IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) 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
Through its Authorised Signatory
F-18, Jangpura Extension, First Floor,
NewDelhi–110014 ...Applicant

WRITTEN SUBMISSIONS BY MS. MEENAKSHI ARORA, SENIOR ADVOCATE

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ADVOCATE FOR THE APPLICANT LIZ MATHEW

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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

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.

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[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*

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[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

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[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]

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[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.*
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> ***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*

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[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.

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]

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[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]

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[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.

[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

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[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.

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

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[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.

"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

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[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;***

(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]

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[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

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[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.