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A Comparative Study of Laws and Rights of LGBT Community in Australia and India

RUPALI MEHTA¹

ABSTRACT

Every person who has taken birth on this planet, irrespective of his race, sex, religion, caste, creed deserves equality and freedom. They should not be discriminated against. But we have done this to a larger section of the world. This section is the LGBT+ community. Various crimes have been done against them in the past. But slowly and steadily, we have moved towards providing a safe environment and equal rights to all. The constant fight for rights and recognition done by the community has resulted in some positive changes. This article is aimed at understanding the past and present laws relating to the LGBT+ community in India and Australia.

Keywords: LGBT, Equality, Freedom, Community

I. INTRODUCTION

United Nations Declaration of Human Rights (UDHR) in its article 1 talks that every human born in the world is free and equal in dignity and rights. Article 3 guarantees everyone a right to life and liberty. Both of these rights concerning the jurisdiction of the nation have been guaranteed by India. Australia being a member of the UN should also apply these laws to their country. Australian constitution and Indian constitution both guarantee its citizens protection from discrimination. But still for a long time both the countries have failed in guarantying these rights to a specific section of their population. This has been done to the LGBT+ community of both nations. They have been denied the basic rights that every living person deserves. And in both countries, these communities have shown great resilience and courage in the past years. A long political and legal battle has been fought by the communities. This has brought them to a condition where the nation is now trying to protect their rights and making society more inclusive. This has been a long battle. Many generations have lived in fear of expressing themselves, and now the current generation hopes that they might not have to live like that.

¹ Author is a student at Panjab University, Chandigarh, India.

II. HISTORY OF LGBT COMMUNITY IN INDIA AND AUSTRALIA

India and Australia both had one thing common in past, both were a colony of Britain. Australia got independence in 1901, meanwhile, India got independence in 1947. Both the nations got their first anti-LGBT community laws after the Britishers became the real power holder of these nations. There is no documentation of any such law in Australia before the British took Australia under its control. However, India has had a constant touch with the homosexual community. Indian mythology, especially Hindu mythology has many references to both heterosexuals and homosexuals. Transgenders also had a special position in Hindu mythology. From the concept of Ardhnareeshwar to Sikhandi, trans people are present in all the yugas that exist as the Hindu culture. Temples in Khujrao are also sign of the same. Meanwhile, Muslim rulers had trans people in their harems. Mughals had given a special place to trans people in their court.

It was in 1788 that the British brought their anti-homosexual laws to Australia. In India, the same law was introduced in 1871. It was the Criminal Tribes Act. This act made the registration of Eunuchs compulsory in India. The Criminal Tribes Act, 1871 made registration of all the eunuchs in India compulsory. The act got amended in 1897 and was then renamed as an Act for Criminal Tribes and Eunuchs. This act's section 29 prohibited all the registered Eunuchs from giving gifts, forming a will, adopting a son, or even becoming the guardian to any minor. This law reduced the level of trust of society in transgenders. It was replaced by a sense of fear. This feeling can still be felt all around the country until the present day. Thomas Macaulay introduced the new criminal laws in 1860. These were in response to the sepoy mutiny. It was this set of laws of which introduced the anti-homosexual laws. They criminalized all types of sex which they perceived as against the order of nature.

III. COMPARISON

Australia got independence in the year 1901 and it marked the year of change of laws in the nation. But the nation was slow in recognizing the problems of the LGBT community. Victoria was the first state to liquidate the punishment for having anal sex in the country. It was reduced to imprisonment of 20 years from the death penalty in the year 1949. This law affected both homosexuals and heterosexuals. 19 years later, in 1968 Australia formed its first Homosexual law reform committee. This happened in the city of Canberra.

The year 1975, was the year that showed positive signs toward change in the laws. South Australia decriminalized homosexuality for men. The age of consent was also made the same for both men and women in that year. The Australian Capital Territory (ACT) decriminalized

male homosexuality in the consequent year. Meanwhile, by the time 1980 approached, Australia had noticed its first AIDS case. This increased the discrimination against homosexuals around the nation. Australia introduced the Anti-discrimination law in 1986. The sex discrimination act makes it illegal to discriminate based on sex. But it does not cover discrimination on the basis of sexual orientation². Though it has been suggested by various commissions to include it in the act. Even though all the states in Australia give legal recognition to homosexuals and prohibit discrimination against them. But all the states use different vocabulary in their laws. New South Wales uses the word 'homosexuality'. This removes bi-sexual from the definition. And hence no law covers them in the state. Meanwhile, other states use terms such as 'sexual orientation'³, 'lesbianism', and 'sexuality'⁴. All the states protect the LGBT+ community from any sort of discrimination that may occur in the workplace against them. Also, there is the Fair Work Act. This act acts as the protection for everyone from discrimination that they may face on the basis of their sexual preference. Adoption and marriage rights are available in Australia.

The story of recognition of rights for the LGBT community in India is comparatively very new. In India, homosexuality was a criminal act under section 377 of the Indian Penal Code, 1860. Many petitions were filed in the court regarding challenging the section's validity. The first petition was filed in 2001 in the Delhi High Court 2001, and this was dismissed in 2004. Following this, another petition was filed by an NGO named Naaz Foundation. This was a big moment. The court found the act to violate the fundamental rights guaranteed by the constitution and hence was removed. This judgment was challenged in the Supreme court. And the court reversed the judgment⁵. But in the upcoming years, the Indian court showed positive signs of changes. First, in the NALSA case, the third gender was recognized in the country. After this, the court gave a landmark judgment in the Navtej Singh Johar case⁶. This case decriminalized homosexuality in India. In both cases, the court accepted that most basic rights for the community were not given due to section 377 and the non-recognition of gender.

The next major step taken in India was the formulation of THE Transgender Persons (Protection of Rights) ACT, 2019. Section 3 of the act protects transgender people from any form of discrimination. But section 4 is the topic of major concern. It talks about the identity

² Felix Walter Rohner v Linda Scanlan and The Minister for Immigration and Multicultural Affairs (1998) 86 FCR 454

³ Equal Opportunity Act 1995 (Vic), Sec. 4(1), Australia

⁴ Anti-Discrimination Act 1991 (Qld), Sec. 7(n), Australia

⁵ Suresh Kumar Koushal and Ors. Vs. NAZ Foundation and ors., CIVIL APPEAL NO.10972 OF 2013

⁶ Navtej Singh Johar and ors. Vs. Union of Indian and ors., WRIT PETITION (CRIMINAL) NO. 76 OF 2016

of the person and gives provision for making of certificate after verification by the District Magistrate. This is in complete opposition to the judgment of the NALSA case where the court gave the right of self-determination of gender.

But there are many more things which show a positive change in the attitude of the government. The act promises a new insurance policy, HIV surveillance centers, and therapy for sex-change surgeries. It also makes sexual harassment of transgender a criminal offense. But the punishment is less when compared to sexual harassment against women and this raises concern. It also makes wrongful eviction of transgender from their home a criminal offense. Apart from this, harassment of economical nature and force bonded labor has also been classified as a criminal offense.

IV. CONCLUSION

Both countries have shown positive change when it comes to making laws for the protection of the LGBT community. The legal structure of Australia and India is very different and hence the way of application of laws is very different in both the nation. India follows a more federal approach when it comes to laws related to the LGBT community but Australia has more laws on the state level. There are various laws in Australia for protecting the LGBT+ community from discrimination but in India, there is just one law. Adoption and marriage rights are available in Australia but are absent in India. This is a major drawback. The way courts have reacted till now, shows that these rights may take a lot of time for recognition.

Both the countries have made a slight improvement in the condition of the LGBT+ community. But as Malcolm X had once said that “if you stab a man 9 inches and then pull out the knife 6 inches, it is not called as progress.” Even if the knife gets pulled out completely, one must not consider it as progress. Progress will be when the person’s wounds start to heal. Both the nations by taking initial steps have done the act of pulling out of knife 6 inches. But it is a long way for healing of the wounds of the community.
