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GENDER OR SEX; THE BRAWL BETWEEN LEGAL AND SOCIAL WITH SPECIAL EMPHASIS ON SCOPE OF GENDER IN INDIAN SCENARIO

AUTHORED BY- KASHISH KHANNA

I. Abstract

With the coming up of AI increasing trends of homogenization and adoption of the western culture, the debate of what prevails over the other; gender or sex, or what is more legitimate has gathered global attention. Some researchers are of the opinion that masculine and feminine roles are not biologically fixed but socially constructed, calling them genders. Whereas, on the other hand, the orthodox opinion is that you are either born as a male or a female and that is what you are expected to be and act like as in an ideal society, calling it sex. Even in the Indian law, article 15(1) and 16(2) where the two (male and female) were talked about, the word 'sex' has been used. Thus, according to the legal scholars sex is more legitimate than gender and in the opinion of the sociologists gender is the real identity of a person. These articles are meant for the purpose of protecting the two sexes from discrimination. Various other countries also refrained from using the term 'gender' in their laws as multiple connotations can be derived from it. It is important to understand that there are more than two genders; male, female, non-binary, pangender, genderqueer, neutral gender etc. This debate besides being a topic of discussion has hugely impacted gender justice, especially in India. According to the Indian Penal Code a transgender, if sexually abused can use all the provisions made for women. But why? They are different genders all together. Are we as a society doing enough for them? According to a survey about 6 in 10 countries have not gone far enough when it comes to the question of gender justice.¹ Furthermore, gender justice doesn't just comprise making laws for all, but also involves factors like respect, equal pay for equal work, identification and equal access to resources also. And this process can only start after legal recognition. How to go about this process? Should one of the two; gender and sex be chosen? Shall both be taken into account creating a balanced society?

¹ John Gramlich, Things we learned about gender issues, Pew Research Centre, <https://www.pewresearch.org/short-reads/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/> Last Accessed on 19th August, 2023-10:23 AM.

What are the probable solutions to end this debate once and forever? The answer to all these questions shall be given in the research paper.

Keywords: homogenization, gender, sex, gender justice, scholars, connotations, socially constructed, pangender, IPC.

II. Introduction

As already discussed, some researchers are of the opinion that masculine and feminine roles are not biologically fixed but socially constructed, calling them genders. Whereas, on the other hand, the orthodox opinion is that you are either born as a male or a female and that is what you are expected to be and act like as in an ideal society, calling it sex.

According to Canadian Institute of Health Research, In both people and animals, the term "sex" refers to a collection of biological characteristics. Physiological characteristics, such as chromosomes, gene expression, hormone levels and functions, and reproductive/sexual anatomy are largely involved. Although sex is often classified as either female or male, there are differences in the biological characteristics that make up sex and how those characteristics are exhibited. The socially created roles, actions, expressions, and identities of girls, women, boys, men, and persons of all genders are referred to as gender. It affects how individuals behave and interact, how they see themselves and other people, and how power and resources are distributed in society. Gender identity occurs on a continuum and may evolve over time; it is not limited to a binary (girl/woman, boy/man). The roles that people and groups take on, the expectations that are put on them, how they interact with others, and the nuanced ways that gender is institutionalized in society all contribute to the wide range of how people and groups interpret, feel, and express gender.²

Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being a male or a female. Sometimes, their innate perception of themselves may not be in conformity with their sex. Such people are transgenders.

S. 2 (k) of Transgender Persons (Protection of Rights Act), 2019, reads- "transgender person"

²Gender and Sex, CIHR, <https://cihr-irsc.gc.ca/e/48642.html>, Last Visited On 20th September, 2023-9:00 AM.

means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”

As per the judgement in the landmark case, Navtej Singh Johar VS Union of India³, LGBT people in India are entitled to all constitutional rights, including the liberties protected by the Indian Constitution. The judgement also made note that the LGBTQ (lesbian, Gay, Bisexual, Transgender, Queer) community is entitled to equal citizenship and protection under law, without discrimination. Similarly, these rights are also reserved for the other members of the LGBTQ Community.

III. The LGBTQ Community: Major Reason Behind the Debate.

- **Legally accepted:** The rights of the LGBTQ community in India and in various other countries have been recognized by various laws and judgements. Several countries, including India, have formally recognized third sex and homosexuals as equal citizens after a protracted campaign that included several protests and demonstrations in various areas of the world. By referring to them as "We the people of India," the Preamble to the Indian Constitution recognizes all of its citizens without discrimination. It ensures political, economic, and social fairness.
- **Socially not yet accepted:** According to a report of the Bar Council of India, 99% of the people are not ready for the change that the LGBTQ community demands. But what prevails over the other- constitutional morality or social morality? There are two basic reasons why social morality is important. First, social morality has aided in the evolution of civilization. The culture of humans has always included concern for others. Everything from politics to nonprofit organizations have undergone upheaval. Second, by realising that others experience similar emotions to our own, this discipline teaches us how to be more empathic. This idea has gradually strayed from its original intent. Its core consists on showing empathy and taking note of how others feel about one another. But right now, this idea is being employed to terrorise minority groups' very existence. There is no

³ Navtej Singh Johar and Others VS Union of India, [2018] 4MLJ 9 (CRL) 306.

definition of "Constitutional morality" in the Constitution. As a result, the Judges have given it various interpretations. Indirectly, the idea has been codified in the Constitution itself in the Preamble, Fundamental Duties, Part IV, Directive Principles of State Policy, and Part III, Fundamental Rights (Articles 12-35, 36-51, and 51).⁴

V. The Feminist Debate

Pseudo feminism also called fake feminism is the negative form of feminism. It refers to behaviour or claims that give the impression that they support feminist ideals but are not truly motivated by a commitment to gender equality. Instead of really wanting to advance gender equality, these actions or words could be made for personal benefit, to look politically right, or to win social acceptance. Pseudo feminism may be found in a wide range of settings and circumstances, including as the workplace, the media, and political debate. The use of feminist terminology or symbolism without genuinely supporting or promoting women's rights is one instance of fake feminism. This idea roughly represents "women over men". As per Neo Feminism, women don't have to act like men to be treated equal to them.

WAVES OF FEMINISM:

Different waves of feminism demanded different rights. The wave newer to the previous saw it as incomplete. These were:

First Wave: The first wave in the late 19th century was the first genuine political movement in the Western world, not the first manifestation of feminist principles. Mary Wollstonecraft's groundbreaking *Vindication of the Rights of Woman* was published in 1792. Around 200 ladies gathered at a chapel in 1848. They created 12 resolutions requesting particular rights, such the ability to vote. Early feminists also made reproductive rights a key concern. Congress eventually ratified the 19th amendment, granting women the right to vote, in 1920 as a result of years of feminist campaigning. Nearly 30 years had passed since New Zealand became the first nation to grant women the right to vote. The main objective of first-wave feminism was to make society acknowledge that women are people, not objects. First-wave feminism's founders were abolitionists, but their main concern was the rights of white women. For years to come, feminism

⁴Social Morality VS Constitutional Morality, Manupatra, <https://articles.manupatra.com/article-details/Social-Morality-vs-Constitutional-Morality-with-special-reference-to-Navtej-Singh-Johar-V-Union-of-India.>, Last Visited On 22nd September, 2023- 11:00 AM.

would be haunted by this omission.⁵

Second Wave: The 1960s and 1970s saw the rise of second-wave feminism. It questioned what women's place in society ought to be and built on first-wave feminism. Activists concentrated on the structures that held back women, drawing inspiration from the Civil Rights movement and anti-Vietnam War demonstrations. This required a closer examination of the causes of women's oppression. Traditional roles for men and women in the home were questioned. More groundwork was done for queer theory. The Equal Pay Act of 1963, Roe v. Wade in 1973, and other Supreme Court rulings were among the significant successes of this period. Feminism split into three main subgroups: mainstream/liberal, radical, and cultural. The primary goals of mainstream feminism were institutional reforms, which included eradicating gender inequality and providing women access to areas traditionally controlled by males. Radical feminism argued that because society is intrinsically patriarchal, only a complete transformation can lead to liberty. It contested the notion that males and females are essentially the same. Similar thinking was held by cultural feminism, which asserted that women possess a "female essence" that is unique from males.⁶

Third Wave: Going into the 1990s, women had more authority and rights as a result of second-wave feminism's institutional successes. The ability to consider other facets of their identity allowed them to embrace independence and revolt. Reclaiming was the theme of the time. The Guerilla Girls, riot girls, and Eve Ensler's The Vagina Monologues are significant cultural touchstones. Many women were more open in how they spoke, behaved, and dressed about their sexuality. Second-wave feminists, many of whom had opposed conventional femininity, occasionally found this perplexing. There were several ideas and little movements at this time, but there was only one "rule": there weren't any rules. A woman should make her own life decisions.⁷

IV. Orthodoxy vs Gen Z: Another Reason Behind the Debate.

Different opinions and ideologies exist among different generations. Several studies showed that the generation gap is causing relationship problems between adults and youngsters. The Sex or

⁵ Types of Feminism, The Four Waves, Human Rights Careers, <https://www.humanrightscareers.com/issues/types-of-feminism-the-four-waves/>, Last Visited on 20th September, 2023- 10:00 AM.

⁶ Supra Note 5.

⁷ Supra Note 5.

Gender Brawl strikes a debate between the orthodox generations and the Genz's too.

A book has been written on the same issue, according to which:-

In the orthodoxy of today, discussions on sex and gender have heated up during the previous generation. Arguments around feminism, sexual orientation, the sacrament of marriage, conceptions of family, adoption of children, and treatment of transgender people have all emerged since the debate over women's ordination began. Gender essentialism, the theory that male and female are ontologically fixed and incommensurate categories with separate sets of traits and abilities for each sex, shapes first reactions to each of these issues. Gender roles are then defined by these categories in the household, the church, and society. The book *Gender Essentialism and Orthodoxy* presents an immediate criticism of gender essentialism as it exists in the "Paris School" of Russian Migrant Theologians and their successors-influenced stream of the modern Orthodox Church. The Book *Gender Essentialism and Orthodoxy* present an immediate criticism of gender essentialism as it exists in the "Paris School" of Russian Migrant Theologians and their successors-influenced stream of the modern Orthodox Church. It employs an interdisciplinary method to engage patristic discussions of sex and gender, personalist theological anthropology, gender and queer theory, and contemporary biological understandings of human sexual diversity. *Gender Essentialism and Orthodoxy*, which reject a rigid gender binary in favour of more flexible options, unexpectedly show places of connection while appearing to be independent discourses. In the study's conclusion, the theological ramifications of the findings are discussed with regard to the ordination of women to the priesthood, same-sex relationships and sacramental conceptions of marriage, family definitions, and pastoral care for parishioners who identify as intersex, transgender, or nonbinary.⁸

V. Indian Scenario

Women

Since ancient times, women have played a significant role in Indian culture and society. However, there has long been discussion and worry about the status of women in India. India's initiatives to empower women have made numerous great strides in recent years. In order to improve the health, education, and economic possibilities for women, the government has put in place a

⁸ Gender Orthodoxy, Mit Press Book Store, <https://mitpressbookstore.mit.edu/book/9781531501525>, Last Visited On 23rd September, 2023-10:00 AM.

number of programmes and initiatives. Women are now making up a larger proportion of the workforce and are holding prominent roles in a variety of industries, including politics, business, and entertainment.⁹ Rights of the women are protected by various case laws and statutes in India. Very recently, The Women Reservation Bill has received “Presidential Assent.” It has now become a law. It aims to provide 1/3rd reservation of seats for females or women candidates in the Lok Sabha. In India, despite of continuous efforts in the field of Safety, women are threatened by various acts via feticides, domestic violence, trafficking, honour killings, etc.

Men

Readers must be wondering the use of the term “men” in the list of endangered genders. How is that possible? Is that true enough that to in a patriarchal society like India? Yes, it is. The misuse of the rights given to women against men as led to this scenario. Fake dowry and domestic violence cases have led mine in this situation.

LGBTQ Community

The LGBTQIA+ community in India suffers from gender and identity-based persecution, and finding safe places to live is a painful battle for its members. Because of their identities, landlords and brokers publicly refuse to rent them out spaces, rooms, or flats, alleging potential "disturbance" in their neighbourhoods. There have been a number of online projects to address difficulties with identity-based discrimination. For instance, Nirat Bhatnagar launched the online platform Belongg in 2019 shortly after the general elections in reaction to the shifting socio-political landscape. Along with concentrating on giving disadvantaged populations with education, employment opportunities, and healthcare, Belongg also manages a housing initiative that matches renters who have experienced prejudice with home owners who are prepared to publicly give space. In a similar vein, Mumbai-based Spanish instructor Sachin Jain started the internet network known as Gay Housing Assistance Resource (GHAR). When Jain launched an email group in 1998 in an effort to host the online community, the concept for GHAR was born. Later, in 2001, the group relocated to Yahoo Groups, and in 2012 it took on its current format as a Facebook group. Currently, GHAR has 19,000 Facebook users. In the network, landlords who are ready to rent out their properties to members of disadvantaged groups connect with renters

⁹ Status of Women, Times of India, <https://timesofindia.indiatimes.com/readersblog/lawpedia/status-of-women-in-india-51422/>, Last Visited On 23rd September, 2023- 10:30 AM.

who might otherwise face unjust treatment.

Even though these programmes have been actively helping the LGBTQIA+ community, they have very narrow scopes. For instance, out of at least 30 members of the LGBT community from various places that Outlook talked with, only five were aware of Belongg, and just one was aware of GHAR. Members outside of this information chain continue to struggle, as programmes like Belong and GHAR can only serve those who are aware of their existence. Dr. Dhiren Borisa, Assistant Professor at OP Jindal Global University, whose doctorate research focuses on Queer Cartographies of Desires in Delhi, tells Outlook that there are other difficulties in addition to the issue of being outside of this information chain. According to Dr. Borisa, "Queer people who are members of economically disadvantaged groups in society frequently lack access to smart phones and the internet, making it difficult for them to learn about existing campaigns and initiatives." As a result, finding a place to live that is discrimination-free becomes difficult for community members, especially for those who are openly LGBT or come from socially disadvantaged groups. However, difficulties don't stop there; locating areas for leisurely pursuits brings with it a new set of challenges.¹⁰

VI. ANALYSIS

In my opinion, to the orthodox, emergence of binary and non binary genders and their empowerment is a new concept. Any society or community takes time to adapt to a change, not being a critic of the orthodox opinion, I would like to shed light on the fact that all citizens regardless of their gender are entitled to their basic rights of identifying or associating themselves with a particular gender. As mentioned above the scenario of the female gender has drastically improved, but we should not forget that it also took centuries to reach where it stands today. Thus both leftists and rightists should hold their horses and be patient and welcoming about the new society of LGBTQ's, though with reasonable restrictions.

VII. Conclusion

Diversity in any situation spreads enlightenment, freshness and food for thought. In a liberal society it is expected that diversity is tolerated. To ensure justice to all the citizens all citizens

¹⁰ Are Cities Safe for LGBTQ Communities, Outlook India, <https://www.outlookindia.com/national/are-cities-safe-for-lgbtqia-community-in-india-news-213478>, Last Visited On 24th September, 2023-10:00 AM.

should be subject to same laws, which implies that there is a need for gender neutral laws or separate statutes governing separate genders. No two genders should be combined together, as all genders are different. The ideology that division of humans only exist on the basis of their sexual identity should be given another thought. It should be insured that all citizens regardless of their gender are given equal representation in the government so that they can make their opinions heard by the public. UCC and gender-neutral laws ae a possible way out for these. Also the word gender should be used in place of sex so expand the usage of the term. This will lead to gender equality and it will enhance the feeling of oneness living in a democratic country.

