

Inheritance Rights of Transgender

A Cry of Humanity

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ABSTRACT: Transgender community in India has a great history where they enjoyed dignity and privileges during one period and abolishment of the same in other. According to Hindu mythology and text there are three identified genders- Male, Female, and Trans but the laws provide protection to just male and female. Transgender people have their own struggle and fight for their rights as a human and a normal being. One such right is the right to inherit property from their parents or family. This paper will discuss the lacuna in the prevailing legislature which does not recognize transgender rights in the field of inheritance laws according to their gender identity as Trans. The paper further investigates the initiative taken by various international organization and countries for the upliftment of the transgender. The paper will also talk about the latest Supreme Court judgment for recognition of LGBTQ and the transgender bill introduced in the year 2016.

I. HISTORY OF TRANSGENDER IN INDIA

Transgender is a person who is neither wholly male nor wholly female. Such person can be a combination of female and male, or neither male or female. Their sense of gender does not match with the gender identity assigned to them on birth. They are considered to be socially, economically and politically backward classes throughout the world. They used to be known as 'Eunuchs' and have existed since 9th century BC. During Mughal period Eunuchs who were regarded as castrated men were in popular demand to take care and guard the royal women quarters. The Transgender were treated with great dignity in the courts of Mughal Emperors as they used to hold high positions in the court. They were given right to hold and acquire property but unlike the person from other gender they were not given right to inherit from their blood relations. They were permitted to collect revenues from the land and were justified in carrying out business of begging, etc.

With the arrival of Britishers in India, the transgender right to life with dignity and property and the right to be recognized and earn livelihood was abolished. In the early period of Britishers rule in India transgender were given benefits in the provision of lands by rulers of various states which was latter on taken away by the Britishers. In the presidency of Bombay, the land was taken away from the transgender on the ground that such lands were not inherited from blood relations under the Bombay Rent-Free Estates Act, 1852.¹ In the second half of the nineteenth century all civil rights of the transgender were denied. They were bought under the ambit of Criminal Tribes Act, 1871, thereby declaring them as criminals. During post-independence era transgender people were made to register themselves so that they can be relieved from the false charges of crimes. On one

¹ Bombay Rent-Free Estates Act 1852, (Act 11 of 1852)

hand, in India transgender were recognized as criminal community whereas on the other hand, in US transgender were given equal rights in property after the 14th Amendment to Section 1 of US constitution in the year 1868.²

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. Even in the contemporary time this mentality of Indian society of not considering the transgender as their family member has not changed. Also, the laws governing the family matters do not recognize them with their gender identity as transgender. They were not treated with dignity which is a part of fundamental right to life under Article 21 of Indian Constitution.³

II. INHERITANCE LAWS IN INDIA

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

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.⁴ The terms used in the act such as male, female, daughter, son, etc. are restricted to binary gender identity. The act 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. Generally transgender people recognize themselves as female and therefore can inherit property as a daughter or otherwise as a son. 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.⁵ The term 'Sex' is not just limited to biological sex as male or female but also includes a person who does not recognize himself as male or female.⁶ In the given Act the grounds for disqualification of a person is restricted to the Section 24 to Section 26 wherein

² Constitution of United States of America, s 1

³ *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861.

Francis Corali v. Union Territory of Delhi, A.I.R. 1981 S.C. 1675. The Court held that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life.

⁴ Hindu Succession Act 1956

⁵ Constitution of India, Article 15

⁶Manjeet Kumar Sahu, 'CASE COMMENT ON NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA & OTHERS (AIR 2014 SC 1863): A RAY OF HOPE FOR THE LGBT COMMUNITY ' (2016) Volume III Issue 2 BRICS Law Journal <<https://www.bricslawjournal.com/jour/article/download/48/49>>accessed 24 April 2018

being a transgender is no ground for disqualification.⁷ 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.⁸ According to the said definition 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.⁹ Therefore, disqualifying the transgender on the ground of their gender identity is not justified under the Section 28 of the Act.¹⁰ Although the most common argument that can be made against such a claim is the intention of the legislature to include just male and female as a subject matter of the said Act.

The Muslims are also governed by their personal law i.e. Sharait Law for the purpose of succession. In India Muslims are majorly divided into two sects- Shia and Sunni. Both these sects have their own principles of inheritance and are gender restricted laws. Like Hindu personal law for succession Muslim law also recognizes male and female as the subject matter to inheritance. This can be clearly inferred from the terms used in the list of sharers and residuary in Shia and Sunni inheritance laws.

Christian inheritance of property is governed by the Indian Succession Act, 1925¹¹ which has broader application than the personal laws of Hindu and Muslims. It has been reported that unlike Hindu or Muslim personal laws, 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.¹² This is one of the major progressive moves made in the Indian society, though no such amendment has been made to the existing laws.

Moreover, the decision of Supreme Court in the case of *National Legal Service Authority v. Union of India & Others*,¹³ made India the first nation to legally identify LGBT community's right and given them the status of 'Third Gender' citizen of India. It was argued that transgender rights are not social or medical issue but is a matter of Human Rights. The court in the judgment said that the "Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection."¹⁴ They have right to education, employment and inheritance of property, etc. The court also said that the judgment given in the case of *Suresh Kumar Koushal and another v. Naz Foundation and Others*¹⁵ has already spoken on the constitutionality of

⁷ Hindu Succession Act 1956, s 24-26

⁸ The General Clauses Act, No. 10 of 1897, Section 3(39)

⁹ Constitution of India, Article 5

¹⁰ Hindu Succession Act 1956, s 28

¹¹ Indian Succession Act 1925

¹² Maria Akram, 'Christian transgenders to have equal rights on ancestral property' The Hindu (New Delhi, 12 May 2016)

¹³ *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863

¹⁴ *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863

¹⁵ *Suresh Kumar Koushal and another v. Naz Foundation and Others*, (2014) 1 SCC 1

Section 377 IPC and this judgment has a different issue as to the Human Rights of the transgender community.

III. INTERNATIONAL LAWS ON TRANSGENDER RIGHTS

Transgender face discrimination throughout the world. Several countries like Malaysia, Kuwait, Nigeria, etc outlaw the very existence of transgender and countries like India marks them as criminal tribes. The lack of legal representation deprives transgender of Human Rights. In order to give them legal recognition and access to human rights various measures were taken by the UN and other international organizations. Yogyakarta principles laid down the International Human Right Law in relation to sexual orientation and gender. These principles gave transgender right to education, employment, right to property, right to exercise their choice of gender identity, etc. Principle 3 of the Yogyakarta states the Right to Recognition before Law. Principle 3A of Yogyakarta 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.¹⁶

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 should be given right to protection of law against such interference.¹⁷ The interference in the family includes the right to be taken away by not recognizing transgender as a part of the family and therefore subject to no rights arising out of family arrangements including inheritance rights.

The judgment given by European Courts of Human Rights in the case of *Christine Goodwin v The United Kingdom*¹⁸ 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.¹⁹

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.*²⁰ The judgment stated that transgender or Eunuchs are citizen of the Pakistan and are subject to the Constitution of Islamic Republic of Pakistan, 1973.²¹ The court held that transgender will be given right to life and property under the Pakistani Constitution just like other citizens. This case was then

¹⁶ “Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.” rep <http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf> accessed April 24, 2018

¹⁷ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

¹⁸ *Christine Goodwin v The United Kingdom*, App no 28957/95 (ECHR, 11 July 2002)

¹⁹ General Recommendation Act, 2004

²⁰ *Dr Mohd Aslam Khaki versus Operations SSP Rawalpindi and others.*” Constitution Petition no 43. Supreme Court of Pakistan, 2009.

²¹ Constitution of Islamic Republic of Pakistan 1973

referred by the Justice K.S. Radhakrishnan in the judgment of *National Legal Service Authority v. Union of India & Others*²² to determine the rights of transgender.

IV. TRANSGENDER BILL, 2016

After the judgment in the case of *National Legal Service Authority v. Union of India & Others*²³ the Transgender Persons (Protection of Rights) Bill was introduced in Lok Sabha in the year 2016. The Bill has been divided into various chapters dealing with various rights that are to be granted to transgender against the prevailing discrimination faced by them. Chapter III of the Bill gives recognition to the transgender identity. Chapter V of the Bill provides transgender with rights in various establishments. Section 13 of the Chapter deals with the transgender's right of residence. Section 13(1) clearly states that a transgender person should not be separated from their family and immediate family on the ground of their gender identity.²⁴ Section 13(2) provides them with the right to enjoy the household and use all facilities available in the house.²⁵ This provides them with the right to maintenance as other members of the family irrespective of their gender.

The bill introduced by the Lok Sabha though talks about the transgender right of residence but does not talk about their inheritance rights. They are not given the status of coparcener in the Joint Hindu Family with their gender identity nor as a legal heir of their parents separate property. The bill needs a lot of correction as transgender are citizens of India and should be recognized in every law concerned with their Human and Legal Rights as third gender.

V. CONCLUSION

Transgender community is still subject to various discriminations on the ground of employment, gender identity and various other legal rights of which inheritance of property is discussed in this paper. The laws for inheritance in India are subject to binary gender identity and therefore transgender is not included in it. According to the Section 377 of Indian Penal Code, 1860²⁶ anal intercourse between the transgender is criminalized in India. They cannot marry or adopt child as they are not legally recognized as per their gender identity. The Criminal Tribe Act, 1871²⁷ made it illegal for transgender to act as guardian, make will or gifts or to adopt or to inherit property. The move to be progressive in the matter of transgender rights is very conflicting in India as one of the Supreme Court Judgment recognizes transgender as 'Third Gender'²⁸ and the other

²² *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863

²³ *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863

²⁴ The Transgender Persons (Protection of Rights) Lok Sabha Bill (2016) 210

²⁵ The Transgender Persons (Protection of Rights) Lok Sabha Bill (2016) 210

²⁶ Indian Penal Code 1860

²⁷ Criminal Tribe Act 1871

²⁸ *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863

Supreme Court judgment still uphold the constitutionality of Section 377 of Indian Penal Code, 1860 which criminalizes the LGBTQ community.²⁹ The Bill introduced by Lok Sabha for the protection of rights of transgender need a lot of contemplation in the field of inheritance and succession of property. The recognition of transgender as a third gender in legally is still a far fledged goal. The perception and stereotypes towards transgender are deeply ingrained in our society since ages and cannot be 'un-carved' easily. The move taken by various international organizations and countries to recognize transgender as third gender has set the foundation stone for the empowerment of Human Rights throughout the world. Countries like Pakistan, Germany, Bangladesh, etc. have recognized transgender as a separate class thereby breaking the binary box of gender identity but this is just a drop in the bucket towards change.

²⁹ *Suresh Kumar Koushal and another v. Naz Foundation and Others*, (2014) 1 SCC 1