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

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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.

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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).

7. POSITION AND STATUS OF TRANSGENDER PERSONS IN ISLAM

Islam recognises only two genders corresponding to two sexes, i.e., male and female[36]. Apart from that Islamic law recognises intersex persons and categorises them into (khuntha wadhih) and (Khuntha mushkil)[37]. A person with observable biological male organs, will get a male's share even if the person identifies as a female and a person with observable female organs will get a female's share even if later the person identifies as a male[38]. This applies where the sex of the person is clear but where the sex of the person is not clear like in the case of intersex persons, the urine- test is applied, i.e., if the persons' urine passes from the female organ (vaginal or similar opening), the person will get a female's share and if a person's urine passes from the male organ (penis or penis like structure), the person gets a male share[39].

Another category is the Khuntha- Mushkil category which is further divided into two categories a). where both male and female organs are present and the urine passes through both organs and b). where there are no organs[40]. However, if the urine passes from both male and female organs, the person's share will be decided as per the organ through which more quantity of urine passes predominantly and consistently and in case the person has no organ, then secondary characteristics like beard, menstruation, seminal discharge etc. are considered in some schools[41]. Although, secondary signs can help in sex-assignment but most schools prefer assigning minimum- share in case of intersex with no sex- organs as a legal caution or the average of share of both male and female[42]. But the former rule is preferred in both Hanafi and Shafi school of thought[43].

From the above analysis, it can be inferred that the under the Islamic Law, inheritance is determined on the basis of binary biological sex. A person with a biological deviation is to fit the two-sex model. Transgender persons with no ambiguity in biological sex, will get share as per two- sex model as Islam does not recognise any third- sex / gender.

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[36] Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* 45–47 (Oneworld Publications 2008).
[37] Ibn Qudāmah, *Al-Mughnī*, vol. 9, 58–60 (Dar al-Fikr, Beirut 1984).
[38] Al-Marghinānī, *Al-Hidāyah*, vol. 4, 507–08 (Farid Book Depot, New Delhi 1990).
[39] Ibn ʿĀbidīn, *Radd al-Muḥtār ʿala al-Durr al-Mukhtār*, Vol. 6, 758–760 (Dar al-Fikr, Beirut, 2000).
[40] Al-Nawawī, *Rawḍat al-Ṭālibīn*, Vol. 7, 58–59 (Dar al-Kutub al-ʿIlmiyyah, Beirut, 1991).
[41] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, 61–62 (Dar al-Fikr, Beirut, 1984).
[42] Abū Bakr al-Kasānī, *Badā'iʿ al-Ṣanā'iʿ fi Tartīb al-Sharā'iʿ*, Vol. 7, 142–143 (Dar al-Kutub al-ʿIlmiyyah, Beirut, 1986).
[43] Al-Sarakhsi, *Al-Mabsūṭ*, Vol. 30, 31–33 (Dar al-Maʿrifah, Beirut, 1993) and Al-Nawawī, *Minhāj al-Ṭālibīn*, 323–324 (Islamic Texts Society, Cambridge, 2000).

Thus, although there is no legal vacuum regarding the inheritance share of the transgender person, the third-gender identity created by NALSA and the Transgender Act of 2019, creates a doctrinal clash with the Islamic law which recognises only two genders corresponding the two-sexes. This inconsistency arises in case of sex- reassignment surgery and the Islamic law is silent on what share will a person get once their biological sex organs are changed through sex-reassignment surgery. The clash between the Islamic law and the secular Indian law is that of self-identification and gender- expression of the transgender persons and not that of inheritance.

a). Castration/Sex-Reassignment Surgery

Castration is not allowed in Islam under any school of thought. Castration is allowed only in cases of medical emergency and when the private parts get cut off accidently[44]. With regards to sex-reassignment surgery, the Sunni school of thought, the general rule is that sex- reassignment surgery is not allowed. Sunni fiqh allows only corrective surgery in case of intersex persons.

The Shia school of thought especially scholars like Ayatollah Khameini (Shia) and Sheikh Mohammad Al Tantawi (Sunni) of Iran have through fatwa allowed sex- reassignment surgery, however, the same appears to be an enforced change of sex and not acceptance of transgenderism as such. The qualification of sex-reassignment surgery or corrective surgery is in cases where medical experts have confirmed gender identity disorder or intersex ambiguity, not freely or universally.

There is no Islamic obstacle to sex change surgery, if it is approved by a reliable doctor". In 1964 also Ayatollah Khomeini had issued a fatwa stating that sex- reassignment surgery from male- to-female and female-to- male is not forbidden under Islam. The same is also not forbidden for a khuntha/ intersex. While transgender identity is socially and personally fluid in nature, the current legal framework especially under Islamic law is dependent on binary classification for the practical determination of inheritance rights. This ensures clarity in enforceability even though it does not fully capture the nuances of gender identity.

Ayatollah Seyyed Yusef Madani Tabrizi for example has disallowed sex- reassignment surgery on the basis that modification of vital body organs goes against the Quranic verses. Tabrizi applied the

[44] LAM, Castration of Male Genitals: Permissible?, https://lamonline.net/en/castration-of-male-genitals-permissible/.

literal interpretation on the Quranic verse like Chapter 4, verse 119 which says- “I will command them and they will change Allah’s creation”.

On the other hand, as per Mohammad Hashim Kamali, another Shia fatwa is a legal opinion of a qualified Islamic jurist in response to a question by Muslims. Ayatollah Khomeini’s fatwa recognises sex change surgery, but does not provide any view on transgender status in law and/ religion. In the case of sex- reassignments surgery, there are differing views but the dominant one in Shia law is that of Khomeini. Apart from Khomeini, nine other Marja-al-Taqlid allow sex- reassignment surgery.

The difference between Sunni and Shia school of thought matters because this creates different legal position and thus different status of transgender persons. Given the fact that majority of India’s Muslim population is Sunni, this Shia- Sunni fiqh distinction puts Indian Muslim transgender persons in a peculiar position as Sunni fiqh will apply to the majority of them, thus, they do not have religious sanction of sex- reassignment surgery as the Shia transgender Muslims do. Moreover, even in the Sunni fiqh, ‘transgender’ as a separate identity isn’t recognised, rather it is treated as gender- dysphoria needed to be fixed with the help of sex- reassignment surgery. Thus, it is more of an enforced phenomenon- a corrective procedure than an enabling Islamic legal decision.

The enforced sex- reassignment surgery although may have positive implications in some cases where the transgender person wants to opt for sex- change and does make navigating gender binary legal structure easier for them but the same may create medical issues especially in a country like India where medical experts for such surgeries are not as readily available.

Moreover, the surgery requires hefty finances which the marginalised transgender community may not be able to acquire. Although many states in India like Kerala provide reimbursement for sex-reassignment surgery, the one- time expenditure has to be made. In an empirical study on transgender welfare schemes on Kerala, it was brought to the notice by transgender persons of Kerala that the welfare schemes of the state government are focused on aligning the transgender persons with the gender- binary thus, mirroring the Islamic fiqh on transgenderism.

It is also to ben noted that though Shia fiqh allows for sex- reassignment surgery, no explanation has been given on the inheritance rights of male- to female or female- to male transitioned transgender persons. Since, under the Islamic law a male gets double the share of a female and inheritance rules revolve around this distinction, the sex-transition changes many inheritance rules vis- a- vis the transgender person and their relatives. This argument was also raised by the Federal Shariat Court while

discussing the constitutionality of Transgender Persons (Protection of Rights Act), 2018 of Pakistan[45]. In the case, it was ruled that inheritance should be decided as per the biological sex only irrespective of the sex- change[46].

The decision of Federal Shariat Court is in appeal before the Supreme Court and is awaiting final decision, till then the provisions of the Transgender Act, 2018 of Pakistan applies on inheritance, i.e. the transgender person to get share as per their self- perceived identity.[47]Since gender- binary division of share is the main issue of contention, equal division of share irrespective of gender can be a possible solution but this comes with heavy political consequences in a diverse country like India and may challenge other constitutional norms like right to religion under Art 25 and Art 26[48].

8. INHERITED INEQUITIES: TRANSGENDER RIGHTS, ADOPTION, AND THE BOUNDARIES OF ISLAMIC LAW

For the purposes of discussing the inheritance rights of transgender persons, it is important to highlight the differences inherited/ ancestral property and acquired property under Islamic law. Some contours of adoption will also be discussed here as they are relevant for understanding the empirical findings.

Under the Islamic law, self-acquired property can be distributed in three ways- **1). Wassiyat or will-** one can bequeath self-acquired or inherited property under will not exceeding 1/3rd of the property. **2). Hiba or gift-** one can give gift whole property without any limitation. **3). Hiba-al-iwaz or gift for condition-** one can gift whole property without limitations in lieu of some consideration. Thus, in case of acquired and inherited property, a transgender person has absolute control and can give property to any person or adoptee. This also means that a transgender person may not get any share from inheritance once the parent exercises Hiba or Hiba-al-iwaz in favour of other children or relatives.

A transgender person may only get share in inheritance as per biological sex when the parent dies intestate and general rules of inheritance apply. This works as a double-edged sword affecting two important rights of the transgender persons, first, the right to inheritance and second the right to adopt.

[45] Mehr Muhammad Adeel Riaz & Mehrub Moiz Awan, Transgender Rights in Pakistan: Implications of Federal Shariat Court Ruling, 10 *Lancet Psychiatry* 620 (2023), https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(23)00191-8/fulltext.
[46] The Transgender Persons (Protection of Rights) Act, 2018.
[47] *Hammad Hussain v. Federation of Pakistan* (2023) PLD Federal Shariat Court 45. In this judgment, the FSC struck down several provisions of the Transgender Persons (Protection of Rights) Act 2018, ruling that "gender" cannot be based on "self-perceived identity" but must be based on biological sex in accordance with Shariat.
[48] The Transgender Persons (Protection of Rights) Act, 2018.

Once a transgender person is denied share from ancestral property, it becomes difficult for such a person to get a child for adoption for lack of financial stability, especially in a place like India where inherited property accounts for majority of the assets. Additionally, if a transgender person dies intestate, the adopted child will not be able to claim even the self-earned property of the adopter as Islam does not recognise legal adoption but only emotional adoption where blood relations have precedence over the adopted child.

The above situations can be explained from the following examples-

a). A person F has three children, one of whom is a transgender (T). F makes a gift deed in favour of his other two children excluding (T) from share in F's inheritance. It is immaterial here whether F's property is ancestral or self-acquired because in Muslim Personal Law, once a person gets ancestral property, he or she becomes the absolute owner of that property. His or her children or other relatives will have a claim over the property only in case of death of F.

b). Similarly, if T (the transgender) adopts (O) and does not exercise his right to make a gift- deed in favour of (O) and dies intestate, O cannot claim any share even in (Ts) self- earned property and the property will devolve to T's other relatives like siblings, parents, nieces, nephews etc. as the case may be.

The above analysis will now be used to understand the real- lived experiences of the transgender persons of Kashmir community.

9. SOME CASE LAWS ON POINT-

a). Iqbal Ahmed V. Gulzaro Begum and Ors. (Delhi Adj, 2024 / 2023-24)[49]

In this case, the adopted son was entitled to inheritance because the deceased Muslim owner had not opted to be governed by the Muslim Personal Law under sec 3 of the Muslim Personal Law Shariat Act, 1937. Thus, in this case secular adoption applied and inheritance was granted to the adoptee.

This case shows that the inheritance rights of adoptee are dependent on the application or non-application of the Muslim Personal law and the owners will. Considering that the transgender persons

[49] *Iqbal Ahmed v. Gulzaro Begum & Ors.*, CS No. 613105/2016 (Delhi Dist. Ct., Tis Hazari, Feb. 3, 2024).

are less literate and lack financial standing and access to administrative and judicial services, this option is viable but difficult for the transgender to exercise.

b). Mohammad Allahdad Khan V. Mohammad Ismail Khan (1888) (Allahabad High Court Full Bench)[50]

This case is a classic example of the traditional status and rules regarding adoption under the Muslim law. In this case, the court held that under the Muslim Personal law legal adoption is not recognised and therefore not valid.

Adding cultural nuance to the above two cases is the case of –

c). Mohd. Akbar Bhat V. Mohammad Akhnoon[51]

In this case cultural norms of Muslims in the region of Jammu and Kashmir were considered and it was accepted that in certain cases cultural adoption is recognised as valid and inheritance can be claimed under such adoption.

The case of **Mohd. Akbar Bhat v. Mohammad Akhnoon** provides a cultural, context- specific judicial precedent on adoption suggesting that though the general rule under Muslim Personal Law is that adoption is not legally valid, cultural norms may sometimes have precedence over the general legal doctrine.

10. INHERITED INEQUITIES: TRANSGENDER RIGHTS, ADOPTION, AND THE BOUNDARIES OF ISLAMIC LAW

For analysing the inheritance rights of transgender persons, it is essential to distinguish between self-acquired and inherited property under Islamic law, and to briefly outline the contours of adoption, as these issues frequently surface in the empirical findings.

Under Islamic law, self-acquired or inherited property may be transferred through: (1) **wasiyyat** (will), which allows a bequest of only up to one-third of the estate[52]; (2) **hiba** (inter vivos gift), through

[50] *Mohammad Allahdad Khan v. Mohammad Ismail Khan*, (1888) ILR 10 All. 289 (Full Bench).
[51] *Mohd. Akbar Bhat v. Mohammad Akhnoon*, AIR 1972 J&K 105 (Full Bench).

[52] Asaf A.A. Fyzee, *Outlines of Muhammadan Law* 358–62 (5th ed. Oxford University Press 2008).

which a person may gift the whole of their property without limitation[53]; and (3) **hiba-bil-iwaz** (gift for consideration), which similarly permits complete transfer of ownership. Once an individual becomes the owner of inherited property, they possess full authority to dispose of it through any of these mechanisms. However, the converse also holds: a transgender person may be deprived of their share in the parental estate if the parent transfers the property through hiba or hiba-bil-iwaz to other children or relatives during their lifetime[54].

As a result, a transgender person receives a share in inheritance only when the parent dies intestate, and even then, the share is determined strictly according to the person's *biological sex* as per classical Islamic jurisprudence. This creates a dual vulnerability. First, the right to inherit is precarious because it can be defeated entirely by lifetime gifts. Second, the ability to raise a child through emotional adoption (kafāla) becomes insecure: if the transgender adoptive parent dies intestate without executing a gift deed in favour of the child, the child receives no share even in the adoptive parent's self-acquired property, since Islamic law does not recognise legal adoption[55].

These issues may be illustrated as follows: (a) If F has three children, including a transgender child T, and transfers property via hiba to the other two children, T receives no share in F's estate regardless of whether the property was ancestral or self-acquired, as F becomes the absolute owner once they inherit. (b) Similarly, if T emotionally adopts a child O but dies intestate without gifting property to O, the property devolves on T's blood relatives (siblings, parents, nephews, nieces, etc.), leaving O with no legal claim.

11. EMPIRICAL ANALYSIS

This section will situate the above doctrinal analysis into the lived- experiences of the transgender persons of Kashmir. The empirical work involved in- depth interviews of 14 transgender persons on various themes, one of which was inheritance. For the purposes of this paper, the researcher has included and analysed only the theme of inheritance. The interviews were semi-structured and ranged from 20 minutes to 40 minutes duration. The participants were informed of the objective for interview and consent was taken for the same. The names have been changed to maintain anonymity.

[53] Mulla, *Principles of Mahomedan Law* § 149 (22d ed. LexisNexis 2017).
[54] *Khursheed Maun v. Mst. Amanullah Begum*, AIR 1964 SC 275.
[55] *Hashmi v. Union of India*, (2014) 4 SCC 1.

The interviews reveal a few patterns although the patterns were seen to be repeated in various cases, this data analysis cannot be generalised as the data- set was small. Despite the lack of generalizability this data is useful in understanding the layered interaction of sex, gender-identity, gender- expression, roles with economic viability/ independence, family dynamics and law.

11. a). Interlinkage of Inheritance, Marriage and Adoption

Two of the respondents namely Shakira and Bisma (name changed) revealed that their parents especially father has categorically denied to give inheritance to them stating that since they cannot get married and can't have progeny, they will not receive any share from the property. Additionally, Bisma's father said that if he transfers property to Bisma, Bisma will pass it to someone else (not a family-member).

These interviews demonstrate that inheritance, is interlined with marriage and adoption in Kashmir and right to marriage, right to adoption and surrogation all connect to disinherit the transgender persons from their share. This is despite the fact that Islamic inheritance rules do not exclude transgender or even intersex persons from inheritance. Thus, implying that doctrinal rules and social realities may differ starkly.

11.b). Interlinkage of Inheritance with financial contribution by transgender persons

Umaira's cases are strong evidence in support of the economic contribution and right to inheritance in the Kashmiri transgender community. For example, Umaira said- that today money is everything and my family accepts me because I am earning money. Bisma's account however shows a different stance. Bisma says that her father will not give her any property. On being asked what share will be preferred by Bisma, Bisma clearly says the share of a male because of the immense financial contribution Bisma has made. It must be noted that Bisma identifies as a woman and not a third- gender.

This is evident of the dissonance between self- identification and preferred share considering real-life aspects like financial contribution. Additionally, the lack of marital status which is used against transgender persons for denying inheritance can also work in their favour as they have no marital responsibilities and can provide for their parents more and better than the married siblings.

11. c). Interlinkage of Inheritance with Old-Age Care of Parents

Taha's case highlights another nuance in the inheritance distribution in Kashmiri transgender community because Taha's only brother is not living with his parents thus the onus of taking care of parents comes on Taha and due to the same Taha has been given share in the property.

11. d). Law as a Protector and an Abuser of Transgender Inheritance-A Double- Edged Sword

Shazia whose father dies intestate had to find a long battle to get share in the property, to the extent of being labelled as an insurgent by the brother to deny the inheritance. Although, Shazia got the share of a male after the legal battle access to legal support is not available to all. Shazia's case emphasises that law can be a powerful tool for the marginalised people like transgender persons as well as a tool against them depending upon who has better access to the legal and judicial system.

Since under Islam, a transgender person may be not denied any share, the doctrinal lacunae lie in the absolute power of Hiba to exclude the transgender child. The law should make specific law for protecting transgender persons to protect their inheritance rights for ensuring that the transgender persons are not denied their share solely on the basis of their self-identified gender and/ gender expression.

12. LEGAL, SOCIAL AND POLICY SUGGESTIONS

12.a). Conditional Life-Interest in Inheritance

From the above analysis, we observed that the transgender persons may be legally removed from the property exercising Hiba/Gift or Hiba-il-iwaz (conditional gift), one of the most important policy-action is to prevent exercising of Hiba by parents in exclusion of a child solely on the basis of gender/ gender- expression.

Additionally, the respecting the basic Islamic principles of inheritance, the transgender persons should receive life- interest in their share of family property so that they are able to live and use the property to their benefit during their lifetime but with a condition that after their death the share should go to Islamic heirs as per the Islamic rules of inheritance. To prevent being abused by siblings and other relatives (potential next heirs), there should be an abuse- protection clause where it is clearly stipulated that in case of abuse, eviction, harassment and mistreatment by the above, such share will not devolve to such next heirs, converting the life-time share to full ownership.

12.b). Housing Reform

Transgender persons like Shakira, Bisma and others in my interview pointed to the lack housing facility once they are disinherited from the property. To tackle this, it is important that till the time inheritance doctrines related to transgender persons get properly implemented, the transgender persons are given rental subsidy schemes within their preferred society. Ghettos should be discouraged as this leads to further marginalisation and stigma.

12.c). Community-Based Family Counselling

The root of 'social exclusion' and 'marginalisation' of transgender community is non-acceptance starting from family extending to other members and institutions of the society. Thus, sensitisation of family and community is quintessential. A pragmatic way to do this is use multi-media for awareness regarding transgender issues, use Public Health-CARE Centres, Community halls, Local welfare committees aanganwadi centres to sensitise people and resolve family disputes with transgender persons. Apart from that political, social and religious leaders should use their voice to end stigma and discrimination towards transgender persons. These places and leaders give a political, social and religious backing to transgender welfare.

12.d). Legal Aid for Inheritance Disputes

As Shazia's case points out legal mechanism plays an important role in inclusion of transgender persons in in familial inheritance. Thus, to ensure easy access of transgender persons to the judicial system, judicial system should be sensitised regarding transgender persons exclusion from inheritance and ensuring that there is legal aid for both negotiation as well as proper litigation. Moreover, notifications should be circulated by Social Welfare Department or any other concerned department on inheritance rights of transgender persons to undo the cultural and social injustice meted out to transgender persons in Kashmir.

CONCLUSION

This paper concludes that the Islamic law which recognises only binary categories of gender, accommodates intersex persons and transgender persons within the inheritance rules based on their dominant sexual characteristics. The lived- reality of transgender persons in Kashmir, however shows a stark contrast to the otherwise accommodative Muslim Personal Law.

NALSA judgement created third-gender category with good will but the Transgender Act, 2019 created a 'binary-trap' by creating distinct category of 'transman and transwoman' under sec 6 and 7 of the Act. By creating a 'third-gender' and not deliberating on civil rights like inheritance, both NALSA and the Transgender Act, 2019 have created a legal vacuum and administrative confusion.

This paper through the empirical study explored the intersection of secular law, Muslim Personal law and social realities to come to the conclusion that in the case of transgender persons primary barrier to inheritance is not doctrinal but social in nature. Insights from the in-depth interviews of Shakira, Bisma, and Shazia, underscore that social pressure and lack of administrative clarity and dearth of domestic abuse protection laws for transgender persons severely affects the inheritance rights of the transgender persons in the valley.

This denial of inheritance is often exercised through the absolute power of Hiba (gifts) in favour of male or female heirs over transgender /intersex heirs. Disinheritance from ancestral or parental property plunges transgender persons further into poverty and marginalisation defeating the objective of both NALSA and Transgender Act, 2019. This also adversely affects the right to equality and the right to life under Art 14 and 21 respectively.

Such a multi-faceted and intersectional problem requires a multi-faceted approach. Legally, a conditional life- interest can act as a bridge between Art 14 and Art 26 where the right to life of transgender persons and the religious right of Hiba both are preserved. At the social level, community-sensitisation is an important step towards reducing the marginalisation and disinheritance of transgender persons to ensure that invisibility is no longer a 'survival- strategy' and identity is not the reason for social exclusion for the transgender persons.

At the administrative level, government should notify that transgender persons should not be denied inheritance by force or coercion by other legal heirs. In a country where right to life and right to religion have been at odds many a times, it's important to tread with legal, social and religious caution while ensuring the most marginalised communities like transgender community's rights don't get lost in the majoritarian rights discourse.