
LEGISLATIVE COMMENT ON THE DECRIMINALIZATION OF ADULTERY: ANALYSING THE CONSTITUTIONAL VALIDITY OF STRIKING DOWN SECTION 497 OF THE INDIAN PENAL CODE

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I. Introduction and Contextualization of the Legal Shift

The Supreme Court of India's landmark decision in *Joseph Shine v. Union of India* (2018) marked one of the most significant judicial interventions into personal liberty and marital law in the nation's history. This judgment unanimously struck down Section 497 of the Indian Penal Code (IPC), which criminalized adultery, and declared it unconstitutional. This legislative comment seeks to provide an exhaustive analysis of the constitutional, social, and legal rationale underpinning this removal, exploring the implications for gender parity, individual autonomy, and the very fabric of the institution of marriage in modern India.

The former Section 497 of the IPC, 1860, defined adultery as follows: "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."

For over 158 years, this provision stood as a draconian relic of the Victorian era, a penal law that treated women as chattel—the exclusive property of their husbands—and failed every modern test of equality and fundamental rights. The legislative comment argues that the Supreme Court's decision was not merely an act of judicial review, but a necessary, emancipatory step required to align the criminal justice system with the progressive vision enshrined in the Constitution of India, particularly its guarantees under Articles 14, 15, and 21. The ruling rightfully shifted the conversation around marital infidelity from the punitive realm of criminal law to the remedial domain of civil and family law, acknowledging that a breach

of trust in marriage, while a ground for divorce, cannot be equated with a crime against the State.

II. The Inherent Flaws and Patriarchal Foundation of Section 497 IPC

To understand the necessity of its removal, one must first dissect the inherent flaws of Section 497. The provision was not merely a gender-neutral prohibition against infidelity; it was a deeply discriminatory and patriarchal law built on three fundamental, unconstitutional premises:

A. The 'Wife as Property' Conception (Violation of Dignity)

The most striking feature of Section 497 was its explicit premise that adultery was only an offense committed by a man against another man (the husband). The provision effectively codified the notion that the wife's body, fidelity, and sexual agency belonged exclusively to her husband.

. Exclusion of the Wife as Primary Offender: The provision only punished the man who had intercourse with the wife of another man. The wife herself was specifically exempted from prosecution, even as an abettor. This exemption, often misleadingly viewed as protective, was in reality demeaning. As the Supreme Court noted, this *benevolent patriarchy* treated the woman not as an individual capable of committing an offense, but as a victim or a passive recipient of the act, lacking independent legal agency or volition. Her participation was viewed as involuntary or inconsequential in the eyes of the law, reducing her to the status of a passive object.

. Husband's Consent as Immunity: The law stipulated that if the sexual intercourse occurred with the "consent or connivance of that man (the husband)," no offense of adultery was committed. This provision was the most potent evidence of the section's patriarchal origins. It implied that the husband could license or permit his wife's sexual activity, effectively treating her sexual and moral autonomy as a transferable right controlled by him. When the husband consented, the act ceased to be 'adultery' in the criminal sense, demonstrating that the injury was not to the marital bond or the woman's dignity, but to the husband's proprietary interest over his wife.

B. Violation of Article 14: Arbitrariness and Classification Test Failure

Article 14 guarantees equality before the law and equal protection of the laws. Section 497 failed this test on multiple fronts due to arbitrary classification:

- . Exclusion of Woman as an Offender: By exempting the wife from punishment, the law created an arbitrary classification that placed the entire criminal blame on the man who was not the husband. This classification bore no rational nexus to the object sought to be achieved (protecting the sanctity of marriage), as the offense equally involves two consenting adults.
- . Exclusion of Woman as a Complainant: A wife could not file a complaint against her husband for infidelity, even if the husband had multiple extramarital affairs. The law only allowed the "aggrieved husband" to prosecute the "seducer," thereby insulating a faithless husband while penalizing the other man, further cementing the unequal treatment of spouses.
- . Gendered Application of Locus Standi: Adultery was actionable only when a married man had sexual intercourse with a married woman, *without* the permission of her husband. If a married man had intercourse with an unmarried woman, or if a married woman had intercourse with an unmarried man, it was not deemed a criminal offense under this section. This limited, gender-specific application proved the law's arbitrary nature, focusing only on the specific proprietary injury to the husband.

C. Violation of Article 15: Discrimination Solely on the Basis of Sex

Article 15(1) explicitly prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, or place of birth. Section 497 was a direct and blatant violation of this provision because:

- . It created an offense that could *only* be committed by a man.
- . It created an exception (immunity from prosecution) that *only* benefited a woman, but based on a demeaning premise.
- . The distinction in criminal liability was founded *solely* on the sex of the person (the husband, the wife, and the 'other man').

The Court correctly observed that the supposed protective clause in Article 15(3) (allowing

special provisions for women and children) could not be invoked to sustain a provision that is fundamentally discriminatory and detrimental to the dignity of women.

III. Constitutional Imperatives: Autonomy, Dignity, and Privacy

The judicial rationale for striking down Section 497 was rooted in the expanded interpretation of fundamental rights, particularly the transformative constitutionalism surrounding Article 21.

A. The Right to Life and Personal Liberty (Article 21)

The most crucial ground for decriminalization was the violation of Article 21, which includes the right to dignity, autonomy, and privacy.

. Sexual Autonomy and Choice: The Supreme Court recognized that every individual has a right to sexual autonomy, which forms an intrinsic part of personal liberty. The choice of a partner, whether within or outside of marriage, is a deeply private and personal matter. Criminalizing this choice, even when it affects the marital relationship, constitutes an overreach by the State into the private sphere. Criminalizing adultery treated citizens as incapable of exercising moral choice and judgment regarding their own intimate lives.

. Dignity and Identity: The law fundamentally eroded the dignity of the married woman by subjugating her identity to that of her husband. By treating her as a passive entity lacking the capacity for independent moral decision-making, the provision perpetuated systemic sexism. The Court emphasized that dignity is central to personhood, and any law that strips an individual of their agency and moral identity is violative of Article 21.

. Right to Privacy (Puttaswamy Foundation): Following the *K.S. Puttaswamy v. Union of India* judgment (2017), the right to privacy was firmly established as a fundamental right under Article 21. Intimacy, sexual activity, and marital relationships fall squarely within the zone of privacy. The State's criminalization of infidelity intruded upon this private domain without a compelling and legitimate State interest, especially when a non-penal remedy (divorce) already existed.

B. The Doctrine of Manifest Arbitrariness

The *Shine* judgment heavily relied on the expanded scope of Article 14, incorporating the

doctrine of manifest arbitrariness. As established in *Shayara Bano v. Union of India* (2017) (Triple Talaq case), a statute can be struck down if it is found to be manifestly arbitrary, meaning it is capricious, irrational, and disproportionate. Section 497 was found to be manifestly arbitrary because:

- . It failed to protect the marriage itself: It punished one partner to the extramarital relationship while simultaneously exempting the other (the wife) and also exempting the husband from any criminal liability for his own infidelity.

- . The provision was based on an outdated social premise that marriage is a proprietary transaction rather than a partnership of equals.

IV. Comparative Jurisprudence and Global Trends

The removal of the adultery law aligns India with the vast majority of liberal democracies and common law jurisdictions, reflecting a global trend away from criminalizing private moral breaches.

A. Common Law Jurisdictions

- . United Kingdom: Adultery ceased to be a criminal offence in the UK centuries ago. It remains solely a civil ground for divorce. The focus is entirely on the dissolution of the marriage contract rather than penal punishment.

- . United States and Canada: While some states in the US still technically have adultery laws on their books (often archaic and unenforced), they are rarely, if ever, prosecuted. In Canada, it is purely a matter for civil courts in the context of divorce proceedings. The prevailing legal philosophy in these nations views the State's role as limited to protecting public order, not enforcing private moral contracts like marriage.

B. Civil and European Jurisdictions

Most European nations, including France, Germany, and Italy, decriminalized adultery decades ago, recognizing the fundamental right to individual freedom and the private nature of the act. The general consensus is that penal sanctions are disproportionate to the offense, which primarily constitutes a private injury to the marital union. The global legal trajectory is

unequivocally towards recognizing marital infidelity as a civil wrong (a ground for divorce) and not a crime against the State.

V. Societal and Ethical Implications of Decriminalization

The removal of Section 497 prompted intense public debate regarding the sanctity of marriage and social morality. However, the constitutional court's decision was careful to distinguish between 'morality' (which is enforced by the State) and 'marital fidelity' (which is enforced by civil law and personal ethics).

A. Marital Sanctity vs. Individual Autonomy

The argument that criminalization protected the 'sanctity' of marriage was decisively rejected by the Court. The judgment posits that the institution of marriage cannot be protected by the criminal law; it must survive on the strength of the relationship, mutual trust, and shared commitment of the partners. If a marriage breaks down due to infidelity, the criminal law cannot repair it; it can only punish, which often leads to further destruction of family unit, including adverse effects on children.

. Shift to Civil Remedy: The decriminalization formally reinforces the principle that infidelity is a breach of the civil contract of marriage, warranting remedies like divorce, judicial separation, maintenance, and distribution of property, but not incarceration.

. Recognition of Marriage as a Partnership: By striking down the law, the Supreme Court delivered a powerful message that a marriage is a union of equals, where both partners possess independent constitutional identity and autonomy. The law must reflect this equality by refusing to treat one spouse as the controller and the other as the controlled.

B. Morality, Law, and Constitutionalism

The judgment underscored the distinction between "societal morality" and "constitutional morality." While adultery may be condemned by conventional societal norms or religious/ethical texts, the Constitution, as the supreme law of the land, dictates a morality founded on fundamental rights, equality, and dignity. Where societal morality clashes with constitutional morality, the latter must prevail. The Court effectively stated that the State cannot legislate morality in the bedroom; its role is to secure rights.

VI. Legislative and Policy Recommendations Post-Decriminalization

While the Supreme Court succeeded in removing the offending criminal provision, the removal necessitates certain legislative and policy adjustments to manage the fallout and reinforce the civil remedies.

A. Reform of Divorce Laws (The Civil Aspect)

Adultery remains a valid ground for seeking divorce under various personal laws (e.g., the Hindu Marriage Act, the Special Marriage Act). Legislative bodies must ensure that the framework for divorce adequately addresses the economic and social consequences of infidelity, especially for the financially dependent spouse.

. Streamlining Proof: While the criminal standard of 'beyond reasonable doubt' is gone, divorce proceedings often still require rigorous proof. Amendments should consider modernizing the evidence standards to prevent protracted, emotionally draining litigation over infidelity.

. Revisiting Maintenance and Alimony: The civil laws must be robust enough to handle cases where economic dependency results from the breach of trust. Courts must be empowered to award appropriate maintenance, ensuring that the financially weaker partner is not penalized by the economic consequences of the marital breakdown.

B. The Status of the Armed Forces

A unique complexity arose from the *Joseph Shine* judgment concerning the armed forces. The Court clarified that its judgment would not impede the armed forces from initiating departmental action (administrative dismissal or discharge) against officers for "unbecoming conduct" or "scandalous conduct" which might include adultery, under the Army Act, Navy Act, or Air Force Act.

. Distinction between Criminal and Service Law: This carve-out is crucial. The criminal law applies to citizens generally, while military law operates under a different ethical and disciplinary code required for maintaining command integrity, morale, and discipline. Adultery, in a military context, can affect the operational efficiency and integrity of a unit, especially when spouses live in close proximity on cantonment bases.

. Need for Clear Policy: The Armed Forces should, if not already done, clearly delineate the standards and procedures for disciplinary action related to extramarital affairs, ensuring that such actions are consistent, non-arbitrary, and sensitive to gender issues, adhering to the principles of equality under the Constitution. The focus must be on the conduct's impact on discipline and service, not its status as a crime.

C. Promotion of Alternative Dispute Resolution (ADR)

The decriminalization of adultery necessitates a stronger reliance on family dispute resolution mechanisms. Infidelity is a deeply personal wound that cannot be healed by litigation.

. Mandatory Mediation: Legislative recommendations should consider making family mediation and counseling mandatory steps before a divorce petition based on adultery is formally accepted in court.

. Training and Sensitization: Judicial officers, counselors, and mediators need specialized training to handle marital breakdown cases arising from infidelity with empathy, focusing on restorative justice and fair closure, rather than punitive outcomes.

VII. The Judicial Journey to Emancipation: Overruling Patriarchal Precedents

The *Joseph Shine* verdict did not happen in a vacuum; it was the culmination of decades of judicial scrutiny of Section 497, which had previously been upheld in three significant cases.

A. The Earlier Upholding of Section 497

. Yusuf Abdul Aziz v. State of Bombay (1954): The challenge was primarily on the basis of Article 14 and Article 15. The Supreme Court upheld the provision, arguing that the exemption of the wife from prosecution was permissible under Article 15(3), which allows for special provisions for women. This interpretation viewed the exemption as a 'special beneficent provision,' ignoring the underlying proprietary and objectifying nature of the law.

. Sowmithri Vishnu v. Union of India (1985): The Court again upheld the law, reiterating that the exclusion of women as offenders was a special provision and that the failure to allow women to prosecute their husbands was a matter for the legislature, not the judiciary. Crucially, the Court acknowledged the possibility of the law being misused but refused to interfere.

. V. Revathi v. Union of India (1988): Upholding the law for the third time, the Court reasoned that the law was a “shield” and not a “sword.” It argued that adultery was an offense designed to protect the sanctity of the family unit and that the provision did not suffer from unconstitutionality because the man and the woman were not situated similarly under the law (a faulty premise the *Shine* court later rectified).

B. The Paradigm Shift in Joseph Shine (2018)

The *Joseph Shine* judgment corrected the flawed constitutional morality of the previous rulings. It held that the interpretation of Article 15(3) in the earlier cases was restrictive and incorrect. A provision cannot be upheld merely because it grants women an exemption, if the very premise of that exemption is discriminatory and violative of her fundamental dignity and autonomy under Article 21.

. Focus on Article 21: The 2018 ruling shifted the focus from the technical reading of Article 15(3) to the holistic understanding of constitutional rights, primarily dignity and privacy under Article 21.

. Rectification of Article 15(3) Misuse: The Court clarified that Article 15(3) is meant to be an enabling provision for positive discrimination (affirmative action) to combat historical disadvantages, not a shield for discriminatory laws that perpetuate gender stereotypes and women’s subordination.

VIII. Conclusion: The Triumph of Constitutional Morality

The removal of Section 497 IPC is more than the deletion of a single provision; it represents the triumph of constitutional morality over inherited societal patriarchy. It is a decisive recognition by the judiciary that the marital space, like any other sphere of human interaction, must be governed by the principles of equality, liberty, and human dignity.

By decriminalizing adultery, the Supreme Court has:

. Restored Agency: Acknowledged the married woman as a sovereign individual with her own sexual and moral agency, discarding the view of her as the passive property of her husband.

. Upheld Equality: Ensured parity under the law by eliminating a provision that punished one consenting adult for a relationship while shielding the other and restricting the complainant's ability based purely on sex.

. Reinforced Privacy: Mandated that the State cannot intervene in the intimate affairs of two consenting adults, reinforcing the fundamental right to privacy.

The legislative comment concludes that the removal of Section 497 was a critical and overdue constitutional requirement. It has cleared the statute book of a discriminatory colonial vestige and solidified India's commitment to a progressive and rights-based jurisprudence. The focus must now shift to the legislature to ensure that the civil remedies for marital breakdown are robust, equitable, and designed to support family units through counseling and mediation, reflecting a modern understanding of marriage as a partnership of equals, governed by trust, not the threat of penal servitude. The ultimate protection of the institution of marriage lies in mutual respect and love, not in the coercion of the criminal law.

The judgment of the Supreme Court serves as a powerful reminder that the law must evolve to reflect and protect the dignity of all citizens, moving beyond archaic moralistic assumptions to embrace the foundational principles of constitutional liberty.