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COMPARATIVE ANALYSIS OF AFFIRMATIVE ACTION PROGRAMME FOR LGBTQ COMMUNITY IN UNITED STATES, AUSTRALIA, AND SOUTH AFRICA

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ABSTRACT

In this article, affirmative action laws for the LGBTQ community in the United States of America, Australia, and South Africa are compared and contrasted. This article makes a significant attempt to discuss about the atrocities faced by this community in the respective regions and to further evaluate what happened to improve their situation little or not so little. Thereby, this article looks at each nation's legislative framework for affirmative action and evaluates how well these practices promote equality for LGBTQ people. The writer examines the origins and development of affirmative action policies for the LGBTQ population in each nation, as well as the difficulties and restrictions these laws confront. The article's conclusion provides insights into how affirmative action laws in these nations differ from one another and are influenced by preexisting societal and cultural norms while also trying to find an "ideal country" that has the best approach towards affirmative action program for LGBTQ community.

Keywords: *Affirmative Actions, LGBTQ community, USA, Australia, South Africa.*

INTRODUCTION

Both legal experts and philosophers have studied affirmative action, justice, and equality in great detail for more than a decade. Many arguments have been made in favour of and against affirmative action, but it does not seem that a synthesis that properly integrates the philosophical and constitutional components of the issue has arisen. Nonetheless, one must consider the fundamental idea of equality in order to understand the right connection between affirmative action and justice. In fact, from the time of the Greeks, justice has been equated with equality¹, and the equal protection provision provides the concept of equality a legal status. Affirmative action would likely conform to the principles of equality and the standards of the provisions provided for equality in the constitution if philosophy can show that it does so. Yet, because equality has

¹ Ross, A., *On Law and Justice*, 26(2), THE UNIVERSITY OF CHICAGO LAW REVIEW, 254-297, (1959).

become such a widely accepted moral and political ideal, the phrase's prescriptive meanings have grown significantly, seemingly robbing it of most of its utility as a descriptive term².

So, it is accurate to say that affirmative action refers to laws and initiatives intended to advance equality of opportunity and lessen prejudice in fields including politics, employment, and education. These laws seek to redress the systematic discrimination and historical injustices that women, people of colour, and people with disabilities have historically and still experience today. These actions thus can take many various forms, such as disadvantaged people's assistance programmes, preferential employment or admissions policies, and focused outreach and recruitment campaigns. Depending on the situation and the objectives of the organisation or institution, several policies and programmes may be implemented.

Affirmative action can be crucial in the case of the LGBTQ community since LGBTQ people have traditionally experienced prejudice, harassment, and exclusion from a variety of spheres of life. Several situations, including the workplace, housing, and access to healthcare, might result in this prejudice. By encouraging equal access for LGBTQ people to opportunities in school, employment, and other areas, affirmative action policies and initiatives can aid in addressing these structural disparities. This can involve actions like anti-discrimination laws, focused recruitment and outreach campaigns, and LGBTQ support systems. Affirmative action is a crucial strategy for combating the historical and on-going discrimination against the LGBTQ community, and it can support the development of more welcoming and egalitarian workplaces where LGBTQ people can thrive.

Affirmative action policies for the LGBTQ community could significantly affect how LGBTQ people are represented and given chances, as well as more general society views and practises around LGBTQ concerns. Yet, the success and results of affirmative action programmes will depend on how they are implemented specifically and in what context.

AFFIRMATIVE ACTIONS- DEFINED

Affirmative action is a complicated and diverse subject that has received much research and discussion from academics from many different fields. Affirmative action is frequently claimed to have beneficial impacts on both targeted and non-targeted groups, although these effects are

² Rae, D., Yates, D., Harsanyi, J., Morone, J., & Fisse, C. *Equity and Justice*, 10(4), PHILOSOPHY & PUBLIC AFFAIRS, 283-345, (1981)..

dependent on a number of variables, including the particular policies being implemented and the context in which they are implemented. It is also suggested that certain policies in particular areas should balance the trade-off between quality and fit in order to more effectively promote diversity while maintaining high standards of quality. This is because affirmative action can help promote diversity, but it may also have negative effects on the quality of candidates selected for certain positions.

A small number of nations have implemented affirmative action to reduce discriminatory practises against some historically marginalised populations. Affirmative action is a system of preferential treatment for minorities and women that aims to make up for their lack of development possibilities as a result of historical and on-going discrimination in the United States³. Affirmative action is a strategy used by some nations, such as India, to address underprivileged populations.⁴

Affirmative action, according to Mkhwanazi⁵, is a purposeful and long-term intermediate strategy designed to improve the skills and potential of underprivileged groups so they can compete on an equal basis with those who benefitted from the apartheid system. Affirmative action is viewed as a collection of policies intended to proactively address the disadvantages that certain groups in the community have historically faced.

Affirmative action can be implemented in a variety of different ways; it is vital to highlight this right away. Affirmative action is not always a single policy or tactic.⁶ According to Khoza⁷, affirmative action is a type of positive discrimination intended to address inequalities brought about by years of oppression. Whether you call it affirmative action, black advancement, equal opportunity employment, or strategic resourcing, it has gone by numerous names at various points in time. The need to address unfair hiring practises still has to be addressed.

Another crucial element in regard to affirmative action policies is the idea of equality. The “equality” axis around which affirmative action revolves is noted in the Green Paper on

³ TRIBE, LAURENCE H. AMERICAN CONSTITUTIONAL LAW §§ 16-22 (2d ed. 1988).

⁴ MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (Oxford Univ. Press 1984).

⁵ MKHWANAZI, D. NEW BREED OF MANAGERS NEEDED IN A NEW SOUTH AFRICA (Human Resource Management, 1993).

⁶ Innes, D., *Affirmative Action — Issues and Strategies*, 4-5 (1993).

⁷ Khoza, H., *Affirmative Action — A Personal View*, 77-85. (1993).

Affirmative Action.⁸ Nonetheless, the idea of affirmative action cannot replace the idea of merit since to do so would unfairly deny others of opportunities that are their due. The ultimate goal is to perfect and realise this ideal of equal opportunity and equality.

Further, the affirmative action is used to promote employment equity in the workplace, which is one of its key goals. Such steps are taken to make up for historical inequalities. It acknowledges that there exist differences in employment, occupation, and income within the country's labour market as a result of apartheid and other discriminatory laws and practises. It also acknowledges that simply removing discriminatory legislation will not be sufficient to address such inequities because they result in such severe disadvantages for some groups of individuals.

Affirmative action is also referred to as "preferential treatment" or "protective discrimination" in India. Because it entails discrimination in favour of those who, up until recently, had themselves been the targets of discrimination, it is known as reverse discrimination⁹. Reverse discrimination can have various meanings to different people. The expression, which is only used in circumstances where the favoured groups are given absolute preference, is sometimes accused of being prejudiced.¹⁰

In a nutshell, policies that expressly grant preferences based on membership in a defined group are referred to as affirmative action¹¹. Although these policies have a wide range of objectives, legal justifications, applications, and recipient groups, the substantive variety of policies that fall under its purview tends to cause the most uncertainty regarding the term's definition. Affirmative action programme types can be loosely categorised into five models: quotas, outreach plans, goals and deadlines, preference plans, and basis non-discrimination.

Affirmative Actions for LGBTQ Community

A group of people who identify as lesbian, gay, bisexual, transgender, queer, or questioning is known as the LGBTQ community. Although traditionally oppressed and discriminated against, there has been a growing push in recent years for LGBTQ acceptance and rights. Prejudice and discrimination are among the major issues that the LGBTQ community must contend with. Many

⁸ COSATU. (1997). "A Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service". GG GN 851 of 1997, V(383), No. 18034.

⁹ Anand, C. L. (1987). "Equality Justice and Reverse Discrimination", 53

¹⁰ Brounagh, R. (Ed.). (1978). "Authority, Equality, Adjudication, Privacy". Philosophical Law, V(II), 47.

¹¹ Kennedy, R. (1986). "Persuasion and Distrust: A Comment on the Affirmative Action Debate". Harvard Law Review, 99, 1327, 1327 n.1.

members of the community experience discrimination, violence, and harassment when seeking job, housing, medical care, or an education. Discrimination can have a detrimental impact on one's emotional and physical health.

The LGBTQ community has made substantial progress in recent years towards greater acceptance and equality despite these obstacles. To safeguard the rights of LGBTQ people, many nations have made same-sex marriage lawful and established anti-discrimination legislation. Also, there is now more LGBTQ representation in politics and the media, which has aided in spreading understanding and acceptance. It is crucial to understand that there are people from a variety of backgrounds and experiences within the LGBTQ community. Certain members might experience additional difficulties because of their race, ethnicity, religion, or level of handicap. It is crucial to strive for greater inclusivity and understanding while keeping these intersecting identities in mind.

Overall, some parts of our culture values and appreciates the contributions made by the LGBTQ community. We must keep fighting for the rights and welfare of all LGBTQ people and working to create a world in which everyone is respected and treated equally, regardless of their sexual orientation or gender identity. The range and scope of affirmative action initiatives based on sexual orientation are extremely constrained, and they typically appear within more general government contracting criteria. Nonetheless, as demographics change and public perception shifts as a result of civil rights triumphs for homosexual and lesbian people, the implementation of sexual orientation-based affirmative action policies in the employment and educational sectors becomes increasingly likely.

Programs of affirmative action based on sexual orientation tend to be restricted in availability and have only been implemented in a few number of jurisdictions as part of a larger legal framework. Yet, the recent triumphs for LGBTQ rights¹² make the possibility of expanding these programmes more conceivable. Hence, those who are against the expansion of these programmes should think about the tools at their disposal.

Affirmative action is required for the LGBTQ community for a number of reasons. First of all, LGBTQ people have traditionally experienced marginalisation and prejudice, which has prevented them from accessing opportunities and resources. Disparities in education, income, healthcare, and

¹²Geidner, C. (2012, December 27). "The Seven States (Or More) That Could See Marriage Equality in 2013". BuzzFeed News.

other sectors are the outcome of this. Equal access to these resources and opportunities can be achieved with the use of affirmative action. Second, LGBTQ people frequently experience major difficulties at employment. Several LGBTQ people experience reduced salary and job stability due to discrimination and harassment, which can also limit career options and advancement. Affirmative action laws can aid in preventing unjust workplace discrimination and ensuring that LGBTQ people have equal access to career opportunities.

Last but not least, affirmative action can encourage a greater awareness and acceptance of the LGBTQ population. Affirmative action can serve to lessen prejudice and discrimination against LGBTQ people by fostering more diverse and inclusive settings in both education and the workplace. In general, affirmative action measures are required for the LGBTQ community to address past and present prejudice, encourage more access to opportunities and resources, and foster greater acceptance and understanding.

AFFIRMATIVE ACTIONS FOR LGBTQ COMMUNITY IN THE UNITED STATES, AUSTRALIA, AND SOUTH AFRICA

United States of America

Many affirmative measures are in place in the US to combat prejudice and advance equality for the LGBTQ population. Although there has been progress, there is still much to be done to guarantee full equality for all LGBTQ people. One such step taken by the Federal Government of the United States was by passing the Hate Crimes Prevention Act in 2009¹³, commonly known as the Matias Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The statute is named for two victims of hate crimes: James Byrd, Jr., an African American man who was dragged to death in Texas in 1998, and Matthew Shepard, a gay man who was killed in Wyoming in 1998. In addition to crimes motivated by a victim's race, colour, religion, or national origin, the Act broadens the definition of a hate crime to include offences motivated by the victim's actual or perceived sexual orientation, gender identity, gender, or disability¹⁴.

The legislation enables the Department of Justice to investigate and prosecute hate crimes when the states are unable or unwilling to do so, and it grants federal aid to state and local law enforcement agencies that investigate and prosecute hate crimes. The passing of the Hate Crimes Prevention Act was hailed as a significant breakthrough in the fight against crimes motivated by

¹³ 18 U.S.C. § 249

¹⁴ 18 U.S. Code § 249 (a)(2)

hatred against members of the LGBTQ community and other oppressed groups. Nonetheless, some detractors have voiced worries about possible inconsistencies with the rights for free speech and religion. The Hate Crimes Prevention Act is nevertheless a crucial instrument for preventing hate crimes and defending the rights of underrepresented people in the US, notwithstanding these worries.

Later in 2015, The Obergefell v. Hodges¹⁵ judgement from the Supreme Court was a landmark decision that made same-sex marriage lawful across the country. Before this ruling, just a few states permitted same-sex marriage, while others outright forbade it. Several same-sex couples who had been denied the opportunity to wed in their home states brought the lawsuit. The Supreme Court ruled 5-4 that same-sex couples are entitled to the same legal recognition and rights as opposite-sex couples and that the right to marry is a fundamental freedom protected by the Constitution.

The Obergefell ruling was a crucial turning point in the struggle for marriage equality and constituted a huge triumph for the LGBTQ community. The access to benefits like social security, health insurance, and adoption, as well as other legal rights and safeguards for same-sex couples, were also significantly impacted. Despite the fact that many LGBTQ people and their allies welcomed the ruling; some religious and conservative groups opposed it, claiming that it damaged traditional notions of marriage and family. Yet, the Obergefell ruling continues to be a pivotal point in the fight for LGBTQ equality and rights in the United States.

Even in the medical field, all nursing home residents, including those who identify as LGBTQ, have their rights and wellbeing protected by the Nursing Home Reform Act¹⁶. Yet, in nursing home settings, LGBTQ seniors may experience particular difficulties and discrimination, which emphasises the significance of taking this population's needs into account when implementing the act. Residents' rights to be free from discrimination, including discrimination based on sexual orientation or gender identity, are specifically protected under the act. Nursing homes must ensure that all residents are treated with dignity and respect and must offer a safe, encouraging atmosphere free from bullying or other forms of abuse.

Several policies are being implemented in the United States to safeguard LGBTQ youth too from

¹⁵ 772 F. 3d 388

¹⁶ 42 U.S.C. §1396r - Requirements for nursing facilities

harassment and discrimination in schools and higher education in order to promote equality, in addition to the federal laws passed by the federal government and various Supreme Court rulings upholding the rights of the LGBTQ community. Although there is still much to be done to guarantee complete equality for LGBTQ people in education, these rules mark a significant advancement in the struggle for LGBTQ rights and equality. These policies include some of those listed below.

Like the introduction of thorough anti-bullying regulations that forbid harassment and discrimination in schools based on sexual orientation and gender identity. With the help of staff training, mechanisms for reporting and investigating instances, and assistance for victims of bullying and harassment, these policies mandate that schools take proactive steps to stop bullying and harassment of LGBTQ students. Since no federal law governs the issue several states have independently put in place other laws and regulations, like gender identity protections and safe schools statutes, to safeguard the rights of LGBTQ kids. While gender identity rights may compel schools to permit kids to use facilities and engage in activities that are consistent with their gender identities, safe school regulations mandate that schools take affirmative actions to promote a safe and supportive learning environment for LGBTQ students. One such example is of the state of California where The Safe Place to Learn Act¹⁷ has been passed which has provisions for dealing with bullying and harassment in educational settings. This law mandates that schools have particular anti-bullying policies and procedures in place, as well as training for school staff on how to identify and deal with bullying conduct.

Similar to other states, New York's anti-bullying law is called the Dignity for All Students Act¹⁸ (DASA). All New York City public schools are required by law to create a welcoming atmosphere free from bullying, harassment, and discrimination. The Dignity Act mandates that schools establish plans for preventing and responding to bullying behaviour, and it also includes requirements to address cyber bullying. The law also stipulates that all school personnel must get training on how to identify and deal with bullying, harassment, and discrimination.

Policies have been put in place in various states to safeguard the rights of transgender and gender non-conforming kids. The use of the student's preferred name and pronouns, and the provision of accommodations for transgender students who are unable to use gendered facilities may all be

¹⁷California Education Code Section 234.7

¹⁸N.Y. Educ. Law §§ 10-18 (McKinney 2022)

mandated by these regulations. Examples of such policies include:

- The Gender Identity Non-discrimination Policy - University of California¹⁹
- Transgender and Gender Non-Conforming Student Policy - New York City Department of Education²⁰
- Gender Identity Policy - California State University²¹
- Gender Identity and Expression Policy - University of Oregon²²

Furthermore, two federal statutes and regulations serve as the main sources of LGBTQ healthcare rights in the US. First of all, the Affordable Care Act²³ (ACA) forbids discrimination based on sex, which has been construed to include discrimination based on gender identity and sexual orientation. Section 1557 of the ACA²⁴ is the specific provision that outlaws this. In other words, healthcare professionals and insurers cannot deny LGBTQ people care or coverage or increase their premiums or copays. Second, regardless of a person's sexual orientation or gender identity, The Health Insurance Portability and Accountability Act²⁵ contain measures that safeguard the privacy of their health information.

Some states have also passed legislation and regulations that give extra safeguards for LGBTQ people accessing healthcare, in addition to these federal rights. For instance, the LGBTQ Patient Bill of Rights in California²⁶ forbids discrimination based on sexual orientation or gender identity in healthcare settings and mandates that healthcare professionals undergo cultural competency training particular to the LGBTQ community.

To ensure that LGBTQ patients receive adequate and sensitive care, certain healthcare organisations establish their own rules and guidelines. For instance, the World Professional Association for Transgender Health²⁷ (WPATH) offers instructions for medical practitioners on

¹⁹University of California, Policies Applying to Campus Activities, Organizations, and Students (PACAOS), Chapter 1, Section 100: Nondiscrimination.

²⁰New York City Department of Education, Transgender and Gender Non-Conforming Student Guidelines

²¹California State University, Executive Order 1097: Systemwide Policy Prohibiting Discrimination, Harassment and Retaliation, Sexual Misconduct, Dating and Domestic Violence, and Stalking Against Employees and Third Parties, and Systemwide Procedure for Addressing Such Complaints by Employees and Third Parties

²²University of Oregon, Policy on Gender Identity and Expression.

²³Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001-18121 (2010).

²⁴ Forbids discrimination in covered health services and activities on the basis of race, colour, national origin, age, handicap, or sex (including pregnancy, sexual orientation, gender identity, and sex characteristics).

²⁵ Public Law 104-191, 110 Stat. 1936 (1996).

²⁶ California Health and Safety Code §§ 1276.5 and 1317.5

²⁷ World Professional Association for Transgender Health (WPATH). Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, version 7. 2011.

how to treat transgender and gender non-conforming patients in a way that affirms their gender. The LGBTQ Senior Bill of Rights²⁸, a set of principles and suggestions intended to guarantee that LGBTQ seniors have access to secure, welcoming, and inclusive care and services as they age, even takes into account a unique issue for senior members of the LGBTQ community. LGBTQ seniors should be granted a variety of particular rights and protections in healthcare and social service contexts, according to the bill of rights. The LGBTQ Senior Bill of Rights is a set of suggestions and best practises that can direct the creation of policies and programmes to better assist LGBTQ seniors in healthcare and social service settings, even if it is not a formal law or statute.

There are many other state laws, regulations and policies that the state within itself implements for the protection of LGBTQ community. Moreover, there are various organizations that pro-actively take part in this endeavour and takes effective part in such affirmative actions.

Australia

Many affirmative measures are in place in Australia for LGBTQ people to advance equality and lessen prejudice. Nevertheless, like to the United States, there is still work to be done to provide complete equality and protection against discrimination in Australia. The Sex Discrimination Act 1984²⁹ contains the federal anti-discrimination rules in Australia that forbid discrimination based on sexual orientation, gender identity, and intersex status. By virtue of this law, discrimination against a person is prohibited based on:

- Sex (including pregnancy and breastfeeding)
- Sexual preference
- Sexual orientation (including transgender status)
- gender identity

A variety of topics are covered under the Act, including work, education, access to goods and services, lodging, and the supply of facilities. For instance, it is illegal to reject a job application or fire a worker based on that person's sexual orientation, gender identity, or intersex status. A person may not be denied access to goods or services, nor may they be treated less favourably when receiving these goods or services. The Act also protects against victimisation and sexual harassment and enables people to file complaints with the Australian Human Rights Commission

²⁸ Endorsed by SAGE (Services and Advocacy for LGBT Elders) and the National LGBTQ Task Force.

²⁹ Sex Discrimination Act 1984 (Cth)

if they feel they have been subjected to discrimination. It is significant to note that several Australian provinces and territories also have anti-discrimination legislation that address related issues, however they vary in terms of their reach and the safeguards they provide.

But, in Australia, same-sex marriage became legal after a national postal survey on marriage equality. The Marriage Amendment Act³⁰, passed by the Australian government in 2004, established marriage as a union of a man and a woman. Many attempts to introduce legislation to permit same-sex marriage during the following ten years were unsuccessful. The Australian Capital Territory approved same-sex unions in August 2015³¹; however, the law was later invalidated by the High Court of Australia³². The Australian government declared in August 2017 that it would conduct a national postal survey on marriage equality. The survey was non-binding, so it wouldn't automatically alter the law, but its goal was to determine how the people felt about the subject. Australians had the opportunity to participate in the postal survey from September to November 2017 by mailing back a survey form and marking whether they supported or opposed same-sex marriage legislation. The Australian Bureau of Statistics reported on November 15, 2017, that 61.6% of respondents had voted in favour of allowing same-sex unions³³. The Marriage Amendment (Definition and Religious Freedoms) Act³⁴, enacted by the Australian parliament on December 7, 2017, made same-sex unions legal there. The legislation becomes operative on December 9, 2017.

Meanwhile, The National LGBTI Health Strategy³⁵, a comprehensive strategy to enhance the health and well-being of LGBTQ persons throughout Australia, was created and released by the Australian Government in 2019. The policy attempts to address the particular health issues that LGBTQ people and communities confront, such as prejudice, stigma, and a lack of access to quality medical care. LGBTQ people and groups, medical experts, and governmental organisations all worked together to establish the approach. It contains a variety of programmes and suggestions, such as enhancing data collection and research on LGBTQ health, increasing LGBTQ cultural competency training for medical professionals, promoting inclusive and nondiscriminatory health care services, and providing specialised assistance to LGBTQ people dealing with mental health issues or domestic and family violence.

³⁰ Marriage Amendment Act 2004 (Cth)

³¹ Act Legislation Register. (2013). Marriage Equality (Same Sex) Act 2013.

³² Commonwealth v Australian Capital Territory [2013] HCA 55

³³ Australian Bureau of Statistics. (2017). Results of the Australian Marriage Law Postal Survey.

³⁴ Commonwealth of Australia. (2017). Marriage Amendment (Definition and Religious Freedoms) Act 2017.

³⁵ Australian Government Department of Health. (2019). National LGBTI Health Strategy 2019.

Further, an effort called the Safe Schools Program³⁶ further aims to lessen bullying and prejudice against children who identify as LGBTQ in Australian schools. The program was created in response to the high rates of bullying and harassment LGBTQ students endure, which can have a detrimental effect on their mental health, general welfare, and academic achievement. The Program gives teachers and schools the tools and assistance they need to make their classrooms welcoming and safe for LGBTQ kids. This contains materials and tactics for tackling bullying and prejudice in schools, as well as training and professional development for teachers on topics relating to sexual orientation and gender identity. Students and their families can also access materials through the programme, including details on legal rights and support services.

As a result of the demand for safe spaces and assistance for the LGBTQ population, LGBTQ centres have sprung up in Australia. Due to historical persecution, stigma, and marginalisation experienced by LGBTQ persons in Australia, there is a need for support services and organisations. In 1973, Sydney became home to Australia's first LGBTQ centre. Its name is the Gay Counselling Service of New South Wales, and it provided guidance and support to LGBTQ people who were dealing with mental health problems or had encountered prejudice. Since that time, a large number of other facilities and groups have popped up, providing the LGBTQ community with a variety of services and support. In Australia today, LGBTQ centres are crucial in encouraging social inclusion, fighting for equal rights for LGBTQ people, and helping those in need. They also give LGBTQ individuals who may feel alone or stigmatised a sense of belonging.

South Africa

When it comes to LGBTQ+ rights, South Africa is renowned for having some of the most progressive legislation and laws in the entire globe. The first nation to do so was South Africa, which included explicit safeguards for LGBTQ citizens in its Constitution. Sexual orientation is a protected trait under the country's Bill of Rights³⁷; hence discrimination based on sexual orientation is prohibited. Section 9 of the Constitution of South Africa³⁸ deals with equality and particularly outlaws discrimination on the grounds of many characteristics, including sexual orientation. This clause states that "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,

³⁶ Deane, M., and Kendall, E. (2017). Final assessment on the success of the Australian Safe Schools Coalition. The Western Sydney University.

³⁷ Republic of South Africa. Constitution of the Republic of South Africa, 1996.

³⁸ Republic of South Africa. Constitution of the Republic of South Africa, 1996. Chapter 2: Bill of Rights, Section 9: Equality.

culture, language, and birth.” It also states that “everyone is equal before the law and has the right to equal protection and benefit of the law.” As a result, this clause offers safety for the LGBTQ community in South Africa.

Furthermore, a landmark court decision and following legislative action in South Africa made same-sex marriage legal. The Marriage Act³⁹, which defined marriage as a partnership between a man and a woman, was found to be illegal and to have infringed the right to equality in 2005’s Minister of Home Affairs v. Fourie⁴⁰. The administration was given a year by the court to change the law to permit same-sex marriage. The Civil Union Act⁴¹, which permits same-sex couples to enter into either a marriage or a civil partnership, was passed in November 2006. According to the Act, same-sex couples now have the same legal obligations and rights as heterosexual couples, including the ability to adopt children and receive spousal benefits like inheritance and health care. A big win for the LGBTQ community was achieved with the legalisation of same-sex unions in South Africa, as well as globally. With the legalisation of same-sex unions, South Africa became the first nation in Africa and the fifth nation overall. The action also established a standard for other nations in the area and around the globe to follow.

Additionally, South Africa’s Promotion of Equity and Prevention of Unfair Discrimination Act⁴² (PEPUDA) forbid discrimination on a number of grounds, such as sexual orientation and gender identity, in a variety of contexts, including employment and housing. Aiming to advance equality and halt unfair discrimination in all spheres of South African society, PEPUDA was passed in 2000. In accordance with the law, discrimination is “any act or omission, including a policy, law, rule, practise, condition, or situation which directly or indirectly places burdens, obligations, or disadvantages on, or withholds benefits, opportunities, or advantages from, any person on one or more prohibited grounds.” In accordance with PEPUDA, it is prohibited to discriminate against anyone based on their sexual orientation or gender identity in a variety of settings, including employment and housing⁴³. Anyone who believes they have been the victim of discrimination may file a complaint with the South African Human Rights Commission, which is in charge of

³⁹ South Africa. Marriage Act, 1961.

⁴⁰ Minister of Home Affairs v. Fourie, [2005] ZACC 19, 2006 (1) SA 524 (CC)

⁴¹ Republic of South Africa. Civil Union Act, 2006 (Act No. 17 of 2006).

⁴² Republic of South Africa. Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000).

⁴³ Section 6(1), 7, 10(1), 13(1) of Republic of South Africa. Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000).

upholding PEPUDA's requirements⁴⁴.

Based on the 1999 Constitutional Court decision in the case of National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others⁴⁵, South Africa's healthcare-progressive legal framework is also very active in recognising the rights of transgender and gender-nonconforming people. In this significant decision, the court ruled that discrimination based on sexual orientation is against the South African Constitution's guarantee of equality and is therefore unconstitutional. The Alteration of Sex Description and Sex Status Act of 2003⁴⁶ was put into effect by the South African government as a result of this judgement, enabling transgender people to legally change the gender marker on their identification documents, including their birth certificate, ID card, and passport. In order to guarantee that transgender and gender nonconforming people receive high-quality, non-discriminatory healthcare services, the government has also created policies and standards for healthcare providers. To guarantee that all people who need these therapies can get them, the Department of Health, for instance, has published guidelines for the delivery of gender-affirming operations and hormone therapy⁴⁷. The right of transgender and gender nonconforming people to live their life in a way that is consistent with their gender identification is also acknowledged by the South African government. In all facets of their existence, including their access to healthcare services, this entails defending their rights to secrecy, dignity, and non-discrimination.

The National Health Act of 2003⁴⁸, which guarantees everyone the right to access health services, including HIV prevention and treatment services, provides for the provision of HIV testing, prevention, and treatment services in South Africa that are accessible to all people, regardless of their sexual orientation or gender identity. Everyone has the right to obtain health services, including reproductive health care, according to Section 27(1)(a) of the Act, and no one may be denied access to emergency medical care. Further aiming to provide a comprehensive and coordinated response to HIV, tuberculosis, and sexually transmitted infections (STIs) in South Africa, the South African National Strategy Plan on HIV, TB, and STIs, 2017–2022⁴⁹. It underlines

⁴⁴ Section 10 of Republic of South Africa. Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000).

⁴⁵ [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC)

⁴⁶ Alteration of Sex Description and Sex Status Act, No. 49 of 2003

⁴⁷ Department of Health. (2015). Standard Operating Procedures for the Management of Transgender and Gender Non-Conforming Persons in South Africa.

⁴⁸ National Health Act, No. 61 of 2003

⁴⁹ South African National AIDS Council. (2017). South African National Strategic Plan on HIV, TB and STIs 2017-2022.

the importance of offering everyone access to HIV testing, prevention, and treatment services regardless of their sexual orientation or gender identity. Guidelines for the management of HIV in the health services, such as the provision of HIV testing, prevention, and treatment services, are also included in the Department of Health's 2015 Policy on Management of HIV in the Health Services⁵⁰. It highlights the significance of supporting the rights and dignity of all people living with HIV and offering HIV care in a non-discriminatory manner. The Department of Health's Policy and Guidelines for the Implementation of the Decentralized Model of Care for HIV, TB, and NCDs, 2019⁵¹ – are the last document to mention. This policy offers instructions for implementing a decentralised model of care for non-communicable diseases, TB, and HIV (NCDs). The goal of the policy is to make integrated, person-centered care available to everybody, especially important demographics like LGBTQ people.

Apart from the above mentioned medical support made available by the South African Government, there are various other non-profit organizations like The South African Depression and Anxiety Group⁵² (SADAG), The Triangle Project⁵³, OUT LGBT Well-being⁵⁴, etc. that have as their primary goal giving LGBTQ people access to advocacy services, therapy, and other resources for mental health. These programmes seek to advance the mental health and well-being of all people in South Africa by addressing the particular mental health needs of the LGBTQ community.

Conclusion

It is challenging to compare the affirmative actions taken for the LGBTQ group in the USA, South Africa, and Australia because each nation has different legal frameworks, social norms, and policies in place. In addition, the LGBTQ community is not a homogeneous group and is subject to various forms of prejudice and marginalisation depending on things like colour, gender identity, and financial background.

Yet, all three nations have made progress in advancing LGBTQ rights and combating discrimination. The USA has made strides towards anti-discrimination laws and marriage equality, but it still has a history of anti-LGBTQ policies and regulations. LGBTQ people still experience

⁵⁰Department of Health. (2015). Policy on Management of HIV in the Health Services.

⁵¹Department of Health. (2019). Policy and Guidelines for the Implementation of the Decentralized Model of Care for HIV, TB, and NCDs.

⁵²South African Depression and Anxiety Group. (n.d.). Home. Retrieved [10/3/2023] from <https://www.sadag.org/>

⁵³The Triangle Project. (n.d.). Home. Retrieved [10/3/2023] from <https://triangle.org.za/>

⁵⁴OUT LGBT Well-being. (n.d.). About us. Retrieved [10/3/2023] from <https://www.out.org.za/about-us/>

prejudice and violence despite South Africa being the first nation in the world to include provisions for sexual orientation in its constitution. Although Australia has made strides towards anti-discrimination laws and marital equality, the LGBTQ population still faces many difficulties, notably with relation to healthcare access and mental health support.

In the end, it is critical to understand that when it comes to affirmative action policies for the LGBTQ community, there is no one “ideal” country. Each nation has particular advantages and disadvantages, and efforts to advance equality and inclusion are continuous. However, it is also important to note that India on the other hand has not yet executed any affirmative actions for the LGBTQ community rather it’s judiciary only has as of now struck down the provision of Section 377 of the Indian Penal Code⁵⁵ which has before criminalized homosexuality⁵⁶. Even the law brought up by the Indian Legislature for recognizing Transgender is full of ambiguities and vagueness⁵⁷. However, the LGBTQ community is being supported by various state governments. For instance, the Kerala government announced plans to create a transgender justice board in 2018 to address challenges the transgender population is facing⁵⁸. Nonetheless, prejudice and violence against LGBTQ people are still pervasive. There is a need for more legislative and policy changes, as well as campaigns to raise awareness and alter societal attitudes, to support equality and inclusion for LGBTQ people even though the present central government of India is still opposing same sex marriages in India on the traditional and out-dated ideas of an “Indian family” to be a concept involving only biological man and woman.⁵⁹ In all, what actually will help is the inclusivity of the society at large that accepts a person for who he or she is not based on sex, religion, caste, class or for that matter any other differentiation that divides one human from other.

⁵⁵ Section 377 of the Indian Penal Code, 1860: Unnatural offences

⁵⁶ Navtej Singh Johar v. Union of India case is (2018) 10 SCC 1

⁵⁷ The Transgender Persons (Protection of Rights) Act, 2019

⁵⁸ “Kerala to set up transgender justice board”, The Hindu, June 16, 2018.

⁵⁹ “Central government opposes same-sex marriage plea in Supreme Court; says Indian family concept involves biological man and woman”, Bar & Bench, March 12, 2023