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ADULTERY AS MISCONDUCT AND JUDICIAL MUSINGS

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

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‘Some private space is given to personnel where moral policing is not allowed’ | Photo Credit: Getty Images/iStockphoto

.More than four years ago, the Supreme Court of India decriminalised adultery in its landmark judgment, *Joseph Shine versus Union of India* (September 2018). It held Section 497 of the Indian Penal Code (on adultery) along with Section 198 of the Criminal Procedure Code to be unconstitutional on the premise that these provisions were violative of Articles 14, 15 and 21 of the Constitution of India.

Aggrieved by the order concerning its implementation in the armed forces, the Union of India sought clarification from the Court saying that any promiscuous or adulterous acts should be allowed to be governed by the relevant sections of the Army Act, the Air Force Act and the Navy Act being special legislations by the virtue of Article 33 of the Constitution. Under Article 33, Parliament has powers to restrict or abrogate the fundamental rights of certain categories of persons, including members of the armed forces to ensure the proper discharge of their duties and the maintenance of discipline among them. The Court, recently, without going into the nuances of relevant sections of the special legislations (i.e., the Army Act and similar special Acts) said that in Joseph Shine it ‘was not at all concerned with the effect and operation of the relevant provisions’ and ‘it is not as if this Court approved of adultery’. The Court further added that it found adultery as a moral (and civil) wrong and a ground for securing dissolution of marriage. With these observations, the case was disposed of.

The moot question is whether these observations by the Court give an impression that the armed forces may go ahead with disciplinary action for the misconduct of adulterous acts (as understood in common parlance without reference to Section 497 of the IPC) under their special legislations?

Consequent to the Joseph Shine case, the Rajasthan High Court, in Mahesh Chand Sharma versus State of Rajasthan and Others (2019), set aside the departmental proceedings against the petitioner who was serving as an inspector in the Rajasthan Police (after having served for 18 years in the Indian Air Force) and allegedly had illicit relations with one woman constable and had also ‘begotten a child from illicit relations’. The High Court held that no employer can be allowed to do moral policing on its employees which go beyond the domain of his public life and personal choices and selections (to have sexual intercourse) cannot be a subject matter of departmental proceedings under the Service Conduct Rules.

More recently, in Maheshbhai Bhurjibhai Damor versus State of Gujarat and 3 other(s) (2022), the Gujarat High Court quashed and set aside the dismissal order of an armed police constable arising from allegations that he had developed illicit relations with a widow which amounted to misconduct. The departmental inquiry revealed that the relations between the two were voluntary and mutual, and there was no exploitation of the woman. The Court held that in order to prove misconduct, allegations must have some nexus, direct or indirect, with the duties to be performed by the government servant. As the alleged act was a private affair, and not a result of any coercive pressure, the act of the petitioner at the most could be considered as an immoral act; however, to term it as misconduct as per Conduct Rules would be too far-fetched.

A corollary may also be drawn with the conduct of an army personnel who consumes alcohol. Unless, the drinking habits or any such act of an officer affects the discharge of his duties or discipline of the force, no departmental action is initiated. It is nobody's secret that army canteens officially provide alcohol to their men and officers at subsidised rates at all locations. A section of society may consider drinking alcohol as an immoral act, but this does not authorise the employer to initiate disciplinary action. In other words, some private space is given even to army personnel where moral policing is not allowed.

Though Article 33 of the Constitution empowers Parliament to restrict the fundamental rights of the members of the armed forces, the caveat of 'so as to ensure the proper discharge of their duties and the maintenance of discipline among them' cannot be overlooked. The same principle will also apply to members of the forces charged with the maintenance of public order, i.e., the police personnel of all States and Union Territories, intelligence and counter-intelligence agencies including their communication sections as provided in Article 33 of the Constitution.

Therefore, neither did the Joseph Shine verdict of 2018 inhibit the parameters of departmental proceedings nor has the clarification sought enlarged them. It is true that many acts and omissions which are not necessarily criminal in nature may amount to acts unbecoming of a government servant. A common thread running through all relevant judgments is that if the conduct interferes directly or indirectly with the honest discharge of duties; such conduct may be considered as unbecoming of a government servant. The legislative intent of Article 33 of the Constitution is also similar. Therefore, the sacrosanct right to privacy available to the members of the armed forces (and the policemen engaged in the maintenance of public order) cannot be taken away under the guise of the special legislations unless it has some nexus with their duties.

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