IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL WRIT JURISDICTION

WRIT PETITION

(Under Article 32 of the Constitution of India)

WRIT PETITION (CRL.) NO. 194 OF 2017

[PUBLIC INTEREST LITIGATION]

IN THE MATTER OF:

JOSEPH SHINE ... PETITIONER

VERSUS

UNION OF INDIA ... RESPONDENT

PAPER BOOK

[FOR INDEX KINDLY SEE INSIDE]

ADVOCATE FOR THE PETITIONER: **SUVIDUTT M.S.**

FILED ON: **10.10.2017**

INDEX

S.No.	Particulars of Documents	Page No. of part of which it belongs		Remarks
		Part I (Contents of Paper Book)	Part II (Contents of file alone)	
(i)	(ii)	(iii)	(iv)	(v)
1.	O/R on Limitation	A	A	
2.	Listing Proforma	A1-A2	A1-A2	
3.	Cover Page of Paper Book		A-3	
4.	Index of Record of Proceeding		A-4	
5.	Limitation Report prepared by Registry		A-5	
6.	Defect List		A-6	
7.	Note Sheet		NS1 to …	
8.	List of Dates	B – H		
9.	Writ Petition with Affidavit	1 – 36		
10.	Appendix Relevant provisions of (i) Indian Penal Code (ii) Cr.P.C.	37		
11.	**Annexure - P 1** True copy of the relevant pages of the 42nd Law Commission Report, 1971	38 – 46		
12.	**Annexure - P 2** True copy of the relevant pages of Report of Committee on	47 – 52		

	Reforms of Criminal Justice System, Vol 1, March 2003			
13.	**Annexure - P 3** True copy of the judgment by Hon'ble Supreme Court in the case bearin Crl. Appeal No.2232/ 2011 dated 01.12.2011	53 – 55		
14.	**Annexure - P 4** True copy of the news report dated 18.10.2012	56		
15.	F/M		57	
16.	V/A		58	

SYNOPSIS

This Writ Petition is filed challenging the constitutional validity of Section 497 of IPC and Section 198 (2) of CrPC. This is a Public Interest Litigation and the Petitioner has no personal interest in the matter.

Section 497 of the IPC is prima facie unconstitutional on the ground that it discriminates against men and violates Article 14, 15 and 21 of the Constitution of India. When the sexual intercourse takes place with the consent of both the parties, there is no good reason for excluding one party from the liability. The said discrimination is against the true scope and nature of Article 14 as highlighted in *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621, *R.D. Shetty v. Airport Authority*, (1979) 3 SCR 1014 and *E.P Royappa V State Of Tamil Nadu*, 1974(4) SCC 3.

Section 497 of the IPC cannot be interpreted as a beneficial provision under Article 15(3) as well. The exemption provided for women under Article 15(3) does not fall within the scope of the Article which is explained in *Thota Sesharathamma and Anr v. Thota Manikyamma (Dead) by Lrs. and Others*, (1991) 4 SCC 312 by this Hon'ble Court.

It also indirectly discriminates against women by holding an erroneous presumption that women are the property of the men. This is further evidenced by the fact that if the adultery is engaged with the consent of the husband of the woman then, such act seizes to be an offence punishable under the code. The same amounts to institutionalized discrimination which was repelled by this Hon'ble Court in *Charu Khurana*

and Ors v. Union of India and Ors., 2015(1) SCC 192. (Also see *Frontiero v Richardson,* (1973) 411 US 677). The said provision also does not pass the test of reasonable classification as enunciated in *State of W.B. v. Anwar Ali Sarkar,* AIR 1952 SC 75.

The said provision is also hit by the ratio laid down in *Justice K.S Puttaswamy (Retd.) v. Union of India and Ors,* (Writ Petition (Civil) No. 494 OF 2012), since sexual privacy is an integral part of 'right to privacy.' Section 198 (2) of CrPC is also violative of Article 14, 15 and 21 of Constitution of India since it excludes women from prosecuting anyone engaging in adultery.

This provision was challenged before this Hon'ble Court on three occasions, firstly in *Yusuf Abdul Aziz v. State of Bombay and Another*, AIR 1954 SC 321, secondly in *Sowmithri Vishnu v. Union of India AIR 1985 SC 1618* and finally, in *V. Revathi v. Union of India*, (1988) 2 (SCC) 72.

However, in view of the emerging jurisprudence on Articles 14, 15 and 21 of the Constitution and the changed social conditions, this Writ Petition is filed seeking reconsideration and a direction to declare Section 497 of the IPC and Section 198(2) CrPC as unconstitutional.

CHRONOLOGY OF EVENTS

Date	Particulars
1860	Indian Penal Code, 1860 (hereinafter, "IPC") was enacted. Section 497 of IPC defines and punishes the act of

committing 'Adultery'. S.497 reads:

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

This Writ Petition is filed challenging the constitutional validity of the above section along with Section 198(2) of CrPC. Section 198(2) of CrPC reads:

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

	with the leave of the Court, make a complaint on his behalf." Both of these provisions are violative of fundamental rights guaranteed under Articles 14, 15 and 21 of Constitution of India.
10.03.1954	For the first time, Section 497 was challenged stating that the exemption provided for women being prosecuted is discriminatory and the same was repelled by this Hon'ble Court in *Yusuf Abdul Aziz v. State of Bombay and Another,* AIR 1954 SC 321, stating that the same falls within the ambit of Article 15(3).
1971	The 42nd Law Commission Report analysed various provisions of Indian Penal Code and made significant recommendations. One of them was to remove the exemption provided for women from being prosecuted and to reduce the punishment for the offence from 5 years to 2 years.
27.05.1985	This Hon'ble Court considered the validity of Section 497 afresh in *Sowmithri Vishnu v. Union of India*, AIR 1985 SC 1618. The challenge was rejected again stating several reasons.

25.02.1988	The constitutional validity of Section 497 of the IPC along with the Section 198 (2) of CrPC was challenged in *V. Revathi v. Union of India*, (1988) 2 (SCC) 72. This Hon'ble Supreme Court repelled the challenge relying on the decision of the Supreme Court in *Sowmithri* (supra).
March, 2003	The Report of Committee on Reforms of Criminal Justice System, Vol 1, March 2003 was published. The said Committee was formed to consider measures for revamping the Criminal Justice System. The said report, in one of its recommendations, suggested removing the exemption provided for women from being prosecuted under the impugned system.
01.12.2011	In *W. Kalyani v. State of Tr. Inspector of Police and Another*, 2012 (1) SCC 358 this Hon'ble Court was pleased to make an observation about the impugned Section. It was stated*:"the provision is currently under criticism from certain quarters for showing a strong gender bias, it makes the position of a married woman almost as a property of her husband".*

18.10.2012	A Working Group of United Nations established by the Geneva-based Human Rights Council in September 2010 urged the countries to eliminate laws that classify adultery as a criminal offence.
20.06.2015	The Supreme Court of South Korea has struck down Article 241 of the Criminal Act (enacted as Law No. 293 of September 19, 1953) which stipulates imprisonment for two years or less for adultery and interdiction. The judgment held that the impugned clause therein violated the principle of excessive prohibition and infringed on peoples' right to self-determination and privacy and freedom of privacy.
26.02.2016	The President of India had called for a thorough revision of the Indian Penal Code by removing the obsolete provisions of the code.
10.10.2017	Hence, this Writ Petition.

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL WRIT JURISDICTION

WRIT PETITION

(Under Article 32 of the Constitution of India)

WRIT PETITION (CRIMINAL) NO. OF 2017

[PUBLIC INTEREST LITIGATION]

IN THE MATTER OF:

Joseph Shine

Thevadiyil House P.O.,

Koodathai Bzar,

Kozhikode,

Kerala – PIN 673573 … Petitioner

VERSUS

Union of India

Through its Secretary,

Ministry of Home Affairs,

North Block, Cabinet Secretariat,

Raisina Hill,

New Delhi, PIN – 110001 … Respondent

PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA SEEKING APPROPRIATE WRIT FOR DECLARING SECTION 497 OF IPC AND SECTION 198(2) OF Cr.P.C. AS UNCONSTITUTIONAL

TO

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF

THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE

PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The Petitioner herein is filing the present Writ Petition under Article 32 of the Constitution of India for issuance of a Writ, order or direction in the nature of Mandamus or any other appropriate Writ or order challenging the constitutional validity of Section 497 of Indian Penal Code, 1860 (hereinafter IPC) which defines 'Adultery' and prescribes the punishment. The Petitioner herein also challenges Section 198(2) CrPC. These Sections are apparently discriminatory and they violate the principles of gender justice.

1.A. The Petitioner herein is a citizen of India presently employed in Italy. The Petitioner herein is a law abiding citizen of India and had been taking keen interest in the socio-political affairs of the nation. He has been actively observing the happenings in his country i.e. India and has tried to highlight certain significant events before the court by way of public interest litigation before also. His postal address is: His email id is: *vecchiatrento@gmail.com* His phone number is: 0039-3208349936. His Passport No. is L4256924. His annual income is 30,000€. The Petitioner does not have any PAN card or Aadhar card.

2. The Petitioner herein has not filed any similar Writ Petition either in this Hon'ble Court or any other High Court. The Petitioner herein has not approached any of the Respondents/authority for the reliefs sought in the present Writ Petition. Further, it is stated that there is neither civil,

criminal nor revenue litigation, involving the Petitioner herein which has or could have a legal nexus with the issues involved in the present Public Interest Litigation.

3. The Petitioner herein has the locus to file the present PIL as he is a public spirited person and is keen and active in fighting for the cause of public in general since years. The adverse impact of Section 497 IPC and Section 198(2) CrPC upon gender justice is a great concern to be addressed as it violates the rights of a citizen guaranteed under Article 14, 15 and 21 of the Constitution. Hence, the Petitioner has locus standi to file the instant Writ Petition challenging the said provisions before this Hon'ble Court under Article 32 of the Constitution.
4. The Petitioner herein prefers the present petition in the nature of PIL and the same squarely falls within the ambit of the guidelines prescribed in the decision of this Hon'ble Court in *State of Uttaranchal V Balwant Singh Chaufal and others*, 2010 (3) SCC 402 and subsequent judgments wherein this Hon'ble Court had reiterated the prerequisites of a PIL.
5. An affidavit of undertaking that there is no personal gain, private or oblique reason for the Petitioner herein in filing the instant PIL is enclosed with the vakalatnama.
6. The above provisions are discriminatory and violative of Article 14 of Constitution of India. Section 497 IPC was challenged before this Hon'ble Court on three occasions [*Yusuf Abdul Aziz v. State of Bombay and Another*, AIR 1954 SC 321; *Sowmithri Vishnu v. Union of India*, AIR 1985 SC 1618; and *V. Revathi v. Union of India* (1988) 2 (SCC) 72]

and on all these occasions, the challenge was repelled by this Hon'ble Court. With due respect, it is submitted that the said decisions have not appreciated the contentions in the right sense. However, in view of the emerging jurisprudence on Articles 14, 15 and 21 of the Constitution and the changed social conditions, this writ petition is filed seeking reconsideration and a direction to declare s. 497 IPC and s. 198(2) CrPC as unconstitutional.

7. That the Petitioner herein has no personal gain, private motive or oblique reason in filing the instant Public Interest Litigation. The Petitioner herein has filed the Public Interest Litigation with the noble aim of assisting this Hon'ble Court in ensuring gender justice. That the Petitioner herein is not involved in any litigation before any other forum/ court/ authority which have nexus with the instant petition.

8. Sole Respondent herein is the Union of India.

FACTS OF THE CASE ARE AS FOLLOW:

i) In February 2016, the Hon'ble President of India had called for a thorough revision of the Indian Penal Code. Archaic provisions of the Code were sought to be removed and "The IPC has undergone very few changes in the last one hundred fifty-five years. Very few crimes have been added to the initial list of crimes and declared punishable. Even now, there are offences in the Code which were enacted by the British to meet their colonial needs. Yet, there are many new offences which have to be properly defined and incorporated in the Code." In view of the same, it is submitted that Section 497

is a also an outdated provision, in addition to being illegal and violative of fundamental rights.

ii) This writ petition is filed challenging the constitutional validity of S.497 of Indian Penal Code, 1860 (hereinafter IPC) which defines 'Adultery' and prescribes the punishment. The petitioner also challenges s. 198(2) CrPC. The sections are apparently discriminatory and they violate the principles of gender justice.

iii) Section 497 of the IPC reads as follows:

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

Section 198 (2) of CrPC states as follows:

> *"For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such*

offence was com- mitted may, with the leave of the Court, make a complaint on his behalf."

iv) The above provisions are discriminatory and violative of Article 14 of Constitution of India. Section 497 IPC was challenged before this Hon'ble Court on three occasions, firstly in *Yusuf Abdul Aziz v. State of Bombay and Another*, AIR 1954 SC 321, secondly in *Sowmithri Vishnu v. Union of India*, AIR 1985 SC 1618 and finally, in V. Revathi v. Union of India, (1988) 2 (SCC) 72. In *Revathi (*supra), the constitutionality of Section 198(2) CrPC was also challenged. On all these occasions, the challenge was repelled by this Hon'ble Court. With due respect, it is submitted that the said decisions have not appreciated the contentions in the right sense. However, in view of the emerging jurisprudence on Articles 14, 15 and 21 of the Constitution and the changed social conditions, this writ petition is filed seeking reconsideration and a direction to declare Section 497 IPC and Section 198(2) CrPC as unconstitutional.

v) In the year 1971, the 42nd Law Commission Report analyzed various provisions of Indian Penal Code and made several important recommendations. One of them was to remove the exemption provided for women from being prosecuted and to reduce the punishment for the offence from 5 years to 2 years. The true copy of the relevant pages of the 42nd Law Commission Report, 1971 is produced herewith and marked as **ANNEXURE P-1 (Pages 38 to 46)**

vi) In the year 2003, a Committee headed by Justice V. S. Malimath was constituted to consider measures for

revamping the Criminal Justice System. In the report submitted by the Committee, in the Chapter "Offense against Women" under the subhead "Adultery: Section 497 IPC" it is stated:

> *"16.3.1 A man commits the offence of adultery if he has sexual intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man.*
>
> *16.3.2 The Committee therefore suggests that Section 497 of the I.P.C should be suitably amended to the effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery**.....**."*

vii) The same was also included in Recommendations of the report. True copy of the relevant pages of Report of Committee on Reforms of Criminal Justice System, Vol 1, March 2003 is produced herewith and marked as **ANNEXURE P-2 (Pages 47 to 52)**. These recommendations may be relevant to be considered by this Hon'ble Court while examining the constitutionality of the provisions.

viii) It is also pertinent to note that in the year 2011, this Hon'ble Court was pleased to make an observation about the impugned section in *W. Kalyani v. State of Tr. Inspector of*

Police and Another, (2012) 1 SCC 348. Therein, this Hon'ble Court was pleased to observe that:

> *"The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband".*

The true copy of the judgment dated 01.12.2011 in Crl. Appeal No.2232/2011 is produced herewith and marked as **ANNEXURE P-3 (Pages 53 to 55)**.

ix) In the year 2012, a Working Group of United Nations established by the Geneva-based Human Rights Council in September 2010 urged the countries to eliminate laws that classify adultery as a criminal offence. To show this aspect, the true copy of the news report dated 18.10.2012 of the said statement downloaded from the official website of United Nations news center is produced herewith and marked as **ANNEXURE P-4 (Page 56)**.

x) In 2015, the Supreme Court of South Korea has struck down Article 241 of the Criminal Act (enacted as Law No. 293 of September 19, 1953) on 26.02.2015, which stipulates imprisonment for two years or less for adultery and interdiction. The judgment held that the impugned clause therein violated the principle of excessive prohibition and infringed on peoples' right to self-determination and privacy and freedom of privacy.

xi) It is submitted that Section 497 as it stands, is unconstitutional. The reasons for repelling the challenge

against Section 497 have to be assessed afresh in the light of changed social and legal scenario.

xii) Hence the present Writ Petition before this Hon'ble Court.

That in the circumstances mentioned hereinabove, this Writ Petition is being preferred by the Petitioner *inter alia* on the following among other grounds:

GROUNDS

A) It is respectfully submitted that a reading of Section 497 of IPC and Section 198(2) of CrPC makes it clear that only a man can be penalized for commission of offence of adultery. This is evident from Section 198 (2) of CrPC; Section 497 of the IPC criminalizes sexual intercourse with a married woman. It does not cover sexual intercourse with an unmarried woman. Further, if the act is conducted with the consent of husband of the married women, then the act is no longer the offence of adultery.

B) The above provisions are vulnerable to the constitutional challenge under Article 14, 15 and 21 of Constitution of India. Primarily, Section 497 discriminates against men. In a sexual intercourse with the consent of both partners, there is no good reason to punish only one of the parties of such intercourse. There is no rational for penalizing only one the participant in the act of sexual intercourse. In the particular case, men and women are similarly situated persons. It has been held by this Hon'ble Court and several High Courts in a number of cases that, persons situated similarly cannot be subject to a discriminatory or dissimilar treatment. This in fact is the crux of the constitutional guarantee of Articles 14

and 15 of the Constitution. The true scope and nature of Article 14 of the Constitution was highlighted in *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 and *R.D. Shetty v. Airport Authority*, (1979) 3 SCR 1014. In *E.P Royappa V State Of Tamil Nadu*, 1974(4) SCC 3, it was held as follows:

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

14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

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

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

The preposition that those who are situated on the same footing are liable to be treated alike is a settled preposition in

foreign jurisprudence as well. (Please see *Arbier v. Connolly*, 113 U. S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *Railway Express Agency v. New York,* 336 U. S. 106 (1949); *McDonald v. Board of Election Commissioners,* 394 U. S. 802 (1969) *Reed v. Reed,* (1971) 404 US 76). Section 497 of IPC and Section 198(2) of CrPC plainly fail to meet this test of equality. The implication that men are arbitrarily punished and women are not for committing the same act is unjust, illegal and unconstitutional.

C) Section 497 IPC cannot be interpreted as a beneficial provision under Article 15 (3) of the Constitution of India. Article 15 (3) of the constitution states as follows: *"Nothing in this article shall prevent the State from making any special provision for women and children"*. Article 15 (3) permits affirmative action in favour of women. This provision is not meant to exempt married women from the liability of punishment in criminal offences. When men and women are on equal footing, discrimination against a particular sex would offend Articles 14 and 15 of the Constitution of India. That has never been the intention of the Constitutional makers to bring in criminal exemption under the purview of Article 15 (3) of the constitution.

Permissibility of affirmative action is different and distinct from exemption from criminal prosecution. Both cannot be conflated or confused with each other. The scope of Article 15(3) of the Constitution of India was explained by this

Hon'ble Supreme Court in *Thota Sesharathamma and Anr v. Thota Manikyamma (Dead) by Lrs. and Others,* (1991) 4 SCC 312 in the following words, *"Freedom of contract would yield place to public policy envisaged above. Its effect must be tested on the anvil of socio- economic justice, equality of status and to oversee whether it would sub serve the constitutional animation or frustrates. Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to-women socioeconomic equality. As a fact Art. 15(3) as a fore runner to common code does animate 'to 'make law to accord socio- economic equality to every female citizen of India, irrespective of religion, race, caste or region."* Therefore, the purpose of Article 15(3) is to further socio-economic equality of women and has always been interpreted as such. Article 15(3) permits reservation and the like for special classes. It cannot operate as a license for criminal exemption and the jurisprudence on Article 15(3) clearly evidences this.

D) The differential treatment accorded to men and women under the impugned provisions have no justification or rational basis. The assumption that women are incapable of committing adultery is irrational and perverse. Such an assumption is part of institutionalized discrimination. Institutionalized discrimination was repelled by this Hon'ble Court in *Charu Khurana and Ors v. Union of India and Ors.* 2015(1) SCC 192 as follows:

> *"The present writ petition preferred under article 32 of the constitution of India exposes with*

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

have been a matter of history, but it has not been so, as it seems."

It was further held as follows:

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

3. Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American man of letters, stated "A sufficient measure of civilization

is the influence of the good women." Speaking about the democracy in America, Alex De Tocqueville wrote thus: "If I were asked … to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women." One of the greatest Germans has said: "The Eternal Feminine draws us upwards."

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

5. At one point, the UN Secretary General, Kofi Annan, had stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

6. Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

7. At this juncture, we may refer to some international conventions and treaties on gender equality. The Covenant on the Elimination of All Forms of Discrimination Against Women (Cedaw), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.

8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this convention and other declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus:

> *"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. … The World*

Conference on Human Rights urges governments, institutions, inter-governmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl child."

9. The other relevant international instruments on women are: (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)."

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

"Moreover, the Government concedes that the differential treatment accorded men and women

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

Therefore, if the discriminatory treatment is extended without any basis in law, such a treatment has to meet the constitutional test of equality and non-discrimination. The

impugned provisions fail to meet such test and are only liable to be struck down.

F) The above provisions also cannot be held to be a measure of reasonable classification. Going by the consistent jurisprudence enclosed by the Supreme Court and the High Courts, the two permissible grounds of classification are (i) intelligible differentia (ii) rational nexus with the aim. In *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75, it was held as follows: "*In order to pass the test of permissible classification two conditions must be fulfilled viz. (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them*." This preposition was reiterated *in re the Special Courts Bill,* 1978 (1979) 1 SCC 380. Exempting women from criminal prosecution for the offence of adultery does not fulfil the above test. Firstly, married women are not a special class for the purpose of prosecution for adultery. They are not in any way situated differently than men. Secondly, there is no purpose sought to be achieved by the legislation having a rational nexus with this exemption.

G) Above said provisions are also discriminatory against women in another aspect. It is important to note that women cannot prosecute/file a complaint under Section 497 IPC read with

198(2) CrPC because Section 198 (2) expressly lay down as follows:*"no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code."* Therefore, the woman whose husband is committing adultery is left with no remedy. Wives of those men committing adultery are also equally aggrieved by the adulterous act. Excluding her from the purview of initiating criminal prosecution has no rhyme or reason. She is situated in the same position as an aggrieved husband whose wife has committed adultery. Such an exclusion is unjust, illegal and arbitrary and violative of the fundamental rights under Article 14, 15 and 21 of the Constitution of India.

H) Section 497 IPC also suffers from the vices of irrationality, arbitrariness and perversity. This can be understood with the help of the following illustration: Ayush is bachelor and has sexual relationship with Gayathri who is married. Both voluntarily and willingly started the relationship. The sexual relationship is without the consent of Gayathri's husband. In this particular case following problems occur: if the consent of Gayathri's husband taken, then there is no offence of adultery. This does not have any rational basis or nexus with the objective sought to be achieved by the provision, if the object of the provision is to protect the sancity of marriage, there is no rational for exempting an adulterous relationship based on the consent of husband. Moreover, sexual intercourse with an unmarried woman is as damaging to the marriage of the adulterer as sexual intercourse with a

married woman. In the above case, if Gayathri were not married, the same wouldn't be coming under the ambit of the provision. Such exclusion is without any rational basis.

I) The above said provisions are also indirectly discriminatory against women. Sexual intercourse with married women with the consent of her husband is exempted from the ambit of the provision. The essential premise of the provision is that women are the property of the men and every married woman is the lookout of her husband. The provision conceives a marriage between women and a man as a master servant relationship. Therefore, if the consent of the husband as the master is taken, the act no longer becomes the offence of adultery. Such a treatment was also condemned by this Hon'ble Court in *Charu Khurana* (supra).

J) Section 497 of the IPC is unconstitutional for the further reason that the right to engage in sexual intercourse is an intrinsic part of right to life under Article 21 of Constitution of India. As held by this Court in the historic judgment in *Justice K.S Puttaswamy (Retd.) v. Union of India and Ors*, Writ Petition (Civil) No. 494 OF 2012), several foreign judgments were reiterated by the Court as follows:

> *"70. A large number of judgments of the U.S. Supreme Court since Katz (supra) have recognized the right to privacy as falling in one or other of the clauses of the Bill of Rights in the U.S. Constitution. Thus, in Griswold v. Connecticut, 381 U.S. 479 (1965), Douglas, J.'s majority opinion found that the right to privacy*

was contained in the penumbral regions of the First, Third, Fourth and Fifth Amendments to the U.S. Constitution. Goldberg, J. found this right to be embedded in the Ninth Amendment which states that certain rights which are not enumerated are nonetheless recognized as being reserved to the people. White, J. found this right in the due process clause of the Fourteenth Amendment, which prohibits the deprivation of a person's liberty without following due process. This view of the law was recognized and applied in Roe v. Wade, 410 U.S. 113 (1973), in which a woman's right to choose for herself whether or not to abort a fetus was established, until the fetus was found "viable". Other judgments also recognized this right of independence of choice in personal decisions relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v Oklahoma, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 40 U.S. 438, 453-454, 92 S.Ct. 1029, 1038-1039, 31 L.Ed.2d 34 (1972), family relationships, Prince v. Massachusetts, 32 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); an child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070

> *(1925)." It is further held that, "In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being extinguish with human being." It was also held that, "36) Similarly, I also hold that the "right to privacy" has multiple facets, and, therefore, the same has to go through a process of case-to-case development..."*

The right to privacy invariably has to include the right to sexual privacy. In fact, in *Bowers v. Hardwick* 106 S. Ct 2841, Justice Blackmun said in his dissent that *"depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our nations' history than tolerance of non conformity could ever do."* There is no reason to criminalize consensual sexual intercourse between two adults. Therefore, for this reason as well, the above said provisions are only liable to be struck down as unconstitutional.

K) In Sowmithri (supra), this Hon'ble Court held as follows in order to repel the contentions:

> *"These contentions have a strong emotive appeal but they have no valid legal basis to rest upon.*

Taking the first of these three grounds, the offence of adultery, by its very definition, can be committed by a man and not by a woman: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man ... ... is guilty of the offence of adultery." The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law might have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years under section 392 of the penal Code but the offence of adultery should be punishable with a sentence of five years only : 'Breaking a matrimonial home is not less serious a crime than breaking open a house'. Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed."

The said reasoning is blatantly illogical. The analogy provided is incorrect. Exempting an entire class from the purview of criminal penalty is not analogous to providing for a particular punishment for an offence. When an entire class of the citizens is exempted from being punished, such an exemption should rest on sound reasons supported by Constitutional principles. It is pertinent to note that the above provisions are not challenged because a better alternative is suggested to the legislature. The challenge is primarily based on the contention that excluding women from the purview of punishment has no rational or sound basis and is *prima facie* arbitrary and unjust.

L) This Hon'ble Court proceeded with a wrong presumption in *Sowmithri* (supra) that only men are capable of committing/abetting the offence of adultery. In the words of this Hon'ble Court:

> *"We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position might have undergone some change over the years but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone. The Law Commission of India in its 42nd Report, 1971, recommended the retention of Section 497 in its present form with*

the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The suggested modification was not accepted by the legislature. Mrs. Anna Chandi, who was in the minority, voted for the deletion of Section 497 on the ground that "it is the right time to consider the question whether the offence of adultery as envisaged in Section 497 is in tune with our present day notions of woman's status in marriage". The repot of the Law Commission show that there can be two opinions on the desirability of retaining a provision like the one contained in Section 497 on the statute book. But, we cannot strike down that section on the ground that it is desirable to delete it." (Emphasis Added)

M) The emphasized portion would make it clear that this Hon'ble Court presumed that man is the seducer and not the woman. The said observation is highly incomprehensible. There is no scientific data or material to support this statement. In the current social situation, the said observation is irrelevant. It also goes against the spirit of the judgment in Charu Khurana (supra). In the light of the decision of this Hon'ble Court in *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 and the drastic change in the social situation, the impugned provisions needs reconsideration in terms of their constitutional validity.

N) This Hon'ble Court in *Sowmithri* (Supra) has held as following:

> *"In so far as the second of the three grounds is concerned, section 497 does not envisage the prosecution of the wife by the husband for 'adultery'. The offence of adultery as defined in that section can only be committed by a man, not by a woman. Indeed, the section provides expressly that the wife shall not be punishable even as an abettor. No grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, we revert to the same point: Who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute."*

It is submitted that when this Hon'ble Court has stated that the contemplation of the law is that the wife who is involved

in an illicit relationship with another man is a victim and not the author of the crime. Such a premise is illogical, arbitrary and has no sound or rational basis. Also, if that be the case, this Hon'ble Court has not addressed the contention as to why a woman is not permitted to prosecute her husband, who, even as per the observation of this Hon'ble Court is an author of the crime.

O) This Hon'ble Court had held in *Sowmithri* (supra) that the impugned section does not violate the right to reputation included under Article 21. In the said case, the petitioner had taken the contention that since there is no provision to include the accused women in the party array in the trial, she cannot defend herself and conviction of her paramour will infringe her right to reputation. The said argument was answered stating that since there is no bar in the impugned section to implead the accused woman in the party array and thus there is no infringement of right to reputation. The said answer is also completely incomprehensible. If that be the case, the right to reputation of a woman will be at the mercy of each judicial officer in the each case allowing or disallowing the petition for impleading. The said situation is unjust, illegal and arbitrary.

P) *In Revathi* (supra) this Hon'ble Court held as follows:

> *"The argument in support of the challenge is that whether or not the husband has the right to prosecute the disloyal wife, the wife must have the right to prosecute the disloyal husband. Admittedly under the law, the aggrieved husband whose wife*

has been disloyal to him has no right under the law to prosecute his wife, in as much as by the very definition of the offence, only a man can commit it, not a woman. 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 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. Whether one does or does not subscribe to the wisdom or philosophy of these provisions is of little consequence. For, the Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law."

It is submitted that the above explanation is not the intent of the legislature. The sole object of the exemption provided for women from being prosecuted for committing the offence is that the definition treats women as incapable of committing offence and the property of the husband.

Q) Further, in the said case, this Hon'ble Court has held:

"Section 497 of the Indian Penal Code and Section 198(1) read with Section 198(2) of the Criminal Procedure Code go hand in hand and constitute a legislative packet to deal 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 relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is why neither the husband can prosecute the wife and send her to jail nor can the wife to prosecute the husband and send him to jail. There is no discrimination based on sex. While the outsider who violates the sanctity of the matrimonial home is punished a rider has been added that if the outsider is a woman she is not punished. There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman in so

far as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated an offender in the eye of law. The wife is not permitted as Section 198(l) read with section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practiced. I circumscribing the scope of Section 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 submitted that if the above explanation is to be accepted, even an unmarried woman is 'an outsider' for the matrimonial home. Such persons ought to have been included as the persons capable of committing the offence. A woman is not enabled to prosecute merely because the definition of the offence. The above explanation is thoroughly insufficient to address the issue.

R) In *Lawrence v. Texas 539 U.S 558(2003)* the criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity were held not to be in "legitimate state interest". On global level there have been continuous concerns about decriminalizing adultery. At present, in the United Kingdom, adultery is not an offence. In most of the

countries in Europe, adultery is not treated as a criminal offence. Though in some of the States of United States, adultery is still considered as an offence most of them are put to disuse. Recently, in the year 2015, the Supreme Court of South Korea has struck down Article 241 of Criminal Act (enacted as Law No. 293 of September 19, 1953) which stipulated imprisonment for two years or less for adultery and interdiction. The European Parliament vide resolution of 24 May 2007 on human rights in Sudan condemned the severe punishment imposed for adultery and stated that it "violates the basic human rights and international obligations".

S) It is submitted that international conventions have advocated the abolition of penal laws on adultery. In the year 2012, the then Working Group on the issue of discrimination against women in law and in practice established by United Nations in the year 2010 urged the countries to eliminate laws that classify adultery as a criminal offence. India being the signatory to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) has an obligation to reconsider the impugned sections in the light of the current social and global legal scenario. Moreover, the International Covenant on Civil and Political Rights, 1966 (ICCPR) also has guarantees of equality. ICCPR forms part of customary international law and is binding on nation states. "*The State parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant*." Article

14 (1) states that "all persons shall be equal before the courts and tribunals". Article 26 emphatically lays down that "*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*" Moreover, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (hereinafter 'CEDAW') is another peculiar instrument proscribing discrimination. India is a party to CEDAW and the provisions are therefore, binding on it. Article 1 defines discrimination as follows: "*Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*" S.198 (2) of CrPC by specifically excluding women from the eligibility to prosecute directly violates the said provision. Article 16 lays down an express prohibition against "discrimination against women in all matters relating to marriage and family relations."

T) Any other ground that may be raised with the permission of this Hon'ble Court.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may be pleased to:

a) Strike down Section 497 of the Indian Penal Code,1860 as unconstitutional being unjust, illegal and arbitrary and violative of fundamental rights;

b) Declare that Section 497 of the Indian Penal Code, 1860 is unconstitutional ;

c) Strike down Section 198(2) of the Code of Criminal Procedure, 1973 as unconstitutional being unjust, illegal and arbitrary and violative of citizen's fundamental rights;

d) Declare that S.198(2) of the Code of Criminal Procedure, 1973 is unconstitutional being unjust, illegal and arbitrary and violative of citizen's fundamental rights;

e) Pass such other Order(s) in favour of the Petitioner herein, as this Hon'ble Court may deem fit and proper in the interest of Justice.

AND FOR THIS ACT OF KINDNESS PETITIONER, AS IN DUTY BOUND, SHALL EVER PRAY.

DRAWN BY FILED BY

KALEESWARAM RAJ, **SUVIDUTT M.S.**

THULASI K. RAJ & ADVOCATE FOR PETITIONER

MAITREYI HEGDE

DRAWN ON: 22.08.2017

FILED ON: 10.10.2017

NEW DELHI

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL.) NO. OF 2017

IN THE MATTER OF: -

JOSEPH SHINE ... PETITIONER

VERSUS

UNION OF INDIA ... RESPONDENT

AFFIDAVIT

I, Joseph Shine, aged 40 years, S/o Joseph, residing at via dei muredei, 32 – 38122 Trento, Italy (Thevadiyil House P.O., Koodathai Bzar Kozhikode, Kerala, PIN 673573, presently at New Delhi, do hereby on solemn affirmation state as under:-

1. That I am the Petitioner in the above mentioned matter hence fully conversant with the facts of the case, as such competent to swear this affidavit.
2. That the facts stated in the accompanying Writ Petition from Page No. 1 to 35, are true and correct to my knowledge and the statements in List of dates from Page No. B to G and facts furnished along with the W.P. and I.A.s are true to my knowledge and belief.
3. That the Annexures from P-1 to P-4 filed in the W.P. are true copies of their respective originals.

DEPONENT

VERIFICATION

Verified at New Delhi on this 23rd day of August, 2017 that the contents of the paragraphs of my above affidavit are true and correct to my knowledge and belief, no part of it is false nor has any material fact been concealed therefrom.

DEPONENT