

# **Inheritance rights of transgender persons in India**

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## Abstract

This paper studies the inheritance rights of transgender persons in India. Using commercial databases (e.g., SCC and Manupatra), it examines the legal framework for inheritance and looks at all court decisions since 1950 that mention the term transgender. Inheritance laws are based on a binary notion of gender. They do not envisage transgender persons or a change in gender identity. This means that individuals must choose between conforming to their *assigned gender* or not availing their rights. Moreover, successors are often difficult to identify as individuals may lack documentation, could not marry, or cannot prove adoption. The Indian Constitution bars any discrimination based on *sex* and *gender*. Laws should not discriminate against transgender persons only because of their identities. Though courts attempt to address these challenges, they leave it to their subjective satisfaction on when to secure the rights of transgender persons. These are important issues that must be addressed through changes in the law.<sup>1</sup>

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<sup>1</sup>While we attempt to incorporate the Supreme Court's interpretation of transgender persons and supplement it with that of leading commentators on gender rights, we recognise that gender is a growing spectrum. Our understanding may be flawed. Comments and corrections are welcome.

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# 1 Introduction

Over the last decade, India has seen an increasing institutional recognition of transgender persons. This is reflected both in public policy and legal decisions. In 2011, the national census for the first time allowed persons to identify as *others* - leading to approximately five hundred thousand individuals availing the choice.<sup>2</sup> However, transgender persons continue to face discrimination.<sup>3</sup> One reason for this is the lack of legal recognition. It was only in 2014 that the Supreme Court of India first directed the constitutional recognition of a third gender.<sup>4</sup> The petitioners claimed deprivation of rights ordinarily available to citizens (such as the right to access healthcare and employment, and the right to own property). The court acknowledged the hurdles that transgender persons face in exercising inheritance rights. It attributed this to (i) rights based on a binary notion of gender, and (ii) difficulty in identifying successors.<sup>5</sup> Although the judgment reflects a progressive understanding of gender identities, India still needs to tackle several challenges. For example, Dutta (2014) highlights the lack of representation and understanding of distinctive Indian and South Asian realities of marginalised communities, including but not limited to the well-known *hijra* community.<sup>6</sup> This was perhaps at the forefront in 2005 when Ajay Mafatlal, the first person in India to undergo a sex reassignment surgery, was accused of doing so for inheritance.<sup>7</sup>

Literature regarding transgender persons in India focuses on three main themes: (i) the

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<sup>2</sup>This number is likely to be an underestimate. As per the census, the State of Kerala had approximately four thousand transgender persons. However, according to the Kerala Government, the State had nearly twenty-five thousand transgender persons in 2015. Office of the Registrar General & Census Commissioner, 2011 Census Data (2011); Government of Kerala, Social Justice Department, *State Policy for Transgenders in Kerala* (2015).

<sup>3</sup>Examples of discrimination include expulsion from homes, bullying in schools, denial of employment opportunities, sexual violence, wrongful confinement, and the use of corrective therapy. Ministry of Social Justice and Empowerment, Report of the Expert Committee on the Issues Relating to Transgender Persons (21 January 2014); Bhumika Rajdev, “For Transgender Persons, Discrimination Begins in Schools” [2020] *The Wire*; International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India* (Geneva, 2019).

<sup>4</sup>*National Legal Services Authority v Union of India* (2014) 5 SCC 438, The National Legal Services Authority is a statutory body that aims to provide “free and competent legal services to the weaker sections of the society”.

<sup>5</sup>p 63 and 116, *ibid*.

<sup>6</sup>Aniruddha Dutta, “Contradictory tendencies: The Supreme Court’s NALSA judgment on transgender recognition and rights” (2014) 5 *Journal of Indian Law and Society* 225; Oishik Sircar, “New queer politics in the new India: Notes on failure and stuckness in a negative moment” [2017] Harvard Law School, Harvard University; Saatvika Rai and Josephine Kipgen, “Gender Nonconformance in Non-Western Contexts: Hijras in India” in *Oxford Research Encyclopaedia of Politics* (2020).

<sup>7</sup>The accusation was levelled by his brother (Atulya Mafatlal) based on the *then* differential inheritance rights of brothers and sisters. PTI, Sex change not for property: Mafatlal (*Economic Times* 8 November 2005).

struggle for identity and legal sanction,<sup>8</sup> (ii) health and social issues,<sup>9</sup> and (iii) ethnographic accounts of lived experiences.<sup>10</sup> However, civil rights garner little attention.<sup>11</sup> Though this extends to education and employment, this paper focuses on the right to inheritance. Immovable property is the largest asset holding of individuals in India.<sup>12</sup> Access to property is widely understood to alleviate the social standing of persons.<sup>13</sup> This is particularly important since transgender persons have low income, savings, and lack access to housing.<sup>14</sup> If they cannot access property, it will cater to continuing marginalisation. While some attention has been paid to discrimination faced by transgender persons while seeking rental housing,<sup>15</sup> a

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<sup>8</sup>Siddharth Narrain, “Crystallising Queer Politics-The Naz Foundation Case and Its Implications for India’s Transgender Communities” (2009) 2 NUJS L Rev 455; Paul Horton, Helle Rydstrøm, and Maria Tonini, “Contesting heteronormativity: The fight for lesbian, gay, bisexual and transgender recognition in India and Vietnam” (2015) 17(9) Culture, Health & Sexuality 1059; Jennifer Ung Loh, “Transgender identity, sexual versus gender ‘rights’ and the tools of the Indian state” (2018) 119(1) Feminist Review 39.

<sup>9</sup>Sushant Sahastrabuddhe and others, “Sexually transmitted infections and risk behaviours among transgender persons (Hijras) of Pune, India” (2012) 59(1) JAIDS Journal of Acquired Immune Deficiency Syndromes 72; HG Virupaksha, Daliboyina Muralidhar, and Jayashree Ramakrishna, “Suicide and suicidal behaviour among transgender persons” (2016) 38(6) Indian Journal of Psychological Medicine 505; Venkatesan Chakrapani and others, “Syndemics of depression, alcohol use, and victimisation, and their association with HIV-related sexual risk among men who have sex with men and transgender women in India” (2017) 12(2) Global public health 250.

<sup>10</sup>Soumi Dey, “Being A ‘Kothi’: An Ethnographic Interrogation with A Male Transgender in Kolkata, India” (2013) 11(6) IOSR Journal of Humanities and Social Science 51; Sumit Dutta, Shamshad Khan, and Robert Lorway, “Following the divine: an ethnographic study of structural violence among transgender jogappas in South India” (2019) 21(11) Culture, Health & Sexuality 1240.

<sup>11</sup>*Civil rights* have different connotations across the world. Thus, this paper relies on the ambit accepted by the Supreme Court of India and the United Nations Development Programme on civil rights. Here, among others, civil rights include access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption. Venkatesan Chakrapani and others, “Hijras/transgender women in India: HIV, human rights and social exclusion” [2010] United Nations Development Programme (UNDP), India; *NALSA v Union of India* (n 4).

<sup>12</sup>There are multiple positions concerning the exact proportion that immovable property occupies in Indian household finance. However, it is understood to be the largest constituent. As per Badarinza et al., the average household holds 77% of its total assets in real estate (i.e. residential buildings, buildings used for farm and non-farm activities, constructions such as recreational facilities, and rural and urban land). This is 84% as per the Reserve Bank of India Household Finance Committee. Cristian Badarinza, Vimal Balasubramaniam, and Tarun Ramadorai, “The Indian household finance landscape” [2016] Available at SSRN 2797680; Household Finance Committee, Reserve Bank of India, *Indian Household Finance* (2017).

<sup>13</sup>See Klaus Deininger, Songqing Jin, and Hari K Nagarajan, *Land reforms, poverty reduction, and economic growth: evidence from India* (The World Bank 2008); Ruth Meinzen-Dick, Patricia Kameri-Mbote, and Helen Markelova, “Property rights for poverty reduction?” (2009) 10017 New York, NY 86; Ruth Meinzen-Dick and others, “Women’s land rights as a pathway to poverty reduction: Framework and review of available evidence” (2019) 172 Agricultural Systems 72.

<sup>14</sup>As per the National Human Rights Commission, the average monthly income is approximately ₹11000 (US \$ 148) with savings close to ₹5600 (US \$ 75). Moreover, 30% of persons do not have access to any housing. Notably, across nine public sector banks (that account for 60% of the market share), four hundred thousand bank accounts belong to transgender persons. This is as per responses to a right to information application filed by the authors. Jacob John, *Study on Human Rights of Transgender as a Third Gender* (National Human Rights Commission, 2017).

<sup>15</sup>Reports highlight that landlords often deny renting property to LGBTQ persons or discriminate against them, resulting in forced evictions. Staff reporter, “No house for rent for transgenders” [2016] The Hindu; International Commission of Jurists (n 3).

majority of property in India is acquired through inheritance.<sup>16</sup> The law, in this regard, has been of little assistance. Although the 2019 *Transgender Persons (Protection of Rights) Act* grants protection against discrimination regarding residence, it is silent about inheritance rights.<sup>17</sup>

This paper supports the finding that inheritance laws are based on a binary notion of gender.<sup>18</sup> Hence, they do not envisage transgender persons or a change in gender identity and are at odds with the society they govern. This means that individuals must choose between conforming to their *assigned gender* or not availing their rights. Moreover, successors are often difficult to identify as transgender persons may lack documentation, could not marry, or cannot prove adoption.<sup>19</sup> As an example, only 8% of transgender persons have an Aadhar Card or a voter's ID that recognises their perceived gender.<sup>20</sup> Though challenges by themselves, this also affects the inheritance rights of transgender persons by denying them the guarantees ordinarily available to citizens. The Indian Constitution bars any discrimination based on *sex* and *gender*. Laws should not discriminate against transgender persons only because of their identities. Though courts attempt to address some of these concerns, they leave it to their subjective satisfaction on when to secure the rights of transgender persons. Courts also require transgender persons to conform to binary genders to seek legal protection. This is because litigants must prove that they - as an individual or collective - fit within an already protected identity. These challenges are rooted in gender-based rights that fail to guarantee equal protection.<sup>21</sup>

Notably, other countries and international bodies acknowledge these challenges. Not only should India learn from country case studies, but it is also obligated to apply the rules of international law if they are not in conflict with domestic legislation. It should amend legislation to include gender-neutral provisions, guarantee identity documents to transgender persons, and include inheritance as prohibited field of discrimination under the *Transgen-*

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<sup>16</sup>Close to 85% of all household land is acquired through inheritance Lahoti, Suchitra, Swaminathan, and others, "Not in her name: Women's Property Ownership in India" (2016) 51(5) Economic and Political Weekly 17; Carmen Diana Deere, Abena D Oduro, Hema Swaminathan, and others, "Property rights and the gender distribution of wealth in Ecuador, Ghana and India" (2013) 11(2) The Journal of Economic Inequality 249.

<sup>17</sup>§ 3 (Prohibition against discrimination), Transgender Persons (Protection of Rights) Act, 40 of 2019.

<sup>18</sup>Given India's cultural diversity, inheritance rights are guided by both customary practices and codified laws. This paper focuses on the latter. Without denying the importance of the customary practices, it remains concerned with the stated aspirations of the law. How these aspirations interact with traditions and are then realised is an important but distinct inquiry.

<sup>19</sup>It is well known that birth parents who cannot take care of their children leave them in the care of transgender persons. Mini Muringatheri, "Transgenders raise the adoption question" [2020] The Hindu.

<sup>20</sup>The proportion is measured based on persons who identified as *others* in the 2011 census i.e approximately five hundred thousand individuals. Ministry of Communication and Information Technology, Government of India, Unstarred Question 1492 (6 May 2016); PTI, Others voters increase by 15,306 in 5 yrs; activists blame paperwork, insensitive officials (Economic Times 17 March 2019).

<sup>21</sup>Though this paper focuses on transgender rights, these challenges may affect women and other gender minorities. Bina Agarwal, *A Field of One's Own* (1994); Shipra Deo and Akansha Dubey, "Gender Inequality in Inheritance Laws: The Case of Agricultural Land in India" [2019] landesa; Devendra Damle, Siddharth Srivastava, Tushar Anand, and others, "Gender discrimination in devolution of property under Hindu Succession Act, 1956" [2020] NIPFP Working Paper No 305.

*der Persons (Protection of Rights) Act*. In the same spirit, materialising inheritance rights requires guaranteeing freedoms (such as marriage and adoption) ordinarily available to citizens. This paper fills a gap in existing literature regarding transgender persons and civil rights. It describes the legal developments regarding transgender inheritance rights (section 2). Then, section 3 focuses on the challenges in the current regime based on gendered laws and difficulties in identifying successors. This is followed by examining the role of courts. To understand the position of courts, section 4 shows the results of a manual study of 129 judgments i.e., every decision since 1950 that mentioned the term *transgender*. Section 5 compares the Indian framework with other countries and international rules to understand how they deal with similar challenges. Finally, section 6 discusses the possible reforms in India and section 7 concludes the paper.

## 2 Rights of transgender persons in India

Several scholars and judges have written about the acceptance of transgender persons in ancient India.<sup>22</sup> This position changed during India’s colonial rule.<sup>23</sup> The *Criminal Tribes Act* of 1871 labelled *eunuchs* as criminals, mandated registration, and granted widespread powers to arrest individuals under the apprehension of *promiscuous activities*.<sup>24</sup> It also forbade eunuchs from willing away their property.<sup>25</sup> The criminalisation was rooted in British norms and a complex set of local factors, including elite Indian attitudes.<sup>26</sup> Though the Act was repealed in 1952, its remnants, such as the 2011 amendment to the Karnataka Police Act, continued in Indian legislation. The amendment intended to *control undesirable activities of eunuchs* and required mandatory registration.<sup>27</sup>

However, there has been some progress regarding the rights of transgender persons. In 2011, after petitions to several government bodies, the national census for the first time allowed

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<sup>22</sup>The *hijra* community, with its historically continuous trajectory, is documented to have held positions in royal courts till at least the seventeenth century. Moreover, as the Supreme Court notes, transgender communities also trace their origins to foundational myths such as the Ramayana and the Mahabharata Laurence W Preston, “A right to exist: Eunuchs and the state in nineteenth-century India” (1987) 21(2) *Modern Asian Studies* 371; Gayatri Reddy, *With respect to sex: Negotiating hijra identity in South India* (Yoda Press 2006); Aniruddha Dutta, “An epistemology of collusion: Hijras, kothis and the historical (dis) continuity of gender/sexual identities in eastern India” (2012) 24(3) *Gender & History* 825; *NALSA v Union of India* (n 4).

<sup>23</sup>For example, the colonial government aimed to erase *hijras* as a visible socio-cultural category and gender identity in the public space. Jessica Hinchy, “Obscenity, moral contagion and masculinity: Hijras in public space in colonial North India” (2014) 38(2) *Asian Studies Review* 274.

<sup>24</sup>Chapter 2 (Eunuchs), *Criminal Tribes Act*, 27 of 1871.

<sup>25</sup>The local government could, at any point, mandate eunuchs to provide details of their property. This provision applied to both movable and immovable property. Kunjana Mittal and Seema Garg, “Transgender in India: New developments and enactments” (2015) 2(11) *International Journal of Multidisciplinary Research and Development* 402.

<sup>26</sup>For example, apart from discussing colonial perception, Hinchy discusses the dominant depiction of *hijras* in the north Indian public sphere. See chap 3, Jessica Hinchy, *Governing gender and sexuality in colonial India: the Hijra, c 1850–1900* (Cambridge University Press 2019).

<sup>27</sup>§ 36 A (power to regulate eunuchs), *Karnataka Police Act*, 4 of 1963, notably, after protests and litigation, the State government removed overt references to eunuchs in 2016.

persons to identify as *others* - leading to approximately five hundred thousand persons availing the choice.<sup>28</sup> Two years later, the government constituted an Expert Committee to examine issues related to transgender persons.<sup>29</sup> The report gave recommendations regarding increased access to education, healthcare, and employment.<sup>30</sup> In 2014, in a watershed moment for transgender rights, the Supreme Court of India passed its judgment in *NALSA v Union of India*, officially recognising a third gender and directing the government to implement welfare policies.<sup>31</sup> After the judgment, several State governments passed transgender policies to secure a wide array of civil rights. Lastly, the *Transgender Persons (Protection of Rights) Act* was passed in 2019. It aims to protect the rights of transgender persons and encourage welfare measures. Though most of these developments did not focus on property rights, it is worth showing them credence and understanding transgender rights, including any reference to inheritance and related rights.

## 2.1 NALSA v Union of India

After several reports regarding the discrimination faced by transgender persons, in 2012, the National Legal Services Authority of India (NALSA) filed a petition before the Supreme Court to address these concerns.<sup>32</sup> The petitioners claimed deprivation of rights ordinarily available to citizens (such as the right to vote and participate in elections, access healthcare and employment, and *own property*).<sup>33</sup>

A two-judge bench of Justice Radhakrishnan and Justice (Dr) Sikri pronounced its judgment in April 2014. While dealing with whether persons had the right to be recognised as per their perceived gender, it expanded the notion of *sex* under the Constitution.<sup>34</sup> Now, any prohibited discrimination based on sex under Articles 15 and 16 would include discrimination based on gender identity.<sup>35</sup> Transgender persons were to be equal citizens with full protection of all fundamental rights. It held that one's gender expression would be protected under Article 19(1)(a) of the Constitution as it reflects the innate character and identity of persons.<sup>36</sup> Lastly, the court observed that provisions in the Constitution are gender-neutral

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<sup>28</sup>An NGO had petitioned all concerned offices, which resulted in the Technical Advisory Committee recommending the inclusion. For a history on the reasons for including the option, see PTI, "Transgenders to be counted separate in Census" [2010] Indian Express.

<sup>29</sup>Report of the Expert Committee on the Issues Relating to Transgender Persons (n 3).

<sup>30</sup>See chap 6, 8, and 12, *ibid*.

<sup>31</sup>p 129, *NALSA v Union of India* (n 4).

<sup>32</sup>In particular, the judgment relied on Serena Nanda, *Neither man nor woman: The hijras of India* (Wadsworth Publication 1990); Chakrapani and others (n 11); T Laxmi, S Gauri, K Payal, and others, "Transgender-hijra strategy" [2011] India: NACO, NACP IV working groups Hijras TG 1.

<sup>33</sup>*NALSA v Union of India*, Written Submission by Anand Grover, Sr Advocate for the intervenor, Laxmi Narayan Tripathi (Supreme Court of India 2013).

<sup>34</sup>See the concurring opinion of Dr Sikri, J for a discussion on the questions before the court. See also, Tarunabh Khaitan, "Reading Swaraj into Article 15: a new deal for all minorities" (2009) 2 NUJS L Rev 419; Bret Boyce, "Sexuality and gender identity under the Constitution of India" (2015) 18 J Gender Race & Just 1.

<sup>35</sup>Art 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) and Art 16 (equality of opportunity in matters of public employment), Constitution of India 1950.

<sup>36</sup>Art 19 (protection of certain rights regarding freedom of speech, etc), *ibid*.



and include transgender persons within the scope of protection.<sup>37</sup> They are not limited to strict interpretations of the male or female gender. These findings were reflected in the slew of remedies granted to the petitioners.<sup>38</sup> The court directed the Central and State governments to comply with specific (provide healthcare centres), broad (create public awareness to ensure social inclusion) and imprecise (address problems faced by transgender persons and ensure a respectful place in social and cultural life) orders.<sup>39</sup>

Though the question before the court did not require it to evaluate inheritance and property rights, it acknowledged the hurdles that transgender persons face in exercising these rights. It attributed this to two reasons:

**Gendered Laws:** Indian law, on the whole, only recognises the paradigm of binary genders of male and female, based on a person’s sex assigned by birth, including the law relating to marriage, *adoption, inheritance, succession*...Non-recognition of Hijras/-Transgender’s identity in various legislations denies them equal protection of the law, and they face widespread discrimination.<sup>40</sup>

**Identification:** Gender identification becomes an essential component for enjoying civil rights by this community. It is only [then] ...that many rights attached to the sexual recognition as ‘third gender’ would be available to this community more meaningfully viz. the right to vote, *the right to own property*, the right to marry, [and] the right to claim a formal identity...<sup>41</sup>

Unsurprisingly, the judgment is not perfect and often vague in understanding gender.<sup>42</sup> At instances, the court assumes that transgender persons necessarily have a *genital anatomy problem*.<sup>43</sup> Though the court’s primary responsibility is to interpret the Constitution, which it admittedly does well, it often fails to be an instructive judicial authority. The judgment gives contradictory and imprecise directions that cannot be implemented – passing the onus for recognition to governments and leaving scope for arbitrariness.<sup>44</sup> However, it is the only acknowledgement by a central authority of the poor property rights of transgender persons.

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<sup>37</sup>p 85, *NALSA v Union of India* (n 4).

<sup>38</sup>pp 127-129, *ibid*.

<sup>39</sup>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.

<sup>40</sup>p 63, *NALSA v Union of India* (n 4).

<sup>41</sup>p 116, *ibid*.

<sup>42</sup>For example, Jain shows that the judgment is both over- and under-inclusive. While it fails to mention female to male transgender persons, at instances, the court states that *even gay, lesbian, bisexual are included by the descriptor ‘transgender’*. See p 12, Dipika Jain and Kimberly M Rhoten, “Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism” (2020) 26(1) Journal of Human Values 30.

<sup>43</sup>For precise quotations and their implications, see Gee Imaan Semmalar, “Gender outlawed: The Supreme Court judgment on third gender and its implications” (2014) 19 Round Table India 24.

<sup>44</sup>Evidence suggests the directives were unevenly implemented due to the gap between the judgment and its implementation on the ground. Dipika Jain and others, “Bureaucratization of transgender rights: Perspectives from the ground” (2018) 14 Socio-Legal Rev 98.

## 2.2 Transgender Persons (Protection of Rights) Act

After the decision in NALSA, the Transgender Persons (Protection of Rights) Bill was introduced in Parliament in 2016.<sup>45</sup> However, it lapsed with the then Parliament’s dissolution, subsequently being reintroduced and passed in 2019.<sup>46</sup> Given its proximity to the Supreme Court’s decision, § 2 incorporates the following multi-identity definition:

(k) **transgender person** means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani*, and *jogta*.

The Act prohibits discrimination against transgender persons, including unfair treatment or denial of service concerning: (a) education; (b) employment; and the ... (g) *right to reside, purchase, rent, or otherwise occupy any property*.<sup>47</sup> However, the Act is silent whether the definition clause impacts other legislation and does not have anti-discrimination provisions concerning other property right components (including inheritance). For instance, how should transmen and women be treated under legislation that only allude to *men* and *women*? Similarly, what is the treatment of persons who do not identify with either gender? Moreover, though individuals cannot discriminate against transgender persons concerning rent etc., there is no clarity on whether one can inherit or bequeath property. The Rules under the Act are similarly silent about these concerns and only suggest welfare schemes for affordable housing.<sup>48</sup>

Moreover, the Act gives recognition to transgender identity, directs the enactment of welfare measures, and imposes obligations on various establishments.<sup>49</sup> However, it has not been without criticism.<sup>50</sup> Individuals must apply for a *transgender certificate*, without which they cannot avail any protection under the Act.<sup>51</sup> If individuals undergo medical intervention to change their gender, they require a revised certificate issued by the District Magistrate, who may examine the application’s correctness.<sup>52</sup> A person also has to prove residence within the

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<sup>45</sup>Transgender Persons (Protection of Rights) Bill, 210 of 2016.

<sup>46</sup>Transgender Persons (Protection of Rights) Bill, 169 of 2019.

<sup>47</sup>§ 3, Transgender Persons (Protection of Rights) Act.

<sup>48</sup>As per the rules, the government must formulate welfare schemes that are transgender sensitive, non-stigmatising, and non-discriminatory to transgender persons. See Annexure II, paragraph 3, Transgender Persons (Protection of Rights) Rules 2020.

<sup>49</sup>See Chapters III, IV, and V, respectively. Transgender Persons (Protection of Rights) Act.

<sup>50</sup>Niha Masih, “A bill meant to protect India’s transgender community instead leaves them angry and aggrieved” [2019] *The Washington Post*; Akshat Agarwal, “Make legal frameworks inclusive” [2019] *The Pioneer*.

<sup>51</sup>See rule 3 (application for issue of certificate of identity under section 6 or section 7) Transgender Persons (Protection of Rights) Rules 2020; Gautam Bhatia, “The Rajya Sabha must amend the Transgender Persons Bill” [2019] *The Hindustan Times*.

<sup>52</sup>An application for a revised certificate should be supported by an affirmation from the chief medical officer of the institution in which the person underwent medical intervention. See rule 6 (procedure for issue of a certificate of identity for change of gender) Transgender Persons (Protection of Rights) Rules 2020; Shruti Jain, “Pride Month 2020: Evaluating the Transgender Persons Act, 2019” [2020] *Observer Research*

Magistrate’s jurisdiction, a task which may be difficult for transgender persons who may not possess identification documents and often do not have a permanent residence.<sup>53</sup> The law exacerbates discretion regarding determining a person’s gender and goes against the right of self-determination recognised in *NALSA v Union of India*.<sup>54</sup>

## 2.3 State laws

The *Transgender Persons (Protection of Rights) Act* is not the only law that governs the rights of transgender persons in India. Under the VIIth Schedule to the Constitution, subjects are divided among Central and State legislatures.<sup>55</sup> *Transfer of property* is a concurrent subject.<sup>56</sup> This means that both the Central and State governments can regulate transfer. However, if both enact legislation, the Central law precedes State provisions. Moreover, State governments also have exclusive powers to legislate the transfer of *agricultural land*.<sup>57</sup> After the decision in *NALSA v Union of India*, several States exercised these powers and took measures to secure the rights of transgender persons. In particular, Uttar Pradesh enacted legislation guaranteeing inheritance rights in agricultural property.<sup>58</sup> On the other hand, Assam, Madhya Pradesh, Karnataka, Kerala, Odisha, and Tamil Nadu released *transgender policies* to secure a wide array of civil rights.<sup>59</sup> Though the latter are not binding legislation, they reflect the perspective of the governments. However, apart from Uttar Pradesh and Madhya Pradesh, none of the changes address the right to transfer or receive property, including inheritance.<sup>60</sup>

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Foundation Young Voices.

<sup>53</sup>As mentioned earlier, 30% of transgender persons do not have access to any housing. Similarly, the 2013 Expert Committee states that “*the main problems ...faced by the transgender community are discrimination, [and] ...homelessness*”. Jaime M Grant and others, “Injustice at every turn” [2011] A report of the National Transgender Discrimination Survey; Report of the Expert Committee on the Issues Relating to Transgender Persons (n 3); Rozelle Laha, Hunting for a home not easy for transgenders (Hindustan Times 14 September 2015); John (n 14).

<sup>54</sup>The Supreme Court has issued notice in three petitions challenging the constitutional validity of the Act as being violative of the right to life, privacy and equality. The petitioners have also prayed for the court to direct implementation of the decision in *NALSA v Union of India*. *Swati Bidhan Baruah v Union of India* Writ Petition (C) 51 of 2020; *Rachana Mudraboyina v Union of India* Writ Petition (C) 281 of 2020; *Grace Banu Ganesan v Union of India* Writ Petition (C) 406 of 2020; Supreme Court Observer, Challenge to Transgender Persons Act (2020).

<sup>55</sup>VIIth Schedule (Subject matter of laws made by Parliament and by the Legislatures of States), Constitution of India 1950.

<sup>56</sup>VIIth Schedule, List III, Entry 6, *ibid*.

<sup>57</sup>VIIth Schedule, List II, Entry 18, *ibid*.

<sup>58</sup>Uttar Pradesh Revenue Code (Amendment) Act, 28 of 2020.

<sup>59</sup>Government of Assam, Social Welfare Department, *State Policy for Transgenders* (2019); Atal Bihari Vajpayee Institute of Good Governance and Policy Analysis, *Garima: State Transgender Policy, Madhya Pradesh* (2021); Government of Karnataka, *Karnataka State Policy on Transgenders* (2017); *State Policy for Transgenders in Kerala* (n 2); Government of Odisha, SSEPD Department, *Sweekruti: A Scheme for Promotion of Transgender Equality & Justice* (2017); V Chakrapani, “The case of Tamil Nadu transgender welfare board-insights for developing practical models of social protection programs for transgender people in India: Policy brief” [2012] UNDP India.

<sup>60</sup>Although Tamil Nadu offered free land pattas (deeds) for greater access to housing schemes, the policy was silent on inheritance and transfer of property rights. *ibid*.

In Uttar Pradesh, the State Law Commission conducted a study concerning *Transgender Rights in Agricultural Land*.<sup>61</sup> It relied on the Supreme Court's order to guarantee civil rights to transgender persons. Despite a large population of transgender persons, the State had no provisions to facilitate inheritance. Thus, the Law Commission recommended legislative and administrative changes to recognise the right to acquire (including through inheritance) property. Since Agricultural Land is a State subject, in 2020, the government amended the Land Revenue Code and included transgender persons in inheritance provisions.<sup>62</sup> In particular, it made amendments regarding the definition of a *person*, the allotment of abadi sites, and the order of succession.<sup>63</sup> Madhya Pradesh also recognised the inability of individuals to exercise property rights. It released its policy in early 2021, which is meant as a model reference for the State government.<sup>64</sup> Notably, after stakeholder discussions, the policy emphasises that individuals are unable to: (i) rent houses or find accommodation, (ii) adopt children, and (iii) obtain identity documents or change their gender on existing documents.<sup>65</sup>

1. However, due to their gender identity, they find it difficult to get a house for rent... Hence the housing problem is a major challenge. All aspects of it should be taken into account in the policy.
2. Transgender persons should be empowered to adopt children by making necessary changes in the guidelines to raise children as single parents.
3. They should get all the basic identity documents such as a birth certificate, voter identity card, Aadhaar card, PAN card, driving license, ration card, passport etc.

(translation by authors)

Though States have started adopting transgender policies, they are not binding and only reflect the vision of the government.<sup>66</sup> Most policies are also silent on how transgender persons should be treated under existing law. Moreover, apart from the ability to rent, the Madhya Pradesh policy does not address property rights, including but not limited to inheritance. The effect of these policies will be seen if and when State governments make corresponding changes in the legislative framework.

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<sup>61</sup>In the prelude to the report - the chairperson notes that since transgender persons *have been deprived of the right of succession in the property*, there is a need to study and address the concern (translation by authors). Uttar Pradesh Law Commission, *Transgender Rights in Agricultural Land* (Report No 6, 2019).

<sup>62</sup>Uttar Pradesh Revenue Code (Amendment) Act.

<sup>63</sup>(i) a person now includes a transgender person - which uses the same definition as the 2019 central Act; (ii) abadi sites are rural land used for a residential purpose - transgender persons have been included in the order of preference in which abadi sites should be allotted; (iii) a *transgender issue* (child) has been added to the list of inheritors for male and female persons.

<sup>64</sup>Separately, the policy aims to provide employment opportunities, sensitise officials, and assist in medical procedures. *Garima: State Transgender Policy, Madhya Pradesh* (n 59).

<sup>65</sup>p 9, *ibid*.

<sup>66</sup>Guidelines are neither statutory instruments nor issued under explicit Constitutional provisions. They are thus not laws. Compliance cannot be enforced through courts, and the government may depart when warranted. This is because such guidelines only have an advisory role to play, and non-adherence is understood to be permissible. Seema Jhingan and Neha Yadav, "India: Enforceability Of Government Directions, Policies, Guidelines And Contracts" [2018] Mondaq.

### 3 Challenges in the law

As the Supreme Court observed, the current regime restricts the ability of transgender persons to acquire property. In India, most property is acquired through inheritance. For example, Lahoti, Suchitra, Swaminathan, and others (2016) note that almost 85% of land in rural areas is acquired through inheritance.<sup>67</sup> We thus focus on challenges faced by transgender persons in inheriting property. These arise primarily for two reasons: (i) inheritance laws define rights based on a binary notion of gender, and (ii) difficulty in identifying successors. To better understand the consequences of these challenges, we use hypothetical situations inspired by the case of Ajay Mafatlal. However, we make modifications in the situation depending on the challenge faced in inheritance. This is because there is no uniform route of discrimination against transgender persons. For example, while some instances may require the determination of the gender of the deceased person, others may require understanding what relations could the person enter into. Notably, these situations do not capture all transgender experiences. Other instances may include distinctive Indian and South Asian realities of marginalised communities, including but not limited to the well-known *hijra* community. They are only meant as an example to demonstrate the consequences of the challenges in the Indian inheritance scheme.

#### 3.1 Gendered inheritance laws

India has a long history of gendered laws. This is not restricted to laws dealing with property. It permeates across criminal (e.g., the Indian Penal Code and the Code of Criminal Procedure) and labour (e.g., the Workmen’s Compensation Act and the Factories Act) laws.<sup>68</sup> Perhaps this is most evident in laws such as the Hindu Succession Act and the Hindu Marriage Act, which govern personal rights.<sup>69</sup> Table 1 shows the count of gendered sections in an indicative list of Indian legislations. Not all of these result in varying treatment for individuals across the gender spectrum. Notably, § 13 of the *General Clauses Act* prescribes that all words importing the *masculine gender* shall be taken to include *females*.<sup>70</sup> However, the repeated inclusion of such terms reflects inherent biases in drafting legislation. As is evident, § 13 does not include transgender persons and is restricted to *males* and *females*. Besides, it only applies if the context does not exclude its application and is not ubiquitously applicable

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<sup>67</sup>Similarly, a large share of the dwellings in Karnataka, 57 %, are also acquired through inheritance. If the house itself is not inherited, the plot upon which the dwelling is built was likely inherited. Lahoti, Suchitra, Swaminathan, and others (n 16); Deere, Oduro, Swaminathan, and others (n 16).

<sup>68</sup>These laws usually include what are meant to be beneficial provisions for women. Indian Penal Code, 45 of 1860; Code of Criminal Procedure, 2 of 1974; Workmen’s compensation Act, 8 of 1923; Factories Act, 63 of 1948.

<sup>69</sup>This may be because such laws are often based on religious practices. However, the origins of gendered terms in legislation are beyond the scope of this paper. For a detailed analysis, see Archana Parashar, “Gender inequality and religious personal laws in India” (2008) 14(2) *The Brown Journal of World Affairs* 103, As per Parashar, though religious personal laws allow for inclusiveness in religion, their history in India shows that they have been used selectively as a tool of benefiting certain genders.

<sup>70</sup>The Act aims to provide uniformity of expression in Central Acts by defining terms in common use. A similar provision is included in § 8 of the *Indian Penal Code*. Moreover, as an example, though the *Transfer of Property Act* includes gendered terms, it does not affect the ability of individuals to transfer property via wills, etc. *General Clauses Act*, 10 of 1897.

to all legislation.<sup>71</sup>

### Gendered laws

In this paper, gendered laws are those that only recognise the paradigm of male and female binary genders. Among other terms to this effect, they use binary pronouns such as *he* and *she*. The laws do not envisage transgender persons - who either do not recognise as per their assigned gender, or as neither binary gender.

Apart from using gendered terms, legislations also differ in the treatment across the gender spectrum. As this sub-section will show, there are different rules of inheritance for men and women. Not only does this exclude transgender persons, but it also leads to confusion about how they will inherit property if included. This is not a new challenge and is acknowledged by several government reports such as the *174th Report of Law Commission of India*, the *207th Report of Law Commission of India*, and the *Consultation Paper on Reform of Family Law*.<sup>72</sup> Similarly, Agarwal (1994) and Deo and Dubey (2019) note the effect of gendered provisions on excluding women from inheritance laws regarding agricultural property.<sup>73</sup> This is especially significant since the Constitution bars any discrimination based on religion, race, caste, *sex*, or birthplace. This implies that the State cannot make laws that treat people differently based on the aforementioned distinctions (except in particular circumstances).<sup>74</sup> Since gender has been read within *sex* in Article 15,<sup>75</sup> laws should not discriminate against transgender persons only because of their identities.<sup>76</sup>

#### 3.1.1 Hindu Succession Act

The *Hindu Succession Act* governs the rights of Hindus, Sikhs, Buddhists, and Jains.<sup>77</sup> It provides detailed rules regarding succession.<sup>78</sup> However, the Act does not envisage transgender persons within its scheme. This is evident through the definition clause, which prescribes

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<sup>71</sup>§ 2 (definitions), the definitions only apply to other laws, *unless there is anything repugnant in the subject or context*. General Clauses Act.

<sup>72</sup>For example, the *174th Report of Law Commission of India* in 2000 states that *legislation that on the face of it discriminates between a male and a female must be made gender neutral*. Law Commission of India, *Property Rights of Women: Proposed Reforms under the Hindu Law* (Report No 174, 2000); Law Commission of India, *Proposal to amend Section 15 of the Hindu Succession Act, 1956 in case a female dies intestate leaving her self-acquired property with no heirs* (Report No 207, 2008); Law Commission of India, *Consultation Paper on Reform of Family Law* (2018).

<sup>73</sup>For example, women's legal rights in agricultural land show a vast disparity by region, especially in relation to the devolution of land deemed to be under tenancy. Agarwal (n 21); Deo and Dubey (n 21).

<sup>74</sup>Clauses (3), (4) and (5) of Article 15 provide exceptions to clause (1). The State may make laws designed to provide special benefits for women, children, and socially and economically backward classes of citizens.

<sup>75</sup>p 75, *NALSA v Union of India* (n 4).

<sup>76</sup>For an analysis of the origin and extant of Article 15, see Hormasji Manekji Seervai, *Constitutional law of India: A critical commentary* (4th edn, NM Tripathi 1997).

<sup>77</sup>§ 2 (application of the Act), Hindu Succession Act, 30 of 1956.

<sup>78</sup>This is largely divided into three components: (i) devolution of interest in coparcenary property - § 6; (ii) general rules of succession in the case of males - § 8; and (iii) General rules of succession in the case of female Hindus - § 8.

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**Table 1** Gendered sections in Indian legislation

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Indian laws have gendered sections which do not accommodate transgender persons. For example, the Indian Succession Act contains 178 sections (45% of the legislation) which have gendered terms.

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<b>Legislation</b>	<b>male*</b>	<b>female*</b>	<b>he**</b>	<b>she**</b>	<b>Total</b>
<b>Property Laws</b>					
Hindu Succession Act	7 (23)	5 (16)	8 (26)	12 (39)	14 (45)
Indian Succession Act	12 (3)	13 (3)	168 (43)	31 (8)	178 (45)
Transfer of Property Act	3 (2)	2 (1)	55 (40)	5 (4)	57 (42)
<b>Criminal Laws</b>					
Indian Penal Code	9 (2)	15 (3)	181 (35)	15 (3)	193 (38)
Code of Criminal Procedure	8 (2)	12 (2)	260 (54)	12 (2)	267 (55)
<b>Labour Laws</b>					
Workmen Compensation Act	-	-	26 (72)	-	26 (72)
Factories Act	6 (5)	7 (6)	45 (38)	2 (2)	48 (40)

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*Source:* Authors' calculations

Brackets represent the number of gendered sections as a percentage of the total sections in the concerned Act.

\**male* and *female* include the count for *husband* and *wife*, respectively.

\*\**he* and *she* include the count for *him* and *her*, respectively.

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that *heirs* are limited to male and female persons. It also defines *agnates* and *cognates*' rights based on a binary notion of gender.

**Agnate:** one person is said to be an agnate of another if the two are related by blood or adoption wholly through *males*.<sup>79</sup>

**Cognate:** one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through *males*.<sup>80</sup>

**Heir:** any person, *male* or *female*, who is entitled to inherit the property of an intestate under this Act.<sup>81</sup>

The Act grants inheritance rights to sons and daughters. It does not envisage transgender persons or a change in gender identity. Moreover, there are specific sections for rules of inheritance for males and females.<sup>82</sup> § 8, which governs devolution of male intestates' property, dictates the priority of inheritance through classes of heirs.<sup>83</sup> Class I heirs include, broadly, the male intestate's mother and lineal descendants. Class II heirs are the father, siblings, lineal descendants of siblings, and the siblings of the male intestate's parents.<sup>84</sup> On the other hand, § 15 (1) provides the rules of inheritance for property belonging to female intestates. It does not organise the heirs by classes. Instead, it explicitly lists the persons who are eligible to inherit the property. The property first devolves to the deceased's children, followed by her husband's heirs.<sup>85</sup>

There is a marked difference in how males and females are treated under the Act. However, there is no clarity on who is included within either of these terms. For example, the Act is silent whether a transgender person who identifies as a male would be entitled to inheritance under § 8. The answer to this question is also not available in the *General Clauses Act*, which provides definitions missing from specific legislation.<sup>86</sup> This challenge can be demonstrated with the following situation:

A person (P) born a female decides to undergo a sex reassignment surgery and identifies as a male. P has two children - a son (S) and a daughter (D) - with a now deceased husband (H). Both S and D are unmarried. P passes away intestate.

The inheritance rights of P's family would depend on whether the latter is perceived as a male or a female (there is no legal situation to identify them as non-binary). In both situations, S and D will equally inherit P's self-acquired property. This is because both § 8 and § 15 bequeath property on the deceased's children. However, if P had not had any children, inheritance will take a different route. If the sex reassignment surgery is recognised, the property will dissolve to his class I heir - his mother. On the other hand, if still perceived

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<sup>79</sup>§ 3 (a), Hindu Succession Act.

<sup>80</sup>§ 3 (c), *ibid*.

<sup>81</sup>§ 3 (f), *ibid*.

<sup>82</sup>Damle, Srivastava, Anand, and others (n 21).

<sup>83</sup>§ 8, Hindu Succession Act.

<sup>84</sup>For a list of class-wise heirs, see the Schedule, *ibid*.

<sup>85</sup>§ 15, this is followed by her parents, father's heirs, and last - the mother's heirs. *ibid*.

<sup>86</sup>General Clauses Act.



as a female, the property will go to H's surviving heirs. P's mother (or other surviving family members) will not be entitled to any inheritance. This means that any property owned by P, a transgender person, will be subject to arbitrary dissolution depending on how he is recognised. As is evident, the law does not include transgender persons. Even if they were included, transgender persons who do not conform to either male or female roles would be excluded. Just as likely, grievances may arise (though unfounded) regarding persons changing gender to gain benefits under the Act - similar to the case of Ajay Mafatlal in 2005.<sup>87</sup>

### 3.1.2 Muslim Personal Law (Shariat) Application Act

Muslim property law is largely uncodified in India. Inheritance rights are determined according to customary laws. These have their genesis in verses of the Qur'an and classical Islamic jurisprudence. However, they have also been shaped and reshaped by both colonial and postcolonial measures.<sup>88</sup> Thus, there is a considerable variation in how individuals inherit property.<sup>89</sup> In some instances, this may be as per the degree of separation, thus creating no differentiation between genders. In others, the male relation is allocated an inheritance share twice as large as the female relation — albeit with an accompanying responsibility to take care of the female relation.<sup>90</sup> This is because, upon marriage, the wife is meant to receive *Mehr* and subsequent maintenance from her husband.<sup>91</sup> However, to improve the inheritance rights of Muslim women, the *Muslim Personal Law (Shariat) Application Act* was enacted in 1937.<sup>92</sup> § 2 states that Muslim personal law should apply to all Muslims, with certain exceptions, including personal property of females inherited or obtained under contract, gift, marriage, or dissolution of marriage.<sup>93</sup> Since there is no uniform way to ascertain inheritance, any one hypothetical situation would not do justice to the varied treatments. However, there is little assistance, whether transgender persons (P in our hypothetical situation) will be accorded the differential protection under the Act in inheritance cases, etc. or if they would be subject to personal law.

### 3.1.3 Indian Succession Act

The Indian Succession Act governs all those not covered by the above laws.<sup>94</sup> It is commonly understood to govern the inheritance of Parsis and Christians.<sup>95</sup> As a general scheme, it

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<sup>87</sup>Sex change not for property: Mafatlal (n 7).

<sup>88</sup>Rina Verma Williams, *Postcolonial politics and personal laws: Colonial legal legacies and the Indian state* (Oxford University Press, USA 2006); Narendra Subramanian, "Legal change and gender inequality: Changes in Muslim family law in India" (2008) 33(3) *Law & Social Inquiry* 631.

<sup>89</sup>Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (22nd Ed 2017, Lexis Nexis 1915).

<sup>90</sup>Abdulmajeed Hassan Bello, "Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women" (2015) 29(3) *Arab Law Quarterly* 261.

<sup>91</sup>*Mehr* is the money or property (dower) that the wife is entitled to receive from her husband in consideration of the marriage.

<sup>92</sup>Muslim Personal Law (Shariat) Application Act, 26 of 1937.

<sup>93</sup>§ 2 (application of personal law to Muslims), *ibid*.

<sup>94</sup>For example, § 29 of Chapter V (Intestate Succession) prescribes that the chapter does not apply to any Hindu, Muhammadan, Buddhist, Sikh or Jaina. Indian Succession Act, 39 of 1925.

<sup>95</sup>Sebastian Champappilly, "Christian Law of Succession and Mary Roy's Case" (1994) 4(I) *SCC* 9.

leans towards gender-neutral terms such as *kindred* and *lineal descendants*.<sup>96</sup> In intestate inheritance, the property proceeds to the deceased's *children* without differentiation between sons and daughters.<sup>97</sup> Children mean any lineal descendants in the first degree of the persons.<sup>98</sup> Where gendered terms are used, they attempt to create a similar inheritance path. For example, though the Act uses *male* and *female* separately, they largely have the same inheritance rights.

However, the Act falls short of being truly gender-neutral. § 42 and § 43, which govern the inheritance rights of Christians (there is a separate scheme for Parsis), differentiate between the inheritance rights of the deceased's parents.<sup>99</sup> Where the deceased person's father is living, and there are no lineal descendants, the father inherits the property, and the mother does not get any share. Even where the deceased's father does not survive, § 43 requires the mother to equally share the property with the siblings of the intestate, unlike what the father would be entitled to. These challenges may be demonstrated with minor modifications to the hypothetical situation above.

A person (P) born a female decides to undergo a sex reassignment surgery and identifies as a male. P has two children - a son (S) and a daughter (D) - with a now deceased husband (H). Both S and D are unmarried. D passes away intestate.

P's inheritance will be reduced as he is likely to be identified as D's mother. He will have to share the property equally with S. This would not be the case if P were perceived as per his perceived gender. The law suffers from the same challenges as those mentioned above. There is little clarity on how transgender persons should be included in the gamut of relations. The above example would be puzzling if, instead of being related by blood, P and D were in a guru-chela relation followed by some transgender persons (the hijra community).<sup>100</sup> The Act is silent on how and if the former could inherit the property of the latter. Though some provisions are gender-neutral and provide a better route than their counterparts in the Hindu Succession Act, this approach is not uniform. There are also reported instances where transgender persons are not given any rights in the property as male or female.<sup>101</sup> However, this may change. In 2016, the Delhi Minorities Commission requested the Law Commission of India to study whether transgender persons can be specifically included within the Indian

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<sup>96</sup>§ 33 (where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred) and § 50 (general principles relating to intestate succession), Indian Succession Act.

<sup>97</sup>Ibid.

<sup>98</sup>§ 99 (a) (construction of terms), *ibid.*

<sup>99</sup>The Law Commission of India has recommended that these provisions be made gender-neutral and allude to *parents* instead of individual references to one's *mother* and *father*. § 42 (where intestate's father is living) and § 43 (where intestate's father dead, but his mother, brothers and sisters living), *ibid.*; Law Commission of India, *Sections 41 to 48 of the Indian Succession Act, 1925 – Proposed Reforms* (Report No 247, 2014).

<sup>100</sup>The relation is based on apprenticeship systems between the guru (teacher) and the chelas (disciples), where the latter is the head of the gharana (house). Ina Goel, "The Lifestyle of Hijras Embodies Resistance to State, Societal Neglect" [2018] *The Wire*.

<sup>101</sup>As an example, Laxmi, a 53-year-old Hijra from Kerala, was denied any claim over ancestral property. Her three brothers distributed the property among themselves. Maria Akram, "Christian transgenders to have equal right on ancestral property" [2016] *The Hindu*.

Succession Act; however, the commission has not yet taken on such a study.<sup>102</sup>

## 3.2 Identifying successors

Apart from inheritance laws not envisaging transgender persons, the property rights regime also poses other significant challenges. It is often difficult to identify successors since transgender persons may lack documentation, could not marry, or cannot prove adoption. Though challenges by themselves, these also affect the inheritance rights of transgender persons by denying them the guarantees ordinarily available to citizens.

### 3.2.1 Documentation

In *NALSA v Union of India*, the Supreme Court held that gender identity is based on self-determination. However, a year later, a survey conducted by the Kerala government found that 76% of transgender persons could not register their perceived gender identities. 81% wished to change their gender identity but had no support system.<sup>103</sup> Individuals are still deprived of their rights unless they can produce identification confirming their perceived gender.<sup>104</sup> This is the case even when there may be a difference in their self-perceived and legal identities. One reason for this is the 2019 Act, which mandates certification to prove gender and avail protection under the Act.<sup>105</sup> This is based on the misconception that welfare measures will be misused unless persons can verifiably identify themselves.<sup>106</sup> Notably, the certificate can be the basis to change the gender, name, and photograph in other official documents.<sup>107</sup>

As table 2 shows, several State documents are still restricted to binary genders and do not allow self-determination. Identification documents are required to enter into a variety of relationships. Unless transgender persons are allowed to identify as per their preference and accordingly get identification, they will be unable to claim legal rights such as access to food, education, or inheritance. Inheritance requires one to prove their identity, relation to the deceased person, and residence of both parties, neither of which is possible without legal mandates to recognise transgender persons in identity documents. Binary classification of gender into male and female that does not recognise a third gender turns the transgender status into a legal non-entity.<sup>108</sup>

Though Central government documents such as the Passport or the Voter Identity Card allow

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<sup>102</sup>This was after consultation with the Advisory Committee of Christians. Akram (n 101).

<sup>103</sup>*State Policy for Transgenders in Kerala* (n 2).

<sup>104</sup>Raman notes that the lack of identity cards in their preferred names and recording their preferred gender identities excludes transgender persons from various social security benefits. Shreya Raman, “Denied visibility in official data, millions of transgender Indians can’t access social benefits” [2021] IndiaSpend.

<sup>105</sup>§ 5 (application for certificate of identity), Transgender Persons (Protection of Rights) Act.

<sup>106</sup>Flavia Agnes, “Protective Legislations: Myth of Misuse” [1995] *Economic and Political Weekly* 865.

<sup>107</sup>Rule 5, Transgender Persons (Protection of Rights) Rules 2020.

<sup>108</sup>Identification based on binary structures is a crucial component of civil identity. PUCL, “Human Rights Violations Against the Transgender Community” [2003] *A Study of Kothi and Hijra Sex Workers in Bangalore*.

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**Table 2** Gender and identification documents

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Often, state documents require people to identify as male or female.

Issued by the Central government	Issued by State governments
Passport (others)	Birth Certificate (male and female)
Voter ID (others)	Driving License (male and female)
Aadhar (others)	Ration card (male and female)

*Source:* adapted from UNDP (2012)

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persons to identify as per their perceived gender, there is still scope for denial of rights.<sup>109</sup> A non-uniform acceptance of a third gender in State documents means that persons have different genders in different documents. Documents are also often linked i.e., the birth certificate may be used as proof in obtaining a passport, etc. Thus, obtaining Central government documents may be tedious and time-consuming due to the incongruence in gender.<sup>110</sup> In fact, in 2016, only forty-one thousand (8% of persons per the 2011 census) had an Aadhar card with their perceived gender.<sup>111</sup> Similarly, in 2019, thirty-eight thousand persons had voter IDs with the perceived gender.<sup>112</sup>

In our second hypothetical situation (where D passes away intestate), a change in land records concerning inheritance may require both Central and State government documents. If P has both type of documents, a rarity in itself, they will not match. Thus, apart from determining the share he is entitled to, P may not be able to enforce inheritance. Governments are aware of this problem and acknowledge the lack of identity documents as one of the main reasons for the limited efficacy of existing schemes for transgender persons. For example, the Karnataka government's *Lingathwara Alpasankhyathara Yojana* observes that transgender persons may not have permanent addresses and may have identification issues.<sup>113</sup>

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<sup>109</sup>Since 2005, the passport has allowed persons to identify outside binary genders. Similarly, the Election Commission has allowed persons to identify as others since 2009. Election Commission of India, Form 6 - Application for Inclusion of Name in Electoral Roll for First time Voter OR on Shifting from One Constituency to Another Constituency (2021); Ministry of External Affairs, Passport Seva - Passport Application Form (2021).

<sup>110</sup>Though an example of two central documents, in 2018, the government faced several representations of transgender persons not being able to link their Aadhar and PAN cards. The latter did not recognise genders except male and female. Individuals could, in turn, not pay their taxes and could be penalised. Pankuk Sharma, Only male or female can get PAN card, transgender told (Times of India 15 March 2018).

<sup>111</sup>Unstarred Question 1492 (n 20); Raman (n 104).

<sup>112</sup>Reportedly, only a third of the transgender persons in Kerala had an Aadhaar card or a voter ID card, and only 2% had a PAN card. Close to 16% in UP and Delhi had an Aadhaar card or voter ID card where they were identified as transgender. Others voters increase by 15,306 in 5 yrs; activists blame paperwork, insensitive officials (n 20).

<sup>113</sup>It thus proposed implementing the scheme through non-government organisations working in the area who may have better knowledge about transgender persons. Venkatesan Chakrapani and Arvind Narrain, "Legal recognition of gender identity of transgender people in India: Current situation and potential options"

### 3.2.2 Marriage

Marriage has immense public significance, and among other things, plays an important role in determining the rights of persons. This is especially in the case of rights related to inheritance, which often stem from marriage.<sup>114</sup> Courts have held that marriage to a person of one's choice is a fundamental right (as a part of the right to life and liberty) guaranteed to all persons in India.<sup>115</sup> However, legislation, such as the *Hindu Marriage Act*, does not clarify who can get married. § 5 of the Act provides that a marriage is a relation between a *bride* and a *bridegroom*.<sup>116</sup> Whether these terms include transgender persons is left to the reader's sense of gender. Enforcing authorities such as the registrar of marriages can determine whether to permit such a marriage.<sup>117</sup> This is the case even when a literal reading of the Act in no way restricts marriage between transgender persons.<sup>118</sup> However, legislative language is not self-enforcing. It ends up being interpreted and implemented by other authorities after its passage. On the other hand, the *Special Marriage Act*, which governs marriage between persons of different religions, explicitly states that for a valid marriage, the *male* should be 21 years of age and the *female* of 18 years.<sup>119</sup>

Hence, Indian legislation, either in letter or in spirit, restricts the marriage of transgender persons. If they are not permitted to get married, a significant legal challenge by itself, it would also hamper their inheritance rights. This is because personal laws (of marriage and inheritance) are often interwoven. Inheritance laws bestow property on listed relations, including marriage partners (and their direct family).<sup>120</sup> Without a valid marriage, a person cannot claim any part of their deceased partner's property. For example, the Hindu Succession Act scheme requires two persons to be married to inherit the other's property.<sup>121</sup>

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[2012] UNDP India Report.

<sup>114</sup>*Indra Sarma v VK Sarma* (2013) 15 SCC 755.

Marriage as an institution has great legal significance and various obligations and duties flow out of [a] marital relationship, as per law, in the matter of inheritance of property, etc.

<sup>115</sup>Starting from 2006, the Supreme Court of India has held that *an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage*. In 2017, a nine-judge bench of the court held that *privacy includes at its core the preservation...marriage*. *Lata Singh v State of Uttar Pradesh* (2006) 5 SCC 475; *In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014* (2014) 4 SCC 786; *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1; *Shakti Vahini v Union of India* (2018) 7 SCC 192; *Shafin Jahan v Asokan KM* (2018) 16 SCC 368.

<sup>116</sup>§ 5 (conditions for a Hindu marriage), Hindu Marriage Act, 25 of 1955.

<sup>117</sup>In one case, the Supreme Court held that marriage is a legal union between a *man* and a *woman* as husband and wife. However, the court was not examining whether transgender persons could get married under the Act. *Reema Aggarwal v Anupam* (2004) 3 SCC 199.

<sup>118</sup>Conversations with scholars and practising advocates suggest that the inclusive language may have been coincidental and only intended to include *male* and *female* persons. The Madras High Court also implied this in a 2018 decision. See section 4 for further details. However, recently, the Supreme Court has observed that members of the LGBT community “are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution”. *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; *Arun Kumar v Inspector General of Registration* (2019) 4 Mad LJ 503, Concurring opinion of Chandrachud J.

<sup>119</sup>§ 4 (c) (conditions relating to solemnization of special marriages), Special Marriage Act, 43 of 1954.

<sup>120</sup>See section 3.1.

<sup>121</sup>Dinshaw Fardunji Mulla, *Principles of Hindu Law* (Satyajee A Desai ed, 23rd edn, 2018).

Looking back at the hypothetical situation, one question arises – how would P have inherited H’s property? The administration in charge of executing the inheritance may not recognise P’s rights. Though a widow’s rights are clear, those of a transgender partner are not. Thus, P would have to conform to her assigned gender to inherit H’s property.

### 3.2.3 Adoption

In India, adoption is governed by personal (*Hindu Adoptions and Maintenance Act*) and general law (*Juvenile Justice (Care and Protection of Children) Act*).<sup>122</sup> Adoption has a direct relation to inheritance rights. This is because it would affect the family structure, including the order of inheritance. For example, if a person without children is unable to adopt, their property may proceed to their siblings. This would not be the case if they could adopt a child. This is of increased significance for transgender persons that may follow a *guru-chela* relation analogous to adoption.<sup>123</sup>

Adoption laws differ in the treatment of *male* and *female* persons. The Hindu Adoptions and Maintenance Act provides that a single male person can only adopt a female if he is at least twenty-one years older than the person to be adopted.<sup>124</sup> Similarly, there needs to be a twenty-one-year gap between a single adoptive mother and a male child.<sup>125</sup> Moreover, the *Adoption Regulations* passed under the Juvenile Justice Act do not allow a single male to adopt a female child.<sup>126</sup> There is no such restriction on a female adopting a male child.<sup>127</sup> Both Acts (and regulations) also have repeated usage of gendered sections. There are 36 and 37 instances of the terms *male* and *female* in the Adoption Regulations, respectively.

This creates uncertainty for transgender parents. Consider the following situation:

A person (P) born a male decides to undergo a sex reassignment surgery and identifies as a female. She already looks after a female child (F) and wants to legally adopt her. However, she is unable to do so. P is a Hindu and has a brother (B) and a sister (S). Their parents are deceased. Both B and S are unmarried. P passes away intestate.

If P had adopted F, the latter would have been a class I heir and inherited P’s property. However, P’s assigned gender restricted such adoption. Thus, both B and S will inherit as class II heirs.<sup>128</sup> This means that any property owned by P, a transgender person, will be subject to arbitrary dissolution depending on how she is recognised. This uncertainty also remains in the case of children. Can a male person adopt a transgender child who identifies

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<sup>122</sup>Hindu Adoptions and Maintenance Act, 78 of 1956; Juvenile Justice (Care and Protection of Children) Act, 2 of 2016.

<sup>123</sup>A 2017 survey by the National Human Rights Commission found that 53% of the respondents lived in a *guru-chela* relation. John (n 14).

<sup>124</sup>§ 11 (iii) (other conditions for a valid adoption), Hindu Adoptions and Maintenance Act.

<sup>125</sup>§ 11 (iv), *ibid*.

<sup>126</sup>Regulation 5 (2) (eligibility criteria for prospective adoptive parents), Adoption Regulations 2017, GSR 3 (E).

<sup>127</sup>*Ibid*.

<sup>128</sup>Classes of heirs are exclusive to male persons; however, given the circumstances in the hypothetical situation - this would be the case whether P is considered a male or a female person.

as a female? There is no answer in the legislation. Such uncertainty in the law has adverse consequences. A *guru* may not be able to legally adopt their *chela*. Thus, the latter might have difficulty inheriting property since they cannot prove a relationship between the parties. Similarly, a person not legally recognised as the adopting parent may not be able to inherit the property of the child in case of the latter's demise. Notably, these challenges would also present themselves in situations mentioned in section 3.1.1 and section 3.1.3 that presume recognised parent-children relations.

## 4 The position of courts

To understand the position of courts, we relied on commercial databases (e.g., SCC and Manupatra). This was supplemented with a study of books on personal law and property rights. We went through every judgment since 1950 that mentioned the term *transgender*. In total, this gave us a database of 129 judgments i.e., 8 judgments by the Supreme Court of India, 116 High Court judgments, and 5 judgments by other courts and tribunals. Largely, cases of interest can be divided into four buckets: (i) institutional cases such as *NALSA v Union of India* or *Navtej Singh Johar v Union of India* (where the supreme court decriminalised unnatural sex),<sup>129</sup> (ii) specific cases on inheritance rights of transgender persons, (iii) reading gendered laws, and (iv) claims regarding identification documents. This section provides illustrations regarding the latter three buckets.

1. *Inheritance rights of transgender persons*: To our knowledge, courts had only two opportunities to deal with inheritance rights. The first is a judgment by the Madhya Pradesh High Court in *Illyas v Badshah Alias Kamla*, 1989.<sup>130</sup> In this case, the appellant contended that Munilal (a transgender *guru*) had executed a Will in his favour. The respondent laid a similar claim; however, he also contended that, unlike the appellant, he was Munilal's *chela*.<sup>131</sup> Munilal had also inherited the contested property from their then guru. In addition to a Will in his favour, the respondent (the *chela*) claimed that the property one obtains from a guru cannot be passed to outside the community. Though the High Court ultimately held that the Will in favour of the appellant was forged,<sup>132</sup> it noted that even if this were not the case, the deceased being a Muslim, could not bequeath more than one-third of their property (the testamentary limit of a Muslim person) as opposed to customary practices of the community.<sup>133</sup> As such, at least two-thirds of the property would proceed to the *chela* (as a customary practice) - the respondent in this case.<sup>134</sup>

In the second case, the Himachal Pradesh High Court dealt with an inverse relation. In

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<sup>129</sup>*Navtej Singh Johar v Union of India* (n 118).

<sup>130</sup>*Illyas v Badshah Alias Kamla* 1989 SCC OnLine MP 175.

<sup>131</sup>The Madhya Pradesh High Court refers to all parties as *he/his* through the judgment.

<sup>132</sup>p 5, *ibid*.

<sup>133</sup>The judgment relies on section (*sic*) 118 of Mulla's Principles of Mohammedan law. Though no such text can be found on page 118, on page 29, he states that *a Mohammedan cannot dispose of by will more than one-third of what remains after payment of his funeral expenses and debts.* *ibid*; Mulla (n 89).

<sup>134</sup>p 6, *Illyas v Badshah Alias Kamla* (n 130).

*Sweety v General Public*, the *chela(s)* had passed away.<sup>135</sup> The lower court denied the *guru* any rights in the contested property, stating that the Hindu Succession Act did not envision such a relation.<sup>136</sup> Notably, no one else claimed any part in the property. The High Court reversed the lower court's decision. It concluded that there was no reason why the appellant (*guru*) should not inherit the property as per their customs. The court also concluded (since the religion of the parties was not on record) that the persons would not be bound by the Hindu Succession Act, which it said would curtail their rights.<sup>137</sup>

2. *Gendered Laws*: Aside from the above cases, courts have not dealt with transgender inheritance rights. However, they have addressed disputes regarding the treatment of transgender persons concerning other rights. In *Arun Kumar v Inspector General of Registration*, the Madras High Court held that the term bride in the Hindu Marriage Act would include transwomen. Not doing so would violate the fundamental rights guaranteed to transgender persons.<sup>138</sup> The court acknowledged the need for laws to develop with contemporary understanding.<sup>139</sup> The same High Court also has a long history of allowing transwomen to apply for police constable posts reserved for women.<sup>140</sup> The latter precedent has also come to be followed by the Rajasthan High Court.<sup>141</sup>

However, this policy of reading gendered terms to include transgender persons is not uniform. In *Sumita Kumari v State of West Bengal*, the Calcutta High Court held that transwomen could not apply for Asha posts specifically reserved for women.<sup>142</sup> Thus, it seems that though courts attempt to beneficially read gendered terms, this is not a *carte blanche* approach. Instead, they leave the rights to be granted as per the subjective satisfaction of judges. This also forces transgender persons to conform to binary standards to seek legal protection. It is worth noting that neither of these beneficial cases related to inheritance rights and cannot be considered a binding legal precedent. For example, courts may choose not to read transgender persons within the Hindu Succession Act, holding that the legislature consciously adopted gendered terms for descendants as opposed to its counterpart in the Indian Succession Act.<sup>143</sup>

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<sup>135</sup>*Sweety v General Public* 2016 SCC OnLine HP 909.

<sup>136</sup>p 2, *ibid*.

<sup>137</sup>*Ibid*.

<sup>138</sup>*Arun Kumar v Inspector General of Registration* (n 118).

<sup>139</sup>It prescribed that the expression cannot have a static meaning and is subject to present day conditions. A statute must be interpreted in the light of the legal system as it exists today. In particular, it relied on Justice GP Singh's Principles of Statutory Interpretation. p 12, *ibid*; GP Singh, *Principles of Statutory Interpretation* (15th edn, Lexis Nexis 2021).

<sup>140</sup>*Nangai v Superintendent of Police* 2014 SCC OnLine Mad 988; *G Nagalakshmi v Director General of Police* 2014 SCC OnLine Mad 2536; *Thanusu v Secretary to the Government of Tamil Nadu* 2014 SCC OnLine Mad 3475.

<sup>141</sup>*Ganga Kumari v State of Rajasthan* 2017 (4) WLN 554 (Raj).

<sup>142</sup>*Sumita Kumari v State of West Bengal* 2016 (2) Cal LJ 455.

<sup>143</sup>See section 3.1.



3. *Claims regarding identification documents:* Courts attempt to grant identification documents to transgender persons. In one case, the petitioner (born female) developed male characteristics and obtained medical and psychological certificates confirming his gender as male. He also underwent surgical procedures. However, when he approached the District Registrar (Births and Deaths) to change his name and gender on his birth certificate, the application was rejected. The High Court directed the Registrar to make the requested change.<sup>144</sup> In other cases, courts have directed respondents to allow transmen and women to give exams as men and women, respectively,<sup>145</sup> prescribed the inclusion of a third gender on identification forms,<sup>146</sup> and ensured that lack of ration cards does not hinder the rights of transgender persons.<sup>147</sup>

Courts attempt to give relief to transgender litigants. In two cases, courts recognised the inheritance rights of transgender persons by relying on customary practices. When adjudicating gendered provisions, they have held that the provisions would cover transgender persons. Similarly, courts have directed changes in the identification documents of individuals. However, apart from the two cases, neither of these beneficial cases relate to inheritance. Reading them to support inheritance rights requires theoretical weaving, which only highlights the discretion of judges to grant rights ordinarily exercisable by citizens. Even if courts read transmen and women into concerned brackets of inheritance laws, this would not be ideal. Though better than not granting any inheritance rights, it would force them to conform to binary standards. Thus, individuals would have to become part of an identified class that they do not belong to.

## 5 Transgender rights across the world

India is not the only country where transgender persons face difficulty enforcing their rights. They have had to fight a long battle to secure rights across the world. Even the term ‘transgender’ was coined relatively recently – dating to the 1990s.<sup>148</sup> Before this, the legislature was unaware of how to address the community, let alone grant legal rights. Often countries have not dealt with the inheritance rights of individuals. However, some - like Norway - now grant the same inheritance rights to all their citizens. International bodies also acknowledge that property rights may not be equal for all genders. One reason for this is the lack of identification documents. Not only should India learn from country case studies and adapt the same, but it is also obligated to apply the rules of international law if they are not in

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<sup>144</sup>The Gujarat High Court refers to the petitioner as *he/his* through the judgment. *Mulla Faizal v State of Gujarat* 2000 SCC Online Guj 31; *Shraddha Rohitbhai Tailor v State of Gujarat* 2008 SCC Online Guj 139.

<sup>145</sup>*Swapna v Chief Secretary, Govt of Tamil Nadu* 2016 SCC OnLine Mad 15973; *Chanchal B v State of West Bengal* 2016 SCC Online Cal 2124.

<sup>146</sup>*Atri Kaur v Union of India* 2017 SCC OnLine Cal 3196; *S Tharika Banu v St George Fort* 2017 SCC OnLine Mad 10220.

<sup>147</sup>*VV Mogli v State of Telangana* 2020 SCC OnLine TS 440.

<sup>148</sup>Valentine demonstrates how after its coinage in the 1990s, the term changed how US Americans understood and differentiated between gendered and sexual variance. See, Richard Ekins and Dave King, “Towards a sociology of transgendered bodies” (1999) 47(3) *The Sociological Review* 580; David Valentine, *Imagining transgender: An ethnography of a category* (Duke University Press 2007).

conflict with domestic legislation.

## 5.1 Rights in other countries

Most countries grant civil rights to transgender persons. This includes allowing individuals to identify as per their perceived gender, and allowing marriage and adoption.<sup>149</sup> Such laws affect inheritance rights. However, countries have left the specific question of inheritance open. This may be because their legislation already uses gender-neutral terms and does not *prima facie* discriminate against transgender persons.

Table 3 describes the rights of transgender persons in countries with varying legal structures and India's geographical and cultural neighbours. In particular, Nepal, Norway, and Pakistan amended their laws to reflect the self-determination of gender identity. They do not require State or medical intervention to determine a person's gender identity.<sup>150</sup> Self-declaration in front of a notary is sufficient to record the perceived gender in official documents. On the other hand, though Australia and Spain recently allowed a change in gender identity - they still require State and medical sanction for changes in official documents.<sup>151</sup>

Norway has also recognised marriage between non-binary couples (along with Australia and Spain).<sup>152</sup> This includes marital rights such as the joint ownership of property. Notably, countries that recognise same-sex marriage usually extend adoption rights to such couples. All countries in the table that recognise same-sex marriage also grant adoption rights. This has the adverse effect of countries that do not allow marriage between non-binary couples also do not grant adoption rights. This includes Pakistan and Nepal, both geographical and cultural neighbours of India. Here, transgender persons may be unable to inherit their partner's or adoptive (assumed) parent's property.

However, apart from granting connected civil rights, countries have not specifically amended their inheritance laws. One reason for this is that they already use gender-neutral terms such as *spouse* etc. This is in contrast to India, which uses gender-specific inheritance schemes. A gender-neutral approach limits the scope of excluding anyone from protection since transgender persons are automatically guaranteed the same rights as all other individuals.

On the other hand, given its gender-specific schemes, Pakistan has adopted specific rules to include transgender persons. It is worth examining the 2018 changes in Pakistan legislation in this context. The *Transgender Persons (Protection of Rights) Act* was passed after several years of concerted judicial and public activism.<sup>153</sup> Chapter V deals specifically with the

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<sup>149</sup>For example, of the 27 countries studied by the National Human Rights Commission, only 2 (Ireland and Portugal) did not allow persons to marry as per their perceived gender. pp 77-80, John (n 14).

<sup>150</sup>In fact, in Nepal, the right to reflect one's perceived gender in official documents is protected by the Constitution (Article 12 - Citizenship with identity of descent and gender). Constitution of Nepal 2015; Gender Recognition Act, 2016; Transgender Persons (Protection of Rights) Act, 13 of 2018.

<sup>151</sup>This is also believed to be the case in at least 13 other European countries (including Germany and France). Gender Identity Law, 2007; Guidelines on Recognition of Sex and Gender, 2013; John (n 14).

<sup>152</sup>The Marriage Act, 47 of 1991; Marriage Amendment (Definitions and Religious Freedoms) Act, 129 of 2017; Amendment to the Spanish Civil Code, 13 of 2005.

<sup>153</sup>The Pakistan Supreme Court has held that transgender persons have been neglected *merely on account*

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**Table 3** Transgender rights in selected countries

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Most countries grant civil rights to transgender persons. However, they have left the specific question of inheritance open.

Country	Adoption	Identity	Inheritance	Marriage
India	No provisions	Specific rules	No provisions	Not recognised
Australia	Universal rights	Required diagnosis	Universal rights	Legal since 2017
Nepal	No adoption rights	Self-perceived gender	Not recognised	Not recognised
Norway	Universal rights	Self-perceived gender	Universal Rights	Legal since 2009
Pakistan	No adoption rights	Self-perceived gender	Specific rules	Not recognised
Spain	Universal rights	Required diagnosis	Universal Rights	Legal since 2005
UK	Universal rights	Self-perceived gender	Universal Rights	Legal since 2004

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Source: Authors' compilation

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inheritance rights of transgender persons - a feature markedly lacking in India.<sup>154</sup> It prescribes that there should be no discrimination against transgender persons in inheriting property. A person who is assigned the woman gender at birth but who later identifies as a man is entitled to inherit property as a man and vice versa.<sup>155</sup> The law also prescribes inheritance rights where the person does not conform to binary genders. In such a situation, the inheritance share is the average of two separate distributions for a man and a woman.<sup>156</sup> Thus, though the Act is eponymous with the law that would come to be passed in India a year later, it is an example of the differential treatment of transgender persons across countries.<sup>157</sup>

## 5.2 India's international obligations

Several international treaties prescribe that transgender persons should not be subject to discrimination. The *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR) recognise that no person shall be arbitrarily denied their legal rights.<sup>158</sup> Along similar lines, the *Yogyakarta Principles* address a broad

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*of gender disorder in their bodies*. As per the court, transgender persons should be entitled to all fundamental rights enshrined in the Constitution and recognition as a *third gender* in identification documents. *Dr Mohammad Aslam Khaki v SSP Rawalpindi* Constitution Petition 43 of 2009; *Mian Asia v Federation of Pakistan* WP 31581 of 2016.

<sup>154</sup>§ 7 (right to inherit), Transgender Persons (Protection of Rights) Act.

<sup>155</sup>Ibid.

<sup>156</sup>Ibid.

<sup>157</sup>For an explanation concerning the provisions and history of the legislation in Pakistan, see - Jeffrey A Redding, "The Pakistan Transgender Persons (Protection of Rights) Act of 2018 and its impact on the law of gender in Pakistan" (2019) 20(1) Australian Journal of Asian Law.

<sup>158</sup>Article(s) 2, Universal Declaration of Human Rights 1948, 217 A (III); International Covenant on Civil and Political Rights 1966, United Nations, Treaty Series, vol 999, p 171.

range of human rights.<sup>159</sup> The principles were also relied upon by the Supreme Court in *NALSA v Union of India*. In particular, principles 3 A and 15 C provide that states shall:

Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, *acquire (including through inheritance), manage, enjoy and dispose of property.*

Ensure equal rights to land and home ownership *and inheritance* without discrimination on the basis of sexual orientation or gender identity.

The United Nations Development Program (UNDP) has also recommended that India ensure the legal recognition of transgender persons and avoid ambiguities in issuing identity documents.<sup>160</sup> The suggestion is rooted in the connection between identity documents and civil rights, such as inheritance rights.

Indian law regarding international obligations is well-settled. Courts apply the rules of international law unless they are overridden by domestic law.<sup>161</sup> India has ratified all the above-mentioned documents.<sup>162</sup> Hence, if Indian law is not in conflict with the principles therein, they can be used by domestic courts.<sup>163</sup> There is already precedent for applying the UDHR and ICCPR principles.<sup>164</sup> Reference may also be made to the judgment in *Vishaka v State of Rajasthan*, where the court relied on the Convention on the Elimination of All Forms of Discrimination against Women.<sup>165</sup> *A fortiori*, the principles mentioned above (e.g., Yogyakarta principles regarding inheritance) do not go against Indian law. Instead, they appear to buttress the fundamental rights guaranteed under the Constitution and the Supreme Court's decision in *NALSA v Union of India*. This is also because there is a lack of a comprehensive domestic law regarding the rights of transgender persons. International principles

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<sup>159</sup>Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity 2007.

<sup>160</sup>p 12, Chakrapani and others (n 11).

<sup>161</sup>With some variance, this has been the consistent position of the Indian Supreme Court since 1947. In particular, for internationally accepted socio-political rights, this position was solidified between 1971 and 1990. Venkatachala G Hegde, "Indian courts and international law" (2010) 23(1) *Leiden Journal of International Law* 53.

<sup>162</sup>India ratified (or voted in favour of) the UDHR, ICCPR, and the Yogyakarta Principles in 1948, 1979, and 2006, respectively.

<sup>163</sup>*Gramophone Company of India Ltd v Birendra Bahadur Pandey* (1984) 2 SCC 534; *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228; *RD Upadhyay v State of Andhra Pradesh* (2007) 15 SCC 337; Hegde (n 161) - The 1984 decision continues to be one of the authoritative restatements of the court's position concerning the applicability of international law within the domestic sphere. It elaborates on the theoretical and practical aspects of the operation of transformation and incorporation doctrines and other sources of international law dealing with this issue.

<sup>164</sup>*Jolly George Varghese v Bank of Cochin* (1980) 2 SCC 360.

<sup>165</sup>It observed that

Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

*Vishaka v State of Rajasthan* (1997) 6 SCC 241.

on inheritance cannot challenge a domestic law that does not exist. Thus, such principles should be recognised and enforced in India unless the legislature decides to adopt a separate path.

## 6 Reforming the law

Das CJ, speaking on behalf of the court in *Ram Krishna Dalmia v Justice SR Tendolkar*, held that even a single person may constitute a class by themselves and warrant constitutional protections.<sup>166</sup> The fact that the law can theoretically be read to protect the inheritance rights of transgender persons is important. However, as long as such persons cannot practice their rights and face unique challenges, they should be guaranteed better protection. As we have shown, inheritance laws are based on a binary notion of gender. They do not envisage transgender persons or a change in gender identity and are at odds with the society they govern. Moreover, successors are often difficult to identify.

Even if courts read transmen and women into concerned brackets of inheritance laws, this would not be ideal. Though better than not granting any inheritance rights, it would force them to conform to binary standards. Thus, individuals would have to *become* part of an identified class that they do not belong to. Those who chose not to do so would fall outside it, allowing the system (such as judges when a dispute arises) to exclude persons from protection.<sup>167</sup> If the law does not allow for necessary adjustments, it may lead to legal recognition becoming an instrument of regulation as individuals are limited in demanding rights and presenting self-hood.<sup>168</sup>

What then is the way forward? It is unlikely that the law can create an exhaustive list of gender identities. This is especially because of the developing nature of gender. Thus, the natural way forward may be to preclude gender from the law. Gender-neutral laws that guarantee the same rights to everyone would limit the scope of excluding anyone from protection.<sup>169</sup> As section 5 shows, this is similar to the solutions adopted by other countries. Moreover, all identity documents should include the option of entering one's perceived gender. This is not a contentious stance and is well established across the world. The Yogyakarta Principles explicitly prescribe that governments take all necessary measures to ensure that identity papers such as birth certificates, passports, and electoral records include a person's perceived gender without any medical intervention.<sup>170</sup> For example, after Argentina eased the process of changing one's gender on identity cards, more than 3000 people applied for a change within the first year, and there were no reported cases of fraud.<sup>171</sup>

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<sup>166</sup>p 13, *Ram Krishna Dalmia v Justice SR Tendolkar* AIR 1959 SC 538; Namita Wahi, "The fundamental right to property in the Indian Constitution" [2015] Available at SSRN 2661212.

<sup>167</sup>Jain and Rhoten (n 42).

<sup>168</sup>As per Brown, the price of institutionalised protection is dependence and agreement to abide by the protector's rules. Wendy Brown, *States of injury: Power and freedom in late modernity* (Princeton University Press 1995).

<sup>169</sup>Jain and Rhoten (n 42); Myra J Hird, "For a sociology of transsexualism" (2002) 36(3) *Sociology* 577.

<sup>170</sup>Principle 3 C, Yogyakarta Principles.

<sup>171</sup>This number had increased to 10,000 in 2017 with no reported cases of fraud. Emily Blincoe, "Sex

Civil rights must be available to all regardless of a change in gender identities. In particular, the law requires at least the following three measures:

1. Amend inheritance laws to include gender-neutral provisions;
2. Amend rules to ensure that all identification documents include transgender persons; and
3. Include inheritance as a prohibited field of discrimination under the *Transgender Persons (Protection of Rights) Act*.

In the same spirit, materialising inheritance rights requires guaranteeing freedoms (such as marriage and adoption) ordinarily available to citizens.

Implementing these recommendations may not be easy. First, though this paper attempts to identify inheritance related central laws that include gendered terms, this search is not exhaustive. Without an exhaustive search, uniform changes are not ideal since they require context-specific research. For example, the *Muslim Personal Law (Shariat) Application Act* was enacted to protect the property of women. Thus, it is expected that the legislature would not want to make the Act gender-neutral. This situation may be replicated in other legislation not yet identified. However, like other countries, the law should add definition clauses for transmen and women and provide the treatment for transgender persons who do not identify as either men or women.<sup>172</sup> Second, some legislation would only require changes in their definitions, while others would require changes across sections. The *Hindu Succession Act* is an example of both these categories. Though the definition of an heir, etc should be amended to include transgender persons, this may not be enough. § 8 of the Act should be amended to apply to all persons, irrespective of their gender.<sup>173</sup> This would simplify legislation with less scope for confusion. Thus, the recommendations should be implemented to achieve gender-neutrality through minimally disruptive amendments.

## 7 Conclusion

Transgender rights are a vast and complex subject. Even within the domain of inheritance rights, this paper cannot be a comprehensive work of all challenges faced by transgender persons. However, it supports the finding that Indian laws are based on binary genders. Successors are often difficult to identify as transgender persons may lack documentation, could not marry, or cannot prove adoption. This approach is flawed as it significantly alienates inheritance rights. Contemporary knowledge, both international and domestic, has grown to recognise the rights of all persons, notwithstanding their gender. There is a need to amend Indian legislation to adapt to such knowledge. Notably, our suggestions are based on the findings in this paper concerning codified laws. They are not meant as an exhaustive list of steps to improve access to property for transgender persons.

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Markers on Birth Certificates: Replacing Model with Self-Identification” (2015) 46 Victoria U Wellington L Rev 57; Richard Köhler, Julia Ehrt, and Aleks Recher, “Legal gender recognition in Europe” [2017] Transgender Europe.

<sup>172</sup>The definition may also be provided by suitable amendments in § 13 of the General Clauses Act.

<sup>173</sup>Damle, Srivastava, Anand, and others (n 21).

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