



Third Genders: Their Agonies and the Demand for Legal Recognition

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Abstract

Third genders are the intersex people whose sex is not assigned or determined at birth. They are sidelined, marginalized and treated as untouchable and impervious; they are deprived of the social and the cultural participation and contribution. Not only this, since in many countries their legal status is not determined, they are being dispossessed and robbed of many rights and the privileges which the other gender enjoy and benefit as the citizen of the country. The paper will focus and talk on the grievances and moaning of the third gender community, their demand to have the legal declaration of their gender identity, to get the socio-economic benefits and other privileges, role of the law in giving recognition to their gender identity etc.

Keywords: Gender, Third Gender, Discrimination, Gender Identity, Legal Recognition

Introduction

Intersex people whose sex is not determined or identified when they are born are known or termed as transgender. Transgender is a term used for people whose gender identity, individuality, expression, conduct or deeds varies and are diverse and assorted from those associated with sex assigned or allotted to them at the time of their birth. "Trans" is the short hand term used for "transgender." In contemporary and modern day usage, transgender has become an "umbrella" term and its ambit or realm is so wide and extensive to include and cover transsexual people, intersexes individuals and men and women, regardless and irrespective of their sexual orientation. Now after landmark judgment of the Supreme Court the transgender in India are recognized as the "Third Genders". The third genders are the individuals or persons who are considered males at the time of the birth and who take on a feminine or womanly gender roles or sexual role later on. They may live full- or part-time in the gender role 'opposite' to their biological sex. It is really a pitiable, contemptible and disgraceful thing that they are the creation of the nature but still not considered as the part of the society. We talk about two genders, male and female, what about the third gender? They are ignored and overlooked by the society. Some time the society does not understand why they are different from others. The main aim of the paper is to focus on the grievances of the third gender community, their demand to have the legal declaration of their gender identity, to get the socio-economic benefits and other privileges. It also explores the role of the law in giving them the legal recognition.

Status of the Eunchs/Hijras

Since centuries transgender have not been treated at par with the other genders and are being harassed, persecuted and maltreated in every phase of their life. During the British rule, the Criminal Tribes Act, 1871, was enacted to supervise and administer the deeds of Hijras/TG community. The Act provided punishment and reprimanded eunuchs who were registered, and who used to or come into sight to be dressed or decorated, festooned or adorned like a woman in a public street or place. Additionally, it also rebuked and reproved eunuchs who danced or played music on the public streets and places. Such persons also could be arrested without warrant and the punishment that was awarded was imprisonment up to two years or fine or both. Under the Act, the registered eunuch who used to keep a boy of 16 years was punished with imprisonment up to two years or fine and the Act also denuded and stripped the registered eunuchs of their civil rights by keeping them out from acting as guardians to minors, they were not allowed to make a gift deed or a will and were unable to adopt a son. Such an awful Act has, however been repealed and rescinded in the year 1949. It is not that nothing has been done to perk and ameliorate up their position. In 1994, Hijras were granted voting rights. In 1998, Shabnam Bano became the first transgender to be elected as a member of State Legislative Assembly in Madhya Pradesh. 2005, saw the option of third gender in Indian passport with E(eunuchs) application forms. India agreed to list eunuchs and transgender people as "others" in voter identity cards in the year 2009. In 2011 it was the first time that Transgender people were included and incorporated as a separate category in the national census. Additionally, the Supreme Court recognized the transgender community as a third gender along with male and female in the year 2014. The court, however, clarified and elucidated, its verdict pertained only to eunuchs and not other sections of the society such as gays, lesbians and bisexuals, who are also considered under the umbrella term, transgender. Although, efforts have been made to remodel and upgrade their position, yet it is felt that still third genders are suffering at the hands of people and are facing endless and never-ending problems in every field be it societal discrimination, family issues, problems in educational Institutions, workspaces/household etc

Problems Faced By the Third Genders

Societal Discrimination

Third genders face problems at every phase of their life. They are often ridiculed, scorned and scoffed by the society in the public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals to name a few... They are being treated as untouchable and impervious. They have virtually no safe place in the society and are discriminated. Discrimination is translated into violence, often of a brutal, vile and vicious nature. The most awful and

horrid part is that they are being discriminated by the people who have given birth to them, by the people whom they have confided and unburdened their heart to or in other words, their family members. Seldom, our society realize the trauma, ordeal and agony which the members of transgender community undergo and endure, nor appreciates the innate and intrinsic feelings of the members of the transgender community, especially of those whose mind and body disown and disclaim their biological sex. Social stigma and blot is another factor which makes them frequent targets of harassment, violence, extortion, sexual abuse from relations and acquaintances and the police. Many times they themselves don't want to admit and make a clean breast of the fact of discrimination because it intensifies and strengthens their trepidation, culpability and infamy.

The Family

It is a matter of shame and ignominy that hijra communities face problems and tribulations in their family also which is considered to be the place where a person can consider himself to be at ease and can trust and confide and open his heart to his members of family. The extreme stigmatization surrounding transgressions and misdemeanors around make it extremely difficult and thorny for families to accept and acknowledge their children. The family instead of protecting and shielding a child from the outside world, out of fear, mortification and humiliation neglects and overlook the child and due to constant tortures, beatings, spankings, the only hope, consolation and solace left to the child is the hijra community which is considered to be a family. The guru and his chelas comprise a family. A guru selects a successor and trains him. If a guru falls short of choosing a successor, the panch, its leaders are wise, astute and judicious men who command the respect, reverence and admiration of the entire community.

Educational Institutions

A lot of third genders are said to report that the school was a horrendous, horrid and ghastly affair for them. Fellow students passed rude, offensive and boorish comments resulting in their drop outs and ouster from the school at early stage. Those who somehow manage to get some higher education and become teachers or so and are androgynous and hermaphrodite face severe disparity and bigotry in the schools, colleges and elsewhere. Most of the third genders find it hard to study and utilize their qualification further and end up dancing and singing on the roads to earn their living, thus leading a very vulnerable, deplorable and wretched lives.

Workspaces/household spaces

As already stated that since third genders are unable to get adequate education, and since they are uneducated they are unable to find suitable and apposite employment of their choice. Since time immemorial, they were invited to bless the newly connubial couples and to newly born babies. But in the present scenario, to make both ends meet, they are not only forced to dance on the roads and other places but also beg and beseech on the red lights for their livelihood. In Bangalore, as in South India generally, the hijras do not have the cultural role that they do in North India (where they preponderate), and take up sex work as the only way to earn a living. They usually run 'hamams' (bath houses). It is demeaning, mortifying and debasing, as they are often subjected to the depredations and havocs of brutal, atrocious customers, many of them rowdies, devious and dodgy police.. Due to societal intolerance and fanaticism it is very intricate for hijras to get suitable housing. As a result, most of them end up staying in localities where they have traditionally been staying. They live in the hamams, which are totally devoid of privacy and serves as both workspace and household space. Such is the desolate and abject conditions in which they survive and be in this world.

Discrimination by the state

There is no doubt about the fact that state has discriminated and showed disparity towards third genders every now and then. In 1897 the Criminal Tribes Act of 1871 was amended which was subtitled "An Act for the Registration of Criminal Tribes and Eunuchs". Under this law, the local government was required to keep a register mentioning and declaring the names and residences of all eunuchs who were "reasonably suspected of kidnapping or castrating children or committing offences under Section 377 of the Indian Penal Code". The law also declared eunuchs as inept and incapable of acting as a guardian, incompetent to make gifts, drawing up of a will or adopting a son. Section 377 of the Indian Penal Code, 1860, which criminalizes homosexual behavior and certain sexual acts, which both homosexuals and heterosexuals, married and unmarried people, might engage and take on in, finds place and continues and carry on to be in the Indian statute book although it has long since been get ridden of and has been taken away from the British statute book. However this section is usually seen to target sexually minority populations as they are erroneously and speciously seen as the only ones who perform 'carnal intercourse against the order of nature' and thus intimidate them. The Law Commission of India had historically favored the retention of this section, but in its 172nd report, delivered in the year 2000 it recommended to repeal section 377 of IPC. On 2 July 2009, in the landmark case of *Naz Foundation v National Capital Territory of Delhi*, the High Court struck down much of S.377 of IPC as being unconstitutional as it would violate the constitutionally protected right to privacy under the expanded definition of right to life, individuals fundamental Right to equality before law, freedom from discrimination and right to privacy under the expanded definition of right to life and personal liberty under Article 14, 15, and 21 of the Constitution of India. The High Court did not strike down S.377 completely. The section was valid to the extent it related to non-consensual non-vaginal intercourse with minors and it expressed the hope that Parliament would soon legislatively address the issue. However, On 11 December 2013, the Supreme Court of India ruled homosexuality to be a criminal offence setting aside the 2009 judgment given by the Delhi High Court. On January 28, 2014 Supreme Court dismissed the review Petition filed by Central Government, Naz Foundation and several others, against its December 11 verdict on Section 377 of IPC.

Apart from this, it is also seen that police is also not far behind as far as tormenting and perturbing of hijras are concerned. The main weapons that the Police use mostly against the third gender community are the laws and the power or the authority given to them for the protection and the security of the society. An Act for the Registration of Criminal Tribes and Eunuchs, 1897, section 377 of IPC and provisions in the various state Police Acts are also used to target same

sex behaviors and gender identities. There are catena's of cases endorsing the fact that third genders are being harassed, tormented, besieged and beleaguered by the protectors of the state i.e. police. To name a few, in one of the incidents two hijras who were talking to their friends in Park were picked up by the police without any rhyme and reason, battered, spanked up and taken to the police station. There they were subjected to public humiliation and mortification by being asked lewd and bawdy questions which was audienced by number of people. Not only this, they were also subjected to sexual molestation. There are other reports of hijras being forced to clean up and dirt free the police station, electric shocks being given or administered to their private parts, so on and so for. The police regularly raid and invade the hamams to collect their *hafta* (bribes) and on their refusal, rebuffal or repudiation to give the money, these officials have maltreated and mistreated their authority by undergoing non consensual sex with them. The most appalling and most abysmal thing was that they were stripped and made to stand naked and bare in a line to show that they were not females. Not only this, the police often stop the third genders in the cruising areas, threaten and bully them saying we know what you are doing, take their names and addresses and extort and wrest money from them. This appeared to be one of the most common forms of oppression and tyranny used by police officials against third gender community. Illegal detention is another weapon used against these people to subjugate them. In endless number of cases, the police take these people to the police station on pretext of questioning them and detain them in the lock ups for periods of time varying from overnight to a few days. No First Information Report (FIR) is lodged and due to absence of any documentary evidences, these incidents do not catch the attention of public in general. Bindiya Rana (the first transgender woman to stand as a provincial political candidate in Pakistan) says that the changes and alterations in the law that were made in her own country, which came into effect in 2012, have not been enough and they do not suffice to change or transform lives of the third gender community. The police often abuse the men using filthy, grimy and smutty language, punch an d thrash them up and even subject them to sexual abuse and molestation. Such is the contemptible condition and situation of third genders in the society

Demand for Legal Recognition of Their Gender

Since the late 20th century, some eunuchs activists and Western NGOs have lobbied to officially recognize Hijra as a third gender or third sex apart from two other sexes who are already recognized as males and females. In Bangladesh, Eunuchs have successfully gained this recognition and acknowledgment. However, the traumatic and harrowing experiences faced by the members of the third gender community was highlighted and brought to light by many reports and the media of different countries and submitted that every person of that community has a legal right to decide their sex orientation and to espouse, support, advocate, champion and determine their identity. Since the TGs are neither treated as male or female, nor given the status of a third gender, they are being deprived and devoid of many of the rights privileges and opportunities which a citizen enjoy in his country. Not only this, TGs are also robbed of social and cultural participation. They have a restricted access to education, health care and public places. Further, it was also pointed out that they also face discrimination and bigotry to contest election, right to vote, employment, to get licenses etc. and, in effect, treated as a recluse, outcast and untouchable only because of non recognition of their gender identity.

As far as India is concerned, the Indian position becomes unique and inimitable as compared to the rest of the world whereby although society has accepted the third gender, for a long time, there was no legislation which recognized them unlike and disparate in most other cultures. Due to this Hijra social movements have campaigned for recognition as a third sex and due to their increasing demand, in 2005, Indian passport application forms were updated with three gender options: M, F, and E (for male, female, and eunuch, respectively), with E added later on .Furthermore, in November 2009, with the intention of ensuring and make sure further recognition for the third gender, India agreed to list eunuchs and transgender people as "others" category, distinct from males and females, in voter identity cards. These steps are some of the ways in which the Indian government has tried to integrate the third gender in Indian society but this has not been a complete success as there is still a section of society who fail to understand and comprehend these third genders which leads to discrimination and prejudice. Some people fail to understand them as they fail to recognize them as a separate gender and instead think of them of either being a male or a female resulting in their discrimination and inequity as has been felt by many activists and people belonging to the third gender. In the year 2012 a writ petition was filed by NALSA against the Union of India and Others. A Bench of Justices K.S. Radhakrishnan and A.K. Sikri, in separate but concomitant judgments, said "eunuchs, be treated as a "third gender" for the purpose of safeguarding their rights under our Constitution and the laws made by Parliament and the State Legislature." The Bench observed "recognition of transgender as a third gender is not a social or medical issue but a human rights issue. Transgender are also citizens of India. The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender." The Bench said gender identification is essential and indispensable. It is only with this recognition that many rights, to name a few, right to vote, to own property and marriage will be meaningful and carry great weight. By virtue of this verdict and decree, all identity documents, including a birth certificate, passport, ration card and driving license would recognize and make know the third gender. If any Indian is interested in changing his/her gender to what has been assigned to him/her at birth, then he/she is permitted to do so by filling a gender affidavit indicating his/her preferred gender (from any of the three legally recognized ones). No additional medical certificate or endorsement/clearance by third parties (including relative) need to be furnished or endowed for the procedure. For protecting the rights of these people Bench directed the Centre and States to take steps to treat them as socially and educationally backward classes and extend reservation for admission in educational institutions and for public appointments. However, the bench clarified and made clear its verdict pertains and is applicable only to eunuchs and not to gays, lesbians and bisexuals.

Conclusion

There is no doubt about the fact that each and every member of the society has a role to play and is considered as part and parcel of this society. These eunuchs or third gender community are very much a part of the society but undoubtedly, the position of eunuchs have been most reprehensible, most appalling and most abysmal one since time

immemorial. We keep on arguing about the fact that the position of woman in Indian society is very vulnerable, susceptible, feeble and meek. But it is submitted that the position of third gender community is much more vulnerable, much more susceptible, much feebler, and much meeker as compared to women because they are the ones who are still fighting for their gender identity. We have so many women comrade legislations for safeguarding the rights of desolate women but what about eunuchs or third gender people? Are they not human beings? Do they not have a right to live with dignity and composure? What about their identity? Should legal succor be not available to them? Should they continue to suffer as they have been? Should society continue to harass, agonize and anguish them, the way they have been doing? These and many more questions keep on cropping up and haunting us. The need of the hour is to enact laws that discourage, dispirit and put off brutality against individuals based on sexual orientation, and set up effective systems for reporting hate motivated acts of violence to provide justice. Then, it is also necessary that training should be provided to law enforcement officers and they need to be sensitized on this staid and somber issue. State should 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 and demeaning physical examinations intended to determine their sexual orientation. The laws criminalizing homosexuality including all legislations that criminalizes private sexual conduct between consenting adults should be repealed and annulled. Legislation should be enacted to prohibit and forbid discrimination and bigotry on the grounds of sexual orientation and gender identity. The need of the hour is also to sensitize people in general that they are also human beings and have all the rights that are available to the other human beings and they are also at par with other human beings. Education and training be provided to prevent discrimination and stigmatization of intersex people. These are few steps that can be taken to bring third gender people at par with the other human beings of the society. The urgent need of the hour is to take these few steps forward so that third gender people who have since time immemorial been living a life not more than an animal are allowed to live with dignity, poise, self confidence and self assurance.

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