

A MORAL JOURNEY

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Equality before the law does not only signify equal access to the law, but also equal exposure to the law. This is one of the principles followed by the five-judge bench of the Supreme Court, which has struck down as unconstitutional Section 497 of the Indian Penal Code that had criminalised adultery for 158 years. Section 198(2) of the Code of Criminal Procedure is also struck down. In both cases, the court has found that the woman was robbed of agency and reduced to a chattel. Law which allows only men to have agency and the right to be aggrieved is unacceptable at a time when sexual relations are understood to be between equals.

Section 497 dates from the patriarchal era and criminalised men who knowingly had relations with the wife of another man, “without the consent or connivance of that man”. The woman was not punishable as an abettor, while her husband was automatically the wronged party. Section 198(2) clarified that only the woman’s husband can be the aggrieved party or, in his absence, “someone who had care of the woman”. One gender was granted ownership of the other, which was deemed to be too innocent to look after itself. At the time when these laws came into force, the same logic was used to justify the colonial project — “natives” could not possibly develop modernity except as wards of European power. Just as colonialism is morally repugnant by contemporary ethical standards, the law of adultery is insupportable.

Following the SC intervention, adultery is now a civil matter between individuals. But a criminal residue remains — Section 306 of the IPC will be invoked if a suicide results from adultery. This will hopefully be corrected in the future, now that the court has strongly repudiated the criminality of adultery. This reform is part of a process of change in constitutional morality, which has acquired an inexorable momentum. The striking down of Section 377, which had decriminalised gay sex, may be the most celebrated legal reform, but the trail goes back to 2015, when the Supreme Court found a long-term live-in relationship to be indistinguishable from marriage, even for inheritance. In recent times, the triple talaq ruling and the right to privacy have maintained the trend. It would not be unreasonable now to look forward to the criminalisation of marital rape, which is the next milestone on a road being rapidly travelled.

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