

# INHERITANCE LAWS FOR MUSLIM TRANSGENDERS: INSIGHTS FROM ISLAMIC JURISPRUDENCE ACROSS JURISDICTIONS

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## ABSTRACT

This article delves into the complex landscape of Islamic legal perspectives on sex change for transgender individuals and their implications for inheritance rights. By examining various legal frameworks and approaches adopted by different countries, this study sheds light on the evolving discourse surrounding gender diversity within Islamic jurisprudence and the nuanced interplay between medical and legal considerations in addressing transsexuality within Islamic law. Rather than focusing on the process of *ijtihad* conducted by individual schools of Islamic jurisprudence, this article explores how legal systems navigate the plurality of jurisprudential interpretations to shape inheritance laws that accommodate the rights to inheritance of transgender individuals.

KEYWORDS: Islamic Jurisprudence, Sex Reassignment Surgery (SRS), Transgender, Inheritance.

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## 1. INTRODUCTION

The Islamic law of inheritance of property provides for the disinheritance of a legal heir only in certain exceptional circumstances.<sup>1</sup> With regards to inheritance for transgenders, the Supreme Court of Pakistan declared that an individual cannot be disinherited merely because the deceased disapproves of their gender expression.<sup>2</sup> The Supreme Court did not delve into the appropriate Islamic laws of inheritance applicable in cases of devolution of property to a transgender heir. Later, the Federal Government sought to

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<sup>1</sup> Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, 'Inheritance Law' in *Family Law in Pakistan* (Oxford University Press 2019).

<sup>2</sup> *Dr. Muhammad Aslam Khaki and Others vs. S.S.P. (Operations) Rawalpindi and Others* (PLD 2013 SC 188)

uphold the rights and liberties of transgender individuals by promulgating the Transgender Persons (Protection of Rights) Act in 2018.<sup>3</sup> Section 2(n) defines a transgender person and outlines the spectrum of identities within the definition, whereas the respective succession laws are listed in Section 7 of the Act.

The terms 'transgender' and 'transsexual' represent contemporary English medio-social constructs.<sup>4</sup> 'Transgender' refers to a broad spectrum of gender identities and expressions that do not align with one's assigned biological sex. On the other hand, 'transsexuals' are individuals who have undergone medical procedures to align their self-perceived gender identity with their physical characteristics. However, these terms may not fully capture the indigenous gender terminologies of the Indo-Pak region, such as *hijra*, *zenana* and *khawaja-sira*.<sup>5</sup>

In present-day usage, *khawaja-sira* serves as an umbrella term encompassing gender non-conforming individuals. Historically, in precolonial India, the term *khawaja-sira* described castrated men who often held respectable roles, such as house servants.<sup>6</sup> In contrast, *hijra* referred more broadly to effeminate men, often associated with artistic performances and cultural practices. Similarly, *zenana*, in present-day usage, refers to effeminate men.<sup>7</sup> The marginalisation of these groups following colonial interventions led to the adoption of the term *khawaja-sira* as a unifying term for the third gender in the region. These shifts in terminology reflect the complex interplay of social, historical, and cultural factors influencing gender identities in the Indo-Pak context.

Traditional and modern Islamic jurisprudence employs distinct terminologies in the Arabic and Persian languages to describe various forms of gender

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<sup>3</sup> Transgender Persons (Protection of Rights) Act 2018.

<sup>4</sup> 'Understanding Transgender People, Gender Identity and Gender Expression' (American Psychological Association, 9 March 2023) <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression> accessed 1 May 2024.

<sup>5</sup> Zoya Waheed, 'Legal Recognition of Gender Identity and Sexual Rights: The Voices of Khwaja Saras in Pakistan' (2019) Social Justice Perspectives (SJP) <http://hdl.handle.net/2105/51401> accessed 02 May 2024

<sup>6</sup> Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850-1900* (Cambridge University Press 2019).

<sup>7</sup> *ibid* 22.

expression and sexual ambiguity. Thus, it is essential to recognise and understand the linguistic variations across different regions and languages before delving into respective inheritance principles. For this article, the term 'transgenders' will be utilised to encompass all gender non-conforming individuals. However, efforts will be made to appropriately identify any variations in terminology relevant to discussions on Islamic jurisprudence or historical analysis.

## 2. LITERATURE REVIEW

The exploration of Islamic jurisprudence regarding sex reassignment surgery (SRS) and gender non-conformity is essential for understanding the evolution of medico-legal frameworks addressing transsexuality across different States. This research first delves into Sunni and Shiite perspectives, which diverge on the issue of sex change and its implications for inheritance laws. Drawing from the journal articles, Sunni jurisprudence generally prohibits SRS, emphasising biological sex for inheritance matters, although diverse opinions exist within Sunni scholarship.<sup>8</sup> Conversely, Shiite jurisprudence, as influenced by prominent jurists like Ayatollah Khomeini, supports the legal validity of SRS within Islamic frameworks, tracing the historical development and pivotal *fatwas* (legal rulings passed by qualified Islamic legal scholars) that have shaped contemporary understandings of gender variance within Islamic legal contexts.<sup>9</sup>

Further context will be provided by examining literature detailing the developments in Iran's medico-legal system to accommodate transgender individuals, including revisions to inheritance laws.<sup>10</sup> Insights into Iran's procedural processes – albeit with identified shortcomings – offer a comprehensive examination through extensive primary fieldwork, including

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<sup>8</sup> Serena Tolino, 'Transgenderism, Transsexuality and Sex-Reassignment Surgery in Contemporary Sunni Fatwas' (2017) 17 *Journal of Arabic and Islamic* 223–246.

<sup>9</sup> M. Alipour, 'Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas' (2017) 18 (1) *International Journal of Transgenderism* 91-103; Hamidreza Abdi, Abbas Ali Heidari and Mahmoud Ghayoomzadeh, 'Imam Khomeini's Innovations in Changing Sex in Spousal Sentences' (2021) 12(11) *Turkish Journal of Computer and Mathematical Education* 6669–6673.

<sup>10</sup> Outright Action International, *Human Rights Report: Being Transgender in Iran* (2016) <https://outrightinternational.org/our-work/human-rights-research/human-rights-report-being-transgender-iran> accessed 23 December 2024.

interviews with legal and medical officers, transgender community members, and activists. This will provide a holistic account of Iran's judiciary's consideration of fatwas and the institutionalisation of frameworks for transgender medical care.<sup>11</sup>

While the focus of this paper is on SRS jurisprudence in Muslim countries, it is also relevant to examine India's succession legal framework, case law, and State approaches to gender non-conformity. Pertinent case law is examined to highlight the judiciary's attempts to address inheritance within the indigenous cultural and identity framework of the transgender community. The absence of codification of Muslim personal law regarding inheritance hinders potential avenues for exploring Islamic jurisprudence concerning inheritance for Muslim transgenders.<sup>12</sup> Considering Pakistan's similar social setup of transgender communities, India's approach provides valuable analysis within a shared cultural realm.

Certain limitations of this paper include the inadequacy and unavailability of literature on whether the plurality in Islamic jurisprudence is considered when issuing *fatwas* on the permissibility of SRS. Although the Transgender Persons (Protection of Rights) Act of 2018 in Pakistan codified inheritance principles applicable to transgender individuals, secondary research reveals shortcomings of the Act, its dissonance with indigenous understandings of gender non-conformity,<sup>13</sup> and recent controversies, including a Federal Shariat Court decision declaring few aspects of the 2018 Act against the injunctions of Islam.

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<sup>11</sup> Zara Saeidzadeh, 'Understanding Socio-Legal Complexities of Sex Change in Postrevolutionary Iran' (2019) 6 (1) *Transgender Studies Quarterly* 80.

<sup>12</sup> Karan Gulati and Tushar Anand, 'Inheritance rights of transgender persons in India' (2023) 7(1) *Indian Law Review* 1–25.

<sup>13</sup> Jessica Hinchy (n 6); Faris A. Khan, 'Institutionalising an Ambiguous Category: "Khawaja Sira" Activism, the State, and Sex/Gender Regulation in Pakistan' (2019) 92(4) *Anthropological Quarterly* 1135 - 1172; Marha Fatima and Hajrah Yousaf, 'The (in)Accessibility of NADRA and Union Council Processes for Women and Gender Minorities' (2022) 3 LUMS Saida Waheed Gender Initiative (SWGIG) <https://swgi.lums.edu.pk/publications/gender-bi-annual/article/14189> accessed 01 May 2024.

### 3. ISLAMIC JURISPRUDENCE ON GENDER NON-CONFORMITY

The historical understanding of non-conformity to the gender binary, in the context of Islamic societies, varies significantly from the contemporary approach to gender ambiguity and diversity, especially when one considers the linguistic manifestations that have been employed in classical Islamic jurisprudence. Classical Islamic jurisprudence, while grounded in the gender binary, identifies three categories to illustrate gender non-conformity – *kebunta* (intersex persons with ambiguous genitalia upon birth or later in puberty), *kebasi/mamsuh* (eunuch) and *mukhannathun* (effeminate males).<sup>14</sup> This early discourse on gender non-conformity in Islamic jurisprudence cannot be reconciled with the contemporary notions of ‘sex change’ and medical developments in SRS; rather, gender non-conformity is explored in the context of societal functions and defining Islamic practices for them. Therefore, with the increase in medical developments, Islamic jurists have had to deduce the validity of medical interventions, such as SRS, utilised by transgender individuals. After the 1970s, when the discourse regarding SRS came to the forefront and Islamic jurists increasingly delivered *fatwas* on the subject, a variety of opinions emerged. These opinions can be categorised as either a complete prohibition, a confirmation of legitimacy or a contingent confirmation of legitimacy.<sup>15</sup>

#### 3.1. Sunni Jurisprudence

All major schools of thought acknowledge that sex change is permissible in cases of necessity. However, Sunni jurists, when considering medical interventions for SRS, largely regard these procedures as alterations to God's creation, which they deem impermissible under Islamic law, except in exceptional circumstances.<sup>16</sup> Their position is grounded in several Quranic verses that emphasise the inviolability of the natural order. For instance, they often cite Surah Ar-Rum (30:30), which commands believers to

direct your face toward the religion, inclining to truth. [Adhere to]  
the fitrah of Allah upon which He has created [all] people. No

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<sup>14</sup> Serena Tolino (n 8); M. Alipour (n 9).

<sup>15</sup> Hamidreza Abdi, Abbas Ali Heidari and Mahmoud Ghayoomzadeh (n 9).

<sup>16</sup> Serena Tolino (n 8).

change should there be in the creation of Allah. That is the correct religion, but most of the people do not know.<sup>17</sup>

This verse is interpreted as a clear mandate against altering divine creation. Additionally, regarding the gender binary, Sunni jurists refer to the following verse in Surah Ash-Shura:

‘To Allah belongs the dominion of the heavens and the earth. He creates whatever He wills. He grants females to whomever He wills, and males to whomever He wills...’<sup>18</sup>

From this verse, jurists deduce the existence of only two divinely ordained sexes, thereby reinforcing their stance against SRS except under dire circumstances.

### 3.2. Shiite Jurisprudence

However, Shiite jurisprudence categorises sex change as permissible because it addresses physical and mental illnesses, which cannot be called the ‘tampering of the body’ but rather necessary recourse to medicine to relieve a gender dysphoric person of psychological and physiological complications.<sup>19</sup> It is pertinent to mention that the Shiite jurisprudence that warrants the use of SRS is not ‘progressive’ in terms of expanding gender diversity but rather approaches the psychological state of transgender individuals as a mental illness or a manifestation of ‘the wrong soul in the wrong body’.

Shiite jurisprudence further expands upon the variation in Islamic practices that would result following the sex change.<sup>20</sup> Shiite jurists assert a revised criteria for inheritance according to an individual’s newly assigned gender - a male individual who has transitioned to female identity is entitled to an inheritance share equivalent to that of a biological daughter.<sup>21</sup> While plurality exists in Shiite jurisprudence, the *fatwa* by Ayatollah Ruhollah Khomeini is

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<sup>17</sup> The Qur’an, Surah Ar-Rum 30:30.

<sup>18</sup> The Qur’an, Surah Ash-Shura 42:49.

<sup>19</sup> Hamidreza Abdi, Abbas Ali Heidari and Mahmoud Ghayoomzadeh (n 9).

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

widely used to assert the validity of SRS in Islam. The following is an excerpt from his *fatwa*:

‘In the Name of God. Sex-reassignment surgery is not prohibited in Islamic law (shari‘a) if reliable medical doctors recommend it. God-willing, you will be safe and hopefully the people whom you mentioned might take care of your situation.’<sup>22</sup>

The 1987 *fatwa* marked a significant turning point in Iran's approach to sex change procedures. It triggered a transformation in the medico-legal landscape, paving the way for the establishment of a comprehensive bureaucratic framework for individuals seeking to undergo SRS and subsequently change their official gender identity. Over the following decades, Iranian authorities meticulously structured the process, encompassing both medical procedures and legal formalities.

This development in the Islamic jurisprudence on the permissibility of SRS influenced other Muslim jurists in countries such as Egypt. Following the *fatwa* of Ayatollah Khomeini, Sheikh Muhammad Sayyid Tantawi, a Sunni Muslim jurist in Egypt, also issued a *fatwa* when the Egyptian Medical Syndicate (EMS) requested his opinion on the validity of sex change in Islam. In 1988, EMS received the case of Sayyid/Sally, where the applicant, Sayyid Abd Allah, a biological male, was diagnosed with ‘psychological hermaphroditism’.<sup>23</sup> It had to be determined whether he should undergo SRS at that time. In his *fatwa*, Sheikh Tantawy stated that the applicant is not deliberately trying to resemble or take on the expression of the female sex, but rather due to his psychological state, he has the natural disposition of feminine expression (*mukhannath khalqi*), and hence, was deserving of medical intervention.<sup>24</sup>

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<sup>22</sup> Intisar A. Rabb ‘Conscience Claims in Islamic Law’ (2019) Harvard Public Law Working Paper No. 19-40 <http://dx.doi.org/10.2139/ssrn.3427941> accessed 01 May 2024.

<sup>23</sup> Ahmed Ali Dabash, ‘The Egyptian Constitution and Transgender Rights: Judicial Interpretation of Islamic Norms’ (2023) 3(1) Journal of Law and Emerging Technologies 33–58.

<sup>24</sup> *ibid*.

### 3.3. Inheritance for Intersex Persons

With regards to inheritance for *khunta*, or intersex individuals, extensive early Islamic jurisprudence exists on approaching the gender ambiguity of *khunta* and appropriate inheritance share for them, although with differing opinions by various Islamic schools of thought.<sup>25</sup> For instance, the Hanbalis and Malikis assert that the *khunta* is entitled to half of a male's share and half of a female's share as their gender is undetermined.<sup>26</sup> On the other hand, Abu Hurairah stated that a *khunta* should get the lowest share in the inheritance.<sup>27</sup> Therefore, no consensus has been reached in the determination of inheritance for intersex individuals; however, jurisprudence validating the unique genital physiology which defies the gender binary does exist, and scholars have recognised how it can shape inheritance mechanisms under Islamic law.

The preceding discussion highlights the diversity within Islamic jurisprudence concerning the acceptance or prohibition of SRS. The discourse surrounding the validity of sex change remains dynamic within Islamic jurisprudence, with divergent opinions offered by various jurists. This evolving dialogue reflects the ongoing development of Islamic legal perspectives on gender-non-conformity and transition. Moreover, there are varying approaches to succession for individuals who do not conform to traditional gender norms, further illustrating the multifaceted nature of this discourse within Islamic law.

## 4. CROSS-JURISDICTIONAL ANALYSIS

### 4.1. Pakistan

In the Indo-Pak subcontinent context, the term *khawaja-sira* is an all-encompassing label for individuals outside the traditional gender binary.<sup>28</sup> Understanding indigenous practices such as the *guru-chela* system is crucial for recommending the inheritance framework within our domestic cultural

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<sup>25</sup> Ani Amelia Zainuddin and Zaleha Abdullah Mahdy, 'The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development' (2017) 46(2) Archives of Sexual Behaviour 353 – 360.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> Zoya Waheed (n 5).



setting. In this system, the *guru* assumes a paternal role, offering refuge and guidance to *chelas* (students) who may have been ostracised by their families.<sup>29</sup>

#### 4.1.1. Case Law

In *Zafar alias Mumtaz & another v Mst. Sajjad Begum & Others*,<sup>30</sup> the Supreme Court of Azad Jammu and Kashmir deliberated on the hierarchical structure within *khawaja-sira* communities, particularly concerning inheritance.<sup>31</sup> The Court upheld *shariah* law principles, emphasising the precedence of bloodline and spousal relations in matters of inheritance. The ruling highlights how *shariah* law supersedes customary and cultural practices. However, while the case primarily focused on the question of whether a *guru's* inheritance should pass to their *chelas*, it did not delve into the complexities surrounding inheritance for gender non-conforming individuals. This omission highlights a gap in legal discourse regarding the inheritance rights of transgender individuals.

Nevertheless, the *khawaja-sira* community is recognised as entitled to inheritance from their blood relations, as affirmed in a 2009 constitutional petition.<sup>32</sup> The Supreme Court stated the importance of recognising transgender persons as the ‘third sex’ and directed the National Database and Registration Authority (NADRA) to initiate the official process of including the ‘third sex’ in the identification documents. The Court held that the *khawaja-sira* community must not be denied access to social spaces and facilities, as that would infringe their fundamental right to equality enshrined in Article 25 of the Constitution of Pakistan. This legal precedent illuminates the ongoing dialogue surrounding gender diversity and inheritance rights in Pakistan, underscoring the need for continued exploration and consideration within both legal and cultural spheres.

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<sup>29</sup> Sameen Azhar et al, “Having a guru is like having a licence”: Analysing Financial Relationships between Khwaja Sira Gurus and Chelas in Swat, Pakistan (2022) 25(11) *An International Journal for Research, Intervention and Care* 1449–1464.

<sup>30</sup> *Zafar alias Mumtaz & another v Mst. Sajjad Begum & Others* (PLJ 2015 AJK 14).

<sup>31</sup> *ibid.*

<sup>32</sup> *Dr. Muhammad Aslam Khaki* (n 2).

## 4.1.2. Legislation

In 2018, the Federal Legislature promulgated the Transgender Persons (Protection of Rights) Act, which streamlined the citizenship directives given by the judiciary in 2009 and 2018. It also included the rights and liberties that transgender persons are entitled to, including the right to inheritance. Section 7 of the Act outlines inheritance rules for transgender persons based on their gender identity. A male transgender is entitled to the inheritance share of a male, while a female transgender is entitled to the share of a woman.<sup>33</sup> A person with ambiguous gender/genitalia is allowed to declare their self-perceived identity upon reaching the age of majority, and the respective inheritance share will be applicable, or if they do not identify as transgender man/woman, they are entitled to the average of a male and female's share.<sup>34</sup>

It is pertinent to note the definition of a 'transgender' identified by the Act. Speaking in terms of the Islamic historical classifications, it encompasses *khunta* individuals (intersex), *kbasi* individuals (those who have undergone castration, i.e., eunuchs), as well as any individual who defies the gender binary, which could be to some extent categorised under *mukbannathun* (effeminate male). These classifications and the respective inheritance shares arising out of them have been a major point of controversy that resulted in the petition before the Federal Shariat Court (FSC) in 2020.<sup>35</sup> The FSC had an opportunity to explore the diversity within Islamic jurisprudence concerning gender non-conformity and its implications for inheritance. However, it resorted to unsubstantiated speculations that the 2018 Act can allow access to female exclusive spaces to criminals under the 'disguise of transgender women', exposing them to the risk of sexual violence.<sup>36</sup> The FSC asserted that inheritance can only be divided among legal heirs based on biological sex, as the concept of 'self-perceived' gender identity is contrary to the injunctions of Islam. According to this, the FSC held that Sections 2(f)

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<sup>33</sup> Transgender Persons (Protection of Rights) Act 2018, s 7.

<sup>34</sup> *ibid.*

<sup>35</sup> *Hammad Hussain v Federation of Pakistan* (Shariat Petition No.5/I of 2020).

<sup>36</sup> *ibid* [93].

and 7 must be repealed as they violate Article 227 of the Constitution of Pakistan.<sup>37</sup>

#### 4.1.3. NADRA Process

NADRA, in accordance with the 2009 Supreme Court judgment, established protocols for recognising transgender individuals by introducing the gender X option on their CNICs. However, to obtain this CNIC, transgender individuals are still required to provide parental biometric verification or that of their *guru*. Interestingly, if a transgender individual's CNIC bears their *guru's* name, they have to forfeit their right to claim inheritance as the inheritance process, facilitated by NADRA, revolves around the issuance of a Succession Certificate which only lists biological family members and allots inheritance shares respectively.<sup>38</sup>

In an interview with a NADRA representative, the procedural steps for obtaining this certificate were explained. Notably, one crucial step involves listing the deceased's children along with their genders, enabling NADRA to determine their respective inheritance shares. However, transgender individuals whose CNICs only reflect 'gender X' must additionally submit a self-perceived gender identity declaration with no prerequisite medical records or examinations. According to another interview with a representative from NADRA's Operations Department in Lahore, only two instances in Karachi (none in Lahore) have been reported, which necessitated the implementation of this declaration form process. This information underscores a pivotal aspect in this examination of the inheritance process and prompts deeper analysis into the practical implications of legal frameworks concerning transgender inheritance rights and the challenges encountered in their implementation.

#### 4.2. Iran

By 2005, the Islamic Republic of Iran had unexpectedly become a global leader in SRS.<sup>39</sup> As a Muslim theocratic State with laws and regulations based

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<sup>37</sup> *ibid*, [96].

<sup>38</sup> Marha Fatima and Hajrah Yousaf (n 13).

<sup>39</sup> Robert Tait, 'A Fatwa for Freedom' *The Guardian* (London, 27 July 2005).

on Jafari Shia Islam, the country's decision to legalise SRS is indeed intriguing. Iran's approach to sex change procedures can be traced back to the 1930s when the Iranian medical system started recognising 'gender identity disorder'.<sup>40</sup> Following the *fatwas* by Ayatollah Khomeini, sex change became a medico-judicial process through which transsexuals could undergo surgical procedures to achieve their preferred sex, also known as *amal-e-taghir-e-jinsiyat* in the Persian language.<sup>41</sup>

It is pertinent to note that the terms 'transgender' and 'transsexual' are currently utilised by the Iranian medical system to initiate the medical diagnosis of gender identity disorder. Previously, the Persian term of *tarajinsiyati* was utilised, which primarily means 'a status in which the person's gender identity is discordant with their biological sex and culturally defined gender roles, which results in gender discontent, cross dressing and finally the change of gender'.<sup>42</sup> The sex change, according to the Iranian legal system, is a process through which this state of gender discordance can be treated. It is considered a healthcare service and is recognised as a matter over which Iranian Family Courts have subject-matter jurisdiction.<sup>43</sup> The Family Courts are empowered to refer to *fatwas* during decision-making; Ayatollah Khomeini's *fatwas* regarding sex change in the book *Tahrir ul Wasilah* hold great importance among the Iranian judiciary for these cases.<sup>44</sup> Ayatollah Khomeini's approach to sex change and transsexuality over time laid the foundation for the medico-legal process of attaining the legal gender transition with a new legal name and change in applicable Islamic law, including inheritance.

#### 4.2.1. Medico-legal Process of Sex Change in Iran

In Iran, a court authorisation is required before undergoing SRS and the subsequent changing of the legal name.<sup>45</sup> This authorisation is permission by the court to facilitate the applicant's assessment by the Iranian Legal Medical

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<sup>40</sup> Zara Saeidzadeh (n 11).

<sup>41</sup> *ibid.*

<sup>42</sup> Zara Saeidzadeh, 'Transsexuality in Contemporary Iran: Legal and Social Misrecognition' (2016) vol 24 *Feminist Legal Studies* 249 – 272.

<sup>43</sup> Family Protection Act 1967 (Iran), art 4(18).

<sup>44</sup> Zara Saeidzadeh (n 11).

<sup>45</sup> Outright Action International (n 10).

Organisation (ILMO). The ILMO then initiates the process of gender reconstruction surgery (GRS), which includes extensive hormonal and surgical interventions. Upon the completion of the GRS, the applicant again approaches the Family Court to direct their request for new identification documentation to the National Organisation for Civil Registration (NOCR) which reflects their new gender identity.<sup>46</sup> Transgender individuals who do not undergo the complete legal process of GRS are not allowed to change their gender identity in their identification documents.<sup>47</sup>

The revised rules of inheritance for transgender individuals can only be applicable once they attain their new gender identity from the NOCR. However, the above process of changing one's gender identity is not uniform across Iran; for instance, parental presence is mandatory in the ILMO centre in the city of Shiraz, even for those above the age of 18, but not in Tehran.<sup>48</sup> Moreover, in Kermanshah, the Revolutionary Courts (*dadgah-ha-yi inghilab*), established by Ayatollah Khomeini as parallel to the Iranian criminal courts, are tasked with the issuance of the certificate permitting the sex change instead of the Family Court.<sup>49</sup> These courts are typically presided over by a single judge with expertise in Islamic jurisprudence. The entire transition process encompasses medical, legal, and social aspects; the certificate for GRS (with no expiry date) is utilised by individuals in Iran to socially pass as transgender before they initiate the medical SRS process.<sup>50</sup> However, they cannot legally have their gender identity changed.

#### 4.2.2. Sex Change and Inheritance

Article 939 of the Civil Procedure Code of the Islamic Republic of Iran provides for the shares of inheritance that intersex individuals are entitled to. Where the masculine features are dominant, the individual will get the share of a male, and if the feminine features are dominant, they will be entitled to the share of a female.<sup>51</sup> Moreover, hermaphrodites may undergo GRS once they attain puberty, according to their dominant gender traits, which can

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<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> Zara Saacidzadeh (n 11).

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> Civil Code of the Islamic Republic of Iran 1982.

change their legal gender identity and subsequent inheritance determination.<sup>52</sup> The Civil Procedure Code does not codify the nexus of sex change (undertaken by transsexuals) and inheritance, as discussed in the above section. Following the procedure of sex change and revised gender identity in the identification documents, the individual will receive the respective share of their new gender identity in their identification.<sup>53</sup>

Iran's approach to sex change procedures presents a unique intersection of religious principles, legal frameworks, and medical interventions. Historically rooted in Ayatollah Khomeini's *fatwas*, the medico-legal process of gender transition has evolved significantly over time, guided by both religious and medical authorities. The requirement for court authorisation and subsequent procedures overseen by the ILMO and Family Courts exemplifies the complexities involved in obtaining legal recognition for gender identity. Furthermore, the relationship between sex change and inheritance laws in Iran underscores the complex interplay between legal statutes and personal identity.

#### 4.3. India

In 2019, India promulgated the Transgender Persons (Protection of Rights) Act. The 2019 Act provides legal recognition of the civil liberties which transgender individuals are entitled to, but unlike the Pakistani Act, it does not address the issue of inheritance.<sup>54</sup> In the Indian legal system, the Succession Act 1925 governs the law of inheritance but excludes the ambit of the Muslim personal laws regarding succession. The judiciary mainly relies on the Muslim Personal Law (Shariat) Application Act of 1937, which recognises Muslim personal law and other customary laws and practices to resolve inheritance disputes.<sup>55</sup> Therefore, Islamic jurisprudence on inheritance laws on gender non-conforming individuals is insufficiently codified in India.

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<sup>52</sup> Zara Saaidzadeh (n 11).

<sup>53</sup> Outright Action International (n 10).

<sup>54</sup> Transgender Persons (Protection of Rights) Act 2019 (India).

<sup>55</sup> Karan Gulati and Tushar Anand (n 12).

Although Article 14 of the Indian Constitution mandates recognition of genders as well as in the case of *National Legal Service Authority v Union of India & Others*,<sup>56</sup> the Supreme Court of India recognised a transgender person's right to inheritance and stated that the completion of SRS is not a prerequisite for the recognition of their inheritance rights.<sup>57</sup> Furthermore, the case of *Illyas v Badshah Alias Kamla*<sup>58</sup> dealt with the intersection of gender non-conformity and Muslim law of inheritance. In this case, the petitioner asserted that their *guru*, Munnilal, executed a will which granted them the right to inherit their *guru's* property, which the *guru* had also inherited from their then-*guru*.<sup>59</sup> The Madhya Pradesh High Court decided that the deceased, being a Muslim, cannot devolve their property among their *chelas*.<sup>60</sup> The *gurus* can only devolve not more than one-third of their property as a gift under Islamic law, as the Islamic inheritance law only recognises blood ties when devolving the deceased's property.

While India's Transgender Persons (Protection of Rights) Act 2019 was a crucial step forward in providing legal recognition and safeguarding the rights of transgender individuals, the specific issue of inheritance rights for Muslim transgender individuals remains largely unexplored and unaddressed within the country's legal frameworks.

## 5. ANALYSIS

The conceptualisation of gender self-identification varies significantly across different Islamic jurisprudential traditions. In Sunni jurisprudence, an individual's ability to challenge or alter their gender identity is strictly prohibited, as it is seen as an attempt to change God's creation. This belief forms the basis for the exclusion of gender self-identification in Islamic inheritance laws under Sunni jurisprudence. Emphasising a fixed binary understanding of gender, Sunni legal frameworks do not accommodate any recognition of gender identity beyond the traditional male-female dichotomy, leaving inheritance laws unchanged by an individual's self-identified gender.

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<sup>56</sup> *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

<sup>57</sup> *ibid* [129].

<sup>58</sup> *Illyas v Badshah Alias Kamla* AIR 1990 MP 334.

<sup>59</sup> *ibid* [2].

<sup>60</sup> *ibid* [10].

The medico-legal framework of Iran, regarding the process of SRS and subsequent implications in the laws of inheritance for transgenders, illustrates an intriguing example of developments in Islamic jurisprudence being intertwined with State functions. Ayatollah Khomeini's revolutionary jurisprudence on SRS, which recognised the existence of transgender, has been furthered by other Muslim jurists, including Sheikh Muhammad Sayyid Tantawy. The widespread socio-cultural recognition of such fatwas prompted the State to introduce medical administrative processes aimed at streamlining the procedure of SRS. Judicial bodies, such as the Family Courts in Iran, translated these *fatwas* into binding judicial decisions, appropriately adjudicating on matters related to gender identity. These *fatwas*, rooted in Shiite jurisprudence, should not be interpreted through the lens of the Global North's perspective on recognising gender diversity.

While Shiite jurisprudence acknowledges the complex physiological and psychological factors involved, it primarily seeks to maintain a binary understanding of gender. Its aim is to encourage gender non-conforming individuals to conform to a binary gender status, thereby aligning with the gender binary aspects of *sharia* law, particularly concerning inheritance. Gender self-identification is recognised as inherently linked to medicalisation. Under Shiite jurisprudence, gender actualisation is not seen as solely a personal or social matter but is framed as a medical necessity. The belief underpinning this view is that true integration into one's self-identified gender cannot be fully realised without undergoing medical interventions, particularly SRS. As a result, legal and social recognition of a transgender individual is contingent upon their medical transition. Inheritance laws, being a critical component of Islamic legal principles, are thus only adjusted based on the post-operative gender of the individual.

As previously discussed, Islamic jurisprudence acknowledges the unique physiological condition of *khuntas* (individuals born with ambiguous genitalia), with some Islamic schools of thought proposing specific inheritance principles for them. Nevertheless, there remains an expectation that by the onset of puberty, a *khunta's* dominant gender expression, possibly aided by medical interventions, will enable them to conform to either male or female identity, thus emphasising assimilation into the traditional gender



binary framework. The principles of inheritance will then be applicable according to their post-operation gender.

The stringent requirement for a complete medical transition, as observed in Iran, poses significant challenges for the transgender community. Conversely, in Pakistan, changing legal gender identity from male or female to 'X' does not necessitate medical documentation. However, the legislation in Pakistan remains silent on the provision of appropriate medical mechanisms for transgender individuals seeking SRS. This is further hindered by the recent FSC judgment that did not recognise the plurality of Islamic jurisprudence on SRS and rather erroneously characterised SRS as solely catering to the sexual desires of transgender individuals.

While SRS for transgender individuals remains a relatively new subject in Islamic law, Shiite jurisprudence has developed significant discourse on it, particularly in connection to the law of inheritance, as elaborated in this paper. This perspective warrants further exploration within the context of our domestic social dynamics, particularly concerning the *khawaja-sira* community, before unequivocally declaring SRS as prohibited.

Article 227 states that all laws must be in conformity with the Quran and Sunnah. Moreover, the explanation clause added by the Constitution (Third Amendment) Order 1980<sup>61</sup> recognises the importance of diverse interpretative mechanisms, such as *qiyas* and *ijma*, within each Muslim sect without restriction. Therefore, the FSC's failure to acknowledge Shiite jurisprudence on SRS and its respective inheritance laws and the nullification of Section 7 of the Transgender Persons (Protection of Rights) Act 2018 concerning inheritance represents a misapplication of Article 227 of the Constitution.

## 6. CONCLUSION

This article highlights the intricate relationship between Islamic jurisprudence and State laws regarding SRS and inheritance rights for transgender

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<sup>61</sup> Constitution of the Islamic Republic of Pakistan 1973, art 227(1): Explanation: In the application of this clause to the personal law of any Muslim sect, the expression "Qur'an and Sunnah" shall mean the Qur'an and Sunnah as interpreted by that sect.

individuals in Iran, India, and Pakistan. While Iran has established administrative processes for SRS based on their respective Islamic jurisprudence, Pakistan's legal landscape lacks clarity and consistency, as seen in the recent FSC decision. This cross-jurisdictional comparative analysis reveals the plurality in Islamic jurisprudence on SRS, with state systematising the accessibility of SRS for transgender persons, contingent upon the dominant Islamic legal framework the State aligns with. The findings underscore the need for further exploration of SRS within Islamic law in relation to our domestic social context, particularly concerning inheritance, and emphasise the importance of upholding constitutional rights to diverse interpretations of Islamic law to ensure the equitable treatment of transgender individuals.