

Decriminalisation of Adultery and the Armed Forces: Constitutional Limits, Military Discipline and the Case for a Gender-Neutral Legal Framework

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Abstract

The decriminalisation of adultery by the Supreme Court in Joseph Shine v. Union of India (2018) marked a significant shift in Indian criminal jurisprudence by striking down Section 497 of the Indian Penal Code, 1860, on the ground that it was rooted in patriarchal notions and treated women as the property of their husbands. However, the implications of this judgment for the armed forces presented a distinct constitutional and disciplinary question. In 2023, the Supreme Court clarified that Joseph Shine did not invalidate or otherwise affect the operation of the provisions of the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950, particularly those relating to conduct prejudicial to military discipline. The decision thereby recognised the special disciplinary framework applicable to members of the armed forces under Article 33 of the Constitution.

Nevertheless, a significant legal gap continues to remain. While a member of the armed forces may face court-martial or disciplinary consequences for adulterous conduct under the applicable service laws, no corresponding criminal remedy is available against an outsider who engages in an adulterous relationship with the spouse of an armed forces personnel. This creates an anomalous situation, particularly considering the distinctive conditions of military service, including prolonged separation from family, postings in remote areas and the heightened importance of mutual trust and discipline within the armed forces.

This article examines the legal position concerning adultery before and after Joseph Shine, the

interface between adultery and military discipline, and the constitutional significance of Article 33.

Keywords: Armed Forces, Army, Constitution, Adultery, Decriminalisation, Navy, Air Force.

Introduction

The offence of adultery and the punishment for it are specified in "Section 497" of the "Indian Penal Code, 1860". The Section stated that any male who has sexual intercourse with a married woman without her husband's consent is guilty of adultery, which carries a penalty of up to 5 years in jail or a fine, or both. This provision was, however, abolished by the Supreme Court in **Joseph Shine v. Union of India** (2019) in 2018. As a result, adultery is no longer a criminal offence in India.

However, the decision put the armed services in a challenging position. The armed services experienced volatility as a result of the 2018 ruling. The subject of whether or not adultery in the armed forces should be decriminalized was debated here. A 2018 Supreme Court ruling that eliminated adultery as a crime infuriated the military, especially the 1.3 million-strong army.

The case was then brought before the Hon'ble Chief Justice of India at the time, who directed the formation of a five-judge bench to decide how the 2018 decision would affect the armed forces.

Adultery and the Army Laws

Loyalty, respect, and mutual trust are highly valued by the Armed Forces, who see themselves as a large family. Therefore, stealing the love of a brother officer's wife is considered adultery in the

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military. It is hardly less severe than cowardice, which carries a death sentence.

Section 497 empowers the punishment for stealing the affection of a brother officer's wife; however it is not a stand-alone offence. Prior to the Joseph Shine decision, defence personnel committing adultery were tried under "Section 69" of "The Army Act 1950", or "Section 77" of "The Navy Act, 1957" or "Section 71" of "The Air Force Act, 1950", along with section 497 IPC, as a civil offence, which was tried in a Court-martial and on conviction punishable with imprisonment. All the corresponding provisions in the three Forces are more or less similarly worded.

To penalise officers for adultery, "Section 69" of "the Army Act" is interpreted in conjunction with "Section 497 of IPC". "Section 69" deals with civil offences committed by staff of army and provides a penalty based on the severity of the offence as determined by Indian law. Section 69 of The Army Act, 1950 states:

"Civil offences.—Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,—

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

Sections 45 and 63 of the "Army Act of 1950" are used to penalize indiscipline in the Army in general (Army Act, 1950, § 45; § 63). "Unbecoming conduct," as defined by Section 45, is a reason for

military discharge. Section 63 addresses behavior that undermines military discipline and good order. Adultery is one of the many offenses that fall under the broad interpretation of this law. The punishment for "indecent conduct" in the Navy is outlined in "Section 53" of "the Navy Act of 1957" (Navy Act, 1957, § 53). Further, "Section 54" of "the Navy Act" punishes for unbecoming conduct (Navy Act, 1957, § 54). After Section 497 was repealed, military tribunals would henceforth penalize officers under these sections.

The Navy Act, the Army Act and the Air Force Act are protected by Article 33 of Indian constitution.

Article 33 of the Indian Constitution states that "Power of Parliament to modify the rights conferred by this Part in their application etc. Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,

(a) the members of the Armed Forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them"

It addresses the power of Parliament to modify the rights granted by Part III in their implementation, among other things. Parliament may, by law, decide how much each of the rights outlined in this part should apply to: members of the armed forces; armed forces personnel responsible for upholding public order; workers of any intelligence or counterintelligence bureau or other state-established organization; and those involved in or connected to telecommunication networks established for the purposes of any Force, bureau, or organization mentioned above, so as to ensure

proper fulfillment of their responsibilities and the maintenance of discipline among them.

The primary objective of Article 33 is to ensure the effective discharge of duties by the armed forces while preserving discipline within their ranks. To achieve this objective, the Constitution vests the exclusive authority in Parliament, and not the State Legislatures, to enact laws restricting or modifying the fundamental rights of members of the armed forces.

- A law enacted by Parliament under Article 33, restricting or modifying Fundamental Rights for the purpose of maintaining discipline in the armed forces, is ordinarily immune from challenge on the ground of violation of those rights.
- The expression "members of the armed forces" is broad enough to include not only combat personnel but also non-combatant staff employed by the military, such as barbers, carpenters, mechanics, cooks, janitors, bootmakers and tailors.
- A law enacted by Parliament under Article 33 may also exclude the jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 in matters relating to court-martial proceedings, insofar as such exclusion is necessary to preserve military discipline and ensure the effective discharge of duties.
- Article 33 empowers Parliament to restrict or abrogate the Fundamental Rights of members of the armed forces, paramilitary forces, police forces, intelligence organisations and other specified personnel to the extent necessary for maintaining discipline and ensuring the proper discharge of their official duties.

In its judgment dated 31 January 2023, the Supreme Court clarified that the constitutional invalidation of Section 497 IPC in **Joseph Shine v. Union of India** (2018) has no bearing on the disciplinary jurisdiction exercised under the Army Act, the Navy Act and the Air Force Act. Consequently, members of the armed forces may still be subjected to court-martial or other disciplinary proceedings for adulterous conduct in

accordance with the applicable service laws (The Wire, 2026).

The 2018 ruling overturning Section 497 of the Indian Penal Code, according to a five-judge constitution bench led by Justice K.M. Joseph, did not address the provisions of the armed forces Acts. Justices K.M. Joseph, Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy, and C.T. Ravikumar made up the bench. In a request submitted by the Union government, the bench issued the ruling. Because a five-judge bench rendered the 2018 Joseph Shine verdict, a three-judge bench referred the application to a constitution bench in 2019.

Following the judgment in *Joseph Shine v. Union of India* (2018), the Ministry of Defence approached the Supreme Court seeking clarification that the decision would not apply to members of the armed forces. It contended that the decriminalisation of adultery could impede disciplinary action against personnel engaged in adulterous conduct and adversely affect discipline, morale and operational stability within the armed forces.

In application filed by Central government it was said that, "In view of the aforesaid (2018) judgment, there will always be a concern in the minds of the army personnel who are operating far away from their families under challenging conditions about the family indulging in untoward activities,"

Honorable Supreme Court in its order said that Article 33 of the constitution allows exemptions from the applicability of fundamental rights as determined by parliament. The order further added:

"The judgment of this court [in 2018] was concerned only with validity of S. 497 IPC and S. 198(2) Cr.P.C.. In this case, this court had no occasion to consider the effect of the provisions of the Armed Forces Acts. As we notice, it is not as if this court approved of adultery. This court had found adultery may be a modern problem. This court also held that will continue to be a ground for dissolution of marriage... In view of the fact that the scheme of the Acts in the context of Article 33 did not

fall for consideration before this court, we must observe and clarify that the judgment of this court was not at all concerned with the effect and provisions of the Armed Forces Acts. This court was neither called upon nor has it ventured to pronounce on effect of S. 45 and S. 63 of the Army Act as also the corresponding provisions of the other Acts (Navy Act, Air Force Act)."

During the proceedings, the Union Government submitted that the application had been necessitated by certain decisions of the Armed Forces Tribunal, which had quashed disciplinary proceedings initiated against armed forces personnel for inappropriate sexual conduct by relying on the judgment in *Joseph Shine v. Union of India*. The Government further contended that while the 2018 judgment invalidated Section 497 IPC on account of its patriarchal underpinnings, the disciplinary provisions under the Army Act, the Navy Act and the Air Force Act are gender-neutral in nature and apply equally to male and female personnel. Consequently, it was argued that the constitutional infirmities identified in Section 497 IPC did not extend to the disciplinary framework governing the armed forces.

Though the honorable Supreme Court clarified that Adultery provision still applies within the armed forces, but one important issue was left.

Current Scenario

The honorable Supreme Court clarified that Adultery provision still applies within the armed forces. It does not prevent court martial proceedings initiated against members of the armed forces for adulterous conduct. But, if a spouse of army personnel engages into an adulterous relationship with a person who is not a member of armed forces, then that adulterer cannot be prosecuted for adultery. This is so because Section 497 has been declared unconstitutional and since he is not a member of armed forces so he cannot be court marshaled under military law. So, question arises that what would be the case when a spouse of an officer who is posted thousand miles away from his home indulges into an extramarital affair? He/she has only one legal recourse i.e. only to file a case for divorce against his/her adulterous

partner. He/she cannot take action against the third person who disturbed his/her married life. Army personnel are the protector of this country. But there is no law to protect their marriage. They are posted far away from their families and they get very little time to spend with their family. In this situation there are very high chances that some intruder may barge into their marital life. If there have been any penal provision then, definitely it has prevented such kind of situation. But since there is no provision penalizing adultery, such situation may occur.

There have been two cases in Indian history where the husbands were Army personnel posted apart from their wives. In both cases an outsider intruded into their marriage and created ruckus. These two cases became so popular at their time that they created huge business opportunities. These two cases are discussed below-

K.M. Nanavati Case

Commander K.M. Nanavati v. State of Maharashtra is one of the most celebrated criminal cases in Indian legal history. Decided in 1959, the case arose from the prosecution of Commander Kawas Manekshaw Nanavati, a Naval officer, for the murder of Prem Ahuja, with whom his wife had been engaged in an extramarital relationship. Nanavati was charged with the offence of murder under Section 302 of the Indian Penal Code. Although a jury initially returned a verdict of not guilty, the Bombay High Court set aside the verdict on the ground that it was perverse and ordered a retrial before a bench, which ultimately convicted Nanavati. He was subsequently granted a pardon by the Governor of Maharashtra. The case remains significant not only for its legal principles but also for the extensive public attention it attracted and its enduring place in India's criminal jurisprudence.

Mahant Elokeshi Affair Case

The **Tarakeswar affair**, also known as the **Mahant-Elokeshi affair**, was one of the most sensational criminal cases of nineteenth-century colonial India. The controversy arose from an extramarital relationship between Elokeshi, the wife of Nobin Chandra Banerjee, a government employee, and Mahant Madhab Chandra Giri, the head priest of the Tarakeswar Temple in Bengal.

Upon discovering the affair, Nobin Chandra killed his wife, leading to the widely publicised **Tarakeswar murder trial of 1873**. Separate criminal proceedings were thereafter instituted against Nobin Chandra for murder and against the Mahant for adultery under Section 497 of the Indian Penal Code. Both were ultimately convicted, though for different offences, making the case a significant milestone in the legal history of adultery and criminal law in colonial India (Queen v. Nobin Chandra Banerjee, 1874).

The Tarakeswar scandal resulted in two trials — one, a murder trial against Nobin Chandra Banerjee and other adultery trial against the Mahant Madhab Chandra Giri, the chief priest of Tarakeswar Temple closely interwind. Interestingly, Nobin Chandra Banerjee during the trial in Hooghly was represented by WC Banerjee who later cofounded the Indian National Congress and became its first president in 1885. Bonerjee did the case pro bono, without charge.

Nobin Chandra Banerjee was tried by an Indian Jury and he took a plea of 'temporary insanity' in the murder of his wife. WC Bonerjee argued in the court that Nobin Chandra Banerjee was blinded with rage, when he discovered the affair between his wife and the Mahant of the Tarkeshwar temple. And when the goons of the Mahant reverted Nobin and his wife from leaving his village, which was 70 kms from Calcutta, he was overcome with rage and in a fit of rage, he killed his wife.

When the trial proceeded, it generated a lot of media interest. It is interesting to note that the Hooghly sessions courts became so overcrowded during the trials that an entrance fee was charged and only those who followed English were allowed entry. Plays and long poems were written about the murder of Elokeshi. The murder case also prompted artists in Kalighat to reproduce the various scenes leading to the murder of Elokeshi in paintings, woodworks and photographs.

But in the end when the trial concluded, the Indian jury found Nobin Chandra Banerjee 'not guilty of the murder of his wife' and acquitted him. However, the British presiding judge disagreed with the finding of the jury and referred the matter to the Calcutta High court.

The legal point before the High Court was whether Banerjee was insane or not? The court held—"It is clear that the murder was committed owing to the unhappy position in which the prisoner considered his wife and himself to be placed. He did the deed under the influence of anger, jealousy, and grief. No doubt any person placed in the position in which he was, or believed himself to be placed, is much to be commiserated. But there is absolutely nothing on the facts before us from which any reasonable person can conclude that the prisoner was "incapable of knowing the nature of the act," or that he was incapable of knowing that he was doing what was wrong or contrary to law."

The court found that Banerjee had committed culpable homicide amounting to murder, and sentenced him (under Section 302 of the Indian Penal Code) to transportation for life to Andamans. But in 1875, Banerjee received a pardon from the British government because of massive public petitions for mercy and was set free.

In the second trial, which was of adultery against the Mahant, the court found him guilty of adultery, because at that time adultery was an offence under section 497 of the Indian Penal Code. The mahant, lodged an appeal in the High Court and he was sentenced to three years imprisonment and Rs3000 as fine.

Conclusion

The judgment in *Joseph Shine v. Union of India* was a significant step towards recognising equality, dignity and individual autonomy by removing the patriarchal foundation of Section 497 IPC. However, the complete decriminalisation of adultery has also resulted in a legal vacuum, particularly in cases involving members of the armed forces who remain separated from their families for prolonged periods. Although the Supreme Court has clarified that adulterous conduct by members of the armed forces may still attract disciplinary action under the respective service laws, the same legal consequence does not extend to a civilian who engages in an adulterous relationship with the spouse of an armed forces personnel.

There will always be a concern in the minds of the Army personnel who are operating far away from

their families under challenging conditions about the family indulging in untoward activity. In these conditions, cases like of Nanavati and Tarkeshwar may occur. It cannot be imagined how tough it must be for army officers to leave their loved ones for such a long time and then return home to discover that, while safeguarding the country, they were also being deceived. People in the army are held up as ideals or heroes, and they are regarded as such. However, the issues they encounter in their personal and married life are no less genuine than ours. If an army officer indulges into extramarital affair with his brother officer's wife, then he may be punished in the form of Court Martial. But if an ordinary man indulges into an extramarital affair with an army officer's wife, then the army officer cannot take action against him. Earlier when section 497 was in force, then he was having right to prosecute the adulterer but now since section 497 has been declared as unconstitutional by Honorable Supreme Court, the aggrieved husband has no such right. He only can divorce his wife.

This situation calls for reconsideration of the existing legal framework. However, the answer should not be a return to the old Section 497, which treated the wife as the property of her husband and was inherently discriminatory. Instead, there is a need to consider a **gender-neutral provision** that treats men and women equally and recognises both spouses as individuals possessing equal dignity and autonomy. Such a provision should not seek to protect the proprietary rights of one spouse over another, but should address the consequences of deliberate adulterous conduct in a manner consistent with constitutional values.

A carefully drafted gender-neutral law could therefore strike a balance between **individual liberty, equality, marital relationships and the special requirements of military discipline**. It would ensure that the law does not discriminate on the basis of gender or whether the third person is a member of the armed forces or a civilian. The objective should not be to revive the patriarchal concept of adultery, but to create a modern, constitutionally compliant and gender-neutral legal framework capable of addressing the unique concerns of armed forces personnel while

preserving the principles laid down in *Joseph Shine*.

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