

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 6

2020

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Understanding Adultery in a Post S. 377 World: A Socio-Legal Approach

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ABSTRACT

The complex yet age-old human custom of marriage has been an ancient tradition. Marriage, love and human relationships have always been complicated yet debatable issues that need not share a direct bonding with each other. With the changing times, each of these notions have evolved a lot and are no longer exclusively personal issues.

While the episode of Goddess Seeta's Agnipariksha stands as one of the most legendary instances of a wife having to prove her sanctity and chastity, the concepts of marriage and legitimate relationships have undergone a great deal of changes, for instance, the acceptance of the LGBTQ community, have not only changed the ideas of personal relationships, but have also wrecked a positive social havoc.

Adultery on the other hand is no new concept given the functioning of the older societies. In those terms, polygamy have been used several times to conceal what we today know as adultery, but there arise several pertinent questions like, "why does such a phenomenon takes place?", "what provokes such a thing to happen?" or if it is just a chance-based incident then what should be the ways of dealing with such an occurrence. However, the decriminalisation of Section 377 has been a very recent breakthrough in the recent times which further urges one to ask that can such a change cause any changes in the notions of adultery.

Given such questions, it can be clearly observed that adultery can be approached from a legal, a social as well as a psychological perspective, which is also the main aim of this paper with the prime focus on both marriage as well as adultery.

Keywords: *adultery, marriage, homosexuality, psychology, legal perspective*

I. WHY HOMOSEXUALITY CAN CONTRIBUTE TO ADULTERY

The shift in understanding homosexuality from sin, crime, and pathology to a normal variant of human sexuality occurred in the late 20th century³. It is often thought by most people in

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³ Sadock VA. Normal Human Sexuality and Sexual Dysfunctions. In: Sadock BJ, Sadock VA, Ruiz P, editors. Kaplan and Sadock's Comprehensive Textbook of Psychiatry. 9th ed. Philadelphia: Lippincott Williams

India that homosexuality is an ailment or probably a disorder, but in 1973, the American Psychiatric Association and in 1992, the World Health Organisation accepted and submitted that it is a normal variant of sexuality in human life. In India the concept of marriage or any form of intimate, sexual relationship is observed as procreative, and it's this ideology which strains out people of the LGBTQ community out of the concoction of sexuality in India. The concept of sexuality in the new age is based on studies showing that the same gender feelings and actions in men and women have been highly prevalent in different cultures and in nearly all non-human primate species across the planet⁴.

The question arises is to how does sexuality matter in the context of adultery. Of all the legal updates going on in India, the most recent one has been the decriminalisation of Section 377 of the Indian Penal Code which read as follows:

“Unnatural offences.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1(imprisonment for life), or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”⁵

The case of *Navtej Singh Johar v. Union of India*⁶ brought the most awaited decriminalisation of the above-mentioned Section and hence also caused several people coming out of the closet and thus the happening of some of such instances post marriage is not something unexpected. Thus, the entire idea of adultery as observed socially has been greatly altered from what it was known to be previously.

When talking sociologically, what has been observed way is that, there exists a lack of critical sociological research with relation to the impact and the intensity with which adultery takes place, and ironically, it is the sociological perspective which seems to be the most profound way of analysing how adultery breaches the established social order. As per a study conducted by Annette Lawson in 1988, adultery is something that is still conducted in secret, but it is this aspect of it which is a major source of anxiety which to some extent adds on to the thrill of the relationship. She mentions in her study that adultery is highly gendered and

& Wilkins; 2009. pp. 2027–59

⁴ Drescher J, Byne WM. Homosexuality, Gay and Lesbian Identities and Homosexual Behaviour. In: Sadock BJ, Sadock VA, Ruiz P, editors. Kaplan and Sadock's Comprehensive Textbook of Psychiatry. 9th ed. Philadelphia: Lippincott Williams & Wilkins; 2009. pp. 2060–89.

⁵Section 377 of the Indian Penal Code

⁶ WP (CrI.) No. 76/2016

further notes, “*adultery is about more than marriage. It is about relations between women and men. Indeed, it is about the nature of the whole society.*”⁷ She goes on elucidating on the fact that adulterous relationships are usually secret non-monogamous relationships often dominated by lust and sex although some cases do make a note of deep rooted intimacy and emotion-based sense of commitment. However, it is this very intimacy that is seen to destabilize and threaten the primary relationship of the participants.

II. ADULTERY: THE PSYCHOLOGICAL ASPECT

One of the main research questions that have come up in the recent times is that is adultery or infidelity a psychological disorder?

While several research till date have tried to prove or disprove the existence of any possible relationship between the two, some still doubt that borderline personality disorder might be one of the root causes of the same. Although there does exist a certain number of studies on the prevalence of adultery⁸, there exist very few of them that deal with whether that indicates the prevalence of any psychological disorder. The American Psychiatric Association in one of its reports⁹ had discovered that usually people having borderline personality disorder are usually characterized by impulsive behavior and strained personal and inter-personal relationship, however that did not assert that people suffering from such disorders have a tendency to cheat on their partners always. Usually such patients have more of a tendency to doubt their partners more than engaging themselves in cheating¹⁰. However, there does not lie any solid evidence that ascertains that adultery is a psychological disorder.

Nonetheless, the interviews have revealed some really interesting cases which clearly show that although adultery may not be a psychological disorder, but the vice versa is possible, i.e., certain personality or psychological disorders can lead to infidelity which is more commonly observed in people who have been a part of multiple adulterous relationships; along with other traits such as change in mindsets, increasing competition etc.

III. THE SOCIOLOGICAL ANGLE TO ADULTERY

Infidelity and adultery are two highly dysphemistic terms having culturally diverse meanings

⁷ Lawson, A. (1988). *Adultery: An analysis of love and betrayal*. Oxford: Blackwell.

⁸ Martins A, Pereira M, Andrade R, Dattilio FM, Narciso I, Canavarró MC. Infidelity in Dating Relationships: Gender-Specific Correlates of Face-to-Face and Online Extradynamic Involvement. *Arch Sex Behav*. 2016;45(1):193-205. doi:10.1007/s10508-015-0576-3

⁹ American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders (DSM-5®)*. American Psychiatric Pub; 2013.

¹⁰ Lazarus SA, Choukas-bradley S, Beeney JE, Byrd AL, Vine V, Stepp SD. Too Much Too Soon?: Borderline personality disorder symptoms and romantic relationships in adolescent girls. *J Abnorm Child Psychol*. 2019;47(12):1995-2005. doi:10.1007/s10802-019-00570-1.

both of which requires further study of precisely what sexual intercourse entails. Interestingly, adultery seems like one of the common grounds for divorce¹¹, but what needs to be understood is that the meaning of adultery to be legally recognized as a ground for divorce differs from state to state, that is to say that what all sexual acts and situations build up to be recognized as an adulterous relationship.

The legally or socially perceived gender of the adulterer can cause the quiddity of adultery. In particular it can shed light on how adulterers view themselves as moral figures and why they seek sexual pleasure outside their marriage. The majority of research into homosexual adultery focuses on the married men having sex with other men¹². Various other studies conducted in the same field tend to show how married men face several difficulties in discovering their exact sexuality and being able to derive the differences between terms like gay, bisexual, transgender etc.¹³ The most difficult part for many men in fame is to be able to openly associate with men of similar orientations like them¹⁴. *“When some shroud their same-sex attraction or glorify their self-restraint, they bear a public mask to protect themselves from the stigma of these attractions”*¹⁵

However, such connotations have not only been limited to men alone. According to Moran, in social and legal terms, women's experience differs from men's experience¹⁶. Likewise, women engaging in the same sexual behavior view society and the law differently from men doing the same¹⁷. At the same time, the reason for getting married is much more than just economic dependence, it often involves cultural, traditional¹⁸ as well as certain patriarchal reasonings as well. While for many women that is an absolute state of normalcy as that's a way of conforming to “feminine identity”, yet it appears to be a source of discomfort to many women too¹⁹, or as some women might claim it to be nothing more than a mere following of

¹¹Varnado, S. S. (2013). “Avatars, scarlet As, and adultery in the technological age.” 55 Ariz. L. Rev. 371. 372-416.

¹²Gagnon, J. H., and Simon, W. (1973). *Sexual Conduct*. New York: Scott, Foresman, and Co.

¹³Klein, F. and Schwartz, T. (Eds.). (2001). *Bisexual and Gay Husbands*. New York: Harrington Park Press.

¹⁴Voeller, B. and Walters, J. (1978). “Gay fathers.” *The Family Coordinator*, 27(02), 149-57.

¹⁵Foucault, M. (1900 [1978]). *The History of Sexuality*. Volume I. (R. Hurley, Trans.). New York: Vintage Books.

¹⁶Moran, L. J. (2002). “Lesbian and gay bodies of law.” In D. Richardson and S. Seidman (Eds.), *Handbook of lesbian and gay studies* (291-311). Thousand Oaks: SAGE.

Moran, L. J. (Ed.). (2006). *Sexuality and Identity*. Burlington: Ashgate.

¹⁷Moran, L. J. (2002). “Lesbian and gay bodies of law.” In D. Richardson and S. Seidman (Eds.), *Handbook of lesbian and gay studies* (291-311). Thousand Oaks: SAGE.

¹⁸Bartky, S. (1990). *Femininity and Domination: Studies in the Phenomenology of Oppression*. New York: Chapman and Hall.

¹⁹Stomblor, M. and Martin, P. (1994). “Bringing women in, keeping women down: Fraternity little sister organizations. *Journal Of Contemporary Ethnography*, 23, 150-84.

the “oppressive system of gender relations”²⁰ so as to avoid any form of social destitution. In the same way, men may marry in order to comply with the cultural ideals of masculinity; but they may not face these ideals on the same financial and social scale as women²¹. However that does not necessarily also mean that men are not faced with any sort of social complexities or “mandatory” expectations which somewhat shoot out from the branches of patriarchy, but still men tend to get an advantage from such “patriarchal dividend”²² so to speak owing to their sex.

IV. THE LEGAL SCENARIO

In India adultery is punishable under section 497 of the Indian Penal Code, but the Code framers originally did not make adultery an offense punishable by the Code. It was the Second Law Commission which found that the non-recognition of such an act is not advisable, after considering the issue at a mature level. Adultery figures have always been on a hype all around the world and yet many countries do not recognize it as an offence or something that is of punishable nature.

*“Whoever has sexual intercourse with a person who is and whom he known 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 a case the wife shall not be punishable as an abettor.”*²³

The major problem with this Section had been that it only focused on the punishment of the abettor and in no way was a wife indulging in such a relationship brought into consideration for the same. So, it was basically observed as a discriminatory law. Considering the current situation and the massive evolution that the society has undergone, it is no longer prudent to presume that only a man can be the seducer and not the woman. This law was also observed as a gross violation of Articles 14, 15 and 21 of the Constitution due to the canalization of classification of only men as offenders.

Previously the subjugation and exploitation of women was the most widely used justification for such a framed law. The IPC, when it took shape in 1860, was silent on the penalty for adultery with Lord Macaulay observing that there are certain peculiarities in the Indian social

²⁰Wolkomir, M. (2004). “Giving it up to god: Negotiating femininity in support groups for wives of ex-gay christian men.” *Gender and Society*, 18(06), 735-55.

²¹ Coontz, S. (2005). *Marriage, a History*. New York: Viking.

²² Connell, R. W. (1995). *Masculinities*. Berkeley: University Of California Press.

²³Section 497 of the Indian Penal Code

structure that could well lead a humane man to pause before he decides to punish the infidelity of wives. Also, it was often observed that family pressure was one of the main reasons behind women engaging in such acts. Looking at these complexities, the British, more specifically Lord Macaulay preferred it to be preserved as a civil wrong only.

One Yusuf Abdul Aziz challenged the constitutional validity of the provision in 1951²⁴. However, Bombay High Court Chief Justice M C Chagla upheld the provision claiming that the Indian Constitution permits such special legislation for women, and thus this section does not infringe any of the fundamental rights as laid down in the Constitution of India and is therefore not void in nature.

The honorable Supreme Court is observed more as a wrong against the sanctity of the conjugal bond and hence the charges are mostly pressed against the third-party intruder. The Supreme Court predominantly observes the woman more as a victim than as the seducer or the offender and hence the provision was maintained as a non-discriminatory one. The court had also observed²⁵ that the non-recognition of such an act as ground for bringing up prosecution against each other thus giving them a chance to make-up for one another.

However it needs to be kept in mind that these reasonings were stated a long time back and with the changing times it is difficult to fit them in the current social settings and justify them too and that is due to a number of reasons such as the economic development of women, high career growth and success rates. Although it cannot be argued that subjugation of women has been completely eradicated, but definitely social evils like polygamy and sati have become extinct as well as punishable. The various provisions have empowered women and their position in the society, and in this context providing special benefits to them is unrebuted. But that cannot be justifiably used as an exception clause when dealing with such intimate, personal matters, especially the ones dealing with morality and cleanliness of character. This loophole on the other hand has resulted in a lot of people taking advantage of it for malpractice.

After having undergone a series of debates and discussions, the 42nd Law Commission Report suggested on substituting the existing provision with the following:

“Adultery – 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 by

²⁴ Yusuf Abdul Aziz v. State of Bombay AIR 1951 Bom 470

²⁵ Sowmithri Vishnu v. Union of India AIR 1985 SC 1618

the man 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."²⁶

But this suggestion has not been yet incorporated in the Code as the substituting provision and still remains a mere suggestion. This makes the scenario pretty clear explaining how the current law regarding the same is not in consonance with the changing times thereby establishing the recognition of the suggestions made by the 42 Law Commission Report and by the Malimath Committee on Criminal Justice Reforms as the call of the hour.

V. CONCLUSION

It is difficult to state a proper conclusion for an exploratory, qualitative research, but there have been some very notable observations which might be helpful in the future synthesis of such studies:

- The question as to the volatility of marriage as a concept or as a socio-legal construct is being raised slowly keeping aside the religious and the cultural values that the Indian society attaches to it
- There lies a dearth in the knowledge and the awareness about the difference between gender, sex and sexuality
- The Indian society has become more of a pseudo-western one with highly conservative ideologies
- Marriage is no longer a need except for procreative purposes
- Live-in is being openly accepted by a lot of people who opposed it initially after having witnessed such rapid social changes
- Many people seem to not react to homosexuality or the LGBTQ community per se until their own children are a part of it

Irrespective of laws on adultery or homosexuality, not a lot of people seem to take it at a very serious level unless they themselves or any of their loved ones are faced with such situations. The general attitude of the respondents towards this entire study was more like a study being conducted on an institution or a quality that simply exists in the society with debatable laws guiding them than like a realistic problem which is somewhat a part of human nature and/or is as natural as sexuality and can affect any individual thereby soon taking the shape of a

²⁶Section 497 of Indian Penal Code (suggested substitute provision)

social fact²⁷.

Nonetheless, adultery is something which appears to be borne more out of biological and emotional needs, now that gives birth to the major question that what exactly shall be the yardstick for determining the “criminal” liability of such an act. Analyzing things in a more practical way leads one puzzled with several questions, such as, even if adultery gets criminalized, then will such a criminalization not affect the family negatively? Will such a couple be able to restore their marital life into the one that is desired? Will such a criminalization be an actual solution to the problem, or will it simply be a means of running away from it by penalizing it?

²⁷ Durkheim, Emile (1982). "What is a Social Fact". *The Rules of Sociological Method*: 74