IN THE SUPREME COURT OF INDIA

CRL. M.P. NO. _______/ 2018

IN

W.P. (CRL) NO. 194/ 2017

<u>IN THE MATTER OF:</u>

Joseph Shine … Petitioner

Versus

Union of India … Respondent

<u>AND IN THE MATTER OF:</u>

Partners for Law in Development … Applicant

INDEX

S. No.	Particulars	Pages
1.	Written Submissions of Ms. Meenakshi Arora (Sr. Advocate) on behalf of the Applicant.	
2.	Madhu Mehra, *The Rape Law and Constructions of Sexuality* (2018) [relevant extracts]	
3.	Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (2003) [relevant extracts]	
4.	*Blackstone's Commentaries on the Laws of England*, Books III & IV (8th edition, 1778) [relevant extracts]	
5.	*A Penal Code prepared by The Indian Law Commissioners* (1838) [relevant extracts]	
6.	*Tinker* v. *Colwell*, 193 U.S. 473 (1904)	
7.	*Yusuf Abdul Aziz* v. *State of Bombay*, 1954 SCR 930.	
8.	*Yusuf Abdul Aziz* v. *The State*, 1952 ILR Bom 449.	
9.	*Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137	
10.	*V. Revathi* v. *Union of India*, (1988) 2 SCC 72	
11.	*Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1	
12.	*W. Kalyani* v. *State*, (2012) 1 SCC 358	
13.	*Alamgir* v. *State of Bihar*, (1959) Supp 1 SCR 464	
14.	Judgment dated 07.03.1996 of the Guatemalan Constitutional Court, File No. 936-95	
15.	Judgment dated 26.02.2015 of the South Korean Constitutional Court, 2009 Henna 17.	
16.	UN Human Rights Special Procedures, Working Group on the	

THE LEAFLET

	Issue of Discrimination Against Women in Law and in Practice, October, 2012.	

THE LEAFLET

IN THE SUPREME COURT OF INDIA

CRL. M.P. NO. _______/ 2018

IN

W.P. (CRL) NO. 194/ 2017

IN THE MATTER OF:

Joseph Shine … Petitioner

Versus

Union of India … Respondent

AND IN THE MATTER OF:

Partners for Law in Development … Applicant

SUBMISSIONS OF MS. MEENAKSHI ARORA, SR. ADVOCATE, ON BEHALF OF THE APPLICANT

The Applicant is a legal resource group registered as a charitable trust, and a non-profit organization committed to the realization of social justice and equality for women. The Applicant's work and expertise in the area of gender and sexuality is well established and recognized. The Applicant therefore seeks to put forward its submissions in support of the Petitioner in the above matter, with a view to assist this Hon'ble Court in arriving at a finding on the constitutionality of Section 497 of the Indian Penal Code, 1860 (the "IPC"), which criminalizes the act of adultery.

Origins of the Law on Adultery

A. General Overview

1. The act of adultery is considered to be morally reprehensible across jurisdictions, but the roots of its proscription lie in the status accorded to women in society in earlier times. Aggressively conservative scriptural interpretations and the prevalence of a male patriarchal society had reduced women to mere chattel. Denied the exercise of basic rights and liberties, they had little autonomy over their choices or their bodies. Just like land, cattle and crop, they were subsumed within the estate of their fathers as girls, and thereafter, post marriage, within the estate of their husbands, post marriage. The chastity of a woman, regarded as her most important virtue, was closely guarded to ensure the purity of the male

THE LEAFLET

bloodline. An oppressively high moral code was therefore imposed on women so as to restrict their sexuality as well as control sexual access to them. The woman was simultaneously hailed as an embodiment of the virgin Mary, and condemned as the seductive Eve if she strayed from her moral compass.

2. It is hardly surprising therefore, that laws on sexual offences were designed not to protect the bodily integrity of women as persons, but as the private possessions of their guardians. To illustrate, the word "rape" is derived from the Latin word "raptus" or "rapere", which literally means "to seize", and was commonly used in ancient Roman law to refer to the wrongful "taking away" or abduction of an unmarried girl from the custody of her guardian. Since the girl was the property of her father, only he had the right to give her away in marriage *i.e.* permit a man to have sexual relations with her.[1] In 14th-15th century England, such "abductions" became a common tool for amassing property. As per the social norms, the women were forced to marry their abductors, and the marriage enabled them to inherit the properties and wealth belonging to the woman's family. Concerns of wealthy families prompted the Statute of Rapes of 1382, to disinherit both the 'ravisher' and his 'victim' from the property of the family, and gave the family the right to prosecute the perpertrator.[2] In this entire exercise, the law made no distinction between voluntary and consensual elopement by the woman, and her forced abduction[3] and rape. As such, the crux of the offence inhered not in the assault on the woman's body, but in the perpetrator obtaining sexual access to her without the consent of her guardian.[4]

3. Adultery is no different. While the patriarchal structure of society gave the man moral and social sanction to chastise his wife, he had little or no redress against her paramour. Sexual relations by a man with another man's wife therefore came to be considered as theft of the husband's property. The object was therefore not to protect the woman's bodily integrity, but to ensure that the husband retains control over her sexuality, thereby also ensuring the purity and propagation of his own bloodline or, at the very least, is compensated for the injury done to his property.

THE LEAFLET

---

[1] Madhu Mehra, *The Rape Law and Constructions of Sexuality* (2018), at p. 20.

[2] Trevor Dean, *Crime in Medieval Europe: 1200-1550* (2001).

[3] Abduction, without any element of sexual assault, was made a felony by the Crown much later, in 1487.

[4] Madhu Mehra, *The Rape Law and Constructions of Sexuality* (2018), at p. 20.

4. Noted author Charles Jean Marie Letourneau, in her book, writes as follows:

> "*In all legislations the married woman is more or less openly considered as the property of the husband, and is very often confounded, absolutely confounded, with things possessed. To use her, therefore, without the authority of her owner is theft; and human societies have never been tender to thieves. Nearly everywhere theft has been considered a crime much more grave than murder. But adultery is not a common theft. An object, an inert possession, are passive things; their owner may well punish the thief who has taken them, but him only. In adultery, the object of larceny, the wife, is a sentient and thinking being- that is to say, an accomplice in the attempt on her husband's property in her own person; moreover he generally has her in his keeping; he can chastise her freely, and glut his rage on her without any arm being raised for her defence…*"[5]

5. Brahmanic notions of patriarchy and caste purity are equally to blame. Uma Chakravarti, in her book *Gendering Caste: Through a Feminist Lens*, observes that:

> "*…a fundamental principle of Hindu social organization was to construct a closed structure to preserve land, women and ritual quality within it. These three are structurally linked and it is impossible to maintain all three without stringently controlling female sexuality. Neither land nor ritual quality, that is, the purity of caste, can be ensured without closely guarding women, who form the pivot of the entire structure.*"[6]
>
> "*The structure of social rules also provided for a third level of control to ensure perpetuation of the patriarchal structures: the king was vested with the authority to punish errant wives. The patriarchal state of early India viewed adultery as one of the major crimes in society along with theft as the other major crime in society. Adultery itself was considered a violation of a valued resource owned by men – in particular the husband. A reference in the Jatakas states that damages could be sought from the adulterer for injury done to the 'chattels' under the custody of another. And even before the archaic state emerged as a more fully*

THE LEAFLET

[5] Charles Jean Marie Letourneau, *The Evolution of Marriage* (1911), at p. 208-209.

[6] Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (2003), at p. 66

completed structure, the clan or the community to which a woman belonged had the authority to punish the 'errant' wife, even with death… …In keeping with the requirements of a caste-based society, the most reprehensible cases of adultery are when women have sexual relations with men of the lower castes. Manu reserves the highest punishment for the wife who violates the duty to her lord, though she is aware of his greatness: she is to be publicly humiliated. The king was thus upholding the existing structure of relations pertaining to land and the caste order. The purity of women ensured the purity of caste and thus of the social order itself, not just in the existing society but into the future too…"[7]

6. The above discourse reveals the true object behind the proscription of adultery, *i.e.* violation of the right of a man over exclusive sexual access to his wife, who was considered his private property. The ancient right of the King to penalize "errant" wives, perhaps now anachronistically manifests itself in the right of the State, the modern substitute of the regent, to punish adultery.

B. Common Law and Inclusion of Adultery in the IPC

7. Interestingly, when the IPC was drafted and came into force, adultery was not a criminal offence under common law. Rather, it was treated as an ecclesiastical wrong "*left to the feeble coercion of the Spiritual Court, according to the rules of Canon Law*", and the temporal Courts took no cognizance of it except as a private injury.[8] In the "Second Part of the Institutes of the Laws of England", Coke deals with the Statute of 13 Edw 1 called "Circumspecte Agatis", which allowed ecclesiastical courts to deal with purely spiritual offences. In the context of fornication and adultery, states that "*there be two examples put in particular of meere spirituality for correction of these offences*".[9]

8. Further, the act of adultery or "criminal conversation", as it was deceptively called, was merely a tort. The husband was entitled to bring an action of "*trespass vi et armis*",[10] and sue the adulterer for damages.[11] The quantum of

THE LEAFLET

---

[7] Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (2003), at p. 77.

[8] *Blackstone's Commentaries on the Laws of England*, Book IV (8th edition, 1778), at p. 64-65.

[9] Edward Coke, 2 Inst 487-488 (6th edition, 1662).

[10] Latin for trespass by force and arms.

[11] *Blackstone's Commentaries on the Laws of England*, Book III (8th edition, 1778), at p. 139.

damages awarded depended on various factors, and varied based on the rank and fortune of the parties, the wife's behavior and character, as well as the husband's obligation to provide for children who he suspected to be illegitimate.[12] Even this tort came to be abolished in 1857,[13] a few years before the IPC was brought into force.

9. The rationale behind the tort is well expounded in the following observations made by the American Supreme Court in *Tinker* v. *Colwell*, 193 U.S. 473 (1904):

> "*…We think the authorities show the husband has 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….*
> *An 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.*"[14]
>
> "*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 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***."[15]

THE LEAFLET

---

[12] *Blackstone's Commentaries on the Laws of England*, Book III (8th edition, 1778), at p. 139.

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

[14] *Tinker* v. *Colwell*, 193 U.S. 473 (1904), at p. 481.

[15] *Tinker* v. *Colwell*, 193 U.S. 473 (1904), at p. 485.

10. Though not an offence, adultery was a defence under criminal law, much like the exception of "grave and sudden provocation" under Explanation 1 to Section 300 of the IPC. The killing of a man engaged in an adulterous act with one's wife was therefore manslaughter, and not murder.[16] In *R* v. *Mawgridge*, (1707) Kely. 119, the Court held that "…*a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for Jealousy is the Rage of a Man and Adultery is the highest invasion of property*."

11. It is evident from the above that (i) adultery was considered purely a moral offence, rather than a criminal one; and (ii) even as a civil wrong, the action was based purely on the property rights of the husband in the person of his wife.

12. Even the otherwise orthodox Lord Macaulay, who was instrumental in drafting the IPC, favoured the treatment of adultery as a private wrong, in tune with the prevailing common law position, and opposed the criminalization of adultery. In his Notes to the IPC, he opines as follows:

> "*…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 consider their wives as useful members of their small households, that* ***they generally complain not of the wound given to their affections, not of the stain on their honour, 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."***[17] *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*

[16] *Blackstone's Commentaries on the Laws of England*, Book IV (8th edition, 1778), at p. 191-192.

[17] A Latin expression for an action taken by a person against another who wrongfully deprives him of the services of his servant.

THE LEAFLET

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 tribunal 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."[18]

13. It is therefore curious that the act of adultery was transformed from a tortious act under common law into a criminal act under Indian law. The views of Lord Macaulay were overruled amidst paternalistic concerns regarding the "natives" resorting to extra-legal means to avenge the injury, reflective of the occidental urge to civilize the oriental masses. Extracts of the discussion recorded in the Second Report on the IPC are as follows:

"*Colonel Sleeman opposes the reasoning of the Commissioners on this subject. The backwardness of the natives to have recourse to the courts of redress in cases of adultery, he asserts, "arises from the utter hopelessness on their part of ever getting a conviction in our courts upon any evidence that such cases admit of;" that is to say, in courts in which the Mahommedan law is observed. "The rich man," he proceeds, "not only feels the assurance that he could not get a conviction, but dreads the disgrace of appearing publicly in one court after another, to prove, by numerous witnesses, male and female, his own shame and his wife's dishonor. **He has recourse to poison secretly, or with his wife's consent; and she will generally rather take it than be turned out into the streets a degraded outcast. The seducer escapes with impunity, he suffers nothing, while his poor victim suffers all that human nature is capable of enduring**. Many instances of this have come within my own knowledge. 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*."[19]

THE LEAFLET

---

[18] *A Penal Code prepared by The Indian Law Commissioners* (1838), Notes of Lord Thomas Babington Macaulay, at p. 129.

[19] *A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at p. 74.

"*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 Mahomedan 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 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 consequence 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, coincide 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…*"[20]

From the above, it appears that the purpose behind inclusion of adultery as an offence in the IPC was not to preserve the institution of marriage, but to make it easier for a man to prosecute his wife's paramour and secure a conviction.

14. Section 497, which consequently became part of the IPC, reads as follows: "*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.*" [emphasis supplied]

THE LEAFLET

[20] *A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at p. 76.

15. A plain reading of the provision, makes it painfully obvious that the archaic notion of women being the property of their husbands was reinforced therein. The wife was given no recourse against her husband or his mistresses for adultery, the offence was predicated upon the lack of consent or connivance of the husband, rather than that of the wife. Presumably therefore, consent or connivance of the husband would bring the act outside the ambit of criminal sanction. This is buttressed by Section 198 of the Code of Criminal Procedure, 1973 (the "CrPC"), which expressly bars a Court from taking cognizance of an offence under Section 497, except on a complaint by the husband or, in the absence the husband, by the person who had care of the woman on his behalf.[21] The only difference was that while the offender was only liable for damages under common law for his actions, he became criminally liable under Indian law.

Previous Challenges to Section 497

1. The constitutionality of Section 497 was first impugned in *Yusuf Abdul Aziz* v. *State of Bombay*, 1954 SCR 930, by a man accused of adultery, who contended that the prohibition on the punishment of the wife as an abettor violates Arts. 14 and 15. This Hon'ble Court held that since this was a special provision for women, it was saved under Art. 15(3), and being a sound classification on the ground of sex, it did not fall foul of Art. 14.

2. The provision was next challenged in *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137, on different grounds: (i) that it denies women the right to prosecute their husbands or the women with whom they commit adultery; and (ii) that it does not include cases where the husband has sexual relations with an unmarried woman, and hence gives licence to the husband to have extra-marital affairs.

THE LEAFLET

[21] **Prosecution for offences against marriage -** (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence: …
(2) 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. This Hon'ble Court repelled the challenge on the first ground holding that the offence, by its very definition, can only be committed by a man, and "*...It is commonly accepted that it is the man who is the seducer and not the woman...*".[22] The second ground of challenge was rejected as follows:

> "*...Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or perhaps invites civil action by the wife for separation. The Legislature is entitled to deal with the evil where it is felt and seen most: A man seducing the wife of another...*"[23]

4. In *V. Revathi* v. *Union of India*, (1988) 2 SCC 72, the vires of Section 497 was one again questioned on the ground that it does not permit the wife to prosecute her husband for adultery. The challenge was repelled relying on *Sowmithri Vishnu*, as neither spouse had the right to prosecute the other for adultery under the law.

5. Pertinently, all the above challenges to the constitutionality of Section 497 were based on its under-inclusiveness. In other words, the Petitioners, in those cases, were aggrieved by the fact that it did not penalize certain classes of persons. However, in the present case, the constitutionality of Section 497 is assailed on entirely different grounds *i.e.* that such an offence is not in consonance with the fundamental rights and freedoms under Articles 14, 19 and 21 in the current context. Instead of seeking to include more people within its ambit, the prayer is that it be struck off so that nobody is punished for the act. Therefore, the previous judgments are distinguishable, and the present challenge is unaffected by these previous rulings.

6. Much water has flown under the bridge since 1860. The British colonial and patriarchal notions of female morality, personhood, and rights are completely at odds with the fundamental rights guaranteed to every woman (and man) under Articles 14, 19 and 21 of the Constitution of India, as they stand today. The law on sexual offences has also undergone a sea change. They are now defined on the touchstone of sexual autonomy and agency of the woman, and consider the injury as being done to the woman, rather than her father or husband. Her past

---

[22] *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137, at para 7.

[23] *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137, at para 9.

THE LEAFLET

sexual history is also deemed irrelevant in a prosecution for a sexual offence, as is reflected in the recent amendments to the rape law under the IPC as well as Sections 53A[24] and 146[25] of the Indian Evidence Act, 1872.

7. In *Anuj Garg* v. *Hostel Association of India*, (2008) 3 SCC 1, this Hon'ble Court held that:

> "*…it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with changes occurring therein both in the domestic as also in international arena, such a law can be declared invalid*".[26]

Similarly, in *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611, emphasized the importance taking into consideration subsequent events while interpreting a law, and held that:

> "*It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held unconstitutional in view of the changed situation.*"[27]

8. In *Sowmithri Vishnu*,[28] itself this Hon'ble Court acknowledged that though the case could have been dismissed by placing reliance on *Yusuf Abdul Aziz*,[29] since more than 30 years had passed since the said decision, it was deemed fit to

---

[24] **Evidence of character or previous sexual experience not relevant in certain cases**.-

In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D or section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

[25] **Questions lawful in cross-examination**.—
When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—
(1) to test his veracity,
(2) to discover who he is and what is his position in life, or
to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture: Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character.

[26] *Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1, at para 7. This Hon'ble Court was herein dealing with the vires of a law that prohibited the employment of women in places where liquor or drugs are consumed by the public.

[27] *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611, at para 28.

[28] *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137, at para 11.

[29] *Yusuf Abdul Aziz* v. *State of Bombay*, 1954 SCR 930.

THE LEAFLET

"*examine the position afresh, particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex*".

21. Interestingly, in the judgment of the Bombay High Court in *Yusuf Abdul Aziz*, penned by Justice M.C. Chagla in the year 1951, it was observed that:

    "*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.*"[30]

    In fact, as far back as in 1959, this Hon'ble Court in *Alamgir* v. *State of Bihar*, (1959) Supp 1 SCR 464, despite upholding a conviction under Section 498[31] of the IPC conceded that:

    "*The policy underlying the provisions of Section 498 may no doubt sound inconsistent with the modern notions of the status of women and of the mutual rights and obligations under marriage*".[32]

22. Internationally, most developed countries do not proscribe adultery with criminal sanction. It is not an offence in Europe, Australia, South America and North America, barring some states in USA. Even some of our neighbours, such as Bhutan, Sri Lanka and China do not punish adultery. Countries like Guatemala and South Korea have recently struck down the offence of adultery from their Penal Codes as being unconstitutional.[33] In retaining adultery as n offence therefore, India is in the dubious company of countries like Afghanistan, Brunei and Iraq.

23. 158 years have now passed since the IPC came into force, and over 30 years have elapsed since the decisions in *Sowmithri Vishnu* and *V. Revathi*. Section 497, along with Section 498, and the exception of marital rape,[34] form an unholy triad in the IPC by continuing to reinforce the notion of a woman as chattel of her husband, which were decried by our own Courts as far back as in the 1950s. Sections 497 of the IPC, read with Section 198, CrPC, strike a dissonant note

THE LEAFLET

---

[30] *Yusuf Abdul Aziz* v. *The State*, 1952 ILR Bom 449, at p. 454.

[31] Judgment dated 07.03.1996 of the Guatemalan Constitutional Court, File No. 936-95; Judgment dated 26.02.2015 of the South Korean Constitutional Court, 2009 Henna 17.

[32] *Alamgir* v. *State of Bihar*, (1959) Supp 1 SCR 464, at para 6.

[33] Judgment dated 26.02.2015 of the South Korean Constitutional Court, 2009 Henna 17.

[34] Exception 2 to Section 375 of the IPC, which deals with the offence of "rape" is as follows: "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape*".

with the rights and liberties of women in current times, as well as their perception in society. Subsequent developments in law and international commitments of India have completely eroded the archaic basis for inclusion of adultery as a criminal offence. On the contrary, retention of the offence is at odds with the current interpretation of fundamental rights and freedoms guaranteed under the Constitution. Hence it is imperative that the vires of Section 497 be re-examined in the present social and moral context.

Violations of Fundamental Rights

A. The Right to Life, Liberty & Privacy

1. It is submitted that consensual sexual activity, be it within or outside of marriage, forms the core of a person's right to life and personal liberty as well as the right to privacy, and must be protected from excessive State interference. Punishing the exercise of such rights with imprisonment, as under Section 497 of the IPC, is an unreasonable restriction on the exercise of such rights, and hence violative of the Constitution. Much as Section 377 of the IPC deserves to be struck down as unconstitutional for criminalizing the private sexual conduct of consenting adults, so too, does Section 497.

2. In *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1, a 9 Judge Bench of this Hon'ble Court, unanimously recognized the right to privacy as an overarching fundamental right under the Constitution, which also encompassed within it the right to dignity, autonomy and bodily integrity, and various other aspects of personal life. In his separate opinion, Justice D.Y. Chandrachud extracts nine different types of privacy, *inter alia* as follows:

"(i) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent others from violating one's body or from restraining the freedom of bodily movement;

(ii) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; ***intimate relations and family life are an apt illustration of spatial privacy****;*

…

THE LEAFLET

(vi) ***decisional privacy*** *reflected by an* ***ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations****;*

(vii) *associational privacy which is reflected in the ability of the individual to choose who she wishes to interact with;…*"[35] [emphasis supplied]

3. This Hon'ble Court, in *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1, further accorded a level of protection to matters of family, marriage and sexuality, under the right to privacy, in the following terms:

> "*Privacy of the individual is an essential aspect of dignity… 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 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****. … 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…*"[36]

> "***Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation****…*"[37]

THE LEAFLET

---

[35] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1, Opinion of D.Y. Chandrachud, J., at para 250

[36] Opinion of D.Y. Chandrachud, J., at para 298.

[37] Opinion of D.Y. Chandrachud, J., at para 323.

4. Importantly, in the above decision, this Hon'ble Court not only recognized the right of an individual to decisional privacy and autonomy with respect to one's intimate relations, it also highlighted a "zone of privacy" where an individual was free to exercise these freedoms without being judged:

> "*The ability of an individual to make choices lies at the core of the human personality… The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. …* ***Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others.*** *Privacy enables each individual to take crucial decisions which find expression in the human personality.* ***It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity***." [38]

5. In *Shafin Jahan* v. *Asokan N.M*, 2018 SCC Online SC 343, this Hon'ble Court acknowledged that:

> "*…The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity.* ***The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual.*** *Intimacies of marriage lie within a core zone of privacy, which is inviolable… Neither the State nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution*". [39]

6. In light of the above, it is submitted that each individual is guaranteed the right to life, in being able to choose the manner in which one leads one's life with dignity. The freedoms of personal liberty, of choice and the freedom of expression and association embody within them core aspects of one's identity and personality, including the right of sexual autonomy and to choose one's sexual partner, whether it be male or female, married or unmarried. A person is entitled not only to decisional privacy *i.e.* the ability to not only make decisions regarding his or her sexual nature, desires and preferences, but also to a "zone of privacy", where he or she is exempt from social stigma or judgment in making

THE LEAFLET

[38] Opinion of D.Y. Chandrachud, J., at para 297.

[39] *Shafin Jahan* v. *Asokan N.M*, 2018 SCC Online SC 343, Opinion of D.Y. Chandrachud, J., at para 88.

such choices. This right extends to matters of family and marriage. Much as an individual has the right to marry and start a family, he or she also has the freedom to choose not to marry one's sexual partner or to merely co-habit with him or her.

7. The offence of adultery, which brings within the ambit of criminal law even consensual sexual relations merely because one of the parties is married, cannot co-exist with the above rights and freedoms, which form the core of human dignity and personality. Not merely is a woman's right to life and sexual autonomy and choice of sexual companion, unreasonably curtailed under threat of criminal prosecution of her partner, the very nature of the offence, which completely discounts her consent and bodily integrity, is abhorrent to these rights. Further, the woman is denied any decisional privacy with respect to her intimate relations, as the choice to prosecute her sexual partner, thereby taking the same out of her "zone of privacy", lies solely with her husband. While a person is bound to bear the consequences of her choices, including that of infidelity within the marriage, it is submitted that such consequences must necessarily be civil, rather than criminal in nature.

8. The denial of a woman's right of sexual autonomy and bodily privacy by virtue of Section 497 is made explicitly clear in *Alamgir* v. *State of Bihar*, (1959) Supp 1 SCR 464, where this Hon'ble Court, while upholding a conviction under Section 498 of the IPC, observed as follows:

> "*The provisions of Section 498, like those of Section 497,* ***are intended to protect the rights of the husband and not those of the wife. The gist of the offence under Section 498 appears to be the deprivation of the husband of his custody and his proper control over his wife*** *with the object of having illicit intercourse with her…*
>
> *… It may be conceded that the word "detains" may denote detention of a person against his or her will; but in the context of the section it is impossible to give this meaning to the said word. If the object of the section had been to protect the wife such a construction would obviously have been appropriate; but,* ***since the object of the section is to protect the rights of the husband, it cannot be any defence to the charge to say that, though the husband has been deprived of his rights, the wife is willing to injure the said rights*** *and so the person who is responsible for her willingness has not detained her.* "

THE LEAFLET

9. Therefore, while decisions like *Sowmithri Vishnu*,[40] confidently opined that the woman involved in an illicit relationship with another man is a "victim", rather than the author of the crime, it failed to appreciate that the law gave the woman none of the rights of a victim. As is evident from Section 198 of the CrPC, considers the husband, and not the wife as the victim of the offence. Therefore, the choice of prosecution is that of the husband, and it is his consent and/ or connivance that could bring the act outside the ambit of the offence of adultery.

10. Further, this Hon'ble Court has, in decisions such as *Gobind* v. *State of MP*,[41] and *R. Rajagopal* v. *State of Tamil Nadu*,[42] accorded protection to the personal intimacies of one's self as well as those of the home, family and marriage under the right to privacy. Article 17 of the International Convention of Civil and Political Rights, 1966 ("ICCPR"), which corresponds to Article 12 of the Universal Declaration of Human Rights, 1948 ("UDHR"), accords each individual protection of the law against interference with his privacy, family, home as well as attacks on his honour or reputation.[43] Article 23(1) of the ICCPR, which corresponds to Article 16 of the UDHR, similarly states that "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*" Criminalization of adultery, rather than advancing these human right protections, in fact, denudes them.

11. Every individual has a right to his or her reputation, which is protected under Article 21 of the Constitution.[44] Though the law shields a woman from criminal prosecution under Section 497, it nevertheless exposes her to social stigma by dragging her private affairs into the public domain, as is bound to happen in the course of any criminal trial. Orthodox judges may also comment on the general character of the woman for engaging in such an act during the trial and in the judgment, giving a blow to her self-esteem. Even a malicious complaint made by a husband, is bound to be investigated and become public knowledge. Thus, the existence of the offence of adultery serves as an indiscriminate weapon of public shaming and humiliation in the hands of the husband to be used against

THE LEAFLET

---

[40] *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137.

[41] (1975) 2 SCC 148, at para 24;

[42] (1994) 6 SCC 632, at para 62

[43] Article 17 of the ICCPR reads as follows:
"*1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.*
2. Everyone has the right to the protection of the law against such interference or attacks."

[44] *Umesh Kumar* v. *State of Andhra Pradesh*, (2013) 10 SCC 591; *Kishore Samrite* v. *State of Uttar Pradesh*, (2013) 2 SCC 398; *Om Prakash Chautala* v. *Kanwar Bhan*, (2014) 5 SCC 417.

the wife, thereby tarnishing her reputation. A violation of the right to reputation holds good for the man accused of the offence of adultery as well.

12. The standard of proof required in a trial for adultery is very high, as sexual intercourse has to be proved beyond reasonable doubt. As such, proof of the offence itself would involve extensive invasion of the private lives of persons, thereby destroying their credibility, character and reputation. In the end, the accused may nevertheless be acquitted for insufficient evidence. On the other hand, proving adultery on the preponderance of probabilities as part of a divorce proceeding, is not only easier, but makes it possible for parties to preserve confidentiality of the proceedings.

13. In addition, in a trial under Section 497, the woman has no right to be heard despite the fact that her sexual partner is being tried for an act in which she is also involved. She is neither an accused nor a victim nor a complainant. As a defence witness, she would be considered an interested party, and the prosecution may consider her to be a hostile witness, and not summon her to depose. As has been contended hereinbefore, the consent or willingness of the woman has no role to play in the offence, and hence she has no opportunity to set the record straight. This is a gross violation of the principles of natural justice, which are protected under Article 21.

Unreasonableness of the Restriction/ Interference

THE LEAFLET

14. While every person is entitled to the right to privacy and personal liberty, the same is admittedly not absolute and is subject to reasonable restrictions on the ground *inter alia* of compelling State or public interest and morality, amongst others. However, it is submitted that in the present case, the restriction on the right is not only unreasonable but also excessive and disproportionate.

15. Initiation of criminal proceedings against another person, for what is essentially an injury to one's "honour" is extraordinarily harsh. As expounded by this Hon'ble Court in *Vikas Yadav* v. *State of Uttar Pradesh*, (2016) 9 SCC 541:

> "*One may feel "My honour is my life"* ***but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman****, be a wife or sister or daughter or mother,* ***cannot be allowed to be curtailed*** *definitely not by application of physical force or threat or*

mental cruelty ***in the name of his self-assumed honour****. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl.* ***Her individual choice is her self-respect and creating dent in it is destroying her honour.*** *And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions.*"[45]

16. No doubt, as per the harm principle, the right of a person can be restricted when it causes harm to another. The "harm", as far as adultery is concerned, is caused not to society at large, but suffered only by the aggrieved spouse. This is echoed in Section 198, CrPC, which bars a Court from taking cognizance of the offence under Section 497, except on a complaint by the husband, thereby treating it as a private complaint. Further, the concept of "harm" on which the offence was initially based *i.e.* injury to the property of the husband in his wife, is now outdated and obsolete. Insofar as the "harm" in terms of loss of affection etc. is concerned, it is submitted that the same is easily addressed either by personal volition *i.e.* forgiveness and reconciliation, or by recourse to the personal law remedy of divorce.

17. Under common law, adultery was treated merely as a civil wrong. In fact, one of the prime intentions behind including the offence of adultery in the IPC, was to enable the husband to obtain divorce, as is clear from the following discussion in the Second Report on the IPC:

   "*We would, however, put the parties accused 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.*"[46]

18. The law now recognizes the ability of partners to dissolve their marriages. More and more couples are now choosing to obtain divorce, whether for fault of the spouse or by mutual consent, rather than continue in an unhappy marriage.

THE LEAFLET

[45] *Vikas Yadav* v. *State of Uttar Pradesh*, (2016) 9 SCC 541, at para 75
[46] *A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at p. 76.

Adultery is one of the grounds on which either spouse is entitled to initiate divorce proceedings against the other.[47] Divorce is now no longer considered a social evil, and State interest, if any, in preserving the sanctity of marriage, does not override the freedom of married individuals to separate. In *V. Revathi*,[48] this Hon'ble Court held that:

> "*The philosophy underlying the scheme of these provisions appears to be that as between the husband and the wife social good will be promoted by permitting them to 'make up' or 'break up' the matrimonial tie rather than to drag each other to the criminal court. They can either condone the offence in a spirit of 'forgive and forget' and live together or separate by approaching a matrimonial court and snapping the matrimonial tie by securing divorce. They are not enabled to send each other to jail. Perhaps it is as well that the children (if any) are saved from the trauma of one of their parents being jailed at the instance of the other parent*".

19. The above reasoning, which was ironically used to repel a challenge to the constitutionality of Section 497 for not criminalizing the husband or the wife, is nevertheless sound basis to strike down the provision altogether, for unreasonable State interference into intimate and private matters. The importance of sexual fidelity in the marriage and the subsistence of a marriage are best left to be resolved between the husband and wife. If they decide to 'make up', a criminal prosecution against a third party would serve no purpose. On the other hand, if they decide to 'break up', the remedy of divorce is always available.

20. Criminalizing the private sexual conduct of one of the parties in the process, by punishing a third party to the marriage, is completely disproportionate and does not serve any legitimate State aim. Marriages are an intimate family affair and cannot be preserved under the threat of criminal prosecution against another. As

THE LEAFLET

---

[47] Section 32(d), Parsi Marriage and Divorce Act, 1936, Section 27(1)(a) of the Special Marriage Act, 1954, and Section 13(1)(i) of the Hindu Marriage Act, 1955, entitle a spouse to seek divorce on the ground of adultery. Divorce on the ground of adultery is permissible under Muslim personal law as well. Section 2(viii)(b) of the Dissolution of Muslim Marriages Act, 1939, also recognizes the woman's right to seek divorce on the ground of cruelty if the husband "*associates with women of evil repute or leads an infamous life*". Further, Section 2 of The Muslim Personal Law (Shariat) Application Act, 1936, recognizes the practice of "lian", which gives the wife a right to ask for divorce if the husband levels false allegations of adultery against her.

[48] *V. Revathi* v. *Union of India*, (1988) 2 SCC 72, at para 4. See also *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137, at paras 12-13, where a complaint under Section 497 was quashed on the ground that since the husband had already obtained divorce on the basis of desertion, no useful purpose would be served by inquiring into whether the wife was in an adulterous relationship.

the South Korean Constitutional Court eloquently opined, while striking down the offence of adultery, "*The maintenance of marriage and family should be left to the free will and affection of the parties, and cannot be enforced in a real way through punishment*".[49]

21. If the institution of marriage is to be preserved, the focus must be on reconciliation between the parties. In *Santhini* v. *Vijaya Venketesh*, (2018) 1 SCC 1, this Hon'ble Court underscored the need for reconciliation in matrimonial matters in the following words:

    "*The reconciliation requires presence of both the parties at the same place at the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family Court Judge would not be in a position to interact with the parties in the manner as the law commands. By virtue of the nature of the controversy, it has its inherent sensitivity. The Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. Needless to emphasise, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with….*".[50]

22. Reconciliation can be achieved with maturity, sensitivity and by building trust and maintaining confidentiality. In these circumstances, throwing a private (and consensual) act of the wife open to the process of a criminal trial at the behest of the husband would make reconciliation extremely difficult, if not impossible. Though the wife herself may not be punished under Section 497, the fact that her actions would be the subject matter of trial, knowledge of which is bound to become public, is enough to sound a death knell for the marriage.

THE LEAFLET

23. Further, insofar as the immorality of an act of adultery is concerned, it is neither desirable nor serves any legitimate purpose to criminalize every act which is perceived as amoral. Lord Macaulay, one of the propounders of the IPC, himself discouraged the criminalization of in the following words:

    "***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 as act is not punished*

---

[49] Judgment dated 26.02.2015 of the South Korean Constitutional Court, 2009 Henna 17.

[50] *Santhini* v. *Vijaya Venketesh*, (2018) 1 SCC 1, Majority Opinion of Dipak Misra, C.J.I., at para 48.

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 ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in 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 far worse 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.*"[51]

24. In 2015, the South Korean Constitutional Court struck down as unconstitutional, by a majority of 7:2, Article 241 of their Penal Code, which punished adultery with imprisonment of 2 years. In doing so, the Court eloquently held as follows:

    "*…as public consciousness about social structure, marriage and sex has changed and the awareness of the importance of sexual self-determination has spread, it is no longer possible for the public to recognize that it is appropriate for the State to punish adultery.* ***It is also the trend of modern criminal law that, even though immoral acts are essentially inherent in the private life of the individual and are not so harmful to society, or that there is no apparent violation of specific legal interests, the State power should not intervene****. Adultery crimes are being abolished globally…*

    …the judgment clause violates the Constitution as violating the principle of excessive prohibition and infringing on people's right to self determination and privacy…"

THE LEAFLET

25. Further, the fallacy in penalizing a private wrong merely on grounds of immorality is that morality of a society is constantly in flux, and changes over time. To the contrary, criminal law, as is seen in the constancy of the IPC itself, can remain immutable over centuries, and continue to punish acts which may no longer be considered amoral by society. It is therefore submitted that grounds such as morality or the sanctity of marriage are not reasonable bases for restricting the right to privacy or sexual autonomy. Hence, the criminalization of adultery unconstitutional for constituting excessive and unreasonable

---

[51] *A Penal Code prepared by The Indian Law Commissioners* (1838), Notes of Lord Thomas Babington Macaulay, at p. 130-131.

interference by the State into affairs of the family, marriage and choice of intimate relations, which are protected under the fundamental right to privacy.

B. The Right to Equality

26. It is a settled position of law that both men and women are equal under Article 14, which also grants both men and women equal protection of the law. Section 497 criminalizes adultery based on a classification on the ground of sex and marital status of the woman. It is submitted that such classification bears no rational nexus with the object sought to be achieved, and hence is discriminatory, disproportionate, manifestly arbitrary, and does not further any legitimate State purpose.

Discrimination

27. Section 497 negates equal treatment of the law and discriminates on the grounds of sex and marital status by treating equals unequally for the following reasons:

    (a) The consent or willingness of the woman is irrelevant to the offence, but it is the lack of consent or connivance of the husband, which is considered material.

    (b) Section 497, IPC, read with Section 198, CrPC, gives the man the sole right to lodge a complaint and precludes a woman from initiating criminal proceedings thereunder.

    (c) Sexual relations by a married woman with an unmarried or married man are criminalized, whereas those of a married man with an unmarried woman do not invoke any criminal sanction.

THE LEAFLET

28. In *W. Kalyani* v. *State*, (2012) 1 SCC 358, this Hon'ble Court has itself recognized the gender bias evident in the provision, as follows:

    "***The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband****. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished*

even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence."[52]

29. Section 497 is also contrary to the obligations of India under the ICCPR and the Convention on Elimination of all forms of Discrimination Against Women, 1970 ("CEDAW").[53] Article 23(4) of the ICCPR, obligates States to "*take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.*"[54]

30. Similarly, Article 16 of CEDAW requires the State to ensure equality and eliminate discrimination against women in all matters relating to marriage.[55] Article 1 of CEDAW, which prohibits any restriction on the basis of sex and marital status, reads as follows:

"*For the purposes of the present Convention, the term "discrimination against women" shall mean* ***any distinction, exclusion or restriction made on the basis of sex*** *which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women,* ***irrespective of their marital status****, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*"

The UN Working Group on Discrimination Against Women in Law and in Practice, has also called for decriminalization of adultery based on the rights enshrined under CEDAW, as the laws tend to be discriminatory and, even in

THE LEAFLET

---

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

[53] India signed the CEDAW in 1980, and ratified it in 1993, with a few reservations. These reservations have not been made to the Articles referred to in the present submissions.

[54] Art. 23(4) of the ICCPR reads as follows: "*States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*"

[55] The relevant extract of Article 16 of CEDAW is as follows:
"1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
…
(c) The same rights and responsibilities during marriage and at its dissolution;
…
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation…"

jurisdictions where the law is gender neutral, they are usually invoked to the detriment of women.[56]

31. In the landmark decision of *Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1, this Hon'ble Court, declared Section 30 of the Punjab Excise Act, 1914,[57] as *ultra vires* Articles 14, 15 and 21 of the Constitution, read with the provisions of CEDAW. In a judgment that forms perhaps one of the best expositions of gender equality, autonomy and self-determination in the current context, this Hon'ble Court held as follows:

> "*When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved…*
>
> …
>
> *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 the absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in the early 20th century, may not be a rational criteria in the 21st century…*"

32. In light of the above, an offence based on the age-old concept of the wife being the property of her husband, who can easily fall prey to seduction by another, can no longer be justified as a rational basis for the classification inherent in Section 497. It denies a married woman equality of autonomy and opportunity in terms of her sexual choices and partners by subjecting such partners to criminal prosecution, while a married man and/or an unmarried woman are free to exercise these personal choices without fear of the law. The provision imposes additional, onerous and punitive restrictions on a woman, depending on her marital status and gender, despite shielding her from actual prosecution, and hence falls foul of the fundamental right to equality enshrined in Article 14 of the Constitution. Further, in placing punitive restrictions on the sexual activities of the wife outside of marriage, while granting impunity to men in this regard, Section 497 also discriminates on the basis of marital status and does not ensure

---

[56] UN Human Rights Special Procedures, Working Group on the Issue of Discrimination Against Women in Law and in Practice, October, 2012.

[57] The provision prohibited the employment of women in places where liquor or intoxicating drugs were consumed by the public.

THE LEAFLET

equality in marriage, and hence violates Article 23 of the ICCPR and Articles 1 and 16 of CEDAW, which mandate equality within marriage.

33. The State has tried to justify the law on the ground of "protective discrimination", since the offence, as it now stands, does not encompass women. However, such a justification also fails the test of any compelling State purpose for the following reasons:
    (a) Adultery is often used as a tool to oppress and shame women; and
    (b) The State now proposes to include women within the ambit of the offence.

34. *First*, under the guise of protective discrimination, the offence of adultery, in fact, perpetuates oppression of women, as elucidated hereinafter.

    (a) Lord Macaulay, as far back as in 1860, recognized the use of adultery as a mode of oppression for women. He notes as follows:

    > "*... 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 of fill his zenana with women, is a course which we are most reluctant to adopt... 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.*"[58]

[58] *A Penal Code prepared by The Indian Law Commissioners* (1838), Notes of Lord Thomas Babington Macaulay, at p. 130-131.

THE LEAFLET

(b) Lord Macaulay's views on the hapless state of women in the country were considered only to the limited extent of not making women criminally liable, as is evident from the following discussion:

"*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.*"[59]

(c) The supposed protection given to women under Section 497, not only highlights her lack of sexual agency, but also ignores the social repercussions of such an offence on her. As a moral offence, adultery has been targeted mostly against married women, while the dalliances of married men are either ignored or excused. Historically, it is the women who have had to unfairly and unequally bear the social consequences of adultery, be it chastisement by the husband or ostracism, condemnation or other barbaric forms of punishment imposed by the society. While there has been much progress since Lord Macaulay's time, the scales of gender equality and justice are yet imbalanced. In other words, while the weapon of oppression may have changed, the injury it inflicts is still severe.

(d) In *Anuj Garg*,[60] this Hon'ble Court warned that:

"*46. It is to be borne in mind that legislations with pronounced "protective discrimination" aims... potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on its implementation and effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.*

47. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency unless

THE LEAFLET

---

[59] *A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at p. 76.

[60] *Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1, at paras 46-47.

and until there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases".

(e) The offence of Section 497 is used to stifle a woman's freedom to choose her sexual partners, imposes upon her a stereotype morality and conception of sexual role, and hence perpetuates her oppression. To illustrate, the provision gives the husband of a separated wife an unhealthy amount of control over her sexual activities, by giving him the right to prosecute her companion, despite the fact that their marriage may have broken down. Adultery is also used strategically at the time of divorce, to deny the wife a right to maintenance or alimony, or to malign her character and deny her the custody of her children.

(f) Further, the adverse social consequences on a woman, of the conviction of her sexual partner, are unimaginable. She is often publicly shamed and her reputation sought to be tarnished for engaging in adulterous acts. A classic example of this is *Sowmithri Vishnu's case*,[61] itself, which emanated essentially from divorce proceedings. The Petitioner/ wife had filed for divorce against her husband on the ground of desertion, but failed to obtain the same. Thereafter, the husband filed for divorce on the grounds of desertion and adultery. The Courts granted him divorce on the ground of desertion and hence found it unnecessary to render any finding on adultery. However, in his zeal to establish that his former wife had been living in adultery, and keeping in mind the social stigma attached to such an exercise, he filed a complaint under S. 497 against her partner, despite having already obtained divorce. Punishment in such circumstances can serve no public good.

THE LEAFLET

35. *Secondly,* the State's proposal of bringing women within the ambit of the offence not only negates any notion of "protective discrimination", but is also abhorrent to the present understanding of personal liberties and freedoms.

(a) It is submitted that the inherent inequality and male patriarchy embodied in Section 497 cannot be remedied by making the provision gender neutral so as to bring women also within its ambit. This would only expand the violation of fundamental rights wreaked by the law to a larger class of

[61] *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137.

persons, and deepen the gender inequality and oppression suffered by women as a consequence thereof. Any amendment to the law should strive towards positive equality, rather than foistering negative equality. It is only by striking down the offence that some semblance of equality be restored between sexes in matters of matrimony and sexual autonomy.

(b) The Guatemalan Constitutional Court has done exactly this by striking down the offence of adultery in its Penal Code as being discriminatory, observing as follows:

"*The right of equality acquires in our Constitution full recognition as a supreme value in Article 40 ... **it establishes that a married woman is treated in a discriminatory way because of her sex,** since the concurrence of the same facts under the same conditions or circumstances, if committed by the married man does not typify the crime of adultery, the gender having a direct and unequivocal relationship with the crime, the unfaithful behavior of the married woman is what configures adultery, not the identical behavior observed by the married man**. This criminal figure that sanctions only the conjugal infidelity of women, gives unequal treatment to identical acts**. The difference established by the legislator for the same factual situation is not reasonable and **this regulation cannot find its location or justification within the crimes against the family order and against marital status, because of these were the protected values, he would have sanctioned infidelity on equal terms for both spouses**. The article of the Penal Code that is analyzed for being discriminatory is in contradiction with article 40 of the Constitution that enshrines the right not to be discriminated against, so it is appropriate to eliminate it from the legal system. Articles 233 and 234 of the Criminal Code give the husband the exclusive right to exercise criminal action for the punishment of the crime of adultery and to grant pardon for not pursuing it, and if article 232 violates the right to equality, articles 233 and 234 of that body of law also contradict it and must also be expelled from the legal system.*"[62]

No Rational Nexus to its Purported Objects

[62] Judgment dated 07.03.1996 of the Guatemalan Constitutional Court, File No. 936-95.

THE LEAFLET

36. As per the Counter Affidavit filed on behalf of the Union of India, the object sought to be achieved by retaining Section 497 in the IPC is preserving the institution of marriage. Reliance is placed on *Sowmithri Vishnu*,[63] to urge that a legitimate interest of the society is protected in punishing at least, a limited class of adulterous relationships.[64] It is submitted that this contention of the State is completely misconceived and overlooks the historical origins of the offence.

37. *First*, the object of the offence was never the preservation of marriage, but the preservation of the proprietary right of a husband over his wife, as is evident from the following:

(a) Adultery was not a criminal offence in England at the time of introduction of the IPC, but used to be a tort enabling the husband to claim damages for trespass. The origins of this tort, which then became a criminal offence under the IPC, lie in the notion that a wife is the private property of her husband.

(b) The discussions preceding inclusion of the offence in the IPC are completely silent on the aspect of sanctity of marriage. Rather, they reveal that one of the reasons for including the offence was to deprive the erring woman of her 'matrimonial gains' by enabling the husband to sue for divorce upon conviction for adultery, as is evident from the following quote:

"*We would, however, put the parties accused 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.*"[65]

THE LEAFLET

(c) Extra-marital affairs by men outside the marriage, which are equally destructive of the fabric of marriage, are exempt from the purview of the offence. Hence, as observed by the Guatemalan Supreme Court, the law cannot be justified as a crime against family order or marital status.[66]

---

[63] *Sowmithri Vishnu* v. *Union of India*, (1985) Supp SCC 137.

[64] Counter Affidavit of the Union of India, at p. 2-3.

[65] *A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at p. 76.

[66] Judgment dated 07.03.1996 of the Guatemalan Constitutional Court, File No. 936-95.

(d) The provision does not distinguish between cohabiting and separated wives, even though a formal divorce has not been obtained. No legitimate State interest can be served by permitting the husband to prosecute his separated wife's companion for adultery under the pretext of saving the marriage that has already irretrievably broken down.

38. *Second*, the contention of the State is vague and based entirely on an outdated moral notion of marriage. It has failed to show that the purported object *i.e.* preservation of marriage or sexual fidelity within marriage is actually achieved by penalizing adultery or that the existence of the offence deters men from engaging in sexual relations with married women. On the other hand, it can do more harm to the marriage than good, as is evident from the following:

(a) The marriage may not be able to withstand the process of the criminal trial. Though the woman may not herself be an accused, another person will be tried for an act in which she is also a participant, and hence she would be a crucial witness in the proceedings. Such a traumatic experience would endanger the chances of reconciliation in the marriage.

(b) The State has failed to appreciate that there may be two marriages involved in the circumstances. In the event the alleged adulterer is married, his trial and subsequent conviction itself could ruin his marriage.

(c) If the husband, despite initiating criminal proceedings under Section 497 refuses to give divorce, the woman may be trapped in an unhappy and vengeful marriage.

THE LEAFLET

Manifest Arbitrariness

39. In *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1, this Honble Court recognized manifest arbitrariness as a test to determine the vires of a law. The test was described in the following words:

> "*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." (para 101)

40. *First,* as discussed hereinabove, adultery was not a criminal offence under common law when the IPC was brought into force. A possible reason for its inclusion in the IPC despite this could be the fact that imposition of laws in a colony required none of the public debate or discussion which would have been required for passing a law in England,[67] leaving a free field for experimentation with the law.[68] Further, the purported reasons given for its inclusion are to prevent poisoning of the wife by her husband for want of legal redress.[69] It is therefore apparent that Section 497 of the IPC was included on the whims and caprices of the British colonizers, based on reasons which are completely irrational and disclose no determining principles.

41. *Second,* assuming that protection of marriages is the purported object of the law, it is a wholly disproportionate and excessive means of achieving the goal.

(a) In *Anuj Garg,*[70] this Hon'ble Court held that:
"*The court's task is to determine whether the measures furthered by the State in the form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy, et al. The bottom line in this behalf should be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued.*"

(b) Section 497 goes against the grain of the modern notions of sexual autonomy, equality of opportunity to form sexual associations, and the

THE LEAFLET

---

[67] J. F. Stephen, *A History of the Criminal Law of England* (1883), Vol. III, at p. 304.

[68] Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (1998).

[69] *A Penal Code prepared by The Indian Law Commissioners* (1838), The Second Report on the Indian Penal Code, at p. 74-76.

[70] *Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1, at para 51.

right to privacy of women, and puts a man on trial for engaging in consensual sexual relations with her, merely because she is married. The consequence of a conviction could result in a 5 year imprisonment. Marriages are better saved through personal relationship and fostering reconciliation. Criminal sanction of a third party for what is essentially a private, intimate and consensual act, under the pretext of saving marriages, is tantamount to using a machete where, what is required is a balm. This is therefore completely disproportionate to the aims it seeks to achieve.

42. In view of the above, it is submitted that Section 497 suffers from the vice of manifest arbitrariness, and hence must be struck down.

In sum, it is humbly submitted that Section 497 is abhorrent to the current notion of fundamental rights and freedoms available to persons under the Constitution of India, and hence deserves to be struck down.

THE LEAFLET