

TEAM CODE: JNMCC04

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 RESPONDENT

TABLE OF CONTENT

TABLE OF CONTENT.....	2
INDEX OF ABBREVIATIONS.....	3
INDEX OF AUTHORITIES.....	4
• CASES CITED	
• BOOKS REFERRED	
• STATUTES	
• ARTICLES AND LEGAL JOURNALS	
• TREATIES AND CONVENTIONS	
• LEGAL DATABASE	
STATEMENT OF JURISDICTION.....	9
STATEMENT OF FACTS.....	10
STATEMENT OF ISSUES.....	12
SUMMARY OF ARGUMENTS.....	13
ARGUMENTS ADVANCED.....	15
PRAYER.....	35

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

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➤ **TREATIES AND CONVENTIONS**

1. European Convention of Human Rights, 1950.
2. International Covenant on Civil and Political Rights Act, 1966.
3. The International Covenant on Civil Rights, 1966.
4. Universal Declaration of Human Rights, 1948.

➤ **LEGAL DATABASE**

- Manupatra.
- SCC Online.

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 Respondent 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 Section 497 of I.P.C. 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 Section 497 of the I.P.C. and Section 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 Section 497 of the I.P.C. and Section 198 of the Code of Criminal Procedure are unconstitutional.

❖ **ADULTERY DECLARED UNCONSTITUTIONAL**

The Court 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 Section 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 Section 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 Section 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 section 497, I.P.C. is to curb crime by way of deterrence, but declaring Section 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 SECTION 497, I.P.C. PROTECTS THE SANCTITY OF MARRIAGE?**
- 3. WHETHER THE EXEMPTION GRANTED TO MARRIED WOMEN UNDER SECTION 497, I.P.C. VIOLATES FUNDAMENTAL RIGHTS GUARANTEED UNDER THE CONSTITUTION?**
- 4. WHETHER SECTION 497, I.P.C. READ WITH SECTION 198 (2) Cr.P.C. IS CONSTITUTIONAL?**

SUMMARY OF ARGUMENTS

ISSUE 1. WHETHER THE CURATIVE PETITION IS MAINTAINABLE?

It is humbly submitted before this hon'ble court that the appeal filed by the appellant under Article 137 of the Constitution of India is not maintainable. The curative petition evolved in *Rupa Ashok Hurra v. Ashok Hurra*,¹ was made to be filed only subject to fulfillment of grounds specifically stated. Whereas, the filed petition does not fulfill the grounds for the same as the discerning judgement of the court striking down the provision was rational and embody no error on any part of law or fact. The curative petition observes strict procedural precaution because the matter relates to re-examination of a final decision of this court which is not to be lightly settled as it violates the principle of finality of judgment of the court. Thus, permitting the parties to reopen the concluded judgments of this court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching adverse impact on the administration of justice.

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

It is humbly submitted before this hon'ble court that the said provision does not protect the sanctity of marriage but treats women as property of husband and undermines the status of women in marriage. It treats women as property of her husband by making a third party liable for encroachment into marriage leaving the fact that it is a consensual sexual act between the man and women, which further implies lack of women's right and capability of taking her own decisions. The said provision in no way protects the sanctity of marriage as the sanctity of marriage is not offended only by sexual acts of wife outside marriage but also by man doing the same act with an unmarried women or widow. Section 497, I.P.C. puts women in a state of marital subordination to man entitled to control over her body as consent of husband to the sexual act of women would not render it as a crime, which further badly destroys women's dignity.

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

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

It is humbly submitted before this Hon'ble Court that the said provision of Section 497, I.P.C. is violative of the fundamental rights guaranteed by the Constitution of India. The exemption granted to women is based on the notion of women being the 'victim' and men the 'seducer' which is no longer relevant or applicable in the contemporary societal aspect. Also, the provision by completely exempting women from punishment under adultery as an abettor discriminates against men as it puts both men and women under similar circumstances and fault on different pedestals. The Section is in no way protected under Article 15 (3) of the Constitution of India which does not provides for exemption of women from criminal liability on the baseless presumption of weak status.

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

It is humbly submitted before this Hon'ble Court that the Section 497, I.P.C. along with Section 198 (2), Cr.P.C. shall be held unconstitutional as they are in violation of Article 14, 15 and 21 of the Constitution of India. The Section is manifestly arbitrary as it treats women as property of husband and creates unreasonable categorization between genders. The law intrudes in the privacy of the individual and hurts the dignity of women by allowing her husband to control her sexual activities. Also, there can't be any segregation of valid provision from given provisions as it would then lead to a residue having no practical application. Hence, it needs to be annulled as a whole owing to doctrine of severability, which in this case is that if law be made gender neutral it would no longer have any efficacy.

ARGUMENTS ADVANCED

ISSUE 1. WHETHER THE CURATIVE PETITION IS MAINTAINABLE?

It is humbly submitted before this Honorable Supreme Court of India that the present curative petition is not maintainable on the ground of being frivolous, groundless, objectionable, and absurd.

1.1 NO STRONG GROUND EXISTS FOR ENTERTAINING THE AFORESAID 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 under Art. 137 can only be filed on very strong grounds such as:

- (1) Variation of the principle of natural justice-the right to be heard, as for example, when the affected person was not served notice or not heard during the proceedings;
- (2) A Judge who participated in the decision-making process did not disclose his links with a party to the case, i.e. the question of bias;
- (3) Abuse of the process of the court².

The requirements are stringently enforced and the jurisdiction to entertain such petitions though frequently invoked is rarely exercised.³

The pre-requisite condition for accepting a curative petition is that not only there should be violation of principles of natural justice but also, due to the earlier judgment miscarriage of justice has occurred.⁴

Furthermore, it has been held that the power of review can be exercised for correction of a mistake and not to substitute view. It cannot be treated as an appeal in disguise.⁵ Filing of review petitions in casual and irresponsible manner is an abuse of the process of the Court. Such

² M. P. Jain, *Indian Constitutional Law*, 293 (lexis Nexis, 8th Edition, 2018).

³ *Gurdeep Singh v. State of Punjab*, (2005) 10 SCC 468-470; *Shaukat Husain Guru v. State*, (2008) 6 SCC 776, at P. 779; AIR 2008 SC 2419.

⁴ *Union Carbide Corp. v. Union of India etc* , 1990 AIR 273: 1989 SCC (2540), *CBI and Ors .v. Keshub Mahindra*, (1996) 6 SCC 129.

⁵ *Lily Thomas v. Union of India*, AIR 2000 SC 1650.

practice is deprecated by the Court.⁶ It may evoke exemplary costs.⁷ It can't be exercised merely because there is a possibility of taking a different view.⁸

However, in the present case no such strong grounds exist for entertaining the curative petition filed by the petitioner. Thus, the court has rightly struck down 158 year old adultery law and observed that the husband is not the master of wife.

1.2 THE CURATIVE PETITION CAN BE FILED IN ONLY EXCEPTIONAL CASES

It was the intention of the Constitution framers that the constitutional provisions with regard to judicial review must be construed strictly. They intended to impose limitation on the power given to the Supreme Court for reviewing its own judgment⁹. This is evident from Art. 137 of the Constitution of India which starts with “*Subject to any law made by the Parliament...*” rather than a non-obstante clause¹⁰. Nonetheless, In *Rupa Ashok Hurra v. Ashok Hurra*,¹¹ the court made a conjoint reading of Art. 137 with Order XLVII Rule 6 of the Supreme Court Rules for propounding the constitutional basis for curative petition.

The intention of the constitutional bench in *Rupa Hurra's*,¹² case was that the curative petition will be filed in only exceptional cases,¹³ however, in practice it is just opposite. Since its evolvement in the year 2002, many litigants across the country have filed number of curative petitions, So far only a handful of curative petitions have been able to make out a case within the parameters of Rupa Hurra case. Litigants, irrespective of the fact that whether their case actually fulfils the prerequisites of curative petition or not, they file a curative petition with a hope that the Supreme Court will adjudicate and pronounce favorable judgment.

⁶ *Zahira v. State of Gujarat*, (2004) 5 SCALE 397.

⁷ *Nupur Talwar v. C.B.I.*, AIR 2012 SC 1921.

⁸ *Ibid.*

⁹ Dhruv Tiwari & Anand Vardhan Narayan, “*Recolouring The Colored Walls of Constitution: A Futile Judicial Exercise of Creating The Curative Petition*”, *IJLPP*2.2E.

¹⁰ *Ibid.*

¹¹ *Rupa Ashok Hurra v. Ashok Hurra*, JT (2002) 3 SC 609; (2002) 4 SCC 388.

¹² *Ibid.*

¹³ *Sidram S. Patil and others v. Gurnath Shivappa Patil and others* (2005) 2 SCC 358; *Col. Avtar Singh Sekhon v. Union of India*, AIR 1980 SC 2041; *V.M. Elangovan v. Inspector; Varinder Singh@ RAJA v. State of Punjab and Anr.*, (2014) 5 SCC 859.

In *Sumer v. State of Uttar Pradesh*,¹⁴ an aggrieved party filed a curative petition on the ground that the evidence and the factors taken into account by the High Court have not been properly appreciated by the Court when it allowed the appeal of the State against the judgment of acquittal. The Court held that grounds taken in the curative petition by the aggrieved party makes it obvious that an attempt is made to have another opportunity for re-appreciation of evidence. By rejecting and strongly criticizing such curative petition, the Supreme Court said that such re-appreciation of evidence is impermissible.

Thus, it can be inferred from the above that curative petitions is for rarest of rare cases, meritorious cases will invoke the inherent jurisdiction and only such matters will be entertained where the judgment genuinely suffers from any miscarriage of justice.

1.3 THE DOCTRINE OF FINALITY OF JUDGEMENT MUST BE RESPECTED

“Interest reipublicae ut sit finis litium” elucidates that it is for the public good that there must be an end of litigation after a long hierarchy of appeal. Certainty and continuity are essential ingredients of rule of law. Certainty in the law would be considerably eroded and suffer a serious setback if the highest court of the land readily overrule the views expressed by it in earlier cases even though those views had held the field for a number of years.¹⁵

A departure from the principle of finality can only be justified in circumstances of a substantial and compelling character makes it necessary to do so. A judgment is not reconsidered except *“where a glaring omission or patent mistake or like grave error has crept in the earlier decision.”*¹⁶

It is rare that in an adversarial system, despite the judges of the highest court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening door for a

¹⁴ *Sumer v. State Of Uttar Pradesh*, 2005 CRILJ 540.

¹⁵ Dhruv Tiwari & Anand Vardhan Narayan, *“Recolouring the Colored Walls of Constitution: A Futile Judicial Exercise of Creating the Curative Petition”*, IJLPP2.2E; *Hoystead v. Commr. of taxation*, [1926] AC 155, [1925] All ER 56, (1926) 42 TLR 207, 67 ER 313.

¹⁶ *Chandra Kanta v. Sheikh Habib*, AIR 1975 SC 1500: (1975) 1 SCC 674; *PN Eswara Iyer v. Registrar, Supreme Court Of India*, AIR 1980 SC 808; *Avtar Singh Sekhon v. UOI*, AIR 1980 SC 2041: 1980 Supp SCC 562, *Northern India Caterers v. Lt. Governor of Delhi*, AIR 1980 SC 674: (1980) 2 SCC 167; *Sow Chandra Kanta v. Sk. Habib* (1975) 1 SCC 674, 1975 SCC (Cri) 305, (1975) 3 SCR 933); *R.D. Sugar v. V.Nagary*, AIR 1976 SC 2183.

further appeal could be opening a flood gate which will cause more wrongs in the society at large at the cost of rights.

In *Manganese Ore India Ltd v. The Regional Assistant Commissioner of Sales Tax, Jabalpur*,¹⁷ and this court held that the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extraordinary or special reasons to do so.

A three-Judge Bench of this court in *M/s Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*,¹⁸ held that a party is not entitled to seek a review of this court's judgment merely for the purpose of rehearing and for a fresh decision of the case. Departure from the normal principle that the court's judgment is final would be justified only when compelling or substantial circumstances make it necessary to do so. Such circumstances may be that a material statutory provision was not drawn to the court's attention at the original hearing or a manifest wrong has been done.

In *Union of India & Another v. Raghubir Singh (Dead)*,¹⁹ this Court held that the plea for reconsideration is not to be entertained merely because the petitioner chooses to reargue the points concluded by the earlier decision in Sub-committee on Judicial Accountability.

In *Khoday Distilleries Ltd. and Another v. Registrar General, Supreme Court of India*,²⁰ the Court held the reconsideration of the final decision of the Supreme Court after review petition is dismissed by way of writ petition under Art. 32 of the Constitution cannot be sustained.

Thus, permitting the parties to reopen the concluded judgments of this court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far reaching adverse impact on the administration of justice.

¹⁷ *Manganese Ore (India) Ltd v. The Regional Assistant Commissioner of Sales Tax, Jabalpur*, (1976) 4 SCC 124.

¹⁸ *M/S Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, (1980) 2 SCC 167; *Green View Tea & Industries v. Collector, Golaghat and Another*, (2002) 1 SCC 109.

¹⁹ *Union of India & Another v. Raghubir Singh (Dead) By L.Rs.*, (1989) 2 SCC 754

²⁰ *Khoday Distilleries Ltd. and Anr. v. Registrar General, Supreme Court of India*, (1996) 3 SCC 114; *Mohd Aslam v. Union of India & Others*, (1996) 2 SCC 749.

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

It is humbly submitted before this Hon'ble court that the said provision does not protect the sanctity of marriage and instead treats women as property of husband and undermines the status of women in marriage.

2.1 SEC. 497 I.P.C. GRANTS THE PROPRIETARY INTEREST TO HUSBAND OVER HIS WIFE

It is submitted that the provision treats a married woman as a property of the husband. This provision was drafted by Macaulay based on an erroneous presumption that women are the property of the men and the husband had the sole right over the body of his wife.²¹ This is evidenced by the fact that if the adultery is engaged with the consent of the husband of the woman then, such act ceases to be an offence. So, the idea was not to criminalize physical relations outside marriage but rather to put a bar on any infidelity by the wife without the consent of her "owner".

Moreover, it uses the same analogy that is used for the offence of trespass. There is no doubt then that this Section treats a woman like a man's chattel.²² The way a person is not expected to enter on the property of the other without his consent, another man is not expected to have sexual intercourse with someone's wife without his consent. Adultery therefore is not an offence against the matrimonial home but against the husband himself.

Further, the notion that Sec. 497, I.P.C. was intended to preserve fidelity between partners is not true as the provision does not bother about a husband having sex outside marriage with an unmarried woman. The concern of the provision was with sexual intercourse with wife of another man, and hence the provision was majorly addressing the 'harm' felt by the other man. It is all about protecting a husband's interest in his "exclusive access to his wife's sexuality".²³

²¹ Macaulay, Macleod, Anderson And Millett, *A Penal Code Prepared By The Indian Law Commissioners*, Pelham Richardson, 1838, Note 'Q', P.175.

²² *R. v. R.*, (1991) 4 ALL ER 481; at p.484.

²³ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, Sage Publications (1996), at Page 120.

It is important to note that Sec. 497, I.P.C. does not bring within its purview an extra marital relationship with an unmarried woman or a widow, the law treats it with unconcern. Thus, a married man may engage in sexual relations outside marriage with a single woman without any repercussion in criminal law.

It is clear, therefore, that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational.

2.2 NOTION OF MARITAL SUBORDINATION DENYING SEXUAL AGENCY OF WIFE IS NOT RELEVANT IN CONTEMPORARY SOCIETY

From the historical perspective marriage had been considered a sacrament however, in the modern perspective, the marriage is held to be a contract as it now, can be dissolved and requires consent of parties.²⁴ In the eyes of law, as marriage is a civil contract, the consensual sexual relation of one spouse outside marriage should at best be a violation of that contract that is, it can be a civil offence but, not a criminal offence.

Sec. 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Implicit in seeking to privilege the fidelity of women in a marriage is the assumption that a woman contracts away her sexual agency when entering a marriage.

Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. Sec. 497 is based on the understanding that marriage submerges the identity of the woman, based on a notion of marital subordination.²⁵

As it is contended that the adultery laws are needed to protect the divine and pure institution of marriage. In this regard, it is essential for the judiciary to recognize that a "divinely sanctioned"

²⁴ Mulla's Principles of Hindu Law; Aqil Ahmad, Prof. Iqbal Ali Khan (ed.), *Text Book of Mohammedan Law* (Central law Agency, 15th Edition, 1992).

²⁵ UN Women, Preventing Conflict, Transforming Justice, Securing the Peace: *A Global Study on the Implementation of United Nations Security Council Resolution 1325*, Pp. 83-84, (New York, 2015).

contract which needs unending legislation to keep one partner from abusing the other, is perhaps not all that divine.

*In Payal Sharma v. Supdt, Nari Niketan kalindri vihar, agra,*²⁶ the court had observed:

“A women who is a major has a right to go anywhere and live with anyone she likes without getting married. This may be regarded immoral by society but it is not illegal. There is a difference between law and morality.”

The effect of Sec. 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Sexual autonomy constitutes an inviolable core of the dignity of every individual. Sexuality cannot be dis-associated from the human personality. For, to be human involves the ability to fulfill sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognizes and protects the autonomy of the individual in making sexual choices. Women does not pledge her sexual autonomy to her husband after marriage and depriving her of choice to have consensual sex with anyone outside marriage cannot be curbed.²⁷

Thus, a woman's 'purity' and a man's marital 'entitlement' to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but is not relevant to the contemporary perspective where men and women in marriage are conferred equal rights and liabilities. Sec. 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision. Such a notion has no place in the constitutional order.

2.3 PENALIZING ADULTERY DOES NOT FUNCTION AS A DETERRENCE

It is submitted that Adultery is not the cause but the consequence of a pre-existing disruption of the marital tie. All too often, spouses who have drifted apart irrevocably may be compelled for reasons personal to them to continue with the veneer of a marriage which has ended for all

²⁶ *Payal Sharma v. Supdt, Nari Niketan kalindri vihar, agra*, AIR 2001 All 254.

²⁷ *Joseph Shine v. Union of India*, 2018 SCC: SC 1676.

intents and purposes. In such a situation, Penalizing adultery doesn't serve as deterrence but a final nail in the coffin.

In *James Sibongo v. Lister Lutombi Chaka and Anr.*,²⁸ The Supreme Court of Namibia, in an instructive judgment decriminalising adultery, went into whether the criminal offence of adultery would protect marriages and reduce the incidence of adultery. It said:

“But does the action protect marriages from adultery? The question becomes more focused when the spotlight is directed at the following considerations:

(a) First of all, as was pointed out by the German Bundesgericht in the passage from the judgment (JZ 1973, 668) from which I have quoted earlier, although marriage is — ‘a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence . . . consists in readiness, founded in morals, of the parties to the marriage to create and to maintain it.’

If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that.

*(b) Grave doubts are expressed by many about the deterrent effect of the action. In most other countries it was concluded that the action (no longer) has any deterrent effect and I have no reason to think that the position in our society is all that different. Perhaps one reason is that adultery occurs in different circumstances. **Every so often it happens without any premeditation, when deterrence hardly plays a role.** At the other end of the scale, the adultery is sometimes carefully planned and the participants are confident that it will not be discovered. **Moreover, romantic involvement between one of the spouses and a third party can be as devastating to the marital relationship as (or even more so than) sexual intercourse.***

(c) If deterrence is the main purpose, one would have thought that this could better be achieved by retaining the imposition of criminal sanctions or by the grant of an interdict

²⁸ *James Sibongo v. Lister Lutombi Chaka and Another*, (Case No. SA77-14) (19.08.2016) [Supreme Court of Namibia] cited in *Joseph Shine v. UOI*, 2018 SCC SC 1676.

in favour of the innocent spouse against both the guilty spouse and the third party to prevent future acts of adultery...firstly, that an interdict against the guilty spouse is not possible because he or she commits no delict. Secondly, that as against a third party — ‘it interferes with, and restricts the rights and freedom that the third party ordinarily has of using and disposing of his body as he chooses; . . . it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses’. [At353E.]

(d) In addition the deterrence argument seems to depart from the assumption that adultery is the cause of the breakdown of a marriage, while it is now widely recognised that causes for the breakdown in marriages are far more complex. Quite frequently adultery is found to be the result and not the cause of an unhappy marital relationship. Conversely stated, a marriage in which the spouses are living in harmony is hardly likely to be broken up by a third party.”

Moreover, the Sec. also criminalizes consensual sexual act between wife and third person, even in cases where the spouses have taken judicial separation and are going to take divorce where there can be no scope for protection of marriage. As adultery is marked as an offence against marriage, in that perspective too it is in no way protecting the marriage as the sanctity of marriage can be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow which is not included in the provision under Sec. 497, I.P.C. As far as sanctity of marriage is concerned, it is still a ground for divorce in India which is equal for both men and women then there is no logic in putting women in exempted category in criminal offence.

Furthermore, Adultery is more of a social and civil offense and depicts a more arbitrary and infidelity of trust not only the spouse but the whole family. Adultery is a consequence of the collapse of faith and conscience in a relationship and requires corrective action rather than penalize. The sanctions imposed by the laws can bring relief to the injured party for a short time, but destroys the sanctity of marriage and family life in the long term ruins.

ISSUE3. WHETHER THE EXEMPTION GRANTED TO MARRIED WOMEN UNDER SECTION 497, I.P.C. VIOLATES FUNDAMENTAL RIGHTS GUARANTEED UNDER THE CONSTITUTION?

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

3.1 ARTICLE 15 (3) DOES NOT PROTECT A STATUTORY PROVISION THAT ENTRENCHES PATRIARCHAL NOTIONS IN THE GARB OF PROTECTING WOMEN

It is humbly submitted that this exemption is contrary to the remedy which Art. 15 (3) sought to embody. Sec. 497 exempts a woman from being punished as an abettor. The exemption seeks to be justified on the ground of being a provision that is beneficial to women and protected under Art. 15 (3) of the Constitution.

The constitutional guarantee in Art. 15 (3) cannot be employed in a manner that entrenches paternalistic notions of 'protection'. This view of protection only serves to place women in a cage. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Art. 15 (3).

The invocation of Art. 15 (3) as a *carte blanche* to uphold laws that impose differential benefits and burden upon men and women, ostensibly to the advantage of women, is unjustified.

In *Yusuf Abdul Aziz v. State of Bombay*,²⁹ The Bombay High Court, relied upon the *carte blanche* approach to Art. 15 (3): In this case, the Supreme Court rejected a constitutional challenge to the adultery provision in the I.P.C., which is asymmetrical in that women cannot be prosecuted for adultery. The Court upheld the law by a simple invocation of Art. 15 (3), ignoring the fact that the *basis* of the adultery provision was precisely the kind of stereotypical gender-based assumptions that the Constitution intended to do away with: i.e., that women are passive partners, lacking in sexual autonomy. This inattention to how Art. 15 (3) ought not to end up

²⁹*Yusuf Abdul Aziz v. State of Bombay*, AIR 1951 Bom. 470.

becoming a shield to *perpetuate* sexual and gender-role based stereotypes has plagued the Court's jurisprudence ever since.

In *State of Madhya Pradesh v. Madanlal*,³⁰ the Court held:

“Dignity of a woman is a part of her nonperishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honor which matters the most. It is sacrosanct”.

Moreover, Art. 15 (3) is not a stand-alone constitutional provision, but nestled within the Articles 14-15-16 equality scheme. The use of the phrase “*nothing in this Art.*”, as a precursor to Art. 15 (3) suggests that where a legislative classification might *otherwise* have fallen foul of the non-discrimination guarantee of Art. 15 (1), Art. 15 (3) would save it. However, given that Art. 15 (3) is itself a *part* of Art. 15 suggests that the goal of such classification must also fit within the concept of equality. Art. 15 (3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle.

Consequently, laws making “*special provisions*” for women (and children) ought to be judicially reviewed for whether or not they bear some connection with remedying the historical and structural subordination of women. However, this form of reasoning has been entirely absent from Indian sex discrimination jurisprudence.

The same was endorsed by the Fifth Law Commission which recommended that the wife, who has sexual intercourse with a person other than her husband, should be punished for committing adultery as the reasons that prompted authors of the Penal Code in the nineteenth century for exempting her from punishment are ‘not valid’ and there is ‘hardly any Justification for not treating the guilty pair alike’.³¹ Again In 2003, the Justice Malimath Committee also suggested

³⁰*State of Madhya Pradesh v. Madanlal*, (2015) 7 SCC 681; *Charu Khurana and others v. Union of India and others*, (2015) 1 SCC 192; *National Legal Services Authority v. Union of India and others*, (2014) 5 SCC 438.

³¹ Law Commission of India '42nd Report: *The Indian Penal Code*', Government of India, 1972, Para 20.18.

that suitable amendments to Sec. 497, I.P.C., should be made to bring adulterous woman within its purview as the object of Sec. 497 is to preserve the sanctity of the marriage.³²

Hence, Art. 15 (3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women. It is vehemently argued that special provisions can be made for women as under Art. 15 (3) of the Constitution, but same cannot be used to give them a license to commit and abet crimes. Any provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited.³³

As also in *Roop chand adlakha*³⁴ : “To overdo classification is to undo equality”.

Further, there also exists a disparity of the right even under S.198 (2) of the Cr.P.C. which denies a wife the right to prosecute her adulterous husband, reserving this power only for the husband of the woman involved in the relationship. So, only the husband of the woman involved enjoys the right to prosecute while the wife of the involved man has no resort to take any action.

Furthermore, the judgment in *Yusuf Abdul Aziz v. State of Bombay*,³⁵ applies a constitutional provision which is obviously inapplicable as Article 15 (3), which states that, “nothing in this article shall prevent the State from making a special provision for women”, would refer to the “State” as either Parliament or the State Legislatures or the Executive Government of the Centre or the States, set up under the Constitution after it has come into force. Section 497 is, in constitutional language, an existing law which continues, by virtue of Article 372 (1), to apply, and could not, therefore, be said to be a law made by the State.³⁶

³² Ministry of Home Affairs, “Committee on Reforms of Criminal Justice System” Government of India, 2003, Para 16.

³³ *Joseph Shine v. Union of India*, Writ Petition (Crl.) No. 194 of 2017.

³⁴ *Roop Chand Adlakha v. Delhi Development Authority*, 1989 Supp (1) SCC 116: AIR 1989 SC307.

³⁵ *Yusuf Abdul Aziz v. State of Bombay*, AIR 1951 Bom. 470.

³⁶ *Joseph Shine v. Union of India*, Writ Petition (Crl.) No. 194 of 2017.

Thus, only such provisions can be made in favor of women under Art. 15 (3) as are reasonable and which do not altogether obliterate or render illusory the constitutional guarantee mentioned under Art. 16 (2).³⁷

3.2 THE NOTION THAT MARRIED WOMAN IS A “VICTIM”, AND THE MALE OFFENDER IS THE “SEDUCER” IS NO LONGER RELEVANT IN CONTEMPORARY SOCIETY

Underlying this exemption is the notion that a woman is the victim of being seduced into a sexual relationship with a person who is not her husband. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to ‘protect’ her. The ‘protection’ afforded to women under Sec. 497 highlights the lack of sexual agency that the Sec. imputes to a woman. It exempts women as an abettor in the offence however, the exemption to women is prima facie granted on the perusal of Sec. 497, I.P.C. by treating her as a victim. This sort of differential treatment implying that women is always a victim and not capable of making independent choices and always needs protection in all respects even for the results of her own consensual acts clearly seems to be affecting women’s dignity and equal status in society. It hurts the individual dignity of women and works on the unreal presumption that woman is always a victim even in consensual sexual relationships.

In *Pawan kumar v. State of Himachal Pradesh*,³⁸ the court observed:

“A woman has her own space as a man has. She enjoys as much equality under Article 14 of the Constitution as a man does.”

Recently, In *Sunil kumar v. State of J&K and anr*,³⁹

“When a woman is major and educated, she is supposed to be fully aware of the consequences of having sexual intercourse with a man before marriage.”

³⁷ M.P. Jain, *Indian Constitutional Law* (Lexis Nexis, 8th Edition, 2018).

³⁸ *Pawan Kumar v. State of Himachal Pradesh*, (2017) 7 SCC 780.

³⁹ *Sunil Kumar v. State of J&K and Anr*, 14 Dec., 2018.

It has been held that perpetrators cannot be restricted to “*adult male person*” but also include a female member and non-adults, as it fails the test of reasonable classification in section 2(q) of the Protection of Women from Domestic Violence Act, 2005.⁴⁰

In *Joseph Shine v. Union of India*,⁴¹ Indu Malhotra J. observed:

*“Section 497 of the I.P.C. was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860s. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals. **This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background, in which Section 497 was framed, is no longer relevant in contemporary society. It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a ‘victim’, and the male offender is the ‘seducer’.**”*

Thus, Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today.⁴² Also, the Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times.⁴³

ISSUE4. WHETHER SECTION 497, I.P.C. READ WITH SECTION 198 (2) Cr.P.C. IS CONSTITUTIONAL OR NOT?

It is humbly submitted before this honorable Court that Sec. 497, I.P.C. read with Sec. 198 (2) Cr.P.C. is unconstitutional.

⁴⁰ *Hiral P Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165 : AIR 2016 SC 4774 : 2016 (9) SCJ 204.

⁴¹ *Joseph Shine v. Union of India*, 2018 SCC SC 1676.

⁴² Nariman J. in *Joseph Shine v. Union of India*, 2018 SCC SC 1676.

⁴³ M.P. Jain, *Indian Constitutional Law*, 5, (lexis nexis, 8th Edition, 2018).

4.1 SECTION 497 VIOLATES OF ARTICLE 14, 15 AND 21 OF THE INDIAN CONSTITUTION

Art. 14 strikes at arbitrary state action, both administrative and legislative. There has been a significant shift towards equating arbitrary or unreasonableness as the yardstick by which administrative as well as legislative actions are to be judged.⁴⁴ All persons in similar circumstances shall be treated alike both in privileges and liabilities imposed.⁴⁵

The doctrine of equality before law is a necessary corollary of rule of law which pervades the Indian Constitution.⁴⁶ The right to equality has been declared by the Supreme Court as the basic feature of the constitution.⁴⁷ This means that neither the parliament nor any state legislature can transgress the principle of equality.⁴⁸

Art. 26 of ICCPR,⁴⁹ and Art. 7 of the UDHR,⁵⁰ 1948, declares that all are equal before the law and are entitled without any discrimination to the equal protection of the laws.

The Constitution Bench in *Shayara Bano v Union of India*,⁵¹ held the practice of Triple Talaq to be unconstitutional. Justice Rohinton Nariman, in his concurring opinion, applied the test of manifest arbitrariness to hold that the practice does not pass constitutional muster:

“The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14.”

⁴⁴ *Union of India v. International Trading Corporation*, AIR 2003 SC 3983; *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494.

⁴⁵ *John Vallamattom v. UOI*, (Writ Petition (Civil) 242 Of 1997).

⁴⁶ *Ashutosh Gupta v. State of Rajasthan*, (2002) 4 SCC 34; AIR 2002 SC 1533; *National Human Rights Commission v. State of Arunachal Pradesh*, AIR 1996 SC 1234.

⁴⁷ *M. Nagaraj v. UOI*, (2006) 8 SCC 212; *M. G. Badappanabar v. State of Karnataka*, (2000) Supp 5 SCR. 302; *R. K. Garg v. Union of India*, AIR 1981 SC 2138; (1981) 4 SCC 675; *Jagjit Singh v. State*, AIR 1954 Hyd. 28.

⁴⁸ *Kesav Nanda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Indira Sawhney v. UOI*, (1992) Supp 3 SCC 217.

⁴⁹ <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>;

⁵⁰ https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

⁵¹ *Shayara Bano v. Union of India*, 2017 SCC SC 963; *Sanaboina Satyanarayan v. Govt. of A .P.*, (2003) 10 SCC 78; *Chiranjit Lal v. Union Of India* AIR 1981 SC 41; *Abdul Rehman v. Pinto*, AIR 1951Hyd. 11.

Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman, who is *pari delicto* with the adulterous male, is not punishable, even as an “abettor”, even though the relationship is consensual. The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery. Thus, it is discriminatory against men as it violates their fundamental right of equality before law.⁵²

Art.15 also stands violated as such penal provision not only creates a categorization among the two sexes but in fact metes out unequal treatment amongst the males as well. A married man who has an affair with an unmarried woman is not prosecutable under the existing adultery law while the same man if indulges in such activity with a married woman would be at the risk of facing a prosecution. There exists an inequality in the treatment being mete out depending upon the marital status of the woman.

In *Navtej Singh Johar*,⁵³ Justice Chandrachud had held that a provision of law which perpetuates gender stereotypes will be bad for discrimination on grounds of sex, and hence will fall foul of Article 15 (1). Same approach was extended here; upon identification of patriarchal and paternalistic undertones of the provision. Section 497 has a significant social impact on the sexual agency of women. It builds on existing gender stereotypes and bias and further perpetuates them.

It also violates Article 21 of the Indian Constitution. The Right to Privacy has been recognized as a fundamental right guaranteed under Art. 21 of the Indian Constitution.⁵⁴

In *K M Puttaswamy v. Union of India*,⁵⁵ a nine-judge Constitution Bench declared that the right to privacy is a fundamental right under Art. 21, stating: “*Sexual privacy is an integral part of*

⁵² *W. Kalyani v. State Thro'Inspector of Police and another*, (2012) 1 SCC 358.

⁵³ *Navtej Singh Johar v. Union of India*, [WP (Crl.) No. 76/2016]; *J Srinivas Raju v. State of Orissa*, 113 (2012) Cut LT 13 (22) (Ori).

⁵⁴ *Gobind v. State of Madhya Pradesh*, 1975 AIR 1378; 1975 SCR (3) 946; *Kharak Singh v. State of U.P.*, 1963 AIR 1295, 1964 SCR (1) 332; *R. Rajagopal v. State of T.N.*, 1995 AIR 265; 1994 SCC (6) 632; *People's Union For Civil Liberties v. Union of India*, (1997) 1 SCC 301; *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008)13 SCC 5.

⁵⁵ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1; *Neera Mathur v. LIC*, 1992 AIR 392; 1991 SCR Supl. (2) 146; 1992 SCC (1) 286; *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615; AIR 1987 SC 748; *Unni Krishnan, J.P. v. State of A. P.*, (1993) 1 SCC 645, 66.

right to privacy.” The Apex court unreservedly held that privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. While acknowledging decisional privacy, it upholds the cognitive decisions of every individual including the ability to make intimate decisions primarily consists one’s sexual or procreative nature and decisions in respect of intimate relations.

To "shackle" sexual freedom of a woman and allow criminalization of consensual relationships was a denial of right of sexual privacy and considering a citizen as a property of other was an "anathema" to ideal of dignity.⁵⁶

In Nar Singh Pal v. UOI,⁵⁷ The Supreme Court has asserted:

“Fundamental rights under the constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of fundamental rights available under the constitution.”

In *Anuj Garg v. Hotel Association of India*⁵⁸, this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in.

In *Shafin Jahan v. Asokan K .M. & Ors.*,⁵⁹ this Court observed that each individual is guaranteed the freedom in determining the choice of one’s partner, and any interference by the State in these matters, would have a serious chilling effect on the exercise of the freedoms guaranteed by the Constitution.

Both, Art. 8 of European Convention of Human Rights,⁶⁰ and Art. 17 of the International Covenant on Civil and Political Rights Act, 1966,⁶¹ provide for protection from arbitrary or

⁵⁶ Chandrachud J. in *Joseph Shine v. Union of India*, 2018 SCC: SC 1676.

⁵⁷ *Nar Singh Pal v. UOI*, (2000) 3 SCC 589,594: AIR 2000 SC 1401.

⁵⁸ *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663; *Malak Singh v. State of Punjab*, AIR 1981 SC 760: (1981) 1 SCC 420; *Sunil Batra v. Delhi Admn.*, AIR 1980 SC 1675: (1980) 3 SCC 488.

⁵⁹ *Shafin Jahan v. Asokan K. M. & Ors*, 2018 SCC SC 343.

⁶⁰ https://www.echr.coe.int/Documents/Convention_ENG.pdf.

unlawful interference neither with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation.

Secrecy is an essential adjunct to the private life. The exercise of secrecy in relation to facts that bear a highly personal character is the very essence of personal autonomy. Such view renders the provision criminalizing sexual intercourse between two consenting and willing adults as being illegal and unconstitutional. The mutual decision of two agreeable adults to participate in sexual activity goes to the very core of the privacy jurisprudence and calls for removal of any restrictions on a person's decision to participate or not participate in a sexual activity.⁶²

International trends worldwide also indicate that very few nations continue to treat adultery as a crime, though most nations retain adultery for the purposes of divorce laws. In South Korea⁶³ and Guatemala,⁶⁴ provisions similar to Sec. 497 have been struck down by the constitutional courts of those nations. UN Women has called for the decriminalization of adultery.⁶⁵

A Joint Statement by the United Nations Working Group on discrimination against women in law and in practice in 2012, stated:⁶⁶

"The United Nations Working Group on discrimination against women in law and in practice is deeply concerned at the criminalization and penalization of adultery whose enforcement leads to discrimination and violence against women."

Thus, this provision which treats similarly situated persons unequally and discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15, 21 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination.

⁶¹ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁶² *Sushil Kumar v. Union of India*, AIR 2005 SC 3100; *Thornburgh v. American College of Obstetricians and Gynaecologists*, 476 U.S. 747 (1986).

⁶³ Constitutional Court of South Korea: 2009 Hun-Ba 17(26.02.2015).

⁶⁴ Expediente 936-95, (07.03.1996), República De Guatemala Corte De Constitucionalidad [Constitutional Court Of Guatemala].

⁶⁵ "Decriminalization of Adultery and defenses" <http://Endvawnow.Org>.

⁶⁶ "Statement by the United Nations working group on discrimination against women in law and in practice"

Furthermore, Sec. 198 (2) Cr.P.C. which provides that no person other than the husband of the woman shall be deemed to be aggrieved party and woman are denied right to prosecute for the sexual act committed by her husband. Hence, 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. Thus, it violates the principle of natural justice.⁶⁷ Sec. 198 (2) Cr.P.C. operates as a fetter on the wife in prosecuting her adulterous husband. The procedural law which has been enacted in Sec. 198 of the Code of Criminal Procedure 1973 re-enforces the stereotypes implicit in Sec. 497.⁶⁸ Therefore, when the substantive provision goes, the procedural provision has to pave the same path.

Hence, the provisions of Sec. 497, I.P.C. are held to offend the fundamental rights, the procedure engrafted in Sec. 198 (2) will cease to have any practical relevance. Hence, the relevant provision is unconstitutional on the ground of obnoxious discrimination.

4.2 SECTION 497, I.P.C. READ WITH SECTION 198 (2), Cr.P.C. HAS BEEN RIGHTLY STRUCK DOWN AS UNCONSTITUTIONAL IN ITS' ENTIRETY

It is submitted that Sec. 497, I.P.C. read with Sec. 198 (2) Cr.P.C. is unconstitutional in its entirety and has been rightly struck down by this court.

Art. 13 Clause (1) and (2) of the Indian Constitution declare that laws inconsistent with or in contravention of the fundamental rights shall be void to the extent of inconsistency or contravention, as the case may be. If, however, it is not possible to separate the valid from the invalid portion, then the whole of the statute will have to go.⁶⁹

Further, In *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*,⁷⁰ has held that there is no presumption of constitutionality attaches to a pre-constitutional statute like Indian Penal Code.

⁶⁷ *Rajasthan State Board Transport Corporation v. Bal Bukund Bairwa*, (2) (2009) 4 SCC 229; (2009) 2 JT 423.

⁶⁸ *Joseph Shine v. Union of India*, 2018 SCC SC 1676.

⁶⁹ *Kameshwar Pd. v. State of Bihar*, AIR 1962 SC 1166; 1962 Supp (3) SCR 369; *State of M.P. v. Ranojirao Shinde*, AIR 1968 SC 1053; (1968)3 SCR 489.

⁷⁰ *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, W. P. (Crl.) No. 76 of 2016 D. No. 14961/201.

The Supreme Court laid down the following propositions as regards the doctrine of severability in *R.M.D.C. v. Union of India*.⁷¹ The whole provision being unconstitutional being violative of Art. 14, 15 and 21 of the constitution of India, the question of striking down the unconstitutional part or severability does not arise.

Furthermore, the contention of the appellant that if this Court finds any part of this section 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,⁷² is not tenable as the power under Art. 142 being curative in nature, cannot be used to supplant the substantive law, or to fill lacuna in a statute or by-pass the provision thereof.⁷³ The apex court has even went on to say that it may refuse to exercise its jurisdiction under Art. 142, although it would be lawful to do so.⁷⁴

In *Rupa Ashok Hurra v. Ashok Hurra*,⁷⁵ the apex court has observed in this regard:

“This power could not be used to supplant substantive law applicable to the case or cause under consideration. Even, with the width of its amplitude, Article 142 could not be used to build a new edifice where none existed earlier. By ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly, which could not be achieved directly.”

Consequently, Section 497, I.P.C. read with Section 198 (2) Cr.P.C. has been rightly struck down by this court in its entirety.

⁷¹ *R.M.D.C. v. UOI*, AIR 1957 SC 628, at 633; These Propositions Have Been Reiterated With Approval by the Supreme Court in *Motor General Traders v. State of A. P.*, AIR 1984 SC 121; *Gopalan v. State of Madras*, AIR 1950 SC 27,4 6: 1950 SCR 88.; *Kihota Hollohon*, Supra, Chapter II Section F(A); *Hinds v. R.*, (1976) 1 All ER 355; *Laxmi Khandsari v. State of U.P.*, AIR 1981 SC 873, 891 : (1981) 2 SCC 600; *Sewpujanrai v. Customs Collector*, AIR 1958 SC 845: 1959 SCR 821; *Kihota Hollohon v. Zachilhu & ors*, AIR 1993 SC 412: 1992 Supp (2) SCC 651; *Harakchand v. UOI*, AIR 1970 SC 1453: (1969) 2 SCC 166.

⁷² Page no. 3 of Moot Proposition.

⁷³ *Textile Labour Association v. Official liquidator*, AIR 2004 SC 3272.

⁷⁴ *Ashok Kumar Sahu v. UOI*, (2006) 6 SCC 704.

⁷⁵ *Rupa Ashok Hurra v. Ashok Hurra*, JT (2002) 3 SC 609: (2002) 4 SCC 388; *Common cause, a Registered Society v. UOI*, AIR 1999 SC 2979.

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:

- That the present Curative Petition filed by the Appellant is not maintainable.
- To uphold the decree of this Court in W.F.U. v. U.O.I.

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

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

RESPECTFULLY SUBMITTED BY
COUNSELS ON BEHALF OF THE RESPONDENT