

Editorial

# Legalized Adultery and Mental Health

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DOI: <https://doi.org/10.24321/2581.5822.201906>

## I N F O



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**How to cite this article:**

Jiloha RC. Legalized Adultery and Mental Health. *J Adv Res Psychol Psychother* 2019; 2(2): 1-4.

## E D I T O R I A L

Adultery is the sexual act between a married person and someone who is not that person's spouse.<sup>1,2</sup> The concept of adultery is embodied into the belief that the criminal intercourse with a married woman ... tends to adulterate the issue [children] of an innocent husband ... and exposes him to support and provide for another man's children<sup>3</sup> and the "purity" of the children of a marriage is corrupted, and the inheritance is altered. Marital infidelity is not a socially acceptable behavior and extramarital sex is considered objectionable on various grounds such as religious, moral and ethical. Adultery invites condemnation and carries an implied judgment that the act is wrong.<sup>4</sup> A single act of intercourse is sufficient to constitute adultery. Although the legal definition of *adultery* differs in nearly every legal system, the common theme is sexual relations outside of marriage, in one form or another.

Sexual relationship between a married woman and a man other than her husband, is not only socially and morally bad it has been considered a very serious crime in several societies throughout the history. In 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife was "the highest invasion of property" and the aggrieved husband, that "a man cannot receive a higher provocation".<sup>5</sup> Many European countries once had anti-adultery laws, but most were repealed in the 1970s and 1980s. The last European nations to decriminalise infidelity were Austria, in 1997, and Romania, in 2006. Until 2009, in Syria, it was legal for a husband to kill or injure his wife caught in flagrante *delicto* committing adultery or other illegitimate sexual acts. The law has changed now to allow the perpetrator to only "benefit from the attenuating circumstances, provided that he serves a prison term of no less than two years in the case of killing".<sup>6</sup>

In the US, however, adultery remains illegal in 21 states. In most states, including New York, adultery is considered only a misdemeanour. Adultery is a crime in Taiwan and the Philippines and until 1947 it was a crime in Japan. In Pakistan, adultery is a crime under the Hudood Ordinance, promulgated in 1979. Similar laws exist in some other Muslim countries, such as Saudi Arabia and Brunei.<sup>7</sup>

In India, adultery is described as the sexual intercourse of a man with a married woman without the consent of her husband when such sexual intercourse does not amount to rape. It was a non-cognizable,

non-bailable criminal offence, until the relevant law was overturned by the Supreme Court of India on 27 September 2018.<sup>16</sup>

Until 2018, under Section 497 of Indian Penal Code Adultery is defined as;

*Whosoever has sexual intercourse with a person who is and whom he knows or has reasons to believe to be 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.*

According to IPC 1860, the man is prosecutable and could be sentenced for up to five years (even if he himself is unmarried) whereas the married woman cannot be jailed.<sup>17</sup>

The Adultery law has been often criticized as gender discriminatory in the sense that women cannot be prosecuted for adultery.<sup>18</sup>

It is also argued that the adultery laws maintain social norms in certain societies which justify violence, discrimination and oppression of women; in the form of state sanctioned violence such as stoning, flogging or hanging for adultery; or in the form of individual acts of violence committed against women by husbands or relatives, such as honour killings, crimes of passion, and beatings.<sup>19,20</sup> The United Nations Working Group on discrimination against women in law and in practice is deeply concerned at the criminalization and penalization of adultery and says that such a law and its enforcement leads to discrimination and violence against women.<sup>19</sup> Concerns are expressed that the existence of "adultery" as a criminal offense can affect the criminal justice process in cases of domestic assaults and killings, in particular by mitigating murder to manslaughter,<sup>21</sup> or otherwise proving for partial or complete defenses in case of violence. These concerns have been officially raised by the Council of Europe and the UN in recent years.

National Commission of Women in India has criticized the law of being anti-feminist as it treats women as the property of their husbands. Woman's relationship with other married persons depends on the "consent or connivance of her husband", which also means that a woman can sleep outside her marriage with the 'consent' of her husband. The law gives power to a husband to control the sexuality of his lawfully wedded wife. The adultery law allows the husband to control the sexuality of his wife in order to assert his sole claim to her body. Criticizing this provision, the commission recommended deletion of the law or at least reducing it to a civil offense.<sup>22</sup>

Besides the obvious gender discrimination that the law provides space for, the adultery law is problematic for

several other reasons. The law gives a married man a right to blame an outside agency for the breakdown of his marriage. If a wife has chosen to sleep outside her marriage, it is important that the couple looks at the inadequacies in their own relationship and not hold an outsider responsible for the breakdown of their marriage. And if the relationship has lost its foundation of trust, it makes more sense that the couple approaches the courts for a mutual divorce than put a third person behind bars for breaking their marriage. The law only provides a psychological outlet to a spouse to blame a third person responsible for the failure of a marriage.

In an historic judgment the Supreme Court of India struck down this 158-year-old colonial-era law. The five judges' bench declared the Section 497 of Indian Penal Code, 1860 along with Section 198 of Criminal Procedure Code 1973 which prohibits wives from filing adultery complaints, as unconstitutional, thereby decriminalizing the offence of adultery.

The Hon'ble Court observed that in the recent case, the law per se is based on discrimination as it punishes only the man and spares the woman. There is no rationale, as observed, in treating one party involved in adultery as a victim and the other as a criminal. In doing so, the law violates article 14 of the constitution since it creates an irrational classification between men and women. In the current times when women hold positions of authority in almost all spheres, the premise that the woman is always the 'victim' not only undermines the notion of women's agency but also is entirely unfair to men.

While the judgment is bound to have a far-reaching impact upon marriages in India, the adverse fallout cannot be ignored. In a country beset with rising divorce rates and cases of marital infidelity, the decriminalization of adultery will critically endanger the institution of marriage. Not only does it run the risk of fostering extra-marital affairs, the emergence of divorce as the way out will catalyze the break-up of marriages, leaving little children in the world of uncertainty.

The judgment is likely to rob the aggrieved spouse of the psychological outlet which the Section 497 was providing him. Now the aggrieved party, instead of blaming the perpetrator, has to look for the reasons of debacle from within himself which may be very painful and expose the individual to mental health strains.

Anger, panic, betrayal, broken trust, emptiness, suspicion, grief, and ugly crying are some of the emotions that accompany the discovery that a partner has been cheating him by warming some other person's bed. Infidelity shakes confidence in all realms of the relationship - including emotional and physical intimacy - and downright feel like a punch in the gut.

For various reasons, most couples who marry do so with the expectation of fidelity and mutual trust. Adultery is often seen as a breach of trust and of the commitment that had been made during the act of marriage.<sup>23</sup> Adultery can be emotionally traumatic with a range of emotional and psychological distress, including depression, anxiety, decreased personal and sexual confidence, and decreased self-esteem.<sup>24</sup> The mental health consequences following a partner's infidelity also may result in an increase in health-compromising behaviors, such as unprotected sex or greater alcohol and drug use, which may have lasting effects on the noninvolved partner's health. Therefore, experiencing an infidelity can be stressful for the noninvolved partner, with potential harmful consequences. Feelings of guilt and jealousy in the person with whom the affair is being committed are not uncommon.<sup>25</sup>

Legalized adulterous relationships are likely to cause disruption in society. If a spouse commits suicide because of adultery by the partner, under Section 306 the accused partner can be persecuted for abetment of suicide. This would mean that suicide cases in marital disputes will increase now.

Extramarital sex exposes the individuals to the possibility of sexually-transmitted diseases (STDs) into a marriage. Since most married couples do not routinely use barrier contraceptives,<sup>26</sup> STDs can be introduced to a marriage partner by a spouse engaging in unprotected extramarital sex.

The World Health Organization (WHO) found that women in violent relations were at increased risk of HIV/AIDS, because they found it very difficult to negotiate safe sex with their partners, or to ask medical advice if they thought they have been infected.<sup>27</sup> Honour killings are often connected to accusations of adultery. Honour killings continue to be practiced in some parts of the world, particularly (but not only) in parts of South Asia and the Middle East. Honour killings are treated leniently in some legal systems.<sup>28</sup> Honour killings have also taken place in immigrant communities in Europe, Canada and the U.S. In some parts of the world, honor killings enjoy considerable public support: in one survey, 33.4% of teenagers in Jordan's capital city, Amman, approved of honour killings.<sup>29</sup>

Hon'ble Supreme Court of India, like Bhutan, Sri Lanka and South Korea, has rightly decriminalized adultery in the country. The legal system should not regulate whom one sleeps with. It should only regulate the process of separation when one or both the partners violate the sanctity of a marriage. Moreover, the criminalization of broken trust in a marriage neither leads to a couple settling down again to a blissful life nor does it alter the social behavior of the society.

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