REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

JOSEPH SHINE … PETITIONER

VERSUS

UNION OF INDIA … RESPONDENT

J U D G M E N T

R.F. Nariman, J. (Concurring)

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

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

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

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

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

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

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

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

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

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

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

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

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

> "2. The adulteress and the adulterer, flog each of them (with) a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of believers witness their chastisement."[10]
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[6] THE LAWS OF MANU 150 (Translation by G. Buhler, Clarendon Press, UK, 1886).
[7] *Id*., 315.
[8] DHARMASUTRAS – THE LAW CODES OF APASTAMBA, GAUTAMA, BAUDHAYANA, AND VASISTHA 70-71 (Translation by Patrick Olivelle, Oxford University Press 1999).
[9] *Id*., 116-117.
[10] THE KORAN (AL–QUR'AN): ARABIC-ENGLISH BILINGUAL EDITION WITH AN INTRODUCTION BY MOHAMED A. 'ARAFA 363 (Maulana Muhammad Ali Translation, TellerBooks, 2018).

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

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

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

[11] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis supplied)

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

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

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

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

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

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

Provided that—

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

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

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

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

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

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

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

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

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

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

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

[20] 1952 ILR Bombay 449, 454.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

……..J.
(R.F. Nariman)

New Delhi;
September 27, 2018.