

Protection Of The Rights Of Third Gender

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I. Introduction

Human Rights consist of a set of principles that govern how people are to be treated in an ethical way so they can enjoy a decent life. These rights are universal, in that they apply to all humans equally simply by virtue of them being humans. However, tragically in practice these rights are not applied equally to all.¹ One such marginalized group, which is unable to enjoy even the most basic of human rights, is the transgender community.

This community faces discrimination as they do not neatly conform to the male or female gender. The term gender is used to describe attributes linked to a particular sex. These attributes are also heavily fuelled by socially constructed norms. The transgender community faces discrimination as individuals do not strictly fall in the male or female category of gender. Within Pakistan, individuals which are either transgender² (present gender does not correspond with the identity and gender at birth) or intersex, are forced to face a wide array of discrimination, which in some cases even leads to violence, torture, execution persecution. It is especially important to note that transgender or intersex individuals are one of the most vulnerable groups within Pakistan.

This article will consider the plight of the transgender community and analyze the laws of different countries that extend protection to the said community, focusing specifically on Pakistani laws. It is to be noted that the Transgender Protection Act 2018³ was enacted

in Pakistan in 2018, and was applauded by various politicians and activists. The primary function of the Act was to protect the rights of transgender people who suffer violence, discrimination or persecution. Since Pakistan is known as a nation which fails to provide protection to transgender people, it is considered to be a bad example on the treatment of transgender individuals. However, the passing of the 2018 act has been a welcome change. The purpose of this study will be to analyse the intricacies of the 2018 Act, and how its implementation can be further developed in order to protect the rights of transgender individuals. This is especially important as since the founding of Pakistan, the transgender community has suffered and has been neglected, as they have been unable to receive full protection of their human rights or even other rights such as the right to vote or the right to receive education. This lack of protection of their rights has led to the transgender communities and their individuals, having to resort to begging or prostitution to survive. Ultimately, the Act is a welcome change to the problems faced by the transgender individuals in Pakistan. It is still uncertain however, if the legislation has made true progress.

2. History

It is important to note that transgender people have been a part of the Indian Society for the past hundreds of years, as there has been historical evidence of a recognition of people

and societies which did not conform to being of either a male or female gender, in ancient Indian writings. An important example of this is Hijras, which historically played important roles in royal courts in the Muslim world such as in the Ottoman Empire, as well as the Mughal Empire in India⁴. They were important administrators, generals and political advisors. They were elevated to these positions as they were considered to be loyal and trustworthy, and therefore had access to all sections of society and the empires which they served. In addition, they also had high ranks in religious institutions such as guarding Medina and Mecca.⁵ They were considered to be closest to rulers of their regions such as kings and queens, and were thus able to influence the rulers they served.

During the beginning of the British rule of the Indian subcontinent, the Hijra received and accepted benefits, support and protection from Indian states.⁶ These were benefits such as receiving money, food rights or land provisions from certain areas. These benefits were however removed via the British legislation during their rule, as the lands provided to the Hijra were not being inherited via blood ties.

The situation worsened during the later parts of British rule, as European travellers as well as the British were repulsed by the Hijra community. The British government in the subcontinent then used legislation to criminalize the Hijra community and denied them civil rights, which excluded them from society and paved the way for further discrimination and violence.⁷ The British colonials in fact, strived to remove their rights and criminalise their behaviour. This led to them being considered as a different tribe, or a caste within different regions of India. The Criminal Tribes Act⁸ 1871 in particular, targeted Hijras who kidnapped and castrated

children as well as danced in public places. These acts were punishable for up to two years of imprisonment, or a fine or both. This Act further influenced exclusion of transgender communities, and influenced the modern day circumstances of the Hijra as well.

3. Background to law

An example of marginalization of gender diverse people is of the Khawajasiras, which are a community of gender diverse people. However, in the modern day they are referred to as “transgender women”, however this does not reflect the complexity of their culture or community, and historically they have struggled to survive and achieve methods of demanding enforcement of their fundamental rights. However, a development came in the case of Muhammad Aslam Khaki v. SSP Operations Rawalpindi and others⁹. Here, the Supreme Court passed a judgement which held that provincial governments must take steps for the protection of fundamental rights of citizenships of the Khawajasira community. This decision also led to the National Database and Registration Authority (NADRA) to add more options to the “sex” category in order to acknowledge gender diverse communities. This also led to the Federal Government legislating for the rights and protections of the Khawajasira community.

Another important development took place in 2017 when the Transgender Persons (Protection of Rights) Bill was presented in Parliament by Senator Babar Awan, which led to collaborative effort taking place in order to bring about the final version of the Bill. This also highlights the development of laws to protect the transgender community.

4. The Transgender Persons (Protection of Rights) Act 2018

4.1. Defining Transgenders

When considering the exact definition of a transgender person, it is important to note that there is no single definition which encompasses all. However, the most well-known and acknowledged definition is the one used by the Commissioner for Human Rights of the Council of Europe, which is based on the idea that people may have a gender identity which is different from the gender assigned upon them at birth, or those people who wish to portray their gender identity as different from that which was assigned to them at birth.

In addition, Section 2(f) of the Transgender Persons (Protection of Rights) Act 2018¹⁰ defined 'gender identity' as a person's innermost sense of self which can be of a male, female, a blend of both or neither. Section 2(n)¹¹ of the Act also defined them as a person who is "intersex" with a mixture of male or female genital features or congenital ambiguities, or eunuchs, or any person who differs from the norms or expectations based on the sex they were assigned to at the time of their birth.

These definitions can however be criticized on the grounds that the inclusion of people with intersex characteristics with transgender people, can mischaracterize the transgender community as both are different. The reason for this is that intersex people are individuals which are born with variations of male or female characteristics, such as those relating to their reproductive organs, chromosome patterns or sexual anatomy.¹² This means they do not fit into either the male or female category. Therefore, intersex is different from a person's gender identity, as an intersex individual can identify themselves as a transgender, a male, a female, both, or neither.

The definition of transgender within the Act however, does not include self-defined males, females or any individual who has transitioned by their own choice, into a male or female. It is in fact limited as it is related only to genitals and the medical reasons for an individual being a transgender. This makes it clear that although the Act was aimed at protecting the rights of transgender individuals, it in actuality, does not reflect the desire and need for representation of Pakistan's transgender community. It is also imperative to note that the definition of transgender within the Act, includes a 'screening committee' which would consist of a judge, a doctor, a psychiatrist and a bureaucrat, who would jointly ascertain if a person is transgender. Lastly, the Act does not include the rights of gays or lesbians¹³, thus showing its limited scope.

4.2. Protection from Discrimination

An important chapter of the Transgender Persons (Protection of Rights) Act is that it prohibits discrimination against Transgender people. It specifically states that no person is allowed to discriminate against a transgender person in regards to any context, and they are protected in regards to various things which include the holding of public offices, access to goods, services employment, and especially healthcare¹⁴.

4.3. Offences and Penalties

The Act also creates a criminal offence under Section 17¹⁵, which states that using or forcing any transgender person to do beggary shall result in an imprisonment which can extend to six months, or a fine which may extend to fifty thousand rupees, or both. This is however questionable, as for a vast number of transgender people in Pakistan, begging is necessary for them due to their limited

livelihood opportunities. Similar laws from the Punjab Vagrancy Ordinance have also led to misuse and oppression of the transgender community, as it leads to law enforcement agencies to harass, blackmail or sexually assault transgender people. In addition, the clauses which prohibit begging and vagrancy have caused penalization of rituals of the Khawajasira community such as at weddings and childbirth, which are significant in their cultural tradition.

Another issue is of section 5 of the Act, which prohibits the harassment of transgender people, and section 2(h) which defines harassment as any form of sexual, physical, mental or psychological harassment. However, this is still unclear as it fails to specify what is entailed within this prohibition and the remedies which will be available to victims of such crimes.

It is theorised by writers and scholars that the process of socialisation affects and can prevent individuals from performing criminal activities¹⁶. Therefore, those societies which emphasise moral norms, would have individuals who would be unwilling or unable to do so. This also supports the notion that the norms and pressures surrounding social behaviour would influence the actions and behaviour of those humans which are a part of that society. Societies regard stealing as an action which is socially frowned upon, which therefore causes people to avoid performing such actions, as they fear that doing so would cause them to be cast out from their society and community.

Within Pakistan, it is also common to treat transgender people as if they were non-citizens. This is due to the average Pakistani citizen having preconceived notions on transgender individuals because of their socialisation. Although the 2018 Act introduced numerous changes which are sure to introduce changes,

and to inspire further change in regards to the treatment of transgender persons in Pakistan. This will not be without struggles however, as enforcement of the provisions of the Act will be an issue. An example of this is of national elections which took place after the enforcement of the act, as during the voting within the elections, numerous transgender people faced difficulties in the form of suspicions regarding their national identity cards. This is because the official election¹⁷ forms did not provide correct options for identifying the transgender individuals' gender identity. This shows that although the 2018 Act aimed to address such issues by having national identity cards reissued with their self-perceived gender, there was a lack of implementation by governmental authorities. This also led to some transgender candidates boycotting the election polls, as the election polls and the forms associated with them, failed to acknowledge their gender identity. This was also a violation of the 2018 act as it included a provision that there would be no discrimination on sex, gender identity or gender expression for people of the transgender community when they are contesting elections to hold a public office.

The Supreme Court¹⁸ of Pakistan has made efforts to tackle the issue of discrimination, violence and persecution against transgender people. However, there are still issues with enforcement of the Act. This is linked to the theory that punishment for violation of the law, is not enough of a deterrent to prevent such actions in the future. In addition, it has been stated by Immanuel Kant that mere punishment serves the purpose of the goals of the state in preservation and securing the liberty of individuals.

There is also a severe lack of specific legislation which protects the rights of transgender individuals in the manner which criminalises any persecution or violence

against them based on their sexual orientation, or expression of their gender. This is linked to the fact that throughout the history of Pakistan, its transgender community has suffered violence because of their sexual orientation. Thus, their rights must be effectively protected. It is also to be noted that within the modern world¹⁹, there are many countries which have provisions which criminalise the targeting of transgender individuals on their gender expression or sexual orientation. It is therefore clear that such legislation is needed in Pakistan as well, in order to prevent discrimination against transgender individuals.

4.4. Inconsistency in the Usage of Pronouns

A criticism in the Act is of the inconsistency in relation to the usage of pronouns when referring to transgender people. This is noted in a multitude of sections in the Act, where the pronoun “his” has been written in reference to rights such as right to public places, right to vote and employment. This is problematic as the Act explicitly states that a term which has not been fined within its definition clause, would have the exact same meaning as words from the Pakistan Penal Code²⁰ or the Code of Criminal Procedure. Within the Act however, the word “him” is referred to men or women, and not a separate gender which further showcases the inherent flaws of the Act as it does not cover all people within the transgender community.

Another issue is that of intersex people, as under the Act, they are defined as people with both male and female genitals. This is problematic as due to this wording and terminology intersex individuals will not be under the protection of the Act,

Since a literal reading of the Act would prevent transgender individuals from having their rights

enforced, it would be beneficial if the Pakistani Courts use a liberal interpretation of the 2018 act in order to protect transgender rights.

4.5. Criticism of the Statute

An important criticism of the Act is also that since it was aimed at ensuring fairness in regards to identity and preventing discrimination, these goals would have been achieved by passing a Human Identity Rights Act of a general nature, as it would allow right of identity in regards to each and every person, as well as having more detailed and broad protections which were already covered by the Constitution of Pakistan. It is also necessary to ensure a more broad and sufficient protection for sex and gender rights, which can be done by providing a broad provision of a “right to identify”, as this will cover the transgender community and also to ensure the protection of their fundamental rights.

Another criticism is that under the Act, transgender individuals received rights after the age of 18, and there is no mention of protection of their rights before that age. This is problematic as the majority of discrimination of transgender people occurs in early life, during their schooling, or within their homes or locality. Ultimately, Pakistani society does not accept the Transgender Community²¹. This is showcased in how transgender people are not given rights from their parents. Therefore, the Statute should have included a provision which would explicitly grant rights to transgender children. The flaw of the Act is again seen in regards to forced conversions of children who are forced to live as either a male or female, as there is no provision which deals with such situations.

4.6. Recommended Reforms

Due to the numerous criticisms of the Act, as well as the necessity of further protection for the transgender community, new legislature must be introduced which fully facilitates them in all aspects. Such reforms should include legislation which refrains from using specific pronouns such as “he” within their provisions, as it would have a legal, as well as symbolic value. Penal provisions are also needed in order to classify hate crimes against transgenders, to be of a criminal nature. There is also need of specific legislation which can allow inheritance rights for transgender people who do not identify themselves as Muslims. Lastly, it is also necessary that legislature extend the time period provided towards the Transgender Act, in order to provide for more efficient and effective change for the Transgender community.

Apart from legislative reforms, action and steps must also be taken by the State in order to ensure implementation of the Act. This can be done by the State ensuring that the transgender community receive education equal to other students, as well as to ensure the establishment of institutions for the transgender community as well. This can be immensely beneficial as it can allow for inequalities in society to be eroded, which can lead to transgender people being more integrated within the community. An example of this is how in Sindh recently, transgender people are now allowed to join the police force²², which is a great step and initiative. Lastly, the State must also tackle the numerous issues faced by the transgender community via creating awareness on the hardships and rights of the transgender community.

5. India

Within India, the first Transgender rights legislation arose in 2014 via a bill which aimed to address the discrimination faced by

transgender people. This bill however, did not become law. In 2019, a legislation was passed which addressed these issues, which was the Transgender Persons (Protection of Rights) Bill, 2019²³. This legislation was however flawed, and faced immense backlash and critique by the Transgender community of India. These concerns were also voiced by various human rights groups. Unfortunately, their concerns were not acknowledged²⁴. Ultimately, the new legislation curbed the rights of the transgender community of India, instead of addressing the troubles, hardships, violence and persecution which they faced. The new legislation was heavily criticised for a procedure which is mandated for legal gender recognition. This process is important as it is the means through which transgender people alter their documentation in order to reflect their gender identity. Provisions in the legislation stated that only people who ‘qualify’ as a transgender will be allowed registration. The criteria for this was that they must have undergone surgery, which is problematic as transgender people are not limited to mere biology.

An important development took place in the case of *NALSA v. India* (2014)²⁵, where it was ordered and declared that Transgender individuals have the right to decide their self-identified gender which would then be acknowledged by the state and its authorities. It was also stated that insisting on surgery would be immoral, as well as illegal under the law.

It was also said in the 2015 Delhi High Court Ruling by Justice Siddharth Mridul, that the sense or experience of gender of a transgender person, is a part of their personality and being, and that everyone has a fundamental right to be recognised in their gender of choice.

Activists in India have planned to challenge these new laws, and it is notable that the law

also provides them the opportunity to do this. It was stated by Trans activist Gee Imaan Semmalar²⁶ that the requirement of registering gender identity is contrary to a 2014 ruling by the Indian Supreme Court which recognised the right of a Transgender individual to choose their own gender. They also stated that the bill is against the right to dignity and body autonomy of transgender people. It is also to be noted that Semmalar works for an advocacy organisation which advocates for transgender rights.

Atija Bannerjee, who is a gender and sexuality rights researcher from Delhi, has stated that the Bill has placed a great burden upon transgender people and has added too much bureaucratic elements which hinder them. He has also mentioned that the Bill does not take into account civil rights such as adoption, marriage, social security, etc, and has also not presented quotes for transgender individuals in jobs which was previously done in a ruling by the Indian Supreme Court in 2014. Therefore, it is clear that the government needs to take steps to protect transgender people.

6. Bangladesh

Law in Bangladesh recognises the transgender community. However, it fails to provide adequate protection for them against discrimination, persecution or violence. Although there are laws which safeguard the right of changing a person's legal gender, there are still no such laws which protect a person after they have altered their gender²⁷. Therefore, discrimination against transgender people is still prevalent. It is also to be noted that Bangladesh is a country whose population is primarily conservative, and is therefore not accepting towards transgender people.

It has been reported by Syed Morshed Rahad Uddin²⁸ that there are a multitude of reasons as to why changes must be made in the current transgender laws. He states that there is extensive discrimination and violence against the transgender community and that mere recognition of their gender is not enough to prevent this. The issue with recognition²⁹ revolves around the fact that the existing law only acknowledges transgender individuals who are biologically their chosen gender and received surgery to alter their birth gender to their chosen gender. They are, however, not allowed economic benefits or social services which are available to the common citizen.

It has been provided by the United Nations; Universal Declaration³⁰ on Human Rights that every human being has the right to enjoy the rights and freedoms contained within its articles. Regardless of this, there is no particular law within Bangladesh which protects the rights and freedoms of the transgender community. If the government plans to enact such a law, it would be recommended that they include specific provisions that prohibit any sort of discrimination against transgender people³¹ in all forms. This would include the provisions against the discrimination or harassment of transgender people at workplaces. In addition, it must be mentioned that as per Article 25 of the Convention on the Rights of People with Disabilities, the state parties can take upon measures which protect transgender people from any such discrimination, harassment or violence. Therefore, any such measures made by the State should ensure that people with disabilities should have equal access to health services and especially rehabilitation services³². The State should also issue rules and regulations on transgender people must have equal access to

property as well as inheritance rules which accommodate them. This is especially necessary as the current inheritance law in Bangladesh only provides inheritance for males and females. In addition, there must also be safehouses to accommodate transgender individuals. Lastly, it is important for the government to develop projects and policies which specifically cater to the transgender people of Bangladesh, and a council to monitor such measures. A specific legislation to protect the transgender people is also needed, and it would be recommended that the government take such measures into notice when developing such laws.

It is important to mention that the government has recently announced tax rebates³³ for businesses that choose to employ transgender people. However, there is still need for specific legislation which protects transgender people as the tax rebates will not solve the issue at hand, as legislation is needed to end this discrimination.

7. Middle Eastern Countries

Within Middle East countries, the transgender community has increasingly limited rights³⁴. Due to their sexual orientation, they often receive hostility, persecution, or violence. In addition, in nine of 18 nations of the Middle East, it is illegal for men to have sex and in six countries, such an action will lead to the punishment of death. The treatment of the transgender community and such laws are influenced the Middle East Region's traditions, culture, and religion. They are even forced to hide their gender orientation in their homes and are not able to engage in acts which will display their gender identity within public environments, meaning they will be unable to dress like other genders or engage in intimacy within public environments. The laws of such

Middle Eastern countries also only acknowledge male and females, as genders.

A noteworthy transgender rights activist, Nora Noralla³⁵, has stated in her writings that the transgender community in North Africa and Middle East, face numerous issues regarding recognition and acknowledgement of their gender identity if it is separate from their birth identity. They also face a large amount of violence and discrimination within these regions. Transgender individuals in these regions are given the choice of using their preferred gender and name upon their national identification cards. Unfortunately however, their gender identities are sometimes denied this right due to being considered a marginalised group.

There is also the existence of a death penalty if a person living or dressing like another gender, which exists within countries such as the UAE, Saudi Arabia, Iran, Qatar, and Yemen³⁶. It has also been reported the US Department of State that within Saudi Arabia, no Transgender organizations exist. In addition, any such reports of discrimination in regards to sexual orientation is uncertain, as due to the penalties and stigma against such things, they are never discussed.

Regardless of these, Tel Aviv is notorious among websites. Examples of this are in 2012³⁷, Tel Aviv was named by website called GayCities.com as the world's best gay city. In 2016 in comparison, the Boston Globe referred to it as the "gayest city on Earth" by the Boston Globe³⁸. Regardless of these, Israel still requires change in order to be more accepting and accommodating towards the LGBT community, and the transgender community as well. This is seen in how as per their laws, the marriage of same-sex couples is forbidden, and

they are prohibited from utilizing surrogate families to have children.

8. South America

Another example to take note of, is that of South America³⁹. Within South American countries, there is numerous legislation which has a harmful impact on sexual and gender minorities, which in turn cause situations of persecution, harassment, and violence. This has also led to sexual and gender minorities such as the transgender community, to be forced to leave the region due to the widespread discrimination and violence against them. It must be noted however, that there have been some legislation which have been enacted to curb these issues. Regardless of this, the countries within South America are still majorly ruled by conservative individuals who do not support the transgender community. Due to this, it is clear that much change is needed within the South American countries in order to prevent discrimination and violence against the transgender community.

Within South American countries, there are some which only recognize two genders, which are male and female, while there are some countries which place a ban upon rights for transgender individuals⁴⁰. There are even some countries which accept transgender individuals, however only if they have underwent surgery to their gender of choice. However, there also a few which allow transgender individuals to be recognised by their chosen gender and registered, without the requirement of a surgery. Lastly, there are also a select few countries which force transgender individuals to embark upon gender therapy.

It is important to mention that within Mexico, transgender people have the ability to change their name and legal gender in a wide variety of

cities⁴¹. This includes Mexico City , Oaxaca, Baja California, Hidalgo, Couhuila, Nayarit, Tlaxcala, San Luis Potosí, Puebla, Jalisco, Baja California Sur and more recently, Morelos.

It was stated in 2017 by the Inter-American Human Rights Commission (IACHR)⁴² that its member states from Latin America have an obligation to ensure the promotion and protection of transgender rights. In response to this, there are some countries within South America which have enacted legislation which provide transgender people the right to change their documents in order to choose their own gender identities for registration. These countries are those such as Uruguay and Columbia. However, there are still some countries which have not provided sufficient or adequate protection for transgender individuals at all. Ultimately, it is clear that there are a wide array of rights and limitations faced by transgender people residing within South America and Latin American countries.

Recently in Argentina, a legislation was enacted which allows transgender people the ability to gain public sector jobs. This legislation was heavily praised by transgender and human rights activists who praised it as a step in improving the rights of the LGBT community within Argentina. Another important development in Argentina came recently when the Senate had a majority in favour of a transgender rights bill⁴³. This new legislation would provide loans and tax incentives to businesses which would provide employment to transgender people, which would have a hugely advantageous effect on the lives of the transgender community within Argentina. It also vital to note here that for the majority of the transgender community in Argentina, that the transgender community suffers through many hardships and had previously been unable to obtain employment.

The new legislation would change this situation, and provide a better status to members of the transgender community.

Overall, it can be seen that previously, most countries did not have rights for transgender individuals. Over the passage of time however, it can be seen that more countries are introducing legislation which provide for transgender rights, which showcases a great and significant change.⁴⁴

Conclusion

In relation to Pakistan, it was recently stated by Munir Saadat, a Pakistani-Danish activist who is also the creative director of Aks International Minorities Festival that even when there are rules and regulations within Pakistan, there is a lack of implementation due to corruption. However, it is still been said that although there are numerous hurdles and inefficiency in the system, there are still steps being taken have improved the rights of Transgender individuals within Pakistan⁴⁵.

Apart from Pakistan, other nations have a wide multitude of issues in regards to transgender rights. These include elements such as societal pressure, issues with religion and social issues. Due to these issues, a bias and hate emerges against members of the transgender community, which allows society to dictate the trajectories of their lives. In turn, this leads to them being forced to work as dancers or resort to prostitution to make ends meet. Due to this, Pakistan's transgender laws are in need of legislation which establish a committee which would then aid in the implementation of the transgender rights laws. In addition, there is a lack of legislation for the protection of transgender rape victims, which is of absolute necessity and importance for the transgender community in Pakistan.

In comparison, it is evident that Pakistan provides transgender rights which are better

than some other countries. However, there are still severe issues, as there are flaws within the transgender rights legislation itself which must be rectified. It must be noted that the flaws within the legislation may have a direct correlation with religion within Pakistan, as the conservative majority of the country, oppose transgender rights due to religious reasoning. However, it is imperative that the country, its laws and its human rights, must not be dictated by religious reasoning as it is the duty of the legislators to ensure that citizens must be protected regardless of their gender. This issue is also prevalent within countries of the Middle East, as well as Bangladesh. On the other hand, India and some countries in South America have a different approach. Regardless, it is clear that for Pakistan, extensive measures are needed to further protect the rights of the Transgender community.