BEFORE THE HON'BLE SUPREME COURT OF INDIA

in

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

IN THE MATTER OF

JOSEPH SHINE : PETITIONER

v.

UNION OF INDIA : RESPONDENT

MEMORANDUM OF WRITTEN SUBMISSIONS BY

ADV. KALEESWARAM RAJ, COUNSEL FOR THE PETITIONER

Volume -I

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WRITTEN SUBMISSIONS BY
ADV. KALEESWARAM RAJ, COUNSEL FOR THE PETITIONER

I. DECONSTRUCTING S. 497 IPC.

1. It is important to analyse the elements of S. 497 to appreciate the effects of the provision in their entirety. S. 497 is drafted in a peculiarly convoluted, arbitrary and ironical fashion.

S. 497 of the IPC reads as follows:

> *"497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."*

2. Now, the following aspects may be noted. Firstly, S. 497 of the IPC criminalizes sexual intercourse with a married woman. It does not cover sexual intercourse with an unmarried woman. Secondly, if the act is conducted with the consent of husband of the married woman, then the act is no longer an offence of adultery. Thirdly, only men can be culpable and punished under the said provision going by its very definition. Women are excluded from punishment, even as abettors. The effects of the provision can be demonstrated as follows:

	Marital status of the man	Marital status of the woman	Consent by the wife of the married man	Consent by the husband of the married woman	Whether the act attracts the offence of adultery under S. 497
1	Married man	Married woman	Irrelevant	Given	No adultery
2	Married man	Married woman	Irrelevant	Not given	Adultery
3	Unmarried man	Married woman	NA	Given	No adultery
4	Unmarried man	Married woman	NA	Not given	Adultery
5	Married man	Unmarried woman	Irrelevant	NA	No adultery
6	Unmarried man	Unmarried woman	NA	NA	No adultery

Therefore, the provision suffers from inherent contradictions, which have a clear discriminatory impact. This calls for a constitutional scrutiny, on the grounds indicated hereinafter.

II. S. 497 IPC IS VIOLATIVE OF ARTICLES 14 AND 15 OF THE CONSTITUTION, BEING DIRECTLY DISCRIMINATORY AGAINST MEN.

A. Direct discrimination against men

3. S. 497 IPC punishes men alone for the commission of adultery when adultery is admittedly, an act between a man and a woman. It is submitted that when both the parties engage in the same act, punishing only one of the parties by holding an erroneous presumption that he alone is capable of committing the offence is arbitrary and strikes at the root of anti-discrimination clauses under Articles 14 and 15 of the Constitution of India. Both the adulterous man and the adulterous woman are situated in similar footing, as far as the act of adultery is concerned. The law must similarly treat those who are situated alike. When an act by a woman is not treated as adultery, the same act by a man also cannot be treated as the offence of adultery. As stated in Ground B of the memorandum, erroneously conceiving that only men can commit the offence of adultery and punishing them on this mistaken presumption go against the settled jurisprudence of this Hon'ble Court under Articles 14, 15 and 21 of the Constitution.

4. In E.P. Royappa v. State Of Tamil Nadu, 1974(4) SCC 3, it was held as follows:

> *"**85.**The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbled, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an*

absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

5. Further, in Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487, it was held as follows:

*"**16.** If the Society is an "authority" and therefore "State" within the meaning of Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action."*

6. In State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, it was held:

***"44.** It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same."*

7. Further in M.G. Badappanavar v. State of Karnataka (2001) 2 SCC 666, this Hon'ble Court, while referring to Indra Sawhney v. Union of India [2000] 1 SCC 168 held the following:

"***13***. *Infact while dealing with the fundamental right under Article 14 and Article 16, this Court held in Indra Sawhney v. Union of India(known as the Kerala Creamy layer case) while holding that if creamy layer among backward classes were given same benefits as backward classes, it will amount to treating equals unequally. Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be in violation of the basic structure of the Constitution of India*."

8. Moreover, the provision providing for the offence of adultery should not have had a gender bias and there is no legally sustainable reason as to why only men are culpable and liable under the provision. It also offends the general principle of gender neutrality of penal laws. The provisions under the Indian Penal Code are gender neutral, with very few exceptions. In fact, S. 497 is the sole provision in the Code which penalises only one of the parties of the very same act. Other provisions such as S. 498A or S. 493 are gender specific offences. Since sexual intercourse cannot take place without at least two parties, and when the adulterous act invariably involves both the man and the woman, there is no good reason to exempt women from culpability or punishment.

9. In State of Tamil Nadu, v. R. Vasanthi Stanley and Another, (2016) 1 SCC 376 , when it was argued that by virtue of being a woman, she should be exempt from culpability for a financial offence, this Hon'ble Court was pleased to note as follows:

"***14***. *We will be failing in our duty unless we advert to the proponements propounded with regard to other aspects. They are really matters of concern and deserve to be addressed. The submission as put forth is that the first respondent is a lady and she was following the command of her husband and signed the documents without being aware about the transactions entered into by the husband and nature of the business. The allegation in the charge-sheet is that she has signed the pronotes. That apart, as further alleged, she is a co-applicant in*

two cases and guarantor in other two cases. She was an Assistant Commissioner of Commercial Taxes and after taking voluntary retirement she has joined the public life, and became a Member of the Rajya Sabha. Emphasis is also laid that she is a lady and there is no warrant to continue the criminal proceeding when she has paid the dues of the Banks, and if anything further is due that shall be made good. The assertions as regards the ignorance are a mere pretence and sans substance given the facts. Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in CrPC relating to exercise of jurisdiction under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score."(emphasis mine).

Therefore, there is no good reason why an adulterous woman, who is a party to the very same act, should be exempt from the scope of the penal law whereas the man alone is subject to punishment. Discharging the woman alone from the burden of the culpability is discriminatory.

B. S.497 is not a 'special provision' under Article 15(3) of the Constitution.

10. Article 15(3) of the Constitution enables the state to make any special provision for women and children. However, the said provision does not permit exempting women from culpability and prosecution under a penal offence such as S.497 IPC. Article 15(3) in essence intends to serve a social purpose of uplifting a particular class so as to result in substantive equality. Going by the legislative history as well as the consistent jurisprudence of this Court, Art. 15(3) is intended to serve a beneficial purpose. It may be in the form of reservation, maternity benefit or other welfare measure. At no rate, however can Article 15(3) be adopted for claiming an exemption from punishment from a criminal law. As

stated in Ground C of the petition, permissibility of affirmative action is different and distinct from exemption from criminal prosecution. Both cannot be conflated or confused with each other.

11. Moreover, Article 15(3) is not a stand-alone provision and cannot be dissected from the parent provision of Article 15. Article 15 prohibits discrimination on the basis of sex *inter alia*. Absolving women alone from criminal penalty cannot be contained within the ambit of Article 15(3). This understanding of the article is well supported by the jurisprudence evolved by this Hon'ble Court.

12. This Hon'ble Court in Thota Sesharathamma and Anr v. Thota Manikyamma (Dead) by Lrs. and Others, (1991) 4 SCC 312 held:

> *"**21.**Freedom of contract would yield place to public policy envisaged above. Its effect must be tested on the anvil of socio- economic justice, equality of status and to oversee whether it would sub serve the constitutional animation or frustrates. Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to-women socioeconomic equality. As a fact, Art. 15(3) as a fore runner to common code does animate 'to 'make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race, caste or region."*

13. Also, the purpose of Article 15(3) has been elaborated by this Hon'ble Court in Government of Andhra Pradesh v. P.B. Vijayakumar, 1995 (4) SCC 520 as to include both reservation and affirmative action. It further held:

> *"**7.** The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that*

Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to out at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16.

***8**. What then is meant by "any special provision for women" in Article 15(3)? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4) which deals with any special provision for the advancement of any socially or educationally backward class of citizens or Scheduled Castes or Scheduled Tribes."*

14. From the above said analogy between Art. 15(3) and Art. 15(4), it also follows that if a particular legislation exempts members of the Scheduled Caste from criminal penalty, such a provision would fail to withstand the constitutional test. The so called vulnerability or backwardness cannot be ground for criminal exemption. Likewise, sexual stereotypes cannot be clothed in the form of affirmative action. Such a tendency was resisted by the High Court of Madras in Vasantha R. v. Union of India (2001) 2 LLJ 843 (Mad) in the following words:

*"**95**. For the past two decades and over, various State Governments, Central Government, Universities, and Public Corporations are all trying to reverse the effects of past discrimination which was based on sex. To remedy the past discrimination, at times called "benign or reserve discrimination" and popularly known as "affirmative action," various measures have been taken for their own life. Surprisingly and perhaps certain statutes which make sexual classification which favour women, even if enacted solely to remedy past anti-female*

discrimination, are judged by exactly the same standard; the statute will be stricken if the sex based criterion is not substantially related to an important governmental objective. Further it is also to be pointed out that it is not always so easy to verify whether discrimination that is claimed to be "affirmative action" or "benign" whether really is and at times it is demonstrably established that such a discrimination actually reinforces a negative and untrue stereotype of them. At times, some of the affirmative action plans are ordered by a Court as well to remedy past discrimination and such an order of the Court confirms the constitutional mandate which is yet to be tested or answered."

15. While discussing Article 9 of the draft Constitution, which is the basis for Article 15 of the Constitution , Syed Abdul Rouf (Assam) said: - "…as for sex, I do not think that in the middle of the 20th century, there will be nobody attempting to make any discrimination on (the) ground (of sex)." (Constituent Assembly debates, 29.11.1948). He was moving an amendment to the original article 9, by seeking to add place of birth after the word 'sex' in Article 9 (Now, Article 15). Thus, the purpose of Art. 15, clearly, is to prevent discrimination on the ground of sex and it therefore can not support a statutory provision doing quite the opposite.

16. S. 497 is worded in discriminatory, sexist and paternalistic language. It seeks to remove the sexual agency of woman. Justifying such a provision under Art. 15(3) is diametrically opposite to the intent, content and purpose of anti-discrimination law surrounding Articles 14 and 15. Like anybody else, women are entitled to sexual freedom and moral autonomy. Therefore, at any rate, Article 15(3) cannot be relied upon to sustain exemption of women from a penal law such as S.497.

III. S.497 IPC IS INDIRECTLY DISCRIMINATORY AGAINST WOMEN UNDER ARTICLES 14, 15 AND 21 OF THE CONSTITUTION.

17. S. 497 is a classic case of indirect discrimination and is hit by the constitutional guarantees of equality and non-discrimination. It is pertinent to note that stereotyping and prejudices against women can either manifest in the form of prohibition, such as denying employment opportunity to women for jobs considered risky or in the form of paternalistic protectivism. Neither of them is permitted by the constitutional guarantees of equality. S.497 IPC falls into the latter category.

18. S. 497 has several dimensions discriminating against women in multifarious ways. Firstly, the provision treats women as incapable of committing adultery. It erroneously presumes that sexual agency is solely vested on the men whereas women lack it altogether. Secondly, the provision conceives a married woman as property rather than a person with dignity. She is treated as the property of the husband. The presumption is that whoever pollutes the wife is liable to punishment on an action initiated by the master, who is the husband of the woman. This reading is strengthened by the plain words in S. 198(2) which says 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." Therefore, women are identified as a chattel to be owned by another, who should be a man. This is further fortified by the fact that going by the provision, if the consent of the husband is obtained, no adultery is committed. Therefore, if the consent of the master is obtained, there can not be a complaint of 'trespass to the women' which is considered as his property. This perception is based on archaic stereotypes about women and her lack of autonomy. This attitude of 'romantic paternalism' was looked down upon in Anuj Garg v. Hotel Association (2008) 3 SCC 1. In *Anuj Garg*, this Court noted:

> *"**44**. The description of the notion of "romantic paternalism" by the US Supreme Court in Frontiero v. Richardson (411 U.S. 677, 93 S.Ct. 1764) makes for an interesting reading. It is not to say that Indian society is similarly situated and*

suffers from the same degree of troublesome legislative past but nevertheless the tenor and context are not to be missed. The court noted in this case of military service:

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism', which, in practical effect, put women, not on a pedestal, but in a cage. As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes."

19. In Frontiero v Richardson, (1973) 411 US 677, it was held by the Supreme Court of the United States as follows:

"Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact. The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members than it is to determine which male members are, in fact, entitled to such benefits, and to grant increased benefits only to those members whose wives actually meet the dependency requirement."

20. In *Anuj Garg*, the tendency to treat women as sexual objects was repelled in the following words:

*"**45**. In another similar case wherein there was an effective bar on females for the position of guards or correctional counsellors in the Alabama state penitentiary system. The prison facility housed sexual offenders and the majority opinion on*

this basis inter alia upheld the bar. Justice Marshall's dissent captures the ranges of issues within a progressive paradigm. Dissent in Dothard v. Rawlinson (433 U.S. 321, 97 S.Ct. 2720) serves as useful advice in the following terms:

"It appears that the real disqualifying factor in the Court's view is 'the employee's very womanhood.' The Court refers to the large number of sex offenders in Alabama prisons, and to 'the likelihood that inmates would assault a woman because she was a woman.' In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, 'the pedestal upon which women have been placed has upon closer inspection, been revealed as a cage.' It is particularly ironic that the cage is erected here in response to feared misbehavior by imprisoned criminals."

This Hon'ble Court also held:

"It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, 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 the implications and the 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."

It was further held:

"**51**. *The Court's task is to determine whether the measures furthered by the State in 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."

21. Treating women as incapable of commission of a gender-neutral offence and considering them as merely victims is part of the institutionalized discrimination. Institutionalized discrimination was repelled by this Hon'ble Court in Charu Khurana and Ors v. Union of India and Ors 2015(1) SCC 192. It was held therein as follows:

"The present writ petition preferred under article 32 of the constitution of India exposes with luminosity the prevalence of gender inequality in the film industry, which compels one to contemplate whether the fundamental conception of gender empowerment and gender justice have been actualized despite a number of legislations and progressive outlook in the society or behind the liberal exterior there is a façade which gets uncurtained on apposite discernment. The stubbornness of the fifth respondent, Cine Costume Make-up Artists and Hair Dressers Association (for short "the Association") of Mumbai, as is manifest, thought it appropriate to maintain its pertinacity, possibly being determined not to give an inch to the petitioners who are qualified make-up artists by allowing them to become make-up artists as members of the Association on two grounds, namely, they are women and, have not remained in the State of Maharashtra for a span of five years. The first ground indubitably offends the concept of gender justice. As it appears though there has been formal removal of institutionalized discrimination, yet the mind-set and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of discrimination and prejudice. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so, as it seems."

22. It was further held as follows:

*"***2***. Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising*

battles for the rights of women and claiming equal treatment. Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile. In 1792, in England, Mary Wollstonecraft in A Vindication of the Rights of Women advanced a spirited plea for claiming equality for, "the Oppressed Half of the Species". In 1869, In Subjection of Women John Stuart Mill stated, "the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other". On 18-3-1869 Susan B. Anthony proclaimed "Join the union girls, and together say, "Equal pay, for equal work". The same personality again spoke in July 1871: "Women must not depend upon the protection of man but must be taught to protect themselves."

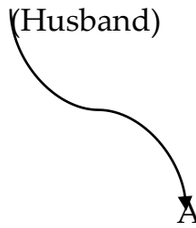
Therefore, discrimination based on apparent reasons, which are stereotypical or sexist is in essence held to be impermissible.

IV. S. 497 IS DIRECTLY DISCRIMINATORY AGAINST WOMEN AS IT LIMITS THE SEXUAL FREEDOM OF MARRIED WOMAN, BUT NOT OF MARRIED MAN.

23. S. 497 has an effect of being directly discriminatory against women. This can be shown with the help of a brief illustration. Reshmi and Gokul are wife and husband. S. 497 does not extend to Gokul's adulterous relationship with an unmarried woman, say Aysha. S. 497 simply cover relationships with married women. Therefore, Gokul can have uninhibited sexual relations with as many unmarried women as he pleases. In case of Reshmi, however, she can not engage in an adulterous relationship without the fear of her adulterous partner being subject to criminal penalty. This also limits her sexual freedom in significant ways, since presumably, criminal law has a deterrent effect and it is less likely for men to take part in adulterous relationships with married women out of fear of the criminal prohibition and punishment. This places a married woman on a different pedestal than a married man, both desirous of having sexual relationship a third person. This unequal treatment of the law is violative of the right of the woman to engage in external sexual conduct under Articles 14, 15, 19 and 21 of the Constitution.

Gokul + Reshmi

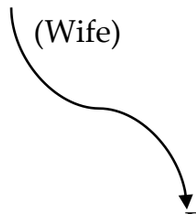
(Husband) (Wife)



Aysha (Unmarried) = No adultery

Gokul + Reshmi

(Husband) (Wife)



Peter (Marital status irrelevant) = Adultery

V. S. 198(2) CRPC DISCRIMINATES AGAINST WOMEN AND IS VIOLATIVE OF ARTICLES 14, 15 AND 21 OF THE CONSTITUTION.

24. S.198 (2) expressly provides as follows:

> *"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."*

Therefore, it follows that the wife of the adulterous husband cannot be an 'aggrieved person' for the purpose of S.198(2). This is so when in fact, she, in her capacity as the wife of an adulterous husband is as aggrieved as the husband of any adulterous wife. The grievance of the husband of an adulterous wife and that of the wife of an adulterous husband are qualitatively the same. Discriminating against women by rendering her ineligible to be an aggrieved person offends the rights to equality and non-discrimination under the Constitution. Women are illegally singled out from being eligible for initiating prosecution for an offence under S.497. The very design of s. 497 is such that women can not have any grievance against the person with whom her partner

has committed adultery. Married men, on the other hand alone can have a grievance, as per the provision. Furthermore, there is no reasonable classification on the basis of which this distinction is evolved by the statute.

25. Firstly, S. 198(2), though part of the procedural code , i.e CrPC, in essence, talks about substantive right, namely the locus of the person to file a complaint. Therefore, the said right is directly affected by the provision. Secondly, the proposition that the right to equality under Article 14 extends not only to substantive laws, but also to procedural laws is well settled.

26. This Hon'ble Court in Chandra Bhavan Boarding and Lodging v. State of Mysore, AIR 1970 SC 2042 held that:

> "*8.It is true that this Court has firmly ruled that the procedural inequality, if real and substantial is also within the vice of Art. 14.*"

27. Moreover, this Hon'ble Court held in State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 as follows:

> *"58. At one stage of his arguments the learned Attorney-General just put forward an argument, which he did not press very strongly, that the Article is a protection against the inequality of substantive law only and not against that of a procedural law. I am quite definitely not prepared to countenance that argument. There is no logical basis for this distinction. A procedural law may easily inflict very great hardship on persons subjected to it, as, indeed, this very Act under consideration will presently be seen to have obviously done."*

Also, it is pertinent to note that both in *Yusuf Abdul Aziz* and *Sowmithri Vishnu*, the validity of s. 198(2) was not in question.

VI. S.497 IPC IS VIOLATIVE OF THE FUNDAMENTAL RIGHT TO PRIVACY.

28. Every adulterous relationship is invariably a consensual relationship between two adults. Adultery can at the most have a civil consequence since it

seems logical to assume that a spouse should be able to divorce his or her partner who is disloyal in the matrimonial relationship. A partner who feels that a matrimonial bond based on trust and love is broken once the married partner engages in an adulterous relationship should be able get legally separated from the partner.

29. However, s. 497 becomes particularly vulnerable to constitutional challenge since it treats a consensual relationship as a penal offence. Even if one might consider an adulterous act immoral, there is no ground for imposing criminal penalties. Such a provision is apparently disproportionate. Privacy includes decisional privacy. And decisional privacy includes at least a right to make one's own decisions about particularly intimate matters. Sex is about the most intimate decision that one can make. The right to sexual freedom necessarily includes the right to choose one's sexual partner, even when one person is legally married to another. Penalising the adulterous relationship infringes the right to choose the sexual partner or make one's sexual preferences.S.497 therefore violates the fundamental right to sexual privacy.

30. In K S Puttaswamy v. Union of India (2017) 10 SCC 1, a 9 bench of this Hon'ble Court emphatically held that the right to privacy can be constitutionally sourced from Article 21 of the Constitution. This Hon'ble Court noted:

> *"**37.** Though many contemporary accounts attribute the modern conception of the "right to privacy" to the Warren and Brandeis article, historical material indicates that it was Thomas Cooley who adopted the phrase "the right to be let alone", in his Treatise on the Law of Torts . Discussing personal immunity, Cooley stated:"the right of one's person may be said to be a right of complete immunity; the right to be alone."*
>
> ***38.** Roscoe Pound described the Warren and Brandeis article as having done "nothing less than add a chapter to our law". However, another writer on the subject states that: "This right to privacy was not new. Warren and Brandeis did not even coin the phrase, "right to privacy", nor its common soubriquet, "the right to be let alone". The right to be let alone is a part of the right to enjoy life.*

The right to enjoy life is, in its turn, a part of the fundamental right to life of the individual."

31. Further in *K.S. Puttaswamy*, several foreign judgments were reiterated by this Hon'ble Court as follows:

*"**507.** A large number of judgments of the US Supreme Court since Katz have recognised the right to privacy as falling in one or other of the clauses of the Bill of Rights in the US Constitution. Thus, in Griswold v. Connecticut , Douglas, J. 's majority opinion found that the right to privacy was contained in the penumbral regions of the First, Third, Fourth and Fifth Amendments to the US Constitution. Goldberg, J. found this right to be embedded in the Ninth Amendment which states that certain rights which are not enumerated are nonetheless recognised as being reserved to the people. White, J. found this right in the due process clause of the Fourteenth Amendment, which prohibits the deprivation of a person's liberty without following due process. This view of the law was recognised and applied in Roe v. Wade, in which a woman's right to choose for herself whether or not to abort a foetus was established, until the foetus was found "viable". Other judgments also recognised this right of independence of choice in personal decisions relating to marriage, Loving v. Virginia, US p. 12 : S Ct p. 1823; procreation, Skinner v. Oklahoma, US pp.541-42 :S Ct pp. 1113-14; contraception, Eisenstadt v. Baird, US pp. 453-54 : S Ct pp. 1038-39, family relationships, Princev. Massachusetts, US p. 166 : S Ct p. 442; and child-bearing and education, Pierce v. Society of Sisters , US p. 535 : S Ct p. 573.*

***557.** In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes their last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguishes with human being."*

32. Therefore right to privacy invariably has to include the right to sexual privacy. In fact, in Bowers v. Hardwick 478 U.S. 186 (1986), Justice Blackmun said in his dissent that :

"depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our nations' history than tolerance of non conformity could ever do."

33. Ram Jethmalani v. Union of India (2011) 8 SCC 1 was also cited by this Hon'ble Court in *Puttaswamy* :

*"**83**.Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values…*

***84**.The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21.The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project.*

That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the

State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others."

34. In the context of sexual orientation, this Hon'ble Court held in *Puttaswamy* as follows:

*"**144**. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."*

35. Likewise, sexual preference or the freedom to choose a sexual partner is paramount and deserves constitutional protection under Article 21. S. 497 infringes with this basic right since it penalizes consensual sexual acts. Therefore, one is penalized because of the sole choice of sexual partner outside marriage. Penalising a private sexual conduct is deeply intrusive and impermissible.

36. If the right to privacy does not contain within its ambit the right to sexual privacy, it renders the right superfluous and meaningless. Privacy has to extend to different aspects of individual's life as this Court correctly noted in *Puttaswamy*: *"195. Having located the right to privacy in the 'person', American jurisprudence on the right to privacy has developed to shield various private aspects of a person's life from interference by the state - such as conscience, education, personal information, communications and conversations, sexuality, marriage, procreation, contraception, individual beliefs, thoughts and emotions, political and other social groups."*

37. The right to privacy, therefore invariably has to extend to consensual extra-marital sex. The right to privacy cannot be limited and compressed by the institution of marriage. It is to be noted that the constitutional right to privacy stretches beyond the institutions of marriage and family. What constitutional law

seeks to do is to protect this right, no matter whether the individual is placed inside or outside a family. (Please see Board of Directors, Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)

38. In *Puttaswamy*, the Court referring to the article titled "A Typology of privacy" (Bert-Jaap Koops, Bryce Clayton Newell, Tjerk Timan, Ivan Škorvánek, Tomislav Chokrevski, and Maša Galič, 'A Typology of Privacy', 38 University of Pennsylvania Journal of International Law 483 (2017) noted the importance of "(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" and "(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." In fact, it is the right to sexual preference or to associate one's body according to one's choice that is repelled and penalized by S.497.

39. Also, the right to sexual privacy is well founded in foreign jurisprudence. The United States Supreme Court in Lawrence v. Texas 539 U.S. 558 (2003) considered the constitutional validity of a Texas statute, which prohibited two persons of the same sex to engage in certain intimate sexual conduct. The Court held:

> *"The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state*

interest which can justify its intrusion into the personal and private life of the individual." (emphasis added).

40. It is submitted that S.497 is a 'morals legislation' seeking to enforce antiquated notions of morality and ideas of woman's sexual agency. It was further held in *Lawrence* as follows:

"The Texas statute, it says, "furthers no legitimate state interest *which can justify its intrusion into the personal and private life of the individual,"* ante*, at 18 (emphasis added). The Court embraces instead* Justice Stevens*' declaration in his* Bowers *dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," ante, at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review."*

41. In National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), the Constitutional Court of South Africa held as follows:

*"**32**. Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy…"*

It was further held:

*"**112**...equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different*

forms of intimate personal behaviour becomes the foundation for the repudiation of equality."

42. The Constitutional Court of South Africa in DE v. RH [2015] ZACC 18 (decided on 19 June 2015) pointedly considered the question as to whether "when a spouse commits adultery, does the non-adulterous spouse have a right of action in delict against the third party for injury or insult to self-esteem (contumelia) and loss of comfort and society (consortium) of her spouse?." The court therein considered the validity of a civil action seeking damages against an adulterous partner. The court was careful enough to note down the significance of the right to privacy:

*"**54**.The delictual claim is particularly invasive of, and violates the right to, privacy. This very case is illustrative of this. The Supreme Court of Appeal dealt with the abusive, embarrassing and demeaning questioning that Ms H suffered in the High Court. She was "made to suffer the indignity of having her personal and private life placed under a microscope and being interrogated in an insulting and embarrassing fashion". Likewise, in order to defend a delictual claim based on adultery, the third party is placed in the invidious position of having to expose details of his or her intimate interaction – including sexual relations – with the adulterous spouse. That goes to the core of the private nature of an intimate relationship."*

43. It was further held:

*"**62**. Nevertheless, this potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and relationships between, people. This must be viewed in light of current trends and attitudes towards adultery both nationally and internationally. These attitudes also demonstrate repugnance towards state interference in the intimate personal affairs of individuals."*

On the grounds of absence of any legitimate state interest and being fundamentally intrusive, S.497 is liable to be struck down as violative of the right to privacy.

VII. *YUSUF ABDUL AZIZ, SOWMITHRI VISHNU* AND *REVATHI* REQUIRE RECONSIDERATION BY THIS HON'BLE COURT.

44. This Hon'ble Court has examined the constitutional validity of Ss.497 and 198(2) on previous three occasions. In all the three occasions, the challenges against the said sections were repelled giving different reasons. A keen examination of the contentions and the grounds of repelling the challenge will show that reconsideration of those judgments is *sine qua non.*

A. Yusuf Abdul Aziz v. State of Bombay and Another, AIR 1954 SC 321

45. S.497 was challenged in *Yusuf Abdul Aziz* stating the same is violative of Articles 14 and 15 of the India Constitution. This Hon'ble Court repelled the challenge with the following words:

> *"**5**. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discriminate in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in section 497 of the Indian Penal Code."*

46. The above said reason is the sole one stated in *Yusuf Abdul Aziz* to uphold the constitutional validity of S.497. As already stated, the impugned section cannot be considered as a measure under S. 15(3) since the same is not a welfare measure.

i. Absence of reasons in Yusuf Abdul Aziz

47. *Yusuf Abdul Aziz is* a cryptic judgment and lacks reasoning. The judgment was passed in *sub-silentio*, rendered without any argument. It is to be noted that

there was no other discussion concerning the constitutional validity of the provision. Though the above said single reason is recorded to repel the challenge, this Hon'ble Court did not explain why the above provision is covered under Article 15(3). In Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla & Brothers., (2010) 4 SCC 785 it was held:

> *"**19**. In the cases where the courts have not recorded reasons in the judgment, legality, propriety and correctness of the orders by the court of competent jurisdiction are challenged in the absence of proper discussion. The requirement of recording reasons is applicable with greater rigour to the judicial proceedings. The orders of the court must reflect what weighed with the court in granting or declining the relief claimed by the applicant. In this regard we may refer to certain judgments of this Court."*

48. *Yusuf Abdul Aziz* had only stated that the section could be covered under Article 15(3). No discussion is found as to what made this Hon'ble Court arrive at such finding or opinion. This Hon'ble Court did not consider the crucial questions like whether the provision can come within the ambit of 'special provision' and whether the said provision is in accordance with the purpose and scope of Article 15(3). Also, it considered Article 15(3) in isolation without considering the principles enshrined in Articles 14 and 15 in general. Due to lack of sufficient reasoning, the judgment in *Yusuf Abdul Aziz* would amount to a non-reasoned order. (Please see State of Uttaranchal and Another v. Sunil Kumar Singh (2008) 11 SCC 205).

ii. Sex is not a sound classification

49. In Shayara Bano v. Union of India, (2017) 9 SCC 1, while discussing the constitutional validity of triple talaq, this Hon'ble Court has held:

> *"**375**. This is the clear mandate of Article 14 of the Constitution. India is also committed to eradicate discrimination on the ground of sex. Articles 15 and 16 of the Constitution prohibit any kind of discrimination on the basis of sex."*

50. This Hon'ble Court carried on a survey of several earlier judgments, words used in the relevant provisions of the Constitution and the Constitutional debates while holding so. In *Anuj Garg* also, it is stated that *"**21**. 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."* In the light of the said well-settled position, the observation that 'sex is a sound classification' has to fail.

iii. Provision is neither deterrent nor reformative:

51. Generally, a penal provision is enacted either for a deterrent or reformative purpose. But S.497 is achieving neither. Even if it is assumed though not admitted that there is a deterrent effect or reformative effect, the same will affect only men. Therefore, on women, there is no deterrent or reformative impact of S.497 which may result in a situation where women commit the offence again and again. Not only that there is a possibility of a repetition of crime by women, but also they are deprived of reformation by the State if at all, there is such reformative effect. In any case, the impugned section does not serve any purpose in deterring or reforming.

iv. Articles 15(1) and 15(3) ought to have read conjointly

52. This Hon'ble Court in *Yusuf Abdul Aziz* ought to have read Art. 15(1) conjointly, and not disjunctly, from Art. 15(3) of the Constitution. Article 15(3) as stated earlier, cannot be read in isolation of its parent provision on anti-discrimination i.e. Article 15. On a conjoint reading, it will be evident that the purpose of Art. 15(3) is only to benefit women in the form of an affirmative action. Any other interpretation of the provision would offend the spirit and intent of the provision.

B. Sowmithri Vishnu v. Union of India, 1985 SCC (Cri) 325

53. At the outset, it can be observed that while addressing the challenge against the impugned section, *Sowmithri Vishnu* relied on the very provision to

answer the challenge. For example, in paragraph 6 of the judgment, the following three contentions of the petitioners therein were noted:

(i) "Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;

(ii) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and,

(iii) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free licence under the law to have extra-marital relationship with unmarried women."

54. The said contentions were addressed with feeble legal grounds. It was stated:

> "**7.** *These contentions have a strong emotive appeal but they have no valid legal basis to rest upon. Taking the first of these three grounds, the offence of adultery, by its very definition, can be committed by a man and not by a woman*"

55. The very fact that the offence is defined in such a manner in which only a man can commit the offence and women cannot is an argument as to why it is gender discriminatory. Treating women as incapable of committing crime itself is violative of the principle of equality. Such classification is not supported by any sound rationale. The said observation is treated as an answer to the challenge against the impugned section. This approach can be seen throughout the judgment in *Sowmithri Vishnu*. (Please see paragraph 8 of the judgment in *Sowmithri Vishnu*).

56. As explained in detail in Ground K of the memorandum of the writ petition, *Sowmithri Vishnu* has upheld the constitutional validity of S.497 on legally vulnerable reasons. *Sowmithri Vishnu* held that S.497 is not

unconstitutional merely on the ground that by the definition or prescription of punishment, it does not go 'far enough'. The Court did not go further into the question calling it as a 'policy of government'. A policy of Government cannot override the fundamental rights of the citizens. This Hon'ble Court failed to consider that it was not a case of mere insufficiency. It is rather active discrimination caused by the impugned section when it absolves the women despite her active involvement whereas the man gets punished. In paragraph 7 of the judgment, *Sowmithri Vishnu* referred to the 42nd Law commission report and its recommendation to retain the section and the modification to the section to make women also criminally liable. Referring to such recommendations, this Hon'ble Court stated that *"we cannot strike down the section on the ground that it is desirable to delete it."* The Court failed to note that it is not mere desirability for altering the content of the provision that made for a challenge, but rather infringement of fundamental rights. When the constitcutional validity of the section was under challenge, the validity has to be tested on the touchstone of Constitutional provisions. Even the legislative policies must pass the test of constitutional validity. (Please see State of Rajasthan v. Basant Nahata, (2005) 12 SCC 77).

i. Judgment in Sowmithri Vishnu rests upon surmises and conjectures

57. In paragraph 7 of the judgment in *Sowmithri Vishnu* it is observed that *"it is commonly accepted that it is the man who is the seducer and not the woman."* As explained in Ground L, such an observation is plainly erroneous and untenable. It is made without any materials or study in support. It is with that premise that the judgment is delivered treating women as victims. Though it is observed in the adjacent sentence that "*this position might have undergone some change over the years…"*, the very assumption that even in an earlier period, man used to be the seducer is without any base. It is incomprehensible that how such an assumption is made about an offence like adultery, which is committed in a private space, that too, without any supporting materials. It is settled position of law that a judgment cannot rest upon surmises and conjectures. (Please see State of U.P. v.

Babu and Others, (2003) 11 SCC 280 and Shiv Charan Singh v. Chandra Ban Singh, (1988) 2 SCC 12)

ii. Sowmithri Vishnu did not examine the nexus between the provisions and the object sought to be achieved by the section

58. In the words of Y.V. Chandrachud C.J., S. 497 is *"considered by the Legislature as an offence against the sanctity of the matrimonial home*." Even Justice V.S. Malimath Committee opined so. S.497 is enacted under the head 'Of Offences relating to Marriage' under chapter XX of the penal code. *Sowmithri Vishnu* did not consider whether the impugned section had any nexus with the purpose sought to be achieved i.e. protection of the sanctity of the matrimonial home. Adultery is provided as a ground for divorce in all the personal laws. When the incident of adultery is a ground for divorce, penalising the said incident will serve no purpose in protecting the matrimonial home.

59. This Hon'ble Court also failed to take note of the fact that the provision was enacted with the object to protect the sanctity of the matrimonial home when the personal laws were not yet codified. Indian Penal Code was enacted in 1860 when none of the personal laws was codified. The first personal law was enacted in the year 1866, i.e. The Converts' Marriage Dissolution Act, 1866. Thereafter, The Indian Divorce Act and the Indian Christian Marriage Act were enacted in the years 1869 and 1872 respectively. Subsequent to the said acts The Kazis Act, 1880, The Anand Marriage Act, 1909, The Indian Succession Act, 1925, The Child Marriage Restraint Act, 1929, The Parsi Marriage and Divorce Act, 1936, The Dissolution of Muslim Marriage Act, 1939, The Special Marriage Act, 1954, The Hindu Marriage Act, 1955, The Foreign Marriage Act, 1969 and The Muslim Women (Protection of Rights on Divorce) Act, 1986 were enacted. Therefore, it is evident that at the time of framing the code, there was no remedy for adultery, either civil or criminal. Post-independence remedy is provided for adultery in personal laws by way of providing it as a ground for divorce. This crucial aspect was not considered by this Hon'ble Court in *Sowmithri Vishnu* while examining the purpose of the section.

60. Even if it is assumed, though not admitted that the punishment has a deterrent effect on the men who want to commit adultery, the object of the provision is not achieved. This is because the section does not cover an intercourse of a married man with an unmarried woman. If the logic that a third person, who is entering into matrimonial tie is punished, then the punishment must extend to unmarried women also. The presumption seems that only if a woman is involved in an adulterous relation, her matrimonial home will be affected. Indirectly, it endorses the sexist notion that if a man involves in an extramarital affair, that is acceptable and may not affect his marital home. Answering this contention, this Hon'ble Court only stated:

> "**9**. *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, invite a civil action by the wife for separation.*"

This reasoning did not meet the contention raised in any case.

iii. Sowmithri Vishnu failed to consider that the section was not supported by intelligible differentia

61. The section unfolds an irrational classification between men who will have a physical relationship with married women and men who will have a physical relationship with unmarried women. The former invites the penalisation whereas the latter does not. This classification does not have any nexus with the purpose sought to be achieved. Any physical relationship outside the marriage of either spouse will equally damage the matrimonial home, if it is assumed that extra marital affairs have such an effect. In such case, penalising only one section of men and leaving the other section outside the purview of the provision is not reasonable.

iv. Sowmithri Vishnu did not consider the aspect of right to reputation

62. The contention was also taken by the counsel for the petitioner that since the woman with whom a person allegedly committed adultery cannot be made an accused, she will be deprived of the right to defence. If at all, the prosecution proves guilt of the said man, the woman will have to face the stigma attached to the said conviction though not punished by the court of law. She will be put to such prejudice without giving any chance for her to defend herself. To the said contention, this Hon'ble Court held, "*that right can be read into the law in appropriate cases.*" Such a finding is again, without any basis and untenable.

v. Even as per Sowmithri Vishnu, a civil action is a sufficient remedy

63. Though the challenge against section was repelled, the complaint against the accused with whom the petitioner allegedly had the relationship, was directed to be quashed in *Sowmithri Vishnu*. The said direction was given because the husband of the petitioner had already obtained the divorce on the ground of adultery. This indicates that even this Hon'ble Court acknowledged the fact that a civil action is sufficient. The 42nd Law Commission also recorded Lord Macaulay's observations that it is enough if adultery is treated as a civil injury rather than an offence. When the civil action is a sufficient remedy and when there is no purpose served with penalisation, S.497 is liable to be struck down.

C. V. Revathi v. Union of India (1988) 2 SCC 72

64. S.198 (2) of CrPC was under challenge in *Revathi* . The said challenge was repelled relying on the judgment in *Sowmithri Vishnu*. The said section was challenged stating that a wife of an erring husband cannot initiate the proceedings against her husband. But the said challenge was repelled stating that neither the husband nor the wife can prosecute each other and thus, no discrimination. But this Hon'ble Court failed to take note that a woman is incapable of taking any action against the woman with whom her husband commits adultery whereas a man can initiate action against the person with whom his wife commits adultery. The discrimination is apparent in S. 198(2).

Therefore, the reasoning that wife or husband cannot prosecute each other and therefore, there is no discrimination is unsustainable.

VIII. DECRIMINALISING ADULTERY IS CRIMINOLOGICALLY JUSTIFIED BEING A VICTIMLESS CRIME .

65. There is an increasingly widespread argument that victimless crimes should be decriminalized. Victimless crimes are generally understood as crimes made culpable merely because of the moral notions the state has. They usually do not have any identifiable victim as such. Penalising consensual sexual acts, in effect amounts to criminalizing victimless crimes. Imposing criminal prohibition based on the moral notions is impermissible going by our constitutional scheme. Community ideas of what is moral and what is immoral cannot lead to violation of fundamental rights. Alcohol consumption, tobacco use, drug abuse, gambling, consensual sexual acts etc. usually come within the category of victimless crimes.

66. In the article titled 'Strictly Taboo: Cultural Anthropology's Insights into Mass Incarceration and Victimless Crime' authored by Brennan T. Hughes (New England Journal on Criminal & Civil Confinement. Winter 2015, Vol. 41 Issue 1, p. 49-84) , they are conceived as follows:

> *"In contemporary America, most victimless crimes involve government efforts to regulate vice. "Vice" can be difficult to define. Vice scholar (and University of Chicago economist) Jim Leitzel describes vices as practices that partake both in pleasure and wickedness, in fun and iniquity. Leitzel suggests that vices generally exhibit three characteristics: they suggest excess, they represent a pattern of behavior, and "the direct ill effects of vice generally are borne by the person who engages in the vice." Vices that subject the vice-indulger to criminal sanctions include such things as the use of marijuana and (in most American jurisdictions) consensual sex crimes such as incest, polygamy, and the patronage of prostitutes. Buggery laws and alcohol prohibition are examples from America's past. In the eyes of the public, vice indulgence implicates morality."*

The article further states:

> *"What about other victimless crimes? What about consensual sex crimes like prostitution and first-cousin marriage? Even assuming that some forms of adult consensual sex are immoral, it does not necessarily follow that the criminal law should be concerned with punishing them."*

67. Therefore, moral judgments or moral valuations cannot be sufficient to impose criminal prohibitions. Morality simply, at any rate, should not determine what acts should be criminal.

68. In *Lawrence* , it was emphatically held:

> *"whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."*

69. Furthermore, it is crucial to note that penalizing victimless crimes also goes against the harm principle of J. S. Mill who advocated that idea that the only reason why power should be exercised over a person against will is to prevent harm to others. Very often, criminal law rests on the harm principle as its foundation. Mill states in his book 'On Liberty' (1859) as follows:

> *"That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to*

produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part, which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

70. Since adultery is a victimless crime, there is no good reason to penalise it. It is an act of consensual act between two adults. In any case, a wife who is emotionally betrayed cannot be treated as a victim of a crime so as to penalize the adulterous partner. Even if one might say that a spouse might feel betrayed or insulted because of the adultery committed by the partner, this feeling of betrayal is insufficient to qualify her as a 'victim' of an offence as criminal law can only perceive 'victim' in the legal sense and not in the moral sense. Emotional damages might have legal relevance, but certainly not in the case of adultery wherein it is claimed to be caused by a third party. No criminal law can seek to penalize a person merely on account of the emotional distress suffered by another, when the person has only engaged in a consensual act with a third party. Therefore, adultery or consensual sexual intercourse, quite evidently, should qualify as a victimless crime, providing an additional reason for its decriminalization. Hence, being a victimless crime, decriminalising adultery is criminologically justified.

IX. POSSIBLE COUNTER ARGUMENTS AND RESPONSES.

71. In this section, some of the possible counter arguments shall be examined and their responses will be provided.

A. There is no right to privacy to commit adultery

72. The State might argue that the fundamental right to privacy does not include a right to commit adultery. It could be said that by virtue of the marriage, one has decided to exercise his/ her right to privacy and there is no further right to engage in extra-marital sex that is protected by the right to privacy.

73. **Response:** It does not seem to quite follow that by virtue of marriage, all private decisions are closed and binding. It cannot put an end to one's private decision-making. Taking a cue from the settled proposition that fundamental rights can not be waived, the right to sexual intercourse can not become abruptly limited by marriage, strictly with the person with whom one is married. The right to privacy protects individuals rather than institutions. It is a personal right, as opposed to a group right. The fact that one already made a decision about marriage does not mean that they can no longer make private decisions. We do not abdicate our right to privacy in such a manner.

B. Marriage is a sacred bond

74. It could be further argued that the institution of marriage is sacred being a bond between persons and criminalizing adultery is justified so as to protect it. It could be argued that decriminalizing adultery will lead to breakdown of marriages.

Response: It is inexplicable how this proposes 'sacredness' is sufficient to justify infringement on constitutional rights. Notably, it is unclear what will determine whether something sacred or not. Things or institutions could either be intrinsically valuable or sacred, or instrumentally so. Marriages simply are not intrinsically valuable. Marriages are important because they provide for intimacy, love, and family life. A divorce of two partners who live happy lives thereafter is not a ground for moral regret. This indicates that we did not attach any intrinsic significance to the institution of marriage as such. In short, marriages are not sacred in a secular sense.

C. Negative Impact on the family

75. It could be argued that what the state wants to protect is healthy families so as to benefit children or other family members.

Response: It is pertinent that other actions can similarly impact family life adversely and no one is suggesting that this is good enough of a reason to outlaw

them. Some examples are alcohol consumption, plain lying, shouting at home, religious conversion, and so on. In all of these cases the government would be violating constitutional rights if it banned any one from doing such acts. In many of the cases it seems that the conduct is less central to one's personal development and intimate choices. If the State's interest of protecting healthy families is not compelling enough to allow outlawing lying, then it can't be compelling enough to justify a ban on one's sexual choices. Also, the State's belief or assumption that one system is better than the other is not a sufficient reason to outlaw certain types of human conduct. In fact, to criminalize behavior, the state needs to establish the necessity of such prohibition.

D. Protection of morals

76. It could be argued that outlawing adultery is permissible to uphold the value of morality.

Response: Not all activities, perceived as immoral by the State can be penalized by law. Inter-caste marriage or contraception may be viewed as immoral by some societies but they cannot be prohibited by law.

77. It was emphatically held by the Delhi High Court in Naz Foundation vs Government of NCT of Delhi 2009 (111) DRJ 1 (DB that *"If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality.* By referring to Dr. Ambedkar from the Constituent Assembly Debates, it was noted:

> ***"79.*** *Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly*

[Constitutional Assembly Debates: Official Reports Vol.VII: November 4, 1948, page 38], Dr. Ambedkar quoted Grote, the historian of Greece, who had said:

"The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves."

After quoting Grote, Dr. Ambedkar added:

"While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.……The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated.We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."

78. Moreover, in Gobind v. State of MP, AIR 1975 SC 1378, it was held as follows:

***"22.** There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as*

well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance."

79. The idea of populist or popular morality was also rejected by this Hon'ble Court in *Puttaswamy* in the following words:

*"**144**.The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream". Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties."*

80. There is good support for the argument that morals should not be subject to the realm of criminal law. Legal liability cannot depend upon majoritarian notions of morality or uprightness. As held by the United States Supreme Court in Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015), "an individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."

81. Further, Dale Carpenter, an American legal commentator opines in the context of the *Lawrence v. Texas* judgment:

"The deeper answer is that Lawrence, in all its emotional, social, and legal complexity, is a reflection of life itself. People do indeed lead complex lives. They fall in love, cheat, lie, drink. None of this makes them any less entitled, as Justice Kennedy put it, to "respect for their private lives." If it were otherwise, there would be very few entitled to liberty - gay or straight- people"

(See 'Flagrant Conduct: The Story of Lawrence v. Texas' at 280 (W. W. Norton & Company, 2012).

82. John Feinberg, an American philosopher also responds to this question similarly. He says:

> "*The liberal does not urge that the legislators of criminal law be unconcerned with "a man's morals". Indeed, everything about a person that the criminal law should be concerned with is included in his morals. But not everything in a person's morals should be the concern of the law, only his disposition to violate the rights of other parties. He may be morally blameworthy for his beliefs and desires, his taboo infractions, his tastes, his harmless explotations, and other free-floating evils, but these moral judgments are not the business of the criminal law*.

('Some Unswept Debris from the Hart-Devlin Debate', Synthese, vol. 72, no. 2, 1987, pp. 249–275. JSTOR, www.jstor.org/stable/20116426.).

Therefore, the impugned provisions namely S. 497 of the IPC and S. 198(2) of the CrPC are only liable to be struck down as unconstitutional. It is most respectfully prayed that this Hon'ble Court may be pleased to strike down the said provisions by accepting the contentions hereinabove.

Respectfully submitted.

Dated this the 19th day of March, 2018

Kaleeswaram Raj

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