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## Case Comment: Joseph Shine v Union of India

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### INTRODUCTION

Marriages have a long history in our world, dating back to ancient times. Over time, as the world evolved, so did human understanding, and therefore, so did customs and traditions. So, to keep up with the milieu, new rules concerning marriages were developed. Although, notably, the connection between love and marriage was not a staple, either a luxury or a coincidence. But what is marriage? For some it is a pre-destined union of souls, others believe it's a calculated union of families. Although, amongst these varied definitions of love, one derivative is the most obvious: that societies direct marriages as much as marriages direct societies, and therefore, both are each other's products.

Nonetheless, marriages are highly regarded relationships shared between, though not limited to, a man and a woman. In India, marriages are performed as a holy ritual, giving it the nature of divine order. So, because marriages are holy in nature, and directed by society, it comes with a strict checklist of all the dos and don'ts that any socially recognized marriage must adhere to. Failing which, that marriage will inevitably peel the divine status and society's garb off of it.

One such essential of marriage is loyalty towards -- and only towards -- your rightfully married, socially recognized spouse. This is known as fidelity. It stipulates that one must not be consensually sexually engaged to anyone else except the person they are married to. And thus, adultery is the 'illegitimate', consensual sexual relationship of a spouse outside of their wedlock. Which spouse carries the greater onus of loyalty towards whom, and what legal immunities absolving a disloyal spouse from liability have been different for spouses of different genders.

Since the law is the mirror of society, different legal scriptures throughout history have attempted to punish adultery to deter it from occurring. Such as in the Greco-Roman world, the stringent laws against adultery<sup>1</sup> only covered sexual relations with a woman who was married, thus prohibiting a wife to sue her husband for committing adultery with a maiden or slave. And in Judaism, the stipulated punishment for adulterators is either stoning<sup>2</sup> or strangulation<sup>3</sup>, an exception is if the adulterator woman came from the priestly caste of Kohen, the punishment<sup>4</sup> was pouring molten lead down their throats. The ancient Hindu scripture Rigveda mentions adultery as a sin, although the punishment for the same has been different in different ancient Hindu texts, some of which do not consider it a punishment at all. Now, there is a clear pattern across almost all different ancient customs which shows that there was a clear distinction between husband and wife -- who can be the abettor and who can be the victim -- so far as adultery is concerned. Similar bias and discrimination were also seen in the erstwhile adultery laws of India under S. 198(2) of the CrPC<sup>5</sup> and S. 497 of the IPC.

S. 497 IPC<sup>6</sup> mentioned, *'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 offense of rape, is guilty of the offense of adultery, and shall be*

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<sup>1</sup> 'Adultery' (New Advent) <<https://www.newadvent.org/cathen/01163a.htm>> accessed 20 February 2023

<sup>2</sup> 'Deuteronomy Chapter 22 Verse 24' (mechon mamre) <<https://mechon-mamre.org/p/pt/pt0522.htm#24>> accessed 20 February 2023

<sup>3</sup> 'Sanhedrin Chapter 52b Verse 26' (Sefaria) <<https://www.sefaria.org/Sanhedrin.52b.26?lang=bi>> accessed 20 February 2023

<sup>4</sup> 'Leviticus Chapter 21 Verse 9' (mechon mamre) <<https://mechon-mamre.org/p/pt/pt0321.htm#9>> accessed 20 February 2023

<sup>5</sup> Code of Criminal Procedure 1973, s 198(2)

<sup>6</sup> Indian Penal Code 1860, s 497

*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.'*

Whereas S. 198(2) CrPC<sup>7</sup> stated, “...no person other than the husband of the woman shall be deemed to be aggrieved by any offense punishable under section 497...of the said Code: Provided that in the absence of the husband, some person who had the care of the woman on his behalf at the time when such offense was committed may, with the leave of the Court, make a complaint on his behalf.”

Because S. 497 was a pre-constitutional law, it considered women inferior to men, thus providing the right to sue primarily only to the husband and not the wife. While this also meant that such a wife whose husband was adulterous had no such legal remedy except for divorce. Because adultery was a criminal offense, it was a ground for divorce as per sec. 13 (1)(i) of the Hindu Marriage Act, 1955.<sup>8</sup> So, on one hand, it granted husbands the sexual autonomy to engage sexually with an unmarried woman, and it punished men (and only men) who were engaged sexually with another married woman. This meant that husbands can only have extra-marital sex with such a woman who is not a wife, and hence not under another man's control. And so, the constitutionality of these laws was challenged in the Supreme Court of India by an NRI from Kerala named Joseph Shine in the power of Article 32 of the Constitution of India. This resulted in a landmark judgment on 27<sup>th</sup> September 2018 which decriminalized adultery.

### **PRAYER OF THE PETITIONER (JOSEPH SHINE)**

Joseph Shine prayed<sup>9</sup> that S. 497 IPC along with S. 198(2) CrPC be struck down because of the following reasons:

**The Problematic Approach of S. 497:** S. 497 punishes sexual relations with a married woman but not an unmarried woman. Also, if the activity is conducted with the consent of the husband, then it is not adultery. And only men can be punished under this provision, unlike women who are excluded from any kind of punishment.

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<sup>7</sup> Code of Criminal Procedure Act 1973, s 198(2)

<sup>8</sup> Hindu Marriage Act 1955, s 13(1)(i)

<sup>9</sup> *Joseph Shine v Union of India* (2018) AIR SC 4898

**S. 497 violates Articles 14<sup>10</sup> and 15<sup>11</sup> of the Constitution, by being directly discriminatory against men.:** S. 497 only punishes men for the commission of adultery despite being committed by a man and a woman. When two persons engage in the same act, punishing only one of them due to an erroneous presumption that only he can commit that offense is arbitrary and grossly violates the anti-discrimination clauses of Articles 14 and 15 of the Constitution of India. Article 15(3)<sup>12</sup> of the Constitution permits the state to make special provisions for women and children. But this provision does not permit excusing women from culpability and prosecution under any penal offenses. S. 497 is written in sexist, discriminatory and paternalistic language. It aims to discard women's sexual agency. So, justifying S.497 under Art. 15(3) is opposite to the purpose, intent, and content of the antidiscrimination laws of Articles 14 and 15. Women are entitled to moral autonomy and sexual freedom just like anybody else.

**Indirectly discriminatory nature of S.497 against women under Articles 14, 15, and 21<sup>13</sup> of the Constitution:** The provision treats women as incapable of committing adultery. It erroneously presumes that sexual agency is only vested in men and not in women. Moreover, the provision presumes that a married woman is a property rather than a person with dignity. She is treated as the chattel of her husband. The presumption is that if someone pollutes the wife, he is then liable to punishment by the master, who is the husband of that woman. This is also strengthened by going as per the provision that if the consent of the husband is obtained, no adultery is committed. So, treating women as incapable of committing a gender-neutral offense and considering them as mere victims showcases institutionalized discrimination.

**S. 497 is directly discriminatory against women as it limits sexual freedom only to married women but not to married men:** The criminalization of adultery also limits married women's sexual freedom in serious ways, since it is believed that criminal law carries a deterrent effect, and so it is quite unlikely for men to engage in an adulterous relationship with married women as they may fear criminal punishment, hence placing a married woman on a different pedestal

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<sup>10</sup> Constitution of India 1950, art 14

<sup>11</sup> Constitution of India 1950, art 15

<sup>12</sup> Constitution of India 1950, art 15(3)

<sup>13</sup> Constitution of India 1950, art 21

compared to a married man, whereas both desire an adulterous relationship with another person. Thus, the unequal treatment of S. 497 violates the right of women to engage in an external sexual relationship under Articles 14<sup>14</sup>, 15<sup>15</sup>, 19<sup>16</sup> and 21<sup>17</sup> of the Constitution.

**S. 198(2) CrPC is discriminatory against women and thus violates Articles 14, 15 and 21 of the Constitution:** Women are illegally restricted from initiating prosecution for an offense under S.497. The wording of S. 497 directs that woman cannot have a grievance against the person with whom her husband has committed adultery. On the contrary, married men alone can have a grievance. This strikes at the core of the principles of equality and non-discrimination under the Constitution.

**S.497 violates the Fundamental Right to Privacy:** Privacy includes privacy to make decisions, and this includes the right to make one's own decisions about intimate matters. Sex is one of the most intimate decisions one can make. The right to sexual freedom naturally encompasses the right to choose a sexual partner, even when a person is married to someone else. Penalizing adultery contravenes the right of choosing a sexual partner and making one's sexual preferences.

**Previous judgments required reconsideration:** The Supreme Court had previously maintained the Constitutional legitimacy of S. 497 in *Yusuf Abdul Aziz v State of Bombay*<sup>18</sup>, *Sowmithri Vishnu v Union of India* and *V. Revathi v Union of India*<sup>19</sup>. The petitioner prayed for these to be reconsidered.

**Decriminalizing adultery is justified criminologically as it is a victimless crime:** Victimless crimes are such crimes that are made culpable solely because of the moral notions of the state. It usually does not have any identifiable victim. Criminalizing consensual sex leads to criminalizing a victimless crime. Imposing criminal prohibition subject to moral notions runs

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<sup>14</sup> Constitution of India 1950, art 14

<sup>15</sup> Constitution of India 1950, art 15

<sup>16</sup> Constitution of India 1950, art 19

<sup>17</sup> Constitution of India 1950, art 21

<sup>18</sup> *Yusuf Abdul Aziz v State of Bombay* (1954) AIR 321

<sup>19</sup> *V. Revathi v Union of India & Ors* (1988) AIR 835

opposite to our constitutional scheme. Community beliefs of moral and immoral must not lead to the transgression of Fundamental Rights.

### **PRAYER OF THE RESPONDENT (UNION OF INDIA)**

The Union of India submitted that ‘striking down S. 497<sup>20</sup> IPC and S. 198(2) CrPC<sup>21</sup> will prove to be detrimental to the intrinsic Indian ethos which gives paramount importance to the institution and sanctity of marriage’ and hence the petition be dismissed. It also stressed that the Law Commission had detected specific target areas and formulated auxiliary groups to contemplate such areas and that the Commission will finalize its views as soon as possible.

### **VERDICT**

On 27 September 2018, a constitutional bench of the Supreme Court collectively decriminalized<sup>22</sup> adultery by striking down S. 497 IPC as it violated Articles 21<sup>23</sup>, 15<sup>24</sup> and 14<sup>25</sup> of the Constitution. It also struck down S. 198(2) CrPC. It was held that these laws were archaic and paternalistic, which infringed upon a woman’s dignity and autonomy. Overall, S. 497 was declared illegal, arbitrary, unjust, and violative of Fundamental Rights.

This bench comprised CJI Dipak Misra, Justice A M Khanwilkar, Justice R F Nariman, Justice D Y Chandrachud, and Justice Indu Malhotra. The Bench also overruled its previous judgments of Yusuf Abdul Aziz, Sowmithri Vishnu, and V Revathi. The CJI in his judgment mentioned that if a person ends their life on discovering that their spouse was adulterous, it would be considered an abetment of suicide if the evidence is produced.<sup>26</sup>

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<sup>20</sup> Indian Penal Code 1860, s 497

<sup>21</sup> Code of Criminal Procedure 1973, s 198(2)

<sup>22</sup> *Joseph Shine v Union of India* (2018) AIR SC 4898

<sup>23</sup> Constitution of India 1950, art 21

<sup>24</sup> Constitution of India 1950, art 15

<sup>25</sup> Constitution of India 1950, art 14

<sup>26</sup> ‘Adultery is not a crime, SC scraps 158-year-old law’ (*The Indian Express*, 28 September 2018)

<<https://indianexpress.com/article/india/supreme-court-adultery-law-section-497-5376499/>> accessed 20 February 2023

## ADULTERY IN THE ARMED FORCES

The armed forces were unhappy<sup>27</sup> after the decriminalization of adultery. They claimed that it was difficult for them to stay away from their families for long durations of time and be bothered by the possibility of infidelity behind their backs. Thus, the Union of India in November 2020 applied to the Supreme Court to seek clarification on whether striking down of S. 497 meant that adultery was legal in the armed forces as well, considering their separate legislatures and needs including Article 33<sup>28</sup> which enables the Parliament to make separate laws for the armed forces personnel.

To this, the Supreme Court clarified<sup>29</sup> in January 2023 that the Joseph Shine judgment did not cover the decriminalization of adultery in the armed forces and thus it should be governed under their separate legislatures. Hence, military personnel is subject to face disciplinary action for executing adultery. Notably, the offense of adultery in army laws<sup>30</sup> is gender-neutral. Which means both men and women can be charged with adultery.

## ANALYSIS

By decriminalizing adultery, the Supreme Court set a precedent that ensures the societal arbitrariness which has seeped into the law must be eroded and paramount focus must be given to the concepts of equality and liberty enshrined in the Constitution. However, it also upheld that the same can be excused because of reasonable restrictions as Article 33.

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<sup>27</sup> Dhananjay Mahapatra, 'Adultery should continue to be an offense in armed forces, Center tells SC' (*The Times of India*, 01 January 2021) <<https://timesofindia.indiatimes.com/india/adultery-should-continue-to-be-offence-in-armed-forces-centre-tells-sc/articleshow/80260232.cms>> accessed 20 February 2023

<sup>28</sup> Constitution of India 1950, art 33

<sup>29</sup> Sohini Chowdhury, 'Armed Forces Personnel Liable To Face Disciplinary Action for Adultery Despite Striking Down Of Section 497 IPC: Supreme Court' (*Live Law*, 31 January 2023) <<https://www.livelaw.in/top-stories/breaking-armed-forces-personnel-liable-to-face-disciplinary-action-for-adultery-despite-striking-down-of-section-497-ipc-supreme-court-220328?infinitescroll=1>> accessed 20 February 2023

<sup>30</sup> Army Act 1950, s 45 and 63; Air Force Act 1950, s 45 and 65; Navy Act 1957, s 54(2) and 74

## CONCLUSION

After the Supreme Court's judgment, India became one of the few countries in the world where adultery does not attract criminal action. In India's neighborhood, adultery continues to be a criminal offense in Bangladesh<sup>31</sup>, Pakistan,<sup>32</sup> and Afghanistan<sup>33</sup> but not in Bhutan<sup>34</sup>, Sri Lanka<sup>35</sup> and Nepal<sup>36</sup> Indonesia is the latest country to recriminalize adultery<sup>37</sup>. Many other countries, mostly the ones following Sharia law, criminalize adultery with harsh punishments<sup>38</sup>.

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<sup>31</sup> 'Is adultery a criminal offence?' (*Sexual Rights Initiative*, 16 December 2016) <<https://sexualrightsdatabase.org/countries/438/Bangladesh>> 20 February 2023

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*

<sup>36</sup> 'Is adultery a crime in Nepal?' (*Forestry Nepal*, 04 December 2021) <<https://www.forestrynepal.org/is-adultery-a-crime-in-nepal/#1>> accessed 20 February 2023

<sup>37</sup> 'Indonesia criminalizes adultery: Which other nations have outlawed extramarital affairs?' (*Firstpost*, 06 December 2022) <<https://www.firstpost.com/explainers/indonesia-criminalises-adultery-which-other-nations-have-outlawed-extramarital-affairs-11763721.html>> accessed 20 February 2023

<sup>38</sup> *Ibid*