Wolfenden Report, 33-34 (1957), (May 28, 2019, 08:15 AM), <https://sti.bmj.com/content/sextrans/33/4/205.full.pdf>.

⁴ K.S Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

do as long as his actions or acts do not harm others. If a person's actions only affect him then society which includes the government should not stop a person from doing what he wants. Thus, the harm principle clearly justified that state and society would have complete rights towards curbing the offence of adultery as it harms the spouse of the person in the adulterous relationship. Thus, it can be inferred from the harm principle that adultery falls squarely within the sphere of the definition of crime as stated in the harm principle.

Adultery is not only the action that just affects the two people but it has been considered as a tripartite interplay in which the person which is most affected and aggrieved often kept in the dark and often have no idea of the actions of the adulterous couple. The spouse and the children of the adulterous couple are the greatest sufferers of such kind of relationship despite the fact that they have no role to play in such matters. It is the clear action of harm which harms the pious and most sacred institution of marriage.⁵

II. INJURY CAUSED BY ADULTERY:

Adultery as an offence is injurious to the spouse of the person engaged in the adulterous relationship which causes psychological and tangible harm to the innocent spouse. As per Section 44⁶ of the Indian Penal Code of 1860 defines injury to include any harm illegally caused to another person in body, mind, reputation and property. Experiencing anxiety after an affair is a common trend which is being followed. Whether affair was emotional, physical or whether it was from either side causes an array of emotional reaction that includes loneliness, social isolation and depression.

The same anxiety after being cheated on marriage causes immense stress on the tangible negative side effect on mental health. The sexual fidelity within the marriage is one of the biggest and reliable pillars on which a particular marriage stands despite being changes in the time and place sexual fidelity is still valued and essential component of a marriage. In the

⁵ Joseph Shine v Union of India, W.P (Criminal) No. 194/2017, (India), Written Submission by Union of India drawn by Advocate Balendu Shekhar, Saudamini Sharma and Snida Mehra, (May 29, 2019, 09:30 AM), <https://barandbench.com/wp-content/uploads/2018/08/Adultery-challenge-written-submissions-by-Central-government.pdf>.

⁶ Section 44 Indian Penal Code, 1860 "Injury".—The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

case of *City of Sherman v. Henry*⁷, it was held that “Sexual relationship with the spouse of other are not a right that is implicit in the concept of ordered liberty or deeply rooted in this nation’s history and tradition. Prohibitions against adultery have ancient roots. The distinction between certain private consensual sexual conduct, on the one hand, and adultery on the other hand is that adultery often injures the third person such as spouses and children.”

III. FAMILY- BASIC UNIT OF SOCIETY:

Family and marriage have been considered as the grundnorm and basic tenet for the existence of a particular society. They both have been defined to play a very important and vital role in the foundation of a civilised society. It is the only relationship of marriage that binds the parties together in obligations towards each other. Any affront to this marital bond will also be an affront to society. As a basic unit of a civilised society, family and marriage have been considered as sanctified this has the duty to protect the marital home.

The Honourable Supreme Court of India in the case of *Chetan Dass v. Kamla Devi*⁸ and *Sarla Mudgal v. Union of India*⁹ held that, Marriage is the very foundation of civilised society. The relation once formed the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilisation can exist.

The right of the company of your spouse is an inherent institution of marriage as held by the Honourable Supreme Court of India in the case of *Saroj Rani v Sudharsan*¹⁰.

Thus, it can be inferred that the institution of marriage occupies an important place and role to play in the society and such cannot be an affront by means of an adulterous relationship.

⁷ City of Sherman v. Henry, 928 S.W. 2d 464 (Texas 1996).

⁸ Chetan Dass v. Kamla Devi, (2001) 4 S.C.C. 250 (India).

⁹ Sarla Mudgal v. Union of India, (1995)3 S.C.C. 635 (India).

¹⁰ Saroj Rani v Sudharsan, (1984) S.C.C. (4) 90 (India).

IV. ADULTERY- CRIME AGAINST MARRIAGE AND SOCIETY:

Marriage is an integral part of the society and with the decriminalisation of the adultery as an offence affects the matrimonial right of the spouse and causes mental injury which is considered to be the substantial one. Cheating in marriage causes immense stress and psychological harm which translate it into diseases like anxiety, depression and cardiomyopathy.

Thus, any outsider who intrudes into a marriage relationship has the full and complete knowledge that he is harming the spouse. Adultery as an offence have ecclesiastical genesis but are relevant in today's context as well. Adultery is the violence perpetrated by an outsider with complete knowledge and intention on a family which has been considered as the basic unit of the family.

Even the International Court has considered Adultery as an offence against the marriage. In the case of the *United States of America v. Jason L Taylor*¹¹, it was held that "Adultery strikes directly at the institution of marriage, it often results in the significant disruption to the lives of the two married people and any of the children of the marriage."

In the case of the *Oliverson v. West Valley City*¹², it was held that "Even in areas where privacy is protected not all aspects of a relationship are free from state intrusion or regulation. Adultery is a crime against the public and the criminalization was a proper exercise legislative authority. Adultery is a transgression against the marriage relation which relates the law as endeavours to protect. An adulterous relationship imposes a cost on the non-involved and innocent spouse. Cost may also be incurred by the errant spouse."

In the case of *Commonwealth v. Judith Stowell*¹³, it was held that "Adultery is an offence against marriage and belongs to the class of subjects with each state control in its own way, there is no fundamental personal privacy right implicit the concept of ordered liberty barring the prosecution of consenting adults committing."

¹¹ United States of America v. Jason L Taylor, 62 M.J 636 (1996).

¹² Oliverson v. west Valley City 875 F. Supp. 1465.

¹³ Commonwealth v. Judith Stowell 389 Mass. 171 1983.

V. OFFENCE OF ADULTERY AS A CRIME:

“What is a crime in a given society at a particular time has a wide connotation as the concept of crime keeps on changing with the change in the social, economic and political set-up of the country. The constitution maker foresaw the eventuality and therefore they conferred the powers to the central and state legislature to make law with such regard. Such powers include powers to define a crime and provide for its punishment.”¹⁴

The pious concept of marriage was always the sole concern of religious laws and state interfered only when religion was commanded. With the passage of time, the concept of morality came to be regulated by criminal law as it was entrusted to uphold the public order. The concept of adultery as an offence justify adultery laws by saying that adultery is against the societal standard and in itself an immoral act. There are varieties of moral principles which consist of two classes. The first class consist of those principles which while abiding by them do not impose on others. Then the second class of moral principles includes those moral principles which cannot be derogated from society.

It was held in *Smt. Sowmithri Vishnu v. Union of India &Anr*¹⁵, that it was legislature to consider whether Section 497 should be amended appropriately so as to take note of the transformation which the society has undergone.

VI. GENDER NEUTRALITY MUST BE THERE UNDER SECTION 497:

The 42nd Law Commission Report¹⁶ in the year 1971 has recommended after consultation from the Judges and advocates to retain the provision of Section 497 of the Indian Penal Code. Also the 156th Law Commission Report¹⁷ in the year 1997 recommended the modification of Section 497 on the concept of the equality of the sexes in the following manner, “Section 497: Whoever has sexual intercourse with a person who is or whom he or she knows or has reason to believe to be the wife or husband as the case may be of another

¹⁴ Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569 (India).

¹⁵ Smt. Sowmithri Vishnu v. Union of India &Anr 1985 Supp S.C.C. 137 (India).

¹⁶ THE 42ND REPORT OF THE LAW COMMISSION OF INDIA, INDIAN PENAL CODE, 324 (1971).

¹⁷ LAW COMMISSION OF INDIA, 156TH Report: INDIAN PENAL CODE (1977).

person without consent or connivance of that person such sexual intercourse not amounting to the offence of rape but commits the offence of adultery.”

Also, the Malimath Committee Report of 2003 recommended the same concept that Section 497 shall be amended suitably so as to maintain the equality of sexes. The report of the Malimath Committee report has held that Section 497 of the Indian Penal Code of 1860 shall be amended as per the provision of equality of sexes. The object of the section is to protect and preserve the sanctity of marriage. The decriminalisation of Adultery as an offence will result in weakening the sanctity of marital bond and would definitely result in laxity in the marital bond in the state where many women are still dependent on their spouses and would definitely have an effect on the society as well on children.

In a nutshell, the decriminalisation of the offence of adultery has been considered as draconian to the institution of marriage, the sanctity of family life and right to marriage and right to privacy under Article 21 of the Indian Constitution. The outsider who intrudes upon, violates and injures the fundamental rights and violates the institution of marriage and marital relationship needs to be deterred and punished according to the law.

The Honourable Supreme Court of India in *K.S Puttaswamy’s v. Union of India*¹⁸, held that “Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.”

VII. CONCLUSION:

*“Society abhors marital infidelity”*¹⁹. The primary purpose of section 497 of the Indian Penal Code 1860 is to preserve the sanctity of marriage and such provisions are reflective to the value system in England where marriages were deemed to be monogamous and indissoluble. Thus, with the decriminalisation of adultery as an offence, it has intruded the pious relationship of marriage and has proven draconian to society. Adultery is still a public wrong which causes mental and physical injury to the spouse, children and family and negates

¹⁸ K.S Puttaswamy’s v. Union of India (2017) 10 S.C.C. 1(India).

¹⁹ FLAVIA AGNES, FAMILY LAW AND CONSTITUTIONAL CLAIMS, 50 (Volume 1, 2011).

against the norms of the state. It is an act of wrong which has been done with the knowledge and intention to cause harm to the rights of the innocent spouse. Thus, there is always the requirement of law which prevents the crime, but with the decriminalization of adultery, the institution of marriage and marital relationship is at stake. The criminalisation of adultery justified an effort on the part of the state with the morality represented by sexual fidelity in marriage.

Thus, adultery would again be reconsidered as an offence as adultery as an offence has been quite effective in achieving the social control in terms of the sanctity of marriage and preservation of the aspect of the norms of the society.

“Adultery is not only the action that just affects the two people but it has been considered as a tripartite interplay in which the person which is most affected and aggrieved often kept in the dark and often have no idea of the actions of the adulterous couple. The spouse and the children of the adulterous couple are the greatest sufferers of such kind of relationship despite the fact that they have no role to play in such matters. It is the clear action of harm which harms the pious and most sacred institution of marriage.”²⁰

²⁰ Written Submission of Union of India in the case of Joseph Shine v. Union of India, supra note 5 at 8.