
CRIMINALISATION OF ADULTERY IN THE ARMED FORCES: AN UNNECESSARY AND PROBLEMATIC ENDEAVOUR

Abhishek Purohit, Jindal Global Law School

ABSTRACT

This paper aims to unfold the problematic features of section 497 of the Indian Penal Code and relate it to the recent attempt of the central government to readopt it for the armed forces. It also showcases that alternative routes, other than section 497, can be used to meet the same objective and suggests a different way out, which is taken into consideration by the central government as well. Therefore, the use of section 497 in its entirety is claimed to be an unnecessary attempt and an alternative route is suggested. The concept of 'Unbecoming Conduct' is neatly defined along with article 33 of the Indian Constitution, in order to enhance the reader's understanding of the claim.

Introduction

Traditionally, adultery was considered as a criminal offense in India and was fundamentally governed by Section 497 of the Indian Penal Code, along with certain procedural provisions of the Crpc. However, the case of *Joseph Shine v. Union of India*¹ reversed this legal standpoint in 2018 and decriminalised it on the grounds that it was violative of various articles, precisely 14, 15 (1) and 21 of the Indian Constitution. Hence section 497 was deemed to be unconstitutional on these grounds along with Sections 198(1) and 198(2) of the Crpc. However, civil law positions with respect to adultery still stand fairly uninterrupted, and a civil liability like dissolution of marriage can still be drawn². In recent times, adultery has again become a topic of mainstream discussion after the centre has filed a petition before the hon'ble Supreme Court of India, seeking the criminalisation of adultery in the armed forces. The main concern, as presented by the Ministry of Defence, is that the decriminalisation of adultery will create an ever-lasting concern in the minds of the army personnels, who are stationed away from their own families, and hence Section 497 shouldn't be seen as a decriminalised statutory provision.

Now for understanding the subject-matter fundamentals of this plea, few important things need to be kept in mind. Primarily, Article 33³ of the Indian Constitution is of extreme importance in this scenario, which basically gives the power to the parliament to nullify or restrict the application of any existent fundamental right to the members of the armed forces. It primarily exists in order to maintain proper discipline in the army along with proper discharge of duties. In line with this, certain restrictions specifically apply to the armed forces, unlike civilians. Secondly, the concept of 'Unbecoming Conduct', too is of intense significance to this topic. It is basically a canopy term, which is used to define few undefined or unstipulated wrongful acts or conduct in the army. Therefore, few acts which might not be offenses or crimes, in line with the Indian Penal Code or any codified statute, may fall under the ambit of 'Unbecoming Conduct', and subsequently be considered as offenses in the army. The internal code of ethics of the armed forces, is a good consideration in such scenarios or precisely anything that is in contradiction with it can fall under the purview of Unbecoming Conduct. These two formulations exist since the army, navy and the Air Force are considered as distinct classes, because they are not subjected to same conditions as civilians and have varied duty

¹ *Joseph Shine v. Union of India*, AIR 2018 SC 4898 (India).

² SCO, *Decriminalization of Adultery*, SUPREME COURT OBSERVER, Oct. 23, 2018. ³ INDIA CONST. art 33.

requirements. Therefore, in its plea the centre has unequivocally aimed to use these formulations and arguments in its own favour, which support it to a great extent.

However, they also attach an ‘Unnecessary’ tag to the plea in my view. Since the central government could well enough restrict the fundamental right to equality using article 33 of the Indian Constitution, and the nature of adultery that it aims to criminalise is such that it can be penalised under the very ambit of ‘Unbecoming Conduct’. Therefore, it could classify such adulterous acts as ‘Unbecoming Conduct’ using the provisions of The Army Act, 1950 and Section 45 in specificity, and penalise the offenders in its accordance³. Most Importantly, organisations in India are free to supersede few legal standpoints, to a reasonable limit, in their own terms of operation. For example, an educational institute might penalise adulterous acts between the students and the faculty, in order to maintain the sanctity of their own organisation. Likewise, the armed forces too could use a similar framework coupled with the concept of Unbecoming Conduct, and then penalise it without approaching the court.

Therefore, the existence of this plea in my opinion isn’t that necessary, since the objective could alternatively be fulfilled using other measures and not only by criminalising section 497⁴. But the central government is probably looking forward to a judicial nod and not to use section 497 in entirety in order to curb any future challenge, which is well enough portrayed by the arguments and the assertiveness of the attorney general in the court.

Disregarding the necessity of this plea, there are few problematic features which are outlined by section 497 that can turn out to be exceedingly disastrous in all scenarios, and which could be unfolded by this plea as well. Now, as mentioned above adultery was decriminalised in India since Section 497 expressly was in contradiction with the essence of the Indian Constitution, encompassing various fundamental rights chiefly the right to equality. The main problematic feature that it incorporated, was indeed the partial and the patriarchal character, or as many point out it was not a gender-neutral statute in its spirit. Primarily, because it only paved the way for a man whose wife had allegedly indulged in an adulterous act with another man, to file a complaint using its provisions. While on the other hand, a woman whose husband indulged in such an act with another woman couldn’t be penalised, since section 497 incorporated no such feature. Therefore, the biasness of this act well enough portrays its problematic nature,

³ The Army Act, No. 46, Acts of Parliament, 1950 (India).

⁴ Rangin Pallav Tripathy, *India’s effort to criminalise adultery for the armed forces reflects a paternalistic mindset*, SCROLL.IN, Feb. 01, 2021.

which can assume a calamitous form. Secondly, the language of section 497 is such that it reduces a woman to an object that belongs to the husband, or in precise terms it treats a woman as a property of the man. Since, as per its provisions the husband's agreement could nullify the crime, i.e., it was all upon the husband to decide whether the accused should be penalised or not, and the consent of the women with respect to the sexual intercourse was deemed to be irrelevant. Therefore, it was somewhat anti-women in its true essence and henceforth problematic. This can especially turn out to be challenging and relevant in this scenario since the Indian Army has started recruiting female soldiers, and hence there is an ever increasing need to disregard such biased statutes and adopt something that is gender-neutral.

I truly believe that the attempt to criminalise adultery again using the provisions of section 497, is absolutely an unnecessary and a disastrous attempt. Since the law is extremely problematic and partial in its true colours, which has been successfully authenticated above.

We can also refer to the findings of the hon'ble court in the Joseph Shine judgement, which truly substantiate this claim. Chiefly the court mentioned that it found no reason as to why such a draconian legal design should be continued, since it deeply violated the right to equality, guaranteed by the esteemed constitution of India. Moreover, adultery sustained as a criminal offense since our judicature thought that it was potent enough to preserve marital sanctity, but they soon enough realised that this partial doctrine did nothing as such and was absolutely archaic. Furthermore, Justice Chandrachud expressly mentioned that criminal adultery deprived women of their own dignity, and Chief Justice Mishra said that any sort of discrimination propagated should completely be subjected to the wrath of the Indian Constitution. Most Importantly, the court was really clear with respect to the point, that a husband is in no case the master of his wife, and a woman or any human cannot be forced to adopt the regressive societal thought process. Therefore, in my view this plea can turn out to be really problematic, since if it aims to readopt section 497 then it would again unfold such features. In my opinion, the central government and the armed forces could follow an alternative route which they have considered in their petition, that is to classify such acts as 'Unbecoming Conduct' and penalise the offenders, by restricting the fundamental right to equality using article 33 of our constitution. Most importantly, they have also ensured that the new provisions would be gender-neutral and disregard the biased features of the IPC. This would ensure that the problematic and partial features of section 497 stand unaccepted, and the objective of maintaining proper discharge of duties and to curb specific injustice in the army is

met. However, it is all up to the central government as to how they want to deal with this situation, dependent on the hon'ble Supreme Court's verdict.

To conclude, it is very much evident by now that the criminalisation of adultery using section 497 in the army is an unnecessary and a problematic endeavour. It is unnecessary since there exist alternative way outs that can be adopted in order to fulfil the objective, without using the scrapped provisions of the Indian Penal Code and Crpc. Moreover, criminal adultery and section 497 are extremely problematic, which I have aimed to portray efficaciously, using both my own arguments and the apex court's views. Therefore, I believe that section 497 is not the answer to the problem, rather the use of the doctrine of 'Unbecoming Conduct' can be a better alternative, being more democratic and less problematic. Since, disregarding partial and patriarchal standpoints, especially by an esteemed institution like the Indian Armed Forces, is no doubt an excellent step especially when the same objective can be met using an alternative framework. But the decision lies with the hon'ble court and the central government, hopeful that they will take into consideration all existent factors.