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TRANSGENDER PROPERTY RIGHT IN INDIA

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Abstract: The transgender community has been abandoned for long, owing to incidents of non-acceptance, abandonment and most of the times harassment from the family members, they are often forced to leave their family and parental home and become vulnerable to homelessness at a very young age. In most of the cases, they end up in shelter-homes and gradually they fall in line with the Guru-Chela system that have been a part of the transgender community since long. On the other hand, though the transgender community have access to education and self-earning capacities, tries to have access to their livelihood, they are restrained in their access to housing and property due to discrimination in the present laws that manage the inheritance laws in India. The laws of inheritance are mainly governed by the personal laws, and in most of the cases, the rights of the transgender remain silent or they are denied of inheriting any property of their ancestors. The paper highlights the property as well as inheritance rights of the transgender community in India. The paper also presents the current scenario of the legal status of the transgender after passing of the Transgender Persons (Protection of Rights) Act, 2019.

“Sex is what you are born with, gender is what you recognize and sexuality is what you discover.” - A. Chettair¹

Discrimination of transgender is a common phenomenon as because they are the most marginalized section of our society. The reason being that they do not fit into the stereotypical categories of gender binary. Owing to the fact of non-acceptance, abandonment and harassment from family members, transgender persons are forced to leave their parental home and become vulnerable to homelessness at a very tender age. After the landmark judgment by the Hon’ble Supreme Court in the NALSA case² and the Transgender Act³, only talk about the Right of Residence and silent about the inheritance rights of the community. The status of the Transgender community during the Mughal period where they received respect, has now completely changed. The English rule in India criminalized communities and still today their position has not been improved. There has not much been done for the community in our country where they are alienated and isolated from the society; they are denied of their basic and fundamental rights which are entitled as a citizen of this country. The problems faced by the transgender community are discrimination, lack of educational facilities, unemployment, lack of shelter, lack of medical facilities and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage, property, electoral rights, adoption. India is a host of different socio-cultural groups of transgender people like hijras/kinnars, and other transgender identities like- shiv-shaktis, jogtas, jogappas, aradhis, sakhi, etc. However, there are other transgender persons who are not a part of either of these groups, but are transgender personally. Though an accurate and reliable estimation is not available for the population of transgender persons in India, it cannot be denied that their number is minuscule compared with the total population of the country.

Over the last decade, India has witnessed an increase in the recognition of the transgender community. This is reflected in both public policy and legal decisions. In the year 2011, the national census for the first time allowed individuals to identify as *others*- leading to approximately five hundred thousand⁴ individuals availing the choice. Despite of this, this community is still continuing to face discrimination, and the reason is lack of legal recognition. Literatures regarding the transgender in India mainly focuses on three aspects:

¹ Anitha Chettiar, “Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police” 5 IJSSH 752 (Sept. 2015), available at: <http://www.ijssh.org/papers/551-W10007.pdf> visited on May 28, 2022.

² National Legal Service Authority vs. Union of India.....

³ The Transgender Person (Protection of Rights) Act, 2019

⁴ Office of the Registrar General & Census Commissioner, 2011 Census Data (2011)

- (a) the struggle for identity and legal sanction⁵
- (b) issues related to health and social status⁶, and
- (c) ethnographic life experiences⁷

However, discussion on the civil rights and rights related to inheritance has given least importance. Immovable property is the largest asset holding of an individual in India. Addressing the issue on inheritance of transgender is quite important as because they lack access to housing, including low income and savings. In fact, the transgender community receive a lot of barriers in their lives, and specially access to property is widely considered as an important aspect for social standing. The law in this regard is of little assistance. Although the 2019 Transgender Person (Protection of Right) Act grants relief against discrimination regarding residence, it is silent about inheritance right⁸.

Rights of the Transgender

Transgender people have been part of Indian society for centuries. Traces have been found in various mythological stories. In the epics of Ramayana, when Lord Rama left Ayodha and marching towards exile, population of the town surrounded the Lord. To this Lord asked all men and women to return back, and so did the men and women. Still there were some persons remained with Lord Rama, and they said that they neither belong to the category of men nor women, so they stayed with him. Evidences of existence of transgender people are also found in Mahabharata. During Mughal Period, they were given much respect and dignity. They were considered as someone having heavenly powers, and also, they were given the duty as a protector of Harem⁹. Their position changed during the British Colonial rule. The Criminal Tribes Act of 1871 labeled them as criminals, mandated registration, and wide power was granted to arrest them under apprehension of promiscuous activities¹⁰. The Act also restricted the transgender to inherit any property¹¹. This criminalization of the transgender which was rooted in the British period was repealed in the year 1952.

Rights Guaranteed by the Constitution of India:

One of the greatest features of the Indian Constitution is the Fundamental Rights, which was conceptualized in the Bill of Rights of the American Constitution¹². Preamble of the Constitution mandates Justice- social, economic and political and equality of status.¹³ In other words, the Constitution is sex blind, and the basic premises of the concept of equality is based on the constitutional mandate that the sex of a citizen of the country is not at all relevant.¹⁴

⁵ Siddharth Narrain, "Crystallising Queer Politics-The Naz Foundation Case and Its Implications for India's Transgender Communities" (2009) 2 NUJS L Rev 455; Paul Horton, Helle Rydstrøm, and Maria Tonini, "Contesting heteronormativity: The fight for lesbian, gay, bisexual and transgender recognition in India and Vietnam" (2015) 17(9) Culture, Health & Sexuality 1059; Jennifer Ung Loh, "Transgender identity, sexual versus gender 'rights' and the tools of the Indian state" (2018) 119(1) Feminist Review 39.

⁶ Sushant Sahastrabudhe and others, "Sexually transmitted infections and risk behaviours among transgender persons (Hijras) of Pune, India" (2012) 59(1) JAIDS Journal of Acquired Immune Deficiency Syndromes 72

⁷ Soumi Dey, "Being A 'Kothi': An Ethnographic Interrogation with A Male Transgender in Kolkata, India" (2013) 11(6) IOSR Journal of Humanities and Social Science 51

⁸ (Prohibition against discrimination), Transgender Persons (Protection of Rights) Act, 40 of 2019.

⁹ Aniruddha Dutta, "An epistemology of collusion: Hijras, kothis and the historical (dis) continuity of gender/sexual identities in eastern India" (2012) 24(3)

¹⁰ Chapter 2 (Eunuchs), Criminal Tribes Act, 27 of 1871.

¹¹ Kunjana Mittal and Seema Garg, "Transgender in India: New developments and enactments" (2015) 2(11) International Journal of Multidisciplinary Research and Development 402

¹² Bill of Rights of the United States of America (1791). The first 10 amendments to the Constitution make up the Bill of Rights. Written by James Madison in response to calls from several states for greater constitutional protection for individual liberties, the Bill of Rights lists specific prohibitions on governmental power. Other precursors to the Bill of Rights include English documents such as the Magna Carta, the Petition of Right, the English Bill of Rights, and the Massachusetts Body of Liberties. Available at: <https://www.billofrightsinstitute.org/foundingdocuments/bill-of-rights/> last visited on May. 17, 2022.

¹³ The Constitution of India- Preamble.

¹⁴ Article 15 of the Constitution of India.

Right to equality- The Constitution under Article 14 provides every person equal status before law and equal protection of law within the territory of India. To mention, the term “person” here refers to any individual irrespective of class, sex, creed, religion, etc. Similarly, a transgender in India is also comes under the category of person and is given the same status of that of cis-gender in India¹⁵. The transgender community cannot be discriminated on the ground of non-applicability of any law within the territory of India by reason of their difference and divide them on the basis of their identity. In the landmark case of National Legal Service Authority vs. Union of India¹⁶, the ambit and interpretation of the term person has been widened and was held that Article 14 of the Constitution does not restrict the word ‘person’ and it is not focused to only men and women. Hijras/transgender, who are neither male nor female also fall within the expression ‘person’ and are equally entitled to protection of law in every sphere including employment, healthcare, education as well as civil and citizenship rights alike the other citizens of this country. The transgender community also falls within purview of the Constitution of India and thereby they are entitled to all the rights as guaranteed by the Constitution.

Equality of opportunity and Right Against All Forms of Discrimination- The key word that specially categorize the transgender community from the rest of the society is “sex”. The interpretation of the term ‘sex’ includes these communities irrespective falling within the category of male or female. The Apex Court of India in the landmark case¹⁷ observed that both gender and biological attributes constitutes variation in sex. Biological character includes genitals, hormones and secondary sexual features, whereas the gender attributes one’s self image, psychological or emotional sex identity and character. *Article 15 and 16* of the Constitution of India prohibits discrimination on the basis of gender identity. By the term ‘sex’ is not just limited to biological sex of male or female, but the intention is clear to include those individuals also who are neither male nor female. *Article 15(2) and 16(4)* has also been interpreted to provide social equality to these communities such as equality in public employment, it provides that the states shall have the power to make any special provision for the upliftment of these vulnerable minority who are now included within the category of socially and educationally backward classes¹⁸. While reading these articles with the Directive Principles of State Policy and other international instruments to which India is a key player, call for social equality, which the transgender community can realize only if such facilities and opportunities are extended to them so that they can also live with the equal status as that of other citizens of the country.

Right to Property and Transgender: Article 300 A of the Constitution of India- The right to property is one of the most controversial issues both in terms of interpretation and existence. The concept of property and the definition has not even been included in the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. The important questions that the right to property involve are:

- a. Who is deemed to have property rights protected, whether it is the human being or the corporate or the both?
- b. The type of property which is protected, properties used for the consumption or used for production?
- c. The reasons for which the properties can be restricted, for taxation or regulations or nationalization for public purpose?

The object of right to property in recent times, is usually understood consisted of the properties that are already owned or possessed, or properties acquired or to be acquired by person through lawful means. In India, prior to the forty fourth amendment, the right to property was a fundamental right under Article 31 of the Constitution of India. It however, permitted the State to acquire private property for public purpose by compensating the private individual.

The object behind the (Forty-Fourth Amendment) Act, 1978, was to reduce the right of property from the status of fundamental rights to that of a legal right.¹⁹ This right to property secured under Article 300A of the Constitution,

¹⁵ National Legal Service Authority v. Union of India, AIR 2014 SC 1863 at 1890 para 54.

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Poonam Verma, Sorrows of Transgenders, Judiciary and our Society – A Study, 52(3) IBR 147 (2015).

¹⁹ Rajesh Kumar v. State of Bihar, AIR 2009 Pat. 98, Decision of the Regional Transport Authority restricting the life of Vehicles to be used under any permit to 15 years is held illegal. It is held to be depriving the owner of their property or usage without authority of law, violative of Article 300

is available against executive interference and not against the legislative action. It has been held to be a human right as well as legal right.²⁰

Laws Related to Inheritance in India- India has a long history of gender laws and are not restricted to laws that deal with the properties. The laws of property have also impacted on the criminal laws (like the Indian Penal Code and Code of Criminal Procedure) and labour laws (like Workmen's Compensation Act and Factories Act) etc.²¹ This is quite evident in the provisions of the Hindu Marriage Act and Hindu Succession Act²², which governs the personal rights of Hindus in India. In Section 13 of the General Clauses Act, prescribes that all words that are mentioned as masculine gender should include females. However, repetition of the term shows that inherent biases while drafting the legislations. As is evident, that the above-mentioned Act does not include the term *transgender*. Besides, it only applies if the context does not exclude its application and is not being everywhere to all legislations.²³ Also, there are separate rules for men and women. Not only this excludes the transgender but also creates a confusion as to how they will inherit a property, if they are included. This is not a new challenge, and is acknowledged by several government reports such as 174th Report of Law Commission of India, the 207th Report of Law Commission of India, and the Consultation Paper on Reform of family Law²⁴ noted the effect of gender provisions excluding the women for inheriting agricultural land. This is significant as the Constitution of India strictly provides that no citizen of the country should be discriminated on the basis of caste, religion, race, sex or birthplace. Since gender has been read within sex in Article 15²⁵, laws should not discriminate against transgender persons only because of their identity.²⁶

Inheritance Under Hindu Succession Act- The rights of Hindus, Sikhs, Buddhists and Jains are regulated by the Hindu Succession Act. This Act is largely divided into three components:

- a. Devolution of interest in coparcenary property²⁷
- b. General rules of succession in case of males²⁸
- c. General rules of succession in case of females.²⁹

However, it is worthy to note that the Act does not include transgender in its ambit. This is evident in the definition clauses of the Act which clearly states that heirs are limited to male and female members only. It also defines agnates' and cognates' rights based on the binary division of sex.

Agnates: one person is said to be agnate to another person if they are related through blood or adoption wholly through males.³⁰

Cognates: a person is related to another person through blood or through adoption, but not wholly through male, they are known as cognates.³¹

Heir: any person who is entitled to inherit any property in an intestate through this Act.³²

²⁰ Gango Copt. Housing Society Ltd. v. M.C., Greater Bombay, AIR 2004 Born. 64

²¹ Indian Penal Code, 45 of 1860; Code of Criminal Procedure, 2 of 1974; Workmen's compensation Act, 8 of 1923; Factories Act, 63 of 1948.

²² Archana Parashar, "Gender inequality and religious personal laws in India" (2008) 14(2) The Brown Journal of World Affairs 103,

²⁴ the 174th Report of Law Commission of India in 2000 states that legislation that on the face of it discriminates between a male and a female must be made gender neutral. Law Commission of India, Property Rights of Women: Proposed Reforms under the Hindu Law (Report No 174, 2000); Law Commission of India, Proposal to amend Section 15 of the Hindu Succession Act, 1956 in case a female dies intestate leaving her self-acquired property with no heirs (Report No 207, 2008); Law Commission of India, Consultation Paper on Reform of Family Law (2018).

²⁵ p 75, NALSA v Union of India (n 4).

²⁶ Hormasji Manekji Seervai, Constitutional law of India: A critical commentary (4th edn, NM Tripathi 1997)

²⁷ Section 6 of Hindu Succession Act

²⁸ Section 8 of the Hindu Succession Act

²⁹ Section 8 of the Hindu Succession Act

³⁰ Section 3(a) of the Hindu Succession Act

³¹ Section 3(c), *ibid*

³² Section 3(f), *ibid*

The Act provides the right to inheritance to sons and daughters. It does not include any transgender or a change in gender identity. Moreover, there are other specific provisions in the Act for the males and females.³³ Section 8 of the Act deals with the male intestates' property, clearly mentions about the inheritance through classes of heirs³⁴. Class I heirs include the male intestates' mother and lineal descendants³⁵. Class II heirs are father, siblings, lineal descendants of siblings, and the siblings' of the male intestates' parents.³⁶ On the other hand Section 15(1) of the Act³⁷ talks about the rules of inheritance of property that belongs to female intestate. The section does not recognize the distribution of property through classes of heirs. Instead, it explicitly give the list of persons who eligible to inherit the property. The property according to the section devolves to the deceased's children followed by her husband's heirs. This is followed by her parents, father's heirs, and last the mother's heirs.³⁸ It is worthy to state that the Act marks a difference in how males and females are treated under this Act. The Act is silent on the question that whether a transgender person who is identified as a male would be entitled to inheritance of a property under Section 8 of the Act. The answer to the question is mentioned in the General Clauses Act, which mentions the definitions missing from the specific legislation.

The above-mentioned problem can be well brought forward through the following illustration:

A person (D) born as a female went to sex reassignment surgery, and identified herself as male. D has two children- a son (E) and a daughter (F) with now a deceased husband (H). Both E and F are unmarried. D passed intestate.

The inheritance right of D's property would depend upon the whether the latter is considered as male or female, as there is no legal situation to identify them as non-binary. In such a situation both E and F will equally inherit the self-acquired property. If D had no children, then the right of inheritance would have taken a different route. So, it is clear that any transgender person like that of D, owns any property, will be a matter of arbitrary dissolution depending on how that transgender person is recognized. As evident, law does not include transgender person. Even if they are included, transgender persons who do not confirm either male or female, would be excluded.³⁹

Right to Inheritance Under Muslim Personal Law (Shariat):

In India, the Muslim personal law is mostly is not a codified one. The laws and rules related to inheritance under the Muslim law are mostly determined according to the customs. The laws are mostly having their base and genesis in the Holy Quran and classical Islamic jurisprudence. However, they were shaped and reshaped during the colonial and postcolonial era⁴⁰. There is a considerable variation in the process how an individual inherits a property. In some cases, this may be as per the degree of separation, thus it can be said that there is no differentiation between male and female. On the other hand, the male relations of the Muslim community are allocated a larger portion of inheritance than female members, along with the responsibility on the male members to bear the responsibilities of the female members⁴¹. The reason is that, after the marriage the wife is legally eligible to receive Mehr⁴² and subsequent maintenance from her husband. In the due course of time, to improve the positions of Muslim women in case of their rights of inheritance, the *Muslim Personal Law (Shariat) Application Act*⁴³ was enacted in 1937. Section 2 of the Act states that Muslim personal law should be applicable to all Muslims with certain exceptions, including personal property of female inheritance or obtained under any contract, gift, marriage or dissolution of marriage. As there is no certainty or uniformity, there is no assistance whether a transgender person will be accorded to the differentiated Act or whether they will be subject to the personal law.

³³ Damle, Srivastava, Anand, and others (n 21)

³⁴ Hindu Succession Act

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Sex change not for property: Mafatlal (n 7)

⁴⁰ 8Rina Verma Williams, Postcolonial politics and personal laws: Colonial legal legacies and the Indian state (Oxford University Press, USA 2006)

⁴¹ Abdulmajeed Hassan Bello, "Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women" (2015) 29(3) Arab Law Quarterly 261.

⁴² Mehr is the money or property (dower) that the wife is entitled to receive from her husband in consideration of the marriage

⁴³ Muslim Personal Law (Shariat) Application Act, 26 of 1937

Indian Succession Act- The Indian Succession Act deals with all those persons who do not fall within the purview of the above laws in India. It is commonly understood as the law that covers the personal laws of inheritance of Christians and Parsis. In general, the law seems lean towards gender neutrality with the adoption of words such as kindred or lineal decedents⁴⁴. It can be noted that in intestate inheritance, there is no distinction made between son and daughter. Children under the Act means any lineal descendants in the first degree of the person⁴⁵. Though the Act uses the terms males and females, they have the same inheritance rights. In the Act also there is no mention about the inheritance rights of transgender persons.

Role of Judiciary in case of Inheritance of Transgender:

Apart from inheritance rights of the transgender in India, the property rights of them seems to have possess a significant challenge, as there is difficulty in identifying the successors of transgender. They may lack documentations, could not marry, or could not prove adoption. Though these are challenges for themselves, they also have an effect on the inheritance rights to the transgender people by denying them the guarantee that are ordinarily available to other citizens of the country. To understand the position of judiciary in this context, it can be categorized in the following:

Illyas vs. Badshah Alias Kamal, 1989⁴⁶- In this case, the appellant contended that Munilal who was a transgender guru, has executed a will in his favour. The same was claimed by the respondent. However, the respondent contended that unlike the appellant, he was the chela of Munilal. Munilal inherited the contested property through his guru. In addition to the Will in his favour, the respondent also claimed that the property one obtains from guru, cannot be passed to outside community. Though the Madhya Pradesh High Court ultimately held that the Will in favor of appellant was forged, the Court also held that, if this was not the case also, the deceased being Muslim, could not bequeath one-third of their property (the testamentary limit of a Muslim person) as opposed to customary practices of the transgender community. As such, at least two-thirds, of the property would proceed to the chela (as a customary practice) to the respondent in this case.

Sweety vs. General Public 2016⁴⁷ - In this case, the Himachal Pradesh High Court dealt with an inverse relation. In the case, the chela died. The lower court denied the guru any right on the contested property. According to the court, the Hindu Succession Act do not envisage any such relation. Notably, no one else claimed any part in the contested property. The High Court reversed the lower court's decision. It concluded that there was no that the guru in this case could not inherit the property as per their customs. The court also concluded that since the religion of the parties has not been recorded, that the persons cannot be bounded to Hindu Succession Act which could curtail their rights.

Conclusion:

In fact, the problems of transgender are vast and complex subject. The Hindu Succession Act stays silent about the third gender. It clearly explains who is a Hindu. The Act lays down a comprehensive and uniform system of inheritance and the person is also specified under the Act. So as the Muslim Personal Law and Indian Succession Act. It is the time that the State takes a dedicated approach towards having the transgender in the line with the international law. Such legislation should ensure that all individuals, without discriminating on the basis of gender identity have the right to administer own, acquire including through inheritance manage, enjoy, and dispose property. Property ownership of the transgender is a vital for the prevention of discrimination and harassment directed towards them. The State must pass appropriate legislation to prevent discrimination in all sphere.

⁴⁴ Section 33 (where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred) and Section 50 (general principles relating to intestate succession), Indian Succession Act.

⁴⁵ Section 99 (a) (construction of terms), *ibid*

⁴⁶ *Illyas v Badshah Alias Kamla* 1989 SCC OnLine MP 175.

⁴⁷ *Sweety v General Public* 2016 SCC OnLine HP 909.

Bibliography

1. Michael Schulman, 'How the transgender alt-glam scenester faces the demands of being a muse, and a mouthpiece' (The New Yorker, September 19, 2016) < www.newyorker.com/magazine/2016/09/26/hari-nef-model-citizen> accessed January 5, 2022
2. Mr. Rohit Shukla, 'history of transgender people and their struggle in Indian society' (JOURNAL OF CRITICAL REVIEWS, July 8, 2020) <www.bibliomed.org/mnsfulltext/197/1971598507333.pdf?1641387379> accessed January 5, 2022
3. A brief history of Hijra, India's Third gender (culture trip) < <https://theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender/>> accessed on January 6 6, 2022
4. National Legal Services Authority v. Union of India & Ors [2012] Writ Petition (Civil) No.400
5. 'What are the rights of transgender in India' (ipleaders, October 24, 2015) <<https://blog.ipleaders.in/legal-rights-of-transgender-india/>> accessed January 6, 2022
6. Transgender Persons (Protection of Rights) Act 2019
7. The Hindu Succession Act 1956
8. The Indian Succession Act 1925
9. Anitha Chettiar, "Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police" 5 IJSSH 752 (Sept. 2015), available at: <http://www.ijssh.org/papers/551-W10007.pdf> visited on May 28, 2022.
10. Soumi Dey, "Being A 'Kothi': An Ethnographic Interrogation with A Male Transgender in Kolkata, India" (2013) 11(6) IOSR Journal of Humanities and Social Science 51
11. 'Status of the inheritance rights of transgender under the Indian Law' (ipleaders, October 16, 2021) , available at: <https://blog.ipleaders.in/status-inheritance-rights-transgenders-under-indian-law> accessed January 7, 2022