

LEGISLATION WATCH CELL

JUL-SEP 2022

Punjab Protection of Rights of Transgender Act 2022

Report 2022-02



Human Rights
Commission of Pakistan

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Introduction

Violence and discrimination against transgender identities is an internationally recognised issue. Numerous international instruments, including the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), address gender-based discrimination and violence. Among others, Article 26 of the ICCPR, and Articles 2 and 7 of the UDHR expressly extend equal rights and protection of law to all individuals and strictly prohibit discrimination based on sex.

In June 2011, the UN Human Rights Council became the first UN intergovernmental body to adopt a wide-ranging resolution on human rights, sexual orientation and gender identity. Resolution 17/19 expressed the Council's 'grave concern' over violence and discrimination against individuals based on their sexual orientation or gender identity, and commissioned a study on the scope and extent of these violations and the measures needed to address them.¹

Subsequently, in November 2012, the UN General Assembly called on states to protect the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings, including those motivated by the victim's sexual orientation or gender identity.²

Given this context, this report analyses the proposed Punjab Protection of Rights of Transgender Act 2022—currently a bill—from the perspective of international and national human rights law. Given the incidence of violence against transgender persons—with eight cases of sexual assault and five cases of murder reported in Punjab in 2022 alone, and reports that trans persons routinely experience discrimination in terms of access to education, health,

¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement>

² <https://press.un.org/en/2012/gashc4059.doc.htm>

employment, housing and public spaces—the Human Rights Commission of Pakistan (HRCP) strongly feels that the existing legislative framework governing the community’s rights must be extended to all four provinces in the wake of the federal Transgender Persons (Protection of Rights) Act 2018.

The report examines the following: (a) the definition of ‘transgender person’ as provided in the bill, (b) the language of the bill, (c) the status of transgender and intersex children and adolescents, (d) the procedures for legal gender recognition stipulated by the law, (e) the jurisdiction of the ombudsperson and the courts under the bill, (f) criminal offences and provisions pertaining to discrimination against, and harassment of, transgender persons, and (g) the overall consistency of the bill vis-à-vis other relevant laws along with enforcement mechanisms.

Overview

The underlying principle of the bill is the concept of gender sovereignty—the idea that human beings themselves, rather than state institutions, should be free to determine their gender. This acknowledges that individuals experience and express their gender socially, psychologically, emotionally and spiritually in ways that may or may not conform to their gender as perceived by others, based on the latter’s own or socially constructed conceptualisations of gender. All individuals should therefore have the prerogative to determine their own gender as opposed to having it assigned to them by state, medical or other official apparatuses.

The proposed Punjab Protection of Rights of Transgender Act 2022 appears to draw on this concept and aims to protect the gender sovereignty of trans citizens of Punjab, empowering them to self-identify in this context.

The bill also protects transgender persons from discriminatory attitudes by expressing these as criminal offences. It reiterates almost all the fundamental rights enshrined in the Constitution of Pakistan but also extends to specific issues such as abandonment, harassment and inheritance rights.

Once passed, the bill will be named the ‘Punjab Protection of Rights of Transgender Act 2022’. It contains 19 definitions of various terms that are fundamental to protecting and securing the rights of transgender persons in Punjab. The bill comprises 44 sections pertaining to (among other things) recognition of gender identity, provisions prohibiting discrimination and harassment, and various rights such as the right to own and inherit property and to vote and stand for public office as well rights to employment, health, education and public spaces.

The bill provides for the enforcement of these rights by empowering the ombudsperson in Punjab to rectify and redress rights violations. It also criminalises certain acts targeting transgender persons,

including discrimination, harassment, procurement, assault, importation, kidnapping and abduction. However, it is not clear which rights are enforceable through the ombudsperson and which are enforceable through the courts, nor does the bill indicate whether these jurisdictions are mutually exclusive or if they may be exercised simultaneously. In practice, these gaps are likely to make implementation difficult.

While the bill also criminalizes the act of abandoning a transgender child under Section 39, the language of this provision is problematic. Under the bill, abandoning a trans child is deemed a criminal offence only if the parent, guardian or caregiver can afford to care for the child in the first place. This implies that caregivers who show they cannot afford to look after a trans child may not be held criminally liable for abandoning them. This provision could be manipulated to avoid criminal liability under the law.

Analysis and specific recommendations

Several problematic provisions of the bill are reproduced and examined below.

Definition of 'transgender person'

Section 2(1)(s)

s) 'Transgender Person' mean a person, including transgender man, transgender woman, non-binary or Khawaja Sira, who falls under any of the following descriptions:

(i) ambiguous sex characteristics and/or bodily features that do not fit the typical binary notions of male or female; or

(ii) unambiguous sex characteristics and/or bodily features that fit the typical binary notions of male or female, having undergone genital excision or partial or full sex reassignment procedure; or

(iii) ambiguous gender identity and/or gender expression that do not fit the typical binary notions of male or female, being incongruent with the social norms and cultural expectations of the sex assigned at birth; or

(iv) unambiguous gender identity and/or gender expression that fit the typical binary notions of male or female, being incongruent with the social norms and cultural expectations of the sex assigned at birth.

A critical review of this definition pinpoints several underlying issues that need to be addressed by improving the definition of 'transgender person'.

First, the use of words such as 'ambiguous' and 'unambiguous' with reference to transgender persons is cause for concern. Such wording implies that 'clarity' is attributable only to the male and/or female genders. This negative connotation fosters the typical

gender binary notion, which defeats the spirit of the bill. Instead, the definition should be simplified to reflect that 'transgender' is an umbrella term used to describe persons whose gender identity or expression differs from that typically associated with the sex assigned to them at birth. Subject to the corrections to other grey areas given below, the words 'ambiguous' and 'unambiguous' should simply be deleted from this section.

Second, both this definition as well as the bill in its entirety disregard the intersex population, which has time and again demanded recognition as a distinct group. It is critical to understand that intersex persons are equally vulnerable, given that they include individuals born with a wide range of natural variations in sex characteristics (or differences in 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. As such, being intersex is distinct from a person's gender identity. Just as biological and social meanings are attached to sex and gender, respectively, intersex and transgender people also have the same distinguishing lines. It is important to cater to the distinct identity of intersex people and not force them to identify as 'transgender' even though these two sets of characteristics may overlap in some individuals.³

There are two alternatives. One is to reconsider the title of the bill itself and rename it the 'Punjab Protection of Rights of Transgender and Intersex Persons Act 2022 while adding a separate definition of 'intersex person' to the bill. The other is to cover only transgender persons under this law and legislate separately to protect the rights of intersex persons to avoid confusion. In either case, both stakeholders must be consulted closely and their needs and experiences taken into account.

³ <https://openbooks.library.umass.edu/introwgss/chapter/gender-and-sex-transgender-and-intersex>

Language of the bill

The bill continues to use 'he or she' and 'his or her' pronouns instead of 'they, them, their' for transgender persons, again reflecting a gender binary and defeating the spirit of the law.

The name of the bill is also imprecise. Rather than the 'Punjab Protection of Rights of Transgender Act 2022', it should be called the 'Punjab Protection of Rights of Transgender *Persons* Act 2022' or the 'Punjab Protection of Rights of Transgender and Intersex *Persons* Act 2022', as explained above.

Scope and application of the bill

Section 3(3)

Every transgender person, being the citizen of Punjab, who has attained the age of eighteen years shall have the right to get himself or herself registered according to self-perceived gender identity with NADRA on the CNIC, CRC, driving license and passport in accordance with the provision of the NADRA Ordinance, 2000 (VIII of 2000) or any other relevant laws.⁴

It is important to note that individuals under 18 years of age or transgender adolescents are not covered by the bill. This implies they would continue to be exposed to discrimination, harassment and other offences without recourse to legal redress under this law.

Moreover, the bill extends only to citizens of Punjab. Transgender individuals with noncitizen status, such as refugees, asylum seekers and migrants, are not protected under the bill and will remain vulnerable to discrimination and violence without the benefit of legal protection.

⁴ There is unfortunately a vague, even contradictory understanding of 'self-perceived' gender identity among many lawmakers, judges and even civil society activists. Many activists who support the federal Transgender Persons (Protection of Rights) Act 2018 are seen to be under the impression that the law only confers the right to change one's gender identity to 'X', although in fact, the law (like this bill) provides for the right to change one's identity from 'M' to 'F' and vice versa. The latter, while desirable from a rights perspective, is likely to lead to backlash, which could increase the vulnerability of the transgender population in the short term. Whether or not the provision should be retained in the provincial law at this stage is, however, a question for transgender stakeholders, rather than cisgender ones, to answer.

The scope of the bill must therefore be extended to all 'persons' in Punjab instead of citizens of Punjab alone. Additionally, transgender children and adolescents should be included in the bill, given that they are doubly vulnerable to harassment, violence and abandonment and are more likely to be forced into gender binary lifestyles or unnecessary medical procedures in their early years. Arguably, this assumes that minors have the capacity and competence to determine whether their gender identity is different from that assigned at birth, which may be more true of older adolescents (15–18 years) than of younger children (aged 10–14 years). Nonetheless, this assumption should not prevent the law from extending protection to transgender and nonbinary children and adolescents.

Unnecessary medical procedures

The bill does not criminalise unnecessary and/or forced hormonal treatment and surgical procedures carried out on intersex and transgender children in their early years to bring their sex and/or gender in conformity with the gender binary notion.

Laws that may affect enforcement mechanism

Section 377 of the Pakistan Penal Code 1860 criminalizes 'carnal intercourse against the order of nature' and is widely misused by the police against transgender persons across the country. Sections 25, 26, 27, 29 and 30 of the proposed bill could potentially be misused against transgender persons because they contain terms such as 'unnatural offence' or 'unnatural lust'. These provisions should be revised and phrased appropriately, keeping in view their propensity for being used against transgender persons rather than to protect them.

Employment quota

Section 8(3)

There shall be reserved two percent quota for all employments in public and private sector departments/organizations for Transgender Persons subject to fulfilment of prescribed requirements.

Until the transgender community is effectively mainstreamed and able to compete on open merit, special provisions for affirmative action should be added to the bill to ensure that the 'prescribed requirements' for employment are not so rigid as to be inequitable. It is important to note that the provision regarding the employment quota will be hard to implement because the transgender community is sorely underrepresented in every sphere of life. Even if the 2 percent reserved quota were applied, many trans applicants may well be unable to meet the 'prescribed requirements' or qualifications for such jobs. Therefore, in addition to express mention of special measures to be taken to employ transgender persons (in this section of the bill), careful and informed employment and hiring policies must also be introduced at all levels in the public and private sectors.

Access to polling stations

Section 9

Provided that the access to polling stations shall be determined according to the gender declared on the CNIC of a Transgender Person.

It is important to ensure that this provision is implemented in terms of infrastructure and inclusive measures at polling stations such that transgender persons can cast their votes at polling stations of their choice (those for men or women).

Access to healthcare

Section 11(c)

to ensure Transgender Persons access to all necessary medical and psychological gender related treatment

Both sex-related and gender-related treatment should be made part of this provision.

Section 11(d)

to create provisions for coverage of medical expenses by a comprehensive insurance scheme for Transgender Persons.

As such, these health insurance schemes should be subsidised.

Section 15(3)(3)

Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

Transgender persons are not 'sick' or 'ill' either physically or mentally. Placing them in rehabilitation centres if abandoned by their immediate family suggests that they need treatment or rehabilitation. Instead, abandoned transgender persons should be housed in 'shelter homes' rather than 'rehabilitation centres'.

Right of residence*Section 15*

Right of residence. – (1) No transgender person shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such person

(2) Every transgender person shall have:

(a) a right to reside in the house-hold where parent or immediate family members reside;

(b) a right not to be excluded from such house-hold or any part thereof;

(c) a right to enjoy and use the facilities of such house-hold in a non-discriminatory manner; and

(d) to live as per his or her choice.

(3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre

While this section stipulates the residency rights of transgender persons, it does not criminalise the abandonment of transgender persons by their families. It is pertinent to note that most violations of trans persons' rights occur when they are abandoned by their families. Such parents must be held criminally liable.

Police harassment

Section 16(4)

Under no circumstances may an officer frisk, search, or otherwise touch any person for the purpose of obtaining information about that person's sex or gender status.

The word 'may' should be replaced by 'shall' as police harassment of transgender persons in itself is a grave issue.

General recommendations and conclusion

The bill is largely silent on the issue of violence against transgender persons. Given the evidence that violence against transgender and intersex persons is rampant in Punjab as well as other provinces, all types of violence against this population should be specifically criminalised.

In addition to violence in general, the bill should specifically cover violence and harassment perpetrated by the police against transgender persons, which trans rights activists report as being a common problem. Police violence should be criminalised and specifically penalised. Moreover, the bill should provide for police and prisons officials to receive special sensitivity training on the treatment of transgender persons in custody, and for police personnel to take proactive steps on receiving complaints of violence against trans persons rather than unnecessarily hindering the registration of first information reports in such cases.

National and provincial commissions or councils for transgender persons should be set up to protect and secure the rights of transgender persons across the country along the lines of the National Commission on the Status of Women and National Commission for Human Rights. Such commissions should include government, bureaucratic and civil society representation of all relevant stakeholders, their function being to advise the federal and provincial governments as well as to monitor the impact of policies, legislation and projects with respect to transgender persons.

While the proposed Punjab Protection of Rights of Transgender Act 2022 is a progressive piece of legislation in many ways—it addresses the issue of familial abandonment and, unlike the federal law, does not criminalise beggary—a number of ambiguities and loopholes remain unaddressed.

Without prejudice to the draft of the bill, it is critical to note that its passage in any form could itself be a serious challenge, considering the extent of religious extremism and transphobia in Punjab. Subsequent to the preparation of a well-revised draft, lawmakers must lobby strongly to ensure that the bill is passed and comprehensive rules of business prepared promptly.

HRCP Legislation Watch Cell

Instituted in 2022, the Legislation Watch Cell is an initiative of the Human Rights Commission of Pakistan (HRCP). The Cell aims to monitor and analyse legislation, rules and procedures in the form of draft bills and amendments introduced by the federal and provincial assemblies each year that warrant attention from a human rights perspective, especially with respect to women, transgender persons, vulnerable labour groups, religious minorities, and the incarcerated population.

The Cell comprises HRCP staff members, an independent legal consultant, and an advisory committee composed of legislators, lawyers and other members of civil society. HRCP seeks to publish quarterly reports through this exercise that encompass the analysis, findings and recommendations of the Cell.



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