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Closing the Legal Gaps: Advancing Transgender Justice in Pakistan

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Executive Summary

The legal recognition and protection of transgender rights in Pakistan has been subject to a complex interplay of societal norms, cultural practices, and legislative frameworks. A significant stride towards addressing the marginalization of this community was marked by the enactment of the Transgender Persons (Protection of Rights) Act (TPPRA), 2018. While this legislation constitutes a notable advancement, its implementation and alignment with international human rights standards present challenges. In particular, the Act's shortcomings in areas such as discrimination, healthcare access, violence prevention, and enforcement mechanisms have hindered its effectiveness in safeguarding the rights of transgender individuals. Moreover, the Act's implementation has been marked by a notable absence of robust enforcement mechanisms. To rectify these deficiencies and ensure the effective protection of transgender rights, comprehensive reforms are imperative.

Policy Recommendations

- The 2018 Act should be amended to explicitly criminalize harassment against transgender individuals and introduce corresponding penalties.
- Existing anti-harassment legislation, such as the Protection Against Harassment of Women at Workplace Act, 2010, and Section 509 of the Pakistan Penal Code (PPC), 1860, should be expanded to include transgender individuals as protected persons.
- Amend Section 375 of PPC 1860 to recognize rape committed against transgender women as well.
- Add a new section in Chapter 3 of TPPRA defining different types of discrimination such as direct, indirect, by association, and highlight corresponding penalties for each.
- TPPRA should be amended to explicitly guarantee the right of transgender individuals to reside with their families and criminalize the abandonment of a child based on their transgender identity
- Through a collaborative effort between the Supreme Court of Pakistan and the Law and Justice Commission, special courts need to handle cases related to transgender rights.
- Amend TPPRA to mandate the construction of separate restrooms for transgender persons in all public spaces, including government buildings, educational institutions, and commercial establishments.

The Compendium of Transgender Persons (Protection of Rights) Act 2018

TPPRA 2018¹ is a comprehensive legislative framework designed to safeguard the rights of transgender individuals in Pakistan. The Act is structured into seven chapters, each addressing critical aspects of transgender rights.

Chapter 1 establishes foundational definitions, including terms such as "transgender person" and "gender identity," which serve as the foundation for the subsequent provisions. Building upon these definitions, Chapter 2 focuses on the legal recognition of gender identity, enabling transgender individuals to have their gender accurately reflected in official documentation, including through registration with the National Database and Registration Authority (NADRA).

To ensure a safe and inclusive environment, Chapter 3 prohibits harassment and discrimination against transgender individuals in diverse sectors, such as education, employment, healthcare, and public transportation. This chapter adopts a broad definition of harassment to encompass any form of aggressive pressure or intimidation, including unwelcome sexual advances or demeaning behavior.

Recognizing the state's responsibility to protect transgender individuals, Chapter 4 outlines its obligations to establish separate prison cells, detention centers, protection centers, and safe houses. Furthermore, the Act mandates the development of specialized vocational training programs and economic support schemes to empower transgender individuals and foster their financial independence.

Additionally, to uphold the fundamental rights of transgender persons, Chapter 5 enshrines their entitlements to education, employment, voting, holding public office, healthcare, access to public spaces, assembly, and property ownership. It further addresses inheritance rights and criminalizes the exploitation of transgender individuals through begging.

To ensure effective enforcement, Chapter 6 establishes mechanisms through which transgender individuals can seek redress for rights violations. This includes access to both civil and criminal legal frameworks, as well as recourse to institutions like the National Commission for the Status of Women (NCSW) and the National Commission for Human Rights (NCHR).

¹ Transgender Persons (Protection of Rights) Act, 2018

Finally, Chapter 7 grants the government the authority to formulate necessary rules for the Act's implementation and confers upon it overriding legal effect, solidifying its position as the paramount law in safeguarding transgender rights.

International Law Obligations

Pakistan is a State Party to several international human rights treaties that impose obligations for the protection of transgender individuals. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are prominent among the many that call for universal protection of individual's rights including transgender persons. Consequently, Pakistan is expected to ensure all people irrespective of gender identity receive non-discrimination, equal protection under law, and access to essential services.

Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires Pakistan to adopt concrete measures to prevent gender-based discrimination. International jurisprudence has extended the scope of this prohibition to encompass discrimination against transgender individuals. The United Nations' Universal Periodic Review² (UPR) mechanism has also consistently emphasized the need for Pakistan to enhance protections for transgender persons, aligning national laws with international human rights standards.

Recent developments, such as the 2017 Yogyakarta Principles plus 10³, have reinforced the United Nations' commitment to the rights of marginalized groups, including transgender individuals. These principles provide a comprehensive framework for applying international human rights law to ensure the dignity and protection of all persons.

Shortcomings

Criminalization of Harassment

Harassment is a pervasive issue faced by transgender individuals in Pakistan, often manifesting in both public and private spheres. While the 2018 Act includes provisions against violence and harassment, it does not explicitly criminalize harassment, nor does it provide

² UN Human Rights Council, Report of the Working Group on the Universal Periodic Review : Pakistan, A/HRC/WG.6/28/PAK/1, 2017 <https://mohr.gov.pk/Detail/OWU2ZGMyyTgtZjNkMC00MzBmLWFmZDAtZjRkMGZhNTUzZDNI>

³ The Yogyakarta Principles Plus 10 on the application of international human rights law in relation to sexual orientation and gender identity, 2017 <https://yogyakartaprinciples.org/>

specific penalties for such behavior. Amending the Act to criminalize harassment and introducing stricter corresponding penalties would provide transgender individuals with stronger legal protections. Furthermore, existing laws such as the Protection Against Harassment of Women at Workplace Act, 2010, and Section 509⁴ of the Pakistan Penal Code, 1860, should be amended to include transgender individuals as potential victims. This would ensure that transgender persons have the same legal recourse as others when facing harassment, thereby promoting equality and dignity.

Revisiting Section 375 of the Pakistan Penal Code, 1860

Section 375⁵ of the Pakistan Penal Code, 1860, currently defines rape as an act of sexual intercourse with a female. This definition, while clear, is exclusionary as it fails to recognize rape committed against transgender women. This gap in the law leaves transgender women without adequate legal protection against sexual violence, thereby perpetuating their vulnerability. Expanding the definition of rape to explicitly include transgender women would close this legal loophole and ensure that all individuals, regardless of gender identity, receive equal protection under the law. This amendment would align with Pakistan's obligations under international human rights instruments, such as CEDAW, which requires states to prevent gender-based violence in all its forms.

Introduction of Remedies and Penalties for Non-Compliance

For any anti-discrimination law to be effective, it must include clear remedies and penalties for non-compliance. TPPRA 2018, prohibits discrimination in various areas, including employment, education, and healthcare, but it lacks specific penalties for those who violate these provisions. Without enforceable penalties, the law's deterrent effect is

⁴ “Whoever,-

- (i) intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman;
- (ii) conducts sexual advances, or demands sexual favours or uses verbal or non-verbal communication or physical conduct of a sexual nature...

shall be punished with imprisonment which may extend to three years or with fine up to five hundred thousand rupees or with both.”

⁵ A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

- (i) against her will.
- (ii) without her consent
- (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt,
- (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
- (v) With or without her consent when she is under sixteen years of age.

significantly weakened, and instances of discrimination may go unaddressed. By introducing concrete penalties for non-compliance, Pakistan would not only strengthen the Act but also signal its commitment to protecting the rights of transgender individuals. This would also align with Pakistan's obligations under ICCPR, which requires states to provide effective remedies for rights violations.

Right to Residence for Transgender Persons

One of the critical issues faced by transgender individuals in Pakistan is the lack of familial support, often resulting in homelessness or forced exclusion from their homes⁶. TPPRA should be amended to include a provision that explicitly guarantees transgender persons the right to reside with their parents or close family members. Additionally, abandoning or disowning a child based on their transgender identity should be criminalized, with penalties imposed on those who engage in such acts. This amendment would provide a legal framework to support transgender individuals in retaining their familial ties and ensure that their basic right to shelter and family life is protected, in line with international human rights standards such as Article 16 of UDHR.

Inclusive Language in Legislation

The language used in legislative texts has a profound impact on the inclusivity and applicability of the law. Currently, many Pakistani laws use gender-specific terms such as "he" or "female," which may inadvertently exclude transgender persons. It is essential that all legislation, especially those concerning rights and protections, employ gender-neutral language. For example, terms like "every person" should be used to ensure that laws are understood to apply to all individuals.

Infrastructural Support

The 2018 enactment leaves several critical issues unaddressed, including the provision of separate public restrooms for transgender persons. The lack of such facilities subjects transgender individuals to heightened risks of sexual abuse and harassment when forced to use gender-binary restrooms⁷. A similar gap exists in public transportation, where buses and trains

⁶ Adams, S. (2022, November 10). Facing the marginalization of Pakistan's transgender community. Accountability Lab. <https://accountabilitylab.org/17190-2/>

⁷ International Commission of Jurists, 'Pakistan: Transgender Persons (Protection of Rights) Act, 2018 A Briefing Paper' (March 2020).

typically have designated spaces for men and women, thereby excluding transgender persons and failing to accommodate their needs.

Limited Complaint Mechanism

Notably, the remedies available to transgender individuals under the 2018 Act are inconsistent with these international obligations. For example, Chapter 6 of the Act allows transgender victims to bring complaints to the NCHR or NCSW, but these bodies have not been formally amended to explicitly include transgender issues within their mandates.

Recommendations:

- The 2018 Act should be amended to explicitly criminalize harassment against transgender individuals and introduce corresponding penalties.
- Existing anti-harassment legislation, such as the Harassment of Women at Workplace Act, 2010, and Section 509 of the Pakistan Penal Code, 1860, should be expanded to include transgender individuals as protected persons.
- Amend Section 375 of the Pakistan Penal Code, 1860, to recognize rape committed against transgender women as well.
- Add a new section in Chapter 3 of TPPRA defining different types of discrimination such as direct, indirect, by association, and highlight corresponding penalties for each.
- TPPRA should be amended to explicitly guarantee the right of transgender individuals to reside with their families. Additionally, the Act should criminalize the abandonment or disowning of a child based on their transgender identity.
- Through a collaborative effort between the Supreme Court of Pakistan and the Law and Justice Commission, special courts need to handle cases related to transgender rights.
- Section 8 of the Pakistan Penal Code, 1860, currently defines gender as “he” which includes men and women. The definition should be expanded to include transgenders.
- Amend TPPRA to mandate the construction of separate restrooms for transgender persons in all public spaces, including government buildings, educational institutions, and commercial establishments.

Action Matrix

Options for Pakistan

Option	Pathways to Solution	Implementation of Solution	Actors Responsible	Implementation Timelines
Amend harassment laws to criminalise harassment against transgenders and specify penalties	Transgender persons have the right to have the same legal recourse as others when facing harassment, thereby promoting equality and dignity.	TPPRA should criminalise harassment and encapsulate corresponding penalties Expand Harassment of Women at Workplace Act, 2010, and Section 509 of the Pakistan Penal Code, 1860 to include transgender individuals as protected persons.	<ul style="list-style-type: none"> • Ministry of Law and Justice. • National Commission of Human Rights • Ministry of Human Rights • National Assembly of Pakistan. 	2-6 months for consultation 6-12 months for Parliamentary amendments
Revisit Section 375 of the Pakistan Penal Code, 1860	Expanding the definition of rape to explicitly include transgender women would close a legal loophole and ensure that all individuals, regardless of gender identity, receive equal protection under the law	Amend Section 375 of the Pakistan Penal Code, 1860, to recognize rape committed against transgender women as well.	<ul style="list-style-type: none"> • Ministry of Law and Justice. • National Commission of Human Rights • Ministry of Human Rights • National Assembly of Pakistan. 	2-6 months for consultation 6-12 months for Parliamentary amendments
Introduce Remedies and Penalties for Non-Compliance in TPPRA	By introducing concrete penalties for non-compliance, Pakistan would not only strengthen the Act but also signal its commitment to protecting the rights of transgender individual	Add a new section in Chapter 3 of TPPRA which defines different types of discrimination such as direct, indirect, by association, and highlight corresponding penalties for each.	<ul style="list-style-type: none"> • Ministry of Law and Justice. • National Commission of Human Rights • Ministry of Human Rights • National Assembly of Pakistan. 	2-6 months for consultation 6-12 months for Parliamentary amendments
Criminalize Abandoning Transgender Children	This amendment would provide a legal framework to support transgender individuals in retaining their familial ties and ensure that their basic right to shelter and family life is protected, in line with international human rights standards such as Article 16 UDHR.	The Transgender Persons (Protection of Rights) Act, 2018, should be amended to include a provision that explicitly guarantees transgender persons the right to reside with their parents or close family members. Additionally, abandoning or disowning a child based on their transgender identity should be criminalized, with	<ul style="list-style-type: none"> • Ministry of Law and Justice. • National Commission of Human Rights • Ministry of Human Rights • National Assembly of Pakistan. 	2-6 months for consultation 6-12 months for Parliamentary amendments

		penalties imposed on those who engage in such acts		
Establish Special Courts for Transgender Persons	Establishing special courts for transgender persons can significantly enhance the protection and enforcement of their rights through efficient case hearing and sensitive handling.	Through a collaborative effort between the Supreme Court of Pakistan and the Law and Justice Commission, special courts need to handle cases related to transgender rights.	<ul style="list-style-type: none"> • Supreme Court of Pakistan • Ministry of Law and Justice • Law and Justice Commission of Pakistan 	12-18 months for development of special courts.