



# PROPERTY RIGHTS ENDOWED ONTO GENDER-BENDING

**Dr. P.Brinda,**

Faculty of law

School of Excellence in Law

The TN Dr Ambedkar Law University

*"The beauty of standing up for your rights is others see you standing and stand up as well."*

— Cassandra Duffy.

## INTRODUCTION:

Property is any physical or virtual entity that is owned by an individual or jointly by a group of individuals. Human life is not possible without property. The concept of property went on expanding gradually to bring in certain rules of acquiring and holding with the notion of holding property. It transfers inter-vivos and its devolution on death was also evolved. As civilization advanced, the concept of property embraced within itself not only the subjects like ownership, transfer, and inheritance. After a long obscurity, property rights were entrenched, which brought forth the plight of gender discrimination in the law of inheritance under the personal laws of Hindus and Muslims. During the Mughal rule, transgender people were respected as being of great valour and strength.<sup>1</sup> They were treated with dignity and had the right to hold and acquire property, excluding the right of inheritance. In the early period of British rule in India, transgender people were given benefits in the provision of lands by the rulers of various states, which were later taken away. In the presidency of Bombay, land was taken away from transgender people on the ground that such lands were not inherited from blood relations under the Bombay Rent-Free Estates Act, 1852.<sup>2</sup> Under post-independence laws of succession, the legislation is lip-tied in dealing with the property rights of transgender people. From my standpoint, we are prejudiced in granting rights to third category people of gender bending (i.e., transgender). Gender-bound people face discrimination despite increasing institutional recognition of transgender people, both in public policy and legal decisions. This wrangling over them is due to a "lack of legal recognition," which demonstrates their struggle to bridge the gap between law and life. This paper supports the finding that the laws of inheritance are based on a binary notion of gender as transgender people

<sup>1</sup> Sherly Hephzibah J, Pushpa Nagini Sripada, "A Study on Trans-Women and their Culture in the Post-Modern Society," International Journal of Applied Engineering Research, Volume 13, Number 6, pp. 3881-3889, ISSN 0973-4562.

<sup>2</sup> Rupal Sharma, "Inheritance Rights of Transgender-A Cry of Humanity", 2018 IJLMH | Volume 1, Issue 3 | ISSN: 2581-5369.

lack documentation, cannot marry or cannot adopt, which makes it difficult to identify the successors. For example, only 8 percent of transgender people have an Aadhar card for voter's ID for their recognition. So the law should not discriminate against transgender people because of their identities.

### **RECOGNITION OF TRANSGENDER AS 'PERSON':**

The term "transgender" refers to those who do not fully identify with either the male or female gender. According to the American Psychological Association and the World Professional Association for Transgender Health, "People whose gender identity (feeling of oneself as a man or woman) or gender expression differs from that typically associated with their natal sex." This group makes up a sizable minority, with an estimated global population of roughly 25 crore. They are non-heterosexual individuals.

Transgender males, transgender females, crossdressers, genderqueer people, transsexuals, hijras, aravanis, kothis, jogtas, and Shiv Shakti are a wide range of transgender-related identities in India. We, being prejudiced, grant rights to third-category people of gender bending (i.e., transgender). Despite increasing institutional recognition of transgender people, both in public policy and legal decisions, gender-bound people still face discrimination. This wrangling over them is due to a "lack of legal recognition," which demonstrates their struggle to bridge the gap between law and life.

### **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016:**

The term "person" shall include any company or association or body of individuals, whether incorporated or not.<sup>3</sup> The liberal interpretation of the term includes "transgender" also. This recognition was first given in 2014 by the Supreme Court in *National Legal Services Authority (NALSA) v. UOI*<sup>4</sup>. In this case, the petition keyed up on the deprivation of rights available to ordinary citizens, which include the right to own property, the right to access healthcare, and unemployment. The court is too cognizant of the hurdles faced by transgender people in exercising their rights of inheritance, although the judgement reflects a cumulative understanding of gender identities. Justice KS Radhakrishnan pointed out that a transgender person's right to decide their self-identified gender should be recognised by state and federal authorities. The Supreme Court in NALSA's case remarked that the obliteration of transgender persons from inheritance and succession laws is opposed to the principles of equality enshrined in the Constitution. Transgender people are recognised as a third category only since 2014. For the first time, people were able to identify their gender by selecting "others" in the 2011 national census. As a result, the transgender community is frequently one of the most marginalised in the country because they do not fit into stereotypical gender binary categories.

<sup>3</sup> General Clauses Act of 1897, Section 3 (42)

<sup>4</sup> AIR 2014 SC 1863

As the succession laws relate back at least 6 decades, it is hard to find a right of inheritance in favour of transgender people. The right to residency of transgender people is addressed in Section 13<sup>5</sup> of the Bill. According to Section 13(1), a transgender person should not be separated from their family and immediate family because of their gender identification. They have the right to enjoy the house and use all of its amenities under Section 13(2). This entitles them to the same level of support as other family members, regardless of gender. Despite the fact that the Lok Sabha law mentions transgender people's right to residence, it does not mention their inheritance rights. They are not awarded the status of coparcener in the joint Hindu family or as legal heirs to their parents' separate property because of their gender identification.

### **PROPERTY RIGHTS FOR TRANSGENDER PEOPLE:**

They should be treated fairly, with respect, and without prejudice. They should not be discriminated against whether applying for jobs, going to public places, owning property, or seeking justice. Civil rights, such as the ability to obtain a passport or ration card, write a will, inherit property, and adopt children, must be open to all regardless of gender/sexual identities.

Because India only recognises two sexes and refuses to accept transgender people as third sex, they have been denied many rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity via a passport and ration card, a driver's licence, and the right to education, employment, and health care, among others. As a result of such discrimination, transgender people are cut off from the fabric of Indian civil society.

### **INHERITANCE LAWS IN INDIA:**

In India, the law of inheritance is governed by the personal laws of the respective religion. These laws recognise only two categories for inheritance, i.e., male and female. Indeed, in all religious personal laws, female heirs are not equally treated with those of males.

- **HINDU LAW OF SUCCESSION:**

Under both Dayabhaga School and Mitakshara School, the female heir had only limited interest and couldn't alienate the property, i.e., she had no right to sell the said property, gift it, or mortgage it. According to Section 14<sup>6</sup> of the Hindu Succession Act of 1956, any property acquired by a Hindu female shall be treated as her absolute property.

<sup>5</sup> Section 13-Right of residence: (1) No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child.br

(2) Every transgender person shall have.

(a) a right to reside in the household where parent or immediate family members reside;

(b) a right not to be excluded from such household or any part thereof; and

(c) a right to enjoy and use the facilities of such household in a non-discriminatory manner.

(3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

<sup>6</sup> Section 14. Property of a female Hindu to be her absolute property.—

The Hindu Succession Act governs the right of Hindus, Sikhs, Buddhists, and Jain to provide succession rules; however, it does not include transgender people in that scheme. If two people are related by blood or are adapted entirely by males, they are referred to as agnates; if they are not adapted entirely by males, they are referred to as cognates. The Act only refers to any person, male or female, as the term "heir" who can inherit the property of an interstate but remains silent about anyone who changes their gender identity. Section 8 deals with the general rules of succession in the case of males and enumerates the priority of inheritance class of heirs. Section 15 covers the general rules of succession of Hindu females, which confines the list of persons who inherit the property of a Hindu female dying intestate. Though the Hindu Succession Act, 1956 recognises women's right to inheritance, the right to inherit the dwelling house and the right to claim partition, they are not equally recognised with those of male heirs. To put an end to this, the Act of 1956 was amended in the year 2005 and added 4 legal heirs on the female line to recognise the female heir as equal to that of the male.

As a result, while this manifests male and female rights under this Act, it is unclear whether transgender people fall under which section, considering them either male or female.

- **MUSLIM LAW OF SUCCESSION:**

Like Hindu personal law, Muslims are also governed by their personal laws, known as **shariat law, for succession**, which is of two sects: Shia and Sunni. Both have separate laws of inheritance. So, whether a transgender person is subject to personal laws or afforded differential protection under the Act, all of these provisions provide some relief. This paper tries to spell out the stillness regarding the broaching of the transperson's right of inheritance even in Muslim personal law. On probing the property distribution among the sharers in Sunni law and Shia law, it is noted that the husband gets 1/4 of the share on the survival of a child or child of a son and 1/2 of the share when he has no child or child of a son. In the case of the wife, she gets 1/8 of the share in the presence of a lineal descendant, and in the absence of a child, she gets 1/4 of the share. It is evident that a gender imbalance persists. Without resolving this disparity, we cannot claim to recognise the rights of trans people.

- **INDIAN LAW OF SUCCESSION**

The Indian Succession Act governs all those which are not covered by the above discussed. It is manifested to govern the inheritance of Parsis and Christians. The scheme of succession to a male intestate and a female intestate is found to be similar in the Christian law of inheritance. Here, no accusation of sexism can be established.

In 2016, the Delhi Minorities Commission requested the Law Commission of India to study whether a transgender person can be included within the Indian Succession Act, but no study has been conducted by the

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(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

commission. However, Christian property rights in the Indian succession Act of 1925 have a broader scope. Section 44<sup>7</sup> of the Act addresses the inclusion of transgender people in inheritance rights over ancestral property. Delhi Minorities Commission, after consultation with the advisory committee of Christians consisting of 52 religious leaders and professionals, has recommended to the Law Commission to amend the Indian Succession Act, 1925 and include the third gender in Section 44. The entire Christian committee agreed that transgender people should be given equal rights as men and women. Mr. Ibrahim Pattiya, member of DMC, stated that with the inclusion of the term "transgender" they can approach the court if they are discriminated against during the distribution of the property.

### • THE INDIAN CONSTITUTION:

In essence, the Indian Constitution is "sex blind," which means that the basic premise of equality before the law and equal protection under the law is based on a constitutional mandate that a person's gender is irrelevant, except where the Constitution requires special provisions for women under Article 15(3)<sup>8</sup> of the Constitution. Article 14<sup>9</sup> ensures that everyone is treated equally in the eyes of the law. Article 19 (1)<sup>10</sup> guarantees everyone's right to free speech and expression. Under Article 21<sup>11</sup>, everyone is guaranteed a dignified existence.

### PLIGHT OF TRANSGENDER'S RIGHT:

Transgender people are deprived of their civil rights, which include the right to inheritance, which has become the root cause of why most transgender people have low incomes, less service, and are in need of ingress to housing. This nexus of law and life makes their viability toilsome. Transgender people face discrimination on a daily basis in India, as society struggles to accept them as normal human beings with different sexual preferences. The law of inheritance is based on a binary notion of gender, as when transgender people lack documentation, cannot marry, or cannot adopt, it becomes difficult to identify the successors.

After the decision in the NALSA case, the Transgender Person's Protection of Rights Bill was introduced in parliament in 2016, which lapsed on the dissolution of Parliament, and was reintroduced and Transgender Person's Protection of Rights Act was passed in the year 2019 which has been brought into effect on January

<sup>7</sup> Section 44: Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.—If the intestate's father is dead but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

<sup>8</sup> Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children.

<sup>9</sup> Article 14: Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

<sup>10</sup> Article 19: Protection of certain rights regarding freedom of speech, etc.— (1) All citizens shall have the right— (a) to freedom of speech and expression; .....

<sup>11</sup> Article 21: Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law



10, 2020 by the Indian Government, where the Bill defines a transgender person as someone whose gender does not match the one assigned at birth. The bill strongly focuses on transwomen and hijra and criminalises begging. This Act grants every transgender person the right to reside and to be included in the household.<sup>12</sup> If the family is unable to take care of the gender-bending person, they can be placed in a rehabilitation centre on the orders of a competent court. Furthermore, no transgender person can be discriminated against with regard to their recruitment or promotion by any Government or private entity.<sup>13</sup>

Despite widespread criticism of transgender protection, identification, and welfare measures, they have the right to apply to the District Magistrate for an identity certificate that reflects their gender as transgender.<sup>14</sup> Aside from that, the city has established the National Council of Transgender People to address eunuch and transgender people's grievances, as well as make recommendations to the Central Government and monitor the impact of legislation, projects, and policies affecting transgender people.

However, apart from Uttar Pradesh and Madhya Pradesh, no other states addressed the right to transfer or receive property, including inheritance. Yet Tamil Nadu offers free land pattas for great access to housing schemes, but the policy was silent on inheritance. Primarily, challenges faced by transgender people in inheriting property are aroused by two major situations: (a) inheritance law defines rights based on a binary notion of gender and (b) difficulty in identifying the successor. To understand the implications of the foregoing, we can look at the hypothetical situation that arose in the case of Ajay Mafatlal.<sup>15</sup> The country has a long history of gender laws. When discussing legal challenges, particularly section 13(1) of the General Clause Act of 1897, it is clear that all words imparting the masculine gender include females. However, section 13 does not include transgender people and is limited to males and females. From this different treatment across the gender spectrum, which treats men and women with different rules of inheritance, as a result, it not only excludes transgender people, but it leads to ambiguity regarding how they will inherit the property if they are included.

These disputes regarding gender discrimination have been raised by the consultation paper on reform of family law, the 174<sup>th</sup> report of the Law Commission of India,<sup>16</sup> (aimed at suggesting changes in the Hindu Succession Act, 1956 so that women get an equal share in the ancestral property), 207<sup>th</sup> report of the Law Commission of India,<sup>17</sup> but no steps have been taken in furtherance of this dispute.

Although the *Transgender Persons (Protection of Rights) Act, 2019* grants protection against gender discrimination regarding residents, it is voiceless about inheritance. However, neither the NALSA judgement nor the 2019 Act distinctly vet inheritance rights or provide for specific concessions in housing facilities.

<sup>12</sup> Section 12 of the Act, 2019

<sup>13</sup> Section 9 - Non-discrimination in employment

<sup>14</sup> Section 5 - Application for certificate of identity.

<sup>15</sup> <https://www.timesnownews.com/business-economy/companies/article/throwback-this-famous-business-tycoon-had-first-sex-change-in-india/722933>, visited on 04.03.2022

<sup>16</sup> "Property Rights of Women: Proposed Reforms under the Hindu Law". Available at <https://lawcommissionofindia.nic.in/reports/report204.pdf>

<sup>17</sup> 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.

The controversy with regard to the identification of transmen or transwomen plays a pivotal role in the law of succession. As the succession laws only mention the gender as son, father, grandfather, daughter, mother, grandmother, etc., the question with regard to succession by transgender is to be decided with respect to the fact of whether he/she is transman or transwoman, because sometimes they may be permitted to claim the right of inheritance as transwoman, as in most of the personal laws, the shares of the male are more than that of the female. Therefore, if a person claims to be a transman, complications or disputes will definitely arise. All the laws of the land should be applied to transgenders like any other person.

Not only in India, but transgender people must fight for their rights all over the world, as many countries have not addressed the right of inheritance due to a lack of identification documents, and even international bodies demonstrate inequality among all genders when granting property rights. As published by the latest trans legal mapping report, only 96 countries have processes to allow trans people to change gender legally.

### **THE INTERNATIONAL BILL OF GENDER RIGHTS:**

The International Bill of Gender Rights also defines the right to gender identity. The right to free expression of one's gender identity is the freedom to define one's own gender identity, and all human beings have this right. As a result, all human beings have the right to freely express their self-defined gender identity. Furthermore, no individual's human or civil rights shall be violated as a result of this manifestation. All human beings have the right to govern and transform their bodies, which includes the right to change their bodies cosmetically, chemically, or medically in order to reflect their self-defined gender identity. Individuals shall not be denied the right to change their bodies as a means of expressing self-defined gender identity, nor shall they be denied human or civil rights because they have changed their bodies cosmetically, chemically, or surgically, or wish to do so as a means of expressing self-defined gender identity. No individual should be denied access to competent medical or other professional care because of their genomic sex, genitalia, assigned birth sex, or initial gender role. Individuals' rights to competent medical or other professional treatment when modifying their bodies cosmetically, chemically, or surgically shall not be denied on the basis of chromosomal sex, genitalia, assigned birth sex, or initial gender role.

### **CONCLUSION:**

Clearly, the Hindu Succession Act is mute when it comes to the third gender. It describes exactly who a Hindu is and who falls under that description. The Act establishes a standard and comprehensive inheritance system that applies to both Mitakshara and Dayabhaga School. It also specifies the individual. The same has been reiterated in Muslim law. There is an obvious gender imbalance in the personal laws. Although our Indian Constitution is not gender biased, it doesn't explicitly talk about the rights of transgender. There has been no stringent and significant legislation after 2015 regarding the rights of transgender people. Unless and until there is equality provided to all people regardless of their gender, Articles 14 and 21 remain meaningless and lose their essence in reality.

If this situation persists, the position of trans people will become even more awful. Day by day, people are transcending and adopting more elevations and progressions needed for the present day situation. This advancement will be hindered if the law does not oblige with the progression of the human mind in the nearer future. To keep up with advancing society and to ensure equal rights for all, current laws should be amended and made unambiguous and clear when it comes to "transgender." The word "third gender" should be legally recognised not only in books but also in reality. Also, we should try and overhaul our minds and laws while the foreigners are able to think rationally and implement the same seamlessly. Moreover, everyone should not only respect them with their heart and mind but also accept them to give them equal rights. After all, why do we call ourselves humans while we don't feel anything for other humans?

