

RIGHT TO COHABIT: A HUMAN RIGHT

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“WITH CHANGING SOCIAL NORMS OF LEGITIMACY IN EVERY SOCIETY INCLUDING OURS, WHAT WAS ILLEGITIMATE IN THE PAST, MAY BE LEGITIMATE TODAY.”

ABSTRACT

India is a country which is world known for its unique cultural diversity and cultural variation. This article works an attempt to sort out and find out why cohabitation have to face legal and cultural issues, even when, it is a right of every person to cohabit whether heterosexually or homosexually. It clears the idea that cohabitation is a human right and is nothing for which a separate demand is to be made. Human rights are natural rights and are vested into a person by Mother Nature and may not require a backbone of any statute. The article has been divided into seven major heads starting with Introduction to the topic which gives the statement of problem and object of the study. Further the article explains the concept of human rights and relationship of human rights with other existent rights. The article proceeds with the concept of cohabitation and legal provisions which support cohabitation in India. There are no any explicit provisions which legalize cohabitation but judicial interpretation is done in such a way that it has become legal and have been said to be human right of every person. Now, cohabitation is not only about living together of heterosexual people but also of homosexuals which is elaborated upon in the article. The second to last head is an endeavor to identify the role of judiciary to identify cohabitation as a right. The last part of the article gives conclusion of the research and certain valuable suggestions which are to be made applicable.

KEY WORDS

Marriage, Cohabitation, Human Rights, Moral Rights, Homosexuality.

INTRODUCTION

The story of human rights in the world is the story of humans wronged. It is the story of humans left from enjoying equality and freedom in full measure. The state and society are equally to blame, as often human rights are used as cliché for suppressing the voice of the people and committing atrocities.¹ Unfortunately, the phrase ‘Consent of the Governed’ is somewhere tactfully manipulated by power of the purse or even basic considerations of ethnicity, language and religion. Protection of human rights is greatly dependant on participative governance. India is known for its unique cultural diversity on the global level, where the cultural variation is represented in various forms and variety of faces. All legal rights and obligation of laws emerge from a social foundation which is marriage, though at national level, laws are not very clear on cohabitation, showing a common theme of standoffishness and reluctance amongst countries to recognize such relationships. Traditionally, the legal system has been biased in favor of marriage. Public policy supports marriage as necessary to the stability of the basic societal unit, i.e., family. Unrealistic number of privileges and rights are provided to people who are married to maintain the importance of the relation in the eyes of the society. It is sometimes said that cohabitation has all of the headaches of marriage without any of the benefits. Recently, honorable Supreme Court have spoke through its judgments on cohabitation and found that there is nothing wrong in this respect.

¹ Sorabjee, J. Soli, World of All Human Rights, xvii (Universal Law Publishing Company, New Delhi, 2010 Edition)

CONCEPT OF HUMAN RIGHTS

Any right which is inherent to each and every homosapien, irrespective of his gender, nationality, sex, color, place of birth, place of residence or ethnicity can be said to be a human right. The subject of human rights is the most powerful new addition to the national agenda of items demanding immediate implementation. In today's scenario, human rights are an accepted term and briefly refer to those rights which are possessed by any human being because they are a human being.

In ancient times, the state was the sovereign having the prime importance. With no actual identity of the states' individuals, but, in the present era, with the growth of society, individual is becoming conscious of his basic rights, i.e., the human rights, for which he is actually entitled to. Human rights are basically natural rights that have been bestowed upon humans by nature. Human rights are generally referred to as egalitarian rights and they do impose an obligation on persons to respect the rights of other person. Every such right is indivisible, interdependent and interrelated.

Article 1 of Universal Declaration of Human Rights says all human beings are born free and equal in dignity and rights.² Hugo Grotius developed a theory of natural law, according to which man made laws were simply imperfect aspects of an eternal and immutable law applicable to the whole cosmos. He began with the proposition that the will of the god was law and was known through man's sociability, which was the basis of all the other laws of nature. Thomas Hobbes also said that in the natural condition of mankind, everyone had the natural right to do anything which was conducive to their preservation. John Locke propounded that an individual possessed basic human rights inherent in his personality, independent of whether these rights were recognized or not by the rules. Human rights could not be denied to the individual or legally taken from him by the ruler or society, since any denial or deprivation of the individual of his human rights by the ruler constituted a double violation, i.e., violation of rights of an individual and violation by the ruler of his duty of the protection of an individual. Jeremy Bentham opposed this mechanism. As per him, nature was a very indefinite term and therefore natural law and natural rights were meaningless. Rights, according to him were not natural but are created by law whose worth depended on its utility. He called natural rights as complete nonsense as they might make a stable society impossible, while John Austin considered natural law to be very vague and meaningless. He said that political and civil liberty constituted the freedom of action left or granted by a sovereign to its subjects.

Some of the basic principles of any human right are that it is universal, inalienable, indivisible as well as interdependent, and have certain prohibitions. The modern concept of human rights is thus traditionally traced to the ideas and texts adopted at the end of the 18th century, like the 1776 American Declaration of Independence and The French Declaration of The Rights of Man and the Citizen, 1789. For proper realization of human rights, it is essential that the society as a whole accepts the basic norms of human rights. According to Hersch Lauterpacht, "The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international."³

RELATIONSHIP BETWEEN HUMAN RIGHTS AND OTHER RIGHTS

The main point of relation as well as difference between a human right and any other right is simply the reason as to why one possesses them. Human rights are part of human nature and reason and are inherited directly from the nature. In its 1987 publication- Human Rights: Questions and Answers, the United Nations describes human rights as follows- "Human rights can well be usually outlined as those rights that are inherent in our nature and while not that we cannot live as mortals. Human rights and elementary freedom permit absolutely developing and mistreatment of one's human qualities, intelligence, abilities and conscience and to satisfy our religious and different wants. These are simply supported by mankind's increasing demand for a life during which the inherent dignity and price of ever creature receives respect and protection."

² Article 1, Universal Declaration of Human Rights, 1948

³ Asish Das and Prasanta Mohanty, Human Rights in India 07 (Sarup and Sons, New Delhi, 1st edition, 2007)

A social and political unrest is created by a mere denial of fundamental freedoms which may not only be because of personal and individual issues. This unrest gives a pedestal for performing acts of conflict between the people and society.

In comparison to human rights, Moral Rights are those rights which are directly or indirectly, related to human consciousness. As moral rights are not enforceable by state like legal rights, hence no legal action occurs on violation of any moral right. Basically moral rights include one's moral behavior, courtesy and good conduct. On the other hand, Legal Rights are the type of rights which are provided by the statute and can broadly be classified into three- Civil Rights, Political Rights and Economic Rights. Legal rights are derived from the Constitution or the laws of the country while the human rights are inalienable, universal and are not allowed to be waived. After interpretation of International Humanitarian Law, one can find out that every state has three obligations- the obligation to respect, the obligation to protect and the obligation to fulfill human rights. In the case of **Virginia**⁴ the American Supreme Court had said- "A state resides on a pedestal with three pillars- legislature, executive and judiciary and there can be no other road for it to perform and function." Hence any such statute shall be struck down as the judiciary has a tendency to make changes to fundamental principles while acting on behalf of the state.

The rights which differentiate any resident from a visitor are the fundamental rights which are highly bizarre. Fundamental are those rights which are required for one's mere existence as a citizen or resident of any state. Sometimes fundamental and human rights do overlap each other as the latter serves as foundation to the former.

MEANING AND CONCEPT OF COHABITATION

Cohabitation means a relationship where there is no marriage between the boy and girl, in the sense of solemnization of marriage under any prevailing law. Yet, both live as couple and there is stability and continuity in this relationship. Two perspectives to cohabitation seem as evidence of selfish individualism and breakdown of family, while other perspective describe it as a less institutionalized way in which people express commitment and build their families. Marriage defined womanhood, manhood and adult status; it governed living arrangement and was also central in determining the division of labour and authority within the family and between the sexes. Marriages, for many, have religious significance, and for others have a mere contractual significance. Parents also understand the importance of marriage in affecting the quality of children's lives. Similar considerations suggest that parents will try to influence the decision of the children about cohabitation as well, although, as with marriage decisions, parents understand the ultimate power to make and break unions lies with their children. The main 5 principles which influence cohabitation are:

- Role squabble and Role affinity
- Beliefs and Values
- Life Course
- Organization of Social Activities
- Interpersonal Bargaining and Marriage Markets

India stands on the grounds of traditional integrity and strong moral values. Somehow, with the changing times, values are changing or better if putted as rigidity of values is changing with the spinning time wheel. Today, India is adopting liberal culture and is being influenced by the western lifestyle. But it is only being influenced by western culture; it still holds its original grounds.

As per Article 21⁵ we all have got right to live and living together is a form of living, then there are no pointing fingers from legal perspective in this regard. For the Indian law, it's fine to live together before marriage. As per the old tales of Indian civilization there are many types of marriages and one of which is the 'Gandharva Vivah'. In this mould of matrimony the duo used to consider each other as husband and wife in front of god and kept their association confidential for the society. So you see that the society that denies accepting cohabitation

⁴ (1880) 100 US 339

⁵ Article 21, The Constitution of India

as a form of relationship had its traces in its culture. In the case of **Revanasiddappa v. Mallikarjun**,⁶ the honorable court held that cohabitation is one of the areas which is under criticism and highly debated in India regarding its legality and implication on the societal relationships.

Sacramental bonding between two person who are consenting and adults is known as marriage and is of utmost importance in Indian culture. The concept of husband, wife and family is still of utmost importance in many communities of the country. Though, it is not illegal in India, majority considers it to be aberrant and is looked down upon. It is a pure form of modern adultery which is formed purely on the pillars of fashion ability and individual life style. Youth generation of today is more interested in cohabitation by which they can get a friendlier approach to their relationship. India is a country which is slowly opening its doors for western ideas and lifestyles and one of the most crucial episodes amongst it, is the concept of cohabitation.

LEGAL PROVISIONS RELATED TO COHABITATION

At present there is no special law in India to deal with the concept of cohabitation and its legality. However, the courts in India, through their decisions in various cases, have interpreted the law in respect of such relationships. Some of them are-

A. Premarital Sex and Cohabitation

Under Article 21, the Constitution of India grants to all its citizens, “Right to Life and Personal Liberty” which means that one is free to live the way one wants. When seen from the spectacles of orthodox Indian society, Cohabitation is a concept which is unethical but clearly it is accepted under Article 21 and is not illegal in any way. In **Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel**,⁷ the apex court held that cohabitation between two adults without a formal marriage cannot be construed as an offence.

B. Presumption of marriage

According to Section 114 of The Indian Evidence Act, 1872 the act of marriage are often presumed from the common course of natural events and therefore the conduct of parties as they are borne out by the facts of a specific case. Where the partners lived together for long spell as husband and wife, there would be presumption in favor of wedlock. In the case of **Lolo v. Durghatiya**,⁸ the court held that Radhika and Lolo lived together and a number of children were born out of the so called wedlock, but living together continuously for long period and giving birth to child by itself does not give rise to presumption of a valid marriage, but in case of **Hymavathi Devi v. Setti Gangadhara Swamy**,⁹ the court opined that continuous cohabitation of man and woman for a long time as husband and wife, gives rise to presumption of marriage between them. But said presumption is rebuttable. The court cannot ignore the circumstances which weaken the presumption of marriage.

C. Legitimacy of Children

A necessary corollary of making a presumption in favor of marriage is the presumption of legitimacy of child born out of such relationship. When it comes to the right of child born under cohabitation, we find the law to be groping in the dark. It is not a matter of concern that whether a marriage is void, valid or voidable, any child procuring out of a marital tie is legitimate and this status of legitimacy have been provided by The Hindu Marriage Act, 1955. However, they may not have property and maintenance rights. If at any time, the cohabiting parents desire to get out of relationship, the future of child comes into question. In the case of **Radhika v. State of Madhya Pradesh**,¹⁰ it was held that cohabitation is nothing but a valid marriage. The

⁶ 2011 (2) UJ 1342 (SC)

⁷ (2006) 8 SCC 726

⁸ AIR 2001 MP 188

⁹ AIR 2005 SCW 718

¹⁰ AIR 2008 SC 1986

court added further that any child out of such a relationship is legitimate and will have property rights in their parents' property.

D. Maintenance Rights

The courts have also conferred to a woman under cohabitation, the right to claim maintenance. In June, 2008, The National Commission for Women recommended to the Ministry of Women and Child Development to include cohabiting female partners for the right of maintenance under section 125 of The Code of Criminal Procedure, 1973. A similar approach was taken by the court in **Abhijit Bhikaseeth Auti v. State of Maharashtra**.¹¹ A flurry of precedents is available regarding maintenance of a cohabiting wife. The issue is whether a mistress can claim maintenance or not just because she is residing with a man who is already legally married.

E. Bigamy

In the case of **Payal Katara v. Superintendent, Nari Niketan Kandri Vihar, Agra**,¹² Rajendra Prasad, the person with whom plaintiff was living was already married. No discussion was made as to the rights of cohabiting wife. The question that seeks answer as with the elevation of concept, what will be the status of wife, if a person who is in live in relationship is already married as law also seek to protect the right of cohabiting partner under statutes like The Protection of Women from Domestic Violence Act, 2005, etc. This promotes bigamy, as the person who is getting into live in might be already married. The position of wife is disadvantageous in such situation as court on the one hand is giving all the rights of wife to cohabiting female partner, while on the other hand it prohibits bigamy.

F. Application of The Domestic Violence Act, 2005

Section 2(f) of The Protection of Women from Domestic Violence Act, 2005 describes Domestic Relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, simply it does not only applies to a marriage couple, but also to a relationship in nature of marriage.

COHABITATION OF HOMOSEXUALS

“Sex is what you are born with, gender is what you recognize and sexuality is what you wish.”

Since the 1980s, a growing number of states and municipalities have passed laws allowing unmarried couples, irrespective of them being heterosexual or homosexual to register as domestic partners. A few states still prohibit fornication, or sexual relations between two people of same sex, but such laws are no longer enforceable.

In India, with the advent of the contemporary epoch, the movement against the repressive and oppressive nature of Section 377 grew exponentially and it was finally on July, 2009 that the Delhi High Court passed a judgment in favor of the LGBTs in the landmark judgment of **NAZ Foundation v. Government of NCT, Delhi**,¹³ declaring Section 377 of The Indian Penal Code, 1860 which criminalizes homosexuality in India to be unconstitutional and violative of The Army Act, 1950, the Workmen Compensation Act, 1923 and Article 14, 15 and 21 of the constitution of India, allowing consensual sexual activity between two homosexuals above 18 years of age.

In the leading judgment of **Navtej Singh Johar v. Union of India**¹⁴ the five judge constitution bench comprising of Chief Justice Dipak Misra and others held Section 377 unconstitutional in so far it

¹¹ Criminal Writ Petition No. 2218 of 2007

¹² 2001 (3) AWC 1778

¹³ 2009 SCC OnLine Del 1762

¹⁴ (2018) 10 SCC 01

criminalized gay cohabitation between consenting adults, and reversed the two judge bench decision in the case of **Suresh Kumar Koushal v. NAZ Foundation**.¹⁵ While giving judgment, Justice R.F.Nariman told that present definition of mental illness in The Mental Healthcare Act, 2017 makes it clear that homosexuality is not considered a mental illness and when viewed in the light of Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender of identity, section 377 will have to be declared unconstitutional. Justice Indu Malhotra added that homosexuality is not an aberration but a variation of sexuality. Sexual orientation is not a choice, and homosexual cohabitation cannot be treated as against the order of nature.¹⁶

ROLE OF JUDICIARY

In India, cohabitation is considered a taboo since British rule. However, this is no longer true in big cities, but is still a conservative concept in rural areas. India is a country, which is slowly opening its doors for western ideas and lifestyles and one of the most crucial episodes amongst it, it is the concept of cohabitation. Indian judiciary have always presented mixed views regarding cohabitation, where sometimes they say that cohabiting couples have all the rights of a married couple but for the other times, kept them out of the ambit of marital laws.

In **D. Velusamy v. D. Patchaiammal**¹⁷ the Supreme Court co-examined the term ‘Aggrieved person’ and ‘Domestic Relationship’ and opined that phrase ‘Relationship in nature of marriage’ included in Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 is not anywhere cleared up in the act and held that relationship in nature of marriage is akin to a common law marriage. The couple although not being formally married, shall hold themselves out to society as being akin to spouses, shall be qualified to enter into a legal marriage and must have cohabited voluntarily.¹⁸

In **Lata Singh v. State of Uttar Pradesh**,¹⁹ the question raised in the front of Supreme Court was whether any person have a right to choose, i.e., to marry a person of her own choice. The apex court held that there is no bar for inter-caste marriage, and every person have a right to choose their life partner as well as inter caste marriage would help in uprooting the caste system.

In **S. Khushboo v. Kanniammal & another**,²⁰ the special bench derived a question-“ If two people, man and woman, want to live together, who can oppose them? What is the offence they commit here? This happens because of the cultural exchange between people,” and opined that cohabitation is a wedge of right to life and cannot be said to be a criminal offence by doing logicless interpretation of any theory or rules of morality. Nearly same was reiterated in the case of **Indra Sarma v. V.K.V.Sarma**²¹ where the court held that live in or marriage, like relationship, is neither a crime nor a sin though socially unacceptable in this country. One judgment which gave a new angle to the concept and law of cohabitation was **Nand Kumar v. State of Kerela**²² where the apex court clearly held that even if parties are not competent to enter into wedlock, they have the right to live together even outside the wedlock.

In **Mohabbat Ali v. Mohammad Ibrahim Khan**,²³ the court observed that when a man and a woman cohabited continuously for a number of years, the law presumes that they are a married couple and are not in a state of concubinage. When the concept of natural law came into force, there was no any difference between woman who was married and who was in cohabitation. But, with changing dimensions of society,

¹⁵ (2014) 1 SCC 01

¹⁶ <https://www.sconline.com/blog/post/2018/09/06/gender-identity-and-self-expression-basic-to-human-dignity-article-377-unconstitutional-in-so-far-it-penalises-consensual-sexual-acts-between-adults-in-private-sc/> (visited on 06 Feb 2020, 12:47 p.m.)

¹⁷ AIR 2011 SC 479

¹⁸ iosrjournals.org/iosr-jhss/papers/Vol19-issue12/version-4/F0191242838.pdf (visited on 06 Feb 2020, 07:01 p.m.)

¹⁹ AIR 2006 SC 2522

²⁰ MANU/SC/0310/2010

²¹ Criminal Appeal No. 2009 of 2013

²² 2018 SCC OnLine SC 492

²³ AIR 1929 PC 135

it had certainly become required to recognize relation of a woman and a man living together even without marriage.

CONCLUSION AND SUGGESTIONS

Human rights have been defined as a group of ethical principles having legal dimension, which arise out of the need of each and every individual to enjoy the conditions essential for a decent life. Protection of human rights in India is not only proclaimed by general laws but also by the Constitution which is the supreme law of the land. British jurist and philosopher, Jeremy Bentham gives the concept of 'Greatest good of greatest number.' It means that every human being wishes and desires to be happy at every human being wishes and desires to be happy at every aspect of life. There is no meaning to the existence of life of any person if he is not happy. Right to happiness have been in existence since ancient times, and is considered to be one of the primary natural right. One way to keep a person happy is to put very less restrictions on him and allow doing him any act exception being that it is not illegal. The concept of cohabitation also has a direct linkage to Right of Happiness and other natural right. Cohabitation is not a very current and unfamiliar concept in India. Cohabitation is an individualistic and human rightist approach although cohabitation is quite prevalent in western countries, but reality in India is different as marriage is still an institution, which is to be preferred over any form of union. Ironically, the land of Kamasutra has always had an unadventurous outlook towards the concept of marriage and relationships. In India, matrimony is sacrosanct but today marriage doesn't hold the same values anymore. Even the Indian apex court has now agreed to the fact that cohabitation is a part of right to life and liberty and is nothing illegal. The view of Indian judiciary is a welcome step towards describing cohabitation as a human right.

The following suggestions may be followed with an aim to give legality to concept of cohabitation as well as securing the rights of cohabiting partners and related relationships:

- There shall be a formulation of a whole new set of laws for governing relations including protection in case of desertion, cheating in such relationships, maintenance, inheritance, etc. so as to protect the rights of the cohabiting partners.²⁴
- The statutes shall be made on the basis of the exhortations put forward by The Justice Malimath Committee.
- Article 21, when interpreted liberally with a humanistic approach, it makes it clear that there is nothing illegal in cohabitation.
- Making cohabitation legal would also create a need to make a law regarding the rights of the cohabiting partners and related relations like children.
- Supreme Court has given a green flag to right of cohabitation but the legislature is not enough bold and brave to create a statute and to create awareness in young minds. Awareness campaign about the right of cohabitation shall be made to make every person to agree with its pros and non-legality.

²⁴ Researchgate.net/publication/286440123_socio-legal_dimensions_of_live_in_relationship_in_india (visited on 07 Feb 2020, 02:09 a.m.)