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**Legal Recognition of
Gender Identity and Sexual Rights:
The Voices of *Khwaja Saras* in Pakistan**

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List of Acronyms

AIDS	Acquired Immune Deficiency Syndrome
CNIC	Computerized National Identity Card
FDI	Forum for Dignity Initiatives
FGD	Focus Group Discussion
FIR	First Information Report
HCP	Health Care Provider
HIV	Human Immunodeficiency Virus
HSW	Hijra Sex Worker
IGLHRC	International Gay and Lesbian Human Rights Commission
KPK	Khyber Pakhtunkhwa
NADRA	National Database and Registration Authority
NGO	Non-Governmental Organization
RHRN	Right Here Right Now
SCP	Supreme Court of Pakistan

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Abstract

Khwaja saras are a marginalized non-gender normative identity in Pakistan. With the recent passage of the Transgender Persons (Protection of Rights) Act 2018, the country is to a degree a trailblazer for transgender rights. However, the application of the law has yet to be seen. This paper draws on research conducted in the Twin Cities of Pakistan with *khwaja saras*. By focusing on experiences of stigma and social exclusion through the voices of *khwaja saras* in the areas of livelihood, law enforcement, health and politics with the central theme of owning a Computerized National Identity Card, the effectiveness of state initiatives for the recognition and redistribution of the marginalized identity are analysed. The voices of *khwaja saras* reveal persisting exclusionary practices in various institutional domains. The efforts, or lack thereof, for the institutional integration of transgender identities reveal that there is a lot more to be done to truly realize the sexual rights of *khwaja saras*.

Relevance to Development Studies

Recent years have been accompanied by increasing demands for the deconstruction of gender as a static category in the field of development. Pakistan, while being a relative trailblazer in transgender rights, lacks a holistic understanding of the ways in which being transgendered in a gender normative world impacts the capabilities of individuals. This paper aims to contribute to a lacking body of knowledge on the lived experiences of social exclusion by *khwaja saras*.

Keywords

Khwaja Sara, Body, Identity, Pakistan, Social Exclusion, Sexual Rights, Human Rights, Legal Consciousness, Transgender, *Izzat*, Recognition and Redistribution

Chapter 1 *The Khwaja Sara Identity in Pakistan*

1.1 Introduction to the Marginalized *Khwaja Sara* Community: A Roadmap

For decades now, if not centuries, the dominant normative ideas about gender and sex are that there exist only two. One can either be born ‘man, male, masculine’ or ‘woman, female, feminine’. In feminist literature, the idea of the gender binary has been critiqued in recent years (Budgeon 2013:318); however, in the realm of the general public ideologies of the gender binary are very much existent at the present moment. That being said, the world over, gender identities that fall outside of the heteronormative gender binary exist. Trans* identities such as “*bakla* in the Philippines, *xaniths* in Oman, *serrers*...in Kenya” (Khan et al 2009:441), *metis* in Nepal (Budhiraja 2010:131), two-spirit amongst Native Americans (Davis-Young 2019) and *hijras* in India have existed for centuries. This research paper will focus on those who do not conform to the gender binary in Pakistan, individuals with the identity of *khwaja sara*.

As a way of a brief introduction, Pakistan’s *khwaja sara* community can be traced back to the times of the Mughal Empire in the Indian Subcontinent (Munir 2019:41). Their status in society at that time was far better than the present (ibid.). Today, Pakistan’s *khwaja sara* community faces discrimination daily. *Khwaja saras* live on the fringes of society, with begging, dancing and sex work as their main sources of livelihood (Hahm 2010:1). They often leave home at a young age, and along with other intersex and trans* identities create a family of their own, living under the direction of a *Guru* (mentor/mother figure) and taking on the role of the *Chehla* (student) (Khattak and Haq 2017:45). Those who fall outside the heteronormative gender binary in Pakistan are denied their sexual rights on a continual basis; due to which they face a denial of their fundamental human rights as one can only gain control of their lives in every aspect if they are allowed to exercise their gender identity without stigma. This denial of rights can be seen in the widely media covered case of Alesha, a *khwaja sara* who was shot eight times in the city of Peshawar due to her gender identity and expression; she died after being denied medical assistance (Marszal 2016). Due to such life circumstances, along with the lack of tolerance for the *khwaja sara* identity by the general public, they are subject to extreme social stigma, and thus social exclusion.

This research aims to understand the ways in which *khwaja saras* perceive and experience social exclusion on a daily basis. This will be done by focusing on legal identity, namely assessing if they have a CNIC (Computerized National Identity Card), which is provided through the institution of NADRA (National Database Registration Authority), and if their CNIC has their self-perceived gender on it. The Supreme Court of Pakistan (SCP) recognized the third gender, granted them protection status and allowed them to be holders of identification cards in 2009 (Khan 2016a:229 ; Khan 2017). However, despite the passage of a decade since the allowance of CNICs for *khwaja sara* and trans* individuals, it is problematic “that only 18% of the recorded *khwaja sara* population in Pakistan has acquired CNICs in 2017” (Waheed 2018:9; Hussain 2017). It is also pertinent to note that the recorded population of *khwaja saras* is at 10,418 as per the national census 2017 (Hashim 2018); however, non-governmental estimates place the population between half a million and a million, and maybe even more (Religion News Service 2016). Individuals lacking a CNIC are excluded from obtaining resources from the majority of institutions as the card is required in the areas of the labour market, healthcare and politics as will be seen in the findings of this research. The NADRA website also claims obtaining a CNIC “is the first requirement of individuals as it is mandatory to obtain documents like license, [National Tax Number], bank account, passport, cellular connection etc.” (NADRA 2019). Without a CNIC, individuals are not considered citizens of the state. They cannot vote, work secure jobs with benefits and get insured amongst many other repercussions.

By focusing on whether the card displays the self-perceived gender of a *khwaja sara*, the extent to which the gender identity is being recognized and integrated by the state can be measured. In terms of institutional integration, although the state has legally recognized *khwaja saras*, many facilities and institutions lack their inclusion as has been done for men and women. For example, only one hospital in the country to date has a ward for *khwaja sara* and trans* individuals (Report 2018). Many election booths lack a line for *khwaja saras* (Hasan, personal communication 1 Jul 2019), and public areas do not have gender neutral bathrooms. *Khwaja saras* have been recognized at the surface of the institutional level; however, the identity has not been integrated, thus creating barriers to overcome gender-sex essentialism which results in the denial of their sexual rights.

Furthermore, the daily discrimination *khwaja saras* are subject to, will be understood through the gender and sex hierarchy, as this is one of the main reasons for their social exclusion. The social exclusion faced by *khwaja saras* in key sectors will be analysed through

their legal consciousness, looking at the *khwaja saras* understanding and opinions of the law and their rights both formally and informally, and how this is impacted by the lack of state redistribution.

This paper will begin by addressing the origins of *khwaja sara* and briefly narrating the historical events that have led to their marginalized position today. The efforts made by *khwaja sara* and trans* activists in mobilizing for their rights will then be addressed. Following will be a review on the literature available thus far on *khwaja saras*, ranging from articles related to HIV/AIDS to those on the social location of and stigma faced by *khwaja saras*. The objective of this research along with the research question that this paper attempts to answer will then be outlined. Subsequently the methods and methodology used during and process of fieldwork will be explained. This will be followed by an introduction of the concepts and theories that will be used to analyse the collected data, accompanied by elaboration on how they will be used together. In the following chapter the data will be analysed through Frasers theory of bivalent justice, using Kabeer's framework of social exclusion and exclusionary practices to understand processes of misrecognition, misdistribution and the denial of their sexual rights, informed and affirmed by the voices and legal consciousness of the *khwaja saras*. The final chapter will link all the experiences together to move towards a holistic understanding of the barriers to the integration and realization of *khwaja saras* rights.

1.2 Defining *Khwaja Sara*

In order to understand the social location of the *khwaja sara* community, it is important to understand the dynamics that surround the term *khwaja sara*. Known also as *hijras* in the rest of South Asia, *khwaja sara* is an umbrella term that encompasses a diverse range of non-conforming sex identities, gender identities and expressions, and sexual orientations.

The *khwaja sara* community consists of those who were born intersex, or with ambiguous genitalia leading to them being classified as 'eunuchs' or 'hermaphrodites' historically (Khattak and Haq 2017:39). Many also consider themselves to be neither male nor female, identifying as the third sex/third gender (ibid.). Additionally, there are individuals in the *khwaja sara* community who identify themselves as cross-dressing males and often identify as homosexual (ibid.). The community also includes those who identify as transgender or transsexual (Chaudhry et al 2014:2553). Transmen/transmales and cross-dressing females are often not considered part of the *khwaja sara* community (ibid.), due to the fact that a defining

characteristic of the *khwaja sara* community is dressing as a woman and adapting a highly feminised quality of interaction (Khattak and Haq 2017:39).

There are several terms with which *khwaja sara* identify, such as “*Hijra*, Kinnar, Jogta, Jogappa, Khusra, Mohar Chanda, Manat and Zanana” (ibid.) amongst others.

1.3 Justification and relevance of this research

The British Raj in India labelled bodies that do not conform to the mainstream ideology of gender and sexuality as “diseased” bodies (Khan 2016a:223). This discourse is prevalent in the existing literature regarding the *khwaja sara* community. The majority of research concerning the *khwaja sara* community is on the prevalence of HIV/AIDS amongst trans* and intersex sex workers, which suggests that researchers have internalised the colonial ideology of the *khwaja sara* body as something to be cured of. Indeed the court documents prior to those produced in the last five years or so label the intersex and trans* individual as “persons suffering from gender disability and gender disorder as well as ‘serious diseases which are not curable and can cause epidemics etc in the society like Hepatitis, HIV etc’ (Khan 2016a:230). Resultantly, there is a crucial lack of research that focuses on the social aspect of the life of the *khwaja sara* community (Khattak and Haq 2017:39).

The social exclusion faced by non-conforming gender identities promotes an increasingly hierarchically structured society, and the contribution that can be made by these individuals is entirely obscured due to prejudices and biases prevalent in the heteronormative discourse.

Nonetheless, the introduction of the Transgender Persons (Protection of Rights) Act demonstrates that at legal and state levels, nuances surrounding gender are gaining recognition by actors holding a degree of power in government. Additionally, it illustrates the state moving beyond the narrative of gender dysphoria being labelled gender disorder and disability, and that individuals are free to identify with the gender that they feel most comfortable with. However, despite protection of rights via the Act, violations of sexual rights presently occur routinely, like the attack on three trans* individuals in Peshawar, one of whom died, in January 2019 (Correspondent 2019).

Pakistan has a slew of marginalized communities on the basis of race, religion, class, and gender. The *khwaja sara* community is perhaps one of the most marginalized in Pakistan

(Chaudhry et al 2014:2553). I was always told who *khwaja sara* were, unisex individuals who dress as women (a description I never questioned at the time), but I was never told, nor did I ever question, their social location. When I went back to Pakistan after having lived abroad for a few years, I would always regard *khwaja saras* as a unique segment of our society, visible yet invisible at the same time. I still didn't question their social position until I began interacting with them over the years and learnt of the difficulties they faced on a daily basis. What even bothered me more was the fact that no one ever questioned the fact that they face violence on a daily basis, and that there is a lack of outlets through which the *khwaja sara* community could voice their concerns and secure their rights.

The lack of nuanced research on the *khwaja sara* community, especially research that focuses on their social location through their own perception, desires and voices is what has motivated this research. In addition, the existing ideologies surrounding gender identity, expression, sex and the body in both Pakistani society and institutions have motivated this research. Upon further investigation, it came to light that despite the legal protections, implementation is extremely scarce, and thus the motivation to focus on the existing disparities between legislation and implementation.

This research aims to understand what *khwaja saras* actually want, as most of the time the information available about the social circumstances surrounding *khwaja saras* is through other individuals' views and not the voices of those affected themselves.

1.4 Background and Context: History, Rights and The Law

Historically, members of the *khwaja sara* community were considered morally righteous individuals due to the ambiguity of their sex. Prior to the colonization of India, *khwaja saras* and *hijras* were separate identities (Khan 2016a:224). *Khwaja saras* identified as eunuchs who lived as men and maintained high positions in society and state, whereas *hijras* identified as cross-dressing males, living in marginalized and detested communities similar to the *hi-jra/khwaja sara* community in contemporary India/Pakistan (ibid.:223). However, following colonization by the British, *khwaja saras* were removed from their positions of power and labelled as 'diseased' bodies (ibid., quotations from self). This occurred through the introduction of Section 377 in 1860, which criminalised "carnal intercourse... against the 'order of nature'" (ibid:223) and the introduction of the Criminal Tribes Act to regulate trans* bodies in 1871 (ibid:224). Khan suggests that without an economic base to support themselves,

those who identified as *khwaja sara* turned to the *hijra* community for a livelihood, merging the two labels into one umbrella term for multiple intersex and trans* identities (ibid.:226). This led to the marginalized position they are in today. However, the community did not sit silent and mobilized for their rights starting in the late 2000's.

Almas Bobby has been hailed as the defining force of the *khwaja sara* movement in Pakistan. Bobby, a *khwaja sara* activist and *guru*, along with lawyer Aslam Khaki filed a petition in the SCP in 2009 on the basis of the constitution demanding the realization of *khwaja saras* fundamental rights as is granted to all citizens of Pakistan under chapter 1 of the constitution (Khaki v Rawalpindi 2009:2) Specifically, the petition mentioned article 22 which entrenches “Safeguards as to educational institutions in respect of religion, etc.” and article 25 which guarantees “Equality of citizens” (ibid.). Following was an order provisioning state responsibility to *khwaja saras*; then referred to as unix/eunuchs with gender disorder (Appendix A). This order resulted in judgments allowing *khwaja saras* to register for CNICs, but only through medical tests to determine their ‘gender’ (Khan 2016a:229). This was met with fierce protests from the community in 2011, demanding for the right of self-perception of gender, as “Men and women are not being asked to undergo testing to verify that they are indeed males and females, why then are we being asked to be tested” (Rana 2014 as cited in Khan 2016a:30). The SCP did not elaborate further on this, instead instructing NADRA to register *khwaja saras* for their CNIC.

Stemming from both the 2009 judgement which mentioned legislation for the protection of rights if necessary, and the continuous mobilization of the community due to the daily discrimination and social exclusion they were facing, the next big milestone for the *khwaja saras* and the trans* community of Pakistan was the introduction and passing of the Transgender Persons (Protection of Rights) Act in May of 2018 (Redding 2019:1). The contents and relevance of the Act will be elaborated in Chapter 4. For now, however, the literature thus far on *khwaja saras* will be discussed to illustrate how *khwaja saras* are portrayed in academia, historically and presently.

Literature Review: HIV/AIDS Stigma, Social Location and ‘Failed Masculinity’

Existing literature in Pakistan regarding *khwaja saras* contain underlying notions of stigma and is unevenly skewed towards HIV/AIDS prevalence in the community. Resultantly, there is an absence of literature focusing on the social exclusion faced by *khwaja saras* and others

who transgress normative gender boundaries. In a study undertaken on social exclusion of the *hijra* population in Bangladesh, participants expressed that the social discrimination and violence they are subject to along with the violation of their rights are not addressed due to the tunnel vision focus on HIV/AIDS interventions directed at the community (Khan et al 2009:441). Resultantly, there is no literature on the violation of the sexual rights of such identities. The situation reflects similarly in Pakistan; however, some articles addressing the social dimension of the lives of *khwaja saras* exist. The literature surrounding HIV/AIDS will be presented first to demonstrate the existent dominant discourse, which will be followed by a review of the scarce literature regarding the social location of *khwaja saras*. Finally, literature dealing with dominant notions surrounding the gender identity will be discussed. Note that in many of these studies, the identity of *hijra* is synonymous to the identity of *khwaja sara*.

Only two articles regarding HIV/AIDS will be presented to illustrate the dominant discourse. Altaf, Zahidie, and Agha concluded through research in Larkana that *hijra* sex workers (HSWs) who were unmarried, of a younger age, only engaged in sex work as a form of livelihood and those who had been engaged in sex work for more than five years were more susceptible to HIV/AIDS (2012:4). This study was labelled “Comparing risk factors of HIV among *hijra* sex workers in Larkana and other cities of Pakistan: an analytical cross sectional study”. The article focuses on condom use, knowledge surrounding HIV, and behaviours during sexual encounters (ibid.:7). The study treated HSWs as uneducated individual’s incapable of apt decision making. Furthermore, *hijras* were only discussed in terms of HIV in the sense that it surrounded all their life circumstances. Similarly, another study conducted in Karachi titled “Condom use during commercial sex among clients of *Hijra* sex workers in Karachi, Pakistan (cross-sectional study)” (Siddiqui et al: 2011) had similar data points. This study also focused only on HIV and portrayed that HSWs are only possible carriers of disease, whilst not addressing their agency or the reasons the participants decided to engage in sex work. In fact, the prevalence of HSWs, rather than being addressed as marginalization, is attributed to the idea that they “are more easily approached by their male clients owing to the popularity of social activities among males and greater tolerance towards extramarital sex” (ibid:4). Their undertaking of sex work is dependent on men, rather than of their own volition.

Such articles portray a certain stigmatized image of *khwaja saras/hijras*. This will be further elaborated in Chapter 4. Research about the social location of and ideologies surrounding *khwaja saras* and their efforts of empowerment are scarce but has been increasing in recent years. A few have informed this research.

Khattak and Haq conducted in-depth interviews with 15 *khwaja saras* in Khyber Pakhtunkhwa (KPK) and concluded that due to their gender identity being far from the mainstream, they are not able to participate in the main institutions of life (2017:50). The study found that *khwaja saras* were unhappy with the government and felt that their voices were not being heard (ibid.:43). Chaudhry et al. conducted research in the capital, Islamabad, and concluded that due to urbanization many *khwaja saras* were no longer employed at functions, birth days of children and weddings for their blessings (2014:2554). Urbanization also massively changed the general public's perception of *khwaja saras*, due to ridicule of *khwaja saras* in the media according to one participant, which has led them to having to beg at traffic signals in the capital (ibid.:2553). Abdullah et al found too that social exclusion is leading *khwaja saras* to engage in sex work. (2012:4). Research by de Lind van Wijngaarden et al. illustrates agency possessed by *khwaja saras* in engaging with sex work and portrays the community as two sided (2012:nopage). On the one hand, it provides young *khwaja saras* with an escape and a social safety net of sorts, alternatively it encourages *khwaja saras* to engage in sex work at a very young age (ibid.:82).

In the analysis of a TV show on which *khwaja sara* activists appeared, Khan illustrated the ways activists used ambiguity of gender as resistance (2016b:8). In the Islamic context of Pakistan, *khwaja saras* must adhere to Islamic ideals of not explicitly addressing sex/sexuality, and thus the ambiguity of addressing their sexual desires and genitalia (which the TV show host referred to in questions) is identity politics and a form of demanding recognition (ibid.:8). Recognition is demanded on the basis of indifference rather than difference, as one of the activists expressed “And why should we have to talk about our sex when ordinary men and women don't have to.” (ibid.:7).). Shahnaz Khan shows in her article the aforementioned colonial origins of the position of *khwaja saras* today and their struggles for the recognition of their rights (2016a:nopage). Further elaborated as a process of labelling *khwaja saras* as ‘diseased’, Hussain dubs the result of British rule on *khwaja saras* as “[marking] them as figures of impotence, ‘failed masculinity’ and sodomy.” (2019:3), coming to be known as “*Hijra* deviance” (ibid.:6). A study by Khan in Bangladesh showed that *hijras* often have a dual identity, embracing a women's identity in certain settings and a man's identity in settings

where their femininity is not appreciated (2009:446). Ideologies supporting *hijras* as being deviant, and the need to possess a dual identity, are those of gender-sex-sexuality essentialism, in so that men performing femininity is seen as a threat to the normative order, resulting in slews of stigma. Resultantly, such ideologies lead to a denial of *khwaja saras* sexual rights which will be further elaborated in Chapter 4.

A paper by Redding analysing the Transgender Persons (Protection of Rights) Act 2018 concludes that although the Act's wording is legally sound and progressive with its use of terms like "self-perception" of gender identity, it leaves a lot to be desired in terms of how the rights enshrined in the Act will realistically be operationalized (2019:4). The lack of implementation will be observed in Chapter 4 through the voices of *khwaja saras* and analysing how they experience the denial of sexual rights.

The next section will cover the specific aim of this research paper and the methodology employed in gathering the data relevant to this research, notably the voices of the *khwaja saras* themselves.

Chapter 2 Finding the Voices of *Khwaja Saras*

2.1 Research objectives and question

Objectives

To find out how *khwaja saras* perceive their rights and social location as outlined in the Protection Act and as experienced in their lived reality.

To analyse with a focus on ongoing processes, arising from recognition or lack thereof through identity cards and un/acceptance of gender identity, which lead to the social exclusion of the *khwaja saras* in key areas of life and understand how they react to (negotiate/resist) these processes in order to attain dignity and their sexual rights.

Main Research Question

In what ways do *khwaja saras* in Pakistan perceive their social exclusion in society, in relation to the opportunity of claiming and freely exercising one's legally recognized identity and rights to achieve a dignified standard of living?

Sub-Questions

In what ways do *khwaja saras* navigate through their life circumstances to attain their livelihood?

In what ways do practices of social exclusion and the living law for *khwaja saras* prevent the realization of their sexual rights?

In what ways does the lack of a preferred gender CNIC affect the enjoyment of accrued and sexual rights by *khwaja saras*?

To what extent has the recognition of *khwaja saras* by the state been integrated at the institutional level through redistributive policies?

2.2 Methodology and Methods

Field work was undertaken during the span of a month, and qualitative methods were used to gather data. As O’Leary posits in her book on research methodology, a qualitative approach “works at delving into social complexities in order to truly explore and understand the interactions, processes, lived experiences and belief systems that are a part of individuals, institutions, cultural groups and even the everyday.” (O’Leary 2017:195). As one of the objectives of this research is to understand how *khwaja saras* in Pakistan experience social exclusion in relation to daily life and institutions, a qualitative approach was employed.

The aim of this research is not to be representative, thus snowball sampling was employed. As O’Leary points out, snowball sampling often does not provide a representative sample (2017:281). Despite initial plans for stratified sampling, *khwaja saras* are subject to various life circumstances, and obtaining a stratified sample given limitations of contacts, elaborated further on, was not plausible. Therefore, this research focuses on specific lived experiences, and the conclusions of this research are not meant to be generalizations. However, they are pointers and can contribute to making generalizations in future research undertaken on this topic.

Methods

During the month of fieldwork, a total of seventeen *khwaja saras* were interviewed, along with one trans identified activist and one NGO director. Eight structured interviews, two semi-structured interviews and two Focus Group Discussion’s (FGD) of five individuals each were conducted. The eight structured interviews and the two FGD’s were conducted with *khwaja saras* in the Twin Cities Islamabad and Rawalpindi. Half of the sample lived in the capital of Islamabad, while the other half lived in the densely populated neighbouring city of Rawalpindi. Both of the semi-structured interviews were conducted with key informants. Of the two, one was conducted with a transgender activist who was part of the legislation of the Transgender Persons (Protection of Rights) Act, and the other with the director of ‘Forum for Dignity Initiatives’ (FDI), an NGO dedicated to gender identity recognition and rights. Additional to qualitative interviews, secondary data sources, mainly in the form of policy briefs provided by FDI, were gathered as these contained information scarcely available elsewhere. These secondary data sources are beneficial, as primary data gathered is always influenced by the researcher in some way; however, secondary data exists outside of this influence, thus allowing for the least bias (O’Leary 2017:351).

Initial designs included employing a narrative inquiry approach due to the nature of the research. Clandinin and Huber state that “narrative inquiry is a way of understanding and inquiring into experience through ‘collaboration between researcher and participants, over time, in a place or series of places, and in social interaction with milieus’ (Clandinin & Connelly, 2000, p. 20). (2010:3). As I wanted to focus more on how those who identify as *khwaja sara* view their social location and life circumstances and opportunities, I initially thought that a story telling approach would be best to encompass this. However, given time constraints, gaining trust of participants in order to successfully employ a narrative inquiry approach was not feasible; especially considering that discussing gender identity and sexuality is taboo in Pakistan. Having begun fieldwork with this limitation in mind, it was not too difficult to shift method from inquiry to structured interviewing when required, with limited open-ended questions. Initial questions were open ended relating to the below mentioned points; however, received responses were off topic. Therefore, questions were narrowed into a structured rather than semi-structured format. Follow-up questions were explored based on responses where relevant, coming back to the structured format eventually.

I focused on the following points during the interviews with individuals from the *khwaja sara* community

1. How *khwaja saras* perceived their social location in society, ranging from the family to the public and institutional sphere.
2. *Specific questions categorized along the criteria of possessing or not a CNIC with/without their self-perceived gender written on it*
3. The awareness of rights and legal mechanisms which are available to those who identify as *khwaja sara* and/or trans*
4. What *khwaja saras* expect from the government moving forward, in regard to their rights and inclusion in major areas of life.
5. The ways in which and the reasons for which *khwaja saras* face discrimination, through their own views and voices.

In the interview with the activist who aided in the legislation of the Protection Act, the interview focused on the above points as well as how the government has or has not been making efforts to actually implement the Act, in terms of policy and affirmative action. Similarly, the interview with the director of the NGO FDI focused on the policy efforts being made in order to implement the Protection Act, as well as how the situation has improved

for *khwaja saras* at an institutional level and reasons for why the rights of *khwaja saras* have not been realized as well as they could and should be.

Scope and Limitations

One of the biggest obstacles I faced during fieldwork was phrasing my questions in a way that the participants understood what I was asking. The majority of interviewees had received no education or had only received a few years of primary schooling, and I realized this in my first interview. When I was asking the first interviewee the questions I had drafted beforehand, often the response was ‘what do you mean by that?’. Even further elaboration on how one would perceive exclusion from certain sectors led the interviewee to give me a response that was quite off topic. Therefore, I began asking very specific questions, such as what kind of treatment one would receive when they went to the hospital, the treatment they received when trying to obtain a CNIC, treatment from the family and educational institutes when they were younger and other similar questions regarding key areas of life.

Furthermore, none of the participants even had any notion about the rights of an individual. Therefore, I told the participants what their basic rights were. Although this deviated from the goal of observing legal consciousness, this had to be done in order to discuss how the rights entrenched in the Transgender Persons (Protection of Rights) Act had been granted or denied to *khwaja saras*.

Due to my lack of Urdu and Punjabi fluency, I had an individual accompany me who could translate when I did not know the Urdu/Punjabi words to use. Additionally, facilitators who got me in contact with the interviewees were also present at the interview, as they had to personally escort me to the homes of the *khwaja saras*, where the majority of interviews were conducted. The presence of other individuals hindered my ability to ask some of the questions I wanted to, as a few of them were sensitive, especially those in regard to abuse faced in childhood and otherwise due to a *khwaja saras* gender identity. This is elaborated further in the positionality section.

Positionality and Ethics

Verbal consent was taken from all the participants. Written consent was not taken as majority of the participants were illiterate. One written consent form was provided on request. Additionally, note that participant names have been changed in the paper out of respect for their privacy.

I recognized that the position I hold in society is very different from the position held by those who fall outside the heteronormative gender binary. I'm a cis-gendered privileged woman who is more or less accepted by society, this increased the already present power relations at play. Especially in a few interviews, I was being spoken to as if I had the power to substantially improve the life circumstances of *khwaja saras*, and in some interviews despite making clear at the start that I was a student, many interviewees assumed that I was from an NGO. I had to ensure a few interviewees more than once that I was only a student and researcher, and thus not from any organization nor did I have the power to change anything.

Sensitive topics regarding gender identity acceptance were not addressed unless participants broached it themselves as facilitators and translators were present. The facilitators/translators were all male which may have prevented some participants from addressing sensitive topics due to taboo, which in the presence of men becomes a 'no-go' area due to the conservative patriarchal quality of Pakistan. Alternatively, some participants were very familiar with the facilitators, resultantly allowing me to obtain information which they otherwise would not have disclosed to me as a stranger. Participants who broached sensitive topics were encouraged to discuss them further and with those willing the topic was discussed, but for those who seemed unwilling it was dropped.

Another factor to address is that each participant was provided Rs. 1000 as compensation for the lost opportunity of being able to earn during that time. While contacting *khwaja saras* through facilitators, I was told that I will only get them to participate if there was compensation. This may have impacted the data in two ways. On a positive side, I may have gotten more information than I would have if there was no compensation. Alternatively, participants may have disseminated information they thought I would want to hear for the compensation.

The main motivation for this topic of research was that in majority of research I had encountered regarding *khwaja saras*, it seemed as if the author was speaking for the *khwaja saras*. They were not presented as individuals with their own agency who were fully capable of understanding their own life circumstances. This results in discrepancies between root causes and solutions, resultantly preventing gender identity justice from being obtained. The full human rights of *khwaja saras* cannot be attained if there is deficient understanding of the stigmas and unjust practices they are subject to; the ways in which individuals face injustice

involves understanding their lived experiences. As this paper moves on to the findings, I aim to present the data as perceived from the voices of the *khwaja sara* themselves, and not treat them as subject's incapable of agency.

Groundwork for this research has been laid in another essay regarding the various axes of discrimination (Waheed 2019), thus the concept definitions and theories presented in the next chapter stem from the understandings and conclusions of the essay.

Chapter 3 **The Lenses for this Research**

This chapter aims to establish a framework through which the social exclusion and sexual rights violations of *khwaja saras* can be analysed. The concepts and theories presented here were chosen as they best fit the context of this research. The crux of the problem being identity, specifically gender identity, notions/concepts relating to such will be employed to analyse the findings. Therefore, gender identity is understood as an individual's self-perceived gender, and gender expression is how they choose to perform that gender identity. The conflation of gender, sex and sexuality, and the ideology of it being stationary, i.e. 'man, male, masculine' and 'woman, female, feminine', is what leads to the persecution of and stigma surrounding *khwaja sara* and transgenders as they transgress ideal notions of heteronormativity, the gender binary, and thus ideals of the norm of cis-gendered heterosexual individuals. Such ideologies and stigma create hierarchies of gender and sex, where *khwaja saras* are located in the lowest tiers, illustrated by the recurring violence, rights violations and discrimination they are subject to. The disparagement they face is a result of misrecognition of their identity stemming from these hierarchies, and thus misdistribution. Therefore, the analysis will be approached through Nancy Fraser's theory of bivalent justice, through the categories of redistribution and recognition to understand how justice is being denied. In turn, Naila Kabeer uses Fraser's theory to move towards an analytical framework for social exclusion, which will be employed to illustrate discrepancies in attaining justice for *khwaja saras* and trans* identities, focusing on areas where recognition of their identity has been granted through legal means but not in actuality in terms of redistribution and the identity's institutional integration. Highlighting this will be the experience of *khwaja saras* in terms of securing their full human rights and the inconsistencies with the law as illustrated by the participants legal consciousness. Fraser theory, Kabeer's framework, sexual rights and legal consciousness will be elaborated here, along with how they will be used to understand the social exclusion faced by *khwaja saras*. Additionally, a 'dignified standard of living' is defined.

3.1 Recognition and Redistribution: Bivalent Justice

Fraser argues that both recognition and redistribution is required for justice (1997:12), labelling this bivalent justice. She defines redistribution as relating to the socioeconomic sphere, finding meaning in the "political-economic structure of society", and misdistribution as manifesting in forms of labour exploitation, economic marginalization, and material deprivation

(ibid.). On the other hand, recognition relates to the cultural sphere, finding meaning in “social patterns of representation, interpretation, and communication”, and misrecognition manifests in cultural domination, nonrecognition and disrespect (ibid.:14). Both recognition and redistribution are ‘intertwined’ in practice as the cultural and socio-economic sphere find meaning within each other, culture is supported by economic means, and economic traditions are supported by cultural ideologies (ibid.:15). Therefore, in practice;

“cultural norms that are unfairly biased against some are institutionalised in the state and the economy; meanwhile, economic disadvantage impedes equal participation in the making of culture, in public spheres and in everyday life. The result is often a vicious circle of cultural and economic subordination” (ibid.).

There are identities which Fraser calls “bivalent collectivities”, identities that have both an economic and cultural facet in the attempt to secure justice (ibid.:19). One such identity is gender (ibid.), therefore redressing the plight of *khwaja saras* requires both recognition and redistribution, i.e. bivalent justice.

The ‘vicious circle’ mentioned above is what underlies the life circumstances and opportunities of *khwaja saras*, therefore this approach is applied in this research. They lack proper access to the formal labour market and political participation due to their gender identity, and their identity’s unacceptance is often exacerbated by the lack of economic and political opportunities which reinforces the heavy stigma they are already facing. Recognition is achieved through “upwardly revaluing disrespected identities...recognizing and positively valorising cultural diversity” (Fraser 1997:15). The analytical category of recognition will be viewed through, in the context of this paper, the Transgender Persons (Protection of Rights) Act 2018 and the acquisition of CNICs with an individual’s self-perceived gender on it. Misrecognition in the paper manifests itself in the denial of gender identity and the denial of basic human dignity and respect on the basis of gender identity. As the gender identities of all participants do not fall within the binary, its relevance in regard to recognition will be observed through the gender hierarchy, the sex hierarchy, and empirically through sexual rights in the next chapter. Redistribution on the other hand is achieved through “redistributing income, reorganizing the division of labour, subjecting investment to democratic decision making, or transforming other basic economic structures” (ibid.). In the context of this paper redistribution is treated as the government’s efforts on ensuring the participation of *khwaja saras* in the political and economic sphere, through the proper and easy provision of

CNICs as well as the implementation of the Protection Act through appropriate measures, as the redistribution of economic opportunities for *khwaja saras* is dependent on their recognition as respected individuals, and vice versa. Thus, both depend on their sexual rights. Misdistribution manifests itself in the hinderance of the realization of sexual rights, whether it be political, economic or social, and will be observed in the lived experiences of the participants.

3.2 Sexual Rights and International Legal Instruments

The IGLHRC adopted a sexual rights framework in 2002 to advance “the rights of all people whose sexual orientation and/or gender expression do not conform to social prescriptions.” (Budhiraja 2010:139). Sexual rights are fundamental human rights, and enable a multitude of opportunities in its attainment, specifically in regard to allowing an improvement in the position of marginalized groups who are detested sexualities (Armas 2006:22). As per Armas, sexual rights “empower people not only regarding their decisions in their sexual lives, but also by generating self-esteem, a new perception of citizenship, and control over their own lives in other spaces such as health, education, employment, etc.” and “increase the quality of participation both in terms of breadth (who participates) and depth (what they participate in).” (ibid.:22). Furthermore, they allow individuals to “demand *accountability* from power holders regarding the most personal and intimate relationships.” and are indivisible from and “interdependent” with fundamental rights such as the right to employment, health and housing. (ibid.). Therefore, the rights as given in the Transgender Persons (Protection of Rights) Act 2018, and as experienced in the lived reality of the participants of this research will be treated as sexual rights, and their implementation or lack thereof due to social exclusion practices as identified by Kabeer will be understood as successful or failed attempts at recognition, redistribution and thus bivalent justice. Furthermore, international mechanisms which aim to protect sexual rights will be used to strengthen the argument that will be made in the next chapter.

In regard to international mechanisms of accountability, Pakistan is a signatory of the Yogyakarta Principles (The Yogyakarta Principles 2007:34), a document created in 2006 outlining 29 principles which aim to affirm and progress rights relating to sexual orientation and gender identity (ibid.:7). Only the principles relevant to the findings of fieldwork will be spoken of here. Principle 3 affirms the rights to recognition before the law (ibid.:11) and principle 9 dictates the right to treatment with humanity while in detention (ibid.:16). Principles

12, 16 and 17 entrench the right to employment, education and health respectively (ibid.:18,21,22). Finally, Principle 25 establishes the right to participate in public life (ibid.:28). These rights, along with those entrenched in the Protection Act, will be addressed further where relevant when discussing the social exclusion experienced by *khwaja saras*.

3.3 Social Exclusion

O'Brien and Penna define social inclusion and exclusion as “the extent to which individuals are (or are not) incorporated within a moral and political community.” (2008:85). They posit that social inclusion is secured through “the acquisition of certain rights – certainly to a basic standard of living, but equally to participation in the major social institutions of the society.” (ibid.)

The efforts or lack thereof in securing bivalent justice for *khwaja saras* will be analysed through Kabeer's framework of social exclusion. Kabeer understands social exclusion through Frasers theory of bivalent justice. She posits that despite the shortcomings of the concept of social exclusion, “it captures an important dimension of the experience of certain groups of being somehow 'set apart' or 'locked out' of participation in social life.” (Kabeer 2000:84). Additionally, “focusing on the processes' of exclusion is more apt, specifically concerning social policy, as the exclusion faced by certain marginalised groups can be traced back to “the dynamics social interactions” (ibid.). Within this research, the dynamics of social and institutional interaction of *khwaja saras* will be analysed in the areas of employment/livelihood, law enforcement, health and political participation, as one of the key focuses is on formal legal identity through CNICs and the realization of rights as entrenched in the Protection Act on CNICs basis. Therefore, looking at the interaction of *khwaja saras* with institutions will reveal how the recognition of their identity and sexual rights, and redistribution of resources to guarantee those rights will depend on a CNIC. Furthermore, institutions are key to uncovering processes of social exclusion, as they not only “structure the relationship between macro-economic change and the pattern of economic growth” but also “the changing life circumstances of individuals, households and groups” (ibid.). Both the cultural (recognition) and political -economic (redistribution) spheres of life, therefore, are dependent on institutions.

Kabeer identifies three practices of social exclusion, namely “mobilization of institutional bias” (2000:91), “social closure”, and “unruly practices” (2000:92). The data collected conforms to these practices as will be observed and further elaborated in Chapter 4. Here

exclusion will be viewed through livelihood in regard to economic exclusion, experiences with the police and access to healthcare in regard to social exclusion, and access to political participation in regard to political exclusion.

3.4 A Dignified Standard of Living

Here no reference will be used to define a dignified standard of living. Rather that will be observed through the findings, as participants in this research speak for themselves as to the standard of living they strive for and desire. However, the importance of dignity in Pakistan will be defined. *Khwaja saras*, in mobilizing for their rights, demanded for *izzat*. Directly translated to as respect, courts and activists understand this demand for *izzat* as a demand for dignity (Hussain 2019:12). Relating to a middle-class ideology of “*sharafat* (respectability)”, *izzat* is measured in regard to *sharafat*, which is understood in terms of having modern education and a “respectable” job (ibid:13-14). As per Hussain,

“*Hijras* demand *izzat* from the state and society because it was *sharafat*, its class-based sexual and gender norms and their legitimisation by the modern state, that barred them from the respectable city and banished them from its citizenship.” (ibid.:15).

Therefore, although not always explicitly stated, the voices of the *khwaja saras* show this desire for being possessed by the category of *sharafat*.

3.5 Legal Consciousness and Living Law

Nielsen defines legal consciousness as “individuals’ experiences with law and legal norms, decisions about legal compliance, and ... the subtle ways in which law affects the everyday lives of individuals” (as cited in Hertogh 2004:458). As this paper is focusing on the implementation of the Transgender Persons (Protection of Rights) Act 2018, it is of utmost importance to understand how *khwaja saras* themselves experience the law, and what their notions regarding the law, official or unofficial, are. Hertogh differentiates between two conceptions of legal consciousness, one American and the other European.

The American conception of legal consciousness understands the concept through “How do people experiences (official) law?” (Hertogh 20014:463). Different studies employing this approach measure peoples understanding and opinion of the law (ibid.:464) and observe the “law in books” vs “law in action” as introduced by Roscoe Pound (ibid.:465). An important factor of this conception is that the law is an “independent variable” (ibid:464).

Whereas the European conception of legal consciousness treats the law as something to be studied in relation to happenings and rules of society. This conception is based on Eugene Ehrlich's notion of "living law" (ibid:472). The 'living law' manifests in the unofficial rules and norms that dictate society, therefore the European conception is "oriented towards the behaviour of people in social associations (inside *and* outside legal institutions)." (ibid:473).

It is important to differentiate between the living law and the law in action, as the living law encompasses the stigma surrounding *khwaja saras* gender identity, and the law in action fails to prevent/address this stigma as the law in books do not wholly understand it. However, for a wholesome account of legal consciousness, both the conceptions will be employed, as individuals' ideas of and experiences with the law cannot be separated (ibid.:480). The way *khwaja saras* experience law is related to the way they understand the law, whether it be formal rights protections, occupational criminalization's, or informal norms that lead to the stigma they face. Thus, the legal consciousness of *khwaja saras* will illustrate the implementation and their knowledge of the Protection Act, but also what drives them towards their mode of livelihood, their intention or lack thereof to seek medical help and their views surrounding political participation, as stemming from stigma of gender identity. This will further reveal how they view their social exclusion through the decisions they take, providing a better understanding of the processes which lead to a denial of sexual rights and the ways in which this impacts their ability to achieve bivalent justice. Additionally, this will show the ways in which *khwaja saras* possess agency and will better portray the voices of the *khwaja saras* themselves which is one of the aims of this research.

These above lenses will be applied to the data collected during fieldwork, moving towards a holistic understanding of the multiple ways in which the sexual and human rights of *khwaja saras* are denied due to a deficiency in measures for preventing their social exclusion.

Chapter 4 Presenting and Analysing the Voices of

Khwaja Saras

The data collected during fieldwork is highly telling of the social location of *khwaja saras*. This chapter will begin by understanding the ways in which they are marginalized through stigma and hierarchies, first through colonial times followed by the voices of the participants in regard to experiences with the family. Consequently, the identity and recognition efforts from the government will be understood in regard to the Protection Act, which will be followed by the voices in determining the effectiveness of the legislation in its implementation specifically focusing on NADRA and CNICs. This will be followed by understanding the opportunities of *khwaja saras* and the redistribution this entails, as per government responsibility and actual institutional practices, demonstrated through the participants voices in the areas of livelihood, police treatment, healthcare and political participation. The social exclusion experienced by *khwaja saras* will be observed in each of these sections of stigma, identity and opportunity through their legal consciousness and through exclusionary practices, leading to the denial of their sexual rights.

4.1 Stigma and Hierarchies

Stigma surrounds *khwaja sara* and their gender identity through various axes. The labelling of *khwaja saras* as diseased emerging in colonial times has created legacies of stigma that effect their lived realities during childhood in contemporary times, resultantly setting a standard for the continual violation of their sexual rights. The voices of the participants speak for this; however, the processes of regulation in colonial times attributing to the sex hierarchy and notions of morality and *izzat* must be understood to fully grasp the dynamics of the voices of the *khwaja saras*. Therefore, firstly the colonial history will be elaborated. The participants childhood realities will then be presented, analysing their position through their voices and framing it in understandings of gender roles, the gender hierarchy and femininity, and how this results in their social exclusion.

The Labelling of the *Khwaja Sara* Body as ‘Diseased’

During the times of the Mughal Empire, *khwaja saras* were perceived as morally righteous individuals due to the ambiguity of their sex (Khan 2016a:221), identified as ‘eunuchs’ who lived as men maintaining high positions in society and state (ibid.:223). *Hijras* alternatively

were an identity which is quite similar to the *khwaja sara* identity in Pakistan today, cross-dressing males living in marginalized communities (ibid.).

The Indian subcontinent's colonization had repercussions for *khwaja saras*, the legacy of which is presently existent. The colonial state began processes of regulating trans*bodies (ibid.:223). *Khwaja saras* were medicalized, and “the label of *diseased body* [was] attached to members of uncertain sex by the colonial state” stemming from Victorian notions of morality (ibid.). This process of medicalization allowed *khwaja sara* bodies to be “declared socially and morally inappropriate” (ibid.). Legal mechanisms were introduced to further label the *khwaja sara* body ‘unnatural’. Section 377, introduced in 1860, punished “carnal intercourse...considered against the order of nature”, i.e. criminalizing sodomy and homosexuality, and the Criminal Tribes Act, introduced in 1871, solidified the medical regulation of *khwaja sara* bodies, as the Act called for the “mandatory registration, surveillance and control” (ibid.) of any “persons of the male sex who admit themselves, or on medical inspection clearly appear to be impotent” (British Library 1871 as cited in Khan 2016a:224). Recall, *khwaja saras* then were male eunuchs that had undergone castration. These processes of control allowed the ‘diseased’ label attached to the *khwaja sara* body to be solidified institutionally and socially, in turn resulting in the misrecognition that *khwaja saras* are facing today.

Regulation marginalized the community as *khwaja saras* were removed from positions of power. *Khwaja saras* during their respected days earned through land; however, colonization resulted in loss of this land and thus an economic base (Khan 2016a:226). *Hijras* at the time would earn their income through singing and dancing (ibid.) and were looked down upon even prior to colonization (ibid.:223). Khan posits that the loss of land by *khwaja saras* prompted them in joining the *hijra* community in order for livelihood (ibid.:226). As they joined the detested *hijra* community, the label of ‘diseased’ and morally unrighteous was even further solidified.

The labelling of *khwaja saras* as diseased is presently existent. As was seen in Chapter 1, majority of research on *khwaja saras* surrounds HIV/AIDS. Court documents of 2009, where the SCP legally recognized the third gender, attach the label of “diseased’ and “disabled” to *khwaja saras* (Khan 2016a:229). These documents identified *khwaja saras* as “persons suffering from gender disability and gender disorder as well as ‘serious diseases which are not curable and can cause epidemics etc in the society like Hepatitis, HIV etc’” (ibid.:230). The very institutions which *khwaja saras* turned to for their liberation were treating them as

infinite bearers of disease. Rubin's theory on sex hierarchy sheds light in this regard. As per the sex hierarchy, "societies appraise sex acts according to a hierarchical system of sexual value. Marital, reproductive heterosexuals are alone at the top erotic pyramid....[and] [t]he most despised sexual castes currently include transsexuals, transvestites,...sex workers such as prostitutes and porn models" (Rubin 1984:149). As written in the groundwork essay

"Since trans* identities, such as *khwaja sara*, are at the bottom of the sex hierarchy, and they transgress the traditional notion of heterosexual monogamous relationships, it allows their bodies to be labelled as 'diseased' and thus medicalised, due to the power relations at play. The view is purported that since it is not heterosexual, cis-gendered, and monogamous, it must not be normal and thus must be a disease. Therefore, their existence is not spoken in terms of social reality, but only in terms of 'disease' as they are already viewed of as 'diseased'." (Waheed 2019:4).

As the *khwaja sara* identity has become to an extent synonymous with disease and immorality, the stigma and societal unacceptance of their gender identity results in exclusion from various arenas. The next section will analyse how this ideology of the 'diseased' *khwaja sara* body and the misrecognition it construes has been absorbed into public ideology manifesting in societal unacceptance through the experiences of *khwaja saras* in their childhood. The section will also establish the empirical beginning of social exclusion for the participants in their life as *khwaja saras*.

Gender, Sex, Femininities and Hierarchies.

Hierarchies of gender and masculinities/femininities are a major contributing factor to the social exclusion of *khwaja saras*. Each mode of structuring social locations will be elaborated, revealing the ways each leads to the marginalization of gender non-conforming identities such as *khwaja sara* and other trans* identifying individuals in Pakistan.

Feminists have theorized the subordinate relationship of women in relation to the dominant position of men, the resulting structure being patriarchy. Jeffreys posits two classes, the former of which contributes to this relationship (as cited in Beechey 1979:69). The economic class system construes "the relations of production", while the sex class system construes "the relations of reproduction" (ibid.). The former posits that the control on women's reproduction by men results in patriarchy (ibid.). Millet offers two dimensions through which society functions, namely "that male shall dominate female" and "that older male shall dominate younger male" (ibid:68). Such theorisations of gender relations fail to

account for individuals outside the gender binary, or those that transgress ideas of sex-gender essentialism. As Lorber posits “Most research designs in sociology assume that each person has one sex, one sexuality, and one gender, which are congruent with each other and fixed for life.” (1996:144). Here, this paper aims to understand the social relations of domination and subordination of non-gender-norm-conforming individuals.

Voices: Exclusion From The Family

“*Humein barbaad kiya jaata hai, hum barbaad hotay nahi hai. Mouashra humein zyada kharab karta hai*” (We are ruined by others, we are not ruined beings. Society makes us worse). This section establishes the beginning of social exclusion for boys who now identify as *khwaja sara*. It starts with the institution of the family (note this does not equate solely the family, but also the surrounding community). Various reasons cited by participants for leaving home will be outlined, subsequently these experiences will link to societies unacceptance of those who do not conform to gender roles and gender norms.

Bano, now aged 42, left home when 12. She didn’t want to leave and stressed on the fact that she left because of her brothers, society and ‘*mohallay walay*’ (neighbours), not due to her sisters or mother. As a child, she liked to buy dolls and makeup while her brothers would be buying toy guns. The *mohallay walay* would complain to her brothers, making issue of Bano wearing women’s clothing and makeup, resultantly they would beat her. She left so people would not insult her family, as a feminine boy was looked down upon by society.

Now 34, Shahida’s family told her to leave when 19. She said that it is an insult for them to talk to *khwaja saras*, and if they liked *khwaja saras* she would not be where she is now, away from home.

Purwa, 27, left home when 13. She was taken by *khwaja saras*, and her family at the time allowed it because of ‘*majboori*’ (helplessness). At the time her brothers would abuse her, locking her in a room due to her femininity. They would tell her to stop being feminine, but she expressed “*lekin yeh toh Allah ki taraf sey tha, meinay konsa jaan bhoojh k kiya houwa tha?*” (But this was Allah’s will, who says I did it on purpose?)

Similarly, Nabila, 27, left home when 12 because her brothers would abuse her due to her gender identity. Her mother told her to leave home for her own safety.

Laila, 30, left around 13. She did not leave because of any immediate family member, but because of *mohallay walay* and other relatives. They would hoot at her because of her

feminine expressions and she posed just how many people her siblings could defend her against. She left because she did not want to ruin their peace.

Ghazala, 20, did not say when she left but cited the '*majboori aur dukh*' (compulsion and sorrow) of her family as the reason for leaving. This conversation emerged from a discussion of violence. "*Tashdid ghar sey shuru hota hai, ghar mein sey hi nahi apnaya jaata humein*" (Violence starts from the home, they do not accept us at home). She would face abuse every day and could not take it any longer.

Jamila, 30, similarly did not say when she left. Her femininity caused her to leave home. She expressed how she would be sitting like and playing with girls, dancing, and doing things that girls do that would cause her family to scold her. They were very strict regarding such habits, prompting her to run away when she was young.

Mahira, now 27, left home when 18 for education. She reported a lot of bullying from cousins, uncles and classmates when young due to her femininity. Her family is not okay with her gender identity, expressing how they would always try to "*crush it out of her*".

The events that prompted the participants to leave home have in common a lack of acceptance of their gender identity and feminine habits, whether it be from the family or community. Pakistan has a community structure where respect and honour is of utmost importance, as seen by *sharafat*. *Khawaja saras* are often seen as bringing dishonour upon a family/community, as can be garnered from the above experiences. Lorber posits, "[b]ehaviour that is gender-appropriate is considered normal; anything else...is considered "gender deviance". (1996:145). Before leaving home, the participants were raised as boys, accompanying this upbringing were the cultural expectations of the appropriate gender roles.

Most assume gender as an identity that is inextricable from an individual's sex (Lorber 1996:144). Gender entered usage as a sociological term by 1980's American feminists to demonstrate the "fundamentally social quality of distinctions based on sex." (Scott 1986:1054). Simultaneously assumed is that by design an individual of the female sex is feminine, and an individual of the male sex is masculine (Risman and Davis 2013:736). Resultant ideology is that boys will exhibit masculine traits of assertiveness and independence while girls will exhibit feminine traits of warmth and gentility (Donnelly and Twenge 2016:556). Further research has disproven this and shown that all individuals possess varying degrees of femininity and masculinity (Risman and Davis 2013:736). Nevertheless, in the patriarchal

conservative society of Pakistan, it is assumed that gender is naturally given, rather than constructed by society. Resultantly, ideas about gender, sex and femininities/masculinities form a hierarchical structuring of society, aforementioned, the patriarchy. Men dominate women, and those conforming to idealized gender roles are rewarded. Due to sex role socialization, “children are rewarded for displaying the gender-appropriate behaviours that they are encouraged to perform” (ibid.:737). Therefore, Bano preferring clothes culturally deemed appropriate for women and Jamila embracing the habits and actions deemed socially appropriate for girls caused their family and neighbours to abuse them, as they expected them to embrace the habits of boys/men. Ghazala conveyed parents getting confused when “*something like us*” is born. As sex role socialization enforces ideology of gender as occurring naturally *khwaja saras* are seen as going against nature. This ideology is supported by colonial history, i.e. as they are going against ‘nature’, they are ‘diseased’. Furthermore, feminine habits expressed by the participants as children was problematic because feminine characteristics are “socially devalued characteristics” (Budgeon 2013:320). A male exhibiting such behaviour angered the sensibilities of the patriarchy. Similarly, referring back to the domination of women by men in patriarchal systems, within Pakistan men are primary bread winners and sons are responsible for supporting parents in old age, resultantly sons are valued far more than daughters (Saeed 2015:18). Supporting this, survey data illustrates the preference of mothers as wanting their next child to be a son, and the neonatal mortality rate of girls is higher than boys (ibid.). Within this society, sons exhibiting gender roles culturally appropriate for girls is another reason why *khwaja saras* are marginalized due to their gender identity. Recall Millets theorization of “the older male shall dominate the younger male” (as cited in Beechey 1979:69). Older males in the households of these young *khwaja saras*, be it father, brothers or uncles, dominate over the younger by abusing them when they transgress idealized gender roles and norms. These various forms of discrimination from family and society prompts *khwaja saras* to leave home at young ages. This is where their economic, political, cultural exclusion begins, while the social exclusion they were already facing is exacerbated without the support of the family.

These lived experiences were prior to the Transgender Persons (Protection of Rights) Act 2018. Following sections will elaborate on the legal protections and fundamental rights/sexual rights granted by the state, subsequently its effectiveness in practice will be analysed by looking at experiences of social exclusion faced by *khwaja saras* in their daily life, and government efforts to redress marginalization of the community through redistribution.

Furthermore, the presence of the discourse of ‘diseased’ and ‘unnatural’ will be observed through these experiences in different areas of life.

4.2 Identity and Recognition

In this section, the legal recognition of *khwaja saras* through the Transgender Persons (Protection of Rights) Act 2018 will be elaborated, to gain understanding of the rights to which they are formally entitled. Focus will then be shifted to NADRA and the experiences of the participants in obtaining/trying to obtain a CNIC to show the ways in which the living law prevents *khwaja saras* from obtaining legal identity and thus recognition and their sexual rights.

Formal Recognition of Gender Identity Through the Law

Moving towards recognition and securing the sexual rights of *khwaja saras*, the ruling of *Khaki v Rawalpindi* in 2009 brought the first legislation passed in their favour - the order from the SCP to allow CNICs for the third gender (Khan 2016a:229). In 2011, the SCP “ordered authorities to issue identity cards to transgender persons by specifically mentioning their sex.” (Hussain 2017). Consequently, the Transgender Persons (Protection of Rights) Act (Appendix B) was passed in May of 2018 (Redding 2019:1). Within, the fundamental and civil rights of transgender individuals are entrenched. Given the context of Pakistan, this progressive Act defines gender identity as “a person’s innermost and individual sense of self as male, female or a blend of both or neither: that can correspond or not to the sex assigned at birth” (Appendix 2:1). Nonetheless, the Act lacks several amendments transactivists were aiming to absorb into the final draft; this will be addressed in section 4.3 where relevant. The clauses relevant to this paper will be addressed in detail here (See Appendix B for the full Act).

The Protection Act protects multiple fundamental rights. The Act applies to the whole of Pakistan, its aim presented as “to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto” (ibid.). It defines a transgender person as intersex, “eunuch assigned male at birth but undergoes genital excision or castration”, transman, transwoman, *khwaja sara*, or any individual whose “gender identity and/or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth” (ibid.:2). The Act reaffirms the right for individuals to self-identify their gender

on any identity documents, including CNICs (ibid.:3). Following sections set prohibitions on harassment and discrimination, relevant here are areas of employment, healthcare, public/private institutions and political office (ibid.:3,4). Government obligations are laid out hereafter, specifically mentioning that the government must take action “to secure full and effective participation of transgender persons and their inclusion in society” (ibid.:4), through adult education programs, grants and loan schemes, vocational training programs, separate jail cells, and sensitization programs for public officials (ibid.:5). Following is the protection of fundamental and civil rights, relevant here are the right to employment, the right to vote, and the right to health. These rights as entrenched in the Act will be elaborated further in section 4.3.

Social Exclusion, Legal Recognition, Gender Identity and Sexual Rights

Recall the question this research aims to answer is “In what ways do *khwaja saras* in Pakistan perceive their social exclusion in society, in relation to the opportunity of claiming and freely exercising one’s legally recognized identity and rights to achieve a dignified standard of living?” The paper will now move on to understanding the ways in which *khwaja saras* face social exclusion through the denial of legal identity.

The Living Law of Gender Identity and Recognition

Khaki v Rawalpindi 2009 and the 2011 SCP ruling allowed *khwaja saras* to register for a CNIC with their self-perceived gender; the Transgender Persons (Protection of Rights) Act affirming such along with the signing of the Yogyakarta Principles by Pakistan. However, in practice, as of December 2017, only 1,882 individuals identifying as *khwaja sara/trans** have received a CNIC with their self-perceived gender (Hussain 2017). Findings mirror this.

Recall that lacking a CNIC presents many repercussions. Of the eighteen participants, ten reported possessing a CNIC. Of these, only three participants reported a self-perceived gender CNIC, i.e. female *khwaja sara*. Note one participant purposely requested a male CNIC. Experiences of obtaining and not being able to obtain a CNIC from NADRA will now be presented.

Voices: Granted and Denied Identity

Purwa communicated no difficulty in obtaining a CNIC, as her mother accompanied her. Having a parent accompany to NADRA allows for an easier registration process. Her

CNIC has her self-perceived gender. Lamia similarly faced no difficulties, being accompanied by her brother. She also has her self-perceived gender on her CNIC.

Sara, Palwasha, Saafiya, Fareeha and Jamila all have CNICs, but without their self-perceived gender. All reported the reason as being home and not having revealed their identity to their family when registering with NADRA.

These positive experiences show that the support of a family member makes the process easier.

Laila faced many difficulties when trying to obtain her CNIC. “*Main takreeban paanch saal pooray zaleel hote rahin hun*” (I’ve been humiliated for five years trying to get it). NADRA requested her birth certificate, which was really difficult to acquire due to a disconnect from her family. She managed to contact her brother and obtain the birth certificate. As for obtaining a self-perceived gender CNIC, “*Main toh chahti thi, mere bhai ne bhi bola that, k jis jins ki marzi hai waisa aap likh lein. Jab humein nahi ehtraz toh aap ko kya ehtraz hona chahiyeh hai? Lekin unho ne apni marzi ki, NADRA walon ne.*” (I wanted, even my brother said, that whichever gender she prefers write that one. When I do not have an objection, then why should you? But the NADRA people did as they pleased.)

Similarly, Mahira communicated that upon entering NADRA, already hesitant about asking for her self-perceived gender CNIC, the officer exclaimed “*tum larka ho k larki ho?*” (Are you a boy or a girl?!). That, and the fact that according to her there is a lot of “bureaucratic red tape” involved was enough to prevent her from going again to obtain a self-perceived gender CNIC.

Rida has no CNIC. Efforts were made to get one, yet she could not as her mother was sick, thus she did not ask her nor did she ask her father, not elaborating why. Similarly, unable to bring her mother or *guru*, Ghazala could not get her CNIC. She asked, “Where do we bring them from?” referring back to bad family relations due to gender identity. She did not desire to make it through her *guru*, similar to Sanya, who lacks hers because she was told at NADRA to not put her parents name, and she did not want to put her *gurus* name on her CNIC.

Nabila and Sidra never attempted to make their CNIC. Nabila reported it was because of the lack of need. However, both expressed the desire for one.

Majority of difficulties reported by participants in lacking a CNIC related to the police. These experiences were heavy in volume, warranting an individual section later in this paper. Other difficulties reported were insufficient access to healthcare facilities and inability to vote. The following sections will address these difficulties as well amongst exclusion faced due to a lack of acceptance of gender identity. At present, Kabeer's framework of social exclusion will be applied to the above experiences.

Most experiences above fall into two practices of social exclusion, what Kabeer calls "*mobilisation of institutional bias*" (2000:91) and "*unruly practices*" (ibid.:92). Institutional bias is when the "rules of the game" benefit one group, systematically excluding others (ibid:91). An example being in workplaces, where the job requirements are "neutral characteristics", nevertheless the demands of the job are such that women, having the dual responsibility of unpaid domestic work, cannot possibly participate (ibid.:92). Therefore, such jobs are institutionally biased towards men (ibid.). Similarly, the procedure of procuring a CNIC is institutionally biased against *khwaja saras*. Established previously, majority of *khwaja saras* leave home when young, lacking good relationships with their family. Rida and Ghalaza's experiences demonstrate that obtaining a CNIC is nearly impossible without the accompaniment of a family member. NADRA requires a family members CNIC or attestation of birth documents from a blood relative to register one as an independent citizen of Pakistan (NADRA 2019). The 'rules of the game' are oriented towards those with positive kinship ties. The rules of NADRA are systematically denying recognition to *khwaja saras* who lack support of the family. Additionally, this institutional bias systematically and socially excludes *khwaja saras* from participating in life as a citizen of Pakistan. Due to this lack of recognition, misdistribution, denial of identity, and thus sexual rights, they are further misrecognized as will be seen in section 4.3.

Some of the experiences with NADRA can be attributed to unruly practices. Unruly practices "refer to the gap between rules and their implementation which occur in practice in all institutional domains" (Kabbeer 2000:92). Distribution of goods and services as dictated by institutional rules, the court rulings of 2009, 2011 and the Protection Act in this case, will not be implemented as "there are various unofficial norms which will shape actual provisions and will mediate people's ability to gain access to goods to which they are officially entitled" (ibid.:93). Experiences demonstrate these unofficial norms. Laila's inability in obtaining a self-perceived gender CNIC illustrates unruly practices occurring, as section 3 subsection 2 of the Protection Act states "A person recognized as transgender under sub-section (1) shall

have a right to get himself or herself registered as per self-perceived gender identity with all government departments including, but not limited to NADRA.” (Appendix B:3). Similarly, Sanya experienced unruly practices, as the individual has the right to put their *gurus* name or their parent’s name, as per *Khaki v Rawalpindi*. Mahira’s experience can be labelled unruly practices, although she was not denied the right to register as her self-perceived gender, the NADRA official’s attitude did not adhere to the laws at the time. This can be attributed to societal stigma of non-gender norm conforming identities. Through these unruly practices, the state is violating *khwaja saras* right to recognition as per the Act and principle 3 of the Yogyakarta Principles.

The lack of a CNIC, and thus the lack of recognition translates into a hinderance of the opportunity for the enjoyment of socioeconomic and political participation and thus redistribution and sexual rights. Further hinderance and social exclusion manifests in the form of additional unruly practices related to both legal and personal identity, pertaining specifically to the police and general public, causing further misrecognition despite legal recognition rights. Observe this in the following section through the experiences of *khwaja saras* in the areas of livelihood, police treatment, dignified access to health care and political participation.

4.3 Opportunity and Redistribution

There are various institutions from which *khwaja saras* experience social exclusion. The opportunities available to them in the areas of employment, law enforcement and freedom, healthcare and political participation will be elaborated in this section. Throughout this elaboration, the voices of the *khwaja saras* will show the ways in which ideologies of stigma and a lack of recognition through CNICs negatively impacts the available opportunities. Additionally, the ways in which these impacted opportunities lead to social exclusion and thus a denial of sexual and human rights will be argued, as the stigma and its various repercussions manifests the denial of the right to be a dignified citizen.

Right to Dignified Livelihood

Recall the majority of *khwaja saras* earn through begging, dancing or sex work (Hahm 2010:1). Demonstrated by the lived realities of the participants, they opt or are pushed to such occupations due to stigma surrounding their identity. The public sees such occupations as the only fit for *khwaja saras*, illustrated by social media comments. A report on social media and the debut of transgenders in Pakistan’s elections illustrated that comments like

“*Transgender kay jo kam hai woi karin siyasat mai anay ki zaroorat nai unhain*” (Do the work that transgenders do there is no need to enter into politics) along with other derogations circulated major social media outlets (Usama 2018:16). The misrecognition of *khwaja saras* manifesting in the stigmatized label of the ‘diseased’ *khwaja sara* body as only capable of criminalized forms of work is ever present.

Of the seventeen participants, eight of them earn solely through begging, the rest earning by dancing at functions. Two earned through both begging and dancing. It is pertinent to point out that all participants, save for one who studied until 8th grade, lacked education or had only 1-3 years of primary education as a result of bullying in schools due to gender identity, and/or poverty. This translates into limited work opportunities they could undertake as most formal employment requires education.

Voices: Denial of Livelihood

Many reasons were cited for not being able to find employment/alternate forms of livelihood; those pertaining to discrimination will be presented. It is pertinent to know that every participant expressed desire for an occupation with *izzat* (respect/dignity), as one of the research aims is to understand how *khwaja saras* attempt to attain a ‘dignified’ standard of living. Majority of the following experiences contain subtext of, or openly, the desire for a dignified job over any.

Bano, who now begs, once worked at a home. She expressed, “*bahar itna zaleel nahi huwa jaata jitna ghar mein kiya jaata hai, bahir bhi log izzat sey bula letein hain, ghar mein baachon bhi humein khusra khusra bulatin hain.*” (We do not get as humiliated outside as we do in homes, outside people will at least refer to us respectfully, in homes the children even call us *khusra*). *Khusra* is derogatory, therefore Bano quit. Similarly, Nabila found a job in a home; however, the guests of her employers made issue with them employing a *khwaja sara*, resulting in her termination.

Shahida remarked “*Pata kya baat hai, jab hum log maangne jaatein hai na toh sab hi yehi kehtein hain k nokri karo, lekin nokri koi deta nahi hai.*” (You know what, when we go out to beg, people tell us to get a job, but no one gives us a job.) Repeatedly she has tried to gain employment at homes, even going for interviews, yet whenever she arrived for these interviews she was always told that the position is already filled. She has not searched for jobs in public places such as hospitals/hotels because *khwaja saras* already lack respect there, therefore no one would employ her. Similar to lack of respect, Sara expressed that even if she

obtained occupation at e.g. a clothing store, people would harass her, only seeing her as a “*khusra*”.

Jamila refrained from finding alternative occupations because then she would have to give up her feminine gender expression, which she does not desire. She does not want to beg, but not more so than expressing her gender identity. Alternatively, Sidra expressed she could never work alternative jobs in Pakistan with dignity, due to her current occupation (dancing) being shameful.

Purwa and Laila cited lack of opportunity for not being able to find alternative occupations.

Majority participants reported getting arrested due to begging, resultantly many resorted to dancing. However, they took issue with two factors, illustrating their legal consciousness on the matter. During one interview someone remarked that begging is illegal, eliciting justified retorts from participants. Bano questioned why implementation is only recent (also targeted as will be seen), despite its illegality since 1958. Lamia and Ghazala argued they would not have to beg if the government/society would provide jobs, claiming they should be allowed to beg. Bano agreed because if she could not beg, unable to find employment elsewhere, she would unwillingly have to engage in sex work. Furthermore, she desires employment where her identity is respected, as do Jamila and Sara. Their living law dictates they would rather beg or dance than work in occupations intolerant of their gender identity, demanding due recognition and their sexual rights. The second issue was the recent prohibition on functions after midnight. Sara reported loudspeakers at the functions forcefully taken away; expressing need for the prohibition to be lifted as she lacked alternative livelihood. She argued the government should provide funds if they are prohibited from engaging with their current livelihood methods. This can be attributed to institutional bias; *khwaja saras* are unable to find alternative employment elsewhere due to societal rejection of their gender identity, despite this the government has not allocated employment quotas for them. By criminalizing their main methods of livelihood the government is indirectly taking away their right to employment, resultantly preventing redistribution despite the right being entrenched in the Act under section 9, whereas “The Government must ensure the right to enter into any lawful profession or occupation, and to conduct any lawful trade or business for the Transgender persons.” (Appendix B:7). Despite the usage of ‘lawful’ employment, their ed-

educational background and gender identity limits their opportunity to gain 'lawful' employment. The aim would be to create an environment where *khwaja saras* can engage in lawful employment whilst performing their preferred gender expression, thus realizing their sexual rights. Due to the exacerbated circumstances of their social exclusion, the likelihood of lawful employment without quotas seems unrealistic. However, in a lack of redistribution efforts the government did not include a hiring quota in federal institutions, despite gender quotas having shown to "increase women's representation" (Schwindt-Bayer 2009:5). As per the transactivist, it is one of many things not included in the Act because the census only reported 10,418 transgenders in Pakistan. Due to these low numbers the introduction of a quota was not legally justifiable despite the fact that many organizations have declared the population of transgenders to be far more, between half a million and a million (Religion News Service 2016). The low official numbers can be attributed to the government's incompetence in registering *khwaja saras* and aptly including them in the census, similar to the failed redistribution of CNICs (Bokhari and Khan 2019:2). Of course, the low numbers can also be attributed to the stigma surrounding the identity, thus trans* individuals would not feel comfortable disclosing it to government officials. However, despite the duty bearer being largely at fault, *khwaja saras* are the ones being denied their sexual rights in the form of the right to employment. The lack of redistribution efforts leads to misrecognition as the above social media comment illustrates. Criminalization of their current forms of work causes further misrecognition, manifesting in negative experiences with the police in regard to begging.

Right to Freedom From Arbitrary Arrest

The majority of participants reported negative treatment from police officials when asked about difficulties faced from institutions and public officials. Their experiences will now be presented.

Voices: Denial of Freedom

Police attitudes toward *khwaja saras* can be encapsulated by Bano's statement. "*Police wali ki wardi dekh kar na, woh toh humare samne khuda ban jaate hain.*" (Looking at a police officer's uniform, they become God in front of us). Bano articulated no disrespect from public officials except for the police. Begging being illegal, she has been arrested by police on this account. However, rather than taking her to jail, policemen take her money and release her. Similarly, police have taken Shahida to the station when arrested for begging, only

demanding money from her. Such treatments demonstrate unruly practices occurring. Furthermore, Laila expressed the police arrests only *khwaja saras* for begging. In the market, many other men and women are begging; however, the police targets *khwaja saras*. Lamia and Bano agreed. Nabila was arrested for begging, and Purwa only because she protested the formers arrest, both spending several days in solitary confinement as there was no other cell for *khwaja saras* in Adyala Jail. The section 6b of the Protection Act states, “Establish separate prisons, jails, confinement cells, etc for the transgender person involved in any kind of offence or offences” (Appendix B:5). Clearly unfulfilled, this demonstrates unruly practices by police and public officials. Similarly, Purwa’s arrest was unlawful, not having committed any crime. Rida mentioned recurring patterns of *khwaja saras* being arrested for protesting another’s arrest, demonstrating the polices bias against *khwaja saras*, as even when not committing a crime they are targets of arrest.

These experiences show bias from uniformed officials, only arresting those they have a prejudice against for transgressing gender norms. The police also perceive them as an immoral identity; one *khwaja sara* reported when filing a complaint with the police she was met with “How can you register a FIR [First Information Report] against the assaulter when this is your profession?” (Correspondent 2016). During fieldwork, the issuance of an unofficial order to arrest *khwaja saras* by one head policeman was communicated by the participants, prompting many to leave the capital to avoid imprisonment. Misrecognition causes such unruly practices, leading to further misrecognition due to a lack of redistribution i.e. the police perceive *khwaja saras* as a detested group who commit crimes such as begging or sex work. This stereotyping is produced by and results in misrecognition. Such misrecognition stems from their inability to gain ‘respectable’ employment due to lacking redistribution by the state, established previously. This misdistribution resultantly solidifies the misrecognition they are facing, demonstrated by above experiences. The lack of bivalent justice recreates the “vicious cycle” Fraser spoke of, preventing the realization of *khwaja saras* sexual rights, as Yogyakarta principle 7 entrenches the right to freedom from arbitrary arrest or detention (2006:15), and principle 9 envisions the right to treatment with humanity while in detention (ibid.:16).

The above holds heavy for *khwaja saras* lacking a CNIC. Ghazala expressed concern over the polices power, for not possessing a CNIC creates vulnerability of being labelled a ‘terrorist’ as she lacks legal identity. Pakistan’s climate rife with incidences of terrorism, bombings having become common occurrence (Kilbride 2015); not possessing a CNIC can

negatively contribute to the stigmatized label of ‘diseased’ and ‘immoral’ already stamped on *khwaja saras*, leading to further misrecognition of the identity. Indeed, the government has held anxieties to this end, that legalizing transgender identities would lead to a rise in crime, as criminals could ‘slip through the cracks’ under the guise of being *khwaja sara* (Mahira, personal communication 15 Aug 2019). Drawing from this, police can exercise their power unchecked on *khwaja saras* without a CNIC, as there is no legal trace of them in the government system.

Lacking legal identity additionally impacts available healthcare options, as will be seen in the next section.

Right to Health

Few participants had sought medical treatment, seen further. One very important factor to note is that no participant even addressed HIV/AIDS. This can be attributed to a lack of knowledge of the disease (Altaf et al 2012:7), and stigma surrounding it. However, the misrecognition from colonial times and thus the discourse in court documents and studies have labelled *khwaja saras* as carriers of/extremely vulnerable to disease, especially due to the stereotyping of *khwaja saras* as either beggars, dancers, or most relevant here, sex workers. *Khwaja saras* report moral judgements and policing from healthcare providers (HCP) (Young Omang 2018:3), preventing many from disclosing their gender identity to HCPs (ibid:4). Even mental HCPs have treated their “non-binary gender as a disease” (ibid.:6). To be observed, these discourses of ‘disease’ do not reflect in the lived realities of the participants. Nevertheless, the claim here is not that the *khwaja sara* population is less vulnerable to HIV/AIDS than the average individual, rather it is an attempt at shifting the narrative, demonstrating how *khwaja saras* have been, in the dominant discourse, misrecognized.

Voices: Denial of Healthcare

Shahida sought treatment at Pakistan Institute of Medical Sciences for high cholesterol. She received mistreatment; she could not stand, her feet swollen due to the cholesterol, despite this she could not sit during the two hours she waited. Even Though she obtained the bill for the test, a test time was never provided, prompting her departure to seek treatment elsewhere. She was treated eventually but required accompaniment by another in order for such.

Similarly, having fallen ill Purwa went to the hospital for a consultation. However, she left without receiving treatment, having waited three to four hours without attention. Purwa opted for self-medication instead and has now forsaken government hospitals.

Laila reported visiting a hospital that has allocated two rooms for *khwaja saras*. However, she does not go to the hospital anymore, because instead of receiving medicine, she receives degrading treatment.

Sara is only able to visit the hospital on Saturdays as that is the day allocated for *khwaja saras*, the reason denoted to the public's rude behaviour, not the doctors.

Mahira expressed fear and anxiety of hospitals because of the discrimination she has faced there. Resultantly, she has not visited the hospital in a long time, also expressing fear of showing her male CNIC as her gender expression is feminine, thus exposing her to discrimination and abuse from hospital staff.

Rida conveyed difficulty accessing healthcare due to lacking her CNIC, as even emergency services at hospitals require CNICs for entry, thus she needs to beg a lot for access.

Regarding access on the basis of legal identity, only Rida mentioned the lack of a CNIC hindering access to healthcare. Other participants did not because of owning a CNIC, or not venturing into such spaces due to stigma, discrimination or lack of need. Before addressing dynamics surrounding CNICs it is important to understand dynamics surrounding misrecognition, which *khwaja saras* presently suffer in healthcare. In Right Here Right Now's (RHRN) study, one *khwaja sara* expressed how “[d]octors and other staff members when come to know about my identity they start degrading me and pass derogatory remarks” (Young Omang 2018:3). This and the participants experiences demonstrates their identity is still severely stigmatized, despite section 12b of the Protection Act entrusting the government responsibility “to facilitate access by providing an enabling and safe environment for Transgender Persons in hospitals and other healthcare institutions and centers” (Appendix B:8). A survey in KPK reported 92% of *khwaja saras* discriminated against by HCPs (Young Omang 2018:3). Mahira's hesitance in showing her CNIC and the participants mistreatment along with their reluctance in seeking medical help demonstrates a lack of state initiative in the education and sensitization of HCPs for the needs of *khwaja saras*. This shortcoming causes unruly practices, resulting in misrecognition and the violation of sexual rights. Although the allocation of rooms for *khwaja saras* is an important step towards ensuring the

prevention of cases like Alesha's, it is futile if HCPs remain in the dominant discourse of *khwaja saras* as 'diseased' HIV carriers and 'immoral' sex workers.

Regarding socioeconomic redistribution and the dynamics surrounding CNICs, focus shifts to health insurance. Public health insurance has been empirically validated as a method of redistribution to disadvantaged groups (Henriet and Rochet 2006:80). Zero participants expressed any knowledge about health insurance, similar to the participants in RHRNs study (Young Omang 2018:5). Yet even if they did, the lack of a CNIC means no access to any insurance program. For example, the Sehat Sahulat Program is a health insurance scheme for under-privileged individuals including the transgender population in the KPK province (Yusufzai 2017). However, the first thing on the website is "SMS YOUR NATIONAL IDENTITY CARD NUMBER TO 8500 AND CHECK YOUR ELIGIBILITY IN THE PROGRAM." (Sehat Sahulat Program 2019). Only 1,882 individuals have transgender CNICs (Hussain 2017), meaning majority *khwaja saras* who do have a CNIC are not eligible for the program as they lack the legal transgender identity. Out of the seventeen research participants only three would be eligible, and only in the province of KPK. Those lacking a CNIC lack any access to such government initiatives, nor do they have access to healthcare spaces primarily as Rida mentioned. This can be understood as institutional bias. Albeit providing redistribution to some *khwaja saras*, the government in actuality fails to do so because "the rules of the game" make it impossible for *khwaja saras* to benefit, because of unruly practices and institutional bias by NADRA. Additionally, it is only available in one province. Furthermore, this misdistribution is leading to misrecognition, as *khwaja saras*, by not venturing into public healthcare spaces, are not being integrated on the personal social level, i.e. interaction with HCPs, due to their invisibility. If HCPs are not exposed to *khwaja saras* who have common ailments, they will carry the stigmatized notion of the 'diseased' *khwaja sara* body everlasting, which prevents *khwaja saras* from seeking access to health care in the first place, recreating the 'vicious cycle'. Even allocating a certain day for *khwaja sara* healthcare, as told by Sara, will not rectify any issues as the public lack's exposure to *khwaja saras* in everyday contexts, which maintains a misrecognized identity in their eyes.

Moreover, the above experiences and data speaks to the living law for *khwaja saras*. Despite having some options for gaining access to healthcare, they would rather not access it because of the discrimination they would face. Their deficient knowledge of available options exacerbates their unwillingness to venture into healthcare spaces where they would feel insecure. Their inability to gain bivalent justice manifests their own personal law of self-

medication over treatment from professionals. One *khwaja sara* in the RHRN study expressed “I prefer self-medication, [...] I am afraid to see a doctor because I am sure they will make fun of me” (Young Omang 2018:3). Similarly, Purwa and Laila prefer self-medication over visiting a trained professional. The governments inefficiency in providing proper access to healthcare due to institutional bias and unruly practices, and thus in proving redistribution, has manifested in a legal consciousness which is harming *khwaja saras*, preventing them from attaining their sexual rights as self-medication can cause irreparable harm.

Further misdistribution is experienced in the realm of political participation.

Right to Vote

Very few participants had experiences with voting, as many of them lacked a CNIC and others were unwilling to vote. What this means will be seen in terms of the living law, but also reveals one of the principal repercussions of lacking a CNIC – not being able to participate in the democratic process as a citizen of Pakistan, thus negating the sexual political rights of *khwaja saras*. These processes of exclusion manifest misrecognition. The voices regarding election voting will now be presented and understood in the various above-mentioned frames.

Voices: Denial of Public Participation

Purwa has a CNIC but has never wanted to vote. Even if she ever would, her vote is registered in her hometown which is far, and she cannot travel there.

Similarly, Laila has a CNIC but has never voted, her reason being her deficient knowledge of the meaning and process of voting. If she knew then she would vote.

Jamila and Sara view voting as pointless because the political parties have never done anything for *khwaja saras*. Sara also expressed a lack of inclusive spaces at polling stations, i.e. there is a male and female line, but none for *khwaja saras*. People stare too, so she would rather not go.

For the other participants, those who lack CNICs cannot vote, although Nabila and Sanya expressed the desire to vote once they do. Participants with CNICs expressed views similar to Purwa, Jamila and Sara. The reluctance to vote demonstrates two lines of legal consciousness. Firstly, their ‘living law’ in regard to political participation manifests in self-exclusion from it. Previous governments and political parties exhibited a lack of initiative on

advancing *khwaja sara* rights, and only four political manifestos of the 2018 elections mentioned transgender rights (Bokhari and Khan 2019:3). Due to the lack of recognition from contesting parties, the participants legal consciousness dictates a law of no participation. Secondly, the lack of acceptance they face in such areas dictates the living law of protection of self over protection of rights. A statement on transgender inclusion in the election process identified one key challenge as gender expression inclusion, for *khwaja saras* who wanted to vote at the female booth were forbidden and redirected to the male booth (FDI 2018:2). Many also reported being refused access owing to a mismatch between their gender expression and gender identity on their CNIC (Srivastava and Beresford 2018) despite the fact that section 10 of the Protection Act states that “access to polling stations shall be determined according to the gender declared on the CNIC of a Transgender Person” (Appendix B:8). Other than unruly practices owing to stigma surrounding non-gender-norm-conforming identities taking place, the law demonstrates institutional bias which results in a lack of recognition.

Assuming the possession of a CNIC, above-mentioned, only three participants possessed a self-perceived gender CNIC. The above section from the Act contains a paradox which emerges via institutional bias. As established previously, unruly practices prevent *khwaja saras* from obtaining a self-perceived gender CNIC. Therefore, by legally codifying that gender specific access is based on the CNIC, the ‘rules of the game’ unfairly rob *khwaja saras* right to gender identity, thus violating their sexual rights. clause a) of Yogyakarta principle 25, the right to participate in public life, conditions that states must “Review, amend and enact legislation to ensure the full enjoyment of the right to participate in public and political life and affairs... with full respect for, each person’s sexual orientation and gender identity” (2006:28). By forbidding *khwaja saras* to vote at their preferred gender booth the government is violating their sexual rights while also preventing recognition by devaluing their gender identity. Regarding redistribution, such instances prevent *khwaja saras* from venturing into the realm of political participation, established above. Furthermore, *khwaja saras* boycotted the 2018 elections as the nomination forms did not possess gender options other than male/female (Mehmood 2018), demonstrating insufficient state initiative regarding the integration of the transgenders in formal documents. This institutional bias manifests misrecognition, prevents redistribution, and thus bivalent justice for *khwaja saras*. But this is for the few with CNICs.

Lacking a CNIC means a missed opportunity of political participation. Another key challenge during the 2018 elections was that “majority of transgender citizens do not have their CNIC at all”, attributing responsibility to the inefficiency of NADRA and the election commission (FDI 2018:2). To avoid repetition, be reminded of unruly practices regarding CNICs in section 4.2. The lack of recognition and distribution of CNICs leads to the political exclusion of *khwaja saras*. Furthermore, the government, by not providing education to *khwaja saras* regarding the political process, is creating further repercussions in achieving redistribution.

Laila’s deficient knowledge on the meaning of a vote, and Purwa’s on re-registering her vote demonstrate the need for education. FDI observed inadequate information regarding the above, resulting in a minimum *khwaja sara* voter turnout (ibid.:2). Affirming this is Shahida’s experience of voting, where she was the only *khwaja sara* at the voting booth. Section 6a of the Protection Act dictates government obligation to provide “adult education to the Transgender Persons” (Appendix B:4). Educational authorities demonstrate a lack of initiative, and redistribution, here with no action taken except for an anti-discrimination notification issued in 2018 to schools in Punjab. Nevertheless, some progress on transgender inclusion in the election has occurred, as thirteen transgender candidates ran in 2018 (Bokhari and Kahn 2019:3). However, none of them won, demonstrating a need for a *khwaja sara* election quota. For reasons similar to the lack of an employment quota, the government is failing to redistribute, resultantly preventing recognition and the realization of political sexual rights for *khwaja saras*, as “[p]olitical participation certainly goes a long way in normalising presence of excluded communities in the mainstream” (ibid.:4).

The concluding chapter will string the above presented experiences together, understanding holistically the ways in which legal identity in the form of the CNIC is crucial to the realization of *khwaja saras* sexual rights and their inclusion in society, reflecting on the government as a duty bearer who is preventing such. Attention will also be given to the possibility of ‘transformation’, in regard to the current call for ‘affirmation’.

Chapter 5 From Recognition to Redistribution and the Sexual Rights of *Khawaja Saras*: A Conclusion

This paper has illustrated the various ways in which *khawaja saras* experience social exclusion, misrecognition of their identity and misdistribution of corrective measures through their voices. The various axes of exclusion prevent the realization of their sexual and fundamental human rights. The colonial history labelled *khawaja saras* as an ‘immoral’ identity with ‘diseased’ bodies. Resultantly, the discourse manifested legacies which are the driving force of the social exclusion they face today, a legacy of stigma and disparagement of their gender identity. The voices of the participants regarding their childhood demonstrates dominant ideologies of *khawaja saras* as ‘unnatural’. The resulting abuse they were subject to as young children is what prompted them to leave home, beginning their life long social exclusion.

Without the safety net of kinship ties, obtaining a CNIC is extremely difficult owing to the institutional bias against *khawaja saras*. The state not having addressed the institutional bias, its exclusionary capacity is exacerbated by NADRA's unruly practices. These unruly practices make the acquisition of a CNIC, and one with a *khawaja saras* self-perceived gender, much more unlikely. Lacking a CNIC/self-perceived gender CNIC results in major repercussions. For one, *khawaja saras* lack representation in the national database. Resultantly, measures required to uplift them from their marginalized positions, such as employment and election quotas, are not warranted by state rules due to an official absence of their sufficient population. Secondly, the stigma surrounding *khawaja saras* is further exacerbated when they lack the legal identity affirming their gender identity. This restricts access to institutions, such as the Sehat Sahulat health insurance, or turning *khawaja sara* voters away due to a mismatch between their gender expression and CNIC gender. By being denied the right to a self-perceived gender CNIC, *khawaja saras* sexual rights are violated, as they are not able to exercise their rights to health, employment, and political participation amongst others.

Despite the introduction of the Transgender Persons (Protection of Rights) Act in 2018, this rejection of *khawaja saras* self-perceived gender further misrecognizes them, counteracting the aims of the Act. Such practices manifest a self-exclusionary legal consciousness of *khawaja saras*, where the living law dictates that they refrain from venturing into key institutions such as healthcare. Resultantly, they do not require an ID card because they would

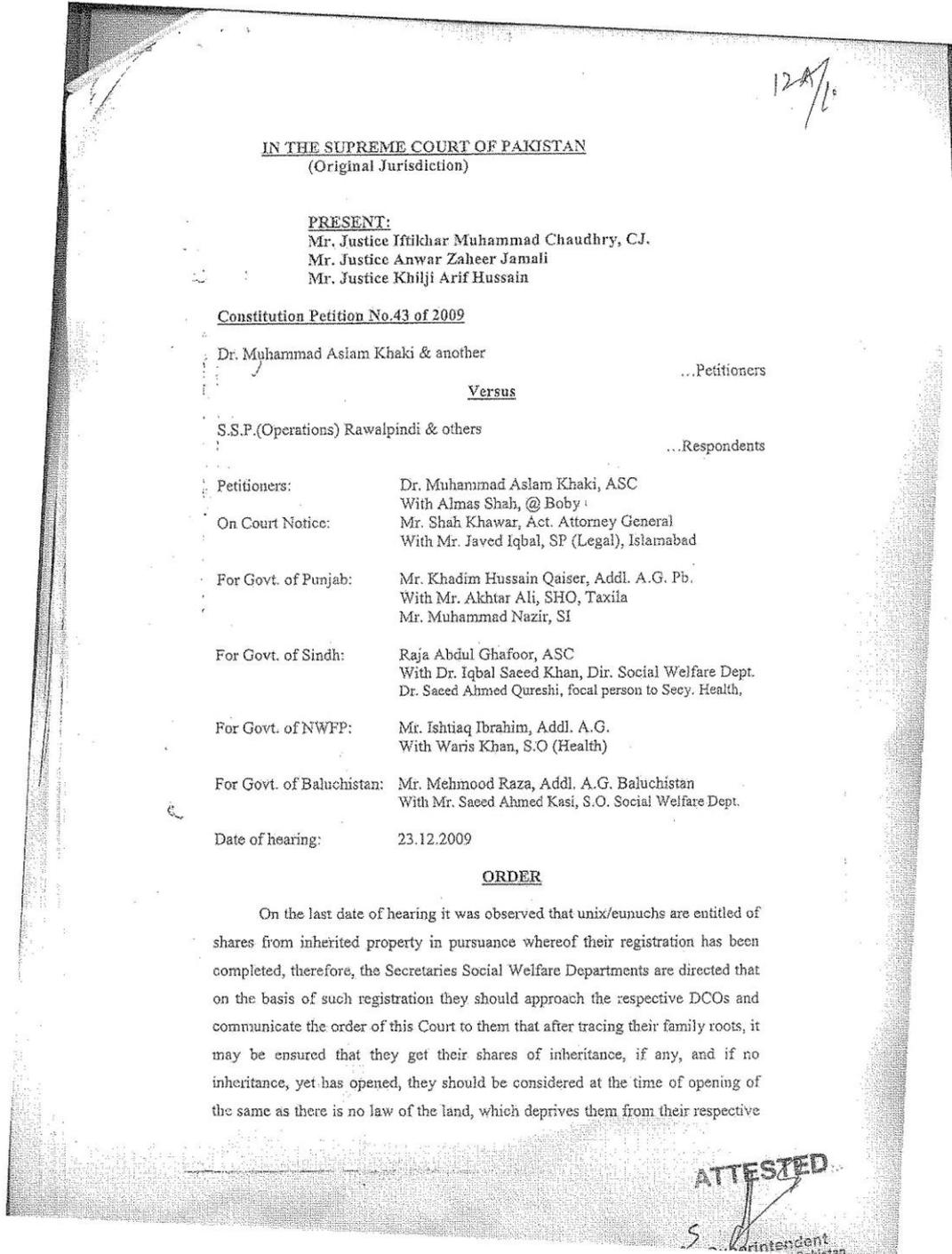
rather remain on the sidelines than face discrimination and stigma stemming from their gender identity. Unfortunately, this exacerbates the situation as doing so reinforces their invisibility in the national database, the repercussions of which are already known.

This results in *khwaja saras* facing further misrecognition because of the occupations they are pushed to i.e. begging, dancing and sex work. These occupations further solidify the stigmatized labels of ‘diseased’ and ‘immoral’, especially in the eyes of the police (but also very much so the public). Yet they strive for a dignified identity, for which they require a ‘lawful’ occupation. However, due to these multiple levels of misrecognition, the general public does not give them jobs as they do not want to associate with ‘diseased’ and ‘immoral’ gender identities (if they would, it would be on the condition of giving up their feminine gender expression). Whereas the government has shown a lack of initiative in redistributing education, trainings and formal job opportunities through a quota. Therefore, the lack of redistribution falls back into this vicious cycle of constant misrecognition, which in turns leads to a denial of their sexual rights and thus full human rights, keeping them at the margins while facing worsening social exclusion. All of these above processes make it impossible for *khwaja saras* to attain a dignified standard of living.

Although it is not the goal of this paper to make recommendations to allow for the better realization of *khwaja saras* rights, it is important to address the possibility of such as a closing remark. In line with the categories of recognition and redistribution, two remedial approaches to achieve bivalent justice can be applied, ‘affirmation’ and ‘transformation’ (1997:23). ‘Affirmation’ involves correction, while ‘transformation’ involves restructuring (ibid.). This paper has argued for the need for affirmation through redistributive quotas and the need for recognition, as the conservative climate of Pakistan is not ready to accept radical changes. However, the passage of a Protection Act for transgenders indicates changes in the states attitude towards gender. Therefore, future studies can study the plausibility of applying transformative measures in the country, thus not only contributing to transgender justice, but gender justice on the whole.

Appendices

Appendix A: Khaki v Rawalpindi 2009 Order



rights. The unix are also directed to cooperate with the authorities in this behalf. However, their family members who have deprived them from their due shares, are also advised not to deny their rights otherwise the law will take its own course. Reports in this behalf shall also be completed and be sent province-wise on the next date of hearing. In the meanwhile this order shall be treated as judgment in their favour for the purpose of getting right of inheritance etc. from moveable and immovable properties left by their predecessors.

2. Mr. Khalid Zaman, Section Officer, Ministry of Interior stated that copy of the order dated 20.11.2009 has been received in their office on 16th December, 2009 therefore, so far, Interior Ministry has not consulted with the NADRA for the purpose of recording exact status of unix in the column, meant for male or female after undertaking some medical tests based on hormones, therefore, on the next date of hearing progress in this behalf shall also be made.

3. Learned Attorney General stated that so far no progress has been made regarding entering the names of the unix in the electoral list. However, Mr. Aslam Khaki, learned ASC stated that names of so many unix have already been registered and some have also contested elections. The Election Authorities of the Provinces are directed to have a contact with the Secretaries Social Welfare Department and after getting the copy of the registration of the unix in the Provinces, they should enter their names in the voter lists on the basis of the I.D. Cards whatsoever they possess and if any change is recorded on the basis of NADRA's entries, the same shall also be carried out in the electoral lists. Copy of this order be also sent to the Chief Election Commissioner for making directions to the concerned authorities.

4. The Provincial and the Federal Governments have also not taken steps for ensuring the admission of the unix in the educational institutions. The Secretary, Social Welfare Department, Sindh, Mr. Iqbal Ahmed stated that steps are being taken for their admission and accommodation in the educational institutions. The remaining Provincial Governments through Secretaries Social Welfare Department, are also directed to follow the same practice and ensure their admission in the educational institutions, because it is their basic and fundamental right to get education in the institution in terms of Article 22 read with Article 25 of the Constitution.

5. Learned Attorney General stated that previously there was a scheme by the name of Adult Education, however, he will inquire from the Federal and the

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Provincial Governments whether such scheme is still there or not. However, in absence of any scheme, the government may ensure admission in the educational institutions including technical and vocational institutions, of all those unix who have not crossed the age of receiving the education so far.

6. It is informed by Mr. Iqbal Saeed, Director Social Welfare Department, Mr. Saeed Ahmed, Director Health, Government of Sindh that unix were involved by these two departments during Polio Vaccination Scheme of this month. Efforts made in this behalf by the Government of Sindh are highly appreciable and we expect that other Provincial Governments shall also follow the same practice. Besides, they shall also accommodate them against other jobs as has already been noticed that steps be made to create some respectable jobs so they may earn their livelihood respectably. In this behalf all the Secretaries of the Social Welfare Department of the Provinces shall submit a comprehensive report.

7. The police authorities apparently had not taken any step to ensure that unix are not being harassed and actions are being taken against those persons who in fact are not unix but by using such status are committing the crimes and ultimately the actual unix are being blamed for the same. In this behalf the IGPs shall instruct their subordinates to adopt a mechanism to ensure that they are not being harassed and their status being of unix be not exercised by other persons etc.

8. Learned Attorney General stated that the Government has decided to prepare a scheme and if need be, legislation shall be made to protect the rights of the unix, being citizens of this Country in terms of Article 25(3) of the Constitution on the same lines as are guaranteed to the other citizens of the Country. Adjourned to a date after one month for receiving the reports.

9. It has been pointed out that in the State of Bihar (India) a strategy has been evolved to provide respectable jobs to the unix like recovery of taxes from the habitual defaulter etc. Extract of such information has been downloaded from the internet which is reproduced herein below:

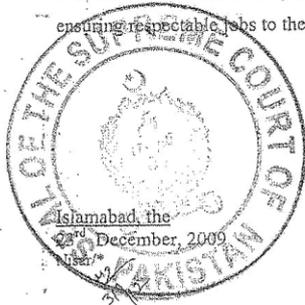
"The Bihar government is trying out innovative ways to involve the eunuchs, also called kinnars or hijras, in socially useful work. It has successfully used the services of eunuchs to recover taxes from habitual defaulters in Patna. Now, the social welfare department plans to rehabilitate them - in a first such rehabilitation scheme for eunuchs. Bihar Social Welfare Minister Damodar Raut told LANS that the government would soon launch a plan for the rehabilitation of eunuchs. "It is in the pipeline. The rehabilitation scheme for rehabilitation scheme for eunuchs will be a reality in the state soon, he said. Eunuchs will be

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Supreme Court of Pakistan
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provided literacy and vocational training to prepare them for respectable regular employment. It will give them the opportunity to enhance their socio-economic status," said Masood Hassan, director of the social welfare department."

10. The Government of Pakistan, Social Welfare Departments as well as the Provincial Governments may also take this information as well for the purpose of ensuring respectable jobs to the UNIX.



Sd/- Afkhar Muhammad Chaudhry J
Sd/- Anwar Zaheer Jamali J
Sd/- Iqbalji Arif Hussain J

Certified to be True Copy
Superintendent
Supreme Court of Pakistan
ISLAMABAD

Case No: 2284/10 Civil/Criminal
 Date of presentation: 6-6-10
 No. of wards: 1200
 No. of pages: 12
 Registration Fee Rs: 5.00
 Copy Fee In: 7.64
 Court Fee stamp: 72.44
 Date of Completion of Copy: 7/4/10
 Date of delivery of Copy: 21-5-10
 Copy: 9
 Compared by/Prepared by: 9
 Received by:

Appendix B: Transgender Persons (Protection of Rights) Act 2018

[AS PASSED BY THE NATIONAL ASSEMBLY]

A

BILL

to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto

WHEREAS it is expedient to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto;

It is hereby enacted as follows: -

CHAPTER I PRELIMINARY

1. Short title, extent and commencement. - (1) This Act may be called the Transgender Persons (Protection of Rights) Act, 2018.

- (2) It extends to the whole of Pakistan.
- (3) It shall come into force at once.

2. Definitions.- (1) In this Act, unless there is anything repugnant in the subject or context,-

- (a) "**Act**" means the Transgender Persons (Protection of Rights) Act, 2018;
- (b) "**CNIC**" means Computerized National Identity Card;
- (c) "**Complainant**" means a transgender person who has made a complaint on being aggrieved by an act of harassment;
- (d) "**CRC**" means Child Registration Certificate or B-Form;
- (e) "**Gender expression**" refers to a person's presentation of their gender identity, and/or the one that is perceived by others;
- (f) "**Gender identity**" means a person's innermost and individual sense of self as male, female or a blend of both or neither; that can correspond or not to the sex assigned at birth;
- (g) "**Government**" means the Federal Government;

- (h) **"Harassment"** includes sexual, physical, mental and psychological harassment which means any aggressive pressure or intimidation intended to coerce, unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with living, mobility or work performance or creating an intimidating, hostile or offensive work or living environment including the attempt to punish the complainant for refusal to comply with such requests or to bring forth the complaint;
- (i) **"NADRA"** means the National Database and Registration Authority;
- (j) **"Notification"** means a notification published in the Gazette;
- (k) **"PMDC"** means Pakistan Medical and Dental Council made under the PMDC Ordinance, 1962;
- (l) **"Prescribed"** means prescribed by rules made by the Government under this Act;
- (m) **"Rules"** means the rules made under this Act; and
- (n) **"Transgender Person"** is a person who is:-
- (i) Inter-sex (Khunsa) with mixture of male and female genital features or congenital ambiguities; or
 - (ii) Eunuch assigned male at birth, but undergoes genital excision or castration; or
 - (iii) a Transgender Man, Transgender Woman, KhawajaSira or any person whose gender identity and/or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.
- (2) A word or expression not defined in the Act shall have the same meaning as assigned to it in the Code of Criminal Procedure, 1898 or Pakistan Penal Code, 1860 (XLV of 1860).

**CHAPTER II
RECOGNITION OF IDENTITY OF TRANSGENDER PERSON**

3. Recognition of identity of Transgender Person. – (1) A transgender person shall have a right to be recognized as per his or her self-perceived gender identity, as such, in accordance with the provisions of this Act.

(2) A person recognized as transgender under sub-section (1) shall have a right to get himself or herself registered as per self-perceived gender identity with all government departments including, but not limited to NADRA.

(3) Every Transgender Person, being the citizen of Pakistan, who has attained the age of eighteen years shall have the right to get himself or herself registered according to self-perceived gender identity with NADRA on the CNIC, CRC, Driving Licence and Passport in accordance with the provisions of the NADRA Ordinance, 2000 or any other relevant laws.

(4) A Transgender Person already issued CNIC by NADRA shall be allowed to change the name and gender according to his or her self-perceived identity on the CNIC, CRC, Driving Licence and Passport in accordance with the provisions of the NADRA Ordinance, 2000.

**CHAPTER III
PROHIBITION OF CERTAIN ACTS**

4. Prohibition against discrimination. – No person shall discriminate against a transgender person on any of the following grounds, namely:-

- (a) the denial of, or discontinuation of, or unfair treatment in, educational institutions and services thereof;
- (b) the unfair treatment in, or in relation to, employment, trade or occupation;
- (c) the denial of, or termination from, employment or occupation;
- (d) the denial of, or discontinuation of, or unfair treatment in healthcare services;

- (e) the denial of, or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment of use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of general public or customarily available to the public;
- (f) the denial of, or discontinuation of, or unfair treatment with regard to right to movement, safe travel, and use of public facilities of transportation;
- (g) the denial of, or discontinuation of, or unfair treatment with regard to the right to reside, sale/purchase, rent or otherwise occupy, inherit any movable and immovable property;
- (h) the denial of, or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; or
- (i) the denial of access to, removal from, or unfair treatment in, government or private establishment, organizations, institutions, departments, centers in whose care, custody or employment a transgender person may be.

5. Prohibition against Harassment. - Harassment of Transgender Persons, as defined in this Act, both within and outside the home, based on their sex, gender identity and/or gender expression is prohibited.

CHAPTER IV OBLIGATIONS BY THE GOVERNMENT

6. Obligations of the Government. - The Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society, namely: -

- (a) Establish Protection Centers and Safe Houses to ensure the rescue, protection and rehabilitation of Transgender Persons in addition to providing medical facilities, psychological care, counseling and adult education to the Transgender Persons;

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- (b) Establish separate prisons, jails, confinement cells, etc for the transgender persons involved in any kind of offence or offences;
- (c) Institute mechanisms for the periodic sensitization and awareness of the public servants, in particular, but not limited to, law enforcement agencies and medical institutions, relating to the issues involving the Transgender Persons and the requirement of protection and relief of such persons;
- (d) Formulate special vocational training programmes to facilitate, promote and support livelihood for Transgender Persons;
- (e) Encourage Transgender Persons to start small business by providing incentives, easy loan schemes and grants; and
- (f) Take any other necessary measures to accomplish the objective of this Act.

**CHAPTER V
PROTECTION OF RIGHTS OF TRANSGENDER PERSONS**

7. Right to Inherit. – (1) There shall be no discrimination against Transgender Persons in acquiring the rightful share of property as prescribed under the law of inheritance.

(2) The share of Transgender Persons shall be determined as per the gender declared on CNIC in accordance with the law of inheritance in Pakistan.

(3) The share of inheritance for transgender persons will be as follows:

(i) For Transgender Male, the share of inheritance will be that of man;

(ii) For Transgender Female, the share of inheritance will be that of woman;

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- (iii) For person who has both male and female or ambiguous characteristics, such as their state is difficult to determine upon birth, following shall apply:-
- (a) Upon reaching the age of 18 years, if the person's self-perceived gender identity is Transgender Male, the share of inheritance will be that of man;
 - (b) Upon reaching the age of 18 years, if the person's self-perceived gender identity is Transgender Female, the share of inheritance will be that of woman;
 - (c) Upon reaching the age of 18 years, if the person's self-perceived gender identity is neither Transgender Man nor Transgender Woman, the share of inheritance will be an average of two separate distributions for a man and a woman; and
 - (d) Below the age of eighteen years, the gender as, determined by medical officer on the basis of predominant male or female features.

8. Right to Education.- (1) There shall be no discrimination against Transgender Persons in acquiring admission in any educational institutions, public or private, subject to fulfillment of the prescribed requirements.

(2) All educational institutions shall provide education and opportunities for sports, recreation and leisure activities without any discrimination, and on an equal basis with others.

(3) The Government shall take steps to provide free and compulsory education to Transgender Persons as guaranteed under Article 25A of the Constitution of the Islamic Republic of Pakistan, 1973.

(5) It is unlawful for an institution whether private or public, to discriminate against a person on the ground of person's sex, gender identity and/or gender expression, including but not limited to:

- (a) in determining who should be offered admission; or
- (b) in the terms or conditions on which admission is offered; or
- (c) by denying the person's access, or limiting the person's access, to opportunities, training or to any other positive externalities associated with the education; or
- (d) by denying access to appropriate student facilities based on a person's sex, gender identity and/or expression.

9. Right to employment.– (1) The Government must ensure the right to enter into any lawful profession or occupation, and to conduct any lawful trade or business for the Transgender Persons as guaranteed under Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973.

(2) No establishment, institution, department, organization, shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion, appointment, transfer and other related issues.

(3) It shall be unlawful for an employer to discriminate against an employee on the ground of their sex, gender identity and/or gender expression:

- (a) in determining who should be offered employment; or
- (b) in the terms or conditions on which employment is offered; or
- (c) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or

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- (d) by dismissing the employee; or
- (e) by subjecting the employee to any other detriment.

10. Right to Vote. – No Transgender Person shall be deprived of their right to cast a vote during national, provincial and/or local government elections:

Provided that the access to polling stations shall be determined according to the gender declared on the CNIC of a Transgender Person.

11. Right to hold public office. – (1) There shall be no discrimination on the basis of sex, gender identity and/or gender expression for Transgender Persons if they wish to contest election to hold public office.

12. Right to Health. – The Government shall take the following measures to ensure non-discrimination in relation to Transgender Persons, namely: –

- (a) to review medical curriculum and improve research for Doctors and nursing staff to address specific health issues of Transgender Persons in cooperation with PMDC;
- (b) to facilitate access by providing an enabling and safe environment for Transgender Persons in hospitals and other healthcare institutions and centers;
- (c) to ensure Transgender Persons access to all necessary medical and psychological gender corrective treatment;

13. Right to assembly. – (1) The Government must ensure the freedom of assembly for Transgender Persons in accordance with Article 16 of the Constitution of the Islamic Republic of Pakistan, 1973.

(2) The Government must take steps to ensure appropriate safety measures for Transgender Persons.

(3) No discrimination shall be made on the basis of person's sex, gender identity and/or gender expression subject to reasonable restrictions imposed by law in the interest of public order.

14. Right of access to public places. – (1) No Transgender person shall be denied access to public places, places of entertainment or places intended for religious purpose solely on the basis of their sex, gender identity and/or gender expression.

(2) The Government must ensure Transgender Persons access to public places in view of Article 26 of the Constitution of the Islamic Republic of Pakistan, 1973.

(3) It shall be unlawful to prevent Transgender Persons to access facilities available for access of general public and public places mentioned in sub-section (1).

15. Right to property. – (1) No Transgender Person shall be denied right to purchase, sell, rent or lease property, household or tenancy on the basis of sex, gender identity and/or gender expression.

(2) It shall be unlawful to discriminate any Transgender Person with regards to renting, subletting or tenancy on the basis of their sex, gender identity and/or gender expression.

16. Guarantee of Fundamental Rights. – (1) In addition to rights mentioned in this chapter, Fundamental Rights mentioned in Chapter I, Part II of the Constitution of the Islamic Republic of Pakistan, 1973 shall be available unequivocally for every Transgender Person.

(2) It shall be the duty of the Government to ensure that the fundamental rights mentioned in sub-section (1) are protected and there shall be no discrimination for any person on the basis of sex, gender identity and/or gender expression.

17. Offences and Penalties.- (1) Whoever, employs, compels or uses any transgender person for begging shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees or with both.

**CHAPTER VI
ENFORCEMENT MECHANISM**

18. Enforcement Mechanism. – In addition to the remedies available under the Constitution or Pakistan Penal Code 1860, Code of Criminal Procedure, 1898 or the Code of Civil Procedure 1908, the aggrieved transgender person shall have a right to move a complaint to the, Federal Ombudsman, National Commission for Status of Women and National Commission of Human Rights (NCHR) if any of the Rights guaranteed herein are denied to him or her.

**CHAPTER VII
MISCELLANEOUS**

19. Act having over-riding effect to any other law.– The provisions of this Act shall have an over-riding effect on any other law for the time being in force.

20. Power of Government to make rules.– The Government may, by notification, make rules for carrying out the purposes of this Act.

21. Power to remove difficulties.– If any difficulty arises in giving effect to the provisions of this Act, the Government may make such order or give such directions, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

STATEMENT OF OBJECTS AND REASONS

Transgender people constitute one of the most marginalized communities in the country and they face problems ranging from social exclusion to discrimination, lack of education facilities, unemployment, lack of medical facilities and so on. The Supreme Court of Pakistan passed a ruling in 2009 stating that no Pakistani laws provide room to disenfranchise "eunuchs" from their fundamental rights. Though Article 25 of the Constitution of the Islamic Republic of Pakistan guarantees to all citizens equality before law, clause (1) of Article 26 and clause (1) of Article 27, inter alia prohibit, in explicit terms, discrimination on the basis of sex and Article 19 ensures freedom of speech and expression to all citizens, yet the discrimination and atrocities against Transgender Persons continue to take place.

The Transgender Persons (Protection of Rights) Bill, 2017 seeks to:

- (i) define a Transgender Person;
- (ii) prohibit discrimination against Transgender Persons;
- (iii) confer right upon Transgender Persons to be recognised as such, and a right to self-perceived gender identity;
- (iv) provide that no establishment shall discriminate against Transgender Persons in matters relating to employment, recruitment, promotion, education and other related issues; and
- (v) provide for welfare measures by the Government for Transgender Persons.

The Bill seeks to achieve the above objects.

**SENATOR RUBINA KHALID
SENATOR RUBINA IRFAN
SENATOR SAMINA SAEED
SENATOR KALSOOM PARVEEN
SENATOR KARIM AHMED KHAWAJA
MEMBERS-IN-CHARGE**

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