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Inheritance Rights through the Lens of the Transgender Community

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Transgenders represent a major section of our society. It has been 8 years since the 2014 NALSA judgement and it is now high time that we properly address their rights. The government needs to make proper laws for the benefit of Transgenders so that they are not devoid of their basic rights. This article analyses in this sense how the Inheritance Rights of the Transgender Community have been affected since the 2014 judgment of NALSA v Union of India when it was recognised in the Indian Society.

Keywords: *transgender, inheritance rights, NALSA, Indian society.*

INTRODUCTION

The term 'transgender,' also known as Hijras, Eunuchs, Kothis, Aravanis, Jogappas, and Shiv-Shaktis, have a gender identity or expression that differs from the sex assigned to them at birth. When we hear the phrase “transgender”, a large portion of our society conjures up prejudices in their heads, and as a result, they face a majority of problems, including

discrimination in the workplace, difficulty in accessing certain healthcare services, and loss of inheritance rights.

When dealing with the inheritance rights of transgender people, it's important to remember that this is a unique situation that must be handled with caution because it can lead to a variety of problems. Even though there are several instances and mentions of the transgender community from time immemorial, one thing that has stayed consistent throughout these times and continues to be so is that society does not treat transgender individuals with the respect that they need.

When it comes to the Transgender community's right to property, it's critical because they cannot rent a home or live a decent life due to discrimination or a lack of resources. Some people are unable to find suitable employment or a reliable source of income to sustain themselves, so having a shelter or a roof over their heads becomes critical.

PROBLEMS FACED BY TRANSGENDERS

The genders in Indian law are binary. Transgender people may lack documents, be unable to marry, or be unable to verify adoption, making successors difficult to locate.

- They are avoided by family and society alike;
- They have limited access to schools, health services, and public areas;
- They were previously excluded from effectively engaging in social and cultural life;
- It's difficult for transgender people to exercise their fundamental civil rights.

INHERITANCE RIGHTS OF TRANSGENDERS

Transgenders face two major issues when it comes to inheriting property.

The court recognized the difficulties transgender people confront in claiming their inheritance rights. It attributed this to (i) rights based on a binary notion of gender, and (ii) difficulty in identifying successors.

Case of Ajay Mafatlal -

In 2005, Ajay Mafatlal, India's first sex reassignment surgery patient, was accused of doing so for inheritance. His brother (Atulya Mafatlal) made the claim based on the disparity in inheritance rights between brothers and sisters at the time.

Individuals' largest asset holding in India is immovable property. Property ownership is widely believed to improve a person's social standing. This is especially essential because transgender people have limited income, savings, and housing options. If they are unable to obtain property, they will continue to be marginalized. While there has been considerable attention paid to discrimination experienced by transgender people seeking rental accommodation, the vast majority of property in India is inherited. Although the Transgender Persons (Protection of Rights) Act of 2019 protects transgender people from discrimination in housing, it is silent on inheritance rights. The concept of gender is binary in inheritance laws. As a result, they are at war with the society they rule since they do not envision transgender people or a change in gender identity. This means that people must choose between conforming to their gender identity and exercising their rights. Furthermore, transgender people may lack documentation, be unable to marry, or be unable to verify adoption, making successors difficult to find. Only 8% of transgender people, for example, have an Aadhar Card or a voter's ID that recognizes their gender identity. While these are obstacles in and of themselves, they also have an impact on transgender people's inheritance rights by denying them the protections that citizens have. Discrimination based on sex and gender is prohibited by the Indian Constitution. Legislation should not discriminate against transgender people solely based on their gender identity. Though courts seek to address some of these problems, they leave it up to them to decide when transgender people's rights should be protected. Transgender people must also conform to binary genders to receive legal protection. This is because litigants must demonstrate that they, as an individual or a group, are part of an existing protected identity. These issues stem from gender-based rights that do not provide equal protection. In a similar vein, realizing inheritance rights necessitates ensuring freedoms (such as marriage and adoption) that are normally open to citizens.

TRANSGENDER PROTECTION RIGHTS BILL OF 2016 AND 2019

In the case of *NALSA v Union of India*, the Supreme Court of India provided legal recognition to transgender and other gender-nonconforming people. It stated, in particular, that everyone has the constitutional freedom to self-identify as a woman or a man. It also ordered the Union and state governments to provide reservations for transgender people in public education and employment. The Rajya Sabha passed the Rights of Transgender Persons Bill, 2014 (hereafter referred to as the ("2014 Bill")) in response to the verdict. The 2014 Bill, on the other hand, never made it to the Lok Sabha and so died.

The Transgender Persons (Protection of Rights) Bill, 2016 (hence referred to as the '2016 Bill') was introduced in the Lok Sabha two years later. The 2016 Bill deviated significantly from *NALSA*, in comparison to the 2014 Bill. So much so that in its 43rd Report, issued to the Lok Sabha on September 21, 2017, the Parliamentary Standing Committee on Social Justice pointed out multiple instances where the 2016 Bill contradicted *NALSA*. However, the Bill was eventually enacted by the Lok Sabha without the Standing Committee's recommendations. The 2016 Bill was renamed the Transgender Persons (Protection of Rights) Act, 2019, and took effect on December 5, 2019. Various transgender people challenged the 2019 Act before the Supreme Court, claiming that it contains unconstitutional restrictions. Two Writ Petitions have been filed in particular. Swati Bidhan Baruah, a transgender advocate from Assam, filed the first complaint on December 11, 2019. On June 12, 2020, a second petition was submitted by many prominent transgender activists, including Grace Banu and Vyjayanti Vasanti Mogli. Sections 4, 5, 6, 7, 12(3), 18(a), and 18(d)¹ of the Act are challenged by the Petitioners as unconstitutional. They further want the Court to grant a Writ of Mandamus directing the Centre and State governments to make reservations for transgender people in public employment and education, as the Court ordered in *NALSA*.

The Transgender Persons (Protection of Rights) Bill was tabled in Parliament in 2016 following the *NALSA* verdict. It lapsed with the dissolution of Parliament at the time but was

¹ Rights of Transgender Persons Bill, 2014, s 4, s 5, s 6, s 7, s 12(3), s 18(a), and s 18(d)

reintroduced and passed in 2019. Because of the proximity to the Supreme Court's ruling, includes the following multi-identity definition:

(k) A transgender person means a person whose gender does not match the gender assigned to them at birth and includes trans-man or trans-woman (whether or not they have undergone Sex Reassignment Surgery, hormone therapy, laser therapy, or other therapy), a person with intersex variations, genderqueer, and people with sociocultural identities like Kinner, hijra, Aravani, and Jogta. The Act forbids discrimination against transgender people in a variety of areas, including: (a) education; (b) employment; and... (g) the right to dwell, purchase, rent, or otherwise occupy any property. However, the Act is ambiguous on whether the defining clause has any impact on other legislation, and it lacks anti-discrimination measures for other aspects of property rights (including inheritance). How should transmen and women be regarded under laws that only refer to men and women, for example? Similarly, how are people who do not identify with either gender treated? Furthermore, while individuals cannot discriminate against transgender people in terms of rent or other financial matters, there is no clear guidance on whether or not they can inherit or leave the property. The Act's Rules are equally quiet on these issues, recommending simply affordable housing assistance programs.

The Act gives sons and daughters the right to inherit. It excludes transgender people and people who change their gender identity. Furthermore, there are separate sections for male and female inheritance regulations. The priority of succession through classes of heirs is dictated by Section 8, which determines the devolution of male intestates' property. 83 The male intestate's mother and lineal descendants are considered Class I heirs. The father, siblings, lineal descendants of siblings, and siblings of the male intestate's parents are all considered Class II heirs. 15 (1), on the other hand, specifies the laws of inheritance for female intestates' property. The heirs are not divided into classes. Rather, it specifies the individuals who are qualified to inherit the property. The deceased's children receive the property first, followed by her husband's heirs. Its goal is to preserve transgender people's rights while also encouraging welfare measures. Even though the majority of these advancements did not focus on property rights, it is important to give them credibility and to understand transgender

rights, including any references to inheritance and associated rights. The Act forbids discrimination against transgender people in a variety of areas, including: (a) education; (b) employment; and... (g) the right to reside, purchase, rent, or otherwise occupy any property. However, the Act is ambiguous on whether the defining clause has any impact on other legislation, and it lacks anti-discrimination measures for other aspects of property rights (including inheritance). It is unclear if the property can be inherited or bequeathed. The Act's Rules are equally quiet on these issues, recommending simply affordable housing assistance programs. The Transgender Persons (Protection of Rights) Act is not the only law in India that protects transgender people's rights. Subjects are allocated between the Central and State legislatures under the Constitution. This means that transfer can be regulated by both the federal and state governments.

Furthermore, state governments have sole authority over the transfer of agricultural land. Following the judgment in *NALSA v Union of India*, numerous states used these powers and made steps to protect transgender people's rights. Uttar Pradesh, in particular, enacted legislation that ensures agricultural property inheritance rights. Assam, Madhya Pradesh, Karnataka, Kerala, Odisha, and Tamil Nadu, on the other hand, have developed transgender laws to protect a wide range of civil rights. Though the latter is not legally enforceable, they do reflect the governments' viewpoints. Except for Uttar Pradesh and Madhya Pradesh, none of the amendments touches the ability to transfer or receive property, including inheritance. Because agricultural land is a state issue, the government changed the Land Revenue Code in 2020 to include transgender people in inheritance provisions. It made changes to the definition of a person, the allocation of Abadi sites, and the line of succession, among other things. Apart from the ability to rent, Madhya Pradesh acknowledges that individuals are unable to exercise property rights, such as inheritance. In rural areas, about 85% of the land is passed down through the generations. Difficulties that transgender people experience when it comes to inheriting property emerge principally because inheritance rules establish rights based on a binary notion of gender, and identifying successors is difficult when it comes to the transgender community.

Hindu Succession Act (Hindu Succession Act): Hindus, Sikhs, Buddhists, and Jains all have rights under the Hindu Succession Act. It lays out all of the rules for succession in great detail. However, transgender people are not included in the Act's framework. This is demonstrated by the defining clause, which stipulates that the heir must be male or female.

Application of Muslim Personal Law (Shariat) Act: In India, Muslim property law is essentially uncodified. Customary laws are used to define inheritance rights. These are based on Qur'anic verses and traditional Islamic jurisprudence. Both colonial and postcolonial measures, however, have altered and modified them. The Indian Succession Act is a law that governs the succession of Indians. All those not covered by the foregoing laws are governed by the Indian Succession Act. It is widely assumed that it governs Parsi and Christian inheritance.

LANDMARK JUDGEMENTS AND THEIR AFTER-EFFECTS

Following that, in 2014, the Supreme Court recognised a transgender person's freedom to self-identification as male, female, or third gender in the path-breaking judgment of *National Legal Service Authority v Union of India & Others*.² Furthermore, the term 'transgender' was expanded to include 'pre-operative, post-operative, and non-operative transexuals,' who are of the opposite sex. The Court went on to say that non-recognition of gender is a breach of the Indian Constitution's fundamental rights, including Article 14 (equality), Article 15 (non-discrimination), Article 19(1)(a) (expression), and Article 21³. (autonomy). Importantly, the Supreme Court does not consider undergoing sex reassignment surgery (SRS) to be a requirement for obtaining essential legal rights such as inheritance.

Though the momentous decision was lauded, it failed to state or construe a reason for it to be used as a precedent to grant transgender individuals equal property rights. For example, Section 16⁴ of the Hindu Succession Act specifies that daughters and sons may inherit their parents' self-acquired property through succession, but there is no exception for eunuchs who

² *National Legal Service Authority v Union of India & Ors* AIR 2014 SC 1863

³ Constitution of India, 1950, art. 14, art. 15, art. 19(1) (a), and art. 21

⁴ Hindu Succession Act, 2005, s 16

do not identify as male or female. Only in 2017 did the Rajasthan High Court correctly state in a case that the Supreme Court's ruling was 'path-finding' rather than 'path-breaking.' While the courts have issued judgments in compliance with the NALSA decision, what happens in the real world by police enforcement and some employers to the transgender community has been and continues to be extremely painful. It's also important to recognize that the only way transgender persons can consider expanding their family is through unusual methods like adoption and surrogacy. However, in India, marriage is defined as a relationship between "a man and a woman" and is a requirement for adoption and surrogacy. This is a structural barrier that prevents transgender people, as well as the LGBTQIA+ community as a whole, from exercising their constitutionally guaranteed right to family, which includes the ability to leave property to their children under Article 21 of the Constitution.

S Swapna vs Tamil Nadu State⁵: This case also discusses the discrimination they suffer after receiving a gender change certificate. In this instance, the petitioner was a transsexual woman who had previously been a guy. She applied for SSLC and HSC certificates, but the director of the school exams declined her application since she had enrolled with a different name and gender. The case was then taken to the Madras High Court for further consideration. The court stated that the application would be reconsidered and that she would receive the certificate within four weeks of the verdict. This instance demonstrates the need for transgender people to register their identities in many institutions.

Ganga Kumari vs State of Rajasthan⁶: Ganga Kumari was chosen for the position of women constable, which was open at the time. She passed all of the qualifying, medical, and physical tests that were required for selection. Then she was requested to submit to a random medical examination, which would determine the ultimate selection. It was discovered during the examination that she is a transgender person who belongs to the third-gender community. Based on the medical test, she was rejected by the electors and is no longer qualified for the position. She claimed in court that she was denied because of gender discrimination, which is

⁵ *S. Swapna v State of Tamil Nadu* (2014) Writ Petition No. 10882/2014

⁶ *Ganga Kumari v State of Rajasthan* (2017) Civil Writ Petition No. 14006/2016

unethical. Article 14⁷ of the Indian constitution, as well as Articles 16 and 21⁸, were all violated in this case. The court ruled that she could not be rejected based on her gender identity during the recruitment process and that no one has the authority to take away someone's fundamental rights. According to the court, everyone has the right to express and obtain the gender of their choosing under the 1941 law. It even mentioned the case NALSA vs Union of India, which argued for transgender rights and protection in the Indian constitution. Furthermore, the court found that Article 21⁹ will contain that until a job specifically requests gender information, it should be limited to the title 'Gender.' Ganga Kumari has a right to 'Self Identity' for gender, according to the court, and should be rehired for the position. In addition to the verdict in the NALSA case, the court declared that people should comprehend the distinction between 'Sex' and 'Gender identity,' and provided an exact description of transgender in the case.

STEPS TAKEN BY THE GOVERNMENT - ¹⁰

Despite significant progress, many notable scholars believe that this evolutionary process is a long-term process that has begun but is still ongoing. The 2014 Madras High Court decision followed in the footsteps of the NALSA decision, declaring that forcing a transexual or transgender person to identify as either a 'man' or a 'woman' would be a violation of their fundamental rights. For the first time in India, in 2016, transgender people from the Christian community were awarded the same rights to agricultural property as cisgenders. In the 2019 case of Arunkumar v The Inspector General, a clear distinction was made between 'sex' and 'gender,' with 'sex' referring to a biological feature that is decided at the moment of birth and 'gender,' referring to a state of mind that an individual acknowledged. The state government of Uttar Pradesh revised the Uttar Pradesh Revenue Code, 2006 in August 2020, allowing transgender persons to inherit and own ancestral agricultural land. The pre-existing code's nomenclatures have now been updated to include transgender people rather than being

⁷ Constitution of India, 1950, art. 14

⁸ Constitution of India, 1950, art. 16 and 21

⁹ Constitution of India, 1950, art. 21

¹⁰ Karan Gulati & Tushar Anand, 'Inheritance rights of transgender persons in India' (2021) 350 National Institute of Public Finance and Policy New Delhi

<https://nipfp.org.in/media/medialibrary/2021/08/WP_350_2021.pdf> accessed 18 March 2022

gender binary. Furthermore, the Union government has devoted a national internet platform to the Indian transgender community, which will be used for a "simplified identification and certification process", as well as particular residences to uplift and preserve the community. Living in the twenty-first century, India has undoubtedly made progress, and as the saying goes, "slow development is better than no progress."

CONCLUSION

The topic of transgender rights is large and multifaceted. Each individual in this Universe is one of a kind and essential to the natural world. As a result, it would be incorrect to condemn and discriminate against persons who do not fit the stereotype, which is, after all, a man-made construct. It is past time for India to recognize that every citizen has equal rights and benefits, and to adopt a "live and let live" approach. Despite the progress made by legislative authorities in recent years, there is still a gap in the law that needs to be filled as soon as possible. Recognizing the difficulties at hand, some suggested remedies can be suggested to help jump-start the process. The establishment of social assistance schemes and measures would aid in changing the public's and legislature's negative attitudes. Second, to put the Uniform Civil Code into effect, as required by Article 44¹¹ of the Constitution, to eliminate the dichotomy that exists in personal law. This would allow for the elimination of the discriminatory aspects of current inheritance rules in favor of a more egalitarian framework. Instead of seeking and reading regulations like Section 5¹² of the Hindu Marriage Act literally, another approach could be to address issues of self-identification, personal autonomy, and freedom of self-expression, culminating in the acceptance of transgender people's right to marry. Finally, international convention standards for the protection of transgender people's rights can be adopted, and, as the aforementioned underdeveloped countries have recently done, we must reform our legislative perspectives to recognize their gender identity as it is while also providing them with inheritance rights. The theme of the twenty-first century is *vox populi*, but that voice is useless unless it results in real and intentional change that benefits people. The legal system has examined all the procedures and has provided a full-grown

¹¹ Constitution of India, 1950, art. 44

¹² Hindu Marriage Act, 1955, s 5

option to alter one's gender through a recorded process, making inheritance for transgender persons who have had the mentally and physically draining SRS a little easier than for those who have not. Passing legislation, amending statutes, and granting legal status to transgender people may be beneficial, but pragmatically, society must understand that a person's sex, gender, or sexual orientation is not a criterion that should deprive them of essential rights such as inheritance. The process of societal advancement is huge, and it would undoubtedly benefit from governmental backing. However, these topics have widespread support, and evolving cultural depictions of these challenges are leading to a more accommodating attitude in modern society. To be representative, we must accept the coming changes and respect the rights of each individual. The Act gives sons and daughters the right to inherit. It excludes transgender people and people who change their gender identity. Therefore, there is still so much that we need to recognize about the rights of Transgenders, the parliament needs to make appropriate laws, and the people in the society need to accept them wholeheartedly. Only when we do this will the scenario change in society and will lead to proper growth and development.