



Adultery, Family Stability and Constitutional Morality In Contemporary India: A Critical Socio-Legal Analysis

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ABSTRACT

This paper critically examines the decriminalisation of adultery in India following the landmark Supreme Court judgment in *Joseph Shine v. Union of India* (2018), wherein Section 497 of the Indian Penal Code, 1860 was struck down as unconstitutional. Engaging with the intersections of constitutional morality, gender equality, marital autonomy, and family stability, the analysis situates the judgment within the broader socio-legal landscape of contemporary India. The paper surveys the historical foundations of adultery law, its patriarchal underpinnings, and its incompatibility with Articles 14, 15, and 21 of the Constitution. It further explores post-decriminalisation consequences for family law, including civil remedies under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, and interrogates whether constitutional morality and popular morality can be reconciled. The paper concludes with a call for a gender-neutral, rights-based framework that protects marital dignity without criminalising personal choice.

Keywords: Adultery, Section 497 IPC, Joseph Shine, Constitutional Morality, Family Law, Gender Equality, Marital Autonomy

1. INTRODUCTION

The regulation of sexual conduct within marriage has long occupied an uneasy position at the intersection of law, morality, and personal liberty in India. Adultery — broadly understood as voluntary sexual intercourse between a married person and someone other than their lawful spouse — was criminalised under Section 497 of the Indian Penal Code, 1860 (IPC). For over 157 years, this provision formed part of Indian criminal law, yet its constitutionality remained largely unquestioned until a five-judge Constitutional Bench of the Supreme Court unanimously struck it down in *Joseph Shine v. Union of India*, (2018) 2 SCC 189.

The ruling marked a watershed moment not merely for criminal law but for the evolving discourse on constitutional morality, gender justice, and individual autonomy in India. Chief Justice Dipak Misra, writing for himself and Justice A.M. Khanwilkar, declared that Section 497 was "manifestly arbitrary" and violated Articles 14 (equality before law), 15 (non-discrimination on grounds of sex), and 21 (right to life and personal liberty) of the Constitution of India, 1950.

This paper undertakes a critical socio-legal analysis of the adultery law paradigm in India, examining its colonial origins, constitutional infirmities, impact on family stability, and the tension between constitutional and popular morality. It also surveys the civil law landscape post-decriminalisation and proposes a normative framework consistent with contemporary constitutional values.

2. HISTORICAL AND COLONIAL FOUNDATIONS OF ADULTERY LAW IN INDIA

Section 497 of the IPC was enacted in 1860 under the stewardship of Lord Macaulay's drafting committee. The provision made it a criminal offence for a man to have sexual intercourse with the wife of another man without the consent or connivance of her husband. Strikingly, the wife herself could neither be prosecuted as an abettor nor could she file a complaint. The married woman whose husband committed adultery had no cause of action under the provision.

This asymmetry was rooted in the Victorian-era patriarchal conception of women as property of their husbands. The provision essentially treated a wife as a chattel, her sexual autonomy subsumed within the proprietary rights of the husband. As Justice D.Y. Chandrachud observed in his concurring opinion in *Joseph Shine*, Section 497 embodied a "notion of marriage which subordinates the identity of the woman to that of her husband." The law was never designed to protect the sanctity of marriage in a gender-neutral sense; it was a tool to police female sexuality and protect male honour.

The colonial legacy of Section 497 IPC must also be read alongside Section 198(2) of the Code of Criminal Procedure, 1973, which restricted the filing of a complaint for adultery exclusively to the husband of the woman involved. No other person, including the wife of the adulterous husband, could initiate criminal proceedings. This procedural bar further entrenched the discriminatory character of the law.

3. CONSTITUTIONAL CHALLENGE: FROM YUSUF ABDUL AZIZ TO JOSEPH SHINE

The constitutionality of Section 497 IPC had come before the Supreme Court on multiple occasions prior to 2018. In *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SC 321, a two-judge bench upheld the provision, holding that Article 15(3) of the Constitution — which permits special provisions for women — justified the exemption of women from prosecution. The Court reasoned that the legislature had the power to make provisions in favour of women, and the wife's exemption from criminal liability was one such protective measure.

In *Sowmithri Vishnu v. Union of India*, AIR 1985 SC 1618, the Supreme Court again upheld Section 497, rejecting the argument that the provision was discriminatory. The Court found that the section did not violate the equality provisions of the Constitution and dismissed the petition. Similarly, in *V. Revathi v. Union of India*, AIR 1988 SC 835, the Court held that the law did not offend Article 14 since both the adulterer and the wife's husband were treated as parties to an agreement — the husband being the victim and the adulterer being the offender.

These earlier decisions reflected a conception of women as victims requiring legal protection rather than autonomous agents capable of making independent choices. It was only in *Joseph Shine* (2018) that the Supreme Court departed decisively from this paternalistic framework, overruling its earlier judgments and applying a progressive, rights-based constitutionalism.

4. JOSEPH SHINE V. UNION OF INDIA (2018): A DETAILED ANALYSIS

4.1 Constitutional Grounds

The five-judge bench in *Joseph Shine v. Union of India*, (2018) 2 SCC 189 grounded its decision in three constitutional provisions: Article 14 (equality), Article 15 (non-discrimination on grounds of sex), and Article 21 (right to life and personal liberty, including dignity and

autonomy). The Court held that Section 497 IPC failed the test of reasonable classification under Article 14 because it treated the husband as the sole guardian of the woman's sexual agency, thereby perpetuating inequality.

Under Article 15, the bench found that while the provision facially discriminated against men (only men could be prosecuted), it substantively discriminated against women by treating them as legal non-entities — incapable of agency and reduced to the status of property. The exemption of the wife from prosecution was not a protective measure but an expression of deep-seated patriarchal assumptions about the subservience of women within marriage.

On Article 21, Chief Justice Misra articulated that the right to life encompasses the right to live with dignity, which includes the right to sexual autonomy within or outside marriage. Justice Chandrachud's concurring opinion went further, identifying the right to privacy — as affirmed in Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 — as a key constitutional value violated by Section 497. The criminalisation of consensual adult sexual conduct, he reasoned, intruded into the most intimate sphere of individual autonomy.

4.2 Constitutional Morality vs. Popular Morality

One of the most intellectually significant aspects of the Joseph Shine judgment is its engagement with the concept of constitutional morality — a phrase first used in Indian constitutional jurisprudence by Dr. B.R. Ambedkar during the Constituent Assembly debates. The Court drew a sharp distinction between constitutional morality (the values embedded in the Constitution — equality, dignity, freedom) and popular morality (majoritarian or community moral standards). It held that where the two conflict, constitutional morality must prevail.

Justice Chandrachud explicitly stated that "constitutional morality trumps popular morality." This principle has profound implications: the law cannot criminalise conduct simply because a majority of society finds it morally offensive. Adultery, however reprehensible many may consider it, is a consensual act between adults, and criminalising it based on popular moral disapproval violates constitutional guarantees of freedom and dignity.

This reasoning draws upon the earlier precedent in *Navej Singh Johar v. Union of India*, (2018) 10 SCC 1, decided just weeks before *Joseph Shine*, in which the Supreme Court decriminalised consensual same-sex relations by striking down Section 377 IPC. Both judgments collectively signal a paradigm shift in Indian constitutional jurisprudence — away from majoritarian moralism and towards a liberty-centred, dignity-affirming constitutionalism.

5. ADULTERY, DECRIMINALISATION, AND THE QUESTION OF FAMILY STABILITY

A recurring concern voiced by critics of the *Joseph Shine* judgment is that decriminalising adultery would undermine the institution of marriage and destabilise the family unit. This concern, while empirically contestable, merits serious socio-legal engagement. The question is: does the criminalisation of adultery actually protect family stability, or does it merely create the illusion of legal protection?

Empirical evidence from jurisdictions that have decriminalised or never criminalised adultery — such as the United Kingdom, Canada, and France — does not support the claim that

decriminalisation leads to higher rates of marital breakdown. The United Kingdom abolished adultery as a criminal offence through its Sexual Offences Act, 1967, and marriage rates and divorce statistics there do not indicate that decriminalisation precipitated a collapse of family values. In India, Section 13 of the Hindu Marriage Act, 1955 (HMA) and Section 27 of the Special Marriage Act, 1954 (SMA) continue to recognise adultery as a ground for divorce, ensuring that civil law remedies remain available to aggrieved spouses.

The Supreme Court in *Joseph Shine* was careful to note that decriminalisation does not mean condonation. Adultery remains a ground for divorce under Section 13(1)(i) of the HMA and equivalent provisions. What the judgment eliminates is the criminal sanction — the use of state power and the threat of imprisonment to police consensual adult behaviour. This distinction between civil wrong and criminal wrong is critical: marriage is a civil institution, and its dissolution through divorce is an appropriately civil remedy.

Moreover, one may question whether the threat of criminal prosecution was ever an effective deterrent to adultery in practice. The extremely low prosecution and conviction rates under Section 497 IPC historically suggest that the provision functioned more as a social stigma tool wielded selectively by aggrieved husbands than as a genuine mechanism for protecting family stability. In many documented cases, the section was misused to harass women and their alleged paramours, with no corresponding protection available to wives whose husbands engaged in extramarital relations.

6. GENDER JUSTICE, MARITAL AUTONOMY, AND PROTECTION OF WOMEN

The *Joseph Shine* judgment must be situated within India's broader constitutional commitment to gender justice. The Constitution of India, through Articles 14, 15, and 21, mandates equality of status and opportunity, prohibits discrimination on grounds of sex, and guarantees the right to live with dignity. Section 497 IPC was fundamentally incompatible with these commitments. The Protection of Women from Domestic Violence Act, 2005 (PWDVA) represents a parallel legislative development that recognises the gendered nature of harm within intimate relationships. While the PWDVA does not address adultery directly, it provides civil remedies — including protection orders, residence orders, and monetary relief — to women subjected to domestic abuse, which may include emotional harm arising from a spouse's infidelity. Read together with the post-*Shine* civil law landscape, the PWDVA illustrates that the Indian legal system increasingly prefers civil protection mechanisms over criminal sanctions for intra-marital wrongs.

The Immoral Traffic (Prevention) Act, 1956 (ITPA) is also relevant to the broader discourse on sexual morality and the law, as it criminalises trafficking and commercial sexual exploitation without criminalising consensual adult sexual relations. The legislative distinction between exploitative and consensual sexuality is a normative thread running through Indian law that the Supreme Court amplified in *Joseph Shine*.

Critics have argued that decriminalising adultery leaves women without adequate protection in a society where patriarchal power dynamics persist. This concern is legitimate but misdirected: the solution is not to retain a discriminatory penal provision but to strengthen civil law remedies and social support mechanisms. Matrimonial property rights, maintenance law under Section

125 of the CrPC (now Section 144 of the Bharatiya Nagarik Suraksha Sanhita, 2023), and the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 collectively offer a more rights-consistent framework for family protection than a criminal adultery law rooted in patriarchal property norms.

7. CIVIL LAW LANDSCAPE POST-DECRIMINALISATION

Following the striking down of Section 497 IPC, the civil law framework for addressing adultery within marriage remains intact. Section 13(1)(i) of the Hindu Marriage Act, 1955 continues to list adultery as a ground for judicial separation and divorce. Under Section 27 of the Special Marriage Act, 1954, a party to a marriage may seek divorce on the ground that the respondent "has had voluntary sexual intercourse with any person other than his or her spouse." The Indian Divorce Act, 1869, governing Christian marriages, similarly recognises adultery as a ground for divorce under Sections 10 and 22.

These civil provisions ensure that decriminalisation does not leave the institution of marriage without legal protection. An aggrieved spouse retains the full panoply of civil remedies: divorce, judicial separation, restitution of conjugal rights (though this remedy has itself come under constitutional scrutiny), and ancillary relief including alimony and custody. In *Shayara Bano v. Union of India*, (2017) 9 SCC 1, the Supreme Court's invalidation of triple talaq further demonstrated the Court's willingness to reform family law in conformity with constitutional values, signalling an ongoing process of alignment between personal law and constitutional morality.

The Bharatiya Nyaya Sanhita, 2023 (BNS), which replaced the IPC with effect from 1 July 2024, does not re-enact Section 497. This legislative endorsement of the Joseph Shine ruling confirms that adultery has been definitively removed from the domain of criminal law in India, and the policy direction is towards civil regulation of marital conduct.

8. COMPARATIVE PERSPECTIVES

A comparative survey reinforces the appropriateness of India's move towards decriminalisation. The United States has seen a gradual retreat of criminal adultery laws — while some states retain nominal statutes, enforcement is virtually non-existent, and the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003) signalled that consensual adult sexual conduct is constitutionally protected from state criminalisation. France decriminalised adultery in 1975 as part of broader reforms to family law. Germany and Canada have never criminalised adultery in the modern era.

South Korea's Constitutional Court offers a particularly instructive parallel: in 2015, it struck down the country's criminal adultery law as unconstitutional, holding that it violated the right to sexual self-determination and privacy, despite centuries of social convention to the contrary. The Korean court, like the Indian Supreme Court in *Joseph Shine*, drew a distinction between constitutional values and popular moral sentiment, privileging the former.

Pakistan and Bangladesh, which inherited the same colonial IPC framework as India, continue to retain criminal adultery provisions — though enforcement remains erratic. The divergence between India and its neighbours on this issue reflects the distinctive trajectory of India's

constitutional jurisprudence, which has increasingly embraced a progressive, rights-centred interpretation of fundamental rights.

9. CRITIQUE AND REMAINING CONCERNS

While the Joseph Shine judgment is broadly celebrated as a progressive step, several critiques and residual concerns merit acknowledgment. First, the judgment does not address the position of parties whose marriages were subsisting at the time of the alleged adultery in the context of civil law proceedings. The absence of criminal liability may, in practical terms, reduce the deterrent effect against infidelity, though as argued above, the empirical basis for this concern is weak.

Second, the judgment deals primarily with heterosexual adultery within the framework of marriage as defined under personal laws. The rights of same-sex couples, whose unions are not yet legally recognised in India following the Supreme Court's decision in *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) SCC OnLine SC 1348, remain outside the ambit of family law protections including adultery-related divorce grounds. This lacuna underscores the need for comprehensive codification of relationship rights.

Third, the question of social morality cannot be entirely dismissed. In a country where marriage remains a deeply social and familial institution, the symbolic function of law — expressing collective moral norms — carries weight. The Court's response, however, is persuasive: law must evolve ahead of social prejudice to enforce constitutional values, and it cannot remain hostage to majoritarian moral attitudes that conflict with fundamental rights.

10. TOWARDS A RIGHTS-BASED FRAMEWORK FOR MARITAL REGULATION IN INDIA

The decriminalisation of adultery, read alongside the invalidation of triple talaq in *Shayara Bano* and the decriminalisation of consensual same-sex relations in *Navtej Singh Johar*, represents a coherent arc in Indian constitutional jurisprudence — one that progressively liberates intimate personal choices from the coercive reach of criminal law, while preserving civil remedies for harm within relationships.

A rights-based framework for marital regulation in India should rest on three pillars. First, civil law supremacy: marital wrongs, including infidelity, should be addressed through civil remedies — divorce, maintenance, property division — rather than criminal punishment. Second, gender neutrality: laws governing marriage and its dissolution must apply equally to all genders, consistent with Articles 14 and 15 of the Constitution. Third, dignitary protection: the state must provide effective mechanisms to protect marital dignity and welfare, particularly for economically vulnerable spouses and children, through robust enforcement of maintenance, domestic violence, and property laws.

Legislative reform is also needed to codify a uniform civil code or, at minimum, to harmonise the adultery-related provisions of the HMA, SMA, Indian Divorce Act, and Muslim personal law in a gender-neutral, constitutionally compliant manner. The Law Commission of India, in its 227th Report (2009), had recommended reforms to marriage and divorce laws; the post-Shine landscape provides renewed impetus for comprehensive legislative action.

11. CONCLUSION

The Supreme Court's unanimous decision in *Joseph Shine v. Union of India* (2018) was not merely a judicial strike at a colonial-era penal provision. It was a constitutional declaration that the institution of marriage cannot be sustained by criminalising personal choice, and that the dignity and autonomy of individuals — especially women — cannot be subordinated to patriarchal conceptions of marital property and honour. By invoking constitutional morality against popular morality, the Court demonstrated the transformative potential of the Indian Constitution as a living document, capable of cleansing the legal system of inherited inequities. Family stability, rightly understood, is not achieved by coercion but by mutual respect, legal equality, and the availability of fair civil remedies. India's post-Shine legal landscape — retaining adultery as a ground for divorce while removing criminal sanctions — strikes the appropriate balance between protecting the institution of marriage and respecting individual constitutional rights. The challenge ahead is to build upon this foundation: strengthening civil family law, ensuring gender neutrality across personal laws, and aligning India's legal framework with its constitutional promise of equality and dignity for all.

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