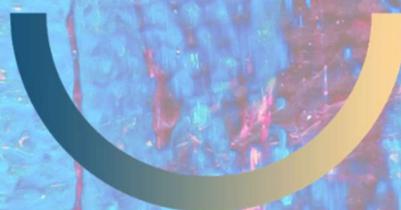


# RIGHTS OF TRANSGENDER PERSONS IN PAKISTAN

CENTRE FOR HUMAN RIGHTS



University College Lahore  
School of Law

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For more information, please contact:

Umar Mahmood Khan

Director, Centre for Human Rights

umar.khan@ucl.edu.pk

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## Contents

<b>Introduction</b> .....	1
<b>The Problem</b> .....	1
<b>The Transgender Persons (Protection of Rights) Act, 2018</b> .....	3
• <i>A futile legislation?</i> .....	5
<b>Conclusion and Recommendations</b> .....	7
<b>References</b> .....	8

## Rights of Transgender Persons in Pakistan

### Introduction

Pakistan in May 2018 took a major step in protecting the rights of one its most marginalized segments of society; spearheading the movement in the region, it passed the Transgender Persons (Protection of Rights) Act, 2018.<sup>1</sup> The move was lauded in the international sphere by UN bodies and international organizations alike for bridging a gap in its legal framework that had exacerbated over the years. The transgenders community, or *Hijra*, as they are referred to in South Asia, has not only been subjected to degrading treatment but has also faced a persistent denial of their fundamental rights enshrined within the Constitution. The 2018 legislation does attempt to address most of these problems in an apt manner, however, that is only part of the solution. The real impact crucially depends on the manner it is implemented in.

Therefore, this policy brief shall analyze the different aspects of the legislation and the problems it hopes to solve, followed by an assessment of the extent to which the provisions have translated into practice and effective policy changes at the provincial level. The brief shall conclude with a set of recommendations on ways the legislation may be improved/ amended and applied.

### The Problem

*Hijra* is used as an umbrella term in Pakistan to refer to individuals that “do not come under the definition of either man or woman [but are] sexually deviant in their sexual orientation.”<sup>2</sup> It encompasses individuals who are hermaphrodites,<sup>3</sup> transgender, eunuch, transvestites or bisexuals with feminine behavior<sup>4</sup> females that cross-dress to attain the male identify are not included in this definition.<sup>5</sup> Though it has been reported that only 1% of the *Hijra* community are hermaphrodite, with the rest of them falling under the latter categories,<sup>6</sup> people are unable to differentiate between them and hence judge them through the same lens.<sup>7</sup>

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<sup>1</sup> Hereinafter referred to as ‘TP (PR)A 2018’.

<sup>2</sup> Factors Affecting the Social Exclusion of Eunuchs (Hijras) in Pakistan, Umair Ahmed, Dr. Ghulam Yasin, Asad Umair, Mediterranean Journal of Social Sciences, Vol 5 No 23, MCSER Publishing, Rome-Italy, November 2014.

<sup>3</sup> Hermaphrodites are referred to locally as ‘Khusra’ – a category which is subsumed within the overarching term ‘Hijra’.

<sup>4</sup> Neither man nor woman: Hijras of India, Nanda, S. (2nd ed.), 1999. New York: Wadsworth Publishing Company; Hijras: The labelled deviance. Sharma, S. K., 2000, New Delhi: Gyan Publishing House.

<sup>5</sup> Condition and status of hijra in Pakistan. Country report, Jami, H. (2005), presented on 1st International Conference: Gender and Sexualities, Bangkok, Thailand.

<sup>6</sup> Hijroon Ki Pursarar Duniya: dukhon Ki chakki mein Pisnay walay Aik Tabkay Ki Daroon-en Khana Dilchasp, Zafar, R. Kahani. Jang: Sunday Magazine, 19<sup>th</sup> September 2004.

<sup>7</sup> Fallacy about male-to-female gender dysphorics in Pakistan, Haider, S. K., & Bano, M. Pakistan Journal of Psychology, 37(2), 2006: 45-60.

The socio-cultural dynamics in Pakistan are such that the term '*Hijra*' is considered derogatory, usually referring to a person who is womanly, effeminate and whimsical – characteristics that are socially looked down upon when associated with men.<sup>8</sup> In the binary gender system that exists in Pakistan, families feel guilt, shame,<sup>9</sup> and embarrassment<sup>10</sup> if a *Hijra* is born into the family.<sup>11</sup> Studies have revealed that their families are often abusive and harsh towards them.<sup>12</sup> If they exhibit their gender identities after growing up, they often face rejection by society and public institutions.<sup>13</sup> *Hijras* face blatant discrimination and harassment in the workplace, in accessing housing, public accommodation, health facilities, education institutions,<sup>14</sup> public services<sup>15</sup> as well as the justice system, where they face negligence and are treated abusively by the police.<sup>16</sup> This “exclusionary environment fuel[s] social vulnerability over a lifetime”,<sup>17</sup> forcing the transgender community into a substandard of living- one that does not conform to the protections granted under the Right to Life<sup>18</sup> in the Constitution.

The inability to access social services and earn a decent living, inevitably leads to widespread homelessness<sup>19</sup> and poverty in the *Hijra* community – as they are unable to cope with the hostile environment.<sup>20</sup> Therefore, with no other means of redress,<sup>21</sup> they are most vulnerable to

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<sup>8</sup> The third sex and human rights', Talwar, R., New Delhi: Gyan Publishing House, 1999: 23.

<sup>9</sup> 'Biased-interaction theory of psychosexual development: "How does one know if one is male or female?"', Diamond, M., *Sex Roles*, 55(9-10), 2006: 589-600. doi: 10.1007/s11199-006-9115-y

<sup>10</sup> 'Playing back the nation: Waria, Indonesian transvestites. *Cultural Anthropology*', Boellstroff, T., 2004, 19(2), 159-195. doi: 10.1525/can. 2004.19.2.159; 'Case study: Sex reassignment in a teenage girl', Reiner, W. G., *Journal of the American Academy of Child & Adolescent Psychiatry*, 35(6), 1996: 799-803.

<sup>11</sup> 'Parent reactions to transgender youth' gender nonconforming expression and identity', Grossman AH, D'Augelli AR, Howell TJ, Hubbard S., *J Gay Lesbian Soc Serv.* 2005;18(1):316.

<sup>12</sup> Supra Note 2: Victims constituted 64% of the sample.

<sup>13</sup> 'Injustice at every turn: a report of the National Transgender Discrimination Survey', Grant J, Mottet L, Tanis J, Harrison J, Herman J, Keisling M., Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force; 2011.

<sup>14</sup> "Social exclusion review", Beall J, Piron L-H. DFID, London: Overseas Development Institute, 2004: 32-7.

<sup>15</sup> 'The Transgender Community in Pakistan: Issues in Access to Public Services', AAWAZ Programme, 2016.

<sup>16</sup> Supra Note 2: The study revealed that 62% of the interviewees admitted facing discrimination of such a nature.

<sup>17</sup> 'Transgender social inclusion and equality: a pivotal path to development', Vivek Divan, Clifton Cortez, Marina Smelyanskaya and JoAnne Keatley, Divan V et al. *Journal of the International AIDS Society* 2016, 19(Suppl 2):20803.

<sup>18</sup> Article 9: "Security of person: No person shall be deprived of life or liberty save in accordance with law"; See Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693.

<sup>19</sup> Supra Note 12.

<sup>20</sup> 'Correlates and Prevalence of HIV and Sexually Transmitted Infections Among Hijras (Male Transgenders)', Khan, A.A., N. Rehan, K. Qayyum and A. Khan in Pakistan', *International Journal of STD and AIDS* 19 (12), 2008: 817-20.

<sup>21</sup> 'Is social exclusion pushing the Pakistani Hijras (Transgenders) towards commercial sex work?', Abdullah, Muhammad Ahmed, Zeeshan Basharat, Bilal Kamal, Nargis Yousaf Sattar, Zahra Fatima Hassan, Asghar Dil Jan and Anum Shafqat, *BMC International Health and Human Rights*, 2012:32.

exploitation.<sup>22</sup> They are mostly presided over by a leader or guru,<sup>23</sup> where their 'deviant' nature is acceptable, appreciated and groomed,<sup>24</sup> leading to a sense of belongingness after being ostracized from their own families and relatives.

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

In light of the above socio-economic status and problems faced by transgender persons, the legislature via the Transgender Persons (Protection of Rights) Act, 2018 has attempted to effectively integrate this segment of society into the social fabric of Pakistan. The legislation is quite extensive and factors in cultural hurdles that are faced by the community. Firstly, the Act defines a 'Transgender' as "any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth."<sup>25</sup> This is a major step forward as it incorporates the various categories of people subsumed within the umbrella term, e.g. hermaphrodites, transvestites etc., and is also innovative in its approach so as to deem gender, to be 'self-perceived.'" It further goes on to crystalize this approach by stipulating that the transgender persons have the "right to be recognized as per his or her self-perceived gender identity" on their government issued identity documents. The provision is especially important if seen in comparison to the counterpart provisions of the country's neighbors: India requires that 'District Screening Committees' shall have the authoritative say on the 'authenticity' of someone's claim to be a transgender based on medical evidence.<sup>26</sup> Hence, the Pakistani approach does indeed give value to the self-perception of gender, and an important actor in this regard is the Supreme Court of Pakistan, which was the first to recognize the legal status of transgender persons as the third gender in its 2009 judgment.<sup>27</sup> Pursuant to the Supreme Court's judgment, the National Database Registration Authority (NADRA) included a third gender option in the National ID Cards, i.e. Khansa,<sup>28</sup> which was welcomed at the time, however, the apex Court has also been criticized for taking on the role of differentiating between a 'true' and 'false' transgender across several of its judgments since 2009.<sup>29</sup>

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<sup>22</sup> 'Female Desires: Same-Sex Relations and Transgender Practices across Cultures' by Evelyn Blackwood, Saskia E. Wieringa, 1989.

<sup>23</sup> 'The Hijras of Pakistan's', Drenner, D., 1999. Retrieved from <http://www.arsrhetorica.net/Queen/Volume 11/Articles/IntroDennis.html>.

<sup>24</sup> 'Condition and Status of Hijras (Transgender, Transvestites etc.) in Pakistan (Country Report)', Humaira Jami, National Institute of Psychology Quaid-i-Azam University Islamabad, Pakistan

<sup>25</sup> Section 2(n), TP (PR)A 2018.

<sup>26</sup> Transgender Persons (Protection of Rights) Bill, 2018 (India), Sections 5-8.

<sup>27</sup> Constitution Petition No.43 of 2009, 01.02.2012 Order

<sup>28</sup> 'Transgender rights: NADRA provides 3 gender options on CNIC registration form', The Express Tribune, 3 February 2012; 'Pakistan issues landmark transgender passport; fight for rights goes on', Zeeshan Haider, REUTERS, June 29, 2017

<sup>29</sup> 'From 'She-males' to 'Unix': Transgender Rights and the Productive Paradoxes of Pakistani Policing', Jeffrey A. Redding, in Regimes Of Legality: Ethnography Of Criminal Cases In South Asia 258, 264

The Legislation further goes onto to provide the Right of Inheritance to transgender persons as well. This is partly influenced by the Supreme Court’s initiative in the 2009 case – where the Transgender person’s plight of being commonly disinherited was brought to light<sup>30</sup> as well as the prevailing complications arising due to enforcing the Islamic law in inheritance matters,<sup>31</sup> which only recognizes the binary form of gender in relation to the division of property and assets.<sup>32</sup> Therefore, the provisions in this regard are quite important as it not only grants an enforceable right irrespective of their family’s attitude towards them, but ensures that their self-perception of gender has no devastating effects on their right to inherit. The Act does so by determining their inheritance share as per what they chose to identify themselves on their National ID cards, i.e. Transgender Male, Transgender Female and Intersexed.<sup>33</sup>

In addition to the aforementioned two major steps, the Act also guarantees the protection of all fundamental rights encapsulated within the Constitution:<sup>34</sup> specifically the right to property,<sup>35</sup> right to access public spaces,<sup>36</sup> right to assembly,<sup>37</sup> right to health,<sup>38</sup> right to hold public office,<sup>39</sup> right to vote,<sup>40</sup> right to employment<sup>41</sup> and the right to education.<sup>42</sup> The court went further on to stipulate the prohibition against harassment<sup>43</sup> and discrimination<sup>44</sup> in all walks of life, especially to ensure that the transgender persons face no hurdles when accessing education, employment

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<sup>30</sup> Ibid, at 266

<sup>31</sup> ‘Governing Islam: Law, Empire, And Secularism In South Asia’, Julia Stephens, 2018: 167-71.

<sup>32</sup> ‘Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women’, Abdulmajeed Hassan Bello, 29 Arab L. Quarterly 261, 2015.

<sup>33</sup> Section 7(3), TP(PR)A 2018.

<sup>34</sup> Section 16, TP(PR)A 2018.

<sup>35</sup> Section 15, TP(PR)A 2018.

<sup>36</sup> Section 14, TP(PR)A 2018.

<sup>37</sup> Section 13, TP(PR)A 2018.

<sup>38</sup> Section 12: “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 i.t 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”, TP(PR)A 2018.

<sup>39</sup> Section 11, TP(PR)A 2018.

<sup>40</sup> Section 10, TP(PR)A 2018.

<sup>41</sup> Section 9, TP(PR)A 2018.

<sup>42</sup> Section 8: “(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”, TP(PR)A 2018.

<sup>43</sup> Section 5: “Harassment of transgender persons, as defined in this Act, both within and outside the home, based on their sex, gender identity and gender expression is prohibited”, TP(PR)A 2018.

<sup>44</sup> Section 4, TP(PR)A 2018.

and health facilities— all of which are essential to ensure that they have a fair chance to earn a living and have the same opportunities as available to a man or woman. The Act couples this approach with obligating the government to tackle the generally held negative perception with regards to transgender persons through sensitization campaigns, vocational training and making special arrangements for Transgender people in various public institutions.<sup>45</sup> This is particularly imperative in order to effectively translate the spirit of law into practice, as the bias towards transgender persons is also caused by the lack of interaction with them<sup>46</sup> and lack of awareness and gender sensitization.

- *A futile legislation?*

Despite the National Assembly having passed a very expansive and apt legislation to guarantee and protect the rights of transgender persons, it still remains to be seen as to the extent to which the provincial governments will be able to adopt, incorporate and ensure its implementation. It has indeed set in motion quite a few initiatives, though only preliminary in nature at this point. The Punjab Social Protection Authority (PSPA), on the request on the Supreme Court,<sup>47</sup> has drafted a ‘Transgender Welfare Policy’ in an attempt “to provide guiding principles and priority areas in implementing various future programs for the welfare and protection of rights of transgender persons.”<sup>48</sup> The policy by recognizing the denial of education and employment opportunities to transgender persons as a major challenge provides for a blanket provision of social services,<sup>49</sup> skill development courses, scholarships and stipends, and community development programs to enable access to education. Further, it also addresses employment concerns by instituting self-employment schemes, offering job search and entrepreneurship support and providing interest free loans. The policy places emphasis on awareness campaigns<sup>50</sup> and monetary benefits,<sup>51</sup> which is a significant step as research shows that transgender persons are reluctant to register themselves under the ‘Third Gender’ category on their CNICs firstly, due

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<sup>45</sup> Section 6, TP(PR)A 2018; See also Section 8 & 12, TP(PR)A 2018.

<sup>46</sup> ‘Sex reassignment of adolescent transsexuals: A follow-up study’, Cohen-Kettenis, P., & van Goozen, S., *Journal of the American Academy of Child & Adolescent Psychiatry*, 36(2), 1997: 263-271; ‘Sex-reassignment: Predictors and outcomes of treatment for transsexuals’, Smith, Y. L. S., Wageningen, The Netherlands: Ponsen & Looijen BV, 2002.

<sup>47</sup> Case No. 32005-P/2018

<sup>48</sup> ‘Transgender Person Welfare Policy’, Punjab Social Protection Authority, Government of the Punjab, August 2018; It is currently ‘open for comment and feedback’ stage, as of September 2018 – it has not been adopted yet.

<sup>49</sup> It focuses on areas such as Housing – providing for shelter and low cost housing units –, Medicine – providing for free access to basic medical facilities and special arrangements to be made to deal with the unique issues faced by transgender persons – and other social services – including pensions, social security, unemployment insurance and health insurance.

<sup>50</sup> The policy envisages specialized training for public officers, i.e. the police, civil officers and judiciary etc, change in school curriculums and campaigns via an effective media policy.

<sup>51</sup> The Policy plans to introduce both conditional and unconditional cash transfers for transgender persons in collaboration with private and non-government organizations such as Akhuwat.

to the prevailing stigma attached to 'going public'<sup>52</sup> as well as due to the dominant patriarchal structure of our society.<sup>53</sup> Despite the legal recognition of the third gender in 2009, only about 1,432 individuals had opted for this option, whereas the population of transgender persons is estimated to range between 80,000 to 300, 000.<sup>54</sup> This reality has been attributed to utilitarian concerns associated with adopting the male gender: males are legally granted a higher share in inheritance,<sup>55</sup> and can also perform Haj (pilgrimage) – a fundamental obligation on all Muslims with the financial means to perform it - unaccompanied, unlike females who have to be accompanied by a male relative. Moreover, transgender persons also face a high administrative burden when attempting to obtain a legal ID.<sup>56</sup> This burden however, due to the social isolation they face, is extenuated especially for those people who are previously registered as men but wish to opt for the third identity after 2018.<sup>57</sup> Nonetheless, despite the prevalence of the aforementioned hurdles to the effective implementation to any law on the matter, the Transgender Welfare Policy does seem to solve most of them. Not only does it envisage redistributive changes to balance the rights and benefits between each gender, but it provides numerous material benefits of adopting the third identity – both of which are necessary for an effective policy.<sup>58</sup> However, it cannot be ignored that it is only a policy at this point in time and is yet to be implemented in full.<sup>59</sup> Nonetheless, there is some progress in the right direction including the formation of an exclusive school for transgender persons in Lodhran District, Punjab.<sup>60</sup>

The KP government on the other hand, as of 2018, has allocated a budget specifically for the welfare of transgender people, and has made a special committee to submit its recommendations. It has also highlighted the importance of and committed to protecting Transgender rights in its Human Rights Policy of 2018.<sup>61</sup> In pursuance of this, the government has

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<sup>52</sup> Transgender interviews have revealed that there is substantial hostility and anxiety over family honor at the news of their 'son' registering as a Transgender; See *Infra*, Note 53.

<sup>53</sup> 'Legal Consciousness of the Third Gender Category in Pakistan', Muhammad Azfar Nisar, Lahore University of Management Sciences, Pakistan, *Gender & Society*, Vol 32 No. 1, February, 2018: 59–81. DOI: 10.1177/0891243217740097

<sup>54</sup> 'A first for Pakistan's third gender', Baig, Rabail. *Foreign Policy*, 20 March 2012.

<sup>55</sup> As-Sa'adi, Abd Ar-Rahman ibn Nasir. (2003). *Tafsir Saadi*. Lahore: Dar-us-Salam

<sup>56</sup> 'Administrative burden: Learning, psychological, and compliance costs in citizen-state interactions', Moynihan, Donald, Pamela Herd, and Hope Harvey, *Journal of Public Administration Research and Theory* 25 (1) 2014: 43-69.

<sup>57</sup> 'Children of a lesser god: Administrative burden and social equity in citizen state interactions', Nisar, Muhammad A., *Journal of Public Administration Research and Theory*, 2017.

<sup>58</sup> 'Rethinking recognition', Fraser, Nancy. *New Left Review* 3 (May-June) (2002): 107-20; 'Recognition without ethics?' Fraser, Nancy, *Theory, Culture and Society* 18 (2/3) (2001): 21-42.

<sup>59</sup> 'Managing the margins: Intersections of the state and the Khawaja Sira in Lahore, Pakistan', Muhammad Azfar Nisar, Ph.D. diss., Arizona State University, Tempe. 2016.

<sup>60</sup> 'Literacy centre started for transpersons', *DAWN*, 23 February, 2019.

<sup>61</sup> 'Khyber Pakhtunkhwa Human Rights Policy', Government of Khyber Pakhtunkhwa Law, Parliamentary Affairs and Human Rights Department, 2018

taken initiatives for the provision of health insurance, driving licenses and training, as well as holding a trans-specific sport fest ahead of the policy finalization.<sup>62</sup>

In comparison, the remaining provinces of Pakistan are still far behind in developing an effective legal framework to tackle the issue, but have nonetheless also started moving in the right direction. The Sindh government has reserved 5% seats in police exclusively for transgender persons, in an aim to solve the problems they face during registration of an F.I.R, and while it may not deter violent crimes against them to a noticeable extent, it will make justice more accessible.<sup>63</sup> Similarly, although Balochistan is yet to make a transgender specific policy, they have claimed to grant transgender persons equal rights to the other two binary genders in its 'Policy Framework for Gender Equality and Empowerment of Women'.<sup>64</sup>

### Conclusion and Recommendations

Although the government's step in enacting the legislation is a major development in addressing the plight of the transgender community, however, there is still a long way to go. The problem is not only one that it is widespread but one that has roots in our social fabric.

Therefore, in light of the above, the following recommendations are put forward:

- The Government of Punjab should adopt its 'Transgender Welfare Policy' and implement it in its letter and spirit.
- The provinces of Punjab, Sindh, KP and Balochistan should take immediate action to draft effective policies as well as enact legislation to give effect to the Transgender Person (Protection of Rights) Act, 2018.
- Awareness campaigns should be organized to engage local influential, religious leaders as well as executive and elected officials of the local government.
- Government, private and civil society organizations should involve transgender persons in their activities so that they may feel confident and included.
- Legal aid provisions should be made across Pakistan in order to increase accessibility to the legal system to transgender persons.
- Policies and laws should be enacted to protect the right to a personal life for transgender persons, such as marriage and adoption, and participation in civil and armed services.

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<sup>62</sup> '7 Times PTI made History in Trans Rights in Pakistan', Noreen Khalid, Voice of Journalists, 22 July 2018

<sup>63</sup> 'Police to allow transgender recruits in Sindh', DAWN, 25 April 2019.

<sup>64</sup> 'Government of Balochistan's Policy Framework For Gender Equality and Empowerment of Women', Department of Women Development, Government of Balochistan, September 2012

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