

Historical Background and Legal Status of Third Gender In Indian Society

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INTRODUCTION:

The terms third gender and third sex describe individuals who are categorized as neither man or woman as well as the social category present in those societies who recognize three or more genders. To different cultures or individuals, a third gender or sex may represent an intermediate state between men and women, a state of being both (such as "the spirit of a man in the body of women) the state of being neither (neuter), the ability to cross or swap genders, another category altogether independent of men and women. The term has been used to describe hizras of India, Bangladesh and Pakistan who have gained legal identity, Fa'afafine of Polynesia, and Sworn virgins of the Balkans, among others, and is also used by many of such groups and individuals to describe themselves like the hizra, the third gender is in many cultures made up of biological males who takes on a feminine gender or sexual role. In cultures that have not undergone hetero normativity, they are usually seen as acceptable sexual partners for the masculine males as long as these latter always maintain the "active" role. The very sight of eunuchs speaks volumes about them. Dressed in ill-fitting, loud, hideous clothes and face caked with cheap make-up, they roam about in public places, trying to extract money from any person who seems susceptible to part with it, generally as a way to get away from them. These members are not ordinary beggars, they are eunuchs, castrated males who are typically known to dress like women, have voices and are identified by their prototypal clap.

II. RESEARCH METHODOLOGY

The research methodology is primarily qualitative and draws from both primary and secondary sources. The author admits that it was extremely difficult to stand upright on the threshold of objectivity, for the victimized transgenders lacked voices, as the social stage has been quite unwelcoming for the majority of them. Some of the key informants included transgenders (primarily Male to Female), police officers, lawyers, media people, representatives from the civil society and the youth .

The analysis focused on comparing the data collected and assessing the degree of the compliance with the international human rights. The focus has been framed through the (de)constructivist theories of sexual identity, taking its roots primarily from Judith Butler's works, vi which suggest that identity-based politics, instead of superseding marginalization, actually work for reinforcing it.

HISTORICAL BACKGROUND:

Eunuchs have existed since 9th century BC. The word has roots in Greek and means "Keeper of the bed" castrated men were in popular demand to guard women quarters of royal households. The practice is behind to have started in China where, at the end of the Ming Dynasty, there were as many as 70,000 eunuchs in grand place itself. In the Mahabharata, the Pandavas used Shikhandi, a eunuch, to defeat Bhishma Pitamah in the battle of Kurukshetra. The Hindu God Shiva is often represented as Ardhanarisvara, with a dual male and female nature; Typically, Ardhanarisvara's right side is male, and left side female. This sculpture is from the Elephanta Caves near Mumbai. References to a third sex can be found throughout the various texts of India's three ancient spiritual traditions - Hinduism, Jainism and Buddhism - and it can be inferred that Vedic culture recognised three genders. The Vedas (c. 1500 BC - 500 BC) describe individuals as belonging to one of three separate categories, according to one's nature or prakrti. These are also spelled out in the Kama Sutra (c. 4th century AD) and elsewhere as pums-prakrti (male-

nature), stri-prakrti (female-nature), and tritiya-prakrti (third-nature). Various texts suggest that third sex individuals were well known in premodern India, and included male bodied or female-bodied people as well as intersexuals, and that they can often be recognised from childhood. A third sex is also discussed in ancient Hindu law, medicine, linguistics and astrology. The foundational work of Hindu law, the Manu Smriti (c. 200 BC - 200 AD) explains the biological

origins of the three sexes: "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child or boy and girl twins are produced; if either are weak or deficient in quantity, a failure of conception results. Indian linguist Patanjali's work on Sanskrit grammar, the Mahabhaya (c. 200 BC), states that Sanskrit's three grammatical genders are derived from three natural genders. The earliest Tamil grammar, the Tolkappiyam (3rd century BC) also refers to hermaphrodites as a third "neuter" gender (in addition to a feminine category of unmasculine males). In Vedic astrology, the nine planets are each assigned to one of the three genders; the third gender, tritiya-prakrti, is associated with Mercury, Saturn and (in particular) Ketu. In the Puranas, there are also references to three kinds of devas of music and dance: apsaras (female), gandharvas (male) and kinnars (neuter). The two great Sanskrit epic poems, the Ramayana and the Mahabharata, also indicate the existence of a third gender in ancient Indic society. Some versions of Ramayana tell that in one part of the story, the hero Rama heads into exile in the forest. Halfway there, he discovers that most of the people of his home town Ayodhya were following him. He told them, "Men and women, turn back," and with that, those who were "neither men nor women" did not know what to do, so they stayed there. When Rama returned to from exile years later, he discovered them still there and blessed them, saying that there will be a day when they will rule the world. In the Buddhist Vinaya, codified in its present form around the 2nd century BC and said to be handed down by oral tradition from Buddha himself, there are four main sex/gender categories: males, females, ubhafobyanjanaka (people of a dual sexual nature) and pandaka (people of various non normative sexual natures, perhaps originally denoting a deficiency in male sexual capacity). As the Vinaya tradition developed, the term pandaka came to refer to a broad third sex category which encompassed inter sex, male and female bodied people with physical and/or behavioral attributes that were considered inconsistent with the natural characteristics of man and woman. Contrary to what is often portrayed in the West, sex with male (specifically receptive oral and anal sex) was the gender role of the third gender, not their defining feature. Thus, in ancient India, as in present day India, the society made a distinction between third genders having sex with a man, and a man having sex with a man. The latter may have been viewed negatively, but he would be seen very much as a man (in modern western context, 1 (straight), not a third gender (in modern western context 'gay') in Mediterranean culture.

IN MODERN TIMES :

The Hijra of India are probably the most well known and popular third sex type in the modern world - Mumbai - Based community health organization. The Humsafar Trust estimates there are between 5 and 6 million hizras in India. In different areas they are known as Aravani / Aruvani or Jagappa. Australia made significant progress toward recognizing transgender rights. The country now makes it easier for its citizens to apply for passports that reflect a third gender - neither male nor female. Importantly, the government will no longer require citizens to present proof of gender reassignment surgery in order to change the gender on their passport from the gender on their birth certificate. India has included a third gender category on its passport application since 2005, however the label "E" for eunuch has been controversial. Bangladesh just added a third category this year as well, using the term "other." Here in Nepal, despite the Supreme Court ordering the government to treat the third gender as equal in 2007, citizens are still denied this basic right. Just before the Parliament voted on a new Prime Minister, Baburam Bhattarai promised to do the right thing and issue a directive to all CDO offices demanding they start issuing third gender citizenship ID cards. Of course he did this while seeking support from CPN (United), a party with 5 votes in the parliament, one of which belonged to Blue Diamond Society's Sunil Babu Pant. Advocates and activists were encouraged by Bhattarai's promise. It would get the ball rolling, eliminate one node in the bureaucratic blame game, and put pressure on other government offices to start treating third genders as equal. The third genders (tesro lingis) in Nepal have emerged as a strong faction in the LGBTI rights movement here. Their persistent advocacy has won them some significant strides, not the least of which was their inclusion (albeit limited) in the 2011 census. Moves like the census and the issuing of a handful of citizenship ID cards to third genders around the country demonstrate that Nepal has the technical capacity to recognize third genders as such. Nepal's sexual and gender minority rights movement - especially the 2007 Supreme Court decision - is seen around the world as an example of effective and sophisticated grassroots human rights activism. The bureaucratic impediments to implementing the full, fundamental equality the court called for are leaving thousands upon thousands of citizens struggling for their basic rights. "Without official recognition of their preferred gender, transgender and intersex individuals face a wide range of practical, everyday challenges - for example, when applying for a job, opening a bank account or travelling," UN High Commissioner for Human Rights, Navi Pillay, said on Friday with regard to the progress in Australia. The highest human rights office at the United Nations has recognized this issue of gender and documentation as crucial. Nepal's sexual and gender minority rights movement - especially the 2007 Supreme Court decision - is seen around the world as an example of effective and sophisticated grassroots human rights activism. But the bureaucratic

impediments to implementing the full, fundamental equality are leaving thousands of citizens struggling for their basic rights. Through instituting a sexual and gender minorities budget line in 2008, issuing a few third gender ID cards in recent years, and adding a third gender category to the 2001 census, the Nepali government has begun to incorporate the third gender into its infrastructure. The issue, then, is clearly not ability, it's will. The Ministry of Foreign Affairs has said the Home Ministry must institute third gender on citizenship ID cards before it can start issuing passports. All four home ministers since 2007 have stalled the process and heaped blame on bureaucrats within their own ministry. Ministers can pass the buck to bureaucrats, and bureaucrats can claim that they operate in a skein of red tape. But until the administrative ministries, bureaus, and agencies in Kathmandu take collective action to include the third gender on the basic forms that allow citizens to access state services, they are failing to respect the human rights of Nepali citizens. In New York City, Dr. Bhattarai responded to a question I posed to him about his promise to issue third gender ID cards via Twitter: "And about the question of citizenship ID for third genders, we have in principal agreed that we will provide citizenship - even our Supreme Court has given a ruling in that context. So the government is committed to implement that. The TG will be treated on an equal basis as the other genders, and will be given full citizenship rights and all the facilities." Perhaps when he arrives home, the prime minister will keep his promise. Until then, simple, daily administrative tasks remain a challenge for third gender citizens; they are stuck waiting for their rights. Pillay put it plainly: "Making it simpler for people to obtain official documents that reflect their preferred gender will make life easier for thousands of people, in the process removing barriers that until now have prevented them from exercising their

human rights on an equal footing with others." With a flick of his pen, the prime minister can do his part. But then the bureaucracy has to react as if it cares about the fundamental rights of the citizens of the country it serves. 2nd century Roman copy of Greek sculpture. The figure is Hermaphrodites, from which the word hermaphrodite is derived. In Plato's Symposium, written around the 4th century BC, Aristophanes relates a creation myth involving three original sexes: female, male and androgynous. They are split in half by Zeus, producing four different contemporary sex/gender types which seek to be reunited with their lost other half; in this account, the modern heterosexual man and woman descend from the original androgynous sex. The myth of Hermaphrodites involves heterosexual lovers merging into their primordial androgynous sex. Other creation myths around the world share a belief in three original sexes, such as those from northern Thailand.

LEGAL STATUS:

Disowned by their families in their childhood and ridiculed and abused by everyone as "hijra" or third sex, eunuchs earn their livelihood by dancing at the beat of drums and often resort to obscene postures but their pain and agony is not generally noticed and this demand is just a reminder of how helpless and neglected this section of society is. Thousands of welfare schemes have been launched by the government but these are only for men and women and third sex do not figure anywhere and this demand only showed mirror to society. As many as 175 complaints and issues were disposed of at the "khula durbar" and most of these pertained to the grant of pension, making ration cards and BPL cards, cleaning of village pools, allotment of 100 sq m plots, drainage of water and removal of encroachments. The Constitution gives rights on the basis of citizenship and on the grounds of gender but the gross discrimination on the part of our legislature is evident. The Constitution, while it contains certain prohibited grounds of discrimination such as race, caste, creed, sex, etc., does not specifically include sexual orientation. A reading of Section 13 of General Clauses Act, 1897 which talks about gender and number makes the discrimination more apparent. It says : "words importing masculine gender shall be taken to include females". This in itself shows that the law makers did not take cognizance of eunuchs. Legal Discrimination against the sexuality minorities takes many forms, the most notorious being Section 377 of the Indian Penal Code (IPC). It reads :

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to 10 years and also be liable to fine." There is no mention of eunuchs in this section, even as eunuchs are known to engage in prostitution. Neither the Hindu Marriage Act nor the Special Marriage Act mentions third gender. Degree of Prohibited relationship refers to any relationship between a man and woman that is mentioned in Part I and Part II of the First Schedule of the Act. The focus is on the male and the female sexes. The 'third sex' has conveniently been ignored. A BBC correspondent covering a eunuch festival in Bangalore in September, 2003 quoted a eunuch complain that due to their social unacceptability. Jobs are denied to eunuchs due to their gender and they are ridiculed in the society. Time Magazine once interviewed a eunuch who complained that the application form for the job has only two sexes mentioned and makes it blatant how unwanted they are. Even if they apply, they are not allowed to enter the offices. The article also said that the eunuchs were deprived of the liberty of opening bank accounts and possess passports. The BBC report also spoke about eunuchs being deprived of the right to vote

as the people shun them. This is a matter of concern that a citizen of the largest democracy in the world is not given his fundamental right granted by any democracy. The main cause for discrimination against eunuchs is the mindset of the society at large. Owing to the fact that these people are different in matters of their sexual preferences and are strong enough to show it, the society sees it as a violation of a norm and thus subjects them to isolation. Family and popular psychology play a predominant role in perpetuating the present dilemma law needs to step in to ensure that a relatively small but deeply aggrieved humiliate section of the civil society is given its rights guaranteed by the Constitution of the land.

LAWS IN INDIA: VIOLATIVE OF HUMAN RIGHTS :

Given this background, the Ministry of Social Justice and Empowerment in its „2013 Expert Committee Report“, observed that a lack of recognition before the law is itself a human rights violation and this presents a major barrier to the transgenders in realizing other basic rights. The report noted, “Article 5 of the Constitution identifies the person who is entitled to be citizens of India. None of the conditions specified therein require a determinate sex or gender identity as a pre-condition of acquiring citizenship.”^{xxviii} Though there is no articulate mention of transgenders in either the statutes of India or the legislation, leaving them invisible and dependent on how general clauses relating to their human rights protection are interpreted, yet there are some legal provisions which passively provide rights to them. Further, India has ratified most of the international treaties with specific reference to the broad purview of human rights, be it be with regard to children, women, disabled or the elderly but since long there has been a disconnect between the plight of the transgenders and the Yogyakarta Principles, which were developed by a coalition coordinated by the International Service for Human Rights and the International Commission of Jurists and were formally adopted by a panel of leading international law experts way back in November 2006. These provide authoritative guidance on the human rights of LGBTIQ and the obligations of states to promote and protect these rights, ensuring full equality and addressing discrimination. It is because of this disconnect that the perpetration of human rights violations, on grounds of sexual orientation and despite the ratification, on ground of gender identity, is a common practice and is entrenched in India, to the point of being systematic, while discrimination on the same ground is institutionalized.

With regard to the domestic laws, Article 51 of the constitution of India, strives to promote international peace and security and foster respect for international law and treaty obligations in the dealings for international law and treaty obligations, and is supplemented by Article 253, which necessitates the state to create legislations for giving effect to international agreement. While reading the two together, we understand that in the absence of a contrary legislation, municipal courts in India would respect the rules of international law. Therefore, any international convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions, for example, articles 14, 15, 19 and 21 of the

constitution. Article 14 states that the state shall not deny to “any person” equality before the law or equal protection of the law. The article does not limit the term “person” to just male or female. Article 15 prohibits discrimination by the state on ground of „sex“ with regard to access to shops, hotels or use of well, tanks and other public places; Article 16 guarantees equal opportunity for employment irrespective of sex, but unfortunately, despite these articles, India still has discriminatory laws that contravene international human rights law. Further, though the articles do address and attempt to redress sex discrimination, transgenders are still systematically denied rights under articles 15(2) and 15(4), with almost the entire onus on the state. Under Article 19(1) (a) certain basic freedoms, which constitute as human rights, are granted as natural rights to all the citizens of India including, right to freedom of speech and expression of his self-identified gender and the right to choose one’s personal appearance. Though the values of privacy, self-identity, autonomy and personal integrity are guaranteed to the members of the transgender community under it and the state is bound to protect and recognize these rights, but in many cases, there exists a disassociation between their gender, their social name and their identification documents which dehumanizes them and also denies them their civil and legal status. The greatest and most inclusive constitutional provision is Article 21 which states that no person shall be deprived of life or personal liberty except according to procedure established by law commonly understood as “Right to life”, which includes within it self-determination of gender which is an integral part of personal autonomy. However, somehow we have failed in letting the people with alternate sexualities live a life with respect and dignity.

CONCLUSION:

Considering the complex network of people and the sizeable number of eunuchs in the world, it is not possible to close our eyes and ignore their existence. It must be noted that the third gender in India is not adequately provided for, though their existence is evident in our country. A vertical intervention of rights is necessary in recognising eunuchs as equal citizens of India.

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