

JURISPRUDENCE ANALYSIS OF ADULTERY BY CASE STUDY

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P. MOHANDAS PANICKER V. K.K. DAKSHAYANI

Citation: ILR2014(1)Kerala538

Jurisdiction: High Court of Kerala

The **Section 479** of The Indian penal Code, 1870 relating to Adultery laws states that:

*"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."*²⁵⁶

Brief of the Case:

This particular case is concerned with the issue of Adultery. The appellant (Mohandas) married the respondent (Dakshayani) as per the Hindu customary rituals. During the relationship two children were born to the couple and the matter of adultery came into picture when both of the children attained the majority. After some time the behaviour of the wife changed and she started creating various problems in the house. She started going to her village house again and again. This created a doubt in the mind of husband and he investigated the whole matter which involved the phone calls of his wife and frequent visiting of a person who was later identified as Manoj. The son of the couple warned Manoj and his mother to discontinue the illicit relationship. After this whole issue also wife did not understand and started another illicit relationship with the second respondent of the case namely Rathnakaran. The wife was caught red handed by the husband when he heard some noise from the other room of his house. When the second respondent tried to run away, the neighbours caught him. After this incident also the relationship between Dakshayani and Rathnakaran did not end and they were caught naked and indulging in sexual activity in the bedroom by the son and husband. Due to all these instances and issues husband filed a case for divorce in the family court as his wife was living

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²⁵⁶ Criminal Manual, Eastern Book Company, Twenty Sixth Edition

in adultery under section 13 1(a) of Hindu Marriage Act, 1955²⁵⁷. The appellant (husband) filed an appeal for the cancellation of his marriage in the High Court of Kerala after being rejected the same by the Family Court.

Analysis:

I. Feminist Jurisprudence

"Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes."²⁵⁸

Feminism is a struggle concept from a socio-legal point of view. It focuses on the struggle for achieving women's dignity, liberty, and freedom of choice in respect to their lives and bodies and equality within the home and in outside world. Feminist Jurisprudence is a tree having many branches (various feminist thought), each having an analytical approach of its own. However, there is one aspect that unites all the feminist legal theorists, i.e. a belief that society, and necessarily legal order, is patriarchal.²⁵⁹

The legislations relating to adultery make only man liable for the act of adultery and not the woman. Also, Section 198(2)²⁶⁰ of Code of Criminal Procedure, 1973 has only given rights to the husband only in this matter that he is entitled to file a complaint. The fundamental notions of patriarchy are too evident to be ignored. First, these provisions look at married women as sufferers or victims, not capable of either protect themselves against the salacious behaviour of other men. Second, as stated above the husband is regarded as having the sole right over his wife's sexuality, which is infringed by a trespasser. Third, by refusing a criminal remedy to the wife when her husband is involved in adultery, the law

²⁵⁷ Section 13 1(a): Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse.

²⁵⁸ https://www.law.cornell.edu/wex/feminist_jurisprudence

²⁵⁹ Ahuja Naysa, *Feminist Jurisprudence: The need to understand the Woman's Question and its implications on women in the Indian Patriarchal Society*, University of Delhi, 2010 , https://www.academia.edu/1562885/The_Need_to_Understand_the_Woman_s_Question_and_its_Implication_on_Women_in_Patriarchal_Society

²⁶⁰ *Supra I*

gives monopoly to the husband over his wife's sexuality. The law has not provided any such protection to the wife so as to secure her monopoly over her husband's sexuality. It is fascinating that one of the reason given for this discrimination is that whereas a wife can burden her husband with a child by a illicit relationship, as stated in Section 112 of the Evidence Act, 1872²⁶¹, the husband has not been given any such possibility which arises from his sexual relationships outside the marriage.

Traditional Liberal Feminist (approach of Sameness) believed in the current framework and thought that equality between men and women could be achieved in this framework also. But the path to equality is very far from this point. However Article 14 of the Constitution of India says about equality, on the plain reading of Section 497 of IPC, 1870 it can be deduced that equality is not applied there in terms of right and protection.

II. Positive School

Positive School of Law says that a law is a law. It is not possible to deduce law as good or bad or moral or immoral. It can only be regarded as valid or invalid. If it is made by proper authority no matter how inapplicable, brutal, confusing, contradicting to other laws, senseless it is, it will then also be regarded as valid law.

Austin, one of the main philosophers of this theory gave very simple definition of law which reads as:

"Law is command of sovereign backed by sanction" ²⁶²

In this particular case, it was evident from the facts and circumstances of the case that wife was living an adulterous life after almost 25 years of her marriage. Also, law does not allow taking any step against her. After several warnings and being caught in by the neighbours and husband also she did not her illicit relationships and betrayed her husband again and again but after all these issues

²⁶¹ Section 112: The fact that any person was born during the continuance of a valid marriage between his mother and man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

²⁶² Subbarao Venkata G.C., *Jurisprudence and Legal Theory*, Eatsern book Company, 9th Edition, pg. 51

also law permits her to walk freely. Also no discretion is given to the courts regarding this.

This behaviour of law with woman clearly shows the basics of Positive School as here law is not concerned with the facts and circumstances of the case. This particular field of law is based on the principles of Austin as it is only concerned what law is and not what should be done to achieve just and fair society. The violators of this law are duly punished.

Also when courts want to give take charge against the wife they simply can't. All of them are bound to follow the word of law.

III. Historical School of Law

Father of Historical School is Savigny. He said that law is what 'people consciousness' is. He called 'people consciousness' as *Volkgeist*.²⁶³ There is no universal law in this and no uniformity is seen in law relating to different places. This school of law is utilitarian in nature. The fidelity and acceptance to the law is much more than any other type of school as laws made in this school are majority centric.

In this school of thought 'custom'²⁶⁴ is considered as the purest form of people consciousness. The propagators of this theory believe that custom is the primary source of any legislation. And thus, law is just conforming to the belief.

The legislations relating to the Adultery in India are basically based on this theory. From ancient time adultery is considered as sin in all the religions. The religious books of different religions also talks about the punishment which should be given to the adulterous spouse. Mainly, the Hindu religious books and scripts only talks about the punishment which should be given to the adulterous wife and says that wife should not take any action against her husband in any situation. This is the epitome of patriarchal society.

Current Adultery laws in India are also based on the same notion with slightly changes.

²⁶³ Dias, *Jurisprudence*, LexisNexis, 5th edition, pg. 378

²⁶⁴ Dias, *Jurisprudence*, LexisNexis, 5th edition, pg. 375

IV. Natural School of Law

The Natural School of Law is one of the oldest schools of law. It talks about what law should be and that is why natural law is normative.²⁶⁵ According to this theory behind each and every law there should be a logical reasoning. Natural law is same for everyone everywhere. The Natural law is based on the structure of reality itself. It simply says, "Do good avoid evil"²⁶⁶, where good is according to the reason and bad is contrary to the reason.

This theory here plays a role when the court talks about the "standard of proof" relating to adultery. It says that in the case of adultery, it is not needed that petitioner should prove the act beyond reasonable doubt; mere "preponderance of probability" is enough to prove the act. It is so because the matrimonial affairs are civil suit and not criminal suit as stated by the Apex Court of India various times. In the judgement of *Jayachandra v. Aneel Kaur*²⁶⁷ the Supreme Court of India said that matrimonial disputes are civil disputes and thus standard of proof will also be of civil disputes.

The court arrived on this decision because in the cases of adultery it is very difficult to get direct evidences by the party and so to deliver justice to party court agreed on the concept of preponderance of probability in the matter relating matrimonial disputes. This is a true example of logical reasoning being taken by the court in this matter

Conclusion:

Adultery is persistent in the Indian society from the ancient time. Earlier, different religious laws were the source of dispute resolution and now the Adultery laws described in the Indian Penal Code, Code of Criminal Procedure and Evidence Act are the source. We may have become highly developed in terms of technology, lifestyle and thinking but this area of law till now is working on ancient principles. There is urgent need to amend it so that more *Equality* among the men and women of the country can be achieved.

²⁶⁵ Dias, *Jurisprudence*, LexisNexis, 5th edition, pg. 470

²⁶⁶ Dolhenty Jonathan, *An Overview of Natural Law Theory*, http://undrakh_hicheel.blog.gogo.mn/read/entry76907

²⁶⁷ AIR 2005 SC 534