

The Inheritance Rights of Transgenders in India

Mrs. Gouri S Nalawade¹ & Dr. Rajlakshmi Wagh²

Abstract:

This research paper tries to find out the current situation of inheritance laws in respect of the most unwanted children and members of the family i.e. Transgenders. The concept of gender is binary in inheritance laws. Transgender individuals who alter their gender identification are not contemplated by them. This implies that people must choose between adhering to their gender identity and exercising their rights. Furthermore, successors sometimes are difficult to recognize since they may lack documents, be unable to marry or be unable to verify adoption. Any inequality based on sex and gender is prohibited by the Indian Constitution. Based only on their gender identity legislations ought to not prohibit towards transgender individuals. Though courts strive to tackle these issues, when it comes to securing transgender individual's rights, they leave it to their subjective judgement. These are significant challenges that require legislative reform.

Key words: Transgender, inheritance, succession rights

Introduction

What is 'Sex' and 'Gender'? In the Indian context, "who is a 'male' and who is a 'female'?" Is it a sin to be born as a "Transsexual?" Why does this transsexualism occur? What are the causes? In this regard we may say that there is no consensus even among medical, psychological, psychiatry, genetical and the other scientific communities. It is manifest that there is no consensus among various theories as to how the transsexualism happens in human beings. Similarly, there is no recognised or universally accepted mode drawing a line differentiating transsexuals from the other sexes. People of third sex are called in several names, like Transsexuals, Transgenders, Hijras, Alis, Aravanis, Thirunangais, etc. Several Studies have been conducted and a number of research papers have been submitted by Scholars on the issues relating to the Transsexuals. The term "Sex", as it has been understood all along, is that which operates within the classic binary biological model, in which, the human beings are clearly divided into either male or female.

'Sex' and 'Gender' what is the difference? "Who is a 'male' and who is a 'female' in the context of India?" Is being born as "Transsexual" a sin? What causes this transsexualism? What are the underlying factors? In this aspect, amongst medical, psychological, psychiatric, genetic, and other research institutions, there is no unanimity. It is clear that no consensus

¹ Research Scholar, Bharati Vidyapeeth (Deemed to be University), New Law College, Pune

² Assistant Professor, Bharati Vidyapeeth (Deemed to be University), New Law College, Pune

exists among many hypotheses about how transsexualism occurs in humans. Similarly, there is no universally known or acknowledged method for distinguishing transsexuals from the other genders. Third-sex people are referred to as Transsexuals, Transgenders, Hijras, Alis, Aravanis, Thirunangais, and so on. Researchers have conducted several studies and submitted a lot of research articles on transsexual difficulties. As it has been interpreted throughout, the term "sex," refers to the biological model that operates inside the basic binary biological paradigm, in which humans are distinctly classified as either male or female.

Rights of transgender persons in India:

The 2011 national census included three options for declaring a person's sex: 'Male,' 'Female,' and 'Other.' This was India's first attempt at gathering data on people who identify as non-binary. Despite difficulties of exclusion and accuracy, the census estimated India's transgender population to be 487,803 people.³ The 2011 national census included three options for declaring a person's sex: 'Male,' 'Female,' and 'Other.' This was India's initial endeavour at gathering information on people who identify as non-binary. Despite the obstacles of exclusions and authenticity, the census estimated India's transgender population to be 487,803 people. Despite the fact that India has millions of transgender individuals, there appears to be no reason why they should be turned down fundamental human rights such as the right to life and liberty in self-respect, the right to freedom of opinion and expression, the right to education and empowerment, the right against violence, the right against exploitation, and the right against discriminatory practices.⁴ Because of abuse and harassment, transgender youth are compelled to drop out of school, compromising their employment prospects and social integration. Individuals who identify as transgender are frequently discriminated against by healthcare staff, restricting their access to care. They are more likely to be victims of gender-based violence.

Transsexuals do not fall under the same classification as heterosexuals within Law in India. Transsexuals are individuals who create a true identity with the gender, opposite to the gender indicated at birth, according to research undertaken around the world. According to studies, trans-sexualism is a type of human variability in sexual formation in which a person attempts to change their sexually differentiated body in order to bring it into sexual alignment with their natural gender orientation or brain sex.

The courts have been asked to deal with laws relating to males and females and to make decisions with no legal meaning for these terms, for all these years. However, Indian courts have had difficulty enforcing legislation relating to terminology like male and female, man and woman & son and daughter. All of these statutory and customary rules have exclusively recognised male and female sex and have implemented civil and criminal laws accordingly.

³ Denied Visibility in Official Data, Millions Of Transgender Indians Can't Access Benefits, Services, Shreya Raman, 11th June 2021, IndiaSpend available at <https://www.indiaspend.com/gendercheck/denied-visibility-in-official-data-millions-of-transgender-indians-cant-access-benefits-services-754436>

⁴ National Legal Ser.Auth vs. Union Of India & Ors on 15 April, 2014 available at <https://indiankanoon.org/doc/193543132/>

However, there has been a third sex from the dawn of time and individuals of the third sex have not been recognised or treated respectfully as normal humans.

Status of Transgenders as citizens of India:

Article 14 of the Indian Constitution⁵, assures everyone's equality before the law and equal treatment under the law. Solely on the basis of religion, race, caste, sex, or place of birth, or any combination of these factors, Article 15⁶ bans discrimination against citizens. Article 16(2)⁷ ensures equal opportunity in state jobs and further states that no citizen shall be ineligible for or treated unfairly against in respect of any employment or office under the State solely on the basis of religion, race, caste, sex, descent, place of birth, residence, or any combination of these factors. However, in using the term "Sex" in these sections, the creators of the Constitution, would not have anticipated that a disagreement over an individual's sex would emerge over the course of the Constitution's operation, and hence did not feel it necessary to define the term Sex.⁸

No Status and Existence of Transgenders in laws:

There are a number of civil and criminal statutes that deal with sexuality. The division is between Male and Female in certain enactments; Boy and Girl" in others; and Son and Daughter" in a few others. The Child Marriage Restraint Act of 1929⁹, for example, defines 'a child' as an individual under the age of twenty-one for a male and eighteen for a female. However, neither male nor female have a definition. The Hindu Minority and Guardianship Act, 1956¹⁰, implies that the natural guardian of a Hindu minor is the father, followed by the mother, in the case of a boy or an unmarried girl, and in the case of an illegitimate boy or an illegitimate single girl, the mother, followed by the father, and in the case of a married girl, the husband. The names boy and girl aren't defined here either. In the same manner "Pre-Conception and Pre-Natal Diagnostics Techniques Act, 1994¹¹" also does not discuss the main and distinguishing characteristics which define the difference between male and female child. The Prohibition of Child Marriage Act of 2006¹² likewise describes a child as a person who has not attained the age of twenty-one years for a male and eighteen years for a female. A child is defined as a male or female youngster aged 6 to 14 years under the Right of

⁵ Article 14, Equality before law, The Constitution of India, available at https://legislative.gov.in/sites/default/files/COI_1.pdf

⁶ Article 15, Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, The Constitution of India, available at https://legislative.gov.in/sites/default/files/COI_1.pdf

⁷ Article 16, The Constitution of India, available at https://legislative.gov.in/sites/default/files/COI_1.pdf

⁸ <https://indiankanoon.org/doc/144523857/>

⁹ Sec.2 (a) The Child Marriage Restraint Act, 1929 available at <https://wcd.nic.in/child-marriage-restraint-act-1929-19-1929>

¹⁰ Sec.6. Natural guardians of a Hindu minor, The Hindu Minority and Guardianship Act, 1956 available at https://legislative.gov.in/sites/default/files/A1956-32_0.pdf

¹¹ The Pre-Conception and Pre-Natal Diagnostics Techniques Act, 1994 available at <https://www.indiacode.nic.in/bitstream/123456789/8399/1/pre-conception-pre-natal-diagnostic-techniques-act-1994.pdf>

¹² Sec.2 (a) The Prohibition of Child Marriage Act available at <https://legislative.gov.in/sites/default/files/A2007-06.pdf>

Children to Free and Compulsory Education Act of 2009¹³. This Act likewise makes no distinction between who is a 'man' and who is a 'woman.' The Hindu Succession Act of 1956¹⁴ defines an heir as any person, male or female, who is eligible to inherit an intestate's property under the Act. The terms son and daughter are employed elsewhere in the aforementioned Act. In the case of men, Section 8¹⁵ deals with basic succession rules, whereas Section 14¹⁶ deals with a female Hindu's absolute property. In the case of female Hindus, Section 15¹⁷ deals with general succession regulations. However, the terms male, female, son and daughter are not specified elsewhere in the Act.

The Indian Penal Code 1860 deals with Gender¹⁸, which stipulates that the pronoun "he" and its derivatives may be used to refer to any individual, male or female. According to Section 10¹⁹, the term "man" refers to a male human being of any age, whereas the term "woman" refers to a female human being of any age. The terms male and female, however, are not specified in the Code. These phrases are likewise not defined in the General Clauses Act of 1897²⁰. There are various similar statutes that have liberally utilised these terminology without defining them.

Very ironically, around the world and in India also, legislative protections has been rendered to all the animals also via various acts, such as, the Wild Life Protection Act of 1972, the Prevention of Cruelty to Animals Act of 1960, and so on.

Pinki Pramanik²¹ and Shanthi Soundararajan, a young female hailing from Pudukkottai District²², are just two examples of transsexuals' rights not being adequately protected by the state and society, despite the fact that we have now gone past 66 years since the Universal Declaration of Human Rights, 1948²³, to which India is a signatory, and 64 years since the

¹³ Sec.2(c) The right of Children to Free and Compulsory Education Act, 2009 available at <https://legislative.gov.in/sites/default/files/The%20Right%20of%20Children%20to%20Free%20and%20Compulsory%20Education%20Act,%202009.pdf>

¹⁴ Sec.3(f) The Hindu Succession Act, 1956 available at <https://legislative.gov.in/sites/default/files/A1956-30.pdf>

¹⁵ Sec.8 General rules of succession in the case of males, The Hindu Succession Act, 1956 available at <https://legislative.gov.in/sites/default/files/A1956-30.pdf>

¹⁶ Sec.14 Property of a female Hindu to be her absolute property, The Hindu Succession Act, 1956 available at <https://legislative.gov.in/sites/default/files/A1956-30.pdf>

¹⁷ Sec.15 General rules of succession in the case of female Hindus, The Hindu Succession Act, 1956 available at <https://legislative.gov.in/sites/default/files/A1956-30.pdf>

¹⁸ Sec.8 Indian Penal Code available at <https://legislative.gov.in/sites/default/files/A1860-45.pdf>

¹⁹ Sec.10 "Man" "Woman" Indian Penal Code available at <https://legislative.gov.in/sites/default/files/A1860-45.pdf>

²⁰ Sec.13. Gender and number, The General Clauses Act, 1897 available at <https://legislative.gov.in/sites/default/files/A1897-10.pdf>

²¹ Pinki Pramanik -vs.- State of West Bengal & Anr available at <https://translaw.clpr.org.in/wp-content/uploads/2018/10/Pinki-Pramanik.pdf>

²² Nangai vs. The Superintendent Of Police on 17 April, 2014 available at <https://indiankanoon.org/doc/144523857/>

²³ Universal Declaration of Human Rights available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

Constitution of India, which guarantees a large number of fundamental rights. As a result, the transsexuals are the most misunderstood group for no fault of their own.

NALSA v Union of India

Following multiple complaints of transgender individuals being discriminated against, the National Legal Services Authority of India (NALSA) filed a case with the Supreme Court in 2012 to address these issues. The petitioners alleged that citizens' rights were being taken away from them (such as the right to vote and participate in elections, access healthcare and employment, and own property)²⁴. In April 2014, a two-judge bench comprised of Justice Radhakrishnan and Justice (Dr) Sikri issued their decision. It was decided that gender expression is secured under Article 19(1) (a) of the Constitution since it represents a person's intrinsic character and identity. Furthermore, the court noted that the Constitution's provisions are gender-neutral and cover transgender individuals in their sphere of security. The provisions in law are not restricted to the gender of the person. These decisions were quite visible when the courts started granting various measures for procuring justice for transgenders. All the government authorities, at Central as well as State levels were provided guidelines to comply with the rules regarding the provisions of health care centres which were quite specific. The guidelines also comprised broad guidelines such as creating public awareness programs to ensure their inclusion and dignified participation in society and imprecise guidelines too, regarding affective redressal of the problems endured by the transgenders in day to day life.²⁵

The court, however, did not address transgenders' inheritance and property rights, despite the fact that all other rights were examined.

The Transgender Persons (Protection of Rights) Act, 2019

As a result, it has always been a difficulty for the legal community to reconcile the status of transsexuals and bring them into the binary classification of male or female so that they can enjoy all of the rights that men and females have.

The Transgender Individuals (Protection of Rights) Act, 2019²⁶ was passed in the Seventieth Year of the Republic of India to provide for the protection of transgender persons' rights and welfare, as well as things connected with and incidental thereto. However, the condition of the transgenders in society remains unsatisfactory.

When India was shut down because to the Covid-19 outbreak last year, the government declared that each transgender individual would receive Rs 1,500/- as direct transfer and

²⁴ National Legal Ser.Auth vs Union Of India & Ors on 15 April, 2014 available at <https://indiankanoon.org/doc/193543132/>

²⁵ Danish Sheikh, "A Tale of Two Judgments: The Afterlives of a Defeat and Victory for Queer Rights in India" (2018) 8 Harvard Kennedy School LGBTQ Policy Journal.

²⁶ THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 available at <https://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

ration supplies. Only 5,711 transgenders got the bank transfer and 1,229 transgenders received ration supplies, despite a population of 4.8 million.

“When we asked members of the community to send us their bank account information so that we can somehow forward it to the government, about 80% of them said they didn't have one,” said Tinesh Chopade, advocacy manager at Humsafar Trust, an initiative to promote LGBTQIA+ health, advocacy, capacity building, and research. “It's just that they don't have any documentation.” Many Indians who identify as transgender are denied access to numerous social security benefits due to a lack of identification documents in their preferred names and records of their desired gender identities.

The lack of legal recognition is one of the causes for this. The Supreme Court of India did not order the constitutional recognition of a third gender until 2014²⁷. The petitioners alleged that citizens' rights were being taken away from them (such as the right to access healthcare and employment, and the right to own property). The court recognised the difficulties transgender individuals encounter in claiming their inheritance rights. This was linked to (i) rights based on a binary gender concept, and (ii) difficulty in identifying heirs. Despite the fact that the ruling indicates a growing understanding of gender identities, India still faces a number of obstacles. Aniruddha Dutta (2014)²⁸, for example, underlines the underrepresentation and knowledge of marginalised people in India and South Asia, include but are not limited to the well-known hijra community. This was likely most prominent in 2005, when Ajay Mafatlal²⁹, India's first sex reassignment surgery patient, was accused of doing that for inheritance.

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 possess 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). For example, how should transmen and women be treated under laws that only refer to men and women? Similarly, how are people who do not identify with either gender treated? Furthermore, while people cannot discriminate against transgender individuals in terms of rent or other financial matters, there is no clear guidance on whether or not they can inherit or leave property. The Act's Rules are equally quiet on these issues, recommending simply affordable housing assistance programmes. Furthermore, the Act recognises transgender identity, regulates the implementation of welfare measures, and imposes duties on a variety of entities. It has not, however, been without criticism. Individuals must apply for a transgender certificate in order to benefit from the Act's

²⁷ *ibid*

²⁸ Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights, Aniruddha Dutta available at https://theasiadialogue.com/wp-content/uploads/2017/06/105-jils_vol-5_monsoon_2014.pdf

²⁹ PTI, Businessman Ajay Mafatlal, First Major Sex Change Case in India, Passes Away, DNA INDIA (Aug. 23, 2015), available at <https://www.dnaindia.com/india/report-businessman-ajay-mafatlal-first-major-sex-change-case-in-india-passes-away-2117607>

protections. Individuals who undertake medical treatment to change their gender must get a new certificate from the District Magistrate, who may conduct an examination of the application's accuracy. A person must also show that they live within the Magistrate's jurisdiction, which can be problematic for transgender individuals who lack identifying credentials and don't have a permanent address. The statute increases discretion in establishing a individuals' gender and violates the right to self-determination established in *NALSA v Union of India*.³⁰

Suggestion and Conclusion:

The right to inherit is the subject of this study. Individuals' greatest asset holding in India is immovable property. Property ownership is commonly believed to improve a person's social status. This is especially essential because transgender individuals have limited income, savings, and housing options. If they are unable to get property, they will continue to be marginalised. While there has been considerable attention devoted to discrimination experienced by transgender individuals seeking rental accommodation, the vast majority of property in India is inherited. In this aspect, the legislation has been of little help. Although the Transgender Persons (Protection of Rights) Act of 2019 protects transgender individuals from discrimination in housing, it is silent on inheritance rights.

Civil rights must be accessible to everyone, regardless of gender identity. The law, in particular, necessitates the implementation of at least the following three measures: 1. Alter inheritance laws to include gender-neutral measures; 2. Alter guidelines to guarantee that transgender individuals are included in all identifying documents; and 3. Add inheritance to the Transgender Persons (Protection of Rights) Act as a forbidden sphere of discrimination. In a similar vein, realising inheritance rights necessitates ensuring freedoms (such as marriage and adoption) that are normally open to citizens.

References:

Statutes and Constitution

- The Constitution of India,
Available at https://legislative.gov.in/sites/default/files/COI_1.pdf
- The Child Marriage Restraint Act, 1929
Available at <https://wcd.nic.in/child-marriage-restraint-act-1929-19-1929>
- The Hindu Minority and Guardianship Act, 1956
Available at https://legislative.gov.in/sites/default/files/A1956-32_0.pdf
- The Pre-Conception and Pre-Natal Diagnostics Techniques Act, 1994
Available at <https://www.indiacode.nic.in/bitstream/123456789/8399/1/pre-conception-pre-natal-diagnostic-techniques-act-1994.pdf>
- The Prohibition of Child Marriage Act, 2006
Available at <https://legislative.gov.in/sites/default/files/A2007-06.pdf>

³⁰ National Legal Ser.Auth vs. Union of India & ors. on 15 April, 2014 available at <https://indiankanoon.org/doc/193543132/>

- The right of Children to Free and Compulsory Education Act, 2009
Available at
<https://legislative.gov.in/sites/default/files/The%20Right%20of%20Children%20to%20Free%20and%20Compulsory%20Education%20Act,%202009.pdf>
- The Hindu Succession Act, 1956
Available at <https://legislative.gov.in/sites/default/files/A1956-30.pdf>
- Indian Penal Code
Available at <https://legislative.gov.in/sites/default/files/A1860-45.pdf>
- The General Clauses Act, 1897
Available at <https://legislative.gov.in/sites/default/files/A1897-10.pdf>
- Universal Declaration of Human Rights
Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

Cases:

National Legal Ser.Auth vs. Union Of India & Ors on 15 April, 2014 available at <https://indiankanoon.org/doc/193543132/>

- Pinki Pramanik -vs.- State of West Bengal & Anr available at <https://translaw.clpr.org.in/wp-content/uploads/2018/10/Pinki-Pramanik.pdf>
- Nangai vs. The Superintendent Of Police on 17 April, 2014 available at <https://indiankanoon.org/doc/144523857/>

Books

- Hindu Law of Inheritance, Sarkar G. C., published by Gyan Publishing House, New Delhi, 2015
- Legal Handbook on Succession (Hindu, Indian, Parsi), Wills & Transfer of Property [Marathi], Deepak Puri, published by Mahiti Pravah Publication, Ahmednagar, 2016
- Hindu Law of Succession towards Equality of Sexes, R. Swaroop's by ALD Publications, Hyderabad
- Transgender Rights, by Paisley Currah (Editor), Richard M. Juang (Editor), Shannon Price Minter (Editor), published by University of Minnesota Press

Reports and Articles

- Denied Visibility in Official Data, Millions Of Transgender Indians Can't Access Benefits, Services, Shreya Raman, 11th June 2021, IndiaSpend available at <https://www.indiaspend.com/gendercheck/denied-visibility-in-official-data-millions-of-transgender-indians-cant-access-benefits-services-754436>
- Danish Sheikh, “A Tale of Two Judgments: The Afterlives of a Defeat and Victory for Queer Rights in India” (2018) 8 Harvard Kennedy School LGBTQ Policy Journal.
THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019
available at
<https://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

- Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights, Aniruddha Dutta available at https://theasiadialogue.com/wp-content/uploads/2017/06/105-jils_vol-5_monsoon_2014.pdf
- PTI, Businessman Ajay Mafatlal, First Major Sex Change Case in India, Passes Away, DNA INDIA (Aug. 23, 2015), available at <https://www.dnaindia.com/india/report-businessman-ajay-mafatlal-first-major-sex-change-case-in-india-passes-away-2117607>