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# A COMPARATIVE STUDY ON THE EFFECT OF INHERITANCE RIGHTS THROUGH THE LENS OF THE TRANSGENDER COMMUNITY

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## ABSTRACT

A psychiatrist at Columbia University, John F. Oliven, coined the term 'transgenderism' in 1965 and replaced it with the term 'transsexualism'. The Indian Constitution (Art.15) Prohibits discrimination on the grounds of sex, in which the term 'sex' collectively includes all genders not just limited to biological sex as male and female. As the transgender persons are deprived of their civil rights, including the right to inheritance in India and the Hindu Succession Act (HSA) (1956) nowhere defines transgender within its scheme and states that male and female persons can only be heirs.

This paper fills a gap in existing literature regarding transgender persons and civil rights, and describes the legal developments regarding transgender inheritance rights (Section II), Then, the present gender laws challenges, successors' difficulties and the role of courts are dealt in (Section III)

Further the Paper, critically analyses the personal laws and the Inheritance Laws of Transgender (Section IV) HSA, 1956. The Paper reviews the landmark judgement of NALSA V. UOI and also refers to the pertinent Legal Provisions of the Transgender Persons (Protection of Rights) Act, 2019.(Section V). The Research also analytically identifies the International Yogyakarta Principle on the Rights of the Transgenders and critiques on their justifiability. (Section VI). The paper compares the Indian framework with other countries and International rules to understand how they deal with similar challenges. Finally, the researcher discusses the possible reforms in India and concludes the paper (Section VII).

**Keywords:** 'Trans', NALSA, Yogyakarta, Personal Laws, Hindu Succession Act, Inheritance

## .CHAPTER 1

*"Human rights are universal, indivisible and interdependent. They are not reserved for the few –they apply to everyone, everywhere. It is essential to reaffirm this fundamental principle and join forces to make it a reality"*

**Inrina Bovoka, Director General of UNESCO**

### 1.1 INTRODUCTION

In this article as the name proposes the Researcher has managed an actual view about

Inheritance rights of Transgender through various Indian as well as International frameworks and argues the need of an urgent regime for the gender laws and the Inheritance rights of third gender. The study is completed with the assistance of actual informations taken from different sources.

Transgender people are part of the LGBTQ+ community. They officially declared as Third Gender in 2014.They do not pertain to their biological sex, and differ from the stereotype gender identity.



When we hear the phrase “transgender”, a large portion of our society conjures up prejudices in their heads, and they constitute the marginalized section of the society as a result, they face many problems, including discrimination in the, society, workplace, difficulty in accessing certain healthcare services, and loss of inheritance rights. Though the Transgenderism culture is widely known in India, majority of people has no awareness about the community. In addition, India has no proper data on their socio-economic status.<sup>1</sup>

## 1.2 HISTORICAL BACKGROUND OF THE STUDY

The concept of Transgender and Hijras are existing since ancient history onward. The community consists of eunuchs, Kothis, Aravanis, Jogappas, and Shiva-Shakthis etc and historically they have earned a valuable position in the Hindu Mythology and other religious texts<sup>2</sup>. When, Lord Rama, left for the forest upon being banished from kingdom for 14 years, asked all the men and women followers to return to the city. The Hijras being His followers do not feel bound by this direction and stayed with Him. Being impressed with their devotion, Rama sanctioned them the power to confer blessings on people on auspicious occasions such as arrival of a newborn, wedding or inaugurations and it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings<sup>3</sup>. In Hindu mythology, Bahuchara Mata who is a Hindu Goddess is considered as their patronage.

The Transgenders were political advisor during the Mughal period and administered in empire and in the British era they were given food and land possession. The contemporary era, the Government of India implemented new policy and schemes which benefitted them with social protection and welfare.<sup>4</sup> Under the Bombay Rent-Free Estates Act, 1852, the transgenders land were taken away as it was not inherited from blood relations.<sup>5</sup>

During post-independence era transgender people were made to register themselves so

that they can be relieved from the false charges of crimes. In India, transgender individuals were categorized as a criminal group, while in the United States; transgender people were granted equal property rights following the implementation of the 14th Amendment to Section 1 of US constitution in the year 1868.<sup>6</sup> The tag that transgender carried since the Act of 1871 rendered them to such a status that they were left in a condition where acceptance of their existence was absent in not just their parents but in themselves also. This lack of recognition in family sphere was a major hurdle in any of kind of rights to be created for them including the right to inheritance.<sup>7</sup>

## 1.3 INDIAN SCENARIO

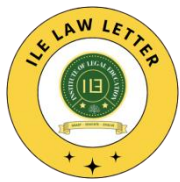
According to the census 2011, Transgender population is very high in the states like Uttar Pradesh (28.18%), Andhra Pradesh (8.97%), Bihar (8.37%), West Bengal (6.22%) and Tamil Nadu (4.58%) and also it recorded that over 487 thousand people of them were came from the state of Uttar Pradesh.

According to the data Portal on June 2022, of 9,064 applications received for a transgender certificate and ID card, 1,995 (22%) are pending and 1,164 (13%) have been declared 'not-eligible'<sup>8</sup>.

## 1.4 GLOBAL SCENARIO

Globally the transgender people still face discrimination significantly as a reason it is very difficult to estimate their exact number. Approximately 2% of people identified as gender fluid worldwide and this includes people who are non-binary. It is expected that their number will still arise if the people's attitudes toward them doesn't change. It is indeed an active area for further research. The globally estimation shows that Germany has the highest rate (3%) which identified as Transgenders, gender fluid, or non binary.

In addition, Sweden is similar to Germany in that it also has approximately 3% percent of people who are transgender, gender fluid, or non



binary. In addition, Sweden is similar to Germany in that it also has approximately 3% percent of people who are transgender, gender fluid, or non binary. Except these two countries, there are also other nations where approximately 2% people are belongs to the transgender, gender-fluid, or non –binary, Such as India, Argentina, Russia, Canada, Spain. The data shows that USA is down from this list with only 1% of people falls under this community.<sup>9</sup>

### 1.5 NEED OF THE STUDY

In India the Inheritance of property is handled by their respective personal laws, which has weak gender history as these regulations does not categorise transgender as either male or female in order to avail their inheritance rights. This leaves a question which confuses their rights in succession of family property. Additionally, the general rule is that the verification of the identity, relationship with the deceased person is and both parties home is mandatory. As the gender remains a barrier for the transgender community to obtain their Identity card and the lack of documentations has a bad impact on their Inheritance rights by denying the protection that citizen's have.<sup>10</sup>

As there are no proper provisions of inheritance rights for the transgender community, there is an urgent need to reform the current legal system and also the stigma, discrimination and human rights violation towards them must be eradicated by the Government.

### 1.6 REVIEW OF LITERATURE

According to WHO, Transgender is an umbrella term that describes a diverse group of people whose internal sense of gender is different than that which they were assigned at birth... The term is increasing in familiarity globally, although other culturally specific terms may be used to describe people who have non-binary gender identities<sup>11</sup>

A study conducted by Tushar Anand, (2015), "Inheritance rights of transgender persons in India", argued that, the watershed moment for

transgender rights in 2014. By the Supreme Court's judgement passed in NALSA V.Union of India, has recognised transgenders officially as third gender and directed the government to implement welfare policies for that community. As a result the State Government has passed secure policies to protect their rights and the Transgender Persons (Protection Rights) Act was passed in 2019. It is the naked truth that yet, none of these developments focused on their property inheritance related right<sup>12</sup>

A study conducted by Rupal Sharma in (2018) "Inheritance Rights of Transgender A Cry of Humanity" contended that, the Hindu Succession Act, 1956, does not talk about the transgender or any other person with the different sexual orientation. Mostly such person is out casted from their family and has no say in their family property or in the property of their parents. To enjoy right to inherit property they had to compromise their gender identity as transgender. The gender identity of such person for inheritance is recognized according to the gender assigned to them in their birth certificate. This criterion of inheriting property from the parents and family is violative of Article 15 of the Indian Constitution which prohibits the discrimination on the ground of sex.<sup>13</sup>

A study conducted by Hurbada in (2022) Om, Transgender Community Property Rights in India 2021), opined that, basically. The transgender's faces many issues including property, marriage, electoral, adoption etc. The Transgender Persons (Protection of Rights) Bill was introduced in Lok Sabha in 2016, addresses the community's right to reside but does not address their inheritance rights. In the Joint Hindu Family, they are not given the status of coparcener.<sup>14</sup>

A study conducted by Karan Gulati in (2021) "Inheritance Rights of Transgender Persons in India" argued that, the successors are often difficult to identify as individuals may lack documentation, could not marry, or cannot prove adoption. Though, Courts have addressed on this matter, it left it as unsecured. These are

important issues that must be addressed through changes in the law.<sup>15</sup>

### 1.6 OBJECTIVES OF THE STUDY

- To study the legal development regarding transgender inheritance rights.
- To find out the challenges in the current regime based on gender laws and difficulties in identifying successors.
- To analyse the laws of transgender under personal laws.
- To study the International Yogyakarta principle on the rights of the transgenders and critics on their justifiability
- To compare the impact Indian frame works and critiques on International rules.
- To discuss the need of amendment of Inheritance rights of transgenders in India.

### 1.7 HYPOTHESIS

- H<sub>0</sub>: The Hindu Succession Act, 1956 has significant provisions for transgender Inheritance right
- H<sub>a</sub>: Provisions under HSA has no impact on transgender identity right of Inheritance.

### 1.8 RESEARCH METHODOLOGY

The researcher follows Doctrinal method of research which requires gathering relevant data from the specified documents and compiling databases in order to analyze the material and arrive at a more complete understanding and analysis of the rights, vested in the 'trans', relating to inheritance, thus, imputes the secondary sources as a method of tool collection. An analysis of reports, documents and case-laws, in reference to the Personal Law's, and available resources within other Online Library scientific databases, along with various bookcum-compendiums, were referred to.

### 1.9 SCOPE OF THE STUDY

The research paper, in its very essence, is of a socially sensitive pertinence. But, the topic being a vast field of applicability and socio-economic, religious and cultural significance cannot be confined, thus, the research has met some unavoidable limitations.

## CHAPTER II

### LEGAL ANALYSIS OF TRANSGENDER INHERITANCE RIGHTS

Transgender person's inheritance right ought to be construed as an integral part of Article 21, as it guarantee that such persons are not condemned to live as animal<sup>16</sup>. And the Constitution would reaffirm their dignity. The right to property is not a Statutory right rather it is personal right<sup>17</sup>. The progressive reading of HAS, states that males cannot be construed as female, as widely in the light of Arunkumar and NALSA. and, if it is not maintained, it would be the violation of Article 21<sup>18</sup>

The controversy surrounding transgender inheritance emerged in 2005 when Ajay Mafatlal, formerly known as Aparna Mafatlal, underwent sex reassignment surgery to transition from female to male. This case became a significant milestone, as it established the legal recognition of transgender individuals and their rights to inherit property under inheritance laws. As a result, in 2011, the National Census allowed the option to select "others" as a gender category.

As the transgender's have no access to housing, property and have low income, which continue them to amrginisation<sup>19</sup>. And needs to be alleviating for their social standing. As said earlier, though the law grants the protection against discrimination of residence, it is still silent about inheritance rights<sup>20</sup>

### 2.1. CHALLENGES IN THE GENDER IDENTITY

In India property is acquired through inheritance, which is evidenced through the study by Lahoti, Suchitra, Swaminathan, and others (2016) note that almost 85% of land in rural areas is acquired through inheritance<sup>21</sup>. The

study also focuses on the challenges faced by this community regarding inheritance primarily as two reasons.

i) The law of Inheritance laws define rights based on a binary notion of gender.

(ii) Difficulty in identifying successors.

The modification in the situation is always depending upon the challenge faced in the inheritance. The transgenders are only meant as an example in the Indian Inheritance scheme.<sup>22</sup>

Hindu Succession Act, 1956 which governs Hindus for the purpose of inheritance of both Joint and separate property only recognizes male and female as a subject matter to the property rights.<sup>24</sup>

The expression 'Sex' is not only meant to biological sex as male or female but also includes a person who does not recognize himself as male or female.<sup>25</sup> In the Hindu Succession Act, 1956, the grounds for disqualification of a person is restricted to the Section 24 to Section 26 wherein being a transgender is no ground for disqualification.<sup>26</sup>

Also these sections have used the term 'person' which is a wider and is defined in the General Clause Act, 1897 as any company or association or body of individuals, whether incorporated or not. And it is not the case that the term person is referred to just male or female but is the term which can include transgender as they are citizen of India. Therefore, disqualifying the transgender on the ground of their gender identity is not justified under the Section 28 of the Act<sup>27</sup>.

## 2.2 MUSLIM LAW

Sharait Law is for the purpose of succession. In India Muslims are majorly divided into two sects- Shia and Sunni<sup>28</sup>. Both these sects have their own principles of inheritance and are gender restricted laws. The Muslim also Inherit their property as Hindu personal law. This can be clearly inferred from the terms used in the

list of sharers and residuary in Shia and Sunni inheritance laws.

## 2.3 CHRISTIAN LAW

Christian inheritance of property is governed by the Indian Succession Act, 1925<sup>28</sup> which has broader application than the personal laws of Hindu and Muslims. It has been reported that, the Christian community has approved the idea of including transgender in Section 44 of Indian Succession Act, 1925 for inheritance rights over ancestral property. Law commission of India was recommended this proposal by the Delhi Minorities Commission after getting majority approval from the Advisory Committee of Christians.<sup>29</sup> This is one of the major progressive moves made in the Indian society, though no such amendment has been made to the existing laws.

## CHAPTER III

### 3.1 INHERITANCE LAWS IN INDIA

The inheritance of property is governed by personal laws of the respective religion and the laws distinguish as per gender in two categories i.e. Male and Female. Transgender person should be put themselves in any one of these categories in order to come within the ambit of the inheritance laws.

### 3.2 AN INSIGHT TO NALSA V. UNION OF INDIA

According to the judgement given by the SC, the absence of law is not meant to the transgenders as third gender are barred from education, employment and discriminate them in availing equal opportunities. Through this judgement they got legal recognition primarily and the 3<sup>rd</sup> gender will be considered as SC/OBC reservations in the field of education and employment. Also it directed to the state authorities to devise the welfare schemes for them and even to run a campaign to erase the stigma. The state was also ordered to make special toilets and special medical departments for their community.

A person cannot discriminate against the surgery he/she does to change their identity. The Apex court also showered concerns on the Trans community and the harassment they face in the society and thus passed the slew direction for their welfare in order to bring back their respect as in the ancient times. It has been also mentioned about the Section 377 of IPC, which is misused by the police and other authorities against the transgender community.<sup>29</sup>

### 3.3 TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, (2016)

The transgender person's bill was introduced in the Lok Sabha (2016) after the judgement of NALSA V.UOI. The bill has bought various rights of transgenders against their discrimination challenged by them.

The section 13 of the bill deals with their rights such as residence (13)(1), Section 13(2) provides them with the right to enjoy the household and use all facilities available in the house, includes maintenance as other members in the family, irrespective of gender.

They are the citizens of India and should be recognised in every law with their Human and Legal Rights as third gender.<sup>30</sup>

## CHAPTER IV

### 4.1 INTERNATIONAL LAWS ON TRANSGENDER RIGHTS

Transgender community is discriminated all over the world. Many Countries like Malaysia, Kuwait, Nigeria are excesses the existence of third gender community countries like India marks them as criminal tribes. The UN and other International variations have taken various measures to provide the legal recognition and access to the transgenders.

Yogyakarta principles laid down the International Human Right Law in relation to sexual orientation and gender and they gave transgender right to education, employment, right to property, right to exercise their choice of

gender identity, etc. Yogyakarta Principle (3) states the Right to Recognition before Law. 3(A) ensures the inheritance rights of transgender by enabling state to provide property rights including right to acquire through inheritance to transgender without discriminating on the ground of sexual orientation and gender identity.<sup>31</sup>

International Covenant on Civil and Political Rights in its Article 17 states that no one shall interfere with the transgender right to privacy, family, etc. and must protected by law against such interference.<sup>32</sup>

In the case of Christine Goodwin v The United Kingdom<sup>33</sup> the Europe courts judgement of Human Rights made the United Kingdom to pass General Recommendation Act, 2004. This act not only recognize acquired gender of a person as legal but also provides the provisions to highlight the consequences of the new gender status and their legal rights in various aspects such as marriage, succession, etc.<sup>34</sup>

After the recognition of transgender in the above-mentioned initiatives the Pakistan Supreme Court gave a landmark judgment in the case of Dr. Mohammad Aslam Khaki & Anr. V. Senior Superintendent of Police Rawalpindi & Ors.<sup>35</sup>

The judgment stated that transgender or Eunuchs are citizen of the Pakistan and are subject to the Constitution of Islamic Republic of Pakistan, 1973.<sup>36</sup> the court held that, like other citizen the transgender also will be given right to life and property under the Pakistani Constitution. It was then referred in the judgment of National Legal Service Authority v. Union of India & Others<sup>37</sup> by the Justice K.S. Radhakrishnan, to determine the rights of transgender.

### 4.2 INDIA'S INTERNATIONAL OBLIGATIONS

Many International treaties prescribe that transgender's persons should not be discriminated. The Universal Declaration of Human Rights (UDHR) and the International



Covenant on Civil and Political Rights (ICCPR) recognise that no person shall be arbitrarily denied their legal rights.<sup>38</sup>

Indian law regarding international obligations is well-settled and the Courts apply the rules of international law unless they are overridden by domestic law. As India has ratified all the above-mentioned documents, therefore, if Indian law is not in conflict with the principles therein, they can be used by domestic courts there is already precedent for applying the UDHR and ICCPR principles.<sup>39</sup>

In *Vishaka v State of Rajasthan*, where the court relied on the Convention on the Elimination of All Forms of Discrimination against Women,<sup>40</sup> the above mentioned principles must appear to be functional on the fundamental rights guaranteed under the Constitution and the Supreme Court's decision in *NALSA v Union of India*.

This is also because there is a lack of a comprehensive domestic law regarding the rights of transgender persons. International principles on inheritance cannot challenge a domestic law that does not exist. Therefore, such principles should be recognised and enforced in India unless the legislature decides to adopt a separate path.<sup>41</sup>

## CHAPTER V

### 5.1 NEED OF REFORM THE EXSITING LAW

In *Ram Krishna Dalmia v Justice SR Tendolkar*, held that even a single person may constitute a class by themselves and the constitution guarantee to protect them <sup>42</sup> stating the fact that the inheritance rights of transgenders are important and it must be well protected as they faces many challenges. As the inheritance laws are based on the binary notion of gender and are odd with the trans community,

ever, successors are often difficult to identify and the transgenders are put inside the bracket of law of inheritance. Those who chose not to do so would fall outside it, allowing the system (such as judges when a dispute arises) to

exclude persons from protection.<sup>43</sup> .The existing law does not function on their welfare and thus it may lead to an legal instrument only when it is amended as per their need. Gender-neutral laws that guarantee the same rights to everyone would limit the scope of excluding anyone from protection.<sup>44</sup>.

Additionally, they must also have all the identity documents such as passport, birth certificate and the electoral records as established for other genders in the world, which reminds the Government by the Yogyakarta principles and must able to avail the heath care facilities without any discrimination or stigma.<sup>45</sup> ie. All the civil rights must be available to all regardless of a changes in gender identity, including the Inheritance right too.

Therefore it can be suggested that the amendment of Transgender Persons (Protection of Rights) Act. is an urgent necessary in today's modern era.

Although, the implementation of these recommendations may not be easy, this paper attempts to identify inheritance related central laws that include gendered terms and this search is not exhaustive.

Like other countries the law must add the definition clause for transgender community<sup>46</sup> in order to provide the necessary interventions to them and their cry should be heard in a holistic way.

### 5.2 OUTCOME OF THE STUDY AND SUGGESTION

As the study analysed through various other Articles, Acts, and Provisions and compared with other countries Laws, policies through "Lense "transgenders inheritance rights and dignity. It has been seen that In India, though the laws and policies are made for them, none of them are benefited and explore their dignity. There so no checks and balance does against their "Cry "n the society. Therefore, the Null hypothesis ( $H_0$ ) is rejected as there no significant provisions under HSA , and the alternative hypothesis ( $H_a$ )

is accepted as there is no impact of the HAS provisions on the Transgender inheritance rights.

### 5.3 CONCLUSION

This paper cannot be a comprehensive work of all challenges faced by transgender persons.. To safe guard the transgender communities there are many policy and schemes implemented by the government. The transgender community could develop only through the socio-economic status; therefore, our Government should take interest in eradication of stigma, discrimination and human rights violation for their recognition. Practically by bringing all these requirements together will upgrade the status and dignity of transgenders.

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