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Dawn of LGBT Crusade and Progression of their Human Rights

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ABSTRACT

Human rights consist of myriad rights that are considered minimal for the human existence. The doctrinal concept of the term human rights plays a very significant role in the lives of all human beings. In a nutshell, it can be emphasized that human rights refer to those rights which lays down basic requirements of human to have a 'minimally good life'. Human rights as a concept can still be considered in its embryonic stage as its vague and ambiguous. This ambiguity is reflected in the sense that there is differentiation of thoughts as to how rights originated as according to some scholars, rights are derived from principles discovered from the nature while other scholars specify its origin in political and legal instruments. Leaving behind all the uncertainty, Human rights as a catalyst has proved to be pivotal for all human beings in general and for the protection of the vulnerable section like LGBT in particular. Human rights have a strong and meaningful grouse that affords protection to those who are vulnerable to the violations of their fundamental human rights. In the recent past there have been various instances to emphasize the fact that there is an urgency of progression of human rights for the LGBT community members. Members of the LGBT community face severe transgression of their fundamental rights because of their sexual orientation and gender identity. The United Nations Human Rights Committee has supervised immensely to protect the rights of this community, there have been initiatives taken at both the national and international levels for the protection and upliftment of multifarious gender identities existing in this world. The Constitution of India is a grundnorm that upholds the ideas of equality, liberty and fraternity amongst all and paves way for each and every individual to live a life that is much more than mere animal existence. Besides all these efforts, there's still room that asks for laying greater emphasis on the problems of the members of LGBT community and lend them a helping hand for the holistic development of their personalities.

Keywords: Human rights, LGBT community, Sexual Orientation, Constitution of India, Equality, Etc.

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I. INTRODUCTION

The preamble of the Universal Declaration of Human Rights States: —

"... It is essential if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."²

Human rights consist of myriad rights that are considered minimal for the human existence. The doctrinal concept of the term human rights plays a very significant role in the lives of all human beings. In a nutshell, it can be emphasized that human rights refer to those rights which lays down basic requirements of human to have a 'minimally good life'.

The basic fact to remember about human rights is that they are not the gift or bounty of any political sovereign through legislation or any edict, but are rights inherent in human existence.³ 'Human rights' in practice have been defined to include all aspects of dignified human existence which make every human being an equal member of the human family. Human dignity is the essence of human rights.⁴

Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948 and subsequently large number of international human right instruments and covenants came into existence.

- **The U. N. Charter, 1945.**
- **Universal Declaration of Human Rights, 1948.**
- **International Covenants of 1966 i.e. Civil and Political Rights and Economic, Social and Cultural Rights.**
- **European convention for protection of Human Rights, 1953.⁵**

Human rights are universal and inalienable; indivisible; interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background.⁶ Human Rights are universal and inalienable. All people everywhere in the world are entitled to them. **The universality of human rights is encompassed in the words of Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."⁷**

Human rights have a strong and meaningful grouse that affords protection to those who are vulnerable to the violations of their fundamental human rights. In the recent past there have been various instances to emphasize the fact that there is an urgency of progression of human rights for the LGBT community members. Members of the LGBT community face severe transgression of

² A Brief Lecture on "HUMAN RIGHTS IN CONSTITUTION OF INDIA", <http://mls.org.in/books/H-2537%20Human%20Rights%20in.pdf>(last visited Dec 3, 2021).

³ Human Rights, <https://nios.ac.in/media/documents/srsc317newE/317EL25.pdf>(last visited Dec 3, 2021).

⁴ *Id.*

⁵ *Supra Note 1.*

⁶ Human Rights Principles and Rights, https://www.hurights.or.jp/archives/other_publications/section1/pdf/Principles%2C%20Rights%2C%20Duty%20and%20Pedagogy.pdf(last visited Dec 2, 2021).

⁷ *Id.*

their fundamental rights because of their sexual orientation and gender identity.

"There is nothing wrong with you. There's a lot wrong with the world you live in"

- **Chris Colfer⁸**

The status accorded to the members of the LGBT i.e., lesbian, gay, bisexual and transgender community is always regarded as inferior by rest of the so-called superior society. Throughout the ages, various national and international organizations and institutions have been called upon to justify the violations of the fundamental human rights of this community. Every now and then, LGBT community is subjected to discrimination and atrocities at all stages of their life be it in the spheres of education, health, income and civil participation. Various national and international instruments have been enacted to protect their rights, but sadly, all of this goes in vain because of the stereotypical mindset of the people. They are still hesitant to consider them as individuals who are also very much the people who make the society, we live in.

Discrimination subjected on the basis of their gender identities or their sexual orientations is drawing greater attention from International and human rights bodies. There are numerous examples of grave infringements of their human rights that includes ill-treatment, sexual assaults, rape, denial of education and employment, invasions in their privacy etc. individuals across

the world are subjected to violence and suffer inequality on the grounds of their physical appearance and who they love. These social stigmas and unwanted barriers act as stumbling blocks in the path of their development and they remain stagnated because of such stigmatized mindsets. LGBT community lives under constant dilemma and pressure because of their fellow humans who become so judgmental and roll out their eyes upon their activities and make their lives a miserable one to live in. There is an urgency to uplift the notion that we all are humans and we all are alike.

II. NOTION OF HUMAN RIGHTS

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

- **Preamble, Universal Declaration of Human Rights⁹**

Human rights are a set of principles concerned with equality and fairness. They are not a recent invention - ideas about rights and responsibilities have been an important part of all societies throughout history. Since the end of World War II, there has been a united effort by the nations of the world to decide what rights belong to all people and how they can best be promoted and protected.¹⁰ Governments have a particular responsibility to ensure that people are able to enjoy their rights. They are required to establish

⁸ LGBT Equality, <https://lgbt-equality-for-everyone-blog.tumblr.com/post/90092232380/there-is-nothing-wrong-with-you-theres-a-lot/amp/>(last visited Dec 2, 2021).

⁹International Human Rights Law, <https://www.uscis.gov/sites/default/files/document/fo>

ia/International_Human_Rights_Law_RAIO_Lesson_Plan.pdf(last visited Dec 3, 2021).

¹⁰An Introduction to Human Rights, <https://humanrights.gov.au/our-work/education/introduction-human-rights>(last visited Dec 3, 2021).

and maintain laws and services that enable people to enjoy a life in which their rights are respected and protected.¹¹

Three of the most important international instruments pertaining to human rights are collectively known as the International Bill of Human Rights:

- The Universal Declaration of Human Rights (UDHR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²

The first human rights principle, dignity, can be found in the preamble of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), containing a recognition that “these rights derive from the inherent dignity of the human person”.¹³

Human rights constitute a set of norms governing the treatment of individuals and groups by states and non-state actors on the basis of ethical principles regarding what society considers fundamental to a decent life.¹⁴ These norms are incorporated into national and international legal systems, which specify mechanisms and procedures to hold the duty-bearers accountable

and provide redress for alleged victims of human rights violations.¹⁵

In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. **The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birth right.**¹⁶

Values of tolerance, equality and respect can help reduce friction within society. Putting human rights ideas into practice can help us create the kind of society we want to live in.¹⁷

III. DEFINITION OF HOMOSEXUALITY

The word homosexuals literally mean as ‘of the same sex, being a hybrid of the Greek prefix homo meaning ‘same’ and Latin root meaning ‘sex’. Homosexuality is a sexual orientation characterized by sexual attraction or romantic love exclusively for people who are identified as being of the same sex. People who are homosexual, particularly males are known as ‘gay’, gay females are known as ‘lesbians. That is homosexual marriages, sometimes referred to as gay marriage, indicates a marriage between

¹¹ *Id.*

¹² *Supra Note 8.*

¹³ Preamble ICESCR and ICCPR, see also Article 1 of the Universal Declaration of Human Rights.

¹⁴ Human Rights: A Brief Introduction, <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/134/2016/07/Human-Rights-A-brief-intro-2016.pdf> (last visited

Dec 3, 2021).

¹⁵ *Id.*

¹⁶ Human Rights Principles, <https://www.humanrightscommission.ky/human-rights-principles> (last visited Dec 3, 2021).

¹⁷ *Supra Note 9.*

two persons of a same sex. They are also referred to be as Gay or Lesbians.¹⁸

According to Oxford Dictionary, Homosexuals as a unit are those whose sexual preference is of a same sex. They are also referred to be as Gay or Lesbians.¹⁹

According to Black's Law Dictionary, all those people that attract the folks of same sex term to be as homosexuals.²⁰

IV. DAWN OF LGBT CRUSADE IN INDIA

Justice Indu Malhotra while reading her 50-page verdict emphasized that *“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries”*.²¹

The following definitions illustrate the commonalities and variations between the LGBT populations:

- Lesbian – a girl physically, emotionally, and mentally attracted to other females.
 - Gay – a person physically, emotionally, and mentally attracted to same gender.
- This

- term is employed either to solely establish men or all sexual minority people.
- Bisexual – a person who is physically, emotionally, and mentally attracted to both genders.
- Transgender – an individual whose self-identity as male or feminine differs from their anatomical sex determination at birth.²²

LGBT in Republic of India has been documented for various times, in recent times thanks to unbanning of sexual activity and promotion of LGBT rights which has contributed to large number of researches and opinions concerning the LGBT in Republic of India. No individual has been executed for sexual activity in Indian history.²³ In India, sexuality has long been a silent battleground. Each decade has taught us more about the ways in which it underlies almost every aspect of our lives, making the socially enforced silence that envelops issues of gender and sexuality seem increasingly more deafening.²⁴ Homosexuality is not a new concept in India though nobody talks about it. Sexuality minorities have always existed in India

¹⁸ LGBT Rights in India, <https://www.ijlmh.com/wp-content/uploads/2019/03/LGBT-Rights-in-India.pdf> (last visited Dec 3, 2021).

¹⁹ Available at: <https://en.oxforddictionaries.com/definition/homosexuality> (last visited Dec 3, 2021).

²⁰ Available at: <https://thelawdictionary.org/homosexual/> (last visited Dec 3, 2021).

²¹ Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal, <https://blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/> (last visited Dec 3, 2021).

²² Peter Gamache, & Katherine J. Lazear, Lesbian,

Gay, Bisexual, Transgender, Questioning, Intersex, and Two Spirit (LGBTQI2-S), available at: <http://rtckids.fmhi.usf.edu/rtepubs/FamExp/lgbt-mono.pdf> (last visited Dec 3, 2021).

²³ Being LGBT In India: Some Home Truths, <https://www.ijser.org/researchpaper/ASSIGNMENT-TITLE-BEING-LGBT-IN-INDIA-SOME-HOME-TRUTHS.pdf> (last visited Dec 3, 2021).

²⁴ Recognition and Protection of LGBT Rights: LGBT rights in India- An Ignored Identity, http://ijariie.com/AdminUploadPdf/Recognition_and_Protection_of_LGBT_Rights_LGBT_rights_in_India_An_Ignored_Identity_ijariie3513.pdf (last visited Dec 3, 2021).

sometimes in forms, which are culturally sanctioned (such as the Eunuchs) and at other times in invisibility and silence, their issues have never seriously been articulated.²⁵

There is a need to protect LGBT community from discrimination by the State and Societal Discrimination. LGBT people are abused, raped and murdered because of their sexual orientation and gender expression.²⁶

V. UNFOLDING OF THE OF LGBT RIGHTS IN INDIA: EVOLVING THE SENSE OF LIVING FREE WITH DIGNITY

The history of the legal campaign for the rights of LGBTI persons in India largely started with the legal challenge to Section 377 of the Indian Penal Code. Section 377 is an anti-sodomy provision derived from the Indian Penal Code of 1860, which reads as follows:²⁷

377. Unnatural offences. —Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.²⁸

6th of September 2018 was not an ordinary day. Something momentous happened on the day that

“blew a life of “constitutionality” in the dead members of the LGBTQIA+ community, who have been subjected to centuries of mind-numbing toil. What marked the day special for the LGBT+ community was that the Supreme Court of India delivered a historical verdict decriminalising homosexuality by partially striking down Section 377 of IPC.²⁹

In 2018, at a time when the LGBTI and the transgender movement had gained great social acceptance and the community was waiting with bated breath for a decision from the Supreme Court, on 6th September 2018, the Supreme Court in a 5-judge Bench, led by the Chief Justice unanimously held in **Navtej Johar v. Union of India** that Section 377 was unconstitutional to the extent that it criminalizes consensual relationships of any kind between adults and overruled Koushal. The impact of the Navtej decision is unprecedented.³⁰ The court unanimously ruled that Section 377 is unconstitutional as it infringes the fundamental rights of intimacy, autonomy and identity. and decriminalised homosexuality by reading down Section 377 to exclude consensual intercourse between adults of the same sex/gender.³¹ The court rationalised that the Section 377 is vague and does not create intelligible differentia between what is “natural” and what is “unnatural”. It also curbs freedom of expressing one’s sexual identity, i.e. right to freedom of expression as enshrined under Article 19 of the

²⁵ *Id.*

²⁶ *Id.*

²⁷Section 377 and Beyond A New Era for Transgender Equality?, <https://clpr.org.in/wp-content/uploads/2019/06/Section-377-and-Beyond.pdf>(last visited Dec 3, 2021).

²⁸ Section 377 in The Indian Penal Code, <https://indiankanoon.org/doc/1836974/>(last visited Dec 3, 2021).

²⁹ *Supra Note 20.*

³⁰ *Supra Note 26.*

³¹ *Supra Note 28.*

Indian constitution.³² In his collective judgment with Justice A M Khanwilkar, it was further stated that: **“Section 377 fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction,” they said.**³³

The Supreme court also directed the government to create public awareness regarding LGBT rights and to eliminate the stigma surrounding the LGBT people. The judges further elaborated upon the issues surrounding mental health, dignity, privacy, right to self-determination and transgenders.³⁴ Millions of Indians belonging to the LGBT community and their numerous supporters waited anxiously for the Supreme Court ruling on Section 377 of IPC, a law that was made in the colonial era and still continued to prevail in the modern and liberal India, where it had no place. For decades, countless people belonging to the LGBT community were smothered by the vague and archival stipulation that homosexuality is against the order of nature.³⁵ This judgement provided all the members belonging to the LGBT Community to have a dignified life with equality in all spheres. There will be no bar on the freedom of expressing

one’s sexual identity. Human sexuality and gender identity cannot be confined to a binary.³⁶ . The first attempt to question the constitutional validity of Section 377 of IPC was made by a Delhi based NGO called Naz Foundation, in the case of Naz Foundation v. Govt. of NCT of Delhi,³⁷ in which the Delhi High Court held the present section to be unconstitutional. Later, in an unfortunate turn of events, the judgment was overruled by the Supreme Court and Section 377 was recriminalized.³⁸

VI. CULMINATING REMARKS

The decriminalization of this age-old law was received with tears of joy, hope and euphoria. The stance of the judges on this issue was applauded and appreciated by millions of people in the country and all over the world. This path breaking judgment has become a beacon of hope and a soothing reassurance for many young people. It had proved to the many LGBT activists that their struggle had not been vain.³⁹ While this historical and landmark judgment was celebrated for validating the rights and liberties of LGBT people, it has also shed light on the ugly and intolerant attitude of the people who are against homosexuality. Certain sections of our society are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes and bigoted perceptions.⁴⁰ There is an urgent need to

³² *Id.*

³³ Decriminalization of Section 377: The Attitude of the Indian Society towards Homosexuality., <https://www.ijlmh.com/wp-content/uploads/2019/03/Decriminalization-of-Section-377-The-Attitude-of-the-Indian-Society-towards-Homosexuality.pdf>(last visited Dec 3, 2021).

³⁴ *Supra Note 31.*

³⁵ *Supra Note 32.*

³⁶ National Legal Services Authority v. Union of India, (2014) 5 SCC 438

³⁷ W.P(C) No. 7455/2001.

³⁸ Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors., Civil Appeal No. 10972 of 2013.

³⁹ *Supra Note 34.*

⁴⁰ *Id.*

get the mentality and attitude of the people changed so that they accommodate every individual irrespective of his or her physical appearance, social background, social status and sexual preferences.

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