DE JURE NEXUS LAW JOURNAL

Author:

Aarya Kulshrestha

Amity Law School, Noida

2nd Year, BA LL.B. (Hons.)

HUMAN RIGHTS AND SAME SEX MARRIAGE

Abstract

This research paper aims to bring into common knowledge the history of homosexuality, how it came in India and abroad, how the judiciary interpreted the laws and acted accordingly, and how the international committee views the LGBTQ+ community. It talks about the origin of homosexuality, how it came into existence, the role of the judiciary, the international committee's laws and rulings and what will it mean for us in the future.

Keywords

Homosexuality, LGBTQ+ community, judiciary, international committee.

Introduction

The world in which we live, it is changing every second. We should adapt to such changes. One such change is homosexuality. It is defined as the attribute of a person to be attracted to someone of the same gender or sex. Many countries have legislations, customs and of course, religion which prohibits the existence of same-sex marriage. But there are some developed countries which give recognition to same-sex marriage when it comes to the rights- human and civil. Marriage is understood to be an important feature of the identity of a person in socio-economic

and politico-legal terms. Marriage is an institution which is legal in nature. It gives recognition to the relationship which is between two people. In many personal laws, marriage is recognised as legal. In today's world, marriage is a civil right and has earned the respect of the international community. The state has an obligation to give the right to marry to individuals. In India, the right to marry is a fundamental right, thus allowing anyone to marry and choose their spouse. Gone are the days when people were ashamed of one's sexuality. In today's changing world, everyone and anyone are welcomed in society. Nowadays, in every form, be it government form, bank form, form for a society, in the gender column, there are always three options. Gender is not limited to two options. Society should welcome everyone with open arms. Thus, when everyone is accepted in society and they are respected, then the world will be a place which is happier.

Origin of Homosexuality In India

Scientists from all around the world have done several studies to understand and decipher why exactly homosexuality is existing in human beings. Some biological theory gives the idea that factors such as genes or early environment of the human beings or both of them show the sexual orientation of a person. Research suggests that it is normal and a person cannot control it. Even in the modern world, people say that it is dysfunctional. In India, it has been considered a taboo. As per most laws, the institution of marriage is pure in nature and is considered a fusion of two souls who are people of different sexes. Many people frown upon the same-sex marriages and say that is sinful and it is in violation of values which are religious. In India, people believe that it is a 'devil' which has come from the western nations and thus, will have a negative impact on other nations. But, contrary to popular belief, it is not a concept of western origin. In fact, it is possible that this concept may have come from early ages literature and scriptures. There exists a long history of homosexuality in India. In ancient texts such as the Rig-Veda, depictions of practises which were of sexual nature between women are not uncommon. The Rig-Veda, which is one of the sacred texts of Hinduism, consists of proverbs such as "Vikriti Evam Prakriti" meaning "what is abnormal is also natural". There is historic evidence of same-sex marriages such as homosexual acts in Kamasutra, Harem of boys which were held by Aristocrats and

Nawabs and the presence of sodomy under Tantric rites. After the British came, such experiences have lost their importance.

Role of the Judiciary

In India, the judiciary also gave recognition to the homosexuals. Homosexuality was beginning to be given recognition from the case of *National Legal Services Authority v. Union of India & Ors.*[1]. The decision in this case should be appreciated for not allowing discrimination based on gender and for being the light at the end of the tunnel to those people who were left out by the society and the law. In this case, the bench gave legal status to each and everyone who was left out by the society and its standards. This decision was a turning point in the history of topics of law such as marriage, adoption, etc. This led to the abandonment of the concept of only two genders and inclusion of the third gender.

In *Naz Foundation v. Government of NCT of Delhi and Ors.*[2], the section 377 of the IPC was found to be challenged. Here, in this case, the court struck down those sections of the IPC that were found to be violating Articles 14, 15 and 21 of the Constitution of India. However, the Delhi High Court abstained from finding the whole Section 377 as unlawful.

Then in the case of *Suresh Kumar Koushal & Anr v. Naz Foundation & Others*[3], the Naz Foundation judgement was overruled by the Supreme Court. As per the panel of two judges, the community of LGBTQ+ constituted "miniscule fraction of the total population" and powers which were put in Section 377 were misused by the police did not show that the section was constitutionally valid. It was decided that the Section 377 of IPC applied regardless of factors such as age, consent and it would not ban an individual, their identity or the sexual orientation. The Court was of the view that only some acts in section 377 were identified, that if they were committed, they would be constituted as a crime. It said that such prohibition was applicable to all behaviour which was sexual, not taking into account the identification of gender or the orientation.

[1] National Legal Services Authority v. Uni ..., (2014) 5 SCC 438
[2] Naz Foundation v. Government of NCT of D ..., 2009 SCC OnLine Del 1762
[3] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1

This decision led to a lot of public outcry. A writ petition was put that challenged this judgement. Thus, this decision was put to a bench of five judges.

The Suresh Kumar decision was further overturned by the Supreme Court in *Navtej Singh Johar v. Union of India*[4] where the court was of the view that Section 377 was violating Articles 14, 15 (1), 19 and 21 of the Constitution of India. It said that these articles were violated as in the current form which Section 377 of IPC was, it had an effect which was of distasteful and objectionable nature (Article 14), a whole class of citizens had to go through discrimination which was based on the sexual orientation [Article 15(1)], the people's fundamental right, that is the right to freedom of speech was restricted because of public order, morality and decency (Article 19) and was infringing on the people's right to privacy, and dignity (Article 21).

United Nations Committee of Human Rights

In a case before the United Nations Committee of Human Rights, it was held by the committee that "marriage" is a term which, as per the meaning of Article 23 (2) of the International Covenant on Political and Civil Rights, only finds meaning when it is between people of the opposite sex only.[5] This committee was of the view that the right to equality which is mentioned under Articles 2 and 26 of the International Covenant on Political and Civil Rights, which Australia had approved, was not violated. This is because the presence of inequality is not there, since the definition did not include people who were of the same sex. These people are equal and thus, defining the institution of marriage as that of being between people of opposite gender was not to make these people unequal. This is equal to the clarification of the United Nations Committee of Human Rights, that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate".

Universal Declaration of Human Rights (UDHR)

[4] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791

[5] Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002) University of Minnesota Human Rights Library (umn.edu)

Article 16 of the UDHR states that:

1) *"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."*
2) *"Marriage shall be entered into only with the free and full consent of the intending spouses."*
3) *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

Article 16 gives us the argument that it is understood to be a union which is between people of the opposite sex only, "men and women...without any limitation due to race, nationality or religion"; not "men and men", or "a human along with another human" or " men and women who have no limitation due to either sex or gender". The absence of a reference to either sex or gender of a person as a ground of discrimination leaves no to little doubt that the institution of "marriage" is supposed to mean a union between a man and a woman. This is rational with the next part, "founding a family" which is consistent with the fact that only a man and a woman can have a family as same-sex couples cannot do so because of biological reasons. The third section of Article 16 gives a more detailed info about family. It tells that family is a fundamental unit of the society. Same-sex couples cannot be regarded as fundamental unit of a society.

This interpretation of article 16 is the same as the precedent which was established in the case of *Joslin v. New Zealand.* Some people are of the view that this interpretation is narrow and does not see the principle of "equality before the law" which is in Article 26 of the International Covenant on Political and Civil Rights and as mentioned below:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

As per this article, discrimination which is done on basis of composition of a family is not exactly prohibited. There are allegations that the prohibition is because of the reference which is given to "other status". According to me, I don't think that the above argument is right, since there are only good reasons to discriminate in the given situation on some specific factors. The above principle of equality which is before the law does not allow discrimination of unjust or arbitrary nature only. This gives us the question that is the discrimination which is of contested kind- will it fall under unjust or arbitrary discrimination. To put it generally, the discrimination which is prohibited on basis of a status will not prevent the cases of discrimination which are justifiable on basis of another status. In this case, it is necessary to distinguish between the type of discrimination which is on basis of "sexual composition of a family" and "sexual orientation of the partners". The sexual orientation of people who are partners will not prevent the legal marriage which happens between persons of the opposite sex and usually the state does not have an interest in this matter. In this sense, the equal marriage already exists as persons of the opposite sex can marry each other, as long as they are not related to each other. Thus, this debate of same-sex marriage is not only about the rights of an individual, but also about the change which is in the institution of marriage, i.e., should the legal protection which is given to marriage be decoupled. By prevaricating between the union which is of opposite sexes and same-sex union which is under the scope of "marriage" we may be eroding the essence that is of "natural family" as a vehicle that is of procreation, giving less importance to its main function, that is, a life-giver and more importance to the other values. The norm of sexual relations, which is the most important condition of existence of humans, will be thus eradicated in the side of normalising any and every sexual combination possible. As per this, if we legalise the same-sex marriage under the same conditions as the marriage which is of opposite sexes, then this would result in the violation of human right given in Article 16, that is, the natural family would consist of persons of the opposite gender, the unit which is fundamental to the society and the only sexual beings who can produce offspring, the state and society must give them special protection. Some people may say that the threat that same-sex marriage poses to a traditional family is too indefinite. But all the same, this threat should not be ignored. I am of the view that the people in same-sex marriage

should have rights and be protected from harm so that they may lead normal and fruitful lives, maybe all rights that are granted to families of people of opposite genders. We should protect the difference that is there between the opposite-sex and the same-sex couples with respect to marriage because new life can only be brought into this world by a man and a woman through a natural process and this is of extreme importance. If we see the other side, if the social unit which possesses the capacity for procreation or birth is the focal point of marriage then there is no sense in any other unit to claim the marriage on the reason of "equality before the law" without actually having the capacity which can procreate. The people who support same-sex marriages say that the "traditional" marriages are becoming dysfunctional in nature, but this does not require that if we change the meaning of marriage or if we weaken the "natural family", it would be necessarily beneficial to the usefulness. In contrast to this, the traditional family is in need of more protection, self respect and a treatment which is dignified by the society and the state.

European Court for the Rights of Human

In its decisions in 2010, 2014, 2015 and 2016, the European Court for the Rights of Human has been of the view that the Convention of Europe, which is on the rights of humans, does not say that same-sex couples should be allowed to marry. As a result, it was held continuously by the court that the states which recognise that marriage is union of two opposite sexes did not breach the prohibition which is there on discrimination in Article 14. The court was of the view that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another."

Equality is included in human rights. However, both these organisations have refused to believe that the same-sex marriages are included in human rights.

Conclusion

If we start to recognise the same-sex marriages, then there will be need of proper legislation, which, if truth be told, is years away. Even if the laws come, it will require the society to have a mindset which is progressive and liberal in nature. Despite the rulings that come, whether in India or abroad, the community of LGBTQ+ will be at a

disadvantage until the mindset changes. As the couples of same-sex marriages do not have same legal status as the "traditional" couples, the businesses which are sympathetic will have to see whether they can grant pensions, provident funds and other benefits to the LGBTQ+ employees.