

## **Transgender: Dilemmas and Challenges**

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### **Abstract**

Transgenders are human beings and ought to be treated as such. The State under consideration i.e., Islamic Republic of Pakistan has often been alleged to fail in providing substantive equality to its nationals especially the susceptible classes like transgenders. This Article analyses the right to equality of transgender in Pakistan from the perspective of the aggrieved community i.e., transgender community, by delving into the legal and policy framework. By studying the Transgender Persons (Protection of Rights) Act, 2018, and the jurisprudence developed by the August Supreme Court of Pakistan, this Article argues that the framework of substantive equality is still lacking in Pakistan, and there is a dire need to bring the transgender community with the rest of the population through affirmative action by the State. It is suggested in this article that the only positive way of bringing transgender persons as formally and practically equal, is to take positive actions in the social, economic, and political arena, without any discrimination against them and eradicating the obstacles against the above stated motto.

**Keywords:** Transgender, fundamental rights, education rights, inheritance rights and the Transgender Persons (Protection of Rights) Act, 2018.

### **Introduction**

Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender (Ghosh, 2019). To enjoy all human rights, without discrimination based on gender identity is, of course, everyone's right. Everyone has the right to recognition everywhere as a person before the law. Seldom, our society realizes or cares to realize the trauma, agony, and pain which the transgender community undergoes, nor appreciates the intrinsic emotions of the transgender

community whose mind and body repudiate their natal sex (A Sikri, 2014). Our society often ridicules, humiliates, and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, parks, public toilets they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we must change (Jurists, 2017). It is high time to change the mindset of the society and to realize that a person of diverse gender identity should also have legal capacity in all aspects of life. It is to be accepted and realized that the transgender are respectable and exalted citizens of the country like any other sex and gender (Divan et al., 2016). They are entitled to all fundamental rights enshrined under the constitution, including right to education, property and life which includes quality of life and livelihood (The Constitution of Islamic Republic of Pakistan, 1973).

### **Transgender; What it Actually Connotes?**

'Trans' is a Latin prefix which means "across or beyond" while 'Gender' shares the same Latin root as genus. Therefore, the term 'Transgender' means "denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex (Dictionary.com, 2011). Transgender also known by different names in different societies in different countries as "Khawaja Sara", "Khadra" "Eunuch", "Khusra", "Hijra", "Jogappa" "Kinnar or Kinner", "Aruvani" "Chhakka", "Aravani", "Moorat" and "Mukhannas" (Taylor and Haider-Markel, 2015)

Oxford Dictionary defines the transgender as designating a person whose sense of personal identity and gender does not correspond to that person's sex at birth, or which does not otherwise conform to conventional notions of sex and gender (Oxford English Dictionary, 2022).

An individual's actual or perceived sex, gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned at birth.

## **Differentiating the Misconception between Gender Identity and Sexual Orientation**

In everyday life, the terms ‘gender’ and ‘sex’ are used interchangeably. However, it is often important to differentiate both terms. For example, the term ‘sex’ is used by social scientists to make reference to a person’s biological or anatomical identity as male or female. On the other hand, the term ‘gender’ is used to make reference to the culturally concomitant collective characteristics that used to or are associated with maleness or femaleness of an individual (Oxford English Dictionary, 2022).

Gender identity is of, one being male, female or transgender or transsexual person whereas a person’s sex is usually assigned at birth, but a relatively small group of persons may be born with different bodies having both or certain aspects of both male and female physiology. It is possible that on occasion, a genital anatomy problem may ascend in a person whereby his or her native acuity about his or herself, is different from the sex that was assigned to him or her at the time of birth. This includes those people or individuals that are considered to be pre- and post-operative transsexual persons, persons willingly denying, or not opting for operation (due to intent or circumstances) and persons who cannot undergo successful operation.

Countries, all over the world, including Pakistan, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender physiognomies of the sex which conform to their perception of gender. This irrefutably leads to legal and social complications since official record of their gender at birth is found to be at variance with the gender identity these individuals acquire, assume or accept afterwards. Here, the term ‘gender identity’ refers to the in-house or internal feeling of each person about their gender, which may be at variance with the by-birth sex assigned to that individual. The gender identity is also inclusive of the personal sense of the individual about his body which may be natural or physically modified through any medical, surgical means and other expressions of gender such as attire, vocals, appearance and manners. Hence, ‘gender identity’ is a reference to an “individual’s self-identification as a man, woman, transgender, or other identified type” whereas

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‘sexual orientation’ denotes “an individual’s persistent physical, romantic and/or emotional attraction to another person”. Sexual orientation is inclusive of transgender and gender-variant people. The gender variant people may have heavy sexual orientation that may be change pre-or post-gender transmission. Such gender variations include homosexual, bisexual, heterosexual and asexual etc. hence, it may be concluded that the concept of gender identity and sexual orientation are inherently different despite being commonly referred as similar. It is a case to present that a person’s self-defined sexual orientation and gender identity is fundamental to that person’s personality and is part and parcel of their inalienable rights, dignity as human being and basic freedoms which include freedom to opt or deny any medical procedure to prove their gender.

### **United Nations and Other Human Rights Bodies/Organizations – On Gender Identity and Sexual Orientation**

In this part, the writing considers the role of international bodies and organization that are playing role in discussion and development of human rights specially those of transgender. The focus is thus, on the United Nations that has been active and influential in promoting and protecting rights of these sexual minorities. The Universal Declaration of Human Rights, 1948 (hereinafter referred as UDHR) is a political document, and its Article 6 which was later on made part of the legal document i.e., Article 16 of the International Covenant on Civil and Political Rights 1966 (hereinafter referred as ICCPR) recognizes that “every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right”. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that “*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and that everyone has the right to protection of law against such interference or attacks*”. International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project “*to develop a set of international legal principles on the application of international law to human rights violations based on sexual*

*orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations".* The Yogyakarta Principles were formulated, drafted, developed and reformed by a distinguished group of human rights experts, in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 Nov., 2006. The Yogyakarta Principles deals with the application of "International Human Rights Law in relation to Sexual Orientation and Gender Identity". These principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity (The Yogyakarta Principles, 2006). UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the state's obligations to respect, protect and fulfil human rights of all persons, regardless of their gender identity. Committee on Economic, Social and Cultural Rights (CESCR), a committee formulated under the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), in its Report of 2009 discussed and enlightened on gender orientation and gender identity as follows: -

The term 'Other status' as used in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

### **Transgender Issues**

Transgender have among others, the following issues:

#### ***Personal Issues***

- humiliation, fear, and assumed transphobia and homophobia;
- disclosure and coming out;
- adjusting, adapting, or not adapting the social pressure to conform;
- fear of relationships or loss of relationships; and

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- self-imposed limitations on expression or aspirations.
- Self-harm and drug abuse

### ***Policy Issues***

- access to education;
- access to social services such as homeless shelters, rape crisis centers, medical clinics;
- abusive treatment by law enforcement personnel;
- hate violence;
- fear of repercussion or reprisal in retaliation for exerting one's ordinary rights, such as speaking out in public;
- denial of employment;
- chronic unemployment or underemployment;
- Public humiliation, derision, ridicule, marginalization and exclusion;
- denial of housing; and
- denial of access to public accommodations such as shops, restaurants, hotels, and public transportation.

### ***Legal Issues***

- legal status as a man or a woman;
- marriage;
- divorce;
- adoption and child custody;
- inheritance, wills and trusts;
- immigration status;
- employment discrimination;
- access to public and private health benefits;
- protection from hate violence; and
- identity papers and records (name change, driving license, birth certificate, CNIC, passport, school transcripts, work history).

### ***Medical Issues***

- denial of medical care;
- ridicule and mistreatment by health facility providers;
- inability to obtain ongoing, routine medical care;
- inability to obtain or pay for hormone therapy and sex reassignment surgeries; and

- exclusion of transition-related services under Medicaid, Medicare, and private health insurance plan.

### **Transgender Rights are Human Rights**

Basic civil rights protections for transgender people ensure their ability to live and work as productive members of society. Practically, if the cost or results on inclusion of transgender and their exclusion are compared, then it can be concluded that the discrimination against transgender community will inevitably lead to higher detriment than as compared to their inclusion or acceptance in the society. Anti-trans discrimination forces many trans people into a deadly cycle of poverty and unemployment. It prevents them from putting their abilities and skills to constructive uses, and often forces them into illegal activities to survive; however, Ultimately, the most compelling arguments in favor of providing transgendered people with basic legal protections are those rooted in our common humanity. Transgender rights not special rights but are simple human rights. The reason for their hype is that transgenders are denied even basic or fundamental rights. Moreover, the only unique aspect of their rights is that they need or require recognition of the fact that, as human beings, they are entitled to due respect and dignity, without any discrimination on the basis of their sex, appearance or choices about their personal life (Jamison Green, 2000).

### **Recognition of Rights of Transgenders Through Judicial Verdicts in the World**

In England, in the seminal judgment of *Corbett*, the Court was presented with the question about determination of gender of an individual (*Corbett v. Corbett*, 1970). This was a case concerning validity of marriage of a transsexual. By birth sex of the accused was male, who later on operated it to be changed as female transsexual. In order to determine the sex of the accused, the honorable court held that the determination was to be done scientifically through three tests i.e., chromosomal, gonadal, and genital tests. It was of the view of the three tests affirm that the individual is of a certain sex, then it will be determinative proof of

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the sex. This meant that any operation done on the individual was not determining criteria and it is the sex at birth that matters. This judgment, thus, takes back the right of the transgender to choose its sex. This judgment also ignores the fact that natural development of organs of the opposite sex or by medical or surgical means, sex may be changed. The same test was used in subsequent cases for determination of sex of individuals for conviction matters. (R v. Tan, 1983)

As opposed to UK and approach adopted in Corbett, New Zealand has given due heed to the choice of the individual in selecting its sexual orientation. Justice Ellis was of the view, “*once a transsexual individual has undergone surgery, he or she is no longer able to operate in his or her original sex*”. (Attorney-General v. Otahuhu Family Court, 1995). The important aspect to note here is that it was acknowledged by the court that if the law fails to recognize or acknowledge the validity of marriage of transsexual, then there is no social advantage behind such an approach. Hence, the determinative feature in New Zealand is based upon the “adequate test”. The test poses the questions as to “whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex”.

In Australia, another common law country, it was discussed in a case, by Chisholm J., that there is no ‘formulaic solution’ to the questions of determination of sex of an individual for the purpose of marital or personal law (Re Kevin (Validity of Marriage of Transsexual), 2001). The court recognized that the answer or determination of sex require consideration of relevant matters which include person’s life experiences and self-perception. The views of Chisholm J, were accepted by the Full Court of the Federal Family Court in 2003 and it was held that under personal law or marriage statutes, the words ‘man’ and ‘woman’ should be given their ordinary, everyday contemporary meaning and that the word ‘man’ includes a post operative female to male transsexual person. The Full Court also held that there was a biological basis for transsexualism and that there was no reason to exclude the psyche as one of the relevant factors in determining sex and gender.

❖ *The above referred judgments were revisited in later era. Lockhart, J. in Secretary, Department of Social*



*Security v. 'SRA' (1993), and Mathews, J. in R v. Harris & McGuinness (1988), are some of the judgments that reviewed various decisions, including the ones mentioned above, regarding answering question of recognition of gender of a transsexual person who had undertaken a surgical procedure. The approach of the courts of New Zealand has been in contrast with that of UK in Corbett v. Corbett (supra) and R v. Tan (supra). In other words, the purely biological test, devised by UK courts was not be followed. In fact, Lockhart. J. in SRA observed that the issue of transgender is not merely medical or genomic but a question which requires attention because of development in surgical and medical techniques, and social attitudes towards transsexuals. This is a matter that falls within the domain of psychology, self-perception, and sociology i.e., how society perceives the individual.*

- ❖ *In a Nepali Judgment of the Supreme Court of Nepal, titled Sunil Babu Pant & Ors. v. Nepal Government, 2007, the Supreme Court of Nepal held, “the fundamental rights comprised under Part II of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the State. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well.... Thus, the people other than ‘men’ and ‘women’, including the people of ‘third gender’ cannot be discriminated. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution.”*

## **Different Legislations for Protection of Transgender Rights in the World**

Most of the countries around the globe has enacted laws that recognize or protect rights of transsexual persons including those who have undergone sex related surgeries. Subsequently, some of those countries including United Kingdom, US, South Africa, Australia, Germany, Argentina, etc. will be discussed, with reference to their laws on transgender and their protection:

- The parliament of the United Kingdom passed the Gender Recognition Act, 2004 which was the result of or the aftermath of the decision rendered by the European Court of Human Rights in Strasbourg (ECtHR). The UK is a signatory and member of the Council of Europe and it has the European Convention on Human Rights, so the rights enshrined under the ECHR are to be provided to the UK citizen by virtue of Human Rights Act, 1998 (HRA, 1998). The ECtHR decision in Christine Goodwin was the basis of a shift in the UK, in recognition of transgenders including acquired genders. The Act does the same and implements the same. The Act of 2004 provides legal recognition to the acquired gender of a person, and shares consequences of newly acquired gender status on legal rights and liabilities of the same in contexts of marriage, parentage, succession, social security, and pensions etc. in addition to it, the Equality Act, 2010 is an important legislation in UK, which has effected through consolidation, repealing, and replacing nine different anti-discrimination legislations in UK, including the Sex Discrimination Act, 1986. In the Equality Act of 2010 certain characteristics are classified as “protected characteristics”, and they are set as benchmark against whom “no one shall be discriminated or treated less favorably on grounds that the person possesses one or more of the ‘protected characteristics’”. In addition to it, the 2010 Act imposes a positive obligation on the government or public bodies to ensure elimination of all kinds of discrimination, harassment, and victimization. In addition to it, it is pertinent to mention here that gender reassignment has been declared as one of the protected characteristics which include transsexuals i.e., those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act.

- In Australia, there are two Acts dealing with the gender identity: one is Sex Discrimination Act, 1984; and second one is Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013. Act of 2013 amended Sex Discrimination Act, 1984 and defines gender identity as appearance or mannerisms or other gender-related characteristics of a person with or without regard to the person's designated sex at birth.
- In the United States of America, the situation is constitutionally different from other states. The state laws and federal law are to be read together. With regards to states, it is pertinent to mention here that state laws may be inconsistent with each other. On the other hand, the Federal Law i.e., Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2009 provides for protection to transgenders, expanded United States Federal Hate-crime Law of 1969 by including offences motivated by actual or perceived gender identity. As far as state laws are concerned, around fifteen States and District of Columbia have anti-discriminatory legislations. Lastly, there are some executive orders prohibiting discrimination.
- The South African legislation titled Alteration of Sex Description and Sex Status Act, 2003, which authorises transgender persons (including those who have undergone gender reassignment intentionally or naturally), to apply for change in birth and governmental records, through applying to the Director General of the National Department of Home Affairs.
- In 2012, the Argentinian Senate passed a law on gender identity. The 2012 law recognizes the right by all persons to the recognition of their gender identity and their right to development of their person according to it. It also allows individuals to request amendment in their recorded sex and other necessary changes in name, and image. This law is aware of the fact that transgender can be natural or can have done so after surgery. So, the law does not require or impose obligation on the applicant to share information about surgical procedure for genital reassignment etc. It is worth pointing out that as per Article 12 of the law, the definition of dignified treatment is provided which requires respect for the gender identity adopted by the individual, even though the first name is different from

the one recorded in their national identity documents. It is the adopted first name that law necessitates for provision of summons, record, filings etc.

- Lastly, as per the German Code that was introduced on 5th November, 2013, parents were allowed to register the sex of the children as ‘not specified’ in the case of children with intersex variation. As per Section 3 of the code, “if a child can be assigned to neither the female nor the male sex then the child has to be named without a specification”.

### **Historical Background**

In Pakistan, transgender community is facing many problems because of the intolerant behavior of the society. That community is still striving hard to get its respectable place among other genders. Intolerant society has its unique historical background and is not a matter of a single day or incident. In British Colonial rule, the Criminal Tribes Act, 1871 (the Act) was enacted to declare eunuchs (transgenders), a criminal tribe. Preamble of the Act provides that ‘it is expedient to provide for the registration, surveillance and control of certain criminals and eunuchs (transgenders)’; the Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a street or place, as well as those who danced or played music in a public place. Such persons are also arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the Government had to register the names and residence of all eunuchs residing in that area as well as properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under section 377 of the Indian Penal Code, 1860, or of abetting the commission of any of the said offences. Under the Act, the act of keeping anybody under sixteen years in the charge of a registered eunuch was an offence punished with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting son. The Act was not only to attack the dignity of transgenders community, degrading them socially but also to eventually force them to adopt begging and other questionable

professions. After British Colonial rule, the Act was repealed in Aug.1949; however, the damage done to transgenders remained irreparable. Transgenders lost social respect and various stereotypes have been built to humiliate the transgenders community.

Finally in Year 2009, the august Supreme Court of Pakistan took up the matter in its original jurisdiction in Civil Petition No.43 of 2009 (Dr. Muhammad Aslam Khaki and another v. Senior Superintendent of Police (Operation), Rawalpindi and others, 2013) and directions were passed from time to time to recognize the dignity of transgenders and declaring them third gender entitled for equal protection under Article 25 of the Constitution of the Islamic Republic of Pakistan. In this case, the Supreme Court of Pakistan decided that it was needless to observe that eunuchs in their 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. Thus, no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in the case of other citizens. The apex Court further noted that transgenders have been neglected on account of gender disorders in their bodies. They have been denied the right of inheritance as they neither are sons nor daughters who could inherit under Islamic Law and sometime even families intentionally disinherit transgender children. To eliminate this gender based ill-treated discrimination against transgenders, august Supreme Court in a case directed the Provincial and Federal Governments to protect transgenders identification, right to inherit property, right to education and right to life which includes employment and quality of life.

In 2017, almost eight years after this judgment, Senator Babar Awan presented the Transgender Persons (Protection of Rights) Bill in Parliament. The tabling of the bill started a process that included many different actors who worked sometimes together, and at other times at odds with one another, to bring the final version of the bill to fruition. This journey highlights in many ways how coalitional work can help bring meaningful legislative change (Transgender Persons (Protection of Rights) Act, 2018). Finally, the law, Transgender Persons (Protection of Rights) Act, 2018 was enacted.

**Analysis of the Transgender Persons (Protection of Rights) Act, 2018**

The Transgender Persons (Protection of Rights) Act, 2018 focuses upon the inheritance rights of transgenders. In doing so, the law provides that self-identification of gender is important. The 2018 Act, entitles a transgender man 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). This legislation has one basic issue. It applies to transgenders but without considering their religion or succession laws. For example, the transgender of Hindu religion, Christian religion or Sikh religion may not be acceptable to the inheritance shares devised under the 2018 Act. Such issues may be better dealt with under their personal law. It is suggested that better reforms could have been made if the amendments were made in the personal or succession laws of the relevant nationals. The Act further lays down the right to education for the transgender persons. There is a practical issue in the same. The law's phrasing, interpretation and practical effects are yet to be known. 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. What does 'fulfilment of the prescribed requirements' mean? Is it to be given its ordinary meaning? In doing so, an inference can be drawn that if the transgender children fulfil the admission criteria of the educational institutions, they shall be given admission and not to be discriminated on the basis of children or its parents' sexual orientation. This provision, however, blatantly disregards the structural inequalities that are a huge hurdle for the transgender persons. Notwithstanding the above, the practical implications or the taboo mindset may practically impede the access to school of such individuals and their families.

When it comes to practical reality, transgender children leave their homes at a young age. This is because they are compelled by their families to act in a different sexuality. This is also because of the reason that families of transgender persons do not accept or want to accept that their children are transgender. They do not consider it a natural phenomenon but a psychological issue and try to regulate their behavior into a form of normative masculinity. This difference

leads to the tethered development of the child. Their behavior and manner challenge the mental growth of the child and they often complain about violence at home and at school. This eventually leads to their dropout from institutions. They seek refuge from home and world, and are usually given by gurus. Gurus are not educationists but are only guardians they find in the unacceptable society which is not open to or susceptible to these children's entering the modern civil society. So, even if they are to be given equal access to education, and they take an open merit exam, there is less chance that they will be successful in securing competitive marks. In a case, while interpreting the right to equality, the Supreme Court held that any restriction based on 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 prejudgment and exclusion of their female counterparts as it amounted to gross violation of constitutional mandate (*Shirin Munir v Government of Punjab*, 1989).

It is important to refer to Article 25 of the Constitution, which provides for equality of citizens. The equality of citizens does not require the equality for two genders or sexualities. Rather, it is for all sexualities. Hence, it includes and applies to transgender community. Article 25 of the Constitution leads to an important point; is equality required to be equality in law, or equality in practice? Is it more like the rule of law in books or rule of law in practice? For law, the scope of these rights is confined to books and legislations. In practice, it is more than mere legislation, but there is a need to inculcate tolerance and societal patience to allow transgenders in the system. In doing so, and training morals of the society, the government is under a positive duty. The transgenders can be considered as a backward class which need protection under constitution as well, under its principle and policy. Under the Constitution of Islamic Republic of Pakistan, 1973, Article 25A requires the Government to provide education. This right to education is an obligation on the state to take steps to provide free and compulsory education to children of a certain age. The children may be a boy or a girl or even a transgender. It is important for discussion because on practical terms, the transgender persons are not able to get basic education. Their lack of basic and essential education and lack of schools for them is one of the chief reasons. The transgenders feel insecure in current boy's and girl's schools.

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They feel different from them, and they are seen to be alien or queer. On this basis, if the government has to ensure their basic education, they should establish special institutions for them. On the other hand, if lack of funding is one excuse, there is a possibility to use the schools already working, to have second time or evening classes for them. Even otherwise, if this is also impractical for them, which is less likely to be the case, the current school policy may be altered in a way that is inclusive of such issues of transgender education. Hence, this is the way that most of the transgenders that are out of school for their uniqueness can be reduced and many of them can be invited to school and educated. This is an increase in human resources for Pakistan as well. Practically, State has been considering transgender persons to be at an equal footing with the rest of the citizens, but this is wrong and against the realities. There are flaws in legislative drafting of the Act of 2018. It has multiple contradictions as far as usage of pronouns is concerned. The Act of 2018 occasionally uses the pronoun 'his' for transgender persons, instead of the accepted pronoun 'they.' This glaring issue has been applied when the law referred to the transgender's right to vote, employment, access to public places, and property. Furthermore, there is another issue, 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 or the Pakistan Penal Code, 1860". So, how does PPC and CrPC define such genders? Pakistan Penal Code stipulates that 'he' include male and female. So, this, again fails to include transgender in it. The only way out, under current issue is that the court and the executive authorities have to utilize purposive and broad approach in statutory interpretation. The definition of transgender and the laws made for it, hardly consider intersex individuals i.e., individuals having a mixture of male and female genital features or congenital ambiguities. There is also lack of strict penal provisions under the Act. The only penal provision concerns compulsion of transgender persons to beg. Although the Honorable Supreme Court of Pakistan has initiated the idea that the governmental bodies have to take steps to eliminate discrimination against transgender persons and causing any interference in actions which are pursuant to the directives of the superior court. If the government fails to do so, or the impact or effect of such actions of the governmental bodies is that it impedes the access to fundamental rights of transgender



individuals, then it will be contempt of court which is a punishable offence. Pakistani transgender community has been a prey of violent crimes driven by the inherent discriminatory attitude against them. Rationally, the discussion concerning the other rights of the transgender community in Pakistan should ensure their fundamental and most significant right to life.

This type of legislation will not only harvest the care of multiple fragments of the society but also provide the transgender community with a sense of fortification. Supreme Court of Pakistan declared transgender persons to be equal citizens of Pakistan, hence, the State must make further active effort to provide transgender community the proper benefits of this status. In essence, 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 Act 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.

### **Conclusion and Recommendations**

In the light of the above, following suggestions can be presented. However, it is to be stated out rightly that the law alone cannot do much unless the societal norms and approach of the society towards transgender is not changed. It is not only the transgenders that solely need education and training, but also the society as a whole, which needs training and enlightenment. Hence, the suggestions are as follow: *First*, the society's attitude and mindset need to be changed and the onus of doing so should be on the state. It can do so through campaigning and making awareness ads to enlighten people that transgenders are human. They are not to be considered a curse but an element or evidence of diversity. The achievements and skills of the transgenders are to be highlighted and accepted; *Second*, the transgenders are to be given due representation in the Parliament, cabinet and other areas of public representation. They should have quotas in the government services; *Third*, they should be given due coverage and respect so that they are not made a weapon by international media to show that Pakistan is a failed state as far as protection of such minorities is concerned; *Fourth*, they shall be given due importance as respectable and dignified citizens of

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Pakistan; Actions, including legislations and executive actions are to be undertaken to assure provision of all fundamental rights to the transgenders; *Fifth*, academics should be given instructions that their academic writings, dramas, stage plays, media events show transgender as respectable people with soft heart; *Sixth*, transgenders who are thrown by their families are unaware of their original families and parents. Public functionaries and policy makers should either help them in identifying their original families or allow them to use their names in a way that they are not tortured as illegitimate by the society; *Seventh*, awareness campaigns regarding the historic experiences and contributions of the transgender community may be made; *Eighth*, reports on the problems faced by them, and the rights guaranteed to them under the Constitution and the 2018 Act ought to be made; *Ninth*, take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments; *Tenth*, operate separate medical centers specially related to the sexual health issues be made; take proper measures to provide sanitation facilities such as toilets, and separate hospital wards to them; *Eleventh*, framing various social welfare schemes for their betterment; *Twelfth*, take steps to create public awareness so that transgenders will feel that they are also part and parcel of the social life and be not treated as untouchables; *Thirteenth*, take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life; *Fourteenth*, open the existing Social Welfare Schemes for needy transgenders and create specific welfare schemes to address the basic needs of transgenders including housing and employment needs; *Fifteenth*, further legislation should be passed concerning the inheritance rights of the transgender persons who do not ascribe to the Islamic faith; *Sixteenth*, hate crimes against the transgender community should be strictly dealt with and special provisions should be added to the law to that effect; and *Seventeenth*, State should make special institutions to provide education to the transgender community.

Hence, in the light of the above suggestions, it can be concluded that the writing has sufficiently addressed the social, legal and medical issues related to the transgenders in Pakistan. The available law in Pakistan, jurisprudence in Pakistan and in other jurisdictions is also given due heed. The suggestions presented are very vital and

important if the State of Pakistan intends to cash on or bank upon the human resources which the transgender community may bring to the national exchequer. They can be used to represent culture, history and even diversity in Pakistan. The attempts are being made, and 21<sup>st</sup> Century has been a new beginning for promotion of transgender rights. Their fundamental rights are aimed to be protected. They are considered as equal citizens of the Islamic Republic; their inheritance is also given importance. In my humble opinion, even if the constitutional rights are ensured in next Five to ten years, it is going to be a great achievement because more rights are not even available to other individuals. In a developing country like Pakistan, their rights are important. They ought not to be discriminated against. It is worth mentioning that they cannot be given equality and should not be called as even to other genders and binary sex. This is because they have been denied basic rights for so long that now equating them with others will put them at severe back foot. Hence, first the state has to bring them together and equal to other sexes. It can be done by positive actions only such as quotas for transgender persons. Recently, in Sindh, transgender persons were allowed to join the police force as regular duty officers.

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