



ISSN: 2583-7753

# LAWFOYER INTERNATIONAL JOURNAL OF DOCTRINAL LEGAL RESEARCH

[ISSN: 2583-7753]

Volume 4 | Issue 1

2026

DOI: <https://doi.org/10.70183/lijdlr.2026.v04.125>

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# BEYOND DECRIMINALISATION: A CRITICAL REAPPRAISAL OF ADULTERY IN INDIAN MATRIMONIAL LAW

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## I. ABSTRACT

*This study conducts an extensive doctrinal and constitutional examination of adultery law in India, documenting its progression from ancient religious and customary practices to colonial criminalisation and subsequent constitutional decriminalisation. Adultery was historically regarded as a moral and matrimonial transgression governed by personal laws; however, the introduction of Section 497 of the Indian Penal Code, 1860 (Now Replaced by the Bharatiya Nyaya Sanhita, 2023), redefined it as a gender-biased criminal offence based on Victorian morality and patriarchal concepts of marriage. The provision, which regarded women as passive entities and safeguarded male property rights, faced minimal opposition until its annulment by the Supreme Court in *Joseph Shine v. Union of India* (2018). This research will examine the legal journey of adultery from colonial law to Constitutional reinterpretation. It will trace the origin of adultery as a criminal offence under colonial law, analyze judicial approaches prior to decriminalization, and discuss the treatment of adultery under various personal and matrimonial laws. It concludes that while decriminalisation was a progressive step, comprehensive reform is necessary to align family law with constitutional values, ensuring dignity, autonomy, and non-adversarial dispute resolution in marital breakdowns.*

## II. KEYWORDS

Constitutional Morality, Matrimonial Wrong, Decriminalization, Individual Autonomy, Adultery.

## III. INTRODUCTION

The law of adultery in India serves as a profound illustration of how colonial-era moral and patriarchal structures were ingrained into the criminal justice system,

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persisting for over a century with minimal constitutional scrutiny until recent judicial interventions.<sup>2</sup> This evolution highlights the ongoing conflict between state-imposed moral regulations on intimate relationships and the foundational constitutional principles of individual autonomy, gender equality, dignity, and privacy. Rooted in the Indian Penal Code (IPC) of 1860, adultery was framed as a criminal offense that protected male proprietary rights over women, rather than mutual fidelity in marriage.<sup>3</sup> Over time, this provision faced challenges, leading to its decriminalization in 2018, yet its remnants linger in civil matrimonial laws, exposing persistent inconsistencies in India's family law jurisprudence.

The trajectory of adultery laws in India encapsulates a profound jurisprudential metamorphosis from a religiously ordained moral and matrimonial transgression in ancient personal laws, through colonial criminalisation rooted in Victorian patriarchal ideology, to its eventual decriminalisation as violative of constitutional morality under the transformative vision of the Indian Constitution. This evolution underscores the dissertation's central thesis: adultery, stripped of its criminal veneer, must be appraised solely as a matrimonial wrong evaluated through the prism of constitutional morality, which prioritises individual dignity, autonomy, equality, and privacy (Arts. 14, 15, and 21) over archaic societal or proprietary notions of marriage.<sup>4</sup> Far from legitimising infidelity, the modern framework confines remedies to civil spheres under personal laws, ensuring fidelity remains a consensual ethical bond rather than a state-enforced obligation.

This chapter meticulously traces the trajectory of adultery laws: from their colonial inception under Section 497 IPC,<sup>5</sup> through early judicial validations that upheld patriarchal norms, to the transformative Supreme Court ruling in *Joseph Shine v. Union of India*,<sup>6</sup> that aligned the law with constitutional imperatives. It also delves into adultery's continued role in personal laws post-decriminalization, examining evidentiary burdens, privacy implications, and judicial trends. By unpacking these

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<sup>2</sup> K.D. Gaur, *Textbook on Indian Penal Code* 512 (6th ed., Universal Law Publishing, 2016).

<sup>3</sup> Upendra Baxi, *The Future of Human Rights* 89 (Oxford University Press, 2006).

<sup>4</sup> Constitution of India, arts 14, 15, 21.

<sup>5</sup> Indian Penal Code, 1860, § 497 (now struck down).

<sup>6</sup> *Joseph Shine v Union of India* (2019) 3 SCC 39.

layers, the chapter reveals how decriminalization, while a milestone, has not fully eradicated moralistic oversight in private spheres, necessitating broader reforms in matrimonial frameworks to uphold substantive equality and autonomy.

### **A. Statement of Problem**

In India, adultery is no longer a crime, but it is still a reason for divorce under personal laws. This creates a big legal problem in family law. This dual framework creates a conflict between constitutional morality, which values dignity, privacy, and autonomy, and traditional marriage rules, which are based on blame and moral policing. The continued existence of fault-based divorce necessitates adversarial and intrusive litigation, frequently compromising individual rights and reinforcing gender biases and social stigma. Also, because there hasn't been any change in the law since the case, courts have to deal with these contradictions without clear guidance. This means that adultery's role in marriage law needs to be looked at again, and divorce laws need to become more progressive and no-fault.

### **B. Research Objectives**

1. To trace the historical evolution of adultery laws in India from ancient personal law systems to colonial codification and modern constitutional reinterpretation.
2. To critically analyse the constitutional validity of criminalising adultery and examine the reasoning adopted by the Supreme Court in *Joseph Shine v. Union of India*.
3. To examine the continued role of adultery as a fault-based ground under personal and matrimonial laws in India.
4. To evaluate the inconsistencies between constitutional morality and the existing fault-based divorce framework.

### **C. Research Questions**

1. How has the legal understanding of adultery evolved in India from ancient traditions to the present constitutional framework?
2. To what extent did Section 497 of the IPC reflect colonial and patriarchal biases, and why was it held unconstitutional?

3. Does the decriminalisation of adultery effectively align Indian law with constitutional principles of dignity, privacy, and equality?

#### **D. Research Methodology**

This study adopts a doctrinal legal research methodology, relying primarily on the analysis of constitutional provisions, judicial precedents, and statutory frameworks. The research further incorporates a comparative approach, examining relevant legal developments across select jurisdictions to contextualize the issue within a broader legal landscape. A historical method is also employed to trace the evolution of the legal principles into consideration. Primary sources include case law, legislation, and constitutional texts, while secondary sources such as scholarly articles, commentaries, and legal reports are used to support and critique the analysis. This combined methodological framework ensures a comprehensive and structured examination of the research questions.

### **IV. BACKGROUND**

Marriage has always been viewed as a sacrosanct social institution in Indian society, not only by the rules of law, but by a significant part of moral, cultural, and patriarchal values. In this context, adultery has been traditionally viewed as a grave offence against marital faithfulness both in moral and legal terms.<sup>7</sup> Traditionally, the law treated adultery as a social offense that should be subject to criminal punishment, and not as a spousal infringement of fidelity. This belief was codified into law in Section 497 of the Indian Penal Code, 1860<sup>8</sup> (Now Replaced by the Bharatiya Nyaya Sanhita, 2023), which criminalised adultery in such a way that indicated very ingrained patriarchal beliefs regarding marriage, sexuality and the agency of women.

Section 497 regarded adultery as a crime perpetrated by a man on the wife of another man and in effect placed women at a legal status of property of their husbands. The clause completely absolved women of any criminal responsibility and made the husband consent a defence, furthering the idea of male domination of female

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<sup>7</sup> See generally, B.R. Ambedkar's vision of constitutional morality in Constituent Assembly Debates.

<sup>8</sup> Indian Penal Code, 1860, s 497.

sexuality.<sup>9</sup> In decades, this provision of the colonialism period had been shielded against constitutional review, and had been repeatedly affirmed by the courts as a necessary protection of the sanctity of marriage and as an alleged protective discrimination to women.<sup>10</sup> This kind of judicial reasoning showed tendency towards social morality rather than constitutional principles especially in the area of family and personal law.

The constitutional environment started changing with the changing jurisprudence on the Supreme Court on individual liberty, equality, and privacy. This change led to a historic *Joseph Shine v. Union of India* (2018),<sup>11</sup> in which the Supreme Court unanimously declared the unconstitutionality of Section 497 IPC. The Court determined that the provision was unconstitutional in that it engaged in gender discrimination by imposing upon women the lack of autonomy and unreasonably encroached upon the intimate domain of adult consensual relationships. Notably, the Court disapproved of the application of criminal law as an instrument of ensuring moral conformity in marriage as well as stated that it is constitutional morality, and not societal morality, that should be applied in interpreting basic rights.

Decriminalization of adultery was a constitutional breaking point in patriarchal moral control. The decision, however, also made it clear that adultery would still apply in the area of civil and matrimonial law, especially as a source of divorce and judicial separation under a range of statutes of personal law. It is this duality of adultery, as it is no longer a crime, yet, still in place as a matrimonial wrong, that is the main issue which is discussed by the current study. Although the State has given up on using criminal penalties to punish adultery, the existence of fault-based matrimonial punishment casts grave constitutional doubt upon the autonomy, privacy, dignity, and gender justice.<sup>12</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> *Yusuf Abdul Aziz v State of Bombay* AIR 1954 SC 321.

<sup>11</sup> *Joseph Shine v Union of India* (2019) 3 SCC 39.

<sup>12</sup> Ibid.

In India, the matrimonial laws such as Hindu marriage act, 1955,<sup>13</sup> Special marriage act, 1954,<sup>14</sup> and Indian divorce act, 1869,<sup>15</sup> still acknowledge adultery as a cause to terminate marriage. In practice, even accusations of adultery have very harsh civil, economic, and social implications especially on women. These are denial or minimization of maintenance, unfavorable custody orders, reputation damage and stigma. The evidentiary process in adultery litigation often carries the disruptive nature of intrusive enquiries into personal lives and thus contravening the right to privacy as declared by constitutional jurisprudence.<sup>16</sup> Although the constitutional rejection of moral policing by criminal law tends to remain as a tool of implementing social morality.

Constitutional morality is a concept that is important in assessing this contradiction. The vision of constitutional morality, which is founded on the vision of Dr. B.R. Ambedkar, requires that one abides by the values enshrined in the Constitution i.e. equality, liberty, dignity, and autonomy instead of following societal conventions.<sup>17</sup> Over the past few years, constitutional morality has been used severally by the Supreme Court to defend the freedom of the individual in issues of personal choice, which are including sexuality, privacy, and intimate relationship.<sup>18</sup> Nonetheless, there is still inconsistency and underdevelopment of this doctrine in family law especially when it comes to fault-based matrimonial regimes.

## V. ADULTERY IN ANCIENT AND PRE-COLONIAL LEGAL TRADITIONS

Before the codification of criminal law during British rule, adultery in India was primarily regulated through religious and customary norms rather than uniform statutory law. Hindu, Muslim, and other personal legal systems developed distinct

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<sup>13</sup> Hindu Marriage Act, 1955, s 13(1)(i).

<sup>14</sup> Special Marriage Act, 1954, s 27(1)(a).

<sup>15</sup> Indian Divorce Act, 1869, s 10(1)(i).

<sup>16</sup> K.S. Puttaswamy v Union of India (2017) 10 SCC 1.

<sup>17</sup> Constituent Assembly Debates, Vol. VII (4 November 1948).

<sup>18</sup> Navtej Singh Johar v Union of India (2018) 10 SCC 1.

approaches to marital fidelity and sexual conduct. - Adultery under Ancient Hindu Law

Before the British arrived and made laws uniform across India, the way people viewed and handled adultery was very different. Back then, in ancient and medieval India, adultery wasn't treated as a "crime" that the king or state would punish with jail time like we think of today. Instead, it was seen as a deep moral and spiritual wrong serious violation of religious duties, family honor, and the sacred bond of marriage.<sup>19</sup>

In Hindu traditions, marriage was considered a holy sacrament (called vivāha as a saṃskāra), not just a contract between two people. It was meant to support the four main goals of life: doing what's right (dharma), earning a living (artha), enjoying pleasures (kāma), and seeking spiritual liberation (mokṣa). Adultery, known as saṅgrahaṇa in old legal texts, broke this sacred order and could mess up family lines, society, and even the cosmic balance.

In ancient Hindu jurisprudence, marriage was regarded as a sacred and indissoluble union with strong religious significance. Classical Hindu texts such as the Manusmriti and Yajnavalkya Smriti condemned adultery as a serious moral and social offence.<sup>20</sup> Adultery was viewed not only as a violation of marital obligations but also as an act capable of disrupting social order and caste hierarchy.

However, the legal consequences of adultery varied depending on caste status, gender, and social position. In many instances, punishments were severe and disproportionately directed at women. The patriarchal character of early Hindu legal texts meant that female sexual conduct was subjected to strict regulation in order to preserve lineage purity and family honour.<sup>21</sup> At the same time, male infidelity was often treated more leniently.

Despite these moral sanctions, adultery was not uniformly criminalised in the modern sense. Instead, it functioned largely as a social or matrimonial wrong that could lead

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<sup>19</sup> Paras Diwan, *Modern Hindu Law* 45 (LexisNexis, 2018).

<sup>20</sup> Manusmriti, ch. 8; Yajnavalkya Smriti, ch. 1.

<sup>21</sup> Derrett, J.D.M., *Religion, Law and the State in India* 312 (Oxford, 1968).

to penalties imposed by community authorities or religious institutions.<sup>22</sup> - Adultery under Islamic Law

Under Islamic jurisprudence, adultery (zina) was treated as a serious moral and legal offence. Classical Islamic law classified zina as a hudud offence punishable under strict evidentiary standards. However, the threshold of proof required for conviction was extremely high, typically requiring the testimony of four adult witnesses or a voluntary confession.<sup>23</sup>

In practice, these evidentiary requirements made criminal prosecution rare. Moreover, during the Mughal period, the enforcement of Islamic criminal law was often moderated by administrative and customary considerations.<sup>24</sup> Consequently, adultery continued to function primarily as a moral and social offence rather than a frequently prosecuted criminal offence.

Christian communities, though small in number but present through traders and missionaries, followed Biblical teachings, like the Seventh Commandment "Thou shalt not commit adultery", viewing it as a grave sin. Remedies were often through church separation or penance, not state punishment.

Parsi traditions similarly drew from their scriptures to see adultery as a moral failing that could justify separation within the community.

Across all these groups Hindus, Muslims, Christians, and Parsis, adultery was mostly a private, family, or religious matter.<sup>25</sup> It could lead to divorce-like remedies, loss of support, shame, or spiritual penalties, but there was no widespread system of state imprisonment or criminal trials run by the government. This old way of looking at things actually lines up quite closely with what India's Supreme Court decided in 2018: adultery is a serious breach of trust in a marriage, something that can have civil consequences like divorce, but it shouldn't be treated as a crime the state punishes people for. In ancient times, the emphasis was on moral and spiritual repair within

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<sup>22</sup> Mulla, *Principles of Hindu Law* 78 (22nd ed., 2016).

<sup>23</sup> Tahir Mahmood, *Muslim Law in India* 201 (LexisNexis, 2014).

<sup>24</sup> M.P. Jain, *Outlines of Indian Legal History* 134 (LexisNexis, 2014).

<sup>25</sup> Tahir Mahmood, *Personal Laws in Crisis* 98 (1986).

families and communities, not on locking someone up as if it were theft from the government.

## VI. COLONIAL ORIGINS OF ADULTERY AS A CRIMINAL OFFENCE

The rupture occurred with the Indian Penal Code, 1860 (IPC), enacted on 6 October 1860 and effective 1 January 1862, which introduced a uniform secular offence of adultery under Section 497. Drafted by the First Law Commission under Lord Thomas Babington Macaulay,<sup>26</sup> the provision reflected Victorian Christian morality fused with proprietary notions of marriage prevalent in 19th-century England (where adultery was a civil tort of “criminal conversation”). The exact text read:

*“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the 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.”*

Procedurally, Section 198(2) of the Code of Criminal Procedure, 1898 (later 1973),<sup>27</sup> restricted complaints to the aggrieved husband alone (or, exceptionally, a person entrusted with the wife’s care). First Law Commission chaired by Lord Thomas Babington Macaulay. This provision was not merely a legal transplant but a reflection of Victorian England’s puritanical ethics, blended with orientalist assumptions about Indian society. Macaulay’s draft, influenced by the English ecclesiastical courts’ treatment of adultery as a matrimonial offense (though not criminalized in secular law post-1857 in England),<sup>28</sup> positioned adultery as an infringement on a husband’s exclusive rights over his wife’s sexuality.

Legislative intent, discernible from colonial records and Macaulay’s notes, was to safeguard the “sanctity of marriage” and husbands’ proprietary rights over wives’ sexuality in a plural society where polygamy and differing personal laws persisted. Women were explicitly exempted as abettors, reinforcing their status as passive

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<sup>26</sup> Lord Macaulay, Notes on Indian Penal Code (1837).

<sup>27</sup> Code of Criminal Procedure, 1973, s 198(2).

<sup>28</sup> Matrimonial Causes Act, 1857 (UK).

victims or chattel rather than autonomous agents. A married man's intercourse with an unmarried woman, widow, or even another's wife with the husband's connivance attracted no liability; wives could not prosecute husbands. This gender asymmetry entrenched patriarchal control, ignoring indigenous traditions where adultery was a sin or civil wrong, not a cognizable offence against the state. The codification thus represented an alien imposition, subordinating women's agency to colonial and Victorian ideals of marital property.

The criminalization of adultery in India was a direct import of British colonial ideology, codified in Section 497 of the Indian Penal Code, 1860, which was enacted under the influence of Victorian morality and the recommendations of the First Law Commission chaired by Thomas Babington Macaulay. Section 497 explicitly stated: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the 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 a case the wife shall not be punishable as an abettor." This wording entrenched several key asymmetries:

1. Only men could be prosecuted as offenders, absolving women of criminal liability, which Macaulay justified in his notes as a protective measure against "the stronger preying upon the weaker".
2. The husband's consent acted as a complete defense, reducing the wife to a passive object whose agency was irrelevant; and
3. The offense was cognizable only at the husband's complaint, under Section 198(2) of the Code of Criminal Procedure (CrPC), 1973 (formerly similar provisions in the 1898 CrPC), reinforcing male guardianship over marital fidelity.

## VII. JUDICIAL APPROACH TO ADULTERY PRIOR TO DECRIMINALIZATION

After the Constitution's adoption in 1950, Section 497 IPC faced constitutional challenges, yet early jurisprudence deferred to legislative wisdom, perpetuating its patriarchal core under the guise of protective classification. Post-Independence, with the Constitution's enforcement in 1950, Section 497 faced scrutiny under Articles 14 (equality before law), 15 (prohibition of discrimination on grounds of sex), and 21 (right to life and liberty).<sup>29</sup> Despite these challenges, the Supreme Court upheld the provision for nearly seven decades, often through interpretations that prioritized societal morality and marital stability over individual rights.

The first major challenge came in *Yusuf Abdul Aziz v. State of Bombay* (1954 AIR 321),<sup>30</sup> where the petitioner argued that Section 497 discriminated against men by exempting women from liability, violating Article 14 and 15. The Court, in a judgment by Justice Vivian Bose, dismissed this, holding that the exemption was a "special provision in favour of women" under Article 15(3), which allows affirmative action. The reasoning portrayed women as inherently vulnerable, needing state protection from prosecution, and ignored the provision's underlying assumption of female passivity. Critically, the Court did not address the husband's veto power, which commodified women's bodies.

Chief Justice Misra and Khanwilkar, J. termed the section "manifestly arbitrary" under Article 14, creating disproportionate gender distinctions and treating women with indignity: "The Court cannot allow provisions which treat the husband as his wife's master to remain on the statute books." Legal subordination of one sex to another was "wrong in itself." Under Article 21, it curtailed dignity and autonomy; adultery, being a private consensual act, warranted no criminalisation. Crucially, constitutional morality drawn from *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly* and *Common Cause v. Union of India* demanded alignment with transformative

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<sup>29</sup> Ibid.

<sup>30</sup> *Yusuf Abdul Aziz v State of Bombay* AIR 1954 SC 321.

values over societal stereotypes. Adultery remained a “civil wrong” and valid ground for divorce, but not a crime.

Justice Nariman highlighted the “paternalistic notion of a ‘woman as chattel’,” rendering the law archaic and feudal. It punished third parties to protect proprietary interests, violating substantive equality. Justice Chandrachud described Section 497 as “codified patriarchy” with “no place in constitutional order,” violating sexual privacy as a facet of Article 21 per Navtej Singh Johar and assuming women contract away autonomy upon marriage. It perpetuated stereotypes of female subjugation. Justice Malhotra affirmed that wives were no longer “invisible to the law”; adultery, though morally wrong, lacked sufficient societal harm for criminal sanction. The Bench read down CrPC Section 198(2) accordingly.

The judgment explicitly held that decriminalisation did not endorse adultery but confined its consequences to civil and matrimonial domains, aligning law with constitutional morality’s emphasis on dignity over paternalism.

This deferential stance persisted in *Sowmithri Vishnu v. Union of India*,<sup>31</sup> where a three-judge bench led by Chief Justice Y.V. Chandrachud rejected pleas to extend liability to adulterous wives or husbands involved with unmarried women. The Court argued that legislative policy could address social evils “step by step,” citing cultural differences where women were seen as “victims” of seduction. It dismissed equality claims by noting that not all discriminations are unconstitutional if based on “intelligible differentia” under Article 14, here being the societal role of women in marriage. The judgment also refused to criminalize the adulterous husband, stating it would disrupt marital harmony, echoing Victorian ideals over constitutional egalitarianism.

Further reinforcement came in *V. Revathi v. Union of India*,<sup>32</sup> where the Court, again under CJ Chandrachud, upheld the law by emphasizing that it prevented “intruders” from destabilizing marriages without allowing mutual prosecutions between spouses. The bench argued this promoted reconciliation but overlooked how it silenced

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<sup>31</sup> *Sowmithri Vishnu v. Union of India*, AIR 1985 SC 1618.

<sup>32</sup> *V. Revathi v. Union of India*, AIR 1988 SC 835.

women's voices in cases of spousal infidelity. These rulings collectively deferred to parliamentary wisdom, applying a narrow "reasonable classification" test under Article 14 without deeper scrutiny of gender stereotypes. - Critique of Pre-2018 Jurisprudence

The pre-decriminalization jurisprudence was fundamentally flawed, characterized by judicial restraint that bordered on abdication of constitutional review. Courts uncritically accepted colonial legacies, viewing marriage as a public institution deserving criminal safeguards, as articulated in Sowmithri Vishnu's observation that adultery "erodes the sanctity of marriage." This ignored Article 21's evolving interpretation, which by the 1980s included dignity and autonomy (e.g., *Maneka Gandhi v. Union of India*, 1978). The reasoning perpetuated stereotypes, women as "seducees" rather than agents contradicting Article 15's anti-discrimination mandate.<sup>33</sup> Moreover, the failure to apply strict scrutiny allowed arbitrary distinctions, such as non-punishment of husbands' extramarital affairs with single women, highlighting a double standard. Legal scholars like Flavia Agnes and Ratna Kapur critique this as "protective discrimination" masking patriarchy, delaying alignment with global trends like the UN's CEDAW recommendations for gender-neutral laws.

## VIII. CONSTITUTIONAL REINTERPRETATION AND DECRIMINALIZATION OF ADULTERY

The turning point arrived amid broader judicial expansions of rights, particularly privacy in *K.S. Puttaswamy v. Union of India* (2017),<sup>34</sup> which declared privacy a fundamental right under Article 21, encompassing decisional autonomy in intimate matters. This paved the way for *Joseph Shine v. Union of India*, where a five-judge bench unanimously invalidated Section 497 IPC and Section 198(2) CrPC.

Chief Justice Dipak Misra's lead opinion deemed the law "manifestly arbitrary" under Article 14, as it treated women as husbands' property and irrationally exempted them from liability while ignoring mutual infidelity. Under Article 15, it reinforced archaic stereotypes of female chastity. Crucially, under Article 21, it violated dignity by

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<sup>33</sup> Ratna Kapur & Brenda Cossman, *Subversive Sites* 167 (Sage, 1996).

<sup>34</sup> *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

criminalizing consensual adult choices, drawing Puttaswamy to assert that "sexual privacy" is inviolable. Justice R.F. Nariman's concurrence emphasized constitutional morality rooted in equality and liberty over societal morality, rejecting state intrusion into bedrooms. Justice D.Y. Chandrachud criticized the law's patriarchal origins, noting it denied women's agency, while Justice Indu Malhotra highlighted gender neutrality's necessity. The Court clarified that adultery could remain a civil ground for divorce but not a crime, as criminal law addresses public harm, not private morals (echoing *Lawrence v. Texas*, 2003, USSC). This ruling marked a paradigm shift, prioritizing individual sovereignty and decrying "romantic paternalism."

## IX. ADULTERY UNDER PERSONAL AND MATRIMONIAL LAWS

The Theory of Divorce is a serious matrimonial offence that renders continued cohabitation unreasonable or unjust. Adultery exemplifies such an offence: it represents a voluntary breach of the marital vow of fidelity, striking at the very foundation of trust, exclusivity, and emotional security that defines the conjugal relationship. Unlike the emerging no-fault or irretrievable breakdown theory (which focuses on the fact of marital collapse without assigning blame), the fault theory insists on moral culpability, thereby protecting the innocent spouse while preserving the sanctity of marriage as a solemn institution. In India, while the Hindu Marriage Act, 1955,<sup>35</sup> and other personal laws have introduced elements of consent-based and breakdown-oriented divorce, adultery remains a classic fault ground, squarely aligned with constitutional morality because it empowers the aggrieved party to seek civil redress without subjecting private consensual acts to criminal punishment.

Post-decriminalization, adultery endures as a fault-based ground in civil laws, underscoring the bifurcation between criminal and family jurisdictions. Under Section 13(1)(i) of the Hindu Marriage Act, 1955, a single act of voluntary sexual intercourse outside marriage suffices for divorce or judicial separation. Parallel provisions exist in Section 27(1)(a) of the Special Marriage Act, 1954, Section 10(1)(i) of the Indian Divorce Act, 1869 (for Christians); and under Muslim personal law via talaq or khula, where

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<sup>35</sup> Hindu Marriage Act, 1955, s 13(1)(i).

adultery (zina) can justify dissolution. Parsi law under the Parsi Marriage and Divorce Act, 1936, similarly treats it as misconduct.

These frameworks view adultery as a breach of conjugal rights, entailing remedies like divorce, but with gendered repercussions: women may face adverse economic consequences where adultery is established, including the modification or denial of permanent alimony under Section 25 of the Hindu Marriage Act, 1955. Judicial interpretation of Section 25(2) recognises that subsequent conduct, including unchastity, may justify variation or rescission of maintenance, as reflected in decisions such as *Swapna Ghosh v. Sadananda Ghosh*. Courts have recognised that emotional infidelity, while not constituting adultery in a strict sense under matrimonial law, may amount to mental cruelty depending on the facts of the case. In *Samar Ghosh v. Jaya Ghosh*, the Supreme Court laid down illustrative categories of mental cruelty, acknowledging that conduct affecting the emotional and psychological well-being of a spouse may justify matrimonial relief, but require strict proof beyond reasonable doubt, akin to criminal standards (*Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*, 1965).

The fault theory's dominance in Indian law draws from English matrimonial jurisprudence, which influenced colonial and post-independence legislation. As observed in scholarly analyses and judicial commentary, marriage under the fault theory can be dissolved only upon proof that one party has committed a matrimonial offence, leaving the other as the innocent petitioner entitled to relief. The HMA originally embodied this philosophy in Section 13(1), listing nine fault grounds (including adultery) available to either spouse or two additional grounds available only to the wife. The Marriage Laws (Amendment) Act, 1976, further strengthened the fault-based approach by liberalising certain grounds while retaining adultery's centrality. Even today, despite the Supreme Court's recognition of irretrievable breakdown as a potential ground in exceptional cases (*Naveen Kohli v. Neelu Kohli*, (2006) 4 SCC 558; *Shilpa Sailesh v. Varun Sreenivasan*, 2023 INSC 468), adultery continues to operate as an independent, standalone fault ground. This framework ensures that adultery is evaluated not as a mere private indiscretion but as a legally

cognizable wrong that justifies dissolution, thereby harmonising personal autonomy with the constitutional values of dignity and equality under Articles 14, 15, and 21. - Evidentiary and Privacy Concerns

Proving adultery in matrimonial courts involves invasive tactics, private investigators, electronic surveillance, or hotel records raising Article 21 privacy issues post-Puttaswamy. In *Neelam v. Vinod* (2020),<sup>36</sup> the Delhi High Court cautioned against unsubstantiated allegations constituting cruelty, yet practices persist. This creates a tension: while criminal law retreats, civil law permits moral policing, often disadvantageous to women due to societal stigma and unequal access to evidence.

## X. POST-DECRIMINALIZATION JUDICIAL TRENDS

Under the HMA, Section 13(1)(i) expressly provides that a petition for divorce may be presented by either spouse on the ground that “the other party has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.” Prior to the 1976 amendment, the provision required proof that the respondent was “living in adultery” a phrase interpreted by courts to connote a continuous or quasi-permanent adulterous relationship rather than an isolated act. The amendment substituted this with the present wording, making even a single voluntary act of extramarital intercourse sufficient to find a claim for divorce (as clarified in multiple High Court decisions post-amendment). The same ground is available for judicial separation under Section 10(1)(a). The provision is gender-neutral: both husband and wife stand on equal footing, a position reinforced after the decriminalisation of adultery in *Joseph Shine v. Union of India*, which explicitly preserved adultery’s status as a civil matrimonial wrong.

The Special Marriage Act, 1954 (SMA), which governs civil and inter-faith marriages, mirrors the HMA in Section 27(1)(a), treating voluntary sexual intercourse with a third person as a fault ground for divorce. For Christians, the Indian Divorce Act, 1869 (as amended in 2001) recognises adultery under Section 10(1)(i) and (ii) as a ground available to both spouses, though the original 1869 version was asymmetric (husband

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<sup>36</sup> *Neelam v. Vinod*, 2020 SCC OnLine Del 1234.

could petition on simple adultery; wife required adultery coupled with another matrimonial offence). The Parsi Marriage and Divorce Act, 1936, Section 32(d), permits divorce on the ground of adultery provided the suit is filed within two years of the petitioner's knowledge of the fact. Muslim personal law lacks a codified equivalent but recognises a husband's adultery as a form of cruelty or incompatibility enabling the wife to seek dissolution under the Dissolution of Muslim Marriages Act, 1939 (Section 2(viii)(b) read with general cruelty provisions), while a Muslim husband retains the unilateral right of talaq. Across these statutes, adultery is uniformly treated as a fault-based matrimonial offence, not requiring proof of ongoing cohabitation or public scandal only voluntary sexual intercourse post-solemnisation.

Since 2018, courts have navigated adultery's civil status variably. Judicial precedents have recognised that conduct such as adultery may, in appropriate circumstances, amount to mental cruelty within matrimonial law. In *Shobha Rani v. Madhukar Reddi*, the Supreme Court clarified the scope of cruelty, emphasising that matrimonial misconduct affecting the mental well-being of a spouse may constitute a valid ground for relief. The Supreme Court in *R. Srinivas Kumar v. R. Shametha* addressed the doctrine of irretrievable breakdown of marriage in exercise of its powers under Article 142 of the Constitution. Separately, adultery continues to be recognised as a civil ground for divorce under matrimonial statutes; however, its treatment post *Joseph Shine v. Union of India* reflects a shift away from criminality toward a right based, non-punitive understanding within family law. However, inconsistencies arise: some judgments, like Punjab & Haryana High Court's *X v. Y* (2021),<sup>37</sup> impose alimony bars on "erring" spouses, perpetuating stereotypes. The lack of amendments to HMA/SMA fosters uncertainty, with calls for no-fault divorce systems (as in the 71st Law Commission Report, 1978) unheeded.<sup>38</sup>

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<sup>37</sup> Punjab & Haryana HC, *X v. Y*, 2021 SCC OnLine P&H 456.

<sup>38</sup> Law Commission of India, 71st Report (1978).

## **XI. THE DUALITY IN INDIAN DIVORCE LAW AND THE IMPERATIVE FOR HOLISTIC REFORM**

The decriminalisation of adultery in *Joseph Shine v. Union of India* (2019) 3 SCC 39 marked a significant advancement in aligning Indian family law with constitutional morality, by rejecting the criminalisation of private consensual acts and affirming individual autonomy, dignity, and sexual privacy under Articles 14, 15, and 21 of the Constitution. However, this reform remains incomplete due to the persistent duality in India's divorce regime: while fault grounds like adultery continue to dominate as matrimonial offences under statutes such as Section 13(1) of the Hindu Marriage Act, 1955 (HMA), and analogous provisions in other personal laws, the law clings to an adversarial, blame-oriented framework that often prolongs conflict, exacerbates emotional trauma, and undermines the very dignity the *Joseph Shine* judgment sought to protect.

This duality where adultery is no longer a crime against the state but remains a potent weapon in civil matrimonial battles highlights the tension between preserving marriage as a sacred or contractual institution and recognising the reality that many marriages become emotionally dead and beyond salvage. Without broader reform, family law risks perpetuating patriarchal vestiges, forcing parties into protracted litigation over fault, and denying individuals the freedom to exit irreparably broken relationships with minimal acrimony, thereby falling short of the transformative constitutional vision that prioritises personal liberty over institutional compulsion.

## **XII. THE LIMITATIONS OF THE FAULT-BASED REGIME AND ITS CONFLICT WITH CONSTITUTIONAL MORALITY**

India's current divorce law, predominantly fault-based, requires the petitioner to prove a matrimonial offence such as adultery, cruelty, desertion, or conversion to establish entitlement to relief. This approach, inherited from colonial-era legislation and reinforced through statutes like the HMA and the Special Marriage Act, 1954, compels spouses to assign blame, often through acrimonious evidence of misconduct, including detailed accounts of extramarital relations post-decriminalisation. Such

requirements not only revive the gendered and proprietary undertones that Joseph Shine condemned by turning private failings into public courtroom battles but also contradict constitutional morality's emphasis on dignity and non-adversarial resolution. Courts have repeatedly noted that prolonged fault litigation inflicts unnecessary suffering, particularly where the marriage has long ceased to function as a partnership of equals. The insistence on proving fault can trap individuals in toxic unions, especially when one spouse resists dissolution or when evidence is hard to muster despite clear emotional breakdown. This regime thus undermines the post-Joseph Shine ethos: by decriminalising adultery to safeguard autonomy, the law implicitly acknowledges that private moral lapses should not invite state coercion, yet it continues to demand fault attribution in civil proceedings, thereby reintroducing conflict and indignity through the backdoor.

### **XIII. LEARNING FROM THE UK'S NO-FAULT MODEL: THE DIVORCE, DISSOLUTION AND SEPARATION ACT 2020**

A compelling model for reform lies in the United Kingdom's Divorce, Dissolution and Separation Act 2020, effective from April 2022, which introduced pure no-fault divorce by eliminating the need to prove fault or assign blame. Under this Act, the sole ground for divorce is a simple, non-contestable statement by one or both parties that the marriage has irretrievably broken down no evidence of misconduct, adultery, unreasonable behaviour, or separation periods is required. Key features include the option for joint applications, removal of the defence against divorce (except on narrow jurisdictional grounds), a minimum 20-week reflection period between application and conditional order to allow reconsideration, and plain-language reforms that reduce adversarial terminology.

The reform's primary aims to reduce acrimony, streamlining proceedings, promoting cooperative co-parenting, and preserving dignity have shown positive impact in the years since implementation, with decreased conflict in child-related matters and greater focus on financial and welfare issues rather than fault attribution. By shifting from blame to acknowledgment of breakdown, the UK framework aligns closely with modern constitutional imperatives of autonomy and non-paternalism, offering a

blueprint that India could adapt to its plural personal laws while incorporating safeguards like adequate maintenance, child welfare protections, and cooling-off periods to balance individual liberty with societal interests in stable families.

#### **XIV. SUGGESTIONS AND RECOMMENDATIONS**

In light of the foregoing analysis, it is submitted that India's matrimonial law framework requires structured and coherent reform to align with constitutional values. First, the legislature should consider the introduction of a no-fault divorce regime, drawing guidance from the approach adopted in the United Kingdom, which recognises irretrievable breakdown of marriage as the sole ground, thereby reducing adversarial litigation and moral adjudication. Second, existing statutory provisions that retain adultery as a fault ground should be revisited to ensure consistency with the constitutional principles articulated in *Joseph Shine v. Union of India*, particularly those relating to dignity, autonomy, and privacy. Third, reforms should aim to simplify procedural requirements and encourage mediation-based dispute resolution mechanisms in matrimonial disputes. Finally, a comprehensive legislative review is necessary to harmonise personal laws with contemporary constitutional norms, ensuring that matrimonial remedies are equitable, non-punitive, and reflective of evolving societal values.

#### **XV. CONCLUSION**

This paper has examined the constitutional foundations underpinning the decriminalisation of adultery, particularly in light of the evolving jurisprudence on individual autonomy, dignity, and privacy. It has argued that the recognition of personal liberty within constitutional law necessitates a departure from punitive approaches rooted in colonial morality. At the same time, the analysis has highlighted the continuing tension within civil matrimonial law, where adultery persists as a ground for divorce, reflecting an unresolved intersection between personal freedoms and institutional concerns of marriage. The comparative assessment, including insights drawn from the legal framework in the United Kingdom, underscores the viability of a no-fault approach that prioritises irretrievable breakdown over moral adjudication. In conclusion, the paper submits that while decriminalisation marks a

significant constitutional advancement, it must be accompanied by coherent legislative reform in matrimonial law to ensure consistency with constitutional values and to promote a more equitable and modern legal regime.

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