**IN THE SUPREME COURT OF INDIA**

**CRIMINAL ORIGINAL JURISDICTION**

**Crl. M.P. No. 108152 / 2018**

**IN**

**WRIT PETITION (Crl.) NO. 194 / 2017**

**IN THE MATTER OF:**

**Joseph Shine** **...Petitioner**

**Versus**

**Union of India & Anr.** **… Respondents**

**AND**

**IN THE MATTER OF:**

**VIMOCHANA** **…Applicant**

# WRITTEN SUBMISSIONS OF JAYNA KOTHARI

**ARGUMENTS** **Pages**

1. *S.497 of the IPC violates the rights to equality and non-discrimination under Articles 14 and 15 of the Constitution.*
2. *Section 497 of the IPC impinges on the fundamental right to privacy - The Right to Privacy and Dignity includes the right to have consensual intimate relationships*
   - *(i) Freedom of intimate association - an integral part of the right to privacy*
3. *Decriminalisation of adultery does not impact the institution of marriage*

**JUDGMENTS**

1. *Griswold v. Connecticut,* 381 U.S. 489 (1965) [US Supreme Court]
2. *Eisenstadt v. Baird,* 405 U.S. 438 [US Supreme Court]
3. *Toonen v. Australia* [CCPR/C/50/D/488/1992]
4. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) [US Supreme Court]
5. *DE v RH,* [2015] ZACC 18 [South African Supreme Court]
6. *JS v. LC* (SA77-14) [2016] NASC (19 August 2016) [Namibia Supreme Court]
7. *Regina v. R.* [1990] UKHL 9 (23 October 1991) [United Kingdom House of Lords]

## ARGUMENTS

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

1.1. It is submitted that Section 497 of the IPC is on its face discriminatory on the grounds of sex, thereby violating the right to equality under Article 14, and the prohibition against discrimination on the grounds of sex under Article 15 of the Constitution.

1.2. Section 497's definition of adultery is confined to cover only the extramarital affairs of married women. The Section is not attracted in cases where married men pursue extramarital affairs giving any rise to a claim to their wives to file a criminal complaint of adultery. Although the Section does not impose any punishment on the woman, and only the man with whom she is accused of having sexual intercourse can be punished, it treats married women differently from married men. When husbands have sexual intercourse with women outside marriage, the said act is not criminalized under Section 497. The impact of this is that the rights of women within marriage are affected, whereas the rights of married men are not.

1.3. Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or equal protection of laws. It reads as: "Equality

before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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

1.5. It is submitted that Section 497 perpetuates gender and sexual stereotypes which constitute a form of discrimination based on sex under Article 15 which includes gender.

1.6. The disparity in the treatment of adultery arises from an in-built gender bias in being more lenient or seemingly accepting the infidelity of husbands as normal, but more stringent on married women who are expected to be faithful to their husbands. The origins of the criminal offence of adultery are deeply rooted in such biases. Only a man has the right to pursue a claim against a third party that had committed adultery with his wife. Wives are viewed as mere chattels and that explains why the offence was only against the third party, and not the wife.

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

> *"The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims…. "The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means*." [paras 36, 45-46]

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

1.9. The Court in Anuj Garg also noted the attitude of "romantic paternalism", described by the US Supreme Court in ***Frontiero v. Richardson*** 411 U.S. 677 : 93 S.Ct. 1764 as the rationalization of sex discrimination by practically placing

women, “not on a pedestal but in a cage” (para.42). In ***Sowmithri Vishnu v. Union of India*** AIR 1985 SC 1618, where Section 497 was previously challenged, the Supreme Court rejected this idea on the basis that it was “commonly accepted that the man is the seducer and not the woman” [para. 7]

1.10. It is submitted that Section 497 of the IPC serves to perpetuate the notion that women are merely the properties of their husbands, and incapable of individual choice or autonomy. It perpetuates the stereotype that adultery committed by a woman would extract a moral toll on the society at large and is therefore deserving of criminal punishment; on the other hand, it is permissible for men to engage in extramarital affairs. It is submitted that the impugned section perpetuates gender stereotypes, which is a form of discrimination based on sex.

## 2. Section 497 of the IPC infringes the fundamental right to privacy - the Right to Privacy and Dignity includes the right to have consensual intimate relationships

2.1. Section 497 of the IPC is a clear violation of the right to privacy of the people involved. The criminal offence of Section 497 creates an undue intrusion into the personal lives of the people involved, which is in violation of Article 14, 19 and Article 21 of the Constitution of India. The violation of the right to privacy and the right to life cannot be made without due process and compelling state interest.

2.2. This Hon'ble Court in ***Justice K.S. Puttaswamy v. Union of India*** **(2017) 10 SC**C 1, has held that:

> *"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….Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy" [para 169]*

2.3. In ***Griswold v. Connecticut*****, 381 U.S. 489 (1965)**, the United States Supreme Court first pronounced the existence of a zone of privacy around marriage, in deciding that the ban on the use of contraceptives by married couples violated their right to privacy guaranteed under the Constitution. It held:

> *"Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen...The Fourth and Fifth Amendments were described in Boyd v. United*

*States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."*

…

*The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.*

2.4. In ***Eisenstadt v. Baird*****, 405 U.S. 438,** the US Supreme Court held:

> *"It is true that, in Griswold, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent*

*entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."*

2.5. The UN Human Rights Committee in ***Toonen v. Australia*** **[CCPR/C/50/D/488/1992]**, declared that the criminalization of same-sex relations was unconstitutional on the basis of privacy, and held:

*"In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of Tasmanian laws… even if these provisions have not been enforced for a decade...The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy." [para 8.2]*

**(i) The Freedom of intimate association as an integral part of the Right to Privacy**

2.6. The "freedom of intimate association" is an integral part of the right to privacy based on the interrelated claims to equality, fundamental freedoms and liberty.

2.7. In the United States, the right to intimate association was first articulated as an aspect of dignity and liberty by the US Supreme Court in ***Roberts v. United States Jaycees*, 468 U.S. 609 (1984)** where the Court on the freedom of association held:

> *"Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."*
>
> ....
>
> *"The Court has long recognised that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State…….Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."*

2.8. There have been cases addressing marriage rights, rights in non-marital situations, illegitimacy, parental rights, and sexual orientation and transgender rights, for example--which could rightly be categorized as intimate association cases, even if not explicitly named as such by the Court, demanding a higher level of judicial scrutiny. The author Kenneth L. Karst in his piece "The Freedom of Intimate Association" in the Yale Law Journal (Vol. 89, No. 4, Mar 1980, pp 624-692) identifies four specific values common to intimate association warranting greater constitutional protection and these include physical society, caring and commitment, close and enduring emotional intimacy, and self-identification.

2.9. In ***Lawrence v. Texas*****, 539 U.S. 558 (2003)** in the context of decriminalizing a Texas sodomy law the US Supreme Court held that:

> *"The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.*
>
> *This, as a general rule, should counsel against attempts by the State, or a Court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this*

*relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.*

*The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey, supra, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."*

2.10. As in the United States, this Hon'ble Court enumerated that the right to privacy is founded upon various guarantees in Part III, including the rights to life, personal liberty and human dignity in Article 21, the right against arbitrary state interference guaranteed under Article 14 and the various fundamental freedoms set out in Article 19. The freedom to enter into an intimate relationship of one's choice without interference is an integral to the right to privacy. In **Justice K.S. Puttaswamy ( 2017 (10) SCC 1),** this Hon'ble Court held that:

*"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 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.*

2.11. 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… 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.

2.12. 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 of 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.

2.13. 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." [para 169]

2.14. The right to privacy as including the right to intimate association including who to select as a partner, or whom to have intimate relations with was also held by this Hon'ble Court vide its judgement dated 08.03.2018 in **Shafin Jahan v. Asokan K.M. and Ors., 2018 SCC Online SC 343**, where it held:

> *"...The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. 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." ……..The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences." [para 19]*

2.15. Internationally, courts have recognized the freedom of intimate association when deciding upon actions for adultery. In the South African Constitutional Court in **DE**

**v RH, [2015] ZACC 18**, which declared even a gender-neutral law entitling damages on the ground of adultery as unconstitutional, held:

> *"Of relevance in respect of the adulterous spouse and the third party are the rights to freedom and security of the person, privacy and freedom of association. These rights do not necessarily weigh less just because the two have committed adultery.*
>
> …
>
> *What is the relevance of the adulterous spouse's rights as the claim is not against him or her? It is this: the claim has the potential of having a negative impact on the adulterous spouse's rights. The threat of delictual liability is undoubtedly an intrusion into the right of a consenting individual to have a sexual relationship with whomever he or she chooses.*
>
> …
>
> *Nevertheless, this potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and relationships between, people. This must be viewed in light of current trends and attitudes towards adultery both nationally and internationally. These attitudes also demonstrate a repugnance towards state interference in the intimate personal affairs of individuals.*" [paras 53, 58, 62]

2.16. In a similar case, the Namibian Supreme Court in ***JS v. LC*** **(SA77-14) [2016] NASC (19 August 2016)** held that the delict of adultery was no longer sustainable:

> *"…But ultimately, it is in respect of the determination of wrongfulness – with reference to the legal convictions of the community informed by our constitutional values and norms - that it is no longer reasonable to impose delictual liability for a claim founded on adultery. Whilst the changing societal norms are represented by a softening in the attitude towards adultery, the action is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association. Its patriarchal origin perpetuated in the form of the damages to be awarded are furthermore not compatible with our constitutional values of equality in marriage and human dignity." [para 55]*

2.17. Thus Section 497, which criminalizes sexual relations between consenting adults, is a violation of the right to privacy. The UN Working Group on the Issue of Discrimination Against Women in Law and Practice also recognizes that adultery provisions in penal codes in many countries have usually been drafted and almost implemented in a manner prejudicial to women. They also acknowledge that in accordance with some traditions, customs or civil law systems, adultery may constitute a matrimonial offense bearing legal consequences in divorce cases, such as in the custody of children or in the denial of alimony, among others. However, it should not be considered as a criminal offense that is punishable by

fine and/or imprisonment. Maintaining adultery as a criminal offense for both women and men means in practice that women will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women compared to men.

## 3. Decriminalisation of adultery does not impact the institution of marriage

3.1. The argument is often made that striking down Section 497 of the IPC will destroy the institution and sanctity of marriage. The question arises as to what constitutes the "institution of marriage" and what is capable of destroying it. This Hon'ble Court has already answered this question in ***Independent Thought v. Union of India and Ors*** (2017) 10 SCC 800, where it struck down Exception 2 to Section 375 of the IPC when it recognised child marital rape and a similar argument against it was made by the Union of India that it would destroy the institution of marriage. This Hon'ble Court held that:

> "*The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the 'institution' of marriage? A judicial separation may dent a marital relationship but does it have the*

*potential of destroying the 'institution' of marriage or even the marriage? Can it be said that no divorce should be permitted or that judicial separation should be prohibited? The answer is quite obvious."* [para 90]

3.2. The Namibian Supreme Court in ***JS v. LC*** also considered whether the delict of adultery protected the institution of marriage and answering in the negative, held that such an action would not "*strengthen a weakening marriage or breathe life into one which is in any event disintegrating."* It stated that:

*(a) "...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.***

*(b) ...**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.*

*…*

*(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.*" [para 45]

3.3. It is clear from the aforementioned provisions that Section 497 of the IPC plays no role in destroying the institution of marriage and the decriminalization of adultery would be incapable of destroying it. The decision to marry or continue to remain married for any reason remains an innately personal, private and intimate choice, core to individual personal liberty.

3.4. Finally, as held by the UK House of Lords in ***Regina v. R***, **[1990] UKHL 9 (23 October 1991)** where it was held:

"*Ever since the decision of* Byrne J. in Rex v. Clarke [1949] 2 All ER 448*, courts have been paying lip service to the Hale proposition, whilst at the*

*same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes. There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behavior.*

*For the reasons already adumbrated, and in particular those advanced by the Lord Justice-General in* S. v. H.M. Advocate, 1989 S.L.T.469*, with which we respectfully agree, the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale meant), is no longer acceptable. It can never have been other than a fiction and fiction is a poor basis for the criminal law. The extent of which events have overtaken Hale's proposition is well illustrated by his last four words "which she cannot retract."*

3.5. It is therefore submitted that there is no reasonable cause to retain adultery as a criminal offence as Section 497 is violative of the fundamental rights to equality,

non-discrimination, liberty and privacy and should be struck down as being unconstitutional.

Place: New Delhi

Date:

Filed by:

Jayna Kothari

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