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LGBTQ RIGHTS: A COMPARATIVE ANALYSIS OF THE RIGHTS AND CHALLENGES FACED BY THE CONSTITUTIONAL FRAMEWORK OF INDIA AND AUSTRALIA¹**ABSTRACT**

The In recent times we have seen the rights and challenges faced by the LGBTQ community. The whole constitutional framework for the freedom of LGBT community in India and Australia. The LGBT community basically refers to the person from sexual minority i.e., the gender identity. This whole community deals with many personal issue, also these people are always discriminated by the other people and earlier the mindset of the society was also different, it was very hard for them to accept this community. And it became very hard for them to survive in the society But after the LGBT community fought for their freedoms, rights, and equal citizenship. The steps taken by the judiciary through judgment in Nazi Foundation case deals with homosexuality in India and Toonen v Australia 1992 deals on the human rights complaint in Australia. the study was concluded by the sources like books, articles, theories, case laws (landmark judgment) etc. this paper speak about the grant of civil liberties and fundamental rights of the India and Australia , provisions with regards to international treaties and also the rights to privacy of persons with varied sexual orientation and gender identities. It also deals with the status quo of laws of both the nations. This paper analysis the same sex marriage in Indian and Australia invisible issue which was successfully kept undercover, also this explains the community including the evolution, the society attitudes and reactions towards such relations. This analysis spreads the lights on legal framework on rights of LGBT community. Its shows that India is a quasi-federal state and Australia is strong federal union. It's a constant endeavor of both the nations to strive for acknowledgement the rights of both the nations.

Keywords: LGBTQ rights, LGBT community, Decriminalization of Section 377

¹ Aakriti Gupta, Amity Law School, Noida

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INTRODUCTION

Even “*Human beings are human being, just treat everyone like that.*” (Williams, n.d.)

The LGBT refers for all Lesbian, Gay, Bisexual and transgender. All of them come under LGBT community. Basically it means sexual attraction with the same sex or gender or more than one sex or gender. LGBT people fight for the freedom as well as they also fight for their gender acceptance in the societies. In ancient times there is no prescribed law or we can say human rights for LGBT community. Even in 90s century LGBT peoples are not acceptable in the society and it is very difficult for them to stand among the people.

At the beginning of the 21st century, The Netherlands was the first country for legalizing the same sex marriage and till now there are 28 countries like United states, Australia, India, etc which legalized the same sex marriages or we can say in the modern world, countries accept them and gave them an opportunity to stand as well as gave the opportunity to the people in the society to accept them and rely upon that they are a part of the society and it doesn't matter that what gender sexuality they have.

After a lot of struggle and fights, LGBT community has their own rights applicable in some of the countries. Like in India it takes 10 years (2009-2018) to legalize the law and in Australia it takes so many years (1997-2017) to legalize the same sex marriages. In all these year, lot of challenges faced by the India and Australia on the basis of rights guaranteed as well as the constitution basis.

As we all know that India is a quasi-federal state with a strong centre and a written, right constitution. By this mean that there is distribution of powers between the state and centre is unequal. Besides, federalism is the basic structure of the constitution and cannot be amended. This has time and again been upheld by the Supreme Court in cases like Keshavananda Bharti v state of Kerala as well as the S.R. Bommai vs Union of India.

The Constitution of Australia declares that Australia is a federation. All the characteristics of a federation such as a written and rigid constitution, division of powers and rigid constitution are present in Australia. Even the residuary powers are enjoyed by the states, the powers of the federal government already specified. According to section 128 of the Australian constitution, it proves that it is a rigid one which says that the only law proposing an amendment passed by an absolute majority in both the houses of the parliament must be submitted to the electors of the houses of representatives in each states and territory to vote upon it by means of referendum within not less than two nor more than one months after its passage through both the houses. Like American constitution but unlike the Indian constitution, the Australian constitution makes

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general provision in regards to the states and the structure of the state government is not mentioned in the constitution. Further, all the states of the Australian Federation have their separate constitution governing their states. This constitution is simpler and more flexible than the Federal Constitution.

SYMBOL FOR LGBT COMMUNITY



This flag represents the LGBT community; this shows the unity, pride, shared value and allegiance to one another. It also communicates the ideas, concept and identity both within the communities.

HISTORY

Each and every person has different opinion and different way of accepting others. Prior it is hard for society for tolerating the LGBT network, likewise earlier individual's doesn't think about their privileges, however now at present individuals know about their own key rights or we can say fundamental rights and they are additionally battling for them like LGBT community.

In September 2018, **India's** LGBTQ development made sure about a significant triumph. The Indian Supreme Court renounced Section 377, a provincial period law going back to 1860 that built up homosexuality as an offense culpable with a jail sentence of 10 years.

The day has since stood out forever for LGBTQ activists and individuals from the network who had been taking on this lawful conflict for quite a long time. In 2019, nonetheless, the network is presently facing an alternate conflict to change social points of view in a nation despite everything characterized by solid male centric codes. Among the many crossing battles for stating their privileges, opportunities, and personalities has been in the distributing business, where there has been a shortage of characters and books that mirror the real factors of Indian strange individuals.

They fought for the different laws like

- Marriage and relationship recognition: It refers to the laws for the same sex marriage.
- Adoption and parenting laws: it refers to the laws related to selection, temporary parenting, and other parental acknowledgement rights for LGBT guardians.
- Non-discrimination laws : this law protect the community from discrimination

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- Safe schools laws and policies: this law is made for protecting the student from bullying or discriminated in schools.

Gay and lesbian rights development bunches were not sorted out in **Australia** until the late 1960s. The ACT Homosexual Law Reform Society, a humanist association situated in Canberra which was shaped in mid 1969; and an Australian arm of the Daughters of Bilitis, which framed in Melbourne in January 1970, are viewed as Australia's first gay rights associations.

In 1994, the Commonwealth passed the Human Rights (Sexual Conduct) Act 1994 – Section 4,[19] sanctioning sexual action between consenting grown-ups (in private) all through Australia. It wasn't until 1997 anyway when the law in Tasmania disallowing gay male sexual direct was cancelled in Tasmania. Anyway the restriction on gay male sexual lead was upset in the courts in 1996 after *Toonen v. Australia* that gay male sexual lead turned out to be officially legitimate in every single Australian state and domains when the national government passed the Human Rights (Sexual Conduct) Act 1994.

In both the nation it grant of civil liberties and the fundamental rights like in Australian constitution does not have any constitutional provisions for civil liberties. However, recent legislations have been enacted on the lines of rights guaranteed by international conventions to which Australia is a signatory to provide the citizens with certain fundamental rights and civil liberties like

- Australian bill of rights 2019 which includes all the human rights enshrined in the international instrument listed in section 3 of human rights act 2011.
- Australian bill of rights 2017 which says about the entitlement to rights and freedoms without distinction ,permissible limitations and right to protection from arbitrary interference.

In India rights which are essential for the all-round development of the individual of the state are provided by the constitution in India under its part the state cannot take away any rights that are covered under this part of the constitution law which says violations to either rights of equality in article 14 or freedom of speech and expression in article 19(1)(a).

Hence, the different between both the systems is that if your rights have been infringed, in India you have a right to institute proceedings against the infringer, while in Australia you can only file a complaint with the Human Rights Committee and concerned officials. Secondly, the proceedings in India may lead to a social reform in the form of a precedent. This precedent can even be overruled with superseding judgements. In Australia a major change and social reform

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is made by the formation of a law by the Legislature on the recommendation of the Committee. This can eventually be declared void by the courts if inconsistent with the rights.

CHAPTER 2

The status-quo of laws of both the nations

Unlike the Indian constitution the Australian constitution which does not include the structure of the state government. It only makes some general provisions in regards to state under section 106 which says that the constitution of each state is subject to this constitution and continue as of till when here is some amendments in the provisions of the states.² The laws regarding rights of LGBTQ have to some extent now gained federal recognition but the struggle for the same has been different in each state, each state has its own story to tell.³ The evolution of the laws in states is to a great extent analogue to each other. Here we discuss how the struggle in some states evolved.

South Australia

Don Dustan who was an attorney general in the Walsh Labor government who later become the premier of the state when the labor party. he showed some interest in the rights of homosexuals. The first step in the state was the bill by Murray hill. Although he claimed to be progressive but the bill did not allow to acts of homosexuality in public because of the belief that it is against the public moral and decency.⁴ It was Duncan who introduced pioneering legislature that created a code of sexual behavior regardless of the gender orientation, and a common age of consent demonstrating the political courage and acumen on this issue⁵. In order to identify the threshold between public and private conversation, it is helpful to characterize 'public' and 'private' as ends of a continuum, rather than as discrete spheres. At the truly private end of the spectrum is conversation (spoken or written) between individual citizens; private not only because the views conveyed in such discussions were not disseminated at the time, but also because they are lost to the historian. Further clause 3 of the Equal Opportunity Act 1984 prohibits discrimination on the basis of sexual orientation.

Queensland

² Vishnoo Bhawgan, Vidya Bhushan, World constitution, Australian Constitution page 11 (7, Sterilng Publication Private Limited)

³ The Human Rights (Sexual Conduct) Act 1994 (Cwth) (No. 179 of 1994)

⁴ Reeves, Tim, "The 1972 debate on homosexuality in South Australia".

⁵ The Criminal Law (Sexual Offences) Amendment Act, 1975 (S.A.), No. 66 of 1975 amended the principal act, the Criminal Law Consolidation Act 1935 (S.A.)

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The condition of homosexuals in Queensland was worse than any other state. The Joe Belk Peterson government imposed oppressive Christian morality in high persecution of the community. The laws persecuting gay sexual relationship were more stringently being applied. But the elections of the new premier from the labour party laws changed. Wayne Goss announced that "the criminal justice commission would conduct a review of the state laws related to homosexuality. The act also provides defence to a charge of engaging in anal intercourse between the age of 12 and 18.

INDIA (Decriminalization of Section 377)

The Indian Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding.⁶Section 377 of the IPC defines Unnatural offences. It states that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall be liable.⁷

The evolution of the whole process of decriminalization started with finding out the eminence of identity. Justice Radha krishnan have great deliberation came to a conclusion in the case of National Legal Services Authority v. Union of India where it is "opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. The discrimination on the ground of "sex" Under Articles 15&16, therefore includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider they to be neither male nor female⁸.

Section 377 was contended to be volatile of Article 14 of the Constitution as the said Section is vague in the sense that carnal intercourse against the order of nature is neither defined in the Section nor in the Indian Penal Code or, for that matter, any other law. Also the classification that is to be treated valid at the time of adoption can cease to be so on account of the changing social norms.⁹

DIFFERENCE BETWEEN BOTH THE NATIONS ACCORDING TO PROCEEDINGS.

⁶ Saurabh Chaudri and Ors. v. Union of India ., 11SCC146,(SC:2003)

⁷IPC, Section 377.

⁸National Legal Service Authority v. UOI, AIR1863 (SC:2014)

⁹ Anju Garg and Ors v. hotel association of India , AIR663

The difference between both the systems is that if your rights have been infringed, in India you have a right to institute proceeding against the infringer, while in Australia you can only file a complaint with the human rights committee and concerned official. Secondly, the proceedings in India may lead to a social reform in the form of a precedent. This precedent can even be overruled with the suspending judgments. In Australia a major change and social reform is made by the formation of a law by the legislature on the recommendation of the committee. This can eventually be declared void by the courts if inconsistent with the rights. However, the difference of proceeding in India and filing a complaints in Australia is that major reform maybe first made by precedent in India e.g. Navtej Singh Johor judgement is an authoritative text for interpreting the rights of homosexuals and in Australia, the ruling of the committee may be considered as authorities texts however, this may lead to formation of reformation of a law by the parliament on the recommendation of the committee.

CHAPTER 3

JUDICIAL APPROACH TOWARDS THE ISSUE

Acknowledgement the rights of LGBTQ community

A. Prohibition on the basis of sex which includes sexual orientation

The fundamental rights and non-discrimination on the basis of sexual orientation has been guaranteed in the following ways:

1. Yogyakarta principles

Ever since the Yogyakarta principles have been authoritative texts concerning the human rights of people related to gender identities. The YP+10 documents was documented by a drafting committee including people of various religions, sexual orientation, gender identities, sex characteristics.

The Yogyakarta principles define Discrimination on the basis of sexual orientation under principle 2 as follows:

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms ¹⁰

¹⁰ The Yogyakarta principles plus10, The Yogyakarta Principles, Geneva, Principle 2, <https://yogyakartaprinciples.org/>.

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Thus, discrimination on the basis of sexual orientation or gender identity includes excluding a particular group from other, making a distinction between them and the others, restricting the rights of these groups or preferring other groups over a certain group in such a way that it affects the leftover group's right to equality or restricts the fundamental freedom of such groups. Further it also states that state shall incorporate principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their constitution and legislations. Also, such incorporation and its effect in giving justice should be ensured.¹¹

According to Principle 2(b), any law that prohibits any consensual activities between same sex couples should be repealed by the states.¹² Hence, this principle explicitly safeguards the rights of the community for indulging in consensual activities and advises the state to make or amend laws to accommodate the same. The same has been reflected in principle 4(a) of the Yogyakarta principle which states:

States shall:

- a) Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them.¹³

Principle 4 of the Yogyakarta principles speaks about the right to life which says that no one after his/her gender identity or sexual orientation being considered, be arbitrarily deprived of life and for consensual acts of such individuals, no death penalty be imposed.¹⁴

b. International covenant on civil and political rights

According to Article 2(1) of international covenant on civil and political rights says that "each state party to the present agreement undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present afferent, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status."¹⁵

¹¹ The Yogyakarta principles plus10, Yogyakarta principles, Principle 2(a).

¹² The Yogyakarta principles plus10, Yogyakarta principles, Principle 2(b)

¹³ Yogyakarta principles plus10, Yogyakarta principles, Principle 4(a), Yogyakarta principles

¹⁴ The Yogyakarta principles plus10, Yogyakarta principles, Principle 4, Yogyakarta principles. The Right To life

¹⁵ International Covenant on Civil and Political Rights, United Nations Human Rights office of the high commissioner, article 2(1).

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Even according to article 26 of the international covenant on civil and political rights says that all people are equal before the law and are entitled without any discrimination to equal protection of law.

In Vos V Netherlands, the meaning of ‘other status’ was laid down in the following way:

Article 26 of the covenant has been interpreted as providing protection against discrimination whenever laws differentiating among groups or categories of individuals do not correspond to objective criteria.¹⁶

AUSTRALIA SCENARIO:

Toonen V. Australia

In this case, Nicholas toonen, an activist of the Tasmanian Gay Law Reform Group (TGLRG) claimed that his rights mentioned in article 2, paragraphs 1, 17 and 26 of the International Covenant on Civil and Political Rights. The sections 122(A) and (C) as well as section 123 which criminalize all the sexual contact between men including the private sexual acts between homosexual men were challenged by him. Thus the first major issue in this case was whether there was discrimination on the basis of sexual orientation. However, according to committee sexual orientation falls under ‘other statuses rather than the gender dominion.’¹⁷

Edward Young vs Australia

The author of the complaint was in a same-sex relationship with a person who was a war veteran. After the latter’s death, the former had applied for pension as the veteran’s dependent. However, the relevant legislation entitling the veterans to the pension, provided pension for only such partners if they were either married or in relationship with the opposite -sex. This was considered as violative of the author’s rights and amounted to discrimination on sexual orientation.

The HRC stated:

The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the

¹⁶ Sarah Joseph, Jenny Schultz and Melisa Castin, The International Covenant on Civil and Political Rights - cases, materials and commentary, Rights of non- discrimination, Second edition, pg. 689.

¹⁷ Toonen v Australia, 50 CCPR 488Merits, (UNHRC ,1994)

couples in question had the choice to marry with all the entailing consequences.¹⁸

Thus, it has been firmly established that article 26 of the covenant prohibits the discrimination based on sexual orientation. Further in this case the committee said that there was no evidence as to how the distinction between the homosexual who were not granted the benefits under the pension scheme and heterosexual couples who could avail the benefit from the scheme was reasonable and objective. Infact, the Australian authorities hadn't argued on the lines of such distinction under article 26. The following lines in the individual opinion by Ms. Wedgood and Mr. De Pasquale reflect this fact:

In a case of this moment, "it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant. Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgment. Under Covenant jurisprudence, a state party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or on grounds of sexual orientation. Yet, as the Committee of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced." In every real sense, this is not a contested case.¹⁹

Accordingly, it is the state's duty to provide reasonable and objective dimensions to the law that distinguishes between same-sex and opposite-sex relationships or discriminates against homosexuals. The human rights act is currently enacted only in three states viz. Australian Capital Territory, Queensland and Victoria, while in other states non-discrimination has been guaranteed by various legislations which have been discussed below.

INDIAN SCENARIO

The Indian constitution grants equality before law under article 14. It prohibits discrimination on the basis of sex and hence sexual orientation under article 15. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them

¹⁸ Young v. Australia, Comm. 2 U.N. Doc. 231, Para 10.4 (HRC ,2003)

¹⁹ Young v. Australia, Comm. 2 U.N. Doc. 231, (HRC ,2003)

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In the Nazi foundation case the court held that is an instant case of how right to equality under article 14 is to be applied is given under article 15.²⁰.article 15 is a specie to the genus of article 14 for the enforcement to right to equality. Article 15 prohibits discrimination on several enumerated grounds, which include 'sex'. The ambit of the term sex can be expanded to the concept of sexual orientation. The term has been defined as an individual's preference in terms of sexual relationship with others - whether homosexual or heterosexual. The principle behind prevention of discrimination on the basis of sex is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning "normal" or "natural" gender roles. The legal position in International law and comparative Jurisprudence includes discrimination on the basis of sexual orientation and is generalized about the conduct of either sex. The Delhi high court in naz foundation case and from there on in the navtej singh johar case was held that shunned separation based on sexual direction is secured under the disallowed degrees of segregation under article 15. The high court in the judgement categorically said that those who are considered by the majority as deviants in the society are not so and are not excluded. In international jurisdiction including one judgement by the supreme court of Canada in the case of JamesEgan and john Norris Nesbit v. her majesty the queen in right of Canada and anr.²¹ Held sexual orientation as one of the ground to claim benefit. Section 15(1) and he said list not being finite and exhaustive can be extended to LGBTs on account of various grounds as disadvantage suffered by the community on political, economic or historical basis.

CONCLUSION

"Openness may not completely disarm prejudice, but it's a good place to start."(collins, n.d.)

In research paper we analyzed all about the current situation and the past situation in Australia and India. We also analyze about the rights of LGBT community and the bills passed by the Australia and steps taken by the India constitutionally. So we all know that Australia is a strong federal Union with a written and rigid constitution, while India is a Quasi- federal state. Civil liberties are not granted explicitly by the Constitution of Australia and enacted through recent legislations while they are embedded in Part3 of the Indian Constitution as Fundamental Rights.

²⁰Nazi foundation v. govt of NCT of delhi,160 DLT 277 (del,2009)

²¹James Egan and john Norris Nesbit v. her majesty the queen in right of Canada and anr 2 SCR 513(1995)
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Discrimination on the basis of sexual orientation has been prohibited by both the countries. In Australia this has been ensured through various legislations and the Human Rights Committee, while in India it has been guaranteed by art.15 of the Constitution as has been highlighted through various case laws. The consensual acts among homosexual individuals in private are covered under right to privacy in both the nations. Same-sex marriage has been legalized in Australia since 2017 but in India a legislation of the same sought has not been enacted yet. However, it's a constant endeavor of both the nations to strive for acknowledging the rights of both the nations.

“It is a human right to live, bond and procreate and it should be the duty of every constitution to guarantee them to all.”



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