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[LONG ARTICLE]

A domain beyond the stereotypical barriers: Extending rights to the LGBTQ+ community

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Abstract: The Constitution, being a living document, has rights enshrined under it that are subject to evolution with social changes. Article 21 has been a brilliant example of constitutional evolution ever since the Maneka Gandhi case. The Supreme Court gave a ray of hope to the LGBTQ+ community when it decriminalised sexual activities 'against the order of nature' between consenting adults. This move, however, was not met with protective legislation by the government of India. The paper, while giving an overview of the stigma against the LGBTQ+ community, has analysed protective legislations in the Commonwealth countries to provide a wider interpretation of the right to life of the community members. This paper also analyses the situation of queer groups and the legislative approach undertaken to normalise their affairs, and to extend the rights to those groups, as are available to others. A comparative analysis has also been drawn between legislations in different Commonwealth countries and how India can benefit from the laws of similar nature.

Keywords: LGBTQ+; Article 21 of the Indian Constitution; Fundamental rights; Section 377, IPC.

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TABLE OF CONTENTS

INTRODUCTION	22
THE LGBTQ+ COMMUNITY AROUND THE GLOBE	24
SECTION 377- IPC, 1860 AND CORRESPONDING LEGISLATIONS ACROSS THE GLOBE	26
THE LGBTQ+ COMMUNITY AND THE INDIAN SOCIETY	29
THE JUDICIARY'S STANCE ON LGBTQ+ RIGHTS OVER THE LAST DECADE	31
A HOLISTIC APPROACH TOWARDS ENSURING RIGHTS OF THE LGBTQ+ COMMUNITY	32
LGBTQ+ RIGHTS IN THE COMMONWEALTH NATIONS	34
RECONSTRUCTING ARTICLE 21 TO ASSIMILATE LGBTQ+ RIGHTS	37

INTRODUCTION

"LGBTQ+" is an abbreviation used to denote Lesbian, Gay, Bisexuals, Trans+, Queer and other gender minorities. Apart from acting as an umbrella term for the abovementioned groups, the term also covers within its ambit other sexually diverse individuals who tend to differ from their ascribed identity at birth. Primarily, male individuals having a different sexual orientation were termed as gay, and the community was called the gay community¹however, owing to the restrictive nature of the said term, it has been extended and made more inclusive to cover other sexually diverse individuals. As of this day, the term is much more inclusive than it used to be and includes bisexual, pansexual, trans+, non-cisgender, non-binary which signifies the evolution of right to determine one's own identity which should not necessarily be the one assigned at birth. Though there is a tendency to generalise gender minorities as being similar to one another, each one of them form an independent class of humans, with a different perception of their selves. To illustrate, a transgender may identify themselves as a male or female whereas a non-binary may not identify themselves with either of the two categories, the only similarity here is individuals belonging to the two categories above tend to differ with respect to their ascribed gender at birth.²Similarly, the only common ground between

¹ Michael Gold, The ABCs of L.G.B.T.Q.I.A+, The New York Times (Aug. 22, 2020, 12:19 AM), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

² Emanuella Grinberg, What the 'Q' in LGBTQ stands for, and Other Identity Terms Explained, CNN (Aug. 22, 2020, 12:35 AM), <https://edition.cnn.com/interactive/2019/06/health/lgbtq-explainer/>.

gays and lesbians is their affinity towards individuals having the same sex as theirs.³

Though there might be misconceptions among people that diverse sexual and gender identities are of recent origin, the same dates back to the prehistoric era. The first-ever recorded instance of socially tolerated anal intercourse between men was seen in the ancient Mesopotamia, where such activities were practiced as rituals. In India, Vedic literature, epics, heritage sites and local folklore endorse the presence of gender diversity, same sex relationships and other instances wherein people departed from their ascribed gender identity.⁴

In ancient Greece, same-sex marriage has been stated in Plato's treatise as a pedagogically beneficial way which was more of a social institution allowed in Greek city states to keep the population in control, but the same was advised to be kept as a private affair. Though translations of Plato's works have revealed his statements which endorse same-sex relationships, the Greek society at large abhorred such practices. However, widespread medical disorders prompted the Greeks to formally put an end to the institution.⁵ These groups started gaining notoriety during the Victorian era when such acts were classified as offences against the order of nature and soon became punishable by death.

India being a British colony during the reign of Queen Victoria was not exempted from the laws which were applicable to other colonies. Thus, with the enactment of the Indian Penal Code (IPC) in 1860, Homosexuality became an offence in India. The IPC laid down severe punishments for any such act which

³ Ananya Das, *Analysis of LGBT rights in India*, 1(2), Int'l JERD (2018).

⁴ Nilanjana S. Roy, Homosexuality in India: A Literary History (Aug. 22, 2020, 1:25 AM), <https://india.blogs.nytimes.com/2012/02/24/homosexuality-in-india-a-literary-history/>.

⁵ James Davidson, Mad About the Boy, *The Guardian* (Aug. 22, 2020, 2:22 AM), <https://www.theguardian.com/books/2007/nov/10/history.society>.

were considered "against the order of nature" by the British Authorities. This erased the fabric of social tolerance-towards sexually diverse from the Indian culture. The development of section 377⁶ of the Indian Penal Code, 1860 has been discussed in the latter part of this paper. It shows how the Indian Judiciary gave a new meaning to the lives of the LGBTQ+ community members, by nullifying the Victorian-era law. The Supreme Court declared the constraints put under Section 377 to be a flagrant violation of the fundamental rights enshrined under Article 21 of the Indian Constitution.

THE LGBTQ+ COMMUNITY AROUND THE GLOBE

The egalitarian philosophy, which iterates that every individual should be allowed an equal platform in society, isn't quite invested in the matters concerning the rights of the LGBTQ+ community. This is because it is afflicted with oversimplified and stereotypical views. It's the 21st century and, though, majority of the western countries, now, recognize and acknowledge the rights of the LGBTQ+ community, there is always some deranging news making its way to the headlines. One of the reports by Amnesty International, (an NGO focused on human rights) states that in 63% of the cases of homosexuality, the individuals harbouring the sexual orientation are made to suffer deliberately. Their lives, rights, and dignity are often jeopardised by the state entities, as in many cases in Southeast Asia and the Islamic countries. The state has refused to acknowledge their rights and, on the contrary to their moral duty, have funded potent genocide against the vulnerable community⁷.

⁶ The Indian Penal Code 1860, S. 377.

⁷ 'LGBTI Rights', (Amnesty International) , (Aug. 12, 2018; 01:30 AM); <<https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/>>.

In countries such as Bangladesh, Saudi Arabia, Brunei, etc., the state has openly condemned the LGBTQ+ community, which has paved the way for the far-right extremists to attack them and instil fear within them.⁸ Besides the community members, the activists have also met with a similar fate in the Islamic countries. Due to such a social setting prevailing in some countries, members of the gay community have either been forced to flee the country and seek refuge or have been forced to hide their identities- which are a psychological burden to them⁹.

However, the same has not been the case in Europe, as the European Union member states have adhered to various treaties and accords that recognise the rights of same-sex couples, gender queers and transgenders. Article 21 of the Charter of Fundamental Rights precedes every other legislation enacted by the European nations and provides a uniform base by expressly prohibiting discrimination based on an individual's sexual orientation.¹⁰ This led to the establishment of a directive which has crystallised norms for treating everyone equally and not discriminating on the basis of sexual orientation. This not only protects the rights of the individuals from being ostracised at workplace, public places, schools, and colleges but also in society, as a whole. Though after the Supreme Court of India's verdict in 2018¹¹, consensual same-sex relationships have ceased to be a criminal offence, changes within the societal structure is yet to be seen.

⁸ Inge Amundsen, *The Ruins of Bangladesh's LGBT Community*, CHR. Michelsen Institute (Aug. 22, 2020, 2:49 AM), <https://www.cmi.no/publications/6489-the-ruins-of-bangladeshs-lgbt-community>.

⁹ *Id.*

¹⁰ Charter of Fundamental Rights of the European Union, 2000, Art. 7.

¹¹ *Navtej Singh Johar and Ors. v. Union of India*, (2018) 10 SCC 1.

SECTION 377- IPC, 1860 AND CORRESPONDING LEGISLATIONS
ACROSS THE GLOBE

Section 377 of the Indian Penal Code, 1860 stated severe punishment for anyone, voluntarily having carnal intercourse “against the order of nature”.

The section in question was partly decriminalised by a constitutional bench in 2018 in the case of *Navtej Singh Johar v. the Union of India*.¹² The bench, in this case, pronounced the verdict that punishing homosexuals by using section 377 of the IPC was unconstitutional. But this was not the first case in which the higher judiciary had the task of determining the constitutional validity of Section 377 (with regards to same-sex activities) of the code. The controversy regarding the aforementioned section came forward with a series of writ petitions filed before the Delhi High Court, back in 2009. The petitions demanded a thorough review of the archaic colonial-era legislation. They further stated that those who had given us this law have themselves done away with the provisions criminalising same-sex activities.

In the landmark case of *Naz Foundation v. Govt. of NCT of Delhi*¹³, a two-judge bench of the Delhi High Court stated that Section 377 of the IPC violated their fundamental rights of equality, personal liberty and privacy. Holding the above view, the court declared that the section was unconstitutional and should be nullified. However, this achievement for the LGBTQ+ community was only short-lived, as the Apex court overturned the Delhi High court’s decision after being flooded with innumerable petitions.¹⁴ In 2013, a two-judge bench of the Supreme Court did the overruling stating that the High court,

¹² *Id.*

¹³ 111 DRJ I (2009).

¹⁴ Owing to multiple petitions filed before the Supreme Court of India, the court decided to hear them all together with *Suresh Kumar Koushal v. Naz Foundation*, (*Infra*, note 15), along with civil appeal Nos. 10792-1794 etc.

out of sympathy for a "minuscule population of the said community, had erroneously reached the conclusion of decriminalising the provision in question. The apex court while reversing the Delhi High Court's judgement stated the parliament was a competent body and it should be the one to decide whether certain provisions of a law should be amended or deleted.¹⁵ The court, however, iterated that the Parliament should debate on the pressing issue on suggestions made by the Attorney General, considering the social changes taking place in the society we live in today.¹⁶

Let us now, walk through the legislative provisions of the countries where same-sex relationships are an offence. The countries which have continued with the offences are largely former colonies of European superpowers and inherited the said legislations from their erstwhile colonial masters.¹⁷ Further, East African nations (along with their southern and northern counterparts) and the Middle Eastern nations governed by Sharia law along with a few Southeast Asian countries, to date, consider same-sex activities a taboo. The penal provisions in the above mentioned countries differ drastically. As in some, the 'offenders' are punishable by death, whereas in others, same-sex relations are punishable with a life sentence¹⁸. On one hand, these third-world countries are refusing to part ways with their draconian legislative provisions dealing with the LGBTQ+

¹⁵ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

¹⁶ *Id.*

¹⁷ S. 377, Pakistan Penal Code, 1860 (Pakistan), Hudood Ordinance which allows individuals found to have committed sodomy to be stoned. S. 377, Penal Code (Bangladesh) prohibits same-sex relationships. Analogous sections deal with the same provisions in Pakistan, Bangladesh and previously India as during the enactment of the Penal Code, 1860 the two countries were part of undivided India.

¹⁸ Pamela Duncan, Gay relationships are still criminalised in 72 countries: report finds, *The Guardian* (Aug. 22, 2020, 1:22 PM), <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report>.

community whereas, on another, there are the European countries which have come forward in solidarity with the community. Ireland set a wonderful example for the entire world when it legalised same-sex marriages by way of a plebiscite. The country has come forward with the best possible way to protect the interests of the community by taking into consideration- the will of the people.

Irrespective of such developments in Europe, Canada, Australia, the United States of America, and Britain, a stigma continues to exist in the minds of the people sharing the same society with ones harbouring a different sexual orientation. Through various surveys conducted in Canada, it has been found that parents usually prohibit their kids from playing or interacting with children brought up by parents of the same sex.¹⁹ Most parents restrict these interactions, fearing that the company (of such children) may adversely affect the psychology of their children and may also lead them to showcase deviant behaviour. As per the surveys conducted by the International Lesbian, Gay, Bisexual, Trans, and Intersex Association, as far as 30 countries including those in Africa, Middle East, and some other there is a legislative provision which acts as a defence in case a person was attacked by a Gay or a Lesbian and enables them to attack them to the extent of killing them²⁰. Brunei, one of the countries in South East Asia,

¹⁹Jasmin Roy, According to "LGBT Realities", the first Pan-Canadian survey on LGBT communities conducted by CROP for the benefit of the Foundation Jasmin Roy, 13% of the Canadian population belongs to the LGBT community, CISION (Aug. 22, 2020, 11:28 PM), <https://www.newswire.ca/news-releases/according-to-lgbt-realities-the-first-pancanadian-survey-on-lgbt-communities-conducted-by-crop-for-the-benefit-of-the-fondation-jasmin-roy-13-of-the-canadian-population-belongs-to-the-lgbt-community-639432223.html>.

²⁰Siobhan Fenton, 'Gay relations are illegal in 74 countries: research finds' (Independent, 17 May 2016), <https://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html> accessed 18 August 2019.

where homosexuality was already an offence introduced a draconian way to punish homosexuals by stoning them to death²¹. The horrific measure has received widespread criticism from Amnesty International and Human Rights Watch²². Furthermore, many countries across Europe extended their support by banning the monarch of Brunei from their hotels²³.

THE LGBTQ+ COMMUNITY AND THE INDIAN SOCIETY

As discussed above, the sexual relationship among individuals belonging to same sex was socially tolerated at historically in India and has been portrayed across timelines ranging from the Vedic age to that of Sultanate, which prevailed in Delhi from 1206-1555. Edicts dating back to the Mughal era support the contention. A few translated manuscripts from the royal court of the first Mughal emperor, Babur,²⁴ confirm that same-sex sexual activities prevailed, back then. The translated version of *Baburnama*, states that the emperor infatuated with young boys and also enjoyed clandestine moments. This has also been endorsed in his memoirs²⁵.

India, a predominantly Hindu country, has witnessed social tolerance towards such activities right from the Vedic age. The ancient Hindu scriptures, dating back to 700 BC, have depicted acts of homosexuality and affinity towards the same or both

²¹Yvette Tan, Brunei implements stoning to death under anti-LGBT Law, BBC (Aug. 22, 2020, 11:45 PM), <https://www.bbc.com/news/world-asia-47769964>.

²²Rachel C. Howard, Brunei Darussalam: Heinous punishment to become law next week, Amnesty International (Aug. 22, 2020, 11:49 PM), <https://www.amnesty.org/en/latest/news/2019/03/brunei-darussalam-heinous-punishments-to-become-law-next-week/>.

²³*Supra*, note 26.

²⁴Ziya Us salam, An Emperor with Foibles, The Hindu (Aug. 22, 1:57 PM), <https://www.thehindu.com/books/books-columns/an-emperor-with-foibles/article5692770.ece>.

²⁵*Id.*

sexes as an innate quality. The Kama Sutra,²⁶ which dates back to the 6th century, BC, gave an account of homosexual relationships under the Sanskrit term, "*Tritiya-Prakriti*", meaning, 'the third sex'.²⁷ These literary shreds of evidence support the fact that long before the advent of colonial rule in India, and long before the Mughal invasion, homosexuality was socially tolerated in India.

It was only after the 1857-58 sepoy mutiny which shook the company²⁸ and the governance of the Indian subcontinent was brought under the rule birthed by the crown. The provision for criminalising homosexuality was enacted through our penal code which is still being used in India. It has been nicknamed 'A parting gift' from our coloniser for proper governance of the nation. Reported homosexuals were punished with severe imprisonment for life, or that extending up to ten years along with a fine, as the courts deemed fit.

After India gained independence, the former colony started undergoing a rapid societal change, and provisions like Section 377 of the IPC, 1860 started being questioned. An act, that is considered to be socially deviant, does not need to stay that way for generations, to come. This was the contention of the rational and idealist pool of the nation. The fight for the recognition of LGBTQ+ rights began in the early 2000s when a report published by an NGO gave a detailed account of how gays and lesbians are targeted and blackmailed by public servants²⁹. This was the first instance, wherein, demands were

²⁶ Mallanaga Vatsyayana.

²⁷ Amara Das Wilhem, Homosexuality, Hinduism & the third gender, GALVA-108 (Aug. 22, 2020, 2:10 PM), <https://www.galva108.org/single-post/2014/05/15/Homosexuality-Hinduism-the-Third-Gender-A-Summary>.

²⁸ Prior to 1858, the administration of India was largely vested in the English East India Company.

²⁹ Maria Thomas, Timeline: The struggle against section 377 began over two decades ago, Quartz (Aug. 22, 2020, 2:30 PM),

made from the government of India to scrap the provision of Section 377 of the IPC (dealing with sexual intercourse between the consenting adults of the same sex). Instances of discrimination were openly seen for the first time when a jail superintendent, Kiran Bedi, refused to provide condoms to inmates, stating reasons that it would promote deviant behaviour and would eventually lead to a spread of AIDS.³⁰

The judiciary has finally overruled its judgement and has decriminalized homosexuality but, the question remains that whether the Supreme Court's judgement will pave the way for equal rights to the members of the LGBTQ+ community still remains unanswered. Even though the Indian society expresses its inclination towards egalitarianism, recognition of rights of the LGBTQ+ community remains to be a taboo. Reports show that their rights are still not acknowledged and they are still not treated as equals. The lifestyle of homosexuals, in contemporary society, continues to remain obscure. It has been found out in various surveys also that transgenders rarely disclose their sex openly in questionnaires out of the fear of being ostracised by the public, in absence of any government protection.³¹

THE JUDICIARY'S STANCE ON LGBTQ+ RIGHTS OVER THE LAST DECADE

Time and again, the Indian judiciary has restored people's faith in itself. The Maneka Gandhi case³² is one of the best examples

<https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights/>.

³⁰ *Id.*

³¹ Dhamini Ratnam, Social acceptance of same-sex relations remains low: Survey, Hindustan Times (Aug. 22, 2020, 11:48 PM), <https://www.hindustantimes.com/india-news/social-acceptance-of-same-sex-relations-remains-low-survey/story-kI9JHEGEx2hzcdmQQvYjOI.html>.

³² Maneka Gandhi v. Union of India, 1978 SCC (1) 248.

of the same. Suresh Kumar Koushal³³ led to the re-criminalization of carnal intercourse, believed to be "against the order of nature". The Supreme Court, the guardian of the fundamental rights, reversed the decision of the Delhi High Court which was seen, all across the nation, as a step against personal liberty and humanity. With the protection of fundamental rights of the LGBTQ+ community going south, a group of five individuals filed a writ petition before the Supreme Court. The group stated that they were directly aggrieved by the provision under Section 377 of the IPC, and according to them, it hampered the enjoyment of their fundamental right to life and personal liberty given under Article 21. The Union surprisingly had left it to the wisdom of the court and the five-judge constitution bench. The bench, unanimously, declared that the said provision of the IPC was indeed a hurdle to the enjoyment of life and personal liberty. However, the judgment by the Supreme Court did not quite pave the way for absolute recognition of the rights of the LGBTQ+ community.

A HOLISTIC APPROACH TOWARDS ENSURING RIGHTS OF THE LGBTQ+ COMMUNITY

To understand the rights of people who have been forced to conceal their identities owing to societal pressure, one must first interpret the dimensions of Article 14 of the Indian constitution³⁴. The said Article states that equals and unequals should not be treated alike. Considering the fact that a section of the population is not situated equally in comparison with the mainstream population of the concerned territory, the state must protect their lives. The state is also bound to safeguard their interests by way of positive discrimination, within the

³³ *Supra*, note 15.

³⁴ Equality before law.

limits, as laid down by the Constitution. The doctrine of Equal Protection of Law³⁵ reiterates that the sovereign body is duty-bound to bring the disadvantaged groups at par with the mainstream population. Article 14 of the Indian constitution, hence, allows reasonable classification. Though there are limited rights given to trans-people, it fails to address the rights of gays, lesbians and other sexual minorities who have become vulnerable to the perpetual stigmatization of social morality³⁶. The first step towards the LGBTQ+ community was taken in 2014 in the NALSA case³⁷. The apex court, in this case, issued a directive to the government to grant recognition under the law to the transgenders. The bench iterated that transgender people, too, have a right to enjoy the fundamental rights enshrined in the Constitution of India. To catch up to this, the multi-tier administrations were asked to treat transgenders as socially and economically backward, thereby, enabling them to take up a few opportunities by way of reservation policies of the government. However, this failed to bring relief to the gays, lesbians, and other queer groups, as the Supreme Court had expressed that its verdict was concerned only with transgenders and no other groups. In 2014, the Parliament introduced The Rights of Transgender Persons Act, through which it aimed to bring transgender people at par with others by providing them reservations and social security. The Act states that the government should take necessary steps to ensure that transgenders enjoy the benefits of Article 15³⁸ of the Constitution of India.³⁹The Transgender Persons (Protection of Rights) Act, 2019 has now been passed with a few modifications.

³⁵ *Id.*

³⁶ Hunt Stephen J, *Conservative Hindu reactions to non-Heterosexual rights in India*, 3 (9), *Intr'l JS&A*.

³⁷ *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

³⁸ Prohibition of discrimination on grounds of religion, race, caste, sex, place of birth.

³⁹ The Transgender Persons (Protection of Rights) Act, 2019S.3 (e).

Section 3 of the newly passed legislation, prohibits any kind of discrimination based in relation with employment, accessibility to public utilities, free movement, right to acquire property etc. Furthermore, the act also gives transgenders the right to self-perceived identity⁴⁰but the same has been diluted by ceding undefined powers to the concerned authority.⁴¹ In addition to this, the Act prohibits forced labour, economic, mental and physical abuse etc.⁴² In the succeeding chapters of the Act, domains such as education, skill development, and social security along with rehabilitation have been given due importance considering the vulnerable status of those people. The gap which needs to be bridged in this domain is to provide for rights for safeguarding the interests of the LGBTQ+ community that are not dealt with under the act mentioned above. To promulgate such legislation, the government is expected to commission an enquiry in order to get the intricate details of the conditions and needs of the LGBTQ+ to come up with a suitable legislation which apart from granting them equal rights protects their interests against the archaic domains of the society we live in.

LGBTQ+ RIGHTS IN THE COMMONWEALTH NATIONS

India being a common law legal system country, should review such legislations existing in other such countries including the erstwhile British Commonwealth of Nations. Great Britain was the first nation to criminalise sodomy by the Buggery Act.⁴³As a result of this these common law statutes came to be implemented in the erstwhile colonies of Great Britain. India, which was one such colony, apart from nations such as

⁴⁰ The Transgender Persons (Protection of Rights) Act, 2019, S. 4 (2).

⁴¹ The Transgender Persons (Protection of Rights) Act, 2019, S. 7 (2).

⁴² The Transgender Persons (Protection of Rights),2019Act, S. 18.

⁴³ The Buggery Act, 1533.

Australia, Canada and a majority of the African continent, was no exception to the said rule.

However, it may be noted that LGBTQ+ rights have sustained through a transition period and then in the 1970s came to be recognised in England and Wales⁴⁴ which was later followed by Scotland and Northern Ireland. The present-day scenario is such that the nation which once promulgated draconian laws to punish LGBTQ+ has now been acknowledged as a champion of LGBTQ+ rights in UK apart from the outstanding development of equality of rights between LGBTQ+ and Non-queer in Scotland⁴⁵. Followed by the decriminalization of homosexuality, the UK has taken a step forward towards recognition of LGBTQ+ rights by amending the Adoption and Children Act, 2002⁴⁶ from which provision that a couple must be of opposite sex in order to adopt a child was dropped paving the way for gay and lesbian couples to adopt a child⁴⁷ and live their lives like any other couple with a family within the UK and similar changes were later made in the corresponding Scottish legislation⁴⁸. Another remarkable legislation for enabling the lesbians an opportunity for proper enjoyment of other rights available to British mothers was the enactment of Human Fertilization and Embryology Act, 2008 which enables lesbian couples to avail the benefits of in vitro fertilization and

⁴⁴ The Sexual Offences Act 1967.

⁴⁵ Press Association, Scotland tops league for gay sex, *The Guardian* (Aug.22, 2020, 3:20 PM),

<https://www.theguardian.com/world/2015/may/10/scotland-tops-league-for-gay-rights>.

⁴⁶ Adoption and Children Act, 2002, S. 29 (Scotland).

⁴⁷ Dave Howel, The Adoption and Children Act 2002: An Overview, Courtroom Advice (Aug. 22, 3:45 PM),

<http://www.courtroomadvice.co.uk/adoption-children-act-2002-overview.html>.

⁴⁸ Press Release, New legislation sees Gay Scottish couple win right to adopt children, *The Herald* (Aug.22, 3:55 PM),

<https://www.heraldscotland.com/news/12613347.new-legislation-sees-gay-scottish-couples-win-right-to-adopt-children/>.

confers upon them the right to be recognised as parents to the child born upon receiving the certificate of birth.⁴⁹

Australia, an erstwhile colony of Britain like India has largely adopted a common law legal system, as a result of which a considerable portion of its laws are derived from a multitude of judicial decisions. People, who fall under the category of LGBTQ+, are duly recognised by the laws operative in Australia. The Sex Discrimination Act, 1984 by the virtue of the amendments made to it prohibits any sort of discrimination on the basis of sexual orientation. The provision of the legislation categorically states that any such situation if at all, arises wherein a person has been treated in a derogatory manner on the grounds of sexual orientation alone shall be an offender⁵⁰. Australia being a federation of states, the laws concerning LGBTQ+ vary from one jurisdiction to another, but all the states of the island nation have recognised equal rights for LGBTQ+, legalised same sex marriage, enacted laws for civil companionship and allows same sex couples to adopt children from foster homes unlike its commonwealth counterpart India⁵¹.

There are stringent measures enshrined under The Sex Discrimination Act 1984⁵² and the burden of proof lies on the person who did an act which may be classified as discriminatory on the basis of sexual orientation or gender identity as per the provisions of the said act⁵³. As far as employment is concerned under the state whether military or any other body functioning under the directives of the state any

⁴⁹ Human Fertilization and Embryology Act, 2008, S.33 (United Kingdom).

⁵⁰ The Sex Discrimination Act, 1984, S. 5 A (Australia).

⁵¹ News, Australia now has adoption equality, *Human Rights Law Centre* (Aug. 22, 3:59 PM), <https://www.hrlc.org.au/news/2018/4/20/australia-now-has-adoption-equality>.

⁵² The Sex Discrimination Act 1984, S. 7 C (Australia).

⁵³ The Sex Discrimination Act, 1984, S. 5C (Australia).

sort of discrimination is considered illegal and are under the protection of the said act.⁵⁴

RECONSTRUCTING ARTICLE 21 TO ASSIMILATE LGBTQ+ RIGHTS

Enacting any prospective legislation for realisation of the rights of the LGBTQ+ should always be done in consonance with the principle of right to life, right to privacy, right to lead a dignified life and by having a fair amount of personal liberty⁵⁵. The article further lays down that no person shall be deprived of his life or personal liberty or both except by any procedure established by law. This provision has been taken from the Fifth Amendment to the Constitution of the US⁵⁶. The phrase, "procedure established by law" in this context means not just any provision mentioned under any statute but a just and reasonable procedure being carried out in accordance with natural justice. In order to bring forth legislation or any safeguard for the said vulnerable community, a nexus must be established between article 14⁵⁷, 19⁵⁸ and 21⁵⁹ of the Constitution of India.

The Supreme Court, while deciding *Maneka Gandhi v Union of India*⁶⁰ iterated that the term personal liberty must be given the widest possible meaning which would cover a multitude of rights. The court relied on this phrase as a cornerstone of various rights from time to time with the changing nature of the society. Relying on the same idea, the constitutional bench in *Navtej Singh Johar v Union of India*⁶¹ decriminalised a portion of

⁵⁴ The Sex Discrimination Act, 1984, S.14, S. 15, S. 16 (Australia).

⁵⁵ Constitution of India, art. 21.

⁵⁶ M P JAIN, INDIAN CONSTITUTIONAL LAW, 875, 8th edition, 2018.

⁵⁷ Right to equality.

⁵⁸ Freedom of expression in various domains guaranteed by the Constitution subject to reasonable restrictions.

⁵⁹ Right to life and personal liberty.

⁶⁰ *Supra*, note 32.

⁶¹ *Supra*, note 11.

Section 377 of the Indian Penal Code 1860⁶² which included consensual sex against the order of nature. Though the court, while deciding the above case decriminalised consensual gay sex, the court remained silent on any prospective legislation which is required to protect the interest of certain individuals, who have been suppressed by the stereotypes of the society they live in. Though the judgement might have brought a sigh of relief, an online survey conducted while compilation of this work suggested that three out of five gays or lesbians would rather not disclose their sexual orientation fearing ostracism from society. Another example of the fact that society punishes an individual more harshly than the law also unfolded itself during the survey wherein it was found that eight out of ten people would not allow their children to socialise with someone harbouring a different sexual orientation fearing their child's sudden inclination towards the said ideology which opposes homophobia.

Even though India is branded around the world as the fastest growing economy, the society continues to be anachronous even when we have stepped foot in the 21st century. It is a time frame wherein people belonging to the said group should not only be socially tolerated but also be made to feel an equal within the ranks in various societies. A society in simpler terms bears an uncanny resemblance to that of a set of gears, wherein if one starts malfunctioning it causes a chain reaction thereby hampering the performance of the entire system. LGBTQ+ are an indispensable part of the said social system and must not be pushed towards seclusion. This is where legislations such as those operating in a few commonwealth democracies play their part by making them feel as equals. Henceforth, the onus lies on the government to allow the members of the said community to enjoy their freedom of expression guaranteed under Article 19 of the Constitution of India and come up with laws to deter

⁶²Unnatural offences.

such activities which promote suppression of someone's real-self.

A democracy only sustains its spirit wherein constitutional morality supersedes the prevailing social moralities disclosing a bias towards dogmas and archaic customs. When we speak of individuality one must not forget of the domains of individuality which allows any individual to properly realise his or her interest as long as it's not hampering the interests of someone else. The LGBTQ+ henceforth, need not be seen as a different species altogether and diversity within them must be appreciated for a monotonous society would not be a society worth living. As the then Chief Justice of India rightly said while delivering the majority judgement, "I am what I am, so take me as I am"⁶³, the government needs to understand that just because they identify themselves differently, they should not be devoid of all such rights, which are enjoyed by other people such as, to enter into a matrimonial alliance for which at present there is no legislation, rights of same sex couples to inherit property, rights of gay and lesbian couples to adopt a child and finally right of lesbian couples to go for artificial insemination which too is missing from the long to do list of the government.

It is of prime importance that one acknowledges the fact that change should not be imposed on someone forcefully for a person bearing certain affinity for another irrespective of their sex, has no control over the same. Society as a concept evolves over the years and certain changes which appear different to the majority should not be suppressed but given due time and space to settle with the existing norms of the said society. Hence, it is solely upon the government and people of India that while considering the judgement by the apex court it also comes up with fair legislations, for a democracy is not just about the brute of the prevailing majority but tends to the interest of every minority community irrespective of their ratio

⁶³ *Supra*, note 11.