



CHANGING THE LAW:  
**A CASE STUDY**

# Pakistan Transgender Persons (Protection of Rights) Act 2018



## ACKNOWLEDGEMENTS

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# Summary

## **Transgender**

### DEFINITION:

*Transgender (or trans)* is a term used to describe people whose gender identity differs from the sex assigned to them at birth. Globally, the term *gender diverse people* may be used to encompass a wider variety of gender identities and expressions, particularly those in the global south and east that are not represented by the term transgender.<sup>1</sup> This report uses the term transgender to describe Pakistan's gender diverse people, in reflection of the use of this term in the legislation itself.

The Transgender Persons (Protection of Rights) Act 2018 was passed by the Pakistan Senate in March 2018 and by the National Assembly in May 2018. The Bill provides full legal recognition to transgender people on the basis of their self-perceived gender identity, outlaws discrimination on the basis of sex, gender identity and/or gender expression, and includes legal mechanisms for safeguarding the fundamental rights of transgender people in Pakistan.

For several hundred years before the British colonial era, Pakistan's Khawaja Sira community was respected and had a special role in society. However, since colonial times transwomen have been targeted by the state. Although the constitution of Pakistan promises equal rights to all its citizens, the transgender community continues to be marginalised and oppressed by heteronormative structures and is ostracised from mainstream society. Transmen are not considered part of the Khawaja Sira community and have historically lacked these community support structures. In addition to this, transmen face the same loss of personal autonomy that Pakistani women experience in a highly patriarchal system.

## **Khawaja Sira**

### DEFINITION:

*Khawaja Sira* refers to a third gender identity in Pakistan that is typically considered to encompass transgender women and eunuchs, but is not inclusive of trans-masculine identities.

Over the last decade transgender community leaders, activists and civil society organisations (CSOs) came together to push for protective legislation. They were meticulous in their drafting of a Bill, and ensured that they engaged the transgender community from all over Pakistan. The movement that came together to bring this change brought together feminist groups, LGBT+ organisations and other allies and this intersectional approach was key to the success in passing this piece of highly inclusive and gender neutral legislation. Combined with leveraging the expertise of academics, researchers and lawyers who strategised lobbying efforts with the Senate, the National Task Force and various relevant ministries and departments, the legislation became law because of this coordinated approach.

This case study explores the motivations, initiators and political influencers that were instrumental in bringing about legislative reform and ensuring the rights and recognition of transgender people on the basis of their self-perceived gender identity in Pakistan. It also draws out the development and use of alliances, collaborations and movement building between different actors and the use of political spaces to make change happen, including working with political realities and setbacks. We hope some of the lessons learned from the passage of the Pakistan Transgender Persons (Protection of Rights) Act 2018 will prove relevant in other countries of the Commonwealth, where civil society and policymakers are seeking to strengthen legal protections for transgender people and other marginalised groups.

# Pakistan Transgender Persons (Protection of Rights) Act 2018

**The Transgender Persons (Protection of Rights) Act provides legal recognition and protection of the rights and welfare of transgender people in Pakistan. Key features of the Act include:**

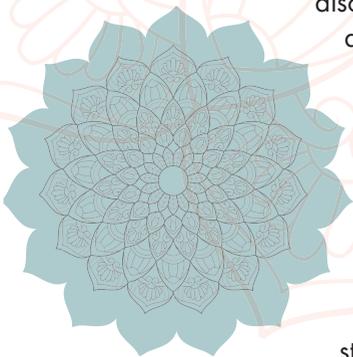
- 1** The right to self-identify as male, female, a blend of either genders or neither, and to have that identity registered on all official documents.
- 2** A prohibition on discrimination based on one's gender identity in educational institutes, employment or occupation, healthcare services, accommodation and other services.
- 3** The legal right to the enjoyment of the use of any goods, the use of public facilities, and the right to reside in, sell or purchase, rent or inherit property and partake in the electoral process.
- 4** A prohibition on the harassment of an individual based on their gender identity.
- 5** An obligation on the government to establish protection centres and safe houses to rehabilitate transgender individuals who have been socially ostracised or victimised.
- 6** The provision of sensitisation and awareness-building in various public institutions including law enforcement agencies and medical institutions.
- 7** A requirement on the government to formulate vocational training programmes for transgender people.
- 8** The legal obligation to provide easy access to credit for transgender people, to increase their ability to start small businesses.
- 9** Underlines the rights of transgender people under the constitution, including their right to inherit, to education, to employment, to vote, to hold public office, to health, to freedom of assembly, to access public spaces and to property.

# Social and legal context

Khawaja Sira have a rich and diverse history in South Asia and historically have held a venerated cultural status in Pakistani society, including holding powerful positions in Mughal Courts prior to the British colonial era. In some parts of the country, Khawaja Sira are considered those whose prayers are answered by God, bestowing on them the unique ability to bring good fortune and fertility to others. During the British colonial era many aspects of local culture that were deemed to fall outside of strict Victorian morality, including more fluid ideas about gender identity, faced newly introduced legal and structural barriers designed to enforce conformity with these foreign norms. The status of Khawaja Sira significantly deteriorated from colonial times resulting in multilevel discrimination and violence. In modern day Pakistan a tension remains in the movement between the historic and cultural third gender concept of Khawaja Sira and the differing concept of transgender, which is inclusive of transmen and which some reject as a foreign notion of gender identity.



Partly as a result of imported colonial-era discrimination and partly due to other existing and changing discriminatory ideas and attitudes in Pakistani society, transgender people (as part of the Khawaja Sira community or otherwise) continue to suffer social and economic marginalisation and stigma. Although the constitution of Pakistan protects all citizens from discrimination on the basis of sex (Article 25) by safeguarding their rights, dignity and status (Article 14<sup>2</sup>, 25A<sup>3</sup>, 28<sup>4</sup>), these rights are not translated into laws and protection mechanisms at the ground level.



The Pakistan Penal Code (Section 377, which is a colonial law) is used to criminalise consensual same-sex acts between men or between Khawaja Sira and is in direct conflict with equality and human rights provisions in the constitution. This law also does not recognise sexual relations among transmen. Also, as the constitution does not guarantee the right to marriage for transgender people, and because Sharia law introduced through the Hudood Ordinance of 1979 criminalises any individual for sex outside of marriage, all sexual interaction between transgender people in Pakistan is illegal by default.

In the legal domain, the utilisation of various legal processes started to have some impact. In 2009, a renowned transgender activists protested against police brutality in Taxila city by setting herself on fire. In response to this the Supreme Court of Pakistan passed a landmark judgment which recognised Khawaja Sira as a third gender and ordered the government to issue National Identity Cards (NIC) to Khawaja Sira that indicated their third gender status. The ruling also stated that they were entitled to protection, education and employment without discrimination.

In 2012 another transgender activist disrupted a press conference of the National Database and Registration Authority, who had introduced a procedure for transgendered people to acquire an NIC which included verification by a medical panel. This led to a ruling by the Supreme Court which made medical tests for the acquisition of an NIC unconstitutional. In 2013, six transgender women filed their nomination papers with the Election Commission of Pakistan and contested incumbents in the general elections. Also, in 2016 the first third gender passport and driving licenses were issued in Pakistan. In 2017, in another landmark moment, the first transman received a male NIC on the basis of self-determination of his gender identity.



In January 2018, the Federal Ombudsman of Pakistan expanded the role of the Commissioner for Children to also be a focal point for transgender concerns, with a view to addressing the grievances of the transgender community and systemic issues through dialogue with key stakeholders.

Despite these advancements, the transgender community has remained particularly vulnerable to emotional, verbal, physical and sexual abuse throughout their lives. Research suggests that in Pakistan nearly all transgender people face violence or threats of violence in various forms. More than 50% of transgender people have reported facing threats and physical or sexual violence from groups of men.<sup>5</sup> As a result of social marginalisation, many Khawaja Sira make a living through begging, sex work or wedding dancing. Those who earn a living through sex work can face high levels of sexual violence and rape, with some studies suggesting that 77% of rape cases documented were of transwomen.<sup>6</sup> Separately, transmen are rarely accepted in Pakistani society as having a distinct gender identity, cannot live freely as men, and are often forced into marriages with cisgender men, thereby being subjected to marital rape and unwanted pregnancy.

It was this broader context that motivated action to draft and pass the Pakistan Transgender Persons (Protection of Rights) Act.

### Cisgender

#### DEFINITION:

*Cisgender* describes people whose gender identity matches the gender assigned to them at birth. It is often used to describe people who are not transgender or gender diverse.<sup>7</sup>

# Conception of the transgender movement

The journey of the transgender movement initially began in 2005 following consultations and a report that focused on HIV interventions and the transgender community. However, the contributions of the local transgender community in mobilising and demanding their fundamental human rights in the face of sexual, physical and institutional violence can be attributed to the already established hierarchy of the *Guru-Chela* system. This system of community structure dates back several centuries, and became a useful tool for Pakistan's gender diverse communities and their allies through which to organise a movement to demand greater rights.

## Guru-Chela

### DEFINITION:

The *Guru-Chela* system is a community system whereby a Khawaja Sira guru (literally teacher or mentor) adopts younger Khawaja Sira chelas (students) in a system of kinship. Groups build a hierarchical structure, where gurus provide chelas with food, shelter and protection in return for contributing to the functioning of the household.

In May 2016 in Peshawar, a transgender woman was shot eight times and died in hospital because of the reluctance of any of the staff to treat her. She was operated on outside a washroom in unsanitary conditions which led to her death. This was the fifth reported case of violence against transgender people in Khyber Pakhtunkhwa in 2016. It prompted nationwide protests organised by gurus, activists, and CSOs who were outraged by the incident. Community activists and CSOs protested outside the Press Club and provincial assemblies and produced numerous media articles that called for the government to legislate to protect the transgender community.

In 2017, Pakistani CSOs drafted the shadow report for Pakistan's Universal Periodic Review process on behalf of the LGBT+ community in Pakistan.<sup>8</sup> The report outlined the grave situation of the community in Pakistan and put international pressure on the government to be more actively involved in the emancipation of the LGBT+ community. Many other actors and organisations also helped to spearhead the transgender movement by developing HIV interventions inclusive of the transgender community. This included many generalist medical organisations which were commendable allies for transgender rights by lending their resources to the cause.

The media also played a role in supporting the movement and sensitising the public on the issues facing the transgender community. Although representation of the transgender community in the media had often been poor, various talk shows and print media outlets were diligent in promoting empathy towards this marginalised community and increasing public awareness of the situation.



# Development of the Bill

## FIRST RESPONSE BY THE STATE

In January 2017 a Bill seeking protection of the rights of transgender people was moved in the Senate as a Private Members' Bill. However, the trans community raised a key concern that the Bill was a close copy of the Indian Bill for Transgender Persons (Protection of Rights), without consideration for the difference in the social climate of the two countries. The proposed Bill did not allow self-determination of gender and asked for medical tests as part of the gender recognition process. This was in direct conflict with the 2012 Supreme Court judgment. The Bill was rejected by the Senate before it could be formally voted upon.

### Derah

DEFINITION:

Communal households for the *Khawaja Sira* community where they live together in group.

## SENATE FUNCTIONAL COMMITTEE ON HUMAN RIGHTS

After this setback, the Senate Functional Committee on Human Rights tasked the National Commission for Human Rights (NCHR) to redraft the Bill. NCHR partnered with the UN Development Programme (UNDP) for provincial consultations, holding various consultation meetings and using the feedback to draft a new Bill for the transgender community. However, the consultation meetings did not allow open access to activists and therefore were not representative of the diversity of the transgender community. The resultant Bill sought to redefine cultural systems like the Guru-Chela system and dictate gender labels to the local transgender community rather than incorporating their suggestions. This meant that the Bill was very unpopular with many transgender activists.

## ▶ ACTIVISTS/CSOs STEPPING IN

In May 2017, transgender activists and representatives of various CSOs stepped forward to take the initiative to draft a new parallel Bill of their own. This meant there were now two Bill documents being drafted to legislate for transgender rights (one led by the NCHR and one led by activists). The various CSOs decided to seek out empathetic senators to endorse their Bill. In the meantime, activists, CSOs and lawyers of the Feminist Collective, in association with senior transgender activists, held meetings at *derahs* and community-based organisations to brief about the Bill. In June 2017 the activists' Bill received support from Senator Farhatullah Babar when he endorsed the Bill and presented it to the Senate floor.

## ▶ NATIONAL TASK FORCE (BY FEDERAL OMBUDSMAN'S OFFICE)

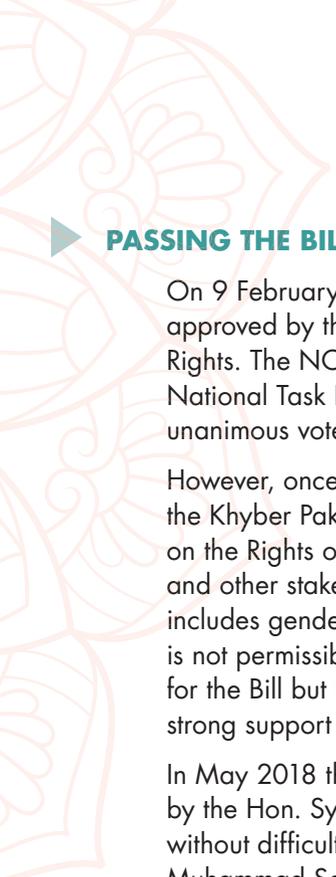
Following this, the National Task Force was set up by the Federal Ombudsman's office and was chaired by Senator Rubina Khalid, while Syeda Viqar un Nisa (Commissioner for Children and Transgender People) served as the coordinator. The National Task Force included senators, policy experts, academics, researchers and several activists and members of the transgender community. Over two months a number of drafting and strategy meetings were held at the office of the Federal Ombudsman where everything from the language of the Bill to its contents were discussed in detail. Parliamentarians, senators, religious leaders, lawmakers and institutional heads were engaged at these task force meetings. For perhaps the first time these representatives and lawmakers were faced with the actual people for whom they were drafting the Bill and were made to directly address their concerns. The task force was introduced to transmale activists who raised issues of identifying their distinct gender identity outside of the Khawaja Sira community. The draft of the Bill was then discussed with the heads of government departments and representatives from the Ministry of Human Rights, Ministry of Law and Justice, and the Social Welfare Department. From the beginning the task force was successful in making a case for both Khawaja Sira and transmen being included in the Bill.

## ▶ SUBMITTING THE FIRST DRAFT

As a result of these two parallel processes, in July 2017 the two Bills – *The Transgender and Intersex Persons (Promotion and Protection of Rights) Bill* by the NCHR and *The Transgender Persons (Protection of Rights) Criminal Law (Amendment) Act* by the National Task Force – were submitted to the Senate. From August to December 2017 the two Bills were discussed in the Senate over several meetings and the language, content and the definition of the words transgender and intersex were debated. During this process the task force worked hard not to compromise on any of the objections that were put forward by Senators. The task force warned the NCHR of the implications of using the word intersex in the title of the Bill, with concern that the word sex would be considered vulgar by parliamentarians and the Council of Islamic Ideology, which would assure its downfall.

## ▶ COUNCIL OF ISLAMIC IDEOLOGY

In January 2018 members of the National Task Force held a meeting with the Council of Islamic Ideology (CII). This was one of the most crucial aspects of the entire process. Convincing the CII to support a number of clauses in the Bill was identified as a particular challenge, especially the definition of the word transgender through the lens of Sharia law. The National Task Force used scientific research and Islamic jurisprudence to give contextual evidence on the plight of the transgender community in Pakistan through the eye of Islam. An academic gave evidence of the recognition under Sharia law of more than just two genders and the various excerpts from religious texts that spoke of transgender rights. Legal experts quoted international laws and legal precedents from countries with progressive legislation on transgender rights that allow transgender communities the right to self-determination. With the help of the religious texts and scientific evidence, the CII came on board to lend their support for the National Task Force's Bill.

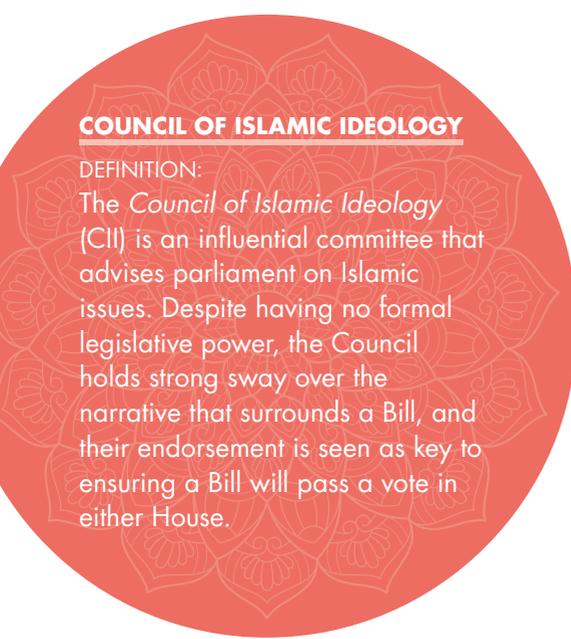


## ▶ PASSING THE BILL IN THE SENATE

On 9 February 2018, the National Task Force's Bill was approved by the Senate Functional Committee on Human Rights. The NCHR's Bill was withdrawn. In March 2018 the National Task Force's Bill was passed by the Senate in a unanimous vote.

However, once the Bill was passed in the Senate, a member of the Khyber Pakhtunkhwa's Chief Minister's Special Committee on the Rights of Transgender Persons started to lobby the CII and other stakeholders to oppose the Bill on the grounds it includes gender affirming surgery as a right. They argued this is not permissible in Islam. The CII eventually withdrew support for the Bill but by then it was too late and the Senate was in strong support of the legislation.

In May 2018 the Bill was introduced in the National Assembly by the Hon. Syed Naveed Qamar MP, where it was passed without difficulty and was signed into law by acting President Muhammad Sadiq Sanjrani.



### **COUNCIL OF ISLAMIC IDEOLOGY**

#### DEFINITION:

The *Council of Islamic Ideology* (CII) is an influential committee that advises parliament on Islamic issues. Despite having no formal legislative power, the Council holds strong sway over the narrative that surrounds a Bill, and their endorsement is seen as key to ensuring a Bill will pass a vote in either House.

# Key lessons

## ▶ INTERSECTIONALITY

The Bill would not have been possible if the activists working on it had not involved people of diverse backgrounds and expertise in the process. The movement relied on various activists from the feminist movement, from the human rights movement, from LGBT+ groups and other grassroots movements to come together in support of each other and work towards creating a better nation for one minority at a time.

**“With this legislation the focus is on self-determination of identity, rather than our genitals, ensuring transwomen and men the right to be identified under the law.”**

Pakistani transgender rights activist

## ▶ STRATEGIC ADVOCACY

Thorough planning and proper mapping of various stakeholders and allies within the state and outside provides a clear path for developing an advocacy plan. It was careful strategising and the accumulation of evidence and opinion that allowed the movement to largely gain the support of the CII and Islamic parties.



## ▶ **MEDIA SUPPORT**

Developing a detailed media strategy helped to counter the potential for opposition voices to derail legislative reform by using specific media outlets to raise controversy.

## ▶ **TIMING IS KEY**

The Bill was passed just when the government was in its last year, when most parliamentarians were preoccupied with elections and the media was also distracted. At the point the legislation was tabled, the Senate was largely progressive and there was minimal political deadlock in the National Assembly, allowing for its smooth passage into law.

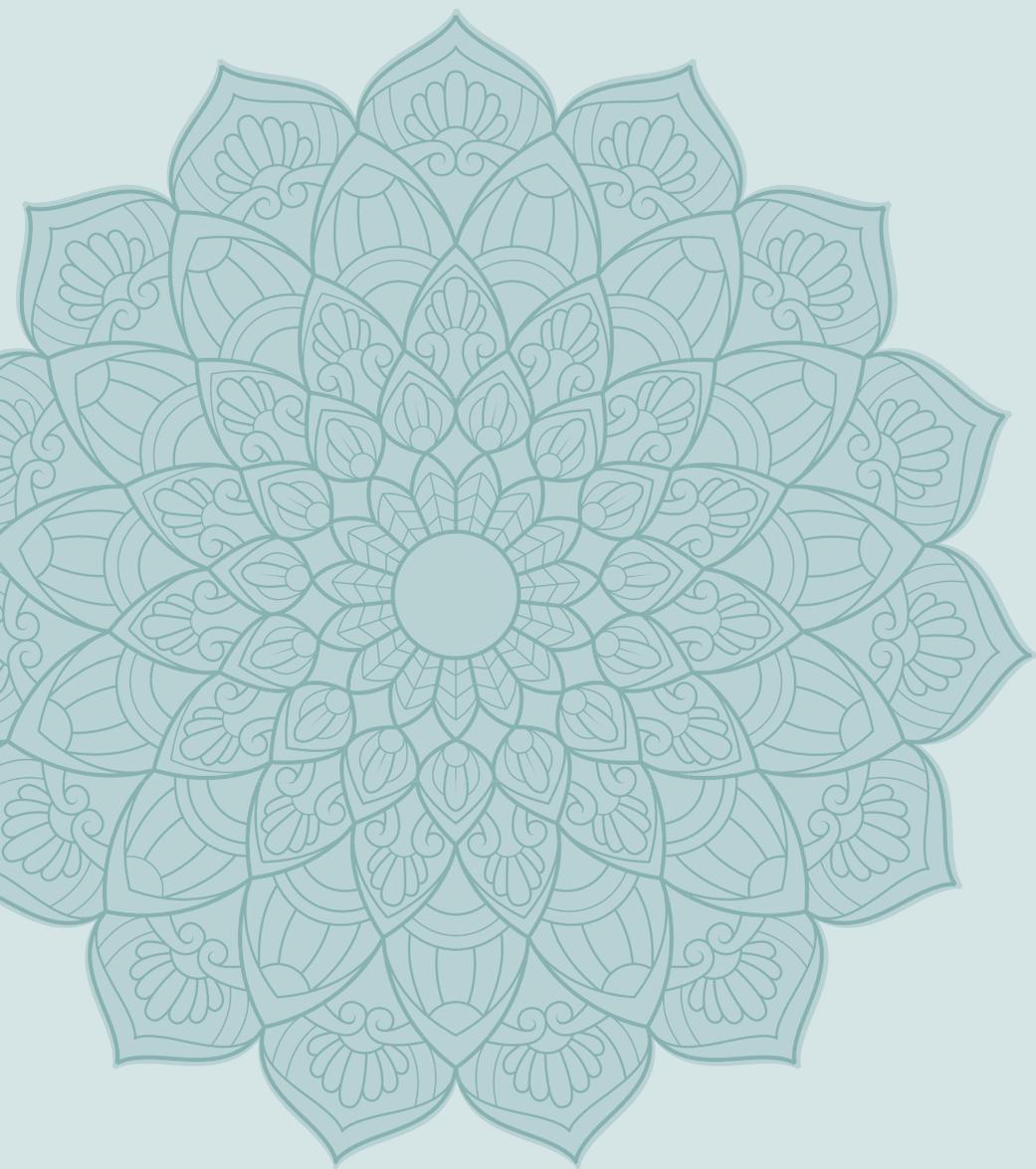
## ▶ **INTERNATIONAL ADVOCACY**

The Bill would not have been possible without the timely support of international human rights mechanisms. The UPR Shadow Report created a favourable environment for the Bill by highlighting key issues the Bill should address, and gave parliamentarians the extra push required for maintaining momentum. Pakistani activists rallied international support through embassies and at the UN in favour of the Bill. Strategic pressure at the right time to make sure that the Pakistani state followed through on its promises played a key role in ensuring the success of the Bill.

# References

- <sup>1</sup> Human Dignity Trust (2019), *Injustice Exposed: The Criminalisation of Transgender People and its Impacts* (pp.5-7).
- <sup>2</sup> Inviolability of dignity of man, etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence.
- <sup>3</sup> Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.
- <sup>4</sup> Preservation of language, script and culture. Any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose.
- <sup>5</sup> NAZ Pakistan (2018), *In the Eyes of the Law – Legal challenges to recognition and inclusive rights for transgender people in Pakistan* (pp.62).
- <sup>6</sup> SAHRA (2019), Human Rights Violation Report.
- <sup>7</sup> Human Dignity Trust (2019), *Injustice Exposed: The Criminalisation of Transgender People and its Impacts* (pp.5).
- <sup>8</sup> Forum for Dignity Initiatives & Naz Pakistan (November 2017), Universal Periodic Review of Pakistan Shadow Report.







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