



# The Indian Journal for Research in Law and Management

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Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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## FROM CRIMINAL OFFENCE TO CONSTITUTIONAL FREEDOM: REVISITING ADULTERY LAWS IN INDIA

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### ABSTRACT

This paper explores the shift from colonial-era notions of 'adultery' as a crime to the new interpretations of 'adultery' as an issue of freedom and autonomy under the Constitution of India. It critically examines Section 497 of the Indian Penal Code, an importation from colonial times which classified women as passive objects to be controlled by their husbands. It sheds light on how the provision was an illustration of Victorian attitudes to men as the agents of the law and women as lacking autonomy and equality in the law.

The paper also delves into the case of *Joseph Shine v Union of India* in which the Supreme Court of India ruled that Section 497 was unconstitutional and infringed upon Article 14, Article 15 and Article 21 of the Constitution. The judgment was a radical one from the point of view of state morality to the constitutional morality because it declared dignity, privacy, equality and sexual autonomy as constitutional rights. Further, the study covers the impact of *Justice K.S. Puttaswamy v. Union of India* which extended the concept of freedom of person and intimacy of relations.

Further, the paper examines the connection between marriage, morality and criminal law, suggesting that in the absence of public harm adultery can be considered a civil wrong, but not a crime. The study argues that the decriminalisation of adultery is a forward-looking constitutional development, which respects individual freedom, gender justice, human dignity over the patriarchal social norms and colonial legal traditions.

**Keywords:** Adultery, Constitutional Morality, Gender Justice, Patriarchy, Individual Autonomy, Decriminalisation.

### 1. INTRODUCTION

The adultery law in India highlights the pragmatic transformation from the colonial legacy to constitutional values. For nearly 100 years, adultery was a criminal offence in Indian Penal Code (IPC) under section 497,<sup>1</sup> which shows that a woman was considered as the "angel in the house" derived from the theory of Victorian ideals of femininity which were largely dependent on the male members of the family. After prolonged injustices, the Supreme Court of India decriminalised adultery in *Joseph Shine v. Union of India*<sup>2</sup> in 2018. This judgement gave constitutional freedom and broadened the understanding of relationships in modern India.

## 2. COLONIAL LEGACY

Under section 497 of IPC,<sup>3</sup> a colonial law, adultery was defined as a criminal offence committed by a male who engaged in sexual intercourse with a married woman without her consent or of her husband. In such cases, women were considered as victims. If the husband gave his consent then the act was not considered as a criminal offence. Such practice reflects the dominance of patriarchy in laws as well as in society. Women are being objectified and considered as a commodity and property. Criminalization of adultery was more focused on the protection and preservation of patriarchy than the marital trust or institution.

Before 2018, in many cases like *Abdul Aziz v. State of Bombay*<sup>4</sup> and *Sowmithri Vishnu v. Union of India*,<sup>5</sup> SC upheld the constitutionality of the provision citing the principle of protective discrimination rather than patriarchal belief over exclusion of women from punishment.

## 3. TRANSFORMATION AND CONSTITUTIONAL MORALITY

The nature of the adultery laws transforms positively in 2018, when the Supreme Court of India gives importance to the individual dignity. In *Joseph Shine*,<sup>6</sup> SC declared section 497 of IPC as null and void because it was violating *Article 14 (equality before law)*,<sup>7</sup> *15 (non-discrimination)*,<sup>8</sup> and *21 (right to life and personal liberty)*<sup>9</sup> of the Indian constitution.

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<sup>1</sup> Indian Penal Code, No. 45 of 1860.

<sup>2</sup> *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

<sup>3</sup> Indian Penal Code, No. 45 of 1860.

<sup>4</sup> *Yusuf Abdul Aziz v. State of Bombay*, A.I.R. 1954 S.C. 321 (India).

<sup>5</sup> *Sowmithri Vishnu v. Union of India*, (1985) Supp. S.C.C. 137 (India).

<sup>6</sup> *Joseph Shine*, (2019) 3 S.C.C. 39.

<sup>7</sup> INDIA CONST. art. 14

<sup>8</sup> INDIA CONST. art. 15

<sup>9</sup> INDIA CONST. art. 21

The court held that section 497, violates the right to equality and dignity enshrined in the constitution of India by considering women as a commodity or passive objects which is a gender stereotype. The judgement further highlighted that constitution does not guarantee the state for advocacy of the patriarchy; instead it underscored that the state should protect the autonomy and privacy of each individual.

The court also gave clarification that adultery may be considered as a civil offence but should have no relation with the criminal offences under any personal laws until and unless it is causing public harm. It should not be applicable on the consenting partners.

After recognition of privacy as a fundamental right in *Justice K.S. Puttaswamy v. Union of India*,<sup>10</sup> The interpretation of adultery has broadened by the court and tried to reinforce that the intimation is a matter of personal liberty. These adjudications indicate change from state sponsored morality to individual autonomy protected by law of the land .

#### **4. EQUALITY AND GENDER JUSTICE**

Decriminalising adultery was a very important step towards ensuring gender equality and individual dignity. It made the women independent from the chain of patriarchy and granted them sexual autonomy irrespective of male requirements and social stigma. Judiciary goes beyond the interpretation and observes that the laws brought for protection may be an agent for inequality. Exceptions under *Section 497 of IPC* for women is not a step for protection of women; rather it is considered as undermining the capacity and capability of women as a whole and subordinating them in laws.

The court's judgment aligned with the interpretation of the feminist academia where they claimed that in the name of protection, the law is patriarchal in nature, maintaining the male dominance over female. The court also raised concerns that adultery may lead to grave social challenges in the family.

#### **5. MARRIAGE, MORALITY AND LIMITATIONS**

Changes in the adultery laws give a space for the state to discuss the regulation of marriage. Since marriages in India have been a sacred tradition which also highlights the social norms according to different religions with different values. With such transformation in adultery

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<sup>10</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

laws, the judiciary undermined historically structured procedural institutions of marriages and provided autonomy with equality.

Criminal law is a weapon of last remedy. Hence, justification of public harm must be given in order to detain someone for violation of criminal laws. However, adultery is considered as a threat to marital status but not a crime against the society. Hence the court separated the concept of public morality and individual criminality. However adultery is still prevalent as a civil liability. Under various personal laws it is widely considered as a reason for the divorce including the *Special Marriage Act, 1954*<sup>11</sup> and the *Hindu Marriage Act, 1955*.<sup>12</sup>

## 6. CONCLUSION

The evolution of adultery laws from section 497 of the IPC to the landmark judgement of *Joseph Shine* highlights the flexible and transformative nature of the Indian laws with respect to time. It gave up the colonial legacy which was based on the patriarchy and incorporated the ideals of individual autonomy, dignity and gender equality.

Further it gives emphasis on sexual autonomy and guaranteed rights to the individual against the state which advocates that any authority cannot interfere with criminal charges in a consent based intimation or relationships which shows that the judiciary has upheld the constitutional morality over societal norms which is largely based on patriarchy.

Finally with the decriminalisation of adultery, the judiciary has acknowledged the autonomy of individual rights over moral societal obligations, which shows the role of constitutional freedom in interpreting laws and ensuring justice to the most marginalised section of the society in the world i.e. women.

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<sup>11</sup> Special Marriage Act, No. 43 of 1954, (India).

<sup>12</sup> Hindu Marriage Act, No. 25 of 1955, (India)