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Analysis of the Transgender Persons (Protection of Right) Act 2018: Implications for Implementation

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Abstract

The study is a critical evaluation of the Transgender Act passed by the Government of Pakistan in May 2018. It explores a historic, cultural and religious background of the Transgender, which have existed with us for thousands of years. The study takes into account their treatment, rights and privileges they have enjoyed in Ancient Europe, India, Muslim India and Pakistan. The study incorporates systematic literature reviews method to see perspectives on the Act from legal and medical practitioners. It differentiates between transgender and intersex as one is a gender problem and the other is a sexual problem respectively. It provides references to previous judgments around the world and also those in Pakistan in the past regarding this issue. The study is significant because there are limited studies on the issues of transgender persons in Pakistan and the current study is the first to critically analyze the Transgender Act. 2018. Major findings of the study reveals few acute flaws including its un-Islamic nature and offers recommendations to consult the Islamic Authorities before passing such a sensitive law.

Keywords: Transgender Rights, Transgender Persons (Protection of Rights) Act, 2018, Implementation

Introduction

Social conventions emphasize two distinct types of humans, male and female. Ancient writers sometimes wrote that people who were neither men nor woman would swap genders; a practice they trace for centuries. Many biological intellectuals, today, debate over the connections between the body and the self (Alipour, 2017; Snow et al., 2019). The modern era has its own developments, there are many alternative genders coming down culturally in the globe, such as Hijras in South Asia, Kethoeyes in Thailand, and Muxes in Mexico. All of them can be categorized in the word, 'Transgender' (Neumann, 2018). The concept of transgender exists since the Greek Era. Both the Greeks and subsequently, the Romans, persecuted them and treated them as second-class citizens with vocational opportunities of domestics afforded

to them. They had no right to plead their case in any court of law, nor were they equal to other citizens. They were neither recognized as men or women (Bolich, 2007).

Muslim societies were based upon the divine concept of shariah. It was the legal system adopted by the Muslim rulers after the interpretations by the Muslim jurists. All the basic ideas for just system were taken from holy Quran and Sunnah. All the citizens of the society including the minorities were equal (Wirtz et al., 2018). Divine laws were the basic foundation of Islam, and further those clerics and jurists of that time rely on the methodology and perspective of ijtehad in which clerics interprets some issue according to Islamic shariah such as Quran and Sunnah and second through qiyas (Afif, 2019; Henderson, 2019; Islam, 2020). In the pre-Islamic period transgenders were divided into different categories: those included the Khasi (people with male sex organs), Hijra (people born as boys and after some time pretend to be female). Other includes Mukhannath (physically male), Khunsa (ambiguous organs), Mamsuh (Neither male nor female genitals). In the pre-Islamic period, the presence of all the above-mentioned categories were there in the society but most of the debate between jurists continued on Khunsa and Mamsuh as both are ambiguous and how they should be treated (Redding, 2019). Legality of these individuals were discussed at that time either they can perform the pillars of Islam such as hajj, can be married and also their rights in inheritance (Omar, 2013). As transgender are divided into three distinctions:

Table- Distinctions of Transgender Persons

<i>Erxing</i>	<i>True hermaphrodite</i>
<i>Nan Hua Nu</i>	<i>Male to Female Transformation</i>
<i>Nu Hua Nan</i>	<i>Female to Male Transformation</i>

The transgender umbrella in China, can be divided in two categories, based on the type of public reaction they received: cross dressers and transgender (Qureshi, 2019). The cross dressers were historically important figures and thus, celebrated, but the transgender people, among which there are three important distinctions, were marginalized and often treated brutally (Wenjun, 2015). Chinese operas have historically retained cross dressing as an important element in theatrical literature. Due to the absence of women in society, men took the role of women in the Peking Operas (Naseem, 2021). However, during the Qing and the Ming dynasties, there was a general fascination with crossdressing in theatrics. The objectives of paper focus on critical analysis of understanding the transgender act 2018. It follows the implication of self-perception for Pakistani society.

Literature Review

All these were faced with disgust from the society. With names like ren ke (human abnormality) and ren yao (human monster), these people were often faced with brutal punishments once disclosed (mainly due to the birth of an offspring in unusual circumstances) or caught having intercourse with a someone they could/should not have in their normal (disclosed) gender identities. In some Chinese philosophical literature, for instance, the omen reader Cheng Feng's discourse, these matters related to the grander scheme of heavenly cosmic forces. Of Yin and Yang (Fazi & Bibi, 2020). Where an imbalance in one or the other could not only cause rebellions, floods, earthquakes but also, cause humans to be born with an ambiguity in their genitals. That was considered as an omen for mankind, for transgression. It was perceived as a moment to reflect over their choices in life. And thus, it was easy for

such people to be wildly discriminated against with impunity (Wenjun, 2015). In today's time, there are pride parades, film festivals and a number of important events happening in China and there is an environment of inclusion in society for people with different sexual orientations.

Western debate on transgender involves recent debate on transgender in west focuses on their legal and fundamental rights, and to be respected in the society with dignity and honor. As a third gender they should be equally given opportunities for Education, Health and Employment. The movement started from LGBTQ which is a psychological phenomenon, main focus was to recognize all the alphabetical Genders mentioned in LGBTQ. Western norms and values later on permit some specific genders to be legalized as third Genders; such as Supreme Court of USA allowed intersex marriage (Walker, 2017). Now looking into the history of transgender from western perspective we found their presence in post Christian world. According to author Andrew Walker, he wrote in his book "GOD AND THE TRANSGENDER DEBATE" about the gender language and the role of church towards third gender (term used in the modern era) (Evans, 2017).

According to author church is the place where transgenders feel satisfied and safe visiting as it is a 'Bible' believed place. Church provides them satisfaction as they experienced conflicting gender identities which makes stressed. Basic argument emphasize in the book is the love of God (Jesus) towards people, how they treated every individual with love and respect. Further he explained that transgender is not a debate it is about the people who are suffering from stress and are still not recognized by the society. He is making comparative analysis that during the time of Jesus transgender were treated equally as other citizens and in the contemporary era these specific community is targeted for self-interests. He wrote that God created every one and according to God each and every person has a right to enjoy fundamental right with dignity (Grout, 2020).

Walker raises the stakes: "Those who reject God's blueprint and design are rejecting Jesus Christ's authority" (Ross-Amato 2002). When humanity in mankind falls, he explains the 'Sins' which the person commits in the society and due to Gender Dysphoria, they change their Gender identity. In United States there is a term "born this way" (Draz, 2017), although Western historians have often ignored this non-normative gender expression, some Western societies now are beginning to accept the transgender community into mainstream public life. Although they do allow the individual to dress, work and live according to their perceived gender, but the transgender community still regularly experiences discrimination. In many areas, they are socially excluded by the majority of the conservative orthodox people. (Morales, 2013). Trans people were facing different problems like the LGB (Lesbian, Gay, Bisexual), and their issues were highlighted by the media but at that time their recognition was limited in research and policy agenda of the government (BEEMYN, 2018). The first law which prohibited discrimination against transgender persons was introduced in the city of Minneapolis in 1975 and in 1993 Minnesota became the first state to extend protection against discrimination to transgender person. Major focus was on the LGB rights (Hunt & Moodie-Mills, 2012).

The Human Rights Commission has played an important role in studying and organizing the Trans community to reduce inequality. Ultimately, research and statistical data aided in

framing their problems and the degrees of discrimination (Nyarango et al., 2017). Historically in the West, the transgender people were seriously marginalized from public sector jobs. E.g., the Criminal Tribes Act 1871 of the British Empire, termed the whole transgender community as Criminal (Radhakrishna, 2001). Several Non-Government Organizations (NGOs) and Trans National Corporations (TNCs) have backed international movements which support human rights for everyone but their primary focus is fixed usually on supporting LGBT rights in general, and not trans rights in particular. Currently more focus is being given towards the understanding of the fundamental and central differences between sex and gender by the ideological left (Jones, 2016). Sex is increasingly disassociated with corresponding gender roles in leftist literature. This makes it possible for theorists, political philosophers, jurists and activists to continue their struggle for the realization of the dream of universality of rights and nondiscrimination on the basis of sex and physical orientation.

In Pakistan, it was actually the British laws of discrimination which marginalized the trans community. These colonial laws such as, The Criminal Tribes act 1871, remained enacted after post Pakistan period. As a result, the transgender community is the most socially deprived group in Pakistan. Due to lack of educational opportunities and societal marginalization they resort to prostitution and dancing at social festivals occasions. Overseen by the oppressive 'Guru' culture, the chances of transgender people escaping their miserable lives are grim, as they are held as bonded slaves in the Guru Doctrine (Boone, 2016). In 1950s and 1960s when transgender rights waves started in the West, it also affected countries in Asia. Pakistan first started to make a policy for this specific group, when the Supreme Court in 2009 recognized their gender identity rights. The Supreme Court in their order, also referred to a system developed by Bihar Government in India in which they are working on innovative ideas (Khan, 2014). Education and technical training were to be provided by the government enabling the community to be useful in the long run. The court also further directed the provinces to protect the community from harassment and abuse. Laws should be legislated for the transgender in the society. According to the Human Rights Commission Report in 2011 (Nyarango et al., 2017). The transgender community is a socially excluded and deprived group of the Pakistani society. They still experience abuse in the society and are seriously disadvantaged. Their social, economic and political condition is forlorn, as they are not accepted in the society. Gallop conducted a survey according to which, only 14% of people are friendly towards the *kawaja sira* ("Public attitude towards transgenders," 2018).

Methodology

Five stages of systematic literature review are divided. In stage 1 of systematic literature review methodology provides for data to be obtained from available literature during last two decades (2000-2020). Here, Transgender Persons Protection of Rights Act 2018 an overview of certain provisions According to section 2(n) of Transgender Act 2017 defines who exactly *Transgender* is ("transgender act Pakistan"). Transgender person is any person who is *Intersex* (Khunsa) who has both genital features of male and female (Patel et al., 2020: Cohen et al., 2019: Veronese et al., 2020: Khan et al., 2019: Gilbert et al., 2018: Johns et al., 2018). Any person who is declared as male at birth, but later on undergoes Castration surgery by which that person loses his testicles and transforms his gender. The third definition in the act, which is very social, explains that any male or female who physically and psychologically thinks that he or she doesn't belong in the specific gender he or she was born as. For example, a male, living as a male but feels that he is not male, because psychologically he is not satisfied and

ready to accept. There is an International political science debate, which has settled three principles to approach any social issue.

The paper contains Scopus search at stage 2 of reviewing literature while selecting type and nature of title on transgender. It involves the definition the nature of human being and their relationship. They see it as if there is anger, lust for sex, everything is very real and revolves around basic human instincts. Liberal Perspective: Liberal ideology revolves around or centers its emphasis on basic human values of liberty, freedom and independence from external influence suggesting the universality of republican of justice (Becasen et al., 2019, Mueller et al., 2017, Galupo, 2017, Vincent, 2018). For social constructivists arguments are nothing but it has been foretold and described as absolute truth relating human attributes, relationships, characteristics and roles is indispensable, nonvolatile and invulnerable to dispute and criticism. The third stage of systematic literature review highlighted procedure of data selected for this research. This idea reflects upon the basic understanding of the gender and a role ascribed and prescribed by society, dismisses this set of knowledge and beliefs, and finally draws a new lens of translation and interpretation of the same through various forms of developing studies. This is a category of science as well. Theoretical physicists also apply this principle in their disciplines as well. They say that the *Transgender* issue is a social construct¹⁸: the society has made it an issue so it will remain like this, and the reality has nothing to do with it.

At stage 4, data is extracted from over 100 publications those are analyzed and classified for transgender role and relation of act. According to the section 3 of this act, *Transgender Person* has the right to be recognized as his or her self-perceived gender identity. All governmental departments including NADRA are bound to recognize it as proclaimed, and they have the right to get all the recognition as any male or female gets. For example, CNIC, passport, CRC (B-Form), domicile, driving license and educational certification after the age of 18. In addition to these, they also get the right to change their name and gender in the above-mentioned documents. There is no doubt about their biological identity, but to survive and recognize themselves in the society as something otherwise, they must prove their social identity. Only then can we expect the society to accept someone as the third gender. So far, there is only a third category in the gender/sex section of CNIC for transgender persons as (Transgender or Khawaja Sira). Things changed for the good, the first time since in 2009 when the transgender community was finally recognized. But many things sit on the pretext of this development and much has been sacrificed to build upon this agenda finally culminating into the Transgender Persons (Protection of Rights) Act of 2018. There are an estimated 22000 identified persons who relate themselves as belonging to the third gender.

Quality and validation at stage 5 of methods of research is analyzed using finding and assessing quality of papers. The indifference and apathy demonstrated by the executive circles running the machinery of the government worsened the situation and added fuel on fire as they failed to provide protection to the Transgender community. The following are some perspectives around which any policy debate related to the transgender issue must revolve: The issues faced by transgender people and their dismal conditions continued to stay on media limelight as a result of struggles made by concerned individuals and organizations. Several Non-governmental organizations also took up the matter, and extensive debates were held on and off-camera. Most notably, Ittehad-bray-Huqooq-e-Khwajasara, Pakistan Transgender Empowerment Association, Gender Interactive alliance Pakistan, Blue veins

Organization, Pakistan Transgender community Network and Aurat Foundation remained at the forefront of the movement. The newspapers were a powerful tool to circulate articles editorials, blogs and research papers supporting and advocating for the movement to recognize transgender people. The Supreme Court, as a result, took up the matter and recognized the transgender community a full citizens having full protection provided under the law in its 2009 and 2012 Judgments.

Discussion

Islam recognizes intersex people and gives them rights of normal men and women. However, self-proclamation is not allowed. Islam requires both genders to act according to their role, it doesn't recognize the concept of transgender in any capacity (Zainuddin & Mahdy, 2017) Which may result in forms of discrimination which are natural to going against the social norms of any society. For the Mukhannas, he narrated an account of Hazrat Ali (RA): "*When Hazrat Ali (RA) was asked about a child born in this rare condition among the Bedouins. The Caliph responded by saying that judging by the ability of the child to urinate, if it is closer to the male, then the child is to be raised like a boy and if closer to the female, then to be raised like a girl.*" The Act, sex and gender are perceived to be two different things. Sex has been referred to as the biological anatomy of a human being: It determines whether a person is a male or a female. While gender is referred to the social roles, based on the sex of the person. Gender identity is how a person identifies himself/herself. In the course of the current study, it was found that a great majority of Pakistani society does not believe in this difference between sex and gender (Bith-Melander et al., 2010). They are only aware of the intersex people, and the idea of believing oneself to be of another gender which doesn't correspond to your sex is very alien. After the enactment of the "Transgender Persons (Protection of rights) act 2018" Pakistan now officially recognizes 3 genders. These include, Male, Female and "X" gender. However, there is a lot of ambiguity regarding the fact that whether the determination of the "X" gender is psychological matter or a medical one (Mueller et al., 2017).

Gender dysphoria is a psychological condition in which the gender identity of the subject is not aligned to his/her biological sex. It was previously considered as a mental disorder, but recently, some academic literatures have started to believe otherwise ("Being transgender no longer classified as mental illness (Dhejne et al., 2016). There are no physical symptoms of gender dysphoria; meaning that gender dysphoria does not necessarily mean that there is problem/fault in the physical anatomy of a person. That can be one of the reasons why this issue is subject to lots of controversy and debate (Beek, 2016). The symptoms of gender dysphoria are related to the feelings and behavior that a person has regarding gender identity. The symptoms, caused by gender dysphoria are different in different age-groups. Children who experience this condition might insist that they are of the opposite sex. They may also dislike or refuse to wear clothes that are worn by their sex and prefer to play with children of the opposite sex. Children with this condition might also insist or hope that their genitals will change (Olson, 2015).

It might also experience extreme distress or depression at the physical changes of puberty. Gender dysphoria is a treatable mental condition; it can be treated through psychotherapy or pharmacologic therapy. However, if the feeling/symptoms of gender dysphoria persist till the affected person reaches his/her adulthood, it is likely that they are not just going through a

phase and the matters are serious (Peterson, 2017). The way this condition affects teenagers and adults is different from the way it affects children. Adult with gender dysphoria think quite seriously, that their gender is not aligned to their biological sex and thus, feeling comfort only when they are in the gender role of their preferred gender identity. They often have strong dislike for the genitalia of their biological sex and tend to exhibit a strong desire for change. This is the main reason why many transgender people undergo very complicated and painful procedures such as castration (van der Miesen, 2018). In our society general perception is that the people who claim to be from “X” gender are born with an ambiguous biological sex. The medical problems that can cause confusion in determining a person's biological sex is called “Intersex”.

Intersex is the person whose biological sex is difficult to determine. This condition is caused due to “Ambiguous Genitalia. Other terms used for this condition are: Hermaphroditism, Disorders of sexual Development (DSDs). According to the “U.S National library of medicine” intersex can be divided into four categories which are presented in the table below.

Table- Categories of Intersex

S. No	Category	Description
1	46, XX intersex	A person who has the chromosomes and ovaries of a female but outside genitals of a male.
2	46, XY Intersex	A person who has the chromosomes of a man, but his genitals are incompletely formed or, ambiguous or clearly female.
3	True Gonadal Intersex	A person who has both, “ovarian” and “testicular” tissues.
4	Complex and undermined Intersex	The normal chromosome configurations are simple such as XX or XY. The chromosome configurations other than these can result in DSD. In case of Complex and undermined Intersex the subject has an extra chromosome, either a X or a Y e.g., XXX or XXY.

Source: U.S National library of medicine

In many cases intersex persons can be treated through “Sex Reassignment Surgeries”, but overall, the condition of intersex is very rare. (About 0.018% of human births). Sometimes, at the time of birth a child he/she might seem like a perfect male/female but later might develop a DSD (Reis, 2021). During the course of the study, it was revealed that, a great majority of the people of Pakistani society think that the term “Transgender” and “Intersex” have the same meaning and that, transgender people have a medical condition related to their sex.

It is still commendable that the legislators have made an effort to address this vital issue of society. There are a considerable number of transgender people living in Pakistan but the subject is a taboo. Prior to enactment of this Act, transgender people had no legal recognition. The community lacked access to fundamental rights like; voting and government job etc. These rights were already enshrined under the chapter of Fundamental Rights in the Constitution of Islamic republic of Pakistan 1973 but by promulgating this Act the parliament has made them as ready reference for further legislative guidelines that would arise out of

their nature and scope. Transgender people can obtain political identity documents like Computerized National Identity Card (CNIC), domicile, voter registration number, driving and arms licenses and license to practice professions. The government wishes to place quotas for them, and it is hoped that these measures will ensure de-marginalization. The Act provides for the establishment of committees that would provide fitting expertise in terms of legal, medical and administrative to address all issues related to transgender persons starting from District level under Deputy Commissioner of a district.

The act as drafted by senate's human rights committee and was tabled before the house by Senator Rubina Khalid and Senator Karim Khawaja. The bill was passed by the Upper House with absolute majority and then was moved towards national assembly for the vote. In the Lower House, Jamiat e Ulema e Islam Fazal (JUIF) showed reservations on the bill as some clauses were against the junctions of Islam. Clerics of Council of Islamic Ideology (CII) also showed reservations on the definition of bill. The bill passed by majority votes of the house, and became an Act of parliament. What lacks, however, is a focus towards positive institutional and effective societal reformation to help end the cruelties perpetrated against the sources of oppression. The problems with this Act are supposed to address the problems faced by "Intersex persons", and not transgender. Because intersex people are born with a natural condition which is detrimental for them in the longer run. And their affliction is not self-imposed, nor is it subject to debate in the scientific community about being classified as a mental disorder. The Act was supposed to protect people who are actually disadvantaged, and not those who choose to go against social norms, which can also be classified as a mental disorder called gender dysphoria. Which, is very problem some in the society to normalize because of the social backlash to the very people it is 'supposed to protect' (transgender) in the highly conservative society of Pakistan.

In the second chapter of the Act (Recognition of Identity of transgender persons) it is stated that "a transgender person shall have the right to be recognized as per his or herself-perceived gender identity". This clause provides legal cover to individuals wishing to change their gender by a process of self-declaration entailing that; a physically perfect male/female person can also get him/herself recognized as a transgender. In 2012, the Supreme Court of Pakistan ordered that no person shall be issued a transgender identity without a chromosome test while the Act states otherwise, because transgender people are perfectly functioning human beings who believe they are not their pre-ordained sex, and thus invisible in the chromosome test. This problem further emphasizes the issue with the naming of this Act, and raises serious questions of legitimacy upon the certain provisions of the Act. After the 18th amendment socials problems are the subject of the provinces, while it is stated in the Act that, "the Act extends to whole Pakistan"

Conclusion and Recommendations

The language used in legal documents is always very precise and clear, both in its structure and meaning. The language used in this Act however, is vague and ambiguous. The term "Transgender" is a broad term and has many categories, such as, Trans male, Trans female, intersex Trans etc. Being transgender does not relate to any medical problems but instead it is related to the psychology of a person, therefore proper definitions are required to identify the real issue. It is suggested that a thorough revisit should be made of the certain provisions of the Act. It is suggested to consult more versatile sections of society before making a

consensus over the regulatory regime and legislative instrument that is needed to eradicate the said evil. Unless a holistic approach involving experts of all the different perspectives laid in the problems no. 6, is adopted, to address deep rooted, socially dogmatic differences and rectify societal fault lines, shadows of fears and doubt shall continue to cast around the effective, constructive, positive goal. The government should reconsider the certain provisions and should consider and address the community problem first and foremost with consultation from the Islamic Ideology Council and consulting with experts in fields of medicine, neuroscience, philosophy, social science and law.

“Transgender” and not “intersex” have the mental condition known as “Gender Dysphoria”: biologically they are male/female but pose otherwise. This act does not even touch, nor asks to assess the problem on a scientific, moral, logical, theological or psychological level of discourse, but simply sanctions laws to protect and preserve that mental condition. That in itself is hasty. Hence, the issues of gender dysphoria must first be resolved, classified, and then legislation should be made. The act does not provide a mechanism for the recognition of transgender persons who are under the age of 18. The act does not prohibit unnecessary medical procedures performed on people with ambiguous sexual characteristics. The act also does not prohibit castration which is a form of self-harm. (PPC 325, 332, Quran 2:195). Another component missing in this legislation is an emphasis towards social development, educating the community, addressing the fault lines that are rooted within the society which act as a driving force for the use of discriminatory and abusive treatment.

Islamic Republic of Pakistan has to have laws only if they are coinciding with the teachings of Islam, as mentioned in the article 227 of the constitution. Transgender and intersex community were living without any identity for about 70 years in this newly born state. The intellectuals of the society were unable to define transgender, and definitions of intersex and transgender were perceived from the same perspective. The movements for rights of LGBTQ in the West highly impacted transgender in our Society, and organizations working for their empowerment demanded legislation for their basic rights. Western thoughts are observed while drafting the bill because this bill is not addressing the problems of Pakistan’s Society. The religious perspective is seriously ignored in the bill, and in umbrella of transgender rights. This type of 'ideal' of freedom is against the fundamental essence of Islam. Socio-cultural philosophy of the society is based upon Islamic principles of divinity of Holy Quran and Sunnah. The ideological left in society has shaped cultures according to their own perception and thought, which allows the Trans community to be perceived on the basis of psychological phenomena rather than biological. This Act has opened ways for other communities like homosexuals to pursue more rigorous acceptance because of the precedence this bill sets.

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