
A CRITICAL STUDY ON THE DECRIMINALISATION OF ADULTERY AND ITS IMPACT ON FAMILY JUSTICE

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INTRODUCTION:

Human behaviour plays a predominant role in making, executing and adjudicating the law. Laws are generally implemented according to the will of the majority, even though societies continue to be influenced by customs, morals, traditions, and various other theoretical perspectives. This paper aims to critically analyse the major socio- legal issues arising after the decriminalisation of adultery by the Supreme Court, its broader impact on society and ultimately the sanctity of the institution of marriage. There lies a significant distinction between the terms: freedom and liberty, where the former refers to the ability to act or move according to one's own will, and the latter refers to one's autonomy, which must be free from external control, which also upholds inherent meaning and reflects the fundamental rights of individuals. One main concern that this article wishes to shed light on is that, while the practice of bigamy remains a punishable criminal offence, prostitution and adultery are increasingly viewed as matters of individual choice or personal liberty. This disparity may create confusion and may also create concerns about moral and legal standards in society, particularly when standard and uniform guidelines are still lacking.

STATEMENT OF PROBLEM:

The research predominantly focuses on the significant legal inconsistency that arose where adultery and prostitution were no longer punishable criminal offences, while bigamy continues to be a criminal offence. Such a position may indirectly trigger individuals to evade responsibilities that arise out of sexual relationships. Modern society increasingly advocates for individual personal autonomy, often expressed through the notion of "my body, my rights", which has gained widespread acceptance within the legal system; however, the continued criminalisation of bigamy raises serious concerns and prompts critical questions regarding the

justification for such restrictions and their inconsistencies between liberty and equality. Previously when adultery was seen as a punishable offence, issues relating to paternity and sexual relationships could be more easily identified through evidentiary mechanisms such as DNA testing, with comparatively minimal concerns regarding the infringement of privacy rights; however, after the decriminalisation of adultery, the continued relevance and operation of Section 116 of the Bharatiya Sakshya Adhinyam has become increasingly questionable, as the persistence of such provisions despite the shift in criminal law creates legal and social inconsistencies that may potentially result in injustice.

RESEARCH QUESTIONS:

1. What are the legal definitions of bigamy, adultery, and prostitution, and what are the fundamental differences among these concepts?
2. What responsibilities and legal obligations are imposed upon the parties involved in bigamy, adultery, and prostitution under the existing legal framework?
3. What inconsistencies exist within the present legal system regarding the regulation and treatment of bigamy, adultery, and prostitution?
4. Do these legal inconsistencies result in social injustice, and if so, to what extent do they affect individuals and society at large?

HYPOTHESIS:

The existing legal framework in India that is currently governing bigamy, adultery and prostitution suggests that there is potential inconsistency in the existing legal framework, which indirectly enables evasion from the moral obligations, particularly by men, which poses potential challenges to the stability of the family structure and social order.

OBJECTIVES:

1. To identify the true legal rationale and motive behind bigamy, adultery and prostitution within the legal framework.
2. To undertake a comparative analysis of bigamy, adultery and prostitution

3. To critically emphasize the responsibilities and obligations of the parties involved in bigamy, adultery and prostitution

4. To examine the extent of social injustice caused by inconsistencies and contradictions within existing criminal laws

REVIEW OF LITERATURE:

There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives.¹

The offence of adultery is legally equivalent to that of theft, the goods being the wife's body. Women are therefore denied agency, whether they themselves have committed adultery (as understood generally) or are married to men committing adultery.²

The primary duty of the law of evidence is to discover the truth of the case based on evidence, but not merely to complete the case through a mechanical procedure.³

PHILOSOPHICAL AND LEGAL ASPECTS OF RELATIONSHIP:

The great Tamil poet Thiruvalluvar, through his Thirukkural, preached obedience and promoted harmonious social conduct. Other prominent jurists advocated that marriage is a sacred companionship founded on mutual understanding, friendship, love, and loyalty.⁴ According to this view, both partners are expected to stick together through all thick and thin and remain devoted to each other, and in the event of misunderstanding, they should stand together to settle the dispute amicably by giving each other mutual respect and understanding. Relationships, particularly personal physical intimacy and marriage, possess both philosophical and legal dimensions. Philosophically, they are grounded in moral duties such as love, affection, honesty and loyalty towards their spouse. Legally, they create enforceable rights and obligations on the parties and act as the foundation of maintaining social order and family stability. Marriage is a legal commitment that strengthens trust, morality and loyalty

¹ See, Comment on the draft of the first Law Commission Report. Gaur K.D., Indian Penal Code. Eastern Law Publication, 2nd Ed. Pg. 388.

² Gangoli Geetanjali, Indian Feminisms: Law patriarchies and Violence in India, Ashgate Publishing Company USA, 1st Ed. 2007. pg. 61

³ Prof. O.Jeyarevathi, Assistant Professor of Law, Government Law College, Vellore, Lecture Series

⁴ <https://thirukkural.io/> accessed on 27/02/2026

between the partners. If either partner violates the obligations, the other has the right to seek an appropriate remedy under the religious personal laws and secular statutory laws. Marriage embodies both contractual and sacramental; while it involves mutual rights and obligations similar to those of a contract, it is also considered a sacred thread of connection in many traditions. Historically, across ancient civilisations, marriage has been treated as a sacrament(samskara), rather than a mere contract. It is believed to be predetermined by destiny or divine will. In Hindu philosophy, it is considered a divine sacrament. In Islamic Jurisprudence, marriage is considered to be a civil contract.

Historically, bigamy has existed and was prevalent in many nations; there was no major religion that absolutely denied the practice of bigamy, though later social reforms shifted towards monogamy to ensure social stability and maintain the uniform order in society. In light of the Golden Rule of interpretation, bigamy constitutes a clear violation of social and legal norms that govern marriage. The aggrieved spouse or victim is entitled to file a representation seeking appropriate remedies, which can be either civil or matrimonial, and criminal against the violator. The same is expected to be decriminalised in light of the issues and concerns cited.

With respect to the concept of adultery, it was strictly prohibited by all religions since it was considered to be a betrayal of one's own spouse or partner. While we consider the concept of prostitution, it has been regarded in many religious and moral traditions as an immoral or illicit activity, which was widely condemned and those who engage in the same are believed to face spiritual consequences. From a broader legal perspective, we can conclude that adultery and prostitution are not criminal offences in certain contexts, when they particularly involve consenting adults. However, the social and legal perspectives continue to disagree with each other. In contrast, bigamy is strictly prohibited and is considered a punishable criminal offence under personal laws of Hindus and Christians, as well as the secular criminal laws of the land. However, Muslim personal law permits the practice with specific conditions.

In a generic sense, adultery refers to a consensual intimate physical relationship between a married person and someone other than their spouse or partner, thereby abruptly violating the mutual obligations of fidelity inherent in marriage. While bigamy involves entering into a second marriage during a spouse's living or while the subsistence of a valid marriage, similarly, adultery represents a breach of the conditions and expectations attached to the marital relationship. Prostitution, on the other hand, involves a consensual sexual activity between

parties without any long-term commitment or marital bond, typically in exchange for monetary consideration. Unlike adultery, it involves a commercial exchange in granting sexual favour, without any marriage ties attached.

DECRIMINALISATION OF ADULTERY:

Adultery was decriminalised in *Joseph Shine v Union of India*⁵ by the apex court. The court found that the provision was constitutionally flawed and discriminatory. Section 497 of the Indian Penal Code, 1860, treated adultery as an offence committed by a man who had sexual intercourse with a married woman without the consent of the husband. The woman was neither punishable as an offender nor considered an abettor. This definition and application of the provision raised several constitutional concerns:

- It denied the equal status of women by treating them as mere property of their husbands.
- It was structured upon the patriarchal mindset and reinforced gender stereotypes.
- It violated the ideals of the Constitution, especially the principles of equality under Article. 14 and right against discrimination under Article. 15.
- It also undermined the dignity and personal autonomy guaranteed under Article. 21 of the Constitution.

The Supreme Court held that the provision promoted inequality and discriminatory treatment among men and women, and highly promotes gender bias. It was also clarified that even though adultery was decriminalized, it can be used as a valid ground for claiming divorce under matrimonial laws. In this context, the court emphasized that morality and criminal laws are not co-extensive, and not every act should attract penal consequences. Therefore, the decriminalization marks a significant shift towards individual autonomy and constitutional morality, and promotes gender equality in the Indian criminal jurisprudence.

SANCTITY OF MARRIAGE VERSUS INDIVIDUAL AUTONOMY:

At the outset, the essential elements involved in adultery and prostitution may appear similar in certain aspects; however, the legal consequences differ significantly. In Adultery, one of the

⁵ <https://indiankanoon.org/doc/42184625/> accessed on 27/02/2026

spouses violates the obligations of the marriage tie, whereas Prostitution involves a consensual sexual relationship involving monetary or any other forms of consideration between the adults. The difference between the two lies in the institutional and legal framework governing those acts. The following concerns are often raised in the above context:

1. The normalization of such relationships will potentially destroy the sanctity of the marriage and also lead to weakening the traditional family structure.
2. Extramarital relationships may pose potential concerns about the paternity of the children, which may create social and legal complications.
3. The children born out of such an illicit relationship will face societal stigma, their legitimacy will be tested continuously, and they will also face psychological distress, which will affect both the mother and the child.
4. In a contractual perspective, marriage includes mutual obligations such as exclusivity, loyalty, and fidelity. Breach of these conditions may be seen as undermining the foundational principles of the marital relationship.
5. It is widely argued that violating mutual trust and fidelity raises concerns, and it also contradicts the moral legitimate expectations that are expected in the marriage commitment.
6. Legal presumptions relating to paternity and legitimacy may raise debates in the modern scientific era, particularly with the availability of DNA testing, potentially engaging questions of the violation of liberty and fundamental rights.

DNA TESTING: LEGAL AND EVIDENTIARY SIGNIFICANCE

It is a scientific method that is employed to identify an individual through the analysis of genetic material. In cases of legal proceedings, more particularly in matters that involve questions relating to legitimacy, paternity, sexual offences, and questions relating to the legitimacy of the children, it serves as the most reliable evidence. It assists the courts in determining the biological relationships with a higher degree of accuracy. The necessity of the same arises in cases where the identity of a biological parent is disputed or in cases where there is a critical need for establishing a genetic link for resolving matrimonial or inheritance-related

disputes, respectively. Unlike traditional presumptions, which lack practical and scientific certainty, the latter aids in the discovery of the truth. However, it cannot be automatically treated as conclusive in all cases. Courts must balance the evidentiary value of DNA analysis with constitutional protections such as personal liberty and right to privacy under the Article. 21 of the Constitution of India. Judicial precedents highly emphasised that while DNA testing evidence is highly persuasive, it must be ordered cautiously, particularly in cases of matrimonial disputes, since it involves the legitimacy and dignity of the children. Thus, DNA testing is given high importance and viewed as a tool in adjudication, but its application must be guided by principles of proportionality, necessity and constitutional safeguards.

JUDICIAL PERSPECTIVE ON ADULTERY AND LEGITIMACY

Joseph Shine v. Union of India (2018)- Decriminalisation of Adultery

The Constitution Bench of the Supreme Court, comprising Chief Justice Deepak Misra and Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra, unanimously struck down Section 497 of the Indian Penal Code as unconstitutional. The Court decriminalised adultery on the following constitutional grounds:

- Section. 497 treated women as passive objects, and denied them agency. The provision only punished the male offender while exempting the married women, which results in gender discrimination, which is against the right to equality under Article. 14.
- The court recognised sexual autonomy as an intrinsic part of the Article. 21, criminalising the same will directly infringe their decisional privacy and individual autonomy.
- A woman's consent was immaterial or never given due consideration to the relationship, reflecting patriarchal and archaic values. The provision was also based on the notion that the husband was the "Owner" of the wife.
- The law punished and labelled only one person as an offender and treated women as victims lacking agency, thereby failing constitutional scrutiny.
- The court clarified that adultery may constitute a civil wrong and a ground for divorce, but it cannot be treated as a criminal offence in a constitutional democracy governed by individual liberty.

Therefore, the judgment marked a shift from public morality to constitutional morality, privacy, reinforcing dignity, and equality.

***Ivan Rathinam v. Milan Joseph (2025)*⁶ - Legitimacy, Presumption and DNA Testing**

The Supreme Court bench comprising Surya Kant and Ujjal Bhuyan, JJ. examined issues relating to the legitimacy of a child and the scope of DNA testing in matrimonial disputes. The Court in this case observed:

- A child born during the subsistence or existence of a valid marriage is presumed to be a legal legitimate one and a mere allegation of adultery is immaterial to displace this presumption.
- The above presumption can be questioned only by proving that there was no access between the spouses during the said period.
- Just by proving an extramarital relationship does not automatically establish a lack of access or negate paternity.
- Compelling a DNA test affects bodily integrity and informational privacy under Article. 21. Therefore, courts must exercise such tests only when it's necessary, and justice really demands it.

PRESUMPTION OF LEGITIMACY: RECONCILING DNA EVIDENCE, CHILD WELFARE, AND CONSTITUTIONAL FAIRNESS:

Section 116 of BNS provides for the presumption of legitimacy of a child born during the subsistence of a valid marriage; the only ground to rebut this presumption is proving the non-access between the spouses. It is argued that this creates a practical difficulty in proving non-access is often limited and may not adequately reflect modern scientific possibilities such as DNA testing. In criminal jurisprudence, DNA testing is routinely used in finding offences such as rape, murder, and such testing is not automatically treated as a violation of privacy when ordered under due process of law. Critics argue that the present condition of legal presumption of paternity, where adultery results in the birth of a child, may impose a financial and legal

⁶ <https://indiankanoon.org/doc/77597954/> accessed on 27/02/2026

responsibility on the innocent husband. They contend that this may appear unjust if the scientific evidence is restricted. From this view, the law should balance the protection of legitimacy, Accountability, fairness to the husband, scientific accuracy, privacy and dignity of all parties. However, the counter view reflected in the constitutional jurisprudence is that the very intention of the provision is to protect the child from social stigma. Courts have always treated legitimacy as a matter of social welfare rather than a biological certainty. Therefore, the debate is not simply about “innocent husband versus guilty wife”, but about how to reconcile child welfare, scientific advancements, gender equality, Principles of natural justice and rights provided under Articles. 14 & 21. A possible reform could be that Section 116 need not be abolished entirely, but its application may require clearer judicial guidelines permitting DNA testing in exceptional and justified cases, which ensures fairness without undermining the child’s dignity and legitimacy. A possible reform-oriented conclusion would be that Section 116 need not be abolished, but its application may require clearer judicial guidelines permitting DNA testing in exceptional and justified cases, ensuring fairness without undermining the child’s legitimacy or dignity.

NEED FOR CRIMINALIZATION OF ADULTERY

There is a clear connection between adultery and the presumption of paternity, in that the aggrieved party has the right to raise a complaint against the infringing party. The State has a duty to investigate the same, for which it may take a DNA test to prove the complaint. In such a situation, the presumption of paternity under Section 116 of the BSA is acceptable, because the cognisance of adultery is not limited by time; it may extend to the cause of the act. Moreover, the Indian Evidence Act was enacted in the year 1872; at that time, there were no scientific means or developments. However, now it is no longer needed by society and should be abolished. Likewise, adultery and prostitution are social evils that should be abolished from our society, and they are different from consensual relationships between individuals. These two evils deliberately damage society as well as the family system. Unfortunately, the courts and laws are wrongly influenced by Western laws; they are not well-versed in morals and humanity because they still indirectly follow a slavery system.

FINDINGS:

Despite India’s long history, there still exists a vacuum in defining the term marriage, resulting in interpretational ambiguities. Certain legal advancements appear to be influenced by

comparative foreign jurisprudence, which may not always align with India's cultural and social framework. Section. 116 of BNS, aimed at protecting the legitimacy of the children, may create tension with the principles of natural justice when scientific evidence, like DNA testing, is disregarded. The decriminalisation reflects a shift towards individual autonomy and constitutional morality, but concerns remain on its long- term impact on matrimonial stability. Similarly, while prostitution raises serious concerns affecting public morality, complete recognition may have indirect social consequences affecting the family structure and child welfare. Therefore, reforms must carefully harmonise constitutional values, social realities, and the protection of family institutions.

CONCLUSION:

Laws imposed by the state must ensure the principles of natural justice and morality, and they should not create any presumptions against the vulnerable or innocent. Marriage, in its broader sense, is founded on mutual loyalty, honesty, chastity, and responsibility, where both spouses are expected to be committed to preserving their marital bond together, protecting the family and children. If irreconcilable differences arise, the law provides separation as a legitimate remedy. While bigamy is still treated as a criminal offence to protect the family system, rightly, prostitution, on the other hand, though considered a moral wrong, should be addressed through regulation rather than institutional acceptance. However, some view the decriminalization of adultery by the apex court as a problematic shift, as it removes criminal liability and may appear to disadvantage the innocent spouse, raising concerns about fairness, accountability, and the balance between individual liberty and matrimonial responsibility.

SUGGESTIONS:

1. The concept of marriage should be clearly defined within a coherent statutory framework to resolve ambiguities.
2. A secular and universally applicable marital framework may be framed to reduce disparities arising from personal laws; it must reflect cultural diversity.
3. Section. 116 of BSA may be reconsidered in the light of DNA testing, carefully balancing the legitimacy of the children and scientific accuracy.
4. A gender-neutral definition for the term adultery may be framed in a strict sense,

ensuring fairness.

5. The law should prescribe clear judicial standards for ordering DNA tests based on necessity, proportionality, the best interests of the child, and protection of dignity, promoting the right to privacy.
6. Personal laws should operate on the principles of substantive equality and must avoid favoritism towards a specific gender.
7. Laws must be grounded in constitutional morality rather than on cultural significances.
8. Reforms relating to Adultery, bigamy, and prostitution must be guided by the principles of natural justice and criminalize adultery as an offence.
9. Any legal framework addressing prostitution should focus on preventing exploitation and trafficking, protecting human dignity, maintaining public order, and ensuring effective rehabilitation. Rather than blanket acceptance or total prohibition, a balanced rights-based and regulatory approach should be adopted.