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## THE LAW ON ADULTERY IN INDIA

*Charul Rathore*

### ABSTRACT

*Marriage has traditionally been understood as a relationship founded on trust, companionship and fidelity. Adultery, therefore, has often been viewed not merely as a private breach of trust but as conduct capable of affecting the legal relationship between spouses. Indian law, however, has undergone a significant transformation in determining how far the State should intervene in such conduct. What was once a criminal offence is today principally a matter of matrimonial law.*

### THE FORMER CRIMINAL LAW ON ADULTERY

Under Section 497 of the Indian Penal Code, 1860 ('IPC'), adultery was treated as a criminal offence. The provision applied where a man had sexual intercourse with a woman whom he knew or had reason to believe was married to another man, without the consent or connivance of her husband. The woman herself could not be punished as an abettor.<sup>1</sup>

The provision reflected a distinctly unequal conception of marriage. Its operation was based on the assumption that the husband's consent was legally significant, while the married woman's independent sexual agency received little recognition. A husband could therefore determine whether his wife's relationship with another man attracted criminal liability. The law did not provide a corresponding right to a wife where her husband engaged in an extramarital relationship.

This unequal structure eventually came into direct conflict with the constitutional commitment to equality and individual autonomy.

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<sup>1</sup> The Indian Penal Code, No. 45 of 1860, INDIA CODE (1860), § 497

## **JOSEPH SHINE : THE CONSTITUTIONAL TURNING POINT**

The decisive moment came in *Joseph Shine v. Union of India*, where a five-judge Constitution Bench of the Supreme Court considered the constitutional validity of Section 497 IPC and the associated procedural restriction under Section 198(2) of the Code of Criminal Procedure, 1973 ('CrPC').<sup>2</sup>

The Court unanimously struck down Section 497 IPC and Section 198(2) CrPC insofar as they related to adultery. It held that the provisions violated Articles 14, 15(1) and 21 of the Constitution.<sup>3</sup>

The constitutional problem was deeper than the fact that the provision treated men and women differently. The Court recognised that the law effectively reduced a married woman to an object within the marital relationship and subordinated her autonomy to the authority of her husband. Criminal law could not be based on the assumption that a wife was the property of her husband.

The judgment therefore connected the issue of adultery with broader constitutional values of dignity, privacy, equality, liberty and decisional autonomy. The Court also emphasised that the existence of a moral wrong does not automatically justify its treatment as a criminal offence.<sup>4</sup>

Importantly, the judgment did not declare adultery morally acceptable or remove every legal consequence arising from it. Rather, it removed the criminal sanction attached specifically to consensual adultery.

## **IS ADULTERY LEGAL IN INDIA TODAY ?**

The present position requires an important distinction: adultery is decriminalised, but it is not legally irrelevant.

Following *Joseph Shine*, a spouse cannot ordinarily seek criminal prosecution merely because the other spouse has engaged in an adulterous relationship. The later enactment of the

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

<sup>3</sup> *Id.* ¶ 158.

<sup>4</sup> *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

Bharatiya Nyaya Sanhita, 2023 ('BNS') confirms this position. The BNS repealed the IPC through Section 358, but it did not introduce a corresponding offence of adultery.<sup>5</sup> The new criminal framework therefore does not restore the offence that the Supreme Court had declared unconstitutional.

However, adultery continues to have consequences under matrimonial law.

## **ADULTERY AS A GROUND FOR DIVORCE**

Section 13(1)(i) of the Hindu Marriage Act, 1955 provides that a marriage may be dissolved where, after solemnisation of the marriage, one spouse has had voluntary sexual intercourse with a person other than his or her spouse.<sup>6</sup>

A similar position exists under Section 27(1)(a) of the Special Marriage Act, 1954, which recognises voluntary sexual intercourse with a person other than one's spouse after marriage as a ground for divorce.<sup>7</sup>

Thus, the law makes a deliberate distinction between criminal liability and matrimonial consequences. A spouse who commits adultery does not commit a criminal offence merely by doing so, but the conduct may provide the other spouse with a statutory ground for seeking dissolution of marriage.

This distinction is significant because it reflects a change in the State's approach. Criminal law is no longer used to punish consensual sexual conduct between adults merely because one participant is married. Matrimonial law, however, continues to recognise fidelity as a legally relevant component of the marital relationship.

## **BEYOND DISCRIMINALISATION**

The evolution of adultery law demonstrates an important feature of constitutionalism in India: social disapproval and criminal liability are not necessarily the same thing. The State may recognise that conduct can cause serious emotional and matrimonial consequences without concluding that imprisonment or criminal prosecution is the appropriate response.

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<sup>5</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), § 358.

<sup>6</sup> The Hindu Marriage Act, No. 25 of 1955, INDIA CODE (1955), § 13(1)(i).

<sup>7</sup> The Special Marriage Act, No. 43 of 1954, INDIA CODE (1954), § 27(1)(a).

At the same time, decriminalisation should not be misunderstood as providing immunity for every form of misconduct occurring within a marriage. If the facts independently constitute another offence recognised by criminal law, liability may arise under that separate provision. The absence of an adultery offence does not place all conduct connected with an extramarital relationship beyond the reach of law.

## CONCLUSION

The Indian law on adultery has travelled a considerable distance from the paternalistic framework of Section 497 IPC. The transformation from criminalisation to decriminalisation, particularly through *Joseph Shine*, reflects the constitutional recognition that marriage cannot extinguish an individual's dignity, privacy or autonomy. standard of proof required to prove adultery in civil court, or how adultery impacts maintenance under Section 125 CrPC / Section 144 BNSS.

Yet the law has not completely withdrawn from the field of marital fidelity. Adultery remains relevant under matrimonial statutes as a ground for divorce.

The present legal position can therefore be stated precisely: adultery is no longer a criminal offence in India, but it remains a legally recognised matrimonial wrong. The distinction reflects a broader constitutional principle: not every act regarded as immoral or harmful by society must necessarily be punished through criminal law.