

**DECRIMINALIZATION OF ADULTERY LAW IN INDIA: LEGAL IMPLICATIONS**

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**ABSTRACT**

The provision of Adultery was initially drafted in 1860 when polygamy was deeply rooted in the Indian patriarchal society. This provision, which made men having sexual intercourse with the wives of other men without the consent of their husbands punishable, was based on an assumption that woman is a property of man whom she is married to. Viewed from the said perspective, the provision attacked the individuality of women. However, it did not seek to punish women as abettors of the offence because it considered them to be mere victims of it. Besides, the provision did not make sexual intercourse by a married man with an unmarried woman an offence.

Respecting the individuality and sexual autonomy of women, the Supreme Court of India in its landmark judgement in the year 2018 struck down Section 497 of I.P.C., 1860 and Section 198(2) of Cr.P.C. 1973, and thus, declared them as unconstitutional. These provisions faced challenges at three levels as they violated Article 14, Article 15 and Article 21 of the Constitution of India. However, it remains a civil offence, thus, continuing to act as a ground for divorce. This paper discusses the provision of adultery as was provided under Section 497 of I.P.C., 1860 before its decriminalization, the deformities in the provision, and the various efforts that have been made for a reconsideration of this provision since its inception. In light of the aforesaid landmark judgement, the paper further points out and discusses the far-reaching legal implications of the said decriminalization.

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**Keywords:** Adultery, Indian patriarchal society, Supreme Court of India, decriminalization, legal implications.

## **INTRODUCTION**

“Adultery is the application of democracy to love.”

-H.L. Mencken

The institution of marriage holds an important place in the Indian society since time immemorial. Considered to be the building blocks of any society, marriage has always been looked upon as a sacred knot that holds together a man and a woman in union. It confers upon the man the status of a husband, upon the woman the status of a wife, and a status of legitimacy upon children born out of the marriage.<sup>2</sup> The sanctity of the marital union has been recognized since the beginning of the Vedic period.<sup>3</sup>

The prima facie requirement for any marital relationship to be a sacred one is that the husband and the wife are faithful and loyal to one another. This faith and loyalty include being honest with one another, dedicated to one another and, above all, not having a sexual relationship with anyone other than his/her spouse. However, some spouses tend to gallivant in search of a sexual partner other than the ones whom they are married to, thus tearing down the sacredness of the marital tie. This, in common parlance, is known as “adultery” that has

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<sup>2</sup> DR. PARAS DIWAN, MODERN HINDU LAW 84 (ed. 21 Allahabad Law Agency 2012).

<sup>3</sup> *Id.*

been derived from the old French word “avoutré”, which has itself evolved from the Latin verb “adulterium” meaning “to corrupt”.<sup>4</sup>

According to Black's Law Dictionary<sup>5</sup>, Adultery is defined as “voluntary sexual intercourse between a married person and someone other than the person's spouse”. It is also defined as “consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of marriage”.<sup>6</sup> Therefore, in order to protect the sanctity of marriage, adultery is often seen as an offence in many jurisdictions like Afghanistan, Bangladesh, Indonesia and Iran, to name a few.<sup>7</sup>

In India, the Indian Penal Code, 1860 used to lay down the legal provision related to adultery, before it was decriminalized by the Hon'ble Supreme Court of India recently, which made only men having sexual relationship with the wives of other men, without the consent or connivance of their husbands, punishable with imprisonment for a term up to five years, or with fine, or with both.<sup>8</sup> It did not seek to punish wives even as abettors.<sup>9</sup> In other words, it sought to punish only the adulterer and not the wife as an adulteress. However, a bare reading of the said provision revealed that it was not considered adultery if the adulterer had obtained the consent or connivance of the husband whose wife, he has had an adulterous relationship with. This treated woman as a mere property of her husband and as one who is not able to take decisions for herself.

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<sup>4</sup> Tejaswi Pandit, *Adultery [S. 497 IPC and S. 198(2) CrPC]*, THE SCC ONLINE BLOG (Feb. 26, 2019, 10:04 AM), <https://www.sconline.com/blog/post/2019/02/21/adultery-s-497-ipc-and-s-1982-crpc/#ftn1>.

<sup>5</sup> BLACK'S LAW DICTIONARY 60 (Bryan A. Garner ed., ed. 9 West Publishing Co. 2009).

<sup>6</sup> Diwan, *supra* note 1, at 159.

<sup>7</sup> *Few countries treat adultery as crime: SC*, BUSINESS STANDARD (Feb. 26, 2019, 10:34 AM), [https://www.business-standard.com/article/news-ians/few-countries-treat-adultery-as-crime-sc-118092701282\\_1.html](https://www.business-standard.com/article/news-ians/few-countries-treat-adultery-as-crime-sc-118092701282_1.html).

<sup>8</sup> Indian Penal Code 1860 § 497.

<sup>9</sup> *W. Kalyani v. State tr. Inspector of Police & Ors.*, AIR 2012 SC 497.

Also, the procedural law allowed only the husband to bring a criminal action against the adulterer.<sup>10</sup> Neither was any right provided to the wife of the adulterer to initiate a prosecution for adultery against her husband, nor was any right given to the other husband to initiate such a prosecution against her own adulterous wife. The rationale behind the same was to protect the marital relationship from an outsider and not to allow spouses to prosecute each other for adultery which could have led to an eventual collapse of the institution of marriage.<sup>11</sup>

Furthermore, since, adultery was considered a criminal offence, it involved the intervention of the State. This meant that the State may intervene in the interpersonal relationship of marriage if a husband files a criminal action against the adulterer.

It is due to these reasons that the laws related to adultery have often come under the scanner of Indian judiciary and several attempts have been made to reconsider the same.<sup>12</sup> However, the judiciary had failed to take any reasonable stand against the lacunas and loopholes that had subsisted in these laws for more than 150 years now.

Nevertheless, in a recent judgement<sup>13</sup> in the year 2018, the Hon'ble Supreme Court of India had declared Section 497 of Indian Penal Code, 1860 and Section 198(2) of Code of Criminal Procedure, 1973 as unconstitutional and had struck them down on grounds of violation of Article 14, 15 and 21 of the Constitution of India. Be that as it may, adultery remains as a civil offence, thus, continuing to act as a ground for divorce in matrimonial law. This

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<sup>10</sup> The Code of Criminal Procedure 1973 § 198, cl. 2.

<sup>11</sup> V. Revathi v. Union of India & Ors., AIR 1988 SC 835.

<sup>12</sup> Prabhash K Dutta, *Section 497: 3 past Supreme Court judgments on adultery law*, INDIA TODAY (Feb. 26, 2019 11:01 AM), <https://www.indiatoday.in/india/story/adultery-law-section-497-3-past-supreme-court-judgments-1349993-2018-09-27>.

<sup>13</sup> Joseph Shine v. Union of India, AIR 2018 SC 4898.

landmark judgement is likely to have critical effects on the institution of marriage and the position of women in the Indian patriarchal society which has been discussed in the later part of this paper.

### **ADULTERY LAW: SCOPE, CRITICISMS AND EARLY JUDICIAL TREND**

Section 497 of Indian Penal Code, 1860, before it was decriminalised recently, used to lay down that adultery was committed by (a) a man having sexual intercourse with (b) the wife of another man (c) without taking the consent or connivance of the husband, and (d) the sexual intercourse should not have amounted to rape.<sup>14</sup>

- Law of Adultery gives the power to the husband of the adulterous wife, to prosecute the adulterer, as per Section 198(2) of the Code of Criminal Procedure of 1973. Only the acts of man are held to be liable as per the said provision. Earlier times thought of punishing the man only, because they thought of the man to be a perpetrator into the sanctity of the marital relationship between a husband and his wife.<sup>15</sup> This was why only the husband was conferred with the power to prosecute the adulterer. However, no power was given to him to prosecute his own wife, in order to protect the institution of marriage from breaking down. This was challenged in the first landmark case related to Adultery law, namely, Yusuf Abdul Aziz v. The State of Bombay & Husseinbhoj Laljee<sup>16</sup>, where the Petitioner argued, that Section 497 of Indian Penal Code, 1860 worked in violation of Articles 14 and 15. The Supreme Court upheld the constitutionality of the provision, and in their defence replied, that the provision of

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<sup>14</sup> Indian Penal Code 1860 § 497.

<sup>15</sup> Sowmithri Vishnu v. Union of India & Ors., AIR 1985 SC 1618.

<sup>16</sup> AIR 1954 SC 321.

adultery was drafted to protect women as per Article 15(3) of the Constitution of India.<sup>17</sup>

- As already discussed above, Section 198(2) of the Code of Criminal Procedure, 1973 provided only the husband with the power to prosecute the adulterer. It simply means that in a case of adultery, the wife of the adulterous husband neither shall have the right to prosecute her husband for adultery, nor the right to prosecute the woman with whom her husband committed adultery. This clearly violated Article 14 & 15 of the Constitution of India. It was on these grounds only, thirty years later, after the Yusuf Aziz judgement, that Section 497 along with Section 198(2) of the Code of Criminal Procedure, 1973 was challenged in the case of *Sowmithri Vishnu v. Union of India*<sup>18</sup>. However, the Supreme Court upheld the constitutional validity of these provisions, stating, that it is the man, who is the seducer, and not the woman. The man is the author of the crime, the victim of which is the woman.<sup>19</sup> Though, the court opined that the status quo of women might have transformed over the years, it left it for the legislature to reconsider Section 497 of Indian Penal Code, in order to meet the said transformation. Furthermore, the apex court held that there is no discrimination of women by not granting them the right to prosecute, under Section 497 of Indian Penal Code, 1860 and therefore, it does not violate Article 21 of the Constitution of India.<sup>20</sup>
- In the year 1988, these provisions were again challenged in the case of *V. Revathi v. Union of India*<sup>21</sup>. The Supreme Court, herein, held that it was for the promotion of

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<sup>17</sup> Yusuf Abdul Aziz v. The State of Bombay & Husseinbhoj Laljee, AIR 1954 SC 321, ¶5.

<sup>18</sup> Sowmithri Vishnu v. Union of India & Ors., AIR 1985 SC 1618.

<sup>19</sup> Sowmithri Vishnu v. Union of India & Ors., AIR 1985 SC 1618, ¶8.

<sup>20</sup> *Id.* at ¶10.

<sup>21</sup> V. Revathi v. Union of India & Ors., AIR 1988 SC 835.

“social good” that women were not included in the prosecution of adultery cases.<sup>22</sup> It further opined that Section 497 of Indian Penal Code and Section 198(2) of the Code of Criminal Procedure, 1973 acted as a “legislative packet” which not only prohibited “an outsider” from invading into a marital relationship but also, in order to protect the sanctity of the marital tie and the tie itself, it did not allow the spouses to prosecute each other for adultery.<sup>23</sup> In other words of the Supreme Court, the laws related to adultery acted as a “shield rather than a sword” which protected the sanctity of the institution of marriage.<sup>24</sup>

- The bare reading of the provision of adultery also reflected that if the husband had consented or connived for an adulterous relationship between his wife and another man, it would have not amounted to adultery.<sup>25</sup> This simply implied that the wife had no will or individuality of her own and it was only the consent of the husband that could render the act as no offence. However, in a recent landmark judgement of the Supreme Court, it had held that right to privacy is a fundamental right under Article 21 of the Constitution of India, and this right to privacy encompasses the right of autonomy, choice and desire of women.<sup>26</sup> Therefore, keeping in mind the current scenario, the consent or connivance clause in Section 497 violated the right of sexual autonomy of women.
- Section 497 of the Indian Penal Code punished any and all men, whether married or unmarried, who had sexual relations with the wife of another man. It, however, did

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<sup>22</sup> V. Revathi, AIR 1988 SC 835, ¶5.

<sup>23</sup> *Id.* at ¶6.

<sup>24</sup> *Id.*

<sup>25</sup> Indian Penal Code 1860 § 497.

<sup>26</sup> Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., AIR 2017 SC 4161.

not punish an unmarried woman, in any way, who had a sexual relationship with a married man. This also meant that a woman could not even make the unmarried woman liable for destroying her marital relationship. Nevertheless, even this argument failed to make any sense before the Supreme Court as it had already held in one of its previous judgements that since the provision of adultery was drafted for the benefit and protection of women, giving a right to the wife to prosecute the unmarried women would mean a “crusade by a woman against another woman”, which would have eventually destroyed the purpose of enactment of the provision of adultery.<sup>27</sup>

### **JOSEPH SHINE V. UNION OF INDIA: THE DECRIMINALIZATION JUDGEMENT**

The Supreme Court in overruling the previous judgements as discussed earlier and striking down Section 497 of the Indian Penal Code, 1860, and Section 198(2) of Code of Criminal Procedure, 1973 in the case of Joseph Shine v. Union of India<sup>28</sup> has relied upon the principles of equality and sexual autonomy to downsize adultery as a mere civil wrong, preventing the State to enter a private realm, i.e., the marital relationship.

#### **Brief facts:**

The Petitioner, Joseph Shine, an Italian based Malayalee Hotelier was provoked by the suicide of a close friend who ended his life after a woman colleague made a false rape complaint against him, even though she had an adulterous relationship with him outside of her marriage.<sup>29</sup> He filed a Public Interest Litigation before the Supreme Court under Article

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<sup>27</sup> Sowmithri Vishnu v. Union of India & Ors., AIR 1985 SC 1618, ¶9.

<sup>28</sup> Joseph Shine v. Union of India, AIR 2018 SC 4898.

<sup>29</sup> *Id.*

32 of the Constitution, challenging the constitutional validity of Section 497 of Indian Penal Code, 1860 and Section 198(2) of Code of Criminal Procedure, 1973.

**Arguments by petitioner:**

The Petitioner argued that Section 497 of Indian Penal Code, 1860 held only men as offenders, whereas Section 198(2) of Code of Criminal Procedure, 1973 prohibited the wife to bring a criminal action against her adulterous husband. Further, it created an irrational classification between married and unmarried women as only sexual intercourse with “another man’s wife” was considered as an offence under adultery law.<sup>30</sup> Moreover, the Petitioner submitted that the conundrum of consent or connivance, provided in Section 497, tends to treat women as object of men.<sup>31</sup> The provision in question along with Section 198(2) of Code of Criminal Procedure, 1973, which prevented women from filing complaints against adultery was contended to be violative of Article 14, 15 and 21 of the Constitution of India.<sup>32</sup>

**Arguments by respondent:**

The argument that was advanced by the Respondent, herein, the State, was that decriminalizing the law of Adultery would lead to an eventual fall of the institution of marriage in India and also would further destroy families, which is considered to be a fundamental unit of the society.<sup>33</sup> The Respondent put forth before the Court another argument that since the offence of adultery in marriage is as morally abhorrent and grave as the offences of battery or assault, the provision of Adultery protects the institution of

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<sup>30</sup> Joseph Shine v. Union of India, [WP (Crl) No. 194 of 2017], ¶A.

<sup>31</sup> *Id.* at ¶I.

<sup>32</sup> *Id.* at ¶G.

<sup>33</sup> Joseph Shine v. Union of India, AIR 2018 SC 4898.

marriage and promotes social welfare by deterring harmful conduct of individuals towards marital relationships.<sup>34</sup>

**Judgement and rationale:**

The Constitutional Bench comprising of the then Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice R.F. Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra held that the adultery law was outdated and while delivering their separate concurring judgements, rendered the impugned provisions as unconstitutional.

**Husband is not the master of wife:**

Chief Justice Dipak Misra, speaking for himself and Justice A.M. Khanwilkar, under paragraph 22 in his part of the judgement, noted that the provisions in question treated women as subordinate to men in as much as where there is consent or connivance given by the husband, there is no offence of adultery. This tends to treat the women as a chattel and the property of their husband, who is submissive to the will of her master.<sup>35</sup> Further, under paragraph 41, it was also observed that Section 497 only treated the husband of the women indulged in adultery, as an aggrieved person, whereas the wife of an adulterer husband was not treated as an aggrieved person, curtailing the equality of dignity of women and creating a dent in their individuality.<sup>36</sup>

**The impugned provisions failed to preserve the sanctity of marriage:**

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<sup>34</sup> Joseph Shine, AIR 2018 SC 4898.

<sup>35</sup> Joseph, AIR 2018 SC 4898.

<sup>36</sup> AIR 2018 SC 4898.

Justice R.F. Nariman, under paragraph 26 in his concurring judgement, opined that the original objective of Section 497 of the Indian Penal Code, 1860 was to protect and preserve the sanctity of marriage which was not being done by it, since the law had loopholes of consent and connivance given by the husband.<sup>37</sup> He also observed that the sanctity of marriage can even be destroyed by a married man having sexual intercourse with an unmarried woman or a widow, which was not considered to be adultery according to the impugned provisions.<sup>38</sup>

**Section 497 deprived women of their sexual autonomy:**

Justice D.Y. Chandrachud, under paragraph 51 in his part of the judgement, observed on similar grounds as the Chief Justice, that Section 497 of Indian Penal Code, 1860 tend to control the sexuality of women in various ways. Adultery did not constitute an offence if the husband consents to a wife's sexual relationship outside marriage since she is treated as the property of her husband and subordinate to him. Thus, the law deprives a woman of her agency, autonomy and dignity. This was in direct contravention to Article 21 of the Constitution.<sup>39</sup>

**The archaic law was filled with inconsistencies:**

Finding Section 497 arbitrary and discriminatory towards women, Justice Indu Malhotra, in her concurring judgement, under paragraph 11, observed on similar lines

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

as the other judges, that the law of adultery as it stood was replete with anomalies and incongruities.<sup>40</sup>

Along with the aforementioned observations, the bench also opined that adultery was more of a personal issue, than a crime and treating it as crime would amount to the State invading a private realm, which is frowned upon.<sup>41</sup> The bench subsequently struck down Section 497 of Indian Penal Code, 1860 and Section 198(2) of Criminal Procedure Code, 1973 and the decisions in *Sowmithri Vishnu v. Union of India*<sup>42</sup> and *V. Revathi v. Union of India*<sup>43</sup> were overruled. Adultery is now only a civil offence and most definitely a ground for divorce in India.

## **LEGAL IMPLICATIONS OF DECRIMINALIZATION OF ADULTERY LAW IN INDIA**

The Joseph Shine judgement has caused good riddance to archaic and arbitrary adultery laws and rendered it unconstitutional, but the decision does leave open ground for various legal implications.

### **Cases of divorce may increase:**

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> AIR 1985 SC 1618.

<sup>43</sup> AIR 1988 SC 835.

Decriminalization of Adultery may lead to an increase in the number of extra-marital affairs, under the veil of sexual autonomy. Cases of divorce may increase, and the Hon'ble Supreme Court of India has not provided any guidelines or remedies in this respect. The possibility of parental estrangement with respect to custody has also not been taken into consideration.<sup>44</sup>

**Effect on children born out of adulterous relationships:**

The Supreme Court, in decriminalizing the Adultery Law, did not lay down any guidelines for the fate of children born out of adulterous relationships. It is to be noted that the children who are born out of extra-marital relationships are not governed by any law currently and their rights or status is not recognised in law. Therefore, a legislation in the same respect is highly awaited by the Parliament of India.

**Cases of suicides in marital disputes may increase:**

The Supreme Court observed that the cases of suicide in marital dispute may increase due to decriminalization of Adultery. Thus, to provide a safeguard to the aggrieved spouse, the Court provided that criminal action can be brought against the adulterer spouse, under Section 306 of Indian Penal Code, 1860<sup>45</sup>, relating to the abetment of suicide, if the aggrieved spouse commits suicide, affected by the adulterous relationship of the other spouse.

**Lays down the roadmap for criminalization of Marital Rape in India:**

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<sup>44</sup>Abha Singh, *Decriminalisation Of Adultery – A Setback To The Institution Of Marriage In India*, OUTLOOK (Feb. 26, 2019, 01:12 PM), <https://www.outlookindia.com/website/story/decriminalisation-of-adultery-a-setback-to-the-institution-of-marriage-in-india/317282>.

<sup>45</sup> Indian Penal Code 1860 § 306.

The most important legal implication of the Joseph Shine judgement, however, is that it lays down a road towards the criminalization of marital rape, striking down exception 2 of Section 375 of Indian Penal Code, 1860<sup>46</sup>, which defines rape. The adultery law treated the women as chattel or property of her husband and the same faulty logic is extended to the cases of marital rape where a wife cannot sue her husband for non-consensual sex, being his property and void of any sexual autonomy.

The Hon'ble Supreme Court relied on marriage not being a cap on the sexual autonomy of a person<sup>47</sup> and the wrath of the constitution invited by the law by treating women as objects of their husbands, in declaring the adultery law as unconstitutional. The Supreme Court also explained that even if the law was rendered as a gender-neutral provision, it would still have remained a criminal offence, amounting to intrusion of the State into a private realm of matrimonial relationships.<sup>48</sup> Therefore, it was best to keep adultery as a civil offence and a ground of divorce in matrimonial law.<sup>49</sup> The opinion of the Court can be applied to the pending Marital Rape Public Interest Litigation<sup>50</sup>, filed by the RIT Foundation, before the Delhi High Court and even if it is appealed before the Hon'ble Supreme Court, the jurisprudence behind the Joseph Shine judgement shall prevail and may lead to criminalization of marital rape.

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<sup>46</sup> Indian Penal Code 1860 § 375.

<sup>47</sup> Joseph Shine v. Union of India, AIR 2018 SC 4898.

<sup>48</sup> Joseph Shine, AIR 2018 SC 4898.

<sup>49</sup> Joseph, AIR 2018 SC 4898.

<sup>50</sup> RIT Foundation v. UOI, WP (Civil) No. 284/2015.

## **CONCLUSION**

The Hon'ble Supreme Court of India, in the case of Joseph Shine v. Union of India, has declared the laws related to adultery as unconstitutional on grounds of violation of Article 14, 15 and 21 of the Constitution of India and has struck down Section 497 of the Indian Penal Code, 1860 and Section 198(2) of the Code of Criminal Procedure, 1973. This clearly shows that the laws related to adultery were in constant violation of Part III of the Constitution of India for more than 150 years now.

In declaring the laws related to adultery as unconstitutional, the Apex Court strongly condemned the old patriarchal notion of husband being the master of his wife. It upheld the dignity of women by treating them equal to men, which is a fundamental right as per Article 14 of the Constitution of India. It also upheld the right of privacy guaranteed to every

individual by Article 21 of the Constitution of India, thus, declaring that the married woman has a right to sexual autonomy. Furthermore, the act of decriminalizing the laws related to adultery is a more suitable one than making it a gender-neutral provision as the Supreme Court believed that State should not intervene into a private relationship like that of marriage. It was of the belief that the parties to a marital dispute should resolve the same between themselves, and if it was rendered as a gender-neutral provision, the State could still intervene in the private affairs of marital relationship as adultery would have remained a criminal offence. However, adultery remains as a ground for divorce in matrimonial laws in India.

This judgement hits the deep-rooted patriarchy in the Indian society that used to subordinate women, treat them with discrimination and prevent them from exercising their fundamental rights as guaranteed by Part III of the Constitution of India.

However, this landmark judgement is likely to have critical impacts on the institution of marriage in India. This may lead to increase in the number of divorce as well as suicide cases in marital disputes. The judgement also does not provide as to what would happen to the children born out of such adulterous relationships. Keeping in mind the rationale of the judgement, it can be said that it lays down the roadmap for criminalization of marital rape in India.