

Flygtningenævnets baggrundsmateriale

Bilagsnr.:	623
Land:	Pakistan
Kilde:	International Commission of Jurists
Titel:	Pakistan: Transgender Persons (Protection of Rights) Act, 2018
Udgivet:	marts 2020
Optaget på baggrundsmaterialet:	12. juni 2023

Pakistan: Transgender Persons (Protection of Rights) Act, 2018

A Briefing Paper
March 2020

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A Briefing Paper

© Copyright International Commission of Jurists, March 2020

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

Pakistan: Transgender Persons (Protection of Rights) Act, 2018

A Briefing Paper
March 2020

TABLE OF CONTENTS

1. INTRODUCTION AND BACKGROUND	2
1 (A) OVERVIEW OF APPLICABLE INTERNATIONAL LAW	2
1 (B) HISTORICAL CONTEXT	3
1 (C) BACKGROUND TO THE LAW	4
2. OVERVIEW OF THE LAW	6
3. DEFINITION OF A TRANSGENDER PERSON	7
4. INTERSEX PEOPLE	9
4 (A) DIFFERENCE BETWEEN INTERSEX AND TRANSGENDER	9
4 (B) RIGHTS OF INTERSEX PEOPLE	10
5. LEGAL RECOGNITION OF GENDER IDENTITY	13
5 (A) NO MEDICAL OR DIAGNOSTIC REQUIREMENT	13
5 (B) CITIZENSHIP REQUIREMENT	14
5 (C) AGE REQUIREMENT	15
6. PROTECTION FROM DISCRIMINATION	17
7. OFFENCES AND PENALTIES	19
8. OTHER AREAS OF CONCERN	22
8 (A) REHABILITATION	22
8 (B) HARASSMENT	22
8 (C) SEPARATE PRISON CELLS	23
8 (D) ENFORCEMENT MECHANISMS	24
8 (E) PROVINCIAL SUBJECTS	25
8 (F) RULES	25
9. CONCLUSION AND RECOMMENDATIONS	27

1. Introduction and background

This briefing paper analyzes some of the salient provisions of the Transgender Persons (Protection of Rights) Act, passed by the Parliament in May 2018, in light of Pakistan's obligations under international law.

Among other issues, the paper specifically addresses the definition of transgender people provided in the act; the procedures for legal gender recognition stipulated by the law; the provisions on anti-discrimination and harassment; the new criminal offence related to begging; and the adequacy and effectiveness of enforcement mechanisms.

1 (a) Overview of applicable international law

The application of international human rights law is guided by the fundamental principles of universality, equality, and non-discrimination. Under international human rights law, all human beings, irrespective of their gender identity or expression, are entitled to enjoy and exercise their human rights, such as the right to life; to liberty and security of person, including to freedom from arbitrary arrest and detention; to private and family life; to freedom from torture and other ill-treatment; to freedom of expression, association and peaceful assembly; to freedom from discrimination; to equality before the law and equal protection of the law without discrimination; and the right to access to justice and effective remedies in respect of violations of those and of other civil, political, economic, social and cultural rights.¹

States, therefore, have well-established obligations to respect, protect and fulfill the human rights of all people, including transgender and intersex people. These obligations range from refraining from interference in the enjoyment of rights, to preventing abuses by third parties and proactively tackling barriers to the enjoyment of human rights, including, in the present context, discriminatory attitudes and practices.²

Historically, however, transgender people, who have been viewed as "deviants" suffering from mental illness who need to be "rescued", "cured" or "rehabilitated", have been systematically denied their human rights. Decades of domestic and international struggles to change this mindset – as well as discriminatory laws, policies and guidelines based on such a pathologizing approach – have recently met with some success as attested by the removal of gender incongruence from the list of "mental illnesses" in the latest version of the International Classification of Diseases (ICD-11).³

¹ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, November 2011, accessed at: https://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf.

² Ibid.

³ International Classification of Diseases, <https://www.who.int/classifications/icd/en/>.

The struggles of transgender and other queer human rights advocates have also led to the development of international principles adopted in Yogyakarta, Indonesia, in 2006 (the Yogyakarta Principles),⁴ as well as additional principles added in 2017 (Yogyakarta Principles plus 10).⁵ These principles set out State obligations under international human rights law applicable in relation to sexual orientation, gender identity, gender expression and sex characteristics. They envision a future where human dignity is anyone's birthright, unhampered on the basis of sexual orientation and gender identity, expression, and sex characteristics (SOGIESC).

1 (b) Historical context

A microcosm of this international struggle was the local struggle in Pakistan of the transgender community and, more specially, the socio-historically constituted *khawajasira* communities.⁶

In many ways, the marginalization of transgender people in South Asia was intimately tied to the colonial State's creation of a "new public order". Key to this "new public order" was a redefinition of masculinity as the ruler's ideology, with the British man representing the apex of masculinity. The ideal man was physically strong, occupied himself with "masculine" pursuits like hunting and sports, and above all, ruled the vast subcontinent in an "enlightened" manner. Below the British in the hierarchy of masculinity were the Indian "martial races" of Sikhs, Pathans and Muslims, followed by the "effeminate" Bengalis. Women were excluded from this public order except under the protection of their respective male counterparts.⁷ The "discovery" by British colonizers of a gender variant community of "eunuchs" in the 1850s – or *hijras* as they were called in North India – therefore subverted the hierarchy of masculinity the colonial rulers sought to create. The Colonial State, in its response, sought to discipline and ultimately erase gender diverse people and communities as visible social categories by "criminalizing" them under the Criminal Tribes Act of 1871, thereby, creating a pattern of control that continues to this day.⁸

In post-colonial Pakistan, these colonial practices of criminalization, exclusion and marginalization of gender diverse people

⁴ The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006, <https://yogyakartaprinciples.org/principles-en/>.

⁵ [The additional Yogyakarta Principles \(YP+10\)](http://yogyakartaprinciples.org/principles-en/yp10/): Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017, <http://yogyakartaprinciples.org/principles-en/yp10/>

⁶ Khawajasiras are socially, politically and historically constituted community of gender diverse people. Nowadays, they are often referred to as transgender women. But this classificatory category is unable to encapsulate the experience, complexity, diversity and historical poistion of khawajasiras.

⁷ Jessica Hinchy (2014) Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India, *Asian Studies Review*, 38:2, 274-294, DOI: 10.1080/10357823.2014.901298.

⁸ Ibid.

were seamlessly folded into the State structure. In the face of such institutional discrimination and exclusion, the khawajasira communities have struggled to survive and organize in meaningful ways to demand their rights.

1 (c) Background to the law

The passage of the Transgender Persons (Protection of Rights) Act, 2018, is a testament to the hard work and struggle of the Pakistani transgender communities, as well as the support and solidarity offered at different points by other social and civil society groups.

In 2009, Dr Aslam Khaki filed a petition in the Supreme Court in response to a widely reported case of police violence against a group of khawajasiras in Taxila, located in the Rawalpindi district of Pakistan's Punjab province.⁹

In *Muhammad Aslam Khaki v. SSP Operations Rawalpindi and others*, the SC passed a judgment holding that respective provincial governments should take adequate steps for the protection of the fundamental citizenship rights of khawajasiras. The judgment also led to the National Database and Registration Authority (NADRA) to add options to the “sex” category. Most importantly, it directed the Federal Government to legislate specific rights and protections for the khawajasira community.

In 2017, almost eight years after this judgment, Senator Babar Awan presented the Transgender Persons (Protection of Rights) Bill in parliament. The tabling of the bill started a process that included many different actors who worked sometimes together, and at other times at odds with one another, to bring the final version of the bill to fruition. This journey highlights in many ways how coalitional work can help bring meaningful legislative change.

Khawajasira and transgender activists, UN agencies, such as the UNDP, the National Commission on Human Rights (NCHR), the Federal Ombudsman’s taskforce on transgender people, non-governmental organizations working on issues of gender and sexuality, the Council for Islamic Ideology (CII), parliamentarians from across party lines, feminist groups and civil society allies came together over a period of almost a year to draft legislation to address the concerns of the khawajasira community, and the law was eventually enacted in May 2018.

The central and most important premise of the law is the concept of “gender sovereignty”: namely, that individuals who experience and express their gender socially, psychologically, emotionally and spiritually have the prerogative to determine their gender, rather than official, state/medical apparatuses only assigning gender at birth. The law also reiterates the fundamental rights of transgender people as guaranteed in

⁹ <https://www.icj.org/sogicasebook/khaki-v-rawalpindi-supreme-court-of-pakistan-12-december-2009/>.

the Pakistani Constitution, and contains a number of anti-discrimination provisions to prevent harm done to members of the transgender community on the basis of discriminatory attitudes towards their gender identity and expression.

It should be noted, however, that Pakistan still remains one of the most vocal opponents to greater recognition and protection of human rights on the basis of SOGIESC. While a bare acknowledgment at the societal and governmental level exists for the historically recognized khawajasira community, in which all other transgender identities are then folded in through this law, it remains to be seen whether the protections afforded by the legislation will extend to transgender people who may also identify as lesbian, gay, pan or bisexual.

2. Overview of the law

The Transgender Persons (Protection of Rights) Act, 2018, is divided into seven chapters.

The first chapter focuses on definitions, and provides the same for key terms such as “transgender person”; “gender identity”; and “gender expression”.

The second chapter addresses legal recognition of gender identity, and recognizes the right of transgender people to get their self-perceived gender registered in Government records.

The third chapter contains prohibitions of certain acts, and includes the prohibition of discrimination against transgender individuals and the prohibition against harassment of transgender people.

Chapter four places certain obligations on the State, which include: establishing protection centers and safe houses for transgender people; establishing separate prison and detention cells for transgender people; instituting periodic sensitization and awareness of public servants, in particular law enforcement officials and healthcare workers; formulating special vocational training programmes to facilitate, promote and support the livelihood for transgender persons; and encouraging transgender people to start small business by providing them incentives, easy loan schemes and grants.

Chapter five relates to the protection of transgender people’s rights, featuring, among other things, the right to inheritance; the right to education; the right to employment; the right to property; and the right to access to public spaces. This chapter also contains a general provision affirming that all the rights guaranteed by the Constitution of Pakistan will also be available for transgender people. Finally, chapter five introduces a new criminal offence, which relates to employing, compelling or using “any transgender person for begging”.

Chapter six sets out enforcement mechanisms under the law, and states that in addition to remedies available under the general criminal and civil law, aggrieved transgender people may file complaints with the Federal Ombudsperson, the National Commission for the Status of Women (NCSW) and the National Commission for Human Rights (NCHR).

Finally, chapter seven contains a number of general provisions, including one empowering the Government to make rules to carry out the objectives of the law, and a provision stating that the law will have an over-riding effect on any other law for the time being in force.

3. Definition of a transgender person

There is no single definition of a transgender person in international standards. Most working definitions, such as the one used by the Commissioner for Human Rights for the Council of Europe, are premised on the notion that people may have a gender identity that is different from the gender assigned to them at birth, as well as those people who wish to portray their gender identity in a different way from the gender assigned at birth.¹⁰

The Yogyakarta Principles also do not give a definition of transgender people, but define gender identity as:

*Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.*¹¹

Section 2(f) of the Transgender Persons (Protection of Rights) Act, 2018, 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," a definition that, to a large extent, is compatible with the one in the Yogyakarta Principles.

Section 2(n) of the law, however, goes on to define a "transgender person" as someone who is: (i) "Intersex" (khusra) with a "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, Khawaja Sira or 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."

The definition provided under section 2(n)(iii) comprises most of the common features of a common understanding of a transgender person.

However, the first two parts – 2(n)(i) and 2(n)(ii) - are either illustrative or not entirely inaccurate.

For example, it would have been clearer had the definition of transgender person been limited to "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", and "transgender man, transgender woman, Khawaja Sira", and "eunuch assigned male at birth, but undergoes genital excision or castration" were

¹⁰ <https://rm.coe.int/1680492119>.

¹¹ <https://yogyakartaprinciples.org/introduction/>.

illustrations to show the diversity within the transgender community in Pakistan.

Also, as discussed below, including intersex people in the category of “transgender” people is inaccurate, and gives rise to a failure to fully recognize the specific legal protections required for intersex people.

4. Intersex people

Section 2(n) of the law defines intersex people as individuals who have a "mixture of male and female genital features or congenital ambiguities." As discussed above, the law includes intersex people in its definition of a "transgender" person.

4 (a) Difference between intersex and transgender

Subsuming individuals with intersex characteristics within transgender people is erroneous and a mischaracterization.¹² Intersex people are individuals born with a wide range of natural variations in their sex characteristics (or differences of sex development) that do not fit the typical definition of male or female, including, for example, with respect to their sexual anatomy, reproductive organs or chromosome patterns.¹³ As such, being intersex is distinct from a person's gender identity.

As with everyone else, an intersex person may identify – as in, they may self-identify their gender – as female, male, both, neither or transgender.

There are, of course, a number of similarities in the experiences of transgender and intersex people in relation to the State and society. For example, both intersex and transgender individuals lack the recognition of their basic right to self-determination: intersex people, because they are often subjected to invasive medical and surgical procedures without their consent; and transgender people, because they face hurdles in legal recognition of their gender. Furthermore, in some countries, transgender people also face invasive medical procedures without their consent (e.g. forced sterilization, conversion therapy), and intersex people (especially those who identify as transgender) face hurdles in having their gender recognized (e.g. in the absence of affirmative legal gender recognition frameworks).

In many countries, transgender and intersex persons continue to be pathologized based on medical classifications. Only in May 2019, in adopting the 11th Revision of its International Classification of Diseases (ICD-11), did the World Health Organization remove trans-related categories from the Chapter on Mental and Behavioral Disorders, thus officially de-psycho-pathologizing trans identities. As a result, pathologizing categories affecting trans and gender diverse people have been removed from the list of mental disorders.

However, as pointed out by civil society organizations, "full depathologization of trans and gender diverse people requires the complete removal of: psycho-medical classifications; legal and bioethical

¹² Amnesty International, "Its Intersex Awareness Day - here are 5 myths we need to shatter", 26 October 2018, accessed at: <https://www.amnesty.org/en/latest/news/2018/10/its-intersex-awareness-day-here-are-5-myths-we-need-to-shatter/>.

¹³ See, for example, UN Free and Equal Intersex Factsheet, accessed at: <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>.

gatekeepers; corporate-driven medical care & treatments; normative gender stereotypes; and all forms of socioeconomic injustice.”¹⁴

In many jurisdictions, both transgender and intersex people are considered to suffer from some kind of “disorder”: for transgender people, the disorder is thought to be “psychological”, whereas for intersex people, it is believed to be “physical”. Furthermore, both transgender and intersex people face discrimination and human rights violations due to such pathologization in a society where the binary of male and female prevails.¹⁵

However, despite these similarities, and the situation of transgender people with intersex variation in this context, there remain important differences in the experiences between intersex and transgender people.¹⁶

4 (b) Rights of intersex people

Since the Transgender Persons (Protection of Rights) Act includes intersex people in the definition of transgender, the above-mentioned rights and protections guaranteed by the law are also available to intersex people.

However, the Act leaves some of the most serious human rights violations faced by intersex people unaddressed. These include subjecting intersex children and adolescents to medically unnecessary hormonal treatment, surgical and other procedures for the purpose of trying to forcibly make their appearance conform to binary sex stereotypes and societal expectations about female and male bodies.

These procedures, which are often irreversible, can cause permanent infertility, pain, loss of sexual sensation and lifelong mental suffering, including depression.

In many countries, intersex children and adolescents, who are born with atypical sex characteristics, are subjected to discrimination and medically unnecessary hormonal treatment, surgery and other procedures without their informed consent or that of their parents. Regularly performed without the full, free and informed consent of the person concerned - who is frequently too young to take part in the decision-making - these procedures violate their rights to mental and physical integrity and to be free from torture or other ill-treatment, among others.¹⁷

In October 2016, ahead of Intersex Awareness Day, a group of United Nations and international human rights experts called for an urgent end to

¹⁴ See, [ICD-11 depathologizes Trans and Gender Diverse identities](#), TGEU, Transgender Europe.

¹⁵ Ghattas, D. (2018). Standing Up for the Human Rights of Intersex People. In J. Scherpe, A. Dutta, & T. Helms (Eds.), *The Legal Status of Intersex Persons* (pp. 429-444). Intersentia. doi:10.1017/9781780687704.027.

¹⁶ Carpenter, M. (2018). The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities. In J. Scherpe, A. Dutta, & T. Helms (Eds.), *The Legal Status of Intersex Persons* (pp. 445-514). Intersentia. doi:10.1017/9781780687704.028.

¹⁷ UN Free and Equal Intersex Factsheet, accessed at: <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>.

human rights violations against intersex children and adults. They urged Governments to “prohibit harmful medical practices on intersex children, including unnecessary surgery and treatment without their informed consent, and sterilization.”¹⁸

The UN Committee against Torture has expressed concern about early unnecessary and irreversible sex-determining surgeries and its long-term impact in several countries; and the UN Committee on the Rights of the Child has stated that such practices are discriminatory and constitute “harmful practices.”¹⁹ The UN Committee on the Rights of Persons with Disabilities has also expressed concern about “sex assignment” and “sex normalizing” surgeries on intersex children, most recently in its concluding observations on India.²⁰

As a result, a number of States around the world are prohibiting surgical interventions on intersex children without the informed consent of the individual concerned unless it is medically necessary.²¹

Courts around the world too have reaffirmed that children must give consent to any medically invasive sex-determining procedures. In 1999, the Colombian Constitutional Court, for example, held that a five-year-old child had “not only developed a defined gender identity but is also aware of what happens to his or her body and can [understand] different gender roles and express their wishes.” Therefore, parental consent could only be a substitute for a child’s consent if the child was less than five years old and parental consent was “informed, qualified and persistent”.²²

Recently, following directions from the Madras High Court, the Indian state of Tamil Nadu also banned sex assignment surgeries on intersex “infants and children, except in life-threatening situations.”²³

A law that relates to the rights of intersex people but does not address these issues is a failure of the State to protect the rights of intersex people as guaranteed under international law.

¹⁸ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>.

¹⁹ Sandberg, K. (2018). Intersex Children and the UN Convention on the Rights of the Child. In J. Scherpe, A. Dutta, & T. Helms (Eds.), *The Legal Status of Intersex Persons* (pp. 515-535). Intersentia. doi:10.1017/9781780687704.029

²⁰ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/IND/CO/1&Lang=en

²¹ See, for example, Malta: 14. (1) It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent: Provided that such sex assignment treatment and, or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor. Accessed at: <https://rm.coe.int/168045b1e6>.

²² See International Commission of Jurists, Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook, Chapter Six: Intersex, pp. 140-146, accessed at: <https://www.icj.org/wp-content/uploads/2012/05/Sexual-orientation-gender-identity-and-Justice-report-2011.pdf>

²³ G.O. MS No. 355, 13 August 2019.

Recommendation: Rename the law as Transgender *and* Intersex Persons (Protection of Rights) Act; amend the definition of transgender people to remove the conflation between transgender and intersex people; and after broad-based consultations that include intersex activists and organizations, add additional provisions to ensure the respect, protection and fulfillment of the rights of intersex people, such as the prohibition of medically unnecessary hormonal treatment, surgical and other procedures, including “sex-assignment surgeries”, on intersex children and adolescents, unless and until they are performed with their full, free and informed consent.

5. Legal recognition of gender identity

Legal Gender Recognition (LGR) is the official recognition of a person's gender identity, including gender markers and names in public registries and other key documents. One of the key objectives of a law protecting the rights of transgender people is LGR without medical requirements, such as gender confirmation surgery, forced sterilization or hormonal treatment. LGR processes must also be "quick, transparent and accessible", and effectively uphold the rights of transgender people, including their right to self-determination.²⁴

The Transgender Persons (Protection of Rights) Act is in many ways consistent with international standards and good practices related to legal recognition of preferred gender identity. There remain, however, a few areas of concern or ambiguity, which would greatly benefit from amendment or elaboration in related rules and policies.

5 (a) No medical or diagnostic requirement

Under international human rights law and standards, a person's declaration of their preferred gender identity for the purpose of obtaining gender recognition should not require validation by a medical expert, judge or any other third party. Requiring someone seeking legal recognition of their self-identified gender to undergo treatment, purportedly for "medical reasons", or to require them to accept "to be treated" in connection with a certain diagnosis (e.g. "gender dysphoria") is, among other things, a breach of their right to protection against attacks on their dignity, as well as their physical and mental integrity under Article 7 of the ICCPR,²⁵ in addition to being a violation of the State obligation to respect for their private life under Article 17 of the ICCPR, among other rights. Gender identity is a private matter, concerning someone's deeply felt individual conviction, which should not be subject to arbitrary third-party scrutiny.²⁶

²⁴ Parliamentary Assembly of the Council of Europe, Discrimination against Transgender People in Europe, Resolution 2048 (2015), para 6.2.1.

²⁵ With respect to this, Principle 32 of the Yogyakarta Principles + 10, entitled "The Right to Bodily and Mental Integrity", states: "Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person."

²⁶ See, for example, Principle 3 of the Yogyakarta Principles: "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity..." See also, Maciej Szydłowski (2016), Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people, *International Journal of Transgenderism*, 17:3-4, 199-211. In addition, the YP+10 set out the following State obligations with respect to one's right to privacy (Principle 6), "RELATING TO THE RIGHT TO PRIVACY STATES SHALL: G. Ensure that requirements for individuals to provide

The biggest strength of the Transgender Persons (Protection of Rights) Act is that it offers legal recognition of preferred gender identity as a matter of right without any medical or diagnostic requirements. Section 3 of the law states, “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.” It goes on to affirm that transgender people have the right to have their “self-perceived gender identity registered with all government departments including, but not limited to, NADRA (the National Database and Registration Authority).”²⁷

This makes the Transgender Persons (Protection of Rights) Act one of the more progressive gender recognition laws not just in Asia, but also globally. For example, the Indian Transgender Persons (Protection of Rights) Act, enacted in December 2019, requires transgender people to go through a district magistrate to get certified as a transgender, a process that subjects transgender people to intrusive medical scrutiny.²⁸

5 (b) Citizenship requirement

The Transgender Persons (Protection of Rights) Act appears to impose a citizenship requirement for people to be able to benefit from legal gender recognition. Section 3(3) states, “every transgender person, being the citizen of Pakistan, who has attained the age of eighteen years shall have the right to let himself or herself registered according to self-perceived gender identity.”

Legal gender recognition procedures should be accessible for all people residing in the State, whether or not they are citizens, including migrants, asylum-seekers, refugees and stateless individuals.²⁹ If legal gender recognition procedures are limited to only the citizens of a country, transgender migrants, asylum-seekers, refugees and stateless persons residing in the country are at risk of being left in a situation where they are not recognized for who they are where they live, and are not able to obtain gender recognition in their home country. Migrants, asylum-seekers, refugees and stateless persons, who are transgender, are

information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons’ right to self-determination of gender; H. Ensure that changes of the name or gender marker, as long as the latter exists, is not disclosed without the prior, free, and informed consent of the person concerned, unless ordered by a court.”

²⁷ However, according to information received by the ICJ, this provision is not being implemented as provided under the law and government departments routinely ask for medical and psychological assessments for change of gender.

²⁸ International Commission of Jurists, India: Parliament must revise Bill on Rights of Transgender Persons to ensure compliance with International Law and Supreme Court Rulings, 23 July 2019, accessed at: <https://www.icj.org/india-parliament-must-revise-bill-on-rights-of-transgender-persons-to-ensure-compliance-with-international-law-and-supreme-court-rulings/>.

²⁹ See, for example, Scherpe, J. (Ed.). (2015). *The Legal Status of Transsexual and Transgender Persons*. Intersentia. doi:10.1017/9781780685588, Comparative Analysis and Recommendations, p 629, and Legal Gender Recognition in Europe, a toolkit, accessed at: <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf>.

particularly at risk of becoming targets for transphobic offences, violence and discrimination. ID documents in the State where they reside, reflecting their gender identity, are key for social integration, for access to the job market, for accessing social services, including healthcare, goods and services and, if need be, for turning to law enforcement in case they are targeted because of their gender identity.³⁰

Under international human rights law and standards, including those enshrining binding obligations on Pakistan, the obligations of States towards individuals do not depend on the particular status or recognition of status of such persons under domestic or international law, except for a limited number of provisions explicitly applicable to special categories. For instance, all the rights recognized by the International Covenant on Civil and Political Rights (ICCPR) apply to everyone, with the sole exception of the rights under Article 25 (participation in public life, voting and election, access to serve in the public service), which the ICCPR expressly guarantees only to citizens.

Considering the number of refugees residing in Pakistan in particular, this is a significant omission in the law.³¹

5 (c) Age requirement

The same provision, Section 3(3), recognizes the right to legal gender identity recognition according to one's self-perceived sense of one's gender only to those who have attained 18 years of age. It thus appears that adolescents who are below the age of 18 years of age do not have the right to have their preferred gender recognized in Government records, including birth certificates, before they reach the age of adulthood at 18 years.

Such an age restriction exists in a number of other legal gender recognition laws globally. Often, the link with medical treatment or surgery for LGR is given as a justification for additional age restrictions.³² However, since the Pakistani law commendably does not require surgical or medical interventions for the legal recognition of preferred gender identity, the reasons for limiting LGR to people who are 18 years or older are unclear.

While the Convention on the Rights of the Child, to which Pakistan is a party, does not directly address the question of legal gender recognition, a number of provisions of the Convention support the notion that LGR should not be denied to children only on the basis of their being below 18 years of age. Article 2 speaks of non-discrimination; Article 3 states the best interests of the child shall be a primary consideration in all actions

³⁰ Legal Gender Recognition in Europe, a toolkit, accessed at: <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf>.

³¹ Take, for example, the Maltese law. While the "rights to the recognition of their gender identity" only applies to Maltese citizens, Article 4(8) of the law provides the same mechanism to change name and gender for persons with refugee status.

³² Kirsten Sandberg, "The Rights of LGBTI Children under the Convention on the Rights of the Child", *Nordic Journal of Human Rights*, 33:4, 337-352.

concerning children; Article 5 is about the need to respect the evolving capacity of a child to make decisions about their life; and Article 12 obligates States to give due weight to children's views, in accordance with the age and maturity of the child.³³

At what age legal recognition may be granted should depend on the evolving capacities of the child, their views as to whether they wish to be recognized in their "self-identified" gender, and the best interest principle.

The Committee on the Rights of the Child has acknowledged that transgender and intersex adolescents commonly face "persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information."³⁴ Consequently, the Committee has emphasized that States must protect the rights of all adolescents to "freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy."³⁵

There is growing recognition around the world that legal gender recognition may help prevent stigmatization and discrimination against transgender people, and may also benefit the psychological stability of individuals and ensure they have access to proper education, health care and other such services. Social transition, however, can be very difficult if it is not formally recognized through some type of legal gender recognition process. It can be argued, therefore, that LGR for adolescents may be in their best interest,³⁶ and therefore should not be denied to them solely on the basis that they are below 18 years of age.

The LGR laws in Malta and Argentina, for example, ask for the informed consent of the child, without precluding the possibility that adolescent children may be able to give their informed consent in this matter.

Recommendations: Amend the law to include provisions for legal gender recognition for non-citizens, including refugees.

Remove the absolute age limit of 18 years from the law and allow for legal gender recognition for adolescent children based on the best interests of the child, their evolving capacity and taking into account their opinion.

Formulate rules and policies to ensure legal gender recognition procedures are quick, transparent and accessible.

³³ Open Society Foundations, A legal gender recognition issue brief, trans children and youth, accessed at: https://www.opensocietyfoundations.org/uploads/a958c063-2b80-4173-b5b4-3811eab51919/lgr_trans-children-youth-20151120.pdf.

³⁴ UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, available at: <https://www.refworld.org/docid/589dad3d4.html>, para 33.

³⁵ Ibid, para 34.

³⁶ Scherpe, J. (Ed.). (2015). *The Legal Status of Transsexual and Transgender Persons*. Intersentia. doi:10.1017/9781780685588, Comparative Analysis and Recommendations, p. 625.

6. Protection from Discrimination

Chapter three of the Transgender Persons (Protection of Rights) Act prohibits discrimination against transgender people. It states that “no person” shall discriminate against a transgender person with respect to a number of contexts, and lists, among others, educational facilities; employment; healthcare; access to goods and services; housing; and holding public office.

4. Prohibition against discrimination:

No person shall discriminate against a transgender person on any of the following grounds, namely:-

- (a) the denial 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 or discontinuation of or unfair treatment in healthcare services;
- (e) the denial 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 or discontinuation of, or unfair treatment with regard to, right to movement, safe travel and use of public facilities of transportation;
- (g) the denial or discontinuation of, or unfair treatment with regard to, the right to reside; sale, purchase, rent or otherwise occupy or inherit any movable and immovable property;
- (h) the denial 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.

Secondly, in chapter five of the Act titled “protection of the rights of transgender persons”, the obligation not to discriminate is repeated in relation to the right to hold public office; the right to access educational and healthcare facilities; the right to assembly; the right to access public places; and the right to hold property. Another section in this Chapter states that the Government shall ensure that there is “no discrimination for any person on the basis of sex, gender identity or gender expression” in the guarantee of fundamental rights recognized by Pakistan’s Constitution.

The Act, however, does not provide any definition of what constitutes discrimination. It also provides no penalties, remedies or enforcement mechanisms in case of a violation of the anti-discrimination duty under

chapter five, except for a general enforcement provision under section 18 (see section 8 (d) for a discussion on the enforcement mechanism).

It should be noted that while the Pakistani Constitution guarantees the right to equal treatment of the law, the specific prohibition related to discrimination is limited to discrimination on the "basis of sex".³⁷ Furthermore, there is no anti-discrimination legislation to protect people/groups who are at a heightened risk of human rights abuses as a result of discrimination on the grounds of their gender expression, gender identity, race, ethnicity, etc.³⁸

The protection of the right to equality before the law, to equal protection of the law and to freedom from discrimination are fundamental obligations on States under international law, and require States to prohibit and prevent discrimination in private and public spheres, and to diminish conditions and attitudes that cause or perpetuate such discrimination.³⁹

While it is encouraging that the Transgender Persons (Protection of Rights) Act recognizes discrimination against transgender people in a number of different areas by a number of different actors, it would be more effective to enact robust anti-discrimination legislation that includes gender identity and gender expression among the prohibited grounds of discrimination, and that also protects intersex people from discrimination.

Recommendation: Enact a comprehensive anti-discrimination law, following transparent, meaningful and broad-based nationwide consultations with relevant stakeholders, with the aim of prohibiting discrimination on protected grounds including gender identity, gender expression and sex characteristics, in line with international law and standards.

³⁷ Article 25, Constitution of Pakistan: "There shall be no discrimination on the basis of sex."

³⁸ One of the few exceptions is the Sindh Empowerment of 'Persons with Disabilities' Act, 2018, which among other things, contains a provision related to non-discrimination.

³⁹ See, for example, Article 2, 3 and 26 of the ICCPR.

7. Offences and penalties

The Transgender Persons (Protection of Rights) Act creates a new criminal offence, which is related to beggary. Section 17 of the Act states: "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."

The provision's language appears to cast the net too wide: it is not just restricted to "compelling" transgender people to beg, which would entail some kind of coercion, but also includes: "employing" or "using", which may therefore also apply to voluntary and willful actions on the part of transgender people.

In this context, it is worth recalling that other laws in force in Pakistan also criminalize beggary, such as the Punjab Vagrancy Ordinance, 1958. The Ordinance defines a "vagrant" as someone who "solicits or receives alms in a public place" or "allows himself to be used as an exhibit for the purpose of soliciting or receiving alms", and provides a sentence of up to three years in prison for "vagrants". The Ordinance also criminalizes employing or causing "any person to solicit or receive alms" or using a person as "an exhibit for the purpose of soliciting or receiving alms", with a penalty of up to one year in prison.

Including begging by transgender people as a separate, distinct offence under the Transgender Persons (Protection of Rights) Act is at the very least questionable since for many transgender people in Pakistan, begging remains one of their limited livelihood opportunities. Laws related to beggary, including the Punjab Vagrancy Ordinance, have been significantly misused against the transgender community, allowing for law enforcement agencies to harass, blackmail, imprison and sexually assault transgender people. Furthermore, the police routinely interpret the vague penal clauses on "begging" and "vagrancy" to prohibit and penalize spiritual and celebratory rituals of the khawajasira community (for instance, at weddings and childbirth) that have crucial significance in the community's folk tradition.

Section 17 of the Transgender Persons (Protection of Rights) Act also reinforces certain stereotypes against transgender people, which can be traced back to the British colonial period. The Criminal Tribes Act, enacted in 1871, considered "begging" a nuisance to public order and designated it a criminal activity, taking away from *hijras* one of the main sources of their traditional livelihood: the collection of alms at marriages, childbirth and other occasions.

The provision against begging in the Transgender Persons (Protection of Rights) Act not only reinforces the criminalization of beggary, it could also be read to target the relationship between *guru*⁴⁰ and *chaila*⁴¹, in which *gurus* train their *chailas* to collect alms. Such a provision also risks making

⁴⁰ Roughly translated as "teacher",

⁴¹ Roughly translated as "disciple".

the “structure of relatedness” and “kinship” of such communities vulnerable to the State’s disciplinary and punitive measures,⁴² allowing it to, effectively, “police” forms of kinship common in certain transgender communities.

While this would have been a problematic provision in any law, the fact that it has been included in a law whose stated aim is to protect the rights of transgender people makes it even more invidious.

The criminalization of beggary has been a subject of debate in other contexts as well. In 2017, the African Commission on Human and Peoples’ Rights adopted the Principles on the Decriminalisation of Petty Offences in Africa. The Principles “articulate standards for acceptable human rights practices, specifically concerning matters of access to justice.” They “seek to guide States on measures that can be taken to enhance human rights protections at the critical intersection of poverty and criminal justice.” They call for petty offences, including begging, to be decriminalized.⁴³

The general criminalization of begging has also been subjected to judicial criticism in the region. In 2018, the Delhi High Court held provisions related to criminalization of begging under the Bombay Prevention of Begging Act, 1959, went against the Indian Constitution. The Court held:

*Criminalizing begging is a wrong approach to deal with the underlying causes of the problem. If we want to eradicate begging, artificial means to make beggars invisible will not suffice. A move to criminalize them will make them invisible without addressing the root cause of the problem. The root cause is poverty, which has many structural reasons: no access to education, social protection, discrimination based on caste and ethnicity, landlessness, physical and mental challenges, and isolation.*⁴⁴

The Delhi High Court also pointed out the flaws in criminalizing “forced beggary”. It said that if the State wishes to criminalize specific types of forced beggary, “it has to first think out a clear factual basis and impact thereof to pass a well-thought legislation after due application of mind, and being mindful of the constitutional rights provided under the Constitution of India.”⁴⁵

Courts in Pakistan have been less forthcoming in acknowledging the human rights concerns stemming from the criminalization of beggary. The Federal Shariat Court⁴⁶ and the Lahore High Court have respectively declared the Punjab Vagrancy Ordinance, 1958, compatible with Islam and the Constitution of Pakistan. Other courts have also reinforced the

⁴² Saria, V. (2019). Begging for change: Hijras, law and nationalism. *Contributions to Indian Sociology*, 53(1), 133–157. <https://doi.org/10.1177/0069966718813588>

⁴³ <https://acjr.org.za/resource-centre/decriminalisation-of-petty-offences-web.pdf/view>.

⁴⁴ W.P.(C)Nos.10498/2009 & 1630/2015, p. 15.

⁴⁵ Ibid, p. 19.

⁴⁶ The Federal Shariat Court is a constitutional court with the mandate to examine the compatibility of laws of the country with Sharia law. It is located in the federal capital, Islamabad.

colonial stigmas of “pollution” and “nuisance” attached to collecting alms. With such jurisprudence, it is essential that laws related to the criminalization of beggary be rethought, including by taking into account the discriminatory application of such laws against transgender people.

Recommendation: Repeal section 17 of the Transgender Persons (Protection of Rights) Act and decriminalize beggary in all other legislation, such as the Punjab Vagrancy Ordinance, 1958.

8. Other areas of concern

8 (a) Rehabilitation

The preamble of the Transgender Persons (Protection of Rights) Act states that the law seeks to “provide for protection, relief, and rehabilitation of rights of the transgender persons...” Section 6(a) goes on to obligate the Government to “establish protection centers and safe houses to ensure the rescue, protection and rehabilitation (emphasis added) of transgender persons...”

The use of “rehabilitation” indicates a “rescue” approach, which would tend to imply State’s control over transgender people. In response to a similar language in the Indian Transgender Persons bill, Sampoorna, a network of “trans* and intersex” people in India, has argued that the idea of “rehabilitation” comes from outdated disability discourses and has a negative connotation indicating lack of agency of transgender people, which is undesirable in a law that recognizes the rights of transgender people.⁴⁷

Recommendation: Remove references to “rehabilitation” from the law and frame the Government’s duty in concrete, affirmative terms, such as the duty to provide housing, as well as medical and psychological care in line with international guidelines in protection centers and other facilities to transgender and intersex people.

8 (b) Harassment

Section 5 of the law “prohibits” the harassment of transgender people and section 2(h) defines harassment broadly to include “sexual, physical, mental and psychological harassment”. However, it remains unclear what such prohibition of harassment entails, and what remedies and forms of redress will be available to transgender people who are subjected to harassment.

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 gender expression is prohibited.

2(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.

⁴⁷

<https://sampoornaindiablog.wordpress.com/2019/07/19/spwg-statement-on-transgender-persons-protection-of-rights-bill-2019/> and <http://orinam.net/sampoorna-response-msje-trans-rights-bill/>.

“Harassment” as defined under the transgender law is not a criminal offence in Pakistan. The Pakistan Penal Code, however, already criminalizes sexual harassment; the Protection against Harassment of Women at the Workplace Act, 2010, prohibits sexual harassment in the workplace; and the Prevention of Electronic Crimes Act, 2016, makes stalking a criminal offence.

Recommendation: Ensure that legislation already in force, including the Protection against Harassment of Women at the Workplace Act and the Penal Code, to the extent that they address harassment, are interpreted to provide protection against harassment also to transgender and intersex people.

8 (c) Separate prison cells

Around the world, transgender people are at high risk of violence, discrimination, and torture and other ill-treatment when they are deprived of their liberty, including in prison. UN experts have highlighted the absence of training and policies in most countries to understand the needs of transgender people, to avoid their stigmatization in detention, to recognize their self-identified gender, and to carry out proper risk assessments.⁴⁸

Responding to these concerns, section 6(b) of the Transgender Persons (Protection of Rights) Act places an obligation on the Government to “establish separate prisons, jails, confinement cells, etc. for the transgender persons involved in any kind of offence or offences.”

The provision for separate prison cells to address these abuses, however, is not without its own set of problems.

First, the law does not specify whether there will only be one category of prisons or jails for all transgender people, regardless of whether they identify as men, women, both or neither.

Secondly, as a general principle, provisions that encourage segregation of transgender people, as opposed to integration and acceptance, should be discouraged, not just in prison cells, but other gender-segregated facilities, such as public transport and restrooms.

Advocates for separate prison cells in other parts of the world often make the argument that segregation is necessary for the protection of transgender people, who are at high risk of violence and harassment while in detention. Since the primary concern is the safety of transgender

⁴⁸ See, for example, “Targeted and tortured: UN experts urge greater protection for LGBTI people in detention”, 23 June 2016, accessed at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E>.

prisoners, a better response would be to reiterate the obligation on the police and prison officers to protect prisoners from violence; provide them with training to understand the specific vulnerability of transgender people; and hold to account State officials involved or complicit in incidents of violence.

As for any other detainees, determining whether an individual poses a threat to other detainees or to police/prison staff should be carried out on an individual basis, and should be based on objective evidence. Given the unique risks faced by transgender prisoners, special provisions may also be made for them. This could include, for example, allowing them facilities to shower separately at their request.⁴⁹

Recommendation: In consultation with transgender organizations, prison authorities should develop policies and strategies that:

- a) Ensure the maximum possible protection of transgender detainees;
- b) Strictly adhere to the prohibition against discrimination on the basis of gender identity and/or gender expression;
- c) Ensure disciplinary action of staff who fail to respect such principles;
- d) Recognize prisoners' right to privacy with respect to their gender identity and/or gender expression; and
- e) Facilitate their social reintegration in an effective manner.

The same prison authorities and other entities charged with social welfare of transgender prisoners should develop measurable standards to assess and evaluate the outcomes of such strategies and practices.

8 (d) Enforcement mechanisms

The law does not create any new enforcement mechanisms. Section 18 provides that, in addition to remedies available under the Constitution of Pakistan, 1973; the Pakistan Penal Code, 1860; the Code of Criminal Procedure, 1898; and 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 (NCSW) and National Commission of Human Rights (NCHR) if any of the rights guaranteed herein are denied to him or her."

However, there have been no corresponding amendments in the legislation of the NCSW or the NCHR to expressly include transgender people in their mandate or to give them any additional powers and resources to enforce the rights provided in the Transgender Persons (Protection of Rights) Act.

Further, while the Act allows transgender people to approach the NCHR and the NCSW to seek redress, they do not place any obligations on these

⁴⁹ ACLU, End the abuse: Protecting LGBTI Prisoners from Sexual Assault, <https://www.aclu.org/sites/default/files/assets/012714-prea-combined.pdf>

commissions to include in their mandate the rights of transgender people for the purposes of research, training etc.

Finally, among other things, the mandate of Federal Ombudsperson is to seek to “resolve complaints and provide relief to the public by carrying out independent investigations into complaints about ‘maladministration’ in any Federal Government agency”. In February 2018, the Ombudsperson appointed a commissioner for transgender rights. However, like the Ombudsperson, the Commissioner’s mandate is limited to Federal Government agencies and does not extend to provincial agencies (see also the next section on “provincial subjects”).

This raises questions about whether the enforcement mechanisms provided under the law are robust enough to ensure the effective implementation of far-reaching provisions, such as those relating to non-discrimination and harassment.

Recommendation: Establish commissions at provincial and federal levels for the protection of the rights of transgender and intersex people and amend the statute and rules of the NCSW to expressly include in its mandate the rights of transgender women.

8 (e) Provincial subjects

The Transgender Persons (Protection of Rights) Act is a federal law, which is applicable to the whole of Pakistan. However, a number of provisions of the law relate to provincial subjects, which means that they may require legislation by provincial assemblies to be implemented. These areas include, for example, health, education, prisons, family and inheritance laws.

Similarly, some of the enforcement mechanisms specified in the law, such as the Federal Ombudsperson, are federal institutions, which have limited jurisdiction in the provinces. Their resulting inability to intervene in the provinces could be a hindrance in implementation of the law.

To be effective, therefore, it is necessary for provincial legislation to be adopted.

Recommendation: Enact robust provincial legislation to respect and protect the rights of transgender and intersex people and ensure the fullest implementation of the Act, not solely at the Federal but also at the provincial level.

8 (f) Rules

Section 20 of the law provides that the Government may, by notification, make rules to give effect to the purposes of the Act.

It is of concern that nearly two years after the law was enacted, these rules have still not been framed, which, in turn, has impeded the implementation of the Act.

While the Ministry of Human Rights has started the process of drafting the rules and has prepared an initial draft, there are concerns that the consultations have not been broad-based. Transgender activists have also raised concern about a number of provisions in the draft rules.

Recommendation: Ensure rules under the law be promptly framed after transparent, meaningful and broad-based consultations with transgender and intersex activists, CSOs, and other stakeholders.
--

9. Conclusion and recommendations

Despite its limitations, the Transgender Persons (Protection of Rights) Act, 2018, is an affirmative federal law that allows for self-identification as the basis of legal gender recognition. This is a crucial progressive improvement in the legal status of transgender people in Pakistan since it recognizes the autonomy, agency and freedom of any person to determine their own gender identity and gender expression in line with international standards. Based on this provision, transgender people have the right to have all their official documents changed and reissued in line with their self-identified gender, which makes the Act one of the most far-reaching in the region, if not the world over.

The law also prohibits discrimination against transgender people, imposing an obligation on the Government to take steps to sensitize government departments about the human rights of transgender people. It affirms the rights of transgender individuals to education, health, inheritance, employment, vote, assembly, to access to public spaces and the right to hold public office, among other human rights. These provisions in the Act, if enforced in their true spirit, have the potential to ensure transgender people can live their lives with dignity, as provided by Pakistan's Constitution, but which has been denied to them for decades.

It is also commendable that transgender activists and organizations were meaningfully and actively consulted in the drafting process of the law, and their concerns are to a large extent reflected in the final draft that was enacted.

For the objectives of the law to be realized in a manner that fully respects the human rights of transgender people, however, it is essential that this process does not end with the enactment of the law. Challenges towards implementation and enforcement still remain, which demand a proactive and inclusive approach from the authorities that takes into account the context and lived experiences of transgender people.

Pakistan must also review its legal framework to ensure that other laws, including provisions of the Pakistan Penal Code do not violate the human rights of transgender people. For example, it is of particular concern that section 375 of the PPC continues to define rape in gendered terms - as a crime that only a man can commit against a woman - thereby, for instance, omitting the perpetration of rape against transgender people from its ambit. There are other legal provisions that discriminate, including against transgender individuals, such as section 377 of the PPC, which criminalizes "carnal intercourse against the order of nature", and which should therefore be urgently repealed.

The analysis in this paper provides some guidance to policy makers and members of parliament on how the law can be further strengthened. The following recommendations should be implemented, both at national and provincial levels, to make the Transgender Persons (Protection of Rights)

Act the more consistent with Pakistan's obligations under international law:

1. Rename the law as Transgender and Intersex Persons (Protection of Rights) Act; amend the definition of transgender people to remove the conflation between transgender and intersex people; and after broad-based consultations that include intersex activists and organizations, add additional provisions to ensure the respect, protection and fulfillment of the rights of intersex people, such as the prohibition of medically unnecessary hormonal treatment, surgical and other procedures, including "sex-assignment surgeries", on intersex children and adolescents, unless and until they are performed with their full, free and informed consent.
2. Amend the law to include provisions for legal gender recognition for non-citizens, including refugees.
3. Remove the absolute age limit of 18 years from the law and allow for legal gender recognition for adolescent children based on the best interests of the child, their evolving capacity and taking into account their opinion.
4. Formulate rules and policies to ensure legal gender recognition procedures are quick, transparent and accessible.
5. Enact a comprehensive anti-discrimination law, following transparent, meaningful and broad-based nationwide consultations with relevant stakeholders, with the aim of prohibiting discrimination on protected grounds including gender identity, gender expression and sex characteristics, in line with international law and standards.
6. Repeal section 17 of the Transgender Persons (Protection of Rights) Act and decriminalize beggary in all other legislation, such as the Punjab Vagrancy Ordinance, 1958.
7. Remove references to "rehabilitation" from the law and frame the Government's duty in concrete, affirmative terms, such as the duty to provide housing, as well as medical and psychological care in line with international guidelines in protection centers and other facilities to transgender and intersex people.
8. Ensure that legislation already in force, including the Protection against Harassment of Women at the Workplace Act and the Penal Code, to the extent that they address harassment, are interpreted to provide protection against harassment also to transgender and intersex people.
9. In consultation with transgender organizations, prison authorities should develop policies and strategies that:

- a) Ensure the maximum possible protection of transgender detainees;
- b) Strictly adhere to the prohibition against discrimination on the basis of gender identity and/or gender expression;
- c) Ensure disciplinary action of staff who fail to respect such principles;
- d) Recognize prisoners' right to privacy with respect to their gender identity and/or gender expression; and
- e) Facilitate their social reintegration in an effective manner.

The same prison authorities and other entities charged with social welfare of transgender prisoners should develop measurable standards to assess and evaluate the outcomes of such strategies and practices.

- 10. Establish commissions at provincial and federal levels for the protection of the rights of transgender and intersex people and amend the statute and rules of the NCSW to expressly include in its mandate the rights of transgender women.
- 11. Enact robust provincial legislation to respect and protect the rights of transgender and intersex people and ensure the fullest implementation of the law, not solely at the Federal but also at the provincial level.
- 12. Ensure rules under the law be promptly framed after transparent, meaningful and broad-based consultations with transgender and intersex activists, CSOs, and other stakeholders.
- 13. Review Pakistan's legal framework to ensure that other laws, including provisions of the Pakistan Penal Code, do not violate the human rights of transgender people. In particular, repeal section 377 of the PPC, and revise section 375 of to ensure rape is defined in gender-neutral terms.

Commission Members

March 2020 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org