INTernational Strategies on LGBT Dignity

In this chapter, an exertion has been made to focus a bird’s eye view on the International Strategies on LGBT Dignity such as the evolution of LGBT movement, Homophile movement, Gay liberation on LGBT dignity along with Yogyakarta principles and jurisprudence of European court followed by certain case laws with vividly delineation.

4.1 Evolution of LGBT Movement

LGBT dignity is protected in many of the nations today. But, the history reveals that many of the LGBT personnel were brutally treated by the other civilians in past. Historians agreed that there were the traces of homosexual activity and same-sex love in every documented culture, whether they are recognized or persecuted. It was argued that Sexual Orientation and Gender Identity (SOGI) are innate and cannot be consciously changed by conversion theory, the belief that sexual orientation cannot be changed. SOGI was often regarded as immoral by the religious beliefs.

In eighteenth- and nineteenth-centuries in Europe, same-sex sexual behavior was widely considered to be socially unacceptable, and was a serious crime under sodomy and sumptuary laws. Social reformer Jeremy Bentham wrote the first known argument for homosexual law that homosexuality was a victimless crime, and therefore not deserving for social approbation or criminal charges. He regarded popular negative attitudes against homosexuality as an irrational prejudice, fanned and perpetuated by religious teachings. ¹ However, he did not publicize his views as he feared reprisal and finally was published in 1978. In 1791, France became the first Nation to decriminalize homosexuality, by Napoleonic Code by Jean Jacques Régis de Cambacérès. In 1792, groups of

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¹ Bentham, Jeremy, *Offences Against One's Self*, c1785
militant "sodomite-citizens" in Paris petitioned the Assemblée nationale, the
governing body of the French Revolution, for freedom and recognition.\(^2\) With the
introduction of the Napoleonic Code in 1808, the Duchy of Warsaw also
decriminalized homosexuality.\(^3\)

In 1830, the new Penal Code of the Brazilian Empire made sodomy a
crime. Social attitudes to homosexuality became more hostile during the late
Victorian era. In 1885, the Labouchere Amendment was included in the Criminal
Law Amendment Act, which criminalized 'any act of gross indecency with
another male person'; the charge which was invoked successfully to convict
Oscar Wilde, a play writer in 1895. Since then the movement took a different
medium, poetic and authors’ club started propagating against criminalization of
homosexuality. In 1897, George Cecil Ives, founded the first homosexual rights
group with recruitment of several poets. A friend of Ives, Edward Carpenter, an
English socialist poet thought that homosexuality was an innate and natural
human characteristic and that it should not be regarded as a sin or a criminal
offence. His 1908 book on the subject, *The Intermediate Sex*, would become a
foundational text of the LGBT movements of the 20th century.

However, the formal study of homosexuality started and understood by
the European doctors and scientists, including Sigmund Freud and Magnus
Hirschfield. They identified that homosexual or bisexual orientation occurs
naturally and Freud himself did not consider homosexuality an illness or a crime.
The Freud's theory that same-sex attraction was caused by childhood trauma and
was curable\(^4\) was challenged later by Ellis and Krafft-Ebing.

Hirschfield founded Berlin's Institute for Sexual Science in 1919 and
Europe's best library archive of materials on gay cultural history. With the rise of
Hitler's Third Reich, however, the former tolerance demonstrated by Germany's


\(^3\) http://www.glbtqarchive.com/ssh/poland_S.pdf., *The Encyclopedia of Gay, Lesbian, Bisexual,
Transgender, and Queer Culture*.

\(^4\) Doan, p. XIII.
Scientific Humanitarian Committee vanished. Hirschfield's great library was destroyed and the books were burnt by Nazis on May 10, 1933. USSR's Criminal Code of 1922 decriminalized homosexuality. This was a remarkable step in freeing sexual relationships and expanding women rights. During Stalin’s era, USSR reverted all these progressive measures – re-criminalizing homosexuality and imprisoning gay men and banning abortion.

### 4.1.1 Homophile Movement

Immediately following World War II, a number of homosexual rights groups came into being or was revived across the Western world, in Britain, France, Germany, the Netherlands, the Scandinavian countries and the United States. These groups usually preferred the term *homophile* to *homosexual*, emphasizing love over sex. The homophile movement began in the late 1940s with groups in the Netherlands and Denmark, and continued throughout the 1950s and 1960s with groups in Sweden, Norway, the United States, France, Britain and elsewhere.

In the United States, few attempts were made to create advocacy groups supporting gay and lesbian relationships until after World War II, although pre-war gay life flourished in urban centers such as Greenwich Village and Harlem during the Harlem Renaissance of the 1920s. Greater awareness, coupled with Senator Joseph McCarthy's investigation of homosexuals holding government jobs during the early 1950s, led to the first American-based political demands for fair treatment in mental health, public policy, and employment. Throughout the 1950s and 60s, gay men and lesbians continued to be at risk for psychiatric lockup and jail and for losing jobs or child custody when courts and clinics defined gay love as sick, criminal, or immoral. One, Inc., the first public homosexual organization in the U.S. The first organization acknowledging gay

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men as an oppressed cultural minority was the Mattachine Society, founded in 1950 by Harry Hay and Chuck Rowland. The first lesbian support network, Daughters of Bilitis, founded in 1955 by Phyllis Lyon and Del Martin. These first organizations soon found support from prominent sociologists and psychologists. In 1951, Donald Webster Cory published *The Homosexual in America* (Cory, 1951), asserting that gay men and lesbians were a legitimate minority group, and in 1953, Dr. Evelyn Hooker won a grant from the National Institute of Mental Health (NIMH) to study gay men. Her ground breaking paper, presented in 1956, demonstrated that gay men were as well adjusted as heterosexual men, often more so. Subsequently in 1973, the American Psychiatric Association removed homosexuality as an "illness" classification in its diagnostic manuals. Illinois becomes the first State in the U.S. to decriminalize homosexual acts between consenting adults in private.

The civil rights movement took a new form in 1965, after a new legislation outlawing the racial discrimination against LGBT in demonstrations took place in Philadelphia and Washington, DC, led by longtime activists Frank Kameny and Barbara Gittings. Meanwhile, in San Francisco, the LGBT youth organization Vanguard was formed by Adrian Ravarour to demonstrate for equality, and Vanguard members protested for equal rights during the months of April–July 1966, followed by the August, 1966 Compton's riot, where transgender street prostitutes in the poor neighborhood of Tenderloin rioted against police harassment at a popular all-night restaurant, Gene Compton's Cafeteria. This led to the introduction of Sexual Offences Bill, 1967 supported by Labour M.P. Roy Jenkins, the then Labour Home Secretary. When passed, The Sexual Offences Act decriminalized homosexual acts between two men over 21 years of age *in private* in England and Wales. As the socialist and cultural conditions in India were against the recognition of LGBT, there is no any movement which aimed at LGBT rights in India.

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4.1.2 Gay Liberation Movement

The turning point for gay liberation came on June 28, 1969, when patrons of the popular Stonewall Inn in New York's Greenwich Village fought back against ongoing police raids of their neighborhood bar. Stonewall is still considered a watershed moment of gay pride and has been commemorated since the 1970s with "pride marches" held every June across the United States. A scholarship is also called for better acknowledgement of transgender patrons and minorities in the Stonewall riots. Immediately after Stonewall, such groups as the Gay Liberation Front (GLF) and the Gay Activists' Alliance (GAA) were formed. Their use of the word gay represented a new unapologetic defiance as an antonym for straight ("respectable sexual behaviour").

In 1970's, the gay liberation movement experienced myriad political organizations spring up. The gay liberation groups, lesbians formed their own collectives, record labels, music festivals, newspapers, bookstores, and publishing houses called for lesbian rights as they were frustrated with the male leadership, with the feminine groups like National Organization for Women. With the expanded religious acceptance for gay men and women of faith, the first out gay minister was ordained by the United Church of Christ in 1972. Other gay and lesbian church and synagogue congregations soon followed. Parents and Friends of Lesbians and Gays (PFLAG), formed in 1972, offered family members greater support roles in the gay rights movement. In 1972, Sweden became the first country in the world to allow people who were transsexual by legislation to surgically change their sex and provide free hormone replacement therapy. Sweden also permitted the age of consent for same-sex partners to be at age 15, making it equal to heterosexual couples. Political action exploded through the National Gay and Lesbian Task Force, the Human Rights Campaign, the election of openly gay and lesbian representatives like Elaine Noble and Barney Frank, and, in 1979, the first march on Washington for gay rights.
In India, Shakuntala Devi published the first study of homosexuality in India. Homosexual intercourse was a criminal offence under Section 377 of the Indian Penal Code, 1860. This made it an offence for a person to voluntarily have "carnal intercourse against the order of nature."

4.2 LGBT MOVEMENT

After the anarchist Gay Liberation movement of the early 1970s, arises a more reformist and single-issue Gay Rights movement, which portrayed gays and lesbians as a minority group and used the language of civil rights. Gay and lesbian rights advocates argued that one's sexual orientation does not reflect on one's gender; that is, "you can be a man and desire a man... without any implications for your gender identity as a man," and the same is true if you are a woman. In 1974, Maureen Colquhoun came out as the first Lesbian M.P for the Labour Party in the UK. When elected she was married in a heterosexual marriage. In 1977, Harvey Milk was elected to the San Francisco Board of Supervisors becoming the first openly gay man in the United States elected to public office. In 1979, Sweden became the first country in the world to remove homosexuality as an illness. Another setback in the United States occurred in 1986, when the US Supreme Court upheld a Georgia anti-sodomy law in the case Bowers vs. Hardwick. (This ruling would be overturned two decades later in Lawrence vs. Texas).

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10 "Where are they now: Maureen Colquhoun".


12 478 U.S. 186 (1986)

In 1980’s the gay male community was decimated by the AIDS epidemic. This broke out a demand for compassion and medical funding led to renewed coalitions between men and women as well as angry street theatre by groups like AIDS Coalition to Unleash Power (ACT UP) and Queer Nation. The military started expulsion of the infected people. In 1993, “Don’t ask, don’t tell” policy was passed for permitting gays to serve in the military but banning homosexual activity. A different wing of the political rights movement called for an end to military expulsion, with the high-profile case of Col. Margarethe Cammermeyer publicized through a made-for-television movie, "Serving in Silence.” The patriotism eventually resulted in uncomfortable compromise to decades of military witch hunts and dishonorable discharges.

In the last decade of 20th century, heralding a new era of gay celebrity power and media visibility, actress Ellen DeGeneres came out on national television in April 1997. Many of LGBT have become the celebrity performers and they called for tolerance and equal rights. As a result of their hard work and by countless organizations, the 21st century heralded new legal gains for gay and lesbian couples. Same-sex civil unions were recognized under Vermont law in 2000, and Massachusetts became the first state to perform same-sex marriages in 2003. In 2003, in the case of Lawrence vs. Texas, the Supreme Court of the United States struck down sodomy laws in fourteen states, making consensual homosexual sex as legal in all 50 states, a significant step forward in LGBT activism and one that had been fought for by activists since the inception of modern LGBT social movements.

The Netherlands was the first country to allow same-sex marriage in 2001. In 2006, November, the Yogyakarta principles were adopted on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (SOGI) in meeting of 29 specialists, the International Commission of Jurists and the International Service for Human Rights. The UN declaration on

14 Supra.
15 Cordova, Jeanne, When We Were Outlaws (2011) p 51-56.
sexual orientation and gender identity was adopted by the United Nations General Assembly on 13th December 2008. In 2009, the Delhi High Court in *Naz Foundation vs. Govt. of NCT of Delhi*\(^{16}\) held that Sec 377 of IPC is in direct violation of fundamental rights of LGBT.

Iceland became the first country in the world to legalize the same-sex marriage through a unanimous vote: 49-0, on 11 June 2010.\(^{17}\) A month later, Argentina became the first country in Latin America to legalize the same-sex marriage. On June 26, 2015, the Supreme Court ruled that the Constitution requires that same-sex couples be allowed to marry no matter where they live in the United States.\(^{18}\) With this ruling, the United States became the 17th country to legalize the same-sex marriages entirely.\(^{19}\) As of 2016, same-sex marriages are also recognized in Sweden, Argentina, Belgium, Canada, Iceland, Norway, South Africa, Spain, Portugal, Denmark, Uruguay, Brazil, France, Colombia, New Zealand, Mexico, Israel (though not performed there), and the United States.\(^{20}\)

### 4.3 HUMAN RIGHTS VIOLATION AGAINST LGBT

People of all sexual orientations and gender identities are entitled to the full enjoyment of human rights.\(^{21}\) Everyone has a sexual orientation and a gender identity, and this shared fact means that discrimination against members of the Lesbian, Gay, Bisexual and Transgender community, based on sexual orientation and/or gender identity, is an issue that transcends that community and affects all of us.

\(^{16}\) 160 Delhi Law Times 277  
\(^{21}\) The Yogyakarta principles on the application of International Human Rights Law in relation to sexual orientation and gender identity, Article 1.
Human rights in relation to sexual orientation or gender identity include, for example, the right to:

- freedom from discrimination
- recognition as a person before the law
- life, liberty and security of the person
- freedom from arbitrary detention and to a fair trial
- an adequate standard of living, including decent work and housing
- education
- health and protection from medical abuses
- found a family including right to have children by adoption or otherwise
- participate in public life and in cultural life
- freedom of expression
- freedom of association and peaceful assembly
- freedom of thought, conscience and religion
- pass on the property to their heirs

Despite international human rights standards’ applying to all people, everywhere, the international context has been characterized by tensions in states’ discussions of sexual orientation and gender identity. These tensions have emerged from the historical absence of a specific human rights standard in relation to sexual orientation and/or gender identity and in the light of steps towards inclusion. In this perspective, the ‘Yogyakarta Principles’ become widely recognized as a useful statement of International Human Rights law. These principles have also been used to advocate for the promotion and protection of sexual and gender minorities.

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23 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 in which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfill that precious birth right.
The United Nations Human Rights Office has prescribed some of the human rights violations committed against the individuals on the basis of Sexual Orientation and Gender Identity (SOGI):

*These include:*

(i) Violent attacks, ranging from aggressive verbal abuse and psychological bullying to physical assault, beatings, torture, kidnapping and targeted killings.

(ii) Discriminatory criminal laws, often used to harass and punish the LGBT people, including laws criminalizing the consensual same-sex relationships, which violate rights to privacy and to freedom from discrimination.

(iii) Discriminatory curbs on free speech and related restrictions on the exercise of rights to freedom of association and assembly, including laws banning dissemination of information on same-sex sexuality under the guise of restricting the spread of so-called LGBT “propaganda.”

(iv) Discriminatory treatment, which can take place in a range of everyday settings, including workplaces, schools, family homes and hospitals. Without national laws prohibiting discrimination by third parties on the grounds of sexual orientation and gender identity, such discriminatory treatment continues unchecked, leaving little recourse to those affected. In this context, lack of legal recognition of the same-sex relationships or of a person’s gender identity can also have a discriminatory impact on many LGBT individuals.

(v) It remains legal in 44 States for employees to discriminate against employees on the basis of sexual orientation and on the basis of gender identity and/or gender expression.

(vi) LGBT students are exposed to rejection at home and at school, creating a greater need for appropriate advice, health education, and referrals to available resources from supportive adults.

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25 Like Wisconsin, New Hampshire States in US etc..

26 By Julie Gerdo, Empire State College
(vii) LGBTI persons are discriminated against during disasters, being perceived as lower priority for rescue efforts, families with the same sex partners being excluded from distribution of food and other basic supplies and difficulty visiting the injured partners and claiming the bodies of the deceased partners.28

These are the usual forms of violation of Human Rights against the LGBT. If you take a look at the each issue and statistics of the persons affected, shows the real need to redress the problem in a prompt way.

4.3.1 Violence

According to UN’s first report on LGBT persons in 201129, homophobic and trans-phobic violence has been recorded in every region of the world. Violations include –but are not limited to –killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education. The incidents against LGBT group show a high degree of cruelty and brutality and include beating, torture, mutilation, castration and sexual assault. In one survey in Republic of Georgia, 32% of LGBT individuals reported having experienced physical violence30. In some countries, (e.g., EI Salvador, Kyrgyzstan, South Africa) it has been reported that lesbian, bisexual and transgender women are at risk of being raped or forcibly impregnated, in some cases due to widely held beliefs that women who are raped by a man will change their sexual orientation to conform to societal expectations. LGBT people are more likely to be targets of hate crimes than any other minority group. There are numerous reports detailing

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28 Kyle Knight(Journalist) and Courtney Welton-Mitchell(University of Denver) while studying the relocation efforts following floods in Southern Nepal in 2008.
the targeted killings of LGBT people, including 31 in Honduras over an 18 month period, 44 bias- motivated killings in the Organization for Security and Cooperation in Europe (OSCE) region in 2009. In addition to that, LGBT people may be particularly susceptible to being pulled into larger conflicts by virtue of their marginalized status, with fewer resources to defend themselves.

LGBT persons have also suffered violent attacks in response to peaceful advocacy campaigns and demonstrations. LGBT leaders and civil society activists have been targeted by the most extreme forms of violence. Specific examples include the murder of transgender teen Dwayne Jones in Jamaica, LGBT activist, David Kato in Uganda, and the torture and murder of Eric Ohena Lembembe, the director of Cameroonian Foundation for AIDS in Cameroon. In 2007, the director of the Kosovo LGBT organization received repeated death threats; after the police offered no protection, he was forced to flee the country.\footnote{IGLA, ILGA - Europe’s submission to the European Commission’s 2010 progress report on Kosovo, 2010, The International Lesbian and Gay Association: Brussels.} In general, because of the lack of systems in place for reporting or monitoring the cases of violence or human rights violations directed at LGBT persons, the prevalence of these phenomena is very difficult to accurately ascertain.

On June 12, 2016, the attack on an Orlando nightclub, a gay night club, left 49 dead and 53 wounded at the gay nightclub Pulse. The incident was the deadliest mass shooting in the United States history. The attacks on the LGBT are also in the form of the homicides. National Coalition of Anti-Violence Programs, [AVP]’s most recent annual report, released last October, documented 18 anti-LGBT homicides in 2013. Almost 90 percent of the victims were people of color, and more than two-thirds were transgender women, where as in 2014, the number of attacks was increased to 25.\footnote{The Huffington Post, dated on 27th August, 2016.}
Legal Barriers

LGBT individuals and groups face a multitude of legal barriers, including criminalization of their sexual orientation and/or gender identity. Seventy-six countries and territories currently criminalize same-sex sexual relations and in at least 5 countries they may be sentenced to death on the basis of consensual sexual activities. In the majority of the countries, there is no non-discrimination statute regarding employment, access to housing, and government services is inclusive of sexual orientation and gender identity.

The lack of legal recognition for transgender persons has placed them outside laws that protect citizens from abuse and discrimination, and hinders their access to health, education, and other social services. Laws banning homosexual propaganda to minors in some Eurasian countries have raised fears that any show of public support for LGBT people could result in fines or arrest.

‘Hate speech’ is another form of violence against the LGBT which is growing at an alarming rate. The students are the worst victims of bullying.

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33 Algeria, Angola, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi (enforcement of law suspended), Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe, Afghanistan, Bangladesh, Bhutan, Brunei, Daesh (or ISIS / ISIL), India, Iran, Iraq, Kuwait, Lebanon (law ruled invalid in one court), Malaysia, Maldives, Myanmar, Oman, Pakistan, Palestine/Gaza Strip, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen, Antigua & Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Trinidad & Tobago Cook Islands, Indonesia (Aceh Province and South Sumatra), Kirbati, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu
LGBT youth deal with bullying in the form of harassment, violence, and attacks. Mental Health America conducted a study in 1998. They found that students constantly heard bigoted verbal abuse from name-calling like “homo”, “fag” or “sissy” more than two dozen times per day, which is one derogatory comment every fifteen minutes of each day. Lesbian, gay, bisexual, and transgender (LGBT) youth are coming out at younger ages than ever before, a trend that dramatically impacts their education and experience at school. One recent study found that the average age gay and lesbian teenagers first self-identify is 16. In the 1980s, when the average age for self-identification was 19 to 21 for gay men and 21 to 23 for lesbians, the coming-out process for most young adults occurred either during college, or after having established an independent life. Self-identification at an earlier age can expose students to rejection at home and at school; creating a greater need for appropriate advice, health education, and referrals to available resources from supportive adults. The National School Climate Survey conducted by GLSEN in 2011 reported these statistics on bullying:

- 82% of LGBT youth had problems during the previous year with bullying about sexual orientation.
- 64% felt unsafe at school due to sexual orientation.
- 44% felt unsafe at school due to gender identification.
- 32% did not go to school for at least one day because of feeling unsafe.

GLSEN also reported that of the bullied LGBT youth, 44% experienced physical harassment and 22% experienced stronger violence. 61% of LGBT youth never reported the attacks. Of those that did report the attacks, 31% said that the school made no effort to respond. A report produced by the U.S. Department of Health and Human Services in 1989 found that gay and lesbian youth are two to three times more likely to attempt suicide than their heterosexual

37 Gay Lesbian Straight Educational Network.
peers, and that up to 30% of all completed suicides are committed by gay and lesbian youth. Up to 35% of homeless youth identify as gay or lesbian, and many engage in sex work (prostitution) to feed and support themselves.

Discriminatory treatment of LGBT at workplace, everyday settings, family homes and hospitals became another major impediment in protecting the rights of the LGBT individuals and groups. Recently, in Southern Nepal, in 2008, during the floods, the LGBT community was discriminated and was given lower priority for rescue and for mitigation of their families. They were also excluded from food supply and other basic supplies. An LGBT was distressed when she was relocated to a plot of land far away from her previous home. “We are safe when we are in the communities who know us and have seen us as we are”, she said. “But when we have to start in a new place, it doesn’t matter if the government gives us money or a house – we are not safe and we have to hide again.” With this we can easily understand the living conditions and security given to that of the LGBT in the society.

However, accessing health care services is among the most daunting challenges to the LGBT community confronts. Those who seek health care often encounter rejection, humiliation, derision, or at best sub-standard services. Homophobia, stigma (negative and usually unfair beliefs), and discrimination (unfairly treating a person or group of people) against gay, bisexual, and other men who have sex with men still exist in the countries and can negatively affect the health and well-being of this community. The LGBT individuals are discriminated against others in medical treatment. The health care providers, government hospitals lack basic information and training about distinct health

conditions and prescribing appropriate medical practices for LGBT. HRC is working on this issue and to transform hospitals to LGBT–friendly hospitals. HIV/AIDS health care distinctively illustrates the pervasive impacts of discrimination on LGBT community. While HIV rates among the general population are falling in many countries, the HIV infection among gay men and men who have sex with men (MSM) and transgender persons is disproportionately high and among youth also. MSM are 19 percent more likely to be affected by HIV compared to the general public. HIV prevalence rate of LGBT is alarmingly high, ranging from 8 percent to 68 percent. This stigma and social and legal obstacles block the LGBT community mobilization. So, there is a need to check impediments in delaying access to the life saving treatment services and provide for rehabilitation of the LGBT community.

Yet, another area where the LGBT facing the violation of their Human Rights is Discrimination at work place. According to surveys done by UCLA’s William's Institute, approximately four percent of the United States workforce identifies as lesbian, gay, bisexual or transgendered (LGBT). The LGBT workforce continues to face widespread discrimination in the workplace with 21 percent of LGBT employees reporting that they have been discriminated against in hiring, promotions and pay. Furthermore, one out of every 25 complaints made about workplace discrimination comes from LGBT employees. At present, too many gay and transgendered workers are being judged based on their sexual orientation and gender identity factors of which have no impact on an individual's ability to perform in a workplace setting. With this deprivation, most of the LGBT youth are discouraged and as a consequence they are committing suicides or becoming criminals and even they are doing prostitution and other illegal acts to feed themselves.

41 Beyrer, C., et al., The global epidemics in men who have sex with men (MSM): time to act, AIDS, 2013.27:
LGBT participation in democratic process, public offices, and their role in decision making and in the government is limited and almost nil. The lack of participation in civil society and in the democratic process resulted in a great gap between the laws and the actual life of the LGBT individuals. In many countries, LGBT CSOs have been left out of development dialogue and process. Globally, the number of CSOs working on the human rights and well-being of the LGBT persons remains relatively small and many of these struggles financially. Many LGBT-focused CSOs have the difficulty to locate a safe place to conduct their meetings and operate or engage publicly on issues relating to their cause.43

Discrimination and laws which do not recognize LGBT contribute to poverty. Equality is not only a matter of human rights, but also critical to sustainable development. A recent World Bank study estimates that the economic cost of LGBT discrimination is as high as 1.7 percent of global GDP. Simply put, LGBT discrimination stifles innovation, curbs economic growth and locks people into the devastating wheel of extreme poverty. This can be by various reasons like LGBT are abandoned by their family and living in with a very poor amenities and they were deprived and impacted by discriminatory employment practices, which render them vulnerable to poverty and predispose them to risky and illegal occupations. This negatively impacts their earning potential and ability to contribute to the economic development. Data from the United States show that transgender adults are four times more likely than the general population to have household incomes less than $10,000 a year, and 16 percent reported sex work or other underground activities as a means for earning income.44 Transgender persons in Guatemala, El Salvador, Peru and Chile are also disproportionately represented among sex workers.45 Working sex industry, in turn, may increase the risk that diseases may affect some LGBT sub-populations may be transmitted to uninfected people.

4.4 COVENANTS ON LGBT DIGNITY

The United Nations’ UN General Assembly proclaimed the Universal Declaration of Human Rights (UDHR) on 10th December, 1948.\textsuperscript{46} This document was published at a time when homosexuality was regarded as a mental illness by most therapists, as a criminal act by most governments, and as the ultimate sin by many faith groups. Understanding of transgender/transsexual persons was then in its infancy. The United Nations General Assembly, in a series of resolutions, has called on States to ensure the protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings including those motivated by the victim’s sexual orientation and gender identity.\textsuperscript{47} Article 1 of the Universal Declaration of Human Rights states that ‘all human beings are born free and equal in dignity and rights’

The right to express one’s sexuality or the right to sexuality relates to the human rights of the people of diverse sexual orientation, including lesbian, gay, bisexual and transgender (LGBT) people and should be free from discrimination on the ground of Sexual Orientation and Gender Identity (SOGI). The right to sexuality and freedom from discrimination is based on the universality of human rights and the inalienable nature of rights belonging to every person by virtue of being human. The right to sexuality is difficult to define as it consists of various rights in the context of human rights.

The right to sexuality doesn’t expressly enumerated in International Human Rights Law; but it is founded in many of International Human Rights Instruments including Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Sexual orientation is defined in the Preamble to the Yogyakarta Principles as "each person’s capacity for profound emotional, affection and sexual attraction

\textsuperscript{46} The UDHR text is at: http://www.un.org/
\textsuperscript{47} see, for example, resolution A/RES/67/168
to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”. 48

Freedom from discrimination on the grounds of sexual orientation is found in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.49 The discrimination based on ‘sex’ contained in Article 2 can be construed as ‘sexual orientation’. In the ICCPR, it was stated that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”50 The reference to ‘sex’ in Article 2 of the ICCPR includes sexual orientation and sexual orientation is prohibited grounds of distinction in respect of enjoyment of rights under the ICCPR.51 This right of LGBT against discrimination is also related to the fundamental rights of a person.

Sexual orientation is not stated explicitly as a ground of discrimination in Article 26 of the International Covenant on Civil and Political Rights. The United Nations Human Rights Committee, however, has established that Article 26 also includes lesbian, gay and bisexual people. The UN Committee on Economic, Social and Cultural Rights emphasised in 2009 that both sexual orientation and

48 The Yogyakarta Principles, Preamble.
49 Article 2 of the Universal Declaration of Human Rights (UDHR).
50 Article 2 of the International Covenant on Civil and Political Rights (ICCPR).
51 Toonen V. Australia. , CCPR/C/WG/44/D/488/1992 (Working Group’s rule 91 decision, dated 10 April 1992)
gender identity were covered by the protection from discrimination in Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights.

Forms of discrimination against LGBT include the denial of right to life, the right to work and the right to privacy, non-recognition of personal and family relationships, interference with human dignity, interference with security of the person, violations of the right to be free from torture, discrimination in access to economic, social and cultural rights, including housing, health and education, and pressure to remain silent.\textsuperscript{52}

Violence against LGBT is vicious compared to other persons of society. Particularly a distressing example is the sexual assault and murder of fifteen lesbians in Thailand in March, 2012. In a case in Zimbabwe, the multiple rape of a lesbian was organised by her own family in an attempt to "cure" her of homosexuality.\textsuperscript{53} State law enforcement authorities are complicit in human rights abuses for failing to persecute violators of rights.

The right to privacy is not explicit but a protected freedom under the UDHR\textsuperscript{54} and the ICCPR\textsuperscript{55}. The European Court of Human Rights also held in number of cases that criminalisation of homosexual relationships is an interference with the right to privacy.\textsuperscript{56} The freedom to decide on one's own consensual adult relationships, including the gender of that person, without the interference of the State is a fundamental human right. To prohibit the relationships of people of diverse sexual orientation is a breach of the right to sexuality and the right to privacy.


\textsuperscript{54} Universal Declaration of Human Rights, Article 12.

\textsuperscript{55} International Covenant on Civil and Political Rights, Article 17.

\textsuperscript{56} Schlumpf v. Switzerland., 2009.
The right to Freedom of expression is a protected human right under Article 19 of the UDHR and Article 19 of the ICCPR, as is the right to freedom of assembly under Article 20 of the UDHR and Article 21 of the ICCPR. LGBT people are discriminated against in respect of their ability to defend and promote their rights. Gay pride marches, peaceful demonstrations and other events promoting LGBT rights are often banned by State governments.\(^{57}\)

The United Nations, even though founded in 1945, has not discussed the LGBT rights regarding equality regardless of sexual orientation and gender identity until December 2006, when Norway presented a joint statement on human rights violations based on sexual orientation and gender identity at the Commission of Human Rights on behalf of 54 States. This was followed by another joint statement presented at General Assembly by Argentina on behalf of 66 States in December 2008. However, those declarations have not been officially adopted by the General Assembly and remain open for signatories.

In 2003, Brazil tabled a resolution\(^{58}\) at the former UN Commission on Human Rights, stressing that human rights apply to all human beings regardless of sexual orientation. The resolution was indefinitely deferred. Since 2008, the 34 member countries of the Organization of American States have unanimously approved a series of resolutions affirming that the human rights protections extend to sexual orientation and gender identity.\(^{59}\) Discussions of LGBT rights at the United Nations have included resolutions and joint statements in the United Nations General Assembly and the United Nations Human Rights Council (UNHRC), attention by the expert led human rights mechanisms, such as the United Nations Treaty Bodies and Special Procedures, as well as by the UN Agencies.


\(^{58}\) Brazillian resolution, E/CN.4/2003/L.92

An early and important milestone was passed in 1994 when the World Health Organisation clarified that homosexuality was neither a disorder nor a disease when it removed sexual orientation from the International Classification of Diseases.\(^{60}\)

Since then, other UN entities have made efforts to integrate issues concerning LGBTI persons into their work, including the OHCHR, the United Nations Development Programme (UNDP), the United Nations International Children's Emergency Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Office of the United Nations Fund for High Commissioner for Refugees (UNHCR), the International Labour Organization (ILO), the United Nations Fund for Population Activities (UNFPA) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). For example, in 2013 the ILO issued the results of a pilot research on discrimination on the basis of sexual orientation and gender identity.\(^{61}\) In 2014, UNDP released a discussion paper on transgender health and human rights, and UNICEF published an issues paper on eliminating discrimination against children and parents based on sexual orientation and/or gender identity.\(^{62}\)

In the European Convention on Human Rights also, Sexual orientation is not explicitly stated as a ground of discrimination under Article 14 of the European Convention on Human Rights and Fundamental Freedoms\(^{63}\). In 1997, the then European Commission of Human Rights noted that it was not clear whether a difference based on sexual orientation is a difference based on ‘sex’ or on ‘other status’ for the purposes of Article 14 ECHR.\(^{64}\) This was clarified in

\(^{60}\) “Norms, case law and practices relevant to sexual orientation, gender identity and intersex status in the United Nations system (Annex 6)” (PDF).

\(^{61}\) Supra

\(^{62}\) Supra

\(^{63}\) ARTICLE 14: Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

\(^{64}\) European Commission of Human Rights Report, Sutherland v The UK (Application No 25186/94), report of 1 July 1997.
1999 in *Salgueiro da Silva Mouta v. Portugal*, where the European Court of Human Rights (ECtHR) stated that a difference based on a person’s sexual orientation is ‘a concept which is undoubtedly covered by Article 14 of the Convention’, adding that ‘the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as”’.\(^{65}\) From this, it may be concluded that the Court recognises sexual orientation as a discrimination ground in its own right, rather than conceiving of it as being part of either ‘sex’ or ‘other status’.

But, the European Court of Human Rights, in its jurisprudence made it evident that the convention has been considered applicable when a person has been discriminated against on grounds of sexual orientation, as the grounds of discrimination are not exhaustive. Sexual orientation is a concept covered by Article 14; differences based on sexual orientation require particularly serious reasons by way of justification.\(^{67}\)

Under Article 13 of the EC Treaty, the Council of the European Union has the option to take measures to combat discrimination on various grounds, including sexual orientation. On 27\(^{th}\) November, 2000, the Council Directive\(^{68}\) was adopted, establishing a general framework for equal treatment in employment and occupation, which includes a prohibition of discrimination on grounds of sexual orientation.

The European Parliament has also become involved in LGBT issues. In a resolution adopted on 18\(^{th}\) January, 2006, the European Parliament sharply condemned homophobia and all discrimination in Europe on grounds of sexual orientation. The Parliament urged both the Commission and the governments of

\(^{65}\) ECtHR, Salgueiro da Silva Mouta v Portugal, Application No 33290/96, Judgment of 21 December 1999, para. 28.


\(^{67}\) L. and V. v. Austria, 39392/98 & 39829/98, European Court of Human Rights

\(^{68}\) 2000/78/EC
the Member States to take measures to protect lesbians, gays and bisexuals from discrimination, hatred and violence. Article 21 in the Charter of Fundamental Rights of the European Union states that ‘discrimination on grounds of sexual orientation is prohibited’.

While the United Nations adopting different resolutions, there has been a demand to provide a consistent understanding about application of International Human Rights Law in relation to sexual orientation and gender identity. So, to meet this issue an International Seminar of legal Experts on Human Rights took place at Yogyakarta, Indonesia, from 6th to 9th November, 2006. The seminar clarified the nature, scope and implementation of states’ human rights obligations under existing human rights treaties and law, in relation to sexual orientation and gender identity. Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination against Women (CEDAW), Convention on the Elimination of All Forms of Discrimination Against Women deal with the matters of Yogyakarta principles.

The finalized Yogyakarta Principles was introduced as a global charter for gay rights on 26th March, 2007 at the United Nations Human Rights Council in Geneva. Michael O’Flaherty, spoke at the International Lesbian and Gay Association (ILGA) Conference in Lithuania on 27th October 2007; he explained that "all human rights belong to all of us. We have human rights because we exist not because we are gay or straight and irrespective of our gender identities", but that in many situations these human rights are not respected or realized, and that "the Yogyakarta Principles is to redress that situation". The Yogyakarta Principles were presented at a United Nations event in New York on 7th November 2007.

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4.4.1 The Yogyakarta principles can be understood simply as cited beneath:

- Principles 1 to 3 set out the universality of human rights and their application to all persons.
- Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention.
- Principles 12 to 18 set out non-discrimination in relation of economic, social and cultural rights, including employment, accommodation, social security, education and health.
- Principles 19 to 21 emphasize the importance of freedom of expression, identity and sexuality, without State interference, including peaceful assembly.
- Principles 22 and 23 set out the right to seek asylum from persecution of based on sexual orientation.
- Principles 24 to 26 set out the right to participate in family and cultural life and public affairs.
- Principle 27 sets out the right to promote and defend human rights without discrimination based on sexual orientation.
- Principles 28 and 29 emphasize the importance of holding those who violate human rights accountable and ensuring redress for those who face rights violations.

These principles influenced UN Declaration on sexual orientation and gender identity in 2008 and made reference to the Principles by the New Zealand Human Rights Commission in their November, 2007, report To Be Who I Am, on transgender rights. A reference to the Principles in the handbook published in January, 2008, on the protection of women and girls by the UN High Commission for Refugees. By these principles, the International Community stepped further in protection of rights of the LGBT persons.

In June 2011, the United Nations Human Rights Council became the first UN Intergovernmental Body to adopt a wide-ranging resolution on human rights, sexual orientation and gender identity. Resolution 17/19 expressed the Council’s
“grave concern” at violence and discrimination against individuals based on their sexual orientation and gender identity, and commissioned a study on the scope and extent of these violations and the measures needed to redress them.

The requested study, prepared by the Office of the High Commissioner for Human Rights, was released in December 2011. It pointed to a pattern of violence and discrimination directed at individuals because of their sexual orientation and gender identity. Its findings and recommendations formed on the basis of a panel discussion that took place at the Council in March, 2012 the first time a formal inter governmental debate on the subject had been taken place at the United Nations.71

In recent years, the General Assembly resolution on executions also covered gender identity as a ground for protection.72 It was therefore, an historic success when the UN Human Rights Council adopted a resolution on 17th June, 2011 which emphasised the equal value and rights of all people regardless of sexual orientation or gender identity. The resolution also expressed grave concern over the violence and discrimination affecting people as a result of their sexual orientation or gender identity and at the same time requested a study by the UN High Commissioner for Human Rights. The UNHRC adopted a second resolution related to sexual orientation and gender identity on September 26, 2014.73 The resolution calls a report from the Office of the High Commissioner for Human Rights on best practices for combating discrimination based on sexual orientation or gender identity.

4.5 JURISPRUDENCE OF THE EUROPEAN COURT

The European Court of Human Rights dealt with many cases and ruled out several judgments regarding the prohibition of inhuman or degrading


72 "Norms, case law and practices relevant to sexual orientation, gender identity and intersex status in the United Nations system (Annex 6)” (PDF).

treatment (Article 3 of the European Convention on Human Rights) like Conditions of detention, Risk arising from the return of homosexuals to their country of origin, Right to liberty and security (Article 5 of the Convention), Civil unions, Dismissal of claim for defamation, Exclusion from giving blood, Parental authority, Residence permit, Social protection (insurance cover, survivor’s allowances, etc.), Freedom of thought, conscience and religion (Article 9 of the Convention), Freedom of expression (Article 10 of the Convention), Freedom of assembly and association (Article 11 of the Convention), Right to marry (Article 12 of the Convention).

4.5.1 Prohibition of inhuman or degrading treatment (Article 3)

In Identoba and Others vs. Georgia, a peaceful demonstration organized by a non-governmental organization (NGO) in Tbilisi in May, 2012 to mark the International Day against Homophobia, which was violently disrupted by counter-demonstrators outnumbering the marchers. The 13 applicants who had participated in the march complained against Georgian authorities had failed to protect them from the violent attacks of the counter-demonstrators and to effectively investigate the incident by establishing, in particular, the discriminatory motive behind the attacks.

The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) taken in conjunction with Article 14 (prohibition of discrimination) of the Convention with respect to the 13 applicants who had participated in the march. The Court further found that, surrounded by an angry mob of people who outnumbered them, uttered serious threats and randomly used physical violence, the applicants must have felt fear, anguish and insecurity which were not compatible with respect for their human dignity. Moreover, the authorities, who knew or ought to have known of the risks surrounding the demonstration, had therefore been under an obligation, but had failed to provide adequate protection. Lastly, noting that Georgian criminal law provided that discrimination on the grounds of sexual orientation and gender identity should be treated as an aggravating circumstance in the commission of an
offence, the Court found that it would have been essential for the authorities to conduct the investigation in that specific context, which they had failed to do. They had accordingly failed to conduct a proper investigation into the 13 applicants’ allegations of ill-treatment.

M.C. and C.A. vs. Romania\textsuperscript{74} (Application No. 12060/12)

In June, 2006, the applicants participated in the annual gay march in Bucharest. On their way home in the metro, they were attacked by a group of six young men and a woman. The attackers punched and kicked them and shouted homophobic abuse at them. The applicants complained that the investigation into the attack against them had been inadequate. They alleged in particular that the authorities had not taken into account the fact that the offences against them had been motivated by hatred against homosexuals.

The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) read together with Article 14 (prohibition of discrimination) of the Convention, finding that the investigations into the applicants’ allegations of ill-treatment had been ineffective as they had lasted too long, had been marred by serious shortcomings, and had failed to take into account possible discriminatory motives.

A pending application regarding the ill treatment of LGBT is Aghdgomelashvili and Japaridze vs. Georgia,\textsuperscript{75} the complaint by two staff members of a NGO promoting LGBT rights of a police raid of the organization’s office, during which they were allegedly ill-treated and unlawfully searched. They further complain about the lack of an effective investigation. Finally, they allege that their ill-treatment, the interference with their private lives and the lack of an effective investigation into the alleged police abuse was due to the authorities’ discriminatory attitudes towards the applicants’ actual or perceived sexual orientation and/or their activities for the NGO.

\textsuperscript{74} application no. 12060/12
\textsuperscript{75} no. 7224/11
The Court gave notice of the application to the Georgian Government and 
put questions to the parties under Articles 3 (prohibition of inhuman or degrading 
treatment), 8 (right to respect for private life) and 14 (prohibition of 
discrimination) of the Convention, and under Article 1 (general prohibition of 
discrimination) of Protocol No. 12 to the Convention.

In detention also, the LGBT are facing many issues regarding their 
guaranteed dignity. In X. vs. Turkey76, a homosexual prisoner who, after 
complaining about acts of intimidation and bullying by his fellow inmates, was 
placed in solitary confinement for over 8 months in total.

The Court took the view that these detention conditions had caused the 
applicant mental and physical suffering, together with a feeling that he had been 
stripped of his dignity, thus representing “inhuman or degrading treatment” in 
breach of Article 3 (prohibition of inhuman or degrading treatment) of the 
Convention. The Court further found that the main reason for the applicant’s 
solitary confinement had not been his protection but rather his sexual orientation. 
It thus concluded that there had been discriminatory treatment in breach of 
Article 14 (prohibition of discrimination) of the Convention.

In Stasi vs. France, the applicant complained that he had been the victim 
of ill-treatment by other inmates during his imprisonment, in particular because 
of his homosexuality, and he alleged that the authorities had not taken the 
necessary measures to ensure his protection.

The Court held that there had been no violation of Article 3 (prohibition 
of inhuman or degrading treatment) of the Convention. It found that, in the 
circumstances of the case, and taking into account the facts that had been brought 
to their attention, the authorities had taken all the measures that could reasonably 
be expected of them to protect the applicant from physical harm.

76 no. 24626/09
The court also dealt with the issues of asylum and the risk arising from the return of homosexuals to their own countries. In *M.K.N. vs. Sweden*\(^77\), the applicant complained that he had had to leave Mosul (Iraq) because he was being persecuted on account of his Christian beliefs. He further alleged that, if returned to Iraq, he would be at risk of persecution for having had a homosexual relationship, the Mujahedin having already killed his partner.

The Court held that the implementation of the deportation order against the applicant would not give rise to a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. It found that, if removed to Iraq, the applicant would not be at risk as a result of the general situation in the country which was slowly improving. Furthermore, although there was evidence to show that his belonging to a vulnerable minority would expose him to a real risk to inhuman or degrading treatment if removed, the Court held that the applicant could reasonably relocate to other regions in Iraq such as Kurdistan in the north. Lastly, the Court considered that the applicant’s claim concerning the homosexual relationship was not credible.

Later in *M.E. vs. Sweden*\(^78\), the applicant, an asylum seeker, submitted in particular that, if he were forced to return to Libya to apply for family reunion from there, he would be at real risk of persecution and ill-treatment, primarily because of his homosexuality but also due to previous problems with the Libyan military authorities following his arrest for smuggling illegal weapons.

The Court noted that the applicant had been granted a residence permit by the Migration Board on 17\(^{th}\) December, 2014, which effectively repealed the expulsion order against him. The Board found that the security situation in Libya had deteriorated since the summer of 2014 and that the applicant, if expelled to his home country, would be at risk of persecution since he lived openly as a homosexual and could be expected to continue doing so on his return. He was  

\(^77\) no. 72413/10  
\(^78\) no. 71398/12
therefore in need of protection in Sweden. Although there was no friendly settlement between the parties, the Court considered that the potential violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention had now been removed and that the case had thus been resolved at national level. Nor did the Court accept the applicant’s argument that it should continue to examine his case as it raised serious issues of fundamental importance relating to homosexuals’ rights and how to assess those rights in asylum cases all over Europe, as the Migration Court had taken into account the applicant’s sexual orientation in its decision of 17th December 2014. The Court held that it was therefore appropriate to strike the application out of its list of cases.

4.5.2 Right to liberty and security (Article 5)

In *O.M. vs. Hungary*79, the applicant’s detention for 58 days following his request for asylum in Hungary, in which he stated that he had been forced to flee Iran, his country of origin, because of his homosexuality. In October 2014 he was recognized as a refugee. The applicant complained in particular that his detention had been arbitrary and unjustified.

The Court held that there had been a violation of Article 5 (right to liberty and security) of the Convention in the period between 25th June and 22nd August, 2014. It found in particular that the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran.

4.5.3 Right to respect for private and family life (Article 8)

Every competent person eligible for adoption can adopt a child including an LGBT. Adoption right is the debatable issue in respect of LGBT family life. In *E.B. vs. France*80, the application for grant of permission for adoption is rejected on the ground of the applicant’s life-style as a lesbian living with another woman. The applicant alleged that at every stage of her application for authorization to

79 No. 9912/15, This judgment will become final in the circumstances set out in Article 44 (2) of the Convention.
80 no. 43546/02
adopt a child, she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the Convention. It observed in particular that the applicant’s homosexuality had been a determining factor in refusing her request, whereas French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual.

The noted principle is that “the right of adoption is limited by the interests of the child adopted”. In Fretté vs. France, the applicant, a homosexual man, complained that the decision dismissing his request for authorization to adopt a child amounted to arbitrary interference with his private and family life because it was based exclusively on unfavorable prejudice about his sexual orientation. He further complained that he had not been summoned to the hearing on his case held by the Conseil d’État.

The Court held that there had been no violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private life) of the Convention. It found that the national authorities had been legitimately and reasonably entitled to consider that the right to be able to adopt, on which the applicant had relied, was limited by the interests of children eligible for adoption, notwithstanding the applicant’s legitimate aspirations and without calling his personal choices into question.

In X and Others vs. Austria⁸¹, This case concerned the complaint by two women who live in a stable homosexual relationship about the Austrian courts’ refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother’s legal ties with the child (second-parent adoption).

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⁸¹ no. 19010/07
The applicants submitted that there was no reasonable and objective justification for allowing adoption of one partner’s child by the other partner if heterosexual couples were concerned, be they married or unmarried, while prohibiting the adoption of one partner’s child by the other partner in the case of homosexual couples.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the Convention on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in which one partner wished to adopt the other partner’s child. It further held that there had been no violation of Article 14 taken in conjunction with Article 8 when the applicants’ situation was compared with that of a married couple in which one spouse wished to adopt the other spouse’s child.

The Court found in particular that the difference in treatment between the applicants and an unmarried heterosexual couple in which one partner sought to adopt the other partner’s child had been based on the first and third applicants’ sexual orientation. No convincing reasons had been advanced to show that such difference in treatment was necessary for the protection of the family or for the protection of the interests of the child.

In Oliari and Others vs. Italy, complaint by three homosexual couples that under Italian legislation they do not have the possibility to get married or enter into any other type of civil union.

The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention. It considered that the legal protection available to same-sex couples in Italy as was shown by the applicants’ situation did not only fail to provide for the core needs relevant to a couple in a stable committed relationship, but it was also not sufficiently reliable. A civil union or registered partnership would be the most appropriate way for same-sex
couples like the applicants to have their relationship legally recognized. The Court pointed out, in particular, that there was a trend among Council of Europe member States towards legal recognition of same-sex couples 24 out of the 47 member States having legislated in favor of such recognition and that the Italian Constitutional Court had repeatedly called for such protection and recognition. Furthermore, according to recent surveys, a majority of the Italian population supported legal recognition of homosexual couples.

4.6 LGBT RIGHTS IN ARMY

Perkins and R. vs. the United Kingdom and Beck, Copp and Bazeley vs. the United Kingdom

The applicants were all British armed forces personnel, discharged from the forces on the basis of their homosexuality. They alleged in particular that the investigations into their sexuality and their discharge as a result of the absolute ban on homosexuals in the armed forces that existed at the time, had violated their rights under Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the Convention.

In all these cases, the Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention. It found that the measures taken against the applicants had constituted especially grave interferences with their private lives and had not been justified by “convincing and weighty reasons”.

In Smith and Grady and Beck, Copp and Bazeley, the Court also held that there had been a violation of Article 13 (right to an effective remedy) of the Convention, in that the applicants did not have an effective domestic remedy in relation to the violation of their right to respect for their private lives. In these two cases, it lastly held that there had been no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention.
4.6.1 Parental authority

In *Salgueiro da Silva Mouta vs. Portugal*, the applicant, a homosexual living with another man was prevented by his ex-wife from visiting his daughter, in breach of an agreement reached at the time of their divorce. He complained of an unjustified interference with his right to respect for his private and family life, as guaranteed by Article 8 of the Convention and discrimination contrary to the Article 14 of the Convention. He maintained, too, that contrary to Article 8, he had been forced by the court of appeal to hide his homosexuality when seeing his daughter.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the Convention. The Portuguese courts’ decision had been largely based on the fact that the applicant was a homosexual and that “the child should live in a traditional Portuguese family”. That distinction, based on considerations relating to sexual orientation, was not acceptable under the Convention.

4.6.2 Residence permission

In *Pajić vs. Croatia*, the complaint by a national of Bosnia and Herzegovina, who is in a stable same-sex relationship with a woman living in Croatia, of having been discriminated against on the grounds of her sexual orientation when applying for a residence permit in Croatia.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the Convention. It found in particular that the applicant had been affected by a difference in treatment between different-sex couples and same-sex couples introduced by the Aliens Act, which reserved the possibility of applying for a residence permit for family reunification to different-sex couples. The Croatian Government had not shown that that difference in treatment was
necessary to achieve a legitimate aim or that it was justified by any other convincing reason.

In *Taddeucci and McCall vs. Italy*\(^{82}\), the inability of the applicants, a gay couple one of whom is an Italian and the other a New Zealand national, to live together in Italy on account of the Italian authorities’ refusal to issue the second applicant with a residence permit on family grounds because the national immigration legislation did not allow unmarried partners to obtain a family member’s residence permit. The applicants alleged in particular that this refusal amounted to discrimination based on their sexual orientation.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the Convention, finding that the refusal to grant a residence permit to the applicants on family grounds was an unjustified discrimination. The Court found in particular that the situation of the applicants, a gay couple, could not be understood as comparable to that of an unmarried heterosexual couple. As they could not marry or, at the relevant time, obtain any other form of legal recognition of their situation in Italy, they could not be classified as “spouses” under national law. The restrictive interpretation of the notion of family member constituted, for homosexual couples, an insuperable obstacle to the granting of a residence permit on family grounds. That restrictive interpretation of the concept of family member, as applied to the second applicant, did not take due account of the applicants’ personal situation and in particular their inability to obtain a form of legal recognition of their relationship in Italy. The Court therefore concluded that, in deciding to treat homosexual couples in the same way as heterosexual couples without any spousal status, Italy had breached the applicants’ right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

\(^{82}\) This judgment will become final in the circumstances set out in Article 44(2) of the Convention.
4.6.3 Social protection (insurance cover, survivor’s allowances, etc.)

In *P.B. and J.S. vs. Austria* 83

This case concerned the refusal to extend sickness insurance cover to the homosexual partner of an insured person. Before a legislative amendment in July 2007, Austrian law provided that only a close relative of the insured person or a cohabitee of the opposite sex qualified as dependants.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention in respect of the period prior to July 2007, and no violation of these provisions since July 2007. As a result of the July 2007 legislative amendment, the relevant law was now neutral as regards the sexual orientation of cohabitees, which, in the Court’s view, had put an end to the violation.

In *Aldeguer Tomás vs. Spain*, the applicant complained of having been discriminated against on the ground of his sexual orientation in that he was denied a survivor’s pension following the death of his partner, with whom he had lived in a *de facto* marital relationship. The applicant had been unable to marry his partner under the law in force during the latter’s lifetime. Three years after his partner’s death, the law legalizing same-sex marriage in Spain entered into force.

The Court held that there had been no violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life) of the Convention and Article 1 (protection of property) of Protocol No. 1 to the Convention, finding that there had been no discrimination in the applicant’s case. In particular, his situation following the entry into force of the law legalizing same-sex marriage in Spain in 2005 had not been relevantly similar to that of a surviving partner of a heterosexual cohabiting couple, who had been unable to marry his or her partner before the law legalizing divorce entered into force in 1981 and who qualified for a survivor’s pension by virtue of

83 no. 18984/02
a provision of that law. Moreover, States had, at the relevant time, a certain room for manoeuvre (“margin of appreciation”) as regards the timing of the introduction of legislative changes in the field of legal recognition of same-sex couples and the exact status conferred on them, an area which was regarded as one of evolving rights with no established consensus.

4.7 FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (Article 9 of the Convention)

In *Ladele and McFarlane vs. the United Kingdom*, the applicants respectively a Registrar of Births, Deaths and Marriages and a counselor with a confidential sex therapy and relationship counseling service were practicing Christians who alleged that domestic law had failed adequately to protect their right to manifest their religious beliefs. They both complained that they had been dismissed for refusing to carry out certain of their duties which they considered would condone homosexuality, a practice they felt was incompatible with their religious beliefs.

The Court found that there had been no violation of Article 9 (freedom of religion) taken alone or in conjunction with Article 14 (prohibition of discrimination) of the Convention, as concerned the second applicant, and no violation of Article 14 taken in conjunction with Article 9 as concerned the first applicant. It held in particular that it could not be said that national courts had failed to strike a fair balance when they upheld the employers’ decisions to bring disciplinary proceedings. In each case the employer was pursuing a policy of non-discrimination against service-users, and the right not to be discriminated against on grounds of sexual orientation was also protected under the Convention.

4.8 FREEDOM OF EXPRESSION (Article 10 of the Convention)

In *Mladina D.D. Ljubljana vs. Slovenia*, the applicant publisher’s complaint that it was ordered by the national courts to pay damages to a parliamentarian for insulting him in an article concerning a parliamentary debate on the legal recognition of same-sex relationships. The article was published in
the publisher’s magazine in June 2005. The applicant complained, in particular, that the national courts had been unwilling to expose harmful, homophobic stereotypes and had not taken into consideration that the exaggerated, satirical style of the article was a reaction to the parliamentarian’s own controversial behaviour.

The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention. It pointed out that the limits of acceptable criticism were wider as regards a politician, especially when he himself had made controversial public statements, than as regards a private individual. Both the context in which the publisher’s article had been written (an intense political debate) and the style used (matching the parliamentarian’s own provocative comments and behavior) had not been given sufficient consideration by the national courts. The article had not, therefore, been a gratuitous personal attack on the parliamentarian, but a counter-response to the parliamentarian’s own public remarks and, in particular, conduct which could be regarded as a ridicule of homosexuals and promoting negative stereotypes. Accordingly, the national courts had failed to strike a fair balance between the competing interests of protecting the reputation or rights of the parliamentarian and the publisher’s right to freedom of expression.

4.9 FREEDOM OF ASSEMBLY AND ASSOCIATION
(Article 11 of the Convention)

In Bączkowski and Others vs. Poland, the applicants are the Foundation for Equality (Fundacja Równości) and five of its members. They campaign for homosexual rights. In 2005 the local authorities refused permission for them to organise a march in the streets of Warsaw to raise public awareness of discrimination against minorities, women and people with disabilities. The march was eventually held anyway. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied relevant domestic law to their case. They also complained that they had not had at their disposal any procedure which would have allowed
them to obtain a final decision before the date of the planned demonstrations. They further alleged that they had been treated in a discriminatory manner in that they had been refused permission to organise certain demonstrations whereas other organisers had obtained permission.

The Court held that there had been a violation of Article 11 (freedom of assembly), a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 11, and a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 11 of the Convention. It observed in particular that while it was true that the march had eventually been held, the applicants had taken a risk since it had not been officially authorised at the time. Further, the applicants had had only post hoc remedies available in respect of the decisions refusing permission for the event. Lastly, it could reasonably be surmised that the real reason for the refusal had been the local authorities’ opposition to homosexuality.

In Alekseyev vs. Russia, the applicant was one of the organisers of several marches in 2006, 2007 and 2008 which were aimed at drawing public attention to the discrimination against the gay and lesbian community in Russia and to promoting tolerance and respect for human rights. He complained about the repeated ban on holding the gay-rights marches and pickets, about not having an effective remedy to challenge those bans, and about them being discriminatory because of his and the other participants’ sexual orientation.

The Court found a violation of Article 11 (freedom of assembly), a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 11, and a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 11 of the Convention. It held in particular that the bans imposed on the holding of the impugned marches and pickets had not been necessary in a democratic society. It further held that the applicant had no effective remedy to challenge those bans, and that they had been discriminatory because of his sexual orientation.
4.10 RIGHT TO MARRY (Article 12 of the Convention)

In Schalk and Kopf vs. Austria, the applicants are a same-sex couple living in a stable partnership. They asked the Austrian authorities for permission to marry. Their request was refused on the ground that marriage could only be contracted between two persons of opposite sex; this view was upheld by the courts. Before the European Court of Human Rights, the applicants further complained of the authorities’ refusal to allow them to contract marriage. They complained that they were discriminated against on account of their sexual orientation since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

The Court found that there had been no violation of Article 12 (right to marriage), and no violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention. It first held that the relationship of the applicants fell within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would. However, the Convention did not oblige a State to grant a same-sex couple access to marriage. The national authorities were best placed to assess and respond to the needs of society in this field, given that marriage had deep-rooted social and cultural connotations differing greatly from one society to another.

4.11 STEPS TO BE FOLLOWED BY THE STATES

Equality is the biggest social issue today. It is absolutely ridiculous that people in this part of world consider LGBT people inferior in every aspect. But the role of legal support system for LGBT in western countries is stronger. Now, nearly 13 countries legalise the gay marriage.\(^{84}\) Many countries’ governments and Judiciary is steeping towards the legalising the gay marriages and also for

protection of the rights of LGBT. In *Varnum vs. Brien*\textsuperscript{85}, the Iowa Supreme Judicial Court stated that the exclusion of gay and lesbian people from the institution of civil marriage did not substantially further any important governmental objective and that the legislature had excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. The Court stated its constitutional duty to ensure equal protection of the law and that faithfulness to that duty required it to hold that Iowa's marriage statute, Iowa Code section 595.2, violated the Iowa Constitution.

The human rights of LGBT are to be protected by the States ensuring same sex couples, the equal rights as of the general public. In 2009, The Constitutional Court granted civil, political, social, economic, immigration and criminal rights to gay and lesbian couples. Before this case, those rights had been reserved for non-married heterosexual couples. The Court stated that equal rights could not allow qualifications or exceptions based on sexual orientation.\textsuperscript{86} The court found that if a family is covered under mandated health coverage, it also includes spouses and cohabitants and must be extended to same-sex couples. The court opined that providing benefits to opposite-sex cohabitants but not to same-sex cohabitants would violate principles of human dignity and equality, which is prohibited by the Constitution of Colombia.\textsuperscript{87}

The same sex couples must be protected legally. The Judiciary should carefully look after the protected status of same sex couples. A statute was challenged on the ground that it was under-inclusive and for that reason discriminated unfairly against gays and lesbians on the grounds of their sexual orientation. The Court then ruled that Section 5 of the Children's Status Act 82 of 1987 was inconsistent with the Constitution because the word "married" appeared in that section, yet the words "or permanent same-sex life partner" after the word

\textsuperscript{85} 2009Iowa  ) ,862d 2.W.N 763
\textsuperscript{86} 2009 Constitutional Court of Colombia - Sentence C-029 de 2009
\textsuperscript{87} 2007 Constitutional Court of Colombia - Sentence C-811 de 2007
"husband" did not appear in that section. Denial of marriage licenses to same-sex couples violated provisions of the state constitution guaranteeing individual liberty and equality.

The laws which are discriminatory in nature against the LGBT should be checked. The Constitutional Court by the Cape of Good Hope High Court declared section 25(5) of the Aliens Control Act 96 of 1991 unconstitutional as it failed to give persons, who were partners in permanent same-sex life partnerships, the benefits extended to "spouses" under this section. The Court ruled that this section discriminated unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. It did so in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Having coming to the conclusion the Court decided the words "or partner in a permanent same-sex life partnership" should be added to the section. The Court emphasized that the Legislature could refine and alter the remedy of the court within constitutional limits.

In 1999, the Supreme Court of Canada in *M. vs. H.* struck down Section 29 of the Ontario Family Law Act, for the definition of ‘Common-law Spouse’, which excluded the same-sex couples from the definition, is in violation of equality rights under section 15(1) of the Canadian Charter of Rights and Freedoms. The court gave six months time to the province to make necessary changes. The section was subsequently amended by the Legislative Assembly of Ontario to include all common-law spouses, whether same-sex or different-sex. The court in another case ruled that exclusion of same-sex couples from

88 2003 Constitutional Court of South Africa - J and B v. the Director General of Home Affairs and Others
89 2003 Massachusetts Supreme Judicial Court - Goodridge v. Department of Public Health
90 Constitutional Court of South Africa - National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others, 1999
91 [1999] 2 S.C.R. 3
eligibility for spousal allowance under the Old Age Security Act amounted to a violation of section 15 of the Canadian Charter of Rights and Freedoms because denial for benefit is on the distinction based upon sexual orientation. So, the impugned legislation was not justified under section 1 of the Charter. In 1996, an amendment to the Colorado Constitution that prevented protected status under the law for homosexuals or bisexuals was struck down.\textsuperscript{93}

The States which have going to frame their Constitution should enumerate the provisions concerning the protection to the LGBT and to safeguard the LGBT against discrimination. In Nepal, the Supreme Court issued an order of \textbf{Certiorari, Mandamus, Prohibition were Issued} to the Government of Nepal to form a Committee to make legal provisions to enable the LGBTI people to enjoy fundamental rights. It also called for provisions in the new constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of "gender identity" and the "sexual orientation" in line with the Bill of Rights of the Constitution of South Africa. The Court stated that no one possessed the right to question how two adults performed sexual intercourse and whether that intercourse was natural or unnatural. The right of privacy was equally secured to people who have different gender identity and sexual orientation. The court further held that gender identity and sexual orientation of homosexuals and third gender could not be ignored by treating the sexual intercourse among them as unnatural. The court took the view that both the selection of a sexual partner and the decision of marital relation was a matter falling entirely within the right to self-determination.\textsuperscript{94}

\textbf{In Thomas McCosker Vs. The State of Fiji\textsuperscript{95}}, The Fijian High Commissioner declared that both sections 175 and 177 of the Penal code which criminalized both "private consensual sex against the course of nature between adults" and the "private consensual sexual conduct of adult males" were

\textsuperscript{93} Supreme Court of the United States of America - Romer v. Evans, 1996
\textsuperscript{94} Sunil Babu Pant and Ors. V. Nepal Government, Writ No. 917 of the year 2064 BS (2007 AD).
\textsuperscript{95} [2005] FJHC 500.
inconsistent with the Constitution. In 1998, the Constitutional Court of South Africa decriminalised homosexuality and found that sodomy and other crimes are aimed at prohibiting sexual intimacy between gay men, violated the right to equality in that they unfairly discriminated against gay men on the basis of sexual orientation. Such discrimination was presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. Therefore the court concluded that the offences were accordingly found to be unconstitutional and invalid. 96

Another suggesting step to provide equal rights is letting the LGBT persons to choose their own gender and modification of their gender in identity documents. The Constitutional Court of Columbia ruled that a five year old intersex child had the right to choose his/her own gender, against the family's wishes. 97 In 2009, the Mexico Supreme Court of Justice unanimously decided to grant protection to a transsexual by ordering that a new birth certificate be granted to him. Argentina also allowed the transsexual post-operate woman to modify their identification document according to her chosen sex.

Yet, another right the States has to ensure LGBT is “Freedom of assembly”. The Supreme Court of Appeals of Turkey rejected the local court's decision to close Lambda Istanbul on the grounds that reference to LGBT people in the name and the statute of the association did not constitute opposition to Turkish moral values. The Supreme Court of Appeals referred to Article 20 of the United Nations' Universal Declaration of Human Rights, Article 22 of the UN Covenant on Civil and Political Rights, Article 9 of the European Human Rights Convention, Article 10 of the Turkish Constitution, Article 56 of the Turkish Civil Law and Article 3 of the Association Law and concluded that LGBT individuals have the right to freedom of assembly.

97 Constitutional Court of Colombia - Sentence T-912 de 2008
Adoption by the same sex couple is not widely discussed and is over shadowed by others (LGBT) rights. The Constitutional court of South Africa in a unanimous judgment, the court found that provisions of the Child Care Act and Guardianship Act infringed constitutional rights. The dignity rights of the LGBT were infringed as restriction of joint adoption to married persons discriminated on the grounds of sexual orientation and marital status. Finally, the Court held that the legislation infringed the principle of the paramountcy of a child's best interests. The legislation must now allow same-sex life partners jointly to adopt children where they were otherwise found to be suitable parents. Adoption by same-sex couples (free joint adoption) is legal in Canada, Netherlands, South Africa, Sweden, Spain, U.K.(England and Wales), Belgium, Iceland, Norway, Uruguay, Argentina, Denmark, Brazil, U.S.A.(23 States).

In 2015, the ILO, OHCHR, UNAIDS, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO issued a joint statement calling on States to act urgently to end violence and discrimination against LGBTI adults, adolescents and children. These are the suggested steps that the other countries must follow while ensuring the human rights of the LGBT. Human rights are common everywhere in the world. So, the steps of the judiciary in the western countries are invited.

The core legal obligations of States with respect to protecting the human rights of LGBT people include obligations to:

\( (i) \) Protect individuals from homophobic and transphobic violence and prevent torture and cruel, inhuman and degrading treatment. Enact hate crime laws that discourage violence against individuals based on sexual orientation, and set up effective systems for reporting hate motivated acts of violence, including effectively investigating, and prosecuting perpetrators, bringing those responsible to justice. Provide training to law enforcement officers and monitor places of detention, and provide a system for victims to seek remedies. Additionally, asylum laws and policies should recognize that persecution based on sexual orientation may be a valid basis for an asylum claim.

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98 Du Toit and Another v. Minister of Welfare and Population Development and Others
(ii) **Repeal** those laws criminalizing homosexuality including all legislation that criminalizes private sexual conduct between consenting adults. Ensure that individuals are not arrested or detained on the basis of their sexual orientation or gender identity and are not subjected to any degrading physical examinations intended to determine their sexual orientation.

(iii) **Prohibit** discrimination based on sexual orientation and gender identity. Enact legislation that prohibits discrimination on the grounds of sexual orientation and gender identity. Provide education and training to prevent discrimination and stigmatization of LGBT and intersex people.

(iv) **Safeguard** freedom of expression, association and peaceful assembly for all LGBT people and ensure that any restrictions on these rights even where such restrictions purport to serve a legitimate purpose and are reasonable and proportionate in scope are not discriminatory on grounds of sexual orientation and gender identity. Promote a culture of equality and diversity that encompasses respect for the rights of LGBT people.99

(v) Enact comprehensive anti-discrimination legislation, ensuring that combating discrimination based on sexual orientation is in the mandates of national human rights bodies.

(vi) Implement appropriate training programmes for law enforcement personnel, and support public information campaigns to counter homophobia and transphobia amongst the general public and in schools.

(vii) Facilitate legal recognition of preferred gender of transgender persons.

The essential problem the LGBT individuals facing is ‘oral abuse’. It is interesting and very important to know the scope of freedom of speech and expression against the verbal abuse especially in democratic countries. A famous case *Snyder vs. Phelps*100, which was decided by the United States Supreme Court, shows the wide scope of right of expression. In this case, U.S. Marine Lance Corporal Matthew A. Snyder was killed in a vehicle accident in Iraq. On March 10, 2006, Westboro Baptist Church (WBC), which had picketed at

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99 Facts Sheet, United Nations for LGBT Equality. “*International Human Rights Law and Sexual Orientation and Gender Identity.*”

100 562 U.S. 443 (2011)
thousands of other funerals throughout the U.S. in the protest of increasing America’s tolerance of homosexuality, had done at the funeral of Snyder in Westminster, Maryland. Picketers displayed placards such as "America is doomed", "You're going to hell", "God hates you", "Fag troops", "Semper fi fags" and "Thank God for dead soldiers".

Albert Snyder, Mathew Snyder’s father, sued Fred Phelps, Westboro Baptist Church and two of Phelps’s daughters, Rebekah Phelps-Davis and Shirley Phelps-Roper, for defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. The facts of the case were undisputed at trial. Albert Snyder testified “They turned this funeral into a media circus and they wanted to hurt my family. They wanted their message heard and they didn't care who they stepped over. My son should have been buried with dignity, not with a bunch of clowns outside”. Snyder described his emotional injuries, including becoming tearful, angry, and physically nauseated. He stated that the Defendants had placed a "bug" in his head, so that he was unable to think of his son without thinking of their actions. Snyder called several expert witnesses who testified that worsening of his diabetes and severe depression had resulted from the Defendants' activities.

In defense, WBC pleaded that they had complied with all local ordinances and had obeyed police instructions. Mr. Snyder testified that, although he glimpsed the tops of the signs from the funeral procession, he did not see their content until he watched a news program on television later that day.

The Judge, Richard D. Bennett for the United States District Court for the District of Maryland asked the jury to decide whether the defendant’s actions would be highly offensive to a reasonable person causing extreme and outrageous feelings and whether the these actions were offensive in spite of the First Amendment protection to the free speech having limits including vulgar, offensive and shocking statements. The jury finally on October 31, 2007, awarded the plaintiff Snyder US$2.9 million in compensatory damages, later
adding a decision to award $6 million in punitive damages for invasion of privacy and an additional $2 million for causing emotional distress (a total of $10.9 million). On February 4, 2008, Bennett upheld the verdict but reduced the punitive damages from $8 million to $2.1 million, to take into consideration the resources of WBC. The total judgment then stood at $5 million.

An appeal by WBC was heard on September 24, 2009. The Fourth Circuit Court of Appeals reversed the jury verdict and set aside the lower court’s $5 million judgment. The Fourth Circuit ruled that the lower court had erred by instructing the jury to decide a question of law rather than fact (specifically, whether or not the speech in question was protected by the First Amendment). It also ruled that the protest signs and language on WBC’s website were rhetorical hyperbole and figurative expression, rather than assertions of fact, so they were a form of protected speech. On March 30th, 2010, the Court further ordered that Albert Snyder to pay the court costs for the defendants, an amount totaling $16,510.

4.12 WRIT OF CERTIORARI WHEN AVAILABLE
A Writ of Certiorari was filed on March 8th, 2010, with the following issues:
1. Whether the prohibition of awarding damages to public figures to compensate for the intentional infliction of emotional distress, under the Supreme Court’s First Amendment precedents, applies to a case involving two private persons regarding a private matter;
2. Whether the freedom of speech guaranteed by the First Amendment trumps its freedom of religion and peaceful assembly.
3. Whether an individual attending a family member’s funeral constitutes a "captive audience" who is entitled to state protection from unwanted communication.

In an 8-1 decision, the Supreme Court ruled in favor of Phelps, upholding the Fourth Circuit’s decision. Chief Justice, John Roberts wrote the majority opinion stating What Westboro said, in the whole context of how and where it
chose to say it, is entitled to 'special protection' under the First Amendment and that protection cannot be overcome by a jury finding that the picketing was outrageous.

Justice Samuel Alito was the lone dissenting justice in this case, beginning his dissent with, "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case." He concluded that "In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.”

This case is considered to be the guarantor of the right to speech and expression absolutely. The First Amendment prescribed certain limits with in which the right can be ascertained. The law and the judgment seem like allowing the civilians to outrage the LGBT further. So, in spite of increasing tolerance there should be some specific laws to combat the discrimination and oral abuse of the LGBT.

NALSAR University in Hyderabad, on the request of Anindita Mukherjee, a 2015 passed student, was issued the graduation certificate with the gender-neutral honorific “Mx”, instead of “Mr”, “Ms”, “Miss” or “Mrs”. The University accepted the request by the student to issue the certificate with a neutral gender honourific and took the decision in a progressive way, interpreted the rules according to the social and scientific understanding and recognized gender fluidity and self incrimination.

The step towards the view against the gender identity should be welcomed. At least the law students should think over the matter with the changing social and scientific view towards LGBT.
4.13 CONCLUSION

Thus the annals of the History divulged that LGBT personnel were brutally treated by the fellow civilians. In 18\textsuperscript{th} and 19\textsuperscript{th} centuries in Europe, same-sex sexual behavior was widely considered to be socially unacceptable and was a serious crime under sodomy and sumptuary laws with the introduction of the Napoleonic Code in 1803, the Duchy of Warsaw decriminalized homosexuality. In 1830, the new Penal Code of the Brazilian Empire made sodomy a crime. The Criminal Code of 1922 of USSR decriminalized homosexuality. After the World War-II, a number of homosexual rights groups emerged across the Western World emphasizing the love over sex. The Homophile movement began in the late 1940s and continued throughout 1950s, 1960s and 1970s. The turning point for gay liberation came on June 28\textsuperscript{th}, 1969, when patrons of the popular Stonewall Inn in New York’s Greenwich Village bought against ongoing police raids of their neighborhood bar which leads to “Pride marches”. This led to formation of GLF, GAA and PFLAG. In 1979, Sweden became the first country in the world to remove homosexuality as an illness. In 1993, “don’t ask, don’t tell” policy was passed for permitting gays to serve in the military. In the last decade of 20\textsuperscript{th} century, heralding a new era of gay celebrity power and media visibility. Like-wise, the 21\textsuperscript{st} century heralded new legal gains for gay and lesbian couples. Same-sex civil unions were recognized under Vermont Law in 2000. Netherlands was the first country to allow same-sex marriages in 2001. In 2006, the Yogyakarta Principles were adopted on the application of IHRL in relation to SOGI. The UN Declaration on sexual orientation and gender identity was adopted by the UN General Assembly on 13\textsuperscript{th} December, 2008. In 2009, the Delhi High Court in \textit{Naz Foundation vs. Government of NCT of Delhi}, held that Section 377 of the IPC,1860 is indirect violation of the Fundamental Rights of the LGBT. Iceland became the first country in the world to legalize the same-sex marriages on 11\textsuperscript{th} June, 2010. On 26\textsuperscript{th} June, 2015, the Supreme Court ruled that the Constitution requires that the same-sex couples be allowed to marry no matter where they live in USA. As of 2016, same-sex marriages are also recognized in Sweden, Argentina, Belgium, Canada, Iceland, Norway, South Africa, Spain, Portugal, Denmark, Uruguay, Brazil, France, Colombia, New Zeeland, Mexico.
and USA. Albeit, the human rights violations committed against the LGBT on the basis of SOGI which includes Killings, rape, physical attacks, torture and defamation etc. on 12th June, 2016, the attack on Orlando Night Club, a gay night club, left 49 dead and 53 wounded.

Therefore, in the recent past, across the world, many countries governments and judiciary are stepping towards legalizing the gay marriages and protection of the rights of the LGBT. Further the human rights of the LGBT are to be protected by the states ensuring the same sex couples, the equal rights on par with general public. Further, the same sex couples must be protected legally. The judiciary should carefully look after the protected status of the same-sex couples. Besides that, the laws which are discriminatory in natural against the LGBT should be checked. The states should frame their constitution in such a way not only to protect and safeguards the rights of the LGBT but also against discrimination. The states shall initiate suitable steps to protect the LGBT from homophobic and transphobic violence by way of repealing those laws criminalizing homosexuality, implementing appropriate training programmes for law enforcement personnel and public information campaigns to counter discrimination and facilitate legal recognition of preferred gender of LGBT. It is sincerely extrapolated that if the states, Judiciary and the society will implement all possible steps as cited supra with true letter and spirit and with the milk of human kindness, I am sure, the discrimination against the LGBT will be reduced and their dignity will be increased to a greater extent and they will also come in the main stream on par with fellow human beings.