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Case Commentary: *Joseph Shine v Union of India:* Farewell to a Victorian-Era Adultery Law

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ABSTRACT

This case commentary critically analyses the rationale behind the decision made by the Indian Supreme Court in the case of *Joseph Shine v Union of India* [2018] Indlaw 899 (SC). The constitutionality of section 497 of the Indian Penal Code and section 198(2) of the Code of Criminal Procedure, which criminalise adultery, was challenged in this case. Being well aware that this case was a call made due to societal changes, the Supreme Court was prepared to adopt a liberal interpretation of the Indian Constitution. However, it had to face the sea of precedents flowing in the opposite direction of the societal changes. The Supreme Court, in dealing with these archaic provisions had carefully scrutinized Articles 14, 15 and 21 of the Indian Constitution to declare that the impugned provisions have long outlived their purpose and do not fit within today's constitutional morality. This case is definitely one of the significant decisions made in the history of Indian law as it portrayed the Supreme Court's bold move in finally bidding farewell to a Victorian-era law. As a result, adultery is no longer a crime in today's India and this decision is the reason behind it.

Keywords: Adultery; Indian Constitution; Archaic law; Morality; Gender discrimination

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1. Indian Constitution

The Indian Constitution, which has been around for more than seven decades, has been the guiding light for many significant decisions made by the Indian courts. The Indian courts have always relied on the magnificent monument, the Indian Constitution, to be the real ray of light when it involves the dignity and equal rights of Indian women. Though a few judgments chose to tie themselves down by precedents, many notable decisions were made with the best interest of society and the future in mind. *Joseph Shine v Union India* by the Supreme Court is such a decision.¹

2. Facts

Joseph Shine v Union of India is the first ever public interest litigation filed in the Indian Supreme Court concerning adultery. A writ was filed in 2017 under Article 32 of the Indian Constitution to determine the constitutionality of section 497 of the Indian Penal Code.² Section 497 of the Indian Penal Code and section 198(2) of the Code of Criminal Procedure³ read as follows:—

Section 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.

Section 198: Prosecution for offences against marriage

(2) For the purposes 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: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

In short, section 497 of the Indian Penal Code read with section 198(2) of the Code of Criminal Procedure criminalizes adultery in India and provides for the right to prosecute the offence.

In this case, the petitioner, Joseph Shine challenged the constitutionality of section 497 of the Indian Penal Code and section 198(2) of the Code of Criminal Procedure on the grounds

¹ *Joseph Shine v Union of India* [2018] Indlaw 899 (SC).

² The Indian Penal Code 1860, s 497.

³ The Code of Criminal Procedure 1973, s 198(2).

that they are discriminatory and are in violation of the fundamental rights of Indian citizens. A panel consisting of five judges was formed to hear this matter.

3. Decision of the Court

In deciding the relevance and constitutional validity of this Victorian-era law, the first hurdle the Supreme Court faced was with potential binding precedents. In this regard, the Supreme Court explained that judges often had to confront the need to expand constitutional rights due to the demand of societal change. Although it is necessary to reexamine history to understand the development of the law, Justice Dipak Misra held that that does not mean that the courts should be held back by precedents. The learned judge further held that constitutional courts should adopt the concept of 'cohesive adjustment' to facilitate the development of legal interpretation. His Lordship was of the view that cohesive adjustment is the way forward, especially when existing precedents are not in line with societal change. His Lordship held that the cohesive adjustment would enable courts to scrutinise provisions through a progressive and developed interpretation. However, His Lordship did caution that 'cohesive adjustment' should be applied sparingly only when there is a real societal change:

The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts.⁴

As a result, the Supreme Court decided that it will not wave its hands in despair and, held that constitutional courts should not bind themselves to precedents especially when it comes to controversies related to the lives of human beings.

The Supreme Court further took note of the *Yusuf Abdul Aziz v State of Bombay*⁵ case which dealt with a similar issue on the constitutionality of section 497 of the Indian Penal Code. This matter was heard by the Indian Supreme Court consisting of five-panel judges. In the present case, the Supreme Court decided that it was not necessary to refer the case to a larger bench. The Supreme Court also relied on the decision in *Central Board of Dawoodi Bohra Community and another v State of Maharashtra and another*,⁶ which established the principle that it is open to the bench of coequal strength to express its opinion doubting the correctness of the prior decisions made by the earlier benches of coequal strength. With that, the first hurdle of binding precedents was overcome.

⁴ *Joseph Shine* (n 1) 900.

⁵ *Yusuf Abdul Aziz v State of Bombay* [1954] Supreme Court Reports (India) 930.

⁶ *Dawoodi Bohra Community v State of Maharashtra* [2004] Indlaw 1067 (SC).

The Supreme Court then proceeded with the main crux of the case. The issues before the Supreme Court were:

1. Whether section 497 of the Indian Penal Code and section 198(2) of the Code of Criminal Procedure are discriminative and gender biased and as such they violate Article 14 and Article 15 of the Indian Constitution;
2. Whether section 497 Indian Penal Code and section 198(2) of the Code of Criminal Procedure violate the right of freedom accorded by the Indian Constitution mainly under Article 21 due to the interference with the right to privacy; and
3. Whether the provisions criminalising adultery are beyond the realm of public law.

In dealing with the above-mentioned issues, the Supreme Court examined section 497 of the IPC and section 198(2) of the Code of Criminal Procedure thoroughly and found that:

1. Only an adulterous man can be prosecuted according to the said provision and not an adulterous woman. An adulterous woman is protected to the extent that she cannot be prosecuted even as an abettor of the offence.
2. It is only considered an adultery if a man has an adulterous relationship with a married woman. Conversely, if a married man has an adulterous relationship with an unmarried or divorced woman, it does not fall within the purview of adultery.
3. Only the husband of the married woman who is involved in the adultery is considered the victim and is entitled to prosecute the adulterous man. However, in situations where the husband in a marriage is involved in an adultery act, the wife is not considered the aggrieved party. She does not even have an agency to prosecute the adulterous woman and/or her husband.
4. An adulterous relationship with the consent of the married woman's husband does not amount to adultery under the Indian Penal Code.

4. Equality

The Supreme Court found that these laws on adultery portray two sets of standards based on gender. Referring *EP Royappa v State of Tamil Nadu*⁷ and *Shayara Bano v Union of India*,⁸ the learned judges held that any law which manifests arbitrariness is in violation of the equality clause under Article 14 of the Indian Constitution and should be struck down. The classification of only the husband as the victim who is given the right to prosecute the offence of adultery but not to the wife demonstrates the arbitrariness in the law. Further to

⁷ *EP Royappa v State of Tamil Nadu* [1974] 4 Supreme Court Cases (India) 3.

⁸ *Shayara Bano v Union of India* [2017] 9 Supreme Court Cases (India) 1.

that, the fact that an adulterous wife is not to be treated as an offender goes to show the bias of these laws. Based on these reasonings, the learned bench anonymously held that section 497 of the Indian Penal Code was in violation of Article 14 of the Indian Constitution.

5. Gender Discrimination

The learned judges also held that a closer examination of section 497 of the Indian Penal Code reveal that married women were not given an equal voice and were hidden behind the shadows of their husbands. That is the justification why the provision did not allow husbands to prosecute their wives but only third parties.

The judges then reviewed earlier court decisions on this matter. In *Sowmithri Vishnu v Union of India*,⁹ section 497 of the Indian Penal Code was challenged because it did not provide the right to women to prosecute the third party and her husband who were involved in adultery. The court in *Sowmithri Vishnu* found the provision valid on the ground that extending the ambit of the law to allow women to prosecute is the purview of the legislator and not the courts. Similarly, in *V Revathi v Union of India*,¹⁰ section 497 of the Indian Penal Code was held to be valid and not discriminatory as it prohibited both wife and husband from prosecuting each other.

In overruling both these two decisions, the Supreme Court opined that the impugned provision painted a picture that a married woman was to be treated as the property of her husband and that he was in full control of his property. This also explains why an adulterous relationship of a married man with a divorced or unmarried woman does not fall within the purview of the offence. Furthermore, the Supreme Court opined that by treating married women as the property of their husbands, married women are portrayed as submissive and incapable. For that very reason, adulterous married women are not even considered abettors to the offence because they are seen to be submissive and incapable of seducing men.

In the case of *Yusuf Abdul Aziz*,¹¹ the court was faced with a similar question of whether the protection of adulterous women under the provision is constitutionally valid. To this question, the court in finding section 497 of the Indian Penal Code valid, held that it was a special provision according to Article 15(3) of the Indian Constitution which was designed to protect women. However, in the present case, Justice Dr Dhananjaya Y Chandrachud at the Supreme Court, overruled *Yusuf Abdul Aziz* by looking at the purpose of Article 15(3) of the Indian Constitution. He held that Article 15(3) was designed to protect women and children in socio-economic aspects due to the fact that for centuries, women and children in India were socially and economically disadvantages and that Article 15(3) encapsulates the notion of 'protective discrimination'. Hence, the constitutional guarantee in Article 15(3) cannot be used in a manner that entrenches paternalistic notions of 'protection'. As such, section 497 of

⁹ *Sowmithri Vishnu v Union of India* [1985] Supp Supreme Court Cases (India) 137.

¹⁰ *V Revathi v Union of India* [1988] 2 Supreme Court Cases (India) 72.

¹¹ *Yusuf Abdul Aziz* (n 5).

the Indian Penal Code was held to be discriminatory and in violation of Article 15 of the Indian Constitution by the Supreme Court.

6. Right to Privacy

To another beautiful component of the Indian Constitution, the Supreme Court held that Article 21 provides for the protection of life and personal liberty. The learned judges held that although the right to live with dignity is not expressly provided under Article 21, it has a special mention in the preamble of the Indian Constitution and when it is read into the right of life and personal liberty, it is an established principle that right to live with dignity is a guaranteed right pursuant to Article 21. The Supreme Court further held that the right to live with dignity encompasses the privacy of an individual. The Supreme Court cited the cases of *S Puttaswamy v Union of India*¹² and *Common Cause v Union of India*¹³ and held that privacy is not only part of personal liberty but also an aspect of the dignity of an individual. Section 497 of the Indian Penal Code which curtails the right of a married woman towards her own choice of sexual partner is a clear deprivation of her privacy. Furthermore, permitting adultery of a woman with her husband's consent gives the impression that men have absolute control and autonomy over their wives' choice of sexual partners which is a disregard of her right to privacy. As such, the Supreme Court held that section 497 of the Indian Penal Code deprived married women of their right to privacy, and thus is in contravention to Article 21 of the Indian Constitution.

7. Decriminalisation of Adultery

The Supreme Court, in deciding whether the best solution to remedy the flaws and chaos caused by the impugned provision was to amend it by subjecting men and women equally liable for the offence, began to examine the meaning of 'crime'. Many references were cited and the Supreme Court held that the most important principle derived was that to criminalise an act, the law must include three main elements: (i) harm, (ii) wrongdoing, and (iii) a public element.

The public element is the most important element in determining a criminal offence. A crime must affect society at large and not just an individual. Something morally wrong does not necessarily amount to a crime. There is a thin silver lining between the private realm and the public realm. A clear distinction must be drawn between offences related to matrimonial aspects and offences which attract penal sanctions. Adultery is undoubtedly a morally-prohibited act but it involves the institution of marriage within the private realm. Just like many other various aspects of marriages that have been regulated by the States, such as divorce, registration of marriage, judicial separation, guardianship, etc., adultery is within

¹² *Puttaswamy v Union of India* [2017] 10 Supreme Court Cases (India) 1.

¹³ *Common Cause v Union of India* [2018] 5 Supreme Court Cases (India) 1.

the civil realm and does not require a penal sanction. The Supreme Court was minded that the minimalist approach must be used in criminalising offences. The Supreme Court also looked into the consequences and purposes of the criminal punishment and opined that imposing penal sanctions on adultery does not benefit anybody, be it the offender or the victim. As such, the Supreme Court held that section 497 of the Indian Penal Code is to be struck down as unconstitutional.

8. Comment

This 75-page long judgment penned down by the five-panel judges could brighten up a dull day and is sure to vividly remain in the memories of the student of Indian constitutional law. It is such a significant judgment that goes to the roots of the interpretation of constitutional law and is bound to contribute to many important aspects of public law. The Supreme Court in decriminalising adultery in has taken many aspects of rights guaranteed by the Indian Constitution into consideration. It is significant and important to public law because the Supreme Court has drawn a distinction between offences which fall within the purview of public law and thus attract penal sanctions and laws which should remain within the private realm. This distinction is important because the right to be subjected to a penal sanction appropriately by the State falls within the ambit of the right to live with dignity. It is enlightening and relieving to learn that the Indian courts have finally taken the brave move to decriminalise this archaic law which has long lived past its useful life. The learned judges, in this case, also emphasised the importance of treating women with dignity and equality in society since it is a right guaranteed under the Constitution. The Supreme Court made it clear that married women should not be treated as chattels owned by their husbands. Justice R F Nariman while providing his concurring judgment rightly pointed out that:

Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman's husband is obtained—the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the “licensor”, namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has 'seduced' her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational.¹⁴

¹⁴ *Joseph Shine* (n 1) 927.

Further to that, Justice Nariman gave a recognition and made an expansion of women's right to privacy under the purview of the right to live with dignity under Article 21. There is definitely no better way for the Supreme Court to recognise women's right to privacy since it is not an express right provided under the Indian Constitution. It is only through this kind of judicial activism that the colours are added to the wordings of the Constitution.

The learned judges, in this case, have also compared the different approaches to adultery adopted in various countries. This has given us a picture of societal change at large across the globe. The learned judges gave a serious consideration to societal development and change when deciding on this matter. This case is an excellent of courts bringing out the colours of the Indian Constitution by expanding the horizon of interpretation of the law in response to societal change, especially with removing persistent archaic laws not suitable to a modern society.

Although this is a change that needs to be celebrated, it also raises the question of how much colour can judges add to the words of the Indian Constitution. Are they free to interpret it based on their whims and fancies? What should be the key factors which determine women's right to privacy or any rights whatsoever which may come up in the near future? This definitely leads to a never-ending debate over how the constitution should be interpreted, i.e. liberally or conservatively. As far as this Supreme Court case is concerned, the judges appeared to have chosen a more progressive approach as the need based on the societal change is apparent. Although the liberal approach is being largely accepted for the time being, there must be a safeguard on how liberal can the court be in interpreting or adding colour to the Constitution without changing the true nature of the Constitution. There is a fine line between what is the 'just right' amount of judicial activism and what is too much of colour. This could be a real issue in the near future with the drastic change in society due to the borderless nature of the world today. Nevertheless, the liberal approach taken by the Supreme Court in this case is definitely a way forward in taking the bold steps to remove archaic laws and a step forward in recognising women's right to privacy.

9. Conclusion

Although it is a shame that it took the Indian court almost a century to do away with this archaic law, we must all remember that it is always better late than never. However, this is not the time to relax and be relieved that this archaic law has been removed. Many similar provisions are still silently living in the statute books although they are no longer relevant today. It is sad to note that although the Supreme Court mentioned section 498 of the Indian Penal Code, no further references were made to it. Section 498 of the Indian Penal Code on enticing another man's wife is another archaic provision that symbolises married women as the husbands' property.

In Malaysia, we can be proud that we have decriminalised adultery before the Indians, but it is sad to note that section 498 remains in force in Malaysia. When will we be able to do away with it? Only time will tell.

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