

# Transgenders and Human Rights

**Ujjwal Kumar, Brajesh Kumar**

Advocates, Supreme Court of India, New Delhi, India

## Abstract

*Much of the 20th century, especially its later half is known as the 'Age of Human Rights' and rightly so as no preceding century in human history witnessed such a provision of human rights enunciations on a global scale. Never have the languages of human rights sought to supplant all other ethical languages. No previous century has witnessed the proliferation of endless normativity of human rights standards as a core aspect of the politics of the intergovernmental desire. Never has this been a discourse so varied and diverse. <sup>1</sup>It was this sheer importance which prompted the then Secretary General of the United Nations, Mr. Boutros Boutros-Ghali, to term it, in his inaugural address at the 1993 Vienna Conference on Human Rights, as a 'common language of humanity'. This article attempts to discover how far the changing dimensions of the human right discourse has helped the transsexuals (or Transgenders, as they are preferred to be called now) as well as lesbians, gays, bisexuals and other such sexual and gender minorities in attaining the social, economic and political status they have been fighting for all these years.*

**Keywords:** Transgenders, human rights, status, Human Right Commission, HIV/AIDS

**\*Author for Correspondence** E-mail: [advocateujjwalkumar@gmail.com](mailto:advocateujjwalkumar@gmail.com)

## INTRODUCTION

Human rights are very fundamental and inalienable in nature. They are not supposed to be granted by state but are inherent in a person because of him/her being a human. State is merely a protector of these rights. It is therefore a sheer paradox that one still must fight for what one is naturally entitled to just because the supposed protector of rights assumes to itself the role of a grantor of rights. In this background, the article looks at the general concept of human rights, the development of human rights jurisprudence over a period and its impact on the transgender and other sexual and gender minorities, in general, who have long been a victim of state's apathy and neglect.

## CONCEPT OF 'HUMAN (OR 'HUPER') RIGHTS' [2]

The concept of 'human rights', a modern term for natural rights, derives its origin from the natural law. It was contended by the proponents of natural law that God created all men equally with some inalienable natural rights. According to John Locke, who gave the theory of the inalienable rights of individuals, every individual had a natural inborn right to "life, liberty and estate". In his state of nature,

which was a state "of peace, goodwill, mutual assistance and preservation" men had all the rights which nature could give them. Further, nobody had an absolute and arbitrary power over himself or any other person to destroy his own life or take away life or property of another [3].

John Rawls, on the other hand, derived human right as ethical imperative informing the basic structure of a liberal and well-ordered society that fully respects both liberty and equality. Lon Fuller, however, constructed the logic and languages of human rights through contrasting, but still, coalescing morality of duty and aspiration [4].

Jurists of other schools of law have also defined the basis of human rights. Thus, H. L. A. Hart (Positive/Analytical School) derived his 'minimum natural law rights' from certain non-contingent facts about being human. According to him, all human beings are equal because all are co-equally mortal and vulnerable to pain, hurt and physical harm and because all of us remain co-equally deficient in our capacity to order social cooperation according to the best dictates of human reason [5].

### The Rights Jurisprudence

All human rights are derived from the dignity and worth inherent in the human, who is the central object of human rights and fundamental freedoms. In simple terms, whatever adds to the dignified and free existence of a human being should be regarded as human right [6]. The proliferation of endless normative human rights order in the latter half of the 20th century has led to the emergence of people's movements that interrogate the practices of the politics of cruelty everywhere [7]. That being fully said, we ought to note that not all forms of human violations stand addressed by the languages of human rights [8].

For making the framework of a conscientious human rights order, the most important task is to establish the dimension of evolving the rights and locate it in the accepted conventions of the international human rights order. This is then followed by debating and negotiating with the authorities and setting up a movement for the realization of the right at the conceptual, statutory, executive as well as at the penal levels. The evolution of the human rights world order has been due to the effort of positive interpretation of the emerging vistas of human civilization, the relativity of the moral standards and theorization of various philosophies. Although it is comparatively better comprehensible today with extensive theorization of the core principles of humanity. Any derogation from the desired standards of humanity (as per the theorized charters of human rights) deserves immediate articulation on the established standards and creation of an adequate space for the rightful existence of the community or individual, if violated upon. It is a journey that never ends but is aimed at evolving measures for attainment of the highest standards of life and dignity [9]. Hence, the proposition that 'Rights are not given by nature merely waiting to be found' finds a footing here. On the same standard, rights are inventions created by human agents through symbolic interactions [10]. They involve the collective conduct and social meaning of many and come into being through the interpretive and activist work of social movements and a diverse range of moral crusaders and entrepreneurs: from kings,

prophets and philosophers to governments, social movement, writers and NGOs.

### Constructing Human Rights for Sexual and Gender Minorities

A starting concern lies with the thinkers who see human rights as inalienable, given and universal. They were heralded by natural law theories that somehow see such rights as given and inhered naturally in the world, as said earlier in this article. Most religions subscribe to this view as rights (and obligations) may be seen to have been inscribed in Hammurabi's Code, the Bible, the Quran and the Vedas. But for the interactionist, such texts do not have any inherent meaning. This is clearly witnessed by debates, schisms, conflicts and different interpretations which texts have generated throughout history. In contrast, others see rights as constructed i.e. they are built by human beings. Constructionists look at the ways in which some people and groups (often social movements) are claim makers and do what might be called 'human rights work'. They clarify laws, write justifications, generate reports and conferences, network in cyberspace and generally, provide rhetoric for human rights. They provide evidences and arguments, identify key types of people (homosexuals, transgenders and people suffering from AIDS), usually against a moral backdrop that helps to identify 'trouble'. Different claim-makers and different moral backgrounds would lead probably to a different sense of just what these rights should be. So, while transgender activists champion 'transgenders' rights', others would claim that this infringes their rights. Likewise, such claims depend upon audiences who will hear and there is an inevitable competition between different claims to rights. The world of sexual rights almost invariably speaks to moral codes: religious, organizational and humanitarian [11].

In a rights discourse concerning sexuality or gender identity, the prime question arises with respect to the carving out of the dimensions and developing an arena for participation. Here, the historical constructions of identity and difference need to be unwrapped. Prof. Upendra Baxi, in his writing on *Critiquing Rights*, has very finely argued about the politics of identity and difference and framed an interesting query

at the end [12]: Do the languages and logics of human rights essentialize the identity or celebrate the difference of the bearers of human rights? He very succinctly puts in eight points concerning political identity in the human rights discourse [13]:

- First, identities remain historically given, socially constructed and transformed by critical praxes.
- Second, identity formations stand always constituted by the practices of identification.
- Third, these in turn, destabilize ‘the identity of the object’.
- Fourth, essentializing notions are liable to disruption by multiple, fluid, complex, contradictory practices of identification.
- Fifth, narratives of politics of cruelty and violent exclusion (especially, class, gender, race and ‘despised sexuality’) frame politico-juridical identity, mirroring, domination and resistance, histories whose task is ‘not to discover the roots of our identity but to commit ourselves to its participation’.
- Sixth, a notable feature of collective identities and group rights; forms of sharing or group membership, history and loyalty do not quite preclude contestation concerning the injustice and rightlessness that its mores cause to individuals thus framed.
- Seventh, identity politics thus raises the problem of the ‘recognition-redistribution dilemma’ confronting the overweening power of state and social institutions or networks.
- Eighth, logics of identity and difference articulate themselves in the context of state-and-regime-sponsored politics of cruelty and social violence.

This discourse on identity provides for an extremely rich jurisprudential background for the problem at hand i.e. constructing rights for sexual minorities including transgenders.

A continuous search for allegiance with an organised (preferably dominant) political community goes to the root of making the process of accessibility to human rights a non-universal phenomenon [14].

Forms of human rights’ historic struggles have paved the way for theorizing repression; these even open the area of discrimination on the grounds of sex and sexual orientation, among others, as violations of internationally proclaimed rights [15].

Another dimension to the universality or universal accessibility of human rights is linked to the cultural understanding of social suffering and alienates human rights discourse from the lived experience of culturally and civilizationally constituted humanness [16].

Identity subversion remains a complex affair. Thus, for instance, homosexuals living under the constant threat and protesting against the criminalizing tendencies of the state may still unite in protest claiming respect for the *right to be different or a right to difference*. This conflict of human rights to free choice of belief and identity and cultural relativism can pose extremely difficult problems to ponder upon unless made socially visible by a global paradigm of human rights securely in place.

It is in this background that the author intends to situate the human rights jurisprudence for sexual and gender minorities in general, and transgenders, in particular. The foundation stone for basing the human rights of sexual minorities, hence, is laid to meet the increasing concerns of the evolutionary dynamics of the ‘rights’ movement itself.

On a further clarification of phraseology, the term ‘sexual minorities’, also used for transsexuals, is simply based on the quantitative and numerical measurements. It is for a much greater concern here as the term ‘minority’ has not primarily been used in gendered-sociological sense but has more of an emotional and sociological overtone. Basically, the context of such sexual minorities is primarily social, something that is on the surface and even capable of influencing the demographic patterns. Not surprisingly, one does not find sufficient statistics and census reports on the profile of these sexual minorities. Hence, they constitute the term ‘sexual minority’, for the purposes of present research. Gender identity as well has indeed a locus of fundamental rights and there are

indeed people whose rights of choosing their gender or sexual orientation have been violated that may suffice to use the term 'sexual minorities' in a general way but does not necessarily suffice to constitute a 'minority' as that term is used in human rights law. It is demanded that all human rights should simply be framed in terms of individual and individual rights of freedom of speech, assembly or religion, for example, providing enough legal support for the group life of cohesive minorities. Though, the ultimate value of the concept of 'sexual minorities' remains debatable, for the time being, the concept has played and is likely to keep playing an important role in human rights law. Hence, its applicability to sexual minorities should be considered along with its other established applications [17].

Further, before articulating the multi-dimensional rights discourse and the treaty law, it is quite important to connect the study on transgenders with various multi-disciplinary realm of rights, for instance, rights of tangible and intangible nature, positive and negative rights, individual and group rights and so on and so forth. To elaborate it further, it can be argued that criminalizing an action of physical violence on a person of a certain sexual orientation or gender identity is a tangible right, however, penalizing the same for mental or psychological outcomes would amount to an intangible right. Then the question arises whether these two rights are placed on a different hierarchy of rights. This is when the legitimacy must be drawn from the allied sister statutes. For example, S 498A Indian Penal Code (IPC) defines "cruelty" by including both mental and physical elements as constituents. The penalty is based on the impact on the overall health, both physical as well as mental. Similarly, S5 of the Domestic Violence Act 2005, proceeding on the same lines, brings into its ambit the tangible physical as well as intangible mental harassment. The hierarchy clearly seems to be on a permanent abeyance in the modern interpretation of rights [18].

Also, with the onset of the democratic rights movement, the emphasis on the positive obligations of the state has been considerably

widened. Not only does it remain within the *laissez faire* domain of protecting life and liberty of the individual but also has been vested with extensive responsibilities of ensuring economic and social rights of the subjects. The Indian constitutional rights scenario has been a unique example for tracing the journey of (individual) non-interference rights to (group) state-sponsored rights standards with the contribution of judicial activism [19].

A yet another dimension of this is individual interests vis-a-vis the collective societal code and a seemingly unbridgeable conflict between the two [20].

The articulation of utilitarian principles of the Dworkin's 'Trump theory' can, however, make an interesting approach. An approach that most individual rights activists generally take up has found substance in this theory. Dworkin states that the function of rights is to preclude governmental actions motivated by reasons that denigrate or express contempt for certain members or sections of the community. He is quite explicit that the purpose of rights is to counteract the in-eliminable presence of "external preferences" (views that people may have about the value of others or the worthiness of other's desires) in utilitarian and majoritarian justifications of state actions [21].

To sum up this discussion, it is noted that within the contemporary international parameters of human rights a comprehensive set of rights and obligations needs to be articulated upon and merged within categorical yet porous 'generations of rights' discourse.

### **LGBT and International Human Rights Discourse**

Back into the mid-20th century, the LGBT movement marked its first documented emergence in the West and had challenged traditional notions of sexual orientation and gender identity. Initially this discarded section of the western society followed a soft approach but when oppression and violations persisted, the movement adopted a proactive stance, challenging the attitudes of those in the authority. The period during which the riots erupted in New York in the late 1960s, after

police raids on the Stonewall Inn (a gay bar), is still remembered as the beginning of LGBT rights movement in the West. The aggressive stance that the rights activists adopted demanded a change in attitudes and drew world attention to the violations of the rights the community faced. This was called the 'Stonewall era' of the movement named after the place where the resistance for the first time, sparked off. Through pressure group activity and social movement building in many countries across the world, claims had been started to be made gradually for the rights to different kinds of gender identities and sexual orientations [22].

Minor campaigns to take the community out of the realm of law and place it within medical model of understanding and treatment had started in the mid-to late nineteenth century itself. By the beginning of the century, in the works of those like Havelock Ellis and Magnus Hirschfield (whose work was destroyed by Nazis), one starts to see claims being made over the rights of these people. Hirschfield mentions about the creation of Centre Arid, an organisation for the rights of homosexuals as well as transsexuals. In the middle of 20th century, one comes across a proliferation of rather low key, often apologetic, organisations which started to put LGBT rights more and more on the political agenda [23].

The Wolfenden Committee Report, 1963 in the UK which was a result of a government inquiry ordered to look into several 'homosexual scandals' in the early 1950s, helped to make the issue a public issue. The recommendations of the Committee were later enshrined into Sexual Offences Act 1967, which decriminalized homosexuality in England and Wales [24].

Then came a broad phase, which incorporated both gender and health rights perspectives. It was the arrival of HIV/AIDS on the scene between 1981 and 1986, and ironically, it worked to strengthen the LGBT movement. For the first time, hitherto 'outcast' community came to work with the government in shaping the policies. They became professionalized. More than this, they also had

to deal with the linkage between the community and health rights; in many ways latter was more acceptable than the former, and hence, new links over rights talks were established. Perhaps more significantly, since HIV/AIDS was an international issue, it brought the community and their health rights on the world stage. HIV/AIDS was a pandemic bringing chronic illness, early death and tragic bereavement for many young men but ironically, it revitalized and professionalized an otherwise dying movement [25].

Of late the movement has been widely globalized, courtesy the NGOs such as Amnesty International and Human Rights Watch and an increasing a search for 'cosmopolitan democracy' and 'global citizens' [26].

However, in practice, as some nations have implemented programmes aimed at well-being of trans-people, others are reluctant or quite slow in doing that. In many countries, sexual minorities are still outcast as they are bullied, harassed and discriminated against in schools and offices, unfairly arrested/detained and become victims of hate-crimes. They are also fined, flogged, tortured, raped and executed. These incidents have been well documented by international agencies like United Nations Human Right Commission [27].

### **Impact of Women's Rights Movement**

Although traditionally the core concern of women's movement in this field has been with women's reproductive rights, gradually, they have been able to put together a much more wide-ranging programme that claims sexual rights as human rights like any other essential rights. Women's demands for rights to gender equality, to have control over their bodies, sexuality and fertility or right to marriage have come to have definite bearing on international human rights [28].

### **Citizenship Debate**

One of the most recent developments in the fight for gender and sexual rights has led to citizenship debates. T. H. Marshall's (1950) classic model of citizenship suggested a development model of civil, legal and welfare

rights emerging in Western societies. These days it is used more broadly and has come to signify a model of 'social inclusion' or 'full participation' and has been harnessed by feminist and lesbian/gay/transsexual political agendas seeking to claim their own social inclusion but drawn upon a much wider canvas [29].

David Evan's *Sexual Citizenship* (1993) stated that the history of citizenship is a history of fundamental formal heterosexist patriarchal principles and practices ostensibly and progressively 'liberalized' towards and through the rhetoric of 'equality' but, in practice, to effect unequal differentiation. David introduces his own concept of sexual citizenship which involves partial, private and primarily leisure and life-style membership and which he connects to the market. His primary focus is on specific groups like homosexuals, women, bisexuals, transsexuals and children. He attempts to construct the subjects to whom right and obligation could be ascribed. The idea, although new, has contributed immensely to the citizenship debate of such marginalized groups and has led to the development of politics connected to the relationships between men and women, families, the denaturalization of the sexual, balancing different communities and their claims and trying to live with diversity and common humanity [30].

## CONCLUSION

In the final analysis of this discussion, it can be said that what one has witnessed at the closure of the 20th and in the beginning of 21st centuries, has not been just fulfilment, even though partial, of some of the main claims of an earlier LGBT movement but many of their uncultivated dreams also have become a reality in some parts of the world. A new visible public culture of lesbian rights, gay rights and transgender rights and intimate citizenship are in the process of being created even as they are being contested. It is this development which has led to several international conventions (e.g. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, which can be relevant in cases of discrimination of any kind against lesbian, bisexual as well as transgender women,

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which is not limited to state actors) and documents (e.g. UN Declaration on Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006), creating a wide international human rights framework. These conventions and documents have, in turn, have provided the judiciary with some tenable legal basis to write progressive and commendable judgments in favour of the sexual and gender minorities. The Naz Foundation [31] and NALSA [32] judgments in India by the Delhi High Court and the Supreme Court respectively are good examples wherein these courts have generously referred to and drawn ample support from various international conventions and documents on human right to bring home the point that sexual minorities can and should no longer be kept out of human rights' scope and ambit. While Naz deals with sexual rights of the gays and lesbians, NALSA talks about social and economic rights of transgenders.

Mahatma Gandhi, the Father of Nation, had once said that every human being has a right to live and therefore to find the wherewithal to feed and clothe himself and to his family and is also entitled to proper medical care. Right to life includes right to live with basic human dignity [33]. It is these most basic human rights that are being unfairly denied to the sexual and gender minorities including the transgenders as the state and the society even refuses to acknowledge them as human beings. The fight is not just for human rights but also for the *Right to be human*. However, the modern day human right discourse has given this fight a new meaning and purpose and has brought these minorities in contention much more than ever as they are inching closer and closer to the complete fulfilment of all their long-cherished demands. Their long-fought war is about to enter its decisive phase. It is just a matter of time when they get freed from the shackles of state's and society's neglect, apathy and prejudices and like their other fellow human beings will live thereafter without fear in their hearts and with their heads held high with pride and dignity.

## REFERENCES

1. Upendra Baxi. *The Future of Human Rights*. 2nd Edn. Delhi: Oxford University Press; 2006.
2. Upendra Baxi. *Transgender People and Their Problems*. Jul 27, 2017, 9:30 PM. <http://socialjustice.nic.in/pdf/introduction.pdf>. (According to Prof. Baxi, human stands marked by the presence of 'man' and person by a 'son'. So, he prefers to use a non-sexist version by combining the first letters of both the words: 'huper' and expects that this term will replace the term 'human' in future.)
3. Mahajan VD. *Jurisprudence and Legal Theory*. 607 (Rep. 2010).
4. Baxi. Supra 14.
5. id.
6. Subramaniam S. *Human Rights: International Challenges*. Vol. 1, 3 2007.
7. Mahajan. Supra 610.
8. id.
9. Manika. *Homosexuals: The Fight for Normalcy*. / (Unpublished LL.M. Dissertation) University of Delhi; 2013.
10. Ken Plummer. *Rights Work Constructing Lesbian, Gay and Sexual Rights in Late Modern Times*. 153 (2006).
11. Manika. Supra, 39.
12. Baxi. Supra, 115.
13. Id. at 147–48.
14. Manika. Supra, 40.
15. id.
16. id.
17. id. at 41.
18. id.
19. id.
20. id.
21. Ronal Dworkin. *Taking Rights Seriously*. 234 (1999).
22. Michael Foucault. *History of Sexuality*. 155 (2004).
23. id.
24. Arvind Narrain. That Despicable Specimen of Humanity: Policing of Homosexuality in India in Challenging the Rule(S) of Law: Colonialism, Criminology and Human Rights in India. Kalpana Kannabiran, editor. 2008.
25. Manika. Supra, 55.
26. id.
27. United Nations High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity: A Report. 2011.
28. Foucault. Supra 157.
29. Id. at 162.
30. id.
31. Naz Foundation v. NCT Delhi, 160 DLT 277, 334 (2009).
32. National Legal Services Authority (NLSA) v UoI & Ors. 4 SCJ 148, 2000-01 (2014).
33. Dhyani SN. *Jurisprudence and Indian Legal Theory*. 23 (Rep. 2011).

### Cite this Article

Ujjwal Kumar, Brajesh Kumar. Transgenders and Human Rights. *Journal of Human Rights Law and Practice*. 2018; 1(1): 25–31p.