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**"DECRIMINALIZATION OF ADULTERY WILL ENDANGER THE INSTITUTION OF MARRIAGE?"**

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**I. HISTORY OF ADULTERY:**

Before going into the discussion of the aforementioned topic we have to see how the concept of adultery was initially institutionalized in society and became a very essential part of society. The origin of the word "Adultery"<sup>1</sup> is from a French word "avoutré" which itself evolved from a Latin verb "adulterium" which means to corrupt.

Adultery was coined as a term for the wife corrupting the concept of marriage by having a relationship outside the marriage. In India, the concept of adultery as it was mentioned in the Indian Penal Code, 1860 under section 497 was in the context of the Victorian morality where a woman was eventually considered the property of the husband and the offence was committed by the adulterous man against the husband.

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**I.1 ENGLAND:**

Initially, in England husband and wife were regarded as a single legal entity, this concept is also known as "The Doctrine of Coverture". Under this doctrine, a husband subsumed the legal rights of his wife. A married woman could not own property, execute legal documents; enter into a contract, etc. She could not even retain a salary for herself; everything she owned belonged to her husband by the virtue of the doctrine of coverture.<sup>2</sup> The same theory was

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<sup>1</sup> The New international Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopaedic Edition, Trident Press International (1996 Edn.) at page 21.

<sup>2</sup> Fernandez, Angela "Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity." Married Women and the Law: Coverture in England and the Common Law World, edited by Tim Stretton and Krista J. Kesselring, McGill-Queen's University Press, 2013, pp. 192-216.

adopted by William Blackstone in his commentary “Laws of England”<sup>3</sup>. The doctrine of coverture was also discussed by Bracton, who was a medieval period writer. He wrote that the husband wielded power over the wife, being the rulers and custodian of their property. The institution of marriage came under the jurisdiction of ecclesiastical courts.<sup>4</sup>

He explicitly says that the wives were made to live in the shadows of the husbands.<sup>5</sup> Adultery was used as a means to obtain a divorce as it was not possible to obtain a divorce through a civil court and neither divorce came under the jurisdiction of the church.

The origin of adultery was discussed for the first time in *Pritchard vs. Pritchard*<sup>6</sup>, which also talk about the Doctrine of Coverture. Even in the Victorian era, the status of women after marriage was the same and they were denied of their very basic rights.<sup>7</sup>

The plight of the women during the Victorian Era was also spoken by Lord Wilson in his speech titled “Out of his shadow: The long struggle of wives under English Law”<sup>8</sup>.

Criminal Conversion as a tort under the English Law gained importance from the remnants of coverture which allowed the husband to claim damages against a man who is involved in a sexual relationship with his wife.

The consent of the wife didn’t even matter for the husband to claim compensation from the adulterous man. The legal position of matrimonial wrongs underwent a change with the passage of Matrimonial Causes Act, 1857 in England. Section 59<sup>9</sup> of the act abolished the

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<sup>3</sup> Blackstone’s Commentaries on the Laws of England, Books III & IV (8th Edn.), 1778.

<sup>4</sup> Cahir Davitt, Vincent Grogan, Gerard Clarke and Gerard Sheehy; “Some Aspects of the Constitution and the Law in Relation to Marriage”; [https://www.jstor.org/stable/30087273?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/30087273?seq=1#page_scan_tab_contents) (last viewed on 12.6.19 at 13:00 hours).

<sup>5</sup> Bracton: De Legibus Et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England attributed to Henry of Bratton, c. 1210-1268) Vol III, pg. 115.

<sup>6</sup> Fredrick John Pritchard vs. Margaret Florence Pritchard, [1966] 3 All E.R. 601.

<sup>7</sup> Margot Finn (1996). Women, Consumption and Coverture in England, c. 1760–1860. The Historical Journal, 39, pp 703-722.

<sup>8</sup> The High Sheriff of Oxfordshire’s Annual Law Lecture given by Lord Wilson on 9 October 2012.

Available at: <https://www.supremecourt.uk/docs/speech-121009.pdf> (last visited on 30.05.2019 at 14:00 hours).

<sup>9</sup> Matrimonial Causes Act, 1857, Section 59: No Action for Criminal Conversation: “After this Act shall have come into operation no Action shall be maintainable in England for Criminal Conversation.”.

Common Law action for “Criminal Conversion”, but Section 33<sup>10</sup> of the same Act gave the husband the right to claim damages from adulterers and thereby ended up enforcing adultery as it was before and kept wives as a property of husbands.

Later on, with the passage of Matrimonial Causes Act, 1923 gender equality was recognised and adultery was made available as a ground for divorce to both the man and the woman. In England, adultery has always been a civil offence and was never considered as a criminal offence.

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### I.II INDIA:

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In India, the Indo-Brahmanic traditions that prevailed regarded chastity of women as her prime virtue which was to be closely guarded. The objective was to ensure that the husband remained in control of the sexuality of the wife conforming her to purity.<sup>11</sup> This also took all the autonomy from women, regarding their own actions, be it in terms of education or marriage or a sexual partner.

Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties and could not be constituted as a criminal offence and hence adultery was not present in the first draft of the Indian Penal Code in 1837.<sup>12</sup> However, the other members of the commission came out with the view that the remedy for Adultery under common law would be insufficient for the poor people in India, who would have no recourse against the

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<sup>10</sup> Matrimonial Causes Act, 1857, Section 33: Husband may claim Damages from Adulterers: “Any Husband may, either in a Petition for Dissolution of Marriage or for Judicial Separation, or in a Petition limited to such Object only, claim Damages from any Person on the Ground of his having committed Adultery with the Wife of such Petitioner, and such Petition shall be served on the alleged Adulterer and the Wife, unless the Court shall dispense with such Service, or direct some other Service to be substituted; and the Claim made by every such Petition shall be heard and tried on the same principle, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversations are now tried and decided in Courts of Common Law; and all the enactments herein contain with reference to the hearing and decision of Petitions to the Courts shall, so far as may be necessary, be deemed applicable to the hearing and decision of Petitions presented under this enactment..”

<sup>11</sup> Uma Chakravarti, *Gendering Caste Through a Feminist Lens*, STREE Publications (2003) at page 71.

<sup>12</sup> 156th Report on the Indian Penal Code (Vol. I), Law Commission of India at para 9.43 at page 169.

Available at: <http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf> (last viewed on 30.05.2019 at 15:00 hours).

paramount of their wives.<sup>13</sup> The debate that took place in order to determine whether adultery should be a criminal offence in India was recorded in ‘Note Q’ of ‘A Penal Code prepared by the Indian Law Commissioners’<sup>14</sup>.

The existing laws were considered to be inefficacious for the husband to take matters in his own hands and not making adultery a criminal offence may sanction to immorality. Colonel Sleeman opposed the reasoning of ‘poor countrymen’ and said that if adultery is not made a crime, the adulterous wives will alone bear the brunt of the rage of their husbands<sup>15</sup>, and hence Section 497 was drafted.

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## II. HOW ADULTERY IS TREATED IN CONTEMPORARY COUNTRIES:

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Before addressing the issue, we need to see how adultery is treated in contemporary countries and international jurisprudence. Adultery has been defined differently across the world. Some states require the act of adultery to be “open and notorious”<sup>16</sup> whereas some require cohabitation of the adulterer and the adulteress, etc.

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### II.I UNITED STATES OF AMERICA:

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Out of 50 states in the United States 17 holds adultery as a criminal offence under the state laws.

In *Oliverson vs. West Valley City*<sup>17</sup>, the state of Utah adultery was challenged against privacy and violates the substantive due process of law under the U.S. Constitution. The court held that adultery is against the institution of marriage which the law seeks to achieve and thereby upholding adultery. Whether criminal charges can be levied on the offence of adultery, the

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<sup>13</sup> A Penal Code prepared by The Indian Law Commissioners, (1838), The Second Report on the Indian Penal Code.

<sup>14</sup> A Penal Code prepared by The Indian Law Commissioners, (1838), Notes of Lord Thomas Babington Macaulay, Note Q.

<sup>15</sup> A Penal Code prepared by The Indian Law Commissioners, (1838), The Second Report on the Indian Penal Code.

<sup>16</sup> Illinois Criminal Code, 720 ILCS 5/11-35, Adultery “(a) A person commits adultery when he or she has sexual intercourse with another not his or her spouse, if the behaviour is open and notorious...”.

<sup>17</sup> Oliverson vs. West Valley City, 875 F. Supp. 1465.

court opined that the rationality of the crime must be considered. In the state of North Carolina, adultery is not considered as a criminal offence.<sup>18</sup>

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## II.II CANADA:

Section 172 of the Criminal Code of Canada imposes criminal sanctions for adulterous acts.<sup>19</sup> Even adultery is considered a valid ground for divorce in Canada under Section 8(2)(b)(1) as it constitutes breakdown of marriage.<sup>20</sup>

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## II.III MALAYSIA:

In a country like Malaysia, there are two outlooks on adultery. Adultery is a criminal offence under the Islamic Laws whereas for non-muslims adultery is considered a civil offence under Law Reform (Marriage and Divorce) Act, 1976. But in the case of divorce, the situation in Malaysia is the same as in Canada as adultery is considered a valid reason for divorce as it constitutes a breakdown of the marriage.<sup>21</sup> But interestingly in Malaysia, both the aggrieved parties, i.e., either of the spouses can claim damages for adultery.<sup>22</sup>

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<sup>18</sup> Hobbs vs. Smith, No. 15 CVS 5646 (2017) [Superior Court of North Carolina].

<sup>19</sup> Criminal Code of Canada, 1985 [Canada], Section 172, “(1) Everyone who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. (2) For the purposes of this section, —child means a person who is or appears to be under the age of eighteen years.”

<sup>20</sup> Divorce Act, 1968 [Canada], Section 8, “(1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage. (2) Breakdown of a marriage is established only if: (a) .... (b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage, (i) committed adultery, or ....”

<sup>21</sup> Law Reform (Marriage and Divorce) Act, 1976. [Malaysia], Section 54(1)(a), “54. (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say: (a) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent ...”

<sup>22</sup> Law Reform (Marriage and Divorce) Act, 1976. [Malaysia], Section 58. “58. (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so. (2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery. (3) Where damages have been claimed against a co-respondent— (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element.”



#### **II.IV JAPAN:**

Adultery in Japan was somewhat similar to Section 497 of the Indian Penal Code in India. It punished only the woman and the adulterer on the basis of a complaint filed by the husband. In the case where adultery was committed with the consent of the husband, there can be no valid demand for prosecution.<sup>23</sup> But this provision has been deleted.<sup>24</sup> Adultery is only a ground for divorce in Japan according to the civil code.<sup>25</sup>

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#### **II.V SOUTH AFRICA:**

In South Africa the Constitutional Courts struck down the concept of adultery in the judgement of *DE vs. RH*<sup>26</sup>, relying on its earlier judgement *Green vs. Fitzgerald*<sup>27</sup>, which stated that the offence of adultery has fallen in disuse and has ceased to be regarded as a crime. But the court noticed that cases of adultery were very common in South Africa and reports of divorce on the basis of adultery are almost daily published in the newspapers.

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#### **II.VI TURKEY:**

In a country like Turkey, the offence of adultery was struck down as a part of Turkish Penal Code 1926 by the constitutional court<sup>28</sup> as it was violative of the Right to Equality which is guaranteed by the Turkish Constitution as it treats men and women differently.

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#### **II.VII SOUTH KOREA**

In South Korea, adultery was decriminalized in the famous Adultery Case of February 26, 2015<sup>29</sup>. It was decriminalized as it was violating Article 10 of the Constitution which

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<sup>23</sup> Penal Code, 1907 [Japan], Section 183, “Whoever commits adultery with a married woman will be punished by prison up to two years. The same applies to the other party of the adultery. These offences are only prosecuted on demand of the husband. If the husband has allowed the Adultery, his demand is not valid.” [ as translated by Karl-Friedrich Lenz, in History of Law in Japan since 1868, ed. Wilhelm Rohl, published by Brill, 2005, at page 623].

<sup>24</sup> H. Meyers, —Revision of Criminal Code of Japan| Washington Law Review & State Bar Journal, Vol. 25, (1950) at pp. 104-134.

<sup>25</sup> Civil Code, 1896. [Japan], Article 770, “Article 770 (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce: (i) if a spouse has committed an act of unchastity; ....”.

<sup>26</sup> DE vs. RH, (594/2013) [2014] ZASCA 133 (25 September 2014).

<sup>27</sup> Green vs. Fitzgerald, 1914 AD 88.

<sup>28</sup> Anayasa Mahkemesi, 1996/15; 1996/34 (Sept. 23, 1996).

promotes Right to Personality, pursue happiness and self-determination. The right to self-determination includes the right of freedom to choose sexual activities and partners. The court found it difficult to find a reason as to how the criminalization of adultery safeguarded monogamy-based marriage system, good sexual culture, etc.

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### III. PREVIOUS CHALLENGES TO ADULTERY IN INDIA:

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Section 497 was first challenged in India for the 1<sup>st</sup> time in *Yusuf Abdul Aziz vs. State of Bombay*<sup>30</sup>. It was called into question that section 497 contravened Article 14 and Article 15 of the Constitution of India on the grounds that if the wife was involved in the act of adultery, she cannot be pressed with any charges. The Constitutional bench of The Supreme Court of India held that Section 497 was a special provision for the woman which is safeguarded under Article 15(3) of the Constitution of India which is an enabling provision.

Later in *Sowmithri Vishnu vs. Union of India*<sup>31</sup>, Section 497 was again challenged on the ground that only the husband was given the right to prosecute the adulterous man and no such right was given to the wife of the adulterous man. The three-judge bench of the Supreme Court of India stated that they could not see any legal ground of the petition. Moreover, it is for the legislature to decide whether section 497 should be amended aligning to the transformation, the society has undergone, thereby not decriminalizing Section 497.

In *V. Revathi vs. Union of India*<sup>32</sup>, the Supreme Court of India upheld the constitutional validity of Section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure. The view taken by this court is that the inability for the husband to sue the wife should be equated with the inability of the wife of the adulterous man to sue her husband.

At last in the landmark judgement of *Joseph Shine vs. Union of India*<sup>33</sup>, the five-judge constitutional bench of the Supreme Court of India declared Section 497 of the Indian Penal

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<sup>29</sup> Adultery Case, 27-1 (A) KCCR 20.

<sup>30</sup> Yusuf Abdul Aziz vs. State of Bombay, 1954 SRC 930.

<sup>31</sup> Sowmithri Vishnu vs. Union of India, (1985) Supp SCC 137.

<sup>32</sup> V. Revathi vs. Union of India, (1988) 2 SCC 72.

<sup>33</sup> Joseph Shine vs. Union of India, AIR 2018 SC 4898.

Code to be ultra-virus as it violates Article 14, Article 15 and Article 21 of The Constitution of India.

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#### **IV. CURRENT CHALLENGES TO ADULTERY IN INDIA:**

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In India today, the law relating to adultery is premised on the outdated notion of marriage. The law is not only biased on the husband's right to the fidelity of his wife but also treats the wife merely as a chattel of her husband. Such a gender-discriminatory and proprietary oriented law is contrary to the spirit of the equality of status guaranteed under the Constitution of India. It is proposed to evaluate the present law on adultery in the light of the current notions of marriage and mutual obligations of wife and husband arising thereunder<sup>34</sup>.

The law unequivocally says that the adulteress wife holds no criminal responsibility in any capacity. Thus, making 'Adultery' an offence relating to marriage. The sympathetic and charitable view of the weakness of women back in the era when these laws were written. Adultery is not something that qualifies as an offence equivalent to murder, rape or any other heinous crime, but it relates to the internal matters of a marriage, hence, it should be dealt with in the same manner as any other matrimonial issue.

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#### **V. JOSEPH SHINE CASE VS. SOWMITHRI VISHNU CASE:**

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Both the cases were great developments in the matter of adultery, one back in 1985 ruled out by Justice Yeshwant Vishnu Chandrachud, and the other one in 2018 ruled out by Justice Dhananjay Chandrachud. Almost the very same arguments as in Sowmithri Vishnu were raised in Joseph Shine against Section 497(1) as it confers upon the husband's right to prosecute the adulterer but, it does not confer any right upon wife to prosecute the woman with whom her husband has committed adultery; (2) it does not confer any right to the wife to prosecute the husband who has committed adultery ; and, (3) it does not take in cases where the husband has sexual relations with an unmarried woman, a divorcee or a widow, with the result, giving a free licence under the law to have extra-marital relationship with unmarried

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<sup>34</sup> K. I. Vibhuti; "Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective; (2001) 6 SCC (Jour) 16.

women; and (4) the section is a kind of 'Romantic Paternalism', which stems from the assumption that women, are subsided by men and is the husband's property. These arguments were dismissed by Justice Y V Chandrachud, he called the arguments to be highly appealing emotionally but there are no legal foundations, where these arguments can rest upon.

It was held that a penal provision cannot be held unconstitutional merely because it punishes man alone. "It is commonly accepted that it is the man who is the seducer and not the woman"<sup>35</sup>.

Hence, the other arguments were also dismissed on the same grounds that women are the one suffering in both ways, be it the wife or the woman with who, the offence has been committed. He labelled the discrimination when it comes to the trial of only men under section 497, under the head of "positive discrimination", considering the plight of women in that era.

Later, in a turnaround of events, all the above arguments found favour with the Supreme Court in Joseph Shine, declared by the three-judge bench. Justice D Y Chandrachud affirmed sexual autonomy and gender equality in stark contrast with the 1985 judgement, speaking for the three-judge Bench observed that by definition, the offence of adultery can be committed by a man and not by a woman. The court construed the plea of the petitioner as amounting to a suggestion that the definition should be recast in a manner that would make the offence gender neutral<sup>36</sup>.

The three-judge bench strongly adjudicated against the perpetual subordinate nature of a woman in a marriage. The law originally passed was ahead it's time considering the protection of women from all types of oppressions that prevailed at that time, but as the times have changed and women hold an equal share in the development of the nation, and them excelling in all the areas, amendment to such laws is a need of the hour. Accepting all the

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<sup>35</sup> Sowmithri Vishnu vs. Union of India, (1985) Supp SCC 137.

<sup>36</sup> Joseph shine V. Union of India, AIR 2018 SC 4898.

above arguments, the judgment of Justice D Y Chandrachud has overruled Sowmithri Vishnu.

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## **VI. CONCLUSION:**

The epicentre here is, whether decriminalizing adultery will endanger the institution of marriage or not. We personally think that adultery itself endangers the institution of marriage and doesn't require adultery to be a criminal offence. Adultery itself is a reason for divorce in almost all contemporary countries and India is not an exception to it, hence adultery should be treated as a civil wrong and not a criminal wrong which imposes criminal sanctions. Adultery should be a ground for divorce, alongside treating both the parties to a marriage equally responsible in case of observance of such act and without considering the marital status of the unfaithful partner. Decriminalising adultery will not enfeeble the roots of marriage, but it will remove the discrepancies of the established law, which favours the wife in the light of positive discrimination and beneath the surface treats women as the chattel of men.

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## **VII. RECOMMENDATIONS:**

We think that the legislature should revise the laws in force of civil nature regarding adultery and thereby granting equal rights to men and women by allowing either of them to bring a civil suit in the court of law and thereby grant a divorce for that matter. The foundation of the law was feeble in itself; hence, it did not serve the purpose of the law equally to both the genders.

The law should be observed in civil matters relating to matrimonial issues, eliminating the gender discrimination in the institution of marriage, because if it is a crime, it is an equal crime for either of the genders and should not restrain to a particular case.