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Beyond Acknowledgement: The Legal Gap in Protecting the Family Rights of Transgender Persons in India – Constitutional and Personal Law Aspects

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ABSTRACT

The Supreme Court of India's landmark judgments in NALSA v. Union of India (2014) and Navtej Singh Johar v. Union of India (2018) have paved the way for broader legal recognition of transgender persons in India. However, basic rights such as the right to marry, to form a family, to adopt and to inherit remain largely unrecognised in law. This article examines the intersection of the rights of transgender persons with the statutory and personal laws of the Indian legal framework. The Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 continue to use heteronormative terms such as "bride" and "bridegroom", creating impediments for transgender couples. Likewise, adoption under the Hindu Adoptions and Maintenance Act, 1956 is confined to a "male" or "female" Hindu, leaving transgender persons in a grey zone. The Hindu Succession Act, 1956 is also framed in gendered terms, giving rise to disputes over self-identified gender. Marriage (nikah) under Muslim personal law is traditionally a contract between a man and a woman, leaving little, and uncertain, space for transgender persons. Beyond kafala (guardianship), adoption is not recognised under Muslim personal law, and inheritance rights under Muslim law are tied to the distribution of property between binary gender categories. The article argues that these exclusions in the personal laws conflict with the fundamental rights to equality (Article 14) and dignity (Article 21) guaranteed by the Constitution of India, particularly since the Supreme Court in Shayara Bano v. Union of India (2017) brought a personal-law practice within fundamental-rights scrutiny. Drawing on constitutional reasoning, statutory interpretation and comparative analysis, the article advocates legislative amendments to make the provisions on marriage, adoption and inheritance in the personal laws gender-inclusive. Mere recognition of gender identity does not make transgender persons equal with persons of binary gender identity; that requires legal affirmation of their right to family life (marriage, adoption and inheritance), which is the foundation of human dignity.

Keywords: Transgender persons, Marriage, Adoption, Inheritance, Hindu law, Muslim law

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I. INTRODUCTION

For centuries transgender persons have been ignored by society, which has made them a marginalised and invisible part of human civilisation. Gender movements are often framed around the binary of ‘men versus women’ and focus on dismantling the patriarchal structure of society that has long kept cisgender women in subservience and hardship through the unjust exercise of authority. Although these movements are essential to a better society, transgender people have been left out of them, and their struggles have gone unheard. They face layered discrimination even within gender movements, as they do not fit neatly into cisgender categories.

This neglect began to change in 2014, when the Supreme Court of India, in its historic *NALSA* judgment, recognised the identity of transgender persons.¹ The Court gave them their long-awaited recognition as a ‘third gender’. Affirming that gender identity is an innate perception of oneself that does not depend on biological characteristics, the Court upheld the right of transgender persons to self-identify their gender without any medical test or surgery.² It also directed the Centre and the State governments to treat transgender persons as socially and educationally backward classes and to take affirmative action for their advancement.³

Four years later, in *Navtej Singh Johar v. Union of India*,⁴ the Supreme Court read down section 377 of the Indian Penal Code, 1860⁵ in so far as it criminalised consensual sexual conduct between adults. Relying heavily on constitutional morality, these judgments establish that sexual orientation and gender identity are intrinsic to a person’s individual autonomy. Parliament then enacted the Transgender Persons (Protection of Rights) Act, 2019⁶ to safeguard the rights and promote the welfare of transgender persons in India. Even after these decisive steps, however, a legal gap remains in the personal laws, particularly in matters of marriage, adoption and inheritance.

This article studies the continued exclusion of transgender persons from the right to form a family under the statutory and personal laws (Hindu law and Muslim law), an exclusion that

¹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 [hereinafter *NALSA*].

² *Id.*

³ *Id.*

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁵ The Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India), *repealed by* The Bharatiya Nyaya Sanhita, 2023, § 358, No. 45, Acts of Parliament, 2023 (India).

⁶ The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

runs against the constitutional guarantees of equality (Article 14)⁷ and of dignity and personal liberty (Article 21),⁸ and against the developing concept of constitutional morality.

II. RESEARCH GAP

While several studies address legal recognition, there is little in-depth research on the denial, under the statutory and personal laws, of the rights of transgender persons in matters of marriage, family formation, adoption and inheritance.

III. RIGHT TO MARRIAGE: A CONSTITUTIONAL PERSPECTIVE

The Constitution of India does not expressly guarantee a ‘right to marry’. In several landmark cases, however, the Supreme Court has interpreted provisions of Part III to protect marriage, intimacy and family formation as integral to individual freedom. These constitutional interpretations can serve as a legal anchor for challenging discriminatory statutory and personal laws.

Article 14: Article 14 guarantees every person equality before the law and the equal protection of the laws, and it has given rise to the doctrine of reasonable classification. Discrimination on the ground of sex is, moreover, expressly prohibited by Article 15(1). In *NALSA*, the Supreme Court held that discrimination on the ground of gender identity violates Articles 14, 15 and 16, read ‘sex’ in Articles 15 and 16 to include gender identity, and directed that hijras and eunuchs be treated as a ‘third gender’.⁹ Yet the statutory and personal laws in force in India frame their rights and protections in matters of family life in terms of men and women, and make no express provision for transgender persons, so that those whose identities or relationships fall outside the binary are left beyond their protection. This, it is argued, cannot be reconciled with Article 14.

Article 19(1)(a) and (c): Article 19(1)(a) guarantees freedom of speech and expression, which, as *NALSA* recognised, includes the expression of one’s gender identity.¹⁰ Article 19(1)(c) guarantees the freedom to form associations or unions, which, it may be argued, extends to forming a familial association or entering a marital union with a partner of one’s choice. On this view, excluding transgender persons from the statutory and personal laws infringes both provisions.

Article 21: Article 21 guarantees the right to life and personal liberty, which the Supreme Court has repeatedly interpreted to include the right to live with human dignity, the right to privacy

⁷ INDIA CONST. art. 14.

⁸ INDIA CONST. art. 21.

⁹ *NALSA*, (2014) 5 SCC 438.

¹⁰ *NALSA*, (2014) 5 SCC 438.

and the right to make personal choices. In *Justice K.S. Puttaswamy v. Union of India*, the Court recognised the right to privacy as a fundamental right under Article 21 and understood privacy to include autonomy in decisions about sexual orientation, family life and procreation.¹¹ Likewise, in *Shafin Jahan v. Asokan K.M.*, the Court held that the right to marry a person of one's choice is integral to Article 21, as is the freedom to choose one's faith.¹² These constitutional principles apply equally to transgender persons, and denying them these rights under statutory and personal laws offends the Constitution.

Article 25: In India, marriages are usually solemnised through customary rites closely connected with religious identity. Article 25 protects freedom of conscience and the right freely to profess, practise and propagate religion, subject to public order, morality and health and to the other provisions of Part III. In *Shayara Bano v. Union of India*, the Supreme Court, by a majority of three to two, set aside the practice of instant triple talaq (*talaq-e-biddat*), bringing a personal-law practice within the scrutiny of Part III.¹³ This constitutional protection extends to transgender persons. In practice, however, the institution of marriage under religious law is heteronormative, and transgender persons are left out of consideration without legal justification.

Constitutional morality: In *Navtej Singh Johar*, the Supreme Court took a transformative approach and upheld the primacy of constitutional morality over social morality.¹⁴ It held that the fact that the LGBTQ+ community is a small minority of the population cannot justify denying its members their fundamental rights in the name of social morality. This reasoning bears directly on the right of transgender persons to marry and to form a family.

IV. HUMAN RIGHTS OBLIGATIONS UNDER INTERNATIONAL LAW

The International Bill of Human Rights comprises the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). India voted for the UDHR in 1948 and acceded to both Covenants in 1979. Article 16 of the UDHR, Article 23 of the ICCPR and Article 10 of the ICESCR protect the right to marry and to found a family and call for the protection of and support for the family; Articles 8 and 12 of the European

¹¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

¹² *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

¹³ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

¹⁴ *Navtej Singh Johar*, (2018) 10 SCC 1.

Convention on Human Rights (ECHR), which binds only the member States of the Council of Europe, offer a persuasive regional comparison.¹⁵

The Yogyakarta Principles are a set of principles that apply existing international human rights law to issues of sexual orientation and gender identity (SOGI). They were developed by a group of human rights experts who met in Yogyakarta, Indonesia, in November 2006, were published in 2007, and were supplemented in 2017 by the Yogyakarta Principles plus 10 (YP+10), which extend them to gender expression and sex characteristics.¹⁶ Their purpose is to provide a unified framework for protecting the rights of LGBTQ+ persons, especially transgender, non-binary, intersex and gender-diverse persons, under existing human rights law. Since 2011, the United Nations Human Rights Council has adopted a series of resolutions specifically addressing sexual orientation and gender identity.¹⁷ These resolutions focus on ending violence and discrimination based on SOGI and affirm the rights of LGBTQ+ persons, including transgender persons. The 2011 resolution was the first United Nations resolution on sexual orientation and gender identity.¹⁸

V. BARRIERS TO MARRIAGE AND FAMILY FORMATION: A STATUTORY OVERVIEW

While the Constitution offers a robust conception of equality and dignity, the statutes governing marriage and family life in India remain heteronormative. They reflect the social assumption that only men and women within the binary have a legitimate claim to marry and to form a family, and thereby exclude many transgender persons from key domains such as marriage, adoption, guardianship, reproductive technologies and inheritance.

The Hindu Marriage Act, 1955: The HMA applies to any person who is a Hindu by religion, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj, and to any person who is a Buddhist, Jain or Sikh by religion.¹⁹ A transgender person, like a cisgender man or woman, may profess Hinduism, since freedom of religion is a fundamental

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 16 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 12, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁶ INTERNATIONAL COMMISSION OF JURISTS, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007); INTERNATIONAL COMMISSION OF JURISTS, *The Yogyakarta Principles plus 10* (2017).

¹⁷ Human Rights Council Res. 17/19, *Human Rights, Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/RES/17/19 (June 17, 2011); see also Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Sept. 26, 2014); Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (June 30, 2016).

¹⁸ Human Rights Council Res. 17/19, *supra* note 17.

¹⁹ The Hindu Marriage Act, 1955, § 2, No. 25, Acts of Parliament, 1955 (India).

right guaranteed to all by Article 25.²⁰ It follows that the HMA should apply to transgender Hindus as it applies to persons of binary gender. The difficulty lies in the expressions ‘bride’ and ‘bridegroom’ in section 5, which have traditionally been read to denote the male–female binary.²¹ In *Supriyo v. Union of India*, the Constitution Bench accepted that transgender persons in heterosexual relationships may marry under the existing law, including the personal laws.²² The uncertainty that remains concerns transgender and non-binary persons whose relationships do not fit that description, and the reluctance of registering authorities to act on the law as declared.

The Special Marriage Act, 1954: Interfaith and inter-caste marriages may be solemnised under the secular framework of the SMA. This Act, too, provides for marriage between a ‘male’ and a ‘female’ and makes no express provision for transgender persons.²³ In the marriage equality case,²⁴ the Supreme Court declined to read the SMA in gender-neutral terms so as to permit same-sex marriage, holding that to do so would amount to judicial legislation. While the Court acknowledged that queer couples face discrimination, it left the recognition of their unions to the legislature.

The Hindu Adoptions and Maintenance Act, 1956: HAMA confers the capacity to adopt on a ‘male Hindu’ and a ‘female Hindu’, subject to conditions relating to capacity and marital status.²⁵ It makes no express provision for adoption by a transgender person or a transgender couple. In practice, transgender persons who seek to adopt face legal and social hardship: courts and adoption agencies often question their eligibility in a manner that cisgender applicants rarely encounter.

The Juvenile Justice (Care and Protection of Children) Act, 2015: Unlike HAMA, the JJ Act is secular and permits adoption by individuals and couples irrespective of their religion.²⁶ On paper, it opens the door to adoption by transgender persons. The Adoption Regulations, 2022, however, permit a couple to adopt only after at least two years of stable marital relationship, and allow a single person to adopt subject to conditions, a single male being ineligible to adopt a girl child.²⁷ In *Supriyo*, the majority of the Constitution Bench declined to

²⁰ INDIA CONST. art. 25.

²¹ The Hindu Marriage Act, 1955, § 5(iii), No. 25, Acts of Parliament, 1955 (India).

²² *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348 (holding that transgender persons in heterosexual relationships may marry under existing law, including the personal laws).

²³ The Special Marriage Act, 1954, § 4(c), No. 43, Acts of Parliament, 1954 (India).

²⁴ *Supriyo*, 2023 SCC OnLine SC 1348.

²⁵ The Hindu Adoptions and Maintenance Act, 1956, §§ 7–8, No. 78, Acts of Parliament, 1956 (India).

²⁶ The Juvenile Justice (Care and Protection of Children) Act, 2015, §§ 56–57, No. 2, Acts of Parliament, 2016 (India); see also *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1.

²⁷ Adoption Regulations, 2022, regs. 5(2)–(3) (India).

strike down the marital requirement, so that unmarried couples, including queer and transgender couples, cannot adopt jointly.²⁸ Although no statute prohibits transgender persons from adopting, they may still face rejection and harassment from adoption agencies because they are transgender.

The Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021: The Surrogacy Act permits altruistic surrogacy only for an ‘intending couple’, that is, a legally married Indian man and woman, and for an Indian widow or divorcee aged between 35 and 45 years.²⁹ The ART Act likewise confines its services to an infertile married couple or a woman above the age of twenty-one.³⁰ These provisions operate arbitrarily against transgender persons who wish to found a family through reproductive technologies. While Article 21 protects reproductive autonomy,³¹ these statutes perpetuate a rigid and exclusionary framework by denying access to transgender persons.

The Hindu Succession Act, 1956 and the Indian Succession Act, 1925: Both the HSA and the ISA use terms such as ‘son’, ‘daughter’, ‘male’ and ‘female’, which have historically been understood in binary terms.³² A transgender person’s self-identified gender is often disregarded by the family, and disputes follow, since social stigma makes it difficult for many families to accept the identity of a transgender child. Thus, while courts may protect the inheritance rights of a transgender person under Article 14,³³ the ambiguity of these statutes leaves very little room for transgender persons in matters of inheritance.

VI. HINDU LAW PERSPECTIVE

Both codified and uncoded Hindu law have historically been expounded around the binary of male and female, a framing reinforced by post-independence enactments such as the HMA, HAMA, the HSA and the Hindu Minority and Guardianship Act, 1956.³⁴ While constitutional law now recognises the self-identification of transgender persons, these statutes remain

²⁸ *Supriyo*, 2023 SCC OnLine SC 1348.

²⁹ The Surrogacy (Regulation) Act, 2021, §§ 2(1)(h), (r)–(s), 4(iii)(c), No. 47, Acts of Parliament, 2021 (India).

³⁰ The Assisted Reproductive Technology (Regulation) Act, 2021, §§ 2(1)(e), (u), 21(g), No. 42, Acts of Parliament, 2021 (India).

³¹ INDIA CONST. art. 21; *Puttaswamy*, (2017) 10 SCC 1.

³² The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India); The Indian Succession Act, 1925, No. 39, Acts of Parliament, 1925 (India).

³³ INDIA CONST. art. 14.

³⁴ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India); The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India); The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India); The Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956 (India).

unamended, creating doctrinal and practical obstacles to a dignified life for transgender persons.³⁵

The HMA uses the terms ‘bride’ and ‘bridegroom’, which have traditionally been read as confined to cisgender women and men.³⁶ The Madras High Court, however, following *NALSA* on self-identification, held that the term ‘bride’ includes a transgender woman.³⁷ The Supreme Court has since accepted that transgender persons in heterosexual relationships may marry under the personal laws,³⁸ but marriage registrars often remain reluctant to register such marriages, as the HMA contains no express provision for marriages involving transgender persons. Without legislative reform, questions remain unresolved about the validity of a marriage between two transgender persons, or between a non-binary person and a partner of any gender.

Under HAMA, only a ‘male’ or ‘female’ Hindu may adopt.³⁹ The Act does not expressly recognise a transgender person as competent to adopt. On a constitutional reading informed by *NALSA*, a transgender man who identifies as male, or a transgender woman who identifies as female, may in principle adopt under sections 7 and 8 of HAMA.⁴⁰ Social stigma and restrictive agency practice, however, keep this from happening. Guardianship law likewise fails to secure equal parental rights for transgender parents, contrary to the guarantee of equality in Article 14.⁴¹

Under the Hindu Succession Act, heirs take through gendered categories such as ‘son’, ‘daughter’, ‘widow’, ‘husband’, ‘father’ and ‘mother’.⁴² This creates uncertainty about the inheritance rights of transgender persons, and the questions it raises cannot be settled without clear legislation. If a person recorded as a ‘son’ at birth later identifies as female, is she to be treated under the HSA as a ‘son’ or as a ‘daughter’? And if a transgender woman’s marriage is not recognised as valid under the HMA, can she claim inheritance rights as a widow?

Under Hindu law, marriage is regarded as a sacrament rooted in customary rites such as *saptapadi*, traditionally founded on the male–female binary.⁴³ India nevertheless has a rich tradition of recognising gender diversity, and Hindu scriptures and traditions acknowledge non-

³⁵ *NALSA*, (2014) 5 SCC 438.

³⁶ The Hindu Marriage Act, 1955, § 5, No. 25, Acts of Parliament, 1955 (India).

³⁷ *Arunkumar v. Inspector General of Registration*, 2019 SCC OnLine Mad 8779.

³⁸ *Supriyo*, 2023 SCC OnLine SC 1348.

³⁹ The Hindu Adoptions and Maintenance Act, 1956, §§ 7–8, No. 78, Acts of Parliament, 1956 (India).

⁴⁰ *Id.*; see *NALSA*, (2014) 5 SCC 438.

⁴¹ INDIA CONST. art. 14.

⁴² The Hindu Succession Act, 1956, §§ 6–8, 15 & sch., No. 30, Acts of Parliament, 1956 (India).

⁴³ The Hindu Marriage Act, 1955, § 7, No. 25, Acts of Parliament, 1955 (India).

binary and third-gender identities. As the Supreme Court observed in *NALSA*, the concept of *tritiya prakriti* (third nature) or *napumsaka* has long been part of Vedic and Puranic literature.⁴⁴ According to a tradition associated with the Ramayana, Lord Rama blessed the hijras for their unwavering loyalty, a story the community reads as divine recognition of its identity.⁴⁵ In the Mahabharata, Shikhandi, a rebirth of Amba born female, later lives as a man and is instrumental in Bhishma's death, while Arjuna lives as Brihannala, a eunuch teacher of dance, during the final year of the Pandavas' exile.⁴⁶ The Aravanis, a transgender community in Tamil Nadu, trace their spiritual identity to Aravan, a son of Arjuna and Ulupi in the Mahabharata.⁴⁷ Aravan offered himself as a sacrifice to secure the Pandavas' victory in the Kurukshetra war. Before dying, he wished to spend his last night as a married man, but no woman would marry a man destined to die the next day. To fulfil his wish, Lord Krishna took the form of Mohini, a beautiful woman, and married Aravan. The next day Aravan was sacrificed, and Krishna, as his widow, mourned his death. The Aravanis identify with Krishna-Mohini and regard themselves as Aravan's spiritual brides. The myth is re-enacted each year at the Koovagam festival in Tamil Nadu, where thousands of transgender women symbolically marry Aravan and observe rites of widowhood the following day.⁴⁸ The story gives the community religious legitimacy and a cultural identity, blending mythology with the lived struggles and the celebration of gender diversity. Ardhanarishvara, the composite form of Shiva and Parvati, embodies the union of masculine and feminine energies,⁴⁹ and Krishna's form as Mohini illustrates a divine transformation of gender for cosmic purposes.⁵⁰

Codified Hindu law could now be developed to reflect these inclusive strands of its own cultural heritage.

VII. MUSLIM LAW PERSPECTIVE

In India, Muslim personal law is largely uncodified and is governed by classical Islamic jurisprudence (*fiqh*), the Muslim Personal Law (Shariat) Application Act, 1937 and judicial interpretation.⁵¹ In matters of marriage, guardianship and inheritance, the interpretive framework is gendered, with a clear distinction between 'man' and 'woman'.⁵² Although

⁴⁴ *NALSA*, (2014) 5 SCC 438; see also SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY (Ruth Vanita & Saleem Kidwai eds., 2000).

⁴⁵ Valmiki Ramayana, Ayodhya Kanda; see also *NALSA*, (2014) 5 SCC 438 (recounting the tradition).

⁴⁶ Mahabharata, Udyoga Parva, Virata Parva and Bhishma Parva.

⁴⁷ *Id.*

⁴⁸ SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA (2d ed. 1999).

⁴⁹ STELLA KRAMRISCH, THE PRESENCE OF ŚIVA (1981).

⁵⁰ WENDY DONIGER, THE ORIGINS OF EVIL IN HINDU MYTHOLOGY (1980).

⁵¹ The Muslim Personal Law (Shariat) Application Act, 1937, § 2, No. 26, Acts of Parliament, 1937 (India).

⁵² DINSHAW FARDUNJI MULLA, PRINCIPLES OF MAHOMEDAN LAW (22d ed. 2017).

Muslim law is open to interpretation, conservative readings have generally been taken to exclude transgender persons. This section examines how Muslim personal law, as applied in India, treats transgender persons.

Under Muslim law, marriage (*nikah*) is conceptually a contract between a man and a woman that legitimises companionship and procreation and confers social status.⁵³ Difficulty arises when one of the parties is a transgender person. Classical Islamic jurisprudence recognises the *khuntha* (a person of intersex or ambiguous sex)⁵⁴ and accepts that such a person may marry according to the predominant sex characteristics, but it is silent on the marriage of self-identified transgender persons. Reform-minded jurists argue for recognising such marriages on the principle of human dignity (*karamah insaniyyah*) found in the Quran,⁵⁵ but *nikah* registrars are largely reluctant to register such marriages in the absence of an explicit rule. Pakistan's Transgender Persons (Protection of Rights) Act, 2018 recognises a person's self-perceived gender identity but contains no provision on marriage,⁵⁶ and in May 2023 the Federal Shariat Court held its provisions on self-perceived identity and inheritance contrary to the injunctions of Islam.⁵⁷

Muslim personal law does not recognise adoption in the sense of transferring a child's lineage (*nasab*), which the Quran does not permit,⁵⁸ but it recognises guardianship (*kafala*) as a protective institution. Transgender Muslims therefore face two difficulties. First, like all Muslims, they cannot adopt under personal law,⁵⁹ although the secular route under the JJ Act remains open to them.⁶⁰ Secondly, social stigma and uncertain legal interpretation may hamper their applications for guardianship, and there is no legal clarity on whether a transgender Muslim may act as guardian (*wali*) under personal law or be appointed guardian under the Guardians and Wards Act, 1890.⁶¹

In Muslim law, the right of inheritance arises on the death of a person, not by birth. Each heir takes a fixed share determined by the heir's gendered relationship with the deceased; generally,

⁵³ ASAF A.A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* (Tahir Mahmood ed., 5th ed. 2008).

⁵⁴ MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* (2008).

⁵⁵ *Qur'an* 17:70 ("We have honoured the children of Adam ...").

⁵⁶ Transgender Persons (Protection of Rights) Act, 2018, § 3 (Pak.).

⁵⁷ Rebekah Yeager-Malkin, *Pakistan Federal Shariat Court Rules Against Landmark Transgender Rights Legislation*, JURIST (May 21, 2023), <https://www.jurist.org/news/2023/05/pakistan-federal-shariat-court-rules-against-landmark-transgender-rights-legislation/>; AMNESTY INTERNATIONAL, *Pakistan: Revocation of Rights of Transgender and Gender-Diverse People Must Be Stopped* (May 19, 2023), <https://www.amnesty.org/en/latest/news/2023/05/pakistan-revocation-of-rights-of-transgender-and-gender-diverse-people-must-be-stopped/>.

⁵⁸ *Qur'an* 33:4–5.

⁵⁹ Mulla, *supra* note 52.

⁶⁰ *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1.

⁶¹ The Guardians and Wards Act, 1890, No. 8, Acts of Parliament, 1890 (India).

a son takes twice the share of a daughter.⁶² For a transgender Muslim this creates a complex situation. Classical jurists provided for the inheritance of the *khuntha mushkil* (a person of indeterminate sex) through a cautious rule under which the heir takes the smaller of the two possible shares, male or female.⁶³ This article argues that the rule is difficult to reconcile with the guarantee of equality in the Constitution of India.⁶⁴

During the Mughal period (sixteenth to eighteenth centuries), transgender persons, commonly known as khwajasaras or hijras, enjoyed a relatively respected and institutionalised status, especially in the royal courts and aristocratic households.⁶⁵ They served as guards and attendants in the royal harem and were entrusted with protecting its women. Many held administrative, military and diplomatic positions and enjoyed salaries, land grants and social prestige.⁶⁶ Khwajasaras were educated, well versed in court culture, and often acted as confidants and advisers to royalty. Their presence was also valued in religious rituals and public ceremonies.⁶⁷

VIII. PATHWAY TO REFORM

The analysis so far shows that Hindu and Muslim personal law in India still revolve around the binary conception of gender in matters of marriage, family formation, adoption, succession and guardianship. Despite landmark judgments protecting the rights of transgender persons in the light of constitutional equality, the personal laws continue in effect to exclude many transgender persons from their family rights. These exclusions not only offend equality and dignity but also sustain social stigma and invisibility. Reform is the way forward, as a legal necessity and as a social imperative.

The judiciary has often protected marginalised groups by reading statutes expansively to fill gaps left by legislative inaction. From *Vishaka* in 1997,⁶⁸ which protected women against sexual harassment at the workplace, to *NALSA* in 2014 and *Navtej Singh Johar* in 2018,⁶⁹ which recognised the rights and legal identity of transgender persons, the judiciary has acted as a guardian of people at the margins of society. Courts can likewise read the terms ‘bride’ and ‘bridegroom’ in the HMA in a gender-inclusive manner, following the Madras High Court’s 2019 decision in *Arunkumar*, which held that ‘bride’ includes a transgender woman.⁷⁰ The same

⁶² Fyzee, *supra* note 53.

⁶³ Kamali, *supra* note 54.

⁶⁴ INDIA CONST. art. 14.

⁶⁵ RUBY LAL, DOMESTICITY AND POWER IN THE EARLY MUGHAL WORLD (2005); *see also* *NALSA*, (2014) 5 SCC 438.

⁶⁶ Vanita & Kidwai, *supra* note 44.

⁶⁷ *Id.*

⁶⁸ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁶⁹ *NALSA*, (2014) 5 SCC 438; *Navtej Singh Johar*, (2018) 10 SCC 1.

⁷⁰ *Arunkumar*, 2019 SCC OnLine Mad 8779.

interpretive approach can be taken in adoption, guardianship and succession law by treating a transgender person as ‘male’ or ‘female’ according to the right of self-identification already established by the Supreme Court in *NALSA*.⁷¹ In 2017, in *Shayara Bano*, the Supreme Court set aside instant triple talaq; two of the three judges in the majority held the practice, as recognised through the Shariat Act, manifestly arbitrary under Article 14.⁷² Courts can use the doctrine of constitutional morality to check the arbitrary operation of personal laws that deny transgender persons basic human rights. Articles 38, 39 and 44 can serve as guiding stars for harmonising the personal laws with the principles of fundamental rights.⁷³

Beyond judicial advances, legislative reform is needed to secure clarity and uniformity. The HMA and HAMA could be amended to use gender-neutral terms such as ‘spouse’ and ‘parent’ in place of binary terms. Any codification of Muslim personal law could include provisions on the marriage of transgender persons and recognise their inheritance and guardianship rights. As the SMA provides a secular framework, it could readily be amended to provide for the marriage of transgender persons, offering transgender couples a non-religious route to family life. The Transgender Persons (Protection of Rights) Act, 2019 is a welcome legislative step that protects transgender persons against discrimination and provides welfare mechanisms, but it is silent on marriage, adoption and inheritance; its only family-related guarantee is the right of a transgender person not to be separated from parents or immediate family and to reside in the household.⁷⁴ A comprehensive amendment of the Act is needed to address the rights of transgender persons in matters of marriage, adoption and inheritance.

Reform in India may also draw on experience beyond its borders. In Arabic, the most commonly used neutral term for a transgender person is *mutahawwel/mutahawwelah jensiyan*, meaning ‘transgender’; another, less specific, term is *jins thalith*, meaning ‘third gender’. In Urdu, *khwaja sira* is the term generally regarded as respectful for transgender or third-gender persons. In 2013 Bangladesh decided to recognise hijras as a separate gender, a decision notified in January 2014, which entitled them to identify as ‘hijra’ for purposes such as identification, voting and social welfare.⁷⁵ In March 2024, a mosque for the hijra community, built on land donated by the government, opened near Mymensingh in Bangladesh, so that its members could

⁷¹ *NALSA*, (2014) 5 SCC 438.

⁷² *Shayara Bano*, (2017) 9 SCC 1.

⁷³ INDIA CONST. arts. 38, 39, 44.

⁷⁴ The Transgender Persons (Protection of Rights) Act, 2019, § 12, No. 40, Acts of Parliament, 2019 (India).

⁷⁵ Ministry of Social Welfare (Bangl.), Gazette Notification (Jan. 26, 2014) (giving effect to the Cabinet decision of Nov. 11, 2013); see HUMAN RIGHTS WATCH, “*I Want to Live With My Head Held High*”: Abuses in Bangladesh’s Legal Recognition of Hijras (Dec. 23, 2016), <https://www.hrw.org/report/2016/12/23/i-want-live-my-head-held-high/abuses-bangladeshs-legal-recognition-hijras>.

pray without facing exclusion from mainstream congregations.⁷⁶ Pakistan's Transgender Persons (Protection of Rights) Act, 2018 recognised the rights of transgender persons to education, employment and inheritance, although its provision on inheritance has since been held contrary to the injunctions of Islam by the Federal Shariat Court.⁷⁷ In *Sunil Babu Pant*, the Supreme Court of Nepal directed legal recognition of a third gender and the formation of a committee to study same-sex partnerships.⁷⁸ In the United States, *Obergefell v. Hodges* recognised the right of same-sex couples to marry, holding that its denial violates individual dignity and the guarantee of equal protection.⁷⁹ These models suggest that a legal framework can be gender-inclusive without diminishing religious or cultural values.

Social and institutional reforms are also necessary. Gender-sensitisation programmes should be conducted for judges, lawyers and marriage registrars to protect transgender persons from bureaucratic harassment. To ensure that reforms reflect lived realities, transgender voices should be included in law reform commissions and committees and in legislative debate. Public awareness campaigns, especially within religious communities, could help show that the inclusion of transgender persons is not contrary to Hindu or Islamic religious principles and that a gender-inclusive society is consistent with their spirit of justice and compassion.

IX. CONCLUSION

India has long been regarded as a paradigm of profound religious and cultural traditions, which have shaped the development of its legal system. Indian law has never been merely a set of rigid rules; it has been deeply influenced by a plurality of faiths and customary practices, which makes it a living expression of social values grounded in spirituality and morality. India cherishes its composite culture, in which Hindu and Muslim law have coexisted over centuries. This plural legal heritage is not merely a matter of belief; it embodies India's cultural pluralism, in which law serves as a medium through which social norms evolve in harmony with spiritual values.

Although India has taken commendable judicial and legislative steps to secure the dignity of transgender persons, the core domains of marriage, family formation, adoption and inheritance under statutory and personal law still rest on the binary of male and female. The result is a socio-legal lacuna in which transgender persons are recognised in theory but excluded in practice. There is much advocacy, and a considerable body of scholarship, on the legal

⁷⁶ *Bangladesh Opens Mosque for Transgender Hijra Community*, FRANCE 24 (Mar. 29, 2024), <https://www.france24.com/en/live-news/20240329-bangladesh-opens-mosque-for-transgender-hijra-community>.

⁷⁷ Transgender Persons (Protection of Rights) Act, 2018, §§ 7–9 (Pak.); Yeager-Malkin, *supra* note 57.

⁷⁸ *Sunil Babu Pant v. Nepal Government*, Writ No. 917 of 2007 (S.C. Nepal Dec. 21, 2007).

⁷⁹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

recognition of the dignity of transgender persons, but the gap identified in this article calls for urgent legal reform, guided by constitutional morality, that harmonises the personal laws with the constitutional guarantees of equality and dignity.
