
THE HIJRA COMMUNITY IN INDIA: A CRITICAL EVALUATION OF THEIR RIGHT TO INHERITANCE

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ABSTRACT

Inheritance is a right under Indian law, but it is so much more than that. It is about equality; it is about representation and recognition within a family or a community; it is something one is born with but is also a right that is bestowed upon them. How does this right work when it is viewed from the lens of a person who has lost ties with their natal family? To evaluate this, this paper will delve into one such community that represents this idea, the Hijra Community in India. Transgender people in this community, like most queer people in India from lower classes in India, are often excommunicated from their natal families and are not considered for inheritance by their birth parents. The Hijra community is now their family. The law fails to recognise the right to inheritance of the third gender, and only their customary law governing Guru-Chela relationships elaborates upon it. This paper seeks to analyse this lacuna in the legal realm by bringing forth various statutes, case laws, and socio-cultural aspects governing the transgender community and further poses the question, “Does a transgender person’s customary law ensure that the lacuna left by statutory law on their right to inheritance is filled or is it just as moot?”

Keywords: *Guru-chela Relationships, Hijra Community, Inheritance, Transgender.*

1. INTRODUCTION

An individual's property and the consequent rights to such property largely influence and determine one's social stratum in society. An essential right in property is the right to access the property, and the prevailing way of acquiring it is through inheritance¹. This means that the right to inheritance largely anchors one's right to property and is interlinked with one's class. The transgender community in India was legally recognised and given basic constitutional rights through legislation and judicial action only in the recent past. However, there are no explicit statutory laws that grant them the right to inheritance. This paper aims to analyse queer inheritance in India with reference to the Hijra community and how succession works in their society. For ease of understanding, this research paper is divided into organised chapters. The first chapter traces the changes in attitudes towards the Hijra community by looking at their social and legal position comparatively in the past and present. The second chapter attempts to analyse the problems faced by transgender individuals in accessing their right to property. The penultimate chapter lays down two judgements recognising a transgender person's right to inheritance through the customs of the community, and the last chapter aims to elaborate on such customs to gauge the hierarchies prevalent in their culture and attempt to address its sociological aspects.

2. THE PERCEPTION TOWARDS THE HIJRA COMMUNITY: A BRIEF TIMELINE

The Hijras have been a predominant transgender community in India. They identify as neither wholly male nor entirely female but consist of an umbrella of individuals whose gender identity does not align with either one of the binary sexes they were assigned at birth. Hijras are defined as a group of male-born emasculates, or "born eunuchs," who usually wear feminine clothing and adopt feminine names. This community has a rich history in India. A hijra's existence can be traced back to Hindu mythology, where gender-ambiguous figures, resembling hijras, in the Mahabharata and Ramayana played important roles. There was also the observation of a large presence of 'eunuchs' with the advent of Muslim rule in South

¹ Karan Gulati and Tushar Anand, *Inheritance Rights of Transgender Persons in India*, 7(1) INDIAN L. REV. (2023)

Asia, which further legitimised the discourse surrounding the Hijra ontology². During these times, the Hijras were widely revered and recognised in high positions in society³.

It was only with the arrival of the British Raj that Hijras were suppressed. They were classified as a “criminal caste” under the Criminal Tribes Act of 1871, which abolished their right to live with dignity, their right to property, and even their right to be recognised and earn a livelihood⁴. The discrimination and ostracization faced by this community were largely due to colonial imposition and Indian elitist attitudes⁵. This prejudice was still practiced years after independence. The 2011 amendment to the Karnataka Police Act continued this and intended to police the undesirable activities of transgenders and required mandatory registration. Under this act, the police commissioner had the power to register the names and residences of transgender people who were suspected of committing so-called undesired activities such as kidnapping and emasculation of young boys or committing unnatural offences such as prostitution.

However, in recent years, India has begun to recognise the need for equality for the transgender community. In 2011, the national census incorporated the category of ‘others’ to include transgender persons⁶. An expert committee constituted by the government in 2013 recognised the social stigma and subjugation faced by the transgender community and laid down recommendations to provide increased access to education, healthcare, and employment⁷. Following this, in 2014, the Supreme Court of India, in its landmark judgement in *NALSA v. Union of India*, legally recognised transgender people as the third gender and directed the government to implement welfare policies for them⁸. This motion of the court prohibited discrimination against transgender persons and regarded them as equal citizens who had access to constitutionally guaranteed fundamental rights, including the right to vote, participate in elections, access healthcare and employment, and the right to own property. After this landmark decision, the Parliament of India passed the Transgender Persons (Protection of Rights) Act of 2019, which prohibited discrimination against the community

² RACHEL DWYER, *KEY CONCEPTS IN MODERN INDIAN STUDIES* (NYU Press 2015)

³ Rupal Sharma, *Inheritance Rights of Transgender A Cry of Humanity*, 1(3) INT’L J. L. MGMT. & HUMAN. (2018)

⁴ *Id.*

⁵ Gulati & Anand, *supra* note 1

⁶ *Id.*

⁷ Report of the Expert Committee on the Issues Relating to Transgender Persons.

⁸ *NALSA v Union of India* AIR, 2014 SC 1863

and provided protection for their rights and welfare. It dealt with safeguarding their basic rights, and one such clause was (g), which prohibited the denial of service of their right to rent, purchase, reside in, or otherwise occupy any property.

Although these steps were crucial to the advancement of the transgender community in India, they failed to envisage their right to inheritance under the right to property. The court in NALSA neglected to evaluate the question of a transgender person's right to inheritance or property rights, and there was no express provision provided under the Transgender Persons (Protection of Rights) Act that impacted other legislation or had anti-discrimination guidelines concerning the inheritance of property⁹.

3. AN ANALYSIS OF THE HURDLES FACED BY TRANSGENDER PEOPLE IN EXERCISING THEIR RIGHT TO PROPERTY: GENDERED LAWS AND IDENTIFICATION PROBLEMS

The court in NALSA examined the challenge faced by transgender people in exercising their right to property as a two-pronged problem. The first prong is that the pre-existing inheritance laws define the right to inheritance based on a binary notion of gender, and the second prong presents the difficulties in identifying successors¹⁰.

India has consistently created laws that have adopted a binary notion of gender, including the IPC, CrPC, Workmen's Compensation Act, Factories Act, etc. These gendered laws refer to laws that only recognise male and female binary genders. Such is the case with personal laws in India. The Hindu Succession Act provides detailed provisions regarding the succession rights of Hindus, Sikhs, Buddhists, and Jains. However, this act does not include transgender people and their right to inheritance under its ambit, which can be gauged by looking at the definition clause that limits the heirs to male and female persons and defines agnates and cognates' rights based on a gender binary. No section of this act envisages a person who doesn't conform to the gender binary or who is transgender¹¹. Muslim personal law that governs Indian Muslims is largely uncodified in India, and the right to inheritance is determined by customary laws. Despite several developments in this law over the years, there

⁹ Gulati & Anand, *supra* note 1, at 8

¹⁰ *Id.*

¹¹ Hindu Succession Act, 1956, § 3, No. 30, Acts of Parliament, 1956 (India)

is no inclusion of transgender people in the rules. Even the Muslim Personal (Shariat) Application Act of 1937 does not specify the rights of transgender people, and there is no differential protection under the Act in inheritance cases of transgender persons. The Indian Succession Act governs the inheritance of Parsis, Christians, and other religions that aren't included in the previous statutes. Although the ISA has a certain degree of gender-neutral terms such as 'kindred', 'lineal descendants', and 'children', there have been recorded case studies of transgender people being denied rights to property as male or female under this act. For example, a Hijra from Kerala was denied claims over ancestral property while her three brothers distributed the property amongst themselves¹².

It is also difficult to identify successors within the transgender community, essentially because transgender people face difficulties in obtaining legal documentation, marriage rights, and adoption rights¹³. Trans people are denied rights unless identification is provided confirming their self-perceived gender identity. The Transgender Persons (Protection of Rights) Act mandates certification to prove gender in order to seek protection under the Act, and the process of obtaining such certification has been controversial. Although passports and voter ID cards allow for a third gender, there is a non-uniform acceptance of it in state documents¹⁴. When it comes to the marriage rights of a transgender person, the Hindu Marriage Act, under Section 5, specifies that marriage relations are between a bride and a groom, and one cannot prove if such terms include transgender people and is up to the discretion of the registrar of marriage¹⁵. The Special Marriage Act explicitly states that a valid marriage is between a *male* of 21 years of age and a *female* of 18 years of age, therefore adhering to the gender binary¹⁶. Since transgender people do not have explicit marriage rights under the existing legislation, it becomes difficult for them to obtain inheritance through affinal relationships as personal laws of marriage and inheritance are interlinked¹⁷. Regardless of marriage laws, the Hijras themselves have renounced affinal relationships as well as ties with their natal families and don't constitute such relationships as familial

¹² Maria Akram, *Christian transgenders to have equal right on ancestral property: Delhi Minorities Commission recommends amendment to Succession Act*, THE HINDU (Nov. 10, 2023, 6:35 PM), <https://www.thehindu.com/news/cities/Delhi/christian-transgenders-to-have-equal-right-on-ancestral-property/article8592360.ece> accessed 30 May 2023.

¹³ Gulati & Anand, *supra* note 1, at 18

¹⁴ Gulati & Anand, *supra* note 1, at 19

¹⁵ Hindu Marriage Act, 1955, § 5, No. 25, Acts of Parliament, 1955 (India)

¹⁶ The Special Marriage Act 1954, § 4(c), No. 43, Acts of Parliament, 1954 (India)

¹⁷ Gulati & Anand, *supra* note 1, at 20

relationships¹⁸. The guru-chela and koti relationships are ones that are given utmost importance in the community. In addition to these normative ways of identifying successors, adoption also affects inheritance in India. The Hindu Adoption and Maintenance Act in 1956¹⁹ and the Juvenile Justice (Care and Protection of Children) Act [8] govern adoption rights in India, but nothing within its ambit lays down the possibility of adoption by transgender parental figures such as the gurus. The affiliation of a guru and chela shall be delved into further in this paper, beginning with citing two landmark cases that acknowledged the right of inheritance as per hijra customs.

4. JUDICIAL STAND

There exist merely two cases that present the judiciary's recognition of the transgender community's custom of conferring inheritance rights in guru-chela relationships.

The Madhya Pradesh High Court in *Ilyas v. Badshah Alias Kamla*²⁰ dealt with the rights of a chela in inheriting their guru's property as well as a guru's will. The appellant in the case contended that the transgender guru, Munilal, had executed a will in his favour, and the respondent contested this claim. He stated that the will was actually in his favour and also contended that, unlike the appellant, he was Munilal's chela. The assertion was that the community's custom dictated that as Munilal's Chela, he deserved a portion of his guru's property, and according to the guru-chela system, the guru cannot transfer the property in his hands to anyone outside the community. The court held that the will that was ostensibly in favour of the appellant was forged and ruled in favour of the respondent, stating that at least two-thirds of the property must proceed to the respondent, who was the chela, as per customary practice. This was the first time the judiciary recognised the guru chela system and its customs.

In another high court case called *Sweety v. General Public*²¹, the Himachal Pradesh High Court dealt with an inverse relationship where the guru asked for rights in his deceased chela's property. The lower court denied the guru any rights, claiming that the Hindu

¹⁸ GAYATRI REDDY, WITH RESPECT TO SEX- NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA (University of Chicago Press, 2005)

¹⁹ Hindu Adoptions & Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India)

²⁰ *Ilyas v Badshah Alias Kamla*, AIR 1990 MP 334

²¹ *Sweety v General Public*, MANU/HP/1242/2016

Succession Act did not envision such a relationship, disregarding the guru-chela dynamic. The High Court overturned this decision on the grounds that the religion of the parties was not on record and therefore they would not be bound by the Hindu Succession Act. It further concluded that there was no reason to deny the guru a right to inherit the chela's property as per customs.

5. DELVING INTO ETHNOGRAPHIC RESEARCH ON GURU-CHELA RELATIONSHIPS IN THE HIJRA COMMUNITY TO FURTHER NAVIGATE INHERITANCE RIGHTS

Gayatri Reddy, in her book 'With respect to sex', cites the guru-chela relationship as central to a hijra's identity²². A guru-chela relationship legitimises and solidifies the membership of a hijra within the community; a chela with a guru is considered a real hijra, while hijras with no guru-chela relationships are shunned and shamed²³. In this idealised relationship, a guru is viewed as the primary kin of the chela²⁴. The chela's responsibilities towards the guru are both economic and social²⁵. Hijras earn their means of living in three ways, i.e., through traditional ritual roles of conferring fertility blessings, through sex work, and by begging²⁶. They also delve into the art of singing and dancing, characterised by the ritualistic clapping of hands and cajoling or threatening the patrons to hand over their money, which is traditionally done in large groups²⁷. Being part of such big groups in the community is essential for the hijras to assert their presence, and individuality is not a viable concept of existence for them.²⁸The guru-chela relationship is one of transactional mutual benefit and sustenance. The guru provides the chela with guidance, clothes, food, and legitimacy within the community, along with determining the chela's hours of sex work, household chores, and other work to be done.

On the other hand, the chela offers the guru respect, obedience, and economic support through their earnings from sex work, extortion, and other specific aforementioned means of

²² REDDY, *supra* note 16, at 156

²³ REDDY, *supra* note 16, at 154

²⁴ REDDY, *supra* note 16, at 151

²⁵ BRINDA BOSE, (HI)STORIES OF DESIRE: SEXUALITIES AND CULTURE IN MODERN INDIA (Cambridge University Press 2020)

²⁶ DYWER, *supra* note 2, at 101

²⁷ BOSE, *supra* note 25, at 195

²⁸ *Id.*

livelihood²⁹. There has been wide-ranging ethnographic research done on the different aspects of a guru-chela relationship, and this paper focuses on its role in the inheritance of ancestral property. The guru-chela bond is the primary axis of kinship and genealogical descent, and as seen from the customs highlighted, it bestows inheritance rights³⁰. This relationship forms a hierarchy within the community due to power differences. The mere fact of the guru's control over the livelihood of their chelas and the chela's status, acceptance among their peers, and ease of daily living being largely influenced by the guru's discretion led to the formation of this power structure³¹. The legitimacy attained by a hijra with a guru, the lack thereof without one, as well as the guru's impression of the chela, then seem to be essential to the determination of how much share in property a chela has right over. If the guru is dissatisfied with their chela, they can subject them to ostracization to the extent of stripping them of inheritance. By observing such a power structure and the nature of duties and responsibilities towards one another, scholars have speculated that this guru-chela bond is a hierarchal, obligatory relationship similar to traditional patriarchal relationships in normative families³². This presents the guru's power over Chela's life and how their whims and fancies affect Chela's rights. As previously pointed out in this paper, access to property alleviates one's social standing in society³³. The question remains whether such a relationship predicated on a bond between two hijras with a power dynamic can constitute a guarantee of a right to inheritance to transgender individuals and how these social hierarchies affect the law.

6. CONCLUSION

The transgender individuals' lack of right to inheritance oscillates between the lacunae in law for granting them a guaranteed right to inheritance in their natal family's ancestral property and the subjectiveness of the customs of the community. There cannot be an assertion of what is better, the customs or the law. However, in order to solidify a transgender individual's right to inheritance in India, there exists a need for both representation under the law as well as

²⁹ REDDY, *supra* note 16, at 159

³⁰ REDDY, *supra* note 16, at 157

³¹ REDDY, *supra* note 16, at 158

³² REDDY, *supra* note 16, at 164

³³ Gulati & Anand, *supra* note 1, at 4

further recognition of the community's customs regarding inheritance. To recognise the guru-chela relationship for inheritance laws, the recognition of the work done to earn their livings must also be recognised³⁴. The assertion of this paper remains that though there exists no guarantee in legislation for inheritance for Hijras, does there exist a guarantee within their customs that is contingent on their behaviour, social duties, and the viability of their guru-chela relationship?

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³⁴ BOSE, *supra* note 25, at 201