

1st JAGANNATH MEMORIAL NATIONAL MOOT COURT COMPETITION, 2019

**IN THE HON'BLE SUPREME COURT OF INDIA
REVIEW JURISDICTION**

CURATIVE PETITION (Criminal) (/ 2019)

In

REVIEW PETITION (Criminal) (/ 2018)

In

WRIT PETITION (Criminal) (/ 2018)

IN THE MATTER OF

UNION OF INDIA.....APPELLANT

Versus

WOMEN FREEDOM UNION (WFU).....RESPONDENT

(UNDER ARTICLE 137 OF THE CONSTITUTION OF INDIA)

MEMORIAL ON BEHALF OF THE APPELLANT

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INDEX OF ABBREVIATIONS

➤ &	And
➤ AIR	All India Reporter
➤ All.	Allahabad High Court
➤ Art.	Article
➤ Bom.	Bombay High Court
➤ Anr.	Another
➤ CAL	Calcutta High Court
➤ CBI	Central Bureau of Investigation
➤ Cr.P.C.	Code of Criminal Procedure
➤ Cri. L. J. / Cr. L. J.	Criminal Law Journal
➤ DLR	Delhi Law Review
➤ Ed.	Edition
➤ HON'BLE	Honorable
➤ i.e.	That Is
➤ I.P.C.	Indian Penal Code
➤ ibid.	Ibidem
➤ id.	Idem
➤ ILR	Indian Law Reports
➤ Ors.	Others
➤ RAJ	Rajasthan
➤ SC	Supreme Court
➤ SCC	Supreme Court Cases
➤ SCJ	Supreme Court Journal
➤ SCR	Supreme Court Reporter
➤ SUPP.	Supplementary
➤ UDHR	Universal Declaration on Human Rights
➤ UOI	Union of India
➤ V.	Versus
➤ Vol.	Volume

THE INDEX OF AUTHORITIES

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➤ **LEGAL DATABASE**

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STATEMENT OF JURISDICTION

The appellant in the present case has approached the hon'ble Supreme Court of India to initiate the present appeal under article 137 of the constitution of India. The appellant most humbly and respectfully submits to the jurisdiction of the hon'ble Supreme Court in the present matter.

ARTICLE 137. REVIEW OF JUDGMENTS OR ORDERS BY THE SUPREME COURT

“Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.”

STATEMENT OF FACTS

❖ **SOCIAL STATUS OF WOMEN IN INDIA**

There is a moral notion in Indian society regarding ideal marriages. The past speaks that women were mistreated in various spheres of life across religions, regions and communities. Except for a few revolutionary activities, the situation hanged about more or less the same in the ancient, medieval, and early modern times. Crime against women like female foeticide, discrimination against women, rape, etc. is common. Regardless of existing stringent laws and safeguards to women, the Status of women has not elevated. The unfortunate part of gender inequality in our society is that the women too, through, continued socio-cultural conditioning, have accepted their subordinate position to men and they are also part and parcel of same patriarchal system.

❖ **WRIT PETITION BY WFU FOR DECRIMINALIZING ADULTERY**

Women Freedom Union (WFU), Non-Governmental Organization, raised its concern about discrimination against the women in so far as Sec. 497 of Indian Penal Code confers upon the husband only the right to prosecute the adultery and not women, filed the Writ Petition before Hon'ble Supreme Court of India challenging constitutional validity of Sec. 497 of the Indian Penal Code and Sec. 198 of the Code of Criminal Procedure being in violation of Article 14, 15 and 21 of Constitution of India.

❖ **DISMISSAL OF WRIT PETITION**

On 23.02.2018, Hon'ble Supreme Court passed its judgment dismissing the Writ Petition held that although right to be heard is a fundamental right but, law can't be held unconstitutional on such ground owing to express provision under law.

❖ **REVIEW PETITION FILED BY WFU**

Being aggrieved by the judgment passed by Hon'ble Supreme Court, WFU filed review Petition on the ground that said judgment experiences errors apparent on the face of the record as liberty envisaged under the Indian Constitution will be in peril.

The said review petition was allowed by the Hon'ble Supreme Court. The Court held that Sec. 497 of the Indian Penal Code and Sec. 198 of the Code of Criminal Procedure are unconstitutional.

❖ **ADULTERY DECLARED UNCONSTITUTIONAL**

The Court further decriminalized the adultery observing that “*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.*”

❖ **CURATIVE PETITION FILED BY UNION OF INDIA**

Being aggrieved by the judgment passed by the Hon'ble Supreme Court in a review petition, the Union of India has preferred Curative Petition. The some of the grounds raised by the Union of India are as follows:

- That Sec. 497 is valid on the ground of affirmative action.
- All discriminations in favor of women are saved by Article 15 (3), and hence were exempted from punishment.
- That Sec. 497 does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional.
- The sanctity of family life and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law.
- It was finally suggested that if this Court finds any part of this Sec. violative of the Constitutional provisions, the Court should read down that part, in so far as it is violative of the Constitution but retain the provision.
- The main purpose of enacting Sec. 497, I.P.C. is to curb crime by way of deterrence, but declaring Sec. 497 as unconstitutional by Apex Court of the country, will not only promote deceitful and immoral activity between man and woman but will also create chaos in society.

STATEMENT OF ISSUES

1. **WHETHER THE CURATIVE PETITION IS MAINTAINABLE?**

2. **WHETHER SEC. 497, I.P.C. PROTECTS THE SANCTITY OF MARRIAGE?**

3. **WHETHER THE EXEMPTION GRANTED TO MARRIED WOMEN UNDER SEC. 497, I.P.C. VIOLATES FUNDAMENTAL RIGHTS GUARANTEED UNDER THE INDIAN CONSTITUTION?**

4. **WHETHER SEC. 497, I.P.C. READ WITH SEC. 198 (2) Cr.P.C. IS CONSTITUTIONAL?**

SUMMARY OF ARGUMENTS

ISSUE 1. WHETHER THE CURATIVE PETITION IS MAINTAINABLE?

It is humbly submitted that the appealed curative petition filed under Article 137 is maintainable in this Hon'ble Court to cure gross miscarriage of justice and protect the principles of natural justice. The Apex court is fully empowered to adjudicate and review the case under its inherent power through a Curative petition to render complete justice to parties and it cannot be restricted in any manner. The Curative petition is filed as the final order of the Court has overlooked the results of such order on the society and the institution of marriage. It fulfills all the requirements for admission as a curative petition on the ground that it has error apparent on face of record as the decision clearly declines the express provisions of law and the decision would affect considerably the general public and is opposed to general public policy and specific legislation. Thus, for the sake of justice and public good, the curative petition filed is maintainable.

ISSUE 2. WHETHER SEC. 497, I.P.C. PROTECTS THE SANCTITY OF MARRIAGE?

It is humbly submitted before this honorable court that the object of Sec. 497, I.P.C. is to protect the sanctity of marriage. The aim of the Sec. is to deter crime which would lead to lesser divorce rates and infidelity cases ultimately laying the foundation of a happy marriage. It protects the marriage from intrusion by an outsider owing to the fact that the law penalizes the third party only keeping both the parties to marriage in safe circuit. Also, the law can't be evoked by the state itself but being a non-cognizable offence, action would be taken to this effect only after the complaint by the person so entitled under the Sec. 198 (2), Cr.P.C. is made. The intention behind criminalizing adultery is to punish the adulterer, to deter him from committing such a crime in future. Further the adverse fallout of decriminalizing adultery on society cannot be ignored especially in a society like India where the institution of marriage is regarded as a sacramental union. The provisions of adultery law are to permit husband and wife to make up their relation rather than to break it down.

ISSUE 3. WHETHER THE EXEMPTION GRANTED TO MARRIED WOMEN UNDER SEC. 497, I.P.C. VIOLATES FUNDAMENTAL RIGHTS GUARANTEED UNDER THE CONSTITUTION?

It is humbly submitted before this Hon'ble court that the exemption granted to married women is not violative of right to equality as it is expressly saved by Article 15 (3) of the Constitution of India. The exemption is made for women considering their socio-economic status in society and decrepit position of women. The notion of protective discrimination envisaged in Article 15 (3) of the Constitution of India aims at envisaging unequal treatment to unequal. The Sec. 497, I.P.C. provisions such exemption to women owing to her backward and poor socio-economic status of women in society.

ISSUE 4. WHETHER SEC. 497, I.P.C. READ WITH SEC. 198 (2) Cr.P.C. IS CONSTITUTIONAL?

It is humbly submitted before this honorable court that Sec. 497, I.P.C. along with Sec. 198 (2), Cr.P.C. is constitutional in every aspect. It does not discriminate among equal people but creates differential segregation for different class of persons, which is constitutionally saved under Article 15 (3) of the Constitution, which allows making of special provisions for women. Not only did the Constitution specifically allow making of special provisions for women, but it on the same line also guides the state to do so. The provisions under both the Sections are made keeping in view the conditions prevalent in India itself which can't be compared with the contemporary socio-economic situation in any other country. By taking both the sections together, it can be conclusively inferred that the Sections do no inequity with both husband and wife as wife are exempted to be treated as an abettor similarly the right to prosecute has been given to husband only and that too only against the third party and not his wife, in this way it accords even handed justice to the parties. Further the honorable court may humbly consider amending the part of the respective Sections as far as it deems them unconstitutional but, retaining the law itself as repealing of the law would have probably far reaching negative effects on the society.

ARGUMENTS ADVANCED

ISSUE 1: WHETHER THE PRESENT CURATIVE PETITION IS MAINTAINABLE?

It is humbly submitted before the Hon'ble Supreme Court that the curative petition filed under Article 137 is maintainable in the court of justice to cure gross miscarriage of justice and protect the principles of natural justice.

1.1 THE SUPREME COURT HAS JURISDICTION TO ADJUDICATE CURATIVE PETITION

It is humbly submitted that a curative petition seeking review of the decision which has become final after dismissal of a review petition can be filed under Art. 137 of the Indian Constitution.¹ Order XLVIII of the Supreme Court Rules states that after the dismissal of a case in exercise of review jurisdiction under Art. 137 of the Constitution, by way of circulation, a curative petition can be filed under the inherent jurisdiction of the Court to prevent abuse of its process and cure gross miscarriage of justice,² in any cause or matter.³ It can be either a civil petition or a criminal petition.⁴

Also, under Art. 142 of the Constitution of India, the Supreme Court is vested with extraordinary jurisdiction to pass any decree or order as is necessary to do complete justice. Art. 142 (1) contains no limitation regarding the causes or the circumstances in which the power can be exercised nor does it lay down any condition to be satisfied before such power is exercised.⁵ The exercise of the power is completely to the discretion of the highest court.⁶

An aggrieved person might be provided with an opportunity and may request the Supreme Court to reconsider its judgment to cure gross miscarriage of justice and violation of principles of

¹ *Rupa Ashok Hurra v. Ashok Hurra*, JT (2002) 3 SC 609; (2002) 4 SCC 388.

² *Harbans Singh v. State of Uttar Pradesh*, (1982) 2 SCC 101; *Supreme Court bar Association v. UOI*, (1998) 4 SCC 409; *M.S. Ahlawat v. State of Haryana & Anr.*, 2000 1 SCC 270.

³ *Swati Verma v. Union of India*, AIR 2001 SC 581; *Delhi Electric Supply Undertaking v. Basanti Devi*, AIR 2000 SC 43,49; (1999) 8 SCC 229.

⁴ *The Supreme Court Rules, Order XLVIII, Rule 6 (1966)*.

⁵ *Dayaram v. Sudhir Batham*, (2012) 1 SCC 333 (357); (2011) 11 SCALE 448; *Re, Vinay Chandra Mishra*, (1995) 2 SCC 621.

⁶ *Ibid.*

natural justice, even after the final verdict of the Supreme Court and dismissal of review petition because then it would render the party helpless leaving no recourse to any other forum.⁷

In *Naz Foundation Trust v. Suresh Kumar Koushal*,⁸ where the Supreme Court found the issues sought to be raised of ‘considerable importance’ and ‘public interest’ and some of them carrying ‘constitutional dimensions’, the matter was referred to a five-judge bench in a curative petition.

It is important to note that the grounds to move a curative petition are not exhaustive. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.⁹

Hence, it is clear that even after a review petition filed after Art. 137 is rejected by the court that may not be the end of the road. The Apex court is fully empowered to adjudicate and review the case under its inherent power through a Curative petition to render complete justice to parties and it cannot be restricted in any manner.

1.2 TO PREVENT GROSS MISCARRIAGE OF JUSTICE

It is humbly submitted before this Hon’ble Court that the Curative Petition is filed to prevent gross miscarriage of justice by the order of the Court in the review petition as it is a matter having far reaching impact upon the institution of family and society. Prior to this review order, the Supreme Court had righteously rejected various pleas for decriminalization of Adultery laws in India.

The court in *Suthenthiraraja v. State*,¹⁰ has observed:

“.....to maintain a review petition it has to be shown that there has been miscarriage of justice. Of course, the expression ‘miscarriage of justice’ is all embracing.”

It is humbly submitted that the final order of the Court has overlooked the results of such order on the society and it is contended that abuse of court process has been rampantly used as a

⁷ Dhruv Tiwari & Anand Vardhan Narayan, “Re-Coloring the Colored Walls of the Constitution: A Futile Judicial Exercise of Creating the Curative Petition”, *IJLPP* 2.2E.

⁸ *Naz Foundation Trust v. Suresh Kumar Koushal*, (2016) 7 SCC 485; *Navneet Kaur v. State*, (2014) 7 SCC 264.

⁹ *Rupa Ashok Hurra v. Ashok Hurra*, JT (2002) 3 SC 609; (2002) 4 SCC 388.

¹⁰ *Suthenthiraraja v. State*, AIR 1999 SC 3700; (1999) 9 SCC 323.

weapon by the bad elements for their own vested interest in weakening of the institution of marriage and encouraging the morale of those engaged in such offence.

Firstly, the court in its judgment stated that since Sec. 497 only criminalizes the man committing adultery, not the woman who has consensual sex with him. Thus, it is not gender-neutral. However, it is not true as there are various provisions under I.P.C. such as rape and cruelty which only punishes man and treats women as victim. The constitution specifically provides provisions for both protective discrimination and affirmative action.¹¹

In *criminal justice society of India v. union of India & ors*,¹² a petition was filed in the Supreme Court challenging the constitutional validity of the provisions of the existing law on rape, on the ground that it was not gender-neutral. The Supreme Court dismissed the petition on the ground that provisions like rape are women protective and it is for the parliament to look into it.

Secondly, the court held that the provision is arbitrary and violative of Art. 14. However, as a matter of fact, it is saved by Art. 15 (3) of the Constitution which in earlier cases, dealing with the constitutionality of the said provision, the courts have held to be saved by Art. 15 (3) of the constitution.¹³ Thus, the judgment is given per incuriam.¹⁴ Further, the court took the view that the term “state” under Art. 15 (3) does not include laws made before the commencement of the constitution and since adultery was enacted before the commencement of the constitution, it does not come within the meaning of “state” made law, so as to be protected by Art. 15 (3). It is contended that this view is erroneous because both pre and post constitutional laws are manifestations of the will of the people of India through the parliament and are presumed to be constitutional. It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favor of the former construction.¹⁵ For the same reason,

¹¹ *Andra Pradesh Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1: (2009) 5 JT 563.

¹² *Criminal Justice Society of India v. Union of India & Ors*, 2nd August, 2010.

¹³ *Yusuf Abdul Aziz v. State*, AIR 1954 SC 321.

¹⁴ *M.C. of Delhi v. Gurnam Kaur*, AIR 1989 SC 38: (1989) 1 SCC 101; *Pb.L.D. & R. Corpn. Ltd. v. Presiding Officer, Labour Court*, (1990) 3 SCC 682; *Rattiram v. state of M. P.*, AIR 2012 SC 1485; *State of Rajasthan v. J.N. Chaturbedi*, AIR 2010 SC 157.

¹⁵ *Kedar Nath Singh v. The State of Bihar*, AIR 1962 SC 955.

the court should, if possible make such a progressive or narrow construction of the impugned statute as would sustain its constitutionality.¹⁶

Thirdly, the court while placing reliance on its judgment in *Navtej Singh Johar v Union of India*,¹⁷ states that a woman, whether married or not, has a right to have sex with whomever she wishes as that is part of her right to dignity and privacy. However, there is a vital distinction between the Sec. 377 case and the Sec. 497 case. No one is directly affected if two persons are having gay sex, whereas in adultery, the husband will be outraged. The court itself in the same judgment recognized this as adultery is still a ground for punishment for abetment of suicide. Moreover, the contentions that after marriage women do not lose the right to have sex with whomever she wishes is wrong as marriage requires mutual fidelity and exclusivity. When one voluntarily enters into a marriage they forgo such right. It is held that grounds in one case cannot be the reasons for review of other judgment.¹⁸

Fourthly, the court held that Adultery cannot be a crime, though it may be a ground for divorce. It is humbly submitted that it is for the legislature to decide what will be a crime as the legislature is endowed with the task of making and repealing of laws considering the needs of society. The duty of the court is to interpret and deal with the constitutionality of the provision and not to decide whether an act should be considered criminal or not.

Moreover, it is a non-cognizable offence thus, state does not interfere unless a petition is brought in the court by the aggrieved party. This has been noted by the court however the same is not even considered by the court when the court held that it violated the right to privacy under Art. 21. Any criminal offence is one against the society at large casting an onerous responsibility on the state, as the guardian and purveyor of human rights and protector of law to discharge its sacrosanct role responsibly and committedly, always accountable to the law-abiding citizenry for any lapse.¹⁹ The Court, in *R. Rajagopal* case,²⁰ held that there would be no violation of the right

¹⁶ *Sunil Batra v. Delhi Admn.*, AIR 1978 SC 1675 (Para 38): (1978) 4 SCC 494.

¹⁷ *Navtej Singh Johar v Union of India*, Writ Petition (Criminal) No. 76 of 2016.

¹⁸ *State of Gujarat v. R.A. Mehta*, AIR 2013 SC 1963; *Dwarikesh Sugar Industries Ltd. v. Prem Heavy engineering Works (Pvt.)*, AIR 1997 SC 2477; *Markio Tado v. Takam Sorang*, AIR 2005 SC 446.

¹⁹ *Pooja pal v. UOI*, (2016) 3 SCC 135: AIR 2016 SC 1345.

²⁰ *R. Rajagopal v. State of T.N.*, 1995 AIR 265: 1994 SCC (6) 632.

to privacy if the person concerned “*voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.*” It is well settled that the right to privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others.²¹

Furthermore, the court while considering the constitutionality of Sec. 198 (2) Cr.P.C. has made reference to the judgment of the court in *V. Revathi v. Union of India and Ors.*,²² where the court has held that Sec. 497, I.P.C. and Sec. 198, Cr.P.C. acts as a “legislative package” has been mentioned but no reason or rational has been given to show why the observation of the court in that case was erroneous. The object behind the *theory of precedents* is consistency, which is said to be the cornerstone of the administration of justice. Adherence to the concept of *Stare Decises* is the *sine qua non* of judicial discipline.²³

Lastly, the court places heavy reliance to justify decriminalization of adultery on the decision of the supreme court of Namibia which decriminalized adultery in which their lordship stated that since there is no quantifiable data to show that adultery as a crime has deterrence effect is wrong as there is enough data to prove the same.²⁴

In *Commissioner of Sales Tax v. Pine Chemicals Ltd.*,²⁵ the court held that if reasoning in the judgment is at variance with the clear and simple language in a Statute, the judgment is said to suffer from a manifest error of law, an error apparent on the face of the record and is liable to be rectified.

The Supreme Court has expressed its view on this question as follows:²⁶

“Enlightened litigative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such fundamental importance

²¹ *Mr. X v. Hospital Z*, AIR 1999 SC 495; *Mr. X v. Hospital Z*, AIR 2003 SC 664.

²² *V. Revathi v. Union of India and Ors.*, 1988 AIR 835: 1988 SCC (2) 72.

²³ *Harminder Kaur v. Union of India*, AIR 2009 SC 287.

²⁴ Refer to issue 2 of the memorial

²⁵ *Commissioner of Sales Tax v. Pine Chemicals Ltd.*, (1995)1 SCC 58.

²⁶ *Ganga Sugar Corporation v. State of Uttar Pradesh*, AIR 1980 SC 286, 294: (1980)1 SCC 223; *R. v. Commonwealth Court of Conciliation and Arbitration*, (1914)18 CLR 54.

to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather to be consistently wrong.”

It is thereby submitted that the presented petition fulfills all the requirements for admission of curative petition on the ground of error apparent on face of record and the decision would affect considerably the general public and is opposed to general public policy and specific legislation. Thus, for the sake of justice and public good, the curative petition filed is maintainable.

ISSUE 2. WHETHER SEC. 497, I.P.C. PROTECTS THE SANCTITY OF MARRIAGE?

It is humbly submitted before this hon'ble court that the said provision protects the sanctity of marriage. Decriminalizing adultery will pave way for rise in divorce rates and cases of marital infidelity, the decriminalization of adultery will critically endanger the institution of marriage.

2.1 SECTION 497 I.P.C. ACTS AS AN EFFECTIVE DETERRENCE

It is submitted that laws are made to deter crime and not only to punish it. Criminal law everywhere in the world serves as a guardian of the moral principles of society, protecting a society's historical roots while leading it towards a progressive social order. The Deterrence theory, posits that legal sanctions deter citizens from engaging in criminal activity. This theory, grounded in the rational actor approach, is based on the notion that people choose whether or not to commit a crime by weighing the potential benefits of getting away with it against the potential consequences of getting caught.²⁷

Indian criminal law explicitly criminalizes acts that deceive a person. However, it is surprising that the criminalization of an act that breaches the sanctity of a pure social institution such as marriage, by way of deceit and lies, is facing challenges in the present case. Sec. 497 deals with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit. 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

²⁷ Becker G. S., “*Crime and Punishment: An Economic Approach.*” (*J. Polit. Econ.*1968); Dickerson S. S., Mycek P.J., Zaldivar F., “*Negative Social Evaluation, but not mere Social Presence, Elicits Cortisol Responses to a Laboratory Stressor Task.*” (*Health Psychol.* 27 116–121. 10.1037/0278-6133.27.1.116) (2008).

relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman.²⁸

The intention behind criminalizing adultery is to punish the adulterer; to deter him from committing such a crime in future and to set an example that others also, who will commit the crime will be punished likewise. If it is turned merely into a civil offence, adultery will only be a ground to seek divorce and will provide a free license to prospective offenders to breach in the sanctity of marriage.²⁹

As far as its effect is concerned, Adultery is the biggest reason for divorce around the world. It is important to note here that the National Crime Records Bureau doesn't even maintain a data base as instances of it are negligible. Consequently, In India, the divorce rate is less than 1 per cent. Out of 1000 marriages, only 13 result in divorce.³⁰

If we were to bring down a single brick, the whole house would collapse. A welfare-oriented and inclusive country like India, while demanding that a marriage be registered in order to acknowledge and protect the rights of the parties involved, cannot do away with a crime which undermines the same legally recognized institution. The law of Adultery works as a shield to deter crime and not as a sword to punish offenders, even in punishing offence the law clearly takes cognizance to preserve marriage and parties to it and punishes the outsider.

2.2 DECRIMINALIZING ADULTERY WILL DESTROY THE INSTITUTION OF MARRIAGE

It is further submitted that the judgment of the court in *Joseph Shine v. Union of India*,³¹ decriminalizing adultery is bound to have a far-reaching impact upon marriages in India, the adverse fallout cannot be ignored.

²⁸ *V. Revathi v. Union of India & Ors* 1988 AIR 835, 1988 SCR (3) 73.

²⁹ *Smt. Sowmithri Vishnu v. Union of India & Anr*, 1985 AIR 1618, 1985 SCR SUPP. (1) 741.

³⁰ <http://www.divorcerate.org/divorce-rate-in-india.html>.

³¹ *Joseph Shine v. Union of India*, 2018 SCC SC 1676.

In India, the Institution of marriage is regarded as a sacramental union.³² It is the basis of society. It is a contract but it is also a sacred covenant.³³ The main aim of the institution of marriage is to protect the society from foulness and un-chastity.³⁴ Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.³⁵ Entering into marriage therefore is to enter into a relationship that has public significance as well.³⁶

In the light of such importance being attributed to marriage, decriminalizing adultery will pave way for rise in divorce rates and cases of marital infidelity, the decriminalization of adultery will critically endanger the institution of marriage.

The examples of the disastrous effect of decriminalizing adultery can be seen around the world. According to a study published by the National Institutes of Health,³⁷ Adultery is one of the most cited reasons for divorce. According to the American Psychological Association (A.P.A.), infidelity in the United States accounted for 20-40 percent of divorces.³⁸ Divorce is also a common phenomenon in Europe.³⁹ The divorce-marriage ratio in the US and UK is very high at

³² *Tikait Munmohinti v. Basant Kumar*, ILR 28 CAL. 758.

³³ Aqil Ahmad, Prof. Iqbal Ali Khan (ed.), *Text Book of Mohammedan Law* (Central law Agency, 15th Edition, 1992).

³⁴ Ameer Ali, *Mohammedan Law*, p.97 (Vol. 2, 7th Edition).

³⁵ *Indira Sarma v. V.K.V. Sarma*, AIR 2014 SC 309.

³⁶ O'regan, J., in *Dawood and another v. Minister of Home Affairs and others*, 2000 (3) SA 936 (CC).

³⁷ S. Scott, G. K. Rhodes, S.M. Stanley, E.S. Allen, H.J. Markman, "Reasons for divorce and recollections of premarital intervention: implications for improving relationship education" (Deptt. of Psychology, University of Denver, PMID: 24818068).

³⁸ Rebeca A. Marín, David C. Atkins, Andrew Christensen, "Infidelity and Behavioral Couple Therapy: Relationship outcomes over 5 Years Following Therapy" (Couple and Family Psychology: Research and Practice, American Psychological Association 2014, Vol. 3, No. 1, 1–12).

³⁹ P. Feijten & Maarten van ham, "Neighborhood Change ... Reason to Leave?" (University of St. Andrews, longitudinal studies centre: Scotland, School of Geography and Geosciences).

46% and 39 % respectively.⁴⁰ The institution of marriage has so much deteriorated that more children were born out of wedlock in France than to married parents for the first time in 2006.⁴¹

A study which reviewed over 130 studies measuring how marital status affects personal well-being, it shows that married men and women are generally happier and less stressed than the unmarried.⁴² Moreover, a 2015 study,⁴³ updated and confirmed the findings in a 2002 study in *Clinical Child and Family Psychology Review*,⁴⁴ discuss a variety of health consequences for children of divorced parents. Studies have claimed that people who have been in divorced families have higher rates of alcoholism and other substance abuse compared to those who have never been divorced. Researchers have also shown that children of divorced or separated parents: Have higher rates of clinical depression: Family disruption and low socioeconomic status in early childhood increase the long-term risk for major depression,⁴⁵ Seek formal psychiatric care at higher rates,⁴⁶ In the case of men, are more likely to commit suicide and have lower life expectancies.⁴⁷

It is thus clear adultery not only run the risk of fostering extra-marital affairs, the emergence of divorce as the way out will catalyze the break-up of marriages, leaving little children in the lurch.

⁴⁰ Statistics: 'National Marriage and divorce rate trends' (CDC: Centre for Disease control and Prevention, NCHS); Euro Stats Report: "Marriage and Divorce Rate."

⁴¹ Marsha Garrison, "The Decline of Formal Marriage: Inevitable or Reversible?" (*Family Law Quarterly*, Vol. 41, No.3, 2007).

⁴² Coombs, Robert H., "Marital Status and Personal Well-Being: A Literature Review" (*Family Relations*, 40 (1): 97–102; Doi 10.2307/585665; Jstor 585665, 1991).

⁴³ Thuen, F.Breivik, K. Wold, B. & Ulvester G., "Growing up with one or both parents: The effects on physical health and health-related behavior through Adolescence and into early Adulthood." (*Journal of Divorce & Remarriage*, Doi: 10.1080/10502556.2015.1058659, 2015).

⁴⁴ Troxel, Wm; Ka Matthews "What Are the Costs of Marital Conflict and Dissolution to Children's Physical Health?" (PMID 15119687).

⁴⁵ Gilman, Stephen E.; Ichiro Kawachi; Garrett M. Fitzmaurice; Stephen L. Buka (May 2003), "Family Disruption in Childhood and Risk of Adult Depression", *American Journal of Psychiatry*. 160(5): 939–946. doi:10.1176/appi.ajp.160.5.939. PMID 12727699.

⁴⁶ Marks, Nadine F.; James D. Lambert (1998). "Marital Status Continuity and Change among Young and Midlife Adults: Longitudinal Effects on Psychological Well-being". *Journal of Family Issues*. 19 (6): 652–686. Doi: 10.1177/019251398019006001; Bloom, B. R.; S. W. White; S. J. Asher (1979). "Marital Disruption as a Stressful Life Event". *Divorce and Separation: Context, Causes and Consequences*. New York: Basic Books.

⁴⁷ Kposawa, Augustine (2003). "Divorce and suicide risk". *Journal of Epidemiology and Community Health*. 57 (12): 993. doi:10.1136/jech.57.12.993. PMC 1732362 . PMID 14652268.

2.3 THE PROVISION IS TO PROMOTE GOODWILL BETWEEN HUSBAND AND WIFE AND PERMIT THEM TO MAKE UP RATHER THAN TO DRAG EACH OTHER TO THE COURT

According to the Satpatha Brahmana, “*the wife is verily the half of the husband*”.⁴⁸ Man is only half, not complete until he marries. The Taittiriya Samhita is to the same effect, “*half is she of the husband that is wife*”.⁴⁹ Manu further said, “*Once a man and a woman are united in marriage, they must see that there are no differences between them, and that they remain faithful to each other.*”⁵⁰ From the notion of unity of personality of husband and the wife, mutual fidelity between husband and wife is the highest dharma. The importance of marriage is evident from the pronouncement of the High Court of Madras which states that marriage is the last of the ten sacraments enjoyed by the Hindu religion purifying the body from inherited taints.⁵¹

The same philosophy has been incorporated under Sec. 9 of the Hindu Marriage Act, 1955 which provide for the restitution of conjugal rights. In *Smt. Havinder Kaur v. Harmande Singh*,⁵² the court did not accept the earlier view and rightly observed that:

“The object of restitution decree was to bring about cohabitation between the estranged parties so that they could live together in the matrimonial home in amity. The remedy of restitution aimed at cohabitation and consortium, the restitution decree does not enforce sexual intercourse. It was a fallacy to hold that the restitution of conjugal rights constituted the starkest form of governmental invasion of mutual privacy.”

The same view was reiterated by the SC in *Saroj Rani v. Sudarshan Kumar*.⁵³

In V. Revathi v. Union of India & Ors,⁵⁴ The court has rightly observed:

“The philosophy underlying the scheme of these provisions appears to be that as between the husband and the wife social good will be promoted by permitting them to 'make up' or 'break up' the matrimonial tie rather than to drag each other to the criminal court. They

⁴⁸ *Satapatha Brahmana V. 16, 10.*

⁴⁹ *Taittiriya Samhita, III, 1, 2, 57.*

⁵⁰ *Manu, IX, 101-102.*

⁵¹ *A. v. B.*, AIR 1925 Bom. 486; *Gokalkrishna v. Venkataram*, (1914) 37 Mad. 273 FB; *Indra Sarma v. K. V. Sarma*, (2013) 15 SCC 755: 2013 (14) SCALE 448.

⁵² *B. L. Syal v. Smt. Ram Syal*, AIR 1968 Punj. 489.

⁵³ *Saroj Rani v. Sudarshan Kumar*, AIR 1984 SC 1562; *B. L. Syal v. Smt. Ram Syal*, AIR 1968 Punj. 489.

⁵⁴ *V. Revathi v. Union of India & Ors*, AIR 1988 SC 835.

can either condone the offence in a spirit of 'forgive and forget' and live together or separate by approaching a matrimonial court and snapping the matrimonial tie by securing divorce. They are not enabled to send each other to jail. Perhaps it is as well that the children (if any) are saved from the trauma of one of their parents being jailed at the instance of the other parent."

The offence of adultery, as defined in S. 497 is considered by the Legislature as an offence against the sanctity of the matrimonial home. Therefore, those men who defile that sanctity are brought within the net of the law.

ISSUE 3: WHETHER THE EXEMPTION GRANTED TO MARRIED WOMEN UNDER SEC. 497, I.P.C. VIOLATES FUNDAMENTAL RIGHTS GUARANTEED UNDER THE INDIAN CONSTITUTION?

It is humbly submitted before the Hon'ble SC that the exemption granted to married women from prosecution under Sec. 497 of the I.P.C. is not violative of the fundamental rights guaranteed under constitution of India and is protected by Art. 15 (3) of the constitution of India.

3.1 EXEMPTION GRANTED TO WOMEN UNDER SEC. 497, I.P.C. IS PROTECTED UNDER ART. 15 (3)

It is humbly submitted that by virtue of Art. 15 (3) of the Indian constitution, the state is permitted, despite Art. 15 (1), to make any special provision for women, thus carving out a permissible departure from the rigour of Art. 15 (1).

Under Sec. 497 of I.P.C. the offence of adultery can be committed only by a male and not by a female who cannot be punished as an abettor. As it makes a special provision for women, it is saved by Art. 15 (3) which states:

*"Nothing in this Article shall prevent the State from making any special provision for women and children."*⁵⁵

⁵⁵ *The Constitution of India, Article 15 (3).*

Art. 15 (3) recognises the fact that the women in India have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of Art. 15 (3) is to eliminate the socio-economic backwardness of women and empower them in such a manner as to bring about effective equality between man and woman. The object of Art. 15 (3) is to strengthen and improve the status of women. Art. 15 (3) thus relieves the status from the bondage of Art. 15 (1) and enables it to make special provisions to accord socio-economic equality to women.⁵⁶

The notion of protective discrimination aims at unequal treatment of unequal, i.e. those who were the victim of the man-made asperities for centuries together now need to be compensated.⁵⁷ The meaning of Art. 15 (3) of the Constitution would be that a special provision in favor of women would be valid even if it is an implied discrimination against men.⁵⁸

In *Government of A. P. v. P. B. Vijayakumar*,⁵⁹ The court observed:

“The insertion of Clause (3) of Art. 15 in relation to women is recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Art. 15 (3) is placed in Art. 15. Its object is to strengthen and improve the status of women...”

In *Independent Thought v Union of India*,⁶⁰ Justice Madan B Lokur, speaking for a two judge Bench of this Court, adverted to the drafting history of Art. 15 (3) and held thus:

“The response given by Dr. Ambedkar suggests that he certainly favored special provisions for women and children with a view to integrate them into society and to take them out of patriarchal control...What clearly emerges from this discussion is that Art. 9 (2) of the draft Constitution [now Art. 15 (3)] was intended to discriminate in favor of women and children – a form of affirmative action to their advantage.”

⁵⁶ “Directive Principles”, Chapter XXXIV.

⁵⁷ T.N. Kitchlu, “Scheduled Castes and the problem of Equality” (Ed. 1st 1972).

⁵⁸ *Dattatreya Motiram v. State of Bombay*, AIR 1953 Bombay 311.

⁵⁹ *Government of A.P. v. P. B. Vijayakumar*, AIR 1995 SC 1648; (1995) 4 SCC 520.

⁶⁰ *Independent Thought v. Union of India*, 2017 SCC SC 1222.

A law made to secure maternity relief to women workers, would not be violative of Art. 15 (1), but would be within the purview of Clause (3) of this Art. Sec. 125 of the Cr.P.C., 1974 (Sec. 488 of the Old Code), which requires the husband to maintain his wife and not vice versa, has been held not discriminatory, for it merely provides benefits and protection to women and children in certain circumstances.⁶¹

Likewise, Order 5, Rule 15 of Civil Procedure Code, 1908, which makes service of summon on the male members of the family, has been held not discriminatory and it is a special provision covered by Art. 15 (3).⁶² Likewise, Sec. 14 of the Hindu Succession Act, 1956, absolutely vesting the inherited property in women, which was earlier held by them as limited estates, has been held to be protected from attack under Art. 15 (3).⁶³

On the same note, Sec. 497, Cr.P.C. 1898, prohibited release of a person accused of a capital offence on bail except a woman or a child under 16 or a sick man. The provision has been held valid as it metes out a special treatment to women which is consistent with Art. 15 (3).⁶⁴

In *Hiral P Harsora v. Kusum Narottamdas Harsora*,⁶⁵ the SC has observed:

“Sex is a sound classification and although there can be no discrimination in general on that ground the constitution itself provides for special provision in the case of women and children by clause 3 of Art. 15. Art. 14 and 15 thus read together validate the last sentence of Sec. 497 of I.P.C., which prohibits the women from being punished as an abettor of the offence of adultery”.

Thus, Sec. 497, I.P.C. falling squarely within the ambit of Art. 15 (3), it cannot be struck down merely because it may amount to discrimination solely on the basis of sex.⁶⁶ Special Provision referred to in clause (3) of Art. 15 need not to be restricted to measure which are beneficial in the

⁶¹ *Savitaben Somabhai Bhatiya v. State of Gujarat*, (2005) 3 SCC 636.

⁶² *Ibid.*

⁶³ *Thota Sesharathamma v. Thota Manikyamma*, (1991) 4 SCC 312.

⁶⁴ *Mt. Choki v. State of Rajasthan*, AIR 1957 Rajasthan 10 (*This Provision Now is Section 437 Cr.P.C., 1973*); *Nirmal Kumar v. State of Rajasthan*, CRLJ 1582; *Shehat Ali v. State of Rajasthan*, 1992 CRLJ 1335.

⁶⁵ *Hiral P Harsora v. Kusum Narottamdas Harsora* (2016) 10 SCC 165: AIR 2016 SC 4774: (2016) 9 SCJ 204.

⁶⁶ *Shamsher Singh v. State of Punjab*, AIR 1970 P&H 372.

strict sense.⁶⁷ Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favor of the weaker or the one who is needy.⁶⁸

3.2 THE CONDITION OF WOMEN IN INDIAN SOCIETY IS NOT ELEVATED AND LAWS ARE NEEDED TO PROTECT WOMEN

It is submitted that it is no denying the fact that women in India have made a considerable progress since independence but yet they have to struggle against many handicaps and social evils in the male dominated society. In spite of India's status for regarding women as a goddess, women are mistreated in various spheres of life across religions, regions and communities.

The National Crime Records Bureau reveal that a crime against a woman is committed every three minutes, a woman is raped every 29 minutes, a dowry death occurs every 77 minutes, and one case of cruelty committed by either the husband or relative of the husband occurs every nine minutes.⁶⁹ As per Census 2011, the literacy rate at all India level was 72.98% and the literacy rate for females and males are 64.63% and 80.9% respectively. During the last decade, the highest improvement in literacy rate was observed for rural females (24%).⁷⁰ In the 16th Lok Sabha, 12% of the total members are women (64 out of 534).⁷¹ In 2015, the share of women judges in SC was 4% (1 out of 26) and it was 10% (54 out of 517) considering all High Courts in India.⁷² A study by Action Aid UK found that 80% of women in India had experienced sexual harassment ranging from unwanted comments, being groped or assaulted. Many incidents go unreported as the victims fear being shunned by their families.⁷³

In *Madhu Kishwar v. State of Bihar*,⁷⁴ this Court had stated that Indian women have suffered and are suffering discrimination in silence. And because of such discrimination and suffered status women needs to be protected by different legislations and provisions. Protective

⁶⁷ *Yusuf Abdul Aziz v. State*, AIR 1954 SC 321.

⁶⁸ *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201: AIR 2005 SC 1646.

⁶⁹ <http://ncrb.gov.in/statpublications/Cii/Cii2015/Files/Crimeinindia2015.Pdf>.

⁷⁰ "The World Factbook: India", Central Intelligence Agency.

⁷¹ <https://loksabha.nic.in/members/womenar.Aspx?Lsno=9&Tab=6>.

⁷² <https://www.sci.gov.in/chief-justice-judges>.

⁷³ Bhalla, Nita, "Almost 80 Percent of Indian Women Face Public Harassment in Cities - Survey" (23 May 2016).

⁷⁴ *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864: (1996) 5 SCC 125.

discrimination is a means of doing justice. The notion of protective discrimination aims at unequal treatment of unequal, i.e. those who were the victim of the man-made asperities for centuries together now need to be compensated.

Chagla, C.J., observed:⁷⁵

"What led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in Sec. 497, a position in law which takes a sympathetic and charitable view of the weakness of women in this country."

Consequently, the current status of women with respect to human development parameters, legal rights for women to life and freedom from violence, economic and social discrimination and their rights to equality and equity shows that a lot still remains to be done. It is necessary therefore, to protect women from prosecution under Sec. 497 I.P.C. for creating an enabling environment.

ISSUE 4. WHETHER SEC. 497, I.P.C. READ WITH SEC. 198 (2) Cr.P.C. IS CONSTITUTIONAL?

It is humbly submitted before the honorable Supreme court that this Sec. 497 I.P.C. along with Sec. 198 (2) Cr.P.C. is constitutional as the nature of Sec. 497 I.P.C. is under- inclusive, it selectively incriminates one group of people, or one nature of acts, but not other. But that by itself will not make them unconstitutional.

4.1 SEC. 497 OF I.P.C. ALONG WITH SEC. 198 (2) OF Cr.P.C. DOES NOT VIOLATE ART. 14, 15 AND 21 OF THE CONSTITUTION OF INDIA

It is submitted that Art. 14 prescribes equality before law, but the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality before the law may result in injustice.⁷⁶

⁷⁵ *Yusuf Abdul Aziz v. State*, at p. 472, Para 5.

⁷⁶ *Chiranjeet Lal v. UOI*, AIR 1951 SC 41: 1950 SCR 869.

The underlying principle of Art. 14 of the Constitution of India is that, “*Like should be treated alike and not that unlike should be treated alike*”,⁷⁷ among equals law should be equal and should be equally administered.⁷⁸ Thus, the guarantee against the denial of equal protection of law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances or conditions.⁷⁹ Equality secured under Art. 14 is not absolute and unmitigated. It is a comparative concept,⁸⁰ and not a human impossibility. It is not necessary as a duty of legislature to make Art. 14 applicable to all person in rem.

All person are not equal by their nature, attainment or circumstances. The varying needs of different classes of person often require separate treatment.⁸¹ Thus, application of the same laws uniformly to all, under different state of affair, may result in violation of the principle of equality.⁸² The legislature is requires to deal with diverse problem resulting from an infinite variety of human relation. It must therefore have a power to make laws dealing with particular problems. *As a consequence, the legislature must have the power to make laws distinguishing and classifying person and things upon which its laws are to operate.*⁸³

Accordingly, to apply the principle of equality in a practical manner, the courts have evolved the principle that if the law in question is based on rational classification, it is not regarded as discriminatory.⁸⁴ Art. 14 forbids class legislation, it does not forbid reasonable classification of persons, object and transactions by legislature for the purpose of achieving specific ends.⁸⁵

When a person seeks to impeach the validity of a law on the ground that it offends Art. 14, the onus is on him to plead and prove the infirmity.⁸⁶

⁷⁷ Ivor Jeanings, “*The Law and the Constitution*”, p.94 (University of London Press, London, 1963).

⁷⁸ V.N. Shukla, “*Constitution of India*”, p.30 (Eastern Book Co., Lucknow, 9th Edition,1996); *Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College*, 1990 (3) SCC 130.

⁷⁹ *Chiranjit Lal v. UOI*, AIR 1951 SC 41: 1950 SCR 869.

⁸⁰ *I.R. Coelho v. Anwar Ali Sarkar*, AIR 1952 SC 75.

⁸¹ *Chiranjit Lal Chaudhary v. Union of India*, AIR 1951 SC 41.

⁸² *Municipal Committee, Patiala v. Model Town Resident Association*, AIR 2007 SC 2844.

⁸³ *R. Kaaruppan v. Government of India*, AIR 2008 MAD 264.

⁸⁴ *Ashutosh Gupta v. State of Rajasthan*, (2002) 4 SCC 34; K. Uma Devi, “*Women’s Equality in India: A Myth or Reality?*” p. 33-34 (Discovery Publishing House, New Delhi, 1st edition, 2000).

⁸⁵ *S. Seshachalam v. Bar Council of T.N.*, (2014) 16 SCC 72: 2014 (14) SCALE 79.

⁸⁶ *Ratna Gas and Power Private Limited v. Rds. Projects Limited*, AIR 2013 SC 200: (2013) 1 SCC 524; *T Venkateswarulusaran v. T.T. Devashthanam*, (2009) 1 SCC 546 (574): AIR 2009 SC 763: (2009) 2 MLJ 288; *Kumar v. Regional Manager, Karur Vysya Bank*, (2010) 6 MAD LJ 47.

In *Ameerunnisa's Case*,⁸⁷ the Supreme Court held that legislature has to deal with diverse problems arising out of an infinite variety of human relations must necessarily have the power of making special laws to attain particular objects. Hence, Art. 14 recognizes “women” as a class. The court declared that women as a class were different from men as a class.

In *E.V. Chinnaiah v. State of Andhra Pradesh*,⁸⁸ A legislation may not be amenable to challenge on ground of violation of Art. 14, when it is intended to give effect to principles specified under Art. 15 and 16 or where the differentiation is not unreasonable or arbitrary, but when a classification is made which is per se violative of constitutional provision, the same cannot be upheld.

It must be kept in mind that India is still a semi- feudal country, and not a modern country like USA and the European countries etc.; we cannot go by mere abstract notion of women’s dignity, right to free sex, equality etc. India is still a highly conservative country, and most people here regard having sex with another man’s wife as horrifying, highly immoral and deeply offensive. So, to test the constitutionality of Sec. 497 and 198 (2), this social reality of India cannot be overlooked. Thus, for achieving the socio-economic emancipation of women, the SC has said that the constitution laid down provisions both for protective discrimination and as also affirmative action.⁸⁹

Further, Sec. 497, I.P.C. also does not violate Art. 15 of the Indian constitution. Art. 15 (1) is an extension of Art. 14. It expresses a particular application of the general principle of equality embodied in Art. 14. Sec. 497 does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional. Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extramarital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation.⁹⁰

⁸⁷ *Ameerunnisa Begum v. Mehboob Begum*, AIR 1956 SC 91.

⁸⁸ *E.V. Chinnaiah v. State of Andhra Pradesh*, AIR 2002 SC 162.

⁸⁹ *Andhra Pradesh Public Service Commission v. Balaji Badhavath*, (2009) 5 SCC 1: (2009) 5 JT 563.

⁹⁰ *Smt. Sowmithri Vishnu v. Union of India & Anr.*, 1985 AIR 1618: 1985 SCR SUPP (1) 741.

Furthermore, Sec. 497, I.P.C. does not violate Art. 21 of the constitution of India.

Liberty is not one sided and thus, if a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair, there is no question of violation of Art. 21.⁹¹ The rules of Natural Justice are not embodied rules and undue reliance on the principles,⁹² may lead to miscarriage of justice. There can be certain situations in which an order passed in violation of natural justice need not be set aside.⁹³

In *Sowmithri Vishnu*,⁹⁴ Observing that Sec. 497 and Sec. 198 (2) constitute a “*legislative packet*”, the court observed that the provision does not allow either the wife to prosecute an erring husband or a husband to prosecute the erring wife. In the view of the court, this indicated that there is no discrimination on the ground of sex. In the view of the court:

*“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 Sec. 198(1) read with Sec. 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 Sec. 198 (2) and fashioning it so 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.”*

It is further submitted that Sec. 497, I.P.C. does not violate the right to privacy guaranteed under the Indian Constitution. Any criminal offence is one against the society at large casting an onerous responsibility on the state, as the guardian and purveyor of human rights and protector of law to discharge its sacrosanct role responsibly and committedly, always accountable to the law-abiding citizenry for any lapse.⁹⁵ The Court, in *R. Rajagopal case*,⁹⁶ held that there would be no

⁹¹ *UOI v. V. Sriharan*, (2016) 7 SCC 1: 2016 (2) SCJ 466.

⁹² *Canara Bank v. V.K. Awasthy*, AIR 2005 SC 2090.

⁹³ *Syndicate Bank v. Gen. Secy., Syndicate Bank Staff Association*, AIR 2000 SC 2914.

⁹⁴ *Smt. Sowmithri Vishnu v. Union of India & Anr.*, 1985 AIR 1618: 1985 SCR SUPP (1) 741.

⁹⁵ *Pooja Pal v. UOI*, (2016) 3 SCC 135: AIR 2016 SC 1345.

⁹⁶ *R. Rajagopal v. State of T.N.*, AIR 1991 SC 207.

violation of the right to privacy if the person concerned “*voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.*” It is well settled that the right to privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others.⁹⁷

It should be noted that the state does not interfere in the private matters of party to the marriage as under Sec. 198 (2) of Cr.P.C. no court can take cognizance of an offence of Adultery expect on a complaint by the aggrieved party. Thus, when the party itself come to the court to seek remedy it cannot be allowed to plead violation of right to privacy.

4.2 THE UNCONSTITUTIONAL PART OF THE PROVISION SHOULD BE READ DOWN BUT THE PROVISION SHOULD BE RETAINED

It is humbly submitted that if this court finds any part of this section violative of the constitutional provision, the court should read down that part, in so far as it is violative of the constitution but retain the provision.⁹⁸

As per Art. 13, a law is void only, “*to the extent of the inconsistency or contravention*” with the relevant fundamental rights.⁹⁹ Therefore, there is no need to repeal the entire law as it would lead to chaos and rampant misuse across Indian society.

Art. 141 uses the expression “*law declared by the Supreme Court*”, which is wider than “*law found*”. It means that the Supreme Court does not merely interpret the law, it may also make law or create law.¹⁰⁰ The role of Judiciary to merely interpret and declare the law has been said to be the concept of by-gone age. It is now fairly settled that the courts can so mould and lay down the law, formulating principles and guidelines, as to adapt and adjust to the changing conditions of the society, the ultimate object being to dispense justice.¹⁰¹

⁹⁷ *Mr. X v. Hospital Z*, AIR 1999 SC 495; *Mr. X v. Hospital Z*, AIR 2003 SC 664.

⁹⁸ *Moot Proposition*, Pg. 3 Para. 5.

⁹⁹ M.P. Jain, *Indian Constitutional Law*, Pg. 901 (Lexis Nexis, 8th Edi, 2018).

¹⁰⁰ Dr. Narendra Kumar, *Constitutional Law of India*, Pg. 688 (Allahabad Law Agency, Haryana, 9th Edi, Re.2016).

¹⁰¹ *Ibid.* at 689.

In *Vineet Narain v. Union of India*,¹⁰² a three judge bench of the Supreme Court, unanimously ruled that “*there are ample powers conferred by Art. 32 read with Art. 142 to make orders which have the effect of law by virtue of Art. 141.*”

In *Nand Kishore v. State of Punjab*,¹⁰³ the Apex court held:

“Their lordships decisions declare the existing law but do not enact any fresh law, is not keeping with the plenary function of the Supreme Court...for the court is not merely the interpreter of the law as existing, but much beyond that. The Court, as a wing of the state, is by itself a source of law. The law is what the court says it is.”

A Constitution bench of the Apex Court in *Sahara India Real State Corpn. Ltd. v. SEBI*,¹⁰⁴ held:

“It means law made while interpreting the statutes or the Constitution. Such judicial law-making is part of the judicial process. Further, under Art. 141, law-making through interpretation and expansion of the meanings of open-textured expressions...is a legitimate judicial function.”

The Supreme Court in *Supreme Court Bar Association v. UOI*,¹⁰⁵ has characterized:

“Indeed the Supreme Court is not a court of restricted jurisdiction of any dispute settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a problem solver in the nebulous areas...”

It has been recognized that “*till such time the legislature steps in to cover the gap or the executive discharges its role, the judiciary must step in, in exercise of its constitutional obligations, and exercise the rule making power.*”¹⁰⁶

Thus, if need be to fill the vacuum, and till such time the legislature steps in, the court may exercise the rule making power.¹⁰⁷

¹⁰² *Vineet Narain v. Union of India*, AIR 1998 SC 889.

¹⁰³ *Nand Kishore v. State of Punjab*, (1995) 6 SCC 614.

¹⁰⁴ *Sahara India Real State Corpn. Ltd. v. SEBI*, AIR 2012 SC 3829.

¹⁰⁵ *Supreme Court bar Association v. UOI*, AIR 1998 SC 1895: (1998) 4 SCC 409.

¹⁰⁶ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

¹⁰⁷ Dr. Narendra Kumar, *Constitutional Law of India*, pg. 689 (Allahabad Law Agency, Haryana, 9th Edi, Re. 2016).

PRAYER

WHEREFORE IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, IT IS HUMBLY REQUESTED THAT THIS HON'BLE COURT MAY BE PLEASED TO ADJUDGE AND DECLARE:

- To allow the above curative petition filed by the Appellant.
- To uphold the constitutional validity of Section 497, I.P.C. read with Section 198 (2) Cr.P.C.
- To set aside the decree of this court in W.F.U. v. UOI.

AND MAY PASS ANY SUCH ORDER, OTHER ORDER THAT IT DEEMS FIT IN THE INTEREST OF JUSTICE, EQUITY AND GOOD CONSCIENCE.

AND FOR THIS, APPELLANT AS IN DUTY BOUND SHALL HUMBLY PRAY.

RESPECTFULLY SUBMITTED BY
COUNSELS ON BEHALF OF THE APPELLANT