



OPEN ACCESS

القلم Al-Qālam

P-ISSN: 2071-8683; E-ISSN: 2707-0077

Volume 28, Issue, 2, 2023

<http://alqalamjournalpu.com/>

# Legal History of Transgender Rights and Analysis of Transgender Act 2018

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## Abstract

### KEYWORDS:

*Transgender, Legal History, Transgender Persons (Protection of Rights) Act 2018*

### Date of Publication:

30-12-2023



Transgender community had reputed position in the harem of Mughal courts. In the constitution of 1973, all citizens were entitled for fundamental rights but they are still deprived from the basic rights. In 2018, 'Transgender Persons (Protection of Rights) Act 2018' passed in the parliament of Pakistan to ensure the rights of the transgender community. They were provided with fundamental rights such as education, occupation, etc. This act is appeared as the ray of hope for this community to live with equal honor. Rights are the standard to protect and secure the honor of a person. According to United Nations, human rights are not bestowed by the state. These are the universal rights without any discrimination of color, religion, sex, religion, language and nationality. This article will elucidate the legal history of transgenders in Pakistan and analyze the Transgender Persons (Protection of Rights) Act 2018.

## Introduction

Technically 'rights' are the criterion to determine and preserve the honor of an individual. Human rights regulate the relationships of human beings among themselves and with the state and their living standards in the society. Besides rights each and every individual has responsibilities towards others and they must honor the rights of others by using their right. Neither government, nor any group or person has right to breach and profane the rights of any other individual of the society.<sup>1</sup> According to United Nations definition of Human Rights: Human rights are not bestowed by the state, even it is being attain by us because we persist in a society. These are the universal rights possess to us without any discrimination of color, religion, sex, race religion and language, and nationality.<sup>2</sup> In the history of human rights, the Universal Declaration of Human Rights (UDHR) is the milestone. Different representatives belonging to various backgrounds and terrain of the world who sketched and conferred the bill. General Assembly professed the declaration as an attainment similar for all nations on 10 December, 1948. In the Constitution of Islamic Republic of Pakistan 1973, all the citizens of the state are entitled for all the fundamental rights.

## 1.1 Historical Background of Rights of Transgender Community

Transgender community exists since the beginning of the universe and is facing discriminatory behavior and hatred in almost every society. They are facing multiple issues like rejection, abuse, harassment, illiteracy, unemployment, poverty and discrimination.<sup>3</sup>

### 1.1.1 Mughal Time Period

In the courts of Ottoman and Mughal empires, *hijras* played a vital and eminent character as administrators, political advisors and guardians of *harems*. They were regarded as astute, trustworthy and loyal. They had open ingress to all places. In the politics of empire building, they played momentous roles. In *Makkah* and *Madina*, they were appointed as guardian of the sacred places.<sup>4</sup>

### 1.1.2 British Epoch

The transgender community was provided with privileges like lands, food and money. They were also given the agricultural households in the area which was eliminated under British legislation.<sup>5</sup>

### 1.1.3 Colonial Rule

The circumstances were changed after the 18th century and objections were made on facilities being given to transgender community in the royal courts. In the mid of the 19th century, the British colonial administrative prove them as criminals and decline their civil rights. They also created separate tribes for them in different parts of subcontinent. They were being included in the Criminal Tribes Act 1911 by the colonial administration as they were involved in different criminal activities like kidnapping and castration of children. The punishment under this Act was up to two years of detainment and fine.<sup>6</sup>

### 1.1.4 Post Independence Time

When Pakistan came into being, the Pakistani society endeavors to give identity to the transgender community. The government of Pakistan in 1960 again prohibited the rights of transgender community.<sup>7</sup>

### 1.1.5 Western Concept of Gender Identities

In west, the definition of gender identities is '*Gender attributes to the features of male, female, boy and girl which have been composed by society. It involves characters, attitudes and norms linked with being girl, boy, man or woman and correlation among them. With the passage of time variations comes in it and it also differs from one society to the other society because it is socially built*'. Whereas gender identity is associated with the self-perception of an individual which he/she experience about gender.<sup>8</sup> Transgender whose gender identity is in contradiction at the time of birth comes in the category of LGBTQ (L: Lesbian, G: Gay, B: Bisexual, T: Transgender, Q: Queer). It is used as a synonym for 'non-hetero sexual'.<sup>9</sup>

### 1.1.6 Fundamental Rights in Constitution of Pakistan 1973

In the present constitution of Islamic Republic of Pakistan, fundamental rights are given to each and every individual. Under this law, all the basic rights of a citizen like defense, prohibition of imprisonment, protection of honor, liberty of speech and religion, education and equality are protected.

### 1.1.7 Background of 'Transgender Persons (Protection of Rights) Act 2018'

The 'Transgender Persons (Protection of Rights) Act 2018' is considered as a milestone in the legislative history of Pakistan. It was passed in 2018 after the efforts of activists, organizations and transgender community.<sup>10</sup> In 2009, an incident happened in Rawalpindi where numerous transgender persons were arrested by the police. On the appeal of Almas Shah (Bobby) several transgender persons were released as they were not real culprits. Dr Aslam Khaki lawyer by profession and is head of the organization '*Insaaf Welfare Trust*'.<sup>11</sup> On February 9, 2009 in Supreme Court of Pakistan, he filed a petition for the basic rights of transgender community. He elaborated about their status in society and also mentioned that

they are also citizens of Islamic society. He also explicitly elaborated about rights of inheritance, education and employment.<sup>12</sup> As the output of the petition, three hearings took place in March and May 2009. On June 16 2009, the court instructed provisional government to conduct the consensus of transgender residing in each province. Later on, a transgender named Saleem Iqbal also known as Shazia talked about the abuse and harassment of police. With the efforts of Dr Aslam, the Supreme Court of Pakistan proclaimed that transgender community is also citizens of Pakistan according to the Constitution of Pakistan.

The Supreme Court of Pakistan also ordered the police to give protection to the transgender community. In the next hearing on November 20, the federal and provisional governments were instructed to give educational, employment opportunities and right of inheritance to the transgender community. They were also directed to issue identity card on the basis of their exact gender. The category of 'X' was made for them in place of male or female. In March 2011, the Court gave them the fundamental rights as prescribed in the Constitution of Pakistan.<sup>13</sup> In year 2011, the right of vote was given to the transgender community by the verdict of Supreme Court and enacted first time in 2012 and participated in the general elections of 2013.<sup>14</sup> Later this initiative of Dr Aslam Khaki became the foundation for the Transgender Persons (Protection of Rights) Act 2018. Different bills on this topic have been presented but the bill of 'Transgender Act 2018' was sanctioned by the 'Human Rights Committee' of Senate. Three different bills were presented on this issue in the proceedings of Senate.

- i. Senator Rubina Khalid from PPP presented the bill which was about the protection of transgender by suggesting amendments in some sections of the 'Pakistan Penal Code' (*Taziraat-e-Pakistan*).
- ii. The second bill was presented by Rubina Khalid (PPP), Rubina Irfan (MLQ), Samina Saeed (PTI) and Kalsoom Parveen (MLN).
- iii. The third bill was presented by Kareem Ahmad Khawaja (PPP).<sup>15</sup>

The first bill was sent to the committee of civil law and remaining two to human rights committee. There were many meetings held and decided that both should be present in the senate together. The report was presented by the senator Col. Retd. Syed Tahir Mashhadi (MQM). Mumtaz Tarar, the minister of human rights not just pursues the bill but also appreciated the bill. The Chairman of Senate, Raza Rabbani also appreciated the senators who worked on the bill. After referendum, the bill was sanctioned and sent in the National Assembly. This bill was presented in the National Assembly on May 8, 2018 by Naveed Qamar and Naeema Kishwar raised objection on the bill and suggested to send the bill in the committee of National Assembly. She then demurred on the section of 'Self-Perceived Gender Identity' in 18 years and suggested to send the bill in the 'Islamic Ideological Council' but the speaker of National Assembly Ayaz Sadiq denied. After getting approval from both houses of Parliament, the bill was signed by the President of Pakistan, Mamnoon Hussain on March 18, 2018. This bill got the status of the Act and on March 24, 2018 and got published in the gazette of Pakistan.<sup>16</sup>

### **1.1.8 Implementation of the Transgender Act 2018 in Pakistan**

The transgender community in Pakistan confronted distinction, abuse and violence but still they had obstacles in the way of getting education and job opportunities. They are always pushed towards begging for their livelihood. In reaction to these problems and violations, many NGOs and other Human Rights organizations are working together to remove their issues.<sup>17</sup>

### **1.2 Issues in the 'Transgender Persons (Protection of Rights) Act 2018**

The objective of this Act is to provide protection to transgender community but Section 3 relates to the self-perceived gender identity. Any person can get himself/herself registered as

per his/her self-perceived gender identity in NADRA. This person will get his ID card based on his self-perceived gender without going through any medical examination. According to section 7, the inheritance of such person will be as per his/her self-perceived gender identity. Both these sections are the point of criticism and created other social issues.<sup>18</sup>

### 1.2.1 International Commission of Jurists (ICJ)

The International Commission of Jurists has given the following suggestions regarding Transgender Persons (Protection of Rights) Act 2018:

- i. Rename the Act as ‘Transgender and Intersex Persons (Protection of Rights) Act’ and also change the definition of transgender.
- ii. Protection of the rights of intersex person and prohibit any hormonal treatment.
- iii. Include provisions for legal recognition of gender for refugees.
- iv. Reduce the age limit to 18 years for self-perceived gender identity and it should be based on the personal interest of child.
- v. Make such rules which ensure gender recognition process.
- vi. Strictly prohibit discrimination of gender identity.<sup>19</sup>

### 1.2.2 Amnesty International

Amnesty International is a global movement working for the human rights. It has published a paper in favor of Transgender persons (Protection of Rights) Act 2018 and suggested some recommendations:

- To ensure the legal gender recognition of transgender community.
- Prohibition against any discrimination based on gender identity.
- Assurance of all social, economic and cultural rights.<sup>20</sup>

### 1.2.3 International Human Rights Law

The rudimentary human rights are equally stipulated in the charter of United Nations. According to International Treaty on Political and Social Rights, ‘*Each and every partisan of the present treaty pledge to honor and to certain all citizens within its domain and under the realm the rights identified in the present. Without any discrimination of color, cast sexual identity, language race, social status or estate*’. The third principle of the Yogyakarta Principles on the implementation of International Human Rights Law declares that, ‘*Sexual orientation, gender recognition, and self-perceived gender identity of every individual is essential to the personality of a person and is one of the fundamental facets of self-independence, honor and liberty. States will take all essential administrative, legislative steps to certain that strategies present through which demonstrate the gender or sex of a person which includes birth certificates, passports, electoral records and other documents demonstrate the intense self-perceived gender identity of a person*’.<sup>21</sup>

## 1.3 Shari‘ah Status on the Act

Allāh (عزوجل) has created human beings for procreation of human race. If any person goes to NADRA and on the basis of his self-determination revealed his gender according to his own choice that result in homosexual marriages. Islam has criticized the concept of homosexuality in the Holy Quran as well.<sup>22</sup> Similarly, if a female gets the identity card of male on the basis of self-perception so according to section ‘7’ of the ‘Transgender Act’ she has the right to get double share of inheritance which is against *Shariah*. The change in the creation of Allāh (عزوجل) is strictly prohibited. Even being a Muslim nation, it is also prohibited to adopt the style and appearance of non-Muslims in order to attain their identity.<sup>23</sup>

## 1.4 Scholars View on ‘Self-Perceived Gender Identity’

The different scholars also debated on the issue of ‘Self-Perceived Gender Identity’ and gave their verdicts in the light of the Holy Quran and *Sunnah*.

### 1.4.1 Mufti Muneeb-ur- Rehman

According to this Act, anyone can adopt any gender of his choice and all government authorities including NADRA have to accept him as per his /her self-determined gender identity. He declared this section of the Act as the pursuance and fulfillment of the objective of LGBTQ group. According to the identity of a person, it should be determined as per the sexual characteristics appear at the time of birth. Later, if someone claims of natural change then this decision should be based on medical examination instead of personal choice. There is also contradiction in the section 4 (e) as transgender persons cannot be benefited from the facilities, privileges, services, accommodation available to the general public. According to the view of Mufti Muneeb-ur-Rehman, they should have separate jails. In Islam, there is no condition of age to become eligible for inheritance. By giving the right of self-perception to someone means that a woman considers herself as man so her share of inheritance will get double. There is no capacity of such law in Islam.<sup>24</sup>

#### 1.4.2 Maulana Muhammad Ilyas Ghuman

‘Transgender Act 2018’ is a secret door towards homosexuality which is one of the signs of doomsday. He stated that this is conspiracy to demolish the Islamic identity of Pakistan. In the light of *hadith*, sodomy and homosexuality are forms of adultery.<sup>25</sup>

#### 1.4.3 Mufti Irfan Ahmad Madni

It is prohibited in Islam to implement such law which is contradictory to *Shari’ah* rulings. Allah (عزوجل) has made every person as His vicegerent on earth and it is the duty of each and every individual to continue this duty of vicegerency. This Act has paved the way for lie and deception as if the person who is physically a male person but registered as female. On the basis of the principles of Islamic Jurisprudence, dominant physical features will declare that whether a person is male or female. This Act is also obstacle in the way of implementation of *Shari’ah* rulings because of false identity of the person as he can get double share of inheritance which is illegitimate.<sup>26</sup> This Act also provides a legitimate way to disfigurement body organs through castration surgery which is prohibited for both male and female. This law is also encouraging bisexual marriage. The most negative aspect of this Act is that people would get legal authorization to adopt the similarity of the opposite sex. It is strictly prohibited in Islam for both male and female. Modesty is the part of faith and this law has also attacked on the modesty of a person because there is open access to enter in the public places like washrooms and female educational institutions.

#### 1.4.4 Maulana Zahid Al-Rashidi

Allah has created only two sexual identities i.e., male and female. *Khawaja siras* or *khunthā* do not belong to third sexual identity. In 2018, they have been given a separate subject and were entitled for protection of their rights. This was an error in this Act because they do not belong to any separate identification. They are entitled for protection of their rights. All the religious parties protested on it and considered it contradictory to *Shari’ah*. According to the Transgender Act 2018 of Pakistan, NADRA is obliged to issue ID card as per his/her statement according to the self-perceived gender identity of that person so all the laws will be implemented on that person.

### 1.5 Proposed Amendments in the Act

There were many amendments presented in the Parliament from different political parties to amend the ‘Transgender Persons (Protections of Rights) Act 2018’.

#### 1.5.1 Amendment Bill by Senator’ Mushtaq Ahmed Khan

He introduced a bill in the senate on November 11, 2021 to amend the Transgender Persons (Protections of Rights) Act 2018 which is as follows:

1. The title of the Act will be ‘Transgender Persons (Protection of Rights) (Amendment) Act, 2021’.
2. He proposed amendment Section 3 and 3 A with following changings:

- a. In sub-section (1), replace the words of ‘as per self-perceived gender identity’ with ‘as per advice of medical board’.
- b. He suggested gender re-assignment medical board in every district.
  - i. The gender re-assignment medical board will consist of Professor Doctor, Male General Surgeon, Female General Surgeon, Psychologist and Chief Medical Officer.
3. He suggested removal of section 7 sub-section (3).
4. He adds new section 12 A as, ‘any sex- reassignment surgery or any other treatment will be unlawful which will be done in order to bring variations in the genital features of male or female due to any psychological disease or gender dysphoria’.
5. He substitutes the word ‘*khunthā*’ instead of ‘transgender’.

In order to bring compliance with this Act, followings adverse effect will rise in the society.

- i. Homosexual marriages will be legally permissible.
- ii. Contradiction with the law of inheritance of Islam.
- iii. Infringement of the honor and modesty of Muslim women.<sup>27</sup>

### 1.5.2 Amendment Bill by Fawzia Arshad

She proposed following amendments:

1. The title of the Act will be ‘Transgender Persons (Protection of Rights) (Amendment) Act 2022’.
2. She suggested changes in the Section 2, clause (e), (f) and (n) that definition of ‘Gender Expression’ associates with the demonstration of the gender identity of a person as male, female or transgender. She also said that ‘Gender Identity’ is the identification of a person as male, female or transgender based on his/her biological features. She further modified definition of a ‘Transgender Person’ is hermaphrodite.
3. She requested to substitute the section 7, sub-section 3, clause (iii) as, ‘the person who has ambiguity in the characteristics that it is difficult to determine his identity so his share of inheritance will equal to half share of male and female both.’<sup>28</sup>

### 1.5.3 Amendment Bill by Mohsin Aziz

He has proposed the amendment in the long title and Section 1 in the sub-section (1), the word ‘transgender’ word should be replaced with ‘intersex’. In the section 3, clause (a) and (b) of the Act, he suggested modification in ‘as per self-perceived gender identity’ into ‘sex at birth’ and omission of the clause (c). The right given in this Act of ‘self-perceived gender identity’, through this right a person will be able to change his identity on documents and can become a member of senate on the reserved seats of woman. Further, he can get access towards the public places of women.<sup>29</sup>

### 1.5.4 Amendment Bill by Syed Muhammad Sabir Shah

He proposed amendment in the Section 3 sub-section (1), (2), and (3), the phrase ‘self-perceived’ should replace with ‘medical certificate’. In section 5 A, *guru* is not allowed to adopt the transgender child either by consent or forcefully. He also suggested that who will violate the section 4 A and 5 A will be punished, detained till one year and penalty of five lac rupees.<sup>30</sup>

### 1.5.5 Amendment Bill by Abdul Ghafoor Haidari, Atta-ur- Rehman, Faiz Muhammad and Kamran Murtaza

In their amendment bill, they have suggested to amend ‘self-perceived gender identity’ as it is contradictory to Islam and it should be based on the report of the medical board. Same is the case in the share of inheritance where the inheritance of an intersex person will be incompliance with the religion or personal law.<sup>31</sup>

## 1.6 Determination of Islamic Status of Act

‘Islamic Ideological Council’ and ‘Federal *Shariah* Court’ are two official departments who examines whether any law is contradictory to Islamic commandments or not. The CII gives opinion during legislation and even before making of law whereas ‘Federal *Shariah* Court’ gives decision regarding status of that particular law.<sup>32</sup> The status of opinion is like a suggestion whereas decision is binding. The parliament might or might not accept the recommendations but if *Shariah* Court declared the law as contradictory to Islam so it is mandatory on the Parliament to accept its decision.<sup>33</sup>

### **1.6.1 Recommendations of ‘Islamic Ideological Council’ on Transgender Act 2018**

The Chairman of the ‘Islamic Ideological Council’ (CII), Qibla Ayaz declared some provisions of the ‘Transgender Act’ 2018 as contrary to the Islamic rulings and Constitution of Pakistan. *Shariah* does not permit someone to have his/her gender identity on the basis of self-perception. He also complained that the parliament had to regard the recommendations of the ‘Islamic Ideological Council’ before passing the Act and eradicate the sections contrary to Islamic injunctions.<sup>34</sup>

### **1.6.2 Verdict of Federal *Shariah* Court on the Act**

After the several petitions, the ‘Federal *Shariah* Court’ determined the status of the Act that whether it is in compliance with the Islamic injunctions or not. The court concludes that self-perception of gender identity is opposite to the concept of Islam. The court stated that, the court heard the opinion of the experts and parties and reached the conclusion to proclaim and announce that as per the rulings of the Holy Qur’an and *Sunnah*.<sup>35</sup> According to the ruling of Federal *Shariah* Court, the three sections 2 (n), section 3 and 7 are in contradiction to *Shariah*. The judgment given by acting Chief Justice, Syed Muhammad Anwar and Justice Khadim Hussain of Federal *Shariah* Court that the sections 2 (f), 3 and 7 are in contravention with the Islamic teachings. Firstly, the Court declared the section 2 (f) opposite to the *Shariah* in which there is the definition of the gender identity stated as the innermost perception of a person as being male or female or intersex which may or may not be in accordance with the biological sex. The concept of gender identity is opposite to it because in Islam the gender identity of a person should be compatible with his/her biological sex. In Section 2 (n), there is no ambiguity in the definition because the intersex person who has both organs and there is concept of that person in Islam, eunuch is castrated male who lost his competency due to any disease or accident so that person also exists. The Court has protected the rights of castrated man and intersex on the basis of Constitution but nullify the concept of transgender because such person is in contradiction with the concept of *Shariah*. In Section 3, it is prohibited for a person in Islam to change the gender. The gender of a person will be adjudicated comprised with the prevalent physical features instead of the personal feelings and if a person holds the male dominant features so he will be considered as male. Further, the Court clarified that the worship of a person depends upon the sexual identity of a person. The Section 7 was declared unlawful as the person would get the share of inheritance as per his/her self-determined gender identity. The final decision of a court is that the gender identification of a person cannot depend upon the personal perception and feelings.<sup>36</sup>

## **1.7 Effects of ‘Self-Perceived Gender Identity’ in *Pakistani* Society**

There are following effects of Transgender Act 2018 in the *Pakistani* society:

### **1.7.1 Gender-Change Requests in NADRA**

Since June 2018 to June 2022, there are about 28723 people who changed their gender identity, 16530 who changed from male to female, 12154 people turned from female to male and 21 males to transgender.<sup>37</sup>

### **1.7.2 Bisexual Marriages**

There are many incidents of bi-sexual marriages in different parts of the country where there are many cases reported of same sex marriages. In Taxila, Asma and Neha got married in court.<sup>38</sup> Similarly, there are cases in which two males got married.

### 1.7.3 Transition Surgeries

After the bill passed, many people changed their identity by going through transition surgery. In Pakistan, Noman Khan changed into Naira Khan after the transition surgery and grew up like a girl. So, this is one of the adverse effects of the Act which allowed such people legally to change their identity.<sup>39</sup>

### 1.7.4 Admission in Women Educational Institutions

The institutions specified for women in Pakistan started giving admission to trans-woman. A person who is registered as female based on his self- perceive gender identity on NADRA can get admission in women colleges and universities although that person is a male biologically. It will lead towards other social crimes and will create issues for female students such as sexual abuse. The privacy of females will be disturbed. The parents who send their daughters with the concept that their daughters will be saved and secured cannot get them admitted in such institutes then.<sup>40</sup>

### 1.7.5 Access to Feminine Public Places

A biological male person who registers himself as transgender female can have access to public places of females. He will use female toilets and can attend the female functions and parties and in female hostel.

### 1.7.6 Pakistani Transgender Film ‘Joy land’

After the ‘Transgender Act 2018’, Pakistan released a new movie in 2022 in which a transgender person has been given a leading role. This film is basically based on the concept of LGBTQ. The government of Pakistan banned this movie on the opinion of the ‘Central Sensor Board’<sup>41</sup>

### 1.7.7 Legal Permission for LGBTQ

Legal permission for LGBTQ has been given through this Act that anyone can change his/her gender and can have bi-sexual marriage and promote homosexuality. The homosexuals got legal place to do such acts which is opposite to the rulings of Islam.

## Conclusion

Since no such act has been passed for transgender community that can promote their rights but this is the first time in the history of Pakistan to ensure the protection and rights of the transgender community. They were given the right of education, recognition of gender identity, health facilities, inheritance rights, right to vote and employment.

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<sup>40</sup> Raja Zia-ul-Haq and Taha Ibn e Jaleel, Ali and Danial Abdullah, Transgenders in Women Universities, August 5, 2023, Maulvi with an Attitude, 2:11:14 sec, accessed on August 10, 2023, [\(462\) TRANSGENDERS IN WOMEN’S UNIVERSITIES | Maulvi With An Attitude - YouTube](#)

<sup>41</sup> Amir Khakwani, Transgender Act ka Shakhisana: Film Joy land ki Ijazaat, *Transgender Qanoon-is ki Shar’ae Hasiyaat*, (Lahore, Pakistan: Al-Burhaan, 2020), 449-452