Restrictions Imposed by Human Biology in Achievement of Gender Justice as Human Rights

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Abstract

In contemporary times with frequency as high as that of everyday, we are witnessing debates on implementation of gender justice. Be it college forums, news channels or for that matter parliament everywhere and everyone at both conscious and sub-conscious levels are aware of the problems resulting because of imbalance in power equations between the genders. The focus area of this research paper will be India and legislation of India which has made many laws, bye-laws and rules to bring feminine and masculine gender on the same footing but yet there are gaps through which gender justice is getting hit hard despite the Criminal Amendment Act of 2013 and 2018. Complication by the NALSA judgment have occurred as a result of which the definition of gender justice needs over-hauling but the Indian society is unwilling for it. Through this research paper, researchers trace out the problem is actually lying in the very meaning of sex, sexuality and gender as understood by the society of India and the solution is lying in being neutral towards sex and gender.

Keywords:- Sex, Gender, Sexuality, Gender Justice

Introduction

From the history of human to present, there are ample evidences which are leaving no doubt on the fact that there is some sort of interconnection between working of the human society irrespective of the fact that in which ethnicity and time zone that society is working in. There are certain rules of a society of course unwritten in majority of the human civilizations which are based on the sex of a person. For example, as to how the property is to be distributed, which jobs particular sex and gender can do or cannot do, even the “public places” like parks, circus, theaters, malls etc.. are being restricted by sex and gender of a person.

Nomenclature of Sex And Gender

This research paper is focusing on the how the concept of gender justice has been developed over a period of time. Before that there are certain concepts which shall be understood before focusing on the research problem of this research paper. And they are:-

a) Sex

As known commonly, it is a natural phenomenon which distinguishes between body of man and woman. It is also known as sexual activity which results in progeny. Medilexicon¹⁰ defines Sex as a character biological in nature based on their gonads, chromosomes, hormones, primary and secondary characteristics and identifies human bodies as male and female. Sex is also a psychological progression of a person which triggers the behaviour automatically for the purpose of sexual contentment. Wharton¹¹ in her work defines sex as a characteristic which is biological relying on hormones, chromosomes, gonads etc..and if clearly distinguished then are termed as normal sex being male and female and if parameters are in divergence, the human body is labeled as Intersex.

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b) Gender

Gender is a role which males and females are expected to play in society for ensuring its smooth functioning. Tierney defines Gender as social and civilizing expression which dictates the manner in which defined biological body is suppose to function.

Role of Sex and Gender

As the Indian society began to take shape, individualism vanished and a pattern developed wherein food production became the responsibility of the males, considering their physical potency while distribution went to females because of their biological capacity of giving birth, making womb, a resource to cash as the principle was to survive. These clashes for survival, highlighted the need of human biology where male sex attained preferences in working of the societies and accordingly roles named as gender were formulated for the sake of convenience. It was this convenience, roles in the form of gender began to define and since it meant survival, male and female began to enforce them on the younger generations and inculcated divine, morality and law to aid the compliance of these roles and penalized all acts of deviance.

As a matter of fact, in India the presence of third sex is known by its gender role which is to provide amusement and is labeled as Kinnars, Enuchs, Hijras, Khwaja-sarah s and recently as Intersex, transgenders etc. They were in haraams of the kings and queens, in circus etc., but were in no way daughter-in-laws or sons-in-law of a “normal” family.

Effect of Gender on Sexuality

Sexual behaviour which aided in continuance was accepted as normal known as Heterosexual activity with a rider of reproduction classifying it to be moral sexuality. This termed penile-vaginal intercourse as normal and moral while rest any other sexual activity as immoral even between a heterosexual couple because that was not resulting in progeny.

Because of this moral weightage, sexuality began to give in and same sex relation modernly known as homosexuality were frowned upon and became sin. To ensure that homosexuality and all other non-productive heterosexual activities are discouraged, legal structure was roped in and sanctions as hard as burning alive, amputation, hanging, jail sentences and not to forget fine and social detestation, were introduced to make sure that gender is abided within the four squares as laid down.

However, this control of gender on sexuality backfired and visible victims of this control were females who were then laiden with the expectation to remain chaste till their official union with a ‘man’ in form of marriage and procreate as many times possible. It denied them the access to medical sector without getting their gender role scrutinized first at the help-desk and then at doctor’s chamber. The other casualty were biological males who were sexually attracted towards males. Known as homosexuality, this behaviour was morally and legally penalized.

Last casualty of gender roles are Third sex/ Intersex, whose sexuality itself has no where been defined. The denial is so strong that no proper scientific research have been conducted to understand the sexuality of Intersex. Even the medical fraternity which is of course the members of normal society have concluded their many research attempts by stating that they are abnormal and in need of medical aid in terms of psychological corrections, hormonal and surgery procedures. The ambiguous genitalia is a medical emergency and sex reassignment is prescribed after consulting with parents of the child with the personal opinion of the doctor. Here most of the times the child is too young to understand the complexities of the procedure yet, a “normal” biological sex is assigned to the child with enforcement of parallel gender role. But what is forgotten that what is allotted will be in arms with what is felt internally. The end result is of a contradiction and conflict of soul and when the child defies the allotment the labels, who is then a transgender.

Presence of Third Sex and Gender

It will not be incorrect to say that presence of third sex and gender openly have been felt in the society from last 40-50 years only before that they were open secret of human society which were denied any sort of identity / labeling by the normal society to maintain its self-proclaimed integrity. They have been awarded names from kinnars to hijras, Khawaja-sarahs to kathoeys, sissys to muxes and have faced discrimination along with both physical and sexual violence.

It is only recently that the third sex and gender have been identified as Human and their rights have been advocated through various international conventions.
For instance, united nation resolution on human rights, sexual orientation and gender identity 2012\textsuperscript{14}, wherein it was sketched that it is the State which is to protect the individuals irrespective of their LGBTQI sexual orientation and any violation will be treated as violation of Universal Declaration of Human Rights. Then there is international policy of United nations on Men having sex with Men 2006\textsuperscript{15}, where in states are directed to take all the measures on the fact that homosexual men are not discriminated on basis of their sexuality and proper medical treatment is provided to them as needed. It has been further said that there shall be awareness programmes in local neighbourhood to make society aware that homosexuals shall not be discriminated just because of their sexuality. There is declaration of commitment on HIV/AIDS\textsuperscript{16} wherein it was for first time in the recorded history of international legal documents, stated that the transgender person are in need of State protection and medical aid as they are the ones who are being discriminated solely on the basis of their sexuality.

India also know acknowledges, the presence of the third sex and gender via NALSA\textsuperscript{17} judgment wherein an umbrella term “Transgender” was chosen to identify distinct sexuality of LGBTQIA. It was in NAZ judgment\textsuperscript{18} wherein Section 377 of IPC,1860 was declared as unconstitutional by Delhi High Court, but only till the consensual part. This was overturned in Suresh Kumar\textsuperscript{19} wherein the court opined, that it is the legislative decision and courts shall not interfere as they only interpret law. In 2018 came Navtej Singh Johar\textsuperscript{20} wherein again Section 377 of IPC,1860 was declared unconstitutional till the consensual part giving a choice to make to members of LGBTQIA community.

The reason of such fluctuations in dictates of judiciary pertaining to the issues of LGBTQIA community is the fact that there are moral dilemmas of the society and judges are part of the society, so it is very normal that such dilemmas step in law making process. This conflict between legality and morality was first time recorded in Hart-Devlin debate wherein Wolfenden Committee in England clearly stated that legal dicta has nothing to do with same sex behaviour and hence the Buggery Act got evaporated from the legal text of Britain. This small statement caused uproar in British Society because it was disturbing the way a society works. This lead to debate\textsuperscript{21} between two wise heads namely HLA Hart and Lord Devlin where later opined that segregation of morality from legality will lead to confusion in for a person as there will be no internal, moral force which will make him/ her to oblige with law. HLA Hart, who rejected the arguments made by the former and stated that Devlin is going by the principle of majority rules but the minority no matter how small cannot be overlooked and cannot be imposed on everyone.

In India, it was in 2018 only when the consensual homosexuality was acknowledged. Ideally, it is a great step taken by the judiciary in bestowing Article 21 and 19 on LGBTQIA community and gave them liberty of life and choice but the confusion on sex and sexuality can be seen in the dictum of apex court as well. The celebrated NALSA judgment which recognizes all non-heterosexual activities under the term of transgender and identifies kinnars, hijras etc.. as third gender, while in the interviews conducted by the researcher proves the fact that the judgment has failed them. They opine that their attempt was to identify themselves as women but labeling them as transgender have defeated their struggles. They are still outside the purview of society and hence justice is still a distant dream for them.

**Gender Justice**

Oxfam\textsuperscript{22} defines gender justice as a human right for women in order to grant life full of liberty, dignity and freedom to make choice. While generally, gender justice is taken as something which aims to bring equality between man and woman. Point to note here is that the concept of gender justice in itself is talking about two known biological sexes and genders only. It is correct that gender justice is talking about equality, justice , liberty etc.. all fantasized concepts to restore dignity of human life but they are all incomplete attempts as not all lives are taken into consideration. This results in biasness where the base of discrimination is lying in human genitals as a result of which implementation of gender justice around the world has failed miserably and no concrete results are yet been achieved even in India. For instance, legislation in an attempt to do gender justice formulated Article 14, 15 and 16 of constitution to open up work, education opportunities and public place for Indian women but the glaring question is are they still open?. In a recent survey\textsuperscript{23}, it was conveyed that more number of educated women are dragging themselves out of work force, to be home-makers as there is no one to look after young ones. So, what sort of gender justice are we as a society advocating?. Answer to this situation is lying in gender neutrality, which is relatively new concept but rather simple to understand and it means applying all the principles of justice and
equality without giving any preference to sex and gender of person.

Cambridge dictionary defines gender neutrality as something which has nothing to do with men and women in particular. The definition in itself is confusing and hilarious, as it does not explains what it actually means. European Institute of Gender Equality defines it as, policies which are not in particular effecting men or women. However it does not stop here and says further that these policies effect male and female sex uniformly. This definition on international forum clearly demonstrates the importance of normal sexes in the society and the confusion or rather unwillingness to give acceptance to third sex and gender as a human body.

Even the concept of justice, in form of gender justice is under challenge. However before that we need to have a basic understanding of what is gender justice? United nations defines it as a concept wherein an end is brought to the inequality among biological males and females be it in home, office or societal norms itself.

Here the problem is that years of usage feminine gender is allotted the role of victim and it is the male biology who is a offender. In India, the legal acceptance of homosexuality and all other non-heterosexuality has highlighted the fact that even the biological male can be victim of gender discrimination and the biological female a hardened offender. Now this very notion has jolted the concept of gender, which is finding difficult to accept that masculinity can be a victim and feminity an offender. “Normal/ mainstream” Society is still finding it difficult to accept that in heterosexuality which is still the normal and moral conduct for the society, a man can be victim and a women an offender, as it questions the very role the society had created for them.

Elevation to Gender Neutrality

The question which arises before us is now that what can be done to solve the confusion which the pre-conceived notions of sex, gender , gender justice have on the society. And the answer to this problem is lying in extension of gender justice and moving towards the understanding and accepting of “Gender Neutrality” which means being neutral to one’s gender without giving any preference to biological and sociological sex.

This concept is focusing on bringing formal equality wherein the concept will be applied as whole and focus will be on human body and its rights rather than on his or her rights where substantive equality executes itself. This execution of substantive equality is so unaware of the concept of intersex and LGBTQUIA that there are no roles defined for them in the society. Let alone the roles, no name are also allotted for intersex and transgenders unlike the designations of Mr., Mrs., Miss, His or Her , He or She for ‘normal’ male and female sexes. The names if any available to intersex and transgenders are like abnormal, kinaar, hijras, she-male, he-female and all sorts of slangs and derogatory words which are being used to taunt rather then name them.

Conclusion

To brief up this piece, it seems that this newly found species / variation of human body in India has shook up the strings of society on the basis of which its execution has been drafted. Until now the very concept of human rights to accomplish itself was literally looking below the belt of a human body and if it was able to trace the distinguish genitilia of a male and a female only then that body classified itself to be a human and having any human rights. Even the black and white text of Indian laws including the constitution of India which sculpts the principle of equality from Article 14 to 16 but give it a shape of male and female only. The very concept of human also known as person in law in itself needs a change. Both law and society has to understood the genitilia, testosterone, estrogen and heterosexuality are not the only criteria to identify someone as humanoids. There are feelings of love and respect in the heart, value of life honour and dignity and that certainly cannot be based on sex and sexuality of a person.

Conflict of Interest:-NIL

Source of funding:-Self

Ethical Clearance :- In this self funded research paper, researchers have care of ethics required in research and have duly credited the respective authors at appropriate places and since it is a self funded work, no permission from any committee was required.

References

8. NALSA versus Union of India (2014) 5SCC 438.
10. Suresh Kumar Kaushal versus NAZ Foundation Civil Appeal No. 10972 of 2013.