

GENDER NEUTRAL GENERATION

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ABSTRACT

The article is an attempt to understand the concept of gender identity from the perspective of gender fluid individuals and the importance of gender neutral laws in order to accommodate these individuals and allow them to exercise their human rights and live a safe and healthy life. The idea is to normalize various sexual orientations which are not in conformity with the ancient gender roles. The choice of gender fluid in particular is crucial as these individuals cannot be categorized as straight, gay, lesbian or transgender due to their different positioning across the entire spectrum of gender identities. These individuals truly stand for a life free from barriers and defined boundaries. The article then goes on to cover the emerging laws and amendments that are being made in order to make the laws gender neutral, so as to give equal opportunities to all. The laws in any country should be formulated in such a way that they are inclusive of all genders since inception so as to avoid the lengthy amendments and long drawn court proceedings. Also, how around the globe various countries are doing away with the taboos that are associated with the LGBTQ community of which gender fluid people are a part. The article goes on to discuss the rights granted by UDHR and the Indian Constitution to such people. It also highlights the attempts by various other countries towards neutralizing the discrimination by giving such people societal acceptance. It is an attempt to understand the laws and individuals beyond gender.

INTRODUCTION

The two terms gender- neutrality and gender – fluidity are not just some millennial lingo that shall fade away with time and be replaced by some new words in vogue. These words are concepts that an ideal progressive society must be thorough with in order to create a more conducive environment for all individuals to thrive in. In this dynamic world, where the newer generations are liberating themselves from the strictly defined gender roles that have controlled our actions for eons by setting new parameters for themselves, it is important for the society as a whole to understand that we are in the middle of a cultural shift.

The two terms are either not known or, if heard, are often used interchangeably. But in an attempt to understand them it is of utmost importance that one understands the basic difference of sex and gender. Sex of an individual is the anatomical matter i.e. it depends on the genitals of the individual which leads to us relating them to either of the two genders. While this whole concept of gender begins primarily from there, it is not conclusive, as an individual might correspond or differ from the gender that he is associated to by the society. These boxed thoughts have made us “gender binary”¹.

MEANING AND HISTORY

The word gender fluid is used by individuals who do not identify themselves as having a fixed gender thus, breaking out of the box. They may suffer from gender dysphoria.² They are often categorized as gender queer or non- binary³ category. Gender fluid people are not the same as transgender. A transgender is someone “who identifies with or expresses a gender identity that differs from the one which corresponds to the person’s sex at birth.” While a gender fluid individual might identify with different genders at different time i.e. as male, female, both or none. This association may change even on a day to day basis. It is a constant inconsistent feeling of gender. These people could also be known as gender queer as they have multiple gender identities and expression. This concept is said to have existed in the Native America before the advent of the Europeans. They embraced it and there were no monolithic gender. There were no gender binaries. There were men and women, and then there were feminine men and manly women, and transgendered individuals. In Native American societies, these

¹ The idea that there are just two genders and an individual has to conform to either one of them.

² A psychological feeling of discomfort based on people’s perception of their gender resulting from the misalignment between that and how they identify. <<https://www.dictionary.com/e/gender-sexuality/gender-fluid/>> (visited on: March 18, 2019)

³ It is an umbrella term for all the other genders on the spectrum that do not necessarily fit into the idea of masculine or feminine.

individuals were considered to be normal. In fact, those who adopted fluid gender roles were called Two Spirit female and Two Spirit male.⁴

In India, the Aravanis (named after the brides of the mythological figure, Aravan) who are a subset of the Hijra community are those who are although biologically male, but adopt a female identity. Aravan finds a mention in the Mahabharata. When the Pandavas wanted to conquer Kurukshetra, they had to sacrifice the perfect man and the unmarried virgin Aravan stepped up to be beheaded. However, he wanted to die as a married man after consummating marriage. So, Krishna transformed into a woman to fulfill Aravan's last wish. After making love to the female form of Krishna, Aravan was beheaded.⁵

Hence, the entire concept has evolved from the already existing gender and has only broadened its horizon in the 21st century. The Aravanis are just one of the branches of gender fluid individuals.

The term gender neutral although, as new as gender fluid, has intrigued people so much so that there is a certain awareness of this ideology amongst various societies. The exact origin of the word although is not known but the essence of it has received acceptance in every form be it clothing or language. It has even now come to be in debates concerning the formulation of gender neutral laws. The idea is to have a society where an individual is neither looked as a girl or a boy but as a child nor as man or woman but as a person. There has even been a high rise in usage of gender neutral pronouns which do not carry association with any particular gender. These pronouns are also referred to address non binary gender like gender fluid, trans-genders etc. the concept of gender-neutral pronouns has existed since the late 18th century under various names. In 1808, Samuel Taylor Coleridge referred to the need for a "neutral pronoun" to use when referring to the word person rather than to a man or a woman.⁶

This ideology has gained such popularity because of the understanding of the millennial and generation Z that for centuries we are conditioned to believe in just two genders which has led to a huge amount of violence and discrimination against certain groups and identities. In context to the Indian society, there are Gods and Goddesses who have time and again shown their gender fluid way of life and have evidently embraced the existence of more than two genders. The examples are endless with Ardhanarshwar who is a Hindu deity largely worshipped by the third gender in the country. The lord has the left half as male and the right half as female. In addition, The Hindu scriptures goes on with examples of gods taking various forms and thus making the

⁴ Available at <<https://indianexpress.com/article/world/indigenous-tribes-embraced-gender-fluidity-prior-to-colonisation-but-europeans-enforced-specific-gender-roles/>> (updated: july 27, 2017)

⁵ Ibid

⁶ <https://www.dictionary.com/e/gender-sexuality/gender-neutral-pronouns/> (visited on: March 18, 2019)

whole idea of gender as fluid as one could fathom it to be. One of the many examples of diversity in both gender and sex relates to God Ayyappa. According to Mastya Purana and Vayu Purana, he was born of unison between Lord Shiva and Mohini. It was when Lord Vishnu temporarily took a female form. He is often called *Hari-Hara-sutan*.

Despite such vocal history of gender fluidity, India has legally recognized the status of its LGBTQ community quite recently. The issue of their existential crisis has been staring us in the eye for decades while we have conveniently refused to recognize them forcing them to take on one of the two mainstream genders. Some people have chosen to be gender-blind⁷ whereby they operate on the idea that a person can perform any activity and engage in any services irrespective of their gender. They even prefer to use gender neutral language in their communications. The aim is to do away with the deeply entrenched patriarchal norms that created a language which used a male pronoun in the generic sense. The joke is on us who have accepted to be written about in the language of a single pronoun while we have so many colors in our rainbow.

INTERNATIONAL AWARENESS

Gender neutrality has become a phenomenon that is slowly taking over the world for good. There are umpteen examples of famous personalities who have come out in open to accept a gender fluid approach towards life and have actively adopted the gender neutral concept. Rodrigo Alves famously known as “Human Ken Doll” is a Brazilian public personality who declared to be gender fluid and even participated in a campaign for which he was shot both as a male and a female. It was an attempt to raise awareness about the bullying and hatred that such individuals have to face in the society on account of their choice to wear tuxedo on one day and embrace a corset on another. It is important for all the progressive societies to redefine their expectation of certain behavior based on physical anatomy and support individuals to better express themselves. The taboo that surrounds gender fluidity needs to normalize in order to allow the repressed individuals to realize that it is alright to be different. It is their right as a human being to be able to live the life they want and the way they want it. They should be able to exercise their right to freedom of expression just like any other man or woman.

In Germany, the country’s highest court made a landmark decision- the first of its kind in Europe- stating that two genders for official purposes was unconstitutional. The court recommended creating a third gender category for people born with ambiguous sexual traits and those who do not identify as either male or female, or even dispensing with gender altogether in

⁷ A person who does not distinguish people based on their gender.

public documents.⁸ Following the ruling of the court, in Berlin, fresh rules for billboard ads were formulated that envisaged a land without gender identity. Typical gender specific ads which meant girls wearing pink or boys wearing blue were moved out of the way. Females are not to be depicted as hysterical, naïve or stupid alongside a technically skilled, strong and ambitious man. In 2015, catalogue for the German toy store BR Spielwaren features a girl playing with a toy gun and a boy in an apron playing in a toy kitchen. Yet another milestone was set by recognizing gender fluids on the journey towards gender neutrality when the Studio Я Theatre in Berlin converted its male and female bathrooms to unisex toilets. On the doors are the universal gender signs for men and women but also signs for transgender and intersex.⁹

In Sweden, a new pronoun “hen” was added to the dictionary as a gender neutral pronoun as against “han” which is used for males and “hon” which is used for females. The term is being used in two ways i.e. if the gender is unknown and for inter-gender people. The LGBTQ community has also used this pronoun to voice their identity. In addition, some preschools have adopted it as a part of their teaching language to allow the child to grow without the impact of gender biases.

In Vienna, the traffic signs having figures of solitary man were replaced with heterosexual and same-sex couples. Also, Austria officially changes its national anthem, which once spoke of only of its “great sons”. The new language heralds women first, celebrating “great daughters” and “sons”.¹⁰

In 1948, the universal declaration of Human Rights also stated that “all human beings are born free and equal in dignity and rights”. The treaties so entered into allow no state to withhold rights from a certain group of individuals on the basis of their sexual orientation and gender identity or other status thereby making it a prohibited ground of discrimination.¹¹

⁸ Madhvi Ramani “Will A New Law Forever Change The German Language?” <
<https://www.smithsonianmag.com/arts-culture/will-new-law-forever-change-german-language-180968289/>> (visited on 28 March 2019)

⁹ Anthony Faiola “In Europe, Creating a Post Gender World One Small Rule at a Time” <
https://www.washingtonpost.com/world/europe/the-remarkable-ways-europe-is-changing-how-people-talk-about-gender/2015/06/12/af435d48-0df0-11e5-a0fe-dccfea4653ee_story.html?noredirect=on&utm_term=.319231dd20c0> (visited on 28 March 2019)

¹⁰ supra

¹¹ <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> (visited on: 2nd April 2019)

INDIA'S STANCE

In India, we are being engulfed by the swamp of feminism with major population yet to understand the concept in its entirety. In such a scenario it is more obvious than not that the gender fluids are still hiding behind the closet with the fear of being lynched as the same might hurt someone's religious sentiments. To add to the mockery, the debate to formulate gender neutral laws has been with utmost care struck out from the agenda of the political parties. While we like to call ourselves a progressive society, we have only recently de-criminalized section-377 which tagged sexual relationship between two persons of same sex unnatural and was punishable under the law by the judgment of the Supreme Court in *Navtej Singh Johar v. Union of India*¹². This recognition was long put on hold despite India's scriptures and mythological stories are all full of examples of LGBTQ. Section-377 included in its ambit all sexual acts that were not aimed at procreation and made them into an offence. The 6 judge bench observed that criminalizing consensual sex between two adults is unconstitutional. They further went on to say that laws that criminalize same sex intercourse create social barrier to accessing health care and curb the effective prevention and treatment of HIV/AIDS. Ten countries including the United Kingdom, Bolivia, Ecuador, Fiji and Malta, prohibit discrimination on the grounds of sexual orientation. Joining these countries by accepting that the natural or innate sexual orientation of a person cannot be a ground for discrimination, India brought about a much needed change. It was further stated that the sexual orientation is also an attribute of privacy. In *Ram Jethmalani v. Union of India*¹³ an important observation was made regarding Right to Privacy stating that human beings should be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. It is crucial that we sensitize ourselves to acknowledge and respect the privacy of an individual irrespective of their sexual orientation as long as it does not hamper public order. The same is protected under the right to dignity which is an important facet to Article 21 of the Indian Constitution. The section was also considered in violation of Article 19(1)(c) of the Constitution of India as the community had a fear of societal stigma while forming an association. The lack of representation has been a long going violation of their fundamental right of equality before law and equal protection before law, enshrined under article 14 of the Indian Constitution.¹⁴

It is vital here to focus on gender fluids as unlike the gays and the lesbians who have a fixed sexual orientation or as the transgender who have largely gained the status of third gender, the gender fluids cannot be put in a straitjacket orientation despite legalizing homosexuality because

¹² WRIT PETITION (CRIMINAL) NO. 76 OF 2016

¹³ (2011) 8 SCC 1

¹⁴ FRONTLINE, Vol. 39, number 19, September 2018 issue

their preferences are not uniform. At this point comes in the concept of gender neutrality that aims at laws being formed free from gender bias so as to encompass the individuals irrespective of their gender or sexual orientation and promotes the usage of gender neutral language.

At the present juncture, the ongoing debate of Gender Neutral Laws in India is based on the idea of empowering every individual irrespective of their gender and their sexual orientation by giving them an even plane to compete in all the aspects of their lives, be it social, political or economic. A recent Landmark judgment on adultery although is like a stone in the lake, it created ripples but the water restored its silence again when it came to making the rape laws gender neutral.

The law on adultery, as a crime, is dealt with under section 497 of the Indian Penal Code r/w section 198(2) of the Code of Criminal Procedure which before being struck down by the judiciary gave the exclusive right to the husband (or the person having the care of the woman at the time of the commission of the offence) of the woman committing adultery to make a complaint, as he was deemed to be aggrieved by the offence. Moreover, the woman involved in the offence was not even taken to be an abettor to the offence let alone being considered as an equal to the man committing it. After a series of judgment denying the regressive idea of woman being the property of a male and being a subordinate to him in the marriage the Supreme Court in *Joseph Shine v. Union of India*¹⁵ declared adultery as unconstitutional. While giving its judgment, the court referred to the 156th report of law commission of India in which it was noted that the offence of the adultery under Section 497 is very limited in scope in comparison to the misconduct of adultery in divorce (civil proceedings). The section confers only upon the husband the right to prosecute the adulterous male, but does not confer any right on the aggrieved wife to prosecute her adulterous husband. It was recommended to introduce an amendment to incorporate the concept of equality between sexes in marriage vis-à-vis the offence of adultery.¹⁶ The recommendation was not accepted. In addition, the court also visited back to the report by the Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath which made the following recommendation regarding “Adultery”:

“16.3.1 A man commits the offence of adultery if he has sexual intercourse with the wife of another man without the consent or connivance of the husband. The object of this section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good reason for not meting out similar treatment to wife who has sexual intercourse with a married man.”

¹⁵ WRIT PETITION (CRIMINAL) NO. 194 OF 2017

¹⁶ Law Commission of India, 156th report on the Indian Penal Code (Vol. 1), pages 169-172

Available at: <<http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf>>

“16.3.2 The Committee therefore suggests that Section 497 I.P.C should be suitably amended to the effect that “whosoever has sexual intercourse with the spouse of any other person is guilty of adultery... ..”¹⁷”

Considering the above two texts, the court observed:

“12.2. Section 497 of I.P.C., makes two classifications:

i. The first classification is based on who has the right to prosecute:

It is only the husband of the married woman, who indulges in adultery, who is considered to be an aggrieved person given the right to prosecute for the offence of adultery.

Conversely, a married woman who is the wife of the adulterous man has no right to prosecute either the husband, or his paramour.

ii. The second classification is based on who can be prosecuted:

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an abettor to the offence.¹⁸”

Thus, the judiciary is making a conscious effort to make the laws as gender neutral as a progressive society would need but it has to be the legislature that shapes the laws to be gender neutral to accommodate the different genders as and when required. Striking out adultery as unconstitutional, is a feather in the hat as we brought the two genders concerned at par with each other, both, in terms of the liability that the woman has as a participant in adultery at the same time, the woman of the adulterous male has the right to sue. Now, it is upon the legislature to draft the provision in a more gender neutral way even if it translates into woman being held accountable because equality means taking equal responsibility for your actions as well.

There has been yet another landmark judgment in the case of Hiral P. Harsora and Ors. v.Kusum Narottamdas Harsora and Ors.¹⁹. It looked into the lacunae of the ironic Domestic Violence Act, whereby, if a females is exposed to any kind of violence or discrimination at the hands of the person that she is residing with i.e. “adult male person” or his relatives that includes the females as well of the family, then she has the right to file a complaint against such person. The law was criticized on the ground that if the male member is not involved in the violence and it is just the

¹⁷ Government of India, report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs 2003), page 198

Available at: <https://mha.gov.in/sites/default/files/criminal_justice_system.pdf>

¹⁸ Available at: <https://www.sci.gov.in/supremecourt/2017/32550/32550_2017_Judgement_27-Sep-2018.pdf> pages 229-230

¹⁹ Civil Appeal No. 10084 of 2016 (ARISING OUT OF SLP(CIVIL) NO. 9132 OF 2015)

females of the family then the victim to such abuse cannot file a case against them directly but has to be filed through a male member as a respondent to which these females can be co-respondents. Moreover, any order that shall be passed would be against the respondent which is defined under section 2(q) as “adult male person”. In order to make the rule more gender neutral, the Supreme Court made the following observations which led to striking out of the word “adult male” before the word “person” in the said definition:

When Section 3 of the act defines “domestic violence”, it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore, in tune with the general object of the act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral. When one goes to the remedies that the act provides, things become even clearer. Section 17(2) makes it clear that the aggrieved person cannot be evicted or excluded from a shared household or any part of it by the “respondent” save in accordance with the procedure established by law. If “respondent” is to be read only as an adult male person not standing in the forefront, but putting forward female persons who can therefore evict or exclude the aggrieved person from the shared household. The Court found the necessity to strike out the words as it barred from realization of the reasons and objects behind the enactment of this act. The need was felt for proper implementation of various sections of the act like 18(b) that bars the “respondent” from abetting or aiding such violence. If the respondent includes just the adult male, then the protection becomes conditional and not absolute and the whole purpose is failed. The abettor could be an adult female or someone who might be minor but aware of his acts. Similarly, section 19(1)(c) and section 20 of the act that deals with residence orders and monetary relief respectively were positively affected by such order.

The next law suggested to be reformed is the rape laws:

With the introduction of the Criminal Law (Amendment) Bill, 2012 on the recommendation of the Law Commission’s 176th Report, certain amendments to the Criminal Laws were suggested. This bill substituted the offence of rape with sexual assault which is a gender neutral offence. Through the ordinance of 2013, some of the provisions were given effect to, like the definition of rape was replaced with that of sexual assault thereby giving it a wider scope. Despite that, the aspect of making it gender neutral was not considered.²⁰

A PIL was filed before the Delhi High Court with regards to the suggestion so made, to make rape laws as gender neutral. The current reading of the section 375 of Indian Penal Code has a

²⁰ Criminal law (amendment) bill, 2012 and Ordinance 2013, Ministry of Home Affairs

Available at: < <https://www.prsindia.org/uploads/media/Criminal%20Law/Legislative%20Brief%20-%20Criminal%20Law%20Amendment%202012.pdf>>

very biased approach where the word “perpetrator” has been given the gender male and the females have been categorized as victim. This is not always the case, as in the current times, with MeToo Movement taking over there have been several instances where the males have come out to accept that they had been raped or sexually exploited by both males and females, and similarly there is a possibility that both the perpetrator as well as the victim could be a woman.

Yet another step taken towards making the laws more equitable came in the form of Hindu Succession (Amendment) Act, 2005. The amendment was based on the recommendations made in the 174th report of the Law Commission of India. It ended the discrimination under section 6 of the Hindu Succession Act by giving equal rights to daughters in the Mitakshara Coparcenary Property. Section 16 was omitted which disentitled a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs chose to divide their respective shares therein.

As per UNICEF Report²¹, it urges the countries to have Paternity Leave up to 16 weeks. In congruence to this report, India is due to introduce the “Paternity Benefit Bill” that shall aim at bringing all the males across different sectors under it. It proposes to extend the period of leave availed from 15 days to 3 months.

CONCLUSION

Although both gender fluidity and gender neutrality are relatively introductions in the various societies in the world including India, it is vital for not just the policy makers but also for each individual who forms a part of the society to not wait for the laws to become neutral or for the gender fluid individuals and the entire LGBTQ community to gain a legal recognition. Instead, the appropriate steps to be taken are by all of us, the laws are the outcome of the customs that prevail in the society; therefore, the acceptance has to come from within the society. The idea is very basic, when an individual becomes accepting of gender queers, gender fluids, transgender et al, they would later form a family which is the basic unit. The family so formed would inculcate the same ideology as is taught. A group of such units forms a society, state and nation. It is rightly said that charity begins at home and so does awareness. The basic education that a child gets is from the household where they are brought up. When all the members of the society are aware of their rights and that of the rights of the others it would translate into effective realization of the vision that the Indian Constitution puts forth. This aware society shall have an aware legislature, executive as well as judiciary and the transformation shall become organic unlike the current times where the judiciary although is passing effective judgments but these often fail to become ground reality. The question is- has decriminalizing s-377 of the Indian Penal Code fetched this community an acceptance in the society? Similarly will gender neutral

²¹ Available at: <https://news.un.org/en/story/2018/06/1012152> (visited on- April 3, 2019)

rape laws allow the males in this patriarchal society to come out with their rape stories without the society making a mockery of them? Will we ever fathom a male being exposed to domestic violence as a victim? The 2004 report of National Family Health Survey revealed that 4% of married woman have initiated physical violence against their husband when they were not beaten or physically hurt by the latter²². The world has moved beyond just formulating gender neutral laws that accommodate all, rather their focus is on building a society where these laws are put to use.



²² National Family Health Survey (NFHS-4), Ministry of Health and Family Affairs, 2015-16. Available at: <http://rchiips.org/NFHS/NFHS-4Reports/India.pdf>