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TRANSGENDER PERSONS' PROPERTY RIGHTS: India & Beyond
Jubal Raj Stephen, Siva Mahadevan & Tamoghna Chattopadhyay

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TRANSGENDER PERSONS' PROPERTY RIGHTS: India & Beyond

*Jubal Raj Stephen, Siva Mahadevan & Tamoghna Chattopadhyay**

[Abstract: COVID-19 is genuinely one of the most vulnerable periods for humanity and has brought several predicaments to the world and society at large, and it has also seen a host of hasty legislation by the Government. One of the legislations which suffers from this situation is the Transgender Persons Act and Rules, which came into existence in December 2019 and October 2020, respectively, in quick succession without proper consultation with experts on the topic. With these points in mind, in this article, the authors attempt to dissect the evolution of the transgender persons' inheritance rights in India through a historical analysis, accompanied by doctrinal research and critical analysis on the current status of transgender persons' rights in India. Following that, the authors take an international perspective to elucidate the stand various other legislations took on the same issue.]

I

Introduction

When it comes to any issue regarding transgender persons there is always a legal lacuna in every legislation that arises from the confusion from the conventional and modern interpretation of personal relationships, especially with respect to the rights-based jurisprudence that has taken a centre-stage, globally. There are various issues that continue to persist for the persons of the transgender community and in this realm, the issues of property rights are of pivotal concern. The right to property is unique and important because it helps an individual in multi-pronged manner, in that it is a reflection of dignified existence, a sense of security (*financially*), a sense of belongingness into the social affairs, among others.¹ The guaranteeing of property rights to transgender persons is an issue which persists in several countries and these are yet unenjoyable in

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¹ Carol M. Rose, *Property as Keystone Right*, 71(3) NOTRE DAME LAW REVIEW 329 (1996); Ronald J. Krotoszynski Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555 (1996), *Available at* - https://scholarship.law.ua.edu/fac_articles/230

several nations to transgender persons. This paper will view the above issue through a comparative lens and attempt to provide plausible and probable solutions for the said problem. Further, this article tries to find the legal lacunae in the legislation and illuminate the judiciary's compensatory methods to protect the transgender person community.

II

Normative foundations of Right to Inheritance of Transgender Persons in India

The principal bone of contention in recognizing transgender persons' rights lies in the laws' inability to recognize transgender persons' being and identity as it exists. We can see this in the case of *G. Nagalakshmi v. Director General of Police*,² where a transwoman was subject to the accusation of claiming the reservation for woman police constable and that the 'petitioner is not a woman, according to the medical opinion and she is only a transsexual' after being forced to undergo medical tests. Another example of the denial of the existence and culture of transgender persons' rights is visible in *Sweetey v. General Public*,³ where the lower courts denied the *Guru-Chela Parampara* (this is where *guru* is the teacher, *chela* is the servant or the student in this case and *Parampara* which means tradition) the property will be transferred from the teacher to the student as a tradition which will mostly include self-acquired property, which de facto governed succession in specific Transgender person communities. Medicalization of Transgender persons in the new *Transgender Persons (Protection of Rights) Act, 2019*, cannot be understood without the colonial administration's medicalization⁴ and criminalization⁵ of the local transgender person communities.

Engaging in normative discourse without understanding the intersectionality of transgender persons' discrimination and, similarly, transgender persons' rights is futile.⁶ We can find a clear exemplification of how identities such as caste, race, economic status, and nationality affect the transgender persons community's access in the juxtaposition of Sir Ewan Forbes, a 20th-century transman from British nobility, and

² (2014) 7 MLJ 452.

³ AIR 2016 HP 148.

⁴ A.R. Arondekar FOR THE RECORD: ON SEXUALITY AND THE COLONIAL ARCHIVE IN INDIA(2010).

⁵ A. Banerjee, *Discard Regressive Laws That Legitimise Violence Against Transgender People*, THE WIRE (Mar. 13, 2018) available at – <https://thewire.in/lgbtqia/discard-regressive-laws-that-legitimise-violence-against-transgender-people> (Last visited Oct. 12, 2020).

⁶ J. Kothari, *At the Intersections of Caste and Gender, the Thinking Republic*, THE THINKING REPUBLIC (Oct. 8, 2020) available at – <https://www.thethinkingrepublic.com/being-counted/at-the-intersections-of-caste-and-gender> (Last visited Oct. 12, 2020).

today's Dalit transwomen in South India. For most of his early life, Sir Ewan Forbes lived as a woman, changed his legal gender in a private ruling in a lawyer's chambers in 1965, and inherited his father's barony.⁷ Meanwhile, Dalit transwomen report a shocking rate of 21% sexual abuse while approaching the police, and an overwhelming 74% report having a *very bad* experience while approaching lawyers.⁸ As accessing legal services and law enforcement are essential in enforcing and realizing property rights, this might mean the death knell for many to gain their rightful share even if the laws provide for it.

The principles and norms, such as *equality* and *bodily autonomy of transgender persons people*, are essential in realizing their succession rights, and are neither particularly novel nor unknown in 21st century India's policy discourse and reflections of this innateness is seen in various decisions of the Apex court. In the *Justice Puttasamy*⁹ case, which held that bodily integrity is incidental to the right to privacy which the right to life under Article 21 of the Constitution enshrines, which eventually led to the *NALSA Judgement*,¹⁰ where the Supreme Court held transgender person's rights to self-determination of gender and being recognized as 'Third-gender' and resting these rights and more in their fundamental rights.

The *2006 Yogyakarta Principles*, a document produced by experts meeting at Yogyakarta Indonesia reinforcing Human Rights, especially in recognition of those persecuted for their Sexual Orientation and Gender Identity,¹¹ lay the seeds for the *NALSA Judgement*. *The Yogyakarta plus 10* in 2017 further reinforce these principles. These included the Right to Legal Recognition (principle 31), the right to found a family (Principle 24), and the Right to Participate in Public Life (Principle 25), which further encourage the pursuit of Succession Rights for Transgender persons.¹²

⁷ M. Ritchie, *From the real-life Dr Jekyll to lovers on the run: Writer reveals the captivating stories all leading back to one Edinburgh address*, THE SUNDAY POST (Jan. 26, 2020) available at – <https://www.sundaypost.com/fp/from-the-real-life-dr-jekyll-to-lovers-on-the-run-writer-reveals-the-captivating-stories-all-leading-back-to-one-edinburgh-address/> (Last visited Oct. 12, 2020).

⁸ Center for Law Policy and Reform, *Intersectionality: A Report on Discrimination based on Caste with the intersections of Sex, Gender Identity and Disability in South India* (2019) available at – <https://clpr.org.in/wp-content/uploads/2019/08/Intersectionality-A-Report-on-Discrimination-based-on-Caste-with-the-intersections-of-Sex-Gender-Identity-and-Disability-in-Karnataka-Andhra-Pradesh-Tamil-Nadu-and-Kerala.pdf>.

⁹ (2017) 10 SCC 1.

¹⁰ AIR 2014 SC 1863.

¹¹ International Commission of Jurists, *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Mar. 2007) available at – <https://www.refworld.org/docid/48244e602.html> (Last visited Oct. 12, 2020).

¹² International Commission of Jurists, *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*

III

Transgender persons' Property Rights: The Indian Scenario

History has witnessed several injustices such as discrimination, untouchability, exclusion from the general public, infringement of the right to equality, and more such crimes that the transgender person community has had to endure from the inception of *modern society* and modern laws in India.¹³ The 21st century has been promoting several revolutionary movements in the judicial arena ranging from the decriminalization of adultery under Section 497 of the Indian Penal Code, 1860 (Act no 45 of 1860),¹⁴ decriminalization of Section 377 of the Indian Penal Code,¹⁵ and criminalizing triple talaq.¹⁶ On that note, we also saw a social reform initiation for the betterment of the transgender persons' community's living standards. However, unlike the other movements, the discovery of prominent solutions for their issues and general betterment is dormant.

Judiciary's role in reforming Transgender persons' legal status:

The judiciary has proven itself to be a protector of transgender persons' rights on several occasions. The initial instance was witnessed in the Supreme Court's landmark judgment in the *National Legal Services Authority and Ors v. Union of India*¹⁷ case, popularly known as the *NALSA judgment*, wherein for the first time in India, the Supreme Court recognized transgender persons as a third gender and conferred them with equal rights. The Court had also discussed several aspects of gender recognition and how failing to recognize the personal choice of gender of a transgender person violates several fundamental rights prescribed in Articles 14 (right to equality), 15 (Protection against discrimination), 16 (right to equal opportunity), 19 (right to freedom of speech and expression), and 21 (right to life) of the Constitution of India of the Constitution of India. Apart from these critical aspects, the Court also recognized the need for inheritance and succession rights for the transgender person community. When an issue came before the Court about how transgender persons can receive such

(Nov. 2017) available at – <https://www.refworld.org/docid/5c5d4e2e4.html> (Last visited Oct. 12, 2020).

¹³ Before the advent of the colonial rule in India and the *foreign (received)* legal system, there are umpteen references of how the transgender community was respected in India, during the ancient and medieval era and more so in the Mughal Courts. See generally, Madhavi Menon, INFINITE VARIETY: A HISTORY OF DESIRE IN INDIA (2018); Naresh Kumar Vats & Megha Purohit, *Right to Education and Employment: A Step Towards Empowering Transgender Community*, 5(2) Kathmandu School Law Review 113 (2017).

¹⁴ *Joseph Shine v. Union of India* (2019) 3 SCC 39, AIR 2018 SC 4898

¹⁵ *Navtej Johar v. Union of India* AIR 2018 SC 4321

¹⁶ *Shayara Bano v. Union of India* AIR 2017 9 SCC 1 (SC)

¹⁷ *Supra* note 10.

rights, it stated that the legislation should avoid the 'biological test' and instead adopt the 'psychological test'.¹⁸ It is a person's right to determine his/her gender and any form of discrimination against the same principle, violates the person's fundamental right. With this point, the Court advocated the legislation to bring the due changes in the respective personal laws and the Indian Penal Code of 1860. The judgment provided by the Supreme Court has also been used as a precedent by the Madras High Court in *K. Prithika Yashini v. The Chairman, Tamil Nadu Uniformed Services Recruitment Board*¹⁹. A two-judge bench comprising Justices Sanjay Kishan Kaul and Pushpa Sathyanarayana held that it is discriminatory to refuse a transgender person from writing an exam for a Sub-Inspector was based on the ground that person is recognising as a female though born as a male.

Despite these two very favourable verdicts, the issue of inheritance and succession for transgender persons was never properly analysed or adequately resolved. In the *NALSA judgment*, the Supreme Court merely gave an obiter dictum regarding the inheritance and succession issue for the transgender person community and gave the responsibility to the legislation. Perhaps the first instance when the Court recognizes a transgender person's rights in a personal law was *Arunkumar v. The Inspector General of Registration and Ors*²⁰. As the case is more prevalent in the topic at hand, it deserves further perusal.

The facts of the case go as follows: the petitioner Arunkumar, a male, and Srija, a transgender person, solemnized their marriage in a temple in Tuticorin on 31.10.2018 as per the Hindu rites and customs. The Village Administrative Officer (VAO) has attested that the marriage was a legal one, and the petitioners' wedding was performed by the temple authorities, albeit them rejecting to vouch for the same. After their marriage, the petitioners submitted a memorandum for registering the marriage under Rule 5(1)(a) of the Tamil Nadu Registration of Marriages Rules, 2009. However, the registrar refused to entertain the memorandum. Impugned by this, the petitioners filed a writ petition under Article 226 of the Constitution before the Madras High Court.

The respondent counsel argued that the registrar was within his rights to refuse the marriage registration as Section 7 of the Tamil Nadu Registration of Marriages Act, 2009 (henceforth referred to as 'The Act') validates the same. The petitioners did not submit a document that vouches for them solemnizing their marriage in the temple in Tuticorin, thus not satisfying Section 7(1)(c) of the Act. Furthermore, Section 5 of the Hindu Marriage Act, 1955, states that the bridegroom should be at least 21 years old for a valid marriage, and the bride should be at least 18 years old. Here, there is no bride as a bride's definition is a woman on her wedding day. Thus, the respondent counsel contended that the Court should dismiss the writ petition for the reasons above.

¹⁸ *Id.*

¹⁹ 2016 Lab IC 240.

²⁰ AIR 2019 Mad 265.

The Court, however, declined to entertain these arguments. It took a reference to the *NALSA judgment*, which the Supreme Court refers to and approves in several other landmark judgments such as the *Justice K. S. Puttaswamy v. Union of India*²¹ and the *Navtej Singh Johar v. Union of India*.²² The NALSA judgment recognizes the third gender, but even before that, historic texts remember the same. The Court notes that the Mahabharata states the tale of Aravan²³, who wishes to get married before sacrificing himself for Dharma. When no woman came forward to marry him, Krishna transformed himself into a woman and married him. Here, Aravan is said to have womanly feelings, albeit being a man, thereby noting a transgender person's first instance in mythology. Another character from the Mahabharata is Shikandi, born as a woman but grew up like a man to fulfil her desire to kill Bhishma.

Similarly, Arjuna also transformed himself into a transgender person to hide from the Kauravas during the last year of exile. The deity Ayyappa was born due to the union between Shiva and Vishnu in his Mohini form.

Apart from these mythological references, the Court also referred to several psychological materials while analysing the issue at hand. One of the Court's critical considerations was Professor V.S. Ramachandran's book *The Tell-Tale Brain*.²⁴ In the book, the concept of sex v. gender was analysed and differentiated. Thus, referring to both the terms as the same is wrong, and any following discrimination on the same note violates Article 21.

In *Arunkumar v. The Inspector General of Registration and Ors*²⁵, the petitioner Srijia recognized herself as a woman. When she acknowledged herself as such, the state authorities have no right to question this decision in any form. The definition of a bride in the Hindu Marriage Act cannot be violative of the Constitutional principles as all laws have to adhere to the general principles that the Constitution cited in its abundance of articles. Furthermore, the definition of a term can change with the flow of time, and the Court is also bound to adapt itself to keep up with the changes. The Court derived this concept from Article 16 of the Universal Declaration of Human Rights (UDHR), 1948.²⁶ Thus, as the petitioner recognized herself as a woman, she will fall under a bride's definition and thereby there is no violation of any condition of the Hindu Marriage Act, 1955.²⁷ With this point, the Court concluded that as the bridegroom and bride

²¹ AIR 2017 SC 4161.

²² AIR 2018 SC 4321.

²³ AIR 2019 Mad 265, para 5.

²⁴ V. S. Ramchandran, *THE TELL-TALE BRAIN: A NEUROSCIENTIST'S QUEST FOR WHAT MAKES US HUMAN* (2012).

²⁵ AIR 2019 Mad 265

²⁶ Universal Declaration of Human Rights, U.N.G.A. Res. 217 (III) A, 1948.

²⁷ Act No. 25 of 1955.

profess the Hindu Religion, which Article 25 of the Constitution duly recognizes, the State authorities are bound to accept their marriage and register it properly.

From this case, we can infer an elucidating point. If a transgender person recognizes herself as a woman in the Hindu Marriage Act, she is bound to receive all the rights that a woman can receive from the Hindu Succession Act, 1956. Since this is a High Court judgment, other Courts can take this as a precedent. The Supreme Court has also not struck down this case, thereby establishing its validity and viability. Thus, the judiciary recognizes the transgender persons' successions rights if they profess the Hindu religion and identify themselves as a woman for the marriage. Although this is a very particular instance, it takes a step towards a better future for the transgender community.

Legislation's role in transgender persons' inheritance rights

The legislation has given positive as well as negative reactions while determining transgender persons' rights. Firstly, the *NALSA judgment* states that the legislation should implement the critical points it mentions within six months, which the legislation failed to follow up. Apart from this, the recently introduced *Transgender Persons (Protection of Rights) Act, 2019* (henceforth referred to as 'The Act'),²⁸ seems to gain more dissent from the transgender community. Several provisions/ procedures that the Act provides, are against the *NALSA judgment*.

For example, Section 2(k)²⁹ of the Act states that a transgender person is someone whose gender does not match the biological gender of the same person, and the term includes trans-woman, trans-man with socio-cultural identities *Kinner*, *hijra*, *aravani*, and *jogta*. The *NALSA judgment* notes more than 50 transgender person communities, whereas the Act identifies four of the said communities. The Act excludes the other communities, which is violative and discriminatory.

The Act seems to promote the medical procedures for sex reassignment surgery and avoid parity among genders, thereby restricting it to standard males and females. It also contains contradicting information within the same. If we allude to Section 4(2), the Act states that a person identified as a transgender person has the right to self-perceived gender. However, Sections 5, 6, and 7 immediately talk about confining the definition of a transgender person to the norm as the legislation may deems fit, thereby going against the verdict the Supreme Court pronounced in the *NALSA judgment*. Section 5 of the *Transgender Persons (Protection of Rights) Act, 2019* states that a person may apply for a certificate to identify a transgender person. The writing of the section creates an illusion of choice. However, it is imperative to inculcate that the current social structure, more or less *forces* a person to obtain such a certificate. It generally takes society to question itself and change its thought process in three decades. Thus, each law the legislation drafts must be done with this critical angle in mind. It is apparent here that

²⁸ Act No. 40 of 2019.

²⁹ Transgender Persons (Protection of Rights) Act, 2019, S.2(k) Definition of *transgender person*.

the legislation took no notice of such an issue and thereby creates a juxtaposition. Since Section 5 is *ipso facto* mandatory, the conditions set forth by the corroborating section from 6-7 also have a mandatory effect. The sections make the transgender persons' lives more difficult instead of doing the opposite by introducing several complex and unnecessary procedures. Therefore, the Act here seems to advocate against the transgender person community, resulting from a political infiltration into the pillar of legislation.

Furthermore, Section 18 of the Act, which speaks about the punishments for offences against transgender persons, deserves the most criticism. It talks about several crimes such as compelling a transgender person in bonded labour, obstruction of passage, expulsion from residence, endangering life, physical abuse, mental abuse, sexual abuse, verbal abuse, emotional abuse, and economic abuse shall be punishable for a maximum of two years with a minimum punishment of six months with a fine. This provision is outrageous as it is not in conjunction with the Indian Penal Code's 1860. For example, Section 354A of the Indian Penal Code talks about sexual harassment, which the Act mentions in Section 18. The maximum punishment extends up to three years, with a minimum sentence being for a year. Thus, the Act has reduced the penalty for the same offence committed against a transgender person, violating Article 14 of our Constitution. Finally, Section 21 of the Act prevents any legal action against the Government or authorities for any of their actions committed under good faith in following the Act's provisions. When the Act has several loopholes, the same actions shall be violative, as stated above. With Section 21, the authorities will now have a free hand without any supervision. Despite these noticeable flaws in the Act, it is unfortunate that the legislation has not rectified the same. Recently, the legislation issued the *Transgender Persons (Protection of Rights) Rules, 2020*, under Section 22(1) of the Act, wherein we can see that there is no change in the definitions mandated as per Section 2 of the Act and the legislation unduly establishes further complex procedural rules for Sections 5-7 instead of reversing the effect of the same.

As an additional note, the Act does not even talk about a transgender person's civil rights, thereby leaving a certain vagueness on the topic. Had it included that aspect, it would have been easier to solve the problem faster.

Although there are more significant flaws in the legislation's viewpoint of the issue, it does not necessarily mean that the legislation has not taken any positive steps for reforming a transgender person's legal rights. The Uttar Pradesh Government, on 21.8.2020, proposed an amendment to Sections 109 and 110 of the UP Revenue Code, 2006, which talks about the succession to women as a female heir. Through this amendment, transgender persons can now inherit agricultural land in the State of Uttar Pradesh. Even though this amendment restricts the inheritance part to agricultural lands, it is still a significant positive change that can be the first step towards reforming other personal rights.

These are the main developments regarding a transgender person's inheritance rights in India. The judiciary has given several favourable verdicts for the betterment of the transgender person community. It is now time for the legislation to recognize the flaws in the Acts mentioned above and duly rectify the errors provided in it

IV

Global initiative towards Transgender persons' Property rights

It is fascinating to note that many parts of the world have this peculiar situation where transgender couples' marriages are legal, whereas inheritance or property rights are not yet legal. We will try to investigate each nation as far as possible and then analysing its legal basis will suggest to India at the end regarding the derivable consideration from this Global initiative. We will go nation wise in the following way:³⁰

A – Asia Pacific

- (1) Australia - The relationship property provisions (including superannuation) of the Family Law Act 1975³¹ apply equally irrespective of whether a couple is in the same or opposite-sex relationship. There are some modifications to the division of property for *de facto* relationships, but these apply equally to same- and opposite-sex couples. Superannuation is payable to a member's 'spouse,' which is defined as including a party to a marriage or a *de facto* relationship, as such trans persons are not disenfranchised by inheritance rights to superannuation in the event of their partner's death, whether by marriage or *de facto* relationship. Social security and widows' pensions (including veterans) are payable regarding married, *de facto*, or civil union couples, whether of the same or opposite sex.
- (2) New Zealand - Division of relationship property (including superannuation) under the Property (Relationships) Act 1976 applies to same or opposite-sex couples equally. While there are some modifications in terms of *de facto* couples, these are again applied equally. If a person dies intestate, the Property (Relationships) Act 1976, the Administration Act 1969, and the Family Protection Act 1955 provide that their *de facto* partner, civil union partner, or spouse (irrespective of gender) may be able to claim an interest in their partner/spouse's estate.
- (3) Fiji – They do not consider any other couple rather than a male and a female.

³⁰ The International Bar Association's LGBTI Law Committee 'Mr & Ms X: The Rights of Transgender persons Globally', (2014) Pages 34-41. The report can be accessed from https://www.ibanet.org/PPID/Constituent/LGBTI_Issues/Publications.aspx.

³¹ Act No. 53 of 1975.

- (4) North Caledonia and French Polynesia - Relationship property is divisible between partners. When a person's partner or spouse dies without making a will, the other party can claim under intestate succession rules.
- (5) Samoa – Same-Sex marriage is prohibited here as the 1961 Divorce and Matrimonial Causes Act³² claims property division only between spouses.
- (6) Tonga - No civil unions exist, and marriages are between one man and one woman. Thus, transgender persons cannot marry, as there is no provision for changing gender on a persons' birth certificate.

B – Europe

- (1) The European Union - The European Court of Human Rights found in *Goodwin v. UK* (2002) that the right to marry should extend to trans persons who have undergone gender reassignment. No information regarding property rights is available till now.
- (2) United Kingdom – Same-sex marriage is allowed, but nothing about property rights.
- (3) Spain – Over here, transgender persons people are equal to heterosexual people. Nothing on marriage or property rights.
- (4) Germany – Same-sex marriage is not possible. Recently, few of their courts have allowed change of sex while continuing to be married, but the courts gave no decision about the transgender person's right to marry and his/her property rights
- (5) France – Since 2015, same-sex marriage has been allowed, but the legislation did not provide any provision regarding transgender persons person's property rights.
- (6) Italy – There has been judicial deliberation on allowing same-sex marriage, but the courts did not deliberate the same for the property rights of transgender persons.
- (7) Poland – It rejects the law regarding same-sex marriage; therefore, no law regarding property rights.

C– Africa

- (1) South Africa is the only country allowing same-sex marriage, but there are no such specific laws governing marriage and inheritance there.

D – Latin America

- (1) Argentina & Uruguay – Same-sex marriage and Trans people have the same marriage rules. No law on inheritance.
- (2) Brazil & Colombia – In Brazil, marriage is accepted, whereas, in Colombia, transgender persons have to marry people of the opposite sex. No law on inheritance.

³² Act No. 20 of 1961.

- (3) Ecuador – All derived rights are given to transgender persons, excluding adoption, so there is an implied law.
- (4) Mexico – It is the only jurisdiction that permits transgender persons to conform their legal documents to their gender identity, and given that it is the only jurisdiction that permits same-sex marriage, by implication, it is logical to assume that transgender persons can marry persons of either sex but no law of inheritance to govern.

E – North America

- (1) United States of America – The states permit marriage regardless of gender: California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, New Jersey, New Mexico, New York, New Hampshire, Oregon, Rhode Island, Vermont, Washington. At least three states currently recognize that a person can change their legal gender for marriage (California, Minnesota, and New Jersey). In some states, courts have said that they will not recognize a change of gender for marriage (Ohio, Florida, and Kansas). In *US v. Windsor*³³, however, the Supreme Court found Section 3 of the Federal Defence of Marriage Act (DOMA)³⁴ provided that for all purposes of federal law, the word 'marriage' meant 'only a legal union between one man and one woman as husband and wife' and the word 'spouse' referred 'only to a person of the opposite sex who is a husband or wife to be unconstitutional. No such law of inheritance is present.
- (2) Canada – Since 2005, the law accepts same-sex marriages through legislative actions, but it does not have a provision for inheritance laws.

As the above observations are from the 2014 report, the author will now investigate the recent updates. In December 2017, Germany opened marriage rights for everyone, and Australia went through the same path and acknowledged same-sex marriage. Very recently, Brazil also ratified same-sex marriage. Even though countries have ratified that same-sex marriage is legal, when we see whether the inheritance laws are also relaxed, the answer would be negative. Like every child born in a poverty-stricken household wants to enjoy the fruits of their parent's property, the international community and our national Government should look forward to making similar laws in that regard.

³³ 570 US 744 (2013).

³⁴ US Public Law 104-199.

V

Afterword

The preceding inquiry brings to fore the major issues that transgender persons face in the current liberal rights-based socio-legal society. It further highlights some major issues with the current system adopted by the powers that be for the protection of the persons from this community. As highlighted above, the following suggestions are formulated for the framing of inheritance laws for transgender persons:³⁵

- (a) **Neutralizing the gender binary paradigm** – It is proposed by the authors that as the gender binary norm is the only thing that we know growing up. It is not achieved by mentioning someone as a third gender but by giving a title appropriate so that the person does not feel alienated. The legislature can take rewriting of the existing laws with gender neutral terminologies as the vantage point in this regard.
- (b) **Neutral Device (Wills, Gift deeds, etc.)** – Whenever a person draws a will or a deed, it will be easier for the other person, apart from that gender binary, to enjoy the property. In India, the grandson will not disclose to his parents that he has changed into being a transgender person for the fear of humiliation from family and society. It is now time to have changes in such law where the children who recognize themselves as transgender gets to get family property or gift through gift deed. The deeds can be drawn by the lawyers in more gender-neutral tone, thereby reducing the requirement of the heir being a person belonging to the binary gender only.
- (c) The provision for transgender persons in the Special Marriage Act, 1954 (Act no 43 of 1954) provides inter-caste and inter-class marriage. If intra-sex marriage is recognized, then that will help the transgender persons to have a law governing them and will be governed by the legal principle entailed in the *maxim ubi jus, ibi remedium* (which means every right has a remedy) where if no law provides any right, then what remedy will one ask for so it is vital to have the same in this Act itself. The process of a law being moved and be accepted in the Parliament requires a lot of time and it is the belief of the authors that the number of problems of the transgender people requires speedy rectification.
- (d) **More Representation** – ‘The Act governing the transgender persons provides for a Commission to aid transgender persons, wherein the composition, there is no mention of any transgender person being a member of the said Commission. Hence, the bureaucracy or the Ministers will be unable to better understand about the agony of this community. For the betterment of any community, there should always be an adequate representation.

³⁵ Carla Spivack, *The Dilemma of the Transgender Heir*, 33 QUINNIPIAC PROB. L.J. 147 (2020).

- (e) Examine the meaning of sex in inheritance/succession laws – As soon as the authorities consider the first point, the law's meaning will naturally expand. No judicial precedent will have any value in front of legal backing, so the definition of sex should be changed, and the legislation should make adequate amendments for the same.

As stated above, these suggestions are not just for India but also for other parts of the world as we have already seen the global outlook and suggestions for promoting transgender person's property rights.

VI

Conclusion

The State and the judiciary's common hesitation in recognizing the right to self-determination of a transgender person leads to several potential abuse or fraud even though no evidence exists for the same.³⁶ Thus, in a way, the situation of transgender persons is like an extension of the same normative conflict between the colonial Indian administration's conflict between the preconceived Victorian gender binary and the native Transgender persons' populations' nonbinary existence.³⁷ In a country where the right to inheritance was not fully recognized *de jure* for most of its women till 2005 and even still has not been realized *de facto* for most of its women,³⁸ the pursuit of new norms seeking a gender-inclusive succession law for transgender persons should not be seen as a nuisance or as an act of sympathy but as a mirror, reflecting the patriarchal normative structures affecting the inheritance laws. If the argument for legislative slack is based on the slow yet sure change of recognition of rights, like the 2005 amendment, such an argument would be in poor taste as the transgender persons will continue to suffer. Despite a few critical and positive judgments, no other significant developments are visible in India and globally. Therefore, it is high time for all the countries to wake up from this slumber and ignorance and correct by amending these flaws.

³⁶ J. Kothari, *Trans equality in India: Affirmation of the right to self-determination of gender*, NUJS LAW REVIEW, 13(3) (2020).

³⁷ V. Sahai, *Is it possible to be Trans, Legal, and Free*, CENTRE FOR LAW AND POLICY RESEARCH (Mar. 01, 2020) available at – <https://clpr.org.in/blog/is-it-possible-to-be-trans-legal-and-free> (Last visited Oct. 12, 2020).

³⁸ R. Mehta, *Inheritance rights of women: How to protect them and how succession laws vary*, THE ECONOMIC TIMES (Jul.29, 2019) available at – <https://economictimes.indiatimes.com/wealth/plan/inheritance-rights-of-women-how-to-protect-them-and-how-succession-laws-vary/articleshow/70407336.cms> (Last visited Oct. 12, 2020).