



4th SACJ DIGITAL LECTURE

Date: 15.07.2020 Session – IV – Name: Sharique Uddin (Rapporteur)

Speaker: Dr. Adam Dubin, Comillas Pontificia University, Spain

Topic: LGBTQ Rights: Analysis of the European, U.S. and Indian Jurisprudence

OPENING REMARKS FOR THE SESSION

The speaker commenced the session by addressing how the Universal declaration of Human rights and International convention on Civil and Political Rights propagates the idea of equality before the law and non-discrimination. The “other status” under the article 2 of ICCPR includes sexual orientation, and what UN advances on sexual orientation say, since then what different general assembly resolutions say about protection of LGBTQIA+ community.

JURISPRUDENCE

- 1) The European Convention on Human Rights, article 14, 12 and 8 article 14 which is rights against discrimination is not stand alone and always comes in conjunction with another article, when appealed in the court of law.
- 2) The case Dudgeon v United Kingdom (1981) paved the way for the 1994 case Toonen v. Australia in the United Nations, which repealed sodomy laws and confirmed right to privacy. The 1981 case gave “doctrine of margin of appreciation”, the ECHR gives the states a margin to the states to be able to justify why they maybe infringing on someone’s rights. The counties could not give a proper justification why the morality and religion could triumph over someone’s right to privacy. This set the stage especially in Europe against the laws which criminalised sodomy.
- 3) France judgement and rule of law and equal protection 1969 stone wall crisis 1980s aids
- 4) The American jurisprudence on the LGBTQ rights ranges from the 1986 case of Bowers v. Hardwick to Lawrence v Texas of 2003. The petitioner wanted the courts to declare that the right of homosexuals to engage in sodomy and declare it as a fundamental right and the court declared that there is no constitutional basis or



historical basis to the argument as there is no proof of any fundamental character in the argument. The question if it is non-fundamental right was raised but the court refused to delve into the law and morality debate raised against the majority view dictating the morality and subsequently the laws of the state of Georgia. However the dissent in the case distinguished that the case was not about the right to practise sodomy but issue was about the essential “right to be left alone”, i.e “right to Privacy”.

- 5) The justifiability of Homosexuality survey conducted by World Values Survey from 2001-2004, with 31% recognised that homosexuality cannot be justified.
- 6) Lawrence v Texas of 2003, Justice Kennedy opined that Liberty protects citizens from unwarranted government intrusions into a dwelling or other private places. In American tradition the state is not omnipresent in the home and state should not have a dominant presence. Autonomy, freedom of conduct and independent presence was propounded through the judgement. Held that there is no rational basis on prohibiting same sex behaviour. The state cannot demean their existence and prohibit their conduct. Though marriage was not talked about, right to engage was granted.
- 7) Obergefell v Hodge case of 2015 finally laid a stepping stone in this regard where the issue of homosexuals right to marriage under the 14th amendment was questioned. The court went through a historical analysis of evolution of marriage, wherein the marriage was considered inherent in the concept of autonomy declaring that marriage itself is fundamental. This gave the same sex couples right to marriage and the held that there is no difference between the marriages of same sex and opposite sex couples.
- 8) Bston v Clayton (2020) deals with discrimination based on religion, race and sex. Court tries t convince readers that it is merely enforcing the terms of the statute and attempts to pass off its decision as inevitable product of textualized school of statutory interpretation. Ultimately it found in 5:4 majority, 1964 civil rights act extends to protection of employees based on sexual orientations
- 9) Colorado cake baker case 2018, alleging that making a cake for the homosexual couple is against the principles of the God. The Colorado HR commission was shown to be hostile towards the religion because of remarks of one of its members, but at the same time Justice Kennedy reaffirmed right of Gay individuals and case only applies to this case facts.



- 10) Whereas the European courts in 1992 case of *B v. France*, said that a failure to recognise a completed gender reassignment surgery constituted a violation of Article 8.
- 11) *Schlump v Switzerland* 2009, violation of article 8 when health insurance failed to pay for gender reassignment surgery.
- 12) Council for states told states in a resolution that they should work towards full legal recognition. Recognition of transgender under non-discrimination and equality. Recognition and procedure for recognition are diverse in each state, often complicated and sometimes enforced.
- 13) The SC in *Navtej Johar v UOI*, overruled the *Suresh* case of 2013, the argument of the Govt basically said that there is miniscule number of people in the country comprising of lesbian, gay etc which was rejected by the apex court and held that it cannot be a substantial basis to deny the right to privacy. Cases from various jurisdiction including South Africa, Fiji, Israel were compiled together in the judgement. The concept of constitution of India is a living document was propounded and right to privacy being extended to the same sex couple. The elements to textualism v progress, Shakespeare, and does the better job of recognising international human rights under this judgement. Looking at how societies progress and shaping the law.

QUESTIONS

The following questions were raised by the participants to whom the speaker responded:

1. In India the current Surrogacy Bill explicitly excludes LGBT and it will ban commercial surrogacy. Doesn't it violate reproductive right and what can be done to address that?

The question of Surrogacy is still evolving area in the international law, and should be dealt with caution in terms of how states legislate on it. We can look for the provisions in the International Convention on rights of Child. If there is a surrogacy bill that has been passed in India has to be extended to LGBTQIA+ community too. There has to be proper safeguards so that the child is not forced into various other offences in which children are subjected to like, child pornography, trafficking etc.



2. Don't you think sir that the United Nations should take more proactive step to make a separate Convention for affirmative protection of LGBT in light of the principles in Yogyakarta?

The UN has increasingly come out stronger on LBTQIA+ rights, in recent they have extended to pensions to the same sex partners. A lot of positive responses is coming from various countries, from south American, European, American. Lobbies of Christian groups and some countries in Africa and Middle East have retorted to oppose it. There has been traction, even though the traction is not enough to motivate some countries but the change is taking place if slow. There should be a more reasonable awareness at the regional level, to bring the change at the jurisdictions which have been opposing it.

3. Sir, how much role does Religion beliefs in Europe play as far as acceptability of homosexuals is concerned? Also what has been the position of relatively advanced Scandinavian countries?

Religion does play a role in the acceptability. For example a country like Poland, Serbia Montenegro and a number of Eastern European block countries has been terrible at this context. The growth of nationalism has been linked to the religion have linked to the Christianity and Catholicism. Within the nationalism there is religion and within that there is an attack on the LGBTQIA+ community and the rise of muscularity. His acceptance of LGBTQIA+ rights gives an idea of social-welfare state. The Nordic countries have been much stronger in this point. The idea of criminalising the same sex relationship in India is derived from the British penal code and has been brought by the British, which did not exist in the Indian jurisprudence before the British Invasion of India. Adding to that, Africa too has been plagued by the same British colonialism which introduced the African subcontinent of the Christianity, and the laws were introduced which aimed at criminalising it and it has been liked to the idea of nationalism stating the idea of homosexuality as a western concept trying impose on the African nations.

4. Sir, reg: the dissonance that exists between the federal and the state governments (US), do you think it is easier to engage in anti-LGBTQ behaviour, especially when the Judiciary fails to check the same?



The US Supreme court is doing the same what they did on the rights of blacks, abortion rights and Planned Parenthood. The divide is due to the centre and state divide where the SC has always given power to the state autonomy in this regards to grow their rights gradually and individually, hence it creates sort of an ideological divide in this regards. The states have failed to protect the rights of LGBTQ when there is no sufficient Central legislation and hence the community bears the brunt of it in various hate crimes. Until the Federal gov is empowered to pass the legislation with the majority till then there might not be any such protective rights.

5. Sir, do you think that decriminalization of homosexuality in any jurisdiction merely gives recognition of individuality But equal opportunity to advance and develop their human potential and social, economic and legal interests remain strained?

If you look at the jurisprudence of Lawrence, Privacy is about individual right and autonomy. It perhaps is not within the collective rights as it is more under civil and political right to privacy in India. When we're talking about the constitutional law cases, and human rights law is only within the community that at last we're always in conflict with the culture, for example the difference in acceptability of the case rural India might be totally different from its acceptance in New Delhi. Courts can only go so far, a lot of it is sensitisation. It can take generations till the judgements change the mindset of the people.

6. Sir, there have been demands for the introduction of "anti discriminatory laws" to help people from the LGBTQ community, gain access to various necessities like job, healthcare, education, etc. what is the viability of such policy measures in India?

The scope of policy matter has to encompass some basic things such as introduction of sexual orientation under anti-discrimination laws. Has to ensure that such laws apply to both Public and Private sectors. All these measures can be incorporated in the future policy legislations to provide a much more inclusive conducive environment for the community.

7. Sir, what effective measures, we as young lawyers should take to enhance the representation of LGBTQ rights, which will bring in rapid legislations in India or across the world?

As a young lawyer it is important to take pro bono cases, getting involved in public interest litigations to grab each and every opportunity to use ones skills to advance the ideas of tolerance, acceptability and access to justice to the suffering party. Not only in places where there is a concentration of lawyers for eg urban areas, but also where there is a lack of lawyers, for example village or rural parts of the country, that will be



true access to justice. Taking help from national as well as international organisations to provide accessibility to justice, or sensitisation campaigns.

8. In a country like India where almost all the religions look down on the homosexuals and where there's not so much taught and talked about homosexuality and LGBTQ struggles. It's still a long road to go for getting that acceptance, what according to you can pace this process de-stigmatization?

Creating campaigns locally putting pressure on the governments to push for such rights and campaigns. It's about recognising and celebrating the idea both visually and virtually, for example teaching the civic rights at schools at more primary levels. It's sort of baby steps but all of us have to remain active in sensitisation and calling out wrong behaviours in this regards.

9. In Indian set up though there is specific Act related to that still they are not recognized. Constitution has also not recognized them. How to deal with this issue in a country like India?

Part of this has to come from the central or the federal government which has a role to play in sensitising about community. Sensitisations of the personnel's involved in the judicial process the police the judges the officials have to be sensitised in this regards.

CONCLUSION

The Indian Supreme court has decriminalised the same sex relationship under the section 377 but there is still misuse of the legislations under the outraging modesty law to criminalise this behaviour under the non-bailable law. The rights which has already been propounded by the SC and the amendment of the constitution, in actual sense the community still faces the stigmatisation and behaviour in this regard not only by the law enforcement agency but the common people at large. Adam Sir also adds that if one truly wants to advance the agenda of LGBTQIA+ rights in India, they should do it by the means of Indian Film industry which truly has the potential and the idea of commercial social films can be a viable medium to propagate the said idea.