

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL WRIT JURISDICTION

I.A.NO. /2018

IN

WRIT PETITION (CRL) NO. 194/ 2017

IN THE MATTER OF:

Joseph Shine ... Petitioner

Versus

Union of India ... Respondent

AND IN THE MATTER OF:

VIMOCHANA

A registered charitable Society

Having its registered address at:

33/1, Thyagaraj Layout

Jaibharat Nagar

Bangalore – 560003

Karnataka

Represented by its Authorised Signatory ...APPLICANT

APPLICATION FOR IMPLEADMENT

TO

THE HON'BLE THE CHIEF JUSTICE OF INDIA AND HIS
COMPANION JUSTICES OF THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF THE ABOVE NAMED
APPLICANT

MOST RESPECTFULLY SHOWETH:

1. That the Petitioner has filed the above mentioned Writ Petition challenging the constitutional validity of Section 497 of the Indian Penal Code, 1860 (hereinafter "IPC"), which defines "adultery" and prescribes the punishment. The said petition is the lead petition in the list of connected matters filed challenging the constitutional vires of Section 497 of the IPC.
2. The Applicant herein is filing the present application seeking impleadment as party-Petitioner in the above referred writ petition filed by the Petitioner therein. The Applicant is a not for profit society, registered under the Karnataka Societies Registration Act, 1960 and is a women's rights organization and support center operating in Bangalore. A true copy of the Applicant's registration certificate is annexed herewith and marked as **Annexure A-1**.
3. It provides crisis intervention for women facing domestic violence, dowry harassment etc., offering moral, social and legal support to victims of violence and abuse. It also provides

spaces for women to engage with the issues that affect them and strive for their rights. The Applicant organization works in the areas of advocacy and spreading awareness on issues pertaining to women's rights In Bangalore. The Applicant organization is engaged with women belonging to various classes, communities and religions in Bangalore.

4. The Applicant is filing the present Application through its authorized representative Donna Fernandes, Secretary of the Applicant society. A true copy of the letter authorizing Mrs. Fernandes to act on behalf of the Applicant society is annexed herewith and marked as **Annexure A-2**.

5. Section 497 of the IPC reads as follows –

“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.”

6. It is submitted that provision set out above is violative of the rights enumerated under Articles 14, 15 and 21 of the Constitution of India, and is therefore subject to repeal.

S.497 of the IPC violates the rights to equality and non-discrimination under Articles 14 and 15 of the Constitution.

7. It is submitted that Section 497 of the IPC is on its face discriminatory on the grounds of sex, thereby violating the right to equality under Article 14, and the prohibition against discrimination on the grounds of sex under Article 15 of the Constitution.
8. Section 497's definition of adultery is confined to cover only the extramarital affairs of married women. The section is not attracted in cases where married men pursue extramarital affairs and unmarried women pursue affairs with married and unmarried men. Furthermore, the section does not hold the married woman in question liable for the crime of adultery, only criminalizing the man she has chosen to enter into an affair with.
9. Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or equal protection of laws. It reads as:
“Equality before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

10. Article 15 of the Constitution prohibits discrimination on the grounds of sex. It is submitted that by criminalizing the extramarital affairs of married women and not those of married men, the impugned Section violates the right of women to equality before the law, and discriminates on the basis of the sex of the spouse engaging in the extramarital affair.

11. It is submitted that Section 497 perpetuates gender and sexual stereotypes which constitute a form of discrimination based on sex.

12. The Supreme Court vide a two judge bench in **Anuj Garg v. Hotel Association**, 2008 (3) SCC 1, while adjudicating a challenge to Section 30 of the Punjab Excise Act, which prohibited the employment of any man under the age of 25, and any woman, in any part of an establishment in which liquor or another intoxicating drug was being consumed, rejected the gender stereotypical arguments that said the act was essential to ensure the “security” of women. The Court observed **that**,

“The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims.... “The impugned

*legislation suffers from **incurable fixations of stereotype morality and conception of sexual role**. The perspective thus arrived at is outmoded in content and stifling in means."*

[paras 36, 45-46]

The Court thus decided that the impugned legislation amounted to "invidious discrimination" perpetrating sexual differences, as it encouraged the stereotype that women needed to be "protected" from the alleged harm or poor influence caused by the exposure of women to an establishment where liquor was consumed, however no such measures were required for men.

13. The Court in *Anuj Garg* also noted the attitude of "romantic paternalism", described by the US Supreme Court in *Frontiero v. Richardson* 411 U.S. 677 : 93 S.Ct. 1764 as the rationalization of sex discrimination by practically placing women, not on a pedestal but in a cage (para.42). In *Sowmithri Vishnu v. Union of India AIR 1985 SC 1618*, where Section 497 was previously challenged, the Supreme Court rejected this idea on the on the basis that it was "commonly accepted that the man is the seducer and not the woman" (para. 7)

14. It is submitted that Section 497 of the IPC serves to perpetuate the patriarchal and archaic notion that women are

merely the property of her husband, and incapable of individual choice or autonomy, including the ability to enter into an affair. Section 497 is not in fact a beneficial legislation towards woman and intends to restrict her choice. Further, it perpetuates the stereotype that adultery committed by a woman would extract a moral toll on the society at large and is therefore deserving of criminal punishment; on the other hand, it is permissible for men to engage in extramarital affairs without attracting any social or legal consequences. It is submitted that the impugned section perpetuates gender stereotypes which is a form of discrimination based on sex.

Section 497 of the IPC violates the right to privacy under Article 21 of the Constitution.

15.

16.

Adultery under international law and foreign law

17. As a party to various international human rights conventions, India must harmonise its domestic laws to meet its obligations under international law.

18. The International Convention on Civil and Political Rights, 1966 ("ICCPR"), to which India is a party, enshrines the right against arbitrary or unlawful interference with the

privacy, family and home of persons. In a decision of the UN Human Rights Committee dated 4 April 1994 in the case of *Toonen v. Australia* [CCPR/C/50/D/488/1992] concerning the criminalization of same-sex sexual activity in Tasmania, the Committee ruled that it was undisputed that interference with consensual sexual activity was an interference with the right to privacy under article 17 of the ICCPR.

19. Article 1 of the Convention on the Elimination of Discrimination Against Women (“CEDAW”), 1979, to which India is a signatory, defines discrimination as “*any **distinction, exclusion or restriction made on the basis of sex** which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, **irrespective of their marital status, on a basis of equality of men and women**, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*”. Article 16 further calls upon all State Parties to eliminate discrimination against women in all matters relating to marriage and family relations on a basis of equality of men and women. It is thereby submitted that Section 497 of the IPC which on the face of it, discriminates on the basis of sex as it pertains to adultery, violates India’s obligations under CEDAW.

20. In 2012, the UN Working Group on Discrimination against women in law and in practice called upon Governments to repeal laws criminalizing adultery, citing the inequality in treatment between men and woman by many of the laws. Additionally, it stated that even facially gender-neutral laws practically affected women disproportionately due to existing continuing discrimination and inequalities faced by women. A true copy of the statement released by the UN Working Group on Discrimination against women in law and in practice dated 12 October 2012 is annexed herewith and marked as **Annexure A – 3.**

21. The UN Working Group also analysed the status of adultery laws internationally in its Background Note, annexed herewith and marked as **Annexure A – 4.** Adultery is not a crime in nearly all developed countries, with Ireland the last country in Europe to decriminalize it in 1976. Progress has been made by several nations in recent times to repeal adultery laws, including Guatemala in 1996, Haiti in 2005, and Uganda in 2007. The Constitutional Court of Guatemala struck down its adultery provision on the basis of its constitution's equality guarantees and human rights treaties, including CEDAW.

22. In view of the above it is most respectfully prayed that the Applicant herein may kindly be impleaded as a Petitioner in Writ Petition No. (Criminal) 194 of 2017. That the interest of

justice would be served, if the present application is allowed and the prayers made herein below are granted by this Hon'ble Court. That no prejudice would be caused to the parties to the Writ Petition, if the Applicant herein is impleaded in the matter.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may be pleased to:

- a. Allow the present application for impleadment and implead the Applicant herein as a Petitioner in Writ Petition (Criminal) No. 194 of 2017 titled Joseph Shine v. Union of India; and
- b. Pass such further order/orders as this Hon'ble Court may deem fit & proper in the facts of this case.

AND FOR THIS ACT OF KINDNESS, THE APPLICANT SHALL AS IN DUTY BOUND, FOREVER PRAY.

DRAWN AND FILED BY:

ANINDITA PUJARI

(ADVOCATE FOR THE APPLICANT)

SETTLED BY:

JAYNA KOTHARI, ADVOCATE

DRAWN ON:02.08.2018

FILED ON: 02.08.2018

NEW DELHI