



Rights of Transgender/Transsexual and International Human Rights'

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1. Introduction:

In our society transgenders are looked with a different eye but they are alike us and deserve the human rights enjoyed by us. A universal and inalienable human right is a concept that acknowledges the equality of all human beings and the mutual respect and honourable regard of each other. It is a concept of the inherent entitlement of a human being that cannot be lost or surrendered. The concept of Human Rights is inherently attractive and resonates as truth. But to achieve the basic human rights clarity of sex and gender is must for every human being.

The transgender population of the world is emerging, and in doing so, faces grave misunderstanding, prejudice and injustice on a daily basis. In the absence of recognition as a distinct and equal subset of humanity, transgender people do not receive equal protection under common law or human rights. Many instances can be referenced where transgender people were afforded neither equal rights nor freedoms, and have been subjected to atrocious and inhumane treatment at the hands of law makers and society at large. Due to their perceived gender identity these sexual minority are considered as criminal class and it is fact that no society wants to include criminals in mainstream. Law demands clear status of identity which play central role to get exact location in the eyes of law. Unclear sex and gender of persons is making their life inhuman because they have hardly any status in the eyes of human rights law. Here we will discuss various provisions of human rights which are grossly violated with respect to third sex and further grounds of discrimination.

2. International Human Rights Jurisprudence:

Transsexuals and Intersexual in the world (together with their family members and loved ones) still live out their lives in secrecy, because of their fear of how society (and their neighbour) will deal with them in the event that they disclose the existence, or the history, of their transsexualism or intersexuality. As they disclose it, they are thrown out from society and even most basic human rights are also snatched from them.

However to stop violation and discrimination the twin principles of equal protection and non-discrimination are present in all international human rights instruments and the great majority of national constitutions. Equal protection is the principle that all individuals have the right to have the laws of a specific jurisdiction applies to them in the same manner as those laws are applied to other similarly situated individuals. Non-discrimination is the somewhat broader principle that neither private parties nor

instrumentalities of the state shall discriminate among individuals based upon arbitrary criteria.

Comprehensive documents on human rights like UDHR, ICCPR, ICESCR, CRC all demand clear distinction of sex and gender identity. Various human rights commission also working for best interest of people but perhaps people have only means male and female. The law has largely ignored other medical conditions (apart from traditional method) in which an individual's sex may be ambiguous and may be perceived gender identity.

There are at least three situations in which the rights of third sex (which includes intersex, transsex) to equal protection and non-discrimination are violated. The first is when a state makes certain acts between members of the same sex illegal while permitting the same acts between heterosexuals. The second occurs when certain rights are granted to individuals or withheld from individuals on the basis of their sexual orientation. The third occurs when a state discriminates against sexual minorities in its application of a law which is facially neutral in its application to heterosexuals or homosexuals.

In a sense, the struggle for applying International Human Rights Law to third sex is, at its core, a question of equal protection and non-discrimination. It consists of applying the entire spectrum of International Human Rights Law to sexual minorities on an equal basis as that law is applied to individuals who conform to gender roles--socially and sexually.

An important point to make regarding the right to equal protection and non-discrimination under International Law--and most National Law--is that the instruments are worded so that almost every right explicitly applies to "every person" or "all people." Similarly, prohibitory provisions are worded so that "no one" shall be subject to the relevant Human Rights violations. In addition, the principal International Human Rights instruments contain provisions explicitly granting equal protection and the right to non-discrimination to "all people." The basic problem is sexual minorities are not included in the wording of those provisions, the breadth of the wording indicates that the categories listed as protected are not exclusive and that, indeed, the provisions should be interpreted as expansively as possible. For the protection of individual human rights there are three main Instruments namely-

- i. Universal Declaration of Human Rights of 1948 (UDHR),
- ii. The International Covenant on Civil and Political Rights of 1966 (ICCPR),
- iii. The International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).

Broadly *transsexual* and *intersex* people's most relevant rights are under mention rights-

- The right to freedom from discrimination is protected by the Universal Declaration of Human Rights (UDHR) in its Articles 2 and 7, and by the International Covenant on Civil and Political Rights (ICCPR) in its Articles 2 and 26.
- The right to freedom from torture or cruel or inhuman treatment is protected by the UDHR (Article 7) and the ICCPR (Article 14).
- The right to freedom from arbitrary arrest is protected by the UDHR (Article 9) and the ICCPR (Article 8).
- The right to freedom of movement is protected by the UDHR (Article 13) and the ICCPR (Article 12).
- The right to freedom of expression is protected by the UDHR (Article 19) and the

ICCPR (Article 19).

- The right to freedom of association is protected by the UDHR (Article 20) and the ICCPR (Article 22). Along with this *right to marry, right to asylum and right to privacy* are also worthy.

2.1 Grossly Violated Rights:

2.1.1. Rights against Torture and Ill-Treatment:

At the international level, most of the attention to Transsexuals & Intersexual human rights has focused on violations dealing with administration of justice issues such as torture and ill-treatment and arbitrary detention. These types of violations are usually the most visible forms of state-sponsored persecution and, hence, the easiest to document and address. Several human rights mechanisms already report and comment on the torture and ill-treatment of sexual minorities. In addition, the perception of violations against physical integrity makes them a powerful starting point for advocacy.

The prohibition against torture is contained in two relevant international instruments: the ICCPR and the Torture Convention. First, Article 7 of the ICCPR prohibits torture and "cruel, inhuman degrading treatment or punishment" but does not define what these terms mean.

Second, the Torture Convention provides a definition; however, a claim must show the torturer acted "with the consent or acquiescence of a public official or other person acting in an official capacity." In cases dealing with sexual minorities, many states do not attempt to conceal their persecution.

The numerous instances of torture present a relatively easy case to decision makers, who may be generally hesitant about recognizing the human rights of sexual minorities. Despite its usefulness in getting decision makers to recognize the humanity of sexual minorities, torture is only a starting point for addressing the myriad of violations against sexual minorities. Given its status in international law, torture paves a relatively non-contentious inroad into the potentially contentious area of sexuality. Advocating for a right to sexual autonomy, while a worthy long-term goal, would encounter many more obstacles.

2.1.2. Rights against Arbitrary Detention:

International human rights instruments protect against the arbitrary deprivation of liberty. Violations fall into Category I "when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)." This applies to instances when there is no legal justification for the detention. Category II applies "when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights." This means governments cannot detain individuals for exercising certain rights. Category III includes instances "when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character." This category protects individuals in legal systems that do not guarantee procedural rights. Most deprivations of the rights of sexual minorities fall under Categories II and III.

The detention of Transgender human rights defenders in these circumstances violates Articles 19 (freedom of expression), 21 (freedom of assembly), and 22 (freedom of association) of the ICCPR.

Category II also prohibits detentions resulting from the exercise of Article 26 of the ICCPR, which prohibits and protects against "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

2.1.3. Right to Life:

The biggest threat to the right to life of transsexual and *intersex* is sodomy law and denying of health rights. Many Islamic laws punish with death penalty for sodomy. Sodomy laws, which legitimize the social stigma and persecution sexual minorities encounter. Criminalization sends a chilling message to sexual minorities even where sodomy laws are rarely enforced. Health rights are also come in purview of right to life so here we cannot neglect violation which is ongoing on Transsexual and Intersex community.

2.1.4. Right to Privacy:

Transsexual and *intersex* people have not received any attention with respect to right to privacy. Mostly government bodies like police violate this right, when they arrest these guys.

Despite its presence in the UDHR and the ICCPR, the right to privacy has not received much attention at the international level with respect to sexual minority. Little guidance on the right's meaning or scope is available beyond the Human Right Commission's General Comment 16 on Article 17 of the ICCPR. Until 1995, the HRC had taken only four decisions in communications concerning Article 17; since then however, its jurisprudence has expanded. Article 17 does not apply to all state interferences with the right to privacy but only to those amounting to an "arbitrary or unlawful interference."

3. Grounds of Discriminations:

The intersexual and transsexuals are facing discrimination on two major grounds:

3.1 Discrimination on the ground of Sexual Orientation:

Sexual orientation is not included in the categories of prohibited bases of discrimination in international law. The United Nations Charter lists only race, sex, language, and religion. However, subsequent human rights instruments include "other status," indicating the drafters anticipated the emergence of new categories. The use of "such as" further suggests the enumerated categories are examples in a non-exhaustive list.

Despite the possibilities for the expansion of human rights norms, explicit protections at the international level evade sexual minorities. Some bodies have attempted to include sexual orientation as a prohibited category. However; it is unclear whether they are fitting sexual orientation under "sex," as the Human Rights Committee did in *Toonen*, or "other status."

One solution for sexual minorities is a comprehensive instrument that addresses discrimination on the basis of sexual orientation. In 2003, Brazil became the first state in the U.N. to advance the idea of focusing on human rights violations based on sexual orientation. Beside this nascent effort, sexual minorities have received sporadic attention at the international level.

The existence of the "other status" category makes it possible to fit sexual orientation within existing human rights documents. Given the history of discrimination and violence, sexual orientation is a strong candidate for recognition as a distinctive category.

Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference. Sexual orientation is a fundamental aspect of every individual's identity and an immutable part of self. It

is contrary to human dignity to force an individual to change their sexual orientation, or to discriminate against them on this basis. And, it is repugnant for the State to tolerate violence committed against individuals because of their sexual orientation.

None of the international human rights instruments mentioned make any reference to “sexual orientation” or “gender identity.” A general approach to discrimination has not been characteristic of international human rights law. Instead there are treaties and programs dealing with discrimination on the basis of race and sex, and concerns with specific groups such as refugees, cultural minorities, indigenous peoples and migrant workers.

3.2 Discrimination on the ground of Sex:

The prohibition of sex discrimination has been present since the founding of the modern human rights movement. The preamble of the U.N. Charter calls for the “equal rights of men and women.” The UDHR reiterates this point, adding everyone is entitled to enjoy its rights “without distinction of any kind, such as . . . sex.” Arguments against sex discrimination could apply to sexual minorities, especially in the realm of criminal law. Many sodomy laws apply, textually or in practice, to conduct based on the sex of the partner. In other words, the law criminalizes conduct for same-sex couples that are legal for different-sex couples. This violates the non-discrimination provisions in international human rights treaties. Arguments based on sex also reach the underlying reason for discrimination and violence against sexual minorities, *i.e.*, the disruption of gender norms. Since domestic developments in this field are not promising, international mechanisms may be able to articulate the linkages between patriarchy, sex discrimination, and violations against sexual minorities.

Transsexuals and intersexual need some special treatment in respect to attain status in international human rights law. In this respect discussion of international Bill of Gender Rights is very much relevant. “The International Bill of Gender Rights (IBGR) strives to express human and civil rights from a gender perspective. However, the ten rights enunciated below are not to be viewed as special rights applicable to a particular interest group.

Nor are these rights limited in application to persons for whom gender identity and gender role issues are of paramount concern. All ten sections of the IBGR are universal rights which can be claimed and exercised by every human being.”

After apathy from all walks of life for obtaining basic human rights for the person belongs to third sex, now some new instruments are emerging to protect human rights of third sex but still they are not universally recognized. The International Bill of Gender Rights (IBGR) and Yogyakarta principles are one of the attempts.

4. The International Bill of Gender Rights (IBGR)

The restatement of the International Bill of Gender Rights (IBGR) was first drafted in committee and adopted by the International Conference on Transgender Law and Employment Policy, Inc. (ICTLEP) at that organization's second annual meeting, held in Houston, Texas, August 26-29, 1993. The IBGR has been reviewed and amended at subsequent annual meetings of ICTLEP in 1994, 1995 and 1996. The ten rights are-

“1. The Right to Define Gender Identity, 2 The Right to Free Expression Of Gender Identity, 3 The Right to Secure And Retain Employment And To Receive Just Compensation, 4 The Right of Access

To Gendered Space And Participation In Gendered Activity, 5 The Right To Control and Change One's Own Body, 6 The Right to Competent Medical and Professional Care, 7 The Right to Freedom from Psychiatric Diagnosis Or Treatment, 8 The Right to Sexual Expression, 9 The Right To Form Committed, Loving Relationships and Enter Into Marital Contracts, 10 The Right to Conceive, Bear, Or Adopt Children; The Right To Nurture And Have Custody Of Children And To Exercise Parental Capacity.”

On 26th March, 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). The principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity.

The Yogyakarta Principles define the expression “sexual orientation” and “gender identity” as follows: “*Sexual Orientation*” is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;”

“*Gender Identity*” is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

The Principles recognise:

- Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity.

In practice, a “sexual rights” framework is proving to be a flexible and adaptable tool for advancing the rights of people whose sexual orientation and or gender expression do not conform to social or cultural prescriptions. People—whether they identify as lesbian, gay, bisexual, *transgender*, *meti*, *woubi*, *Hijra*, all-sexual, travesty, women-loving-women or heterosexual— have the right to have control over their bodies and to have autonomy over decisions related to their sexual life, and the right to express and interpret that sexual life free from coercion or discrimination. From our perspective, this growing discourse is a bold challenge to heteronormativity and its corresponding systems of privilege and oppression.

The sexual rights framework is, therefore, by definition, a broad, multi-issue framework that serves to acknowledge the fluidity of identities across space. Finally, a sexual rights framework also creates a space for cross-movement organizing, which is crucial for advancing the human rights of all people who are subject to discrimination on the basis of their actual or perceived sexual orientation.

5. Conclusions:

In order to obtain recognition of even their most basic human right to equal protection from

violence under national and international law, third sex are faced with the multiple tasks of establishing their very existence, and establishing the recognition of their right, on the most basic normative level, to bodily integrity and equal protection. To do this, it is incumbent upon third sex to demonstrate, through cross-cultural documentation, that third sex are a global phenomenon, of relevance to all cultures and societies, and thus an appropriate object of regulation by international law. The accomplishment of this task is necessary to rebut cultural relativist arguments against providing protection for sexual minorities under international human rights law.

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