

RECONSIDERING GENDER JUSTICE: AN ANALYSIS OF THE INDIAN SUPREME COURT'S RULINGS ON HOMOSEXUALITY AND ADULTERY

ABSTRACT

Gender refers to an individual's self-identification as a man, woman, transgender or other identified category. Generally, it can be either male or female or a third gender. Transgender/Hijras are identified either as male or female. In *National Legal Services Authority v. Union of India & Ors.* (NLSA case), the Supreme Court of India, declared transgender as the third gender in the year of 2014. Though, both men and women have equal roles in the creation and development of families, nations and society at all times, but socio-legal equality among them has been one of the major issues all over the world. The gender sensitive Indian laws protected the women considering her victim in the male dominated society and as the property of husband. The two landmark verdicts of the Supreme Court of India, decriminalized homosexuality under section 377 and adultery under section 497 of Indian Penal Code on 6th & 27th September, 2018, while reconsidering gender justice on the grounds of fundamental rights under Articles 14, 15, 19, and 21 of the Constitution. The present paper discusses the extent and impact of decriminalization of homosexuality and adultery in the verdict of the Apex court to a more than one and half century old statute.

Keywords: Homosexuality, Adultery, Transgender, Decriminalization, Lesbian, Gay, Bisexual.

1.1 INTRODUCTION

The social reform movement of the 19th century laid the foundation of the notion of gender justice equality.¹

1. HELIMA EMBAREK WARAZI, THE WORLD OF GENDER JUSTICE Har-Anand Publication 1999.

Gender equality means an equal visibility empowerment and participation of both sexes in all spheres of public & private life. The principle of equality is inherent to the notion of human rights. Not only women should be accorded rights equal to those of men, but that they should be able to enjoy all their rights.²

In the *Vedic* period in India, it is believed that women enjoyed an equal status as men. The education of women held considerable significance, especially from works of Katayana and Patanjali. The *Upanishadas* and the *Vedas* have cited women sages and seers. But the condition declined considerably afterwards. Historical practices such as Sati, Jauhar, purdah and Devdasis, child marriage, are few traditions reflective of the gender imbalance in Indian society. Though these practices are largely defunct now, due to legal reform, the essence of the dysfunctional gender equity still is rampant and manifested today through domestic violence, trafficking, dowry deaths, female infanticide, sexual objectification and violence and sexual harassment at work place.³

In India, since long back, women are considered as the oppressed section of the society and they were neglected for centuries. During the National Struggle for Independence, Gandhi gave a call for emancipation of women. He wrote, “I am uncompromising in the matter of women’s rights. The difference in sex and physical form denotes no difference in status. Woman is the complement of man and not inferior”. Therefore, in post independent India was to provide a Constitution to the people, which would not make any distinction on the basis of sex. The Preamble to the Constitution promises to secure to all its citizens, “Justice, social, economic and political”. The principle of gender equality has been enshrined in its Constitution, the every document that provides the basis and guidance for governance in a democracy. In this sense gender justice in India is inextricable from the working of the democratic principles, we have adopted. The inclusion of gender justice equality before law, enfranchisement positive discrimination of neutralizing social and economic in equality among other thing made the Indian Constitution.⁴

2. UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948.

3. Jan. 25, 2019), www.legalserviceindia.com/article/1358-Gender-Justice.html.

4. UDAY S. MEHTA, “et al”. NIRAJAI GOPALJAYAL & PRATAP BHANU MEHTA WRITE HIS ESSAY, CONSTITUTION, OXFORD COMPANION TO POLITICS IN INDIA (Oxford University Press).

The makers of the Indian constitution mentioned the right to equality, liberty, and fraternity to its citizens by starting “We the people of India” in their context.⁵ While India guarantees Human Rights to its citizen in our fundamental rights chapter, the debate of Lesbian, Gay, Bisexual and Transgender have gathered a lot of attention in present times. Although in leading countries like Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Iceland, Portugal, Brazil, etc., gay marriages are legal, in majority of nations like India prohibits the sexual relations between adults of same sex.⁶ In 2001, through a landmark decision, the Honorable High Court of Delhi, in the case of Naz Foundation v. Government of NCT of Delhi,⁷ gave relief to Lesbian, Gay, Bisexual, Transgender (LGBT) in their physical relationship by declaring Section 377 of Indian Penal Code as unconstitutional⁸ but in 2013, the decision of Delhi High Court declared that section 377 of Indian Penal Code does not violate Article 14, 19, and 21 of Indian Constitution and term same sex relation illegal.⁹ Also they stated that it is the duty of parliament to amend or to repeal this section but till than this type of relationship is harmful to society because of homosexuality the percentage of HIV/Aids in India grows from 1% to 8%.¹⁰ The original draft of Indian Penal Code prepared by first Law Commission’s, was silent about the offence of ‘adultery’. Lord Macaulay, who was unwilling to add adultery as an offence, observed, “There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives”.¹¹ The basic objective of keeping ‘adultery’ out of the penal statute was the social norms which have already provided the values and norms which take care of such instances. The circumstances, he referred to included child marriage and polygamy. Macaulay, hence, advised that it would be enough to treat it as civil injury. Thus, framers of the Code did not include adultery as a crime; it was only after the recommendation of the Second Law Commission which was added to the Code.¹²

5. J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA 30-33 (48th ed., Central Law Agency).

6. Sures Kumar Kaushal and Anr v Naz Foundation and Ors., [2013] MANU S.C. 1278 (Indian).

7. [2010] Cr. L. J. (Del.) 94 (Indian).

8. Id.

9. Sures Kumar, Kaushal and Anr v Naz Foundation and ors [2013] MANU S.C. 1278 (Indian).

10. Id.

11. K.D. GAUR, THE INDIAN PENAL CODE 388 (2nd ed., Eastern Law Publication 1998).

12. RATANLAL DHIRAJLAL, “et al.” in C.K. THAKKER & M.C. THAKKER LAW OF CRIME (26th ed., Bharat Law House 2007).

Therefore, it is on the record that the framers of the Code did not make adultery an offence punishable under the Code. But the Second Law Commission, after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code. The Second law Commission thought otherwise and said it would not be proper to leave the offence out of the Indian Penal Code and suggested that only the man be punished, again keeping in mind the condition of women in the country.¹³ Thus in India, a wife is not punished as an adulterous or an abettor for the offence of adultery. It is only the man, having such unlawful sexual intercourse with married woman, who is to be punished under section 497 of Indian Penal Code. The controversial opinions by law commissions, commenters' and judicial opinions, criminalization or decriminalization on homosexuality and adultery under Indian penal laws, which have declared unconstitutional by Supreme Court of India on 6th and 27th September, 2018 with light of gender prospective. The paper reveals the history, development, legal provisions on homosexuality and adultery laws in India and other countries and Supreme Court of India analysis the gender base of statutory provisions and keep hold the constitutional validity.

2.1 HISTORICAL PROSPECTIVE ON HOMOSEXUALITY IN ANCIENT PERIOD

Homosexuality exists since ages, the origin is obscure. History reveals that same sex relationship was practiced by many kings. Homosexuality was not considered to be a crime in ancient period. Lesbian, Bisexual, Gay and Transgender (LBGT) were well recognized all over world in ancient period in the following countries such as:¹⁴

2.2 AFRICA

Women in Lesotho which is situated in Africa used to engage in a relationship called Motsoalle. Motsoalle refer to a relation which includes sexual desire with each other between same sexes. The male in Northern Congo (locate in Africa great lakes region of Central Africa) which were term as *Azande* warriors took boy-wives who aged between 12 to 20 years with them at time of war, these women look after the household activities of these warrior also engaged them in femoral or inter-femoral sex which is a type of non penetrative sex.¹⁵

13. RATANLAL & DHIRAJLAL, INDIAN PENAL CODE 2305 (29th ed., Bharat Law House 2007).

14. *A Madaan*, (Feb. 05 2019), docs.manupatra.in/.../articles/.../21E161FD-F7AC-4BAD-A8B6-A9356B64E5D3.pdf.

15. J. MYRES, HISTORICAL DICTIONARY OF LESBIAN AND GAY LIBERATION MOVEMENTS 50-60 (Scare Crow Press 2013).

2.3 EGYPT

In Rammeside Period of ancient Egypt the images of homosexuality was found which depict males having sex with boy who term to be as Gay.¹⁶

2.4 AMERICA

In America the term ‘two spirit individual’ in which a common form of same sexuality centered where in the early life of these individual their parents use to give choice to them to follow their path, if their children chooses the same pattern of living as their parents had they raise them in appropriate manner earning the custom of gender they chosen. Their sexual life was based on same sex relation.¹⁷ In America there were third gender people found in which male assume them in feminine role and female took mescaline role. They called as Berdaches.¹⁸

2.5 ASSYRIA

It was believed that in ancient Assyria that if a man will have sex with another man but of same status then will have good luck. Many pictures of anal intercourse practice and many prayer of being homosexual had been found. Many kings had male lover and even Hammurabi King of Babylon use to sleep with man. He was also male lover. Many male and homosexual at that time uses to be found in prostitute business.¹⁹

2.6 CHINA

Homosexuality was a fashion in Han Dynasty nearly every emperor of this dynasty were engaged in same sex relation i.e. male with male.²⁰

16. T. DOWSON, *ARCHAEOLOGIST, FEMINIST AND QUEERS: SEXUAL POLITICS IN CONSTRUCTION OF PAST* (University of Pennsylvania Press 2006).

17. E. JACOBS, W. THOMAS & S. LONG, *NATIVE AMERICA GENDER, IDENTITY, SEXUALITY AND SPIRITUALS- TWO SPIRIT PEOPLE* (Library of Congress Cataloguing in publication 1997).

18. S. FRAYSER & T. WHITBY, *STUDIES IN HUMAN SEXUALITY- A SELECTED GUIDE*, United State of America Publication (2nd ed., 1995).

19. S. BIRCH, *HISTORY OF ANCIENT POTTERY, EGYPTIAN, ASSYRIAN, GREEK, ETRUSCAN AND ROMAN* (John Murray, Albemarle Street: London 1873).

20. F. DAVID & G. BERG, *THE CONSTRUCTION OF HOMOSEXUALITY*, (University of Chicago Press 1988).

Even such relationship was mentioned in many Chinese literatures such as a novel called “Dream of red chamber” depicts the story of same sex affection and their intimation.²¹

2.7 JAPAN

In the diaries of Hein many stories of same sex relationship were found. The emperors of Japans were also evolved in homosexual relationship, where they call good looking boys for their sexual relation. Japan also consist the stories of youth who fall in love with a girl who actually were boy and dressed up in female costume.²²

2.8 GREECE

The development of same sex relationship came from ancient Greece. Plato in its earliest writing accepted the presence of homosexuality. Also he demanded to abolish homosexuality but Aristotle was against the idea of Plato.²³

2.9 ROME

In Rome men was free to enjoy sexual relation with other man without social status of loss. Men’s homosexuality was on heights in compare to women. Even some male uses to keep male concubines.²⁴

The famous emperor Nero celebrates male’s marriage in public where once he dresses up as bride and once in the form of groom. In 2nd century B.C. many male rapes were also happen but the accused got rare penalty in Rome law. Male prostitutes were also found in Rome during ancient period.²⁵

21. J. NEILL, THE ORIGINS AND ROLE OF SAME SEX RELATION IN HUMAN SOCIETIES 260-270 (United State of America Press).

22. G. HAGGERTY, GAY HISTORY AND CULTURES 468-498 (Garland Publishing inc. 2000).

23. K. DOVER, GREEK HOMOSEXUALITY 10-20 (Library of Congress Catalogue 1978).

24. T. HUBBARD, HOMOSEXUALITY IN GREECE AND ROME-A SOURCE BOOK OF BASIC DOC, (University of California Press 2003).

25. C. WILLIAM, ROME HOMOSEXUALITY (Oxford University Press 1999).

2.10 INDIA

Lesbian, Gay, Bisexual and Transgender (LGBT)'s people were found from the ancient periods. India consists of much LGBT text in its history. LGBT relation use to found from Vedic period. Several temples in India define the relationship of same sex. There are many stories in Hinduism which talks about Gods changing their gender. They also get involved in many activities such as Ardhanarishvara, Iravana, Ayyapan, Bahuchara Devi, Ila, Bhagirath, Shikhandi, Mavendra Singh Gohil etc. A classical Indian text which was composed In 400 BCE and 200 CE deals with all aspects of sexual life without any ambivalence and false virtue talks about adultery, marriage, group sex homosexuality etc.²⁶

3.1 GENDER JUSTICE FOR HOMOSEXUALS AS REFLECTED IN HUMAN RIGHT AND INTERNATIONAL LAWS

Human Rights maintain every individual right. It provides freedom to live freely. Right to protect homosexuals from abuse and decriminalizing is now the focusing topic of Human Right organization.²⁷ In 1994 report of Amnesty International, it was reported that violence of LGBT because of their sexual orientation is infringement of human right.²⁸ In Nicholas Toonen v. The State of Australia case,²⁹ the issue of homosexuality act is violation of Article 2 and Article 26 which provide right to privacy and right to equal protection of International Covenant on Civil and Political Rights.

In India, human right raised the issue of homosexuality not only to criminalize section 377 of Indian Penal Code but also to give importance to discuss it openly in a broader platform. In 1996, 'Gender lust law organization' group of LGBT's discussed this topic in a broad manner.³⁰

26. W. DONIGER & S. KAKAR, VATSAYANA KAMASUTRA (Oxford World Classics Paperback 2002).

27. B. FERNANDEZ, HUMJINSI-A RESOURCE BOOK ON LGBT IN INDIA (Indian Centre for Human Right and Law 1999).

28. Walled Stone, <http://www.steetwiseandsafe.org/wpcontent/uploads/2011/01/stonewalledAI.pdf>.

29. U.N. Doc CCPR/C/50/D/488/1992 (1994).

30. B. Fernandez, Humjinsi-A resource book on LGBT in India (Indian Centre for Human Right and law 1999).

UDHR³¹ state all human being are equal in dignity and rights. Article 2 of UDHR declares that everyone is entitled to the right and freedom to live. Non discrimination is basic principle of human right treaties. The committee on Economic Social Council said that the discrimination varied according to the condition evolve during time. Article 2 of ECOSOC stated that the ground of other statues also needed to categorize with different treatment which cannot be reasonable. These grounds can only be recognizes on the social group that have been suffered. UNHR and United Nation General Assembly said that many different ways have been taken to protect LGBT right but people failed to protect them. The current law of international human right is not only made by convention, treaties or by report of international human right but also from precedents and in many cases court talk about the right of homosexuality.³² UNHR and UNGA said that homosexuals also have full rights to express their sexual orientation without fear.³³

The right of homosexuals can only be achieved when:

- State decriminalizes same sexual activities;³⁴
- State stops decriminalizing the sexual orientation in gender identity;³⁵
- State stops imposing punishment on LGBT people;³⁶
- State start to promote right to privacy;³⁷
- Non discrimination of civil marriage;³⁸
- Encourage sexual orientation and gender and stop to arrest them;³⁹
- State has to start providing fair trial to LGBT;

31. United Declaration of Human Rights, 1948

32. Amnesty International, Making Love a crime- Criminalization of same sex Conduct in Sub-Saharan Africa 72-78 (Amnesty International U.K. (2013).

33. Id.

34. International Convention on Civil and Political Rights, Article 2 and Article 26, www.un.org/en/.

35. Article 2 of UDHR; Article 5 of ICERD; Article 2(1) of ICCPR; Article 2(2) of ICESCR; Article 3 of CEDAW; Article 1(1) CAT; Article 2 of CRC; Article 1(1) ICRMW.

36. Article 5 of UDHR; Article 7 of ICCPR; Article 5 of African Charter.

37. Article 12 of UDHR; Article 17 of ICCPR and HRC, Concluding observations of the Human Rights Committee: Chile, UN Doc. CCPR /C/79/Add.104, (30 Mar., 1999).

38. Article 2 and 23 of International Convention on Civil and Political Rights.

39. Article 9 of UDHR; Article 9 of ICCPR; Article 6 of African Charter.

40. Article 10 of UDHR; Article 14 of ICCPR; Article 7 of African Charter.

- State stops the imposing of detention of LGBT person;⁴¹
- State provides freedom to express their opinion and freedom of assembly or an association to them;⁴²

In Amnesty International report, it was stated that these homosexual people suffer a lot in different form such as⁴³ (i) police abuse (ii) Corruption by targeting gay man. In a case man was caught while buying condos through that was legal (iii) Blackmail (iv) Extortion (v) LGBT activist blackmail by police and (vi) After arrest they have been abused brutally by police.

The report on sexual orientation discrimination was published by high commissioner for human right (OHCHR) in 2011. This report says that people face violence and discrimination because of their sexual orientation and gender identity. Many cases of LGBT get them to risk. These violation include rape, killing, physical attack, torture, arbitrary detention, expression, discrimination of health, employment and education. Also it is believed that government neglects the violation against LGBT. Human right commission require filling this gap and promoting universal respect by providing freedom, fundamental right with fair and equal manner.⁴⁴ The *Yogyakarta Principles*⁴⁵ are a set of principles relation to sexual orientation and gender identity in ~~International human~~ Rights Law which sets standards to protect LGBT's. These principles were framed in International commission of jurist meeting where the human rights experts have been called among the world for the international service of human rights. It consists of 29 principles. These principles says that all human being are born free and they have equal rights and they are free to enjoy their right without any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

41. Article 10 of ICCPR; Article 6 of African Charter.

42. Article 20 of UDHR; Article 21 and 22 of ICCPR; Article 10 and 11 of African Charter.

43. Amnesty International. *Making Love a Crime-Criminalization of same sex conduct in sub Saharan Africa*. Amnesty International Ltd. (2013).

44. Human Rights Council, 19th Session, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' Report of the UN Commissioner for Human Rights.

45. The Yogyakarta Principles, Principles on the application of international human rights law in relation to sexual orientation and gender identity. (United Nation Human Rights 2007).

Further it stated that in history LGBT's suffered due to human right violation because of their sexual orientation. These principles provide rights to LGBT's such as right to live, right to equality, right to privacy, right to recognition before law, non discrimination, right to security of person, fair trial, treatment with humanity while detained, freedom from torture or inhuman treatment, protection from sale, trafficking of opinion and expression, right to found a family, right to participate in public culture, right to effective remedies etc. These principles were launched in 2007 at UNHR in Geneva.

The above International resolutions, reports, declarations and principles are focusing on homosexuality in various states and some states have also implemented their legal norms.

4.1 GENDER JUSTICE AND HOMOSEXUALITY IN INDIA

“Sex is creation of God and sexual differences are essential for procreation, but gender is not God's creation. It is creation of patriarchy and serves the male flair for domination”.⁴⁶ Gender justice, simply put refers to equality between the sexes. Gender justice is a correlation of social, economic, political, environmental, cultural and educational factors; these preconditions need to be satisfied for achieving gender justice. Globally, gender justice as a cause has gained in strength over the years, as it has been realized that no state can truly progress if half of its population is held back.⁴⁷

LGBT is abbreviation of Lesbian, Gay, Bisexual and Transgender respectively. According to “Oxford Learner's Dictionary of Current English”, Lesbian means homosexual woman, “Gay” means homosexual person and “homosexual” means person sexually attracted only to the people of same sex as oneself. Clearly, the term homosexual denotes both the homosexual man and the homosexual women. But, after the recognition of homosexual woman as lesbian in the beginning of the 19th century on the name of *Sappho* and her place of birth Greek Island “Lesbos” where she wrote poem largely about her emotional relationship with young women,⁴⁸ the term gay is general used to refer to homosexual man. “Bisexual” indicates two senses:

46. Iqbal Kaur, Ignorance and Fallacy: Gender Idioms in Population Planning, Man and Development, Vol. XIX (1997).

47. (Jan. 25 2019), www.legalserviceindia.com/article/1358-Gender-Justice.html.

48. Harper Douglas, Lesbian Online Etymology Dictionary (2001).

(1) person, sexual attracted to both man and women and (2) person, having both male and female sexual organ. In the second sense, it is synonymous with word “hermaphrodite” that means person or animal that has either male and female sexual organs or characteristics.

The term “transgender” is used for the people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth. People who are identified as transgender are usually the people who are born with typical male or female anatomy, but feel as if they have born into the wrong body. Transgender, transsexual and *hijras* are synonyms.⁴⁹

Carnal intercourse against the order of nature is criminalized as unnatural offence under section 377 of the Indian Penal Code, 1860. Under section 377 IPC, Unnatural offences, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine”. According to explanation to the provision, is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Clearly, following are the ingredients of the offence under this section: (1) The act of carnal intercourse with man, woman or animal; (2) The act should be against the order of nature; (3) The act should be voluntarily and (4) Penetration.

The expression carnal denotes of the body, sexual or sensual. Reasonably, the phrase carnal intercourse is broader than sexual intercourse. Explicitly, oral intercourse, anal intercourse (which is termed as buggery or sodomy) and bestiality (intercourse by a man or woman carried out in any way with a beast or animal) fall in the ambit of this section; because orifices of mouth or anus and beast or animal are not meant for sexual intercourse according to nature. In other words, any form of carnal intercourse other than penile-vaginal attracts the section, because penile-vaginal intercourse is the only carnal intercourse according to nature.⁵⁰

49. Anil Kumar Dubey, Homosexuality in India: The Socio-Legal Perspective and Judicial Approach, *Indian Bar review*, Vol. XLIII (4), 154 (2016).

50. *Id.* at 156.

Gender justice of transgender people refers to gender's identity, equality, privacy, expression, liberty, sexual autonomy, sexual orientation, etc.

5.1 DECRIMINALIZATION OF HOMOSEXUAL ACTS

In the early 20th century, there were many psychiatric theories which regarded homosexuality as a form of psychopathology or developmental arrest.⁵¹ It was believed that normal development resulted in a child growing up to be a heterosexual adult, and that homosexuality was but a state of arrested development.⁵² Homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion.

Towards the end of the 20th century, this notion began to change, and the earlier gave way to a more enlightened perspective that characterized homosexuality as a normal and natural variant of human sexuality. Scientific studies indicated that human sexuality is complex and inherent.

Kurt Hiller in his speech delivered at the Second International Congress for Sexual Reform held at Copenhagen in 1928,⁵³ stated:

“Same-sex love is not a mockery of nature, but rather nature at play.... As Nietzsche expressed it in *Daybreak*, Procreation is a frequently occurring accidental result of one way of satisfying the sexual drive- it is neither its goal nor its necessary consequence. The theory which would make procreation the goal of sexuality is exposed as hasty, simplistic and false by the phenomenon of same-sex love alone. Nature's laws, unlike the laws formulated by the human mind, cannot be violated. The assertion that a specific phenomenon of nature could somehow be “contrary to nature” amounts to pure absurdity... To belong, not to the rule, not to the norm, but rather to the exception, to the minority, to the variety, is neither a symptom of degeneration nor of pathology”.

51. Report of the Committee on Homosexual Offences and Prostitution, at para 30 (1957).

52. J. BENJAMIN SADOCK, “et al” KAPLAN AND SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2060-89 (9th ed. 2009).

53. *Great Speeches on Gay Rights* 24- 30 (James Daley ed., Dover Publication 2010).

In 1957, the United Kingdom published the Wolfenden Committee Report,⁵⁴ which recognized how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals. An extract of the findings of this Committee reads as under:

“We have found it hard to decide whether the blackmailer’s primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim’s relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social consequences were not associated with the present legal position”.

Pursuant to this Report, the House of Lords initiated legislation to de-criminalize homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 came to be passed in England which de-criminalized homosexual acts done in private, provided the parties had consented to it, and were above the age of 21.

The trend of de-criminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognized to be violative of human rights. In 2017, the International Lesbian, gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report⁵⁵ that 124 countries no longer penalize homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments.

Relationship between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognize partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children.⁵⁶ For instance, the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been recognized in England and Wales.

54. Report of the Committee on Homosexual Offences and Prostitution, at para 30 (1957).

55. Aengus Carroll “&” Lucas Mendos Mendos, Ilga Annual State Sponsored Homophobia Report 2017: A World Survey of Sexual Orientation Laws: Criminalization, Protection And Recognition 26-36 (12th ed. 2017).

56. Id.

The British Prime Minister Theresa May in her speech at the Commonwealth Joint Forum on April 17, 2018 urged Commonwealth Nations to overhaul “outdated” anti-gay laws, and expressed regret regarding Britain’s role in introducing such laws.⁵⁷ The relevant excerpt of her speech is extracted herein below:

“Across the world, discriminatory laws made many years ago continue to affect the lives of many peoples, criminalizing same –sex relations and failing to protect women and girls.

I am all too aware that these laws were often put in place by my own country. As the UK’s Prime Minister, I deeply regret both the fact that such laws were introduced and the legacy of discrimination, violence and even death that persists today”.

In 172nd report of law commission, the committee members recommended that section 377 of Indian Penal Code should get deleted also they pleaded that the implementation of such section will create a problem for society and it is harmful for public health as it result a direct impact on the life of homosexuals. Further they stated that banning of same sex relation will result to grow the same in privacy which creates a lot problem.⁵⁸

In *NAZ Foundation v. Government of NCT of Delhi*,⁵⁹ the Honourable High Court on July 02, 2009 ended the discriminatory treatment against LGBT people in India by declaring section 377 of Indian Penal Code. Section 377 is a birth of British Legal system which criminalizes homosexuality. A Writ Petition has been bought up by an NGO named NAZ Foundation who works for HIV/AIDS sufferers who term section 377 of IPC as a Constitutional violation. Section 377 IPC i.e. Unnatural Offences which provides that any person who has involved in activities of carnal intercourse against the order of nature with any man women or animal shall be punished with imprisonment for life or may extend to ten years, and shall also be liable to fine.⁶⁰

57. Theresa May’s Speech at the Commonwealth Joint Forum Plenary (Apr. 17, 2018), <https://www.gov.uk/government/speeches/pm-speaks-at-the-commonwealth-joint-forum-17-april-2018>.

58. Law Commission of India, Review of Rape Laws, 172nd Report, Ministry of Law (2000). (Jan. 2019), www.lawcommissionofindia.nic.in.

59. (2010) Cr.L.J. 94 (Del.).

60. T. BHATTACHARYA, THE INDIA PENAL CODE 606-608 (7th ed., Central Law Agency 2013).

Naz Foundation in their petition also submits the following grounds:

- It violates fundamental rights under Article 14, 15, and 21 of Indian Constitution.
- Article 15 of constitution which provide non discrimination should also include non discrimination among sexual orientation.
- At last they submit that section 377 of IPC violates right to privacy, equality, and dignity.

Ministry of Home Affairs and Ministry of Health and family Welfare oppose the petition by submitting that:

- It provides sexual abuse of children by prosecuting individuals.
- It filled a gap between rape laws.
- It will result into flood gates of delinquent behavior which may harm public.

In 2009, Naz Foundation brings a victory towards equality, dignity and social justice. Honourable Delhi High Court declares that section 377 of IPC is a violation of Article 21, 14 and 15 of the Constitution.

In *Suresh Kumar Kaushal v. Naz Foundation case*,⁶¹ the constitutional validity of section 377 of IPC, which was enacted during the British rule, and by British legal system. Section 377 of IPC i.e. Unnatural Offences which provides that any person who has involved in activities of carnal intercourse against the order of nature with any man, women or animal shall be punished with imprisonment for life or may extend to ten years, and shall be liable to fine.⁶² In 2001 Naz Foundation as a NGO working in the field of HIV/AIDS filed a petition before Honourable High Court for decriminalizing sexual orientation activities by declaring section 377 of IPC as unconstitutional as this section violates Article 14, 15 and 21 of Indian Constitution.

This decision was challenged in Supreme Court stating that decriminalizing of section 377 of IPC, may harm to LGBT community especially the homosexual male. The submission made before the Honourable court was that:

61. (2014) 1 S.C.C. 1.

62. T. Bhattacharya, supra note 60 at 606-608.

- The documentary evidence in court does not prove that the LGBT's got discriminated by the law.
- Section 377 control the growth of HIV/AIDS and decriminalization would increase the rate of HIV/AIDS.
- Section 377 of IPC does not violate rights to privacy and dignity under Article 21 of Indian Constitution.
- Decriminalization of same sex activities may affect the society and will make youngster tempted towards homosexuals.

The Supreme Court judges set aside the judgment of Delhi High Court and ultimately declared section 377 of IPC does not violate Article 14, 15 and 21 of Indian Constitution and dismissed the Writ Petition filed by the respondent.

The eminent identity has been lucidly stated in *National Legal Services Authority v. Union of India and Others*,⁶³ popularly known as NALSA case, wherein the Court was dwelling upon the status of identity of the transgender. Radhakrishna, J., after referring to catena of judgments and certain International Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. The learned Judge further observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre and post operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include person who cannot undergo successful operation.

Further Radhakrishna, J., ruled:

“The self self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female.

63. (2014) 5 S.C.C. 438 (India).

Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a 'third gender'".

A nine Judge decision in *K.S. Puttaswamy and Another v. Union of India and Others*,⁶⁴ wherein the majority, speaking through Chandrachud, J., has opined that sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour or acceptance. Kaul, J., in his concurring opinion, referred to the decision in *Mosley v. News Group Newspapers Ltd.*⁶⁵ to highlight that the emphasis for individual's freedom to conduct his sex life and personal relationship as he wishes, subject to the permitted exceptions, countervails public interest.

The judgment of the Supreme Court in *Navtej Singh Johar & Ors. v. Union of India*,⁶⁶ is culmination of long battle against Section 377 of Indian Penal Code, 1860. On 6th September 2018, Dipak Mishra CJI., and A.M. Khanwikar J., in conclusion view's has held that Ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a Woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC. The decision in *Suresh Koushal* (supra) not being in consonance with what we have stated herein above is overruled.⁶⁷

R.F. Nariman J.,viewed:

We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which in the larger framework of the Preamble of India, will assure the cardinal

64. (2017) 10 S.C.C. 1 (India).

65. [2008] E.W.H.C. 1777 (QB).

66. (2018) S.C.C. Online S.C. 1350.

67. Id. para xvii & xviii.

constitutional value of fraternity that has been discussed in some of our judgments (See (1) Nandini Sunder v. State of Chhattisgarh,⁶⁸ paragraphs 16, 25, and 52 and (2) Subramaniam Swamy v. Union of India,⁶⁹ at paragraphs 153 to 156) . We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that Section 377 insofar as it criminalizes homosexual sex and transgender sex between consenting adults is unconstitutional.⁷⁰

Dr.Dhananjaya Y Chandrachud J., viewed:

- (1) Section 377 of the Penal Code, in so far as it criminalizes consensual sexual conduct between adults of the same sex, is unconstitutional;
- (2) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;
- (3) The choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation;
- (4) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law;
- (5) The decision in Koushal stands overruled.⁷¹

Indu Malhotra J., stated:

- (i) In view of the aforesaid findings, it is declared that insofar as Section 377 criminalizes consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. It is however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.

68. (2011) 7 S.C.C. 547 (India).

69. (2016) 7 S.C.C. 221 (Indian).

70. Id. para 97.

71. Id. para 156.

- (ii) The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revision stages.
- (iii) The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.
- (iv) The judgment in *Sures K. Koushal & Anr., v. Naz Foundation & Ors.*,⁷² is hereby overruled for the reasons stated in paragraph 18.

The Reference is answered accordingly.

In view of the above findings, the Writ Petitions are allowed.⁷³

6.1 LEGAL PROVISIONS OF ADULTERY IN INDIA AND OTHER COUNTRIES

Understanding the gendered nature of Section 497, it needs an inquiry into the origins of the provision itself as well as offence of adultery more broadly. The history of adultery throws light upon disparate attitudes towards male and female infidelity, and reveals the double standard in law and morality that has been applied to men and women.⁷⁴

The definition of the term ‘adultery’ and its consequences vary between religions, cultures, and legal jurisdictions, but the concept is similar in Judaism, Christianity, Hinduism and Islam.⁷⁵ The dictionary defines adultery as ‘voluntary sexual activity between a married man and someone other than her husband’ and term comes from the words ‘ad’ (towards) and ‘alter’ (other).⁷⁶

In India, adultery is considered as an offence and punishable under Section 497 of the Indian Penal Code. It has been placed in Chapter-XX, which is related to offence pertaining to marriage. So the Section-497, Adultery:

72. (2014) 1 S.C.C. 1 (India).

73. Id. para 21.

74. David Turner, *Adultery in the Oxford Encyclopedias of Women in World* (2008).

75. Encyclopedia Britannica online, *Adultery*, Britannica.com.

76. Merriam, Webster’s Dictionary of Law (1696).

“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”.

The scope of the offence under the section is limited to adultery committed with a married woman, and the male offender alone has been made liable to be punished with imprisonment which may extend up to five years, or with both. The consent or the willingness of the woman is no excuse to the crime of adultery.⁷⁷

To constitute an offence of adultery, the following ingredients must be established, viz. (1) Sexual intercourse must be committed with the wife of another man; (2) The person must have knowledge or has reason to believe that the woman is the wife of another man; (3) Such sexual intercourse must be without the consent or connivance of the husband; (4) such sexual intercourse must not amount to the offence of rape.

Adultery under section 497 IPC is limited in scope as compared to the misconduct of adultery as understood in divorce proceedings. As stated earlier, the offence is committed only by man who has sexual intercourse with the wife of another man and without the latter’s consent or connivance. The wife is not punishable for being an adulterous, or even as an abettor of the offence, despite being a consenting party to the crime. She, as an “abettor” will get away with it.⁷⁸

In *Yusuf Abdul Aziz v. State of Bombay*,⁷⁹ the Supreme Court observed that section 497 IPC, is *ultra vires* under Article 14, 15 and 21 of the Constitution on the ground that it is only the man, who is held that liable for adultery and not the wife with whom adultery is committed. The wife is saved from the purview of the section and is not punished as an abettor. Held sex is a reasonable and sound classification accepted by the Constitution, which provides that State can make special provisions for women and children vide article 15 Clause 3 of the Constitution.

77. *Gul Mohammad v. Emperor*, A.I.R. 1947 Nag 121 (India).

78. K.D. GOUR, *TEXTBOOK ON THE INDIAN PENAL CODE*, 800 (4th ed., Universal Law Publishing 2009).

79. A.I.R. 1954 S.C. 321 (India).

The India Penal Code (Amendment Bill, 1972) suggested that the special privileges granted to women under section 497 of the Code be done away with. However, the amendment of the section could not be carried out and the law remains as it was when enacted in 1860.⁸⁰

The criminal law of adultery varies from country to country. It is not uniform. It differs according to the religious norms, attitude of the people and many other factors. The provisions relating to adultery in some of the countries given below:⁸¹

6.2 UNITED STATES

The law relating to criminal adultery prevailing in different States in the United States reveal that three major formulations of adultery exist under state laws in the United States viz. (1) the Common law view;⁸² (ii) the canon (a law or body of laws of a church); (iii) the hybrid view. According to the common law view, adultery takes place only when the woman is married and both husband and wife are held liable. Under the canon law (law of the church) view adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife and only the married person is held guilty.

According to the hybrid rule, followed in twenty states in the United States, if either spouse has sexual intercourse with a third party, both transgressors are guilty of adultery. Finally, eight states held both transgressors guilty, if the woman is married, but if the woman is single only the man is guilty. Six states do not punish adultery at all.⁸³

6.3 ENGLAND AND FRANCE

Adultery is not a criminal offence in the United Kingdom. It is punishable, though mildly, in some of the European countries. For instance, in France, if a wife guilty of adultery is punishable for a period ranging from three months to two years of imprisonment. The husband however, may put an end to her sentence by agreeing to take her back. The adulterer is punishable similarly.

80. K.D. Gour, *supra* note 78, at 801.

81. *Id.*

82. Common law is the term used for the law of a country or state based on custom, usage, and the decision of the courts, technically common law is referred to English law.

83. Law Commission of India, 42nd Report 323-328 (1971).

6.4 GERMANY

In Germany, if a marriage is dissolved as a result of adultery, the guilty spouse as well as the guilty partner, is punishable with imprisonment for a term of not less than six months, but prosecution has to be initiated by the aggrieved spouse by means of a petition.

6.5 PAKISTAN AND ISLAMIC COUNTRIES

In Pakistan adultery is viewed as a heinous offence and both the man and woman are subjected to punishment which may extend to the death sentence. In 1987 a Pakistani Court of Session sentenced a couple to be buried up to their necks and stoned to death in public for committing adultery. In April 2002, (Rape and adultery in Pakistan discussed in section 376, IPC, under sub-heading Death sentence for rape.) as stated earlier, Zafran Bibi was sentenced to death by stoning in North West Frontier province for adultery (zina). Perhaps such a severe sentence for adultery is awarded in Pakistan since Islamic Pena law (Huddod Ordinance) was introduced in 1980. In some other Islamic countries, such as Saudi Arabia, Iran, Egypt, etc., also like Pakistan, adultery is punished severely.

6.6 MALAYSIA, SINGAPORE AND HONGKONG

Malaysia, which is predominantly a Muslim country, adultery is not an offence under the Penal Code. It may be because of Singapore and Honking influence, where adultery is not punishable.

6.7 PHILIPPINES

It is of interest to note that in Philippines, which is a catholic dominated Christian country, it is the married woman, and not the husband, who is liable for adultery.⁸⁴

The above provisions relating to adultery have decriminalized most of the western countries but in Islamic countries such as Saudi Arabia, Iran, Egypt etc. are severe punishment by law. Now our Supreme Court has also decriminalized adultery under section 497, IPC.

84. K.D. Gour, supra note 78 at 802.

7.1 GENDER JUSTICE AND ADULTERY IN INDIA

Former Chief justice of India Lecture delivered, “The reason for gender injustice can be attributed to unequal power equation in gender relation. Patriarchal society, considering women’s household work as economically insignificant, male child preference in society lack of legal awareness in women and so on aggravated the differential status to the disadvantage of women. Neither the term ‘gender justice’ nor struggle for it is new. What has intensified in recent days is the awareness on gender justice. It is being increasingly realized that crimes against women are to be handled with greater sensitivity and women as seekers of justice, to be treated with extra care”.⁸⁵

Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a ‘discourse’ about social structuring.⁸⁶ However, the discourse of law is not homogenous. In the context particularly of Section 497, it regards individuals as ‘gendered citizens’. In doing so, the law creates and ascribes gender roles based on existing societal stereotypes. An understanding of law as a ‘discourse’ would lead to the recognition of the role in creating ‘gendered identities.

Over the years, legal reform has had a significant role in altering the position of women in societal orderings. This is seen in matters concerning inheritance and in the protection against domestic violence. However, in some cases, the law operates to perpetuate an unequal world for women. Thus, depending on the manner in which it is used, law can act as an agent of social change as well as social stagnation. Scholar Patricia Williams, who has done considerable work on the critical race theory, is sanguine about the possibility of law engendering progressive social transformation:

“It is my deep belief that theoretical legal understanding and social transformation need not be oxymoronic”.⁸⁷

85. Lecture delivered by the Hon’ble CHIEF JUSTICE OF INDIA, JUDICIAL AND GENDER JUSTICE, (published by National Judicial Academy, Bhopal, Mar., 2004).

86. RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 40 (Sage Publication (1996).

87. PATRIDIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (Cambridge: Harvard University 1991).

The Constitution, both in text and interpretation, has played a significant role in the evolution of law from being an instrument of oppression to becoming one of liberation. Used in a liberal perspective, the law can enhance democratic values. As an instrument which preserves the status quo on the other hand, the law preserves stereotypes and legitimizes unequal relationships based on pre-existing societal discrimination. Constantly evolving, law operates as an important ‘site for discursive struggle’, where ideals compete and new visions are shaped.⁸⁸ In regarding law as a “site of discursive struggle”, it becomes Imperative to examine the institutions and structures within which legal discourse operates:

“The idea of neutral dialogue is an idea which denies history, denies structure, and denies the positioning of subject”.⁸⁹

In adjudicating on the rights of women, the Court must not lose sight of the institutions and values which have forced women to a shackled existence so far. To fully recognize the role of law and society in shaping the lives and identities of women, is also to ensure that patriarchal social values and legal norms are not permitted to further obstruct the exercise of constitutional rights by the women of our country. The judgment of *Joseph Shine v. Union of India*,⁹⁰ the Court has evolved a jurisprudence of rights-granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the statute of a Constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, we set out to examine the validity of Section 497 of the Indian Penal Code. In doing so, we also test the constitutionality of moral and societal regulation of women and their intimate lives through the law.

8.1 DECRIMINALIZATION OF ADULTERY LAWS

When the IPC was being drafted, adultery was not a criminal offence in common law. It was considered to be an ecclesiastical wrong “left to the feeble coercion of the spiritual court, according to the rule of Canon Law.”⁹¹

88. Ratna Kapur & Brenda Cossman, *supra* note 86 at 41.

89. *Id.*

90. Writ Petition (Criminal) No. 194 of 2017m dated 27.09.2018 (India).

91. Blackstone’s Commentaries on the Laws of England, 64-65 (Book IV (1768)).

Lord Thomas Babington Macaulay, Chairman of First Law Commission of India and principal architect of the IPC, considered the possibility of criminalizing adultery in and ultimately concluded that it would serve little purpose.⁹² According to Lord Macaulay, the possible benefits from an adultery offence could be better achieved through pecuniary compensation.⁹³ Section 497 did not find a place in the first Draft Penal Code prepared by Lord Macaulay. On an appraisal of the facts and opinion collected from all three Presidencies about the criminalizing adultery, he concluded in his Notes to the IPC that:

“.....These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. We think it best to treat adultery merely as a civil injury”.

The Law Commissioners, in their Second Report on the Draft Penal Code, disagreed with Lord Macaulay’s view. Placing heavy reliance upon the statute of women in India, they concluded that:

“While we think that the offence of adultery ought not to be omitted from the code. We would limit its cognizance to adultery committed with married women, and considering that there is much weight in the last remark in note Q, regarding the condition of the women, in this country, in deference to it, we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trail “together” and empower the Court in the event of their conviction to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine”. The Law Commissions’ decision to insert Section 497 into the IPC was rooted in their concern about the possibility of the “native” resorting to illegal measures to avenge the injury in cases of adultery:

“..... The silence of the Penal Code will give, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want

92. ABHINAV SEKHRI, *THE GOOD, THE BAD, AND THE ADULTEROUS: CRIMINAL LAW AND ADULTERY IN INDIA* 52 (2016).

93. *Id.*

of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer”.⁹⁴

Section 497 and Section 198 are seen to treat men and Women unequal, as women are not subject to prosecution for adultery, and women cannot prosecute their husbands for adultery. Additionally, if there is “consent or connivance” of the husband of a woman who has committed adultery, no offence can be established. In its 42nd Report, the Law Commission of India considered the legislative history of section 497 and the purported benefit of criminal sanctions for adultery. The Committee concluded that, “though some of us were personally inclined to recommend repeal of the section, we think on the whole that the time has not yet come for making such a radical change in the existing position”.⁹⁵ It recommended that section 497 be retained, but with a modification to make women who commit adultery liable as well.

In its 156th Report, the Law Commission made a proposal which it believed reflected the “Transformation’ which the society has undergone,’ by suggesting removing the exemption from liability for women under section 497 be made gender-neutral, by suggesting removing the exemption from liability for women under Section 497.⁹⁶

In 2003, the Justice Malimath Committee recommended that section 497 be made gender-neutral, by substituting the words of the provision with “whosoever has sexual intercourse with the spouse of any other person is guilty of adultery.”⁹⁷ The Committee supported earlier proposals to not repeal the offence, but to equate liability for the sexes:

“The object of the Section is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband).⁹⁸

94. Second Report on the Indian Penal Code, cited from Law Commission of India, Forty Second Report: Indian Penal Code 134-35 (1847).

95. Law Commission of India, 42nd Report: Indian Penal Code 326 (1971).

96. Law Commission of India, 156th Report: Indian Penal Code 172 (1997).

97. Report of the Committee on Reforms of Criminal Justice System 190 (2003).

98. Id.

Neither the recommendation of the Law commissions nor those the Malimath Committee have been accepted by the legislature. Though women are exempted from prosecution under Section 497, the underlying notion upon which the provision rests, which conceives of women as property, is extremely harmful. The power to prosecute lies only with the husband (and not to the wife in cases where her husband commits adultery), and whether the crime itself has been committed depends on whether the husband provides “consent for the allegedly adulterous act”.

R. Madhava Menon Panel of January 2007,⁹⁹

The draft National Policy on Criminal Justice, authored by the Madhava Menon Committee, has also suggested de-criminalizing adultery by recommending that it should be treated as a social rather than a criminal offence.

The framers of the Constitution believed that in the middle of the twentieth century no one would discriminate on the ground of sex.¹⁰⁰ However, it is clearly seen that the legislature is clearly making discrimination on the ground of sex on the pretext of giving “protective discrimination” to the women. The special treatment given to the women under cl. 3 of Article 15 should be restricted to such cases which must be related to some features or disability which are so peculiar that it differentiate women from men as a class.¹⁰¹

In the case of Yusuf Abdul Aziz case,¹⁰² the Supreme Court observed that adultery is a wrong against the sanctity of the matrimonial home. Thus charges are pressed against the outsider who breaks the said sanctity. The woman, in cases of adultery, is considered the victim. It appears that the court believes that the man has an unstoppable seductive charm and the woman is helpless against it. The evil that is punished by law, in the mind of court, is that of seduction of a woman by another man.

99. Committee to Draft a National Policy on Criminal Justice, Ministry of Home Affairs, Government of India, Chairman Of Prof. N.R. MadhavaMenon, 31st July (2007).

100. Constituent Assembly Debates, 650 (Vol. VII).

101. DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 1796 (Wadhwa, 8th ed., 2007); Srinivasan v. Padmasini, A.I.R. 1957 Mad 622. (India).

102. A.I.R. 1954 S.C. 321 (India).

According to the court woman is considered to be a victim. Thus the court held that the law was not discriminatory and not violating the right to equality, thus the court upheld the constitutional validity of the section 497. The court also opined that by not allowing the spouses to prosecute each other the law offers a chance to the spouse to make-up, it was further held that “section 497 is not violative of Article 14, 15 and 21 of the Constitution.

On 27th September, 2018 the Supreme Court judgment of Joseph Shine v. Union of India,¹⁰³ Dipak Mishra CJI., and A.M. Khanwilkar J., conclusion viewed:

As we have held that Section 497 IPC is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare Section 198 Cr.P.C which deals with procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path. In view of the foregoing analysis, the decision in Sowmithri Vishnu¹⁰⁴ and v. Revathi¹⁰⁵ stand overruled and any other judgment following precedents also stands overruled.

Consequently, the writ petition is allowed to the extent indicated hereinbefore.¹⁰⁶

The Supreme Court judgment of Joseph Shine v. Union of India,¹⁰⁷ Indu Malhotra J., viewed:

In view of the aforesaid discussion, and the anomalies in Section 497, it is declared that (i) Section 497 is struck down as unconstitutional being violative of Article 14, 15 and 21 of the Constitution. (ii) Section 198(2) of the Cr.P.C which contains the procedure for prosecution under Chapter-XX of the IPC, shall be unconstitutional only to the extent that it is applicable to the offence of adultery under section 497. (iii) The decision in Somithri Vishnu, V. Rewathi¹⁰⁸ and W. Kalyani¹⁰⁹ hereby stand overruled.¹¹⁰

103. Writ Petition (Criminal) No. 194 of 2017m dated 27.09.2018 (India).

104. A.I.R. 1985 S.C. 1618 (India).

105. (1988) 2 S.C.C. 72 (India).

106. Id. para 56, 57, & 58.

107. Writ Petition (Criminal) No. 194 of 2017m dated 27.09.2018 (India).

108. (1988) 2 S.C.C. 72 (India).

109. (2012) 1 S.C.C. 358 (India).

110. Id. para 18.

Again the Supreme Court judgment of *Joseph Shine v. Union of India*,¹¹¹ R.F. Narimam J., viewed:

In *Sowmithri Vishnu v. Union of India and Anr.*,¹¹² this Court upheld Section 497 while repelling three arguments against its continuance, as has been notice hereinabove. This judgment also must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Article 14, 15 and 21. Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today. The moving times have not left the law behind as we have just seen, and so far as engaging the attention of law makers when reform of penal law is undertaken, we may only hasten to add that even when the on statute book. Even as of today, Section 497 IPC continues to be on the statute book. When these sections are wholly outdated and have outlived their purpose, not only does the maxim of Roman law, *cessante ratione legis, cessat ipsa lex*, apply to interdict such law, but when such law falls foul of constitutional guarantees, it is this Court's solemn duty not to wait for legislation but to strike down such law.

As recently as in *Shayara Bano v. Union of India and Others*,¹¹³ it is only the minority view of Khehar, CJI., and S. Abdul Nazeer J., that one must wait for the law to change legislatively by way of social reform. The majority view was the exact opposite, which is why Triple Talaq was found constitutionally infirm and struck down by the majority. Also, we are of the view that the statement in this judgment that stability of marriages is not an ideal to be scorned, can scarcely be applied to this provision, as we have seen that marital stability is not the object for which this provision was enacted. On all these counts, therefore, we overrule the judgment in *Sowmithri Vishnu* case. Equally, the judgment in *V. Revathi*, which upheld the constitutional validity of Section 198 must, for similar reasons, be held to be no longer good law. We, therefore, declare that Section 497 of the Indian Penal Code, 1860 and Section 198 of the Code of Criminal Procedure, 1973 are violative of Article 14, 15(1) and 21 of the Constitution of India and are, therefore, struck down as being invalid.¹¹⁴

111. Writ Petition (Criminal) No. 194 of 2017m dated 27.09.2018 (India).

112. (1985) Supp S.C.C. 137 (India).

113. (2017) 9 S.C.C. 1 (India).

114. Id. para 28.

Lastly, Dr. Dhanajaya Y Chandrachud J., judgment view in Joseph Shine case, (Writ Petition (Criminal) No. 194 of 2017) we hold and declare that:

- (1) Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;
- (2) Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;
- (3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and
- (4) Section 497 is Unconstitutional.

The decisions in Sowmithri Vishnu and Revathi are overruled.¹¹⁵

9.1 CONCLUSION

The struggle for equal rights, freedom and justice has been truly made by the activists of human rights, feminists, NGO's and through Government support also. Even though considerable progress has been made in this direction, women are still lagging behind. With globalization, there are many more issues that women are facing these days. Further, there are many countries and social groups in the world where the condition of women is still deplorable; they have no control or right over themselves or their bodies. Gender justice refers to harmonizing of rights and needs of women into mainstream society.¹¹⁶ Gender sensitive Indian legislature has passed various laws for gender equality and women's empowerment. It can be evidenced by Part-III of Constitution which deals with fundamental rights and also deals Directive Principles of State Policy. Now basically, new challenges of fundamental rights like right to equality (Art. 14), right against discrimination (Art. 15, Transgender as third gender), right to free sexual orientation (Art. 19) and right to liberty and privacy (Art. 21) are protected and reconsidered the gender justice.

115. Id. para 67.

116. Rinku Gangwani, Gender Discrimination & Legal Issues 112Vol.45 (2) Indian Bar Review, (2018).

Section 497, IPC is protects the institution of marriage and also protects social well being. De-criminalization of adultery by declaring Supreme Court of India may be impact on the aggrieved spouse, children and society at large. But time has come when the society must realize that a woman is equal to a man in every field. So Supreme Court India has decriminalized adultery under section 497, IPC and re-considered gender justice.

In *NALSA v. Union of India*,¹¹⁷ the court recognized the rights of privacy, dignity and liberty of transgendered and mandated that the State must recognize their gender expression and non-discriminate against them. After de-criminalization of 377, IPC the member of the LGBT community peoples are entitled as all other citizen, to the full range of constitutional rights including the liberties protected by Constitution and it extend to gender Justice.

The time is ripe for the state, civil society, press-media, and NGOs to collectively debate and elaborate on gender justice of transgender peoples and women in India, in the background of de-criminalization of homosexual and adultery laws, by Supreme Court of India on 6th and 27th September 2018. These two landmark judgments of Supreme Court of India, have reconsidered the gender justice and it is great opportunities for transgender community peoples and women, and in the near future, our parliament should be amending these laws through the criminal law amendment act.

117. (2014) 5 S.C.C. 438 (India).