

Rights of Transgender: National and International Legal Protection

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Abstract

This study focuses on the rights of transgender persons, who are a vulnerable human group facing a lot of challenges. Transgender persons are humans whose gender identity is not in alignment with birth sex. International Human Rights treaties do not specifically protect gender non-conforming people, but general treaties for the protection of Human Rights are interpreted to include transgender persons. International Human Rights Law aims at making states conscious of universal Human Rights and binding states to address such rights in their domestic legal frameworks. For this purpose, this study analyses the legal protections available to transgender persons in the United States of America (USA), the United Kingdom (UK), and Pakistan. The USA has no specific legislation yet at the federal level, but multiple case laws extend the general protection of fundamental rights to transgender persons. The UK has protected the rights of transgender persons actively by legislating on the matter. Pakistan is the first and only Muslim State which enacted the law to specifically protect the transgender community. This study further analyses Islamic law and its implication in the Muslim States concerning the rights of transgender persons. In Islamic law, there is no specific evidence against the rights of transgender persons. In the Muslim States, there has been a conservative approach of societies and governments towards transgender persons, which is by no means justified leading to years of misfortune for transgender persons. This study finds that, although constitutions of many jurisdictions guarantee equal protection to all citizens, laws are still not adequate for the protection of the rights of transgender persons because the vulnerable groups of society need additional and specific legal protections.

Introduction

Transgender persons are a vulnerable human group whose position in society needs strong consideration. After birth, a human psychologically tends to identify his/her gender, it may or may not align with the birth sex. Gender identification is influenced by multiple factors; prenatal gonadal hormonal exposure and cognitive development etc. (Roselli, 2018). Transgender is an umbrella term and can be defined as to include persons who have gender identity not aligning with birth sex: sexually female with the gender identity of male or vice versa (Tauches, 2021). Due to such deviation from prevailing gender sex alignment, resulting in social non-acceptance and marginalization, transgender persons have to face discrimination and struggle for fundamental rights globally.

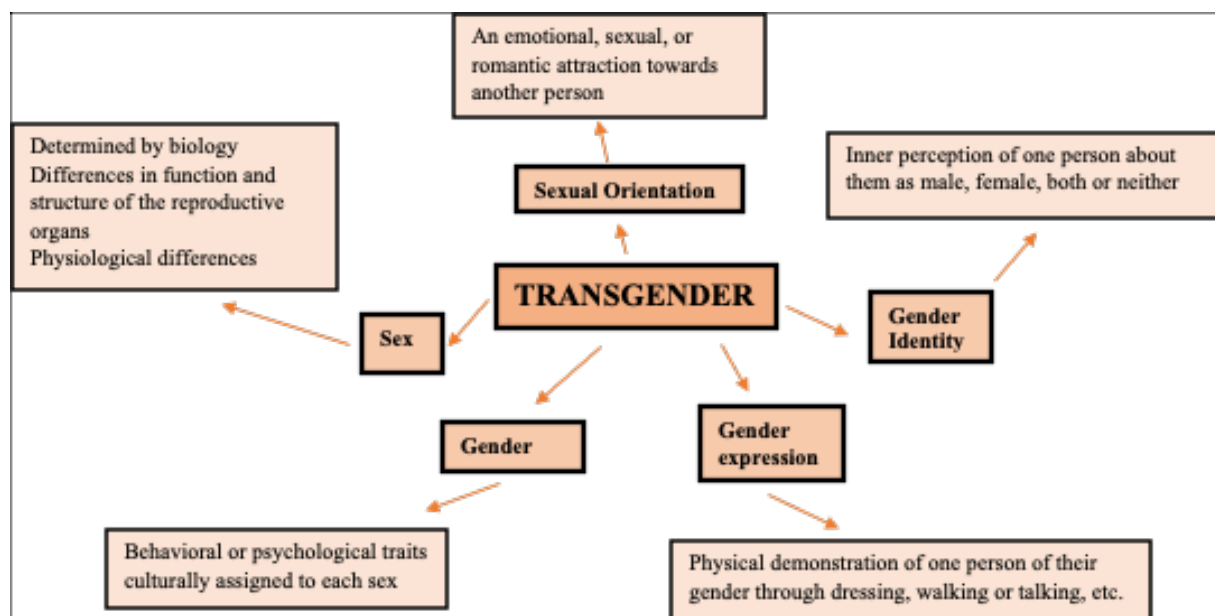
The following research work will first address certain misconceptions towards transgender persons and the challenges they have been facing in general. It will then highlight the legal protections available for the rights of transgender persons internationally as well as in the national legal systems of the USA, the UK, and

Pakistan. Moreover, it will highlight the Islamic perspective on the rights of transgender persons. The research will lead to critically analyzing the adequacy of laws in this respect, pointing out gray areas in law and thereby, making recommendations for the better protection of the rights of transgender persons globally.

Who are Transgender Persons?

Before analyzing the position of transgender persons in the contemporary world, at first, we need to understand who they are. Multiple factually wrong perceptions prevail in the mindset of common people. People mistakenly use the terms gender and sex interchangeably without realizing the difference between them. Sex is determined by the biology of a person and refers to differences in the function and structure of the reproductive organs and consequential physiological differences based on which humans are distinguished as female or male. In contrast, gender refers to the behavioral or psychological traits culturally assigned to each sex (Walker, 1998). Transgender persons deviate from prevailing gender stereotypes for their sex. Furthermore, people associate transgender persons with sexual orientation due to the commonly used acronym LGBT. In LGBT, L stands for lesbian, G for gay, B for bisexuals, and T for transgender. LGB people are distinguished by sexual orientation which describes a person's romantic and sexual attraction towards another person, while T people essentially are distinguished by gender identity which is a person's perception about his/her gender.

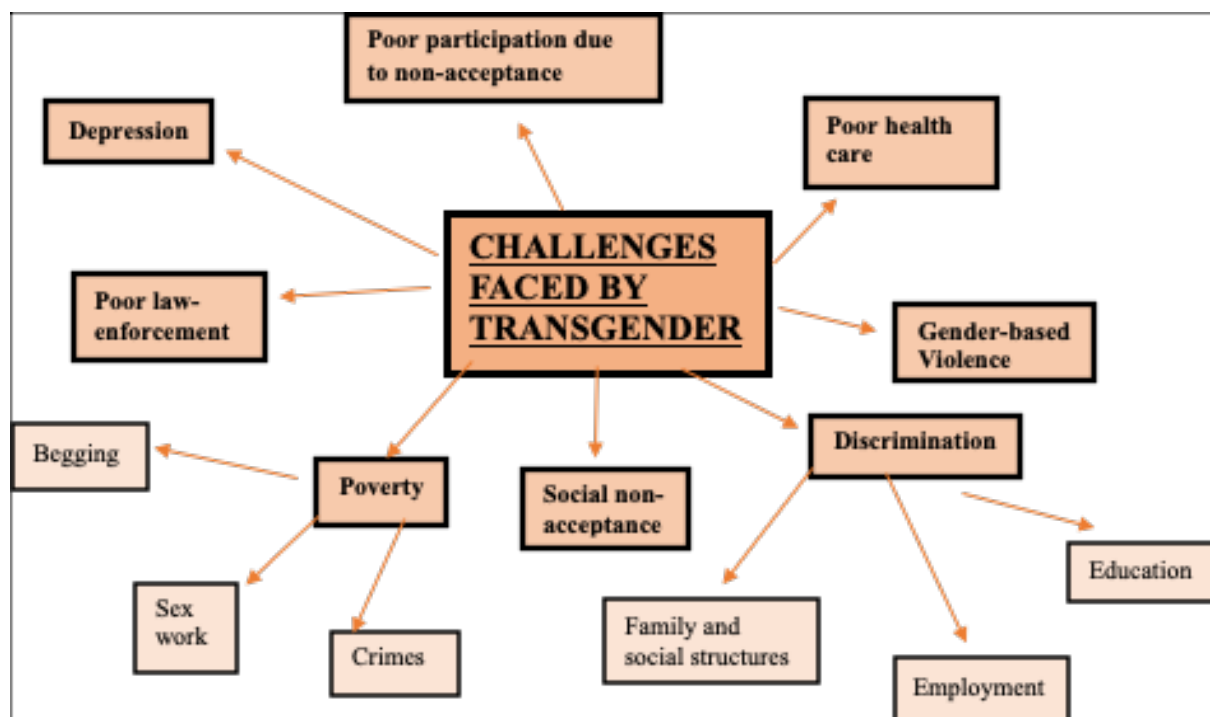
Another misunderstanding about transgender people is that they deviate from their gender expression. Gender expression is an outward character implying one's physical expression of one's gender, that is by way of dressing, talking, and walking etc., which is not inherent to one's gender identity that is an inner character relevant to the psychology of a person. Thus, one person may perceive him/herself as a female and express as a male and vice versa, and the same goes with transgender persons (Ginsley, 2017). These misconceptions have implications on the treatment of transgender persons specifically in Muslim countries. In the majority of Muslim countries, due to religious constraints, people reject the concept of sexual orientation and gender expression not aligning with birth sex. Being unable to differentiate sexual orientation from gender identity and thereby T from LGB, Muslim states prosecute transgender under anti-gay laws and anti-cross-dressing laws (Watch, Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity, 2021).



Challenges Faced by Transgender Persons

Transgender persons, unfortunately, have to face a lot of challenges that are a barrier to the full realization of their potentials. Discrimination faced by transgender people makes them socially, economically, and culturally marginalized globally. The discrimination starts from their birth; they are mostly disowned by their families and forced to live in separate small communities, especially in developing countries like Pakistan, India, and Bangladesh, etc. Due to discrimination in educational institutions and job market, transgender persons are suffering from high rates of poverty. Discrimination makes transgender persons face economic and financial pressures, hence they are forced to get involved in begging, crimes, and sex work for their living. Transgender persons are more susceptible to health disorders like HIV due to involvement in sex work and poor health facilities. For transition-related needs, there is a lack of tailored medical assistance. Moreover, para-medical staff and health professionals are not trained enough and lack awareness regarding transgender terms to deal with them properly (Gupta, 2016).

There is an all-time high rate of physical violence against transgender people especially those who are involved in sex work and informal ways of earning a livelihood. Brutal murders of transgender persons are recorded frequently that are not redressed by law-enforcing agencies. Due to a lack of trust in authorities, there is very little formal reporting of violence against transgender persons (Divan, 2016). Due to non-acceptance, there is very little participation of transgender persons in the state decision-making. Suffering leads them to depression and thereby a high suicidal rate among transgender persons is recorded. Despite the extensive legal needs of transgender people, their civil rights are not significantly recognized and duly respected to cope up with the challenges they face (Khan, 2020).



International Legal Protection

International Human Rights Law does not specifically protect transgender people, even though general treaties are interpreted as extending protection to them. The Universal Declaration of Human Rights (UDHR) in its Article 2 maintains that everyone is entitled without any discrimination to all the rights and freedoms upheld under this declaration (Nations, 1948). This implies that the rights under UDHR extend to transgender individuals on an equal and non-discriminatory basis. Similarly, International Covenant on Civil and Political Rights in its article 9 provides for the right to liberty and security for everyone, and its Article 26 guarantees equality before the law without discrimination for everyone (Nations, International Covenant on Civil and Political Rights, 1966). Moreover, International Covenant on Economic, Social and Civil Rights in its Article 12 protects the human right to health and is interpreted to include transgender persons requiring positive state protections in this regard (Nations, International Covenant on Economic, Social and Cultural Rights, 1966). In 2007, Yogyakarta Principles on the application of international Human Rights Law set up guidelines to instruct state actors to protect LGBT people against violence, abuse, and discrimination (Jurists, 2007). Afterward, in June 2008, United Nations (UN) adopted a Resolution on Human Rights, Sexual Orientation and Gender Identity addressing rights of transgender persons specifically for the first time. Since then, there have been multiple resolutions passed by the UN that recognize the rights of transgender persons and direct member states to take positive steps for transgender protection especially against torture (Watch, UN Makes History on Sexual Orientation, Gender Identity, 2016).

National Legal Protection

Legal Protection for Transgender Persons in the USA

The status of the transgender community in the USA has been evolving for a long time. The Constitution of the USA does not explicitly refer to transgender people. The 14th Amendment's Equal Protection Clause refrains states from denying any person equal protection of the laws which applies to transgender persons as well. In 1975, Minneapolis City for the first time in the USA passed legislation to protect the civil rights of transgender people (Margolin, 2016). There is no explicit legislation at the national level for transgender person's rights in the USA yet, but many judgments from courts have tried to protect the rights of transgender persons in the USA. In the case of Darnell v. Lloyd, the court found that there is no valid justification in denying a change in sex from that which is on the birth certificate (Darnell v. Lloyd, 1975). In Obergefell v. Hodges, Supreme Court upheld that the Constitution's 14th Amendment guarantees all people, particularly same-sex couples and transgender persons, the fundamental right to marry (Obergefell v. Hodges, 2015).

At the onset of the 21st century, many groups started emerging like the Transgender Law Center and the National Center for Transgender Equality for the rights of transgender persons. Resultantly, in 2008, the Subcommittee on Health, Employment, Labor, and Pensions of Congress opened a discussion on discrimination against transgender persons. Under the Obama administration, interpretations of the federal government's major pieces of legislation such as Title VII (employment), Title IX (education), and the Affordable Care Act were made to extend their protection to transgender people. Affordable Care Act, 2010 has been redefined to include gender identity along with sex to strictly prohibit gender-based discrimination in the domain of healthcare (Rhodan, 2016). In Congress, a bipartisan group has introduced the Equality Act which is been passed by the House of Representatives and is pending in the Committee on the Judiciary in the Senate. This bill specifically prohibits the denial of access to public places and places of common use, such as restrooms or dressing rooms, according to the gender identity of a person. It aims to explicitly and strongly extend civil rights protections to LGBTQ people nationwide (Morshedi, 2019). This Act is expected to improve the situation of transgender persons' rights in the USA.

Legal Protection for Transgender Persons in the UK

The UK started recognizing and protecting transgender persons through legal instruments by 2002 (Nevrkla, 2018). In 2002, the European Court of Human Rights ruled in the case of Goodwin v. the United Kingdom that the UK is violating the rights of transgender persons to their private life, marriage and family. The Court directed the UK to take steps for the protection of transgender persons by legally recognizing their transgender identity (Goodwin v. the United Kingdom, 2002). This led to the passage of the Gender Recognition Act of 2004 in the UK to facilitate the rights of transgender persons. Under the Gender Recognition Act of 2004, transgender persons are given the right to obtain a gender recognition certificate as per their perceived gender (Kingdom, 2004). In 2009, a denial of shifting a transgender woman from a men's prison to a women's prison was held to be a violation of her rights by the London High Court, and accordingly, directions were given to authorities (NEWS, 2009). The rights of transgender persons to employment and public services without any discrimination based on sex-reassignment surgery are protected under the Equality Act 2010, except

where the opportunity is limited to a single-sex. It has been reported by the Organization for Security and Co-operation in Europe that incidents of violence against transgender persons are most underreported (Europe, 2006). To properly redress the crimes, reporting is vital; therefore, to tackle this, a policy and practice has been developed by Crown Prosecution Service in England and Wales to ensure investigation of all transphobic crimes. The duty has been imposed on public authorities by the UK Public Sector Gender Equality Duty to eliminate unlawful discrimination and harassment on the grounds of gender (Commission, 2008).

Legal Protection for Transgender Persons in Pakistan

Transgender persons had been a symbol of respect in Muslim communities due to their role inside Haram and the same was manifested in the sub-continent. The status of transgender persons was then adversely affected by the colonial period and the same was carried over to contemporary Pakistan. In the 1850s, eunuchs subverted the hierarchy of masculinity, and in response British rulers started erasing them by criminalizing them under the Criminal Tribes Act, 1871. Similarly, in the post-colonial era, they continued to struggle for their due rights in Pakistan till the state finally provided them with due protection. Being marginalized, transgender persons are forced to live in collective residences under the supervision of Guru in Pakistan (Islam, 2019).

There have been numerous efforts in Pakistan to protect the fundamental rights of transgender persons. These efforts towards the mainstreaming of this community have achieved progress with the aid of judicial decisions and special legislation. Article 3 of the Constitution of Pakistan obliges the state to ensure elimination of any kind of exploitation and Article 4 makes treatment in accordance with the law a fundamental right of every citizen. Moreover, Article 25 states that every citizen is equal and is entitled to equal legal protection without being subjected to discrimination based on sex (Farhat, 2020).

In 2009, Dr. Aslam Khaki filed a petition in the Supreme Court against the reported police violence on the transgender (Khawaja sira) community in Taxila, Pakistan. He claimed that the transgender community has always been subject to sheer discrimination. The respected Supreme Court held that provincial governments should protect the fundamental rights of the transgender community. It led NADRA to add options to the “sex” category and directed Federal Government to legislate new laws (Dr. Muhammad Aslam Khaki Vs. S.S.P, Rawalpindi, 2012). Strict orders and wise recommendations were made which did not lead to overnight change but eventually led to legislation and enactment of the Transgender Persons Act, 2018.

In 2017, the final draft of the Transgender Persons Bill was presented before Parliament by Senator Babar Awan. In 2018, the Parliament of Pakistan approved this bill and it is now enforceable as the Transgender Person (Protection of Rights) Act, 2018. This Act uses the term transgender in a wider sense and its Section 2 defines “transgender” to include intersex (individuals having a mixture of male/female genitals), eunuchs, who are male by birth but later undergo castration, and transgender

man/woman, whose gender identity or expression differs from social norms based on sex assigned at birth (Pakistan, 2018).

Section 3 recognizes the right of transgender people to get registered with governments with their self-perceived gender. The Act does not require any district screening committees to verify self-perceived gender as required in certain other countries including India. This complies with Article 7 and Article 17 of the International Covenant on Civil and Political Rights. Applicants for national identity cards are given a choice between five different genders including male, female, transgender male/female, and Khunsa-e-mushkil (hermaphrodite/intersex). Section 4 prohibits any kind of discriminatory behavior against the transgender community in educational institutions, workplaces and also forbids unfair treatment towards them. Section 5 prohibits any kind of harassment based on their gender identity and expression (Pakistan, 2018).

Section 7 exclusively deals with inheritance rights and states that the transgender person must not be subjected to any discrimination in acquiring a share of property through the inheritance. The share shall be in accordance with the gender recorded on ID card;

- For a transgender male, the share of man
- For a transgender female; the share of woman
- For a person having ambiguous characteristics, upon reaching the age of 18 self-perceived gender identity is to be considered; however, if the individual turns out neither, the share will be a medial three-fourths share (Pakistan, 2018).

Fundamental rights of the transgender community are protected under Sections 8-14 which pertain to the right to education, employment, vote, property, to hold a public office, to health, to protest and assembly, and right to access public places. Section 16 also states that all the rights mentioned in Chapter I, part II of the Constitution of Pakistan shall be equivocally applicable to the transgender community of Pakistan. Section 6 imposes duties on the state which include the establishment of protection centers, separate prisons, and safe houses. The state is now obliged to ensure the awareness of law enforcement officials and healthcare workers. Section 17 prescribes punishment against those who employ/compel transgender persons to beg, which is imprisonment that may extend to 6 months or with a fine of Rs 50,000 or with both (Pakistan, 2018). This Act is by far the most extensive form of protection of transgender rights and its fruitful outcomes can be seen in the society of Pakistan.

Islamic Law and its Implications on Rights of Transgender Persons

Sources of Islamic law do not explicitly cover the concept of gender identity, which has led to miseries for transgender persons in Muslim communities. Islam forbade any behavior that sought to imitate the opposite sex, both in appearance and behavior. The same has been applied to transgender persons and sex-reassignment surgery by many (Afif, 2019). Ibn Hajar, the Sunni scholar, maintains that Prophet condemned those who consciously depart from the norm of their set genders with which they are

born, but not a behavioral abnormality such as dressing like another gender due to such psychological tendency (Snigdha, 2019).

The Prophet (P.B.U.H) respected transgender people as human beings and did not punish them unless they were liable for an immoral act and even then, they were only asked to leave Medina. After Prophet (P.B.U.H), the Mukhannaths (males who resembles females) were accepted in Islam and were appointed as royal teachers and given significant positions in the courts (Aymanee, 2020). Islam forbade same-sex marriage, therefore, a transgender person with visual signs of being a male can marry a non-transgender woman or a transgender person with visible feminine signs. However, a transgender person with clear signs of both sexes is not permitted to marry, according to the fatwa (Deleer, 2016). In Islamic law, a transgender person is to be given inheritance as per birth sex. If a transgender person is Khunsa-e-mushkil, then a transgender person is given a share as a female, except when as a male such a person will get a lesser share according to the majority of Muslim scholars (Nyazee, 2016). The fatwas of Ayatollah Khomeini in Iran and Sheikh Muhammad al-Tantawi in Egypt declare that sex-reassignment surgery is not forbidden in Islam. (Alipour, 2017)

Due to the narrower interpretation of Islam, in most Muslim countries there is no specific legal recognition and protection of transgender persons' rights. In recent years, Bangladesh has taken some positive steps by giving legal recognition to the third gender category, but mandatory medical examination has resulted in the abuse. Egypt rejected recommendations in the third Universal Periodic Review to end arrests and discrimination based on gender identity as it does not recognize the term gender identity. Iran has now permitted sex reassignment surgery for transgender people (Wareham, 2020). In Saudi Arabia as well, efforts made by Human Rights activists for transgender persons are labeled as a violation of the public order. In Turkey, positive steps are taken by the courts to safeguard the right to speech of transgender persons, but still, bans are imposed on their assemblies and events. In the United Arab Emirates, the federal penal code punishes cross-dressing which is used against transgender persons (Watch, Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity, 2021). These restrictive approaches towards transgender persons are a result of a misapplication and misinterpretation of Islamic laws.

Recommendations

International and national legal instruments are not adequate to protect transgender persons because the vulnerable social groups need specific protection. The interpretation of general International Human Rights treaties to protect transgender persons is not sufficient. The status of women and children improved when they were specifically addressed by the international legal framework through specific legal instruments. An International Human Rights treaty should be adopted specifically for transgender persons to enforce the transgender persons' rights more efficiently.

Pakistan's Constitution in its Article 25 maintains that there shall be no sex-based discrimination in any field of life, although it is indispensable in the present context that gender should also be explicitly mentioned along with sex. Furthermore, Article 25

empowers the State to make any special provisions for the protection of women and children, considering them vulnerable, and the same consideration should be extended to transgender people. Federal Legislation is there in Pakistan but now provinces should also bring legal reforms for matters under their jurisdiction to extend the protection for the transgender community at the grass-root level.

There is a need to refer to transgender persons separate from lesbians and gays as they are completely different-natured people scientifically. In Muslim countries, anti-cross-dressing laws, anti-gay laws, and vague provisions of indecency need reforms to protect transgender persons from a misapplication of laws. Medical approval for gender re-assignment should not be there as it is discrimination when no one else is required to give proof of their gender identity. Medical students and paramedical staff should be trained to deal with transgender persons. Domestic legal frameworks should prohibit explicit discrimination based on gender identity. Moreover, policies for better implementation of laws and social awareness campaigns should be introduced for the social inclusion of transgender persons.

Conclusion

In a nutshell, it can be concluded that transgender people are the most vulnerable social group globally. They face challenges of multiple dimensions in respect of their social, civil, economic, and political rights. The rights of transgender persons are not yet specifically addressed by core Human Rights treaties, but protection of these treaties is extended to the transgender persons through interpretation. States, when compared, demonstrate different trends in offering legal protections to transgender persons. Only a few states have explicit laws to provide needed specific legal protections to transgender persons. In the USA, the high judiciary has played a vital role in transgender persons' rights. The UK has been actively addressing transgender persons through effective legislation and policymaking. In Pakistan, the improvements are evident concerning laws as well as social acceptance, but still, there is a need for the strict observance of laws. In Islamic law, there is just confusion in interpretation that displays a sense of conservatism on the rights of transgender persons in Muslim countries. Islam forbade same-sex relationships, although this is a question of sexual orientation, not gender identity, which are erroneously conflated. There is an immediate need to improve legal protections, adoption of effective policies for transgender persons in all jurisdictions, mass awareness movements to sensitize and educate the general public as well as transgender persons about the rights of transgender people for the improvement in the status of transgender persons.

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