

## Determining Gender Identity: Socio-Religious Controversies About the Trans Persons (Protection of Rights) Act, 2018 in Pakistan (A Case Study)

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| Article Information  | Abstract  |
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| <p><b>Keywords:</b><br/>Gender Identity<br/>Controversies<br/>Ambiguities<br/>Trans Protection Act Pakistan<br/>2018</p> | <p>A serious obstacle to realizing human rights is gender stereotypes; organizations like the United Nations, African Union, Council of Europe, etc. are struggling to eliminate this. The limelight bill of Pakistan, "Transgender Persons Act, 2018," was highly admired globally but faced controversies only after four years of its enactment. The act is not only cognizant of trans rights but also guarantees justice and equality on a humanitarian basis. The prolonged struggle of the trans community in the social and legal fields for gender recognition is appreciable. The term "self-perceived gender identity" is the root cause of controversy between trans social activists and religious people. As self-perceived gender identity does not involve a medical checkup, there is no way to counter-check if anybody deceptively pretends to have a gender identity that he or she has not perceived. Religious people argue about how to stop this intentional mischievousness that can open other wrong options that are not compatible with Islamic teaching and Pakistani culture. This question is still answerable to psychologists and scholars. Studies have highlighted that transgender identity is not only dependent on physical appearance and medical procedures. The suggested recommendations are substantive equality as mentioned under Article 25(3) of the 1973 Constitution of Pakistan, optimization in true execution, abstaining from any further delay, and accepting the need of the medical board to avoid further controversies. Through these recommendations, the trans community may win their basic human rights, for which they are still struggling.</p> |

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## 2 Introduction

Failure to achieve gender equity is due to a significant role of friction in the normative systems of a state; the friction is disharmony, discord, or inconsistency in law, such as when national laws are not synchronized at the local, subnational, and regional levels. The ambiguity that the law poses to gender equality is another reason for the failure of the state to achieve gender equity. Space becomes wider for the enforcers and practitioners to interpret these laws due to the ambiguity of terms and loopholes (Guney et al., 2022). The Pakistani Transgender Persons (Protection of Rights) Act, 2018" is also facing controversies due to some ambiguities. Long and arduous activism for trans rights got activated in Pakistan through a Supreme Court order. Initially, these orders caused positive change in public policy, brought trans issues into the public limelight, paved the way for legal reforms for the trans community, and finally, this momentum made the enactment of the 2018 Act possible (Rashid & Umar, 2022). Pakistani society is ready to accommodate two genders in the real sense; the third gender is still struggling for equality and basic human rights. In 2013, the Supreme Court favored the trans community for the first time in issuing CNICs when the petition was filed by Dr. M. Aslam, a social activist. After

that, the "Transgender Persons (Protection of Rights) Act, 2018" is another step in the favour of the community, which is still awaited for true implementation (Siddique and Rana, 2021).

The seventh national and first-ever digital population census revealed Pakistan as the largest Islamic state, having approximately 249.5 million Muslim populations (Abass, 2023). Being an Islamic state, Pakistan believes in equal rights for all. The trans protection bill is also a big attempt to achieve equality for the trans community. But how this bill has become controversial socially and religiously after four years of its enactment is the subject of this case study. The basic need is true implementation of the Act at any cost, because scholars such as Islam (2020) have explicated that Pakistan as a state has often failed to provide its citizens substantive equality. The jurisprudence of the Supreme Court of Pakistan about the Trans Act, 2018 shows that the framework of substantive equality is still lacking, and to bring transgender people into the mainstream, affirmative actions are required.

## **1.1 Research Question**

How did the Transgender Persons (Protection of Rights) Act, 2018 become controversial in Pakistan?

## **1.2 Research Objective**

To know the reasons behind the controversies about the Transgender Persons (Protection of Rights) Act, 2018 in Pakistan.

## **2 Review of Literature**

The circumstances and situation changed for Khwaja siras in the sub-continent with British colonial rule when they passed the Criminal Tribes Act in 1871 and included transgender people in criminal tribes. Since then, the decline of their social life has started, and they are still seeking social justice. So gradual isolation and economic exclusion became permanent parts of their further lives; they slowly moved on to social stigma, discrimination, and humiliation. Slowly, they transitioned to professions like hustlers, panhandlers, theatrical performers, and dancers. After 1947, with the independence of Pakistan, the tribes' criminal act was repealed, but the action required for the reversal of loss of gender identity in the past could not be taken by a new, emerging state. Thence, delinquency, menial status, and slacking scruples are haunting them in our modern society (Punjab Social Protection Authority, Government of the Punjab, Pakistan, 2018).

Problematic legislation across the world over the last decade that has had a destabilizing effect on gender equality and justice was seen closely in a conference at the University of Sussex, UK, in 2018 with different examples. Such as the reintroduced restrictions on women's right to abortion in 2020 by Poland, anti-abortion state laws in the USA, and the Taiwanese so-called foetal "heartbeat" bills, etc. Both problematic anti-gender laws and international laws and initiatives for women's rights and gender equality came into existence during the same decade. The contradiction between international and domestic systems has been observed, which shows the problematic attitudes of states toward restricting gender equality at the domestic level. The superiority problem of national and international norms is also discussed to determine which of them should be integrated to protect individual rights through global constitutionalism (Guney et al., 2022).

Article 25(3) of the 1973 Constitution of Pakistan grants the right to formal and substantive equality. Formal equality is based on the law and the prohibition of discrimination based on sex. On the other hand, Substantive equality allows positive discrimination against women and children because they are deemed to be a weaker section and need a paternalistic approach. But this constitution does not provide the same protection to the trans community, even though they are also a weaker section of society and facing atrocious treatment (Islam, 2020).

## **2 Methodology**

To delve deep into the nitty-gritty of the Pakistan Trans Protection Act 2018, the critical review method is used in this case study. Secondary data is obtained from the officially passed bill by Parliament, and through content analysis, the main content of the act is analysed. To understand the all strengths and weaknesses of this law Grey literature is also used along with published literature. For obtaining the

overview of the reasons of arousing the controversies only recent literature is considered. But to know the history of different terms used for genders is investigated through previous literature.

### **3.1 Criteria for Selection**

At first the original and official document, the Trans Persons (Protection of right) Act is selected for critical review. The main aim of the study is to investigate the reasons behind controversies aroused regarding this act. As this law was passed by parliament in 2018, so to know the controversies aroused about this law have been almost discussed in post-2018 published studies. So there are two main standards for selecting these studies.

1. Only post-2018 studies are considered for this.
2. Grey literature is also considered to elaborate different terminologies of history.

Keywords used for searching online "Trans Person (Protection of right) Act of 2018 Pakistan."

### **3.2 Evaluation of the case**

The bill was piloted by Syed Naveed Qamar of the Pakistan Peoples Party (PPP) on August 8, 2017, and passed in the assembly by a majority on May 8, 2018. The purpose was to provide protection, relief, and rehabilitation of the rights of the trans community. Naeema Kishwer of the Jamiat Ulema-e Islam-Fazal group (JUI-F) opposed the bill and suggested detailed deliberation by the standing committee and amendments through the Council of Islamic Ideology (CII) (Zaman, 2018).

"Transgender Persons (Protection of Rights) Act, 2018" is the title of the act. It has seven chapters and twenty-one sections; the first chapter has two sections and is about title, extent, and commencement. The second chapter has one section that reveals a recognition of identity and multiple definitions of transgender people. The prohibition against discrimination is described in chapter three, which has two sections. An analysis of the government's obligations is highlighted in Chapter 4, Section 6. Different rights like the right to education, inheritance, property, employment, to hold public office, to vote, to assembly, to health, access to public places, and other fundamental rights are subjects of Chapter 5, which is the most prolonged chapter, having eleven sections from Sections 7 to 17. Offenses and penalties are also discussed in this chapter. The enforcement mechanism is elaborated on in Chapter 6 (Section Eighteen). The seventh chapter, which is the last one and has three sections, deals with miscellaneous things to remove hurdles to enforcing this law (Transgender Persons Protection of Rights Act, 2018). However, the main problem with this Act is that there is nothing about substantive equality, through which women and children are given special protection by positive discrimination under Article 25(3) of the 1973 Constitution because they are weak parts of society (Islam, 2020).

## **4. Finding of study**

By analysing the secondary data and through exploring the published and Grey literature the nitty gritty of the Trans Persons (Protection of Rights) Act, 2018 are collected to reach the real reasons behind, ambiguities and controversies.

### **4.1 Controversies**

All controversies are rooted in Chapter 2, Section 3, which is entitled "recognition of identity of transgender person" and elaborates gender identity in this way: Every transgender person, being the citizen of Pakistan, who has attained the age of eighteen years shall have the right to get himself or herself registered according to self-perceived gender identity with NADRA on the CNIC, CRC, driving license, and passport in accordance with the provisions of NADRA ordinance 2000 or any other relevant laws. The above paragraph of this section is the main cause of conflict and controversies, especially the clause "self-perceived gender identity".

Robert Stoller, an American psychiatry professor at UCLA Medical School, coined the term gender identity initially in 1964, which was later popularized by John Money, a controversial psychologist and

New Zealand American professor at John Hopkin University; a gender identity clinic was also founded by him at John Hopkin University, and he defined the term “gender role,” which later became gender identity. Money thought differently from others that gender identity is only due to biological factors; he believed that gender identity was determined by an interaction of biological factors and upbringing. Actually, essentialists argue that gender identity is determined at birth by biological and genetic factors; on the other hand, social constructivists argue that gender identity is socially constructed (Lee, 2022). Gender identity is the self-conception of an individual man or woman, boy or girl, or a combination or fluctuation between man or boy and woman or girl. Mostly, gender identity corresponds to biological sex, but some experience no or little connection between sex and gender, such as transgender people. Since the 20th century, the nature and development of gender identity have been studied and disputed by psychologists, philosophers, and social activists (Butler & Irigarary, 2023). The concept of gender self-identification is to determine legal sex, gender, or biological sex by gender identity (a personal sense of one’s own gender) without any medical requirements. It belongs to the trans rights movement, actually. By February 2023, almost twenty countries in the world will have such a law where no judge or medical expert is involved in determining gender. But in some countries, this created some controversies, such as the United Kingdom, Australia, Canada, and Mexico (gender self-identification, 2023). Pakistan is now among those countries that are facing controversies about self-perceived gender identity.

#### **4.2 Religious sensitivity**

Modern research accepts the self-perceived gender identity because physically, medically, and biologically fit and complete anatomy is not a guarantee of gender congruence because psychological and self-perceived complexities remain hunting. As Afif (2019) elaborates, the phenomenon of transgender people is a problem of gender identity, which refers to the condition in which perpetrator identify their gender and identity as different from their biological sex and cause dissatisfaction and incompatibility between their soul and body. If we delve deep into Islamic literature, we can find little guidance about this because the sacred book (Holy Quran) and hadith (deeds, enforcement, oral reports, and sayings of Muhammad (P.B.U.H.) are two main sources of guidance for Muslims, and only the second source (Hadith) discusses trans matters because Islam generally focuses on only two genders, male and female. For example, the Almighty decrees in the holy Quran that all human beings, whether male or female, are descended from Adam and Eve (Surah An-Nisa 4:1). In Islam, the roles and responsibilities of men and women are different due to psychological, physical, and anatomical differences.

The term "Khunsa" is used in Islam for a person with both male and female organs, which have further sub-categories (khusa ghayr musykil and khnsa musykil). The first has both male and female genitals and can be assigned a specific sex and gender based on the dominant genital organ. According to the decree of the Holy Prophet (P.B.U.H.), the main sign is the organ from which the khunsa urinates. But Khunsa Musykil urinates from both genitalia at the same time, and there is no dominant male or female characteristic, so the correct gender cannot be assigned. After puberty, the signs and symptoms may clear for a true gender indication for Khunsa musykil (Zainuddin, 2017).

Islam allows modern techniques to determine the gender of any person, but the self-perceived gender identity, sex orientation, and resemblance are critical questions that require a lot of nitty-gritty analysis to reach reality.

Gender identity refers to a psychological consciousness of being a man, a woman, or a third gender, which is generally congruent with assigned sex, but in some people, it may not, and if this incongruence becomes distressing, it causes gender dysphoria (Fernandez et al., 2023). Sexual orientation is emotional, romantic, and sexual attraction, but Islam has lots of restrictions on this matter. Sexual relationships are only allowed between males and females after marriage; on the other hand, lesbian, gay, and bisexual relationships are strictly prohibited in Islam. The main reason for the controversy is self-perceived gender identity because it may open the way for lesbians, gays, and bisexuals to pretend to have a false gender identity, which is strictly prohibited in Islam, and nobody can counter-check the truthfulness of self-perceived gender identity. Rashid and Umar (2022) declared that homosexuality is

a grave sin in Islam and a big crime in Pakistan. The trans community is already a hidden source of homosexuality in Pakistan, and self-perceived gender identity will make it legal.

Resemblance to the opposite sex without any reason is also prohibited in Islam, as Muhammad (peace be upon him) cursed men who dress in women's clothing and women who dress in men's clothing (Abū Dāwūd, 2009a, p. 195). But in the case of transgender people, the matter is different because they are by nature so. Those people are cursed who deliberately resemble their appearance to the opposite sex in clothing, behavior, and speech without any solid reason, as trans people have because trans people cannot control their behavior (Afif, 2019).

### **4.3 Federal Sharia Court Verdict**

General Zia ul Haq promulgated a series of ordinances, known as Hudood Ordinances, for the Islamisation of the legal system of Pakistan. Through President's Order No. 1 of 1980, the Federal Sharia Court was established, which was incorporated into Part VII of the Constitution of Pakistan, 1973, under Chapter 3A. Some critics criticised these ordinances for overlooking human rights. The main impact of this federal Sharia court was that it had jurisdiction to examine the validity of laws based on Islam (Lau, 2007). In Islamabad, the Federal Sharia Court ruled about the Trans Persons (Protection of Rights) Act, on May 19, 2023, that Sections 2(f), 3, and 7, which are about gender identity, self-perceived gender identity, and the right of inheritance, do not conform with Islamic principles; therefore, UN-Islamic sections are deemed to have immediate effect. The people who were supporting this act responded that the federal court decision was based entirely on assumptions rather than empirical evidence. They considered this verdict a revocation of the rights of the already beleaguered trans community, which should not be guided by such assumptions that seem to be rooted in fear, discrimination, and prejudice (Rizwan, 2023).

### **4.4 Social Norms**

Culture is normative because it defines the standards of behaviors, and a cultural norm is a set of behavioral expectations that are supposed to be followed by society. Gender generates social disparities to describe a man and a woman's social dealings during their lives (Ghazi et al., 2010). In the British Colonial system, trans people were included in criminal tribes due to their involvement in extensive criminality such as unnatural prostitution and sexual immorality. After the creation of Pakistan, due to the contrary, the Islamic lifestyle was stigmatised continuously and excluded from mainstream society, thus victimized and ridiculed (Rashid & Umar, 2022). In Pakistani society, gender discrimination is deeply rooted. This gender disparity is evident at the household level, which includes basic needs like food distribution, education, health, violence, inheritance, etc. In Pakistani society, gender roles are extremely complex and continuously transferred from generation to generation for ages with minimal changes (Ali et al., 2022).

### **4.5 Complications of terminology**

No single recognized definition is available internationally for trans people, but the umbrella term "transgender" incorporates a wide range of gender-atypical identities (Rashid & Umar, 2022). The bulk of terms used for the third gender are also increasing confusion such as new, old, Asian, and, European terminologies are difficult to understand and differentiate for a common man. In the subcontinent terms like Khawaja Sira, khusras, Zenanas, Khāsīs, Hijras, Mukhannaths, Mutarajjulas, Khunthās, Mamsūḥs are used, in Islam three terms are used only like Khunsa, Khusa ghayr musykil and Khnsa musykil, modern terms like Transgender, Transgender woman, Transgender man, Third gender, Transvestites, Hermaphrodites, Eunuchs, Transsexual, No-binary, Mx, Passing, Gender variant, Genderqueer, Gender fluid, Bigender, agender, Intersex, etc. These terms have a little confusion in their meanings, definitions, and elaborations. And these confusions even remain visible when new laws, acts, and bills are promulgated in support of the trans community.

## **5. Discussion**

No law in Pakistan can be against Islamic teachings. Due to these Islamic criteria, the Trans Protection Act of 2018 was challenged in the Federal Sharia Court, and the court declared that Islamic legal

principles are rooted in biological identity (sex) rather than self-perceived gender identity, but that doesn't mean denying the protection of trans rights, which should be ensured in any case. Other countries, like the United Kingdom and India, also have legislation in which medical checkups are compulsory (Abassi, 2023). At this level, there should be a true implementation of the Trans Protection Act, even with respect to medical and biological identity, because any further delay will cause more controversies, which should be avoided. Gender discrimination can be discouraged only through the true implementation of this act and through improving literacy rates. Delays will arouse more complications for the trans community in the religiously dominant country. Therefore, without any further delay, the Transgender Person (Protection of Rights) Act, 2018 should avoid any further conflicts, contradictions, and controversies. Not only that but it should be ensured that there are no more hurdles in the way of true implementation of this amended act because true implementation of laws is another big problem in Pakistan. The laws, which have religious sensitivity, need to be focused on more intentionally, otherwise, the marginalized transgender community may suffer more in the way of justice and equity. Even with the obligations of medical checkups for gender identity, this law has a large number of benefits to favor the trans community, which can guarantee them a safe and secure life in society, the right to education, inheritance, no discrimination, the right to vote, the right to work, and easy access to public places. At the international level, particularly in the United Nations, we should create more clarity about transgender terminologies. This will guide regional lawmakers to work more precisely, accurately, and appropriately.

## **6. Recommendations**

Following empirical recommendations are suggested to upgrade the life standards of the trans community in our society. Through these recommendations, the trans community may win their basic human rights, for which they are still struggling.

### **6.1 Substantive Equality**

Substantive equality is mentioned in Article 25(3) of the Constitution of 1973 of Pakistan, which allows positive discrimination against women and children because they are deemed to be a weaker section and need a paternalistic approach. But this constitution does not provide the same protection to the trans community, even though this community is also a weaker section of our society and facing atrocious treatment. So under this article, the trans community should be given extra care to meet the provision of equal rights.

### **6.2 Optimization in True Execution**

Implementation of the law in true spirit is also a big problem in Pakistan. Even though the Trans Persons Act of 2018 is enacted, practically it has a very small impact on the social life of the trans community. So unless the laws are not implemented in a true spirit, the environment will not be changed for transgender people.

### **6.3 Abstaining from Any Further Delay**

To avoid any further controversies and delays, the option of a medical board, as suggested by the Shariah Court, should be accepted openly. Because Pakistan is a religiously dominant country, conflicts will create more problems for the trans community. This medical check-up option has already been implemented in the UK and India. Any other things and matters that can cause any conflict and controversies must be avoided so that the chance may increase to get a positive outcome from this law.

## **7. Conclusion**

The milestone covered by the Pakistani parliament to safeguard trans rights became controversial only after its four-year birth. This act was a limelight for the transgender community, but now it has aroused lots of controversies that require immediate remedy. Senator Mushtaq Ahmed Khan, a member of the Jamaat-e-Islami Pakistan, and Orya Maqbool Jan, a columnist and anchor, are both protagonists against the Trans Protection Act of 2018. Mushtaq Ahmed claimed that nearly 23,000 people have changed their gender identity since the act was enacted, but trans social worker Nayab responded to this objection

and declared it a clouding of real facts. The main cause of this controversy is self-perceived gender identity, which does not involve a medical checkup. The objection to the self-perceived gender identity of religious people is that there is no cross and counter-check to prove this. Anybody can deceive to show the wrong gender identity against the actual self-perceived identity, which may open the way for homosexuals, lesbians, gays, and bisexuals; all these options are not only strictly prohibited in Islam but also condemnable to the social norms of our society. How gender should be identified only through a medical check-up or whether other factors should also be considered is still a question that can't be traced in clear verses of the Quran and hadith. To brainstorm this query, we have to consider other options like fiqhah (Islamic Jurisprudence, the prescribed rules of Islam) and ijtiḥād (the process of deriving the laws of the Shari'ah). Hanafī, Maliki, Shafii, Hanbali, and Ja'fari are the main five schools of thought in Islamic religion. Islam divides all matter into two extremes: legal or illegal (Halal or Haram); anything that is impermissible in clear-cut words of Quran verses and hadith (the prophet's saying) is illegal (haram); but things that are not explained anywhere will be traced through Fiqqah (the prescribed rules of Islam). Overall, Islam always respects and supports humanity in all its forms and always encourages justice and equality in every field of life and for every gender; not only that, Islam never endorses any oppressiveness such as that existing in our society for the trans community. Islam has no objection to determining self-perceived gender identity if there is no chance of deceptiveness, but the problem is that there is no counter-check if anybody pretends to have self-perceived gender identity in the wrong way intentionally. The Shariah court verdict clearly states that self-perceived gender identity contradicts Islamic teaching, so medical boards are required to determine gender, but this verdict is again challenged in the Supreme Court. Without a suitable remedy, this matter will be hung on for the long term, which is not in the favour of the trans community. The medical board option is also complimentary in the UK and India. The trans act should be implemented with the suggested amendment in the true spirit without any delay so that transgender people can avail themselves of rights like cisgender people. The delay will cause more complexities and controversies, which should be avoided. Substantive equality and optimization in the true execution of law are also needs of time.

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