



The LGBT Community in the Eyes of Sri Lankan Law

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Abstract

This research paper is an in-depth study on the laws about the LGBT community in Sri Lanka. The history of LGBT relationships dates all the way back to ancient Egypt, where this was strongly opposed. Sri Lanka was a non-conservative society. However, after being colonized by the British the Sri Lankan society adapted to the new laws legislated resulting in the criminalization of rights of the LGBT community. While Sri Lanka is still following the laws imposed by the British the UK has legalized them. Despite the 1978 constitution of Sri Lanka not guaranteeing complete protection for the LGBT community, the present Sri Lankan government has claimed otherwise. This paragraph explains the various methodologies used by the author to gather relevant data to complete the aim of this research paper. This research paper was based on semi-structured interviews. These interviews were conducted with two people from the LGBT community who are in the ages of 20s. The author completed an ethical consideration form before conducting the interviews with the two interviewees as this topic is a sensitive topic. Moreover, their identities will be hidden for privacy purposes. However, two more interviews were held with academics; one from the medical field and the other from the legal field. The reason to choose academics from those fields was that they are two especially important sectors that every human including the LGBT community needs complete access to. Further, the author also referred to international conventions, domestic criminal law provisions, fundamental rights, and the jurisdictions of the United Kingdom and India to complete this research paper. This research paper will answer the question of whether the LGBT community in Sri Lanka is treated equally under the eyes of the law through the above-mentioned interviews. Therefore, it could be re-conducted that the Sri Lankan legal system does not treat the LGBT community on equal ground.

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Introduction

Homosexual relationships date all the way back to 2400 BC as with evidence by the words in the joint tomb of Khnumhotep and Niankhkhnum, the Egyptian royal servants which stated, “joint in life, joint in death.”² Even though this was an unacceptably opposed subject in the distant past, with the development of technology and the evolution of humankind many changes in the legal, social and political fields have resulted in creating anti-discriminatory countries globally. Therefore, many states have adapted and progressed towards accepting and legalizing lesbian, gay, bisexual, and transgender (LGBT) relationships and even marriages. However, certain countries including Sri Lanka still have a discriminatory attitude toward the LGBT community refusing to change the respective legal provisions.

The vast mix of cultures and traditions of Sri Lanka which originated from the ‘Thambapanni’ times are still practiced in the modern era. However, many such cultural boundaries have been illegalized by law. One of the famous marriage practices was the ‘Eka gei Kema’ concept which partially falls within polygamous marriages³. Although, pioneer civilians of Sri Lanka had open and free lifestyles in terms of love, intimacy, and marriage these practices will be considered an offense under the current law.⁴ These are exemplary examples proving that certain concepts that were present back in time have been made illegal after colonization.

The current attitude of society towards the LGBT community derives from the British concept of heterosexual marriages. The British colonial implemented laws criminalizing the actions of the LGBT community via the Penal Code of 1883⁵ which was contrary to the practices that were present at that time⁶.

² The Legacy project, ‘Khnumhotep and Niankhkhnum aka overseers of the manicurists – nominee’ (*The legacy project*, 2020) <<https://legacyprojectchicago.org/person/khnumhotep-and-niankhkhnum-aka-overseers-manicurists>> Accessed 13 December 2021.

³ WTA Leslie Fernando, ‘Marriage and the family life’ (*Daily News online*, 2021) <<http://archives.dailynews.lk/2005/03/22/fea09.htm>> Accessed 13 December 2021.

⁴ Ibid.

⁵ Penal Code Ordinance No 2 of 1883 (Sri Lanka)

⁶ Lola García- Ajofrín, ‘The law on which the sun never set’ (*Outriders*, 30 Dec 2020) <<http://outride.rs/en/377-the-law-on-which-the-sun-never-set/>> Accessed 14 December 2021.

This homophobic trend eventually became stronger and led to a change in society's attitudes, resulting in the evolution of the Sri Lankan culture. The technological advancements in the world have supported this mindset by the creation of negativities like discrimination, based on differences of people building minority communities such as the LGBT.

The social pressure released by a cluster of unfavorable opinions in the society combined with the law offers no protection to these minority groups, hoping to gain justice and fairness. This research paper is an in-depth study of the laws pertaining to the LGBT community in Sri Lanka. This paper aims to identify any loopholes in domestic criminal law and the human rights related to the LGBT community by interpreting different international conventions and treaties and comparing the laws of the United Kingdom and India. Restricting a human choice and tying up the rights based on external differences will be sharply explored and, an analysis of whether the LGBT community in Sri Lanka is treated equally in the eyes of law will be attempted to be answered.

Laws pertaining to the LGBT community in Sri Lanka-Criminal aspect

During the colonial era, many Sri Lankan customary practices fell apart as the societal habits of the British and the Lankans were divergent. As per Christian moralists, homosexuals have always been considered a sin.⁷ Hence, the religious perspective of the British played a key role in legislating laws against the pre-existing homophobic culture in Sri Lanka.⁸ Therefore, society adapted to the ideologies of the British accepting them as the evolution of Sri Lanka's multiculturalism norms⁹.

Section 365 of the Penal Code of Sri Lanka 1883 states that "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment."¹⁰ The term "against the order of nature" in a practical sense means that it is a usual activity that is predictable. Hence, this Section is only supportive of all activities which should be 'natural'. Investigating the term 'natural' in a

⁷ Paul Sands, 'The deadly sin of Pride' (Baylor University 2022)

⁸ *ibid.*

⁹ Lola García- Ajofrin, 'The law on which the sun never set' (*Outriders*, 30 Dec 2020) <<http://outride.rs/en/377-the-law-on-which-the-sun-never-set/>> Accessed 14 December 2021.

¹⁰ Penal Code Ordinance No 2 of 1883 (Sri Lanka), hereinafter 'Penal Code'.

deeper outlook means only peno-vaginal intercourse is considered natural which indirectly conveys that it is only for the purpose of reproduction, which could only occur between a man and woman. Under this argument, it can be further said that the use of condoms and birth control pills by heterosexuals is also unnatural as they are used to prevent pregnancy. Furthermore, sexual cravings are a fundamental need of each individual after they arrive at a particular age. Therefore, this law imposed restricts sexual intercourse between heterosexuals, and hence the manufacturing of all birth-controlling instruments should be banned as it will not be a useful product under the stated section.

Section 365A of the Penal Code states that “any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished”¹¹. Even though, the section states ‘any person, it is practically impossible for the state to carve the borderline and involved in every couple’s life especially in private, to monitor the physical contact between partners. However, if this method is implied then this section contradicts the Human right to private life. Although, it is not explicitly identified as a fundamental right under the 1978 constitution Articles 14(c) Freedom of association¹² and 14(e) freedom either by himself or in association with others, either in public or private¹³ will be in breach. Hence, it is unfair for this section to be imposed only on same-sex couples. In the case of ***Galabada Payagalage Sanath Wimalasiri v Officer in Charge***¹⁴ two people were accused of having oral sex in a car park and after a few appeals, they were given fine and 2-year imprisonment by the Supreme Court of Sri Lanka stating that sodomy and buggery are indecent activities and will continue to be a crime in Sri Lanka¹⁵. However, there was no clear ruling on the benchmark of ‘Gross Indecency’. Moreover, if the above case was between a heterosexual couple, it is questionable if the court would convict or acquit the accused persons. Thus, there is an

¹¹ *ibid.*

¹² Constitution of Sri Lanka 1978, Article 14 (c).

¹³ Constitution of Sri Lanka 1978, Article 14 (e).

¹⁴ *Galabada Payagalage Sanath Wimalasiri v Officer in charge police station- Maradana* [2009] SC SPL LA No.304 (Sri Lanka).

¹⁵ *ibid.*

imbalance as to which pathway the court will take upon heterosexuals and whether the fundamental rights under Article 14 will be in breach.

Homosexuality is not openly categorized but falls under ‘Unnatural Offences’ and ‘Gross Indecency’ automatically falls into an open discussion¹⁶. There are technical terms that have no clear explanation as to which is the practical pathway¹⁷. Even though the Sri Lankan justice system has not reported many cases of homosexual convictions after 1948, the Sri Lankan police and society threaten, harass, and pester these people¹⁸. Therefore, the police and other organizations backed by these laws take it as an opportunity to address these minority groups as perverts and criminals¹⁹.

Further, Section 399 of the penal code of Sri Lanka proves that a person is said to ‘cheat by personation’, which directly aims at the transgender community in Sri Lanka based on misleading the public²⁰. In 2020, an individual was denied access to a bar in Colombo simply because she was identified as a transgender woman through her looks. In fact, this is not the only instance this has happened in Sri Lanka²¹.

Therefore, it is understandable that the domestic criminal laws have loopholes within the legal system as identified and elaborated above.

The International Human Rights Perspective on LGBT and the available local fundamental rights

This section of the paper will be focusing on the scope of Human rights available for the LGBT community from an international perspective. Sri Lanka has ratified many international instruments such as the International Covenant on Civil and Political Rights (ICCPR)²², the Convention on the

¹⁶ Judit Kolbe and Malene Solheim, ‘Hydropower-The effect of climate change mitigation on Human Rights’ (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> accessed 15 December 2021.

¹⁷ *ibid*.

¹⁸ Judit Kolbe and Malene Solheim, ‘Hydropower-The effect of climate change mitigation on Human Rights’ (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> accessed 15 December 2021.

¹⁹ *ibid*.

²⁰ Penal Code (n 9).

²¹ Shihara Maduwage, ‘The morning’ (*Manudam mehewara*, 4 Oct 2020) <<https://www.themorning.lk/why-diversity-training-is-paramount-for-companies/>> 28th June 2022.

²² International Covenant on Civil and Political Rights.

Elimination of All Forms of Discrimination Against Women (CEDAW)²³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁴. In this section of the paper apart from the mentioned instruments, The Universal Declaration of Human Rights (UDHR) and the European Convention on Human Rights will also be used to address the gaps in the law relating to the LGBT community.

Article 1 of the UDHR states that all human beings are born free and equal in Dignity and Rights²⁵. This Article highlights that every person should be treated equally, despite any external factors²⁶. Similarly, Article 12 (1)²⁷ of the 1978 constitution states that all persons are equal before the law and are entitled to the equal protection of the law²⁸. Even though this has been expressed in the constitution unlike in the ***Galabada Payagalage Snath's case***²⁹ in the case of ***Amerasinghe v Daluwatta***³⁰ which was also an allegation against homosexuality the case was dismissed under procedural irregularities³¹. Even though this is one rare case in Sri Lanka where a homosexual was charged, it breached the right to equal protection of the law under Article 12(1) as similar cases were decided otherwise under extremely different and unjustifiable reasonings. Further, Article 26³² of the International Convention on Civil and Political Rights (ICCPR) states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law³³. This means that international bodies like the ECHR, UDHR, and the ICCPR which Sri Lanka agrees to guarantee the protection of the LGBT community.

Article 2 of the UDHR States the similar right that Article 12(2)³⁴ of the Sri Lankan Constitution states that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, or any such

²³ The Convention on the Elimination of all Forms of Discrimination Against Women.

²⁴ International Covenant on Economic, Social and Cultural Rights.

²⁵ Universal Declaration on Human Rights, Article 1.

²⁶ *ibid*.

²⁷ Constitution of Sri Lanka 1978, Article 12 (1).

²⁸ *ibid*.

²⁹ See note 13.

³⁰ *Amerasinghe v Daluwatta* [2001] C.A 128/98.

³¹ *ibid*.

³² International Covenant on Civil and Political Rights, Article 26.

³³ *ibid*.

³⁴ Constitution of Sri Lanka 1978, Article 12 (2).

grounds³⁵. Although, 'any such grounds' does not explicitly recognize the LGBT community according to Sri Lankan activist Rosanna Flamer Caldera the government has accepted the LGBT community under the stated wording³⁶. According to the Outright Organization, even though the Sri Lankan government has repeatedly stated that the LGBT community is protected under the 1978 constitution, there is a doubt whether systemic discrimination is being upheld as recent leaders have openly wrangled about the LGBT community³⁷.

Article 6 of the UDHR states that everyone has a right to recognition as a person in front of the law³⁸. Article 13(3)³⁹ of the 1978 constitution states that every person is entitled to a fair trial in a competent court. Taking back the example of the case *Amerasinghe v Daluwatta*⁴⁰ this was not a fair trial when comparing it with *Sanath's* case⁴¹. Therefore, these human rights are recognized in the UDHR or even the ECHR the Sri Lankan Supreme Court interpreting the laws of the European Convention on Human Rights (ECHR) in judging LGBT cases will solely depend on the social mindset of the judges. This point is well proven by the judgment of the Akkaraipattu Magistrate judge who ordered to conduct a psychiatric evaluation on the two women who were not involved in any misconduct yet rather just in love⁴². Furthermore, as stated above the right to freedom of expression under Articles 14 (c) and (e) is also violated in contradiction to Section 365 A of the Penal Code of Sri Lanka.

However, the International Gay and Lesbian human rights commission (IGLHRC) showed that the Lesbian Bisexual and Transgender (LBT) population

³⁵ Human Rights Watch, Sri Lanka: forced anal exams in homosexuality prosecutions' (*Human rights watch*, 20 Oct 2021) <<https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions>> Accessed 28 December 2021.

³⁶ Outright International, 'Sri Lanka government says LGBT rights are constitutionally protected' (*Outright international*, 20 Oct 2014) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 28 December 2021.

³⁷ Outright action international, 'Sri Lanka government says LGBT rights are constitutionally protected' (*Outright action international* June 2019) <<https://web.archive.org/web/20190620225217/https://www.outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 12 Jan 2022.

³⁸ Universal Declaration of Human Rights, Article 6.

³⁹ Constitution of Sri Lanka 1978, Article 13 (3).

⁴⁰ See note 28.

⁴¹ See note 13.

⁴² Safira Fazal, 'The morning' (*Manudam mehewara*, 28 June 2022) <<https://www.themorning.lk/indo-slesbian-couple-seeking-matrimony-released/>> 02nd July 2022.

in Sri Lanka suffered increased numbers of sexual, emotional, and physical violence at home and in public with no legal support⁴³. The Convention on Elimination of All Forms of Discrimination (CEDAW) aims to ensure protection over social and cultural issues pertaining to women. The Shadow report presented to the 66th session of CEDAW in 2017 states that Sri Lanka has not offered any statistics to understand the disadvantages faced by the LGBT community⁴⁴. However, in 2016 Sri Lanka progressed to accepting gender recognition for the transgender community to legally obtain the Identity Card⁴⁵. Therefore, it can be established that even though there are certain slips, the rights are protected to a certain extent.

Comparing the criminal view and the Human rights view, the Sri Lanka laws are contradictory to one another. One reason for the criminal law being unclear is because those laws were implemented back in the 1880s almost 140 years ago. The historical roots back then do not have clear-cut evidence as to certain justifications. Additionally, those perceptions of the pioneers do not suit the modern era. Moreover, certain justification and accepted human rights through international instruments are not implemented in domestic courts despite having some of them in the constitution identified as a fundamental right as stated above. Hence, the intersection between the two laws does not balance and hence, the laws pertaining to the LGBT community in Sri Lanka are not stable.

Article 16 of the Sri Lankan Constitution states that all written and unwritten law that existed prior to the 1978 constitution is valid and operative⁴⁶. This means that even though the rights of the LGBT community are protected under the Sri Lankan constitution the laws that criminalize homosexuality and transgender that were imposed before 1978 are still applicable. Therefore, there is a clear overlap of laws in Sri Lanka.

⁴³ Outright International, 'Violence: Through the lens of lesbian, bisexual and trans people in Asia.' (*Outright international*, 6 May 2016) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 30 December 2021.

⁴⁴ Equal Ground, 'Human Rights violations against lesbian and bisexual women in Sri Lanka: A shadow report (July 2016)' <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/LKA/INT_CEDAW_NGO_LKA_24294_E.pdf> Accessed 10 January 2022.

⁴⁵ Judit Kolbe and Malene Solheim, 'Hydropower- The effect of climate change mitigation on Human Rights' (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> Accessed 30 December 2021.

⁴⁶ Constitution of Sri Lanka 1978, Article 16.

Furthermore, Sri Lankan society discriminates against the LGBT community under physical, structural, and cultural bounds⁴⁷. Physical harassment is medical practitioners forcing anal and vaginal examinations to obtain evidence to prove homosexual misconduct. Moreover, the court had ordered several men to take the test for Human Immunodeficiency Virus (HIV) without consent⁴⁸. Under structural discrimination, domestic violence against homosexuals is high. The lack of respect and acceptability in society prevents them from reaching out to the relevant authorities resulting in an increase in suicidal rates⁴⁹. Culture is one of the main excuses for discrimination against the LGBT community. Society has imposed certain gender roles on every person. For instance, a role of a mother should always be done by a female which directly aims at the LGBT community by disregarding two gay men trying to raise a child. Therefore, it directly discriminates against the LGBT community who will not be able to meet these criteria⁵⁰.

Application v Reality

According to the findings from an interview with a 21-year-old law student, a Sri Lankan, whose gender identity is transgender and sexual orientation is homosexual, described discrimination as, “where people have distorted it as an instrument to impair inhabitants who are different from that of an accepted standard human being, especially in Sri Lanka.” He further elaborated that it is from an early age that parents and teachers instill in young children that if you are born a girl, you will always be a girl or vice versa. As Sri Lanka does not have any provisions protecting the LGBT community and their rights, he expressed that it is the responsibility of Sri Lankan Parliamentarians to take the initiative in educating the public and the schools to educate the children. He further stated that, even though he did not face any discrimination in the legal or medical sectors, he has faced many challenges at clothing stores simply

⁴⁷ Human Rights Watch, ‘Sri Lanka: forced anal exams in homosexuality prosecutions’ (*Human rights watch*, 20 Oct 2021) <<https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions>> accessed 15 December 2021.

⁴⁸ *ibid*.

⁴⁹ Global Human Rights Defence, ‘Hydropower- The effect of climate change mitigation on Human Rights’ (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> Accessed 19 December 2021.

⁵⁰ Human Rights Watch, Sri Lanka: forced anal exams in homosexuality prosecutions’ (*Human rights watch*, 20 Oct 2021) <<https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions>> Accessed 28 December 2021.

because he purchased clothing from the men's section⁵¹.

"I feel lucky that I was born as a citizen of this beautiful island surrounded by a rich ecosystem which enhances the natural beauty and the multicultural background. The multiethnic environment was the place I learned to accept differences, but today I am living far away from this land because the laws are discriminatory against my kind". A 26-year-old graduate in civil engineering who is a homosexual stated this in the interview. Moreover, she said because of her sexual orientation she had to move to Australia to live a peaceful life with her wife. "My parents accepted me and my relationship, but my country did not" When a group of open-minded leaders step up and amend the law, my wife and I can come back to Sri Lanka and live with our loved ones peacefully⁵².

A 30-year-old doctor working at government hospitals in Sri Lanka stated that The LGBT community consists of normal people with sexual interests that are out of the norm. As a doctor, I do not see any abnormality being one, it is just people trying to live their lives. I have seen the LGBT community putting an effort to be accepted as friends, be treated kindly, be loved, and live a normal life. Therefore, I believe in the strength they have, despite millions of judging eyes in the world. Their rights should be fulfilled, and society should protect their needs; she further elaborated. Even though I have not had patients who are part of the LGBT community, I remember a time my senior doctor, who was in his 50s, treated a transgender woman with a downgraded mindset which was a depressing instance in my career⁵³.

A 62-year-old Attorney at Law stated that she does not agree with the LGBT community being in society their behavior is unnatural and unethical which damages the culture. She strongly believes in the advice given to her as a child. Despite her personal view, she also stated that once she accepted a case of a gay client and did justice to him simply because the law accepts every human as innocent until proven guilty. However, she also admitted that following this case, she realized that he was no different and therefore has changed her cultural attitude and has later proceeded with probono

⁵¹ Name withheld, Student, (zoom call, 02 January 2022).

⁵² Name withheld, Civil Engineer, (zoom call, 02 January 2022).

⁵³ Karieshini Peiris, Doctor, National hospital (zoom call, 30 December 2021).

services to the LGBT community⁵⁴.

Laws Relating to the LGBT Community in the UK

Even though the United Kingdom (UK) has a positive approach toward the LGBT community today, historically it has always been a complicated subject especially with the majority being Christians. Earlier, homosexual relationships were a criminal offense that was punishable by death under the Buggery Act 1533 which was endorsed by King Henry VIII under the beliefs of sin, conjugal love, and straight and narrow which are teaching of the Holy Bible⁵⁵. In the case of *Alan Turing*,⁵⁶ although he was the main reason for the UK to shorten the war with Germany which saved many lives, he was convicted for gross indecency. As punishment, he was given chemical castration which reduces his need for sexual activities in exchange for prison. Even though Alan was a mastermind mathematician, his personal life's preferences caused him to be punished⁵⁷. The Wolfenden Committee Report was established in 1957 as a result of the increased number of homosexual activities post World War II⁵⁸. 10 years after this report, England and Wales legalized homosexuality if it was consensual and in private between two men above the age of 21, by the Sexual Offences Act 1967⁵⁹. The United Kingdom then worked towards accepting every minority group by identifying the rights of the transgender community in the 1970s and allowing them to obtain legal documents like passports and driving licenses⁶⁰. The case of *Goodwin v UK*⁶¹ established that transgender rights were recognized under

⁵⁴ Padmini Kondapperuma, Attorney-at-Law, Private practitioner (zoom call, 30 December 2021).

⁵⁵ Steven Dryden, 'A short history of LGBT rights in the UK' (*British Library*, 2020) <<https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk>> Accessed 2 Jan 2022.

⁵⁶ Katie O'Malley, 'Alan Turing: why was the code breaker 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>> accessed 2 Jan 2022.

⁵⁷ Katie O'Malley, 'Alan Turing: why was the code breaker 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>> accessed 2 Jan 2022.

⁵⁸ John Wolfenden, 'Wolfenden committee report' (1957) <<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections1/sexual-offences-act-1967/wolfenden-report-/>> Accessed 10 Jan 2022.

⁵⁹ Sexual offences Act 1967.

⁶⁰ Yaiza Derbyshire Vieira, 'Trans people can now change the gender on their passport without a medical letter- government announces' (*Independent*, 15 July 2019) <<https://www.independent.co.uk/life-style/alan-turing-new-ps50-banknote-gay-codebreaker-mathematician-sexuality-pardon-a9005086.html>> accessed 2 Jan 2022.

⁶¹ *Goodwin v United Kingdom* (1996) 22 EHRR 123.

the Gender Recognition Act 2004⁶². Further, by 2010 gender reassignment was also recognized under the Equality Act 2006⁶³ except in Northern Ireland which accepted this provision in 2020.

Even though many believe that homosexuality was a concept that was introduced by the Western countries to their colonies, it is homophobia that the colonial countries adopted from the Western countries. After Sri Lanka became a colony of the British certain laws were implemented to prevent existing customs like homosexuality within the country. However, while the British started progressing in building a free and fair environment, Sri Lanka still follows the provision of the Penal Code of Sri Lanka 1883.

Law Relating to the LGBT Community in India

India is a country that is respected for the broad cultures and traditions practiced within the state. It has similar characteristics to Sri Lanka regarding LGBT laws since it was never illegal in India before the invasion of the British.⁶⁴ The Kama sutra which was published in the 4th century A.D can be identified as one of the best examples to prove that India too had practices such as homosexual relationships as it vividly explains the physical pleasure between males and males. Further, Indian poets like Isha and Rangin openly wrote about homosexual relationships in the same effect they wrote about heterosexual relationships⁶⁵. Hence, the homophobic approach was introduced by the British. Section 377 of the Indian Penal Code criminalizes homosexual relationships while Articles 14 and 21 of the Indian Constitution guarantee equal protection. The Indian constitution adopted a similar outlook as the Sri Lankan contradiction between the human rights view and the criminal law view⁶⁶.

However, after 150 years of hardships faced by the LGBT community in India

⁶² Gender Recognition Act 2004.

⁶³ Equality Act 2006.

⁶⁴ Camille-Maya Jayanthi Lemesie, 'The evolution of the perception and acceptance of the LGBT community in India' (*Voices of the Youth*, 10 Dec 2020) <<https://www.voicesofyouth.org/blog/evolution-perception-and-acceptance-lgbtq-community-india>> Accessed 5 Jan 2022.

⁶⁵ Camille-Maya Jayanthi Lemesie, 'The evolution of the perception and acceptance of the LGBT community in India' (*Voices of the Youth*, 10 Dec 2020) <<https://www.voicesofyouth.org/blog/evolution-perception-and-acceptance-lgbtq-community-india>> Accessed 5 Jan 2022.

⁶⁶ Zainab Patel, 'The long road to LGBT equality in India (United Nations in India 2021)' <<https://in.one.un.org/blogs/the-long-road-to-lgbt-equality-in-india/>> Accessed 6 Jan 2022.

the case of *Navtej Singh Johar & Ors. v. Union of India*⁶⁷ then Secretary, Ministry of Law and Justice became the leading light in finally legalizing the LGBT rights by decriminalizing all the provisions of the Indian Penal Code pertaining to the LGBT community in 2018. Chief Justice of India at the time Mr. Deepak Mishra stated that the court identified criminalizing carnal intercourse" to be "irrational, arbitrary and manifestly unconstitutional" definitely does help that "the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation and deprived that every person of the LGBT community is also entitled to equal protection under the law⁶⁸. Further, Section 399 of the Sri Lankan Penal Code has stated it the same way under section 419 of the Indian Penal Code In, 2014 under the case of *NALSA vs. Union of India*⁶⁹ it was held that the rights of transgender people are protected by the Indian constitution.

India is a country that has many roots in terms of language, religion, race, and other external factors. The intertwining of these roots takes a much wider perspective that cannot be simplified because of the different rituals and customs that have been practiced within Indian history. However, despite India having a much more complex situation the country the law abolished the homophobic aspect instilled in the country by the British. India's complexities are broader than Sri Lanka because of the land extent and the higher population. Therefore, India has faced more challenges to overcome legalizing the LGBT community rights compared to Sri Lanka and they have granted equal rights to all the LGBT community while Sri Lanka is still struggling in overcoming its challenges.

Recommendations

As a result of this research paper, Sections 365 and 365 A of the Penal Code of 1883 in Sri Lanka should be reviewed, and same-sex relationships should be legalized. It should be ruled specifically that there be no discrimination based on sexual orientation and gender identity. There is a need to include

⁶⁷ Navtej Singh v Johar & Ors v. Union of India AIR 2018 SC 4321; W. P. (Crl.) No.76 of 2016; D. No.14961/2016 (India).

⁶⁸ *ibid.*

⁶⁹ *National legal services authority v Union of India* (2014) 5SCC 438(India).

the group LGBT in Article 12(2) of the 1978 Sri Lankan constitution. Moreover, an accomplishment of national laws and policies should be legislated all around the country to guarantee the protection of the LGBT group while eradicating domestic violence faced by LGBT women in the Sri Lankan society. The governmental authorities should take reasonable steps to educate the society from an early age to prevent social discrimination and impede forced marriages of the LGBT community with hetero sexual to prevent and hide their identity. Strong awareness programmes under this topic should be formulated. Governmental officials such as police should be more responsible in dealing with the LGBT community by enhancing professionalism and always practicing it by all people within any community. Also, initiations such as creating school-level awareness programmes throughout the country to ensure that the discriminatory mindsets amongst the society could be minimized from initial stages. Finally, implementing well-organized programmes for adults, to respect and recognize the LGBT community in Sri Lanka could gradually give the society a sense of acceptance.

Conclusion

Sri Lanka is a country in which concepts like LGBT were practiced in the past but later drifted adapting to a homophobic environment. It is necessary to repeal the penal code's provision which criminalizes LGBT relationships because those laws were implemented over 130 years ago. Even though Section 365 and 365 A criminalize the actions of the LGBT community, the Supreme Court recognized contemporary thinking that sex that happens between homosexuals with consent should not be criminalized⁷⁰. Furthermore, the provision that guarantees protection of the LGBT community to a certain extent in the 1978 constitution should be extended and the community should be included under article 12(2) of the constitution. Article 16 of the Sri Lankan constitution should be removed from the constitution as it creates a clash between the criminal law aspect and the human rights view of the Sri Lankan legal system. Article 16 does not provide a suitable law for the current fast-moving world and its legal innovations in this era. Sri Lanka should adopt and incorporate the international perspective of human rights

⁷⁰Outright action international, 'Sri Lanka government says lgbt rights are constitutionally protected' (*Outright action international* June 2019) <<https://web.archive.org/web/20190620225217/https://www.outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 12 Jan 2022.

laws into the Sri Lankan system to build a much fairer and just environment in the legal field. As for the interview findings, the younger generation is more willing to accept the LGBT community than the older generation. Additionally, the fact that Sri Lanka as a country should legalize the rights of the LGBT community was pointed out. It is right and a choice to decide gender identity and sexual orientation oneself and it cannot be tied up just because of a law or alternative public views. The international jurisdiction of the United Kingdom revolutionized the ancient laws in Sri Lanka by criminalizing certain practices which were present, but today while Sri Lanka is still following the 130 years old law, the UK has progressed in legalizing not only LGBT relationships but also LGBT marriages and even taken further steps to grow. India, on the other hand, has a much more rich and diverse culture and ethics compared to Sri Lanka, they have faced many more challenges and have progressed to legalize LGBT relationships today enjoying the rights of every person in society. It is necessary that Sri Lankans also break free from this shell to come out openly about their orientation and it is the duty of the country's legal and political sector to take the initiative to progress. The current Sri Lankan laws do not treat the LGBT community equally as per the clash in the law of Sri Lanka.