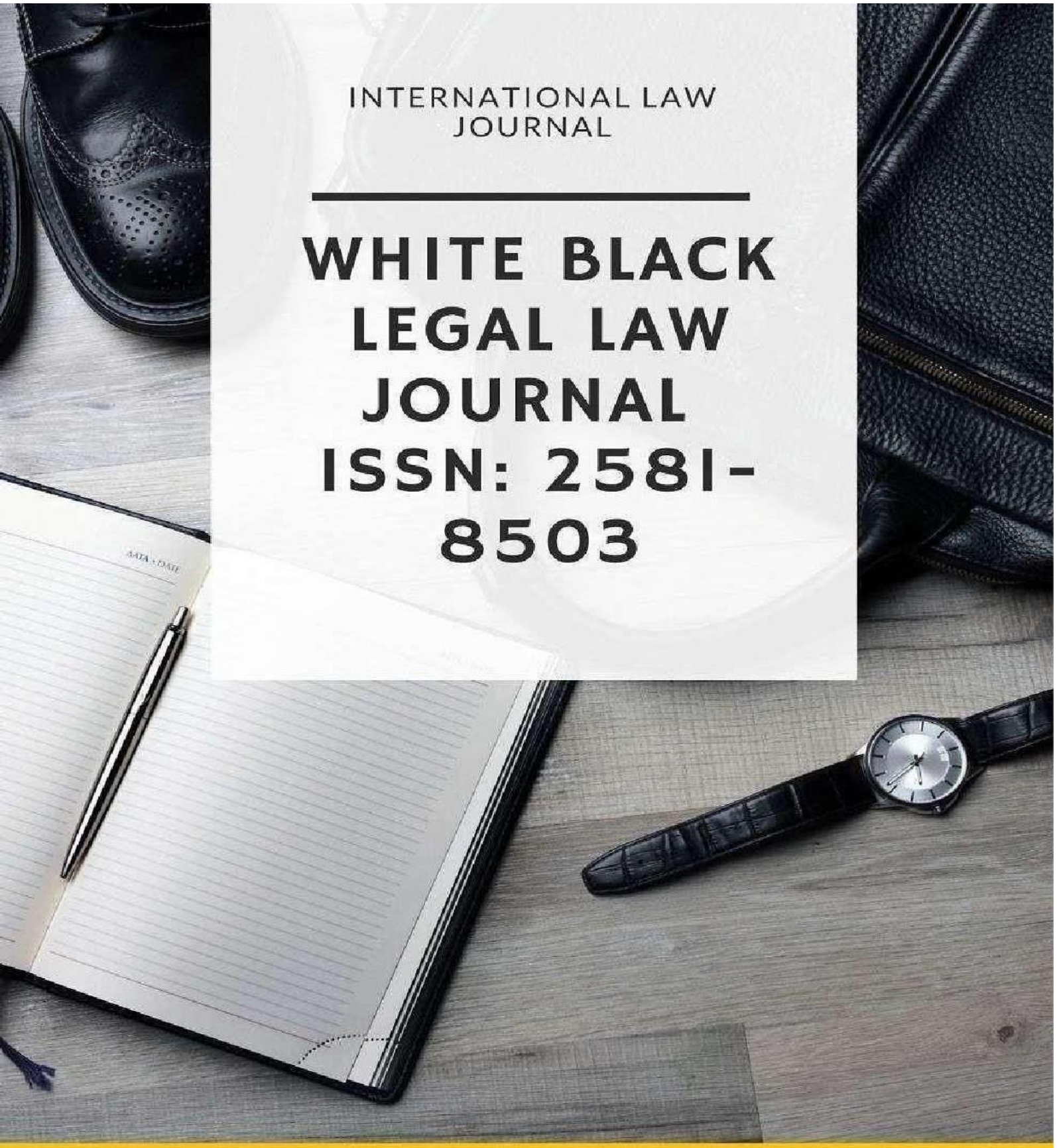


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FROM CRIME TO CONSCIENCE: THE DECRIMINALISATION OF ADULTERY IN INDIA AND ITS CONSEQUENCES FOR FAMILY LAW

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Abstract

On 27 September 2018, a five-judge Bench of the Supreme Court of India struck down Section 497 of the Indian Penal Code, 1860 (IPC), together with Section 198 of the Code of Criminal Procedure, 1973 (CrPC) in so far as it related to that offence, in *Joseph Shine v. Union of India*. The judgment ended an offence that punished only the man who had intercourse with another man's wife, that spared the wife entirely, and that disappeared if the husband consented. This paper traces the history of the offence, examines the decisions that upheld it for more than sixty years, analyses the reasoning that finally brought it down, and tests the arguments for its retention, including the 2023 recommendation of a Parliamentary Standing Committee that a gender-neutral offence be restored. It then turns to the question that matters most to a student of family law: what is left of adultery once the criminal sanction is gone? The paper argues that decriminalisation was constitutionally sound, that adultery keeps its full significance as a ground for divorce and as a fact relevant to maintenance, custody and proof, and that the unfinished work lies less in the penal code than in matrimonial law, which still leans on fault and offers too little economic protection to a spouse whose marriage has failed.

Keywords: adultery; Section 497 IPC; *Joseph Shine*; decriminalisation; sexual autonomy; fault-based divorce; Bharatiya Nyaya Sanhita

I. Introduction

Few provisions of the Indian Penal Code sat as uneasily with the Constitution as Section 497. It looked like an offence about marital fidelity, but a close reading of the text shows that fidelity was not what it protected. Only a man could commit it. The woman could not be punished, not even as an abettor. And no offence was committed at all if her husband had consented to the

intercourse or connived at it. An offence that vanishes when the husband says yes is an offence about the husband's claim over his wife, and in 2018 the Supreme Court said as much.

The decision was welcomed by many as a long-overdue recognition of women's equality and sexual autonomy. It was also criticised, by the Union government in the case itself and later by a parliamentary committee, as a blow to the sanctity of marriage that left a gap in the law. In November 2023 the Department-related Parliamentary Standing Committee on Home Affairs, reviewing the Bharatiya Nyaya Sanhita, 2023 (BNS), urged that adultery be brought back as a gender-neutral crime. The government did not act on that advice, and the BNS, which replaced the IPC on 1 July 2024, contains no offence of adultery. The debate is not closed, though, and for a student of family law it raises a practical question beyond the constitutional one: if the State no longer punishes adultery, what does the law still do about it?

1.1 *Statement of the problem*

Adultery sits where three ideas meet: a private moral wrong, a matrimonial wrong between spouses, and a public crime. For more than a century and a half, Indian criminal law folded the first two into the third, and it did so unequally. The problem this paper addresses is whether that criminalisation was justified, whether its removal was constitutionally sound, and how family law ought to respond now that adultery is a civil and personal matter only.

1.2 *Objectives*

1. To trace the origin and legal structure of Section 497 IPC and Section 198(2) CrPC.
2. To examine the decisions that upheld the offence and the reasoning of *Joseph Shine* in overruling them.
3. To evaluate the arguments for and against criminalising adultery, including the gender-neutral alternative.
4. To study the consequences of decriminalisation for divorce, maintenance, custody and proof under Indian family law.
5. To compare the Indian position with that of selected jurisdictions and to propose reforms.

1.3 *Research questions*

(a) Was Section 497 consistent with Articles 14, 15 and 21 of the Constitution? (b) Does the case for a gender-neutral offence survive the reasoning in *Joseph Shine*? (c) What is the legal status of adultery in Indian family law after decriminalisation? (d) What reforms are

needed in matrimonial law?

1.4 *Hypothesis*

Adultery is a matrimonial wrong best addressed through civil and family law remedies. Its criminalisation, whether in the gendered form of Section 497 or in a gender-neutral form, is incompatible with the constitutional guarantees of equality, dignity and personal autonomy.

1.5 *Methodology, scope and limitations*

The study is doctrinal. The primary sources are statutes, Supreme Court judgments, reports of the Law Commission of India and the Malimath Committee, and the 246th Report of the Parliamentary Standing Committee on Home Affairs. Secondary sources include standard commentaries, textbooks on family law and criminal law, and academic writing on sexual autonomy and criminalisation. Citations follow the Indian convention of reporting by SCC and AIR. The paper is limited to India, with comparative material drawn from a few jurisdictions chosen because they have faced the same question. It does not rest on empirical data, because reliable national figures on adultery prosecutions were never separately collected and few such cases reached reported judgments. Section 497 operated within heterosexual marriage, and the paper follows that frame.

1.6 *Scheme of the paper*

Part II sets out the conceptual and historical background. Part III reviews the law as it stood before 2018. Part IV analyses *Joseph Shine*. Part V offers a constitutional and criminal-law critique. Part VI examines the case for retention. Part VII studies the effect on family law. Part VIII compares other jurisdictions.

Part IX looks at developments after 2018, including the BNS. Part X proposes reforms, and Part XI concludes.

II. Conceptual and Historical Background

2.1 *What is adultery?*

In its usual legal sense, adultery means voluntary sexual intercourse between a married person and someone who is not that person's spouse. The same act can carry four different meanings. It can be a moral or religious wrong, a ground for ending a marriage, a civil injury for which some legal systems once awarded damages, or a crime. Much of the confusion in the Indian

debate comes from sliding between these meanings. To say that adultery is wrong, or that it justifies divorce, does not answer the question whether the State should imprison people for it.

2.2 *Early treatment*

Adultery has been regarded as a serious wrong in almost every legal tradition, but rarely as a wrong done to the person actually betrayed. Augustus's *lex Julia de adulteriis* of 18 BC made it a public crime in Rome. In England, canon law treated it as a sin and left it to the ecclesiastical courts; the common law did not punish it as a crime, apart from the short-lived Adultery Act of 1650 under the Commonwealth, which made it a capital offence and did not outlast the regime. What the common law did offer was a civil action by a husband against his wife's lover, called *criminal conversation*, in which damages reflected the injury to the husband's proprietary interest in his wife. Only husbands could sue.

Parliament replaced the action with a claim for damages in the divorce court in 1857 and abolished such damages in 1970. In India, the classical Hindu texts treated adultery as a grave offence with punishments that varied by caste and sex, and Islamic law treats *zina* as a *hadd* offence hedged by a demanding standard of proof. Across these traditions the shared assumption was that a wife's sexuality belonged, in some sense, to her husband or her family.

2.3 *Codification in India*

The first Indian Law Commission, under Macaulay, left adultery out of its draft Penal Code of 1837. Reasons commonly reported for the omission include doubt that a prosecution would help the aggrieved spouse and a view that the wrong was better left to private remedies. The Second Law Commission thought differently, and the offence entered the Code enacted in 1860, which came into force in 1862. It entered Indian law, in other words, as an offence against a husband's rights and not as an offence against marriage in the abstract.

2.4 *The anatomy of Section 497*

Section 497 provided:

> *"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."*

Section 198(2) CrPC added a procedural rule: for this offence, no one other than the husband of the woman was deemed aggrieved, and in his absence a person who had care of the woman on his behalf could complain with the leave of the court. Four features stand out. First, only a man could be the offender. Second, the offence depended on the woman's status as "the wife of another man", so that intercourse with a widow, an unmarried woman or a divorced woman was not adultery. Third, the husband's consent or connivance was a complete defence. Fourth, the wife was immune, and the wife of the accused man had no standing to complain.

A simple example shows how the structure worked. Let A be a married man and B a married woman whose husband is C. If A and B have intercourse without C's knowledge, A commits the offence. If C consents, the same act is no offence. If B had been a widow, there would be no offence either. A's own wife, whose marriage is equally broken, cannot complain. And B, who also broke her marriage vows, cannot be prosecuted. The only constant in these variations is C's control over the outcome.

III. The Law Before 2018: Four Decades of Judicial Deference

Section 497 was challenged repeatedly, and for sixty-four years the Supreme Court upheld it. The table summarises the main decisions.

Decision	Challenge	Outcome
Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321	A man charged under the section argued it discriminated against men because women could not be prosecuted	Upheld; Article 15(3) permits special provisions for women
Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137	The section was gender-discriminatory and arbitrary	Upheld; widening the offence was for the legislature
V. Revathi v. Union of India, (1988) 2 SCC 72	Section 198(2) CrPC, with Section 497, was discriminatory because a wife could not prosecute her husband's paramour	Upheld; the scheme disabled both spouses equally
W. Kalyani v. State, (2012) 1 SCC 358	Whether the woman could be prosecuted as an abettor	Held not liable in view of the express text

3.1 *Yusuf Abdul Aziz and the use of Article 15(3)*

The first challenge came from a man, and it was framed as a complaint that men were being

treated worse than women. The Court answered that Article 15(3), which allows the State to make special provision for women and children, covers a provision that exempts women from penal liability. The reasoning is instructive for what it left out. The immunity of the wife was treated as a favour to women, and nobody asked what that favour implied about the woman's capacity to make choices of her own.

3.2 *Sowmithri Vishnu*

Three decades later the challenge came from the other direction: the section, it was said, discriminated against women. The Court, speaking through Chandrachud CJ, upheld it. It saw the offence as aimed at the outsider who disturbs another's marriage, treated the exclusion of the wife as a matter of legislative policy, and observed that whether the net should be widened was for Parliament. In doing so it proceeded on an assumption that was later widely criticised, namely that it is ordinarily the man who seduces and the woman who is seduced.

3.3 *Revathi and Kalyani*

In *Revathi* the Court looked at the procedural bar in Section 198(2) and found a design in it: neither spouse could prosecute the other, and only the third party was punishable. It read this as a deliberate attempt to keep the couple from becoming adversaries in a criminal court and to leave room for reconciliation. *Kalyani* later confirmed that, on the present text, the woman could not be prosecuted even as an abettor.

3.4 *Commission and committee views*

Official bodies mostly asked whether the offence should be widened, not whether it should exist. The Law Commission's 156th Report (1997) on the Indian Penal Code did not recommend removing the offence or extending liability to women. The Committee on Reforms of Criminal Justice System (Malimath Committee, 2003) went further, recommending that Section 497 be amended so that the offence would apply to sexual intercourse with the spouse of any other person, thereby making it gender-neutral. The institutional instinct, in short, was to preserve the offence and tidy its drafting.

3.5 *What the earlier cases never asked*

These decisions share a gap. They tested the section against Article 14 and Article 15 in a narrow way, and none asked whether the State could criminalise consensual adult intimacy at all. That question could not be asked in the 1950s and 1980s in the form it can be asked today,

because the constitutional ground has moved since: the recognition of privacy as a fundamental right in *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1; the reading of Article 14 to strike down manifest arbitrariness in *Shayara Bano v. Union of India*, (2017) 9 SCC 1; and the emphasis on dignity and sexual autonomy in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, decided only three weeks before *Joseph Shine*.

IV. *Joseph Shine v. Union of India (2018)*

4.1 *Procedural history*

The petition was filed under Article 32 in 2017 by Joseph Shine, an Indian citizen based abroad, who challenged Section 497 IPC and Section 198(2) CrPC. A three-judge Bench, noting that the earlier decisions called for reconsideration, referred the matter to a Constitution Bench in early 2018. The Bench comprised Dipak Misra CJI, R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra JJ. It delivered four separate opinions on 27 September 2018, unanimous in result: *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

4.2 *The contending positions*

The petitioner argued that Section 497 was archaic, treated the wife as her husband's property, discriminated on grounds of sex, and intruded on dignity and privacy. The Union defended the offence. It described adultery as a wrong that harms the family and society and not merely the spouses, warned that striking the section down would weaken the institution of marriage, and suggested that if the section was flawed the remedy was to make it gender-neutral and not to abolish it.

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4.3 *The four opinions*

Dipak Misra CJI (for himself and Khanwilkar J.) held that the provision denied a married woman her individuality and treated her as subordinate to her husband. The idea that a husband is master of his wife could not stand with a Constitution built on equal dignity. Article 15(3) could not rescue a provision that rested on a stereotype of women as passive. Adultery could remain a ground for divorce and a civil wrong between spouses, but the State had no business punishing it. The Chief Justice added that if a spouse were driven to suicide by the adulterous conduct of the other, the law of abetment could apply in an appropriate case.

Nariman J. held that Section 497 violated Article 14. Its stated purpose, protecting the sanctity of marriage, was undercut by its own exception, since consent or connivance by the husband

made the act lawful; a law that protected marriages would not turn on the husband's permission. The section assumed that a married woman was a chattel, and the classification it drew had no rational connection to any legitimate object.

Chandrachud J. wrote the most expansive opinion, resting on Articles 14, 15 and 21. He treated sexual autonomy, dignity and privacy as part of the right to life and personal liberty, and held that marriage does not extinguish them. The section embodied patriarchal stereotypes and, by giving the husband alone the power to complain, treated the wife's sexuality as something under his supervision. He also emphasised constitutional morality, meaning that the State's coercive power must answer to the Constitution and not to prevailing social attitudes.

Indu Malhotra J. agreed that the provision violated the guarantee of equality. She stressed that adultery may well be a moral wrong, but that criminal law should be reserved for wrongs of a public character, and that a private breach of marital obligation is better met by the remedies of matrimonial law.

Decriminalising it, she said in substance, does not approve it.

4.4 *The holding and what it left untouched*

The Court declared Section 497 IPC unconstitutional and struck down Section 198 CrPC to the extent that it applied to that offence, overruling *Yusuf Abdul Aziz*, *Sowmithri Vishnu*, *Revathi* and the line of cases that followed them so far as they were inconsistent. Three points should be stressed. The Court did not say that adultery is lawful or desirable. It left untouched adultery's role as a ground for divorce. And it chose to strike down the offence instead of reading it as gender-neutral, because the opinions that addressed the point concluded that criminalising consensual sex between adults could not be justified whoever the accused was. The opinions differ in emphasis on how a gender-neutral offence would fare, but the dominant reasoning, built on privacy and autonomy and not only on gender discrimination, leaves little room for one.

V. Critical Analysis: The Constitutional and Criminal-Law Case

5.1 *Equality under Articles 14 and 15*

Under the classification test, a law that distinguishes between persons must rest on an intelligible differentia that has a rational connection to the object sought. Section 497 failed at both stages. If the object was to protect marriage, there was no reason to punish only the paramour and not the unfaithful spouse, and no reason to excuse the act when the husband

agreed. The wife's immunity was defended under Article 15(3) as protective, but the protection was illusory. It rested on a presumption that a woman could not be the author of her own choices, and the Court had already warned in *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, that paternalistic restrictions founded on stereotypes about women's vulnerability offend the Constitution even when presented as protection. An immunity that denies agency is a disability with a kind face. Read this way, Article 15(3) cannot be used to reinforce the very subordination that Articles 14 and 15(1) forbid.

The consent-or-connivance exception exposes the real function of the provision more clearly than any other feature. In law, a woman's sexual conduct became the husband's to authorise. The point was made forcefully in *Joseph Shine*: where a husband's permission converts a crime into a non-crime, the interest being protected is his control, not the marriage.

5.2 *Dignity, autonomy and privacy under Article 21*

The deeper objection is not that the offence was unequal but that it existed at all. *Puttaswamy* recognised that privacy includes decisional autonomy over intimate relationships, and *Navtej Singh Johar* applied that principle to hold that consenting adults cannot be penalised for their choice of partner. The logic carries naturally to adultery. A spouse who strays does breach an obligation that the marriage created, but the obligation is owed to the other spouse, and the remedy lies within the matrimonial relationship, in separation or divorce. To say that the State may send a person to prison for breaking a promise of fidelity is to say that the State may enforce private commitments of intimacy by force, a proposition that is hard to reconcile with the idea that marriage is a relationship of choice.

It is also worth observing that Section 497 left the spouse's own conduct completely untouched. A married man who had intercourse with an unmarried woman or a widow committed no offence under it. The law thus did not even purport to enforce marital fidelity; it enforced one narrow form of proprietary right.

5.3 *Criminal-law theory*

Outside constitutional text, the question is whether adultery meets the ordinary tests for criminalisation. John Stuart Mill's harm principle, set out in *On Liberty* (1859), holds that the State may restrain a person against his will only to prevent harm to others. Adultery undoubtedly harms the betrayed spouse and often the children, but the harm is emotional, relational and economic, and these are the harms that matrimonial law is designed to address through divorce, maintenance and custody. The English Wolfenden Report (1957) argued that

the function of criminal law is not to intervene in the private lives of citizens or to enforce a particular pattern of behaviour, and the later Hart–Devlin debate on the enforcement of morals framed the same dispute: whether the community's moral disapproval, by itself, justifies a penal sanction. The Indian Supreme Court's answer, through the idea of constitutional morality, aligns with Hart: public disapproval does not suffice.

Practical considerations point the same way. Criminal law is a blunt instrument. A prosecution that sends one spouse's partner to jail is more likely to harden positions than to repair a marriage, and a threat of prosecution can be used as leverage in settlement negotiations. There is no persuasive evidence that the offence ever deterred adultery. And the offence, as framed, was in practice available only to husbands, and so left the great majority of betrayed spouses with no remedy at all.

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