**IN THE SUPREME COURT OF INDIA**

**CRIMINAL ORIGINAL JURISDICTION**

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

Joseph Shine …Petitioner

Versus

Union of India …Respondent

**J U D G M E N T**

**INDU MALHOTRA, J.**

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

> *"**497. Adultery —** Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not*

> *amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."*

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

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

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

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

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

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

## 4. THE DOCTRINE OF COVERTURE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] 1807 – 1901 A.D.

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

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

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

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

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

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

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

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

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

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

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

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

[13] *Id.*

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

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

5. SECTION 497 – HISTORICAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*more tenderness than forgery or perjury.*

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

(Emphasis supplied)

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

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

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

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

(Emphasis supplied)

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

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

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

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

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

(Emphasis supplied)

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

were inexcusable and must be punished. Colonel Sleeman observed:

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

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

(Emphasis supplied)

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

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

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

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

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

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

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

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

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

(Emphasis supplied)

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

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

6. THE QUEST FOR REFORM

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

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

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

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

However, the recommendation was not accepted.

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

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

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

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

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

(Emphasis supplied)

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

7. CONTEMPORARY INTERNATIONAL JURISPRUDENCE

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

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

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

- United States of America

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

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

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

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

[28] 875 F. Supp. 1465

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

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

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

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

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

- Canada

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

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

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

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

- Malaysia

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

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

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

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

- Japan

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

- South Africa

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

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

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

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

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

- Turkey

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

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

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

- South Korea

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

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

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

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

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

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

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

8. PREVIOUS CHALLENGES TO ADULTERY IN INDIA

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

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

[45] 1954 SCR 930

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

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

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

[46] (1985) Supp SCC 137

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

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

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

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

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

[47] (1988) 2 SCC 72

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

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

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

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

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

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

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

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

[48] (2012) 1 SCC 358

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

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

[49] 2018 SCC Online SC 343

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

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

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

[50] (2017) 10 SCC 1

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

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

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

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

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

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

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

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

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

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

DISCUSSION AND ANALYSIS

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

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

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

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

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

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

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

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

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

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

v. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.

12. The constitutional validity of section 497 has to be tested on the anvil of Article 14 of the Constitution.

12.1. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination.

12.2. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

i. The classification is made on the basis of an 'intelligible differentia' which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and

ii. The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

The discriminatory provisions in Section 497 have to be considered with reference to the classification made. The classification must have

some rational basis,[52] or a nexus with the object sought to be achieved.

With respect to the offence of adultery committed by two consenting adults, there ought not to be any discrimination on the basis of sex alone since it has no rational nexus with the object sought to be achieved.

Section 497 of the I.P.C., makes two classifications:

i. The first classification is based on who has the right to prosecute:

   It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery.

   Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour.

[52] *E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 (A legislation may not be amenable to a challenge on the ground of violation of Article 14 of the Constitution if its intention is to give effect to Articles 15 and 16 or when the differentiation is not unreasonable or arbitrary).

ii. The second classification is based on who can be prosecuted.

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence.

The aforesaid classifications were based on the historical context in 1860 when the I.P.C. was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or 'property' of their husbands.

Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a 'theft' of his property, for which he could proceed to prosecute the offender.

The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.

12.3. A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore *ex facie* discriminatory against women, and violative of Article 14.

Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary.

13. A law which could have been justified at the time of its enactment with the passage of time may become out-dated and discriminatory with the evolution of society and changed circumstances.[53] What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic.

[53] *Motor General Traders* v. *State of Andhra Pradesh*, (1984) 1 SCC 222; *See also Ratan Arya* v. *State of Tamil Nadu*, (1986) 3 SCC 385

A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality.[54]

Section 497 of the I.P.C. was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860's. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals.[55] This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society.

It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a 'victim', and the male offender is the 'seducer'.

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[54] *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611

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

Section 497 fails to consider both men and women as equally autonomous individuals in society.

In *Anuj Garg* v. *Hotel Assn. of India*,[56] this Court held that:

> *"20. At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the State is very significant, nonetheless it does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics, it is clear that time has come that we take leave of the theme encapsulated under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interests.*
>
> *……..*
>
> *26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in*

[56] (2008) 3 SCC 1

*general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. ...”*

(Emphasis supplied)

The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereo-types in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution.

There is therefore, no justification for continuance of Section 497 of the I.P.C. as framed in 1860, to remain on the statute book.

14. Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens.

Section 497 is a penal provision for the offence of adultery, an act which is committed consensually

between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution.

The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as 'beneficial legislation'.

This Court in *Thota Sesharathamma and Anr.* v. *Thota Manikyamma (Dead) by Lrs. And Ors.*[57] held that:

> *"Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to women socio-economic equality. As a fact Art. 15(3) as a fore runner to common code does animate to make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race, caste or religion."*

In *W. Kalyani* v. *State*[58] this Court has recognised the gender bias in Section 497. The court in *Kalyani* (supra) observed that "*The provision is currently under criticism from certain quarters for showing a string gender bias for it*

[57] (1991) 4 SCC 312
[58] (2012) 1 SCC 358

*makes the position of a married woman almost as a property of her husband.*"

The purpose of Article 15(3) is to further socio-economic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences.

A Section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

15. The Petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage.

The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved.

It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to

have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21.

In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a three-fold requirement as set held in Justice *K. S. Puttaswamy (Retd.) & Anr.* v. *UOI & Anr.* (supra): (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the three-fold requirement, and must therefore be struck down.

16. The issue remains as to whether 'adultery' must be treated as a penal offence subject to criminal sanctions, or marital wrong which is a valid ground for divorce.

16.1. One view is that family being the fundamental unit in society, if the same is disrupted, it would impact stability and progress. The State,

therefore, has a legitimate public interest in preserving the institution of marriage.

Though adultery may be an act committed in private by two consenting adults, it is nevertheless not a victim-less crime. It violates the sanctity of marriage, and the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulteror and the adulteress, it impacts the growth and well-being of the children, the family, and society in general, and therefore must be subject to penal consequences.

Throughout history, the State has long retained an area of regulation in the institution of marriage. The State has regulated various aspects of the institution of marriage, by determining the age when an adult can enter into marriage; it grants legal recognition to marriage; it creates rights in respect of inheritance and succession; it provides for remedies like judicial separation,

alimony, restitution of conjugal rights; it regulates surrogacy, adoption, child custody, guardianship, partition, parental responsibility; guardianship and welfare of the child. These are all areas of private interest in which the State retains a legitimate interest, since these are areas which concern society and public well-being as a whole.

Adultery has the effect of not only jeopardising the marriage between the two consenting adults, but also affects the growth and moral fibre of children. Hence the State has a legitimate public interest in making it a criminal offence.

16.2. The contra view is that adultery is a marital wrong, which should have only civil consequences. A wrong punishable with criminal sanctions, must be a public wrong against society as a whole, and not merely an act committed against an individual victim.

To criminalize a certain conduct is to declare that it is a public wrong which would justify

public censure, and warrant the use of criminal sanction against such harm and wrong doing.

The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the 'best interest' of the individual.

Andrew Ashworth and Jeremy Horder in their commentary titled '*Principles of Criminal Law*'[59] have stated that the traditional starting point of criminalization is the 'harm principle' the essence of which is that the State is justified in criminalizing a conduct which causes harm to others. The authors opine that the three elements for criminalization are: (i) harm, (ii) wrong doing, and (iii) public element, which are required to be

[59] Oxford University Press, (7th Edn.) May 2013

proved before the State can classify a wrongful act as a criminal offence.

John Stuart Mill states that *"the only purpose for which power can be rightly exercised over the member of a civilized community against his will is to prevent harm to others."* [60]

The other important element is wrongfulness. Andrew Simester and Andreas von Hirsch opine that a necessary pre-requisite of criminalization is that the conduct amounts to a moral wrong.[61] That even though sexual infidelity may be morally wrong conduct, this may not be a sufficient condition to criminalize the same.

17. In my view, criminal sanction may be justified where there is a public element in the wrong, such as offences against State security, and the like. These are public wrongs where the victim is not the individual, but the community as a whole.

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[60] Mill, John S., Chapter I: Introductory, *On Liberty,* Published London: Longman, Roberts, & Green Co. 1869, 4th Edn.

[61] A P Simester and Andreas von Hirsch, *Crimes, Harms, And Wrongs: On The Principles Of Criminalisation,* Oxford: Hart Publishing (2011)

Adultery undoubtedly is a moral wrong *qua* the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law?

The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.

The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a

civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

18. In view of the aforesaid discussion, and the anomalies in Section 497, as enumerated in para 11 above, it is declared that :

(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.

(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

(iii) The decisions in *Sowmithri Vishnu* (supra), *V. Rewathi* (supra) and *W. Kalyani* (supra) hereby stand overruled.

**.....J.**
**(INDU MALHOTRA)**

**New Delhi**
**September 27, 2018**