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**

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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.