



## Transgender Rights Law in Pakistan: Mental Health Perspective



Ali Ajmal \*

Faiza Rasool †

**Corresponding Author:** Ali Ajmal (LLM, University Law College, University of the Punjab, Lahore, Punjab, Pakistan. Email: [forensicanalysis007@gmail.com](mailto:forensicanalysis007@gmail.com))

**Abstract:** *The Transgender Persons (Protection of Rights) Act, 2018 is an exclusive statutory law dealing with the rights of transgender persons in Pakistan, the greatest strength of which is the right given to transgender persons to be recognized based on their self-perceived gender identity. However, in its recent judgement, the Federal Shariat Court struck down some of the key sections of this act by declaring them unIslamic. Gender is a social construct and is different from the biological sex. Gender identity, which is the innermost feeling of a person, cannot be changed. Moreover, transgender identity is not a mental disorder and is different from gender dysphoria. This paper discusses the transgender law in Pakistan in detail and the insights from the field of mental health to understand the transgender phenomenon and to handle transgenders' rights in Pakistan by bridging the gaps between the understandings of relevant stakeholders.*

**Key Words:** Dysphoria, Identity, Transgender, Mental

### Introduction

The Transgender Persons (Protection of Rights) Act, 2018 is an exclusive statutory law dealing with the rights of transgender persons in Pakistan. This act was hailed by the International Commission of Jurists for the inclusion of the definition of the transgender person based on self-perceived gender identity and it was suggested that the other countries are much to learn from Pakistan in this regard (International Commission of Jurists, 2020a). However, in its recent judgement, the Federal Shariat Court struck down Section 2(1)(f), section 2(1)(n)(iii), section 3 and Section 7 of this act for being unIslamic (Hammad Hussain v. Federation of Pakistan and others, 2023).

Historically, transgender persons used to be seen as behaviorally deviant and suffering from mental disorders. But the mental health science stopped viewing gender incongruence as a mental disorder and gender identity disorder is no more a part of the latest versions of the Diagnostic and Statistical Manual of Mental Disorders and the International Statistical Classification of Diseases and Related Health Problems (American Psychiatric Association, 2022; World Health Organization, 2019). However, there is a mental disorder named gender dysphoria, but it does not imply a disorder solely based on gender incongruence or a disorder of identity, rather it is a disorder based on distress due to gender incongruence.

\* LLM, University Law College, University of the Punjab, Lahore, Punjab, Pakistan.

† Research Scholar, Institute of Applied Psychology, University of the Punjab, Lahore, Punjab, Pakistan

**Citation:** Ajmal, A., & Rasool, F. (2023). Transgender Rights Law in Pakistan: Mental Health Perspective. *Global Social Sciences Review*, VIII(II), 420-426.

[https://doi.org/10.31703/gssr.2023\(VIII-II\).38](https://doi.org/10.31703/gssr.2023(VIII-II).38)

DOI: 10.31703/gssr.2023(VIII-II).38

URL: [http://dx.doi.org/10.31703/gssr.2023\(VIII-II\).38](http://dx.doi.org/10.31703/gssr.2023(VIII-II).38)

## Transgender Persons

---

There are many misconceptions about transgender persons which are not just widely prevalent among the public but many people's dealings with transgenders are also not clear about it. Many tend to confuse transgender persons with intersex people, just like the drafters of the Transgender Persons (Protection of Rights) Act 2018 confused transgender persons with intersex people, eunuchs, and Khawaja Sira in section 2(n) of this act.

Given the widespread misconceptions, it is pertinent to discuss some of the fundamental aspects of transgender persons. Gender identity is central in almost all the definitions of transgender as there are many definitions of it. The European Commission for Human Rights defines a person as transgender if he/she is having and/or expressing a gender identity different from his/her sex (Council of Europe, [2011](#)).

Transgender refers to an individual whose gender identity is different from the gender assigned (*DSM-5-TR*; APA, 2022). A transgender person is one who has a gender identity that is not aligned with his/her biological sex (American Psychological Association, [2015](#)). It is the gender identity which plays a central role in the transgender phenomenon. The Yogyakarta Principles, which set forth the state obligations regarding gender identity, sexual orientation, and gender expression under international human rights law, too considered gender identity as central and defined gender identity in terms of a person's self-perceived gender identity which may or may not correspond with the sex (The Yogyakarta Principles, [2007](#); O'Flaherty & Fisher, [2008](#)).

It is obvious that the central to the transgender phenomenon is gender identity, which is a subjective feeling and is not, necessarily, always based on the biological sex assigned at birth. Transgender persons all over the world are being defined based on their gender identities, but in Pakistan, it has become a matter solely based on the sex of a person as ruled by the Federal Shariat Court (*Hammad Hussain v. Federation of Pakistan and others*, [2023](#)). Moreover, transgender persons are usually confused with intersex people, which is incorrect. Intersex persons cannot be dealt at par with

transgender persons as they are not the same (International Commission of Jurists, [2020b](#)).

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

---

This act is hailed by many for being a progressive statutory law. According to the International Commission of Jurists, the greatest strength of this law is the right, given to the transgender persons in section 3, to be recognized and get registered one's gender based on self-perceived gender identity and, it makes this act the most progressive law globally protecting the rights of transgender persons (International Commission of Jurists, [2020a](#)).

The act is divided into seven chapters and is comprised of twenty-one sections. The first chapter, comprised of two sections, focuses on the short title, extent, commencement, and definitions of terms including key terms such as gender identity, transgender, and gender expression. The second chapter of this act, comprised of a single section, is about the recognition of self-perceived gender identity and the right to get registered in government records accordingly. The third chapter, comprised of two sections, is about the prohibition of certain acts against transgender persons such as discrimination and harassment. The fourth chapter of the act, comprised of one section, asserts the obligations of the government for the welfare of transgender persons. The fifth chapter which is comprised of eleven sections is about the protection of the rights of transgender persons including all the rights guaranteed by the Constitution of Pakistan. This chapter further includes five criminal offences related to certain prohibited acts against transgender persons. Chapter six, comprised of a single section, discusses the enforcement mechanism and additional remedies available to an aggrieved transgender person other than the remedies available under general law. The last chapter, which is comprised of three sections, deals with the general provisions, gives this act overriding power over the other laws and empowers the government in rulemaking to implement the objectives of this act (The Transgender Persons (Protection of Rights) Act 2018).

## Transgender Rights and Courts in Pakistan

The courts in Pakistan gave a few landmark verdicts which protect the fundamental rights of transgender persons. The supreme court of Pakistan acknowledged the rights of transgenders and ordered the government for taking adequate measures to protect the fundamental rights of transgender persons. Moreover, the court directed NADRA to add more options to the category of sex in its database to include transgender persons. This comprehensive decision by the supreme court of Pakistan cited as PLD 2013 S.C. 188, played a vital role in the direction of accepting transgender rights in Pakistan (Muhammad Aslam Khaki and others v. S.S.P. (Operations) Rawalpindi and others, [2013](#)).

Declaring gender identity as one of the basic components of life, the Lahore High Court ruled that there must be no discrimination based on gender identity as everyone is entitled to the rights given in the Constitution of Pakistan. While deciding the plea of a transgender person with unknown parents regarding the issuance of a national identity card, the high court directed the relevant authorities to issue national identity cards to the transgender persons and make appropriate rules for it (Mian Asia v. Federation of Pakistan and others, [2018](#)).

In another case, when the right to apply for a job was denied to a transgender person by the Punjab Public Service Commission on the ground of being transgender, the high court ordered the concerned authority to make necessary arrangements to include the transgender persons in the mainstream and granted relief to the transgender petitioner (Faiz Ullah v. PPSC, [2021](#)).

Recently the Federal Shariat Court of Pakistan gave its verdict on transgender rights which is received with a mixed reaction. Where this decision is hailed by the religious segments in Pakistan, there it is criticized too by different national and international communities for taking a narrow view of gender identity and for limiting it to the biological sex of a person.

## Recent Decision of the Federal Shariat Court

The Federal Shariat Court, in its recent decision, struck down a few provisions of the Transgender Persons (Protection of Rights) Act, 2018 for being

unIslamic. The Federal Shariat Court while considering the issue of the definitions of a transgender person, gender expression and gender identity, given in section 2(1)(n), section 2(1)(e) and section 2(1)(f) of this act respectively, as the core issue and all other points raised in Shariat petitions as offshoots of this core issue, formulated and settled four points.

First, the court decided if the terms such as intersex (khusra), eunuch, transgender, and Khawaja Sira used in section 2(1)(n) are similar or different. The court declared that transgender persons and intersex persons as different from each other. The court further declared that to consider intersex persons and transgender persons similar as did in section 2(1)(n) of this act caused confusion in understanding. The court in its decision highlighted the fact that the transgenders are the persons whose internal sense of gender identities do not match with their sex. However, the court wrote in its judgement that Islamic law recognizes the gender identity of intersex persons based on their physical characteristics rather than on self-perceptions. Moreover, the court declared eunuch and transgender as two distinct entities. In this regard, the court further ruled that it is prohibited in Islam for a person to go through excision or castration on his own will and this can only be allowed to cure some disease and/or to save life on the recommendation of medical expert. The court asserted that dealing the different terms such as transgender, intersex, eunuch, Khawaja Sira under the heading of a transgender person is misleading. According to the court, Islamic law recognized the existence of a eunuch whose Urdu translation is Khawaja Sira, therefore section 2(ii) is against the directions of Islam. Whereas section 2(1)(n)(iii) is declared as against the injunctions of Islam.

The second point that the Federal Shariat Court decided was, whether it is the gender or the biological sex which is the foundation of gender identity in Islam. While answering this question and acknowledging that sex and gender are two different things, the court decided that in Islam a person must be identified with his/her sex. Thus, the biological sex of a person proceeds over his gender identity. In other words, a person's gender identity must be solely and wholly based on his biological sex. In this regard, the court declared that any law which gives gender identity

precedence over biological sex is against the injunction of Islam and thus, is void and illegal.

Thirdly, if the words such as gender identity and gender expression as defined in this act in accordance with the directions of Islam? On this point, the court ruled that in Islam the determination of a person's gender is based on his/her biological sex rather than on his/her perceived gender identity. Furthermore, the gender identity of a person, based on his/her biological sex, must conform to his/her biological sex. The court asserted that appreciating a person's gender based on his/her self-perception can cause a lot of legal problems in a variety of affairs such as inheritance distribution, and performance of religious practices and it can also infringe the rights of women and intersex persons.

Lastly, if it is permitted in Islam for persons suffering from sexual organs and/or reproductive infirmities to undergo medical treatment? The Federal Shariat Court ruled that any type of treatment for the cure of sexual and/or reproductive infirmities is legal and permissible in Islam. However, the court further ruled that any kind of medical intervention which hurts the sexual and/or reproductive ability of a person such as a gender realignment procedure, without any medical reason, is prohibited.

The court struck down Section 2(1)(f), section 2(1)(n)(iii), section 3 and Section 7 of the Transgender Persons (Protection of Rights) Act, 2018 for being against the directions of Islam. Consequently, these sections ceased to have any legal effect as are null and void (Hammad Hussain v. Federation of Pakistan and others, [2023](#)).

### **Gender Identity and Gender Dysphoria**

---

Gender identity is one of the basic aspects of life which lies deep within a person and is based on inner feelings and experiences. The core of the concept of gender and transgender is gender identity (Brumbaugh-Johnson & Hull, [2018](#)). The incongruence with one's assigned gender lies in the depth of the transgender phenomenon. The essence of transgender is a gender identity which does not always based on assigned gender. It refers to a person having a gender identity different from his/her sex (*DSM-5-TR*; APA, 2022).

A person who is having and/or showing transgender identity is not suffering from any

mental disorder or mental condition. Mental health science abandoned considering transgender identity as a disorder long ago. Having or expressing gender in nonbinary terms is not considered a gender identity issue. Even the directions issued by the American Psychological Association for psychologists working with transgender's direct psychologists to understand and deal with gender in nonbinary terms. In this regard, psychologists are further instructed to consider gender variations in nonbinary terms as healthy (American Psychological Association, [2015](#)).

However, many consider transgender identity as a disorder and take it as equivalent to gender dysphoria, which is incorrect. Not only the public is not aware of gender dysphoria but the enlightened segment of the society and even some of the transgender activists also tend to confuse gender identity with gender dysphoria. Gender dysphoria is distress because of the mismatch between one's gender identity and sex. Mental health science all over the world considers the gender identity of a person other than his/her biological sex no more a disorder of identity. Whereas gender dysphoria is the clinical condition of distress a person can experience because of his/her gender incongruence. The discrepancy and the distress are the core features in this regard (*DSM-5-TR*; APA, 2022).

Gender dysphoria is a mental disorder the core symptoms of which are the contradiction between one's gender identity and sex and, the distress associated with it which may impair daily functioning. The behavioural manifestations of gender dysphoria are different between children and adults. In children, it can be an urge to be of the opposite gender, an urge for cross-gender dressing and cross-gender roles, a preference to play with another gender, a preference for the toys, games etc. typical of the opposite gender, a distaste for one's sexual anatomy and a preference for the sexual characteristics of experienced gender. In adults, the behavioural manifestations of gender dysphoria can be a desire to get rid of one's sexual characteristics and to have the sexual characteristics of expressed gender, a desire to be and to be treated as another gender etc. (*DSM-5-TR*; APA, 2022; *ICD-11*; WHO, 2019). A condition of gender dysphoria cannot be treated at par with the transgender identity just because of the presence of the gender incongruence

phenomenon both. The core of gender dysphoria is the distress that comes with the gender incongruence. If a transgender person is not experiencing distress and his/her daily functioning is not being impaired because of his/her gender incongruence, such a person cannot be said to suffer from gender dysphoria. Transgender identity and gender dysphoria are two different things (Zucker, [2017](#)).

## Recommendations

### Inculcation of Insights from Mental Health Science

Having or expressing gender in nonbinary terms does not consider a gender identity issue. Even the instructions issued by the American Psychological Association for psychologists working with transgender direct psychologists to understand and deal with gender in nonbinary terms. In this regard, psychologists are further instructed to consider gender variations in nonbinary terms as healthy (American Psychological Association, [2015](#)). The law must be amended and interpreted in the light of mental health science while, at the same time, upholding the basic principles of law and keeping the sensitivities of society in mind.

There is a need to understand and appreciate that sex and gender are two different things. Mostly, sex and gender correspond with each other, but it is not necessary that they always correspond with each other in a social sense. Transgender identity is not a mental disorder. Moreover, gender is a social construct rather than a biological construct. Gender is seen, all over the world, as a social construct. Gender identity in most cases cannot be changed. It is almost impossible to change the gender identity of an individual. There is no mechanism available to the mental health professionals employing which the gender identity of an individual can be changed. In light of the insights from mental health science, the law must be amended to address the plight of persons with transgender identities. Gender dysphoria can only be cured by making society sensitive to it.

### Amendments to the Existing Laws

The Transgender Persons (Protection of Rights) Act 2018 was seemingly passed without due diligence while overlooking some of the fundamental aspects, which, consequently, not

only invited unnecessary criticism but also led the Federal Shariat Court to quash some of its important sections. Without inculcating a proper mechanism of gender identity recognition, this law can be exploited by the miscreants in disguise of transgender identity as many such apprehensions are discussed in the decision (Hammad Hussain v. Federation of Pakistan and others, [2023](#)). Therefore, this act must be amended to make its implementation more practical while protecting the rights of transgenders in true letter and spirit. In this regard, insights can be taken from the laws of other jurisdictions and, particularly from the Gender Recognition Act, [2004](#) of the UK. The mechanism of recognition as transgender adopted by the Gender Recognition Panel provided in the Gender Recognition Act 2004 can be considered for adoption in Pakistan (The Gender Recognition Act, [2004](#)).

Moreover, the name of this act must be changed to intersex persons and transgender persons to protect the rights of intersex persons too as intersex and transgender persons are two different things. Furthermore, this act is a federal law, covering many areas which are provincial subjects such as health, education, prison, family, and inheritance law. It is necessary for meeting the objectives given in this act that the provincial assemblies of all the provinces of Pakistan must adopt this law. Furthermore, section 375 of the Pakistan Penal Code, which defines rape as an offence committed by a man against a woman must be amended to deal with the offence of rape against a transgender person. Likewise, section 377 of the Pakistan penal Code which deals with unnatural sexual intercourse must also be amended.

### Training of Mental Health Professionals and other Stakeholders

In Pakistan mental health professionals are not properly trained to deal with transgender issues. Mental health professionals with limited training and experience with transgenders may cause damage to them (Mikalson, Pardo, & Green, [2012](#)). So far there is no specific course on transgender mental health being taught in any of the institutions in Pakistan which can cater for the professional needs of mental health professionals. There is a need to train mental health professionals in Pakistan in dealing with

transgender issues in light of the recommendations provided by the APA (American Psychological Association, [2015](#)). Moreover, there is a need to impart training to social workers, transgender activists, police officers, prison personnel and media persons (Ajmal & Rasool, [2022](#)).

### **Education and Awareness Campaigns**

---

In a society like Pakistan people are not aware of the transgender phenomenon and this lack of awareness is not only limited to the public but many transgender activists and experts are also not fully aware of it. According to one of the experts who gave his expert opinion in the Federal Shariat Court, as reported in the judgement, no

person is born a transgender person and usually, people with gender identity issues are suffering from gender dysphoria. The said expert was wrong in his understanding of gender identity and gender dysphoria. Another expert while giving his expert opinion, as reported in the court's decision, stated that the term gender dysphoria is excluded from the list of mental disorders which is wrong as the term gender dysphoria still exists in the latest version of DSM-5-TR (APA, 2022) and ICD-11 (WHO, 2019). It is highly recommended that renowned and competent experts should be involved when it comes to taking expert opinions on such kind of sensitive and technical topics. It is further recommended that educational courses and awareness campaigns must be run to spread awareness on this important subject.

## References

- Ajmal, A., & Rasool, F. (2022). Forensic Evidence in Criminal Justice System in Pakistan. *Global Legal Studies Review*, 7(3), 25-31. [https://doi.org/10.31703/glsr.2022\(VII-III\).04](https://doi.org/10.31703/glsr.2022(VII-III).04)
- American Psychiatric Association. (2022). *Diagnostic and statistical manual of mental disorders* (5th ed., text rev.). <https://doi.org/10.1176/appi.books.9780890425787>
- American Psychological Association. (2009). *Report of the Task Force on Gender Identity and Gender Variance*. Washington, DC: Author.
- American Psychological Association. (2015). Guidelines for psychological practice with transgender and gender nonconforming people. *American Psychologist*, 70(9), 832-864. <https://doi.org/10.1037/a0039906>
- Brumbaugh-Johnson, S. M., & Hull, K. E. (2018). Coming Out as Transgender: Navigating the Social Implications of a Transgender Identity. *Journal of Homosexuality*, 66, 1-30. <https://doi.org/10.1080/00918369.2018.1493253>
- Council of Europe, (2011). *Discrimination on grounds of sexual orientation and gender identity in Europe* (2<sup>nd</sup> ed. pp. 1-32). Council of Europe Publishing: Jouve, Paris.
- Faiz Ullah v. PPSC, PLD (2021) Lahore 284.
- Hammad Hussain v. Federation of Pakistan and others, Federal Shariat Court, (2023)
- International Commission of Jurists (2020a). *Pakistan: Transgender Persons (Protection of Rights) Act, 2018*. Executive Summary October 2020. Geneva: Switzerland. <https://www.icj.org/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>
- International Commission of Jurists (2020b). *Pakistan: Transgender Persons (Protection of Rights) Act, 2018*. A Briefing Paper March 2020. Geneva: Switzerland. <https://www.icj.org/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>
- Mian Asia v. Federation of Pakistan through Secretary Finance and 2 others, PLD (2018) Lahore 54.
- Mikalson, P., Pardo, S., & Green, J. (2012). *First do no harm: Reducing disparities for lesbian, gay, bisexual, transgender, queer, and questioning populations in California*. Retrieved from: <http://www.eqcai.org/atf/cf/%7B8cca0e2f-faec-46c1-8727-cb02a7d1b3cc%7d>
- Muhammad Aslam Khaki and others v. S.S.P. (Operations) Rawalpindi and others, PLD (2013) S.C. 188.
- O'Flaherty, M. & Fisher, J. (2008). Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles. *Human Rights Law Review*, 8(2), 207-248. <https://doi.org/10.1093/hrlr/ngn009>
- Section 2. (nd). of The Transgender Persons (Protection of Rights) Act 2018.
- The Gender Recognition Act, (2004).
- The Yogyakarta Principles (2007). *Introduction to the Yogyakarta Principles*. <https://yogyakartaprinciples.org/introduction/>
- Transgender Persons (Protection of Rights) Act 2018.
- World Health Organization. (2019). *International statistical classification of diseases and related health problems* (11th ed.). <https://icd.who.int/>
- Zucker, K. J. (2017). Epidemiology of gender dysphoria and transgender identity. *Sexual Health*, 14(5), 404. <https://doi.org/10.1071/sh17067>