

WHY ‘ILLICIT INTERCOURSE’ NEEDS TO BE RETIRED FROM INDIAN CRIMINAL LAW

—SHRADDHA CHAUDHARY*

This essay addresses a surprisingly untouched area of Indian criminal law. A lot has been said about the structure and implementation of sexual offences in India, but almost nothing about the term ‘illicit intercourse’. I argue that the continued use of this term is inappropriate in modern India, especially given the recent trend towards centralising sexual autonomy and individual choice in assessing the legal permissibility of sexual conduct. I consider the evidence available on the meaning of ‘illicit intercourse’ and argue that the wrongs sought to be punished by criminalising illicit intercourse are no longer in tune with the aims of the Constitution of India (Constitution). Furthermore, it is also imprudent to seek to enforce majoritarian morality through criminal law. Therefore, the term should be retired from Indian criminal law.

I. CONTRASTING VIEWS OF THE WRONG OF SEXUAL OFFENCES IN INDIAN CRIMINAL LAW

In this section, I demonstrate that provisions of the Indian Penal Code, 1860 (*hereinafter* ‘IPC’) and their judicial interpretations suggest that two contrasting ‘wrongs’ are currently the focus of sexual offences in India. On the one hand, the criminalisation of ‘illicit intercourse’ (see section I.A) signifies the proscription of sexual conduct that is ‘immoral’ in the sense that it does not conform to the social norms and boundaries of sexual behaviour, especially for women. Here, the ‘wrong’ in focus is socio-normatively ‘immoral’ sexual conduct, anchored in notions of female sexual chastity and the containment and control of female sexuality. On the other hand, according to the modern view (discussed in section I.B), the morality relevant to the criminalisation of sexual conduct is constitutional morality. Here, the ‘wrong’ in focus is an incursion upon sexual autonomy, as conveyed by consent.

* Assistant Professor, School of Law, BML Munjal University Gurgaon and Ph.D researcher, Faculty of Law, University of Cambridge shraddha.chaudhary@bmu.edu.in

A. THE MEANING OF ‘ILLICIT INTERCOURSE’

The IPC frequently uses the term ‘illicit intercourse’ to refer to sexual relations,¹ but it is only defined in §. 372, IPC, which criminalises selling a minor for the purposes of prostitution:²

“For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.”

The application of this definition of illicit intercourse is limited to two provisions,³ but the meaning of illicit sex or intercourse is not uncommonly dependent on the existence (or lack thereof) of marriage or a marriage-like socially approved union. In an extensive historical review of how the category of ‘illicit sex’ came to be constructed in the law of the U.S.A., Dubler argues that the distinction between licit and illicit sex came to be defined and mediated by marriage.⁴ She asserts, “the legal genus of illicit sex has been persistently constructed in relation to the archetypal legal site for licit sex: marriage”.⁵ To put it simply, if sex is licit when it is contained within marriage, it is illicit in other situations. Echoing this particular understanding of what makes sex acceptable or permissible, the State Human Rights Commission of Rajasthan, in 2019, had demanded a law against live-in relationships, purportedly to protect women who, in such relationships, were indistinguishable from concubines.⁶ This is not to say that the use of ‘illicit intercourse’ in the Indian context always is, or has been, anchored

¹ The term has been used in six provisions of the Indian Penal Code, 1860 (IPC), mentioned hereunder. The corresponding provisions in the Bharatiya Nyaya Sanhita, 2023 (BNS) are added in brackets.

a. §366: Kidnapping, Abducting or Inducing Woman to Compel her Marriage (§87, BNS).

b. §336A: Procurement of a Minor Girl (§97, BNS: Procurement of Child).

c. §366B: Importation of Girl from Foreign Country (§141, BNS: Importation of Girl or Boy from Foreign Country).

d. §372: Selling Minor for Purposes of Prostitution, etc. (§98, BNS: Selling Child for Purposes of Prostitution etc.).

e. §373: Buying Minor for Purposes of Prostitution etc. (§99, BNS: Buying Child for Purposes of Prostitution etc.).

f. §498: Enticing or Taking Away or Detaining with Criminal Intent a Married Woman (§84).

² The Indian Penal Code 1860, s 372.

³ The Indian Penal Code 1860, s 372 and 373.

⁴ A.R. Dubler, ‘Immoral Purposes: Marriage and the Genus of Illicit Sex’ (2006) 115(4) Yale Law Journal 756, 763

⁵ *ibid.*

⁶ H. Khan, “Concubine-like Life’: Rajasthan SHRC seeks Law against Live-in Relationships’ Indian Express (Jaipur, 5 September 2019) <<https://indianexpress.com/article/india/rajasthan-shrc-seeks-law-against-live-in-relationships-5967012/#>> accessed 9 November 2023.

in marriage. But even when it makes no explicit reference to marriage, its meaning conveys 'immorality' drawn from social norms. Consider, for instance, that in *Ramesh v. State of Maharashtra*, the Supreme Court of India interpreted 'seduction to illicit intercourse', used in §. 366 and §. 366A, IPC, as 'inducing a woman to stray from the path of virtue', whether for the first time or at any time.⁷ The path of virtue, in this context, obviously means sexual purity or chastity, and the moral wrongfulness being criminalised, therefore, is in a woman giving up her chastity.

Thus, based on the judicial discourse outlined above, illicit intercourse appears to have two (not unrelated) meanings in the IPC: (a) sex outside socially approved relationships such as marriage or marriage-like unions and (b) sex which entailed a woman 'straying from the path of virtue' or giving up her chastity.

B. THE MODERN VIEW OF WRONGFUL SEXUAL CONDUCT

The meanings of 'illicit intercourse' and the sexual conduct they criminalise stand in contrast with the modern view of the wrongfulness of sexual conduct, situated in India's rights-oriented Constitution. In *Navtej Singh Johar v. Union of India*, a five-judge bench of the Supreme Court of India read down §. 377, IPC,⁸ which criminalised 'carnal intercourse against the order of nature', and in effect, homosexuality itself.⁹ In holding that consensual sexual acts between adults could not be criminalised, the Court emphasised (a) that adults have the right to positive sexual autonomy, that is, the normative entitlement to deploy one's sexuality in accordance with one's own preferences,¹⁰ and (b) that criminalisation needed to be in tune with constitutional, rather than public or majoritarian, morality.¹¹ The Court emphasised privacy, dignity and personal autonomy, expressed in sexual relations through choice or consent. This is reflected in Chandrachud J.'s affirmation that,¹²

"The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgement of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them."

⁷ *Ramesh v State of Maharashtra* 1962 SCC OnLine SC 170 : (1963) 3 SCR 396 ¶9.

⁸ §377, IPC: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation— Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section." (This provision has been omitted in the BNS).

⁹ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (*Navtej Johar*).

¹⁰ *Navtej Johar*, ¶¶472—482.

¹¹ *Navtej Johar*, ¶¶600—608.

¹² *Navtej Johar*, ¶474.

Similarly, in *Joseph Shine v. Union of India*, the Supreme Court declared unconstitutional §. 497, IPC,¹³ which criminalised adultery.¹⁴ Again, in doing this, the Court emphasised personal autonomy and consent as the hallmarks of sexual conduct which, at the very least, deserved to be ‘left alone’ by criminal law. This is evident from Misra J.’s observation that,¹⁵

“Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm... adultery does not fit into the concept of a crime. We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere.”

Here too, the Court emphasised that the guiding morality of all law, including criminal law, must be constitutional morality. Chandrachud J. observed that by requiring a wife to cede her sexual autonomy to her husband, the criminalisation of adultery undermined constitutionally protected rights of individual liberty, dignity and equality. Noting specifically that criminal law must be in consonance with constitutional morality, he held §. 497, IPC unconstitutional.¹⁶

I do not present this understanding of the constitutional limits that have been placed on the criminalisation of sexual conduct by Indian Courts to suggest that Indian law clearly or consistently regards non-consent as the determining principle upon which sexual conduct may be criminalised. The marital rape exception¹⁷ obviously does not protect sexual autonomy, consent or personal choice. Instead, as was emphasised by Hari Shankar J. in *RIT Foundation v. Union of India*,¹⁸ it seeks to preserve the sanctity of marriage and, as feminists have argued, the right of a husband over the body of his wife.¹⁹ Similarly, it has been argued that §. 354, which criminalises ‘outraging the modesty of a woman’ instead of sexual harassment or molestation, furthers “a disempowered notion

¹³ §497, IPC: “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.” (This provision has been omitted in the BNS).

¹⁴ *Joseph Shine v Union of India* (2019) 3 SCC 39.

¹⁵ *Joseph Shine*, ¶58.

¹⁶ *Joseph Shine*, ¶219.

¹⁷ §375, Exception 2, IPC: ‘Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape’.

This exception was read down by the Supreme Court of India in *Independent Thought v Union of India* (2017) 10 SCC 800. It now reads, ‘Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.’ (§63, Exception 2, BNS)

¹⁸ *RIT Foundation v Union of India* (2022) 3 HCC (Del) 572 : 2022 SCC OnLine Del 1404 (Delhi High Court), ¶530.

¹⁹ See, RM Ryan, ‘The Sex Right: A Legal History of the Marital Rape Exemption’ (1995) 20(4) Law and Social Inquiry 941.

of women and their bodies rather than treating women as autonomous subjects with mental and bodily integrity".²⁰ My limited argument is that the observations made, and the principles established, by the Supreme Court in these judgements represent, at the very least, the aspiration to move away from criminalisation of sexual conduct based on majoritarian or public morality and to centralise sexual autonomy expressed through consent in determining the legal permissibility of sexual conduct. The meanings of 'illicit intercourse', and the criminalisation of conduct represented by it, are incompatible with this aspiration.

II. 'ILLICIT INTERCOURSE' OUGHT TO BE RETIRED

In this section, I argue that the term 'illicit intercourse' must be retired from Indian criminal law. This is because the wrongs apparently prohibited by criminalising 'illicit intercourse' reflect a morality that, (a) is out of tune with the Indian Constitution and (b) relies on stereotypes about men and women, as well as masculine and feminine sexuality. In addition to this normative reason, there are also pragmatic reasons why criminal law should not be used to enforce majoritarian or public morality. These have to do with the epistemological fragility of majoritarian morality, and the counter-intuitiveness of enforcing it.

A. NORMATIVE REASONS

Neither of the meanings of 'illicit intercourse' discussed in section I.A above are compatible with constitutional morality. Constitutional morality acts as a counterweight to public or majoritarian morality.²¹ The latter is based on the opinions and sentiments held by members of the society. It appears to be a watered-down version of the morality advocated by Lord Devlin,²² called 'positive morality' in the literature on the relationships between morality and law.²³ To signify positive morality, values and norms must qualify the relatively high standard that their enforcement is necessary to the preservation of society.²⁴ It is not clear if public morality as a standard even requires that. Consider, for instance, *Ranjit*

²⁰ S Atreya, 'Feminist constitutionalism: Mapping a Discourse in Contestation' (2022) 20(2) *International Journal of Constitutional Law* 611, 627.

²¹ G Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins, 2019) 54-55.

²² Lord P Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 15. In the context of England, Lord Devlin reasons that the moral judgements of society are to be ascertained by the viewpoint of the man in the street, or the man in the jury-box.

²³ Lord Devlin's conception of morality was called 'positive morality' by HLA Hart, *Liberty, Law and Morality* (Stanford University Press, 1963) 17-20.

²⁴ Devlin (n 23), 13. Lord Devlin observes, "...an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."

Udeshi v. State of Maharashtra, where the Supreme Court upheld the constitutionality of §. 292, IPC²⁵ (criminalisation of obscenity) on the ground that it enforced ‘public morality’.²⁶ The Court understood ‘public morality’ loosely as the ‘mores of the people’ or ‘community standards’,²⁷ without any consideration of which mores were represented by the law, or how important these community standards ought to be (and by what metric) to merit enforcement by law (especially criminal law). Constitutional morality, on the other hand, is based on the universal and aspirational values of the constitution, represented by the vision for an equal and just society that respected individual autonomy, dignity and privacy.²⁸ It is a version of the critical morality, a universal moral code which can reflexively be used in the criticism of social institutions. This, according to Hart, is the only morality that could appropriately be accommodated within law.²⁹

As I demonstrated in the first section of this essay, personal (including sexual) autonomy has been read into the right to life and personal liberty (Art. 21),³⁰ and the ability to make one’s own sexual choices and to express one’s sexuality, are at the core of this right. This right is expressed by adults (who are

²⁵ At the time this case was decided, §292, IPC read as follows: “Whoever-

- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
- (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
- (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
- (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
- (e) offers or attempts to do any act which is an offence -under this section, shall be punished with imprisonment for either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.” (§294, BNS)

²⁶ See, *Ranjit D. Udeshi v State of Maharashtra* 1964 SCC OnLine SC 52 : (1965) 1 SCR 65 (*Ranjit Udeshi*).

²⁷ *Ranjit Udeshi*, ¶¶ 22 and 29.

²⁸ *State (NCT of Delhi) v Union of India* (2018) 8 SCC 501 ¶293; *Navtej Johar* ¶¶ 595—607 (for a sample of cases which have articulated the idea).

²⁹ Hart, (n 23) 19-20. Legal moralism in the philosophy of criminal law has come a long way since the Hart-Devlin debates. It is not possible to do justice to contemporary views on this subject within the scope of this essay. The views of Lord Devlin and H.L.A Hart are meant only to contextualise Indian law’s understanding of constitutional morality.

³⁰ Art 21, Constitution of India: ‘No person shall be deprived of his life or personal liberty except according to a procedure established by law.’

presently the only category recognised by Indian law as having the capacity to consent to sex) through sexual consent. Both meanings of 'illicit intercourse' discussed above completely side-line sexual autonomy, by criminalising sexual conduct that goes against public morality even if it is completely consensual and, in that sense, reflective of sexual autonomy. They are based, instead, on patriarchal norms that seek to restrict sexuality, especially female sexuality, within socially approved unions, and preserve female chastity rather than women's right to sexual autonomy.

Feminist scholars have demonstrated that these norms further the interests of Indian (and other subcontinental) patriarchies, in preserving family 'honour' and facilitating patriliney, by controlling women's sexual (and reproductive) capacities.³¹ Furthermore, by criminalising sex outside marriage or marriage-like unions and the 'inducement' to stray from the path of virtue *only* when such conduct relates to women, these provisions engage in the same kind of harmful sexual stereotyping evident in §. 497, IPC which criminalised adultery before it was held unconstitutional by the Supreme Court.³² The offence of adultery dismissed the moral value of the woman's sexual agency, focusing on the wrong done to her husband by her paramour, a wrong that was negated by the husband's consent even as her own consent was irrelevant. As feminist commentators have demonstrated, the provision and its interpretation by the Supreme Court prior to Joseph Shine, were based in and perpetuated, stereotypes of female sexuality as passive and male sexuality as active and agentic.³³ This view motivated the finding of the Court that §. 497, IPC was violative of Art. 14 of the Constitution.³⁴ Therefore, the meanings conveyed, and the wrongs criminalised, by 'illicit intercourse' are not in tune with the norms of the Constitution, as they centralise public morality (reflecting patriarchal interests) rather than the rights of women to sexual autonomy (expressed through consent) and to equality (which is defeated by sex-based stereotyping). It cannot find place in the criminal law of a modern, liberal democracy, especially when considered against the aspirational view of individual rights expressed by the Supreme Court (discussed in section I).

³¹ U Chakravarti, *Gendering Caste: Through a Feminist Lens* (Sage Publications, 2018) 143; Prem Chowdhry, *Contentious Marriages, Elopement Couples: Gender, Caste and Patriarchy in Northern India* (Oxford University Press, 2009) 17.

³² Joseph Shine (n 14).

³³ N Raut, 'The Offence of Adultery and Gender Equality in the Supreme Court of India' Socio-Legal Review Blog (15 August 2018) <<https://www.sociolegalreview.com/post/the-offence-of-adultery-and-gender-equality-in-the-supreme-court-of-india>> accessed 10 November 2023; S Uma, 'Fidelity, Male Privilege and the Sanctity of Marriage: Examining the Decriminalization of Adultery in India' (2023) 33(1) Women and Criminal Justice 28, 35.

³⁴ Art 14, Constitution of India: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

B. PRAGMATIC REASONS

In addition to the normative concerns raised in Section II.A, I argue that seeking to enforce majoritarian morality through criminal law is not pragmatic. This is for two reasons.

First, it is nothing more than an assumption that the sexual conduct sought to be criminalised under the label of 'illicit intercourse' is actually contrary to majoritarian morality. The IPC, which was enacted in the 19th century, reflected the victorian morality of its time.³⁵ It is absurd to claim that it also represents the core values of Indian society in the 21st century, without any evidence to support such a claim. In any case, gathering evidence to prove that it does represent such values is well-nigh impossible. Indian society is no monolith with a uniform worldview. Which group or community, then, would represent what the core values of India are? How would the views of this group or community be reconciled with the views of those who disagree with them? These difficulties make public or majoritarian morality epistemologically fragile. It is simply unfeasible to present a complete and nuanced picture of such morality. This is why the morality drawn from Constitutional values is most apposite, even in an empirical sense.

Second, even if we assume that public or majoritarian morality is knowable and verifiable, enforcing such morality is counter-intuitive to the effectiveness of criminal law. Consider, for instance, the sexual conduct criminalised by 'illicit intercourse'. As I argued earlier in this section, the criminalisation of such conduct does not further the rights or autonomy of women, but rather patriarchal interests in controlling women's sexuality, and relies on stereotypes of male and female sexuality. If this is the case, how can women be expected to trust that that this law, which is purportedly for their protection (since it only criminalises sexual offences by men against women), is actually for their protection? If they cannot trust the law, what incentive have they to resort to it when a sexual offence is actually committed against them? How, then, can criminal law hope to be useful and effective if those who suffer criminal offences do not resort to it because they cannot trust that it actually preserves their interests? These are not merely rhetorical questions. They point to genuine concerns about the acceptability and effectiveness of a criminal law that enforced a form of morality that goes against the interests of the group in whose benefit it is enacted. While there is no direct research showing that women who cannot trust that criminal law protects their interests are less likely to use it, thereby rendering it less effective, empirical research does link attitudes towards the law and law enforcement agencies on the

³⁵ See, D Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32(3) *Modern Asian Studies* 513. The author demonstrates that the process of enacting the IPC mirrored the ongoing developments in the colonial metropolis at the time, which in turn were entrenched in Victorian morality.

one hand and their effectiveness (in terms of being relied upon) on the other. For instance, a self-report survey-based study of 336 college students from a university based in the southern United States found that the respondents were far more likely to report incidents of sexual assault to authorities (whether police or university administrators) whom they trusted.³⁶

Therefore, there are normative and pragmatic grounds for the rejection of the term 'illicit intercourse' and the criminalisation of sexual conduct encompassed by it. It is time to retire it from Indian Criminal Law.

³⁶ BM Moore, T Baker, 'An Exploratory Examination of College Students' Likelihood of Reporting Sexual Assault to Police and University Officials: Results of a Self-Report Survey' (2018) 33(22) *Journal of Interpersonal Violence* 3419.