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Introduction

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

DECriminalISATION OF ADULTERY IN INDIA: A CRITICAL STUDY OF ITS IMPACT

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Abstract:

Section 497 of Indian Penal code was incorporated in 1860 which particularly deals with the offence of adultery. Adultery is basically a voluntarily sexual intercourse among of a married spouse outside their marital relationship. It involves an offence involving married women. Even though, the offence of Adultery is well recognised all over the world but each country has its own legal provisions to deal with it. Even historically, the various religions such as Hindu, Christian's, Muslims etc. have criticised the adultery and with time it is recognised as a criminal offence. But with change in society, the approach has been used to decriminalise it with a viewpoint that only a man is punished to have relationship with married women but women were not punished as she was treated as the property of the husband. So, overall this remedy was available just to Husband of the married wife.

The legal provisions for the adultery was introduced from the British times and remained effective for over 150 years. In the landmark judgment of 2018, Joseph Shine vs Union of India³, the Supreme Court of India have declared that adultery is no longer a criminal offence. The court declared the reason behind it to struck down is that it violate Article 14,15 and 21 of constitution of India. It was delivered by the five judge constitutional bench and struck down all the judicial precedents before it. So from this judgement, adultery is no longer a criminal offence.

Key words: Adultery, Prostitution, Bigamy, Decriminalisation

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³ k Pallavi, "Joseph Shine v. Union of India : case analysis" *Ipleaders*, 2024 available at: <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/>.

Introduction:

For the formulation, implementation, and adjudication of law, human behaviour plays a important role. In practice, laws are majorly enforced as the majority wants despite there are different customs, moral values and traditions are there in the society. In this paper, a critical analysis of major social-legal issues has been done which arises after the Supreme Court decriminalises adultery and its impact on society. *There is a major difference in two important terms: Freedom and liberty*⁴.

When it comes to freedom, it referred to ability to act or make any movement with your own choice where the another leads to autonomy, upon which, there is be no external control and reflection of fundamental rights of individual can be seen. This article mainly shed of one important thing that is, Even though bigamy is still treated as a criminal offence, prostitution and adultery are now often seen as personal choices or matters of individual freedom. This difference in how such issues are viewed can lead to confusion and raise questions about society's moral and legal standards, especially since clear and consistent guidelines are still not in place

Review of Literature

Several kind of abnormalities can be seen in the state of society of this country which not only leading a humane man to hold before deciding to penalise a wife for being unfaithful⁵.

Adultery was treated as theft where the body of wife was property of husband and this in result, lead to deny independence and decision making power of women weather they themselves were involved in adultery or it was committed by those men with whom they were married.

Philosophical and Legal Aspects of Relationship:

In the work of famous Tamil poet, Thiruvalluvar, emphasis over discipline, obedience and the importance of maintenance of harmony into society can be seen properly⁶. Many famous jurists also describe marriage as a relationship that has been built upon mutual trust, friendship, loyalty,

⁴ Isabel Trujilo, "The legal balance between liberty and equality" *Defining the rule of law in terms of liberty and equality*, 2023 available at: <https://researchoutreach.org/articles/defining-rule-law-terms-liberty-equality/>.

⁵ Dr. Souvik Chatterji, Debosmita Ghosh and Samrat Samaddar, "Examining Adultery after specific judgments laid down by the honorable Supreme Court Of India," 11 *IJCRT* 14 (2023).

⁶ "Thiruvalluvar," *Key Points related to Thiruvalluvar* available at: <https://www.pmfias.com/thiruvalluvar/>.

affection and understanding and both the spouse, are expected to support each other in every manner in every difficulty as well as hard time. It's obvious that's sometimes, there can be some disagreement that arises, but this their mutual duty to resolve it with patience and understanding⁷. Any personal relationship such as marriages and physical intimacy, both carry a philosophical and legal importance. When it comes to philosophical point of view, it can be said that they are based on moral values in which love, honesty, loyalty, affection and faithfulness towards the spouse whereas when it comes to legal importance, all these kind of relationships creates an enforceable rights and duties between the parties and further contributes to maintain a social order ad family stability. Marriage is not only a social bond but an legal bond as well which promotes trusts, morality and loyalty. If one spouse fails to fulfil any of these obligations, the other have the right to seek the remedies under the personal religious law such as Muslim law as well as secular statutory of law. Marriages contains elements of both of a contract as well as a sacrament. It also contains mutual rights and responsibilities those are similar to contractual relationships. There are many traditions those consider it as sacred union. In ancient civilization, marriage was considered as sacrament rather than a merely contract as it believed to be determined by fate or divine will. There are different philosophical thought by religion for marriage as in Hindu philosophy, marriages are a sacred sacrament whereas in Islamic jurisprudence, marriages are a civil contract There were very few religions, where the practice of bigamy was prohibited however, in most of the religions, it existed⁸. With the time and social reforms, many communities are there which moved towards monogamy in order to preserve social stability and maintain an organized social structure. If we interpret it properly, bigamy can be viewed as direct violation of legal and social norms of governing marriage. So, the affected spouse is legally entitled to seek suitable remedies in the form of civil, matrimonial or criminal. At the same time, there have been several demands for the decriminalisation due to social and legal concerns.

Adultery on the other side, have been condemned by almost every religion and the reason behind this is, betrayal of one's spouse or partner⁹. In the same way, prostitution has often been viewed

⁷ "Marriage is a relationship built on mutual trust, companionship: SC," *Business Standard* (Press Trust of India, New Delhi, 2024) available at: https://www.business-standard.com/india-news/marriage-is-a-relationship-built-on-mutual-trust-companionship-sc-124122100538_1.html.

⁸ V Venkatesan, "Bigamy myth" (Frontline, 2015).

⁹ Dr. Souvik Chatterji, Debosmita Ghosh and Samrat Samaddar, "Examining Adultery after specific judgments laid down by the honorable Supreme Court Of India," 11 *IJCRT* 14 (2023).

as religious or moral traditions as an immoral or unlawful activity and those further are engaged in it, were believed to suffer spiritual consequences. It was a kind of sin committed by anyone who practices prostitution. However, from a wide legal viewpoint, adultery and prostitution are not always treated as criminal offences specifically when it acts with the consent of adults. But, when it comes to social norms and rules of the society, all such kind of conduct were disapproved continually. In contrast, bigamy remains punishable offenses under the personal law applicable to Hindu and Christians and secular criminal laws of country but in Muslim law, it has been allowed to practice but on certain conditions¹⁰.

In normal terms, adultery refer to consensual intimate relationships between married person and someone other than the spouse which indirectly was breaking the duty of marriage. Bigamy involves entering into the another relationship of marriage while the first valid marriage still existing and spouse is alive. Prostitution, however refers to consensual sexual relationships undertaken in exchange of money or any other consideration and no long term commitment of martial relationship is there¹¹ unlike adultery, prostitution is commercial in nature and does not involve any martial bond between parties.

Decriminalisation of Adultery:

In the landmarks judgement of *Shine vs Union of India*¹², adultery was decriminalised by supreme court and it was held that the provision was unconstitutional and discriminatory in nature. Under the 497 of IPC, adultery was considered as an offence that was committed only by men who engaged in sexual relation with an married women without the consent of her husband. However, women involved in this was neither punished nor treated as an equivalent a better under law. Such kind of frameworks leads to several constitutional concerns:

- This provision was failed to recognise women as an equal individual and treated them as property of their husband
- An patriarchal approach was seen there which strengthened gender stereotypes
- Constitutional provision of Article 14 and 15 was violated

¹⁰ V Venkatesan, "Bigamy myth" (Frontline, 2015).

¹¹ Stuart Green, "What Counts as Prostitution?," 4 *Bergen Journal of Criminal Law & Criminal Justice* 4(1):65 65 (2016).

¹² k Pallavi, "Joseph Shine v. Union of India: case analysis" *Ipleaders*, 2024available at: <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/>; *Ibid*.

- The dignity, privacy and personal autonomy guaranteed under article 21 was also infringed. Moreover, the supreme court observed that provision also created an unequal treatment between the men and women which leads to gender bias. Court also clarified that adultery would no longer remain a criminal offense and it can serve as a valid ground for divorce under matrimonial laws¹³. In the reasoning, honourable court also clarified that criminal and morality law do not always overlap and also, an immoral act should not always have considered as punishment. This was decided to decriminalise adultery therefor, marked a step towards protecting individual autonomy, upholding constitutional morality and promoting gender equality within Indian criminal jurisprudence.

Individual Autonomy Versus Sanctity of Marriage:

At the first view, it can be said that adultery and prostitution may see similar at certain respects, particularly because both involve consensual intimate relationships outside the traditional framework of marriage. But, their legal implications are completely different as adultery involves breach of marital obligations by one of the spouses whereas prostitution refers to consensual relationships between adults in exchange of money or any other kind of consideration¹⁴. The major difference is in between their legal and institutional frameworks.

Here are some of the concerns commonly discussed here:

1. The increase in the acceptance of these kind of relationships will not only weakness the sanctity of marriage but also affect the traditional family structure
2. Extramarital relationships can create uncertainties regarding the paternity of children which may further give rise to social and legal disputes
3. Any children, born from such relationships may face stigma, repeat questions about their legitimacy and other kind of difficulties
4. Marriages are often find of mutual duties but any violation of those duties may weaken the marital relationships
5. Breach of trust and faithfulness goes against the moral and legitimate expectations

¹³ Soutik Biswas, "Adultery no longer a criminal offence in India" *BBC* (BBC News, New Delhi, 28 September 2018).

¹⁴ Ashwani C Rajeev, "DOES DECRIMINALIZING ADULTERY IN INDIA JEOPARDIZE THE SANCTITY OF MARRIAGE?" *Indian Legal Wing*, 2020 available at: <https://www.indianlegalwing.com/post/does-decriminalizing-adultery-in-india-jeopardize-the-sanctity-of-marriage>.

6. Legal presumptions concerning legitimacy and paternity, continuing the generate debate in the modern scientific era relating to personal liberty and fundamental rights.

DNA Testing: Legal and Evidentiary Significance

To identify the general material of any person, the scientific technique being used in DNA testing. When the matters come related to paternity, legitimacy of children, sexual offences or any related family disputes, this regarded as one of the most dependable form of evidence. It not only enables courts to determine biological relationships with a high degree of accuracy, but it also help to identify the biological parents whenever there is dispute to establish the genetic connection. DNA testing always helps the courts to automatically find the truth. However, such evidence cannot automatically treated conclusive in every case. Courts are also required to balance the evidentiary value of DNA testing for the right to privacy and personal liberty under article 22 of constitution of India¹⁵.

Many judicial decisions emphasis that although DNA evidence carries important persuasive value, court must exercise caution before directing such tests particularly in matrimonial disputes where dignity and legitimacy of children may be impacted. So, DNA testing has become an important tool in the administration of justice¹⁶.

Judicial Perspective On Adultery and Legitimacy

Joseph Shine vs Union of India- Decriminalisation of adultery¹⁷

A bench of the supreme comprising Justice Deepak Mishra and Justice R. F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra unanimously make the section 497 IPC as unconstitutional. Here are the following reasons being provided by the court:

- Women were treated as an object without any independent agency's by section 497 IPC and it punished only male participants. So, violating article 14 promoting gender discrimination
- This judgement also recognise sexual autonomy and decisional privacy as part of article 21, holding that criminalising adultery infringe personal liberty and privacy

¹⁵ Himanshu Pandey and Anhita Tiwari, "Evidential Value of DNA: A Judicial Approach" (Bharati Law Review).

¹⁶ *Ibid.*

¹⁷ k Pallavi, "Joseph Shine v. Union of India: case analysis" *Ipleaders*, 2024 available at: <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/>.

- This provision also reflected the patriarchal notion by treating the husband as “owner” of the wife and ignoring women’s consent.
- The court also clarified that adultery may remain a civil wrong and a ground for divorce but not as a criminal offence.

This judgement marked a landmark shift from public morality to constitutional morality while reinforcing dignity, privacy and equality.

Ivan Rathinam vs Milan Joseph- Legitimacy, Presumption and DNA testing¹⁸

The bench of SC comprising Justice Surya Kant and Ujjal Bhuyan examined that all the issues relating to the legitimacy of children and scope of DNA testing in matrimonial disputes. It was observed by the court that:

- Children born during a valid marriage presumed legitimate and mere allegations of adultery are not sufficient to rebut this presumption
- By proving absence of access between spouses during the relevant period is the only way to challenge presumption
- Courts should order DNA tests only when it is necessary for justice as such kind of testing can affect the integrity and informational privacy under article 21¹⁹.

Criminalisation of Adultery: Need

There is a strong link in between adultery and presumption of paternity as the person who get affected, has the right to file a complaint against the responsible for all the wrong doings. Moreover, the state is also obligated to make the investigation into such complaints and this make it compulsory for DNA testing as that is the only way to establish the truth. In these circumstances, presumption of paternity under section 116 of BSA becomes valid as adultery is not something that confined to a limited period of time. The Indian evidence act 1872 was enacted when the advancement were not available, so as per today’s time, such presumption are no longer necessary and must be removed. In these same way, prostitution and adultery were considered as social evils

¹⁸ Dhruv Vijay, “Ivan Rathinam v. Milan Joseph, 2025 SCC Online SC 175” *Vintage Title* (B.S. Anangpuria Institute of Law, Alampur, Dhauj, Faridabad) available at: <https://www.vintagelegalvl.com/post/ivan-rathinam-v-milan-joseph-2025-scc-online-sc-175>.

¹⁹ *Ibid.*

but both are different from each other as one is consensual relationship and a relationship between individuals. Both practices, not only harm the society but weaken the family structure.

Findings

There is no doubt that India has a rich history and ancient tradition but stills, when it comes to marriage, it can be said that there is no clear and comprehensive definition of marriage and this thing further leads to different kind of interpretation and sometimes legal uncertainties. India has tried many times to draw some legal developments from other foreign systems but those are not always suitable for India due to its culture and social conditions. Under section 116 of BNS, which seeks to protect the legitimacy of children, sometimes can conflict with the principle nature of justice. Particularly, when the scientific evidence as like DNA testing is ignored. The growing impact of decriminalisation of adultery can be seen on personal liberty and constitutional morality and its effects can be seen in a long term way. In the same way, prostitution also raise a serious issue regarding public morality and if complete recognition would be given to it, it may directly affect family system and welfare of children. So, any legal reform should carefully balance between social systems, constitutional principles and family institutions.

Conclusion

In the end, it can be concluded that law imposed by the state must uphold the principle of natural justice and morality which ensure that none of the presumption operate unfairly against innocent or vulnerable individuals. It can be said that marriage is an understanding which built upon loyalty, honesty and responsibility and both the spouse are expected to maintain the sanctity for each other and work together in a way that they can safeguard their family, children and their marital relationship. On the other side, bigamy remain a criminal offence so that the institution can protect the family. However, prostitution considered as an act that is morally objectionable. The decriminalisation of adultery has been views by controversial development as the removal of criminal liability may weaken the accountability and place an innocent spouse at a disadvantage.

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