司法院大法官會台字第 12664 號鑑定意見發言要點

李念祖

一、關於破除性別歧視（憲法增修條文第 10 條第 6 項）

- 釋字第 748 號解釋出現後必須重新檢視刑法的配偶定義與釋字第 554 號解釋。
- 婚姻制度的演變，已從過去不平等的身分性別關係轉變為現代性別平等的契約關係。
- 配偶的不通姦義務，是契約當事人的原生義務，不是親族間的出嫁從夫義務；第三人的不相姦義務，則是婚姻登記後的法律衍生義務，兩者之性質不同。民法未能明示兩項義務，只能透過其他條文意會，不無闕憾。
- 用刑法懲處通姦與相姦行為，是傳統禮教人倫秩序，強制建立男尊女卑身分關係，出禮入刑的思想遺留；刑法雖採看似性別中立的法條文字，仍對男尊女卑的社會刻板意識欠缺免疫力。配偶可選擇處罰同性相姦者而宥恕異性配偶的告訴乃論制度(刑法第 239 條以及刑訴第 239 條但書)，有使刑罰公權力成為配偶復仇的工具，並且繼續復刻並延長鞏固男尊女卑、不平等的身分性別關係之虞。
    - 印度 Dipak Misra 大法官在 2018 年 Joseph Shine v. Union of India 一案判決開篇之處即云：「任何制度歧視女性，或侵犯女性尊嚴、公允與平等原則者，都足以在憲法上引起憤慨；以致於逝者如斯而不舍晝夜，即使過去數十年間曾有任何相關法令條文得到沈默的支持背書，隨著日趨成熟的

憲法觀念與思想的進步，應該已經到了為之書寫輓歌的時候。要求女性按照男性的或社會期待的方式思考，足以摧毀女性的核心自我認同，堪稱可惡；宣布丈夫不是主人的時刻，已當其時[1]。」(Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master.)

- 反過來看，如果主張相關條文是在保障弱勢女性，印度最高法院引用南韓憲法法院宣告通姦罪違憲之判決論述如下：「過去南韓確實將通姦罪看成是用來保障弱勢女性的規定。以為女性在社會與經濟上處於弱勢，違法通姦的主要是男性。因此，通姦罪成為在心理上嚇阻男性的立法，同時也幫助女性配偶獲得金錢賠償，或是以分配財產做為撤銷告訴的條件。然而，社會的變遷稀釋了通姦犯罪刑事立法的正當性。最緊要的是女性的收入及經濟能力因社會

[1]https://cdn.fbsbx.com/v/t59.2708-21/42374210_1241504319324828_6819368336070017024_n.pdf/Joseph-Shine-v.-Union-of-India.pdf?_nc_cat=104&_nc_sid=0cab14&_nc_ohc=4zzPhBHZLyMAX-v6h6S&_nc_ht=cdn.fbsbx.com&oh=af79970d4a8753d1963e79775b8bad57&oe=5E81CD06&dl=1 (最後瀏覽日期 2020 年 3 月 20 日)

與經濟活動的能量而進步，女性是經濟上的弱勢假設，不再普遍適用於已婚的配偶。[2]」(The Court also analyzed the argument that adultery provisions protected women: "It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological deterrence for men, and, furthermore, enabled female spouses to receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation. However, the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples.)

- 歷年相關刑事資料統計數字足以證明，傳統上男尊女卑之社會刻板意識仍然存在而且緣附於刑法第 239 及刑訴 239 但書作用，延續了通姦關係中男性受到宥恕而女性不受宥恕的優越地位；婚姻的性別平等契約關係，也因之回到了不平等的身分性別關係。
- 法官紛紛基於保障性別平等的理由聲請釋憲，堪可證明業已普遍體認自身負有消除性別歧視，促進性別平等的憲法義務

[2]同前註。

與職責（憲法增修條文第 10 條第 6 項）。大院為憲法機關，負有相同的憲法義務。釋字第 372 號即為使用此條項之一項前例。

二、關於比例原則

- 本案系爭法律限制基本人權（包括憲法第 22 條所保障者，無論以隱私權，或如釋字第 554 號以性自主自由稱之皆無不可），涉及實際性別歧視（釋字第 666 號）與限制人身自由的刑罰規定，應依比例原則施以嚴格審查。
- 系爭規定表面上在防止通姦以維繫婚姻，卻在實質配合配偶復仇並延續也助長男尊女卑之社會刻板意識，即不能認為具有特別重要之公共利益。
- 刑罰追訴能否直接而實質地達到預防通姦與維繫婚姻的實際效用，不能徒憑假設。沒有實證資料顯示獲得宥恕配偶之再犯率及其婚姻之維持率如何，即無從證明其手段必要性果然存在。
- 較小之侵害手段，至少有二，一是於**民法中明確載入**，有配偶者不得通姦，以及第三人不得與他人之配偶為性行為兩項義務，並提高賠償額度與慰撫金，以替代刑罰，也可避免除罪化引起通姦具有社會相當性的誤會，同時消除國庫與民事原告自被告之財產求償發生任何競爭關係。
- 二是**只罰配偶，以避免性別歧視**。但大法官必須補充釋 748 解釋，說明配偶的定義是否不因性傾向而有差異。
- 以上二者均指向系爭規定不符限制妥當性而屬違憲立法的結

論。

- 至於主張民事賠償是給予富人以金錢換取不法的說法，至少有兩個錯誤。
  1. 此一論據如果成立，民法賠償責任制度，豈不盡在獎勵富人為侵權行為而悉應改以刑罰施之？民事法院原得斟酌富人被告之財力而判給與其財力相當之賠償，此則與刑罰秩序無涉。問題不只在於損害賠償並不等於用金錢換取違法行為，也在違約的公平法律救濟，並不依賴施以刑罰嚇阻補充。
  2. 在婚姻私事上也迷信刑罰萬能而不重民事救濟，正是國家秩序無遠弗屆，出禮入刑，刑罰直入家門以貫徹人倫秩序的德治傳統思想路徑。而通姦成罪，以刑替民甚或以刑逼民，是民事救濟欠發達的舊時法律文化特徵，也是婚姻制度，從身分轉變到契約迄今猶是困難重重，無法擺脫禮教社會中男性配偶的優越地位，也難以破除社會性別刻板意識的重大障礙。

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

Joseph Shine ...Petitioner(s)

VERSUS

Union of India ...Respondent(s)

J U D G M E N T

Dipak Misra, CJI (For himself and A.M. Khanwilkar, J.)

The beauty of the Indian Constitution is that it includes 'I' 'you' and 'we'. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the

space in an annexe to the main building. That is the manifestation of concerned sensitivity. Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written. It is advisable to remember what John Stuart Mill had observed:-

> "The legal subordination of one sex to another – is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect

> equality, admitting no power and privilege on the one side, nor disability on the other."[1]

We are commencing with the aforesaid prefatory note as we are adverting to the constitutional validity of Section 497 of the Indian Penal Code (IPC) and Section 198 of the Code of Criminal Procedure (CrPC).

2. At this juncture, it is necessary to state that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past.

3. When we say so, we may not be understood that precedents are not to be treated as such and that in the excuse of perceptual shift, the binding nature of precedent should not be allowed to retain its status or allowed to be diluted. When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative

[1] On the Subjection of Women, Chapter 1 (John Stuart Mill, 1869)

changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has

perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts. To explicate, despite conferring many a right on women within the parameters of progressive jurisprudence and expansive constitutional vision, the Court cannot conceive of women still being treated as a property of men, and secondly, where the delicate relationship between a husband and wife does not remain so, it is seemingly implausible to allow a criminal offence to enter and make a third party culpable.

4. We may presently state the nature of the *lis*.

5. The instant writ petition has been filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC. A three-Judge Bench, on the first occasion, taking note of the authorities in ***Yusuf Abdul Aziz v. State of Bombay***[2], ***Sowmithri Vishnu v. Union of India and another***[3], ***V. Revathi v. Union of India and others***[4] and ***W. Kalyani v. State through Inspector of Police and another***[5] and appreciating the submissions advanced by the learned counsel for the petitioner, felt the necessity to have a re-look at the

[2] 1954 SCR 930 : AIR 1954 SC 321
[3] (1985)Supp SCC 137 : AIR 1985 SC 1618
[4] (1988)2 SCC 72
[5] (2012) 1 SCC 358

constitutionality of the provision. At that juncture, the Court noted that:-

> *"Prima facie*, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, *prima facie*, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice."

That is how the matter has been placed before us.

6. At this stage, one aspect needs to be noted. At the time of initial hearing before the three-Judge Bench, the decision in ***Yusuf Abdul Aziz*** (supra) was cited and the cited Law Report reflected that the judgment was delivered by four learned Judges and later on, it was noticed, as is reflectible from the Supreme Court Reports, that the decision was rendered by a Constitution Bench comprising of five Judges of this Court.

7. The said factual discovery will not detain us any further. In ***Yusuf Abdul Aziz*** (supra), the Court was dealing with the controversy that had travelled to this Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution of India. In the said case, the appellant was being prosecuted for adultery under Section 497 IPC. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional question under Article 228 of the Constitution. The Constitution Bench referring to Section 497 held thus:-

> "3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor. The last sentence in Section 497 prohibits this. It runs—

"In such case the wife shall not be punishable as an abettor." It is said that this offends Articles 14 and 15.

The portion of Article 15 on which the appellant relies is this:

"The State shall not discriminate against any citizen on grounds only of ... sex."

But what he overlooks is that that is subject to clause (3) which runs—

"Nothing in this article shall prevent the State from making any special provision for women ...."

The provision complained of is a special provision and it is made for women, therefore it is saved by clause (3).

4. It was argued that clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.

5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code.

> 6. The appellant is not a citizen of India. It was argued that he could not invoke Articles 14 and 15 for that reason. The High Court held otherwise. It is not necessary for us to decide this question in view of our decision on the other issue."

On a reading of the aforesaid passages, it is manifest that the Court treated the provision to be a special provision made for women and, therefore, saved by clause (3) of Article 15. Thus, the Court proceeded on the foundation of affirmative action.

8. In this context, we may refer to the observation made by the Constitution Bench in ***Central Board of Dawoodi Bohra Community and another v. State of Maharashtra and another***[6] while making a reference to a larger Bench. The said order reads thus:-

> "12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms:
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> (*1*) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.
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> (*2*) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case

[6] (2005) 2 SCC 673

of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(*3*)The above rules are subject to two exceptions: (*i*) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (*ii*) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*[7] and *Hansoli Devi*[8]."

[7] *Union of India and Anr. v. Raghubir Singh (dead) by Lrs. etc.*, (1989) 2 SCC 754
[8] *Union of India & Anr. v. Hansoli Devi & Ors.*, (2002) 7 SCC 273

In the light of the aforesaid order, it was necessary to list the matter before a Constitution Bench consisting of five Judges. As noted earlier, considering the manner in which we intend to deal with the matter, it is not necessary to refer to a larger Bench.

9. Sections 497 and 498 of IPC read thus:-

> "**Section 497 : Adultery**
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> 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.
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> **Section 498 : Enticing or taking away or detaining with criminal intent a married woman**
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> Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

10. Section 198 of CrPC provides for prosecution for offences against marriage. Section 198 is reproduced below:-

> "**198. Prosecution for offences against marriage.—**(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that-
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> (a) Where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;
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> (b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub- section (4) may make a complaint on his behalf;
>
> (c) where the person aggrieved by an offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father' s or mother' s brother or sister 2, or, with the leave of the Court, by any other person

related to her by blood, marriage or adoption.

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was com- mitted may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

> (5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.
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> (6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under 3 [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.
>
> (7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence."

11. On a perusal of the aforesaid provision, it is clear that the husband of the woman has been treated to be a person aggrieved for the offences punishable under Sections 497 and 498 of the IPC. The rest of the proviso carves out an exception as to who is entitled to file a complaint when the husband is absent. It may be noted that the offence is non-cognizable.

12. The three-Judge Bench, while referring the matter, had briefly dwelled upon the impact of the provision. To appreciate the constitutional validity, first, we shall deal with the earlier pronouncements and the principles enunciated therein and how we can have a different perspective of such provisions. We have

already referred to what has been stated in ***Yusuf Abdul Aziz*** (supra).

13. In ***Sowmithri Vishnu*** (supra), a petition preferred under Article 32 of the Constitution challenged the validity of Section 497 IPC. We do not intend to advert to the factual matrix. It was contended before the three-Judge Bench that Section 497 confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and that Section 497 does not take in cases where the husband has sexual relations with an unmarried woman with the result that husbands have a free licence under the law to have extramarital relationships with unmarried women. That apart, the submission was advanced that Section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'. At first blush, it may appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of "romantic paternalism" which stems from

the assumption that women, like chattels, are the property of men.

14. The Court referred to the submissions and held thus:-

> "…..The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years under Section 392 of the Penal Code but the offence of adultery should be punishable with a sentence of five years only: "Breaking a matrimonial home is no less serious a crime than breaking open a house." Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed. We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone…."

Proceeding further, the three-Judge Bench held that the offence of adultery as defined in that Section can only be committed by a man, not by a woman. Indeed, the Section expressly provides that the wife shall not be punishable even as an abettor. No grievance can then be made that the Section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, the same point is reverted to; who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute.

15. The Court further held:-

> ".....Since Section 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is said to be bad. Counsel is right that Section 497 does not contain a

> provision for hearing the married woman with whom the accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. We have no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and immediately, by the decision of the court. In fact, instances are not unknown in criminal law where, though the prosecution is in the charge of the Public Prosecutor, the private complainant is given permission to oversee the proceedings. One step more, and the wife could be allowed a hearing before an adverse finding is recorded that, as alleged by her husband, the accused had committed adultery with her. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in Section 497 cannot render that section unconstitutional as violating Article 21."

After so stating, the Court placed reliance on ***Yusuf Abdul Aziz*** (supra) and held that the same does not offend Articles 14 and 15 of the Constitution and opined that the stability of marriages is not an ideal to be scorned. Being of this view, the Court dismissed the petition.

16. In ***V. Revathi v. Union of India and others***[9], the Court analysed the design of the provision and ruled:-

> ".....Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striking each other with the weapon of criminal law. The petitioner wife contends that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband....."

It placed heavy reliance on the three-Judge Bench in ***Sowmithri Vishnu*** (supra) and proceeded to state that the community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It further went on to say that it does not arm the two spouses to hit each other with the weapon of criminal law. That is why, neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination

[9] (1988) 2 SCC 72

based on sex. While the outsider who violates the sanctity of the matrimonial home is punished, a rider has been added that if the outsider is a woman, she is not punished. There is, thus, reverse discrimination in "favour" of the woman rather than "against" her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus, there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis, the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus, no discrimination has been practised in circumscribing the scope of Section 198(2) CrPC and fashioning it in such a manner that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer. Expressing this view, the Court held that the provision is not vulnerable to the charge of hostile discrimination.

17. In ***W. Kalyani v. State Thro' Inspector of Police and another***[10], the Court held:-

> "10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence."

Be it noted, the issue of constitutional validity did not arise in the said case.

18. At this juncture, we think it seemly to state that we are only going to deal with the constitutional validity of Section 497 IPC and Section 198 CrPC. The learned counsel for the petitioner submits that the provision by its very nature is arbitrary and invites the frown of Article 14 of the Constitution. In ***Shayara Bano v. Union of India and others***[11], the majority speaking through Nariman, J., ruled thus :-

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[10] (2012) 1 SCC 358
[11] (2017) 9 SCC 1

"60. Hard as we tried, it is difficult to discover any ratio in this judgment, as one part of the judgment contradicts another part. If one particular statutory enactment is already under challenge, there is no reason why other similar enactments which were also challenged should not have been disposed of by this Court. Quite apart from the above, it is a little difficult to appreciate such declination in the light of Prem Chand Garg (supra). This judgment, therefore, to the extent that it is contrary to at least two Constitution 346 Bench decisions cannot possibly be said to be good law.

61. It is at this point that it is necessary to see whether a fundamental right has been violated by the 1937 Act insofar as it seeks to enforce Triple Talaq as a rule of law in the Courts in India.

62. Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts- (1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the U.K., and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in State of U.P. v. Deoman Upadhyaya, (1961) 1 SCR 14 at 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a rule by which subjects could be classified. If 347 the

classification was "intelligible" having regard to the object sought to be achieved, it would pass muster under Article 14's anti-discrimination aspect. Again, Subba Rao, J., dissenting, in Lachhman Das v. State of Punjab, (1963) 2 SCR 353 at 395, warned that:

> "50……Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content."

He referred to the doctrine of classification as a "subsidiary rule" evolved by courts to give practical content to the said Article.

63. In the pre-1974 era, the judgments of this Court did refer to the "rule of law" or "positive" aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. In S.G. Jaisinghani v. Union of India, (1967) 2 SCR 703, this Court held:

> "In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, 348 discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions

> should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey — "Law of the Constitution" — 10th Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. in United States v. Wunderlick [342 US 98],
>
> "9.....when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes [(1770) 4 Burr. 2528 at 2539],
>
> > ".....means sound discretion guided by law. It must be governed by rule, not by humour : it must not be arbitrary, vague, and fanciful.....".
>
> This was in the context of service rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India."

19. Thereafter, our learned brother referred to the authorities in ***State of Mysore v. S.R. Jayaram***[12], ***Indira Nehru Gandhi v. Raj Narain***[13], ***E.P. Royappa v. State of Tamil Nadu***[14], ***Maneka***

[12] (1968) 1 SCR 349
[13] (1975) Supp SCC 1

Gandhi v. Union of India[15], ***A.L. Kalra v. Project and Equipment Corporation of India Ltd.***[16], ***Ajay Hasia v. Khalid Mujib Sehravardi***[17], ***K.R. Lakshmanan v. State of T.N.***[18] and two other Constitution Bench judgments in ***Mithu v. State of Punjab***[19] and ***Sunil Batra v. Delhi Administration***[20] and, eventually, came to hold thus:-

> "It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary"."

And again:-

> ".....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as

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[14] (1974) 4 SCC 3
[15] (1978) 1 SCC 248
[16] (1984) 3 SCC 316
[17] (1981) 1 SCC 722
[18] (1996) 2 SCC 226
[19] (1983) 2 SCC 277
[20] (1978) 4 SCC 494

> pointed out by us above would apply to negate legislation as well under Article 14."

20. We respectfully concur with the said view.

21. In ***Yusuf Abdul Aziz*** (supra), the Court understood the protection of women as not discriminatory but as being an affirmative provision under clause (3) of Article 15 of the Constitution. We intend to take the path of expanded horizon as gender justice has been expanded by this Court.

22. We may now proceed to test the provision on the touchstone of the aforesaid principles. On a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted.

23. As we notice, the provision treats a married woman as a property of the husband. It is interesting to note that Section 497 IPC does not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of "adultery" is that a married person

commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Section 198 CrPC deals with a "person aggrieved". Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to

think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

24. Presently, we shall address the issue against the backdrop of Article 21 of the Constitution. For the said purpose, it is necessary to devote some space with regard to the dignity of women and the concept of gender equality.

25. In ***Arun Kumar Agrawal and another v. National Insurance Company Limited and others***[21], the issue related to the criteria for determination of compensation payable to the dependents of a woman who died in road accident. She did not

[21] (2010) 9 SCC 218

have a regular income. Singhvi, J. rejected the stand relating to determination of compensation by comparing a house wife to that of a house keeper or a servant or an employee who works for a fixed period. The learned Judge thought it unjust, unfair and inappropriate. In that context, the learned Judge stated:-

> "26. In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children."

26. Ganguly, J., in his concurring opinion, referred to the Australian Family Property Law and opined that the said law

had adopted a very gender sensitive approach. The learned Judge reproduced:-

> "the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent."

27. In ***State of Madhya Pradesh v. Madanlal***[22], the Court held:-

> "Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error."

28. In ***Pawan Kumar v. State of Himachal Pradesh***[23], the Court, dealing with the concept of equality and dignity of a woman, observed:-

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[22] (2015) 7 SCC 681
[23] (2017) 7 SCC 780

"47 ...in a civilized society eve-teasing is causing harassment to women in educational institutions, public places, parks, railways stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated. A woman has her own space as a man has. She enjoys as much equality under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed under Article 21 of the Constitution cannot be violated by indulging in obnoxious act of eve-teasing. It affects the fundamental concept of gender sensitivity and justice and the rights of a woman under Article 14 of the Constitution. That apart it creates an incurable dent in the right of a woman which she has under Article 15 of the Constitution. One is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject.

48. In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution. When the right is conferred under the Constitution, it has to be understood that there is no condescendation. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has

> to be regarded as the summum bonum of the constitutional principle in this context."

29. Lord Keith in ***R v. R***[24] declared:-

> "marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband."

30. Lord Denning[25] states:-

> "A wife is no longer her husband's chattel. She is beginning to be regarded by the laws as a partner in all affairs which are their common concern."

31. In ***Shamima Farooqui v. Shahid Khan***[26], the Court ruled:-

> "Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority."

And again:-

> "Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger - an outsider. That is the truth in essentiality."

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[24] [1991] 4 All ER 481 at p. 484
[25] The Due Process of Law (London, Butterworths, 1980, at page 212)
[26] (2015) 5 SCC 705

32. In ***Voluntary Health Association of Punjab v. Union of India***[27], one of us (Dipak Misra, J.), in his concurring opinion, stated that women have to be regarded as equal partners in the lives of men and it has to be borne in mind that they have equal role in the society, that is, in thinking, participating and leadership. The issue related to female foeticide and it was stated thus:-

> "21. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasised on the individualism of woman. John Milton treated her to be the best of all God's work. In this context, it will be appropriate to quote a few lines from *Democracy in America* by Alexis de Tocqueville:
>
> "If I were asked … to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: To the superiority of their women."
>
> 22. At this stage, I may with profit reproduce two paragraphs from *Ajit Savant*

[27] (2013) 4 SCC 1

Majagvai v. *State of Karnataka*[28]: (SCC pp. 113-14, paras 3 & 4)

"3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of nobility of language. Even when a member of her own species, Madame De Stael, remarked 'I am glad that I am not a man; for then I should have to marry a woman', there was wit in it. When Shakespeare wrote, 'Age cannot wither her; nor custom stale, her infinite variety', there again was wit. Notwithstanding that these writers have cried hoarse for respect for 'woman', notwithstanding that Schiller said 'Honour women! They entwine and weave heavenly roses in our earthly life' and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against 'woman' continues to rise and has, today undoubtedly, risen to alarming proportions.

4. *It is unfortunate that in an age where people are described as civilised, crime against 'female' is committed even when the child is in the womb as the 'female' foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her*

[28] (1997) 7 SCC 110

> *infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable*. To torment a wife can only be described as the most hated and derisive act of a human being."
>
> [Emphasis supplied]

And again:-

> "23. In *Madhu Kishwar* v. *State of Bihar*[29] this Court had stated that Indian women have suffered and are suffering discrimination in silence.
>
> "*28.* … Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination." (SCC p. 148, para 28)
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> 24. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility:
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> "Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death."
>
> 25. Long back, Charles Fourier had stated:
>
> "The extension of women's rights is the basic principle of all social progress."
>
> 26. Recapitulating from the past, I may refer to certain sayings in the *Smritis* which put women in an elevated position. This Court

[29] (1996) 5 SCC 125

in *Nikku Ram case*[4] had already reproduced the first line of the *shloka*. The second line of the same which is also significant is as follows:

"यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः"

Yatra tastu na pujyante sarvastatraphalah kriyah

A free translation of the aforesaid is reproduced below:

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

27. Another wise man of the past had his own way of putting it:

"भर्तृभ्रातृ पितृजाति श्रवश्रुश्वसुर देवरैः।
बन्धुभिश्च स्त्रियः पूज्यां भूषणाच्छादनाशनैः।।"

Bhartr bhratr pitrijnati
swasruswasuradevaraih
Bandhubhisca striyah pujyah
bhusnachhadanasnaih

A free translation of the aforesaid is as follows:

"The women are to be respected equally on a par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

28. Yet again, the sagacity got reflected in following lines:

"अतुलं तत्र तत्तेजः सर्वदेवशरीरजम्।
एकस्थं तदभून्नारी व्याप्तलोकत्रयं त्विषा।।"

Atulam yatra tattejah sarvadevasarirajam
Ekastham tadabhunnari vyaptalokatrayam
tvisa

A free translation of the aforesaid is reproduced below:

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."

29. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society:

"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom — to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."

33. In ***Charu Khurana and others v. Union of India and others***[30], speaking about the dignity of women, the Court held:-

"33. ... Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the

[30] (2015) 1 SCC 192

> mansion of dignity, for it is a highly cherished value. Clause (*j*) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens and see that they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement."

34. In ***Shakti Vahini v. Union of India and others***[31], the *lis* was in a different context. The Court reproduced a passage from Joseph J. Ellis which is also relevant for the present purpose. It reads:-

> "We don't live in a world in which there exists a single definition of honour anymore, and it's a fool that hangs onto the traditional standards and hopes that the world will come around him."

35. In the said case, a contention was advanced that the existence of a woman is entirely dependent on the male view of the reputation of the family, the community and the milieu. The Court, in that context, observed:-

> "5. …The collective behaves like a patriarchal monarch which treats the wives,

[31] (2018) 7 SCC 192

> sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour."

36. We have referred to the aforesaid as we are of the view that there cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance.

37. Having stated about the dignity of a woman, in the context of autonomy, desire, choice and identity, it is obligatory to refer to the recent larger Bench decision in ***K.S. Puttaswamy and another v. Union of India and others***[32] which, while laying down that privacy is a facet of Article 21 of the Constitution, lays immense stress on the dignity of an individual. In the said judgment, it has been held:-

> "108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee

[32] (2017) 10 SCC 1

against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

xxx xxxx xxx

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence…"

xxx xxx xxx

"298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a

private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination."

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"525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.359 The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that

> we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted."

38. In this context, we may profitably refer to ***National Legal Services Authority v. Union of India and others***[33] wherein A.K. Sikri, J., in his concurring opinion, emphasizing on the concept of dignity, has opined:-

> "The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity."

[33] (2014) 5 SCC 438

39. Very recently, in ***Common Cause (A Registered Society) v. Union of India and another***[34], one of us has stated:-

> "... Human dignity is beyond definition. It may at times defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism. But what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a "body"....."

And again:-

> "The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, ―Death plucks my ear and says, Live- I am coming‖ . That is the significance of living. But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently,

[34] (2018) 5 SCC 1

should he/she be —guinea pig for some kind of experiment? The answer has to be an emphatic —Not because such futile waiting mars the pristine concept of life, corrodes 139 the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy."

In Mehmood Nayyar Azam v. State of Chhattisgarh and others, a two-Judge Bench held thus:-

> "1..... Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence"

40. In the said judgment, A.K. Sikri, J. reproduced a passage from Professor Upendra Baxi's lecture in First Justice H.R. Khanna Memorial Lecture which reads as follows:-

> "I still need to say that the idea of dignity is a metaethical one, that is it marks and maps a difficult terrain of what it may mean to say being 'human' and remaining 'human', or put another way the relationship between 'self', 'others', and 'society'. In this formulation the word 'respect' is the keyword: dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints state, law, and regulations."

41. From the aforesaid analysis, it is discernible that the Court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution.

42. Another aspect needs to be addressed. The question we intend to pose is whether adultery should be treated as a criminal offence. Even assuming that the new definition of

adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage. There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, the Parliament has always made efforts to maintain the rights of women. For instance, Section 498-A IPC deals with husband or relative of husband of a woman subjecting her to cruelty. The Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere. The offences under the provisions of the said enactment are different from the provision that has been conceived of under Section 497 IPC or, for that matter, concerning bringing of adultery within the net of a criminal offence. There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social licence that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. We are not

commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, "a good legislation should be fit and equitable so that it can have a right to command obedience". Burke would like to put it in two compartments, namely, 'equity' and 'utility'. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life.

43. Dealing with the concept of crime, it has been stated in "Principles of Criminal Liability"[35] thus :-

> "1. *Definition of crime.*—There is no satisfactory definition of crime which will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not. Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made criminal by Parliament simply because it is criminal process, rather than civil, which

[35] *Halsbury's Laws of England,* 4th Edn., Vol. 11 p.11,

> offers the more effective means of controlling the conduct in question."

44. In *Kenny's Outlines of Criminal Law*, 19th Edn., 1966 by J.W. Cecil Turner, it has been stated that:-

> "There is indeed no fundamental or inherent difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals; and therefore although it is true to say of crime that is an offence against society, this does not distinguish crime from tort. The difference is one of degree only, and the early history of the common law shows how words which now suggest a real distinction began rather as symbols of emotion than as terms of scientific classification."

And again:-

> "So long as crimes continue (as would seem inevitable) to be created by government policy the nature of crime will elude true definition. Nevertheless it is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (*1*) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (*2*) that among the measures of prevention selected is the threat of punishment; (*3*) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so."

45. Stephen defines a "crime" thus:-

> "A crime is an unlawful act or default which is an offence against the public, rendering the person guilty of such act or default liable to legal punishment. The process by which such person is punished for the unlawful act or default is carried on in the name of the Crown; although any private person, in the absence of statutory provision to the contrary, may commence a criminal prosecution. Criminal proceedings were formerly called pleas of the Crown, because the King, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community. Wherefore he is, in all cases, the proper prosecutor for every public offence."

46. Blackstone, while discussing the general nature of crime, has defined crime thus:-

> "A crime, or misdemeanour, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours; which, properly speaking, are mere synonym terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanours" only."

47. In this regard, we may reproduce a couple of paragraphs from ***Central Inland Water Transport***

Corporation Limited and another v. Brojo Nath Ganguly[36]. They read as under:-

> "25. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have nourished, reached their peak and passed away. In the year 1625, Carew, C.J., while delivering the opinion of the House of Lords in Re the Earldom of Oxford in a dispute relating to the descent of that Earldom, said:
>
> > "... and yet time hath his revolution, there must be a period and an end of all temporal things, finis rerum, an end of names and dignities, and whatsoever is terrene...."
>
> The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from "The Rock" said:
>
> O perpetual revolution of configured stars,
> O perpetual recurrence of determined seasons,
> O world of spring and autumn, birth and dying;
> The endless cycle of idea and action,
> Endless invention, endless experiment."
>
> 26. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The

[36] (1986) 3 SCC 156

> early nineteenth century essayist and wit, Sydney Smith, said: "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." *The law must, therefore, in a changing society march in tune with the changed ideas and ideologies."*

48. Reproducing the same, the Court in ***Common Cause (A Registered Society)*** (supra), has observed :-

> "160. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism."

49. We have referred to the aforesaid theories and authorities to understand whether adultery that enters into the matrimonial realm should be treated as a criminal offence. There can be many a situation and we do not intend to get into the same. Suffice it to say, it is different from an offence committed under Section 498-A or any violation of the Protection of Women from Domestic Violence Act, 2005 or, for that matter, the protection conceived of under Section 125 of the Code of Criminal Procedure

or Sections 306 or 304B or 494 IPC. These offences are meant to sub-serve various other purposes relating to a matrimonial relationship and extinction of life of a married woman during subsistence of marriage. Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. Under the existing provision, the husband is treated as an aggrieved person and the wife is ignored as a victim. Presently, the provision is reflective of a tripartite labyrinth. A situation may be conceived of where equality of status and the right to file a case may be conferred on the wife. In either situation, the whole scenario is extremely private. It stands in contradistinction to the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a complaint for second marriage. Adultery stands on a different footing from the aforesaid offences. We are absolutely conscious that the Parliament has the law making power. We make it very clear that we are not making law or legislating but only stating that a particular act, i.e., adultery does not fit into the concept of a crime. We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to

be left as a ground for divorce. For any other purpose as the Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two. Let it be clearly stated, by no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship. In case of the said offences, there is no third party involved. It is the husband and his relatives. There has been correct imposition by law not to demand dowry or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so.

50. In this regard, we may also note how the extramarital relationship cannot be treated as an act for commission of an offence under Section 306 IPC. In ***Pinakin Mahipatray Rawal v. State of Gujarat***[37], the Court has held :-

> "*27.* Section 306 refers to abetment of suicide which says that if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment for a term

[37] (2013) 10 SCC 48

> which may extend to 10 years and shall also be liable to fine. The action for committing suicide is also on account of mental disturbance caused by mental and physical cruelty. To constitute an offence under Section 306, the prosecution has to establish that a person has committed suicide and the suicide was abetted by the accused. *The prosecution has to establish beyond reasonable doubt that the deceased committed suicide and the accused abetted the commission of suicide. But for the alleged extra-marital relationship, which if proved, could be illegal and immoral, nothing has been brought out by the prosecution to show that the accused had provoked, incited or induced the wife to commit suicide."*
>
> [Emphasis added]

51. In the context of Section 498-A, the Court, in ***Ghusabhai Raisangbhai Chorasiya v. State of Gujarat***[38], has opined that even if the illicit relationship is proven, unless some other acceptable evidence is brought on record to establish such high degree of mental cruelty, the Explanation (a) to Section 498-A IPC, which includes cruelty to drive the woman to commit suicide, would not be attracted. The relevant passage from the said authority is extracted below :-

> "*21.* ...True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that cruelty, as envisaged under the first limb of Section 498-A IPC would not get attracted. It would be difficult to hold that the mental cruelty

[38] (2015) 11 SCC 753

> was of such a degree that it would drive the wife to commit suicide. Mere extra-marital relationship, even if proved, would be illegal and immoral, as has been said in *Pinakin Mahipatray Rawal*, but it would take a different character if the prosecution brings some evidence on record to show that the accused had conducted in such a manner to drive the wife to commit suicide. In the instant case, the accused may have been involved in an illicit relationship with Appellant 4, but in the absence of some other acceptable evidence on record that can establish such high degree of mental cruelty, the Explanation to Section 498-A IPC which includes cruelty to drive a woman to commit suicide, would not be attracted."
>
> [Emphasis added]

52. The purpose of referring to the aforesaid authorities is to highlight how adultery has not been granted separate exclusive space in the context of Sections 306 and 498-A IPC.

53. In case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite.

54. We may also usefully note here that adultery as a crime is no more prevalent in People's Republic of China, Japan,

Australia, Brazil and many western European countries. The diversity of culture in those countries can be judicially taken note of. Non-criminalisation of adultery, apart from what we have stated hereinabove, can be proved from certain other facets. When the parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said 'act' should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a

crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness.

55. In this regard, another aspect deserves to be noted. The jurisprudence in England, which to a large extent, is adopted by this country has never regarded adultery as a crime except for a period of ten years in the reign of Puritanical Oliver Cromwell. As we see the international perspective, most of the countries have abolished adultery as a crime. We have already ascribed when such an act is treated as a crime and how it faces the frown of Articles 14 and 21 of the Constitution. Thinking of adultery from the point of view of criminality would be a retrograde step. This Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.

56. As we have held that Section 497 IPC is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare Section 198 CrPC which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path.

57. In view of the foregoing analysis, the decisions in ***Sowmithri Vishnu*** (supra) and ***V. Revathi*** (supra) stand overruled and any other judgment following precedents also stands overruled.

58. Consequently, the writ petition is allowed to the extent indicated hereinbefore.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi;
September 27, 2018

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

JOSEPH SHINE … PETITIONER

VERSUS

UNION OF INDIA … RESPONDENT

J U D G M E N T

R.F. Nariman, J. (Concurring)

1. What is before us in this writ petition is the constitutional validity of an archaic provision of the Indian Penal Code ("IPC"), namely, Section 497, which makes adultery a crime. Section 497 appears in Chapter XX of the IPC, which deals with offences relating to marriage. Section 497 reads as follows:-

> "**497. 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."

The offence of bigamy, which is contained in Section 494 in the same Chapter, is punishable with a longer jail term which may extend to 7 years, but in this case, the husband or the wife, as the case may be, is liable to be prosecuted and convicted. Section 494 reads as follows:

> "**494. Marrying again during lifetime of husband or wife.**—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> *Exception*.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,
>
> nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such

> marriage is contracted of the real state of facts so far as the same are within his or her knowledge."

It will be noticed that the crime of adultery punishes only a third-party male offender as against the crime of bigamy, which punishes the bigamist, be it a man or a woman. What is therefore punished as 'adultery' is not 'adultery' *per se* but the proprietary interest of a married man in his wife.

Almost all ancient religions/civilizations punished the sin of adultery. In one of the oldest, namely, in Hammurabi's Code, death by drowning was prescribed for the sin of adultery, be it either by the husband or the wife. In Roman law, it was not a crime against the wife for a husband to have sex with a slave or an unmarried woman. The Roman *lex Iulia de adulteriis coercendis* of 17 B.C., properly so named after Emperor Augustus' daughter, Julia, punished Julia for adultery with banishment. Consequently, in the case of adulterers generally, both guilty parties were sent to be punished on different islands, and part of their property was confiscated.

2. In Judaism, which again is an ancient religion, the Ten Commandments delivered by the Lord to Moses on Mount Sinai contains the Seventh Commandment – "Thou shalt not commit adultery" – set out in the book of Exodus in the Old Testament.[1] Equally, since the wages of sin is death, the book of Leviticus in the Old Testament prescribes the death penalty for the adulterer as well as the adulteress.[2]

3. In Christianity, we find adultery being condemned as immoral and a sin for both men and women, as is evidenced by St. Paul's letter to the Corinthians.[3] Jesus himself stated that a man incurs sin the moment he looks at a woman with lustful intent.[4] However, when it came to punishing a woman for adultery, by stoning to death in accordance with the ancient Jewish law, Jesus uttered the famous words, "let him who has not sinned, cast the first stone."[5]

[1] *Exodus* 20:14 (King James Version).
[2] *Leviticus* 20:10 (King James Version).
[3] 1 *Corinthians* 6:9-10 (King James Version).
[4] *Matthew* 5:27-28 (King James Version).
[5] *John*, 8:7 (English Standard Version).

4. In this country as well, in the Manusmriti, Chapters 4.134[6] and 8.352[7] prescribes punishment for those who are addicted to intercourse with wives of other men by punishments which cause terror, followed by banishment. The Dharmasutras speak with different voices. In the Apastamba Dharmasutra, adultery is punishable as a crime, the punishment depending upon the class or caste of the man and the woman.[8] However, in the Gautama Dharmasutra, if a man commits adultery, he should observe a life of chastity for two years; and if he does so with the wife of a vedic scholar, for three years.[9]

5. In Islam, in An-Nur, namely, Chapter 24 of the Qur'an, Verses 2 and 6 to 9 read as follows:

> "2. The adulteress and the adulterer, flog each of them (with) a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of believers witness their chastisement."[10]
>
> xxx xxx xxx

[6] THE LAWS OF MANU 150 (Translation by G. Buhler, Clarendon Press, UK, 1886).
[7] *Id*., 315.
[8] DHARMASUTRAS – THE LAW CODES OF APASTAMBA, GAUTAMA, BAUDHAYANA, AND VASISTHA 70-71 (Translation by Patrick Olivelle, Oxford University Press 1999).
[9] *Id*., 116-117.
[10] THE KORAN (AL–QUR'AN): ARABIC-ENGLISH BILINGUAL EDITION WITH AN INTRODUCTION BY MOHAMED A. 'ARAFA 363 (Maulana Muhammad Ali Translation, TellerBooks, 2018).

> "6. And those who accuse their wives and have no witnesses except themselves, let one of them testify four times, bearing Allah to witness, that he is of those who speak the truth.
>
> 7. And the fifth (time) that the curse of Allah be on him, if he is of those who lie.
>
> 8. And it shall avert the chastisement from her, if she testify four times, bearing Allah to witness, that he is of those who lie.
>
> 9. And the fifth (time) that the wrath of Allah to be on her, if he is of those who speak the truth."[11]

What is interesting to note is that if there are no witnesses other than the husband or the wife, and the husband testifies four times that his wife has committed adultery, which is met by the wife testifying four times that she has not, then earthly punishment is averted. The wrath of Allah alone will be on the head of he or she who has given false testimony – which wrath will be felt only in life after death in the next world.

6. In sixth-century Anglo-Saxon England, the law created "elaborate tables of composition" which the offended husband could accept in lieu of blood vengeance. These tables were schemes for payment of compensation depending upon the

[11] *Id.*

degree of harm caused to the cuckolded husband. However, as Christianity spread in England, adultery became morally wrong and therefore, a sin, as well as a wrong against the husband. Post 1066, the Normans who took over, viewed adultery not as a crime against the State, but rather as an ecclesiastical offence dealt with by the Church. The common law of England prescribed an action in tort for loss of consortium based on the property interest a husband had in his wife. Thus, the action for conversation, which is compensation or damages, usually represented a first step in obtaining divorce in medieval England. In fact, adultery was the only ground for divorce in seventeenth-century England, which had to be granted only by Parliament. Interestingly enough, it was only after King Charles I was beheaded in 1649, that adultery became a capital offence in Cromwell's Puritanical England in the year 1650, which was nullified as soon as King Charles II came back in what was known as the 'restoration of the monarchy'. It will be seen therefore, that in England, except for an eleven-year period when England was ruled by the Puritans, adultery was never considered to be a criminal offence. Adultery was only a tort for

which damages were payable to the husband, given his proprietary interest in his wife.[12] This tort is adverted to by a 1904 judgment of the Supreme Court of the United States in **Charles A. Tinker v. Frederick L. Colwell**, 193 US 473 (1904), as follows:

> "…… We think the authorities show the husband had certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful……
>
> The assault vi et armis is a fiction of law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honour, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children."[13]
>
> "We think that it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the

[12] Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex between Domestic Relations Attorneys and Their Clients*, 23 HARVARD WOMEN'S LAW JOURNAL 1, 21-22 (2000) ["Linda Fitts Mischler"].

[13] Tinker v. Colwell, 193 U.S. 473, 481 (1904).

> idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, and so the act of the defendant is an injury to the person and also to the property rights of the husband."[14]

To similar effect is the judgment in **Pritchard v. Pritchard and Sims**, [1966] 3 All E.R. 601, which reconfirmed the origins of adultery or criminal conversation as under:

> "In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, there existed side by side under the common law three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her. …… In the action for adultery known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety interest in the person of his wife, her services and earnings, and in the property which would have been hers had she been feme sole."[15]

[14] *Id.,* 485.
[15] [1966] 3 All E.R. 601, 607.

7. In England, Section LIX of the Divorce and Matrimonial Causes Act, 1857 abolished the common law action for criminal conversation while retaining, by Section XXXIII of the same Act, the power to award the husband damages for adultery committed by the wife. This position continued right till 1923, when the Matrimonial Causes Act, 1923 made adultery a ground for divorce available to both spouses instead of only the husband. The right of a husband to claim damages for adultery was abolished very recently by the Law Reforms (Miscellaneous Provisions) Act, 1970.[16]

8. In the United States, however, Puritans who went to make a living in the American colonies, carried with them Cromwell's criminal law, thereby making adultery a capital offence. Strangely enough, this still continues in some of the States in the United States. The American Law Institute, however, has dropped the crime of adultery from its Model Penal Code as adultery statutes are in general vague, archaic, and sexist. None of the old reasons in support of such statutes, namely,

[16] Section 4, Law Reforms (Miscellaneous Provisions) Act, 1970.

the controlling of disease, the preventing of illegitimacy, and preserving the traditional family continue to exist as of today. It was also found that criminal adultery statutes were rarely enforced in the United States and were, therefore, referred to as "dead letter statutes". This, plus the potential abuses from such statutes continuing on the statute book, such as extortion, blackmail, coercion etc. were stated to be reasons for removing adultery as a crime in the Model Penal Code.[17]

9. When we come to India, Lord Macaulay, in his draft Penal Code, which was submitted to the Law Commissioners, refused to make adultery a penal offence. He reasoned as follows:

> "The following positions we consider as fully established: first, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the Courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in cases of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they

[17] Linda Fitts Mischler, *supra* n. 12, 23-25.

consider their wives as useful members of their small household, that they generally complain not of the wound given to their affections, not of the stain on their honor, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English Courts is, it seems, the real gist of most proceedings for adultery in the Mofussil. The essence of the injury is considered by the sufferer as lying in the “per quod servitium amisit.” Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

These things being established it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes- those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.”

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“These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a Penal code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that because an act is not punished at all it follows that the legislature

considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross in gratitude and insolence, deserves more severe reprehension than the man who aims a blow in a passion, or breaks a window in a frolic. Yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who snatches and devours the rice. Yet we punish the latter for theft, and we do not punish the former for hard-heartedness."

xxx xxx xxx

"There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and

> respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial."[18]

10. However, when the Court Commissioners reviewed the Penal Code, they felt that it was important that adultery be made an offence. The reasons for so doing are set out as follows:

> "**353.** Having given mature consideration to the subject, we have, after some hesitation, come to the conclusion that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the criminal courts preponderate. We conceive that Colonel Sleeman is probably right in regarding the difficulty of proving the offence according to the requirement of the Mohammedan law of evidence, which demands an amount of positive proof that is scarcely ever to be had in such a case, as having some effect in deterring the Natives from prosecuting adulterers in our courts, although the

[18] A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS, AND PUBLISHED BY COMMAND OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL 91-93 (G.H. Huttmann, The Bengal Military Orphan Press, 1837).

Regulations allow of a conviction upon strong presumption arising from circumstantial evidence. This difficulty, if it has had the effect supposed, will be removed, should the Code be adopted. Colonel Sleeman's representation of the actual consequences of the present system, which, while it recognizes the offence, renders it, in the opinion of the Natives, almost impossible to bring an offender to justice, it will be observed, coincides with and confirms practically Mr. Livingstone's view of the result to be expected when the law refuses to punish this offence. The injured party will do it for himself; great crimes, assassinations, poisonings, will be the consequence. The law here does not refuse, but it fails to punish the offence, says Colonel Sleeman, and poisonings are the consequence.

354. Colonel Sleeman thinks that the Commissioners have wrongly assumed that it is the lenity of the existing law that it is complained of by the Natives, and believes that they would be satisfied with a less punishment for the offence than the present law allows; viz. imprisonment for seven years, if it were certain to follow the offender. He proposes that the punishment of a man "convicted of seducing the wife of another" shall be imprisonment which may extend to seven years, or a fine payable to the husband or both imprisonment and fine. The punishment of a married woman "convicted of adultery" he would limit to imprisonment for two years. We are not aware whether or not he intends the difference in the terms used to be significant of a difference in the nature of the proof against the man and the woman respectively.

355. While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a

married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of a women of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial together, and empower the Court, in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code, the woman forfeits her "matrimonial gains", but is not liable to other punishment.

356. We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition.

357. The punishment prescribed by the Code of Louisiana is imprisonment not more than six months, or fine not exceeding 2,000 dollars, or both. By the French Code, the maximum term of imprisonment is two years, with fine in addition, which may amount to 2,000 francs.

358. If the offence of adultery is admitted into the Penal Code, there should be a provision in the Code of Procedure to restrict the right of prosecuting to the injured husband, agreeably to Section 2, Act II of 1845."[19]

(emphasis supplied)

[19] COPIES OF THE SPECIAL REPORTS OF THE INDIAN LAW COMMISSIONERS 76 (James C. Melvill, East India House, 1847).

These are some of the reasons that led to the enactment of Section 497, IPC.

11. At this stage, it is important to note that by Section 199 of the Code of Criminal Procedure, 1898, it was only the husband who was to be deemed to be aggrieved by an offence punishable under Section 497, IPC. Thus, Section 199 stated:

> "**199. Prosecution for adultery or enticing a married woman.—** No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code (XLV of 1860), except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed."

12. Even when this Code was replaced by the Code of Criminal Procedure ("CrPC"), 1973, Section 198 of the CrPC, 1973 continued the same provision with a proviso that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf. The said Section reads as follows:

"**198. Prosecution for offences against marriage.—** (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that—

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

> (6) No Court shall take cognizance of an offence under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence.
>
> (7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence."

At this stage, it is important to advert to some of the judgments of the High Courts and our Court. In **Yusuf Abdul Aziz v. State**, 1952 ILR Bom 449, a Division Bench of the Bombay High Court, consisting of M.C. Chagla, C.J. and P.B. Gajendragadkar, J. held that Section 497 of the IPC did not contravene Articles 14 and 15 of the Constitution. However, in an instructive passage, the learned Chief Justice stated:

> "…… Mr. Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that this offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, we hope, when women were looked upon as property by their husbands. But that is an argument more in favour of doing away with Section 497 altogether."[20]

[20] 1952 ILR Bombay 449, 454.

An appeal to this Court in **Yusuf Abdul Aziz v. State of Bombay**, 1954 SCR 930, ("**Yusuf Abdul Aziz**"), met with the same result.

This Court, through Vivian Bose, J., held that the last part of Section 497, which states that the wife shall not be punishable as an abettor of the offence of adultery, does not offend Articles 14 and 15 in view of the saving provision contained in Article 15(3), being a special provision made in favour of women.

This is an instance of Homer nodding. Apart from a limited *ratio* based upon a limited argument, the judgment applies a constitutional provision which is obviously inapplicable as Article 15(3), which states that, "nothing in this article shall prevent the State from making a special provision for women", would refer to the "State" as either Parliament or the State Legislatures or the Executive Government of the Centre or the States, set up under the Constitution after it has come into force. Section 497 is, in constitutional language, an "existing law" which continues, by virtue of Article 372(1), to apply, and

could not, therefore, be said to be a law made by the "State", meaning any of the entities referred to above.

13. We have noticed a judgment of the Division Bench of the Bombay High Court in **Dattatraya Motiram More v. State of Bombay**, AIR 1953 Bom 311, in which the Division Bench turned down a submission that Article 15(3) is confined to laws made after the Constitution of India comes into force and would also apply to existing law thus:

> "**8.** An argument was advanced by Mr. Patel that Art. 15(3) only applies to future legislation and that as far as all laws in force before the commencement of the Constitution were concerned, those laws can only be tested by Art. 15(1) and not by Art. 15(1) read with Art. 15(3). Mr. Patel contends that Art. 15(3) permits the State in future to make a special provision for women and children, but to the extent the laws in force are concerned Art. 15(1) applies, and if the laws in force are inconsistent with Art. 15(1), those laws must be held to be void. Turning to Art. 13(1), it provides:
>
> > "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."
>
> Therefore, before a law in force can be declared to be void it must be found to be inconsistent with one of the provisions of Part III which deals with

> Fundamental Rights, and the fundamental right which is secured to the citizen under Art. 15 is not the unlimited right under Art. 15(1) but the right under Art. 15(1) qualified by Art. 15(3). It is impossible to argue that the Constitution did not permit laws to have special provision for women if the laws were passed before the Constitution came into force, but permitted the Legislature to pass laws in favour of women after the Constitution was enacted. If a law discriminating in favour of women is opposed to the fundamental rights of citizens, there is no reason why such law should continue to remain on the statute book. The whole scheme of Art. 13 is to make laws, which are inconsistent with Part III, void, not only if they were in force before the commencement of the Constitution, but also if they were enacted after the Constitution came into force. Mr. Patel relies on the various provisos to Art. 19 and he says that in all those provisos special mention is made to existing laws and also to the State making laws in future. Now, the scheme of Art. 19 is different from the scheme of Art. 15. Provisos to Art. 19 in terms deal with law whether existing or to be made in future by the State, whereas Art. 15(3) does not merely deal with laws but deals generally with any special provision for women and children, and therefore it was not necessary in Art. 15(3) to mention both existing laws and laws to be made in future. But the exception made to Art. 15(1) by Art. 15(3) is an exception which applies both to existing laws and to laws which the State may make in future."

14. We are of the view that this paragraph does not represent the law correctly. In fact, Article 19(2)-(6) clearly refers to "existing law" as being separate from "the State making any

law", indicating that the State making any law would be laws made after the Constitution comes into force as opposed to "existing law", which are pre-constitutional laws enacted before the Constitution came into force, as is clear from the definition of "existing law" contained in Article 366(10), which reads as under:

> "**366. Definitions.—**In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—
>
> xxx xxx xxx
>
> (10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;"

15. Article 15(3) refers to the State making laws which therefore, obviously cannot include existing law. Article 15(3) is in this respect similar to Article 16(4), which reads as follows:

> "**16. Equality of opportunity in matters of public employment.—**
>
> xxx xxx xxx

> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

The vital difference in language between Articles 15(3) and 16(4) on the one hand, and Article 19(2)-(6) on the other, must thus be given effect.

16. Coming back to **Yusuf Abdul Aziz** (supra), the difference in language between Article 15(3) and Article 19(2)-(6) was not noticed. The limited *ratio* of this judgment merely refers to the last sentence in Section 497 which it upholds. Its *ratio* does not extend to upholding the entirety of the provision or referring to any of the arguments made before us for striking down the provision as a whole.

17. We then come to **Sowmithri Vishnu v. Union of India and Anr.**, (1985) Supp SCC 137, ("**Sowmithri Vishnu**"). In this case, an Article 32 petition challenged the constitutional validity of Section 497 of the Penal Code on three grounds which are set out in paragraph 6 of the judgment. Significantly, the

learned counsel in that case argued that Section 497 is a flagrant instance of ‘gender discrimination’, ‘legislative despotism’, and ‘male chauvinism’. This Court repelled these arguments stating that they had a strong emotive appeal but no valid legal basis to rest upon. The first argument, namely, an argument of discrimination was repelled by stating that the ambit of the offence of adultery should make the woman punishable as well. This was repelled by saying that such arguments go to the policy of the law and not its constitutionality. This was on the basis that it is commonly accepted that it is the man who is the seducer and not the woman. Even in 1985, the Court accepted that this archaic position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 be amended appropriately so as to take note of the transformation that society has undergone.

The Court then referred to the 42nd Law Commission Report, 1971, which recommended the retention of Section 497, with the modification that, even the wife, who has sexual relations

with a person other than her husband, should be made punishable for adultery. The dissenting note of Mrs. Anna Chandi was also taken note of, where the dissenter stated that this is the right time to consider the question whether the offence of adultery, as envisaged in Section 497, is in tune with our present-day notions of women's status in marriage.

The second ground was repelled stating that a woman is the victim of the crime, and as the offence of adultery is considered as an offence against the sanctity of the matrimonial home, only those men who defile that sanctity are brought within the net of the law. Therefore, it is of no moment that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.

The third ground, namely, that Section 497 is underinclusive inasmuch as a husband who has sexual relations with an unmarried woman is not within the net of the law, was repelled stating that an unfaithful husband may invite a civil action by the wife for separation, and that the Legislature is entitled to deal with the evil where it is felt and seen most.

A challenge on the ground of Article 21 was also repelled, stating that the fact that a provision for hearing the wife is not contained in Section 497 cannot render that Section unconstitutional. This Court then referred to the judgment in **Yusuf Abdul Aziz** (supra) and stated that since it was a 1954 decision, and 30 years had passed since then, this Court was examining the position afresh. The Court ended with the sermon, "stability of marriages is not an ideal to be scorned."

18. In **V. Revathi v. Union of India and Ors.**, (1988) 2 SCC 72, this Court, after referring to **Sowmithri Vishnu** (supra), repelled a similar challenge to Section 198 of the CrPC, 1973. After referring to **Sowmithri Vishnu** (supra), since Section 497, IPC and Section 198, CrPC go hand in hand and constitute a 'legislative packet' to deal with the offence of adultery committed by an outsider, the challenge to the said Section failed.

19. International trends worldwide also indicate that very few nations continue to treat adultery as a crime, though most

nations retain adultery for the purposes of divorce laws. Thus, adultery continues to be a criminal offence in Afghanistan, Bangladesh, Indonesia, Iran, Maldives, Nepal, Pakistan, Philippines, United Arab Emirates, some states of the United States of America, Algeria, Democratic Republic of Congo, Egypt, Morocco, and some parts of Nigeria.

On the other hand, a number of jurisdictions have done away with adultery as a crime. The People's Republic of China, Japan, Brazil, New Zealand, Australia, Scotland, the Netherlands, Denmark, France, Germany, Austria, the Republic of Ireland, Barbados, Bermuda, Jamaica, Trinidad and Tobago, Seychelles etc. are some of the jurisdictions in which it has been done away with. In South Korea[21] and Guatemala,[22] provisions similar to Section 497 have been struck down by the constitutional courts of those nations.

[21] 2009 Hun-Ba 17, (26.02.2015) [Constitutional Court of South Korea].
[22] *Expediente* 936-95, (07.03.1996), *República de Guatemala Corte de Constitucionalidad* [Constitutional Court of Guatemala].

20. The Supreme Court of Namibia, in an instructive judgment,[23] went into whether the criminal offence of adultery would protect marriages and reduce the incidence of adultery. It said:

> "**[45]** But does the action protect marriages from adultery? For the reasons articulated by both the SCA and the Constitutional Court, I do not consider that the action can protect marriage as it does not strengthen a weakening marriage or breathe life into one which is in any event disintegrating. [*DE* v. *RH*, 2015 (5) SA 83 (CC) (Constitutional Court of South Africa) para 49]. The reasoning set out by the SCA is salutary and bears repetition:
>
> > 'But the question is: if the protection of marriage is one of its main goals, is the action successful in achieving that goal? The question becomes more focused when the spotlight is directed at the following considerations:
> >
> > > (a) First of all, as was pointed out by the German Bundesgericht in the passage from the judgment (JZ 1973, 668) from which I have quoted earlier, although marriage is —
> > >
> > > > 'a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence . . . consists in the

[23] James Sibongo v. Lister Lutombi Chaka and Anr. (Case No. SA77-14) (19.08.2016) [Supreme Court of Namibia].

> readiness, founded in morals, of the parties to the marriage to create and to maintain it.'

If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that.

(b) Grave doubts are expressed by many about the deterrent effect of the action. In most other countries it was concluded that the action (no longer) has any deterrent effect and I have no reason to think that the position in our society is all that different. Perhaps one reason is that adultery occurs in different circumstances. Every so often it happens without any premeditation, when deterrence hardly plays a role. At the other end of the scale, the adultery is sometimes carefully planned and the participants are confident that it will not be discovered. Moreover, romantic involvement between one of the spouses and a third party can be as devastating to the marital relationship as (or even more so than) sexual intercourse.

(c) If deterrence is the main purpose, one would have thought that this could better be achieved by retaining the imposition of criminal sanctions or by the grant of an interdict in favour of the innocent spouse against both the guilty spouse and the third party to prevent future acts of adultery. But, as we know, the crime of adultery had become abrogated through disuse exactly 100

years ago while an interdict against adultery has never been granted by our courts (see, for example, *Wassenaar* v *Jameson, supra* at 352H – 353H). Some of the reasons given in *Wassenaar* as to why an interdict would not be appropriate are quite enlightening and would apply equally to the appropriateness of a claim for damages. These include, firstly, that an interdict against the guilty spouse is not possible because he or she commits no delict. Secondly, that as against a third party —

> 'it interferes with, and restricts the rights and freedom that the third party ordinarily has of using and disposing of his body as he chooses; . . . it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses'. [At 353E.]

(d) In addition the deterrence argument seems to depart from the assumption that adultery is the cause of the breakdown of a marriage, while it is now widely recognised that causes for the breakdown in marriages are far more complex. Quite frequently adultery is found to be the result and not the cause of an unhappy marital relationship. Conversely stated, a marriage in which the spouses are living in harmony is

> hardly likely to be broken up by a third party.'"[24]

21. Coming back to Section 497, it is clear that in order to constitute the offence of adultery, the following must be established:

(i) Sexual intercourse between a married woman and a man who is not her husband;

(ii) The man who has sexual intercourse with the married woman must know or has reason to believe that she is the wife of another man;

(iii) Such sexual intercourse must take place with her consent, i.e., it must not amount to rape;

(iv) Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

22. What is apparent on a cursory reading of these ingredients is that a married man, who has sexual intercourse

[24] *Id*., 17-19.

with an unmarried woman or a widow, does not commit the offence of adultery. Also, if a man has sexual intercourse with a married woman with the consent or connivance of her husband, he does not commit the offence of adultery. The consent of the woman committing adultery is material only for showing that the offence is not another offence, namely, rape.

23. The background in which this provision was enacted now needs to be stated. In 1860, when the Penal Code was enacted, the vast majority of the population in this country, namely, Hindus, had no law of divorce as marriage was considered to be a sacrament. Equally, a Hindu man could marry any number of women until 1955. It is, therefore, not far to see as to why a married man having sexual intercourse with an unmarried woman was not the subject matter of the offence. Since adultery did not exist as a ground in divorce law, there being no divorce law, and since a man could marry any number of wives among Hindus, it was clear that there was no sense in punishing a married man in having sex with an unmarried woman as he could easily marry her at a subsequent point in

time. Two of the fundamental props or bases of this archaic law have since gone. Post 1955-1956, with the advent of the “Hindu Code”, so to speak, a Hindu man can marry only one wife; and adultery has been made a ground for divorce in Hindu Law.

Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman’s husband is obtained – the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the “licensor”, namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has ‘seduced’ her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today’s constitutional morality, in that the very object with

which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt, as has been held by this Court in **Shayara Bano v. Union of India and Ors.**, (2017) 9 SCC 1, as follows:

> "**101.** …… Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

24. It is clear, therefore, that the ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage, is not in fact the object of Section 497 at all, as has been seen hereinabove. The sanctity of marriage can be utterly destroyed by a married man having sexual

intercourse with an unmarried woman or a widow, as has been seen hereinabove. Also, if the husband consents or connives at such sexual intercourse, the offence is not committed, thereby showing that it is not sanctity of marriage which is sought to be protected and preserved, but a proprietary right of a husband. Secondly, no deterrent effect has been shown to exist, or ever to have existed, which may be a legitimate consideration for a State enacting criminal law. Also, manifest arbitrariness is writ large even in cases where the offender happens to be a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she has sex with another man, the other man is immediately guilty of the offence.

25. The aforesaid provision is also discriminatory and therefore, violative of Article 14 and Article 15(1). As has been held by us hereinabove, in treating a woman as chattel for the purposes of this provision, it is clear that such provision

discriminates against women on grounds of sex only, and must be struck down on this ground as well. Section 198, CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 has also to be held constitutionally infirm.

26. We have, in our recent judgment in **Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.**, (2017) 10 SCC 1, ("**Puttaswamy**"), held:

> "**108.** Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom

(Article 19) and in the right to life and personal liberty (Article 21)."

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"**298.** Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these

guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and

freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

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"**482.** Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in *Jolly George Varghese* v. *Bank of Cochin* [*Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360], at para 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in *Sunil Batra* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155], at paras 192, 197-B, 234 and 241 and *Prem Shankar Shukla* v. *Delhi Admn.* [*Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815], at paras 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in

personal liberty, but also in the dignity of the individual."

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"**525.** But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [In 1834, Jacques-Charles DuPont de l'Eure associated the three terms liberty, equality and fraternity together in the *Revue Républicaine*, which he edited, as follows: "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity." Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter. For example, see *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 at para 21, *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 at paras 6, 7 and 8, *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 at para 10, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, (2010) 3 SCC 786 at para 37, *Shabnam* v. *Union of India*, (2015) 6 SCC 702 at paras 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761 at para 37.] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can

> only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted."

The dignity of the individual, which is spoken of in the Preamble to the Constitution of India, is a facet of Article 21 of the Constitution. A statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine and must be struck down on this ground also.

27. When we come to the decision of this Court in **Yusuf Abdul Aziz** (supra), it is clear that this judgment also does not, in any manner, commend itself or keep in tune with modern constitutional doctrine. In any case, as has been held above, its *ratio* is an extremely limited one as it upheld a wife not being punishable as an abettor which is contained in Section 497, IPC. The focus on whether the provision as a whole would be constitutionally infirm was not there in the aforesaid judgment.

At this stage, it is necessary to advert to Chief Justice Chagla's foresight in the Bombay High Court judgment which landed up

in appeal before this Court in **Yusuf Abdul Aziz's** (supra). Chief Justice Chagla had stated that since the underlying idea of Section 497 is that wives are properties of their husbands, Section 497 should not find a place in any modern Code of law, and is an argument in favour of doing away with Section 497 altogether. The day has long since arrived when the Section does, in fact, need to be done away with altogether, and is being done away with altogether.

28. In **Sowmithri Vishnu** (supra), this Court upheld Section 497 while repelling three arguments against its continuance, as has been noticed hereinabove. This judgment also must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14, 15, and 21. Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today. The moving times have not left the law behind as we have just seen, and so far as engaging the attention of law makers when reform of penal law is undertaken, we may only hasten to add that even when the

CrPC was fully replaced in 1973, Section 198 continued to be on the statute book. Even as of today, Section 497 IPC continues to be on the statute book. When these sections are wholly outdated and have outlived their purpose, not only does the maxim of Roman law, *cessante ratione legis, cessat ipsa lex,* apply to interdict such law, but when such law falls foul of constitutional guarantees, it is this Court's solemn duty not to wait for legislation but to strike down such law. As recently as in **Shayara Bano** (supra), it is only the minority view of Khehar, C.J.I. and S. Abdul Nazeer, J., that one must wait for the law to change legislatively by way of social reform. The majority view was the exact opposite, which is why Triple Talaq was found constitutionally infirm and struck down by the majority. Also, we are of the view that the statement in this judgment that stability of marriages is not an ideal to be scorned, can scarcely be applied to this provision, as we have seen that marital stability is not the object for which this provision was enacted. On all these counts, therefore, we overrule the judgment in **Sowmithri Vishnu** (supra). Equally, the judgment in **V. Revathi** (supra), which upheld the constitutional validity of Section 198 must, for

similar reasons, be held to be no longer good law. We, therefore, declare that Section 497 of the Indian Penal Code, 1860 and Section 198 of the Code of Criminal Procedure, 1973 are violative of Articles 14, 15(1), and 21 of the Constitution of India and are, therefore, struck down as being invalid.

……..J.
(R.F. Nariman)

New Delhi;
September 27, 2018.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO 194 OF 2017

JOSEPH SHINE **...Petitioner**

VERSUS

UNION OF INDIA **...Respondent**

J U D G M E N T

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Dr Dhananjaya Y Chandrachud, J

A Gender: the discursive struggle

1 Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the ideals of equality, dignity and freedom triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality. The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices.

2 Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a 'discourse' about social structuring.[1] However, the discourse of law is not homogenous.[2] In the context particularly of Section 497, it regards individuals as 'gendered citizens'.[3] In doing so, the law creates and ascribes gender roles based on existing societal

[1] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 40
[2] Ibid at page 41
[3] Ibid

stereotypes. An understanding of law as a 'discourse' would lead to the recognition of the role of law in creating 'gendered identities'.[4]

3 Over the years, legal reform has had a significant role in altering the position of women in societal orderings. This is seen in matters concerning inheritance and in the protection against domestic violence. However, in some cases, the law operates to perpetuate an unequal world for women. Thus, depending on the manner in which it is used, law can act as an agent of social change as well as social stagnation. Scholar Patricia Williams, who has done considerable work on the critical race theory, is sanguine about the possibility of law engendering progressive social transformation:

> "It is my deep belief that theoretical legal understanding and social transformation need not be oxymoronic"[5]

The Constitution, both in text and interpretation, has played a significant role in the evolution of law from being an instrument of oppression to becoming one of liberation. Used in a liberal perspective, the law can enhance democratic values. As an instrument which preserves the status quo on the other hand, the law preserves stereotypes and legitimises unequal relationships based on pre-existing societal discrimination. Constantly evolving, law operates as an important "site for discursive struggle", where ideals compete and new visions are shaped.[6]. In regarding law as a "site of discursive struggle", it becomes

[4] Ibid
[5] Patricia Williams, The Alchemy of Race and Rights, Cambridge: Harvard University Press (1991)
[6] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 41

imperative to examine the institutions and structures within which legal discourse operates:[7]

> "The idea of neutral dialogue is an idea which denies history, denies structure, denies the positioning of subjects."[8]

In adjudicating on the rights of women, the Court must not lose sight of the institutions and values which have forced women to a shackled existence so far. To fully recognise the role of law and society in shaping the lives and identities of women, is also to ensure that patriarchal social values and legal norms are not permitted to further obstruct the exercise of constitutional rights by the women of our country.

4 In the preceding years, the Court has evolved a jurisprudence of rights-granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the stature of a Constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, we set out to examine the validity of Section 497 of the Indian Penal Code. In doing so, we also test the constitutionality of moral and societal regulation of women and their intimate lives through the law.

[7] Ibid
[8] Gayatri Spivak, The Post Colonial Critic: Interviews, Strategies, Dialogies, Routledge (1990)

B Judicial discourse on adultery

5 This Court, on earlier occasions, has tested the constitutionality of Section 497 of the Indian Penal Code as well as Section 198(2) of the Code of Criminal Procedure.

Section 497 reads thus:

> "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."

Section 198(2) of the Code of Criminal Procedure reads thus:

> "(2) For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was com- mitted may, with the leave of the Court, make a complaint on his behalf."

6 The decision of the Constitution Bench in **Yusuf Abdul Aziz** v **State of Bombay**[9], arose from a case where the appellant was being prosecuted for adultery under Section 497. On a complaint being filed, he moved the High Court to determine the constitutional question about the validity of the provision, under

[9] 1954 SCR 930

Article 228. The High Court decided against the appellant[10], but Chief Justice Chagla made an observation about the assumption underlying Section 497:

> "Mr Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that the offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, when women were looked upon as property by their husbands."

A narrow challenge was addressed before this Court. The judgment of Justice Vivian Bose records the nature of the challenge:

> "3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor.
> The last sentence in Section 497 prohibits this. It runs—
> "In such case the wife shall not be punishable as an abettor".
> It is said that this offends Articles 14 and 15."

Hence, the challenge was only to the prohibition on treating the wife as an abettor. It was this challenge which was dealt with and repelled on the ground that Article 14 must be read with the other provisions of Part III which prescribe the ambit of the fundamental rights. The prohibition on treating the wife as an abettor was upheld as a special provision which is saved by Article 15(3). The conclusion was that:

> "5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code."

[10] AIR 1951 Bom 470

7 The challenge was to a limited part of Section 497: that which prohibited a woman from being prosecuted as an abettor. Broader issues such as whether (i) the punishment for adultery violates Article 21; (ii) the statutory provision suffers from manifest arbitrariness; (iii) the legislature has, while ostensibly protecting the sanctity of marriage, invaded the dignity of women; and (iv) Section 497 violates Article 15(1) by enforcing gender stereotypes were neither addressed before this Court nor were they dealt with.

This Court construed the exemption granted to women from criminal sanctions as a 'special provision' for the benefit of women and thus, protected under Article 15(3) of the Constitution. In **Union of India** v **Elphinstone Spinning and Weaving Co. Ltd**,[11] a Constitution Bench of this Court held:

> "17…When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state of law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy…"[12]

It is of particular relevance to examine the mischief that the provision intends to remedy. The history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency. Thus, Section 497 was never conceived to benefit women. In fact, the provision is steeped in stereotypes about women and their subordinate role in marriage. The

[11] (2001) 4 SCC 139
[12] Ibid. at page 164

patriarchal underpinnings of the law on adultery become evident when the provision is considered as a whole.

8 In the subsequent decision of the three judge Bench in **Sowmithri Vishnu** v **Union of India**[13], the court proceeded on the basis that the earlier decision in **Yusuf Abdul Aziz** had upheld Section 497 against a challenge based on Articles 14 and 15 of the Constitution. This is not a correct reading or interpretation of the judgment.

9 **Sowmithri Vishnu** did as a matter of fact consider the wider constitutional challenge on the ground that after the passage of thirty years, "particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex", it had become necessary that the matter be revisited. **Sowmithri Vishnu** arose in a situation where a petition for divorce by the appellant against her husband on the ground of desertion was dismissed with the finding that it was the appellant who had deserted her husband. The appellant's husband then sued for divorce on the ground of desertion and adultery. Faced with this petition, the appellant urged that a decree for divorce on the ground of desertion may be passed on the basis of the findings in the earlier petition. She, however, opposed the effort of the husband to urge the ground of adultery. While the trial court accepted the plea of the husband to assert the ground of adultery, the High Court held in revision that a decree of divorce was liable to be passed on the ground of desertion, making it unnecessary to inquire into adultery. While the petition for

[13] 1985 Supp SCC 137

divorce was pending against the appellant, her husband filed a complaint under Section 497 against the person with whom the appellant was alleged to be in an adulterous relationship. The appellant then challenged the constitutional validity of Section 497.

The judgment of the three judge Bench indicates that three grounds of challenge were addressed before this Court : **first**, while Section 497 confers a right on the husband to prosecute the adulterer, it does not confer upon the wife to prosecute the woman with whom her husband has committed adultery; **second**, Section 497 does not confer a right on the wife to prosecute her husband who has committed adultery with another woman; and **third**, Section 497 does not cover cases where a man has sexual relations with an unmarried woman. The submission before this Court was that the classification under Section 497 was irrational and 'arbitrary'. Moreover, it was also urged that while facially, the provision appears to be beneficial to a woman, it is in reality based on a notion of paternalism "which stems from the assumption that women, like chattels, are the property of men."

10 The decision in **Sowmithri Vishnu** dealt with the constitutional challenge by approaching the discourse on the denial of equality in formal, and rather narrow terms. Chandrachud, CJ speaking for the three judge Bench observed that by definition, the offence of adultery can be committed by a man and not by a woman. The court construed the plea of the petitioner as amounting to a

suggestion that the definition should be recast in a manner that would make the offence gender neutral. The court responded by observing that this was a matter of legislative policy and that the court could invalidate the provision only if a constitutional violation is established. The logic of the court, to the effect that extending the ambit of a statutory definition is a matter which requires legislative change is unexceptionable. The power to fashion an amendment to the law lies with the legislature. But this only leads to the conclusion that the court cannot extend the legislative prescription by making the offence gender neutral. It does not answer the fundamental issue as to whether punishment for adultery is valid in constitutional terms. The error in **Sowmithri Vishnu** lies in holding that there was no constitutional infringement. The judgment postulates that:

> "7…It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone. The Law Commission of India in its Forty-second Report, 1971, recommended the retention of Section 497 in its present form with the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The suggested modification was not accepted by the Legislature. Mrs Anna Chandi, who was in the minority, voted for the deletion of Section 497 on the ground that "it is the right time to consider the question whether the offence of adultery as envisaged in Section 497 is in tune with our present-day notions of woman's status in marriage". The report of the Law Commission shows that there can be two opinions on the desirability of retaining a provision like the one contained in Section 497 on the statute book. But, we cannot strike down that section on the ground that it is desirable to delete it."[14]

[14] Ibid. at page 141

These observations indicate that the constitutional challenge was addressed purely from the perspective of the argument that Section 497 is not gender neutral, in allowing only the man but not to the woman in a sexual relationship to be prosecuted. The court proceeded on the assumption, which it regards as "commonly accepted that it is the man who is the seducer and not the woman." Observing that this position may have undergone some change, over the years, the decision holds that these are matters for the legislature to consider and that the desirability of deleting Section 497 is not a ground for invalidation.

11 The decision in **Sowmithri Vishnu** has left unanswered the fundamental challenge which was urged before the Court. Under Article 14, the challenge was that the statutory provision treats a woman purely as the property of her husband. That a woman is regarded no more than as a possession of her husband is evidenced in Section 497, in more than one context. The provision stipulates that a man who has sexual intercourse with the wife of another will not be guilty of offence if the husband of the woman were to consent or, (worse still, to connive. In this, it is evident that the legislature attributes no agency to the woman. Whether or not a man with whom she has engaged in sexual intercourse is guilty of an offence depends exclusively on whether or not her husband is a consenting individual. No offence exists if her husband were to consent. Even if her husband were to connive at the act, no offence would be made out. The mirror image of this constitutional infirmity is that the wife of the man who has engaged in the act has no voice or agency under the statute. Again, the law does

not make it an offence for a married man to engage in an act of sexual intercourse with a single woman. His wife is not regarded by the law as a person whose agency and dignity is affected. The underlying basis of not penalising a sexual act by a married man with a single woman is that she (unlike a married woman) is not the property of a man (as the law would treat her to be if she is married). Arbitrariness is writ large on the provision. The problem with Section 497 is not just a matter of under inclusion. The court in **Sowmithri Vishnu** recognised that an under-inclusive definition is not necessarily discriminatory and that the legislature is entitled to deal with the evil where it is felt and seen the most. The narrow and formal sense in which the provisions of Article 14 have been construed is evident again from the following observations:

> "8…The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, we revert to the same point: Who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute."[15]

The decision of the three judge Bench does not address the central challenge to the validity of Section 497. Section 497, in its effort to protect the sanctity of marriage, has adopted a notion of marriage which does not regard the man and the woman as equal partners. It proceeds on the subjection of the woman to the will of her husband. In doing so, Section 497 subordinates the woman to a

[15] Ibid. at page 142

position of inferiority thereby offending her dignity, which is the core of Article 21. Significantly, even the challenge under Article 21 was addressed on behalf of the petitioner in that case in a rather narrow frame. The argument before this Court was that at the trial involving an offence alleged to have been committed under Section 497, the woman with whom the accused is alleged to have had sexual intercourse would have no right of being heard. It was this aspect alone which was addressed in **Sowmithri Vishnu** when the court held that such a right of being heard can be read in an appropriate case. Ultimately, the court held that:

> "12…It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationships is punishable by law. Stability of marriages is not an ideal to be scorned."[16]

Sowmithri Vishnu has thus proceeded on the logic that in specifying an offence, it is for the legislature to define what constitutes the offence. Moreover, who can prosecute and who can be prosecuted, are matters which fall within the domain of the law. The inarticulate major premise of the judgment is that prosecution for adultery is an effort to protect the stability of marriages and if the legislature has sought to prosecute only a limited class of 'adulterous relationships', its choice could not be questioned. '**Sowmithri Vishnu**' fails to deal with the substantive aspects of constitutional jurisprudence which have a bearing on the validity of Section 497: the guarantee of equality as a real protection against arbitrariness, the guarantee of life and personal liberty as an essential recognition of dignity, autonomy and privacy and above all gender equality as a cornerstone of a truly equal society. For these reasons, the decision in **Sowmithri Vishnu** cannot be

[16] Ibid. at page 144

regarded as a correct exposition of the constitutional position. **Sowmithri Vishnu** is overruled.

12 The decision of a two judge Bench in **V Revathi** v **Union of India**[17] involved a challenge to Section 497 (read with Section 198(2) of the Code of Criminal Procedure) which disables a wife from prosecuting her husband for being involved in an adulterous relationship. The court noted that Section 497 permits neither the husband of the offending wife to prosecute her nor does it permit the wife to prosecute her offending husband for being disloyal. This formal sense of equality found acceptance by the court. The challenge was repelled by relying on the decision in **Sowmithri Vishnu**. Observing that Section 497 and Section 198(2) constitute a "legislative packet", the court observed that the provision does not allow either the wife to prosecute an erring husband or a husband to prosecute the erring wife. In the view of the court, this indicated that there is no discrimination on the ground of sex. In the view of the court :

> "5…The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practised in circumscribing the scope of Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer."[18]

[17] (1988) 2 SCC 72
[18] Ibid. at page 76

13 The decision in **Revathi** is a reiteration of **Sowmithri Vishnu.** It applies the doctrine of equality and the prohibition against discrimination on the ground of sex in a formalistic sense. The logic of the judgment is that since neither of the spouses (man or woman) can prosecute the erring spouse, the provision does not discriminate on the ground of sex. Apart from reading equality in a narrow confine, the judgment does not deal with crucial aspects bearing on the constitutionality of the provision. **Revathi,** like **Sowmithri Vishnu** does not lay down the correct legal principle.

C Relics of the past

> "Our Massachusetts magistracy…have not been bold to put in force the extremity of our righteous law against her. The penalty thereof is death. But in their great mercy and tenderness of heart they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory, and then and thereafter, for the remainder of her natural life to wear a mark of shame upon her bosom."[19]

14 Section 497 of the Indian Penal Code, 1860 makes adultery a punishable offence against "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." It goes on to state that, "in such case the wife shall not be punishable as an abettor." The offence applies only to the man committing adultery. A woman committing adultery is not considered to be an

[19] Nathaniel Hawthorne, The Scarlet Letter, Bantam Books (1850), at page 59

"abettor" to the offence. The power to prosecute for adultery rests only with the husband of the woman.

Understanding the gendered nature of Section 497 needs an inquiry into the origins of the provision itself as well as the offence of adultery more broadly. The history of adultery throws light upon disparate attitudes toward male and female infidelity, and reveals the double standard in law and morality that has been applied to men and women.[20]

15 Throughout history, adultery has been regarded as an offence; it has been treated as a religious transgression, as a crime deserving harsh punishment, as a private wrong, or as a combination of these.[21] The earliest recorded injunctions against adultery are found in the ancient code of the Babylonian king Hammurabi, dating from circa 1750 B.C. The code prescribed that a married woman caught in adultery be bound to her lover and thrown into water so that they drown together.[22] By contrast, Assyrian law considered adultery to be a private wrong for which the husband or father of the woman committing adultery could seek compensation from her partner.[23] English historian Faramerz Dabhoiwala notes that the primary purpose of these laws was to protect the property rights of men:

[20] See David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008)
[21] Ibid
[22] James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 10
[23] Ibid, at page 11

> "Indeed, since the dawn of history every civilisation had prescribed severe laws against at least some kind of sexual immorality. The oldest surviving legal codes (c.2100-1700 BCE), drawn up by the kings of Babylon made adultery punishable by death and most other near Eastern and classical culture also treated it as a serious offence…The main concern of such laws was usually to uphold the honour and property rights of fathers, husbands and higher status groups…"[24]

16 In Ancient Greco-Roman societies, there existed a sexual double standard according to which adultery constituted a violation of a husband's exclusive sexual access to his wife, for which the law allowed for acts of revenge.[25] In 17 B.C., Emperor Augustus passed the *Lex Julia de adulteriis coercendis*, which stipulated that a father was allowed to kill his daughter and her partner when caught committing adultery in his or her husband's house.[26] While in the Judaic belief adultery merited death by stoning for both the adulteress and her partner,[27] Christianity viewed adultery more as a moral and spiritual failure than as a public crime.[28] The penalties of the *Lex Julia* were made more severe by Christian emperors. Emperor Constantine, for instance, introduced the death penalty for adultery, which allowed the husband the right to kill his wife if she committed adultery.[29] Under the *Lex Julia*, adultery was primarily a female offence, and the law reflected the sentiments of upper-class Roman males.[30]

[24] Faramerz Dabhoiwala, The Origins of Sex: A History of the First Sexual Revolution (2012), at page 5
[25] David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 30
[26] Vern Bullough, Medieval Concepts of Adultery, at page 7
[27] The Oxford Encyclopaedia of Women in World History, (Bonnie G Smith ed.), Oxford, at page 27
[28] Martin Siegel, For Better or for Worse: Adultery, Crime & the Constitution, Vol. 30, Journal of Family Law (1991), at page 46
[29] Vern Bullough, Medieval Concepts of Adultery, at page 7
[30] James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 27

17 Once monogamy came to be accepted as the norm in Britain between the fourth and fifth centuries, adultery came to be recognized as a serious wrong that interfered with a husband's "rights" over his wife.[31] The imposition of criminal sanctions on adultery was also largely based on ideas and beliefs about sexual morality which acquired the force of law in Christian Europe during the Middle Ages.[32] The development of canon law in the twelfth century enshrined the perception of adultery as a spiritual misdemeanour. In the sixteenth century, following the Reformation, adultery became a crucial issue because Protestants placed new emphasis on marriage as a linchpin of the social and moral order.[33] Several prominent sixteenth century reformers, including Martin Luther and John Calvin, argued that a marriage was irreparably damaged by infidelity, and they advocated divorce in such cases.[34]

Concerned with the "moral corruption" prevalent in England since the Reformation, Puritans in the Massachusetts Bay Colony introduced the death penalty for committing adultery.[35] The strict morality of the early English colonists is reflected in the famous 1850 novel 'The Scarlet Letter' by Nathaniel Hawthorne, in which an unmarried woman who committed adultery and bore a child out of wedlock was made to wear the letter A (for adulterer) when she went out in public; her lover was not so tagged, suggesting that women were punished

[31] Jeremy D. Weinstein, Adultery, Law, and the State: A History, Vol. 38, Hastings Law Journal (1986), at page 202; R. Huebner, A History of Germanic Private Law (F. Philbrick trans. 1918)
[32] James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 6
[33] David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 30
[34] Ibid.
[35] The Oxford Encyclopaedia of Women in World History, (Bonnie G Smith ed.), Oxford, at page 30

more severely than men for adultery, especially when they had a child as evidence.[36]

18 In 1650, England enacted the infamous Act for Suppressing the Detestable Sins of Incest, Adultery and Fornication, which introduced the death penalty for sex with a married woman.[37] The purpose of the Act was as follows:

> "For the suppressing of the abominable and crying sins of…adultery… wherewith this Land is much defiled, and Almighty God highly displeased; be it enacted...That in case any married woman shall…be carnally known by any man (other than her husband)…as well the man as the woman…shall suffer death."

The Act was a culmination of long-standing moral concerns about sexual transgressions, sustained endeavours to regulate conjugal matters on a secular plain, and a contemporaneous political agenda of socio-moral reform.[38] It was repealed in 1660 during the Restoration. The common law, however, was still concerned with the effect of adultery by a married woman on inheritance and property rights. It recognized the "obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate heir into his family."[39] Accordingly, secular courts treated adultery as a private injury and a tort

[36] James R. Mellow, Hawthorne's Divided Genius, The Wilson Quarterly (1982)
[37] Mary Beth Norton, Founding Mothers and Fathers: Gendered Power and the Forming of American Society (1996).
[38] Keith Thomas, The Puritans and Adultery: The Act of 1650 Reconsidered, in Puritans and Revolutionaries: Essays in Seventeenth-Century History Presented to Christopher Hill (Donald Pennington, Keith Thomas, eds.), at page 281
[39] Charles E. Torcia, Wharton's Criminal Law, Section 218, (1994) at page 528

for criminal conversation was introduced in the late 17th century, which allowed the husband to sue his wife's lover for financial compensation.[40]

19 In 19th century Britain, married women were considered to be chattel of their husbands in law, and female adultery was subjected to ostracism far worse than male adultery because of the problem it could cause for property inheritance through illegitimate children.[41] Consequently, many societies viewed chastity, together with related virtues such as modesty, as more central components of a woman's honor and reputation than of a man's.[42] The object of adultery laws was not to protect the bodily integrity of a woman, but to allow her husband to exercise control over her sexuality, in order to ensure the purity of his own bloodline. The killing of a man engaged in an adulterous act with one's wife was considered to be manslaughter, and not murder.[43] In **R** v **Mawgridge**,[44] Judge Holt wrote that:

> "…[A] man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for Jealousy is the Rage of a Man and **Adultery is the highest invasion of property.**" (Emphasis supplied)

20 In his Commentaries on the Laws of England, William Blackstone wrote that under the common law, "the very being or legal existence of the woman

[40] J. E. Loftis, Congreve's Way of the World and Popular Criminal Literature, Studies in English Literature, 1500 – 1900 36(3) (1996), at page 293
[41] Joanne Bailey, Unquiet Lives: Marriage and Marriage Breakdown in England, 1660–1800 (2009), at page 143
[42] David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 28
[43] Blackstone's Commentaries on the Laws of England, Book IV (1778), at page 191-192
[44] (1707) Kel. 119

[was] suspended during the marriage, or at least [was] incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performe[d] everything."[45] In return for support and protection, the wife owed her husband "consortium" of legal obligations, which included sexual intercourse.[46] Since adultery interfered with the husband's exclusive entitlements, it was considered to be the "highest possible invasion of property," similar to theft.[47] In fact, civil actions for adultery evolved from actions for enticing away a servant from a master and thus depriving the master of the quasi-proprietary interest in his services.[48]

Faramerz Dabhoiwala notes that a man's wife was considered to be his property, and that another man's "unlawful copulation" with her warranted punishment:

> "…[T]he earliest English law codes, which date from this time, evoke a society where women were bought and sold and lived constantly under the guardianship of men. Even in cases of consensual sex, its system of justice was mainly concerned with the compensation one man should pay to another for unlawful copulation with his female chattel."

21 When the IPC was being drafted, adultery was not a criminal offence in common law. It was considered to be an ecclesiastical wrong "left to the feeble coercion of the Spiritual Court, according to the rules of Canon Law."[49] Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India

[45] William Blackstone, Commentaries on the Laws of England. Vol. I (1765), at pages 442 445
[46] Vera Bergelson, Rethinking Rape-By-Fraud in Legal Perspectives on State Power: Consent and Control (Chris Ashford, Alan Reed and Nicola Wake, eds.) (2016), at page 161
[47] R v. Mawgridge, (1707) Kel. 119
[48] Vera Bergelson, Rethinking Rape-By-Fraud in Legal Perspectives on State Power: Consent and Control (Chris Ashford, Alan Reed and Nicola Wake, eds.) (2016), at page 161
[49] Blackstone's Commentaries on the Laws of England, Book IV (1778), at pages 64-65

and principal architect of the IPC, considered the possibility of criminalizing adultery in India, and ultimately concluded that it would serve little purpose.[50] According to Lord Macaulay, the possible benefits from an adultery offence could be better achieved through pecuniary compensation.[51] Section 497 did not find a place in the first Draft Penal Code prepared by Lord Macaulay. On an appraisal of the facts and opinions collected from all three Presidencies about the feasibility criminalizing adultery, he concluded in his Notes to the IPC that:

> "…All the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly; that scarcely any native of higher classes ever has recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in case of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain on their honor , but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the women may be sent back." **These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. We think it best to treat adultery merely as a civil injury**."[52] (Emphasis supplied)

22 The Law Commissioners, in their Second Report on the Draft Penal Code, disagreed with Lord Macaulay's view. Placing heavy reliance upon the status of women in India, they concluded that:

[50] Abhinav Sekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Socio-Legal Review (2016), at page 52
[51] Ibid.
[52] Macaulay's Draft Penal Code (1837), Note Q

> "While we think that the offence of adultery ought not to be omitted from the code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in note Q, regarding the condition of the women, in this country, in deference to it, we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial "together", and empower the Court in the event of their conviction to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine."[53]

The Law Commissioners' decision to insert Section 497 into the IPC was rooted in their concern about the possibility of the "natives" resorting to illegal measures to avenge the injury in cases of adultery:

> "The backwardness of the natives to have recourse to the courts of redress in cases of adultery, [Colonel Sleeman] asserts, "arises from the utter hopelessness on their part of ever getting a conviction in our courts upon any evidence that such cases admit of;" that is to say, in courts in which the Mahommedan law is observed. "The rich man…not only feels the assurance that he could not get a conviction, but dreads the disgrace of appearing publicly in one court after another, to prove…his own shame and his wife's dishonor. He has recourse to poison secretly, or with his wife's consent; and she will generally rather take it than be turned out into the streets a degraded outcast. The seducer escapes with impunity, he suffers nothing, while his poor victim suffers all that human nature is capable of enduring…The silence of the Penal Code will give still greater impunity to the seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer."[54]

[53] Second Report on the Indian Penal Code (1847), at pages 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, at page 365

[54] A Penal Code prepared by The Indian Law Commissioners (1838), The Second Report on the Indian Penal Code, at page 74

Section 497 and Section 198 are seen to treat men and women unequally, as women are not subject to prosecution for adultery, and women cannot prosecute their husbands for adultery. Additionally, if there is "consent or connivance" of the husband of a woman who has committed adultery, no offence can be established. In its 42nd Report, the Law Commission of India considered the legislative history of Section 497 and the purported benefit of criminal sanctions for adultery. The Committee concluded that, "though some of us were personally inclined to recommend repeal of the section, we think on the whole that the time has not yet come for making such a radical change in the existing position."[55] It recommended that Section 497 be retained, but with a modification to make women who commit adultery liable as well.

23 In its 156th Report, the Law Commission made a proposal which it believed reflected the "'transformation' which the society has undergone," by suggesting removing the exemption from liability for women under Section 497.[56] In 2003, the Justice Malimath Committee recommended that Section 497 be made gender-neutral, by substituting the words of the provision with "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery."[57] The Committee supported earlier proposals to not repeal the offence, but to equate liability for the sexes:

> "The object of the Section is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who

[55] Law Commission of India, 42nd Report: Indian Penal Code (1971), at page 326
[56] Law Commission of India, 156th Report: Indian Penal Code (1997) at page 172
[57] Report of the Committee on Reforms of Criminal Justice System (2003), at page 190

> has sexual intercourse with a man (other than her husband)."[58]

Neither the recommendations of the Law Commission nor those of the Malimath Committee have been accepted by the Legislature. Though women are exempted from prosecution under Section 497, the underlying notion upon which the provision rests, which conceives of women as property, is extremely harmful. The power to prosecute lies only with the husband (and not to the wife in cases where her husband commits adultery), and whether the crime itself has been committed depends on whether the husband provides "consent for the allegedly adulterous act."

24 Women, therefore, occupy a liminal space in the law: they cannot be prosecuted for committing adultery, nor can they be aggrieved by it, by virtue of their status as their husband's property. Section 497 is also premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. The notion that women are 'victims' of adultery and therefore require the beneficial exemption under Section 497 has been deeply criticized by feminist scholars, who argue that such an understanding of the position of women is demeaning and fails to recognize them as equally autonomous individuals in society.[59] Effectively, Indian jurisprudence has interpreted the constitutional guarantee of sex equality as a justification for differential treatment: to treat men

[58] Ibid.
[59] Abhinav Sekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Socio-Legal Review (2016), at page 63

and women differently is, ultimately, to act in women's interests.[60] The status of Section 497 as a "special provision"[61] operating for the benefit of women, therefore, constitutes a paradigmatic example of benevolent patriarchy.

25 Throughout history, the law has failed to ask the woman question.[62] It has failed to interrogate the generalizations or stereotypes about the nature, character and abilities of the sexes on which laws rest, and how these notions affect women and their interaction with the law. A woman's 'purity' and a man's marital 'entitlement' to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but they cannot be recognized as being so today. It is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497.

[60] Brenda Cossman and Ratna Kapur, Subversive Sites: Feminist Engagements with Law in India (1996)
[61] Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930
[62] The 'Woman Question' was one of the great issues that occupied the middle of the nineteenth century, namely the social purpose of women. It is used as a tool to enquire into the status of women in the law and how they interact with and are affected by it; See Katherine T. Bartlett, Feminist Legal Methods, Harvard Law Review (1990)

D Across frontiers

26 The last few decades have been characterized by numerous countries around the world taking measures to decriminalize the offence of adultery due to the gender discriminatory nature of adultery laws as well as on the ground that they violate the right to privacy. However, progressive action has primarily been taken on the ground that provisions penalising adultery are discriminatory against women either patently on the face of the law or in their implementation. Reform towards achieving a more egalitarian society in practice has also been driven by active measures taken by the United Nations and other international human rights organizations, where it has been emphasized that even seemingly gender-neutral provisions criminalising adultery cast an unequal burden on women:[63]

> "Given continued discrimination and inequalities faced by women, including inferior roles attributed to them by patriarchal and traditional attitudes, and power imbalances in their relations with men, the mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality."

The abolishing of adultery has been brought about in equal measure by legislatures and courts. When decisions have been handed down by the judiciary across the world, it has led to the creation of a rich body of transnational jurisprudence. This section will focus on a few select comparative decisions emanating from the courts of those countries where the provision criminalizing adultery has been struck down through judicial action. The decisions of these

[63] U N Working Group on Women's Human Rights: Report (18 October, 2012), available at: http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E

courts reflect how the treatment of the law towards adultery has evolved with the passage of time and in light of changing societal values.

27 In 2015, the South Korean Constitutional Court,[64] by a majority of 7-2 struck down Article 241 of the Criminal Law; a provision which criminalized adultery with a term of imprisonment of two years as unconstitutional. In doing so, South Korea joined a growing list of countries in Asia and indeed around the world that have taken the measure of effacing the offence of adultery from the statute books, considering evolving public values and societal trends. The Constitutional Court had deliberated upon the legality of the provision four times previously[65], but chose to strike it down when it came before it in 2015, with the Court's judgement acknowledging the shifting public perception of individual rights in their private lives.

The majority opinion of the Court was concurred with by five of the seven judges[66] who struck down the provision. The majority acknowledged that the criminal provision had a legitimate legislative purpose in intending "to promote the marriage system based on good sexual culture and practice and monogamy and to preserve marital fidelity between spouses." However, the Court sought to strike a balance between the legitimate interest of the legislature in promoting the

[64]Case No: 2009Hun-Ba17, (Adultery Case), South Korea Constitutional Court (February 26, 2015), available at http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do

[65] Firstpost, South Korean court abolishes law that made adultery illegal, (February 26, 2015), available at https://www.firstpost.com/world/south-korean-court-abolishes-law-saying-adultery-is-illegal-2122935.html

[66] Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho (Adultery is Unconstitutional)

institution of marriage and marital fidelity vis-à-vis the fundamental right of an individual to self-determination, which included sexual-self-determination, and was guaranteed under Article 10 of their Constitution.[67] The Court held:

> "The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the provision at issue restricts the right to sexual self-determination of individuals. In addition, the provision at Issue also restricts the right to privacy protected under Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain."

The Court used the test of least restrictiveness, and began by acknowledging that there no longer existed public consensus on the criminalization of adultery, with the societal structure having changed from holding traditional family values and a typeset role of family members to sexual views driven by liberal thought and individualism. While recognizing that marital infidelity is immoral and unethical, the Court stated that love and sexual life were intimate concerns, and they should not be made subject to criminal law. Commenting on the balance between an individual's sexual autonomy vis-à-vis societal morality, the Court remarked:

> "…the society is changing into one where the private interest of sexual autonomy is put before the social interest of sexual morality and families from the perspective of dignity and happiness of individuals."[68]

[67] Article 10 of the South Korean Constitution "All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

[68] Supra, note 64, Part V- A (3)(1) ('Change in Public's Legal Awareness' under the head of 'Appropriateness of Means and Least Restrictiveness')

Next, the Court analysed the appropriateness and effectiveness of criminal punishment in curbing the offence of adultery. Addressing the question of whether adultery should be regulated, the Court stated that modern criminal law dictated that the State should not seek to interfere in an act that is not socially harmful or deleterious to legal interests, simply because it is repugnant to morality. Moreover, it held that the State had no business in seeking to control an individual's actions which were within the sphere of his or her constitutionally protected rights of privacy and self-determination.

Moving on to the effectiveness of the provision at hand, the Court remarked that criminalizing adultery did not help save a failing marriage. The Court remarked that it was obvious that once a spouse was accused of adultery, the consequence was generally intensified spousal conflict as opposed to the possibility of family harmony:

> "Existing families face breakdown with the invoking of the right to file an accusation. Even after cancellation of the accusation, it is difficult to hope for emotional recovery between spouses. Therefore, the adultery crime can no longer contribute to protecting the marital system or family order. Furthermore, there is little possibility that a person who was punished for adultery would remarry the spouse who had made an accusation against himself/herself. It is neither possible to protect harmonious family order because of the intensified conflict between spouses in the process of criminal punishment of adultery."[69]

[69] Supra, note 64, Part V- A (3)(3) ('Effectiveness of Criminal Punishment', under the head of 'Appropriateness of Means and Least Restrictiveness')

Addressing the concern that an abolition of a penal consequence would result in "chaos in sexual morality" or an increase of divorce due to adultery, the Court concluded that there was no data at all to support these claims in countries where adultery is repealed, stating:

> "Rather, the degree of social condemnation for adultery has been reduced due to the social trend to value the right to sexual self-determination and the changed recognition on sex, despite of the punishment of adultery. Accordingly, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy as it loses the function of regulating behaviour."[70]

The Court also analysed the argument that adultery provisions protected women:

> "It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological deterrence for men, and, furthermore, enabled female spouses to receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation.
>
> However, the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples."

Finally, the Court concluded its analysis by holding that the interests of enforcing monogamy, protecting marriage and promoting marital fidelity, balanced against

[70] Ibid.

the interference of the State in the rights to privacy and sexual autonomy were clearly excessive and therefore failed the test of least restrictiveness.[71]

28 In 2007, the Ugandan Constitutional Court in **Law Advocacy for Women in Uganda** v **Attorney General of Uganda**[72], was called upon to rule on the constitutionality of Section 154 of the Penal Code, on, the grounds that it violated various protections granted by the Ugandan Constitution and meted out discriminatory treatment between women and men. The law as it stood allowed a married man to have a sexual relationship with an unmarried woman. Moreover, only a man could be guilty of the offence of adultery when he had sexual intercourse with a married woman. The same provision, however, penalized a married woman who engaged in a sexual relationship with an unmarried or married man outside of the marriage. The penalties for the offence also prescribed a much stricter punishment for women as compared to their male counterparts.[73] The challenge was brought primarily under Article 21 of the Ugandan Constitution, which guaranteed equality under the law, Article 24 which mandates respect for human dignity and protection from inhuman treatment and Article 33(1), which protected the rights of women under the Constitution. [74]

[71] Supra, note 64, Part V- A (5) ('Balance of Interests & Conclusion')
[72] Constitutional Petitions Nos. 13 /05 /& 05 /06 in Law Advocacy for Women in Uganda v. Attorney General of Uganda, (2007) UGCC 1 (5 April, 2007), available at https://ulii.org/ug/judgment/constitutional-court/2007/1
[73] Reuters: 'Uganda scraps "sexist" adultery law', (April 5, 2007), available at https://www.reuters.com/article/us-uganda-adultery/uganda-scraps-sexist-adultery-law-idUSL0510814320070405
[74] Constitutional Petitions Nos. 13 /05 /& 05 /06 in Law Advocacy for Women in Uganda v. Attorney General of Uganda, [2007] UGCC 1 (5 April, 2007), available at https://ulii.org/ug/judgment/constitutional-court/2007/1

The Respondent prayed that the Court consider making the provision of adultery equal in its treatment of men and women, instead of striking it down completely. However, in its holding, the Court denied this request, holding it could not prescribe a punishment under penal law to change the statute. The Court held that Section 154 of the Penal Code was wholly unconstitutional as being violative of the provisions of the Constitution, and remarked:

> "...the respondent did not point out to us areas that his Court can or should modify and adapt to bring them in conformity with the provisions of the Constitution. The section is a penal one and this Court in our considered opinion cannot create a sentence that the courts can impose on adulterous spouses.
>
> Consequently, it is our finding that the provision of section 154 of the Penal Code Act is inconsistent with the stated provisions of the Constitution and it is void."[75]

29 In 2015, in **DE** v **RH**,[76] the Constitutional Court of South Africa held that an aggrieved spouse could no longer seek damages against a third party in cases of adultery. Madlanga J poignantly remarked on the preservation of marriage:

> "…although marriage is 'a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties . . . Its essence . . . consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it'. If the parties to the marriage have lost that moral commitment, the marriage will fail and punishment meted out to a third party is unlikely to change that."[77]

[75] Ibid.
[76] DE v RH, [2015] ZACC 18
[77] Ibid, at para 34

The decisions of the US Supreme Court bearing on the issue of privacy have been analysed in an incisive article, titled “For Better or for Worse: Adultery, Crime and The Constitution”[78], by Martin Siegel. He presents three ways in which adultery implicates the right to privacy. The first is that adultery must be viewed as a constitutionally protected marital choice. Second, that certain adulterous relationships are protected by the freedom of association and finally, that adultery constitutes an action which is protected by sexual privacy.[79] A brief study is also undertaken on whether action penalizing adultery constitutes a legitimate interest of the State.

The first privacy interest in adultery is the right to marital choice. The U.S. Supreme Court has upheld the values of ‘fundamental liberty’, ‘freedom of choice’ and ‘the ‘right to privacy’ in marriage. With this jurisprudence, the author argues, it would be strange if a decision to commit adultery is not a treated as a matter of marriage and family life as expressed in **Cleveland Board***[80]*, ‘an act occurring in marriage’, as held in **Griswold**[81] or a ‘matter of marriage and family life’ as elucidated in **Carey**.[82]

[78] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 45
[79] Ibid, at page 46
[80] Cleveland Board of Education v. LaFleur, 414 U.S. 623 (1973)
[81] Griswold*,* 381 U.S. 1 (1967)
[82] Carey, v. Population Serv. Int’l, 431 U.S. 678

Siegel posits that a decision to commit adultery is a decision 'relating to marriage and family relationships' and therefore, falls within the domain of protected private choices. He observes that the essence of the offence is in fact the married status of one of the actors, and the mere fact that the commission of the act consisted of a mere sexual act or a series of them is legally irrelevant. If the argument that adultery, though unconventional, is an act related to marriage and therefore fundamentally private is accepted, then it deserves equal protection. Siegel cites Laurence Tribe, on accepting the 'unconventional variants' that also form a part of privacy:

> "Ought the "right to marriage," as elucidated by Griswold, Loving v. Virginia, Zablocki, Boddie v. Connecticut and Moore, also include marriage's "unconventional variants"-in this case the adulterous union?"[83]

The mere fact that adultery is considered unconventional in society does not justify depriving it of privacy protection. The freedom of making choices also encompasses the freedom of making an 'unpopular' choice. This was articulated by Justice Blackmun in his dissent in **Hardwick**[84]:

> "A necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[85]

Siegel concludes that the privacy protections afforded to marriage must extend to all choices made within the marriage:

[83] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 70
[84] Hardwick, 478 U.S.205
[85] Ibid, at page 206

> "The complexity and diversity among marriages make it all the more important that the privacy associated with that institution be construed to include all kinds of marriages, sexually exclusive as well as open, 'good', as well as 'bad'."[86]

Siegel then proceeds to examine the next privacy interest in adultery, that of the right to association. The right to freedom of association he states is 'a close constitutional relative of privacy'[87], and they often interact in an intertwined manner. Siegel proceeds to explain that adultery must not simply be looked at as an act of consensual adult sexual activity, as sexual activity may simply be one element in a continuum of interactions between people:

> "Sexual activity may be preliminary or incidental to a developing association, or it may be its final culmination and solidification. In either case, it is simply one more element of the relationship. Two people may have sex upon first meeting. In this case, associational interests seem less important, although "loveless encounters are sometimes prerequisites for genuine love relationships; to forbid the former is, therefore, to inhibit the latter."' [88]

Next, Siegel examines the plausible protection of adultery through the lens of the freedom of expression. Since the act of engaging in sexual activity can be interpreted as being expressive, Siegel claims adultery might also implicate First Amendment rights. In support he cites a body of case law[89],where courts have held that First Amendment rights are not limited to merely verbal expression but also encompass the right to 'expressive association'.

[86] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 74
[87] Ibid, at page 77
[88] Ibid, at, page 78
[89] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)

In concluding his section on the right to associate, Siegel warns against the dangers of classifying adultery solely as a sexual activity, as doing so would be akin to protecting a part of the relationship and criminalizing the other. This would be manifestly unjust:

> "It is difficult, both theoretically and practically, to single out the sexual contacts two people may have from the rest of their relationship- to criminalize the one and constitutionally protect as fundamental the other". [90]

Lastly, Siegel discusses the connection between adultery and the right to sexual privacy. It is accepted that a right to privacy safeguards an individual's deeply personal choices which includes a recognition accorded to the inherently private nature of all consensual adult sexual activity.[91] This understanding of sexual privacy found favour with the U.S. Supreme Court, which in **Thornburgh** v **American College of Obstetricians and Gynaecologists**[92] quoted Charles Fried with approval:

> "The concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole."[93]

Siegel reiterates the underlying intangible value of adult consensual sexual activity:

[90] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 78
[91] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 82
[92] Thornburgh v. American College of Obstetricians and Gynaecologists, 476 U.S. 747 (1986)
[93] Ibid, at Page 777

> "The real importance of sexuality to humans, more so in today's world of effective birth control than ever, lies in the possibilities for self-realization and definition inherent in sexual choices. Sexual experience offers "self-transcendence, expression of private fantasy, release of inner tensions, and meaningful and acceptable expression of regressive desires to be again the free child - unafraid to lose control, playful, vulnerable, spontaneous, sensually loved."[94]

Reflecting on the relationship between marital privacy and associational freedom, Spiegel remarks the "heterogeneity of experience", resulting in a variety of choices, necessarily include the adulterous union which must be protected since it is unrealistic to expect all individuals to conform to society's idea of sexuality:

> "Because sex is so much a part of our personhood, we should not expect that people different in so many other ways will be identical sexually. For some, adultery is a cruel betrayal, while for others it is just comeuppance for years of spousal neglect. In some marriages, sex is the epitome of commitment, while in others spouses jointly and joyfully dispense with sexual monogamy."[95]

In concluding the author states that the foregoing three-layered analysis left no room for doubt that adultery was a matter of marriage. It therefore deserved to be protected like all other affairs occurring in marriage and implicated routine privacy-based freedoms, and it was imperative to treat is as such. Spiegel concludes by quoting the U.S. Supreme Court in **Eisenstadt** v **Braid**, on the importance of protecting the power to make a 'bad' choice in a marriage:

> "A marriage's privacy and autonomy are the best routes to safeguarding liberty and pluralism. This is no less true when

[94] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) at page 85
[95] Ibid, at Page 86

> the power to choose, as it inevitably will, results in bad choices. It is a confidence in nothing less than the theory underscoring our entire political order: Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully appraised of the merits of the controversy."[96]

While acknowledging the interest that the State has in preserving the institution of marriage, Siegel precisely points out the inefficacy of attaching criminal sanctions to adultery in the following words:

> "Even if we accept that a state is trying to foster the interests of specific deceived spouses by its laws criminalizing adultery, it is impossible to believe that a criminal penalty imposed on one of the spouses would somehow benefit a marriage instead of representing the final nail in its coffin. And if deterrence of adultery is the goal, then the state's failure to arrest and prosecute offenders has long since removed any fear of legal sanction."[97]

Deborah L Rhode in her book titled "Adultery" argues that "intermittent idiosyncratic invocations of adultery prohibitions do little to enforce marital vows or reinforce confidence in the rule of law. There are better ways to signal respect for the institution of marriage and better uses of law enforcement than policing private, consensual sexual activity."[98]

[96] Eisenstadt v. Baird , 405 U.S. 438, 457 (1972)
[97] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 89
[98] Deborah Rhode, Adultery: Infidelity and the Law, (Harvard University Press, 2016)

E Confronting patriarchy

> "Norms and ideals arise from the yearning that it is an expression of freedom: it does not have to be this way, it could be otherwise."[99]

30 The petitioner urged that (i) The full realisation of the ideal of equality enshrined in Article 14 of the Constitution ought to be the endeavour of this Court; (ii) the operation of Section 497 is a denial of equality to women in marriage; and (iii) the provision is manifestly arbitrary and amounts to a violation of the constitutional guarantee of substantive equality.

The act which constitutes the offence under Section 497 of the Penal Code is a man engaging in sexual intercourse with a woman who is the "wife of another man". For the offence to arise, the man who engages in sexual intercourse must either know or have reason to believe that the woman is married. Though a man has engaged in sexual intercourse with a woman who is married, the offence of adultery does not come into being where he did so with the consent or connivance of her husband.

These ingredients of Section 497 lay bare several features which bear on the challenge to its validity under Article 14. The fact that the sexual relationship between a man and a woman is consensual is of no significance to the offence, if the ingredients of the offence are established. What the legislature has

[99] Iris Marion Young, Justice and the Politics of Difference, Princeton University Press, 1990

constituted as a criminal offence is the act of sexual intercourse between a man and a woman who is “the wife of another man”. No offence exists where a man who has a subsisting marital relationship engages in sexual intercourse with a single woman. Though adultery is considered to be an offence relating to marriage, the legislature did not penalise sexual intercourse between a married man and a single woman. Even though the man in such a case has a spouse, this is considered to be of no legal relevance to defining the scope of the offence. That is because the provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be ‘adulterous’, by definition.

31 The essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man. But if the man to whom she is married were to consent or even to connive at the sexual relationship, the offence of adultery would not be established. For, in the eyes of law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. Indeed, even if the two men (the spouse of the woman and the man with whom she engages in a sexual act) were to connive, the offence of adultery would not be made out.

32 Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the 'institution of marriage', it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision.

33 The test of manifest arbitrariness is rooted in Indian jurisprudence. In **E P Royappa** v **State of Tamil Nadu**[100], Justice Bhagwati characterised equality as a "dynamic construct" which is contrary to arbitrariness:

> "85…Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. **Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed,**

[100] (1974) 4 SCC 3

> **cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14**…"[101]
> (Emphasis supplied)

The Constitution Bench in **Shayara Bano** v **Union of India**[102] held the practice of Triple Talaq to be unconstitutional. Justice Rohinton Nariman, in his concurring opinion, applied the test of manifest arbitrariness to hold that the practice does not pass constitutional muster:

> "87. **The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14.** Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."[103]
> (Emphasis supplied)

[101] Ibid. at page 38
[102] (2017) 9 SCC 1
[103] Ibid. at pages 91-92

On the application of the test of manifest arbitrariness to invalidate legislation, the learned Judge held thus:

> " 101…there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."[104]

34 The decision in **Shayara Bano**, holds that legislation or state action which is manifestly arbitrary would have elements of caprice and irrationality and would be characterized by the lack of an adequately determining principle. An "adequately determining principle" is a principle which is in consonance with constitutional values. With respect to criminal legislation, the principle which determines the "act" that is criminalized as well as the persons who may be held criminally culpable, must be tested on the anvil of constitutionality. The principle must not be determined by majoritarian notions of morality which are at odds with constitutional morality.

[104] Ibid. at page 99

In **Navtej Singh Johar** v **Union of India**, (**"Navtej"**)[105] Justice Indu Malhotra emphasized the need for a "sound" or "rational principle" underlying a criminal provision:

> " …Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle…
>
> Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community."

35 The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. 'Ostensible' it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The

[105] Writ Petition (Criminal) No. 76 OF 2016

essential values on which the Constitution is founded – liberty, dignity and equality – cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness.

36 While engrafting the provision into Chapter XX of the Penal Code – "of offences relating to marriage" – the legislature has based the offence on an implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law is that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman is bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality is an essential aspect of identity. Choices in matters of sexuality are reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be dis-associated from the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and

are premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it is only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision is proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which is one sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14.

37 The procedural law which has been enacted in Section 198 of the Code of Criminal Procedure 1973 re-enforces the stereotypes implicit in Section 497. Cognizance of an offence under Chapter XX of the Penal Code can be taken by a Court only upon a complaint of a person aggrieved. In the case of an offence punishable under Section 497, only the husband of the woman is deemed to be aggrieved by the offence. In any event, once the provisions of Section 497 are

held to offend the fundamental rights, the procedure engrafted in Section 198 will cease to have any practical relevance.

38 Section 497 amounts to a denial of substantive equality. The decisions in **Sowmithri** and **Revathi** espoused a formal notion of equality, which is contrary to the constitutional vision of a just social order. Justness postulates equality. In consonance with constitutional morality, substantive equality is "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society."[106] To move away from a formalistic notion of equality which disregards social realities, the Court must take into account the impact of the rule or provision in the lives of citizens.

The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals.[107] The disadvantage must be addressed not by treating a woman as 'weak' but by construing her entitlement to an equal citizenship. The former legitimizes patronising attitudes towards women. The latter links true equality to the realisation of dignity. The focus of such an approach is not simply on equal treatment under the law, but

[106] Kathy Lahey, Feminist Theories of (In)equality, in Equality and Judicial Nuetrality (S.Martin and K.Mahoney (eds.) (1987)
[107] Ratna Kapur On Woman, Equality and the Constitution: Through the Looking Glass of Feminism in Gender and Politics in India (Nivedita Menon ed.) (1993)

rather on the real impact of the legislation.[108] Thus, Section 497 has to be examined in the light of existing social structures which enforce the position of a woman as an unequal participant in a marriage.

Catherine Mackinnon implores us to look more critically at the reality of this family sphere, termed ‘‘personal,’’ and view the family as a “crucible of women’s unequal status and subordinate treatment sexually, physically, economically, and civilly.”[109] In a social order which has enforced patriarchal notions of sexuality upon women and which treats them as subordinate to their spouses in heterosexual marriages, Section 497 perpetuates an already existing inequality.

39 Facially, the law may be construed to operate as an exemption from criminal sanctions. However, when viewed in the context of a social structure which considers the husband as the owner of the wife’s sexuality, the law perpetuates a deeply entrenched patriarchal order. The true realisation of the substantive content of equality must entail an overhaul of these social structures. When all visible and invisible forms of inequality- social, cultural, economic, political or sexual- are recognised and obliterated; a truly egalitarian existence can be imagined.

[108] Maureen Maloney, An Analysis of Direct Taxes in India: A Feminist Perspective, Journal of the Indian Law Institute (1988)
[109] Catherine A Mackinnon, Sex equality under the Constitution of India: Problems, prospects, and ‘personal laws’, Oxford University Press and New York University School of Law (2006)

F ‘The Good Wife’

Article 15 of the Constitution reads thus:

> “15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them.”
> (Emphasis supplied)

40 Article 15 prohibits the State from discriminating on grounds only of sex. The Petitioners contend that (i) Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15.

From a joint reading of Section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure, the following propositions emerge:

i. Sexual relations by a married woman with another man outside her marriage without the consent of her husband is criminalized;

ii. In an ‘adulterous relationship’, the man is punished for adultery, while the woman is not (even as an abettor);

iii. Sexual relations by a married man with an unmarried woman are not criminalized;

iv. Section 497 accords primacy to the consent of the husband to determine whether criminality is attached to the man who has consensual sexual

relations with the spouse of the former. Consent or willingness of the woman is irrelevant to the offence;

v. A man who has sexual relations with the spouse of another man is relieved of the offence only if her spouse has consented or, even connived; and

vi. Section 497, IPC, read with Section 198, Cr.PC, gives the man the sole right to lodge a complaint and precludes a woman from initiating criminal proceedings.

41 The operation of Section 497, by definition, is confined to the sexual relations of a woman outside her marriage. A man who has sexual intercourse with a married woman without the consent or connivance of her husband, is liable to be prosecuted under the Section. However, a married man may engage in sexual relations outside marriage with a single woman without any repercussion in criminal law. Though granted immunity from prosecution, a woman is forced to consider the prospect of the penal action that will attach upon the individual with whom she engages in a sexual act. To ensure the fidelity of his spouse, the man is given the power to invoke the criminal sanction of the State. In effect, her spouse is empowered to curtail her sexual agency. The consent of the husband serves as the key to the exercise of the sexual agency of his spouse. That the married woman is in a consensual relationship, is of no consequence to the possible prosecution.

A married man may engage in sexual relations with an unmarried woman who is not his wife without the fear of opening his partner to prosecution and without the consent of his spouse. No recourse is provided to a woman against her husband who engages in sexual relations outside marriage. The effect of Section 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Though Section 497 does not punish a woman engaging in adultery as an abettor, a married man and a married woman are placed on different pedestals in respect to their actions. The effect of Section 497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing.

42 Section 497 criminalizes the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being

denuded of sexual agency, should be afforded the ‘protection’ of the law. In criminalizing the accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is ‘submissive’, or worse still ‘naïve’ has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalizes only the accused man.

43 Pertinent to the present enquiry, is that the provision allows only the husband to initiate a prosecution for adultery. The consent or connivance of the husband precludes prosecution. If a husband consents, his spouse is effectively granted permission to exercise her sexual agency with another individual. This guarantees a degree of control to the husband over the sexual agency of his spouse. As a relic of Victorian morality, this control over the sexual agency of the spouse, views the wife as the property of the husband. Fidelity of the woman, and the husband’s control over it, is seen as maintaining the ‘property’ interest of a husband in his wife.[110] In this view, a woman is confounded with things that can be possessed. In construing the spouse as a passive or inanimate object, the law on adultery seeks to punish a person who attempts theft on the property of the husband. Coontz and Henderson write that the stabilization of property rights and

[110] Phyllis Coleman, Who’s Been Sleeping in My Bed? You and Me, and the State Makes Three, Vol. 24, Indian Law Review (1991)

the desire to pass on one's property to legitimate heirs, were what motivated men to restrict the sexual behavior of their wives.[111]

44 Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. In condemning the sexual agency of the woman, only the husband, as the 'aggrieved' party is given the right to initiate prosecution. The proceedings once initiated, would be geared against the person who committed an act of 'theft' or 'trespass' upon his spouse. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497.

Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or

[111] Women's Work, Men's Property: The Origins of Gender and Class (S Coontz and P Henderson eds.) (1986)

presuming the lack of consent once she enters a marriage is antithetical to constitutional values.

45 A provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. In its operation, law "permeates and is inseparable from everyday living and knowing, and it plays an important role in shaping (legal) consciousness."[112] A contextual reading of the law shows that it influences social practices, and makes "asymmetries of power seem, if not invisible, natural and benign".[113] Section 497 has a significant social impact on the sexual agency of women. It builds on existing gender stereotypes and bias and further perpetuates them. Cultural stereotypes are more forgiving of a man engaging in sexual relations than a woman. Women then are expected to be chaste before and faithful during marriage. In restricting the sexual agency of women, Section 497 gives legal recognition to socially discriminatory and gender-based norms. Sexual relations for a woman were legally and socially permissible when it was within her marriage. Women who committed adultery or non-marital sex were labeled immoral, shameful, and were criminally condemned.

[112] Rosemary Coombe, Is There a Cultural Studies of Law?, *in* A Companion to Cultural Studies, Toby Miller (ed.), Oxford, (2001)

[113] Austin Sarat, Jonathan Simon, Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship, Yale Journal of Law & the Humanities, (2001), at page 19

In **Anuj Garg** v **Hotel Association of India**,[114] this Court struck down Section 30 of the Punjab Excise Act, 1914 which prohibited the employment of women in premises where liquor or other intoxicating drugs were consumed by the public. Holding that the law suffered from "incurable fixations of stereotype morality and conception of sexual role", the Court took into account "traditional cultural norms as also the state of general ambience in the society" and held that "no law in its ultimate effect should end up perpetuating the oppression of women."

In **Navtej**, one of us (Chandrachud J.) held thus:

> "A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1)."

46 Section 497 rests on and perpetuates stereotypes about women and sexual fidelity. In curtailing the sexual agency of women, it exacts sexual fidelity from women as the norm. It perpetuates the notion that a woman is passive and incapable of exercising sexual freedom. In doing so, it offers her 'protection' from prosecution. Section 497 denudes a woman of her sexual autonomy in making its

[114] (2008) 3 SCC 1

free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to a limited autonomy on entering marriage. The provision is grounded in and has a deep social effect on how society perceives the sexual agency of women. In reinforcing the patriarchal structure which demands her controlled sexuality, Section 497 purports to serve as a provision envisaged for the protection of the sanctity of marriage. In the context of a constitutional vision characterized by the struggle to break through the shackles of gender stereotypes and guarantee an equal citizenship, Section 497 entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order.

F.1 The entrapping cage

47 Section 497 exempts a woman from being punished as an abettor. Underlying this exemption is the notion that a woman is the victim of being seduced into a sexual relationship with a person who is not her husband. In assuming that the woman has no sexual agency, the exemption seeks to be justified on the ground of being a provision that is beneficial to women and protected under Article 15(3) of the Constitution. This is contrary to the remedy which Article 15(3) sought to embody. In **Government of A P** v **P B Vijayakumar**,[115] a two judge Bench of this Court dealt with a challenge to sub-rule (2) of Rule 22-A of the Andhra Pradesh State and Subordinate Service

[115] (1995) 4 SCC 520

Rules, which gave women a preference in the matter of direct recruitment. Speaking for the Court, Justice Sujata V Manohar held thus:

> "7. The insertion of Clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women…"[116]

In **Independent Thought** v **Union of India**,[117] Justice Madan B Lokur, speaking for a two judge Bench of this Court, adverted to the drafting history of Article 15(3) and held thus:

> "55. The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into society and to take them out of patriarchal control…[118]
> 56. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children – a form of affirmative action to their advantage."[119]

48 Article 15(3) encapsulates the notion of 'protective discrimination'. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of 'protection'. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles

[116] Ibid. at page 525
[117] (2017) 10 SCC 800
[118] Ibid. at page 837
[119] Ibid. at page 837

14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was 'seduced' into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to 'protect' her. The 'protection' afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

G Denuding identity – women as sexual property

49 Charles Jean Marie wrote in 1911[120] about the central forms of adultery as an offence. The criminalisation of adultery came at a social cost: of disregarding the agency of a woman as a sentient being.

[120] Charles Jean Marie Letorneau, The Evolution of Marriage (2011)

> "In all legislations the married woman is more or less openly considered as the property of the husband and is very often confounded, absolutely confounded, with things possessed. To use her, therefore, without the authority of her owner is theft…But adultery is not a common theft. An object, an inert possession, are passive things; their owner may well punish the thief who has taken them, but him only. **In adultery, the object of larceny, the wife, is a sentient and thinking being- that is to say, an accomplice in the attempt on her husband's property in her own person;** moreover he generally has her in his keeping…"

The law on adultery is but a codified rule of patriarchy. Patriarchy has permeated the lives of women for centuries. Ostensibly, society has two sets of standards of morality for judging sexual behaviour.[121] One set for its female members and another for males.[122] Society ascribes impossible virtues to a woman and confines her to a narrow sphere of behaviour by an expectation of conformity.[123] Raising a woman to a pedestal is one part of the endeavour. The second part is all about confining her to a space. The boundaries of that space are defined by what a woman should or should not be. A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex-determination and infanticide. As an embodiment of virtue, society expects the women to be a mute spectator to and even accepting of egregious discrimination within the home. This is part of the process of raising women to a pedestal conditioned by male notions of what is right and what is wrong for a woman. The notion that women, who are equally entitled to the protections of the Constitution as their male counterparts, may be

[121] Nandita Haksar, Dominance, Suppression and the Law in Women and the Law: Contemporary Problems (Lotika Sarkar and B. Sivaramayya eds.), Vikas Publishing House (1994)
[122] Ibid
[123] Ibid

treated as objects capable of being possessed, is an exercise of subjugation and inflicting indignity. Anachronistic conceptions of 'chastity' and 'honour' have dictated the social and cultural lives of women, depriving them of the guarantees of dignity and privacy, contained in the Constitution.

50 The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.

The opinion delivered on behalf of four judges in **K S Puttaswamy** v **Union of India**[124] has recognised the dangers of the "use of privacy as a veneer for patriarchal domination and abuse of women." On the delicate balance between the competing interests of protecting privacy as well dignity of women in the domestic sphere, the Court held:

> "The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty."

[124] (2017) 10 SCC 1

51 In “Seeing like a Feminist”, Nivedita Menon has recognized the patriarchal family as the “basis for the secondary status of women in society.”[125] Menon notes that ‘the personal is political’.[126] Her scholarly work implores us to recognise spaces which may be considered personal such as the bedroom and kitchen. These spaces are immersed in power relations, but with ramifications for the public sphere.[127]

Control over women’s sexuality is the key patriarchal assumption that underlies family and marriage.[128] When it shifts to the ‘public’ as opposed to the ‘private’, the misogyny becomes even more pronounced.[129] Section 497 embodies this. By the operation of the provision, women’s sexuality is sought to be controlled in a number of ways. First, the husband and he alone is enabled to prosecute the man with whom his wife has sexual relations. Even in cases where the relationship is based on the consent of the woman, the law treats it as an offence, denying a woman who has voluntarily entered into a consensual relationship of her sexual agency. Second, such a relationship would be beyond the reach of penal law if her husband consents to it. The second condition is a telling reflection of the patriarchal assumption underlying the criminal provision: that the husband is the owner of the wife’s sexual agency.

[125] Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 35
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.

52 In remedying injustices, the Court cannot shy away from delving into the 'personal', and as a consequence, the 'public'. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and "granting" rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink- women are equal citizens of this nation, entitled to the protections of the Constitution. Any legislation which results in the denial of these Constitutional guarantees to women, cannot pass the test of constitutionality.

Patriarchy and paternalism are the underpinnings of Section 497. It needs no iteration that misogyny and patriarchal notions of sexual control find no place in a constitutional order which has recognised dignity as intrinsic to a person, autonomy being an essential component of this right. The operation of Section 497 denotes that 'adulterous women' virtually exercise no agency; or at least not enough agency to make them criminally liable.[130] They are constructed as victims. As victims, they are to be protected by being exempt from sanctions of a criminal nature.[131] Not only is there a denial of sexual agency, women are also not seen to be harmed by the offence.[132] Thus, the provision is not simply about protecting the sanctity of the marital relationship. It is all about protecting a husband's interest in his "exclusive access to his wife's sexuality".[133]

[130] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 119
[131] Ibid.
[132] Ibid.
[133] Ibid. at page 120

53 Section 497 chains the woman to antediluvian notions of sexuality. Chief Justice Dipak Misra in **Navtej** emphasised the importance of sexual autonomy as a facet of individual liberty, thus protected under Article 21 of the Constitution:

> "The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged."

In **Navtej**, one of us (Chandrachud J.) held that the recognition of the autonomy of an individual is an acknowledgement of the State's respect for the capacity of the individual to make individual choices:

> "The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them."

To characterise a woman as a passive object, denuded of agency, is a denial of autonomy. The same judgment in **Navtej** has recognized sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual:

> "In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the 'Original Position' serves as a constructive model to illustrate the notion of choice behind a "partial veil of ignorance." Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society. The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of 'good' might be. These neutrally desirable goods are described by Rawls as 'primary social goods' and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect. **Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy. Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner**."
> (Emphasis supplied)

G.1 Exacting fidelity: the intimacies of marriage

54 Marriage as a social institution has undergone changes. Propelled by access to education and by economic and social progress, women have found greater freedom to assert their choices and preferences. The law must also reflect their status as equals in a marriage, entitled to the constitutional guarantees of privacy and dignity. The opinion delivered on behalf of four judges in **Puttaswamy** held thus:

> "130…As society evolves, so must constitutional doctrine. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen."[134]

[134] Ibid. at page 414

In **Navtej**, Justice Rohinton Nariman countered the assertion that the Court must "not indulge in taking upon itself the guardianship of changing societal mores" by holding thus:

> "…The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities.One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens**. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India. Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes."**
> (Emphasis supplied)

55 Section 497 seeks the preservation of a construct of marriage in which female fidelity is enforced by the letter of the law and by the coercive authority of the state. Such a conception goes against the spirit of the rights-based jurisprudence of this Court, which seeks to protect the dignity of an individual and her "intimate personal choices". It cannot be held that these rights cease to exist once the woman enters into a marriage.

56 The identity of the woman must be as an 'individual in her own right'. In that sense, her identity does not get submerged as a result of her marriage. Section 497 lays down the norm that the identity of a married woman is but as the wife of her spouse. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal

constitution. Chief Justice Dipak Misra in **Navtej** has drawn on the interrelationship between 'identity' and 'autonomy':

> "…Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society."

This Court in **Puttaswamy** has elucidated that privacy is the entitlement of every individual, with no distinction to be made on the basis of the individual's position in society.

> "271.Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals."[135]

57 It would be useful to refer to decisions of this Court which have emphasised on the freedoms of individuals with respect to choices in relationships. In **Navtej**, Chief Justice Misra highlighted the indignity suffered by

[135] Ibid. at page 484

an individual when “acts within their personal sphere” are criminalised on the basis of regressive social attitudes:

> “An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit.”

The Chief Justice observed that the “organisation of intimate relations” between “consenting adults” is a matter of complete personal choice and characterised the “private protective sphere and realm of individual choice and autonomy” as a personal right:

> “It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual‘s choice to prevent harm or injury to others. **However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.”**
> (Emphasis supplied)

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In **Shakti Vahini**, this Court has recognised the right to choose a partner as a fundamental right under Articles 19 and 21 of the Constitution. In **Shafin Jahan**, “intimate personal choices” were held to be a protected sphere, with one of us (Chandrachud J) stating:

> “88.The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual.

> Intimacies of marriage lie within a core zone of privacy, which is inviolable."

58 In **Navtej,** one of us (Chandrachud J) held that the right to sexual privacy is a natural right, fundamental to liberty and a soulmate of dignity. The application of Section 497 is a blatant violation of these enunciated rights. Will a trial to prove adultery lead the wife to tender proof of her fidelity? In **Navtej**, the principle was elucidated thus:

> "In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters."

In so far as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with.

In **Puttaswamy**, it was recognised that a life of dignity entails that the "inner recesses of the human personality" be secured from "unwanted intrusion":

> "127.The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution."[136]

[136] Ibid. at page 413

59 In criminalizing adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship.

This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. Individuals in a relationship, whether within or outside marriage, have a legitimate expectation that each will provide to the other the same element of companionship and respect for choices. Respect for sexual autonomy, it must be emphasized is founded on the equality between spouses and partners and the recognition by each of them of the dignity of the other. Control over sexuality attaches to the human element in each individual. Marriage – whether it be a sacrament or contract – does not result in ceding of the autonomy of one spouse to another.

60 Recognition of sexual autonomy as inhering in each individual and of the elements of privacy and dignity have a bearing on the role of the state in regulating the conditions and consequences of marital relationships. There is a fundamental reason which militates against criminalization of adultery. Its genesis lies in the fact that criminalizing an act is not a valid constitutional response to a sexual relationship outside the fold of marriage. Adultery in the course of a subsisting marital relationship may, and very often does question the commitment of the spouse to the relationship. In many cases, a sexual relationship of one of the spouses outside of the marriage may lead to the end of the marital relationship. But in other cases, such a relationship may not be the cause but the consequence of a pre-existing disruption of the marital tie. All too often, spouses who have drifted apart irrevocably may be compelled for reasons personal to them to continue with the veneer of a marriage which has ended for all intents and purposes. The interminably long delay of the law in the resolution of matrimonial conflicts is an aspect which cannot be ignored. The realities of human existence are too complex to place them in closed categories of right and wrong and to subject all that is considered wrong with the sanctions of penal law. Just as all conduct which is not criminal may not necessarily be ethically just, all conduct which is inappropriate does not justify being elevated to a criminal wrongdoing.

61 The state undoubtedly has a legitimate interest in regulating many aspects of marriage. That is the foundation on which the state does regulate rights,

entitlements and duties, primarily bearing on its civil nature. Breach by one of the spouses of a legal norm may constitute a ground for dissolution or annulment. When the state enacts and enforces such legislation, it does so on the postulate that marriage as a social institution has a significant bearing on the social fabric. But in doing so, the state is equally governed by the norms of a liberal Constitution which emphasise dignity, equality and liberty as its cardinal values. The legitimate aims of the state may, it must be recognized, extend to imposing penal sanctions for **certain** acts within the framework of marriage. Physical and emotional abuse and domestic violence are illustrations of the need for legislative intervention. The Indian state has legitimately intervened in other situations such as by enacting anti dowry legislation or by creating offences dealing with the harassment of women for dowry within a marital relationship. The reason why this constitutes a legitimate recourse to the sovereign authority of the state to criminalize conduct is because the acts which the state proscribes are deleterious to human dignity. In criminalizing certain types of wrongdoing against women, the state intervenes to protect the fundamental rights of every woman to live with dignity. Consequently, it is important to underscore that this judgment does not question the authority and even the duty of the state to protect the fundamental rights of women from being trampled upon in unequal societal structures. Adultery as an offence does not fit that paradigm. In criminalizing certain acts, Section 497 has proceeded on a hypothesis which is deeply offensive to the dignity of women. It is grounded in paternalism, solicitous of patriarchal values and subjugates the woman to a position where the law

disregards her sexuality. The sexuality of a woman is part of her inviolable core. Neither the state nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalizing adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.

62 The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse. It is the duty of this Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life- irrespective of whether these spheres may be regarded as 'public' or 'private'.

H Towards transformative justice

63 Constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of

dignity and equality for its citizens. One of the most significant of the battles for equal citizenship in the country has been fought by women. Feminists have overcome seemingly insurmountable barriers to ensure a more egalitarian existence for future generations. However, the quest for equality continues. While there has been a considerable degree of reform in the formal legal system, there is an aspect of women's lives where their subordination has historically been considered beyond reproach or remedy. That aspect is the family. Marriage is a significant social institution where this subordination is pronounced, with entrenched structures of patriarchy and romantic paternalism shackling women into a less than equal existence.

64 The law on adultery, conceived in Victorian morality, considers a married woman the possession of her husband: a passive entity, bereft of agency to determine her course of life. The provision seeks to only redress perceived harm caused to the husband. This notion is grounded in stereotypes about permissible actions in a marriage and the passivity of women. Fidelity is only expected of the female spouse. This anachronistic conception of both, a woman who has entered into marriage as well as the institution of marriage itself, is antithetical to constitutional values of equality, dignity and autonomy.

In enforcing the fundamental right to equality, this Court has evolved a test of manifest arbitrariness to be employed as a check against state action or legislation which has elements of caprice, irrationality or lacks an adequate

determining principle. The principle on which Section 497 rests is the preservation of the sexual exclusivity of a married woman – for the benefit of her husband, the owner of her sexuality. Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings of Section 497 render the provision manifestly arbitrary.

65 The constitutional guarantee of equality rings hollow when eviscerated of its substantive content. To construe Section 497 in a vacuum (as did **Sowmithri Vishnu**) or in formalistic terms (as did **Revathi)** is a refusal to recognise and address the subjugation that women have suffered as a consequence of the patriarchal order. Section 497 is a denial of substantive equality in that it re-inforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse.

66 This Court has recognised sexual privacy as a natural right, protected under the Constitution. To shackle the sexual freedom of a woman and allow the criminalization of consensual relationships is a denial of this right. Section 497 denudes a married woman of her agency and identity, employing the force of law to preserve a patriarchal conception of marriage which is at odds with constitutional morality:

> "Infidelity was born on the day that natural flows of sexual desire were bound into the legal and formal permanence of marriage; in the process of ensuring male control over

> progeny and property, women were chained within the fetters of fidelity."[137]

Constitutional protections and freedoms permeate every aspect of a citizen's life - the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.

67 Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster.

We hold and declare that:

1) Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

[137] Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 135; quoting Archana Verma, Stree Vimarsh Ke Mahotsav (2010)

2) Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;

3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and

4) Section 497 is unconstitutional.

The decisions in **Sowmithri Vishnu** and **Revathi** are overruled.

…….…..…..J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
September 27, 2018.

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

Joseph Shine …Petitioner

Versus

Union of India …Respondent

J U D G M E N T

INDU MALHOTRA, J.

1. The present Writ Petition has been filed to challenge the constitutional validity of Section 497 of the Indian Penal Code (hereinafter referred to as I.P.C.) which makes 'adultery' a criminal offence, and prescribes a punishment of imprisonment upto five years and fine. Section 497 reads as under:

> *"**497. 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."*

2. The Petitioner has also challenged Section 198(2) of the Code of Criminal Procedure, 1973, (hereinafter referred to as "Cr.P.C"). Section 198(2) reads as under:

> *"For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code.*
> *Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."*

3. The word 'adultery'[1] derives its origin from the French word '*avoutre'*, which has evolved from the Latin verb '*adulterium'* which means "to corrupt." The concept of a wife corrupting the marital bond with her husband by

[1] The New international Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopedic Edition, Trident Press International (1996 Edn.) at page 21.

having a relationship outside the marriage, was termed as 'adultery'.

This definition of adultery emanated from the historical context of Victorian morality, where a woman considered to be the 'property' of her husband; and the offence was committed only by the adulterous man. The adulterous woman could not be proceeded against as an 'abettor', even though the relationship was consensual.

4. THE DOCTRINE OF COVERTURE

Adultery, as an offence, was not a crime under Common Law, in England. It was punishable by the ecclesiastical courts which exercised jurisdiction over sacramental matters that included marriage, separation, legitimacy, succession to personal property, etc.[2]

In England, coverture determined the rights of married women, under Common Law. A '*feme sole'* transformed into a '*feme covert'* after marriage. '*Feme covert'* was based on the doctrine of 'Unity of Persons' – i.e. the husband and wife were a single legal identity. This was

[2] Outhwaite, R.B. (2007). *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860.* Cambridge, UK: Cambridge University Press

based on notions of biblical morality that a husband and wife were 'one in flesh and blood'. The effect of 'coverture' was that a married woman's legal rights were subsumed by that of her husband. A married woman could not own property, execute legal documents, enter into a contract, or obtain an education against her husband's wishes, or retain a salary for herself.[3]

The principle of 'coverture' was described in William Blackstone's Commentaries on the Laws of England as follows:[4]

> *" By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage. I speak*

[3] Fernandez, Angela "*Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity*." Married Women and the Law: Coverture in England and the Common Law World, edited by Tim Stretton and Krista J. Kesselring, McGill-Queen's University Press, 2013, pp. 192–216.

[4] *Blackstone's Commentaries on the Laws of England,* Books III & IV (8th Edn.), 1778

> *not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all contracts made between husband and wife, when single, are voided by the intermarriage."*
>
> (Emphasis supplied)

On this basis, a wife did not have an individual legal liability for her misdeeds, since it was legally assumed that she was acting under the orders of her husband, and generally a husband and wife were not allowed to testify either for, or against each other.

Medieval legal treatises, such as the Bracton[5], described the nature of 'coverture' and its impact on married women's legal actions. Bracton (supra) states that husbands wielded power over their wives, being their 'rulers' and 'custodians of their property'. The institution of marriage came under the jurisdiction of ecclesiastical courts. It made wives live in the shadow of their husbands, virtually 'invisible' to the law.

[5] *Bracton: De Legibus Et Consuetudinibus Angliæ* (Bracton on the Laws and Customs of England attributed to Henry of Bratton, c. 1210-1268) Vol III, pg. 115 *Available at* http://bracton.law.harvard.edu/index.html

The principle of coverture subsisted throughout the marriage of the couple. It was not possible to obtain a divorce through civil courts, which refused to invade into the jurisdiction of the church. Adultery was the only ground available to obtain divorce.

The origin of adultery under Common Law was discussed in the English case *Pritchard* v. *Pritchard and Sims*[6], wherein it was held that:

> *"In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, under the common law, three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her…In the action for adultery, known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety which would have been hers had she been feme sole."*
>
> (Emphasis supplied)

[6] [1966] 3 All E.R. 601

In the Victorian Era[7], women were denied the exercise of basic rights and liberties, and had little autonomy over their choices. Their status was *pari materia* with that of land, cattle and crop; forming a part of the 'estate' of their fathers as daughters prior to marriage, and as the 'estate' of their husband post-marriage.[8]

Lord Wilson in his Speech titled "*Out of his shadow: The long struggle of wives under English Law*"[9] speaks of the plight of women during this era:

> *"8. An allied consequence of the wife's coverture was that she was not legally able to enter into a contract. Apart from anything else, she had no property against which to enforce any order against her for payment under a contract; so it was only a small step for the law to conclude that she did not have the ability to enter into the contract in the first place. If, however, the wife went into a shop and ordered goods, say of food or clothing, which the law regarded as necessary for the household, the law presumed, unless the husband proved to the contrary, that she had entered into the contract*

[7] 1807 – 1901 A.D.

[8] Margot Finn (1996). Women, Consumption and Coverture in England, c. 1760–1860. The Historical Journal, 39, pp 703-722

[9] The High Sheriff of Oxfordshire's Annual Law Lecture given by Lord Wilson on 9 October 2012
Available at: https://www.supremecourt.uk/docs/speech-121009.pdf

as his authorised agent. So the shopkeeper could sue him for the price if the wife had obtained the goods on credit.

9. In the seventeenth century there was a development in the law relating to this so-called agency of necessity. It was an attempt to serve the needs of wives whose husbands had deserted them. The law began to say that, if a deserted wife had not committed adultery, she could buy from the shopkeeper all such goods as were necessary for her and, even if (as was highly likely) the husband had not authorised her to buy them, he was liable to pay the shopkeeper for them. But the shopkeeper had a problem. How was he to know whether the wife at the counter had been deserted and had not committed adultery? Sometimes a husband even placed a notice in the local newspaper to the effect, true or untrue, that his wife had deserted him or had committed adultery and that accordingly he would not be liable to pay for her purchase of necessaries….."

The remnants of 'coverture' sowed the seeds for the introduction of 'Criminal Conversation' as an actionable tort by a husband against his wife's paramour in England.

Criminal Conversation as a tort, gave a married man the right to claim damages against the man who had entered into a sexual relationship with his wife. The

consent of the wife to the relationship, did not affect the entitlement of her husband to sue.

The legal position of matrimonial wrongs underwent a significant change with the passing of the Matrimonial Causes Act, 1857 in England.[10] Section 59 of this Act abolished the Common Law action for "criminal conversation".[11] Section 33 empowered the Courts to award damages to the husband of the paramour for adultery.[12] The claim for damages for adultery was to be tried on the same principles, and in the same manner, as actions for 'criminal conversation' which were formerly tried at Common Law.[13]

The status of the wife, however, even after the passing of the Matrimonial Causes Act, 1857 remained as

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[10] Matrimonial Causes Act 1857; 1857 (20 & 21 Vict.) C. 85

[11] LIX. No Action for Criminal Conversation:
"*After this Act shall have come into operation no Action shall be maintainable in England for Criminal Conversation.*"

[12] XXXIII. Husband may claim Damages from Adulterers:
"*Any Husband may, either in a Petition for Dissolution of Marriage or for Judicial Separation, or in a Petition limited to such Object only, claim Damages from any Person on the Ground of his having committed Adultery with the Wife of such Petitioner, and such Petition shall be served on the alleged Adulterer and the Wife, unless the Court shall dispense with such Service, or direct some other Service to be substituted; and the Claim made by every such Petition shall be heard and tried on the same principle, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversations are now tried and decided in Courts of Common Law; and all the enactments herein contain with reference to the hearing and decision of Petitions to the Courts shall, so far as may be necessary, be deemed applicable to the hearing and decision of Petitions presented under this enactment..*"

[13] *Id.*

'property of the husband', since women had no right to sue either their adulterous husband or his paramour.

Gender equality between the spouses came to be recognised in some measure in England, with the passing of the Matrimonial Causes Act, 1923 which made 'adultery' a ground for divorce, available to both spouses, instead of only the husband of the adultrous wife. The right of the husband to claim damages from his wife's paramour came to be abolished by The Law Reform (Miscellaneous Provisions) Act of 1970 on January 1, 1971. In England, adultery has always been a civil wrong, and not a penal offence.

5. SECTION 497 – HISTORICAL BACKGROUND

5.1. The Indo-Brahmanic traditions prevalent in India mandated the chastity of a woman to be regarded as her prime virtue, to be closely guarded to ensure the purity of the male bloodline. The objective was not only to protect the bodily integrity of the woman, but to ensure that the husband retains control over her sexuality,

confirming her 'purity' in order to ensure the purity of his own bloodline.[14]

5.2. The first draft of the I.P.C. released by the Law Commission of India in 1837 did not include "adultery" as an offence. Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties, and not a criminal offence.[15]

The views of Lord Macaulay were, however, overruled by the other members of the Law Commission, who were of the opinion that the existing remedy for 'adultery' under Common Law would be insufficient for the 'poor natives', who would have no recourse against the paramour of their wife.[16]

5.3. The debate that took place in order to determine whether 'adultery' should be a criminal offence in India was recorded in 'Note Q' of '*A Penal Code*

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[14] Uma Chakravarti, *Gendering Caste Through a Feminist Lens*, STREE Publications (2003) at page 71.

[15] 156th Report on the Indian Penal Code (Vol. I), Law Commission of India at para 9.43 at page 169
Available at: http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf

[16] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

prepared by the Indian Law Commissioners' [17]. The existing laws[18] for the punishment of adultery were considered to be altogether inefficacious for preventing the injured husband from taking matters into his own hands.

The Law Commissioners considered that by not treating 'adultery' as a criminal offence, it may give sanction to immorality. The Report[19] states:

> *" Some who admit that the penal law now existing on this subject is in practice of little or no use, yet think that the Code ought to contain a provision against adultery. They think that such a provision, though inefficacious for the repressing of vice, would be creditable to the Indian Government, and that by omitting such a provision we should give a sanction to immorality. They say, and we believe with truth, that the higher class of natives consider the existing penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with*

[17] *A Penal Code prepared by The Indian Law Commissioners*, (1838), Notes of Lord Thomas Babington Macaulay, Note Q

[18] The laws governing adultery in the Colonial areas were laid down in Regulation XVII of 1817, and Regulation VII of 1819; the Law Commissioners observed that the strict evidentiary and procedural requirements, deter the people from seeking redress.

[19] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

more tenderness than forgery or perjury.

…That some classes of the natives of India disapprove of the lenity with which adultery is now punished we fully believe, but this in our opinion is a strong argument against punishing adultery at all. There are only two courses which in our opinion can properly be followed with respect to this and other great immoralities. They ought to be punished very severely, or they ought not to be punished at all. The circumstance that they are left altogether unpunished does not prove that the Legislature does not regard them with disapprobation. But when they are made punishable the degree of severity of the punishment will always be considered as indicating the degree of disapprobation with which the Legislature regards them. We have no doubt that the natives would be far less shocked by the total silence of the penal law touching adultery than by seeing an adulterer sent to prison for a few months while a coiner is imprisoned for fourteen years."

(Emphasis supplied)

The Law Commissioners in their Report (supra) further stated:

".....The population seems to be divided into two classes – those

whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.

…No body proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is strong affection and a quick sensibility to family honour. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society we think it far better that the law should inflict no punishment than that it should inflict a punishment which would be regarded as absurdly and immorally lenient."

(Emphasis supplied)

The Law Commissioners considered the plight of women in this country, which was much worse than that of women in France and England. 'Note

Q' (surpa) records this as the reason for not punishing women for the offence of adultery.

The relevant extract of 'Note Q' is reproduced herein below:

> *" There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attention (sic) of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it*

continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial."

(Emphasis supplied)

Colonel Sleeman opposed the reasoning of the Law Commissioners on this subject. The 'backwardness of the natives' to take recourse to the courts for redress in cases of adultery, arose from 'the utter hopelessness on their part of getting a conviction.' He was of the view that if adultery is not made a crime, the adulterous wives will alone bear the brunt of the rage of their husbands. They might be tortured or even poisoned. In his view, offences such as adultery

were inexcusable and must be punished. Colonel Sleeman observed:

> " *The silence of the Penal Code will give still greater impunity to the seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer.*
>
> *…Sometimes the poorest persons will refuse pecuniary compensations; but generally they will be glad to get what the heads of their caste or circle of society may consider sufficient to defray the expenses of a second marriage. They dare not live in adultery, they would be outcasts if they did; they must be married according to the forms of their caste, and it is reasonable that the seducer of the wife should be made to defray these expenses for the injured husband. The rich will, of course, always refuse pecuniary compensation, and for the same reason that they would never prosecute the seducer in a civil court. The poor could never afford so to prosecute in such a court; and, as I have said, the silence of the Penal Code would be a solemn pledge of impunity to the*

guilty seducer, under the efficient government like ours, that can prevent the husband and father from revenging themselves except upon the females."[20]

(Emphasis supplied)

This debate along with the recommendation of the Law Commissioners was considered by the Indian Law Commissioners while drafting the Indian Penal Code.

5.4. The relevant extract from the discussion on whether to criminalize adultery was as follows:

> "*We have observed that adultery is recognised as an offence by the existing laws of all the Presidencies, and that an Act has been lately passed by the Governor-General of India in Council for regulating the punishment of the offence in the Bombay territories. Adultery is punishable by the Code Penal of France. It is provided for in the Code of Louisiana. The following are Mr. Livingston's observations on the subject. "Whether adultery should be considered as an offence against public morality, or left to the operation of the civil laws, has been the subject of much discussion. As far as I am informed, it figures in the penal law of all nations except the English; and some of their most celebrated lawyers have considered the omission as a defect.*

[20] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

Neither the immorality of the act, nor its injurious consequences on the happiness of females, and very frequently on the peace of society and the lives of its members, can be denied. The reason then why it should go unpunished does not seem very clear. It is emphatically one of that nature to which I have just referred, in which the resentment of the injured party will prompt him to take vengeance into his own hands, and commit a greater offence, if the laws of his country refuse to punish the lesser. It is the nature of man, and no legislation can alter it, to protect himself where the laws refuse their aid; very frequently where they do not; but where they will not give protection against injury, it is in vain that they attempt to punish him who supplies by his own energy their remissness. Where the law refuses to punish this offence, the injured party will do it for himself, he will break the public peace, and commit the greatest of all crimes, and he is rarely or never punished. Assaults, duels, assassinations, poisonings, will be the consequence. They cannot be prevented; but, perhaps, by giving the aid of the law to punish the offence which they are intended to avenge, they will be less frequent; and it will, by taking away the pretext for the atrocious acts, in a great measure insure the infliction of the punishment they deserve. It is for these reasons that the offence of adultery forms a chapter of this title."

Having given mature consideration to the subject, we have, after some

hesitation, come to the conclusion that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the criminal courts preponderate.….

…While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of the women of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial together, and empower the Court, in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code, the woman forfeits her 'matrimonial gains', but is not liable to other punishment.

We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition."[21]

(Emphasis supplied)

[21] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

5.5. It was in this backdrop that Section 497 came to be included in the I.P.C.

6. THE QUEST FOR REFORM

6.1. In June 1971, the 42nd Report of the Law Commission of India[22] analysed various provisions of the I.P.C. and made several important recommendations. With respect to the offence of 'adultery', the Law Commission recommended that the adulterous woman must be made equally liable for prosecution, and the punishment be reduced from 5 years to 2 years. This was however, not given effect to.

6.2. In August 1997, the Law Commission of India in its 156th Report[23] noted that the offence of adultery under Section 497 is very limited in scope in comparison to the misconduct of adultery in divorce (civil proceedings). The section confers only upon the husband the right to

[22] 42nd Report on the Indian Penal Code, Law Commission of India
Available at: http://lawcommissionofindia.nic.in/1-50/report42.pdf
[23] 156th Report on the Indian Penal Code (Vol. I), Law Commission of India, pages 169 - 172
Available at: http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf

prosecute the adulterous male, but does not confer any right on the aggrieved wife to prosecute her adultererous husband. It was recommended to introduce an amendment to incorporate the concept of equality between sexes in marriage *vis-à-vis* the offence of adultery. The proposed change was to reflect the transformation of women's status in Indian society.

However, the recommendation was not accepted.

6.3. In March 2003, the Malimath Committee on Reforms of Criminal Justice System[24], was constituted by the Government of India, which considered comprehensive measures for revamping the Criminal Justice System. The Malimath Committee made the following recommendation with respect to "Adultery":

> "*16.3.1 A man commits the offence of adultery if he has sexual*

[24] *Report of the Committee on Reforms of Criminal Justice System*, Government of India, Ministry of Home Affairs, chaired by Justice V.S. Malimath, (2003) *Available at:*https://mha.gov.in/sites/default/files/criminal_justice_system.pdf

intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good reason for not meting out similar treatment to wife who has sexual intercourse with a married man.

16.3.2 The Committee therefore suggests that Section 497 of the I.P.C. should be suitably amended to the effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery……"

(Emphasis supplied)

The recommendations of the Malimath Committee on the amendment of Section 497 were referred to the Law Commission of India, which took up the matter for study and examination. The same is pending consideration.

7. CONTEMPORARY INTERNATIONAL JURISPRUDENCE

Before addressing the issue of the constitutional validity of Section 497 I.P.C., it would be of interest to review how 'adultery' is treated in various jurisdictions around the world.

Adultery has been defined differently across various jurisdictions. For instance, adultery charges may require the adulterous relationship to be "open and notorious,"[25] or be more than a single act of infidelity, or require cohabitation between the adulterer and the adulteress. Such a definition would require a finding on the degree of infidelity.[26] In other instances, the spouses may also be punishable for adultery. Such a provision raises a doubt as to how that may secure the relationship between the spouses and the institution of marriage. Another variation, in some jurisdictions is that cognizance of the offence of adultery is taken only at the instance of the State, and its enforcement is generally a rarity.

7.1. Various legal systems have found adulterous conduct sufficiently injurious to justify some form of criminal sanction. Such conduct is one, which the society is not only unwilling to approve, but also attaches a criminal label to it.

- United States of America

[25] Illinois Criminal Code, 720 ILCS 5/11-35, Adultery
"*(a) A person commits adultery when he or she has sexual intercourse with another not his or her spouse, if the behavior is open and notorious,…*"
[26] Martin Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 Journal Of Family Law 45, 51-52 (1991)

In the United States of America, 17 out of 50 States continue to treat 'adultery' as a criminal offence under the State law.[27] The characterization of the offence differs from State to State.

In the case of *Oliverson* v. *West Valley City*[28], the constitutionality of the Utah adultery statute[29] was challenged. It was contended that the statute offends the right to privacy and violates substantive due process of law under the U.S. Constitution. The U.S. Court held that adultery is a transgression against the relationship of marriage which the law endeavors to protect. The State of Utah had an interest in preventing adultery. Whether to use criminal sanction was considered a matter particularly within the ambit of the legislature. Given the special interest of the State, it was considered rational to classify adultery as a crime.

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[27] Abhinav Sekhri, *The Good, The Bad, and The Adulterous: Criminal Law and Adultery in India,* 10 Socio Legal Review 47 (2014)

[28] 875 F. Supp. 1465

[29] Utah Code Ann. 76-7-103, *"(1) A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse. (2) Adultery is a class B misdemeanour."*

A similar provision exists in the State of New York, wherein adultery is treated as a Class B misdemeanor.[30]

By way of contrast, in the State of North Carolina, it was held in the Judgment of *Hobbs* v. *Smith*[31], that adultery should not be treated as a criminal offence. The Superior Court of North Carolina, relied on the judgment of the U.S. Supreme Court, in *Lawrence* v. *Texas*[32] wherein it was recognized that the right to liberty provides substantial protection to consenting adults with respect to decisions regarding their private sexual conduct. The decision of an individual to commit adultery is a personal decision, which is sufficiently similar to other personal choices regarding marriage, family, procreation, contraception, and sexuality, which fall within the area of privacy. Following this reasoning in *Lawrence*, the Superior Court of the State of

[30] New York Penal Laws, Article 255.17-Adultery, "*A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse. Adultery is a class B misdemeanour.*"
[31] No. 15 CVS 5646 (2017) [Superior Court of North Carolina)
[32] 539 US 558 (2003)

North Carolina held that the State Law criminalizing adultery violated the substantive due process, and the right to liberty under the Fourteenth Amendment to the U.S. Constitution, and the provision criminalizing adultery was declared unconstitutional.

- Canada

  In Canada, the Criminal Code of Canada under Section 172 imposes criminal sanctions for adulterous conduct. This provision was introduced in 1918[33], and continues to remain on the Criminal Code.

  The Criminal Code of Canada prohibits endangering the morals of children in a home where one "participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice."

[33] Criminal Code of Canada, 1985, Section 172, "*(1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*
(2) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years."

Furthermore, Canada has a provision for granting divorce in cases of "breakdown of marriages", and adultery is a ground for establishing the same.[34]

- Malaysia

In Malaysia, adultery is punishable as a crime under the Islamic Laws. However, the Law Reform (Marriage and Divorce) Act, 1976 made it a civil wrong, for all non-Muslims. Similar to the position in Canada, this Act makes adultery a ground for granting divorce, as it is a proof of "Breakdown of Marriage".[35] Interestingly though, the Act also allows either spouse, to be an aggrieved party and claim damages from the adulterer or adulteress.[36]

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[34] Divorce Act, 1968, *"Section 8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.*
(2) Breakdown of a marriage is established only if:
(a) .....
(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
(i) committed adultery, or ....."

[35] S. 54(1)(a), Law Reform (Marriage and Divorce) Act, 1976. [Malaysia] states,
"*54. (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:*
(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent....."

[36] S. 58, Law Reform (Marriage and Divorce) Act, 1976. [Malaysia] states,

- Japan

In Japan, the provision for adultery was somewhat similar to the present Section 497 of I.P.C.; it punished the woman and the adulterer only on the basis of the complaint filed by the husband. In case the act of adultery was committed with the consent of the husband, there would be no valid demand for prosecution of the offence[37]. This provision has since been deleted.[38] Adultery is now only a ground for divorce in Japan under the Civil Code.[39]

- South Africa

"58. (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.
(2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.
(3) Where damages have been claimed against a co-respondent— (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element."

[37] S. 183, Penal Code, 1907 [Japan], "*Whoever commits adultery with a married woman will be punished by prison upto two years. The same applies to the other party of the adultery. These offences are only prosecuted on demand of the husband. If the husband has allowed the Adultery, his demand is not valid."* [as translated by Karl-Friedrich Lenz, in History of Law in Japan since 1868, ed. Wilhelm Rohl, published by Brill, 2005, at page 623]

[38] H. Meyers, *"Revision of Criminal Code of Japan"* Washington Law Review & State Bar Journal, Vol. 25, (1950) at pp. 104-134

[39] Article 770, Civil Code, 1896. [Japan], *"Article 770 (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce: (i) if a spouse has committed an act of unchastity; …."*

In South Africa, in the case of *DE* v. *RH*[40] The Constitutional Court of South Africa struck down adultery as a ground for seeking compensation by the aggrieved persons. The Court relied on an earlier judgment of *Green* v. *Fitzgerald*[41] wherein it was held that the offence of adultery has fallen in disuse, and *"has ceased to be regarded as a crime"*.[42] The Court noted that even though adultery was of frequent occurrence in South Africa, and the reports of divorce cases were daily published in the newspapers in South Africa, the authorities took no notice of the offence.

- Turkey

In Turkey, the decision of the Constitutional Court of Turkey from 1996[43] is another instance where the Court struck down the provision of adultery as a criminal offence from the Turkish Penal Code of 1926. The Court noted that the provision was violative of the Right to Equality, as

[40] *RH* v. *DE* (594/2013) [2014] ZASCA 133 (25 September 2014)
[41] 1914 AD 88
[42] *Id.*
[43] Anayasa Mahkemesi, 1996/15; 1996/34 (Sept. 23, 1996)
See also, Anayasa Mahakemsi, 1998/3; 1998/28 (June 23, 1998) and Anayasa Mahakemsi, 1997/45. 1998/48 (July 16, 1998)

guaranteed by the Turkish Constitution since it treated men and women differently for the same act.

- South Korea

  In South Korea, adultery as a criminal offence was struck down by the Constitutional Court of Korea in, what is popularly known as, the *Adultery Case of February 26, 2015*[44]. The Constitutional Court of Korea held that Article 241, which provided for the offence of adultery, was unconstitutional as it violated Article 10 of the Constitution, which promotes the right to personality, the right to pursue happiness, and the right to self-determination. The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners. Article 241 was considered to restrict the right to privacy protected under Article 17 of the Constitution since it restricts activities arising out of sexual

[44] Adultery Case, 27-1 (A) KCCR 20, February 26, 2015

life belonging to the intimate private domain. Even though the provision had a legitimate object to preserve marital fidelity between spouses, and monogamy, the court struck it down as the provision failed to achieve the "appropriateness of means and least restrictiveness" The Court held as follows:

> *"In recent years, the growing perception of the Korean society has changed in the area of marriage and sex with the changes of the traditional family system and family members' role and position, along with rapid spread of individualism and liberal views on sexual life. Sexual life and love is a private matter, which should not be subject to the control of criminal punishment. Despite it is unethical to violate the marital fidelity, it should not be punished by criminal law.…*
>
> *…..*
>
> *…The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least. It belongs to a free domain of individuals for an adult to have voluntary sexual relationships, but it may be regulated by law when it is expressed and it is against the good sexual culture and*

> *practice. It would infringe on the right to sexual self-determination and to privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders.*
>
> *The tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes.*
>
> (Emphasis supplied)

The Court concluded that it was difficult to see how criminalization of adultery could any longer serve the public interest of protecting the monogamy-based marriage system, maintain good sexual culture, and the marital fidelity between spouses. A consideration of Article 241 which punishes adultery failed to achieve the appropriateness of means and least restrictiveness. Since the provision excessively restricted a person's sexual autonomy and privacy by criminally punishing the private and

intimate domain of sexual life, the said penal provision was said to have lost the balance of State interest and individual autonomy.

8. PREVIOUS CHALLENGES TO ADULTERY IN INDIA

This court has previously considered challenges to Section 497 *inter alia* on the ground that the impugned Section was violative of Articles 14 and 15 of the Constitution.

8.1. In *Yusuf Abdul Aziz* v. *State of Bombay*[45], Section 497 was challenged before this Court *inter alia* on the ground that it contravened Articles 14 and 15 of the Constitution, since the wife who is *pari delicto* with the adulterous man, is not punishable even as an "abettor." A Constitution Bench of this Court took the view that since Section 497 was a special provision for the benefit of women, it was saved by Article 15(3) which is an enabling provision providing for protective discrimination.

[45] 1954 SCR 930

In *Yusuf Aziz* (supra), the Court noted that both Articles 14 and 15 read together validated Section 497.

8.2. Later, in *Soumithri Vishnu* v. *Union of India & Anr.*[46], a three-judge bench of this Court addressed a challenge to Section 497 as being unreasonable and arbitrary in the classification made between men and women, unjustifiably denied women the right to prosecute her husband under Section 497.

It was contended that Section 497 conferred a right only upon the husband of the adulterous woman to prosecute the adulterer; however, no such right was bestowed upon the wife of an adulterous man. The petitioners therein submitted that Section 497 was a flagrant violation of gender discrimination against women. The Court opined that the challenge had no legal basis to rest upon. The Court observed that the argument really centred on the definition, which

[46] (1985) Supp SCC 137

was required to be re-cast to punish both the male and female offender for the offence of adultery.

After referring to the recommendations contained in the 42nd Report of the Law Commission of India, the Court noted that there were two opinions on the desirability of retaining Section 497. However it concluded by stating that Section 497 could not be struck down on the ground that it would be desirable to delete it from the statute books.

The Court repelled the plea on the ground that it is commonly accepted that it is the man who is the 'seducer', and not the woman. The Court recognized that this position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone.

8.3. In *V. Revathi* v. *Union of India*[47], a two-judge bench of this court upheld the constitutional validity of Section 497, I.P.C. and Section 198(2) of the Cr.P.C. The petitioner contended that whether or not the law permitted a husband to prosecute his disloyal wife, a wife cannot be lawfully disabled from prosecuting her disloyal husband. Section 198(2) Cr.P.C. operates as a fetter on the wife in prosecuting her adulterous husband. Hence, the relevant provision is unconstitutional on the ground of obnoxious discrimination.

This Court held that Section 497 I.P.C. and Section 198(2) Cr.P.C. together form a legislative package. In essence, the former being substantive, and the latter being largely procedural. Women, under these provisions, neither have the right to prosecute, as in case of a wife whose husband has an adulterous

[47] (1988) 2 SCC 72

relationship with another woman; nor can they be prosecuted as the *pari delicto*.

8.4. The view taken by the two-judge bench in *Revathi* (supra), that the absence of the right of the wife of an adulterous husband to sue him, or his paramour, was well-balanced by the inability of the husband to prosecute his adulterous wife for adultery, cannot be sustained. The wife's inability to prosecute her husband and his paramour, should be equated with the husband's ability to prosecute his wife's paramour.

9. In the present case, the constitutionality of Section 497 is assailed by the Petitioners on the specific grounds that Section 497 is violative of Articles 14, 15 and 21.

9.1. Mr. Kaleeswaram Raj learned Counsel appearing for the Petitioners and Ms. Meenakshi Arora, learned Senior Counsel appearing for the Intervenors *inter alia* submitted that Section 497 criminalizes adultery based on a classification made on sex alone. Such a classification bears no

rational nexus with the object sought to be achieved and is hence discriminatory.

It was further submitted that Section 497 offends the Article 14 requirement of equal treatment before the law and discriminates on the basis of marital status. It precludes a woman from initiating criminal proceedings. Further, the consent of the woman is irrelevant to the offence. Reliance was placed in this regard on the judgment of this Court in *W. Kalyani* v. *State*[48].

The Petitioners submit that the age-old concept of the wife being the property of her husband, who can easily fall prey to seduction by another man, can no longer be justified as a rational basis for the classification made under Section 497.

An argument was made that the 'protection' given to women under Section 497 not only highlights her lack of sexual autonomy, but also ignores the social repercussions of such an offence.

[48] (2012) 1 SCC 358

The Petitioners have contended that Section 497 of the I.P.C. is violative of the fundamental right to privacy under Article 21, since the choice of a partner with whom she could be intimate, falls squarely within the area of autonomy over a person's sexuality. It was submitted that each individual has an unfettered right (whether married or not; whether man or woman) to engage in sexual intercourse outside his or her marital relationship.

The right to privacy is an inalienable right, closely associated with the innate dignity of an individual, and the right to autonomy and self-determination to take decisions. Reliance was placed on the judgment in *Shafin Jahan* v. *Asokan K.M. & Ors.*[49] where this Court observed that each individual is guaranteed the freedom in determining the choice of one's partner, and any interference by the State in these matters, would

[49] 2018 SCC Online SC 343

have a serious chilling effect on the exercise of the freedoms guaranteed by the Constitution.

The Petitioners placed reliance on the judgment of *K.S. Puttaswamy* v. *Union of India*[50] wherein a nine-judge bench of this Court held that the right to make decisions on vital matters concerning one's life are inviolable aspects of human personality. This Court held that:

> *" 169. ..... The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action...."*
>
> (Emphasis supplied)

[50] (2017) 10 SCC 1

The Petitioners and Intervenors have prayed for striking down Section 479 I.P.C. and Section 198(2) of the Cr.P.C. as being unconstitutional, unjust, illegal, arbitrary, and violative of the Fundamental Rights of citizens.

9.2. On the other hand, Ms. Pinky Anand, learned ASG forcefully submitted that adultery must be retained as a criminal offence in the I.P.C. She based her argument on the fact that adultery has the effect of breaking up the family which is the fundamental unit in society. Adultery is undoubtedly morally abhorrent in marriage, and no less an offence than the offences of battery, or assault. By deterring individuals from engaging in conduct which is potentially harmful to a marital relationship, Section 497 is protecting the institution of marriage, and promoting social well-being.

The Respondents submit that an act which outrages the morality of society, and harms its

members, ought to be punished as a crime. Adultery falls squarely within this definition.

The learned ASG further submitted that adultery is not an act that merely affects just two people; it has an impact on the aggrieved spouse, children, as well as society. Any affront to the marital bond is an affront to the society at large. The act of adultery affects the matrimonial rights of the spouse, and causes substantial mental injury.

Adultery is essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society.

It was argued on behalf of the Union of India that Section 497 is valid on the ground of affirmative action. All discrimination in favour of women is saved by Article 15(3), and hence were exempted from punishment. Further, an under-inclusive definition is not necessarily discriminatory. The contention that Section 497

does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional.

It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law.

It was finally suggested that if this Court finds any part of this Section violative of the Constitutional provisions, the Court should read down that part, in so far as it is violative of the Constitution but retain the provision.

DISCUSSION AND ANALYSIS

10. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would

have to be tested on the anvil of Part III of the Constitution.

11. Section 497 of the I.P.C. it is placed under Chapter XX of "*Offences Relating to Marriage*".

The provision of Section 497 is replete with anomalies and incongruities, such as:

i. Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman who is *pari delicto* with the adulterous male, is not punishable, even as an 'abettor'.

The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery[51].

ii. The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man, has no similar right to prosecute her husband or his paramour.

[51] *W Kalyani* v. *State*, (2012) 1 SCC 358; at para 10.

iii. Section 497 I.P.C. read with Section 198(2) of the Cr.P.C. only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery.

iv. The act of a married man engaging in sexual intercourse with an unmarried or divorced woman, does not constitute 'adultery' under Section 497.

v. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.

12. The constitutional validity of section 497 has to be tested on the anvil of Article 14 of the Constitution.

12.1. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination.

12.2. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

i. The classification is made on the basis of an 'intelligible differentia' which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and

ii. The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

The discriminatory provisions in Section 497 have to be considered with reference to the classification made. The classification must have

some rational basis,[52] or a nexus with the object sought to be achieved.

With respect to the offence of adultery committed by two consenting adults, there ought not to be any discrimination on the basis of sex alone since it has no rational nexus with the object sought to be achieved.

Section 497 of the I.P.C., makes two classifications:

i. The first classification is based on who has the right to prosecute:

   It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery.

   Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour.

[52] *E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 (A legislation may not be amenable to a challenge on the ground of violation of Article 14 of the Constitution if its intention is to give effect to Articles 15 and 16 or when the differentiation is not unreasonable or arbitrary).

ii. The second classification is based on who can be prosecuted.

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence.

The aforesaid classifications were based on the historical context in 1860 when the I.P.C. was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or 'property' of their husbands.

Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a 'theft' of his property, for which he could proceed to prosecute the offender.

The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.

12.3. A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore *ex facie* discriminatory against women, and violative of Article 14.

Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary.

13. A law which could have been justified at the time of its enactment with the passage of time may become out-dated and discriminatory with the evolution of society and changed circumstances.[53] What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic.

[53] *Motor General Traders* v. *State of Andhra Pradesh*, (1984) 1 SCC 222; *See also Ratan Arya* v. *State of Tamil Nadu*, (1986) 3 SCC 385

A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality.[54]

Section 497 of the I.P.C. was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860's. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals.[55] This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society.

It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a 'victim', and the male offender is the 'seducer'.

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[54] *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611

[55] *'A Penal Code prepared by The Indian Law Commissioners*, (1838), Notes of Lord Thomas Babington Macaulay, Note Q

Section 497 fails to consider both men and women as equally autonomous individuals in society.

In *Anuj Garg* v. *Hotel Assn. of India*,[56] this Court held that:

> *"20. At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the State is very significant, nonetheless it does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics, it is clear that time has come that we take leave of the theme encapsulated under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interests.*
>
> *……..*
>
> *26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in*

[56] (2008) 3 SCC 1

general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. ...”

(Emphasis supplied)

The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereo-types in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution.

There is therefore, no justification for continuance of Section 497 of the I.P.C. as framed in 1860, to remain on the statute book.

14. Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens.

Section 497 is a penal provision for the offence of adultery, an act which is committed consensually

between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution.

The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as 'beneficial legislation'.

This Court in *Thota Sesharathamma and Anr.* v. *Thota Manikyamma (Dead) by Lrs. And Ors.*[57] held that:

> *"Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to women socio-economic equality. As a fact Art. 15(3) as a fore runner to common code does animate to make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race, caste or religion."*

In *W. Kalyani* v. *State*[58] this Court has recognised the gender bias in Section 497. The court in *Kalyani* (supra) observed that "*The provision is currently under criticism from certain quarters for showing a string gender bias for it*

[57] (1991) 4 SCC 312
[58] (2012) 1 SCC 358

makes the position of a married woman almost as a property of her husband."

The purpose of Article 15(3) is to further socio-economic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences.

A Section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

15. The Petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage.

The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved.

It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to

have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21.

In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a three-fold requirement as set held in Justice *K. S. Puttaswamy (Retd.) & Anr.* v. *UOI & Anr.* (supra): (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the three-fold requirement, and must therefore be struck down.

16. The issue remains as to whether 'adultery' must be treated as a penal offence subject to criminal sanctions, or marital wrong which is a valid ground for divorce.

16.1. One view is that family being the fundamental unit in society, if the same is disrupted, it would impact stability and progress. The State,

therefore, has a legitimate public interest in preserving the institution of marriage.

Though adultery may be an act committed in private by two consenting adults, it is nevertheless not a victim-less crime. It violates the sanctity of marriage, and the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulteror and the adulteress, it impacts the growth and well-being of the children, the family, and society in general, and therefore must be subject to penal consequences.

Throughout history, the State has long retained an area of regulation in the institution of marriage. The State has regulated various aspects of the institution of marriage, by determining the age when an adult can enter into marriage; it grants legal recognition to marriage; it creates rights in respect of inheritance and succession; it provides for remedies like judicial separation,

alimony, restitution of conjugal rights; it regulates surrogacy, adoption, child custody, guardianship, partition, parental responsibility; guardianship and welfare of the child. These are all areas of private interest in which the State retains a legitimate interest, since these are areas which concern society and public well-being as a whole.

Adultery has the effect of not only jeopardising the marriage between the two consenting adults, but also affects the growth and moral fibre of children. Hence the State has a legitimate public interest in making it a criminal offence.

16.2. The contra view is that adultery is a marital wrong, which should have only civil consequences. A wrong punishable with criminal sanctions, must be a public wrong against society as a whole, and not merely an act committed against an individual victim.

To criminalize a certain conduct is to declare that it is a public wrong which would justify

public censure, and warrant the use of criminal sanction against such harm and wrong doing.

The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the 'best interest' of the individual.

Andrew Ashworth and Jeremy Horder in their commentary titled '*Principles of Criminal Law*'[59] have stated that the traditional starting point of criminalization is the 'harm principle' the essence of which is that the State is justified in criminalizing a conduct which causes harm to others. The authors opine that the three elements for criminalization are: (i) harm, (ii) wrong doing, and (iii) public element, which are required to be

[59] Oxford University Press, (7th Edn.) May 2013

proved before the State can classify a wrongful act as a criminal offence.

John Stuart Mill states that *"the only purpose for which power can be rightly exercised over the member of a civilized community against his will is to prevent harm to others."* [60]

The other important element is wrongfulness. Andrew Simester and Andreas von Hirsch opine that a necessary pre-requisite of criminalization is that the conduct amounts to a moral wrong.[61] That even though sexual infidelity may be morally wrong conduct, this may not be a sufficient condition to criminalize the same.

17. In my view, criminal sanction may be justified where there is a public element in the wrong, such as offences against State security, and the like. These are public wrongs where the victim is not the individual, but the community as a whole.

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[60] Mill, John S., Chapter I: Introductory, *On Liberty,* Published London: Longman, Roberts, & Green Co. 1869, 4th Edn.

[61] A P Simester and Andreas von Hirsch, *Crimes, Harms, And Wrongs: On The Principles Of Criminalisation,* Oxford: Hart Publishing (2011)

Adultery undoubtedly is a moral wrong *qua* the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law?

The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.

The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a

civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

18. In view of the aforesaid discussion, and the anomalies in Section 497, as enumerated in para 11 above, it is declared that :

(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.

(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

(iii) The decisions in *Sowmithri Vishnu* (supra), *V. Rewathi* (supra) and *W. Kalyani* (supra) hereby stand overruled.

.....J.
(INDU MALHOTRA)

New Delhi
September 27, 2018