

The Transgender Community and the Right to Equality in Pakistan: Review of the Transgender Persons Act 2018

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Abstract

The State of Pakistan has often failed in providing substantive equality to its citizens. This paper analyses the right to equality in Pakistan from the perspective of the transgender community by delving into the legal and policy framework. By studying the Transgender Persons Act of 2018, and the jurisprudence developed by the Supreme Court of Pakistan, this paper reaches the conclusion that the framework of substantive equality is still lacking in Pakistan, and there is a need to bring the transgender community at par with the rest of the population through affirmative action by the State. Transgender persons can only be brought within the domain of formal equality once the social, economic and political discrimination against them has been eradicated.

Keywords: Right to Equality, Substantive Equality, Formal Equality, Transgender Persons Act, Discrimination, Affirmative action

Introduction

This paper analyses the fundamental ‘right to equality’¹ in Pakistan from the perspective of the transgender community. For the purposes of this paper, the term ‘transgender’ is used to refer to individuals “with largely physiological male bodies who challenge the male/female binary and are known in many South Asian circles as *Khawaja Sara* and *Hijra*.² Some of these individuals are castrated, others do not develop fully at puberty, and very few are born as hermaphrodites.³ They may also be biologically female and choose to live as males (and vice-versa), or they may be ambiguous categories that have no

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¹ The Constitution of Pakistan 1973, Art. 25.

² Shahnaz Khan, ‘What is in a Name? Khwaja Sara, Hijra and Eunuchs in Pakistan’ (2016) 23 (2) *Indian Journal of Gender Studies* 218, 219 <DOI: 10.1177/0971521516635327> accessed 05 May 2019.

³ Ibid.

parallel in Western labelling of sexual difference.”⁴ The right to equality is studied under the two main frameworks of equality: formal and substantive. Formal equality is based on the concept that “all persons similarly situated should be treated the same.”⁵ Thus to the extent that there are relevant differences, formal equality does not require equal treatment.”⁶ In juxtaposition, substantive equality has a different model which is “less concerned with insuring equal treatment and more concerned with whether laws or policies serve to perpetuate or reinforce historic patterns of subordination. Under this approach, differences are recognised and taken into account...with the goal of eliminating the unequal consequences of...differences (among individuals), whether biologically or culturally determined.”⁷ This paper aims to evaluate the judgment/orders of the Supreme Court of Pakistan regarding the transgender community, and also the Transgender Persons Act of 2018 under the aforementioned models of equality.

Right to Equality-Article 25 of the Constitution of Pakistan

The right to equality in Pakistan stems from Article 25 of the Constitution of 1973. The article appears to give both formal and substantive equality to its citizens: the former because it recognises all the ‘citizens’ to be equal on the basis of law and prohibits discrimination on the basis of sex, and the latter because provision 25 (3) allows for positive discrimination for the sake of women and children.⁸ There is room for positive discrimination as children and women are deemed to be the weaker section of the population, and the State has a paternalistic approach towards them. Considering the gender and sex driven underpinnings of this Article, it is quite unfortunate that the Constitution does not offer the same protection to the transgender persons, since they have faced atrocious treatment since the time of the British colonisers in the Indian sub-continent.⁹ The social stigma, which finds its

⁴ Ibid.

⁵ Eileen Kaufman, ‘Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts’ Equality Jurisprudence’ (2006) 34 (3) *GJCL* 557, 559.

⁶ Ibid.

⁷ Ibid, 597.

⁸ The Constitution of Pakistan 1973, Art. 25.

⁹ Shahnaz Khan, ‘Khwaja Sara, hijra, and the Struggle for Rights in Pakistan’ (2017) 51 (5) *Modern Asian Studies* 1283, 1287-89 <doi:10.1017/S0026749X16000068> accessed 06 May 2019.

roots in the colonial rule,¹⁰ created an atmosphere which failed to subside even after the creation of Pakistan and resulted in civil death for the transgender community. Almost over a century of discrimination and abuse does entitle the transgender community to extra protection on behalf of the State.

This argument is supported by the approach of the courts in United States which employ the equal protection clause of the 14th amendment of the US constitution to adjudicate upon cases concerning gender and racial discrimination.¹¹ However, it has been recognised that there are fundamental differences between how women and African Americans are treated.¹² The oppression that African Americans have faced is quasi-inherited and they were isolated as a community,¹³ as is the case of transgender persons, and even though they have not ‘inherited’ oppression, all members of this community are bound to face subjugation and derogatory treatment on account of their identity. Furthermore, there are women who are better situated (economically or socially) than African Americans so all women cannot be clubbed under one category.¹⁴ But there are no differences in the social or economic standing of the transgender persons. They all are deemed to be outside the bounds of what is considered to be socially ‘normal,’ thus, they find no acceptance in the society. The United States Supreme Court adopted a policy of employing a strict scrutiny standard while dealing with cases of racial discrimination,¹⁵ and a rational to intermediate scrutiny standard¹⁶ when the cases at hand concerned gender discrimination. This distinction addressed and recognised the differences between the two groups of people. Thus, the Supreme Court was able to deal with their contentions while being cognizant of the respective group’s historic experience. The US example is given here to stress upon the point that the model of substantive equality is a necessary tool for the appropriate interpretation and implementation of the inalienable right to equality, and Pakistan should adopt

¹⁰ *Mian Asia v Federation of Pakistan* 2018 PLD 54 [5], [6].

¹¹ Anne-Peters, *Women, Quotas & Constitutions: A Comparative Study of Affirmative Action for Women under American, German and European Community and International Law* (Springer Netherlands 1999) 103.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Grutter v Bollinger* [2003] 539 U. S. 306 (2003) 326.

¹⁶ *Craig v Boren* [1976] 429 U.S. 190 (1976).

this framework to grant the transgender community their due rights in the *proper* manner i.e. by adopting measures which eradicate social discrimination against them and bringing them at the same social, economic, and political level as other citizens of the state.

Role of Pakistan Supreme Court

In 2012, the Supreme Court of Pakistan passed a landmark judgment concerning the rights of the transgender community. This judgment was highly significant as it acknowledged the plight of the community and addressed the negative discrimination which defined the lives of the transgender persons.¹⁷ The background of this case was that transgender persons were being deprived of national identification documents and consequently, they were unable to enjoy any of their fundamental rights in their capacity as a Pakistani ‘citizen.’ The root cause of this discriminatory treatment were the inherent biases prevalent in the society but NADRA¹⁸ adopted the official stance that since many transgender persons had unknown parentage, they could not be issued national identity cards.¹⁹ The Supreme Court explicitly declared that the transgender persons fell into the category of third gender and were ‘equal’ citizens of Pakistan.²⁰ Hence, they were entitled to enjoy all the fundamental rights.²¹ The Court further instructed NADRA to ensure that the transgender community was issued national identity cards, so others could be cognizant of their status as well.²²

Issues with the Supreme Court Judgment

There were a few problematic aspects of the aforementioned parent judgment and the orders that followed. The main issue was that the Court only granted *formal* equality to the transgender community by stating that the issues the transgender persons were facing were due to a communication gap between them and the administration, and this matter could be resolved through the appointment of a focal person who would unequivocally represent the

¹⁷ *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi* PLD 2013 SC 188.

¹⁸ National Database & Registration Authority.

¹⁹ (n 10) [2].

²⁰ (n 17), [2].

²¹ *Ibid.*

²² *Ibid.*, [1].

contentions of the community.²³ Here the court assumed that the transgender persons had a social standing equal to that of other citizens when the reality is on the contrary. Thus, merely directing the governmental bodies to coordinate with the transgender community was only half the solution. The proper solution would have been to order the government to primarily take active measures to counter the discrimination and subjugation inherently prevalent in the society. The judgment on transgender rights is just a minor chapter of Pakistan's long and complicated history of judicial activism and it cannot go unaddressed that the transgender community was granted rights by a panel of 17 unelected men, and there was no proper democratic legitimacy attached to it, thus, there was no obligation on people to own the judgment.

Consequences of the Judgment

After this judgment, NADRA documents incorporated three more separate categories: male transgender, female transgender, and unisex gender.²⁴ However, the Supreme Court also recommended NADRA to make arrangements for medical testing of individuals claiming to be transgender (or eunuchs – a term used by the Supreme Court) to verify their status.²⁵ This ruling was challenged in 2011 and protests were held against it.²⁶ India Rana, President of the Gender Interactive Alliance (GIA) stated that “no such testing was being asked for males and females, instead their word was enough. Why is our word not enough?”²⁷ This ruling was controversial as it discriminated on the basis of sex, which is not allowed by the Constitution under the right to equality. However, as the subsequent Supreme Court orders had no mention of this testing requirement, the situation was diffused.²⁸

The Transgender Persons Act 2018

In May 2018, the Pakistani Parliament passed the Transgender Persons Act.²⁹ This Act embraced fluidity in regards to gender identity and defined transgender persons to include intersex individuals, eunuchs, transgender men and women, Khawaja Sira and any other “person whose gender identity or

²³ (n 17) [6].

²⁴ (n 2) 218, 232.

²⁵ (n 9) 1283, 129.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ The Transgender Persons Act 2018.

gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.”³⁰ The Act also gave the transgender persons a right to get themselves registered according to their self-perceived gender identity with all government departments, including NADRA.³¹ Thus, this resolved the matter of discrimination against the transgender community based on sex and allowed them a lot of room for self-identification.

Inheritance Mechanism under the Act

The allowance for self-identification of gender is important because the Act entitles transgender men to the same share of inheritance that cis-gender men are entitled to receive under Islamic law, and transgender women to the share of cis-gender women (which is half the men’s share). These provisions allow a possibility for transgender persons to circumvent those aspects of the legal system in Pakistan which are deemed to be unequal for members of the cis-gender.³² However, issues can arise in the interpretation of these provisions as the Act applies the Islamic law of inheritance to all transgender persons regardless of their religion. Perhaps, this could be ultimately beneficial for the transgender community as the State is imposing an obligation on the biological families to grant the transgender persons their due share in the inheritance, but this is an imposition of a foreign law on non-Muslim transgender persons which is unacceptable.

Analysis of the Act under the Framework of Substantive Equality

The Act further lays down the ‘right to education’ for the transgender persons but there are multiple issues with how these provisions are phrased, and once again, only formal equality is offered to the community. The Act states there shall be no discrimination against transgender persons in acquiring admission in any public or private institutions, ‘subject to the fulfilment of the prescribed requirements.’³³ If an ordinary meaning is ascribed to the phrase ‘fulfilment of the prescribed requirements’, an inference is drawn that if the transgender children fulfil the admission criteria of the educational institutions, there

³⁰ Ibid, s. 2(1)(n).

³¹ Ibid, s. 3(2).

³² Ibid, s. 7(3).

³³ Ibid, s. 8(1).

should not be any discrimination against them with regards to the admission process. This provision, however, blatantly disregards the structural inequalities that are a huge hurdle for the transgender persons. Transgender children leave their homes at a young age as their families try to regulate their behaviour into a form of normative masculinity.³⁴ As their behaviour and mannerisms challenge the gender binaries, they are subjected to violence at home and at school.³⁵ Thus, they dropout of schools and find acceptance from *gurus* who do not encourage or sponsor education for their *chenas*, and then due to lack of education, these children have no way of entering the modern civil society.³⁶ Therefore, it is quite apparent that it is almost conceptually and practically impossible for the transgender persons to gain admission in educational institutions on the basis of meritocracy by fulfilling the stringent admission criteria. In *Shirin Munir v Government of Punjab*, while interpreting the right to equality, the Supreme Court held that any restriction on the basis of sex was “only permissible as a protective measure of women and children,” but it could not be used as a tool to protect undeserving men to the prejudice and exclusion of their female counterparts as it amounted to gross violation of constitutional mandate.³⁷ It is reiterated that if the State also offers protection to transgender community along with women and children under Article 25 of the Constitution, they could be further protected as any negative discrimination against them would be a violation of the Constitution. The Act also bounds the Government to “take steps to provide free and compulsory education to transgender persons *as guaranteed under Article 25A*”³⁸ but this provision is only restricted to children of ages five to sixteen years under the Constitution. It has already been established in this paper that almost all transgender persons have had no access to formal education, and this limitation of act is, thus, unfair for those persons whose age falls outside the maximum limit as they were deprived of proper schooling due to their unique circumstances, and now the State is not taking any responsibility to rectify that. The State, by considering the transgender persons to be at an equal footing with the rest of the citizens, becomes guilty of reckless disregard of the deplorable historic experience of these persons as a community.

³⁴ (n 2) 218, 231.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Shirin Munir v Government of Punjab* 1990 PLD 295 [17].

³⁸ (n 29), s. 8(3).

Inconsistency in the Usage of Pronouns

There is one glaring ‘inconsistency’ in the Act which is the occasional usage of the pronoun ‘his’ for transgender persons,³⁹ instead of the accepted pronoun ‘they.’ The pronoun ‘his’ has been used in sections related to the transgender persons’ right to vote, right to employment, right of access to public places, and right to property. The Act states that any word which has not been defined in the definition clause of the Act “shall have the same meaning as assigned to it in the Code of Criminal Procedure, 1898 (Act V of 1898) or The Pakistan Penal Code (PPC), 1860 (Act XLV of 1860)”⁴⁰ and the PPC stipulates that “the pronoun *he* and its derivatives are used of any person, whether male or female.”⁴¹ This is a gross oversight on part of the legislative body as the pronoun ‘him’ denotes men and women only, and not any third gender – for whose protection the Act was passed. This oversight will not have any far-reaching legal consequences – if the courts do a liberal reading of the statute – but a narrow reading can make it conceptually impossible to grant the transgender community their rights as they do not fit within the framework of the binaries of gender. These rights can also be restricted to just those transgender persons whose identity closely resembles that of men or women, and thus, there is a danger of intersex individuals being excluded. Intersex individuals are defined as having “a mixture of male and female genital features or congenital ambiguities”⁴² in the Transgender Persons Act.

Lack of Penal Provisions in the Act

The Act, to the most extent, is also not penal in nature. There is only one section therein which sets out any punishment, and it is concerned with those individuals who employ or compel transgender persons to beg.⁴³ However, the lack of any penal provisions can lead to difficulties in the proper implementation of the Act as there would be no incentive (negative as it maybe) for people to follow the word of the law. There are theories which state that “the socialisation process prevents most deviant behaviour.”⁴⁴ Those

³⁹ Ibid, s. 9(3), 10, 14(1), and 15(2).

⁴⁰ Ibid, s. 2(2).

⁴¹ The Pakistan Penal Code 1860, s. 8.

⁴² (n 19), s. 2(1)(n).

⁴³ Ibid, s. 17(1).

⁴⁴ Jackson Toby, ‘Is Punishment Necessary’ (1964) 55 (3) *Journal of Criminal Law and Criminology* 332, 333.

who have introjected the moral norms of their society cannot commit crimes because their self-concepts will not permit them to do so.⁴⁵ Only the un-socialised (and therefore amoral) individual fits the model of classical criminology.”⁴⁶ It can be inferred that societal norms and pressures regulate the behaviour of humans to a great extent. Theft as an act is socially frowned upon, which acts as a preventive tool for people as they fear social exclusion and hence, most do not act on the impulse to steal. However, in this case, treating transgender community as non-citizens is *the norm*. The average Pakistani has been socialised into having an attitude of disgust towards their very existence which makes it imperative that this Act should have some sort of punishments, because it is highly likely that its provisions of would be disregarded as happened in the General Elections of 2018.⁴⁷ The official elections forms did not have the proper gender identity options for candidates who did not identify as male or female.⁴⁸ This was a clear violation of the Transgender Act which stipulates that “there shall be no discrimination on the basis of sex, gender identity and gender expression for transgender persons if they wish to contest election to hold public office.”⁴⁹ The Act contains further such provisions which are phrased under the framework of substantive equality and prohibit discrimination of different kinds.⁵⁰ If such discriminatory acts in schools, hospitals, workplaces are penalised, then it would be a huge step towards eradicating inequality in the country. Although the Supreme Court of Pakistan instructed governmental bodies to take many similar steps to eliminate discrimination against transgender persons and causing any hindrance in actions which are pursuant to the directives of the superior court could be deemed as contempt of court which is a punishable offence,⁵¹ this possibility has not acted as a deterrent in the past and the Act needs to directly penalise such acts to achieve a concrete solution. In addition to this, according to Immanuel Kant, the “general justifying aim of

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Asif Mehmood, ‘Transgender community boycotts elections’ (*Express Tribune*, 12 June 2018) <<https://tribune.com.pk/story/1732970/1-transgender-community-boycotts-elections>> accessed 09 May 2019.

⁴⁸ (n 44).

⁴⁹ (n 19), s 11.

⁵⁰ Ibid, s. 4, 9(2), 9(3), 11(1), 13(3), 14(1), and 15(1).

⁵¹ Contempt of Court Ordinance 2004, s. 2(b), 2(c), and 4.

punishment...is deterrence and crime control, thereby promoting the state's purpose of securing individual freedom for *all* citizens.”⁵²

Furthermore, there is lack of legislation regarding hate crimes against transgender persons. Pakistani transgender community has been a victim of violent crimes motivated by the inherent discriminatory attitude against them.⁵³ Logically, the discussion regarding the other rights of the transgender community in Pakistan should be subsequent to ensuring their fundamental and most significant right to life. In United States, 22 states including Washington DC have legislation against hate crimes which include people with a gender expression or identity falling outside the rigid binaries in the protected category.⁵⁴ Pakistan needs to follow this example as this type of legislation will not only garner the attention of multiple segments of the society but also provide the transgender community with a sense of protection.

Lack of a Proper Time Frame to Bring About the Required Changes

The Supreme Court of Pakistan declared transgender persons to be equal citizens of Pakistan almost a decade back, it is essential that the State makes further active effort to provide transgender community the proper benefits of this status. In essence of this, the proviso clause of section 21 of the Act which states that no order shall be made in furtherance of removing any difficulty which arises in implementation of these provisions after the expiration of a period of two years from the date of the commencement of the Act⁵⁵ is also in need of amendment as a mere period of two years is not enough to tackle all the issues that the transgender community is facing. While the fact that the Act lays down guidelines for governmental affirmative action is highly significant, a mere period of two years is nowhere near sufficient to bring about a change in the rigid mindset of the Pakistani society. There can be no

⁵² Don E. Sheid, ‘Kant’s Retributivism Again’ (1986) 72 (2) *Archives for Philosophy of Law and Social Philosophy* 224, 225 <<https://www.jstor.org/stable/23679494>> accessed 09 May 2019.

⁵³ Bakhtiyar Phullan, ‘Violence against Transgender’ (*The Nation*, 27 August 2018) <<https://nation.com.pk/27-Aug-2018/violence-against-transgender>> accessed 15 September 2019.

⁵⁴ ‘National Equality Maps’ (Transgender Law Centre) <<https://transgenderlawcenter.org/equalitymap>> accessed 15 September 2019.

⁵⁵ (n 19), s. 21.

proper substantive equality for transgender persons until the bias and the derogatory attitude of the people subsides.

Recommended Reforms

The legislature should introduce following amendments in the law to properly facilitate the transgender community:

1. It is essential that the legislature brings the usage of pronouns in conformity, and refrains from using the pronoun 'he' as it has both legal and symbolic significance.
2. Further legislation should be passed concerning the inheritance rights of the transgender persons who do not ascribe to the Islamic faith.
3. The legislature should add penal provisions to the Act in order to create a negative incentive for people to follow the law. Furthermore, hate crimes against the transgender community should be strictly dealt with and special provisions should be added to the law to that effect.
4. The legislature should extend the time frame given in the Act as a period of two years is not enough to bring about a substantial change.

The State should also take the following steps to assist the proper implementation of the Act:

1. The State should start awareness campaigns regarding the historic experiences of the transgender community, the problems faced by them, and the rights guaranteed to them under the Constitution and this Act.
2. The State should make special institutions to provide education to the transgender community to bring them at par with the rest of the population. Once the structural inequalities have been eradicated to an extent, only then the provisions of the Act focusing on formal equality can make a valid difference for the community.

Conclusion

There have been multiple efforts in Pakistan to guarantee the provision of fundamental rights to the transgender community. The main right in this regard is the right to equality as the transgender persons have faced discrimination since the colonial era in the sub-continent. However, the

trajectory Pakistan has adopted to solve this issue is defective. To the most extent, both the Supreme Court and the Parliament have focused on granting formal equality while the focus should have been on substantive equality. As long as the social, economic and political discrimination against the transgender persons persist, the State cannot claim meritocracy for them. There is a need to bring the transgender community at par with the rest of the population through affirmative action by the State, as while the Transgender Persons Act prohibits discrimination, there is little to no mention of any positive measures which the State can adopt, such as quotas for transgender persons. Recently, in Sindh, transgender persons were allowed to join the police force as regular duty officers,⁵⁶ this is a positive initiative which should be followed in other provinces, and at a federal level as well. The transgender persons should also have separate representations in the legislative bodies as they are now considered to be the separate third gender. This is the only way their concerns can be properly heard. The Act allows them to contest elections, but it is almost impossible for them to win from a general seat. Thus, while the Transgender Persons Act was a historic move as the transgender community was acknowledged and owned on a national level by the *chosen representatives* of the population, a proper analysis of the Act showed that it is lacking at several points and leaves much to be desired. The Act should be further amended so these and other concerns can be properly dealt with. Furthermore, the government needs to come up with a proper policy for the implementation of this Act and needs to allocate funding for it, and the provinces also need to come up with their own versions of the Act.⁵⁷ Only then would there be a holistic approach towards the right to equality for the transgender community in Pakistan.

⁵⁶ ‘Police to allow transgender recruits in Sindh’ (Dawn, 25 April 2019) <<https://www.dawn.com/news/1478186>> accessed 11 May 2019.

⁵⁷ Rimmel Mohyidin, ‘With transgender rights, Pakistan has an opportunity to be a pathbreaker’ (Dawn, 10 December 2018) <<https://www.dawn.com/news/1450616>> accessed 11 May 2019.