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RIGHT DELAYED IS A RIGHT DENIED: A CRITICAL APPRAISAL OF PAKISTAN'S TRANSGENDER ACT 2018

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ABSTRACT:

Human rights are meant for all the humans irrespective of their origin, sex, religion, race or orientation. Transgender persons have always been neglected in different jurisdictions of the world and Pakistan is not an exception to it. For the past few decades there had been demands to recognize and protect the rights of such persons in order to lessen their sufferings and bring them into main stream national life through education and trainings. In the year 2018 Government of Pakistan passed the Transgender Persons (Protection of Rights) Act, which in itself happens to be a great step towards empowerment and protection of different fundamental rights of transgender persons, yet there has been hue and cry from different religious and moderate segments of the society, according to whom, this Act has opened backdoor for homosexuality and is a result of international agenda of LGBT campaign. The open ended right of self perceived gender identity given under the Act has been the major concern for different scholars and legal practitioners. This research article tries to look into

the Islamic perspective as well as, discusses the vires of the said Act in order to highlight the issues in the Act and also lists down few recommendations at the end.

INTRODUCTION:

“All human beings are born free and are equal in dignity and rights” UDHR Art. 1

The human societies have long history of struggle for getting their basic rights and humans have succeeded after centuries in getting their civil, political, economical and social rights, recognized and enforced at state level. During this struggle period, both sexes (male and female) focused on their collective as well as individual rights and we have seen different waves of demanding rights, feminism is one of those movements. In between this struggle for recognition and protection of rights of male and female sexes, the transgender persons have been neglected, either deliberately or inadvertently. But, for the past few decades internationally and specially in European jurisdictions, the rights of transgender persons have not only been recognized but also made an example for others to be followed, without understanding the social, cultural and religious aspects of other jurisdictions. The LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer) movement, which has deep roots in different countries and millions of dollars are given to different NGOs and movie makers in order to promote and disseminate the agenda and slow poison the younger generation, has very cleverly blurred the boundaries between them and rights of transgender persons, which has created serious issues for genuine transgender persons in different countries, as the vague definitions of different terms and loose interpretations by different pro-LGBTQ scholars have made it difficult for a layman to differentiate between what is right and what is wrong. In between this, the transgender persons have been the real victims. Pakistani government took a very bold step in the year 2018, when it passed the Transgender Persons (Protection of Rights) Act (Act No XIII of 2018). But it seems as if, the government could not perceive or deliberated upon the Islamic norms and socio-cultural aspects while drafting the Act. Since its enactment there has been criticism from different corners regarding its different sections, which are so vague and open that they tend to open the doors for immorality and deception, as well as, homosexuality. It should be remembered that the nature and context of transgender rights vary greatly around the world, at one extreme they are granted more than what they deserve and at the other they are marginalized and criminalized even. They generally face discrimination in almost every walk of life, personal, social and/or professional. This article tries to explore the debate about transgender persons in Pakistani context with particular focus on the vires of different provisions of 2018 Act and also highlights different issues in this regard.

METHODOLOGY:

This research work is mainly qualitative in nature, where interpretative and analytical paradigms have been applied. Main help is taken from the published reports, articles, reviews, newspaper articles and case law available in different journals and at websites. Secondary data is extensively used and qualitative methods are applied while collecting and interpreting the data.

The Conceptual Paradigm of Transgender(ism) Debate:

Before going into details regarding transgender in Islamic society and Pakistani state, it is better to explain few terms in this regard. As the claim of modern world that gender is cultural or an imaginary human construct with no link to biological sex, is not true in terms of religious context as well as, reality. Gender dysphoria or gender identity disorder is where a person born in one sex does not identify himself with that sex and associates or his inclination is towards the other sex. Transvestitism or cross dressing is where someone exhibits a different gender expression through dress, conduct, posture and behavior and it is prohibited in Islam, if done intentionally. Intersex is a person born with ambiguous genitalia or atypical chromosomes (XXY or XYY). This is dealt in Fiqh with caution under the topic, 'khunta' and old term used for this is, hermaphrodite. Gender reassignment if done deliberately is forbidden in Islam. The word, transgender, comprises two words, 'trans' and 'gender', where trans means to move or change and gender is biological sex. As per UN they are those who deviate from their gender identity given to them at birth and change it. Some of these persons undergo hormone therapy or surgery, these are also called transsexual. Usually transsexual is considered a subset of transgender (although few reject this notion). Third gender is non-binary in nature, now literature is full of many confusing and diverse terms like pan-gender, poly-gender, a-gender and gender-queer. The term 'transgender' is now replaced with gender incongruence or gender dysphoria. Now, trans-man, trans-woman and non-binary terms are also found frequently in the literature.

Shariah recognizes three categories for the purpose of ruling in regard to such persons; (i) normal khansa (congenital eunuch or intersex); (ii) ambiguous khansa (ambiguous congenital eunuch) and (iii) mukhannath (transvestite) (IAK Nyazee, n.d.). As far as first category is concerned, their sex can be easily ascertained through an examination of the genitalia and other physical characteristics. Whereas, for second category, certain tests are discussed by jurists through which sex can be determined. It should be noted that Islamic law recognizes these two for all legal rules including inheritance, praying in mosques, testimony etc. However, when it comes to third category, such person has all the physical characteristics of a normal male, while such person behaves like a female in dressing, mannerism, appearance or gate etc (or vice versa). Such a person is now-a-days called, transgender, who feels like a female due to his inner psychological state (or vice versa). For Shariah, such person is like every other male or female, as the case may be, and is not entitled to a different legal or social treatment of any type whatsoever. Such person will enjoy all the rights according to his/ her actual physical gender, except where he becomes fasiq (disobedient person) due to demeaning acts like homosexuality, where his testimony is not accepted. There is no room for such person to determine his own sex as per his wishes under the injunctions of Islam.

The Transgender Rights:

International Transgender Day of Visibility is celebrated on 31st of March every year. There are few states which allow easy status change for

transgender persons, like Spain (through simple declaration), Argentina (since 2021), Uruguay, Columbia, Peru, Ecuador, Bolivia, Denmark, Malta, Sweden, Ireland, Norway, Belgium and France. In 2009 Pakistan became a state to recognize officially a third gender and in 2014 Indian Supreme Court recognized it. In 2018 right to vote to third gender was given in Bangladesh and Germany also allowed registration of third gender on birth certificates. Now in Pakistani CNIC there is third option given to transgender individuals to register as, 'X' despite already available two options 'M' and 'F' for male and female respectively.

The Transgender Persons (Protection of Rights) Act 2018 – Pakistan

This Act has been enacted to give protection as well as, relief to transgender persons when it comes to their rights and rehabilitation into the society and to ensure their welfare and connected matters in this regard. The Act comprises of 21 sections, divided into VII chapters, dealing with few terms and definitions, recognizing their identity, prohibiting certain acts like discrimination and harassment, government's obligations and, recognition as well as protection of their different rights like educational right, employment, voting, health, property and all those fundamental rights which are enshrined in the Constitution of Pakistan including right to hold public office. Further, it talks of enforcement mechanism as well as, offenses and penalties for engaging transgender persons for begging. Following are major aspects dealt with, in the Act:

As per the Act, *gender expression* refers to a person's presentation of his gender identity as well as, what is perceived by others in this regard (Section 2 (e)). Whereas, *gender identity* is his innermost and individual sense of self as female, male or blend of both, not to the sex assigned to that person at the time of birth (Section 2 (f)). The word *transgender* (Section 2 (n)) is explained in detail including inter-sex (khusra); eunuch, a male by birth undergoing genital excision or castration or khawaja Sira or any other person whose gender identity is different from societal norms and cultural expectations based upon the assigned sex to them at the time of birth. The Act also provides a detailed definition of harassment (Section 2(h)) including but not limited to physical, mental, sexual or psychological harassment like, intimidation, coercive and unwelcomed sexual advancement, asking for sexual favor, written or verbal such type of communication and interference into his living, mobility, working etc. Even a slight action in this regard is covered in the definition given by the Act.

Most controversial provision is section 3 which recognizes the identity of transgender person, giving that person a right to be recognized as per his/her self-perceived gender identity and giving him a right to register him/ her accordingly in NADRA and all government departments including driving license and passport, once he/ she attains 18 years of age. Such person also has right to change the name and gender according to his /her self-perceived identity, if CNIC and other record has already been issued. This section has been badly criticized by different scholars, as it talks of self-perceived gender

identity and indirectly opens legal doors for different social evils including but not limited to same sex marriages.

Section 4 is about prohibition against all sorts of discrimination including unfair treatment in educational institutions and service, employment or trade, denial of employment or termination from it, denial of healthcare services, access to different services, facilities etc available for public at large, denial or discontinuation of right to movement, use of public facilities in transportation, as well as, stopping to hold public or private office. The Act also prohibits harassment (Section 5) at both within the home and outside. In order to ensure full and healthy participation of transgender persons into national life, government is bound to take many steps (Section 6) including establishment of protection centres for their rescue and rehabilitation, and providing medical, psychological and counseling facilities; establishing separate jails and confinement cells for such persons; campaigns for both public servants and general masses in this regard to sensitize them about gravity of the issue; establishing special vocational training programs for adding into their chances of earning decent livelihood and encouraging them to start their own small businesses through easy loans and alike policies.

Chapter 5 deals with different important rights of transgender persons including inheritance (Section 7); education (Section 8); employment (Section 9); vote (Section 10); to hold public office (Section 11); health (Section 12); assembly (Section 13); access to public places (Section 14) and to own property (Section 15). The Act also guarantees the fundamental rights (Section 16) of transgender persons, as mentioned in Articles 8 to 28 of the Constitution of Pakistan 1973 and imposes duty upon the government to ensure that there is no discrimination in this regard.

When it comes to inheritance (Section 7) of a transgender person, the Act prohibits any sort of discrimination in granting them their due share prescribed by the law and also declares that such person's share is to be determined according to his/ her gender declaration in CNIC and following formula is given in this regard: -

- (a) Transgender male – share of a man
- (b) Transgender female – share of a woman
- (c) Ambiguous characteristics (both male and female), where it is difficult to determine their sex, following points are stated i.e.
 - (i) Below 18 years of age, according to sex determined by medical officer
 - (ii) Upon reaching 18 years if he perceives himself to be male, then that of a male;
 - (iii) Upon reaching 18 years if he perceives to be a female, then that of a female;
 - (iv) Upon reaching 18 years, if his self-perceived gender identity is neither of a man or woman, then an average share of two separate distributions for a man and a woman to be given to him.

In case someone compels or employs transgender person for begging, the Act makes such an act punishable with imprisonment upto 6 months or fine upto

rupees 50000 or both (Section 17) according to the satisfaction of the court. In order to ensure these rights and protections provided under the Act, a transgender has all the remedies available under the Constitution 1973, PPC 1860, CPC 1908, Cr.PC 1898 as well as, such person can move a complaint to Federal Ombudsman, National Commission for Status of Women or National Commission of Human Rights (Section 18). The Act is further given over-riding effect on any other law (Section 19).

LITERATURE REVIEW

Redding, J.A. (2022) is of the opinion that the Act declares that it is an individual who will decide his gender identity, which is very liberal approach especially in an Islamic state. The Act is gender specific and not religious in nature, so rights of inheritance of transgender have been prescribed in detail, without specifying any religion, only as per their gender mentioned in the CNIC. The Act has been challenged not on the pretext of being involved with any un-Islamic provision, but encouraging homosexuality and / or same sex marriages, being forbidden by Islam. In Syed Amjad Hussain Shah versus Ali Akash alias Asima Bini & 5 others (WP No. 1421/2020) an issue of this nature arose, where a lady teacher namely Asima Bibi changed her sex on the pretext of her, self-perceived gender identity right given under this Act of 2018 and after that married the daughter of petitioner, who challenged this marriage on the pretext of same sex marriage and a sin. There have been different petitions in Federal Shariat Court too, which challenged the Act on the allegation of giving legal recognition to lesbian and gay people in the name of transgender rights by providing following loop holes:

- (a) The definition of transgender in this Act is too liberal to include lesbians and gays
- (b) There is no mandatory requirement of medical board before change of sex in the Act
- (c) Any person can claim to be transgender on the pretext of his own will and the Act gives this act a legal cover (Petitions initiated by Hammad Hussain (Islamabad) and M. Irfan Khan (Wah Cantonment) in FSC)

The self-perceived gender identity granted and recognized by the Act means that any person at any time may declare that he/ she has changed his/ her sex on self-perception, without any proof of mental or physical condition, hence opening the doors of disturbance into the Pakistani societal norms, Islamic principles and applying the international gay and lesbian agenda (Farhat, N et al, 2020).

Naseem, F. et al (2021) have discussed the role and positions of eunuchs in pre and post Islamic Arabia and their ranks in Muslim religious institutions. Islam has given different rights and honor to all including transgender persons esp. to own properties, start businesses, inherit from their parents and other relatives, offer prayers, visit all places including religious ones, do jobs on their own choice etc. Authors state that there is no direct verse on transgender persons in holy Quran, yet have quoted few verses which in their view, give

implied guidelines relating to transgender persons, like 3:6; 42:49-50; 24:31; 22:5. They have also discussed few Ahadees related to transgender persons like Sunan Abi Dawud 4928; Sahih Bokhari 5887; Ibne Maja 2613 to show their presence and rights at that time.

Naseem, F. et al. (2021) state that the word 'mukhanatun' is used by Muslim scholars for transgender and these mukhanatun are further divided into three categories; (a) natural born persons with sexual disabilities; (b) people having both male and female genitals called, khunsa mushkil and (c) those who act/ behave like other gender with or without sexual disabilities. As per Farhat, N. et al (2020) intersex and eunuchs have medical conditions, which may include psychological or/ and physical aspects, yet it cannot be denied that they have their fundamental rights, as all other human beings. In Pakistan the Supreme Court in 2009 has discussed and taken this approach and the Act of 2018 has also listed many rights and measures in this regard, which is a positive and much needed step towards the right direction. But the big question is, whether a person should be allowed to have sex change reassignment?

Khan, M. et al (2021) quote WHO, according to which, "transgender, an umbrella word for humans whose gender identification and manifestation no longer correspond to the norms and expectations historically associated with the gender given to them at birth; it includes people who are transsexual, transgender or in any other situation labeled a gender non-citizen". Saqib Nisar, CJ while hearing a Human Rights Case (No. 32005-P/2018) regarding issuance of CNIC to transgender people ordered for comprehensive transgender person's welfare policy after deliberations with all concerned, in Pakistan.

The Institute of Policy Studies (IPS) Islamabad in 2022 reviewed the Act through the lens of legal, social, cultural, medical, psychological and religious aspects, by calling diverse experts and came to the conclusion that self perceived gender identification right under the Act is the main flaw and is against the Islamic injunctions and this law serves the purpose of Western agenda pertaining to LGBTQ.

Whereas, few people believe that this condemnation of Act by right-wing political parties, religious scholars and other intellectuals, is nothing but political stunt, without looking at the crux and true spirit of the provisions of the Act and religio-political parties have presented twisted false narrative in this regard (Fatima, B. 2022).

Legal Position in Pakistan:

Apart from the enactment of this Act in 2018, which has been discussed and elaborated at the start, the Constitution of Pakistan 1973 in articles 4, 9, 25, 26 and 27 provides equal rights and non-discrimination principle to all. Article 25 (2) prohibits discrimination on the basis of sex and 26 and 27 deal with non-discrimination in respect to access to public places and in service respectively. A leading case on this is *Dr. Muhammad Aslam Khaki versus SSP Rawalpindi* (PLD 2013 SC 188) which was filed on behalf of transgender community to

give them legal recognition and equal rights. The judgment not only granted legal recognition to them but also opened further doors for these people through a comprehensive policy by Social Welfare Department. This case laid the foundations for the Act of 2018.

As the Constitution of Pakistan is very clear on the point that principles and rules as ordained by Quran and Sunnah cannot be violated and law cannot be enacted against the dicta of Quran and Sunnah. The Muslim scholars' views on transgender persons become very relevant in their day to day life. Hanafi school is of the view that if a mukhannath shows desires towards women, he must be kept away from them and where such person has developed breasts and shows no desire towards women, then can be allowed to stay with them. According to Malikis, mukhannath has strong femininity when it comes to its traits and behavior and where such person has no attraction towards women, then it should be allowed for him to stay with women at home, almost same opinion is of Shafais, whereas Hanbalis treat a mukhannath as na-mehram if he has desires towards women and mehram where there is no desire and all the rules of mehram and na-mehram apply according to the Hanbalis.

Pakistan's instance has been very clear regarding homosexuality, as it has always condemned and criminalized it. UN's '*uniculturality*' has also been condemned by Pakistan. But the Act of 2018 has made radical change in national laws, societal norms, cultural perception and religious demands, as the Act has given de facto recognition to LGBT without public debate and due process (Farhat, N. et. al, p-27). As the 3rd category stated in section 2 (n) (iii) read with section 3 is the most problematic one. It also seems as if a person is given right to change his sex at any time or even many times, as the Act is silent on it and self perceived gender identity is a vague term. Now after the promulgation of the Act, transgender persons are getting their CNICs, passports and even have separate seats in different educational institutions and jobs, which is a good positive sign in the right direction.

Issues with the Act:

It should be further noted that international community now does not treat transgenderism as mental disease, but a condition related to sexual health (International Classification of Disease ICD-11). Sex is biological aspect, while gender is psychological and social component of gender identity (Farhat, N. et al, p-26). The fundamental issue with the definition given by the Act is over generalization of whole concept. Internationally the issue has been that the rights of genuine transgender persons have been knitted with lesbians and gays, making them questionable and problematic for many societies, cultures and nations to implement. The lesbians and gays have very shrewdly used this transgender rights movement into their favor and have deliberately blurred the line between what is right and what is wrong. One more problem with the Act is, it criminalizes begging by transgender persons, but does not talk of prostitution (especially forced one) as a crime. Further by giving overriding effect to the Act under section 19, does it seek to overrule different rules pertaining to homosexuality?

Further there is no mention of any criminal liability upon the family which abandons such a child and hands that child over to a guru, promoting hijra culture. The Act is only passed by Senate as a bill, so it poses financial constraints too (Khan, M. et al, 2021). As the Act applies to whole state, yet after 18th amendment, whether all provincial assemblies have adopted it under Article 144 or not, is also a procedural issue. It is also important to note that determination of self gender identity poses many religious, ethical, social, cultural and moral issues. Furthermore, shares in inheritance for transgender persons have been prescribed as per Sharia law in the Act, which will also be applicable on non-Muslim transgender persons. Is it not a violation of their religious freedoms to have their inheritance decided not according to their religion and norms? It is also pertinent to note here that as per section 7 (2) (iii) (d) the inheritance of minor transgender is to be determined as per medical officer's opinion, which in itself contradictory to the whole concept of granting self-perceived gender identity, as what will happen if after attaining age of majority, such child challenges the share on the basis of not accepting the determination of sex by the medical officer at the time of his/ her birth? When it comes to the applicability of this Act, election rules need to be amended regarding these transgender persons, as they will be voting in which section of polling station- male or female- or there will be a 3rd section for them too like in CNIC. Further there is no mention of marriage of transgender persons in the Act and no direct law in this regard is available in Pakistan and same is left open for societal practices and cultural and religious rules, which are not unanimously followed.

There is also a need for availability of modern medical diagnostic equipments and procedures in Pakistan in order to ascertain the true sex of such individuals. There is lack of awareness among masses, even parliamentarians and legal experts are unaware of different aspects of this whole debate and issue, which poses challenges to the promotion and adoption of transgender rights. Now it is high time to think and interpret things within indigenous paradigm as per our own religion, social and cultural norms, and ethical values coupled with scientifically developed solutions in the light of those narratives which are non-biased, proactive and academically advance, as West is imposing its 'recently explored values' upon all the states, in the name of deceptive title of human rights and promoting intellectual, social and cultural anarchy in the name of post-modernism. Please remember that the idea of separating 'sex' from 'gender' is problematic even in many Western jurisdictions.

RECOMMENDATIONS AND CONCLUSION:

In order to minimize ambiguity, it is better to follow India's approach where, its 2019 Transgender Persons (Protection of Rights) Act empowers district magistrates to assess medically, in order to determine their sex and see whether they 'deserve' such identification or not. Also it is to be noted that an alien and controversial interpretation of any international legal or otherwise rule cannot be allowed to be imposed upon Islamic states like Pakistan and this is where campaign for gender identity and freedom of expression in this regard, has been criticized by Pakistan and other Muslim states. There is a need to amend the Act of 2018 as per vires of Pakistani Constitution, Islamic

principles and societal norms and prevailing culture, giving distinction among intersex and transgender, in order to make them better citizens contributing for the betterment of society at large. Also, international community must look at local and social contexts of different nations and jurisdictions, before making any international standard for the whole global community. The presence of such provisions like section 2 (n) (iii) read with section 3 of 2018 Act giving legal cover to self-perceived gender identity would open doors of deception and lying, encourage immodesty and promote homosexuality. So, it is recommended that the relevant provisions should be amended in order to make things clear and close the chances of any sort of misuse of law, which is otherwise a good step towards the recognition, acknowledgment and enforcement of much needed rights of transgender persons. There is dire need for public awareness, collaboration and networking with all the concerned including transgender community representatives, intellectual input as well as, serious rehabilitation of those being affected by discrimination and centuries old mindset. This issue is to be taken proactively, sincerely and with open heart and mind to avoid social and cultural engineering by the Western and so called NGOs working for LGBTQ agenda. It must further be noted that the Act does not deal with or address any Islamic or un-Islamic issue specifically, rather it is there to grant and recognize the much needed rights of transgender persons. So, a national consensus is needed to make appropriate changes especially in those controversial sections which are questionable, in order to set things right and to make progress towards the protection and betterment of transgender community, as we are already lacking behind while granting rights to neglected and marginalized communities due to delay in making policies and implementing the laws and rules by unnecessarily indulging into minute details and issues hindering the progress. It is needless to say that delay in providing right is actually denial of right (Martin Luther King, Jr.).

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