

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

Joseph Shine

...Petitioner(s)

VERSUS

Union of India

...Respondent(s)

J U D G M E N T

Dipak Misra, CJI (For himself and A.M. Khanwilkar, J.)

The beauty of the Indian Constitution is that it includes ‘I’ ‘you’ and ‘we’. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the

space in an annexe to the main building. That is the manifestation of concerned sensitivity. Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written. It is advisable to remember what John Stuart Mill had observed:-

“The legal subordination of one sex to another – is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect

equality, admitting no power and privilege on the one side, nor disability on the other.”¹

We are commencing with the aforesaid prefatory note as we are adverting to the constitutional validity of Section 497 of the Indian Penal Code (IPC) and Section 198 of the Code of Criminal Procedure (CrPC).

2. At this juncture, it is necessary to state that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past.

3. When we say so, we may not be understood that precedents are not to be treated as such and that in the excuse of perceptual shift, the binding nature of precedent should not be allowed to retain its status or allowed to be diluted. When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative

¹ On the Subjection of Women, Chapter 1 (John Stuart Mill, 1869)

changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendently grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has

perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts. To explicate, despite conferring many a right on women within the parameters of progressive jurisprudence and expansive constitutional vision, the Court cannot conceive of women still being treated as a property of men, and secondly, where the delicate relationship between a husband and wife does not remain so, it is seemingly implausible to allow a criminal offence to enter and make a third party culpable.

4. We may presently state the nature of the *lis*.

5. The instant writ petition has been filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC. A three-Judge Bench, on the first occasion, taking note of the authorities in ***Yusuf Abdul Aziz v. State of Bombay***², ***Sowmithri Vishnu v. Union of India and another***³, ***V. Revathi v. Union of India and others***⁴ and ***W. Kalyani v. State through Inspector of Police and another***⁵ and appreciating the submissions advanced by the learned counsel for the petitioner, felt the necessity to have a re-look at the

² 1954 SCR 930 : AIR 1954 SC 321

³ (1985)Supp SCC 137 : AIR 1985 SC 1618

⁴ (1988)2 SCC 72

⁵ (2012) 1 SCC 358

constitutionality of the provision. At that juncture, the Court noted that:-

“*Prima facie*, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, *prima facie*, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice.”

That is how the matter has been placed before us.

6. At this stage, one aspect needs to be noted. At the time of initial hearing before the three-Judge Bench, the decision in **Yusuf Abdul Aziz** (supra) was cited and the cited Law Report reflected that the judgment was delivered by four learned Judges and later on, it was noticed, as is reflectible from the Supreme Court Reports, that the decision was rendered by a Constitution Bench comprising of five Judges of this Court.

7. The said factual discovery will not detain us any further. In **Yusuf Abdul Aziz** (supra), the Court was dealing with the controversy that had travelled to this Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution of India. In the said case, the appellant was being prosecuted for adultery under Section 497 IPC. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional question under Article 228 of the Constitution. The Constitution Bench referring to Section 497 held thus:-

“3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor. The last sentence in Section 497 prohibits this. It runs—

“In such case the wife shall not be punishable as an abettor.” It is said that this offends Articles 14 and 15.

The portion of Article 15 on which the appellant relies is this:

“The State shall not discriminate against any citizen on grounds only of ... sex.”

But what he overlooks is that that is subject to clause (3) which runs—

“Nothing in this article shall prevent the State from making any special provision for women”

The provision complained of is a special provision and it is made for women, therefore it is saved by clause (3).

4. It was argued that clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.

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 discrimination 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.

6. The appellant is not a citizen of India. It was argued that he could not invoke Articles 14 and 15 for that reason. The High Court held otherwise. It is not necessary for us to decide this question in view of our decision on the other issue.”

On a reading of the aforesaid passages, it is manifest that the Court treated the provision to be a special provision made for women and, therefore, saved by clause (3) of Article 15. Thus, the Court proceeded on the foundation of affirmative action.

8. In this context, we may refer to the observation made by the Constitution Bench in ***Central Board of Dawoodi Bohra Community and another v. State of Maharashtra and another***⁶ while making a reference to a larger Bench. The said order reads thus:-

“12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms:

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case

⁶ (2005) 2 SCC 673

of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3)The above rules are subject to two exceptions: (i) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*⁷ and *Hansoli Devi*⁸.”

⁷ *Union of India and Anr. v. Raghubir Singh (dead) by Lrs. etc.*, (1989) 2 SCC 754

⁸ *Union of India & Anr. v. Hansoli Devi & Ors.*, (2002) 7 SCC 273

In the light of the aforesaid order, it was necessary to list the matter before a Constitution Bench consisting of five Judges. As noted earlier, considering the manner in which we intend to deal with the matter, it is not necessary to refer to a larger Bench.

9. Sections 497 and 498 of IPC read thus:-

“Section 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.

Section 498 : Enticing or taking away or detaining with criminal intent a married woman

Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

10. Section 198 of CrPC provides for prosecution for offences against marriage. Section 198 is reproduced below:-

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

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

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

(c) where the person aggrieved by an offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father' s or mother' s brother or sister 2, or, with the leave of the Court, by any other person

related to her by blood, marriage or adoption.

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

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

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

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

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under 3 [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.”

11. On a perusal of the aforesaid provision, it is clear that the husband of the woman has been treated to be a person aggrieved for the offences punishable under Sections 497 and 498 of the IPC. The rest of the proviso carves out an exception as to who is entitled to file a complaint when the husband is absent. It may be noted that the offence is non-cognizable.

12. The three-Judge Bench, while referring the matter, had briefly dwelled upon the impact of the provision. To appreciate the constitutional validity, first, we shall deal with the earlier pronouncements and the principles enunciated therein and how we can have a different perspective of such provisions. We have

already referred to what has been stated in ***Yusuf Abdul Aziz*** (supra).

13. In ***Sowmithri Vishnu*** (supra), a petition preferred under Article 32 of the Constitution challenged the validity of Section 497 IPC. We do not intend to advert to the factual matrix. It was contended before the three-Judge Bench that 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; that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and that Section 497 does not take in cases where the husband has sexual relations with an unmarried woman with the result that husbands have a free licence under the law to have extramarital relationships with unmarried women. That apart, the submission was advanced that Section 497 is a flagrant instance of ‘gender discrimination’, ‘legislative despotism’ and ‘male chauvinism’. At first blush, it may appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of “romantic paternalism” which stems from

the assumption that women, like chattels, are the property of men.

14. The Court referred to the submissions and held thus:-

“.....The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years under Section 392 of the Penal Code but the offence of adultery should be punishable with a sentence of five years only: “Breaking a matrimonial home is no less serious a crime than breaking open a house.” Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed. We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the “transformation” which the society has undergone....”

Proceeding further, the three-Judge Bench held that the offence of adultery as defined in that Section can only be committed by a man, not by a woman. Indeed, the Section expressly provides that the wife shall not be punishable even as an abettor. No grievance can then be made that the Section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, the same point is reverted to; who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute.

15. The Court further held:-

“.....Since Section 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is said to be bad. Counsel is right that Section 497 does not contain a

provision for hearing the married woman with whom the accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. We have no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and immediately, by the decision of the court. In fact, instances are not unknown in criminal law where, though the prosecution is in the charge of the Public Prosecutor, the private complainant is given permission to oversee the proceedings. One step more, and the wife could be allowed a hearing before an adverse finding is recorded that, as alleged by her husband, the accused had committed adultery with her. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in Section 497 cannot render that section unconstitutional as violating Article 21.”

After so stating, the Court placed reliance on **Yusuf Abdul Aziz** (supra) and held that the same does not offend Articles 14 and 15 of the Constitution and opined that the stability of marriages is not an ideal to be scorned. Being of this view, the Court dismissed the petition.

16. In **V. Revathi v. Union of India and others**⁹, the Court analysed the design of the provision and ruled:-

“.....Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striking each other with the weapon of criminal law. The petitioner wife contends that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband.....”

It placed heavy reliance on the three-Judge Bench in **Sowmithri Vishnu** (supra) and proceeded to state that the community punishes the ‘outsider’ who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring ‘man’ alone can be punished and not the erring woman. It further went on to say that it does not arm the two spouses to hit each other with the weapon of criminal law. That is why, neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination

⁹ (1988) 2 SCC 72

based on sex. While the outsider who violates the sanctity of the matrimonial home is punished, a rider has been added that if the outsider is a woman, she is not punished. There is, thus, reverse discrimination in “favour” of the woman rather than “against” her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus, there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis, the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus, no discrimination has been practised in circumscribing the scope of Section 198(2) CrPC and fashioning it in such a manner that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer. Expressing this view, the Court held that the provision is not vulnerable to the charge of hostile discrimination.

17. In **W. Kalyani v. State Thro' Inspector of Police and another**¹⁰, the Court held:-

“10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence.”

Be it noted, the issue of constitutional validity did not arise in the said case.

18. At this juncture, we think it seemly to state that we are only going to deal with the constitutional validity of Section 497 IPC and Section 198 CrPC. The learned counsel for the petitioner submits that the provision by its very nature is arbitrary and invites the frown of Article 14 of the Constitution. In **Shayara Bano v. Union of India and others**¹¹, the majority speaking through Nariman, J., ruled thus :-

¹⁰ (2012) 1 SCC 358

¹¹ (2017) 9 SCC 1

“60. Hard as we tried, it is difficult to discover any ratio in this judgment, as one part of the judgment contradicts another part. If one particular statutory enactment is already under challenge, there is no reason why other similar enactments which were also challenged should not have been disposed of by this Court. Quite apart from the above, it is a little difficult to appreciate such declination in the light of Prem Chand Garg (supra). This judgment, therefore, to the extent that it is contrary to at least two Constitution 346 Bench decisions cannot possibly be said to be good law.

61. It is at this point that it is necessary to see whether a fundamental right has been violated by the 1937 Act insofar as it seeks to enforce Triple Talaq as a rule of law in the Courts in India.

62. Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts- (1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the U.K., and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in *State of U.P. v. Deoman Upadhyaya*, (1961) 1 SCR 14 at 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the “discrimination” aspect of Article 14, and evolved a rule by which subjects could be classified. If 347 the

classification was “intelligible” having regard to the object sought to be achieved, it would pass muster under Article 14’s anti-discrimination aspect. Again, Subba Rao, J., dissenting, in *Lachhman Das v. State of Punjab*, (1963) 2 SCR 353 at 395, warned that:

“50.....Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content.”

He referred to the doctrine of classification as a “subsidiary rule” evolved by courts to give practical content to the said Article.

63. In the pre-1974 era, the judgments of this Court did refer to the “rule of law” or “positive” aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. In *S.G. Jaisinghani v. Union of India*, (1967) 2 SCR 703, this Court held:

“In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, 348 discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions

should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey — “Law of the Constitution” — 10th Edn., Introduction cx). “Law has reached its finest moments”, stated Douglas, J. in *United States v. Wunderlick* [342 US 98],

“9.....when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered”. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes* [(1770) 4 Burr. 2528 at 2539],

“.....means sound discretion guided by law. It must be governed by rule, not by humour : it must not be arbitrary, vague, and fanciful.....”.

This was in the context of service rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India.”

19. Thereafter, our learned brother referred to the authorities in ***State of Mysore v. S.R. Jayaram***¹², ***Indira Nehru Gandhi v. Raj Narain***¹³, ***E.P. Royappa v. State of Tamil Nadu***¹⁴, ***Maneka***

¹² (1968) 1 SCR 349

¹³ (1975) Supp SCC 1

Gandhi v. Union of India¹⁵, ***A.L. Kalra v. Project and Equipment Corporation of India Ltd.***¹⁶, ***Ajay Hasia v. Khalid Mujib Sehravardi***¹⁷, ***K.R. Lakshmanan v. State of T.N.***¹⁸ and two other Constitution Bench judgments in ***Mithu v. State of Punjab***¹⁹ and ***Sunil Batra v. Delhi Administration***²⁰ and, eventually, came to hold thus:-

“It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be “arbitrary”.”

And again:-

“.....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as

¹⁴ (1974) 4 SCC 3

¹⁵ (1978) 1 SCC 248

¹⁶ (1984) 3 SCC 316

¹⁷ (1981) 1 SCC 722

¹⁸ (1996) 2 SCC 226

¹⁹ (1983) 2 SCC 277

²⁰ (1978) 4 SCC 494

pointed out by us above would apply to negate legislation as well under Article 14.”

20. We respectfully concur with the said view.

21. In ***Yusuf Abdul Aziz*** (supra), the Court understood the protection of women as not discriminatory but as being an affirmative provision under clause (3) of Article 15 of the Constitution. We intend to take the path of expanded horizon as gender justice has been expanded by this Court.

22. We may now proceed to test the provision on the touchstone of the aforesaid principles. On a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted.

23. As we notice, the provision treats a married woman as a property of the husband. It is interesting to note that Section 497 IPC does not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of “adultery” is that a married person

commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Section 198 CrPC deals with a "person aggrieved". Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to

think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicity of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

24. Presently, we shall address the issue against the backdrop of Article 21 of the Constitution. For the said purpose, it is necessary to devote some space with regard to the dignity of women and the concept of gender equality.

25. In ***Arun Kumar Agrawal and another v. National Insurance Company Limited and others***²¹, the issue related to the criteria for determination of compensation payable to the dependents of a woman who died in road accident. She did not

²¹ (2010) 9 SCC 218

have a regular income. Singhvi, J. rejected the stand relating to determination of compensation by comparing a house wife to that of a house keeper or a servant or an employee who works for a fixed period. The learned Judge thought it unjust, unfair and inappropriate. In that context, the learned Judge stated:-

“26. In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer’s work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.”

26. Ganguly, J., in his concurring opinion, referred to the Australian Family Property Law and opined that the said law

had adopted a very gender sensitive approach. The learned Judge reproduced:-

“the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.”

27. In ***State of Madhya Pradesh v. Madanlal***²², the Court held:-

“Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.”

28. In ***Pawan Kumar v. State of Himachal Pradesh***²³, the Court, dealing with the concept of equality and dignity of a woman, observed:-

²² (2015) 7 SCC 681

²³ (2017) 7 SCC 780

“47 ...in a civilized society eve-teasing is causing harassment to women in educational institutions, public places, parks, railways stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated. A woman has her own space as a man has. She enjoys as much equality under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed under Article 21 of the Constitution cannot be violated by indulging in obnoxious act of eve-teasing. It affects the fundamental concept of gender sensitivity and justice and the rights of a woman under Article 14 of the Constitution. That apart it creates an incurable dent in the right of a woman which she has under Article 15 of the Constitution. One is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject.

48. In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution. When the right is conferred under the Constitution, it has to be understood that there is no condescension. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has

to be regarded as the summum bonum of the constitutional principle in this context.”

29. Lord Keith in **R v. R**²⁴ declared:-

“marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.”

30. Lord Denning²⁵ states:-

“A wife is no longer her husband’s chattel. She is beginning to be regarded by the laws as a partner in all affairs which are their common concern.”

31. In **Shamima Farooqui v. Shahid Khan**²⁶, the Court ruled:-

“Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority.”

And again:-

“Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger - an outsider. That is the truth in essentiality.”

²⁴ [1991] 4 All ER 481 at p. 484

²⁵ The Due Process of Law (London, Butterworths, 1980, at page 212)

²⁶ (2015) 5 SCC 705

32. In ***Voluntary Health Association of Punjab v. Union of India***²⁷, one of us (Dipak Misra, J.), in his concurring opinion, stated that women have to be regarded as equal partners in the lives of men and it has to be borne in mind that they have equal role in the society, that is, in thinking, participating and leadership. The issue related to female foeticide and it was stated thus:-

“21. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasised on the individualism of woman. John Milton treated her to be the best of all God’s work. In this context, it will be appropriate to quote a few lines from *Democracy in America* by Alexis de Tocqueville:

“If I were asked ... to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: To the superiority of their women.”

22. At this stage, I may with profit reproduce two paragraphs from *Ajit Savant*

²⁷ (2013) 4 SCC 1

*Majagvai v. State of Karnataka*²⁸: (SCC pp. 113-14, paras 3 & 4)

“3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of nobility of language. Even when a member of her own species, Madame De Stael, remarked ‘I am glad that I am not a man; for then I should have to marry a woman’, there was wit in it. When Shakespeare wrote, ‘Age cannot wither her; nor custom stale, her infinite variety’, there again was wit. Notwithstanding that these writers have cried hoarse for respect for ‘woman’, notwithstanding that Schiller said ‘Honour women! They entwine and weave heavenly roses in our earthly life’ and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against ‘woman’ continues to rise and has, today undoubtedly, risen to alarming proportions.

4. *It is unfortunate that in an age where people are described as civilised, crime against ‘female’ is committed even when the child is in the womb as the ‘female’ foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her*

²⁸ (1997) 7 SCC 110

infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being.”

[Emphasis supplied]

And again:-

“23. In *Madhu Kishwar v. State of Bihar*²⁹ this Court had stated that Indian women have suffered and are suffering discrimination in silence.

“28. ... Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.” (SCC p. 148, para 28)

24. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility:

“Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death.”

25. Long back, Charles Fourier had stated:

“The extension of women’s rights is the basic principle of all social progress.”

26. Recapitulating from the past, I may refer to certain sayings in the *Smritis* which put women in an elevated position. This Court

²⁹ (1996) 5 SCC 125

in *Nikku Ram case*⁴ had already reproduced the first line of the *shloka*. The second line of the same which is also significant is as follows:

“यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः”

Yatra tastu na pujoyante sarvastatraphalah kriyah

A free translation of the aforesaid is reproduced below:

“All the actions become unproductive in a place, where they are not treated with proper respect and dignity.”

27. Another wise man of the past had his own way of putting it:

“भर्तृभ्रातृ पितृजाति श्रवश्रुश्वसुर देवरैः।
बन्धुभिश्च स्त्रियाः पूज्या भूषणाच्छादनाशनैः।।”

Bhartr bhratr pitrijnati
swasruswasuradevaraih
Bandhubhisca striyah pujoyah
bhusnachhadanasnaih

A free translation of the aforesaid is as follows:

“The women are to be respected equally on a par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour.”

28. Yet again, the sagacity got reflected in following lines:

“अतुलं तत्र तत्तेजः सर्वदेवशरीरजम्।
एकस्थं तदभून्नारी व्याप्तलोकत्रयं त्विषा।।”

Atulam yatra tattejah sarvadevasarirajam
Ekastham tadabhunnari vyaptalokatrayam
tvisa

A free translation of the aforesaid is reproduced below:

“The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman.”

29. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society:

“A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom — to develop her personality to the full as a man. When she marries, she does not become the husband’s servant but his equal partner. If his work is more important in life of the community, her’s is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.”

33. In ***Charu Khurana and others v. Union of India and others***³⁰, speaking about the dignity of women, the Court held:-

“33. ... Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the

³⁰ (2015) 1 SCC 192

mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens and see that they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.”

34. In ***Shakti Vahini v. Union of India and others***³¹, the *lis* was in a different context. The Court reproduced a passage from Joseph J. Ellis which is also relevant for the present purpose. It reads:-

“We don’t live in a world in which there exists a single definition of honour anymore, and it’s a fool that hangs onto the traditional standards and hopes that the world will come around him.”

35. In the said case, a contention was advanced that the existence of a woman is entirely dependent on the male view of the reputation of the family, the community and the milieu. The Court, in that context, observed:-

“5. ...The collective behaves like a patriarchal monarch which treats the wives,

³¹ (2018) 7 SCC 192

sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour.”

36. We have referred to the aforesaid as we are of the view that there cannot be a patriarchal monarchy over the daughter or, for that matter, husband’s monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance.

37. Having stated about the dignity of a woman, in the context of autonomy, desire, choice and identity, it is obligatory to refer to the recent larger Bench decision in ***K.S. Puttaswamy and another v. Union of India and others***³² which, while laying down that privacy is a facet of Article 21 of the Constitution, lays immense stress on the dignity of an individual. In the said judgment, it has been held:-

“108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee

³² (2017) 10 SCC 1

against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

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119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence...”

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“298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a

private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.”

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“525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.³⁵⁹ The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that

we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.”

38. In this context, we may profitably refer to ***National Legal Services Authority v. Union of India and others***³³ wherein A.K. Sikri, J., in his concurring opinion, emphasizing on the concept of dignity, has opined:-

“The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.”

³³ (2014) 5 SCC 438

39. Very recently, in ***Common Cause (A Registered Society) v.***

Union of India and another³⁴, one of us has stated:-

“... Human dignity is beyond definition. It may at times defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism. But what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a “body”.....”

And again:-

“The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, —Death plucks my ear and says, Live- I am coming|| . That is the significance of living. But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently,

³⁴ (2018) 5 SCC 1

should he/she be —guinea pig for some kind of experiment? The answer has to be an emphatic —Not because such futile waiting mars the pristine concept of life, corrodes 139 the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy.”

In *Mehmood Nayyar Azam v. State of Chhattisgarh and others*, a two-Judge Bench held thus:-

“1..... Albert Schweitzer, highlighting on *Glory of Life*, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is inseparably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence"

40. In the said judgment, A.K. Sikri, J. reproduced a passage from Professor Upendra Baxi's lecture in *First Justice H.R. Khanna Memorial Lecture* which reads as follows:-

“I still need to say that the idea of dignity is a metaethical one, that is it marks and maps a difficult terrain of what it may mean to say being 'human' and remaining 'human', or put another way the relationship between 'self', 'others', and 'society'. In this formulation the word 'respect' is the keyword: dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints state, law, and regulations.”

41. From the aforesaid analysis, it is discernible that the Court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution.

42. Another aspect needs to be addressed. The question we intend to pose is whether adultery should be treated as a criminal offence. Even assuming that the new definition of

adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage. There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, the Parliament has always made efforts to maintain the rights of women. For instance, Section 498-A IPC deals with husband or relative of husband of a woman subjecting her to cruelty. The Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere. The offences under the provisions of the said enactment are different from the provision that has been conceived of under Section 497 IPC or, for that matter, concerning bringing of adultery within the net of a criminal offence. There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social licence that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. We are not

commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, “a good legislation should be fit and equitable so that it can have a right to command obedience”. Burke would like to put it in two compartments, namely, ‘equity’ and ‘utility’. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life.

43. Dealing with the concept of crime, it has been stated in “Principles of Criminal Liability”³⁵ thus :-

“1. *Definition of crime.*—There is no satisfactory definition of crime which will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not. Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made criminal by Parliament simply because it is criminal process, rather than civil, which

³⁵ *Halsbury’s Laws of England*, 4th Edn., Vol. 11 p.11,

offers the more effective means of controlling the conduct in question.”

44. In *Kenny's Outlines of Criminal Law*, 19th Edn., 1966 by J.W. Cecil Turner, it has been stated that:-

“There is indeed no fundamental or inherent difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals; and therefore although it is true to say of crime that is an offence against society, this does not distinguish crime from tort. The difference is one of degree only, and the early history of the common law shows how words which now suggest a real distinction began rather as symbols of emotion than as terms of scientific classification.”

And again:-

“So long as crimes continue (as would seem inevitable) to be created by government policy the nature of crime will elude true definition. Nevertheless it is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (1) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (2) that among the measures of prevention selected is the threat of punishment; (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.”

45. Stephen defines a “crime” thus:-

“A crime is an unlawful act or default which is an offence against the public, rendering the person guilty of such act or default liable to legal punishment. The process by which such person is punished for the unlawful act or default is carried on in the name of the Crown; although any private person, in the absence of statutory provision to the contrary, may commence a criminal prosecution. Criminal proceedings were formerly called pleas of the Crown, because the King, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community. Wherefore he is, in all cases, the proper prosecutor for every public offence.”

46. Blackstone, while discussing the general nature of crime, has defined crime thus:-

“A crime, or misdemeanour, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours; which, properly speaking, are mere synonym terms: though, in common usage, the word “crimes” is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of “misdemeanours” only.”

47. In this regard, we may reproduce a couple of paragraphs from **Central Inland Water Transport**

Corporation Limited and another v. Brojo Nath

Ganguly³⁶. They read as under:-

“25. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have nourished, reached their peak and passed away. In the year 1625, Carew, C.J., while delivering the opinion of the House of Lords in *Re the Earldom of Oxford* in a dispute relating to the descent of that Earldom, said:

“... and yet time hath his revolution, there must be a period and an end of all temporal things, *finis rerum*, an end of names and dignities, and whatsoever is *terrene*....”

The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from “*The Rock*” said:

O perpetual revolution of configured stars,
O perpetual recurrence of determined seasons,
O world of spring and autumn, birth and dying;
The endless cycle of idea and action,
Endless invention, endless experiment.”

26. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The

³⁶ (1986) 3 SCC 156

early nineteenth century essayist and wit, Sydney Smith, said: “When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool.” *The law must, therefore, in a changing society march in tune with the changed ideas and ideologies.*”

48. Reproducing the same, the Court in **Common Cause (A Registered Society)** (supra), has observed :-

“160. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism.”

49. We have referred to the aforesaid theories and authorities to understand whether adultery that enters into the matrimonial realm should be treated as a criminal offence. There can be many a situation and we do not intend to get into the same. Suffice it to say, it is different from an offence committed under Section 498-A or any violation of the Protection of Women from Domestic Violence Act, 2005 or, for that matter, the protection conceived of under Section 125 of the Code of Criminal Procedure

or Sections 306 or 304B or 494 IPC. These offences are meant to sub-serve various other purposes relating to a matrimonial relationship and extinction of life of a married woman during subsistence of marriage. Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. Under the existing provision, the husband is treated as an aggrieved person and the wife is ignored as a victim. Presently, the provision is reflective of a tripartite labyrinth. A situation may be conceived of where equality of status and the right to file a case may be conferred on the wife. In either situation, the whole scenario is extremely private. It stands in contradistinction to the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a complaint for second marriage. Adultery stands on a different footing from the aforesaid offences. We are absolutely conscious that the Parliament has the law making power. We make it very clear that we are not making law or legislating but only stating that a particular act, i.e., adultery does not fit into the concept of a crime. We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to

be left as a ground for divorce. For any other purpose as the Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two. Let it be clearly stated, by no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship. In case of the said offences, there is no third party involved. It is the husband and his relatives. There has been correct imposition by law not to demand dowry or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so.

50. In this regard, we may also note how the extramarital relationship cannot be treated as an act for commission of an offence under Section 306 IPC. In ***Pinakin Mahipatray Rawal v. State of Gujarat***³⁷, the Court has held :-

“27. Section 306 refers to abetment of suicide which says that if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment for a term

³⁷ (2013) 10 SCC 48

which may extend to 10 years and shall also be liable to fine. The action for committing suicide is also on account of mental disturbance caused by mental and physical cruelty. To constitute an offence under Section 306, the prosecution has to establish that a person has committed suicide and the suicide was abetted by the accused. *The prosecution has to establish beyond reasonable doubt that the deceased committed suicide and the accused abetted the commission of suicide. But for the alleged extra-marital relationship, which if proved, could be illegal and immoral, nothing has been brought out by the prosecution to show that the accused had provoked, incited or induced the wife to commit suicide.*"

[Emphasis added]

51. In the context of Section 498-A, the Court, in ***Ghusabhai Raisangbhai Chorasiya v. State of Gujarat***³⁸, has opined that even if the illicit relationship is proven, unless some other acceptable evidence is brought on record to establish such high degree of mental cruelty, the Explanation (a) to Section 498-A IPC, which includes cruelty to drive the woman to commit suicide, would not be attracted. The relevant passage from the said authority is extracted below :-

"21. ...True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that cruelty, as envisaged under the first limb of Section 498-A IPC would not get attracted. It would be difficult to hold that the mental cruelty

³⁸ (2015) 11 SCC 753

was of such a degree that it would drive the wife to commit suicide. Mere extra-marital relationship, even if proved, would be illegal and immoral, as has been said in *Pinakin Mahipatray Rawal*, but it would take a different character if the prosecution brings some evidence on record to show that the accused had conducted in such a manner to drive the wife to commit suicide. In the instant case, the accused may have been involved in an illicit relationship with Appellant 4, but in the absence of some other acceptable evidence on record that can establish such high degree of mental cruelty, the Explanation to Section 498-A IPC which includes cruelty to drive a woman to commit suicide, would not be attracted.”

[Emphasis added]

52. The purpose of referring to the aforesaid authorities is to highlight how adultery has not been granted separate exclusive space in the context of Sections 306 and 498-A IPC.

53. In case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite.

54. We may also usefully note here that adultery as a crime is no more prevalent in People's Republic of China, Japan,

Australia, Brazil and many western European countries. The diversity of culture in those countries can be judicially taken note of. Non-criminalisation of adultery, apart from what we have stated hereinabove, can be proved from certain other facets. When the parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said 'act' should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a

crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness.

55. In this regard, another aspect deserves to be noted. The jurisprudence in England, which to a large extent, is adopted by this country has never regarded adultery as a crime except for a period of ten years in the reign of Puritanical Oliver Cromwell. As we see the international perspective, most of the countries have abolished adultery as a crime. We have already ascribed when such an act is treated as a crime and how it faces the frown of Articles 14 and 21 of the Constitution. Thinking of adultery from the point of view of criminality would be a retrograde step. This Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.

56. As we have held that Section 497 IPC is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare **Section 198 CrPC which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional.** When the substantive provision goes, the procedural provision has to pave the same path.

57. In view of the foregoing analysis, the decisions in **Sowmithri Vishnu** (supra) and **V. Revathi** (supra) stand overruled and any other judgment following precedents also stands overruled.

58. Consequently, the writ petition is allowed to the extent indicated hereinbefore.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi;
September 27, 2018