

Adultery And Its Decriminalization: An Overall Overview

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Introduction: -

The marriage is an institution of all the forms of human society which is a part of human civilization. Marriage has both moral and legal sanctity in the society. It is considered as the deepest as well as the most complex of all human relations because it is a complex task for two persons to lead their life with each other specially when they have their different understanding, behavior and way of living. Marriage is the bond that holds the two persons together in the society. The Marriage is like the glue gum which holds two persons of different nature. The health of Indian culture, its citizens and their children are ultimately linked to the success of marriage. Marriage is a social institution that gives sanctity to man and woman to lead their life peaceful in a family. It is a stable relationship in which a man and a woman are permitted to live together without losing their status in the family and as well as in community. Marriage gives a real gathering among man and women for sex. Sex outside marriage is not seen with acceptable eyes in India regardless of whether there is no lawful complaint against it. Marriage is not only concerned with the two persons who marry but it affects the whole society and future generations too. It entrusts a couple with heavy and delicate responsibility which bears a social significance within the community. In fact, it is very important for society to maintain because it gives future generation a stable and caring environment. When two individuals enter into the beautiful bond of marriage automatically the rights and duties in such beautiful relation develops. Marriage is not only living together but their togetherness itself forms an organization in which they make promise to stand with each other in each and every aspect of life. Marriage is one of the universal institutions which form the corner stone of the society and it is only because of this marriage a family is formed and it is the fundamental duty of the government is to preserve and protect it. In **Smt. Sarla Mudgal, President v. Union of India & Ors**,³ it was held that the basic foundation of a society is marriage and all communities and religions are interested in maintaining it. The basis of family is marriage which results in the society so the basic pillar of marriage should be protected.

Family is the foundation of all human civilization and it is only in the family children learn to become

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³ 1995 AIR 1531, 1995 SCC (3) 635

a responsible citizen. children learn how to act and what society expects from them. If we go to our childhood memories almost in every society child plays a game called as “home-home” in which they play the role of father, mother even of children despite of being younger. Even though sometimes they have a mock fight. During their play they do such acts which are deep rooted in their minds. Thus, we can say that it is the way they have been brought to believe in. They are taught and will always be taught that there are many up and downs in life and there is a companion in our life who is with us throughout these ups and downs. Thus, we can say behavior of a child is directly linked with a marriage system and it is only this child who makes the future of the nation. so we have to take care of the child to lead them a beautiful smooth society. Jeremy Taylor commonly known as Shakespeare of Divines, a famous poet stated that “Marriage is the mother of the world, and preserves kingdoms, and fills cities, churches and heaven itself. It is that state of thing to which God has designed the present constitution of the world”.⁴ Therefore, in order to maintain the smooth functioning of the society there are few things which are important to maintain and marriage is one of them. In fact, it is very important for society to maintain because it gives future generation a stable and caring environment. Marriage and family are regularly viewed as premise of society. Adultery always destroys that peaceful environment. It is a thing which disturbs one’s family life and threatens the stability of the institution of marriage and automatically creates the uncertainty about the offspring’s paternity. infidelity is a strong rupture of trust agreement. According to Ruth Karras Adultery is a thing which casts doubt on the paternity.⁵ Committing adultery means to do a breach of trust that too consciously and thus a deliberate encroachment to the sacred conjugal guarantees which morally need to be respected and protected. It is however worth to note that an individual who is committing adultery is already of a clear view that the individual in question is damaging the essential standards of the institution of marriage and that of the general public and more over believability and credibility of marriage is being targeted. Infidelity may not be seemed as a serious misconduct or it may not have any apparent effect on the society but it plays a good turmoil in the lives of the individuals concerned. Infidelity may not be gravest of violations as viewed by many people and demanded that it should not be a criminal offence but it brings out the absolute gravest results. It may not pose any direct threat to the peaceful survival of society as in the other cases of crime such as murder, theft, dacoit, grievous hurt, rape, public tranquillity, defamation etc. but it is having the indirect effect on the society. The person committing infidelity is constantly aware of the fact that if some way or another his/her husband or wife will come to know about the illicit relation, he/she won't take it easy, it is sure that such individual should confront a ton of anger by the family and by the society too. No doubt Laws keep on changing with the change in time like Section 377 I.P.C, 1860 which deals with homosexuality is not an offence in India now but the Arrangement of permissible sexual relationship needs a social authorization, practices like polygamy, polyandry, Muta marriage, Slave Keeping were observed as a practice in olden days but now such sexual relations are not permissible because of no social authorization. The act of adultery is hard to follow out from the history.

1.1 DEVELOPMENT OF LAW OF ADULTERY IN INDIA

In India, the provision on “Adultery” has picked up discussion from its beginning. Section 497 Indian Penal Code (hereinafter referred as I.P.C) is a pre-constitutional law, drafted before a 150-year ago, in 1860 and it continued to function in the same form as it was passed till the initiation of the Constitution of the Republic in 1950. At that time Lord Macaulay, the main architect of I.P.C was from the very beginning against the insertion

⁴ Gunjan Jain, “Significance of Marriage as social Institution in Indian English writings”,1 SVS 1 (2019).

⁵ Sara Mcdougall, “The opposite of the double standard: Gender, Marriage and Adultery prosecution in the late Medieval France” 23 JHS 1 (2014).

of Section 497 of IPC as a penal offence. He was of the view that Adultery is a private wrong and not a criminal offence and suggested that it should be left to the society for taking care of but in my view, he forgot to think in such a way that law and society are interdependent on each other and to run a smooth society there is a need of making laws. That was the reason why section 497 I.P.C did not even find any mention in the first draft of the code which was set up in 1834 and headed by Sir Thomas Macaulay. His reason to keep it out of the purview of the penal code was based on the collection of the opinions and facts from all the three presidencies Viz. Bengal, Bombay and Madras. Based on the evaluation from three presidencies, he reached to the conclusion that the population is divided into two groups .one group consists of those people whose feelings are badly affected by the act of adultery and their feelings cannot be satisfied by giving them any kind of punishment and another group consist of those people whose feelings are not much hurt and can be satisfied by payment of money. Under such circumstances, providing any kind of punishment for adultery is of no use and instead of inserting it as a criminal wrong he suggested that it should be treated only as a civil wrong.⁶ He concluded his words as “It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes - Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all and Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it is best to treat adultery merely as a civil injury”.⁷

However, while drafting the Indian Penal Code, the Second Pre- Independence law commission which was established in 1853 headed by Sir John Romilly were of a different view, they recommended that the act of adultery should not be omitted from the code and keeping the condition of women in consideration only the male offender was made liable for punishment. This recommendation was reviewed in 1860 by which section 497 was incorporated in the legislation as “ 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 extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor" and this section was put under chapter XX of Indian Penal Code which deals with offences relating to marriage.⁸ The argument by second law commission regarding the exemption of wife from punishment was different, they stated that the purpose of insertion of adultery as an offence and punishing only a man alone was to prevent a Man from taking the advantage of woman who is starving for the love and affection of her husband and secondly to prevent a Man from keeping sexual relations with the wife of some other man thus controlling the sexuality of wife and thereby conforming her to purity. Thus, the old concept of adultery that women was considered as the property of husband continued with it, so if some third party tries to steal that property, then he was prosecuted for that and the same concept was applied in sec 497 IPC, according to which we were punishing the third party and not his wife even not as an abettor.

In relation to section 497 I.P.C, section 198 of Criminal Procedure code 1973 (hereafter referred as Cr. P.C) had made an obligation on court not to take cognizance of such offence unless the complaint is made by the husband because only the husband was considered as an aggrieved party to such offence. Section 198 Cr.P.C runs as: - "(1) No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code, except upon a complaint made by some person aggrieved by the offence.(2) For the purposes of sub-

⁶ Ankit Jain, “Overview of Section 497 On Adultery” 4 *IJLD* 65 (2018).

⁷ K.I. Vibhute, “Adultery in the Indian Penal Code: Need for a Gender Equality Perspective” 6 *SCC (Jour)* 2(2001).

⁸ Id at 37

section (1) no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the court make a complaint on his behalf".⁹ Thus, when we read section 497 I.P.C with 198 Cr.P.C it clearly states the unequal status of wife and husband in the same institution of marriage. From the date of its enactment, it is spinning into debatable arguments on a few things, for example, its Gender bias approach, uniformity relating to punishment and solid contentions had been raised either for its maintenance, change, or complete removal from penal statutes. Other than Indian Penal Code there was one more legislation in India known as Ranbir Penal Code, 1932 which was applicable to the State of Jammu and Kashmir. According to this legislation too adultery was considered as a criminal offence but according to this section wife was punished as an abettor thus punishing the both.

Then major improvement was made by the Fifth law commission in its 42nd Report in 1971 which called for gender neutrality under section 497 I.P.C. They suggested that the special privilege given to women by exempting her from punishment should be put to end as there is no valid justification "for not treating the guilty pair alike" and the punishment given under this section should be reduced from 5 years to 2 years. They made recommendation as follows: - "20.18. After much discussion and careful consideration, we are of the opinion that the exemption of the wife from punishment under section 497 should be removed, that the maximum punishment of five years imprisonment prescribed in the section is unreal and not called for in any circumstances and should be reduced to two years, and that with these modifications, the offence of adultery should remain in the Penal Code". However the joint select committee placed the revised section as "Whoever has sexual intercourse with a person who is, and whom he or she knows or has reason to believe to be the wife or husband as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse not amounting to the offence of rape commits adultery and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both".¹⁰ Mrs Anna Chandi who was one of the distinguishing members in the 42nd law report observed:- "The wife being considered the husband's property, the present provision reserves for the husband the right to move the law for punishing any trespass on it, while not giving the wife any corresponding right to complain against any transgressions on the part of or relating to her husband. Perhaps to make amends for this harsh discrimination, the present section provides that the wife should not be punished along with the trespasser. The removal of this exemption clause does not cause damage to the basic idea of the wife being the property of the husband. On the other hand, it merely restates the idea, and adds a new dimension to it by making not only the trespasser but the property also liable to punishment. This, as noted before, can hardly be considered a progressive step".

After this in 1978, the amended bill of Indian Penal Code provided the amendment of section 497 but the bill was not passed by the legislature. The draft bill in its clause 199 stated:- "Whoever has sexual intercourse with a person who is, and whom he or she knows, or has a reason to believe to be the wife or husband as the case may be, of another person, such sexual intercourse not amounting to the offence of rape commits adultery and shall be punished with imprisonment of either description for a term which may extend to 5 years or with fine or with both".¹¹ This draft bill has a different view from 42nd Law Commission Report in two ways, firstly this bill provided the punishment for both irrespective of the gender and secondly it considered this act as more serious crime thus retained the maximum punishment of 5 years.

⁹ Id at 38.

¹⁰ Law Commission of India, Forty- second Report on Indian Penal Code (June, 1971).

¹¹ K. I Vibhute, *PSA Pillai's Criminal Law* 779 (LexisNexis Butterworth Wadhwa, 10th ed., 2008).

In 1997, the fourteenth Law Commission in its 156th report on the I.P.C endorsed the proposal that changes suggested by the Joint Select Committee in its revised Section 497 IPC be made in Section 198(2) Cr. P.C. In 2003 Committee on Reforms of Criminal Justice System under the chairmanship of Dr. Justice V. S. Malimath recommended that law should not be gender bias but should be gender equal and the wife who plays the equal part in such act should also be punished as an abettor. They suggested that section 497 should be amended as “ Whosoever has sexual intercourse with the spouse of any other person is guilty of adultery”. They were of view that the object of this section is to preserve the sacred relation of marriage and there is no justification that women who plays an equal part in adulterous act should not be equally treated.¹² In 2006 National Commission for women oppose these recommendations when center tried to make a move and stated that keeping the ground reality of women in mind it should be retained as an offence and both the parties should be allowed to claim divorce on such basis and further suggested that it should be de- criminalized. Finally, in 2017 a writ petition was filed in Supreme Court by Joseph Shine challenging the constitutional validity of section 497 I.P.C when read with section 198 Cr. P.C. The petitioner claimed that it is the violative of Article 14,15(1) and 21 of the Constitution of India but the constitution bench of five judges on 27 September 2018 unanimously decriminalize Section 497 and stated that right to privacy is a fundamental right under article 21 and “Sexual privacy is an integral part of right to privacy”. Moreover, husband is not the owner of wife and she should be dealt with dignity.

1.2 Constitutional validity of Section 497: - The constitutional validity of section 497 I.P.C read with section 198(2) Cr. P.C was challenged by Joseph Shine¹³. It was argued that Section 497 violates articles 14 and 15 of the Indian constitution.

Article 14¹⁴ states that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15¹⁵ states that: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

The Hon'ble S.C Court stated Husband is not the owner of wife and both husband and wife should have equal governing parameters. It is the time to say bye to all historical perceptions. Section 497 of I.P.C is arbitrary and unconstitutional under Article 14 of the constitution of India. Adultery will still be considered as a valid ground for divorce. The problems which an aggrieved person was facing with respect to Section of 497 I.P.C as:

- 1) The need of gender-neutral law because according to this section only the man was punished and no legal action was taken towards woman even, she was not punished as an abettor.
- 2) Man was considered as a seducer and the married women as merely ill-fated victim despite of having an active hand in sexual intercourse
- 3) According to Section 497 of I.P.C, any woman whose husband had sexual intercourse with another woman outside the wedlock has no right to file a complaint against him because she was not considered as an aggrieved person.
- 4) Moreover, the adultery law in Indian Penal Code reduces the value of woman, she is considered as an object because there was no need of consent of the married woman for a man to have sexual intercourse with her but at the same time if the husband of a woman agrees to have a sexual intercourse, then the act is not a crime.
- 5) A married man is having an immunity, he may establish sexual relationship with an unmarried woman, a

¹² Government of India, *Committee on Reforms of Criminal Justice System* (Ministry on Home Affairs ,2003).

¹³ Joseph Shine v. Union of India (2018) SCC 1676.

¹⁴ Article 14 of Indian Constitutional Law.

¹⁵ Article 15 of Indian Constitutional Law.

widow, or a divorcee and such act doesn't come under the purview of adultery even though such a sexual link is equally potential to wreck marriage between him and his wife.

S.NO	Who is involved in sexual intercourse?	Whether it amounts to adultery or not?	Who has the authority to file a criminal case?	Who will be punished?	Who will be exempted from punishment?
I	Married Man + Married Women	Adultery	Husband of Married Woman	Married Man	Married Woman
II	Unmarried Man + Married Woman	Adultery	Husband of Married Woman	Unmarried Man	Married Woman
III	Married Man + Unmarried Women or Divorced Woman	Not committed adultery	None	No application of this Section	
IV	Unmarried Man + Unmarried Woman or Divorced Women	Not committed adultery	None	No application of this Section	
V	Married Women + Married Man or Unmarried Man	Yes, but without the consent of husband.	Husband of married husband.	Married Man or Married Women	Married women, Married Man and, Unmarried Man but if done with the consent of Husband.

Thus Section 497 I.P.C when read with Section 198 Cr. P.C signifies the unequal status of Husband and Wife within the institution of marriage. It declares that

2. Husband of the adulteress wife was considered as an aggrieved party and being a care taker of the married

woman at the time of committing adultery, he is authorized to make a formal complaint.

3. wife is precluded from making any formal complaint against her adulteress husband or against the adulteress woman.

In order to make a person criminally liable for adultery following ingredients should be there:

- 1- There should be the lawful marriage between the parties that is between the Complainant and the Adulteress.
- 2- The adulteress should be lawful wife of another man.
- 3- The Adulterer must have had sexual intercourse with wife of another man without her husband's consent.

1.3 Analytical study of decriminalization of Adultery: -

Decriminalisation of adultery law is a matter of great concern and people have expressed their views relating to decriminalisation. Some of the views are as: -

- Delhi Commission for Women (DCW) Chairperson Swati Maliwal on 01/10/18 stated that most of the women who used to come to DCW are those women who have been cheated by their husbands. She further added that the judgement on Section 497 IPC will only accelerate the pain of women. By striking down the criminalization of adultery law the “sanctity of marriage” will be undermined. It is equal to the giving of an open license to all for committing adultery. Instead of making sec 497 gender neutral, criminalising it both for men and women they have decriminalised it totally. She further added “How come the decriminalisation of adultery be right and if this is right then what is the sanctity of marriage”. Then they should put ban on marriages too.¹⁶
- Bipin Rawat (Army Chief) on 11/1/2019 stated that we cannot accept the decriminalization of adultery as it is a serious crime. He further added that no doubt army is conservative but we love to remain conservative rather than accepting westernization in the form of decriminalization of adultery. We will continue to take action against the people who commit the offense of adultery. He stated that they are unhappy with the Hon'ble Supreme Court Judgement on decriminalization of adultery. He stated “stealing the affection of a brothers officer's wife” is a heinous crime and for that there should be a harsh punishment. They further stated that we the officers and the army men stay faraway from our loved ones for months and during that period others look after our families. There should be some harsh punishment for the people who care for them with another unacceptable purpose. In august 2019 one army person posted in Jammu and Kashmir who was allegedly having adulterous relationship with the wife of a retired officer, was brought back to his position after abolition of adultery law. The proceedings were initiated by General Court Marshal in march 2016. Therefore Hon'ble Supreme Court quashed the General Court Marshal's findings in the recent incident of decriminalization of adultery. He further added that the judgement has altered the Indian family structure into the western culture which will result in the increasing number of broken homes.¹⁷

¹⁶ SC ruling in adultery : Remarks by DCW chief Swati Maliwal are indication of state of marriage available at <https://www.firstpost.com/india/sc-ruling-on-adultery-remarks-by-dcw-chief-swati-maliwal-are-an-indication-of-state-of-marriage-5296321.html> (visited on 5th October 2021).

¹⁷ Army wants adultery to remain offence for discipline in its ranks available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.msn.com/en-in/news/newsindia/army-wants-adultery-to-remain-offence-for-discipline-in-its-ranks/ar-AAGZUKL&ved=2ahUKEwjaqc7YysblAhUBtY8KHd_fBq0QFjALegQIBhAB&usg=AOvVaw08TMNmky0cHBhjf2NAEtj&cshid=1572527969140 (Visited on 08 October 2021)

- Abha Singh in his Magazine (Outlook) on 27/09/2018 expressed her view and stated that the decriminalization of Adultery can have a far-reaching impact on millions of families as it directly impacts the institution of marriage. First point is that it can lead to the extra marital affair and giving the remedy of this problem like divorce will accelerate the breakdown of marriages. Second point is that the effect of broken homes is mostly on children and Hon'ble Court has not taken any remedy in consideration for such children born out off or effected by such adulterous relationship. Third point is that the Court has given the right to prosecute under Section 306 of I.P.C which means that there will be the increasing tendency of suicide incidents in marital disputes. He strongly stood against the abolition of Section 497 I.P.C. He further stated that petition was filed for striking down of Section 198(2) of Cr. P.C which make arbitrary classification between husband and wife, Married and unmarried women and for making amendment to Section 497 of I.P.C.¹⁸
- Dipesh Nepal, A student from Tripura University was of the view that the decriminalization of adultery law may destroy families. As ethics and morals are decreasing day by day therefore in my view there is a need of a strict law which restricts people from breaking families and for preservation of institution of marriage. Decriminalization of Section 497 of I.P.C will only raise the problem in future¹⁹
- Shalini Lobo from Chennai in Indian today on 1/10/18 highlighted the first incident of suicide after the supreme Court decriminalized the Adultery. 24 years old women from Chennai committed suicide after the Hon'ble Supreme Court abolished the Adultery law. As when the wife found his husband having extramarital affair and started opposing the same, he in turn replied her that now she has no right to stop him from having extramarital affair as the Court have decriminalized the Adultery, now Adultery is not an offence anymore.²⁰

1.4 Adultery as an offence an international scenario: -

If we go through the penal code of different countries or to the antecedent's adultery was considered as a crime in most of the countries. let us go through the penal provisions of some of the countries where adultery is a crime.

Ottoman Penal Code: - According to Article 188 of the Ottoman Penal Code 1858 if any man found his wife or any relative women who is within the prohibited degrees of relationship, commits adultery with any man and if he has beaten, killed or injured any one of them or both of them then such person will be exempted from adultery. We can say adultery is such an unbearable act that it is a type of exemption to murder.

Algeria Penal Code: - According to article 279 of Algeria Penal Code 1991 if any spouse finds his or her partner in an adulterous relation and at such surprising moment, he/she murders or beats other spouse then such

¹⁸ Decriminalization of Adultery- A Setback to the institution of Marriage in India available at <https://www.outlookindia.com/website/story/decriminalisation-of-adultery-a-setback-to-the-institution-of-marriage-in-india/317282> (visited on 18 October 2021)

¹⁹ SC's Verdict on Adultery Law does not promote infidelity, it encourages gender Equality available at <https://www.youthkiawaaz.com/2018/10/scs-verdict-on-adultery-law/> (Visited on 3rd November 2021)

²⁰ Women commits suicide after husband justifies extra marital affairs available at <https://www.indiatoday.in/india/story/woman-commits-suicide-after-husband-justifies-extramarital-affair-citing-sc-verdict-1353315-2018-10-01> (Visited on 5th November 2021)

partner is subjected to excuse. This article of Algeria penal code is same as the exception I of section 300 of Indian penal code. The act of adultery can be covered under the purview of grave and sudden provocation.²¹

Canada criminal Code: -According to the criminal code of Canada 1985 adultery is a criminal offence which endangers the basic morals of a child and by such adulterous act the home of a child becomes an unfit place to live. Section 172 of the code states that everyone whether male or female who is having a family and indulges in the adultery, sexual immorality or is in habit of drinking such person is guilty of an indictable offence and shall be liable to an imprisonment for not exceeding 2 years. According to section 8(2)(b)(1) of Canada divorce act 1968 it is considered as a valid ground for divorce as it constitutes breakdown of marriage.²²

Philippines: - According to article 333 of the revised penal code adultery is committed by a married woman and a man who is not her husband and such man knows that she is married still engages in sexual intercourse with such married women Thus if husband proves that her wife is in adulterous relation then both of them will be punished with imprisonment for two years, four months and one day which may extend to six years. On the other hand, if any husband is having sexual intercourse with any women who is not her wife, then such act comes under the definition of concubinage which is defined under Article 334 of revised penal code. Thus, if wife proves that his husband is involved in such act, he will alone be punished for six months and one day which may extend to 4 years and one day and the guilty partner is send away from that country or from particular place.

United States of America: -In united states out of 50 states almost 21 states hold adultery as a criminal offence under their state laws. In new England the puritan colonialists were so much concerned with the moral corruption that they consider adultery with a married woman as a capital offence. After the eighteenth and nineteenth century many states decriminalizes adultery and many states still follows it. In North Carolina for addressing the act of adultery they allow the claims of intentional infliction of emotional distress or claims of negligent in which the spouse who is involved in adultery can be held liable for the damages too. In almost 30 states adultery is considered as a ground for divorce and is also considered as a breach of marriage in which one fails to meet the marital responsibilities of his or her partner. Generally, courts deny the adulterous parent's custody as adultery can have a bad impact on children and contributes the moral unfitness of a parent. In U.S adultery is considered as a reason of provocation which can mitigate the penalization of a person for the criminal act and the same is considered in India too. Thus, adultery is considered as such act which one spouse cannot bear and in a heat of passion can kill their partner as well as the person with whom they are in adulterous relation that is why it is considered as a reason for mitigating the penalization or for decreasing the sentence. In U.S adultery is still considered as a crime and is a punishable offence with one-year imprisonment.²³

1.5 Religious View about adultery: -

The concept of marriage is there in almost all religions and all religions in their own words give importance to the loyalty of both husband and wife. The word loyalty includes the honesty, trust on many things especially

²¹ Extracted provisions from the penal codes of Arab states relevant to crimes of honour, *available at:* <https://www.soas.ac.uk/honourcrimes/resources/file55421.pdf> (visited on March 1, 2021)

²² Soumyadip Ghorai, "Decriminalization of Adultery will endanger the institution of Marriage?" *LAJ* 8 (2019).

²³ Alyssa Miller, "Punishing Passion: A Comparative Analysis of Adultery Laws in the United states of America and Taiwan and their effects on Women" 42 *FILJ* (2018).

not making any sexual relation with any person other than their spouse. There is no religion in the world which is against the concept of marriage, even the atheist is interested in marriage and want to settle down to make a family. Adultery is an ancient delict and was never accepted by the society from the historic times. It is the prohibited act from the religious point of view too. No religion welcomes the concept of adultery and thus considers marriage as a pious thing. Adultery is considered as a breach of duty from the very ancient period and has been punished and prosecuted from centuries. If we go through legal history, it reflects that not only the Muslims, Hindus, Christians but the Jews too recognize the act of adultery and was punishable act more than we can imagine. Religion is a strong source of healthy family functioning. Thus, the person who enters into the beautiful bond of marriage on the basis of their belief on religion are more likely to take marriage as a sacred thing which may likely decrease the chance of marital infidelity. Let us go through the concept of adultery from different religious perspective.

Muslim Law: - According to Muslim law marriage is a civil contract between two parties. Under Muslim law the main purpose of marriage is procreation of children and to legalize the sexual intercourse. According to Muslim law adultery is considered as a breach of duty. The Islamic law is basically a divine law for all the Muslims, having its roots in the sayings of Allah which are embodied in the holy Quran. According to Islamic law adultery is considered as a vile act as it is stated in Quran Surah Al-Israh, Verse 32 “And do not go near adultery; indeed, adultery is a cruel act and a bad road”. In the early days of Islam, the punishment for Zina was confinement in the house or the corporal punishment. According to Quran (4: 15-16) it states “and those of your women, who commit illegal sexual intercourse, take the evidence of four witnesses from amongst you against them; and if they testify, confine them to houses until death comes to them or Allah ordains for them some other way, and the two persons who commit illegal sexual intercourse, hurt them both”. Further you should not feel pity while handling such case as it is a punishment prescribed by almighty Allah, if you believe in Allah and the last day then let the party who believe in Allah witness their punishment.

Christianity: - According to Christians marriage is a relationship which is established by God. It is the uniting of body and a sole of a woman and a man into a single organism. Jesus says “they are no longer two, but one. Therefore, what God had joined together, let man not separate”. The relationship of marriage is emphasized with love, faithfulness, commitment, trust and is considered as a spiritual and sacred. It is the adultery which breaks the spiritual and sacred bond. Jesus said “To the married I give charge, not I but the lord that the wife should not separate from her husband and the husband should not divorce his wife”. Thus, divorce was never a part of divine drive.²⁴ It is stated in Bible that the person who commits adultery shall be punished by stoning (Deut.22:20-24; Lev. 20:10). Both the New Testament as well as the Old Testament passages are against the marital infidelity and regard it as a grave sin.²⁵In Bible of Matthew5, verse 27-28 states “you heard that it has been said, do not commit adultery”.²⁶According to Leviticus 20:10 “If a man commits adultery with another man’s wife or with the wife of his neighbor then both the adulterer and the adulteress should be put to death”. Deuteronomy 5:18 and Exodus 20:14 clearly states that one should be faithful to their spouse and should not commit adultery.²⁷

²⁴ Chung Gwen Joo “Marriage and Sexuality in terms of Christian theological education” 174 *Procedia - Social and Behavioral Sciences* 3943 (2015).

²⁵ Are There Religious Variations in Marital Infidelity?, *available at: <https://journals.sagepub.com/doi/10.1177/0192513X07304269>* (Visited on 5-04-2021).

²⁶ Supra at 3

²⁷Deuteronomy 5:18, *available at:*

Sikhism: - According to Sikhism marriage is a sacred union of two human beings and not a social contract. In Sikhs code of conduct as well as in the holy scripture the sexual relation outside the marriage is strongly condemned and is described as a deadly sin and a destructive evil. A person who is a true Sikh of Guru Nanak have an ethical living and considers other women as sister, mother or daughter. He stated as “Attached to another's woman and other's wealth and slander, they eat poison and suffer pain”. He also stated that “As an unchaste woman, who gives her body to a stranger and for the sake of lust or money whose mind falls unto another's power is never satisfied without her spouse, so is the man of duality.” Once Guru Gobind Singh was asked a question relating to the relationship of a marriage.in return Guru Gobind Singh uttered the following words: - That when I reached to the age of understanding my father namely Guru Tegh Bahadur gave me some instruction it was like “O my son as long as a person is alive and there is a life in body, marriage should be taken as a sacred duty and one should love their own wife more and more. The people who think it is their great cleverness to enjoy with another's wife they are fools it shall result in the death like the dogs”. Guru Gobind Singh has clearly stated that adultery is a prohibited act for both men as well as for women. His teaching for his followers is as: - “Par nari ki sej, bhul supne hun na jaiyo.” That means a person who is a true Sikh should not approach to the bed of some other women not even in his dreams. Guru Arjan Dev, the fifth Guru of Sikhs has stated that: - “The man who is lustful and sensuous has a desire of more and more women and his habit of spying in another’s home will never cease. He cannot distinguish between good and bad. Bhagat Namdev, a holy man has stated as “The blind -man abandons the wife of his home, and has an affair with another's woman”. Thus, it is clear that Sikhism is strongly against the unethical practices which effects the marital bond and disturbs the family peace and opens the door of defamation.²⁸

Buddhism: - This religion was expanded by Gautama Buddha and his teachings were mostly based on liberating the people from the sufferings. Devotees of this faith reaffirm their faith in five principles called Panchsheel which are as: - Don’t take life, don’t steal, don’t commit adultery, don’t lie and don’t consume liquor or other intoxicants.²⁹ Accordingly to Sutta Nipata 123 adultery is described as “Whoever has illicit affairs with the wives of his relatives or friends, either by force or through mutual consent, he is to be known as an outcast”.³⁰

Hinduism: -In Hinduism the historic evolution of law relating to Adultery (Strisamgrahana) can be inferred from the Dharmasutras. The concept of involving in sexual relationship outside the beautiful bond of wedlock is considered as a sin is somehow related to the Vedic texts. If we go through the dharmasutras like Apastamba dharmasutra, Baudhayana dharmasutra, Gautama dharmasutra, Vasistha or even through the smriti we find that the act of adultery has always been looked upon as a criminal offence in India, but punishment for such an act was regulated by the caste of the offender. In Mahabharata, the evil effects of adultery are intensely illustrated through stories and tales. the prohibition of adultery is somewhere laid down clearly and at other times it has been seen by way of consequences of such act. It is stated in Mahabharata that having sexual relation with the guru’s wife is a grave offence. Alike kutilya, in Mahabharata too guru’s wife is considered as a mother that is why it was deemed as a grave sin and requires execution of such a wicked sinner.³¹ Going through the evolution

<https://www.biblegateway.com/passage/?search=Exodus+20%3A14%2CLeviticus+18%3A20%2CDeuteronomy+5%3A18&version=NASB> (visited on 5-04-2021)

²⁸ Dr. Arvinder Singh, “Sikhism & The Crisis of Modernity- Extramarital Relationships” 3 *IJAR* 987-990 (2015).

²⁹The Buddhist Core Values and Perspectives for protection challenges: Faith and Protection, *available at:* <https://www.unhcr.org/50be10cb9.pdf> (last visited April 15,2021)

³⁰ Ankit Jain, “Overview of Section 497 On Adultery” 4 *IJLD* 65 (2018).

³¹ Id at 149

of adultery yajnavalkya has also played a part next to Manu. The rules relating to sexual offence were more specific and clearer in yajnavalkya as compared to Manusmriti. He gave more clear definition of adultery and elaborates which actions constitute adultery. He further stated that if a man and women are involved in a forbidden and illegal sexual relationship then both should be punished.

1.6 Judicial View about decriminalization of Adultery: -

The constitutional validity of adultery law was challenged from time to time in different cases and there was a constant striking on fulfilling the equality clause relating to Section 497 of I.P.C. some of the highlighted cases are as: -

In **Yusuf Abdul. Aziz v. The State of Bombay**³² the Section 497 of I.P.C was challenged on the basis that it is violating the provisions of Article 14 and 15 of the Indian constitution. The Court held that Article 14 of Indian constitution is a general provision for all and must be read with other provision which set out in the scope of Fundamental Rights. The Court held that sex is a reasonable classification and Article 15(3) of the Indian constitution provides special treatment to women and child. However, Court was of the view that they can't see any restrictions as such, nor they agree with the petitioner's contentions that it gives licences to women to commit crime. The Court held that Article 14 and 15 of the Indian Constitution when read collectively will legalize the impugned clause in Section 497 of I.P.C.

Oliverson v. West valley city³³

It was held that the areas in which right to privacy is protected does not mean that such area is free from state regulation and interruption in all aspects of relationship. The act of adultery is a big criminal offence which is against the matrimonial relationship. The criminalisation of such act is a proper exercise of a legislative authority. The act like adultery impose cost on such person who is innocent and non-aware of such criminal acts.

Sowmithri Vishnu v. U.O. I,³⁴ the petitioner opposed that Section 497 of I.P.C is in contravention of Article 14 and 15 of Indian Constitution. It does not confer any right to a woman to sue his husband for committing the offence of adultery nor the wife can take any action against the person who had sexual intercourse with her husband. Moreover, it gives free licence to husband for having sex with the unmarried women as it does not amount to adultery according to Section 497 of I.P.C. The Apex Court rejected these contentions by stating that restricting the class of offender does not mean that the constitutional provisions are infringed. It was further stated that if no such provision is incorporated for hearing wife in Section 497 of I.P.C that does not mean she is stopped at all. If she wants, she can move an application to the trial Court, the opportunity of being heard will not be denied to her. If Sec. 497 will be obliterated from the statute book, then adulterous relations will have a freer play than now. Section 497 of I.P.C doesn't violate the provisions of Article 14 and Article 15 of the Indian constitution. The Hon'ble Court quashed the complaint and dismissed the writ petition.

³² 1954 AIR 321, 1954 SCR 930

³³ 875 F. Supp.1465

³⁴ AIR 1618 1985.

V.Revathi v. Union of India³⁵. In this case, the petitioner presented almost same arguments which were made in the case of Sowmithri. The issue before the Court was the constitutional validity of Section 198(2), Cr. P.C 1973, which gives the right to husband to sue the person who is in adulterous relationship with the adulteress and the same right was not given to the wife of the adulterer. She stressed that whether the husband is permitted or not to make a complaint against his unfaithful wife but the wife cannot be legally disabled from making a complaint against her unfaithful husband. The Court held that under criminal law it does not allow either of the spouse to prosecute each other. According to Section 198(1) of Cr. P.C when read with 198(2) of Cr. P.C wife is not allowed to file a criminal case against her husband. The Court however held that it is in favour of women and not against her as this section doesn't punish her, so there is a reverse discrimination.

W. Kalyani v. State Thro' Inspector of Police and another³⁶

In this case the Hon'ble Court has recognised the gender bias in Section 497. The Court observed that the provision is currently under criticism from certain quarters for showing a string gender bias for it makes the position of a married woman almost as a property of her husband. A Section which spreads oppression of women is unsustainable in law, and cannot take cover under the pretext of protective discrimination.

Joseph Shine v. Union of India³⁷, Petitioner challenged the constitutional validity of Section 497 of I.P.C and Section 198(2) of Cr. P.C. The Hon'ble Supreme Court laid down that the beauty of India Constitution is that it includes I, you, and we. So, the real meaning of it can only be achieved when women are treated equally with men. Husband is not the owner of wife and both husband and wife should have equal governing parameters. It is the time to say bye to all historical perceptions. The Hon'ble supreme Court further stated that there is a need to adopt transformative constitutionalism, the precedents binding nature shall not be allowed. New parameters should be adopted for deciding women's rights. women cannot be considered as a property for men as the Section 497 of I. P C is the reflection of social dominance. It makes no sense if the man gives consent for sexual relationship outside the wedlock, then it is not any offence. Section 497 of Indian Penal Code is arbitrary law as it does not give permission to wife for filing criminal case against her husband or against the person with whom he is in adultery but gives right to husband to file case against third party with whom his wife is in adulterous relationship. At the same time Section 497 of I.P.C guarantees power to wife to take civil action if the adultery is proved. Adultery is considered as a valid ground for divorce and husband is also having such rights, so this provision is arbitrary as it protects women from one side and not from other sides. Hence Section 497 of I.P.C is arbitrary and unconstitutional under Article 14 of the constitution of India. The Hon'ble Supreme Court is of the view that the desire, identity and choice are important features of women dignity. The Honourable Supreme Court refers to the case of **K.S putta swamy and another v. U.O.I and others**³⁸ in which it was held that right to privacy under Article 21 of Indian Constitution is a fundamental right. The control of the patriarchy over daughter and control of husband over wife is the curtailment of sexual autonomy which is incompatible with the constitution. The main objective is to restore the dignity and honour of both the sexes and bring them on equal footing. Adultery can be a civil wrong so, it can be a ground for divorce and cannot be a criminal offence. Moreover, if any partner that is husband or wife commits suicide because of adulterous relationship of the partner then it is to be considered as abetment to suicide. The act like adultery does not come within the

³⁵1988 A.I.R 835.

³⁶ (2012) 1 SCC 358

³⁷ (2019)3 SCC 39

³⁸ (2017)10 SCC

purview of crime. If it is treated as crime then it means the interference in privacy of marital sphere. Hence, Section 198 of Cr. P.C which deals with the filing of complaint with respect to adultery is also unconstitutional. The decisions in Sowmithri Vishnu, V. Rewathi and W. Kalyani are overruled.

Thus, we can say that there was continuous striking for gender neutrality from time to time. Although, law relating to adultery was gender bias but the Hon'ble Supreme Court instead of making it gender neutral with respect to both men and women completely scrapped it from penal statute and held it unconstitutional and finally struck it down.

1.7 Criticism: -

The decision to decriminalize Adultery in India does not seem to be based on established principles of criminal jurisprudence because it has led to chaos and confusion in the minds of common people and has also disturbed the social order as public opinion and the Indian culture has not taken into consideration. On one hand India is heading towards growing gender equality and on the other hand snatching this right by providing divorce and alimony the ultimate justice to the sufferer.

No doubt the said law was gender bias in its phraseology towards women which needed amendment but striking down the whole law i.e. Section 497 of I.P.C and Section 198(2) of Cr. P.C and declaring it as unconstitutional may not solve the problem. Decriminalization of adultery will critically endanger the institution of marriage not only that it can run the risk of fostering Sexually Transmitted Infections but will encourage extra marital affairs. The Hon'ble Supreme Court has given the right to prosecute under Section 306 of I.P.C which means that there will be the increasing tendency of suicide incidents in marital disputes. The emergence of divorce as the way out will catalyze the break-up of marriage and leaving the children of separated parents in the lurch. The recent judgement has not talked about the rights of children which are the most affected persons in case of divorce. It also violates the concept of Monogamous marriages. Focus is needed to examine the aftermath of the judgement on decriminalization of adultery. Here the question of concern is will it promote the dignity of women in real sense, allowing women to sexual autonomy will be the women empowerment in real sense. The Court has isolated main issues of India by not considering the India's socio-cultural background. There are other legal options in which the discriminatory part can be scrapped, and the rest part can be remained in statue. The Hon'ble Supreme Court, thus oversights to have a broad vision into the gender-bias law of adultery. The act of adultery badly strikes the basics of the family. It erodes all close relations, trust, warmth, love of the family and after all family stood as a basic social unit for societies. Striking down of such law will create more chaos in family relationships especially in the marriage bond. However, we should understand that Article 14 of Indian Constitution which talks about equality should be applied for both men and women but instead of making the adultery law equal to both sexes the Hon'ble Supreme Court declared the whole law unconstitutional. There is one more point to note down in the judgment of the Supreme Court where ground for divorce is adultery and in the same breath called it unconstitutional. It is for the Court to review its judgment to protect the family institutions.

1.8 Conclusion: -

After going through all the perspectives of marriage adultery is not welcomed in any sense. It is one the basic ground for breakdown of marriage. If we talk about the concept of adultery according to I.P.C no doubt there were flaws which were continuously striking from its enactment. The case in which the hon'ble supreme court decriminalises adultery was basically filed for reducing the gender gap in such a patriarchal Indian society and

bringing equal footing to both male and female but decriminalizing section 497 may not fulfil the desired purpose and in turn came out with apprehensions of negative impact on institution of marriage as well as on future of children which cannot be ignored. So, there is a need for looking on the judgement and making new and necessary provisions relating to criminalization of adultery so that the society may be protected from such apprehensions.