

The Law on Sexual Orientations and Transgenders in Pakistan: An Analysis

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Keywords: Law, Mental,
Orientation, Sexual,
Transgender

DOI No:

<https://doi.org/10.56976/jsom.v3i2.87>

The objective of this research is to analyze the law on sexual orientations and transgenders in Pakistan. Sexual orientation is a pattern of sexual, romantic, and/or emotional attraction and relation with individuals of either the same sex or opposite sex or towards both sexes. A person can be categorized as straight, gay, lesbian, bisexual, queer, asexual, etc. based on his sexual orientation. Sexual orientation is inherent and not a choice. The sexual orientation of a person cannot be changed. Gender is a psychosocial construct. The gender identity of a person is often wrongly attributed to the biological sex of the person. Mostly, the gender of a person corresponds to his or her biological sex, but it is true for many people. Transgender phenomena and sexual orientation are different but can be associated with each other by their implications. The legal doctrinal analysis approach was adopted to study the law on sexual orientations and transgenders in Pakistan. Any kind of sexual orientation, and sexual encounter other than heterosexual intercourse is prohibited by law in Pakistan. The law in Pakistan only allows heterosexual encounters, and that too with certain specifications, such as vaginal sex between husband and wife or wives. The law in Pakistan must be amended considering the latest advancements in mental health and behavioral sciences, which deal with sexual orientation and transgender phenomena as inherent and different from each other.

1. Introduction

Sexual orientation of a person refers to his inherent pattern of sexual, romantic, and/or emotional attraction and relation with individuals of the same, opposite, or both sexes (The Yogyakarta Principles, 2007). It is a relatively permanent pattern of romantic, emotional, and/or sexual attractions towards men, women, or both (APA, 2022). An individual can be straight, gay, lesbian, bisexual, queer, asexual, etc. based on his sexual orientation. Human sexual behavior is not only a private matter, but it is innate too. Although there is a role for conditioning in human sexuality, a person is biologically formed to engage in certain kinds of sexual activities. Moreover, human sexual activity cannot be limited to certain acts and behaviors. Human sexuality is a complicated subject and cannot be adequately explained by minimizing it to simple assumptions. Diversity in sexual acts and behavior among different individuals is quite normal (Walker et al., 2021).

In Pakistan, any kind of sexual orientation or sexual encounter other than heterosexual intercourse is prohibited by law. The law in Pakistan only allows heterosexual encounters, and that too with certain specifications, such as vaginal sex between husband and wife or wives. Section 377 of the Pakistan Penal Code (1860) deals with the prohibition of same-sex intercourse in Pakistan. This is an exclusive statutory provision on the subject in Pakistan's law which criminalizes any kind of sexual intercourse other than heterosexual (Section 377, Pakistan Penal Code, 1860). It takes a simple view of human sexuality and thus is ambiguous and narrow, as the expression 'against the order of nature' used in this section is the main issue.

Sexual orientation is usually confused with the transgender phenomenon. However, these two are different. The sexual orientation of a person cannot be associated with the gender of that person. Moreover, transgender persons are different from intersex people, eunuchs, and Khawaja Sira. Gender is a psychosocial construct, and the gender of a person has nothing to do with their physiology or anatomy. A transgender person is a person whose gender does not correspond with his or her biological sex. Gender identity holds a central position in the transgender phenomenon. There is a widespread misconception that the sex of a person determines his or her gender. In most cases, it is true that biological sex is aligned with the gender and gender identity, but this does not mean that the gender is based on biological sex. Gender is based on gender identity, which is the innermost feeling (Ajmal & Rasool, 2023).

The Transgender Persons (Protection of Rights) Act, 2018 is the main statutory law which deals with the rights of transgender people. In its latest decision on the subject, the Federal Shariat Court annulled some of its crucial sections. The court, in its decision, considered gender as an attribute which is based on biological sex (*Hammad Hussain v. Federation of Pakistan*, 2023). However, all over the world, across academic disciplines, gender is considered a psychosocial construct which is based on gender identity and not on the biological sex of a person (Ajmal & Rasool, 2023).

2. Literature Review

2.1 Sexual Orientation

Sexual orientation is the relatively fixed pattern of an individual's sexual and/or emotional attraction towards another person of either the same sex, opposite sex, or both sexes (APA, 2015). It refers to an inherent tendency towards sexual, romantic, and emotional attraction towards individuals of either the same sex, opposite sex, or both sexes (The Yogyakarta Principles, 2007). An individual can normally feel sexual, romantic, and/or emotional attraction towards men, women, or both depending upon his sexual orientation (APA, 2022).

Sexual orientation exists on the spectrum of patterns and can result in a variety of relationships, which can be described in terms of acronyms such as LGBT (lesbian, gay, bisexual, transgender). There are a few variations of the acronym LGBT, such as LGB, LGBTQ, LGBTQIA, and LGBTQIA+. The categories of queer, intersex, asexual, and others were included in the LGBT to make this acronym more inclusive of a wide range of sexual relationships. However, these acronyms are not accepted by many based on some reservations, one of which is that transgender and intersex people cannot be dealt with on par with gays, lesbians, bisexuals, etc. in terms of sexuality (Wilcox, 2003).

2.2 Sexual Behavior, Sexual Preferences, and Sexual Orientation

Sexual orientation is generally considered to overlap with sexual preference, but these two are distinct from each other, as sexual preference suggests a choice whereas sexual orientation is not a choice. Sexual orientation is innate (Frankowski & AAPCA, 2004). The sexual behavior or conduct of a person cannot be considered the sexual orientation of that person. However, sexual contact, emotional, and romantic intimacies of a person can be taken as part of the sexual orientation of that person (*Shameti v. Canada (Citizenship and Immigration)*, 2008; *Kornienko v. Canada (Citizenship and Immigration)*, 2012). Moreover, gays and lesbians can have heterosexual relationships. Being married and having children in heterosexual relationships does not mean that a person is not LGBT. A homosexual person can go into a heterosexual relationship against his real sexual orientation in a society where being LGBT is not acceptable (Higgins, 2012; *Leke v. Canada (Citizenship and Immigration)*, 2007; *Kailiki Eringo v. Canada (Citizenship and Immigration)*, 2006).

2.3 Is Sexual Orientation Innate or Conditioned?

There is a scarcity of research on the reasons for different sexual orientations and on the developmental phase in which the sexual orientation of a person is fixed (APA, 2008). However, it is considered that sexual orientation is a product of genetic, physiological, and psychosocial factors (Lamanna et al., 2014). Although the exact causes and mechanisms of the development of sexual orientation are unknown, sexual orientation is not just a sexual preference or sexual tendency; rather, it is fixed and cannot be considered a matter of choice (Frankowski & AAPCA, 2004).



There is an ongoing debate in the scientific community on the causes of different sexual orientations in terms of whether they are conditioned or determined. Mustanski et al. (2005) highlighted the relevance of genetic factors, while Blanchard et al. (2006) found a significant role of the prenatal environment in the development of sexual orientation. Considering sexual orientation is not a matter of choice, the Royal College of Psychiatrists (2001) declared that sexual orientation is not conditioned but a product of genetic and prenatal factors. However, as far as the realization of one's sexual orientation is concerned, it has been studied that during different phases of life, LGBT people start questioning and finding their sexual orientations before self-disclosure (Sandfort, 2000; Shooter, 2000). Moreover, a precedent of the Canadian Court declared that, considering the scientific literature on sexual orientation, it cannot be said that the sexual orientation of a person is innate or the product of his life experiences. Thus, the court overturned the decision of the Immigration and Refugee Board of Canada, which decided a case based on considering sexual orientation as innate (*Lipdjio v. Canada (Citizenship and Immigration)*, 2011).

2.4 Sexual Orientation Other Than Heterosexuality is Not a Disorder

Homosexuality is not a mental or behavioral disorder (Ajmal, 2021a). The field of mental health has been abandoned, considering sexual orientation other than heterosexuality as a disorder. It is not included as a disorder in the latest versions of DSM and ICD, i.e., DSM-5-TR and ICD-11 (APA, 2022; WHO, 2019). The American Psychiatric Association (1973) does not consider homosexuality a disorder. The American Psychological Association (1975) stopped considering sexual orientation other than heterosexuality as a disorder. The World Health Organization (1993) also stopped considering sexual orientation other than heterosexuality as a disorder. The American Psychiatry Association (1973), the American Psychological Association (1975), the Royal College of Psychiatrists (2014), and the Australian Psychological Association (2000) take sexual orientation other than heterosexuality as natural and normal. Furthermore, these professional organizations agree that any kind of sexual orientation other than heterosexuality is not a disorder (APA, 2007).

2.5 Sexual Orientation is Not a Choice

Sexual orientation is not a choice. Many consider sexual orientation in terms of sexual tendency, sexual preference, and sexual behavior in terms of choices, but sexual orientation is not a choice (Ajmal, 2021b). Moreover, sexual orientation and sexual identity are two different things. The sexual identity of a person may be changed, but the sexual orientation is relatively fixed and cannot be changed. This is true for most people. However, the research indicated that some people experience changes in their sexual orientations (Bailey et al., 2016).

2.6 Sexual Orientation of a Person Cannot Be Changed

The sexual orientation of a person cannot be changed (Ajmal, 2022a). Any effort to change the sexual orientation of a person has a risk of harm to such a person (APA, 2009). Homosexuality is not a pathological condition. Changing the sexual orientation of a person to heterosexuality cannot be medically justified (Pan American Health Organization, 2012). Efforts to change the

sexual orientation of a person are discouraged by the American Psychiatric Association, the American Psychological Association, and the American Counselling Association. Further, such efforts are not recommended by the Royal College of Psychiatrists (2001) or the Australian Psychological Association (2000: APA 2007).

2.7 Transgender Identity and Sexual Orientation Phenomena

Transgender identity and sexual orientation are two different phenomena. These may somehow be related to each other by their implications, but they are distinct. Many tend to confuse these two as one. Even many experts, who do not consider these two as one, tend to consider these two as related to each other to a fallacious degree. Gender is primarily a psychosocial construct, and sex is a biological construct. Transgender identity has nothing to do with the biological sex, and sexual orientation has nothing to do with the gender identity of a person. Sexual orientation is different from gender identity. The transgender phenomenon is based on gender identity rather than sexuality (Ajmal, & Rasool, 2023). A transgender person may be of straight, gay, lesbian, bisexual, or some other sexual orientation (APA, 2008).

2.8 Transgender

There is a widespread misconception about the gender phenomenon and transgender people. This misconception is not only prevalent among the public, but even the enlightened segment of society is not substantially aware of it. There is a dearth of transgender experts in Pakistan. Gender is a social construct. The basis of gender is gender identity. Gender identity is the self-perceived innermost feeling about one's gender. The gender identity of a person cannot be altered. Transgender identity is not gender dysphoria (Ajmal & Rasool, 2023). Transgender identity is not a mental or behavioural disorder. Gender incongruence is not a pathological condition (APA, 2022). Transgender is a person whose gender identity does not correspond with the gender assigned to him at birth. A person is transgender if he or she has or expresses a gender identity which does not correspond with his or her biological sex (Council of Europe, 2011).

3. Method

The doctrinal legal analysis approach was employed to analyze the law on sexual orientations and transgenders in Pakistan.

4. Analysis

4.1 Sexual Orientations and Law in Pakistan

Section 377 of the Pakistan Penal Code (1860) is an exclusive statutory provision which deals with all kinds of consensual sexual encounters other than heterosexuals. This section criminalizes non-heterosexual encounters in Pakistan. According to Section 377, if a person willingly has sexual intercourse with any man, woman, or animal, against the order of nature, such a person shall be punished with imprisonment, which may range from life imprisonment to two years to ten years, and with a fine. This section considers penetration a requisite to constitute the crime of unnatural sexual intercourse.

Section 377 of the Pakistan Penal Code (1860) was introduced by Britain during the colonial era. This section was first introduced in the Indian Penal Code (1860) during colonial rule on the subcontinent. Pakistan adopted and incorporated this statutory provision into its penal code after partition. However, the state of India decriminalized all consensual sex, including homosexual intercourse among adults (*Navtej Singh Johar v. Union of India*, 2018).

4.2 Interpretation of Section 377 of the Pakistan Penal Code (1860) by the Superior Courts in Pakistan

The superior courts in Pakistan took a certain line of reasoning about sexual intercourse and human sexuality which is not necessarily supported by the latest developments in the field of behavioral and mental health sciences. The superior courts in Pakistan took a view according to which any kind of sexual intercourse other than heterosexual vaginal intercourse is unnatural and thus prohibited by the law. Any kind of sexual encounter other than heterosexual vaginal sexual intercourse comes in the preview of sexual perversion (*Fazal Rab Choudhary v. State of Bihar*, 1983). Sodomy is a heinous offense (*Naushad v. Jahanzeb*, 1977). Even such an attempt is a crime (*Haji and another v. The State*, 1995).

Penile penetration holds a central position in sexual intercourse, as is obvious by the decisions of the superior courts in Pakistan. There is no sexual intercourse without penetration (*Biren Lal v. State of Bihar*, 1995; *Haji and another v. The State*, 1995; *Ali Muhammad v. the state*, 1970). Penetration is an essential ingredient of sexual intercourse under Section 377. Even a little and partial penetration is sufficient to constitute the act of sexual intercourse (*Haji and Another v. The State*, 1995). Penetration without discharge is enough to constitute sexual intercourse (*State v. Amanullah*, 1978). Discharge during sexual intercourse is not a necessary condition of sodomy (*The State through A.-G, N: W. F. P. v. Amanullah*, 1978). Discharge without penetration means no sexual intercourse (*Ghulam Muhammad v. Wali Muhammad*, 1961). The view taken by the superior courts about sexual intercourse is overly focused on the physical aspects of sexual intercourse while ignoring psychological, emotional, and romantic aspects, which are much more important than the physical aspects.

The physiology of the anus is relevant in determining anal homosexual intercourse, even in cases of rape. The condition and appearance of the anus are relevant to prove the act of sodomy (*Muhammad Din Alias Pindo and another v. the State*, 1981). However, relying on the condition and appearance of the anus in determining homosexual intercourse when the person is active in anal intercourse would adversely and unduly give advantage to the rape accused. Moreover, the reasoning which is based on the physiology of the anus is fallacious in the case of determining the anal intercourse of the people who are active in anal intercourse. And the reasoning is also selective, as it is apparently based on the assumption that only penile penetration can change the physiology of the anus.

The consent of the adults engaging in any other sexual intercourse other than heterosexual is irrelevant, as engaging in such a sexual encounter is illegal even between the consenting adults (*Munsab Ali v. The State*, 1416, 1988; *Mutahir Shah v. State*, 1982). Oral sex is also considered

unnatural and punishable (*Calvin Fransis v. State of Orissa*, 1992). Moreover, penile penetration in anus is not even necessary to constitute the act of sodomy. Ejaculation by rubbing the penis of a male between the thighs of another male is considered unnatural sexual intercourse. Penetration into the artificial cavity in the thighs is sufficient for the offense of carnal intercourse (*Muhammad Ali and another v. the State*, 1961).

4.3 Critical Analysis of the Latest Judgement of the Federal Shariat Court of Pakistan on the Transgender Persons (Protection of Rights) Act, 2018

The Federal Sharia Court, in its latest judgment settled some important legal points related to transgender persons. The federal Sharia Court ordered that it is forbidden in Islam and thus prohibited in law in Pakistan for a person to go through the castration of his own choice. Such a medical procedure is allowed only to cure some disease or to save lives, and that too on the recommendation of the medical board (*Hammad Hussain v. Federation of Pakistan*, 2023).

There is a need to understand the phenomena of gender, gender identity, gender expression, gender identity formation, change in gender identity, and transgender in the light of modern developments in the field of mental health and behavioral sciences. The gender of a person cannot be based on his physiology, even though, in most cases, it corresponds with the biological sex. The gender identity of a person cannot be changed. Even therapeutic intervention to change one's gender identity is unethical and a practice which must be discouraged while keeping the wellbeing of a transgender person as a priority. The therapist must respect the transgender identity and not view gender in a binary fashion (APA, 2015).

Allowing gender alignment interventions amounts to saving the lives of transgender persons. Otherwise, there is no mechanism for making the lives of transgender persons better. Many transgenders are suffering from gender dysphoria, not because gender dysphoria is an inherent condition associated with the transgender identity but because of society's non-accepting attitude and the conflict of identity within the transgenders, i.e., a conflict between who they are, how they are feeling, and what society is expecting from them in terms of their gender identity and gender expression. On the recommendation of medical experts, the law on excision or castration for saving lives must be revisited and reinterpreted in terms of the agreement among mental health professionals that the sex of a person must align with their gender identity. Gender dysphoria is a disorder which can only be completely cured in most cases through gender realignment surgery as part of the treatment (Ajmal & Rasool, 2023).

The Federal Sharia Court further ruled that physiology is the basis of gender identity, and the gender identity of a person must correspond to his physiology. Gender identity and gender expression cannot be based on self-perception (*Hammad Hussain v. Federation of Pakistan*, 2023). Mental health and behavioral sciences do not believe in these assumptions. The sex of a person and his gender are two different things. The very phenomena of human sex and gender are different and cannot collate with each other in the said fashion. The scientific approach towards the nature of the human mind and behavior does not believe in this assumption (Ajmal, 2022a: Ajmal, 2022b: Ajmal, 2021a: Ajmal, 2021b).

The Federal Shariat Court also ruled in its verdict that a medical procedure that affects adversely the reproductive or sexual ability of an individual, such as a gender realignment procedure, without valid medical reason, is illegal (*Hammad Hussain v. Federation of Pakistan*, 2023). This must also be revisited and reinterpreted in the light of modern developments. The gender and gender identity of an individual cannot be changed. It is the sex which needs to correspond with the gender identity of an individual. All over the world, there is no mechanism to change gender identity. The only mechanism available to make the lives of transgender persons livable is gender realignment. Developed countries all over the world have adopted the mechanism of making the physiology of a person aligned with his gender identity. There is a dire need to understand and appreciate the transgender phenomenon in true letter and spirit. Medically, there is no way to change the gender identity of an individual. Thus, we are left with no option but to intervene medically to align the sex of a person with his gender identity. The way medical reasons are mentioned in this judgment does not cover the essence from which medical reasons must be taken. The medical reasons must be interpreted correctly (Ajmal & Rasool, 2023).

4.4 Discussion and Recommendations

The phenomena of gender as based on biological sex and gender identity as based on anything else except self-perceived gender are assumptions which are not supported by the science of human behavior. It is necessary that the reasoning of the law be compatible with the understanding of the nature of human beings. The law is not supposed to control the behavior of human beings in a way that adversely negates the very nature of human beings. There is a need to inculcate insights from science, particularly behavioral and mental health sciences, to understand the phenomena of sexual orientation and transgender identity. Negating the very nature of human beings and trying to control their behavior against the real order of nature cannot be fruitful.

People may have different sexual orientations than heterosexuals. Many are formed that way. Sexual orientation other than heterosexuality is not a disorder. It is neither a simple choice nor a preference. Sexual orientation is not learned; rather, it is innate. The sexual orientation of a person cannot be changed. Considering and inculcating modern scientific developments, the phenomenon of sexual intercourse must be explained broadly. In this regard, terms such as ‘against the order of nature’ and ‘carnal intercourse’ given in Section 377 of the Pakistan Penal Code must be amended and reinterpreted considering the developments in modern scientific knowledge.

Narrow and outdated views of human sexuality and sexual intercourse were taken by the courts in Pakistan, as reflected in the verdicts on the subject. The physical aspects of sexual intercourse are overly focused on the decisions of the courts. Penetration, whether in the anus or thighs, is considered the same in many ways. The whole act of sexual intercourse revolves around penile penetration. The nature of sex and sexual activity must be interpreted considering the modern development of mental health science. Penetration has overly been weighed in the case of sodomy. There are some other aspects, such as psychological and emotional, associated with human sexuality and sexual intercourse which were grossly ignored in the decisions of the court.

The psychological aspect of sexual intercourse must be included while interpreting human sexual intercourse and related matters.

All over the world, gender and gender identity are dealt with as social constructs. The reasoning behind considering gender and gender identity as self-perceived is based on valid scientific knowledge. But in Pakistan, gender is taken as a biological construct, as is obvious in the latest decision of the Federal Shariat Court. Negating gender as a social phenomenon and attempting to take it as a biological construct is based on ill-conceived notions and stereotypes, which would not help solve the very issues of the rights of transgender people. The gender and transgender phenomena must be seen and interpreted in their proper context. The sexual intercourse of transgender persons can be easily confused with unnatural sexual acts. This is particularly true considering the position taken by the recent judgment of the Federal Shariat Court. Gender identity must not be confused with sexual orientation.

There must be capacity building among all the relevant stakeholders, including lawyers, judges, police, and mental health professionals. Most of the lawyers and judges are not well-versed in the issues of transgender and sexual orientation. Many therapists even consider sexual orientation other than heterosexuality as the root cause of a person's clinical condition, such as depression, stress, etc. This notion is not just misunderstood; it is also damaging for the mental health of people having sexual orientations other than heterosexuality. Many therapists in Pakistan falsely claim to change the sexual orientation and/or gender identity of an individual, which is incorrect. The sexual orientation and gender identity of a person cannot be changed.

5. Conclusion

The law and the courts in Pakistan took a certain view on the offenses under Section 377 of the Pakistan Penal Code. The legal reasoning and the interpretation made by the superior courts reflect a view which is not supported by the mental health and behavioral sciences. Likewise, the latest judgment of the Federal Shariat Court on transgender people does not reflect the understanding of the true nature of the subject in line with the latest developments in the mental health and behavioral sciences. There must be amendments to the law considering the latest advancements in the mental health and behavioral sciences.

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