DOCTRINAL RIGHTS VS. SOCIAL REALITIES: RECONCILING ISLAMIC INHERITANCE WITH TRANSGENDER IDENTITY IN THE POST- NALSA LANDSCAPE

Anam Mackay[1]

ABSTRACT

The landmark judgements of NALSA, Puttuswamy and Navtej Johar paved way for a renewed discourse on transgender or gender non-binary identities in India. Although, the legal recognition of transgender persons as 'third-gender' was a watershed moment in the legal visibility of the non-binary persons in India, it simultaneously created unresolved legal vacuums and conflicts in the civil rights framework. This paper analyses one such legal vacuum, i.e., the inheritance rights of the transgender persons. Drawing on doctrinal analysis and qualitative insights from in-depth interviews with transgender persons in Kashmir, this paper explores how the legal recognition of third-gender in India intersects with Muslim inheritance rules and social realities. The paper highlights the dissonance between religious rules of inheritance, secular law and social reality in Kashmir.

The paper concludes that despite the legal recognition, the transgender community continues to face systemic and structural barriers in accessing the civil rights like inheritance, thus showing a stark difference between written law and lived social reality of transgender persons. Although, Muslim Personal Law although does not recognise a third- gender, it does not deny inheritance to the transgender or intersex persons either. Through the in- depth interviews of transgender persons of Kashmir, it was found that most of the transgender persons were denied inheritance altogether thus, defying the Islamic ruling of inheritance further socially excluding transgender persons.

By highlighting the difference between self-identification and survival politics of transgender community in Kashmir, the paper adds a region-specific and a socio-religious perspective to the transgender discourse. Stressing upon the need for studying social practices before altering laws like the Muslim Personal laws, this paper provides a region and identity sensitive approach to inheritance rights of Muslim transgender persons in Kashmir and calls for similar research on Muslims around India for ensuring their social inclusion through proprietor rights.

[1] Doctoral Fellow at Central University of Kashmir, Tulmulla.

KEYWORDS- Transgender Rights, Muslim Personal Law, Inheritance and Succession, Indian Constitutional Law, Transgender inheritance in India.

1. INTRODUCTION

Transgender identity challenges the foundational binary assumptions of legal systems. Transgender is derived from the word 'trans' meaning 'crossing over'[2]. Transgender is a person whose gender identity and gender expression does not match the sex they are born with. As simple as this definition seems, the lived reality of transgender persons is equally complex, nuanced and layered. 'Trans' identity goes beyond just gender expression. It is a complex mix of race, religion, regional identity, cultural preferences and self-identification, which at times goes beyond the accepted gender-binary realm creating unique socio-legal situations[3].

The complex nature of 'transgender' identity calls for a detailed understanding of the transgender persons and the challenges surrounding their rights. All laws governing various civil and personal rights like the marital, adoption, inheritance, educational and employment rights theoretically and structurally revolve around the gender-binary construct, thus, leaving out anyone who does not fit the binary[4]. Additionally, the layered and nuanced lived reality of transgender further complicates access to civil rights including inheritance rights. Because the legal system around the world continues to operate around binary categories, existence of 'trans- identities' challenges current legal structure creating vacuum in the inheritance rights landscape[5].

Recognition of transgender persons as 'third-gender' was a watershed moment in Indian jurisprudence[6]. Along with recognising the socio-economic and educational marginalisation of the transgender persons, the court asserted that 'sex' under Art 15 includes 'gender'. Thus, extending the benefits accruing from Art 15 to the transgender community as well[7]. This declaration creates ease for framing transgender social welfare schemes but leaves many questions regarding the position and status of 'transgender' in various civil laws unanswered.

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[2] Susan Stryker, *Transgender History* 1–15 (Seal Press 2008); see also World Health Organization, Gender and Health (2023), https://www.who.int/health-topics/gender.
[3] Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991).
[4] Rajesh Talwar, *The Third Sex and Human Rights* (Gyan Publishing House 1999); see also Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2015).
[5] *National Legal Services Authority (NALSA) v Union of India* (2014) 5 SCC 438.
[6] India Const. art. 15(3).
[7] The Transgender Persons (Protection of Rights) Act, 2019, § 6–7.

For instance, NALSA promised a third gender category without addressing the intricacies it may create within a gender binary legal structure with regard to civil rights like marriage, inheritance, adoption etc. Post NALSA, Transgender bills of 2014, 2016 and the Transgender Act of 2019 were passed. 2019 Act followed in the footsteps of NALSA recognising the third-gender status of 'transgender' under section 6 and also created a separate category of trans-man and transwoman under section 7 of the Act[8]. It is however, to be noted that neither NALSA judgement nor the Bills or 2019 Act discussed the inheritance rights.

This paper using the case- study of Kashmir argues that transgender persons are not doctrinally disinherited under Muslim Personal Law; rather, exclusion operates through social practices and informal mechanisms that result in cyclic marginalisation of the transgender community. The paper argues that in the case of Muslim transgender persons the reforms at the social level can solve the legal issues relating to inheritance more promptly and efficiently ensuring the balance between the right to equality under Art 14 and right to religious freedom under Art 26 both are preserved in a balanced manner and support the social inclusion of transgender community of Kashmir.

2. JUSTIFICATION OF THIS STUDY

Regional studies on transgender communities are not only essential for understanding the diversity of the community but are also important for framing context-driven policies. Kashmir being predominantly Muslim population creates a unique challenge in integrating the secular laws and Islamic personal law which have two distinct positions on the status and position of transgender persons. Along with the legal dichotomy between secular law and personal law, the lived reality of Kashmiri transgender who remain under-represented in national transgender jurisprudence warrants a study on the struggles in realisation of rights in a society where invisibility is a survival strategy. This paper will delve into the interplay of legal lacunae created by NALSA, perpetuated by 2019 Act in respect of inheritance rights and the social realities of transgender community of Kashmir. In doing so, the paper will seek to understand the struggles of the transgender persons of Kashmir in accessing their share in the inheritance and suggest context-specific measures for overcoming the same.

[8] Aniruddha Dutta, Contradictory Citizenship: Gender-Based Violence and the Regulation of Chhakkas and Hijras in West Bengal, 13 J. S. ASIAN DEV. 311 (2012); see also Helena Alviar García, The Binary Structure of Property Law, in *Feminist Jurisprudence* (Hart Publishing 2021).

3. METHODOLOGY

This study adopts a socio-legal approach, combining doctrinal analysis and qualitative insights drawn from in-depth interviews with fourteen transgender persons in Kashmir. The doctrinal analysis examines Constitutional provisions, relevant legislations, and case laws while as empirical portion explores the lived experiences of transgender persons of Kashmir in relation to inheritance and allied rights.

This mixed-method approach addresses gaps in both the law- created by the NALSA judgement and Transgender Act, 2019 by creating a distinct 'transgender/third-gender' category and the social gap, i.e., the absence of voices of transgender persons of Kashmir in the national legal discourse on transgender rights. The paper analyses inheritance rights under Muslim Personal Law and how they are negotiated within the Kashmiri society. Additionally, to understand the lived- reality and factual position of devolving of shares of transgender persons in Kashmir, the paper draws insights from fourteen in-depth interviews conducted by the researcher as a part of her Doctoral work. To maintain anonymity of the participants, pseudonyms have been used.

The empirical study helps to assess whether the social exclusion of transgender persons is a direct result of exclusion from inheritance rights under Muslim Personal law or a stem from social malpractices instead. This methodology ensures that the broader question of social exclusion of transgender persons in Kashmir and their inheritance status is examined through context-specific case studies of Kashmir's Muslim transgender community.

4. THE LEGAL VACUUM IN TRANSGENDER INHERITANCE RIGHTS: CONSTITUTIONAL PROVISIONS AND STATUTORY GAPS

The right to inheritance under the Indian law in governed by personal laws[9]. Hindu Succession Act, Indian Succession Act and Islamic Personal laws. It is to be noted no law in India explicitly prohibits transgender persons from holding property and devolvement of property to the transgender persons. The issue arises because of the social exclusion and marginalisation of transgender community while seeking inheritance rights. NALSA had clarified that 'sex' under Art 15 includes gender. Thus, discriminating

[9] Hindu Succession Act, 1956; Indian Succession Act, 1925; and Muslim Personal Law (Shariat) Application Act, 1937.

against transgender persons on the basis of preference of gender is violative of Art 15 (1)[10]. Art 15 (1) can be invoked against both the state as well as the individuals[11].

Although NALSA recognised the social exclusion and marginalisation of transgender persons in India, it inadvertently created a new legal issue by creating a 'third-gender' without deliberating upon the consequences and legal vacuum creation of such new category will create in a legal system which operates on gender- binary categorisation. Same legal concern applies to inheritance rights under personal laws. Apart from the fact that majority of personal laws are predominantly governed by binary structure, the fact that different rules apply to male and female inheritance in many instances under inheritance laws creates unique challenges for the transgender persons[12].

The creation of a third-gender by NALSA was further solidified by the Transgender Act, 2019 under secs 4 to secs 6 which provide the issuance of a 'transgender certificate' by the District Magistrate. Additionally, Sec 7 of the 2019 Act provides for change of gender from male to female and vice- versa after submitting proof of sex-reassignment surgery. This creates two categories within the transgender community, one- 'transgender' and second, 'transman/ transwoman' who will be assigned male or female gender as the case may be[13]. This category will find it easier to navigate the gender- binary legal structure because legally they will either be male or female while as the other category, 'the transgender' category will find it difficult to assert their rights in a gender- binary structured legal system.

Transgender category will find it difficult to claim inheritance because law does not make clear how inheritance will devolve on the transgender/ third-gender category. The Transgender Act just like NALSA is conspicuously silent on the many civil rights of transgender persons including the inheritance rights. This distinction created by the 2019 Act, u/s 6 and 7 lacks the 'intelligible differentia' test laid down in the case of State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 and later elaborated upon the case of Ram Krishna Dalmia v. Justice Tendolkar, AIR 1958 SC 538[14].

5. HARMONISING EQUALITY, DIGNITY AND RELIGIOUS FREEDOM: ARTICLES 14, 21, 25 AND 26

[10] *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438, 82.
[11] *Kaushal Kishor v. State of Uttar Pradesh*, (2023) 4 SCC 1.
[12] Namita Wahi & Ankit Ahuja, The Right to Property of Transgender Persons in India (Centre for Policy Research 2017).
[13] The Transgender Persons (Protection of Rights) Act, 2019, §§ 6–7; *Sayantan Mandal v. Union of India*, 2021 SCC OnLine Del. 4111.

[14] *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; see also *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538.

The creation of third-gender by *NALSA* and Transgender Act, 2019 without deliberating about the inheritance raises concerns regarding balance between right to equality under Art 14, right to life under Art 21 and right to religion under Art 25 and 26[15]. Particularly, in the context of Kashmiri Muslim transgender persons, there is not a direct conflict between secular law and Muslim Personal Law but the empirical work demonstrates how social customs override personal inheritance laws leading to inequality and marginalisation of Kashmiri Muslim transgender persons[16].

As will be discussed in the next section, the Muslim Personal law doesn't recognise third-gender but also does not bar transgender or intersex persons from inheriting property[17]. An important test for checking the validity of a law under Art 14 are the tests of intelligible differentia and rational nexus[18]. In the cases of *State of West Bengal v. Anwar Ali Sarkar* and *Ram Krishna Dalmia v. Justice Tendolkar,* it was laid down that if a legislation creates a classification, there should be a reasonable explanation for the creation of such classification and the classification should have a nexus with the object sought to be achieved[19].

In the case of sec 6 and 7 of the *Transgender Persons (Protection of Rights) Act*, 2019, the creation of two distinct categories i.e. 'third-gender' and 'transman/woman' creates a category within the marginalised transgender community without any reasonable justification for the same[20]. The categorisation makes it easier for 'transmen and transwomen' to access inheritance and other rights in a gender- binary set-up as against the 'third-gender' person whose inheritance share and other rights remain undefined under the Transgender Act of 2019[21]. The Act had made no attempt to clarify the inheritance and other civil rights of the 'third-gender' category, thus creating ample room for legal and administrative confusion[22].

NALSA v Union of India and *Navtej Singh Johar* recognised that the life quality of the sexual and gender minorities has suffered due to laws like sec 377 IPC and social dejection[23]. These judgements

[15] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (India).
[16] The Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019 (India).
[17] SIRAJUDDIN AL-SAJAWANDI, *AL-SIRAJIYYAH: THE MOHAMMEDAN LAW OF INHERITANCE* (Almaric Rumsey tr., 2d ed. 1820); D.F. MULLA, *PRINCIPLES OF MAHOMEDAN LAW* (22d ed. 2017).
[18] *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India); *Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191 (India).
[19] *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; *Ram Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538.
[20] The Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019, § 6–7 (India).
[21] Karan Gulati & Tushar Anand, Inheritance Rights of Transgender Persons in India, 7 INDIAN L. REV. 1, 15–18 (2023).
[22] Id. at 16.
[23] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, 74–76; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, 481, 521, 607 (India).

recognised that transgender persons' right to life and right to equality is violated. As Justice Bhagwati famously remarked, right to life under Art 21 does not only mean animal existence but life with dignity in the case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[24]. In *Olga Tellis* case, the court asserted that that right to livelihood or means of living is fundamental to one's existence[25]. Inheritance right is not merely a right to hold property but also an economic right and social right denial of which results in social and financial exclusion and thus strips people off their dignity[26].

Although, Indian Supreme Court has not explicitly declared inheritance right as a fundamental right because property right is governed under Art 300A but denying a person inheritance just on the basis of gender or sexual identity clearly violated Art 14 and Art 21[27]. Off lately, the high court of Madras in *Arunkumar & Sreeja v. Inspector General of Registration* (2019) declared that civil rights like marriage, adoption and inheritance and denial of these rights is violative of right to life under Art 21[28]. The empirical findings of this study demonstrate that denial of inheritance also results in homelessness, extra financial burden and heightened vulnerability directly violating Art 21. Additionally, the inheritance is denied only on the basis of gender identity or sexual characteristics negatively impacting right to equality under Art 14 as well.

Art 25 and 26 of the Indian constitution protect religious freedom including Muslim Personal Law and practise of Hiba[29]. As explained in next sections, Muslim Personal Law does not exclude transgender or intersex persons from inheritance. Art 25 right to practise and profess one's religion is limited by other fundamental rights. *Shayara Bano* and *Indian Young Lawyers Association* held that religious freedom cannot be exercised in a manner that violates other fundamental rights like that of equality and right to life[30]. The constitutional and legal issue arises not out of the religious doctrine but the socially discriminatory use of religious rights like *Hiba* to exclude transgender heirs.

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[24] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, 8 (India).
[25] *Olga Tellis v. Bombay Municipal Corp.*, (1985) 3 SCC 545, 32 (India).
[26] *See also Vidya Devi v. State of Himachal Pradesh*, (2020) 2 SCC 569, 10.1 (India); *see also* Karan Gulati & Tushar Anand, Inheritance Rights of Transgender Persons in India, 7 INDIAN L. REV. 1, 15–18 (2023).
[27] *Cf. Vidya Devi v. State of Himachal Pradesh*, (2020) 2 SCC 569, 10.1 (India); *see also National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, 75 (India).
[28] *Arunkumar v. Inspector Gen. of Registration*, (2019) 3 M.L.J. 541, 20 (India).
[29] India Const. arts. 25, 26; *see also* MULLA, *PRINCIPLES OF MAHOMEDAN LAW* § 138 (S.K. Sarvaria ed., 22d ed. 2017) (defining *Hiba* as an unconditional transfer of property made immediately and without any exchange).
[30] *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 282 (India); *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1, 106, 114.

A harmonising solution balancing the right to religion under articles 25 and 26 with other fundamental rights specifically right to equality and right to life is the least conflicting solution[31]. The solution of conditional life interest explained in later sections of this paper is the transformative streak envisioned by NALSA and emphasised by Navtej Singh Johar[32]. This will ensure that the Muslim Personal Law of inheritance remains untouched while maintaining equality and dignity of transgender persons.

6. GENDER, INHERITANCE AND SOCIAL EXCLUSION: LIVED REALITY OF TRANSGENDER PERSONS IN KASHMIR

The right to inheritance under the Indian law in governed by personal laws. Hindu Succession Act, Indian Succession Act and Islamic Personal laws[33]. It is to be noted no law in India explicitly prohibits transgender persons from holding property and devolvement of property to the transgender persons. The issue arises because of the social exclusion and marginalisation of transgender community. This social exclusion was further exacerbated by legal confusion created by NALSA. NALSA had clarified that 'sex' under Art 15 includes gender[34]. However, this declaration has not translated into attaining civil rights.

Although NALSA recognised the social exclusion and marginalisation of transgender persons in India, it failed to account for the inheritance rights of transgender persons. The Transgender Persons (Protection of Rights Act), 2019 creates the category of a 'third-gender' without deliberating upon how property will be distributed amongst the 'third-gender'[35]. Apart from the fact that majority of personal laws are predominantly governed by binary structure, the fact that different rules apply to male and female inheritance in many instances under inheritance laws creates unique challenges for the transgender persons further leading to their marginalisation.

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[31] *Amjad Khan v. Ashraf Khan*, (1929) 56 I.A. 213 (India) (holding that a gift of a life interest is valid under Muslim law and does not necessarily enlarge into an absolute estate); *see also* MULLA, *PRINCIPLES OF MAHOMEDAN LAW* § 164 (S.K. Sarvaria ed., 22d ed. 2017) (distinguishing between the *corpus* (ayn) and the *usufruct* (manafe) to allow for limited interests).
[32] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, 121, 203 (India); *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, 75 (India); *Commissioner of Income Tax v. Hindustan Bulk Carriers*, (2003) 3 SCC 57, 15 (India).
[33] The Hindu Succession Act, 1956 (applicable to Hindus, Buddhists, Jains, and Sikhs); the Muslim Personal Law (Shariat) Application Act, 1937 (governing intestate succession for Muslims); and the Indian Succession Act, 1925 (applicable to Christians, Parsis, Jews, and those married under the Special Marriage Act, 1954).
[34] *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438.
[35] The Transgender Persons (Protection of Rights) Act, 2019, §§ 3(e), 3(f).