

## **The Supreme Court of India and Social Transformation with Special Reference to Adultery**

*Suparna Bandyopadhyay<sup>1</sup>*

### **I. Introduction**

Change is the law of nature and if something does not change it is considered to be dead. A change is appreciated if it has positive impact on the society. The word 'adultery' derives its origin from a French word '*avoutré*,' which has evolved from a Latin verb '*adulterium*' which means to corrupt. The popular understanding of the act of adultery is that a married person has sexual intercourse with another person outside the wedlock. Indian society has transformed over the period, from a society recognizing patriarchy and matriarchy to a society recognizing rights and duties by upholding the principles of equality, personal liberty and freedom from arbitrariness for a better social cohesion. For maintaining social up-gradation, Indian judiciary has played a very significant role from 1771 (colonial period), as well from 1950 when Supreme Court came into existence to till date. And through landmark judgments, Supreme Court proved that it is better late than never and finally by 2017 one proactive step taken by the Supreme Court with respect to the offence of adultery which is remarkable.

### **II. Concept of Adultery as Understood among Different Religion**

The modern trend has liberal approach towards adultery, but historically, many cultures have regarded adultery as a crime. Hindu, Jewish, Islamic and Christian traditions have unequivocally condemned adultery. Commonly marriage is defined as the union of two persons which excludes all others which indicates that adultery has no place in marriage as the union excludes 'all others'.

**Hindus** consider the marriage as union of sex which is sacred in nature. In *Dharmastras* marriage is considered sacrament or *samskara* which should never be broken and which can never perish. In other words, wedlock is forever with

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<sup>1</sup>Teaching Assistant and Ph.D. Scholar, Department of Law, University of North Bengal.

key of the lock having been thrown away or surrendered to god or society forever.<sup>2</sup> It is a union of man and wife depending upon trust, loyalty and respect. Yajnavalkya declares, An adulterous woman should be deprived of her authority over servants, she should be made to wear dirty clothes, given food sufficient to enable her to live, should be treated with scorn and made to lie on the ground (not on a cot), a woman becomes pure from adultery when she has her monthly period after that, but if she conceives in adulterous intercourse she may be abandoned.<sup>3</sup> During 5<sup>th</sup> Century BCE in Ramayan, an Indian epic taught by sage Valmiki to Lord Rama and Sita's twin son; Luv and Kush. In Ramayana Sita's abduction by *Ravana* so taints her reputation that she had to give *agniparikshato* prove everyone her chastity towards her union. Even in case of *Ahalya* the ignorant or unintended act of her has been misinterpreted and compared to an adulterous wife; by sage Gautam (her husband), who in his sudden rage has converted her into stone.<sup>4</sup> There is another instance from the epics of *Parsurama* where he had to behead his mother *Renuka* because his father *Jamadagni* asked him to and claimed that she had committed a sin by having lustful thoughts after seeing a young couple frolicking in water. So, ancient era was very much strict in keeping the sanctity of marriage where woman were punished without being looked with mercy.

In the epic of Mahabharata (8<sup>th</sup> - 9<sup>th</sup> century BCE) the union of marriage and the position of wife was considered important and equal to man. Yaksha asked Yudhistira, "*kimsvinmitramgrihesatah?*" meaning "Who is the friend of a householder"? To which *Yaksha* replied, "*bhaaryaamitramgrihesatah*" implying "the friend of a householder is his spouse". In another question he is asked, "*kimsviddaivakrutahsakha?*" which states, "Who is man's God-given friend?" he responded, "*bhaaryaadaivakrutahsakha?*", implicating, "A man's God-given friend is his wife." Later sage *Svetaketuis* acknowledged for putting forward the concept of marriage with an inherent element of loyalty after observing a *brahman* catching his mother's hand unintentionally in front of his father.

<sup>2</sup> DR. GANGOTRI CHAKRABORTY, HINDU MARRIAGE: A CRITIQUE 1 (East End Law, Calcutta, 1995).

<sup>3</sup> P.V. KANE, HISTORY OF DHARMASHASTRA, 571, (vol. II, Part I, 6th ed. 1974).

<sup>4</sup> DEVDUTT PATNAIK, A Women's Body, Indian Mythology, (2011)(<https://devdutt.com/articles/a-womans-body/>).

Manusmriti being the oldest sacred text provided punishment for those who intercourse out of the wedlock. Later during the time of Manu the position of women were subordinate to men. A woman is always under her father as a child, under her husband as a wife and under her son as a mother in old age. It was the orthodox conception which led women to feel themselves as a property of men. Hence, there was no commission or justification of adultery in earlier times because women had responsibilities towards their marriage for keeping up the sanctity. That is why a woman was called *sahyogini* (who helps her husband in every aspect of life), *ardhangini* (half of the man is built of she), *pativrata* (loyal to her husband) and so on. A woman considers her husband as *patiparmeshwar* because her husband was equivalent to god but a man never equated his wife with such metaphor.<sup>5</sup>

**Islam** also condemns adultery. The Qur'an firmly forbids adultery in chapter 24, verse 2, it states- "Those who commit adultery, men or women, give each of them a hundred lashes" but the Quran does not stipulate stoning to death as punishment and penalized both men and women for the crime of adultery, unlike what is generally assumed, only women are blamed and responsible for adultery.

In ancient Greece and Roman world, there were harsh laws against adultery which applied only on the female who were married but these laws were not relevant if a man maintained sexual relationship with a slave or an unmarried female.

**Christianity** also firmly bans adultery and brands it impure, licentious, blasphemous and capricious act. Seventh Commandment in the book of Exodus states- Thou shall not commit adultery. The Old Testament agrees that he who commits adultery has no sense and whoever does so destroy him. In the gospels, Jesus affirmed the commandment against adultery and extended it by saying; anyone who looks at a woman with lust has actually committed adultery in his heart.<sup>6</sup> In the book of Genesis, Jesus quoted; when two people marry they no

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<sup>5</sup>Ibid.

<sup>6</sup>ANNONYMOUS, 10 COMMANDMENTS OF GOD, (Last Visited on 26 July, 2020 at 11pm).

longer remain two, but one flesh. Therefore, what God has joined, no man should separate and adultery is a revolt against God's very decision. Hence, adultery under Christianity is a punishable offence and the adulterous (man or women) is given death sentence.

**Judaism** also prohibits the act of adultery in the third book of Torah i.e., Leviticus chapter 20 verse 10 prescribes death penalty for adultery. But the death penalty can only be given after satisfying the testimony of two eyewitnesses of good character.

Hence, every religion opposes the act of adultery as a sin and against morality. The orthodox law prescribes death penalty to an adulterous whereas the evolving laws consider adultery a ground of divorce which is domestically a personal wrong.

### **III. Earliest Code Referring to Adultery**

All the earliest codes of the ancient civilizations disregard adultery as a wrong against morality which destroys the institution of marriage. The earliest recorded injunction against adultery was found in the ancient code of Babylonian king Hammurabi in 1750 B.C. The code prescribed if a married woman is caught in an adulterous relationship she and her lover should be tied together and thrown into the water so that they can die together by drowning. Death by drowning was prescribed a punishment for the crime of adultery.

The first Roman Emperor, Emperor Augustus passed the *Lex Julia de adulteriis coercendis* Act which stipulates the punishment of banishment. In this case both an adulterous woman and man should be sent to different Island so that they cannot meet each other. This law was enacted to curb immorality so that the affected family should not feel shame in the society and also it will protect the illegitimacy of children and their claim to title and property. Prior to this Act, the offence of adultery was left to one's family's personal matter. The father/ husband of the woman had the right to deal with it. Often the father of

the daughter was allowed to kill his daughter and her partner if they are caught committing adultery in his or her husband's house.<sup>7</sup>

#### **IV. Concept of Adultery under Indian Penal Code and Code of Criminal Procedure**

The Indian Penal Code (I.P.C) and Code of Criminal Procedure (Cr.P.C) are colonial/pre-constitutional laws which were first enacted in 1860 and 1882 respectively. Section 497 of IPC, expressly criminalizes adultery. In 18<sup>th</sup> century when Indian Penal Code was enacted, women were not considered an independent individual. She was a chattel or property of the *pater familias* be it father, husband, brother or son. Since, she "belonged" to a male as property; whoever used her for sexual purposes was considered to have stolen another person's property. Hence, the owner of the woman could prosecute a person who stole her. Through this one can see the law has shifted from prosecuting women to protecting women.<sup>8</sup>

In earliest Hindu codes there were no provision for divorce and adultery was a sin against the marriage if it was committed by wife but if husband performs a sexual act with another woman, he will not be prosecuted because he could remarry her at any point of time. Post 1955 Hindu Code was enacted which promotes monogamy and declares adultery a ground for divorce.

Section 497 of Indian Penal Code,<sup>9</sup> expressly criminalizes adultery as an act of a married man having sexual intercourse with a married woman about whom he knows that she is the wife of another man wherein that man has not given his consent to the act. Such act of man did not amount to rape but to the offence of

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<sup>7</sup>MARY ALANA DEMINION, "STAGING MORALITY: STUDIES IN THE LEX IULIA DE ADULTERIIS OF 18 BCE," 2 (University of Victoria, 2007).

<sup>8</sup>Ibid.

<sup>9</sup> Section 497 of PEN CODE States "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."

adultery for which the punishment could have been extended to five years or with fine or both. The section signifies-

- Adultery is not an offence, if the consent of the women's husband was present.
- It will not be an offence if the man is indulged with a woman who is unmarried, divorcee or a widow.
- Section 198 of Cr.P.C<sup>10</sup> in addition to IPC states, a woman cannot be convicted of the offence of adultery neither she can initiate any criminal proceeding against her husband for such offence.
- The proceeding could only be initiated by the husband of the woman and if the husband is absent, then by his nominee.
- This offence denotes that the male offender alone should be made liable and the wife cannot even be charged as an abettor. It means the offence is committed by a third person against a husband in respect of his wife as his personal property.

However, Section 497 of the Ranvir Penal Code, 1932 (State of Jammu and Kashmir) holds the participating woman in adultery is a co-accused along with her paramour. She may also be prosecuted as an abettor of the offence of adultery, which is punishable with imprisonment, which may extend to five years with or without fine.<sup>11</sup>

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<sup>10</sup> Section 198 of CODE CRIM. PROC. States: (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that-(2) For the purpose 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.

<sup>11</sup> The Jammu And Kashmir State Ranbir Penal Code, 1989 (1932 A.D.) (Act No. XII of 1989), Section 497. Adultery.- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to 2 -5 years, or with fine, or with both. In such case the wife shall be punishable as an abettor.

#### **IV. Cases on Adultery**

##### **IV.I. Colonial Period**

Lord Macaulay was against the insertion of Section 497, in the original draft of IPC and wanted to keep it out of the purview of penal statutes. According to him, such inclusion is unnecessary and it shall be left to the society. Hence, the British rulers in India had adopted a tendency of retaining and protecting the personal laws of the community because the practices like, slavery, *Muta* marriage, patriarchy was prevalent in India and judges did not deviate themselves.

The Bombay High Court in colonial era through Shankar Tulsiram Navale v. Kundlik Anyaba Yadav<sup>12</sup> stated, a man convicted of adultery will be liable to a second conviction if he continues his adulterous intercourse with the woman, irrespective of the woman who has participated fully and refused to return to her husband after the conviction of her paramour. In another case of Rej v. Karsan Goja,<sup>13</sup> the court held, even if a woman leaves her first husband and contracts second marriage (perform bigamy) she will not be accused of adultery rather her second husband will be charged with the crime of adultery.

The direct proof of the case of adultery is impossible, so the admission of circumstantial evidence is upon the discretion of a judge to have reasonable and just point of view which is biased towards woman.<sup>14</sup> Hence, judges did not change the law instead affirm it.

##### **IV.II. Supreme Court of India after Independence**

There have been four important cases before Supreme Court from 1954 to 2017 which attacked the very existence of section 497 of IPC contending that adultery law should be amended. Just after independence first case which was dealing with adultery was of Yusuf Abdul Aziz v. State of Bombay, (AIR 1954 Bom. 321). Thereafter, Sowmithri Vishnu v. Union of India [(1985) SCC 137],

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<sup>12</sup> 1928 AIR (Bom) 530.

<sup>13</sup> (1864) 2 B. H. C. R. 117.

<sup>14</sup> Sita Devi v. Gopal Saran Narayan Singh, 1928 SCC Online Pat 37.

followed by *V. Revathi v. Union of India* (AIR 1988 SC 835) wherein, the concept of adultery was challenged but the apex court held the section constitutional but finally in *Joesph Shine v. Union of India* (Writ Petition (Criminal) No. 194 OF 2017) the apex court overturned the past judgments and pronounced the said section unconstitutional.

In *Yusuf Abdul Aziz v. State of Bombay*<sup>15</sup> the Supreme Court, declared:

*“The offence of adultery as defined under section 497 of IPC does not offend the concept of equality enshrined under Article 14 and 15 of the Constitution. There cannot be any restriction into the clause; nor does the court agree that a provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited.”*

Article 15 deals with Prohibition of discrimination based on religion, race, caste, sex or place of birth. Article 15(3) enables the government to make special provisions for women and children. The court unanimously declared that the exemption provided by this section is safeguarded by Article 15(3) of the Constitution.<sup>16</sup>

In the case of *Sowmithri Vishnu v. Union of India*, it was again contended that Section 497 is contrary to Article 14 of the Constitution, it makes an irrational classification between women and men. The argument states-

1. Section 497 confers upon the husband the right to prosecute the husband who has committed adultery, but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery.
2. Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and,
3. Section 497 does not include those cases where the husband has sexual relations with unmarried women. It was held that such

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<sup>15</sup> AIR 1954 Bom. 321.

<sup>16</sup>RGICS POLICYWATCH, *ADULTERY IN INDIA: LAW, COURT AND SANCTITY OF MARRIAGE*, vol. 7 Issue 5, (2018 pdf).

contentions have an emotive appeal but no legal basis to rest upon hence; adultery can be committed by a man and not by a woman.<sup>17</sup>

The Supreme Court adds the wife shall not be punishable even as an abettor. This states the wife who is involved in an illicit relationship with another man, is actually a 'victim' not an 'author' of the crime. It makes a specific kind of extramarital relationship an offence. In a relationship between a man and a married woman, the man is the offender. The court contended that the victim of such a prosecution is the married wife and it is her reputation most importantly involved and assailed. Section 497 contemplates the wife is also not entitled to be heard until and unless she makes an application which is violative of Article 21 of the Constitution.<sup>18</sup> Hence, it was reiterated that the offence of adultery is considered by the legislature as an offence against the sanctity of the matrimonial home, by an act which is committed by a man. Therefore, those men who defile that sanctity are brought within the purview of law." And the very section is not against Article 14, 15 and 21 of the Constitution.<sup>19</sup>

As per the patriarchal mindset, woman has no entity merely a non-person. An analysis of Section 497 of IPC along with the various observations by the Supreme Court of India and High Courts, till 2018 concludes that only a man can commit adultery not woman. A woman is often compared to an object, an inanimate property, whose rights are almost transferable. And property on its own has no legal existence. Moreover, if a married man has sexual intercourse with an unmarried woman it is not adultery because an unmarried woman does not belong to anybody as property and is not owned by anybody, not even by her parents or brother because they hold her in trust and have no ownership rights to prosecute the person. Supreme Court has time and again upheld the reputation of a woman even if she is an abettor/ author or a strong offender the court has maintained her *status quo* by giving her a blanket protection of maintaining her dignity. But somewhere for the sake of doing justice our judiciary went wrong in his decision of comparing women. This law was

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<sup>17</sup>V. K. DEWAN, LAW RELATING TO OFFENCES AGAINST WOMEN, 300 (Orient Law House, New Delhi, 1st Edn, 1996).

<sup>18</sup>Article 21 of the Constitution of India- Right to life and personal Liberty.

<sup>19</sup>Ibid.

blatantly biased against the woman by giving privileged position to a man. The idea of equal status, identity and liberty should be fundamental to any democratic civilization. A law, which forces the woman to live under a code imposed by man, totally negating the feminine viewpoint, is alien to truly humanistic values. As today a woman is seeking for a position *at par* with men not any special protection. Moreover, adultery should not be a criminal offence because 'love' cannot be an offence. It is based on gender stereotypes and they put a serious blow on the woman's dignity.<sup>20</sup>

Even in Revathi's case court held this section is designed in such a way that a husband cannot prosecute wife for defiling the sanctity of matrimonial tie. Thus, the law permits neither the husband of the offending wife nor the wife of the offending husband to strike at each other.

#### **V. The Judgment that Changed the Age Old Belief**

Finally, the day arrived in 2018 when judiciary transformed itself by keeping the beam of justice parallel and struck down section 497 and decriminalized adultery in India. In *Joseph Shine v. Union of India*<sup>21</sup>, a Five-judge bench of the Supreme Court unanimously struck down Section 497 of IPC and asserted that the binding nature of precedent should not be allowed in order to retain the status of precedent; it can be allowed through dilution. The Court observed:

*“when a constitutional court faces a challenge, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional*

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<sup>20</sup>Ibid.

<sup>21</sup> (Writ Petition (Criminal) No. 194 OF 2017).

*court cannot remain entrenched in a precedent, because the lives of human beings transcendently grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach.*"<sup>22</sup>

In this excerpt of judgment, the Apex Court clearly laid down that there is a need to adopt transformative constitutionalism and progressive Jurisprudential Parameters for determining the women's rights, where women should not be considered as a property of men or victims. It is because the autonomy, desire; choice and identity are the important aspects of the dignity of a woman. In this regard, the Court refers the judgment of K.S. Puttaswamy and another v. Union of India and Ors.<sup>23</sup> . And declares that right to privacy is a fundamental right as prescribed under Article 21 of the Constitution.

Further in Joseph Shine's case the Apex Court clarifies its stand on Adultery whether a criminal offence or civil injury and observed:

*"There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. However, the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social license that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. In this context, we are reminded of what **Edmund Burke**, had said- a good legislation should be fit and equitable so that it can have a right to command obedience. Burke would like to put it in two compartments, namely, 'equity and utility.' If the principle of Burke is properly*

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<sup>22</sup>JISMIN BOSE, *JOSEPH SHINE V. UNION OF INDIA*, law times journal, 14(March 8, 2019).

<sup>23</sup> WRIT PETITION (CIVIL) NO. 494 OF 2012.

*understood, it conveys that laws and legislations are necessary to serve and promote a good life.*<sup>24</sup>

#### **VI. Analysis of the Judgement**

The above observation of the Court declares, adultery can be a ground for divorce, but no longer a criminal offence. However, if any aggrieved spouse commits suicide due to the adulterous relations of life partners then it could be considered as abetment to suicide. Hence, Supreme Court decriminalized adultery by holding that it does not fit into the definition of crime. If adultery is treated as a crime it would be an immense interference by the state into extreme privacy of the parties because a marriage cannot be forced. **J. Dipak Mishra** stated, adultery is not only a cause of an unhappy marriage it also could be a result of an unhappy marriage.<sup>25</sup>

#### **VII. Comparative Study of Adultery in SAARC Countries**

The offence of adultery has been dealt severely in religious countries like Pakistan and Afghanistan whereas, the other SAARC countries has reduced the punishment of adultery. In **Pakistan** under Sharia law and Quran, adultery is sin and an adulterer should be punished by stoning to death. In 1987, a Pakistan-based Session Court sentenced a couple—Mohammad Sarwar, age 35 and Shahida, age 26- to be buried up to their necks and stoned to death in public for committing adultery. In 2002, Pakistan court gave death sentence to Zafran Bibi by stoning for committing adultery. By 2007, the infamous “hudud ordinance” was abolished which was introduced by General Zia-ul-Haq. It considered adultery to be a crime against the state which automatically made state a party whenever a woman was accused of such crime and for proving a woman’s innocence she had to produce the testimony of four pious Muslims as evidence. Thereafter, the women's rights bill was introduced which made modern forensic evidence credible. It removed state being a party and considered adultery a domestic offence. It also recognised ‘innocent until proven guilty’ principle. But

<sup>24</sup>JIVESHJHA, COMPARATIVE STUDY OF PENAL PROVISIONS OF SAARC COUNTRIES, <http://nepalforeignaffairs.com/comparative-study-of-penal-provisions-of-saarc-countries/>, (Last Visited on 26 June, 2020 at 9pm).

<sup>25</sup>DR. ARSHI PAL KAUR, *DECRIMINALISATION OF ADULTERY IN INDIA: A SOCIO-LEGAL ANALYSIS*, Vol. 8 No. 12 Intl. Journal of basic & applied research, Pragati Publications, (2018).

sadly instead of such laws the honour killing prevails and people practice such punishments publically.<sup>26</sup>

**Afghanistan** also adopts similar stringent approach to punish the adulterers under Section 427 of the Afghani Penal Code, it states, partners of adultery would be imprisoned at least for 5- 15 years.

In **Maldives**, chapter 90, Section 411 of the Penal Code Law 6/2014 prescribes 100 lashes to the adulterer if the offence is proved by DNA test in case a women is pregnant other than the four witness rule. Law in Maldives is also similar to Islamic countries.<sup>27</sup>

However, SAARC members, including Pakistan and Maldives, are signatory to the ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984’ where they have vowed that their country will stand against inhuman treatments.

However, in **Nepal** under Part 4, Chapter XVIII of General Code of Nepal (*Muluki Ain*), if a case is filled by an aggrieved husband, the adulterine and the woman involved should be punished for a term ranging from 1- 2 months of imprisonment and a fine of Rs 1000- 2000.<sup>28</sup>

The **Bangladesh** Penal Code, 1860 under Section 497 states the adulterer will be punished with imprisonment for a term which may extend to five years, or with fine, or both which expressly exclude wives furthermore, it states an adulterous wife should not be punished as an abettor which is similar to Indian laws prescribed under Indian Penal Code, 1860. Similarly, **Bhutan** and **Sri Lanka** has soft attitude towards the offence of adultery. They stipulate an imprisonment ranging from 1-3 years and extend up to 5 years. Chapter-III of Bhutan Marriage Act provisions that the adulterer committing the said offense shall have to compensate the husband of the woman in question in accordance with the duration of that woman’s marriage. It provides a minimum fine of a sum of Ngultrum 999 on the offender where the duration of marriage does not exceed 3 years and the maximum of Ngultrum 2999 where the duration of

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<sup>26</sup> Three executed for Adultery in Pakistan, The Irish Times, (Published in March 15, 2007).

<sup>27</sup> PENAL CODE LAW, 6/2014, Part 2, Chapter 410, Section 411, Unlawful Marriage.

<sup>28</sup> Part 4, Chapter XVIII of General Code of Nepal (*Muluki Ain*), 2018.

marriage exceeds 7 years.<sup>29</sup>The personal laws of Sri Lanka make adultery a safe ground for divorce whether it is committed by wife or husband.

Amid all the countries **India** consider adultery a civil offence. India in 2017 has declared adultery under section 497 of IPC as unconstitutional and reduced it only a ground of divorce under section 13 of Hindu Marriage Act, 1955.

The 8 SAARC nations differ in culture, traditions and laws. None of the countries uniformly follow Civil Law or Common Law legal system. Hence, wherever a man goes, his personal law follows him. In some countries the *lex loci celebrationis* predominates in respect of the formal validity of marriage. Whereas, in some countries *lex domicilie* is followed to determine the essential validity of marriage. The court first characterizes the offence and then determines the proper jurisdiction. If an Indian goes to Pakistan or any other SAARC nation and marries there; and commits adultery therein, then the Indian will not be treated under private international law rather under public international law because except India all other SAARC nations punish adultery with imprisonment and consider it a crime *in rem*.

#### **VIII. Comments and Suggestions**

The judgment of decriminalization of adultery has a variety of negative and positive impacts on the institution of marriage which cannot be ignored. The effect will give license to the married parties to set up an extra marital affair by destroying the sanctity of marriage which was not only a union of bodies rather union of souls. The divorce cases would increase which would badly affect the future of their children also.<sup>30</sup> Through this step India is trying to westernize our traditions. But laws around the globe differ from stringent to liberal. And the lack of uniformity and more of stoning acts creates a misbalance which should be regulated.

The delay in such social transformation takes place at the cost of parties. The draconian and discriminatory law not only hinders the growth of law but also

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<sup>29</sup>JIVESHJHA, COMPARATIVE STUDY OF PENAL PROVISIONS OF SAARC COUNTRIES, <http://nepalforeignaffairs.com/comparative-study-of-penal-provisions-of-saarc-countries/>, (Last Visited on 26 June, 2020 at 9pm).

<sup>30</sup>Ibid.

interferes with the right and personal liberty of all astrue feminism lies in equality not in unequal protection.

### **IX. Conclusion**

A Roman maxim, *cessanteratione legis, cessat ipsa lex* means- when the reason of the law ceases, the law itself also ceases. When such law falls foul of constitutional guarantees, it is Supreme Courts solemn duty not to wait for legislation but to strike it down.<sup>31</sup>

The draconian section- 497 took 158 years to transform. The adultery law was first challenged in 1951 in Yusuf Aziz case where Court held; women could only be a victim not a perpetrator of adultery. In 1985, Sowmithri Vishnu case, the court said it is a crime committed by a man against another man. By 1988 in Revathi case judges reiterated the same judgment of above case. Finally, by 2018 in Joseph Shine case **CJI Dipak Mishra** stated, equality is the need of the hour and the husband should not be considered the master of his wife. Hence, adultery should no longer remain a crime rather a ground for divorce and Section 497 of IPC and section 198 of Cr.P.C is unconstitutional. **J. D.Y. Chandrachud** asserted that “the history of Section 497 reveals that the law on adultery was for the benefit of the husband, to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency.” The law finally established from confronting women in ancient era to accusing women and finally to respecting women by giving them equal status in the modern era.

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<sup>31</sup>DEVIKA, ADULTERY (Sec. 497 of PENCODE & sec. 198(2) of CODECRIM PROC.), scconline.com in SCC Blog (2019).