

Transgender Rights in Pakistan: A Comparative Analysis

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Abstract

This paper seeks to identify and analyse the constitutional and legal framework set out in Pakistan for the provision and protection of human rights of the transgender community therein. Apart from the constitutional guarantees, the landmark judgment of the Supreme Court in Khaki gave impetus to legal reform in the country for such rights, including most prominently, the Bill introduced in Parliament, the Transgender Persons (Protection of Rights) Act, 2017. The legal framework however, and the provisions of the Bill are not without their flaws, and a comparative analysis has been drawn with the legal protection accorded in the neighbouring country of India, with which a comparison becomes almost necessary owing to the shared history, culture, and shared problems of the transgender community, as well as a virtually identical Bill introduced in the Lok Sabha the subsequent year. This comparative analysis allows for a more analytical approach to the law and helps to identify the areas that need to be discussed, including, significant bars to the practical application of the provisions.

Introduction

Transgenders in Pakistan are marginalized and abused, often living in a community that has a low socio-economic status with their fundamental human rights¹ blatantly abused. According to Human Rights Watch², just because certain people's gender evolves differently and doesn't fit into the 'rigid traditional notions of female or male' is no reason for them to not be able to enjoy their fundamental rights or to be humiliated to the extent that it sometimes becomes lethal. This paper will seek to identify the human rights protection accorded to transgenders by the Pakistani legal system, considering landmark judgments, and any legislation set in place, with a specific emphasis on, inter alia, a general prohibition on discrimination, the right to life and inherent dignity, the right to health and education, the right to freedom of expression etc. In doing so, a comparison of similar legal rules with their counter parts in India will be done, in order to analyse the strength and quality of the legal protections accorded to transgenders in Pakistan.

After setting out a brief history of transgenders in South East Asia, including Pakistan, the Transgenders' Bill³ which has been introduced in the Parliament in Pakistan, will be discussed. This Bill has been introduced six years following the seminal decision of the Supreme Court⁴ in *Khaki*⁵, where the Supreme Court deviated from the traditional gender binary to recognize that the citizenship rights of the third gender in Pakistan; and declared that

¹ "Rights that someone has simply on virtue of being human, thus they are held equally by all, as being human cannot be renounced, lost or forfeited."

Jack Donnelly, *Universal human rights: In theory and practice* (Third edition, Cornell University Press, 2013).

² Kyle Knight and Neela Ghoshal, 'Recognizing the Rights of Transgender People' (*Human Rights Watch*, 13 February 2016)

<www.hrw.org/news/2016/02/13/recognizing-rights-transgender-people> accessed 20 October 2017.

² Transgender Persons (Protection of Rights) Act, 2017.

³ Transgender Persons (Protection of Rights) Act, 2017.

⁴ Herein after referred to as "SC".

⁵ *Dr. Mohammad Aslam Khaki v Senior Superintendent of Police* (Operation Rawalpindi H/R Const. petition (2013) 63 of 2009 PLD SC 188.

both the federal and provincial governments are responsible for the provision⁶ of rights to eunuchs.⁷

A. History of Transgender Rights

The pre-colonial era saw a celebration of *hijras* and a special place for them in society. The 18th century *Maratha* state not only provided them rights but also catered to their rights specifically, giving them land and cash grants, and giving them special positions at royal courts.⁸ Furthermore, the Indian Supreme Court in *NALSA v Union of India*⁹ highlighted the coveted and celebrated position that *hijras*¹⁰ enjoyed in the pre-colonial era and recalled their celebration historically by attributing them to folk stories of Indian gods and goddesses.¹¹

With the onset of colonial rule, transgenders were seen to be greatly marginalized and considered as ‘barbaric’ by the colonialists. The British *Raj* bought about the enactment of the Criminal Tribes Act 1871¹² that classified the entire *Hijra*/eunuch community as innately ‘criminal’ and prone to systematically committing non-bailable offences. The Act¹³ allowed for control and surveillance of certain tribes or castes deemed to be criminal or ‘thugees’, and allowed for penalization of eunuchs/*hijras* if they

⁶ Ibid para. 3 - “Similarly, Federal and Provincial Governments are equally responsible to recognize their rights.”

⁷ ‘Eunuch’ - to only those people who wish to be treated as neither male nor female and embrace a lifestyle that is in conformity with their sexual divergence.

(Standing Committee on Social Justice and Empowerment, Lok Sabha, The Transgender Persons (Protection of Rights) Bill 2017, Forty-Third Report.)

Furthermore, the term eunuch is interchangeable with transgender, or as they are known in South East Asia, *hijras*, or *Khawaja Siras*.

⁸ Lawrence W. Preston, ‘A Right to Exist: Eunuchs and the State in Nineteenth-Century India’ (1987) 21 *Modern Asian Studies* 371, 372.

⁹ *National Legal Services Authority v Union of India and others*, Writ Petition (Civil) [No. 400 of 2012] India: Supreme Court 15 April 2014.

¹⁰ A term used to describe transgenders in Pakistan, India and Bangladesh. A noun collectively identifying eunuchs, and transgender people.

¹¹ *NALSA v OUI*, paras 13 – 15.

¹² The Legislative Acts of 187: (Act No. XXVII) The Criminal Tribes Act, 1871.

¹³ Ibid, Part II.

performed, danced or dressed as women. Further, they could be arrested without warrant and imprisoned for up to two years. It must be noted however, that this Act came about as a result of foreign rule at a time when human rights discourse and civil liberties were not in awareness of the general public. A very interesting aspect of this Act was the fact that it criminalized the adoption or guardianship of minors by transgenders, which meant that *hijras* abandoned by their families at an early age could not come under the protection of those that would willingly take them into their care. Thus, we can see, that from being socially accepted and celebrated at a time, they became social outcasts as a consequence of these practices that were legally authorized by colonial rule: being criminalized, forced into begging and prostitution, stripped of their fundamental rights. Since partition, even though the discriminatory Act itself was repealed by India a mere two years after 1947, transgenders have had to come a long way to be legally recognized as a third gender.

B. Constitutional Guarantees to Transgenders

This paper will focus on specific rights, and their legal provision and scope for implementation in Pakistan. In doing so, it will analyse any corresponding rights in the neighbouring state of India. The reasons for choosing India, as opposed to other countries in the Western hemisphere, as a case study for comparison are multi-faceted: firstly, both countries share the same history with regards to transgenders, as can be seen above. Secondly, to a considerable extent, the cultural values and sentiments of not only the government but also the general public with regard to transgenders are the same: those of social exclusion. Only recently have both legally recognized the existence of a third gender, and in 2017 bills for the protection of transgenders were proposed in, the Pakistani Senate and the Lok Sabha¹⁴. Lastly, owing to a shared legal system since many centuries, both countries greatly respect and borrow from judgments from the apex courts of the other.

¹⁴ Indian Parliament, “parliament of the people”.

1. General Prohibition on Discrimination

It would not be an understatement to say that one of the biggest problems faced by the transgender community in Pakistan today is discrimination. The Pakistani society is greatly progressing, or as we now know from a historical account, reverting back to acceptance and social inclusion of the third gender. Article 25¹⁵ of the Constitution of the Islamic Republic of Pakistan states the general prohibition on discrimination. It provides for the equality of all citizens before the law and protection under the law. Article 25(2) is of particular relevance as it directly prohibits any discrimination based on gender. Safeguards to eunuchs are also available from discrimination in access to public places or in the provision of services, however, it is interesting to note that the latter right¹⁶ refers to ‘either sex’ (i.e. it takes into consideration only the traditional gender binary) and further qualifies that by allowing seats to be reserved if either member of the sex cannot adequately perform that job.

As can clearly be seen this mere constitutional guarantee is not enough: especially given the fact that until 2014, the Pakistani legal system did not recognize the third gender as citizens of the country. ‘Non-recognition of identity of *Hijras/transgender* persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public places, at home and in jail, also by the police.’¹⁷ CJ Iftikhar Muhammad Chaudhry in *Khaki*, in recognizing this fundamental right enshrined in the constitution, held as follows:

“...eunuchs in their own rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected.

¹⁵ Article 25. Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

¹⁶ Constitution of Pakistan, art 25(1).

¹⁷ *NALSA v OUI* (n 9), para. 55.

Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned.” Another milestone in the recognition of citizenship of the eunuchs was *Waqar Ali v Federation of Pakistan*¹⁸ in which the federal government gave an undertaking to include the transgender community in the upcoming Pakistani consensus.

The prohibition on discrimination is enshrined in articles 14, 15 and 16 of the Indian Constitution: The Indian constitution in this respect lays out more detailed provision than Art. 25. Art. 14 of the Indian constitution provides for equality before the law and equal protection before the law, while there are separate provisions for prohibition on discrimination (article 15) and equal opportunities of access to employment (article 16). Yet it was not until 2014 that the Indian legal system gave any substantive recognition beyond the constitution to the provision of this right to the third gender. Justice K.S. Radhakrishnan spelled out the entitlement of transgenders to “economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights” and bound the state take affirmative action with regard to these rights.

In terms of the protection granted by the courts, special light needs to be shed on the judgments in the two jurisdiction themselves: the order issued in Pakistan, while extremely progressive and ground-breaking, was nowhere near as comprehensive as its counterpart judgment in India, which took into account not only laws on transgenders in other countries, but also gave affect to its international legal obligations in granting these rights, taking into account international instruments of vital nature in this respect.¹⁹

The active effort of the apex court in India can be seen in the fact that in *Ashish Kumar Misra (Advocate) vs Bharat Sarkar Thru. Sachiv* the court held that while the statutory provision on question²⁰ was indeed for the empowerment of women, the social security rights (in this case food ration) should also be extended to transgenders who are heads of households, in furtherance of the *NALSA* judgment. The court specifically

¹⁸ *Waqar Ali v Federation of Pakistan* 2017 PLD 2017 Lahore 558.

¹⁹ To name a few: UDHR, ICCPR, and the Yogyakarta Principles.

²⁰ National Food Security Act 2013, s 13.

held that “Incidental to the fundamental right to live in dignity under Article 21 of the Constitution, is a right of access to all facilities for development of the personality including education, social accumulation, access to public places and employment opportunities.”

In the same year two simultaneous potential legislations have surfaced that aim to put the rights recognized by the courts on a statutory footing. Both bills have not currently been passed and are in the process of negotiation.

In terms of non-discrimination against the third gender, section 3 of the Transgender Persons (Protection of Rights) Act, 2016²¹ and the Transgender Persons (Protection of Rights) Act, 2017²² both lay out an identical and comprehensive framework for non-discrimination, consolidating the previously discussed constitutional guarantees and directions by the apex courts. However, a point for further consideration is what, under the section, would constitute “unfair treatment”, as no statutory definition has been provided.

Any right to not be discriminated against is naturally precluded by the right to a gender identity, which is provided for (identically) in s. 4 of both the 2016 and the 2017 Bill. The problem, in the provision of this right lies in the creation of the District Screening Committees, where the gender will only be recognized as ‘other’ on the recognition of that committee. It can be argued that this impedes their fundamental human right to self-expression and the right to be legally recognized as such, since, as was noted in *NALSA*, an individual’s self-identification as a man, woman, transgender or other identified category.²³ This right to express one’s self is linked to the right to dignity: in *Francis Coralie Mullin v Administrator, Union Territory of Delhi*²⁴ the court in recognized that the right to dignity²⁵, is an essential part of constitutional culture and includes ‘expressing one’s self in diverse forms, freely moving about and mixing with comingling with fellow human beings’ in order to ensure full development and evolution of persons.

²¹ Referring to the current bill in India.

²² Referring to the current bill in Pakistan.

²³ *NALSA v OUI* (n 9), para. 19.

²⁴ 1981 1 SCC 608, paras 7-8.

²⁵ Enshrined in art. 21 of the Indian Constitution.

Similarly, article 14 provides for the inviolability of dignity of man in the Pakistani constitution.

2. Right to Health and Education

The rights to education and health are basic social and economic rights that a state has to provide to all its citizens. Since the recognition of eunuchs or *hijras* as a third gender, naturally, these imperative rights have to be forwarded to their community. In this regard, In the constitutional petition of Khaki the courts specifically directed both provincial and federal governments to protect the rights of eunuchs. In the orders issued on 23rd December 2009, in *Khaki*, the Secretaries of Education and Higher Education were requested to provide educational and vocational training facilities to “eunuchs” through enrolment and admissions in relevant institutions. These orders emanate from article 22 of the constitution (Safeguards as to educational institutions vis-a-vis minorities). Article 22(4) allows for public authorities to make provisions for socially or educationally backward classes of citizens, like transgenders, and specifically, article 25A of the Pakistani constitution makes provision for the right to education of all citizens.

With the above being established, we can see that the 2017 Act makes places an obligation on educational institutions and health care facilities to provide these rights to the transgenders. Particularly noteworthy is the fact that article 14 of said Act²⁶ includes not only government educational facilities but also those that are recognized by the government i.e. private institutions, while article 14 of the Indian Bill provides for the same. This is a crucial step towards the advancement of their human rights, especially since the *NALSA* judgment recognized that transgenders have not been afforded the special provisions under art 15(4) of the Indian constitution²⁷ in that they be recognized and treated as SBECs. An achievement to be lauded that is reflective of some progress being made as

²⁶ Obligation of educational institutions to provide inclusive education to transgender persons.

²⁷ Art 15(4) provides for the advancement of socially and educationally backward citizens (SBECs).

a result of their legal recognition is that fact that in 2017 eight transgender students appeared for their entrance exams for MBBS of which five were successful²⁸. However, with regards to article 14 of the proposed bill, the term used is ‘inclusive education’ which means that transgender students, who do not conform to the traditional gender binary will be able to study alongside those that do. While this is certainly a commendable in terms of non-discrimination, this provision needs to take into account and cater to the very real prospect of bullying and harassment that they would face.²⁹

The right to adequate healthcare is a particular concern and problem with increasing HIV/AIDS cases, particularly in the transgenders community. Lack of access to hospitals, and lack of awareness mean that the cases only grow on both sides of the border. Particular concern has been raised in this manner by the UNDP India in its report³⁰ which highlighted that the HIV, Human Immunodeficiency Virus and Sexually Transmitted Infections (STI) is now increasingly seen in the *Hijras/transgenders* population. It also reported a very high rate of HIV among *Hijras* and Transgender women³¹.

It can be analysed that India goes a step further in the provision of healthcare services in the provision of access to gender reassignment surgeries³² and hormonal therapy for transgenders in article 16(b) and (c),

²⁸ ‘Five transgenders clear medical entrance exam’ (*Livemint*, 23 June 2017) <<http://www.livemint.com/Education/ZKEDujdXYGeNoC7bGqajQM/NEET-2017-Five-transgenders-clear-medical-entrance-exam.html>> accessed 20 October 2017.

²⁹ Standing Committee on Social Justice and Empowerment (Lok Sabha) and Ministry of Social Justice and Empowerment (Department of Social Justice and Empowerment), ‘The Transgender Persons (Protection of Rights) Bill 2017: Forty-Third Report’ (Lok Sabha Secretariat New Delhi, July 2017).

³⁰ Dr. Venkatesan Chakrapani, *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion* (United Nations Development Programme (UNDP), December 2010).

³¹ The figures quoted range from 17.5% to 41%.

³² Sex reassignment surgery is a procedure whereby one’s bodily characteristics are modified so as to match his or her subjective sense of gender identity. Tomislav Bracanović, ‘Sex Reassignment Surgery and Enhancement’ (2017) 42 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 86.

and also set up a surveillance mechanism for HIV³³, the need for which its counterpart bill in Pakistan has not acknowledged, yet it allows for a change of gender to of a transgender person to be recorded in official documents.³⁴

3. Property Rights to Transgenders

Perhaps one of the most controversial aspect of human rights in respect of transgenders are property rights, which are a fundamental civil and political right that is granted to them (as to all citizens) by both states. The *Khaki* judgment reinforces that both provincial and federal governments are bound to protect the right of property as well as other rights. The comprehensive *NALSA* judgment speaks of property rights being attached to the general human rights of citizens. Since the legislations in question are still Bill circulating in debate, there is no case law or any secondary legislation to shed further light on this very integral right granted in the constitution of both countries.

C. Implementation of Rights and Recommendations

While the legal system in Pakistan has indeed recognized the existence of a third gender, and the Transgender Persons (Protection of Rights) Act, 2017 is soon to be a legal reality, special emphasis needs to be paid not just to the effective implementation of the rights recognized for transgenders but also in changing core societal hatred towards such citizens which can be done by raising effective awareness and welfare programs for eunuchs.

In terms of the substantive provisions, this paper has identified that the Pakistani legal system accords rights to a backward class of citizens that are similar with those rights granted to them in India. Any key differences

³³ The bill in India; Transgender Persons (Protection of Rights) Act 2016, art 16(a).

³⁴ The bill in Pakistan; Transgender Persons (Protection of Rights) Act 2017, art 8.

have been highlighted and further, any discrepancies in both the laws and decisions have also been identified.

Certain vital differences need to be brought to the attention of the reader here, in both the legislations, which may well adversely affect the transcription of these rights from mere words on an official document to a practical reality. Firstly, The Indian Bill calls for the creation of a National Council for Transgender Persons³⁵ with representatives from various sects of government, including representatives from the transgender community itself, in order to, inter alia, advise on policy formulation, and monitor the impact of such policy formulation. Even though it is merely an advisory body, with no legislative or executive power, it can certainly be seen as an aid to the proper implementation of this Bill and the obligations of government therein. While the Transgender legislation in Pakistan is certainly commendable, one of its glaring flaws is the lack of such a body that can look closely upon issues that surround the transgender community and help in policy formulation.

Perhaps one of the key aspects of this legislation is the implementation of it. Chapter VII of the 2017 Bill and Chapter VII of the 2016 Bill lay out the framework for any offences and punishments with respect to any offence of the rights contained therein. A closer analysis of the two show a significant amount of difference in them. The maximum sentence for the offences laid out in the Indian Bill is a mere six months to two years, and a fine. The penalties do not correspond with the serious offences corresponding to any potential sentences, which include but are not limited to, compelling transgender persons into forced or bonded labour, harming, injuring or endangering the life, health (mental or physical) of transgenders, with acts including physical and sexual abuse.³⁶ The Pakistani bill goes one step further in this case by imposing only a minimum sentence of six months, which means that a maximum sentence can be, if necessary, imposed appropriately according to the seriousness of the offences committed against the transgender community and the impediment of their human rights.

³⁵ The bill in India; Transgender Persons (Protection of Rights) Act 2016, art 17.

³⁶ The bill in India; Transgender Persons (Protection of Rights) Act 2016, art 19.

D. Recommendations for Improving the Transgender Bill in Pakistan

The following recommendations are suggested: To include the recognition of the HIV endemic amongst other health concerns in the transgender community, under article 16. With regards to this right, the UNDP has further suggested that healthcare providers should be competent and sensitive in providing healthcare services to transgenders, and further that the government should not just give provision for but also develop and monitor the implementation of guidelines related to gender transition and gender reassignment surgeries.

With the need to monitor, comes forth the second major recommendation, i.e. to create a body that would help in policy formulation and monitoring the progress and implementation of the transgenders bill, thereby ensuring effective protection of the human rights of the third gender. Further, legal aid and access to judicial processes and remedies need to be introduced among the transgender community, so that they may claim any malfeasances or abuse of their human rights.

In terms of deficiencies in substantive law, while it does provide the right of residence³⁷, the current Bill on transgenders needs to take directly into account the issue of child abandonment, i.e. to expose or leave a child in any place with the intention of wholly abandoning such child, which is the case for most transgender children today who are abandoned by their families. This leads to severe difficulties not just in terms of normal child development and growth, but also hinders their ability to get legal recognition and property rights. Article 328 of the PPC³⁸ criminalizes child abandonment with a sentence that extends up to seven years and/or a fine. The recognition of such a crime should be reinforced in this bill in the context of those children that are abandoned at birth or at an early age.

Perhaps one of the most basic yet significant approaches to the protection of human rights that the proposed Bill does not consider is raising

³⁷ The bill in Pakistan; Transgender Persons (Protection of Rights) Act 2017, art 13.

³⁸ Pakistan Penal Code.

awareness amongst society in order to cut from root the deep seated ill sentiments against the third gender that results in their human rights being violated and abused. The Bill should include a national plan of action of sorts, or, in creation of a council or similar body for transgender rights as suggested above, add the same to its functions.

Conclusion

In conclusion, we can see that transgenders in Pakistan are a severely underserved community that deserve affirmative action to be taken with regards to the protection of their basic human rights to them. In this respect, after the landmark *Khaki* case, the Transgender Persons (Protection of Rights) Act 2017 has been introduced in the Pakistani senate. The act, while a milestone forward in the provision of their rights needs improvement in order to ensure that no human rights of transgender persons are impeded in the process of implementation. The enactment and implementation of this Bill, will be the first step in what will become a comprehensive legal provision of transgender rights and effective protection against their abuse or discrimination.

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