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## *ABOUT US*

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **CASE ANALYSIS: JOSEPH SHINE VS.** **UNION OF INDIA**

AUTHORED BY - JASLEEN KAUR ANAND

Year:	2018
Jurisdiction:	India
Statute/Law(s):	Article 14, Article 15, and Article 21 of Constitution Section 497 of Indian Penal Code Section 198 of Code of Criminal Procedure
Court:	Supreme Court of India
Bench Strength:	5
Bench:	Hon'ble Chief Justice of India Deepak Mishra Hon'ble Justice A.M khanwilkar Hon'ble Justice Indu Malhotra Hon'ble Justice D.Y Chandrachud Hon'ble Justice R.F Nariman
Case Type/Origin:	Civil Writ Petition
Number of Opinion(s):	4
Case Citation:	(2019) 3 SCC 39, AIR 2018 SC 4898
Cases Referred:	Yusuf Abdul Aziz vs. State of Bombay (1954) SCR 930,  Sowmithri Vishnu v. Union of India & Anr. (1985) Supp SCC 137,  V. Revathi vs. Union of India (1988) 2 SCC 72  W. Kalyani vs. State through Inspector of Police and another (2012) 1 SC 358

## **Facts:<sup>1</sup>**

- The Constitutional validity of Section 497 read with Section 198 of Code of Criminal Procedure, had been challenged under Article 32 of the Constitution of India on the grounds of being against or of violation of Article 14, 15 and 21.
- Initially a PIL (Public Interest Litigation) had been filed against adultery claiming that it is discriminative on the grounds of gender and being arbitrary. The Constitutional Bench was set up for hearing the same.

## **Issues Involved:<sup>2</sup>**

1. Whether Section 497 of the Indian Penal Code is violative of Article 14, 15 and 21 of Constitution of India or not?
2. Whether the exemption granted to married women is a violation of the Right to Equality as per the Indian Constitution with regards to Section 497 of Indian Penal Code or not?
3. Whether women shall be included as offenders thereby making the Section 497 gender neutral?

## **Section 497: Adultery<sup>3</sup>**

“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.”

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<sup>1</sup> Case analysis : Joseph Shine v. Union of India by K Pallavi, <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/> , last visited on 12.09.2023

<sup>2</sup><https://scobserver.in/cases/joseph-shine-v-union-of-india-decriminalisation-of-adultery-background/#:~:text=Section%20497%20IPC%20criminalised%20adultery,though%20were%20exempted%20from%20prosecution.>

<sup>3</sup> Indian Penal Code, 1860



## Background of Section 497<sup>4</sup>

- There have been previous occasions as well when the legality and the constitutional validity of the provision has been raised before the court.
- The beginning of the questioning was done in the case of Yusuf Abdul Aziz v. Sate of Bombay (1954) SCR 930, where Adultery as per Section 497 of Indian Penal Code had been imposed on the husband. The Husband had challenged the constitutional validity of the same in Bombay High Court as per provisions of article 228 of the Indian Constitution as violative of Article 14 and 15 stating that the wife cannot be held culprit even for being an abettor. There was a three-judge bench upheld the validity of the section as it was a special provision which had been created for women under Article 15(3).
- In Sowmithri Vishnu v. Union of India & Anr. (1985) Supp SCC 137, a petition had been filed as per Article 32 of the Indian Constitution challenging the fact as to whether Section 497 shall be valid or invalid. The three-judge bench held that the offence of breaking down a family stands not smaller than that of breaking a house, hence holding that punishment for the same stands valid and justified. The constitutional validity of the same had been challenged on three grounds namely;
  1. This section does not render rights to the wife to present the woman with whom her husband had committed the act of Adultery
  2. It does not give any rights to the wife for prosecuting her husband for performing adultery
  3. It also does not cover actions where the husband has sexual relations with a woman who is unmarried
- In the case of V Revathi v. Union of India (1988) 2 SCC 72, it was held by the court that it does not permit either of the spouses for being disloyal and permitting to prosecute for the offence. Hence, since a charge cannot be brought up against either husband or wife for being disloyal and offending their spouse, it does not discriminate on the grounds of sex.

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<sup>4</sup>Joseph Shine V. Union Of India (2018), <https://www.alec.co.in/judgement-page/joseph-shine-v-union-of-india-2018>, last visited on 08.09.2023 ,

Case Analysis: Joseph Shine v Union of India By Khushboo Garg, <https://legalreadings.com/case-analysis-joseph-shine-v-union-of-india/> , last visited on 08.09.2023,

Case analysis : Joseph Shine v. Union of India by K Pallavi, <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/> , last visited on 15.09.2023

It provides only for a punishment for an outsider who tries to destroy the marriage and sanctity of marriage.

- In the case of *W Kalyani v. State through Inspector of Police & Anr.* (2012) 1 SC 358, it was held that the mere fact that appellant is a woman would immune her of any charges of adultery and she cannot be proceeded against for commission of such an offence.

## **Contention of Petitioner:<sup>5</sup>**

The Petitioner's Counsel had put up the following contentions:

1. The counsel held that he believed that fundamental rights were being infringed due to some components of Section 497
2. It was urged by the counsel that the law mentioned about the penalty of a man in the event of adultery, but there is no provision regarding punishment for a woman. Hence, a woman could not make a complaint under this section against her husband.
3. Counsel also added that women as per this section might be treated as objects because the action or act was held "legal" or "illegal" depending upon the agreement of the husband or lack of agreement.
4. It was also argued that sexual intercourse between two individuals was a willing act and mutual for both the parties and hence, the restrictions placed upon it are in such nature that might violate the fundamental rights as under Article 14, 15 and 21 of the Indian Constitution.
5. Petitioner also made a claim that this section of might also violated Article 21 of the Indian Constitution which states about the Right to Privacy in terms of choice a person must choose their partner with autonomy. It was also argued that any individual irrespective of the fact that the person is married or unmarried or is a male or female should have an unrestricted right to engage in sexual intercourse outside of the marital connection.

## **Contention of Respondent:<sup>6</sup>**

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<sup>5</sup> Joseph Shine Vs Union of India By: Bharti Verma, <https://www.lawinsider.in/judgment/joseph-shine-vs-union-of-india#:~:text=Obiter%20dicta%3A,t%20make%20it%20an%20offence> , last visited on 14.09.2023

<sup>6</sup> Joseph Shine Vs Union of India By: Bharti Verma, <https://www.lawinsider.in/judgment/joseph-shine-vs-union-of-india#:~:text=Obiter%20dicta%3A,t%20make%20it%20an%20offence>

There were counter arguments that were laid down by the counsel of the Respondent to contentions made by the counsel of the Petitioner:

1. A person shall not be allowed to have sexual relations outside of their marriage
2. The institution of marriage would suffer a lot and would be subsequently destroyed. Hence, it was argued that in order to safeguard the institution of marriage and protect the society since marriage forms the basis of society, Adultery shall be criminalised.
3. Another argument placed was that acts of such kind can result in offending the morals, ethics, and values in the society so the individuals committing such acts shall be punished.
4. Another claim made was that the Right to Privacy and Personal Liberty which is guaranteed by the Constitution of India as per Article 21 is not absolute and as a result there can be certain restrictions and limitations be placed where the public interest or interest at large had to be protected. It has been considered as an affirmative action in favour of women.

## **Judgment<sup>7</sup>**

- The judgement had been delivered by Former CJI, Deepak Mishra commencing with statements that concluded that wife is not the property of her husband and the husbands likewise are not the masters of their wives.
- This section disposed the dignity, freedom, and privacy of women. He added that to live is to live with respect and dignity. The drafters of the Indian Constitution had made a clear vision of the society wherein the constitutional values will be achieved by highlighting among others liberty, respect and freedom.
- Hence, the fundamental is respect and dignity that it permeates the core of the rights which have been guaranteed to a person as per Part III and Privacy of a person is an important element of dignity.
- This section is an encroachment towards the wife on her right to personal liberty and life by acceptance of notion of marriage which overthrows the concept of true equality.
- As under provisions of Indian Constitution, article 21 entails or covers the area of personal liberty which therefore includes Sexual Autonomy.
- The two major aspects of marriage are trust and respect. The respect for sexual autonomy

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[india#:~:text=Obiter%20dicta%3A,t%20make%20it%20an%20offence](#) , last visited on 09.09.2023

<sup>7</sup> Joseph Shine v/s Union Of India By Somyagoel, <https://www.legalserviceindia.com/legal/article-3127-joseph-shine-v-s-union-of-india.html> , last visited on 11.09.2023

can only be established if the two spouses respect each other with dignity and equality.

- This section denied the substantive equality since it mentioned that women are not able to render her free consent for the sexual acts in a legal way, hence, considering them as the property of their spouse. Hence, this section is violative of the Article 14 of the Constitution of India and stands violative of Article 15's non- discrimination clause.
- It also highlights the importance and value of the consent of the man which somewhere result in subordination of women which is a clear violation of Article 21 of the Indian Constitution.
- Adultery has been decriminalised that is there stands no criminal offence in performance of Adultery. Criminal offence which means a crime that has been committed against the society but Adultery stands to be more of a personal issue.
- Adultery does not constitute a crime since it would otherwise invade the privacy sphere of marriage extremely. But it still stands to be a civil wrong and is a valid ground for divorce by the spouse.
- The judgement highlights the fact that Husband is not the master of his wife and that women should not be considered a property of the father or husband anymore. Women shall have an opportunity to put their stance forward and shall have equal status and respect in the society.
- It was stated that the section was arbitrary in nature and that it does not provide protection to the sanctity of marriage because it stated about the husband to give consent to allow his wife to have a relationship or affair with anyone out of their marriage.
- Rather it stands to preserves proprietary rights of a man that he has over his wife. This section did not have any provision in regards to a married man having a relationship outside his marriage with an unmarried woman.
- Hence, the Section was struck down as being unconstitutional and violative of Article 14, 15 and 21 of the Indian Constitution.
- The CrPC's Section 198(2). which contains the procedure for punishment under Chapter XX of the I.P.C. will be unlawful just to the degree that it is pertinent to the offense of Adultery u/s 497.

## Opinion of Judges<sup>8</sup>

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<sup>8</sup>Joseph Shine vs. Union of India, <https://privacylibrary.ccgmlud.org/case/joseph-shine-vs-union-of-india#:~:text=In%20treating%20adultery%20as%20a,based%20on%20their%20personal%20discretion> , last visited

- Justice D. Misra opined for himself and on behalf of Justice A M Khanwilkar that the treatment of Adultery as a crime was intruding with the matrimonial sphere and the privacy of the same. In his opinion, if Adultery gets criminalised then it has two-fold consequences namely firstly it offends Article 21 of the Indian Constitution and secondly the privacy that is in the relationship between the husband and wife.
- Justice D Y Chandrachud discussed the possibilities or ways in which Adultery had an implication on Right to Privacy while he referred the same to the US Supreme Court's jurisprudence. He elaborated that patriarchal and misogynist notions of sexual control of a woman do not have any place in Indian Constitution which recognises and respects the autonomy and dignity as intrinsic to any individual. A reference of the case of Navtej Singh Johar vs Union of India was made for discussing the essentiality or importance of sexual freedom and autonomy as a facet of liberty of an individual, to put focus on or highlight the indignity that is suffered by a human when the acts done within their personal space are criminalised just on the criteria of regressive social attitudes, and to highlight that right to sexual privacy is a fundamental and natural right to dignity and liberty. He also referred the landmark judgement of K S Puttuswamy vs. Union of India to highlight the fact that law shall reflect women as equal individuals in the sphere of marriage who have right to live with dignity. He added that Section 497 denuded a woman of her privacy, freedom and dignity.
- Justice I Malhotra opined that the act shall remain a civil wrong because the autonomy to have a consensual sexual relationship out of the marriage by a person who is married did not warrant protection as under the Indian Constitution's Article 21. However, she also added that the freedom of a person to make the choice in regards to the sexuality is one of the most intimate spaces of life and it shall be protected by criminal sanction from public censure.

## **Status in India**

- Adultery as a crime existed in India until September 27th,2018. Then it was abolished by the Hon'ble Supreme Court and now it is no longer a crime but still stands as a ground for divorce.



## **Orbiter Dicta<sup>9</sup>**

- The offence is based and relied upon the notion of women being the property of her husband and that the act of adultery is taken into account as being a theft to the property of the husband.
- This is because it mentions about the consent of the husband would not render the act as a crime or his agreement shall make the act not an offence.

## **Ratio Decidendi<sup>10</sup>**

- It was held that women will be protected as per the provisions of Article 15(3) of the Indian Constitution and hence shielded or protected from punishment for abetting or aiding as well.
- It was respected and kept in mind that the dignity of a woman or female in marriage or otherwise cannot be undermined.
- As per Article 21, the personal and sexual privacy are protected and respected in their dignity and a woman is entitled to privacy like others. The autonomy that a person enjoys is their capacity to make correct decisions and to choose a partner is an essential decision which shall be taken freely.

## **Recommendations<sup>11</sup>**

- 42nd Law Commission Report: It was recommended to include the liability for adulterous women and for the reduction of punishment from a time period of 5 years to 2 years. It was however not given effect to.
- 152nd Law Commission Report: It was recommended to introduce equality between the genders as far as the provisions of Adultery were concerned and societal amendment or change in the societal status of women. However, this was not accepted.

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<sup>9</sup> Joseph shine v Union of India Legal Blogs Misbah Khan, <https://lawbhoomi.com/joseph-shine-v-union-of-india-2/#History> , last visited on 07.09.2023 ,

Joseph Shine Vs Union of India By: Bharti Verma, <https://www.lawinsider.in/judgment/joseph-shine-vs-union-of-india#:~:text=Obiter%20dicta%3A,t%20make%20it%20an%20offence> , last visited on 10.09.2023

<sup>10</sup> Joseph shine v Union of India , Legal Blogs , by Misbah Khan , <https://lawbhoomi.com/joseph-shine-v-union-of-india-2/#History> , last visited on 14.09.2023 ,

Joseph Shine Vs Union of India By: Bharti Verma, <https://www.lawinsider.in/judgment/joseph-shine-vs-union-of-india#:~:text=Obiter%20dicta%3A,t%20make%20it%20an%20offence> , last visited on 11.09.2023

<sup>11</sup> Case analysis : Joseph Shine v. Union of India by K Pallavi, <https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/> , last visited on 16.09.2023

- Malimath Committee in the year 2003: They had been formed for Reforms of Criminal Justice System which had made a recommendation to amend the provisions as that a person who has sexual relations or intercourse with the spouse of another person shall be held guilty for the offence of Adultery. But the same is standing pending for consideration and final decision.

## **Critical Analysis and Conclusion**

The decision to make the provision of decriminalisation was quite essential since everyone has a right to choose their partners, irrespective of the fact that the person is a male or female and whether married or not. The Constitution of India makes provisions for the equality and the right of a person to live with respect and dignity. The freedom is also an essential factor which stands granted by our constitution. In this way the right to choose a partner gives dignity, liberty, respect and freedom to everyone and also cancels the patriarchal mindset that a woman after getting married is the property of her husband and any sort of relations she develops out of marriage would be a kind of theft on property of the husband. As there has been decriminalization of Adultery, there are chances for an increase in the offence being committed. Many claims in case laws along with the committee and commission reports have been made to punish the women also if the men are being punished but now it has totally been decriminalised with respect to the Fundamental Rights of the Golden Triangle of the Indian Constitution which is Article 14, 19 and 21 along with article 15 also. There is a sense of modernisation in the society with respect to a great movement and development of thinking, ideas, ideals, and the mindset of the people in the society where women are being not only treated equally but being given more respect and freedom. This stands the 21<sup>st</sup> century where liberalism has taken over and changed the mindset of the population. Adultery's decriminalisation was in a way a demand for the dignity and getting rid of patriarchy in the society. It was a law of an old time where women did not have equal opportunities as men did and an independent identity but now women have all of that and that is the reason while society progressed and as the Indian Constitution is a living document, it also changed the mindset to give the justice to women and remove the law and rendered respect and dignity to all women. Women are now no longer behind men and their property but have an independent identity. Hence, the decriminalisation of Section 497 of Indian Penal Code was justified.