

## The Yogyakarta Principles- A New Dawn for the LGBTQAI Community

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### Abstract:

The LTBTQAI community is constantly fighting for their rights. In spite of having a broad array of human rights, still they are facing a lot of problems across the globe. In order to protect their rights, the United Nations and different organisations took a lot of efforts. In 2006, Yogyakarta Principles (YP) were announced and in 2017, the Yogyakarta Principles plus 10 (YP+10) were brought in additional principles and principles on State obligation. These principles are decisive from the point of view individuals of different sexual orientation. The rights of the LTBTQAI community laid down in the YP and the YP+ 10 are recognised by the legislatures, the courts, partially by the society and the religious authorities. In this article, the author highlights historical evolution, rights of the LTBTQAI community, their importance and response from the stakeholders.

**Keywords:** Rights, State Obligation, Response from the stakeholders

### Introduction:

The Universal Declaration of Human Rights (UDHR) prohibits any discrimination on grounds ‘such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other issues’. In contrast to these classical grounds of prohibited discrimination, sexual orientation or disability have emerged more recently as ‘suspect’ in international human rights law, thus exhibiting a shift in social expectations about the kind of treatment of certain groups that is acceptable.<sup>1</sup> Apart from the UDHR, the various international instruments prohibits all forms discrimination. But when it comes, discrimination against the LTBTQAI community, there is no specific international instrument on international level. Hence, international LGBT human rights advocacy has not necessarily challenged the normative framework within which precarious desires are pursued and addressed.<sup>2</sup> Considering the legal void, for the promotion and protection of

<sup>1</sup> Olivier De Schutter, *International Human Rights Law*, Cambridge University Press, 2011, P. 605

<sup>2</sup> Ratna Kapur, *Gender, Alterity and Human Rights-Freedom in a Fishbowl*, Elgar Studies in Legal Theory, 2018, P. 65

the rights of the LGBTQAI community, the Yogyakarta Principles came into existence. In this article, the author has discussed different aspects with regards to the principles.

### **Advocacy for the LGBTQAI community:**

The LGBTQAI community is a victim of different forms of discrimination. Discrimination is a multi-pronged notion. The vocabulary used to refer to notions such as *de facto* discrimination, institutional discrimination, real or substantive equality, positive or affirmative action. The precise meaning of these concepts may differ between treaties and jurisdictions.<sup>3</sup> In the light of different forms discrimination, the broader global struggle for LGBT rights manifests in polarised responses to the sexual subject and claims to legality and legitimacy. These range from increased criminalization of same-sex conduct and/or simply identifying as homosexual, to increase legal recognition in other countries, where culmination of the struggle for legitimacy and equality is the judicial recognition of the same-sex marriage, generally seen as the ultimate validation of LGBT advocacy. Such trends are invariably presented as evidence of the primitiveness or backwardness of non-Western, developing countries, against the more civilized, evolved approach of Western/liberal democracies.<sup>4</sup>

In order to protect the human rights of the LGBTQAI and eradicate the discriminatory practices, different human rights organisations played a very important role. The ‘contemporary’ production of human rights is exuberant. This is a virtue compared with the lean and mean articulations of human rights in the ‘modern’ period. In the ‘modern’ era, the authorship, of human rights was conceived frankly in terms that were both *statecentric* and *Eurocentric*; in contrast, the process of formulation of contemporary human rights are increasingly inclusive and often marked by intense negotiation between the practitioners of human rights activism and human repression.<sup>5</sup>

In 1955, the American Law Institute Model Penal Code stated that every individual is entitled to protection against State interference in his personal affairs, when he is not harming others. Similarly in 1957, the Wolfenden Committee (UK) stated “it is not function of criminal law to intervene in the lives of citizen or to seek or to enforce any particular pattern of behaviour.”<sup>6</sup> The developments took place in the USA and the UK

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<sup>3</sup> Id. 624

<sup>4</sup> Ratna Kapur, 63

<sup>5</sup> Upendra Baxi, *The Future of Human Rights*, Oxford University Press, 2013, P. 54

<sup>6</sup> Lohit D. Naikar, *The Law Relating to Human Rights*, Puliani and Puliani, Bangalore, 2017, P. 667

paved the way for rights of the LGBTQAI community. The issues of the LGBTQAI community were discussed at different forums but no concrete development happened on international level.

In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.<sup>7</sup> The YP+10 further substantiated the 2006 Yogyakarta Principles.

In 2016, The United Nations Human Rights Council (UNHCR) adopted a resolution on “Protection against violence and discrimination based on sexual orientation, and gender identity.”. The purpose of the resolution is to mandate the appointment of an independent expert on the subject. It was a historic victory of the human rights groups working for the cause of the LGBTQAI community. This resolution builds upon two previous resolutions, adopted by the Council in 2011 and 2014.<sup>8</sup>

In spite of the above mentioned small victories, there is a long way to go for protection of rights of the LGBTQAI community. In the light of the recent positive responses from the stakeholders across the globe, there is a gradual recognition of the rights of the LGBTQAI community.

### **Importance of the YP and the YP+10:**

There have been significant developments in international human rights law and jurisprudence on issues relating to sexual orientation, gender identity, gender expression and sex characteristics, since the adoption of the Yogyakarta Principles;<sup>9</sup> The YP and the YP+10 are important from the point of view of the LGBTQAI community because of the following reasons:

- a) They helped in developing an authoritative statement of the human rights of persons of ‘diverse sexual orientations and gender identities’.

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<sup>7</sup> The Yogyakarta Principles, <http://yogyakartaprinciples.org/principles-en/>

<sup>8</sup> Human Rights Watch, UN Makes History on Sexual Orientation, Gender Identity, June 30, 2016, <https://www.hrw.org/news/2016/06/30/un-makes-history-sexual-orientation-gender-identity#>

<sup>9</sup> Preamble to the Yogyakarta Principles plus 10

- b) The YP and the YP+10 are considered as a significant development both in the field of international human rights law.
- c) They paved the way in the understanding of violations affecting persons of ‘diverse sexual orientations and gender identities’.
- d) The YP and the YP+10 recognised the often distinct violations affecting persons on grounds of ‘gender expression’ and ‘sex characteristics’.
- e) The YP+10 laid down a set of Additional Principles and State Obligations.

The YP and the YP+10 provides for an authoritative, expert elucidation of international human rights law as it currently applies to the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

### **The Yogyakarta Principles (YP):**

The notion of human rights- historically the rights of *man* – has been confronted with two perplexities. The first concerns the nature of *human* nature (the *Is* question). The second concerns the question of who is to be counted as ‘human’ or ‘fully’ human (the *Ought* question). While the first continues to be debated both in theistic and secular terms, the second question occupies the centre stage of the modern enunciation of human rights.<sup>10</sup>

When it comes to the modern enunciation of human rights of the LTBTQAI community, still we find that they are not well protected. Hence, it is pertinent to understand the YP and State obligations with a view to create a conducive environment for the LTBTQAI community in order to enjoy, experience the rights like the other fellow human beings. The rights given in the YP are as follows:

- a) The right to the universal enjoyment of human rights
- b) The rights to equality and non-discrimination
- c) The right to recognition before the law
- d) The right to life
- e) The right to security of the person
- f) The right to privacy
- g) The right to freedom from arbitrary deprivation of liberty
- h) The right to a fair trial
- i) The right to treatment with humanity while in detention

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<sup>10</sup> Upendra Baxi, 51.

- j) The right to freedom from torture and cruel, inhuman or degrading treatment or punishment
- k) The right to protection from all forms of exploitation, sale and trafficking of human beings
- l) The right to work
- m) The right to social security and to other social protection measures
- n) The right to an adequate standard of living
- o) The right to adequate housing
- p) The right to education
- q) The right to the highest attainable standard of health
- r) Protection from medical abuses
- s) The right to freedom of opinion and expression
- t) The right to protection from poverty
- u) The right to sanitation
- v) The right to the enjoyment of human rights in relation to information and communication technologies
- w) The right to truth
- x) The right to practise, protect, preserve and revive cultural diversity

These rights are cornerstone for the LTBTQAI community across the globe but still there are a lot of issues. “The question of autonomy, freedom and supremacy plays itself out, among other places, in the contest between religious freedom and sexual freedom. Absolute sexual freedom lies at the heart of the modern autonomy project. It extends now well beyond preferences about sexual practices or forms of relationship to preferences about the method and manner of procreation, family formation, and the uses of human reproduction in medical research.”<sup>11</sup> In order to give a life and blood to these rights keeping in mind different issues, it is expected that the legislatures would amend the prevailing laws and enact new laws, the executives would implement the laws in the right spirit and the judiciary would perform its role.

### **Obligations on State:**

The YP+10 document cast a positive obligation on States for the betterment of the LTBTQAI community. The YP+10 document provides for a set of nine Additional

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<sup>11</sup> Archbishop Philip Tartaglia, *At the Door of the Temple- Religious Freedom and the New Orthodoxy*, Edi. TM Shah, T F Farr, J Friedman (Religious Freedom and Gay Rights), Oxford University Press, 2016, P. 62

Principles and 111 Additional State Obligations cover a range of rights whose articulation has emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.<sup>12</sup> The YP+10 document is an affirmation of existing international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics. States must comply with these principles both as a legal obligation and as an aspect of their commitment to universal human rights.<sup>13</sup>

State, as a provider, protector, entrepreneur, economic controller and arbitrator plays a pivotal role in the life of masses including individuals with different sexual orientation. State has a positive obligation towards the LTBTQAI community. This positive obligation goes beyond the mere legal prohibition of individual acts of discrimination. It requires that States effectively combat instances of structural or systematic discrimination, by the adoption of positive measures ensuring that no group is permanently disadvantaged or excluded from the community.<sup>14</sup> In this regard, the YP+10 document provides the State obligations as follows;

- a) Relating to the rights to equality and non-discrimination
- b) Relating to the right to privacy
- c) Relating to the right to treatment with humanity while in detention
- d) Relating to the right to freedom from torture and cruel, inhuman or degrading treatment or punishment
- e) Relating to the right to education
- f) Relating to the right to the highest attainable standard of health
- g) Relating to the right to information
- h) Relating to the right to the freedom of peaceful assembly and association
- i) Relating to the right to seek asylum
- j) Relating to the right to found a family
- k) Relating to the right to participate in public life
- l) Relating to the right to promote human rights

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<sup>12</sup> The Yogyakarta Principles Plus 10, P. 5 (Visit: <http://yogyakartaprinciples.org/principles-en/yp10/>)

<sup>13</sup> Id. P. 5

<sup>14</sup> Oliver De Schutter, 623

### **The YP & the YP+10 and Response from the Stakeholder:**

Effectiveness of the principles is based on response from the stakeholders. The existing laws require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries. Same has been reflected on international and municipal level. On international level, the UNHCR has promulgated a resolution in 2016. When it comes to municipal levels, positive steps have been taken in revising the existing laws and introduction of new laws. In the USA, the judiciary<sup>15</sup> has actively engaged in protection of the LGBTQAI community followed by the legislatures<sup>16</sup>. The UK has also responded to the cause by bringing new laws and amendments to the existing laws<sup>17</sup>. From the Indian perspective, the higher judiciary has followed the Yogyakarta Principles in *Naz Foundation v. Government of NCT of Delhi and Others*<sup>18</sup>, *National Legal Services Authority v. Union Of India and Others*<sup>19</sup> and *Navtej Singh Johar et al v. Union of India and Others*<sup>20</sup>. The Parliament has also taken positive steps by passing the Transgender Persons (Protection of Rights) Act, 2019. Apart from the active role of the judiciary and legislatures in different countries, the NGO's, human rights groups etc., are playing a crucial role in achieving the milestones in safeguarding the LGBTQAI community rights through sustained efforts.

### **Conclusions:**

The YP & the YP+10 documents have laid down the path for positive treatment towards the LGBTQAI community across the world. Slowly but steadily, the changes are taking place in different countries and the same has been reflected in the ruling of the courts and introduction of new laws or amendments in the existing laws. There are many hurdles to cross but it is sure that the outcome of the constant efforts of the support group of the LGBTQAI community is changing the mind-set of the society. The YP & the YP+10 documents are definitely valuable in substantiating claims of the LGBTQAI community across the globe.

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<sup>15</sup> Refer: *Lawrence v. Texas*, 539 U.S. 558 (2003) , *Obergefell v. Hodges*, 576 U.S. 644 (2015) etc.

<sup>16</sup> ACLU, *The Rights of Lesbian, Gay, Bisexual and Transgender People*, <https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people>.

<sup>17</sup> Steven Dryden, *A short history of LGBT rights in the UK* , <https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk#> .

<sup>18</sup> 160 Delhi Law Times 277

<sup>19</sup> AIR 2014 SC 1863

<sup>20</sup> (2016) 7 SCC 485