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ADULTERY LAWS ACROSS JURISDICTIONS: TOWARDS A GENDER-NEUTRAL LEGAL FRAMEWORK IN INDIA

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Abstract

The legal treatment of adultery has undergone a significant transformation across jurisdictions, reflecting changing constitutional values, societal attitudes, and perceptions of marriage and individual autonomy. While several countries have completely decriminalised adultery, others continue to recognise it as a criminal offence, either in its traditional form or through gender-neutral statutory provisions. In India, the Hon'ble Supreme Court's decision in Joseph Shine v. Union of India declared Section 497 of the Indian Penal Code unconstitutional on the ground that it was founded upon patriarchal assumptions and violated the constitutional guarantees of equality, dignity, and personal liberty. Although the judgment successfully removed a discriminatory provision, it also left unanswered the broader question of whether the complete decriminalisation of adultery represents the most appropriate legal response for a society where marriage continues to enjoy considerable social and legal significance.

This article undertakes a comparative analysis of adultery laws across selected jurisdictions to examine the diverse legislative approaches adopted towards marital infidelity. By analysing countries that have retained criminal sanctions, those that have abolished adultery as a criminal offence, and those that have adopted gender-neutral legal frameworks, the study seeks to identify principles that may guide future legal reform in India. Rather than advocating a return to the erstwhile Section 497, the article explores whether constitutional concerns can be addressed through a carefully designed, gender-neutral legislative model that respects individual autonomy while acknowledging the legitimate societal interest in protecting the institution of marriage.

Adopting a doctrinal and comparative research methodology, the study examines constitutional jurisprudence, statutory provisions, judicial decisions, and reform reports from India and other jurisdictions. It argues that the debate on adultery should move beyond the binary choice between criminalisation and decriminalisation towards a more nuanced framework that harmonises constitutional values with the evolving realities of family life. The article concludes by proposing guiding principles for a constitutionally sustainable and gender-neutral adultery law that may assist future legislative reform under the Bharatiya Nyaya Sanhita.

Keywords: Adultery, Decriminalisation, Marital Offences, Comparative Criminal Law, Law Reform

1. INTRODUCTION

"He who knows only his own law knows little even of that."

— F. H. Lawson[1]

The regulation of adultery has never been uniform across legal systems. While some nations continue to recognise it as a criminal offence, others have consciously removed it from the sphere of criminal law, treating it exclusively as a matter of personal morality or matrimonial dispute. Between these two extremes lies another legislative approach adopted by several jurisdictions, where adultery is addressed through gender-neutral provisions that seek to balance constitutional guarantees of equality with the societal interest in preserving the institution of marriage. These contrasting approaches demonstrate that adultery remains one of the most contested issues in criminal jurisprudence, shaped as much by constitutional philosophy as by cultural values and public policy.

The absence of international consensus raises an important legal question: should adultery be viewed solely as a private matter beyond the reach of criminal law, or does the State retain a legitimate interest in regulating conduct that may have significant consequences for family relationships and social stability? Different

[1]The Oxford Law School, 1850–1965 (1968).

jurisdictions have answered this question differently. The United Kingdom and several European countries have long abandoned criminal sanctions for adultery, whereas nations such as the Philippines and a number of Islamic jurisdictions continue to recognise it as a punishable offence. Some countries have repealed adultery laws only after replacing gender-specific provisions with gender-neutral frameworks, thereby ensuring that constitutional equality is achieved without entirely disregarding the legal significance of marital fidelity. The diversity of these approaches offers valuable lessons for countries seeking to reform their own legal systems.

India's legal position underwent a fundamental change with the Supreme Court's decision in Joseph Shine v. Union of India[2], which declared Section 497 of the Indian Penal Code unconstitutional. The judgment rightly rejected a colonial provision that treated women as the property of their husbands and imposed criminal liability exclusively upon men. However, the decision also shifted the debate from the validity of the former law to a broader question that remains largely unexplored: whether complete decriminalisation represents the only constitutionally acceptable model, or whether a carefully drafted gender-neutral provision could better reconcile individual autonomy with the legitimate interests of marriage and family. This question has acquired greater significance after the enactment of the Bharatiya Nyaya Sanhita, 2023, which omitted any provision corresponding to the erstwhile Section 497.

Although considerable scholarly attention has been devoted to analysing the constitutional infirmities of Section 497 and the reasoning adopted in Joseph Shine, relatively little emphasis has been placed on examining how other jurisdictions have addressed similar constitutional concerns. Comparative legal analysis is particularly relevant because it enables policymakers to evaluate diverse legislative models, identify their strengths and limitations, and determine whether any of them can be adapted to India's constitutional and social context. Rather than treating criminalisation and decriminalisation as the only available alternatives, comparative law encourages a more nuanced examination of how different legal systems attempt to harmonise equality, privacy, personal autonomy, and the protection of marriage.

Against this backdrop, the present article undertakes a comparative study of adultery laws across selected jurisdictions with a particular focus on gender neutrality. It examines the evolution of adultery laws, the constitutional principles underlying legislative reforms, and the contemporary legal responses adopted by different countries. On the basis of this comparative analysis, the article seeks to identify guiding principles that may assist India in developing a constitutionally sustainable and gender-neutral legal framework capable of addressing both individual rights and the continuing significance of marriage as a social institution.

1.1 Research Problem

The existing literature predominantly examines the judgment from the perspective of equality, privacy, and individual autonomy, with comparatively little attention being paid to the diverse legislative approaches adopted by other jurisdictions. There remains a significant research gap regarding whether comparative legal experiences can assist in developing a constitutionally sustainable and gender-neutral framework for regulating adultery in India. In the absence of such analysis, the ongoing debate continues to be confined to the binary choice between criminalisation and decriminalisation, overlooking alternative legislative models that seek to balance constitutional values with the protection of the institution of marriage. This article seeks to address this gap by comparatively analysing adultery laws across selected jurisdictions and examining their relevance for future legal reform in India.

1.2 Hypothesis

the constitutional deficiencies of Section 497 of the Indian Penal Code arose primarily from its gender-specific and discriminatory character rather than from the very idea of criminalising adultery. Accordingly, a carefully designed, gender-neutral legislative framework, informed by comparative legal practices, may provide a constitutionally valid and balanced approach to regulating marital infidelity in India.

1.3 Objective

The primary objective of this study is to comparatively examine the legal treatment of adultery across selected jurisdictions and analyse the different approaches adopted towards its criminalisation and decriminalisation. The study further seeks to evaluate whether the experiences of these jurisdictions provide useful guidance for developing a constitutionally sustainable and gender-neutral legal framework for adultery in India.

[2](2018)2 SCC 189

1.4 Research Methodology

The research uses a doctrinal approach, focusing on the analysis of legal texts and judicial precedents. The judicial decisions, particularly the Joseph Shine case, were examined to understand their impact on current scenario. The study further undertakes a comparative examination of adultery laws in selected jurisdictions to identify diverse legislative approaches and evaluate their relevance in developing a constitutionally sustainable and gender-neutral legal framework for India.

2. COMPARATIVE MODELS OF ADULTERY LAWS ACROSS JURISDICTIONS

The legal treatment of adultery differs significantly across the world. While marriage is recognised as an important social institution in almost every society, countries have adopted different legal approaches to regulate marital infidelity. Some nations continue to treat adultery as a criminal offence and prescribe imprisonment or other punishments, whereas others have completely decriminalised it and restrict its consequences to divorce and other civil remedies. A few jurisdictions follow a mixed approach, where adultery attracts both criminal and civil consequences depending upon personal laws, religion or local statutes. These diverse legal models provide valuable insights for India while reconsidering the legal response to marital infidelity after the decriminalisation of Section 497 of the Indian Penal Code.

The comparative study of foreign jurisdictions reveals that the legal status of adultery is shaped not merely by constitutional principles but also by historical traditions, religious beliefs, cultural values and the role assigned to marriage within a particular society. Consequently, there is no universal legal model governing adultery. While liberal democracies increasingly emphasise privacy and personal autonomy, several countries continue to regard marital fidelity as a matter of public concern deserving legal protection. Even in jurisdictions where adultery has been decriminalised, it often remains a significant factor in divorce proceedings, maintenance, child custody, property division or civil compensation.

An examination of these varied approaches is particularly relevant in the Indian context. It enables a better understanding of how different legal systems have attempted to balance individual liberty with the societal interest in preserving the institution of marriage. Rather than identifying one approach as universally superior, the comparative analysis seeks to draw lessons that may assist Indian lawmakers in designing a legal framework that is both constitutionally sound and responsive to India's social realities.

2.1 Countries Retaining Adultery as a Criminal Offence

A significant number of countries continue to recognise adultery as a criminal offence. Nations such as **Pakistan, Bangladesh, Iran, Iraq, Saudi Arabia, Indonesia, Nigeria, Sudan, Algeria, Egypt, Morocco and the Philippines** still prescribe criminal liability for marital infidelity, although the nature and severity of punishment differ considerably. In many of these jurisdictions, adultery is viewed not merely as a private dispute between spouses but as an offence against public morality, family values and social order. Consequently, punishment ranges from imprisonment and fines to corporal punishment, and in certain jurisdictions governed by strict interpretations of Islamic law, even capital punishment.

Pakistan presents an important example of the challenges associated with criminalising adultery. The **Zina** Ordinance, 1979 criminalised both adultery and fornication under Islamic law and prescribed severe punishments. However, the implementation of these provisions generated widespread criticism because of procedural shortcomings, misuse against women and difficulties in proving rape, leading to the enactment of the Women's Protection Act, 2006, which substantially reformed the law. The Pakistani experience demonstrates that while criminalisation may aim to protect the institution of marriage, inadequate safeguards can lead to serious violations of individual rights.

Similarly, countries such as Iran and Saudi Arabia continue to prescribe severe punishments for adultery under religious law, whereas countries like Bangladesh, Indonesia and Iraq impose imprisonment and recognise adultery as a criminal offence alongside matrimonial consequences. These jurisdictions reflect the belief that marital fidelity is closely connected with public morality and therefore justifies intervention through criminal law.

2.2 Countries Following the Civil Law Approach

In contrast, several countries have removed adultery from the sphere of criminal law while continuing to recognise its significance under family law. England is one of the earliest examples of this approach. Although adultery historically attracted serious legal consequences, it is no longer treated as a criminal offence. Instead, it operates as a ground for divorce and may influence matrimonial proceedings relating to the dissolution of

marriage. The English legal system recognises that while adultery affects the marital relationship, criminal prosecution is not the appropriate mechanism for addressing consensual sexual relationships between adults.

A similar approach has been adopted in Turkey, where adultery was decriminalised in 1996.[3] Although attempts were later made to reintroduce criminal punishment in the interest of protecting family values, those proposals were ultimately abandoned. Nevertheless, adultery continues to remain a recognised ground for divorce under Turkish civil law. This reflects a balanced approach in which the law protects the institution of marriage through civil remedies rather than criminal sanctions.

Several jurisdictions within the United States of America also follow a similar model. While many states have abolished criminal prosecutions for adultery, marital infidelity continues to influence divorce proceedings, alimony, property division and, in some cases, child custody.[4] Thus, even after decriminalisation, adultery continues to have significant legal consequences within family law.[5]

2.3 Hybrid Legal Models and Lessons for India

Some jurisdictions adopt a middle path by combining criminal liability with civil remedies. Malaysia**,** for instance, distinguishes between Muslims and non-Muslims.[6] Under Islamic law applicable to Muslims, adultery constitutes a criminal offence,[7] whereas non-Muslims are governed primarily by civil matrimonial laws. Likewise, in certain American states, adultery technically remains a criminal offence, although prosecutions are extremely rare, while its practical importance lies in matrimonial disputes.

3. CRIMINALISATION OR DECRIMINALISATION: THE INDIAN LEGAL FRAMEWORK

The comparative study of adultery laws demonstrates that there is no universally accepted legal response to marital infidelity. Different jurisdictions have adopted different approaches depending upon their constitutional philosophy, cultural values and societal needs. This diversity itself is significant because it indicates that neither criminalisation nor decriminalisation can be regarded as the only legally acceptable solution. Consequently, the Indian position must be evaluated not by simply following international trends but by considering its own constitutional principles and social realities.

India occupies a unique social and legal position where marriage continues to be regarded as a foundational institution rather than merely a private arrangement between two individuals. The stability of marriage has implications that extend beyond the spouses and directly affect children, families and the larger social structure. As discussed earlier in this article, marital infidelity has frequently emerged as a contributing factor in offences such as murder, domestic violence, honour crimes and abetment of suicide. While adultery cannot be considered the sole cause of these offences, its recurring presence in such cases raises legitimate concerns regarding the complete withdrawal of criminal law from this sphere.

The comparative analysis suggests that the real issue is not whether adultery should always be criminalised or always remain outside criminal law. The more relevant question is whether the existing legal framework sufficiently addresses the social and legal consequences arising from serious breaches of marital fidelity. A legal system must strike a balance between respecting individual autonomy and safeguarding institutions that continue to hold significant social value. This balance becomes particularly important in India, where marriage continues to perform important social, cultural and economic functions.

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[3]Anayasa Mahkemesi, 1996/15; 1996/34 (Sept. 23, 1996), cited in, Joseph Shine v. Union of India, 2018(4) RCR (Criminal) 480.

[4]Paul H. Jacobson, American Marriage and Divorce 89 (Rinehart & Company, New York, 1959).

[5]Peter Nash Swisher, "Reassessing Fault Factors in No-fault Divorce" 31(2) Family Law Quarterly 269-320 (1997).

[6]Law Reform (Marriage and Divorce) Act, 1976,[Malaysia], s. 54 states:
"(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent..."

[7]Law Reform (Marriage and Divorce) Act, 1976, [Malaysia], s.58 states:
"(1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress as a co-respondent, unless excused by the court on special grounds from doing so.
(2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.
(3) Where damages have been claimed against a co-respondent--- (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element."

Rather than restoring the earlier provision in its original form, the comparative experience points towards the need for a more balanced and constitutionally compatible approach. Any future legislative intervention, if considered necessary, must be gender-neutral, free from patriarchal assumptions and supported by adequate procedural safeguards to prevent misuse. Such an approach would recognise both the constitutional commitment to equality and the continuing importance of preserving the institution of marriage in Indian society.

4. RETHINKING ADULTERY UNDER THE BHARATIYA NYAYA SANHITA: THE NEED FOR A BALANCED LEGISLATIVE APPROACH

The enactment of the Bharatiya Nyaya Sanhita, 2023 marked a significant step towards modernising India's criminal justice system by replacing the colonial-era Indian Penal Code. The new legislation sought to remove obsolete provisions and align criminal law with constitutional values and contemporary societal needs. However, despite this comprehensive legislative exercise, the law relating to adultery was omitted altogether, leaving no scope for criminal accountability in cases of marital infidelity. This legislative silence has revived the debate on whether complete decriminalisation was the only constitutionally acceptable course available.

The decision of the Hon'ble Supreme Court in Joseph Shine undoubtedly corrected the constitutional defects embedded in the former Section 497 of the Indian Penal Code. The provision was rightly criticised for its gender-specific character, unequal treatment of spouses and patriarchal assumption that a married woman was merely an extension of her husband's rights. Nevertheless, the judgment addressed the constitutional validity of the existing provision and not the broader policy question of whether Parliament could enact a fresh, gender-neutral law regulating adultery. Consequently, the legislative field remains open for Parliament to reconsider the issue in a manner consistent with constitutional guarantees.

Comparative legal developments further indicate that constitutional democracies have adopted diverse approaches to adultery rather than embracing complete uniformity. While several countries have decriminalised adultery, many continue to retain criminal sanctions or impose civil consequences to safeguard the institution of marriage. These varying approaches demonstrate that there is no universally accepted legal model. For India, the appropriate response must be shaped by its own constitutional framework, social realities and the continuing importance attached to marriage as a foundational social institution.

In this context, the Bharatiya Nyaya Sanhita presented an opportunity to reconsider the legal treatment of adultery through a constitutionally sustainable framework. Instead of reproducing the defects of the former Section 497, Parliament could have explored a narrowly tailored, gender-neutral provision with adequate procedural safeguards against misuse. Such an approach would have balanced individual autonomy with the legitimate societal interest in protecting marriage, while ensuring that any legal response remains consistent with the principles of equality, dignity and personal liberty

5. CONCLUSION AND SUGGESTIONS

In light of the comparative analysis, Parliament may consider examining whether the complete decriminalisation of adultery continues to serve the broader objectives of justice and social welfare. Any future legislative intervention, however, must avoid the constitutional infirmities that rendered Section 497 invalid.

Further, any statutory framework should incorporate adequate procedural safeguards, including restricting prosecution to complaints by the aggrieved spouse, preventing frivolous or malicious litigation, and prescribing proportionate penalties. Criminal law should function as a measure of last resort and should not become an instrument for harassment or moral policing.

Suggested Legislative Framework: "Whoever, being married, voluntarily engages in consensual sexual intercourse with a person other than his or her spouse, and the person participating in such act knowingly has reason to believe that the other person is married, shall be liable under this section. No court shall take cognizance of the offence except upon a complaint made by the aggrieved spouse. The offence shall be gender-neutral, compoundable with the permission of the court, and punishable with proportionate imprisonment or fine, while ensuring adequate safeguards against misuse."

Ultimately, the objective of any future legislation should not be to criminalise private morality or regulate consensual adult relationships merely because they are considered socially undesirable. Instead, the law should seek to protect the institution of marriage where deliberate acts of marital infidelity produce legally recognisable harm. A carefully drafted, gender-neutral provision that respects equality, dignity, privacy and due process would better reflect India's constitutional values while acknowledging the continuing social significance of marriage. Such a balanced approach would enable the law to reconcile individual autonomy with the legitimate interest of the State in preserving family stability.