

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 3 | Issue 3

2020

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A Comparative Study of Laws regarding LGBTQ in India and UK

RUPALI MEHTA¹

ABSTRACT

This article has one primary objective i.e., to study and understand the progression of LGBT+ rights and laws relating to it in the current era. India and the United Kingdom are the two countries that are covered in this article. The article traces the timeline of laws and rights related to the LGBT+ community in both these countries. Both the countries have a special relationship. Most of the criminal laws of one nation find their origin in the former country. British ruled over India for 200 years and gave India much of its present-day criminal system and laws. Hence, these two nations are tried to be studied in one article. The article aims to provide a better understanding of the history of laws related to the LGBT+ community in these two nations.

Keywords: LGBTQ, Community, Laws, India

I. INTRODUCTION

Human society has evolved from being cave dwellers to landing on the moon. But still, we have been very careless, hateful, and on our worst behavior towards a specific portion of the society. We have always been taught to keep things in boxes or compartments, but we forget that not all containers are watertight. The concept of sex or gender is something that cannot be kept or defined in watertight compartments. It is fluid, fluid like air or water. Just because something couldn't be trapped inside the preconceived boxes, doesn't mean we need to do wrong to them. Our duty as humans were, is and will be to understand those who are not part of the old boxes. We have to break our stereotypes and learn about them. Our duty is to give everyone equal rights, to make a more inclusive society. We have consistently failed in doing so. Our stereotypes didn't stop us from destroying the lives of people who won us the war. The whole world knows what was done to Alan Turing². When the whole world liberated people from Nazi concentration camps, how we left the LGBTQ prisoners to stay in them. Countless crimes have been committed against the LGBTQ+ community all over the world,

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

² Katie O'Malley, "ALAN TURING: WHY WAS THE CODEBREAKER CONVICTED AND PARDONED FOR HIS SEXUALITY?", Independent (15 July 2019), <https://www.independent.co.uk/life-style/alan-turing-new-ps50-banknote-gay-codebreaker-mathematician-sexuality-pardon-a9005086.html>

and they are still being done. But some countries have tried to bring change in the conditions of this community. We aim to study the laws which are related to the LGBTQ community in India and the UK.

II. HISTORICAL BACKGROUND

The United Kingdom is considered to be one of the most advanced nations when it comes rights of LGBT. Meanwhile, India has joined the world very late in bringing positive changes but they have also started bringing some positive changes in legislation.

The United Kingdom passed the Buggery act in 1533³. This act targeted male homosexuality and penalized sodomy with death. It is often considered that this law is the major reason why laws against the LGBTQ+ community have been passed in India. Many historians consider that homosexuality was allowed in India before the British came to India. The transgender community had a place of high respect in the Mughal courts and harems. They occupied important positions. But as soon as East India Company got power in India, they started implementing their stereotypes in India. And hence anti-homosexuality laws were introduced in India also. The most important one was section 377 of the Indian Penal Code. It took over 70 years of independence to remove section 377. There were many cases fought in the court to decriminalize homosexuality. Meanwhile, in the United Kingdom, the act was removed after 300 years in 1861. But homosexuality was still a crime. The new act had just reduced the punishment for practicing homosexuality. A criminal law amendment act was brought in 1885. This strengthened the laws against homosexuality. Prosecution of the people could have been done without even a witness. One of the most famous cases was when legendary writer Oscar Wilde was punished under this act⁴. Homosexuality in females was never directly criminalized. An attempt was made in the 1900s but the law did not see the light as people feared that bringing a law for this would promote women to explore homosexuality.

Ray of hope for positive changes was seen when a Departmental Committee on Homosexual Offences and Prostitution was established. This committee's aim was to find evidence that legally there was no way to criminalize homosexuality. In 1957, this report was published and after 10 years its first recommendation was implemented. Now, men above 21 years of age were allowed to practice homosexuality in private. But in 1988, a conservative government came to power under Margaret Thatcher. She made laws that banned local authorities from promoting homosexuality and to stop funding of projects which were

³The Wire, "Section 377 Based on Law Passed by Henry VIII in 1533", <https://thewire.in/law/section-377-based-on-law-passed-by-henry-viii-in-1533>

⁴ British Library, "Oscar Wilde on Trial 1895", <https://www.bl.uk/learning/timeline/item107514.html>

thought to be promoting homosexuality. This law was abolished in 2003. David Cameroon apologized to the community for this law in 2009, when he was the Prime Ministers.

Meanwhile, the late 90s and early 2000s were also very important for India. A writ had been filed in the High Court of Delhi regarding the decriminalization of homosexuality by an NGO. This came after Kiran Bedi had stopped them from raising awareness about homosexuality in Tihar Jail. The writ did not bring any legislative change but marked the beginning of the legal struggle for decriminalizing it. In 2001, the Naaz foundation⁵ also challenged section 377 of the Indian Penal Code. Section 377 was declared unconstitutional by the court. But the judgment was overruled in 2013 by the court in the Suresh Kumar Koushal case⁶. But the most important cases were the NALSA case⁷, K.S. Puttaswamy Case⁸ and Navtej Singh Jauhar case⁹. Navtej Singh's case decriminalized homosexuality, meanwhile, the NALSA case gave recognition to the third gender in India. K.S. Puttaswamy's case gave recognition to the Right To Privacy, hence whatever a person does in his private life in a private place was of no concern for any other person.

III. CURRENT LEGISLATIONS

The United Kingdom

The United Kingdom is considered to be one of the pioneers when it comes to LGBT rights. Their Marriage (Same-Sex Couples) Act was enacted in 2013. It is also known as the MSSC Act. The act extended the ambit of the word 'Marriage'. Now, the word includes same-sex couples, this removed the restrictions that were applied by the original Marriage Act of 1949. The original act stated that any marriage in which parties are not male and female will be void. The most important aspect of the act was that it allowed civil partnership formed before the enactment of the act could be transformed into marriage. The act also guarantees the same rights to heterosexual and homosexual couples.

The Adoption and Children Act of 2002 allows same-sex couples to adopt. The Gender Recognition Act of 2004 gives complete recognition to trans people. This allows them to acquire a new birth certificate. Though there exists a major drawback i.e., the options available on the certificate are male and female.

There exists the Equality Act 2010. This act gives LGBT workers and employees protection

⁵WP(C)7455/2001

⁶Civil Appeal No. 10972 OF 2013

⁷ WP (Civil) No 400 of 2012

⁸ (2018) 1 SCC 809

⁹AIR 2018 SC 4321

from discrimination, harassment at work. The protections given by the Equality act and Gender recognition act when combined, create a safe workplace for trans workers.

India

The story in India is a completely different one. If we tell today that there existed a time when the LGBT community had safe heaven in India, one may not believe it. But the signs can be seen in the sculptures of temples or the story of Ghazni and his lover Ayaz. But India is comparatively way behind in LGBT community rights in the present day. The last decade had seen the most drastic change. Judiciary recognized the third gender, decriminalized homosexuality, and the new transgender persons protection bill, now an act.

The Transgender Persons (Protection of Rights) Bill, 2019 is India's first step towards making legislation for the trans community. It prohibits discrimination against Trans people with regards to jobs, education, healthcare facilities, and access to private and public establishments. But there is a major drawback of this act. It snatches away the individual's right of determination of one's sexual orientation. This right in the NALSA judgment has been declared as one of the facets of the right to privacy. The bill also shows the discriminatory mindset of Indian society. The punishment of sexual abuse of transgender persons has a maximum punishment of imprisonment for 2 years. But the Indian laws for the same offense in the case of women provide for imprisonment for 7 years at maximum. This raises the question. 'Is the value of the life of a transgender person less than that of a woman?'

The bill also talks about providing "inclusive education and opportunities" for transgender persons. But the government forgot to lay down an exhaustive plan for doing so till now. The laws regulating marriage and adoption have still now given any sign of change. The laws still don't give rights to same-sex couples. Homosexual couples cannot adopt a child, they cannot marry. But them living in a live-in relationship has been identified and confirmed. The Allahabad High court in the last year gave protection to a same-sex couple. Various courts have been recognizing the rights of the LGBT community. Kerala and Tamil Nadu are the only two states in the nation to give adoption to transgender persons.

IV. CONCLUSION

The 20th century has witnessed a lot of revolutions regarding equal rights among all the members of society. The Indian society often considered to be more conservative has clear signs of the existence of an all-inclusive society in the past. Even though the religious orthodox are adamant that nothing of this sort existed.

The change of path that has been started by the nation's judiciary is a new path. Meanwhile, the fight for equal rights started way back in the United Kingdom. The laws in India are not competent enough to provide equal chances and rights to this community. We need new laws which are more inclusive and respect the communities.

The future of both nations is the youth. We need to educate them to stop and break their stereotypes. They must be educated for the creation of a society that does not give benefits to one community by snatching resources of others. India must give adoption and marriage rights to everyone. The signs shown by the Indian judiciary in some states act as a sign of hope. But on the other hand, courts have been reluctant in listening to pleas regarding marriage and adoption rights of the homosexual. It needs to change this.
