IN THE SUPREME COURT OF INDIA

(CRIMINAL ORIGINAL JURISDICTION)

I.A. 100253 OF 2018

IN

WRIT PETITION (CRL) NO.194 OF 2017

IN THE MATTER OF:

JOSEPH SHINE …Petitioner

VERSUS

UNION OF INDIA …Respondents

AND IN THE MATTER OF:

1. AWAAZ-E-NISWAAN
2. AKSHARA
3. SANDHYA GOKHALE
4. CHAYANIKA SHAH …Applicants

NOTE OF ARGUMENTS BY

MR. ANAND GROVER, SENIOR ADVOCATE

I. Origin of adultery law in Religious Texts

1. The first proscription on adultery can be found in religious texts.
2. The Jewish biblical law **(*Leviticus 20:10*)** defines adultery as being committed only with another man's wife and prescribes the punishment of death for both adulterer and the adulteress.
3. The Hindu Religious text, *Manusmriti* **(*Verse 8.352*)** prescribes punishment for those who are addicted to intercourse with the wife of other men.
4. Strict punishments were prescribed for having sexual intercourse with another man's wife; however, having sexual intercourse with a woman outside of marriage was only considered a moral sin.

5. In Islam, adultery is a major sin and violation of the marital contract condemned by Allah **(*Qur'an 17:32 & 7:33*)**. However, Islamic law allowed men to take additional wives or 'concubines' and thus avoid liability for adultery.
6. According to some sources, in Christianity, adultery is considered immoral and a sin for both men and women **(*1 Corinthians 6:9–10*)**. However, other Christian texts focus on the man as being the adulterer and anyone who looks at a woman with lustful intent is considered to have committed adultery with her **(*Matthew 5:27-28*)**.
7. Almost all religious texts manifest discrimination in their attitude towards concept of adultery and consider women subordinate and the property of the husband. .

II. The crime of Adultery at Common Law

8. At Common Law, adultery was not considered a criminal offence, except between the period 1650-1660 when England had no monarch and was ruled by the Puritans of Commonwealth.
9. Between 1660 and 1857 in England it was not possible to obtain a divorce through civil courts, which refused to invade the jurisdiction of the church. The only way to obtain a divorce was through an Act of Parliament and adultery was the sole ground for it. However, since getting an Act of Parliament for divorce was an expensive affair, only a few individuals sought divorce on the ground of adultery.
10. At common law, the jurisprudence on adultery developed by recognizing it as the husband's 'claim for injury'. Common law did not consider adultery by a husband with an unmarried woman as an actionable wrong. The only form of adultery considered was that with a married woman for which the husband had actionable claim.
11. According to Commentaries on the Laws of England, by William Blackstone "*adultery or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass vi et armis against the adulterer, wherein the damages recovered are usually very large and exemplary*." (See

Commentaries on the Laws of England, by William Blackstone*, Volume 2 Book 3 Page 116*)

12. In 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife was "*the highest invasion of property*". The husband had an action against the other man who "*invaded his property*". (See ***The UN Working Group on Discrimination against women in law and in practice report****, Adultery as a criminal offence violates women's human rights*)
13. Courts considered the offences of adultery and fornication as a trespass to the property of the husband or the father respectively. Prior to marriage, the father or the parent of a daughter had an action for the offence of fornication against the wrongdoer. After marriage, the husband had an action against the wrongdoer who "trespassed his property". (See ***The State v. Robert Lash***, 1837 New-Jersey Supreme Court; discussion on Adultery in English common law)
14. Subsequently, the Courts developed the principle that the husband had certain personal and exclusive rights with regard to his wife. An interference with these rights was termed as "*criminal conversation with the wife of other*". The consent of the wife was held to be irrelevant, as her consent cannot affect the rights of the husband. (See ***Tinker v. Colwell***, **1904 Supreme Court of New York)**
15. The English case of ***Pritchard v. Pritchard and Sims.*** **[1966] 3 All E.R.**, reconfirmed the origins of adultery or criminal conversation in the common law offence of trespass. "*In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, there existed side by side under the common law three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her…In the action for adultery known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety interest in the person of his wife, her services and earnings, and in the property which would have been hers had she been feme sole.*"

16. Section 59 of the Matrimonial Causes Act, 1857, abolished the common law action for criminal conversation. By Section 33 of the same Act, Courts were empowered to award the husband damages for adultery. The Act provided that the claim for damages for adultery should be tried on the same principles and in the same manner as actions for criminal conversation were formerly tried at common law. Adultery thus remained de-criminalized in England.
17. Any damages awarded in cases of adultery were compensatory and not punitive in nature. Thus, the status of wife even after the enactment of Matrimonial Causes Act 1857 remained that of 'property of the husband'. In order to determine damages, Courts determined the value of the wife to the husband and the loss sustained on account of adultery.
18. This was the position in India too. [See Thus ***Thomas v. Thomas***, 1924 SCC Online Cal 504],
19. Equality between men and women in part realized in England in 1923 when the Matrimonial Causes Act, 1923 made adultery as a ground for divorce available to both spouses instead of only the husband. However, still under the law only the husband could claim damages against the adulterer.
20. The right of a husband to claim damages for adultery with his wife was abolished by The Law Reform (Miscellaneous Provisions) Act of 1970.

III. ORIGINS AND HISTORY OF SECTION 497 (ADULTERY), INDIAN PENAL CODE

Notes to a Penal Code by The Indian Law Commissioners, 1837

21. The Commissioners noted that adultery was a 'private injury'- an offence which affected the rights of the husband alone, and which only he was deemed competent to prosecute. They also noted that real essence of the injury was considered by the sufferer as covered in the legal maxim, *per quod servitium amisit*, i.e., in consequence of which he 'lost her servitude and sex' or "he lost the company of his wife."
22. While acknowledging that adultery was considered immoral but questioning whether it is necessary to penalise it, the Law Commissioners wrote, "*Many thing which are not punishable are morally worse than many things which are*

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

"An example will illustrate our meaning. We have determined not to make it penal in a wealthy man to let a fellow creature whose life he could save by disbursing a few pice, die at his feet of hunger. No rational person, we are convinced, will suppose because we have framed the law thus that we do not hold such inhumanity in detestation. But if we had proposed to punish such inhumanity with a fine not exceeding fifty rupees we should have offered a gross outrage to the feelings of mankind. That we do not think that a certain act a proper subject for penal legislation does not prove that we not think that as a great crime. But that thinking it a proper subject for penal legislation we propose to visit it with a slight penalty does seem to indicate that we do not think it a great crime."

23. On the perceived benefits of criminalising adultery, the Commissioner's observed:*"the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the Courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in case of adultery to the Courts of law are generally poor men whose wives run away, that these hundreds seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain of their honour, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the woman may be sent back. Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.*

"These things being established, it seems to us that <u>no advantage is to be expected from providing a punishment for adultery</u>. The population seems to be

divided into two classes—those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury."

24. Importantly, the Law Commissioners thought it fit *not to penalise adultery out of concern for women* and the social conditions that prevailed in India. The Commissioners noted that women in India were married young and men enjoyed polygamous relationships. They further observed: - *"...we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the woman of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women is a course, which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manner of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce it's never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons, which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak."*

25. The Law Commissioners in 1837 decided against criminalizing adultery and recommended that it be treated as a civil wrong.

2nd Law Commission Report on the Indian Penal Code, 1848

26. The law on adultery under Regulation XVII of 1817 at the time was observed to be inefficacious to secure a conviction. The impact of absence of an adequate legal remedy for adultery was seen as permitting the husband to take the law in his own hands, as "*…has recourse to poison secretly, or with his wife's consent; and she will generally rather take it than be turned out into the streets a degraded outcast*". [Para 347]

27. As Regulation XVII of 1817 was an inadequate remedy, the law purportedly allowed the husband to seek recourse in Regulation VII of 1819, which authorized him to punish a person convicted of "*enticing or taking away a wife or unmarried daughter for the purpose of rendering her a prostitute*". [Para 347]

28. In cases where the latter law was invoked, it is noted, "*The Courts believe that Regulation VII. of 1819 has been found in practice to be a very successful enactment, and well suited to the feelings of the lower classes of the community, who, in cases of wives leaving their husbands, can, by it's provisions, get the crime of seduction punished without their dishonor being brought prominently forward, the female being induced by fair promises, on the seducer being sent to jail, to return, and domestic harmony restored*". [Para 349]

29. The 2nd Law Commissioner's Report (1853) found that the silence of the penal code on adultery will, "*give greater impunity to seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer".* [Para 347]

30. The Law Commissioner's Report further noted that, "*when the impediments to redress of such wrongs shall be removed in the same manner in all parts of India…the people will, in all parts, be found ready to seek redress through the constituted tribunals, and the seducer will then, and not till then, share danger with the accused*". [Para 348]

31. The 2nd Law Commissioners' Report ultimately agreed that, "*It is the nature of man, and no legislation can alter it, to protect himself where the laws refuse their aid…but where they will not give protection against injury, it is in vain that they attempt to punish him who supplies by his own energy their remissness…Where the law refuses to punish the offence, the injured party will do it for himself…assaults, duels, assassinations, poisonings will be the consequence…It*

is for these reasons that the offence of adultery forms a chapter of this title". [See paras 352-353]

32. The 2nd Law Commissioners' Report recommended that adultery be criminalised under the draft penal code but limited its cognizance to adultery committed by/with a married woman. They favoured making the male partner [of the wife] punishable while exempting the wife from penal liability, on account of the status of women in India as highlighted in the 1st Law Commissioners' Report [highlighted in paragraph (v) above [Para 355].

The Indian Penal Code (Act XLV of 1860) with Notes

33. The final draft of The Indian Penal Code, 1860 included Section 497 (*Adultery)* that punished a man who has sexual intercourse with a married woman, without the consent or connivance of her husband.

34. Colonial legislations on fornication, adultery and rape treated the woman in question as the "*polluted vessel of family honour*".

35. According to colonial administrators and legislators, the "honour of men", particularly among the respectable orders of India, depended upon the chaste reputation of their women. Stories about "defiled women" themselves demanding to be killed tended to be accepted as confirmatory of the anxiety which local people felt on female chastity, to preserve unsullied the reputation of their families (*A Despotism of Law: Crime and Justice in Early Colonial India, Radhika Singha*). It was the honour of men alone in framing Section 497 IPC, to allow the husband to prosecute the man who had sexual relations with his wife

IV. INGREDIENTS OF SECTION 497, IPC

36. Section 497 of IPC titled adultery reads as follows:

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

37. In order to constitute the offence of adultery, the following i must be established: -

a. Sexual intercourse between a married woman and a man who is not her husband;
b. The man who has sexual intercourse with the woman must know or have reason to believe that she is the wife of another man;
c. The sexual intercourse must not amount to rape; i.e. the woman must consent
d. Sexual intercourse with woman must have taken place without the consent or connivance of her husband.

38. Accordingly, the provision does not contemplate sexual intercourse by a husband with a woman who is not his wife as constituting adultery.
39. The provision only penalizes the third party and not the married woman.
40. The women's consent is irrelevant. It is not based on her self-determination or her agency. The consent of the wife is only to establish that the act would not constitute rape.
41. Though the provision does not prosecute the wife, and it has been held that both the "spouses are from prosecution." However that begs the question. The act of the husband's action is never considered adultery. It has to be noted that the husband having a sexual intercourse with an unmarried is not considered adultery Therefore there the question of prosecution does not arise. .
42. Further, Section 198 of the Code of Criminal Procedure (CrPC) provides for *Prosecution for offences against marriage*. The relevant portions In Section 198(2) reads:

"...*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 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."

43. Reading S. 198 CrPC with S 497 IPC indicates that, complaint under S. 497 can be filed by-
a. The husband;
b. In absence of husband, a person who had the care of the married woman on his behalf; with leave of the court

Interpretation of Section 497, IPC

44. The scope of Section 497 of IPC as interpreted by Courts in India is set out below.

On evidence to be adduced

45. In the absence of an averment of the offence of adultery in the complaint, the accused cannot be charged under Section 497 IPC. (See ***Ram Narayan Baburao Kapur v. Emperor*** AIR 1937 Bom 186)

46. In a case where a married Hindu woman left her husband during the subsistence and contracted a second marriage (natra) in accordance with custom it was held that it is opposed to the spirit of Hindu law and not be valid and the husband of the second marriage can be prosecuted for adultery (***Rej v Karsan Goja*** (1864) 2 B. H. C. R. 117)

47. The factum of marriage has to be proved. Mere statements of husband and wife asserting a marriage are not enough to prove the marriage.

(***In re Pitambur Singh*** 5 Cal LR 597, ***Bhagu Dhondi vs. Emperor*** 1914 SCC OnLine Bom 144, ***Ganga Patra vs. Emperor*** AIR 1928 Pat 481, ***Chandra Bahadur Subba vs. State and anr***. 1978 CriLJ 942, ***Dhaniraj Sabar vs Radhakrishna Sabar*** MANU/OR/0102/2006).

48. To prove adultery, circumstantial evidence must be such that it would lead the guarded discretion of a reasonable and just mind to the conclusion of adultery (***Sita Devi vs Gopal Saran Narayan Singh*** 1928 SCC Online Pat 37).

49. The offence of adultery is not a continuing offence. A man convicted of adultery will be liable to a second conviction if he continues his adulterous intercourse with the woman, notwithstanding that the woman has not returned to husband after the conviction of her paramour. (See ***Shankar Tulsiram Navale vs Kundlik Anyaba Yadaw*** 1928 AIR (Bom) 530).

50. Sexual intercourse between the married woman and the accused cannot be based on mere suspicion. (See ***Sunil Kanto Nandy v. State of Bihar*** 1963 SCC online Pat 135)

51. *Connivance* u/s 497 IPC may mean an active aiding or abetting or a conduct from which such aiding or abetting may be inferred. It includes conduct amounting to passive acceptance of the lapse of the married woman and the accused. Condonation on behalf of the husband that may be inferred by conduct also

constitutes *connivance.* [See ***In re Subramaniam***, AIR 1953 Madras 422 and judgment of the Orissa High Court in ***Krushna Chandra Patra vs. Tanu Patra,*** (1992) 2 DMC 20)].

52. However, mere negligence or inactivity of the husband would not constitute 'connivance' on the part of the husband. Facts must lead to direct and necessary inference that negligence led to adultery being committed by the person charged (See ***Munir vs King Emperor***, AIR 1926 All 189).

Who can file a complaint under Section 497 **IPC**

53. The meaning of "*in absence of the husband*" in Section 198 of the CrPC could include situations where the complainant had authority of the husband to take care of the wife, while the husband lived independently. (See ***Ram Narayan Baburao Kapur v. Emperor*** AIR 1937 Bom 186)

54. Even if the husband has abandoned the wife, the father of the wife cannot file a complaint under Section 497 IPC. (See ***Pothi Gollari vs. Ghanni Mondal*** AIR 1963 Ori 60)

Adultery under Section 125 Code of Criminal Procedure (CrPC): law relating to maintenance of wife

55. Relevant portions of Section 125 of the Code of Criminal Procedure titled *Order for maintenance of wives, children and parents* read as follows: -

56. (*1) If any person having sufficient means neglects or refuses to maintain-*

(a) His wife, unable to maintain herself, or

(b) ……

(c) ...

Explanation. For the purposes of this Chapter, -

(*a)……*

(b) "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

…….

"*(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:*

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him."

(4) No wife shall be entitled to receive an [allowance for the maintenance or interim maintenance and expenses of proceeding, as the case may be,] from her husband under this Section if she is living in adultery, or if, they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this Section is living in adultery, or that without sufficient reason, she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

57. For the purposes of granting maintenance, adultery is one of the factors to be considered under section 125 of the CrPC. The expression "living in adultery" under section 125(4) and 125(5) of the CrPC is wider than the expression "commits adultery" under section 497, IPC.

58. Proceedings under section 125, CrPC are not contingent upon proceedings under section 497, IPC. For the purposes of section 125 CrPC, prosecution by a husband under section 497, IPC is not required to show that the wife was living in adultery.

59. It is evident that the law denies the relief [of maintenance] to a woman who is in an adulterous relationship. In other words, a woman already facing adverse legal consequences on account of being in a relationship outside marriage, faces an additional burden on account of Section 497, IPC. This applies to married women alone but not married men. (See ***Gantapalii Appalamma v Gantappali Yellayya*** (1897) ILR 20 Mad 470)

Adultery under matrimonial laws

60. All matrimonial laws recognise adultery as a ground for seeking judicial separation and/or divorce between parties to the marriage. The ground is open to both the parties. Relevant sections are reproduced below:-

The Hindu Marriage Act, 1955

Section 13

Divorce- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse;

The Parsi Marriage and Divorce Act, 1936

Section 32(d):

32. Grounds for divorce—Any married person may sue for divorce on any one or more of the following grounds, namely—

.....

(d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact;

The Indian Divorce Act, 1869:

10. When husband may petition for dissolution.- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution. When wife may petition for dissolution.- Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof,

her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or

has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery, or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Dissolution of Muslim Marriage Act, 1939

Section 2 entails the grounds for decree for dissolution of marriage, where associating with women of evil repute or leading an infamous life has been made a ground for divorce for wife. The section is reproduced hereinafter:

2. Grounds for decree for dissolution of marriage- A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

……

(viii)that the husband treats her with cruelty, that is to say-

(a) .....or

(b) associates with women of evil repute or leads an infamous life, or ....

Special Marriages Act, 1954, adultery has been made a ground for divorce under section 27. The section is reproduced herein:

27. Divorce.-(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the District Court either by the husband or the wife on the ground that the respondent-

(a) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or…

61. The term *adultery* has been used in a wider sense under matrimonial laws than in Section 497, IPC. (See ***Olga Thelma Gomes vs. Mark Gomes*** 1959 SCC OnLine Cal 167; ***Chanda Chitar Lodha v. Mst. Nandu*** ,AIR 1965 MP 268)

V. CONSTITUTIONAL CHALLENGES TO SECTION 497 IPC

62. The Constitutional validity of Section 497 has been challenged before this Hon'ble Court on three occasions i.e. in ***Yusuf Abdul Aziz v State of Bombay*** AIR 1954 SC 321, ***Sowmithri Vishnu v Union of India and Another*** 1985 (Supp) SCC 137, ***V. Revathi v. Union of India and Others*** (1988) 2 SCC 72. These cases are discussed in brief below.

63. ***Yusuf Abdul Aziz v State of Bombay***, AIR 1954 SC 321 [4 Judge Bench]
    a. The issue was whether Section 497 violated Articles 14 and 15.

    This Hon'ble Court noted that-
    b. sex is a sound classification;
    c. That no discrimination in general allowed under Art 14, but Art 15(3) allowed for special provision for women;
    d. Articles 14 and 15 (1) and (3) read together validate Section 497 IPC.

64. ***Sowmithri Vishnu v Union of India and Another***, 1985 (Supp) SCC 137 (3 Judges Bench)
    a. The issue was whether Section 497 IPC violated Articles 14, 15 and 21 on the ground that only the husband can prosecute the man having sexual relations

with his wife but the wife could not prosecute the husband's partner, an unmarried woman, when he had relations with her.

This Hon'ble Court noted-

b. Such arguments go into the policy of the law and not to constitutionality of the provision and if allowed would require recasting of a number of provisions of the IPC;
c. Breaking a matrimonial home is no less serious crime than breaking open a house;
d. The argument is based on under-inclusion and is not necessarily discriminatory;
e. It is commonly accepted that the man is the seducer, not the woman;
f. Woman is the victim and not the author of the crime;
g. Law made only specific kind of sexual relationships an offence;
h. An unfaithful husband risks a civil action by wife for separation;
i. Legislature may enlarge the definition of adultery with moving times;
j. Hence provision does not offend Articles 14 or 15;
k. On the issue that the wife had no role in the proceedings against the man the Court held the right of hearing is part of natural justice. Thus the wife may make an application at the trial court for a hearing;
l. Hence S 497 is not violative of Art 21;
m. It is better from point of view of interest of society that at least limited class of adulterous relationship is punished
n. Stability of marriage is not an ideal to be scorned.

65. ***Revathi v. Union of India and Others***, (1988) 2 SCC 72 [2 Judge Bench]

a. The issue was whether S 497 IPC and 198 CrPC discriminated on the basis of sex because the husband had the right to prosecute the man who had sexual relations with his wife but the wife could not prosecute an unmarried woman who had sexual relations with her husband;

This Hon'ble Court observed-

b. The philosophy behind 497 IPC which does not allow the husband and wife to prosecute each other is that social good would be promoted by allowing them to "make up" or "break up" and "forgive and forget and live together" or "approach the matrimonial court for a divorce;

c. That Section 497 IPC and 198 CrPC constitute a legislative package to deal with an outsider who invades the peace and privacy of the matrimonial unit and poisons it;
d. Section 198 CrPC makes an exception to the general rule that anyone can set the criminal law in motion;
e. That adultery was an act by a man against the sanctity of the marital home;
f. Perhaps scheme was also to ensure the children of the marriage were saved from trauma;
g. Neither of the spouses can prosecute each other under S 497;
h. That outsider woman who has a sexual relationship can not being prosecuted indicates a reverse discrimination in favour of the woman;
i. Hence there is no discrimination based on sex.

International trends on Adultery

73. Adultery continues to be a criminal offence in Afghanistan, Bangladesh, Indonesia, Iran, Maldives, Nepal, Pakistan, Philippines, United Arab Emirates, 21 states of United States of America, Algeria, Democratic Republic of Congo, Egypt, Morocco and some parts of Nigeria.

74. Some countries had a criminal law on Adultery but have abolished the laws or the court has struck the same down and now the act of adultery only invites a civil liability. Adultery was a crime (only for women in the Criminal Code of China, 1935). Protests by women brought about a punishment not only for women but also men. Eventually, in 1979, Adultery was made a ground for divorce only under the Marriage laws of People's Republic of China. Adultery was a crime in Japan under the Code of Criminal Law, 1907. In 1947 the House of Conciliators of Japan abolished the crime of adultery and now it's a ground for Divorce under the Civil Code of Japan. In Malaysia, adultery was punished as a crime under the Islamic Laws However the Marriage and Reform Act made it a civil wrong, which invites Divorce under the head of Breakdown of Marriage. South Korea in 2015 made adultery a civil offence after it was struck down as a crime by the South Korean Supreme Court, which is now governed by the Civil Act, 1958 and is a ground for Divorce only. Canada made adultery an offence if t was committed in the home of a child. It was made a civil wrong in 1985 as a ground for divorce. Adultery is a ground for divorce in all States of America. However,

21 states in the USA simultaneously treat Adultery as a crime. Until 1914, in South Africa, only wife was punished for Adultery as they followed the civil law system taken from the Roman-Dutch. However in 1914 the crime of adultery was struck down by the Appellate Court in the matter of *Green v Fitzgerald*, and later was added as a ground for divorce under the head of "Irreversible Breakdown of Marriage". Argentina's legislation treated adultery differently for men and women. For men, the law recognizes adultery as a relationship in which the man supports a woman other than his wife and has sexual relations with her for a certain period of time. For a woman, a single sexual encounter outside her marriage was considered adultery. It was a crime until 1995 but later was only made a ground for divorce. In 2005, Brazil abolished the crime of adultery and started treating it as justification for the termination of marriage. In Venezuela, under the old code, a wife's adultery was considered a just cause for divorce, but for a woman to obtain a divorce, she had to prove her husband had "publicly and brazenly" kept a mistress. Now equal laws exist for both under the Venezuelan Civil Code. In Denmark in pursuance of the sixth commandment, adultery was made a punishable offence in the early 17th century but it was never a part of the consolidated Penal Code. Under the written law, it's only a ground for divorce. France abolished the crime of Adultery in 1975 and now it's only a ground for divorce. In Germany, Adultery was punishable as a crime until 1969. It was abolished as a crime in 1969. Later in 1977 reforms of the Marriage laws of Germany led to it not even being a ground for divorce. Adultery was very highly punishable in ancient Greece, continued to be criminal in modern time until 1983. Now it's a part of the civil law and is a ground for divorce under "Irretrievable Breakdown of Marriage." It was a crime in the Netherlands until 1971. Later it became civil wrong and is governed by Family Law as disruption of Marriage, In Rome adultery was Criminal offence punishable with imprisonment and fine until 2006. Now it's a civil wrong only. In Turkey it was punishable offence, and discriminatory against women. Later in 1996 it was decriminalised by the judgment of a Constitutional Court. Nwo it's a ground for divorce only.

75. Adultery was always a civil wrong in Thailand and was treated as a ground for divorce. In Australia, adultery was always a civil wrong, The 1975 Family Code removed adultery as a ground of divorce and simply made it irrevocable breakdown of the marriage. In Mauritius, it is a civil wrong, which is a ground for

divorce as fault in the spouse. However the Criminal Code, 1838: Article 242 states that, "*Manslaughter committed by any person on his spouse, as well as on his accomplice, at the very moment he finds them in the act of adultery is excusable*." In Zimbabwe, adultery is a ground for divorce where either of the spouses can claim damages from the other in case of divorce because of adultery. Colombia always treated adultery as a ground for divorce. Venezuela always treated adultery as a civil wrong however, under the old code wife had to give higher proof to get divorce on the ground of adultery. Under the old code, a wife's adultery was considered just cause for divorce, but for a woman to obtain a divorce, she had to prove her husband had "publicly and brazenly" kept a mistress. Now equal laws exist for both under the new code. Austria never had any criminal liability for adultery and treated it as a ground for divorce.

76. In Russia and Germany, there are no legal consequences of Adultery. Article 22(1) of the Russian Family Code simply states that marriage shall be dissolved in court, if it has been found that further life of the spouses together and the preservation of the family are impossible.
77. Today approximately only 16 countries (including USA and India, where it is civil as well as criminal) treat Adultery as a crime.
78. Approximately 19 countries have either abolished or struck down adultery as a criminal offence and it only serves as a ground for divorce under heads such as "irretrievable breakdown of marriage", "fault in spouse" etc.
79. Approximately 8 countries have always treated adultery as a ground for divorce and there was never a criminal liability with respect to adultery on either of the spouse or the third party.

VI. CONSTITUTIONAL PRINCIPLES AND FUNDAMENTAL RIGHTS TO TEST THE VALIDITY OF LAW (S).

Fundamental rights are not silos, but interlinked and intertwined.

80. Section 497, IPC is a pre-constitutional statute. Its constitutional validity must therefore, be adjudged by deeper scrutiny.
81. The Preamble to the Constitution incorporates certain core and abiding values that pervade all other provisions in the document. The Preamble also lays down

the vision and goal of the Constitution, which is, the *"realisation of a social order founded in* justice, *equality and the dignity of the individual."*

82. Together with justice, liberty, equality, fraternity and dignity, forms the bedrock of the Preamble and Articles 14, 15, 19 and 21 of the Constitution. It would not be an exaggeration to say that gender-equality, which partakes from the core values of '*justice', 'liberty', 'equality', 'fraternity' and 'dignity* forms part of the 'basic structure' of the Constitution.

83. Article 51-A (e) of the Constitution enjoins the State and citizens to "*renounce practices derogatory to the dignity of women."* A law that regards a woman as 'chattel' of her husband deeply offends her dignity and must be struck down.

84. A statute, which may have been valid in keeping with societal conditions prevailing at the time of its enactment, may not be so in view of changes in the domestic and international arena. [See ***Anuj Garg v Hotel Association of India*** (2008) 3 SCC 1 hereinafter ***("Anuj Garg")*** **at** para 7]

85. International human rights law has to be read into Part III of the Constitution. This Hon'ble Court has long rejected judicial–insularity, in favour of accepting international law and comparative jurisprudence especially in adjudicating the nature and content of fundamental rights. ***(***See ***Puttaswamy @ para 103)***

VII. SECTION 497, IPC VIOLATES ARTICLE 14

Article 14 guarantees equality before law and equal protection of the law: Section 497 proceeds on unreasonable classification

86. Article 14 permits reasonable classification, provided two conditions are satisfied. These are: - (i) that classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is a nexus between the basis of classification and the object of the Act under consideration.

87. In ***Shashikant Laxman Kale and anr v Union of India and anr*** (1990) 4 SCC 366 this Hon'ble Court held**:-**

"It is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification…."

88. With respect to the first condition, the classification in section 497 is based on the 'sex' of the parties to a marriage i.e. 'husband' and 'wife'. Under section 497, the offence of adultery is committed when a woman ['wife'] has voluntary sexual intercourse with a man who is not her 'husband', without such husband's consent. No offence is committed when a man ['husband'] has voluntary sexual intercourse with a woman who is not his 'wife'. Thus, for the purposes of recognizing the crime of adultery, section 497 classifies persons on the basis of 'sex', which is the intelligible differentia.

89. The scheme of section 497 is based on *common law*, where women ['wives'] were considered 'chattel' or 'property' of the man ['husband']. Accordingly, sexual intercourse by a man with the wife of another man, without the latter's consent alone constituted adultery. The essence of the crime lay in the man having *'invaded the property'* i.e. the wife of the husband without the latter's consent or connivance.

90. Section 497 is crafted along the same lines. Classification on the basis of 'sex', i.e. recognition of the offence of adultery when the woman [wife] has sexual relations with another man and not when the man [husband] has sex outside marriage is founded on the common law philosophy that preserves the "*husband's propriety interest in the person of his wife, her services and earnings, and in the property which would have been hers had she been fame sole."*

91. In ***Anuj Garg,*** this Hon'ble Court affirmed the following observation of Ginsburg J. in *United States v Virgina*, 518 US 515, 532-33 (1996) at para 52:

"Sex classification may be used to compensate women for particular economic disabilities [they have] suffered, to promote equal employment opportunity to advance full development of talent and capacities of our nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."

92. The object of section 497 is to vindicate the 'encroachment' and 'loss' suffered by the husband when his wife, who is his 'property', has sexual intercourse with another man, without his consent. Enabling him to criminally prosecute the 'trespasser', i.e. the man who has sexual intercourse with his wife without his consent, protects the man's rights over his property.

93. The legislative aim of section 497, IPC, which is to treat a wife as 'chattel" or 'property' of the husband and vindicate his 'claim' by prosecuting the man who has sex with her, without his consent, is an anathema to equality and is unconstitutional.

94. Besides, section 497 reveals a blatantly 'sexist' mindset in that it controls a woman and her sexuality and holds her [the 'wife'] responsible for preserving the 'sanctity of the marriage', while making the man ['husband'] immune from it thereby impairing her dignity.

95. It is settled law that if the object is illogical, unfair and unjust; necessarily the classification will have to be held unreasonable. [***Deepak Sibal v. Punjab University*** (1989) 2 SCC 145, at para 20].

96. The Court can strike down a law when the classification results in pronounced inequality or palpable arbitrariness on the touchstone of Article 14. In ***E.V. Chinnaiah v State of A.P.& Ors.*** (2005) 1 SCC 394 @para 98 [*concurring opinion of H.K Sema J*, this Hon'ble Court held: -

"*When a classification is made which is per se violative of the constitutional provisions, the same cannot be upheld*."

Classification is also unreasonable due to changes in time

97. In ***Anuj Garg* @ para 26,** this Hon'ble Court held that classification which may have been rational at the time of its adoption, may not be today, with changed circumstances. Ideas of male dominance and subjugation of women in marriage may have been approved in the 19th century, but cannot be accepted in the 21st century, when equality between men and women is an avowed constitutional and legal goal.

98. At the time of incorporating section 497 in the IPC in 1860, Hindu and Muslim men were permitted to have more than one wife. Therefore, it was illogical to provide an offence of adultery *qua the* husband in India. This position has

drastically changed since then. Polygamy is not only prohibited under most matrimonial laws but also constitutes an offence section 494 of the IPC. Consequently, the very foundation of the sex-based classification under section 497, IPC has collapsed.

99. Thus, Section 497 fails the test of reasonable classification under Article 14.

VIII. ***Object of the law – as claimed by the Respondent***

100. According to the Respondent, the purpose of the law is: - "*to protect and safeguard the sanctity of marriage, keeping in mind the unique structure and culture of Indian society.*"

101. The sex-based classification in section 497, which recognizes adultery as a crime *only* when the wife has sexual relations with another man, is wholly unrelated to the aforesaid object since the sanctity of the marriage can be broken by either party who engages in adulterous relations and not just the wife.

102. Thus when a husband has sexual relations with an unmarried woman, the sanctity of marriage is broken, but the law doesn't recognize that as an offence. Therefore the argument of the State falls to the ground.

103. Moreover, the wife's sexual relations with another man do not amount to 'adultery' under section 497 if the husband 'consents' to it. Therefore, there is no question of the section protecting the 'sanctity of marriage', when the husband acquiesces in adulterous relations by the wife. This is no manner protects the sanctity of the marriage. It does not preserve harmony in the marriage either.

104. It is not the Respondent's case that adultery on the part of the wife is more common than on the part of the husband. On the contrary, given that men – as a class, enjoy greater freedom than women in all spheres of life, their proclivity to extra-marital relations is much more pronounced.

105. Importantly, Section 497 was enacted at a time when divorce was not available in matrimonial laws, with the exception of Islamic law. Today, marriage is no longer a 'sacrament' and can be terminated by either or both parties under matrimonial laws of all religions.

106. Therefore, section 497 cannot be said to preserve the 'sanctity' of marriage, when it can be broken under other laws.

107. Section 497 does not serve any legitimate purpose and is therefore, *per se* unreasonable and arbitrary.

Section treats Unequals Equally

108. In ***Md. Usman & Ors. v. State of Andra Pradesh & Ors.*** and ***Maru Ram v. Union of India,*** this Hon'ble Court has held that Article 14 is violated not only when equals are treated unequally, but also when unequals are treated equally.
109. Section 497 metes out identical treatment to married and cohabiting women and married women who may have separated from their husbands and/or obtained a decree of judicial separation from a competent court, though they are a distinct class.
110. This also has the effect of denying women autonomy and self-determination even on separation from their husbands which a liberal democratic constitutional regime cannot countenance. .

IX. SECTION 497 VIOLATES ARTICLE 15(1)

111. Section 497 treats men and women differently in terms of their marital conduct and responsibility. The man's conduct – whether of engaging in adulterous relations or encouraging the wife to do the same is exempt from penal scrutiny. The focus of the law is the woman's actions alone, based on the underlying philosophy that she is 'chattel or property' of the man. It embodies a stereotype that is repugnant to equality and non-discrimination based on 'sex' under Article 15(1).
112. Section 497 singles out action on the part of the wife, while allowing the husband to engage in the very same conduct. What is prohibited for her, is unhesitatingly permitted for him.
113. Under section 497, the woman's consent to the sexual activity is irrelevant. What is relevant is the husband's consent or connivance for it is that which determines whether the act constitutes adultery or not.
114. In other words the law directly codifies the principle of subsuming the woman's autonomy under her husband's dictates, as an act which is otherwise not penalized in law (on consent by husband). It is rendered worthy only of penal action merely by the fiat of the husband's will, notwithstanding the woman's consent.
115. This is manifestly discriminatory and violates Article 15(1) on basis of sex.

116. The effect of section 497 is restricting the private, autonomous choices of [married] women while imposing no such constraints on [married] men. It also has the effect of rendering women's ['wives'] free-will and expression subservient to the 'consent and connivance' of men ['husbands']. Section 497 constitutes invidious discrimination between men and women, which is violative of Article 15(1).

117. As the law stands today, when a husband commits adultery with another woman, the only remedy available for the wife is civil, i.e. to seek judicial separation or divorce under matrimonial law. However, as the husband, a man enjoys remedies in civil and criminal law both. This also constitutes discrimination under Article 15(1).

SECTION 497, IPC ALSO VIOLATES ARTICLE 15(1) AS IT PERPETUATES SOCIAL, ECONOMIC AND POLITICAL INEQUALITY OF WOMEN BY STEREOTYPING

118. The effect of the decision of the colonial lawmakers, ostensibly made with the best of intentions, is to place the status of the woman in a very precarious position: **(1)** if there is no remedy in law against adultery, the woman lived with imminent risk of violence or death; **(2)** providing a remedy in law purportedly "protected" the woman's 'right to life', but her status in law was to wholly her to that of her husband's property or chattel. In effect, the woman is denied full personhood in law and society, under the garb of protecting her life. It is the woman who is made to pay the price of loss of full personhood in law for the threat of violence by her husband. As per the standard of review suggested by this Hon'ble Court, the appropriate response to violence against women is not to limit the woman's exercise of fundamental rights in law and society, rather to take law enforcement measures against the source of violence and foster an empowering conditions of living for women.

119. The criminalization of adultery in Section 497, IPC is a textbook case of *sex stereotyping*. The oppressive socio-cultural norms (women were often married young; men had several wives by social and legal sanction) that are purportedly cited as reasons for refusing to criminalize the woman in law, and therefore the law is posited as a '*special provision'* or *'protective discrimination'* for woman, are in fact moreover indicative of the existing hierarchies of discrimination and

inequalities that confronted women at the relevant period - which should have informed against classifying adultery as an offence *per se*, regardless of whether or not the woman is penalized. The criminalization of adultery, if also observed in the backdrop of the prevalent social and legal status of women in 19th century, leads to the conclusion that it directly and inevitably perpetuated discrimination in respect of women by relegating the status of woman as the property/chattel of the husband, purportedly as a trade-off to protect her life, at the time of enactment of the penal code (1860) as well as today.

120. This Hon'ble Court has noted that the principle of '*sex stereotyping'* in law, i.e., the phenomenon of classification on basis of sex in the backdrop of the oppressive cultural norms of the time may have pronounced and real differences between men and women. This combination of biological and social determinants are likely to find expression in popular legislative mandate and limit women's rights, and therefore such laws merit strict scrutiny. It is for the Court to review that majoritarian impulses rooted in moralistic traditions do not impinge on individual autonomy (paragraph 41-52, [See ***Anuj Garg v. Hotel Association of India & Ors.*** **(2008) 3 SCC 1**].
121. This Hon'ble Court also held that laws that are based on sex-stereotypes, ostensibly for benefit of women, are violative of the guarantee of non-discrimination on basis of sex under Article 15(1) and therefore unconstitutional.
122. In prioritizing only the husband's interest to prosecute for adultery for the loss of servitude and sexual labour of his wife (as covered by the legal maxim '*per quod servitium amisit'*), Section 497 consolidates and reinforces the status of the woman in the marital relationship as akin to property of the husband.

123. Even when Section 497, IPC does not produce 'tangible' consequences for women by way of prosecution for the offence of adultery, the direct and inevitable operation of the law in denial of women's agency is to render her status inferior to her husband's in law and society, by relegating her as his property/chattel. Therefore, the law under Section 497, IPC militates against the social, economic and political rights guaranteed under the promise of Justice in the Preamble of the Constitution of India.

124. The non-prosecution of woman under the law in Section 497, IPC does not make the impact of the law any less discriminatory on the social, economic and political status of the women. In *Brown et al v. Board of Education of Topeka, 347 US 483 (1954)* the US Supreme Court declared the segregation of public education between Caucasian and African American children as violation of the Constitution as it breached the guarantee of equality.

SECTION 497 IS NOT SAVED BY ARTICLE 15(3)

122. It is respectfully submitted that the observation in ***Yusuf Abdul Aziz v State of Bombay***, **AIR 1954 SC 321,** to the effect that that section 497 is valid as it is in the nature of a 'special provision for women' under Article 15(3) is incorrect.

123. It is questionable whether a statute, which was enacted in 1860, a pre-constitutional statute, long before Article 15(3) came into existence under the Indian Constitution, could ever be 'saved' by it.

124. Though it has been so held, the text as well as legislative history clearly reveal that the purpose of section 497 is *not* to protect the wife but to vindicate the husband, whose property she is considered to be, and has been trespassed.

125. It has been contended that since the 'wife' who has consensual sex with a man, who is not her husband is not criminalized under section 497, the section is protective of, or favourable to women. This argument is misconstrued. In examining the fundamentally discriminatory basis inherent in Section 497 IPC, the issue is not of 'who' is criminalized but that of 'what' constitutes the crime, which in the present case is, *consensual sex by a woman with another man without her husband's consent*.

126. The fact that the wife is not criminalized as an abettor to the crime of adultery does not detract from the sex-based discrimination writ large on the legislation, whose philosophy and object is to treat the wife as 'property' of the husband. Such a philosophy and object cannot be countenanced under Article 15 (3) of the Constitution.

127. Article 15(3) of the Constitution mandates affirmative measures that seek to strengthen women's equality and equal participation and not laws that diminish equality or suppress women's freedoms.

128. In ***Govt. of Andhra Pradesh v P.B. Vijaykumar and anr*** (1995) 4 SCC 520, this Hon'ble Court observed that "*any special provision for women*" in Article 15(3),

refers to affirmative actions that seek to improve women's participation in all activities under the supervision and control of the State.

129. Section 497, which is anachronistic and subverts women's equality and personal freedom, cannot be safeguarded under Article 15(3) of the Constitution.

X. Section 497 is incompatible with India's obligations under the CEDAW

130. India has signed and ratified the Convention on Elimination of Discrimination Against Women (CEDAW) and committed itself to ending discrimination based on 'sex'.

131. the understanding of equality and non-discrimination under Articles 14 and 15 of the Constitution is supported by the provisions of the) CEDAW. Article 1 of the CEDAW provides a wide-ranging meaning of 'discrimination against women. It states: "*the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*." A plain reading of the Article makes it unequivocally clear that 'any distinction' that has the effect of denying rights on an equal basis 'in any field' would constitute discrimination against women.

132. Further, Article 5 states that: "*States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*". This provision highlights cultural patterns of discrimination against women that are often fuelled by prejudicial stereotypes. A conjoint reading of Articles 1 and 5 of the Convention makes it clear that any conduct predicated on stereotypes concerning the superiority of either sexes would constitute discrimination and would be an anathema to gender equality.

133. Taking note of the discriminatory effects of laws criminalising adultery on women, the United Nations Working Group on Discrimination against Women

issued a call to Governments to repeal laws criminalizing adultery in October 2012.

XI. SECTION 497 VIOLATES ARTICLE 21

142. In ***K.S. Puttawswamy v. Union of India,*** **(2017) 10 SCC 1, (hereinafter "*Puttaswamy*")]** a nine-judge bench of this Hon'ble Court has held that privacy is an intrinsic element of the right to life and personal liberty under Article 21. [See ***Puttawswamy*** at paras 96, 313, 320, 322, 406, 407, 411, 535 and 536].

143. The right to personal liberty under Article 21 also includes the right to autonomy. [See ***NALSA v. Union of India and Ors.,*** **(2014) 5 SCC 438 at para 73**].

144. The right to privacy protects the autonomy of individuals and enables them to make choices on matters intimate to human life. [See ***Puttawswamy v*** at paras 271, 297, 298, 299, 521]

145. Dignity is the core underlying principle that unites the fundamental rights of the Constitution. The right to dignity includes the right of the individual to develop to the full extent of their potential and the right to autonomy over fundamental personal choices. [See ***Puttawswamy v***at paras 119, 525, 609, 644].

146. Privacy is an essential aspect of dignity and entails the freedom of self-determination including the right to choose one's sexual partner. This Hon'ble Court has held that, *"Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised."* [See ***Puttawswamy*** at paras 119, 127, 146, 271, 298, 323].

147. This Hon'ble Court has expounded on the relationship of the right to choose one's partner with individual autonomy and identity in ***Shafin Jahan v. Asokan K.M. & Ors,*** 2018 SCC Online SC 343 (hereinafter "***Shafin Jahan***"), as follows: -

"*It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right*." [See para 54]

"*The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects, which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable*." [See paras 88 and 94].

148. International courts have also noted that the right to privacy protects individuals' rights to engage in consensual sexual relations, without interference from the state.

149. In 2015, the South Korean Constitutional Court struck down the penal law criminalizing adultery and held that, "*Sexual life and love is a private matter, which should not be subject to the control of criminal punishment... It would infringe on the right to sexual self-determination and to privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders...*" [See ***2009 Hun-Ba 17***, Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho].

150. In ***Lawrence v. Texas*, 539 U.S. 558 (2003),** the United States Supreme Court held that the Texas law criminalizing consensual homosexual conduct was unconstitutional as intimate sexual relationships between consenting adults were protected by the right to liberty and privacy guaranteed by the Fourteenth Amendment of the United States Constitution. Justice Kennedy delivered the opinion and stated that,

"*The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any*

relationship that homosexual persons seek to enter. 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." [See ***Lawrence v. Texas,* 539 U.S. 558 (2003)** at pages 17, 18].

151. Thus, the fundamental rights to dignity, personal liberty, autonomy and privacy include the right to make decisions with respect to intimate consensual relations.

152. Section 497 criminalizes the male sexual partner of a married woman for engaging in adultery. Section 497 allows the State to intervene in the personal lives of both the married woman and the male partner through a penal statute, though the conduct in question involves consenting adults.

XII. Section 497 violates the Right to Dignity of women

153. By only allowing the husband, and not the wife, to prosecute a third party for adultery (when the married man has adulterous relations with an unmarried woman), this section reduces the status of women to the chattel/property of their husbands. Moreover her consent is totally immaterial to the husband's action. Thus, even if the married woman consents to sexual relations with another man, he can still be prosecuted because of lack of her husband's consent. His consent subsumes her consent and is thus, placed on a higher pedestal. This is chauvinistic, demeaning and stereotypical and violates the woman's right to dignity.

154. Section 497 allows the husband of a married woman to invoke criminal law against her act of consensual sexual intercourse with another man. The proviso to Section 198 (2) of the Code of Criminal Procedure, 1973 states that a complaint may be preferred for the offences under Sections 497 and 498 I.P.C. by some person, in the absence of the husband, if that person had the care of the woman on behalf of the husband (caretaker), at the time when such offence was committed.

155. Both sections read together allow both the husband and a "caretaker", in the absence of the husband, to complain about the woman's exercise of sexual agency and autonomy with an unmarried man.

156. Criminalization of adultery infringes the married woman's autonomy and dignity and privacy as it makes personal and inviolable aspects of her personal life a matter of public scrutiny.

157. Under Section 497, sexual intercourse between the married woman and the man must be proved by the prosecution beyond reasonable doubt. This would inevitably entail elaborate discussions using explicit details of the intimate affairs of the married woman, including her conduct with the accused, the contents of personal conversations between them and other similar private matters.

158. Even though it is only the man that is criminally liable under Section 497, the married woman too suffers consequences in her personal and societal life. She is subject to humiliation through demeaning questions regarding her consensual sexual activities.

159. Section 497 makes married women accountable for their exercise of agency and autonomy in intimate sexual matters, which are inherently private. It denies married women respect and impacts their sense of self-worth by bringing such private matters into the public domain before a criminal court. It renders the most intimate details of their life a matter of interrogation and penal scrutiny, perpetuates gendered notions of chastity and purity historically expected of married women.

160. The Constitutional Court of South Africa has recognized how criminal trials for adultery violate the right to privacy of the parties involved. In ***DE v. RH,*** [2015] ZACC 18, the Court held that,

"*These rights, including right to privacy do not necessarily weigh less just because the two have committed adultery."* [See para 53]

"*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"."* [See para 54]

"*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." [See para 54]

XIII. Section 497 has a chilling effect on the autonomy and social conduct of married women

161. Section 497 has a chilling effect on married women, as their interactions, and conduct with other men, comes under the gaze and scrutiny of the husband, who has the ability, under the law, to prosecute any male friend/partner for adultery.
162. Section 497 enables husbands to perpetuate gendered notions of how a 'good wife' must behave. The married woman is under the constant scrutiny of her husband, which may compel her to retreat from social spaces and inhibit interactions with persons of the opposite gender. This scenario is fairly common in India, especially in conservative towns and villages.
163. This Hon'ble Court in ***Shafin Jahan*** has highlighted that, "*Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals, which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom."* [See para 95]
164. Section 497 impedes the ability of married women to enjoy fundamental rights including the right to express their sexual personality, the right to participate in intimate sexual acts without interference from the State, the right of privacy to conduct sexual relations, and the right to conduct themselves in society with dignity.
165. Thus, Section 497 violates the right to privacy, dignity and autonomy and therefore violates Article 21 of the Constitution of India.

XIV. SECTION 497, IPC FAILS THE TEST OF SUBSTANTIVE DUE PROCESS:

166. Article 14 has been held to animate the content of Article 21, interpreting 'procedure established by law' to mean fair, just and reasonable' procedure. The quality of reasonableness does not attach only to the content of the procedure, which the law prescribes with reference to Article 21, but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable *procedure* under the law, and a law, which does, so may yet be susceptible to challenge on the ground that its *content* does not accord with the requirements of a valid law. A law is open to substantive challenge on the ground the content of the law violates fundamental rights (***Justice KS Puttaswamy (retd.) v. Union of India, (2017) 10 SCC 1, para. 291***).

167. A law which encroaches upon fundamental rights must meet the threefold requirement of (***Puttaswamy, para. 325***):

a. **Legality**, which postulates existence of valid law,
b. **Necessity**, defined in terms of legitimate State aims, and
c. **Proportionality**, which ensures there is a rational nexus between the objects and the means adopted to achieve them.

Legality:

168. Section 497, IPC is validly enacted law.

Necessity:

169. Necessity is determined in terms of a legitimate state aim, which "*ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness.*"(See ***Puttaswamy* @ para 310**)

Preservation of marriage

170. According to the Respondent, section 497 seeks to preserve the "institution and sanctity of marriage". The claim, if accepted, implies that section 497 is not concerned with the actual relationship between the parties to the marriage but by the 'institution' of marriage. In ***Independent Thought v. Union of India, 2017 SCC Online SC 1222 @ para 94,*** this Hon'ble Court held that*, "Marriage is not*

institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable".

171. When the law itself allows parties to end the marriage by means of divorce, the legitimacy of the aim assigned to section 497 by the Respondent becomes suspect.

172. Besides, criminal law is hardly the right means to protect the marriage or family from breaking down. It is upto the parties to a marriage to decide if and why they want to preserve their marriage and their marital bond. It is not for the State do this through the penal code, i.e. criminal prosecution, trial and punishment.

Remedy for 'injury' caused to the husband

173. The legislative intent, as disclosed in the Reports of the Law Commissioners was to provide the husband whose wife had sexual intercourse with a man, without his consent and connivance, a remedy for the injury he suffered.

174. This aim, which is informed by the notion that a wife is 'chattel or property' of the husband, is patently unconstitutional. A statute that recognises and vindicates such a 'wrong' cannot be held to be valid in a society governed by constitutional values which include equality between men and women. Recognition of this sexist aim of section 497 as legitimate, will only endorse noxious ideas of women's subordination and servility towards their husbands.

175. It is not the case that the person whose spouse engages in an adulterous act is not 'wronged'. Indeed, the law does recognise it as a matrimonial wrong - giving rise to a cause of action against the other spouse. The 'injury' suffered by a spouse, whose husband or wife has had sexual relations with another person is of a private nature. It is not a 'wrong' that the State can or ought to redress through the penal statute.

Deterrence

176. One of the key aims of criminal law is to 'deter' crimes or acts considered wrong. There is no data on the prevalence of adultery in Indian society and it is doubtful, whether such data will ever become available. Therefore, the claim that section 497 deters men from engaging in sexual relations with married women is dubious. It is highly doubtful that fear of law acts as a check on relationships that

individuals decide to have outside marriage. Since the reasons for adulterous relationships are personal and intimate; restraints, if any, are also in the personal realm. It is not for the State to invade or impose upon such personal decisions and spaces.

177. Besides, there is hardly any prosecution under section 497 IPC. The National Crimes Record Bureau ("NCRB"), which compiles the Crime in India Report annually, does not collect statistics on arrests and convictions under section 497, IPC. This is only indicates that the State is not really interested in this issue.

Immorality

178. Though adultery may be considered a moral wrong, it is not necessary that it be treated as a criminal offence. This Hon'ble Court has held that:-" *morality and criminality are not co-extensive*." [***S. Khushboo v. Kanniammal and Anr.*** **(2010) 5 SCC 600 at para 46].** The issue before this Hon'ble Court is not the morality of adultery, but the power of the State to criminalise it.

179. Admitting for the sake of argument that public morality does inform several sections of the IPC, Article 14 of the Constitution does not permit any differential standard for men [husband] and women [wife] in the legal condemnation of adultery.

180. Besides, in deciding the validity of a law under challenge, this Hon'ble Court is guided by 'constitutional morality' and not social or public morality. There is no reason to apply a different standard for adjudicating the vires of section 497, IPC.

181. In view of the above, the impugned law does not meet the test of necessity and legitimate state purpose, as laid down in ***Puttaswamy.***.

Necessity:

182. Borrowed from the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, this necessity has be shown to be legitimate in a liberal democratic society with equality has its core value. As evident from the legislative history of the law, the aim of Section 497, IPC, which is to treat a wife as 'chattel' or 'property' of the husband and

vindicate his 'claim' by prosecuting the man who has sex with her, without his consent. Such a law is an anathematic to equality and cannot be considered to be a legitimate aim and necessary in a democratic society. It is, therefore, unconstitutional.

152. As per the Respondent's stated aim, Section 497, IPC serves the purpose of protecting the '*sanctity of marriage as an institution'*. Marriage itself is no longer a 'sacrament' and can be terminated by either or both parties under matrimonial laws. Therefore, Section 497. IPC cannot be said to preserve the sanctity of something, which can be lawfully terminated under existing laws.
153. Besides, the stated aim of Section 497, IPC reveals a blatantly 'sexist' mindset in that it controls a woman and her sexuality and holds her [the 'wife'] responsible for preserving the 'sanctity of the marriage', while making the man ['husband'] immune.
154. This Hon'ble Court held at paragraph 94 in ***Independent Thought v. Union of India, 2017 SCC Online SC 1222****, "Marriage is not institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable".*
155. Section 497, IPC therefore does not serve any legitimate purpose and is therefore, *per se* unconstitutional.

Proportionality

156. The principle that law relating to restriction of fundamental rights can be tested on the anvil of proportionality has never been doubted in India (See ***Om Kumar v. Union of India,*** **(2001) 2 SCC 386,** para 35,).
157. This Hon'ble Court held that in the matter of infringement of fundamental rights, the Court has the obligation to scrutinize and test if Parliament has maintained a balance between adverse effects of the law on the rights, liberties and interests of persons, in comparison to the object sought to be achieved. Parliament enjoys the discretion of employing the appropriate measure to achieve the object. However, if the measure infringes rights excessively or not is the jurisdiction of the Court (paras 27-28, ***Om Kumar,*** paras 45-50, ***Teri Oats Estate v. UT of Chandigarh, (*****2004) 2 SCC 130**).

Strict Scrutiny in testing laws based on Sex Stereotypes:

158. This Hon'ble Court has adopted the test of strict scrutiny in respect of laws based on sex stereotyping to proceed on two levels: (1) the legislative interference shall be justifiable in principle, (2) the same should be proportionate in measure (See ***Anuj Garg*** paras 46-52).

159. The law under Section 497, IPC proceeds on the basis of sex stereotypes of male and female behaviour. The male stereotype encoded here is that married men are polygamous, and this unequal privilege sanctioned by law and socio-cultural norms is uncritically reproduced in the logic of the law in exempting the husband from prosecution under law. The male partner of the 'adulterous woman' is liable for prosecution because he has 'seduced' the wife and given cause of action to the husband to seek a remedy for loss of 'servitude' and 'sexual labour' of the wife; thereby the law reinforces the unequal privilege of the husband and simultaneously subjugates the woman's status as inferior to her husband's. The female stereotype adopted here is that the wife is 'vulnerable' of being 'seduced' by unmarried men, however, the law overlooks the woman is 'vulnerable' precisely because of the privileged status of the husband, in addition to the existing disparities in gender inequality.

160. As the law under Section 497, IPC only reinforces the gender inequality of the woman in the marital relationship by rendering her status as inferior to her husband's in law, this renders the legislative interference as unjustifiable in principle.

161. The "protection" in Section 497, IPC destroys the essence of the woman's right to equality before law as it relegates her to the status of the husband's property/chattel in effect, therefore, the legislative interference (itself unjustifiable) is disproportionate to the stated object in so far as it denies her full personhood in law.

162. Therefore, Section 497, IPC fails both levels of enquiry of review as per the test of strict scrutiny applied by this Hon'ble Court in ***Anuj Garg***.

163. In the matter of ***Park O-Mi (2014Hun-Ka4)*** the Supreme Court of South Korea held that it is inappropriate for criminal law to regulate faithfulness between spouses. It also held criminalization of sex between consenting adults to be a disproportionate response in so far as the negative consequences of placing restrictions on the rights to privacy and autonomy of persons, along with imprisonment on violation of law far outweighed any possible benefits in protecting the marriage without having regard to individual circumstances and beliefs of parties to a marital relationship.

164. Further this Hon'ble Court has held that Parliament shall adopt least restrictive measures to achieve the object of the law. (See ***Om Kumar***, para 35)

165. The applicable matrimonial laws of parties to a marriage are arguably least restrictive measures to achieve the stated object of the law – protection of the marital relationship. The availability of the remedy of divorce is sufficient in law to deter either spouse from committing adultery. Alternatively, if a spouse commits adultery, the aggrieved party has an adequate remedy in applicable matrimonial laws to seek judicial separation, divorce and/or maintenance.

166. Section 497, IPC on the other hand criminalizes sex between consenting adults in private, which is antithetical to values in a constitutional, democratic State as argued in the foregoing paragraphs.

167. Therefore, Section 497, IPC is not proportionate in law to the object it seeks to achieve, as it violates more fundamental rights by penal sanction for an object that is otherwise adequately remediable under civil, matrimonial laws.