

DE JURE NEXUS LAW JOURNAL

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Decriminalization of Adultery**WHAT IS ADULTERY?**

Adultery is taken from a Latin word 'adulterium,' which means 'having extramarital sexual acts between a married person and someone who is not the person's spouse (sexual relations outside of marriage – between a married woman and a man other than her husband). It is considered objectionable on social, religious, moral and legal grounds. Not only in Hinduism, but also in Christianity, Islam and Judaism adultery is considered to be objectionable and a single act of sexual intercourse with someone else's wife is sufficient to constitute adultery.

HISTORICAL PUNISHMENTS FOR ADULTERY:

The Code of Hammurabi in the 18th century BC in Babylonia provided punishment of death by drowning for adultery. In ancient Greece and in Roman law, a female offender spouse could be killed, but the men were not severely

punished. Till the 18th century, many cultures considered adultery as a very serious crime and very severe punishments were given either to the man or the woman and sometimes to even both of them. Heavy penalties were charged to them, including capital punishment, mutilation and even torture.

But from the 19th century onwards, beginning from the Western countries, awarding such punishments has been discouraged and till the date, the countries which still offers punishments for adultery the punishments ranges from fine to caning and capital punishments.

From the 20th century, laws of adultery have become more controversial and even most of the Western countries have decriminalized adultery as an offence.

In Muslim countries, where Sharia law is followed for criminal justice, the punishment for adultery is stoning, including Iran and Somalia for both men and women adultery cannot be tolerated.

Marriage is an indissoluble sacrament according to the Ancient Hindu Law and even wife's adultery could serve the legal tie and dissolve the marriage. But in the Modern Hindu Law, divorce can be granted to the either offended party of one spouse is living in adultery.

In today's date, talking about the Asian countries, then Philippines is one of those nations, where adultery is still considered as an offence. It is considered as a 'crime against chastity' under the Revised Penal Code of the Philippines and is treated as sexual infidelity in the Family Court. In Philippines, both husband and wife can be punished for committing adultery. The wife and her partner can be punished for up to six years in jail and also the husband can be charged if the wife proves that he has sexual relations outside the marriage or has lived together with his mistress in any other place and hence husband can

be imprisoned for up to four years and one day, while his partner can be banished but faces no jail.

HOW DID THE PROCESS OF DECRIMINALIZATION OF ADULTERY BEGUN?

The International organizations have called for the decriminalization of adultery. The head of the United Nations expert body charged with identifying ways to eliminate laws that discriminate against women or are discriminatory to them in terms of implementation or impact.

Adultery in India:

Section 497 of the IPC¹1860 was dealing with adultery. In India, adultery was considered to be *“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment of either description for a term which may extent to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor.”*

However, the judgment sentenced by the Hon’ble Supreme Court of India on 27th September, 2018 defunct adultery, i.e., ‘Adultery is no longer a Crime.’ The Supreme Court called adultery unconstitutional because it ‘treats a husband as the sole master.’ However, the judgment of the Supreme Court also stated that it (adultery) is still considered as a Civil Offence and it can be ground of

¹ IPC – Indian Penal Code

Divorce, factor in property settlement, custody of children, denial of alimony, etc.

Petition to decriminalize Section 497 in India:

Section 497 was a part of the British laws during their times in India. They criminalized adultery, but did it so complicatedly, that it stated that only the man and not the woman who was engaged in adultery was punished for the offence (even though it was consensual). Debates, arguments and cases against Adultery was seen in India since 1954, saying that the ‘laws are supposed to be gender neutral.’ Finally, in 2017 the Supreme Court had accepted the PIL² under article 32 of the Indian Constitution to completely strike down Section 497, along with Section 198(2) of the Criminal Procedure Code, 1973, because of its problematic interpretations.

For Section 497 it was stated that *“It imposed culpability on a man who engages in sexual intercourse with another man’s wife.”* The man was punished with a maximum imprisonment of five years and the woman was exempted from the prosecution.

For Section 198(2) it was stated that *“only the husband may file a complaint for the offence of adultery.”* It was seen that only the husband has the right to bring a prosecution against the other man and hence the women had no individual identity for her own self.

It was during the 42nd report of the Law Commission of India Report in 1971 and the Malimath Committee on Criminal Law Reforms of 2003 which had recommended amendment in the adultery law, but the report was asking to

² PIL – Public Interest Litigation

amend the law in such a way that the law becomes gender neutral for both the parties (both man and woman.)

Concerns relating to Adultery according to the Malimath Committee:

- This law is not gender neutral.
- Section 497 does not allow the woman to file a complaint against her husband, when he had cheated her by having sexual intercourse with another woman.
- Section 497 treated a married woman as her husband's chattel and this provision was a reflection of the social dominance of men that was being faced by the women for over 150 years due to this law.

Details of the Case:

Judges (Five bench)– Justice Indu Malhotra, Justice D. Y. Chandrachud, Justice Ajay Manikrao Khanwilkar, Rohinton Nariman and Chief Justice of India Justice Deepak Misra.

Case Name – Joseph Shine V/S the Union of India

Case Number – WP (CrI.) 194/2017

It was argued that Section 497 violates two articles of the Indian Constitution, namely which states as follows:

- 1) **Article 14** – *“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”*
- 2) **Article 15** – *“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”*

After this, the court had reviewed the correctness of the precedents – Yusuf Abdul Aziz, *Sowmithri Vishnu and V. Revathi*.

But still, even after the amendment in this case, the new law merely makes the woman a victim and thus ‘creates a dent on the individual independent identity of the woman.’

In some cases, both the partners agree to accept sexual relations by either partner with others are sometimes referred to as an open marriage or the swinging lifestyle. Both these forms of marriage are of non-monogamy and it doesn't matter that whether the spouses would not view the sexual relations as objectionable, but extra-marital relations could still be considered as a crime in legal jurisdictions.

However, in the petition filed by Joseph Shine before the Supreme Court strongly opposed the decriminalization of adultery. He only wanted the court to struck down Section 198 of the Code of Criminal Procedure, 1973 and make this law as a gender neutral, because this law violated Article 14 of the Indian Constitution and prohibited wives from filing a suit of complaint against her husband who had cheated on her by committing adultery, because they fail the test of reasonable classification as they carve out arbitrary classifications in favour of the husband. The Section created an arbitrary classification between an aggrieved husband vis-à-vis an aggrieved wife. It also created an arbitrary classification between a married and an unmarried woman and this altogether violated the Article 14 of the Constitution of India.

Again in this year on 27th September 2020, there are many arguments to review the 2018 judgment, but the Supreme Court has refused to review its judgment,

which was again a five bench judge led by the Chief Justice of India Justice Sharad A. Bobde.

DISADVANTAGES OF DECRIMINALIZING ADULTERY:

- As everyone is equal before the law, so decriminalizing this law would have an impact on all the married couples over India and the fallout of the marriages cannot be ignored and hence there are chances of increased number of cases in extra marital affair, which will lead to conflicts in the families.
- There are already so many cases of out breaking of marriages due to n number of reasons and hence adding a law that does not punishes adultery may lead to an increase in the number of divorce cases.
- If divorce happens between the couple, so there are chances that there might be a negative impact in the upbringing of the children as the parents have been separated because of having extra marital affair.
- As we all live in a society and human being is a social animal, so many experts thing that decriminalization of the adultery might destroy the institute of marriage and family and may also destroy the Indian culture by adopting Westernization.
- Due to mental stress and mental pressure there are chances that the number of suicides might also increase.

What will happen to the children born out of Adultery?

As there would be breakdown of marriage and the future of the children born out of adultery will be affected, so while the Hon'ble Supreme Court was

striking off Section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure, should have laid down some provisions for the children who would be born out of adultery.

The parental roles in the upbringing of the children cannot be ignored and underestimated. The breakdown of the marriage and families will play a major role in the psychological factors of the children and there might be cases that those children when are grown up may also adultery with their partner.

At first, the in an institution like marriage, no one should cheat his/her partner.

Secondly, the elders involved adultery should think about the innocent child involved in it who was born out of the sins committed by them. There was no involvement of the child in that relationship, so there should be laws for the child born out of adultery, so that his/her rights are not violated on being innocent.

What if one of the spouses commits suicide? What would be the Rights to Prosecution?

It is well understood that decriminalizing such a law would lead to mental stress on the families involved and the spouse would be under going through an extreme pressure and might end up committing suicide.

So the Supreme Court stated that – *“If any of the spouse would commit suicide because of the adulterous relationship by the other spouse, then one would be able to prosecute under Section 306 of the Indian Penal Code, which related to Abetment of Suicide.”*

Countries which still consider adultery as an offence:

Not only countries in Asia, but there are many countries around the world which till date consider adultery as an offence. Some of them are – China, Saudi Arabia, Pakistan, South Korea, Taiwan, the United States, etc.

CONCLUSION

Before decriminalizing adultery, the Hon'ble Supreme Court should have thought upon the consequences of the future results. Because now the only remedy available for the couple is that they go on for a divorce when they find their partner guilty of adultery. This decriminalization will not lead to destroying marriages and hence it would affect not only the couples involved but also destroy the families involved in the case, which would at last end up effecting the children in the family and the society in altogether.

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