

## Adultery in India: Law, Court and Sanctity of Marriage



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## Lead Essay

### Adultery in India: Law, Court and Sanctity of Marriage

#### I. Introduction

The past few months have seen a series of landmark judgments by the Supreme Court on Sabrimala temple entry issue, the archaic law on Adultery, criminalisation of politics and preventing linking of Aadhar with services provided by private companies. In a first, the proceedings of the Supreme Court have also been live streamed. In this cover story, we will examine the legal arguments presented both for and against adultery. The petition against adultery was filed by Joseph Shine and it was on September 28, 2018 that adultery as a criminal offence was struck down in *Joseph Shine v Union of India*<sup>1</sup>. The petition challenged the concept of adultery as present in Indian laws. Several countries apart from India, have taken a legal position on adultery. In USA, adultery is criminalised in many of its states. In the Asian continent, Pakistan, Philippines and Taiwan have criminalised adultery but countries such as South Korea, Bhutan, Sri Lanka and China have struck it down.

In monogamous societies, where marriage is defined as an exclusive relationship between two people, adultery is unacceptable. However, this does not imply that this moral condemnation is sufficient to stop people from indulging in extra martial affairs. So, between the moral and legal positions on adultery the question that arises is whether “adultery is a crime”? Also, should the law treat men and women differently for what it classifies as a law punishable by law? In this cover story, we will discuss the legal and gendered view of adultery. The core issue is the argument of discrimination which the adultery law perpetuated and we will also analyse the reasoning court has relied upon to strike down adultery law in India as a criminal offense.

We will begin with a short discussion on adultery from a legal perspective- the interpretation of adultery by the judicial system has interpreted adultery and how the Supreme Court has dealt with it in the current judgment. It will include discussing the contradictions inherent in the concept of Adultery as understood by Court and Government.

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<sup>1</sup> Writ Petition Criminal No. 214 of 2017

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They also discussed the possibility of decriminalization of the provision by including two questions in their questionnaire. First, should adultery be punishable at all and secondly, should the offence be limited to men only as in Section 497 of Indian Penal Code. They found “opinion to be more or less equally divided between those who favoured the total abolition of the offence and those who favoured retention of Section 497 without change and those who would have the section modified so as to make the errant wife punishable along with her paramour.” This shows how the possibility of decriminalising the offence was not completely dismissed by the law commission.

Importantly, one dissenting voice was present through Justice Anna Chandy (India’s first Women High Court Judge) who voted for its deletion on the ground that “ it is the right time to consider the question whether the offence of adultery, as envisaged in Section 497, is in tune with present-day notions of a woman’s status within marriage.” The Law Commission did not provide any reasoning for not opting for decriminalisation of adultery as an offence and stated that “though some of us were personally inclined to recommend repeal of the section, we think on the whole that the time has not yet come for making such a radical change in the existing position.” But, they did recommend the decrease in the punishment from five to two years.

### III. Previous challenges to the Adultery Law

Adultery being such a contentious issue has attracted attention from many spheres of the society. We would be focussing on how both the courts and the Government have viewed it.

The Supreme Court dealt with the legality of Adultery three times through different challenges of provisions being discriminatory in nature and has in each case upheld the provisions. Government’s argument was that “*decriminalising the offence of adultery would erode the sanctity of marriage and the fabric of society at large*”.<sup>2</sup> But now, with current judgment declaring it unconstitutional, the offence of Adultery is no more a criminal offence it is only to be considered as a ground for divorce.

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<sup>2</sup> Counter Affidavit filed by the Government

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Let us begin with an explanation of the sections which deal with Adultery in India.

### (i) **Laws concerning Adultery in India**

This is the bare text of both the sections: **Section 297 of Indian Penal Code and Section 198 of Criminal Procedure Code.**

#### ***S 497: Adultery:***

*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.*

And also

#### ***S 198: Prosecution for offences against marriage:***

*(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:*

*Provided that— ...*

*(2) For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code:*

Adultery as per law was defined as an act of a married man having sexual intercourse with a married woman about whom he knows that she is the wife of another man wherein that man has not given his consent to the act. Then that act of man did not amount to rape but to the offence of adultery for which the punishment could have been extended to five years or with fine or both. What is important is that this act was not an offence, if the consent of the women's husband was present. This act could not be termed as adultery if the man has indulged with unmarried women/divorcee/widow. Importantly, a woman was not to be convicted of the offence and also could not initiate any criminal proceeding against the husband for the offence of adultery. The proceeding could be initiated only from the husband of the woman and if the husband was absent, then by his nominee.

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The petition challenged both the sections and sought to declare the sections as unconstitutional.

### (i) Three cases dealt by Apex Court on Adultery:

There have been three instances before Supreme Court i.e., *Yusuf Abdul Aziz v State of Bombay*<sup>3</sup>, *Sowmithri Vishnu v Union of India*<sup>4</sup> and *V. Revathi v Union of India*<sup>5</sup> wherein, the arguments against adultery was challenged but never once, the petition asked to render the sections( mentioned above), as unconstitutional which was done in *Joesph Shrine v Union of India*.

In the case of *Yusuf Abdul Aziz v State of Bombay*, Yusuf Abdul Aziz on trial for adultery, he challenged Section 497 of Indian Penal Code by arguing that this section is contradictory to Article 14 (Right to Equality) of the Constitution. After losing the case in Bombay, he approached Supreme Court. In SC, he argued that concept of equality enshrined in Article 14 and 15 is violated in the S 497 , by assuming that the offence of adultery could only be committed by a man and by the provision that the adulterous wife be not punished even as an abettor. Some have argued that this gives a license to women to commit adultery. However, the court declared that:

“We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited.”

Article 15 deals with Prohibition of discrimination based on religion, race, caste, sex or place of birth. Article 15(3) enables the government to make special provisions for women and children. It was this Article 15(3) which was debated in this case and the court unanimously through Vivian Bose J declared that the exemption provided by this section is safeguarded by Article 15(3) of the Constitution.

<sup>3</sup> Yusuf Abdul Aziz v State of Bombay, 1951(53) Bom LR 736

<sup>4</sup> 1985 Suppl SCC 137

<sup>5</sup> 1988 SC 835

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In the second case, *Sowmithri v Union of India*, it was contended that Section 497, being contrary to Article 14 of the Constitution, makes an irrational classification between women and men in the sense that it:

- (i) Confers upon the husband the right to prosecute the adulterer but it does not confer a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery,
- (ii) Does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and
- (iii) Does not take in its ambit the cases where the husband has sexual relations with unmarried women, with the result that the husbands have a free license under the law to have extramarital relationship with unmarried women.

When the third argument was raised in Sowmithri case of husband using this section as a license, one question that was arose was that a similar argument can be raised by man too that this provision provides license to women as well.

Coming back to the Sowmithri case, court did not find any substance in the argument of violation of Article 14 & 15 of women through S 497 which disables women from initiating any criminal proceeding for the act of adultery.

Then comes the third case of *V Revathi v Union of India*, wherein the petitioner presented the same argument as in the case of Sowmithri which we discussed earlier i.e., of wife being prevented from punishing her adulterous husband but the petitioner also did not miss the argument that that wife of the adulterous husband is also prevented from initiating any proceeding against the husband.

The judgment considered S 497 along with 192(3):

as a “legislative packet “designed to “deal with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial union. It does not arm the two spouses to hit each other with the weapon of criminal law.”

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An important point that was not discussed enough was that the sanctity of marriage cannot be saved from prosecuting the outsider. After the act of adultery, the marital bond between husband and wife suffers and punishing the outsider is actually not a solution. The question that arises is does it save the marriage? The next recourse in such cases is to either go for reconciliation or file for divorce with adultery as the ground.

### IV. Arguments raised in *Joseph Shine v Union of India*

Apex Court struck down the Adultery law in *Joseph Shine v Union of India*, for which judgment was reserved. A reserved judgment implies that it will be declared in few months and this is done in the cases where the judgment is of public importance. There were three petitions submitted in this case. By Adv. Meenakshi Arora (on behalf of Partners for Law and Development), Adv. Kaleeswaram (on behalf of Joseph Shine) and Adv. Jayana Kothari (appearing as a intervenor representing Vimochana trust). We will be dealing with the common objections which have been raised in these three.

#### (a) On Behalf of Petitioners

The three petitions broadly dealt with these three objections against adultery laws in India are:

- Violative of Article 14 & 15 of the Constitution
  - Violation of Privacy
  - Sanctity of Marriage
- Violative of Article 14 and 15 of the Constitution: Petitioners argued that Article 14 and Article 15 are violated because adultery is confined to cover only the extramarital affairs of married women and that of married men. The impugned Section discriminates on the basis of the sex of the spouse indulging in the extramarital affair.

Violation of Privacy: Adultery laws are an intrusion into the private lives of people where the relations between the parties are based on mutual consent. Privacy after Puttuswamy judgment has been recognised as our fundamental right and criminalising a person for relationship between consensual adults amounts to invasion of the same.

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- **Sanctity of Marriage:** To counter the government's argument that "decriminalisation of adultery will erode the sanctity of marriage and of society at large", the petitioner referred to the question of "what is sanctity of marriage" and "what is capable of destroying it" as dealt in previous judgment by Apex Court in *Independent Thought v Union of India* where it struck down marital rape with a minor.

In that case, the same argument was made by Union of India that striking down marital rape for minor will destroy sanctity of marriage. Court held that "The view that "Marital rape of a child has the potential of destroying the institution of marriage cannot be accepted ". Court gave the reasoning that divorce and judicial separation law exists. While divorce may destroy the marriage and judicial separation may dent a marital relationship, but they do not have the potential of destroying the "institution" of marriage or even the marriage. They both result in breaking the marriage but this does not imply that marriage as an institution is being destroyed. (Page 17 of petition by Adv. Jayana Kothari)

Further, that case struck down marital rape with minor by invoking Article 14, 15 and 21 of the Constitution which were argued in this case also.

### **(b) On Behalf of Respondents**

When Government submitted a counter affidavit in the current case, the affidavit stated that the decriminalization of adultery will result in weakening the sanctity and laxity in the marital bond"<sup>6</sup>. But Government's contention that sanctity of marital bond will be destroyed because of decriminalization of adultery, it also needed to emphasise what would be the impact on marriage due to decriminalisation of adultery? Further, this contention also was not supported by any data/research proving the impact of decriminalisation of adultery on sanctity of marriage. Additional Solicitor General (ASG), Pinky Anand on behalf of government argued that issue of adultery is a public issue because marriage is a public affair in India, then Justice Indu Malhotra asked how a relationship between two adults, which is a matrimonial dispute, could be a crime against the society.<sup>7</sup>

<sup>6</sup> Counter Affidavit by Union of India

<sup>7</sup> 'Adultery Affects Sanctity of Marriage' –ASG, 'What is the Sanctity when the Husband give consent for intercourse' –Asks Chandrachud. J: SC Reserves Judgment. Retrieved from <https://www.livelaw.in/adultery-affects-sanctity-of-marriage-asg-what-is-the-sanctity-when-the-husband-give-consent-for-intercourse-asks-chandrachud-jsc-reserves-judgment> on Sep 27, 2018

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Decriminalization of adultery was being contented for because for declaring an act to be a criminal offence, it needs to be against society and impacting society in a negative manner. Adultery on the other hand, involves and impacts only individuals and their families. Even the involvement of family is no argument to regulate the private sphere of the family.

This brings to another issue in which both sanctity of marriage and privacy have been quotes- that of marital rape. It is a matter of interest that if in future, a petition contesting marital rape is raised then would the government again raise the argument of sanctity of marriage? Issue of marital rape has been at the centre of debate for a long time. Government has chosen to stay away from it because criminalising marital rape would lead to even more vehement arguments and opposition than the ones witnessed to adultery laws.

The issue perhaps will come up in the light of Justice Chandrachud remark that “One retains sexual autonomy even after marriage; the right to say “No” is not forfeited” which has been re-emphasised in his judgment as well.

### **IV. Judgment in Joseph Shine v Union of India**

This judgment has been unanimously upheld by the Supreme Court bench consisting of Chief Justice of India Dipak Mishra, A.M. Khanwilkar J, Chandrachud J, Nariman J and Indu Malhotra J. The judgment has clearly declared unconstitutional the adultery law in India.

#### **(a) Overruling previous judgments on adultery and recognising discrimination**

It recognises how historically the adultery law has had “inherent double standard and treatment of women as men’s property in it”. In Ancient Greco –Roman societies, adultery constituted a violation of a husband’s exclusive sexual access to his wife, for which the law allowed for acts of revenge. (Page 17)

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It has recognised the discrimination against women which was inherent in the sections and held Adultery laws as violative of Article 14, 15 and 21 of the constitutional. It also explicitly overrules decisions in *Sowmithri Vishnu*, *Rewathi* and *W.Kalyani*. Judgment states that “*Revathi*, like *Sowmithri Vishnu* does not lay down the correct legal principle.”(Page 15)

The judgment accepts the argument raised by the petitioner of women being accorded the position of a “chattel” in adultery laws as her position is of a victim and not an independent person. It further states that wife is not an aggrieved person and husband has a license to treat his wife as he likes.

*Sowmithri* and *Revathi* were stuck down on the basis of formal notion of equality which the decisions in these cases held which is different from a substantial notion of equality.

“Section 497 is a denial of substantial equality in the sense that it reinforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse.”(Page 75)

The decision in *Revathi* has been laid as a reiteration of *Sowmithri Vishnu*.

Further, there is recognition of the over-arching power of state if adultery is an offense as it states that in “Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. It acknowledges the futility of punishment in establishing commitment. In further recognises another important aspect of Adultery that “in certain of an unhappy marriage, it may not be the cause, rather the result.” (Page 56)

This recognition is refreshing because it is an acknowledgment of the various dynamics which marriage as an institution entails in itself where adultery cannot be seen as immoral in all circumstances.

Additionally, *K.S.Puttuswamy and another v Union of India*<sup>8</sup> has been relied upon in the all four separate judgments, to emphasise to reiterate and emphasise “Privacy as a facet of Article 21 of the Constitution”.

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Herein, judgment relies on Puttuswamy judgment as held in that case to state that an invasion of privacy must be justified on the three fold requirement of,

- (i) Legality
- (ii) Need, defined in terms of legitimate State interest, and
- (iii) Proportionality, which ensures a rational nexus between the object and the means adopted.

And Section 497 “fails to meet the three fold requirement as it stands today and hence should be struck down”. Now, this recognition can be seen as a possibility for future argument on marital rape because Chandrachud J. further states that

“Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order.” (Page 54)

This perhaps can be a hopeful scenario for the future litigation challenging marital rape present in India. It clearly challenges the long held notion of “implied consent” within marriage on part of women which is the very basis behind non-acceptance of marital rape as an offence in Indian law.

## V. Conclusion

The government’s submission that decriminalising adultery will destroy sanctity of marriage could be a reflection the mindset of society. The mindset of the society is rooted in morality which changes and to some extent, has to with passage of time. The declaration of act of Adultery as unconstitutional has led to recognition of the violation of Articles 14, 15 and 21 which the adultery law was perpetuating.

What needs to be understood is that it is not possible to term an act based on consent as criminal when if reconciliation does not work, the civil remedy (of divorce) exists for the same which has been recognised in this judgment as well.

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What government contended was that “sanctity of marriage” would be affected if adultery is decriminalised but the question to focus our attention was beyond this, that at what cost are we trying to do so? Is sanctity of marriage important enough to accept the fundamental rights being violated within it? Atleast, for adultery law, Apex Court has declared in negative.

What government contended was that “sanctity of marriage” would be affected if adultery is decriminalised but the question to focus our attention was beyond this, that at what cost are we trying to do so? Is sanctity of marriage important enough to accept the fundamental rights being violated within it? Atleast, for adultery law, Apex Court has declared in negative.

This renders a hope for challenge to Marital Rape in future wherein the same argument of “sanctity of marriage and implied consent” is always offered, both of which have been questioned in this judgment. Already, in *Independent Thought v Union of India* Supreme Court has held the exception to marital rape inapplicable to minor wives.

Thus, in the light of this judgment, what is perhaps recognised are the fundamental rights within marriage which can go a long way in challenging Marital Rape law in India.

The recognition of adultery law as unconstitutional shows that finally the inherent discrimination in adultery law has been rectified but we hope that this judgment will pave the path for challenging more discriminatory laws.

Issue Coordinator: Neha Panchpal

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