

EUNICH: THE INVISIBLE MASS OF THE SOCIETY

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ABSTRACT

Power needs to be acknowledged and only then can it be channelized in a positive way for the betterment of the society, or else what good is democracy or any public offices in the society as long as none of them actively make an effort towards the welfare of the society, but have been more forth-coming in their aid to the position of eunuchs in our society.

In my mind there is no doubt that it is not the Judiciary, Legal thinker or Politics alone which bears the responsibility of society and its mass's happiness. It needs participation by all and especially the community as a whole without which the voices tend to get lost unless voiced aloud to the Judiciary or Government. More pointedly, it is the concerned 'group' which must stand as one and show self-acceptance, as only when one accepts themselves can expect the society to accept them as well.

I would like to suggest broadly that as any fraction of the society, the most important need is to be recognized and treated as 'persons' before law. Once this is done, half battle is won as then the community as a whole has made not only its presence felt in the society as well as put across their point of not being suppressed in the hands of powerful 'haves' of the society as this is a Democracy and hence everyone has a right to inclusion.

This paper revolves around the 'Legal Capacity' of the Eunuch's and the plays of 'Power' in the society leading to their lack of status and representation, and the utter lack of 'Rights' – a paradox in the Democratic form of Government.

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SCHEMATIC

“I am an invisible man...No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms...I am a man of substance, of flesh and bone, fiber and liquids...I am invisible, understand, simply because people refuse to see me...”

Ralph Waldo Ellison (Invisible Man, 1952)¹

The above lines, from the much celebrated book Invisible Man by Ralph Ellison, I use as to depict what this paper attempts to bring forth – the unvoiced, the unrepresented yet existent mass of the society; and their trials and tribulations due to the ‘Power of Normalization’.

This paper is an effort to bring forth the third gender (which would specifically connote to eunuchs here) *status quo* in the society – understanding who they really are as different from what they have been portrayed to be by the society as a whole. This paper revolves around the ‘Legal Capacity’ of the Eunuch’s and the plays of ‘Power’ in the society leading to their lack of status and representation, and the utter lack of ‘Rights’

The paper, for coherence, shall be divided into three major sections. In the first – “Power at play, against the Invisible Mass”² – I shall briefly introduce this ‘invisible mass’ to the reader, attempting to provide a window into their physical being. Thereafter, I shall explore their actual existence, the entire troublesome ordeal aided by the Foucauldian concept of Power. All this, in hope, to break-through the normalized ‘social disability’³ by virtue of knowledge. The Second section – “Non-Existent Rights of the Invisible Mass”⁴ – becomes an extension to the first as it connects how the ‘all pervasive’ power manipulates the ‘Rights’ of the eunuchs to being non-existent. The final major section of this paper – “Handing out the Responsibility”⁵ – takes a look at the pragmatic dilemma of providing true Democratic play to the people who have been shackled through the un-talked about powers of the society since eternity.

INTRODUCING – ‘THE INVISIBLE MASS’

While introducing this invisible constituency of persons it is of utmost importance that one fully appreciates the distinction between the ‘sex’ and ‘gender’; two terms that are socially used

¹ An American scholar and writer, won National Book Award in 1953 for Invisible Man. Available at < http://en.wikiquote.org/wiki/Ralph_Ellison> (last visited on 30th October, 2015)

² See Footnotes 11-36 and related text.

³ Used in the sense of the ‘Invisible’ status they have in the society.

⁴ See footnotes 37-62 and related text.

⁵ See footnotes 63-72 and relevant text.

interchangeably in our present day society. While the former is what one is usually born with; the latter is what the society determines irrespective of the external sexual attributes by stereotyping.⁶

This is where the terminology ‘transvestite’ and ‘transsexual’ are differentiated. Any person who is born of a particular sex but fails to identify with that sex has a choice of either breaking-through the physical barriers, by castration (if a man), or to cross-dress and carry on practicing the opposite sex’s gender. Therefore, if observed carefully the difference is a very basic one – a person born as a man if feels like a woman and chooses to get castration or sex re-assignment surgery (*here in after SRS*) would be termed as a transsexual. whereas if he chooses not undergo the physical change rather the literal change by cross-dressing, with the logic of wearing what they relate to and not what one is born as, is commonly termed as ‘transvestites’.⁷ Transvestites are a type of trans-gender’s who feel different physical sex people trapped in different sex bodies e.g. man trapped in a woman’s body.

‘Eunuchs’ the term used to acknowledge the third gender of the society go back to a Greek root i.e. *eunoukhos*; which literally means ‘guard of the bed chamber or harem’. Apart from the above two broadly mentioned classification of the third gender, originally eunuch was often used to also denote ‘Hermaphrodites’ or intersex who possess both male and female genitals, whether typical or significant, but are infertile and therefore included in the category of the eunuchs.

In a survey conducted in India, it was witnessed that out of 100 only 13 were born hermaphrodites and 11 transvestites whereas, 76 were eunuchs out of castration which would broadly include transsexuals broadly.⁸ In all there were approximately 1.9 million eunuchs, excluding the trans-genders, in March 2014⁹

‘POWER AT PLAY, AGAINST THE INVISIBLE MASS’

This section of the paper discusses the dynamics of ‘Power’ as they act, and have always acted, upon the invisibility of this mass of persons. This section uses the very existence of the Eunuchs

⁶ Heather, “What is the difference between Sex and Gender?” Available at <<http://transpedianews.com/?p=852>>; last visited on 3rd November, 2015

⁷ Available at <<http://en.wikipedia.org/wiki/Transvestism>>; last visited on 4th November, 2015.

⁸ Shoma A. Chaterji, “Eunuchs of India: Deprived of Human Rights”. Available at <<http://www.humanrightsdefence.org/eunuchs-of-india-deprived-of-human-rights.html>>; last visited on 19th October, 2015

⁹ Dr. Piyush Saxena, “LIFE OF A EUNUCH”. Available at <<http://www.helium.com/items/2299296-marginalization-of-eunuchs-in-india?page=4>>; last visited on 2nd November, 2015

as an exemplification of the very fact of oppression via domination as has been analyzed by Foucault more generally.

Dwelling on this central idea, the first sub-section showcases the absolute domination by the sovereign to this era's subtle, passive domination which seeps into each individual's life with or without choice by virtue of being born in any given society. The role of the second sub-section is then to build upon this passive domination and bring out how it is managed by those with the social power.

1. Power/Domination existent in the society

(A) The Theory of Normalized Power

From the very beginning of times, 'Domination' has been the entry-door for 'Power' into the society. It is fascinating to observe, as was done by Max Weber, that 'Domination' seems to be the inbuilt answer to the important question of how to administer the society; which more often than not then becomes a way of controlling the masses.¹⁰

Foucault speaks of a similar 'Domination' prevalent in the society's of the long past – the Sovereign's command having the ultimate Right to Death¹¹, i.e. the power akin to that of the *patria potestas*¹² whereby the dominator could take away the life of anyone that he or she wished to without having to give any adequate justification.

Over time, Foucault notices that there has been a shift in the strategy of the dominator – instead of espousing this 'naked power'¹³ they have moved onto more subtle variations, which he names the 'Power of the Social body' in the society or Bio-Power¹⁴. This type of Power he lets us know is based upon 'Discipline' and as such is also referred to as the 'Disciplinary Power' which moulds the society, its practices and beliefs in a given manner by continuous, anonymous and automatic functioning.¹⁵

Foucault has made a relentless effort throughout the course of his work of throwing light into the dark letting people know how as of today 'Knowledge' operates as a double-edged sword, a dual

¹⁰ See generally Max Weber, "Domination" in 'MAX WEBER ON LAW IN ECONOMY AND SOCIETY' (Simon and Schuster, New York: 1967)

¹¹ Paul Rabinow, (ed.) 'THE FOUCAULT READER: AN INTRODUCTION TO FOUCAULT'S THOUGHT' (Penguin, London: 1991) at p. 258

¹² 'Person in Law' Available in Prof. Amita Dhanda's Legal Capacity study material compilation

¹³ Bertrand Russell, 'POWER: A NEW SOCIAL ANALYSIS' (1st Imp. London 1938, [Allen & Unwin](#)) at pp. 328

¹⁴ Paul Rabinow, (ed.) 'THE FOUCAULT READER: AN INTRODUCTION TO FOUCAULT'S THOUGHT' (Penguin, London: 1991) at p. 18-23 & 262

¹⁵ Id. at p. 18-20 & 261-3

tool in the society. He claims that ‘Knowledge’ today is what is being used to disseminate the ‘Norms’ set at the fancies of the Dominator, but at the same time it cannot be denied that ‘Knowledge’ is the only way to break through this vicious circle of blindness.¹⁶

(B) Normalized Power in relation to Eunuchs in our society

The domination scenario; despite being evident *prima facie* is something that we choose to ignore and be oblivious to, especially with respect to the conditions of the marginalized sections of the society. In the present analysis, I take a look at the Eunuch community as a whole and how they are still far from being acknowledged as a part and parcel of the society. I shall begin with taking a look at their age old subjugation at the hands of the society and move towards more current issues.

However, it is of interest to note that this subjugation was not something that has always existed. Indian Mythology acknowledged their presence and portrayed them in powerful shades¹⁷ unlike today’s scenario where they are ostracized and positioned as powerless. This downturn in status can be traced back to British rule in India when ‘The Criminal Tribes Act, 1871’¹⁸ was made applicable to the tribes and, for some reason, Eunuchs. Part II of the said Act, i.e. Sections 24 to Section 31¹⁹ dealt with eunuchs and contained inherently arbitrary and irrational legal text to suppress, override and control the existence of Eunuchs in the society.

It had provisions requiring the registration of all Eunuchs and their Property²⁰ – next question that comes to mind is; are all other members of a society without any wrongdoing on their part asked to register in such a manner. The answer is simple: No! This treatment is in itself degrading. On top of this the act further prescribed penalties on such registered eunuchs

¹⁶ Micheal Foucault, “Two Lectures” in ‘POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977’ (Pantheon Books: 1980) available in Prof. Amita Dhanda’s Power and Responsibility study material compilation from Page 47 to 56.

¹⁷ As an illustration there are the cases of the followers (Eunuchs) of Lord Ram, who waited for his return from exile, were blessed by him in Ramayana. Then there are also illustrations from the Mahabharata where Lord Krishna became Mohini (Eunuch) – the wife of Aravan, son of Arjun, while Lord Shiva’s avatar Shikhandi (Eunuch) lead to the death of Bhishma.

¹⁸ TheCriminalTribesAct1871Availableat<<http://ccnmtl.columbia.edu/projects/mmt/ambekar/web/readings/Simhadri.pdf>>; last visited on 3rd November, 2015

¹⁹ S.24 Register of Eunuchs and their Property, defining eunuchs; S. 25 Complaints of entries in Register, S.26 Penalty on Registered eunuchs appearing in female clothes, or dancing in public or for Public hire; S. 27 Penalty on registered eunuchs for keeping boy under sixteen; S. 28 Maintenance and education of boys whose parents cannot be found; S. 29 Disabilities of registered eunuchs; S. 30 Power to require information as to registered eunuchs property penalty for refusing such information; S.31 Rules for keeping and maintaining registers for eunuchs.

²⁰ S. 24, The Criminal Tribes Act 1871

appearing in female clothes, or dancing in public.²¹ The first part of the section then inherently penalizes their natural tendencies²² while the later criminalizes acts which otherwise are not criminal. The point being that the act, especially its provisions with respect to Eunuchs were inherently against reason and only served to push them away from the mainstream.

Apart from being absolutely diabolical in its treatment of ‘free’ people, just like any other in a society another question that one must raise here is in relation to the irony that it was considered that the entire existence of this mass of people could be constrained into eight odd sections of a legislation where for the general mass we have innumerable legislations and acts. What does this really imply?

What is extremely crucial for us to notice here is not just the fact how it is perceived as easier to suppress the weaker (made by the society than really born as one) rather more essentially, how well these eight sections actively exert their power regulated by the state machinery to an extent of dominating not just their death, fate as well as ensuring the destiny designated by them should not be escaped at any cost.²³

The depth of Normalization and the strength of its roots is emphasized by the fact that they were left unrepresented and without a voice – as someone that doesn’t exist – by the Constitution of India, the one that “We the people” gave to ourselves. Our Constitution; which promised exalted notions like Equality, Fraternity and Justice didn’t make any reference to the deplorable social standing of this major part of the society, as if they never existed at all.

As it turned out, they were finally recognized to have a safe existence under the Habitual Offenders Act 1952.²⁴ However as an unwritten clause it was assumed that with the repeal of the Criminal Tribes Act 1871 it was this new act which was created, under a different name, to continue with the same spirit of controlling and punishing the tribes, eunuchs and now other criminals as well who were further brought to their classification.

Therefore, my humble submission through this part of the paper is to bring out the previously ‘top-bottom manners of control’²⁵ as the now ‘bottom-top domination approach’²⁶ of power

²¹ S. 26, The Criminal Tribes Act 1871

²² See previous section of the Paper, the discussion around ‘Trans-vestites’

²³ An illustration to the Disciplinary Power as propounded by Foucault.

²⁴ HabitualOffendersAct,1952Availableathttp://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_ZS0TN8C4.PDF; last visited on 3rd November, 2015

²⁵ Direct Absolute Power of the Sovereign as expounded by Foucault, see generally Part III (1) (A)

players. This topsy-turvy attitude is best manifested when the same text is suitably read and interpreted to their fancies.²⁷ The ambiguities thus created in the legal text are more to do with suiting the will of the dominator than that of the people. When culpability of eunuchs in question they are not left as an exception nor leniently dealt with²⁸ but when it comes to claiming rights, the dilemma of interpreting ‘persons’ before law and ‘sex’ is faked which surprisingly they have managed to evade for almost seven decades.²⁹

2. Power/Domination ‘Normalized’ into each system of the Society – An illustration using ‘Media’ as a sector of concern

This sub-section now goes onto build upon the ‘Domination’ discussed and depicted in the previous, articulating exactly how it is ‘Normalized’ in the society as a matter of fact with regards to especially eunuchs in the present day. Foucault has theorized how eventually the active domination and norms turn to the self-disciplined inner voice of each individual and gets easier for the dominator to passively regulate.³⁰

Right from the birth of a child, when the family discovers the fact of their being a Eunuch – the next ‘rational’ step, as accepted generally, is to give the child up to their ‘own’ community which has their own alternate world. Rarely do families of eunuchs stand up against the ‘norm’ and do not give up their child, ultimately the eunuch child makes the choice of ‘walking away’ considering the social stigma the family is subjected to due to their presence in the family.³¹

²⁶ The facts of ‘exclusion’ of large sections of society the State managed to ‘Normalize’ the people against such discrimination. This is a major reason behind me writing this paper, to ‘efface’ the inherent domination that exists in the society vis-à-vis the Eunuchs.

²⁷ As when eunuchs are to be punished for an offence, they are recognized as ‘Persons before Law’ whereas, when it comes to their subsistence and security right’s claim they are denied the status of ‘Persons before Law’.

²⁸ *Supra note 10*

²⁹ Part II General Explanations, Indian Penal Code, 1860: S. 8 ‘... Gender-- The pronoun "he" and its derivatives are used of any person, whether male or female...’; S. 10 ‘... ‘Man’ and ‘Woman’ -- The word ‘man’ denotes a male human being of any age; the word ‘woman’ denotes a female human being of any age...’; S. 11 ‘... ‘Person’ -- The word ‘person’ includes any Company or Association or body of persons, whether incorporated or not...’

³⁰ Paul Rabinow, (ed.) ‘THE FOUCAULT READER: AN INTRODUCTION TO FOUCAULT’S THOUGHT’ (Penguin, London: 1991) at p. 18-20 & 261-3

³¹ Interview of Sonia/Irfan (leader of eunuch community in Ahmedabad) Video composed and efforts made by Indian Institute of Management, Ahmedabad Available at <<http://www.youtube.com/watch?v=NMWxPxKZfOw>>; last visited on October 19, 2015.

Iris Young once talked about ‘media activism’ which according to her was to be the “voice of conscience and rationality”.³² In this present case, such activism is nowhere to be found while the modern day art and media reinforces the normalized ideology as the right thing to do. There have been various Indian movies which have touched upon this largely virgin topic of eunuchs, unfortunately each one has blamed the difficulties faced by the eunuch community on them by making the choice of living as an inclusive part of the society.³³

Though they highlight the hardships, a wrong approach is taken by accusing the problems on the desire of ‘inclusion’ in the society – thus going with the Normalized beliefs. National Awards are won, audiences crib about harsh realities of life and all is forgotten about the causes they apparently felt enough to invest in except for the critics who try linger on with the idea much longer than the maker obviously did.

Apart from the movies, even the ‘news’ that are highlighted is troubling as not much concern is shown towards reaching out and showcasing the unvoiced. It is more about the TRP raising strategy our media doesn’t believe much in being the ones to provide factual support and act as reminder to the regulators of our country (those having political power) of what is actually needed. They act only as ‘sensation-diggers’, who run stories till they have commercial value to them, and not the conscientious analyzers who show the mirror to the State and Society. An illustration in this regard being the cases of the 2006 Doha Asian Games silver medalist Santhi Soundarajan and Pinki Pramanik who won various gold and silver medals at International meets whether that be Doha Asian Games or the Melbourne Commonwealth Games.

‘NON-EXISTENT RIGHTS OF THE INVISIBLE MASS’

This section of the paper deals with the response of the ‘invisible mass’ against their societal invisibility, their efforts towards invoking justice and the dominator’s response to the same. Since the essence of this paper is to reveal their ground realities, which mainly comprise of their

³² Iris Marion Young, “Activist Challenges to Deliberative Democracy” *Political Theory*, Vol. 29, No. 5 (Oct., 2001), pp. 670-690 at p. 687 available at <<http://poli375engage.pbworks.com/f/3072534.pdf>> last visited October 26, 2015

³³ As a short reference to name a few – Darmiyaan: In between (1997), Tamanna (1997) & Bombay (1995)

‘non-existent’ legal and societal status, it becomes extremely essential to bring forth on that account the prevalent status of the dominated and of those who keep them from achieving their due in the society.

Proceeding with this objective, in the first sub-section I take a look at what I assume to be the root-cause of all their problems – the erroneous non-representation of the Eunuchs, right from the time of making of the Constitution in the Constituent Assembly. The second sub-section then builds upon this and shows how the lack of voice has led to a negation of the ‘Basic Rights’ of the Eunuch community.

1. ‘We’ the people of India

The Indian ‘We’ is, as one and all know, a very diverse group of people. Diverse not just in ethnicities but also culturally, economically, historically and this situation leads to their being a wide range of requirements specific to each group. When the Indian Constitution was to be drafted this was one of the basic aspects kept in mind of the Constituent Assembly Members (hereinafter referred to as the *framers*) who were themselves 217 in number, trying to provide representation to as many constituencies as possible.

The biggest question revolving around the minds of the Indian masses, especially in the present day scenario when the country has reached its chaotic political end is who were the ‘We’ in the ‘*We the people of India*’³⁴ When the Constituent Assembly was deciding the fates of their fellow countrymen for ages to come, they were entrusted to be conscious of the fact that they were writing the ‘futures’ of such a diverse mass of people. However as we sit today, witnessing the gross misuse of political power – in form of rampant corruption, whereby the gaps between the rich and the poor, the dominator and the dominated are getting wider by the day – it is hard to believe that the framers did their job well. Much that is wrong can today be accredited to the vagueness in regards to the substantive provisions of subsistent rights and their justifiability.³⁵ Such a situation compels one to construe the framers, the people who got the privilege of being our representatives on the basis of indirect elections,³⁶ as anything but the *voice of the masses* as

³⁴ Preamble of the Indian Constitution, 1950

³⁵ An interpretive remark on the basis of the past trend of cases and amendments.

³⁶ Granville Austin, ‘The Indian Constitution: Cornerstone of a Nation’ Oxford University Press (1999).

they were never selected by the true face of the country. They were mostly the *elites* of their community; who neither lived in India nor were brought-up or educated here and as such were entirely disconnected to the hardships of those they sought to represent.³⁷ In such a scenario '*We the People of India...*' sounds absurd rather a flawed consolation to live with the destiny one has been designated.

These truths get all the more perplexing when we talk in terms of eunuchs and other marginalized sections of the society as they went unrepresented at any level of physical or emotional presence in the Constituent Assembly Debates. This is evident from a bare reading of the text of the Indian Constitutional which makes no mention of the third gender in the society, despite being known as the 'the most exhaustive' text of among all Constitutions of the world.

2. Negative or Positive Rights

The Theory of Basic Rights

"... My claim is that a life that lacks any one of these capabilities³⁸, no matter what else it has, will fall short of being a good human life... since we look at capabilities rather than actual functioning of a person because we think it's the opportunities that are important.... People should be free to choose which ones to use..."

- Martha Nussbaum³⁹

The above mentioned lines by Nussbaum talks about certain capabilities one must enjoy by virtue of being a human being and a citizen. For instance the capability to have good health, adequate nutrition and to enjoy recreational rights etcetera. With reference to the same, Amartya Sen too has given primacy to the basic requisites which seem inherent to each individual's human existence which would be as that to live disease-free being well nourished, move- around,

³⁷ One can compare the members of the Constituent Assembly to the 'Honoratiaries' of Weber, i.e. someone for whom the 'income' comes without much hard-work (generally due to inheritance or expected inheritance) and also enjoy certain social standing. Weber's Article Available in Prof. Amita Dhanda's Power and Responsibility study material compilation.

³⁸ List of various rights broadly *subsistent* in nature have been enunciated in [Nussbaum, Martha C.](#); Glover, Jonathan, eds. (1995). 'WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES'. Oxford: [Clarendon Press](#). (ISBN 0-19-828917-0 LCCN 94042602)

³⁹ An American Philosopher best known for her profound interest and revelatory work in the field of feminism, Philosophy, Ethics, Politics primarily. Available at <http://en.wikipedia.org/wiki/Martha_Nussbaum>; last visited on 3rd November, 2015

to be educated so as to participate in public life.⁴⁰ The classification put forth by both talks about a holistic demand of rights for human existence irrespective of classified as basic or not. If closely observed each right conforms to be necessary and basic in their own way, since the classification of basic and non-basic rights would differ from individual to individual.

Subsistence rights as to seek shelter, education, health etc. could be termed as basic rights which enjoy status of positive rights being irreplaceable requisites for human existence devoid of which it seems impossible to enjoy security rights i.e. negative rights as just requires protection so as to prevent getting perturbed. Hence, even though the trivia of rights is resolved announcing as subsistent and security rights the basic-non basic perplexity still operates. The fascinating dichotomy has been well elaborated by Henry Shue where he has discussed the interplay of the 'Basic rights'⁴¹ components devoid of being primary or secondary classification. He has unraveled the tussle exemplifying how each one is connected to another whereby in absence of one the other is quite impossible. Therefore he contends that civil-political rights as well as social-economic rights are of equal footing and equally important and corollary of the other.

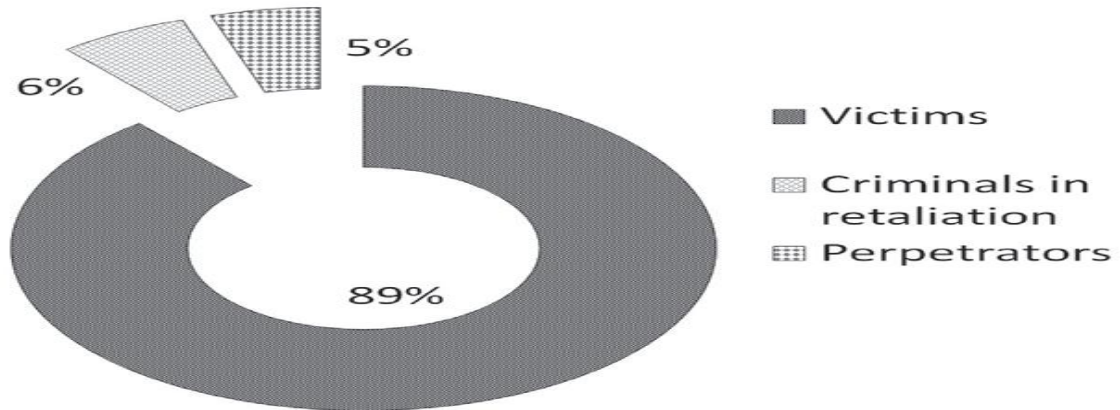
3. Summarizing the 'Rights' situation

Life is as it is not easy for them, on top of this the society makes it all the more terribly complicated – leading this agency of creating problems are the so-called protectors of every national's right i.e. the Sovereign. 'Salvation of the Oppressed Eunuchs', an NGO depicts pictorially⁴² the number of eunuchs who commit crimes and against whom crimes are committed. This chart clearly shows that by not providing them 'Rights' the State is pushing them down the dark lane.

⁴⁰ Amartya Sen, 'Capability and Well-Being' (2003) in M. Nussbaum and A. Sen, eds. 'THE QUALITY OF LIFE', pp. 30–53 (New York: Oxford Clarendon Press)

⁴¹ Henry Shue, 'BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY' (Princeton: Princeton University Press, 1980) p. 30.

⁴² Dr. Piyush Saxena, 'LIFE OF AEUNUCH' Available at <http://www.drpiyushsaxena.com/life_of_a_eunuch/11.pdf>; last visited on 3rd November, 2015



The situation worsens as the Government pretends to follow an inclusive policy but brazenly excludes the eunuchs from censuses. It was only in 2011 that the Government, after a decade full of experiencing various fragmented movements of eunuchs, decided to include them in the census – a third column of ‘Others’ was added, but ironically when the final report appeared there was no such third column. The ‘Others’ were somewhere lost amongst the male-female population. The report shows as below:⁴³

INDIA/ STATE/ UT	PERSONS	MALES	FEMALES	SEX RATIO
1	2	3	4	5
INDIA	1,210,193,422	623,724,248	586,469,174	940

‘OWNING-UP THE RESPONSIBILITY FOR THE PAST SINS’

⁴³ Census Data 2011 Report. Available at <<http://pib.nic.in/prs/2011/latest31mar.pdf>>; last visited on 3rd November, 2015

1. Whose Responsibility should it be?

This paper has attempted bring forth the legal capacity and capability, or rather the lack of it, of eunuchs in our society. As shown this has been majorly because of a social policy of exclusion which has been facilitated by those in power. However, time has come where all sections of the society, eunuchs included, need to be given atleast the very 'basic rights' which we all deserve by virtue of being human. It is time to put an end to the vicious circle of social and therefore legal exclusion, rather it is time to own-up to our responsibility and include the socially excluded to form a diverse and harmonious society with each one's contribution to achieve the 'normatively best possible world'.⁴⁴

In this I assert that it is not any one person in particular whose responsibility it is to achieve the utopian world, but for all to come together in its pursuit.⁴⁵ Though, more pointedly I would rest a major chunk of the responsibility on the 'legal thinker' who have the power of articulation as well as knowledge,⁴⁶ and strive to spread awareness through their writings. Even more specifically, Parashar rightly puts further trust on the shoulders of the judiciary – a body of 'legal thinkers' which combines in itself the powers of articulation, knowledge and authority (under the positivistic system) in the present day scenario.⁴⁷

I stress on the role of the judicial organ of the State as in the present day 'Normalized' world it is they who can use their position as an affirmative activist. Since, we live in times where without 'Power' it is tough to break through the rigid viewpoints of the society.⁴⁸ Judges also at an advantage because theirs is a machinery which encounters the very basic yet core issues faced by

⁴⁴ As, Chhatrapati Singh too talks about the best possible normative world being the one which is harmoniously blend of all sections of the society contributing and making the experience richer as a whole. Chhatrapati Singh, 'Law: From Anarchy to Utopia'. Delhi, Oxford University Press (1986)

⁴⁵ See generally Dennis Dalton, 'NON-VIOLENCE IN ACTION – GANDHI'S POWER' (Oxford University Press: 2011) at p. 8

⁴⁶ Dr. Andrew Schaap (2000), 'Power and Responsibility: Should we Spare the king's head? Politics', 20(3), 129-135.

⁴⁷ Archana Parashar, "Responsibility for Legal Knowledge" in Amita Dhanda & Archana Parashar (eds.) 'DECOLONIZATION OF LEGAL KNOWLEDGE' (Routledge: 2009) at p. 178-204

⁴⁸ Reference could be had to illustrations of Movies and Media who have not been able to tread past the social beliefs in regards to eunuchs.

the society faces every now and then, thus, they can through their responsible action change the face of the society.

2. Efforts made by the Indian Judiciary

Power needs to be acknowledged and only then can it be channelized in a positive way for the betterment of the society, or else what good is democracy or any public offices in the society as long as none of them actively make an effort towards the welfare of the society. The Indian Judiciary showed initial resistance towards recognizing eunuchs as part of the society⁴⁹ but have been more forth-coming in their aid to the position of eunuchs in our society.

In 2011 the Apex Court directed the rehabilitation of sex-workers to be gender neutral stated:

“...What about male sex workers and Transgender’s? Rehabilitation should also include male sex workers and trans-genders. Trans-genders are totally marginalized nobody looks after them...”⁵⁰

Moreover, the bench exerted active direction on the State in its judgment:

“The states should not only come out with schemes indicating therein rehabilitation of the sex workers but they should also demonstrate their commitment to the cause by coming out with some concrete results, at least in phases.”⁵¹

3. Need for ‘all’ to come together and work for *Sarvodaya*

In my mind there is no doubt that it is not the Judiciary, Legal thinker or Politics alone which bears the responsibility of society and its mass’s happiness. The society needs to be reminded time and again that it is not Aristocracy, Dictatorship, Monarchy, Oligarchy or Theocracy which we live in – rather it is a Democracy, which is a ‘Government of the people, by the people and for the people’⁵²

⁴⁹ Madhya Pradesh HC in 2003 invalidated Mayor Kamla Jaan’s (eunuch) seat. District Court in Madhya Pradesh, 2009 invalidated Kamla Bua’s (eunuch) Mayorship as well on grounds of neither being a female nor a woman. In 2009 the Apex Court dismissed Sonam Singh’s (resident of Ajmer) Petition on the basis of being a matter where the State Legislature has to actively make provisions on and not straight forwardly by the Judiciary; he had claimed more rights of eunuchs than mere animals.

⁵⁰ “Rehab of sex workers can be gender-neutral: SC” (August 22, 2012) Available at <http://www.dnaindia.com/india/report_rehab-of-sex-workers-can-be-gender-neutral-sc_1731410>; last visited on 3rd November, 2015

⁵¹ Dr. Piyush Saxena, “Empowering Eunuchs” in ‘LIFE OF A EUNUCH’ Available at <http://www.drpiyushsaxena.com/life_of_a_eunuch/13.pdf>; last visited on 21st October, 2015

⁵² One of most widely accepted and basic explanations of what a Democracy is. Initially stated by Abraham Lincoln – one of the most widely recognized American Presidents, the one who lead his country past the sins of slavery.

It needs participation by all and especially the community as a whole without which the voices tend to get lost unless voiced aloud to the Judiciary or Government. More pointedly, it is the concerned 'group' which must stand as one and show self-acceptance, as only when one accepts themselves can expect the society to accept them as well. A popular example of this is the case of LGBT rights in the much celebrated decision of NAZ foundation where the Judiciary read beyond the legal text to its spirit. The burden then shifts on the Legislature to hold hand of the Judiciary in the society and give its assent by making active provisions for the same as now needs be done in NAZ Foundation and NALSA judgment.

CONCLUSION AND RECOMMENDATIONS

As a conclusion I would like to suggest broadly that as any fraction of the society, the most important need is to be recognized and treated as 'persons' before law. Once this is done, half battle is won as then the community as a whole has made not only its presence felt in the society as well as put across their point of not being suppressed in the hands of powerful 'haves' of the society as this is a Democracy and hence everyone has a right to inclusion.

Moreover, as active measures I would propose my recommendations further.

- Educational Institutions at Primary, Secondary and Higher Educational level should create reserved seats for these kids who are deprived of even seeking education. It must not be imparted to them in separate institutions, rather at the same as others, so that it actively enhances their chances of social inclusion.
- Eunuch awareness programs should be organized at State as well as Central level so as to educate them about their rights of which most of them are unaware. Majority of them do not have the financial means nor do the Institutions accept them, which leaves them illiterate and unaware.
- The Eunuch community's rights should exceed the texts of the judgments and actively support them by recognizing their status as the first step and then making sure they get their due of subsistence and security rights.
- Only after the present situation is actively controlled by treating them as the third gender and treating them as persons before law, can then measures be taken for damage control of the past sins as well.

- Job opportunities should be created for eunuchs so that they can break the normalized stereo-typed role in the society. They should be provided with requisite opportunity for them to contribute in different sectors of the society.
- Media Activism should be more focused on the awareness level amongst the masses and their own community doing more than just fact-finding to ground level work for them.
- Overall, Judiciary, Legislature, Executive and Media as one should make active efforts to bridge eunuch community to the rest of the society in their respective roles and positions.

Whereas, I believe judiciary in the recent October, 2012 NALSA judgment has taken a strong step of recognizing eunuchs as the third gender category in the society and needs to be taken ahead from here on with the support of other machineries of the society.

The logo for IJESLS is presented on a horizontal scroll of aged, yellowish parchment with frayed edges. The text 'IJESLS' is rendered in a large, bold, grey, blocky font with a double outline, centered on the scroll.

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