

Recognizing Civic rights of Transgender in *Shari'a*: Pakistan perspective

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Abstract

Transgender naturally have sex anatomical differences and cannot be categorically classified as male or female. Transgender children and adults are frequently stigmatised and exposed to a wide range of human rights breaches. In both culture and the law, transgender are neglected. Many human rights instruments fail to identify Transgender as rights holders, rather protecting “Male” and “Female”. Transgender are often unable to pursue their legal rights, even though those rights are clearly guaranteed by Sharia. Transgender people face discrimination in almost every aspect of their lives, including their personal lives. Though at any point, in case of rights, jurisprudence has not made any alteration between male, female, and Transgender. This article clarifies and reveals jurisprudential guidelines about civic rights of Transgender by highlighting the matters concerning their life, gender identity, education and employment. This study will also analyse the step taken by Pakistan highlighting the Bill passed by Ministry of Human rights of Pakistan in March, 2021 that provide protection, relief and rehabilitation of rights of the transgender. The qualitative study has been conducted. It is concluded that transgender is a human and deserve the same civic and other rights as “male” and “female”.

Keywords: Transgender, Civic rights, Gender Identity, Employment, Job, Islamic Sharia

Introduction

There are several terms like Intersex, Transgender and Hermaphrodite, used for people having male and female characteristics or reproductive organs. Intersex, in biology, is an organism with morphological traits, midway between a true male and a true female of its species.¹ Transgender are such individuals who do not have a complete gender like male or female. They are born with natural defects and sexual malformation. In them, both the male genital organs and of female co-exists.²

However, Encyclopaedia of Britannica defines Hermaphroditism as a state in which the organisms have both the male and female reproductive organs.³

In recent years, the work of Transgender human rights defenders brought awareness about Transgender and recognized their specific rights. Only a few countries have taken steps to prevent and rectify exploitations of their rights, and the effectiveness of such restrictions has yet to be determined. Among these countries, Pakistan also recognizes transgender and grants them their rights like they get registered as per self-perceived gender identity with all government departments. By the Law, Transgender must be guaranteed their civic rights, in

case when they come across any complaint. They must be looked by legal authorities for particular right.⁴

Civic Rights: It's Meaning and Scope

Civic rights are considered the crown of all the rights because of their significant nature.

Civic rights are the rights which every person can enjoy including Transgender. These are the elementary rights which should not be denied by any state or republic. Individuals like male, female or transgender are equally entitled to them. Civic rights comprise of right to live, right of gender identity, right of education and right to do job.⁵ Right to live of which safety and liberty are considered important traits for one to live peacefully in this world. Individuals who might it be; shall be provided with all the basic rights like gender identity, job and employment.⁶

The circle of civic rights moves around equality and respect of the creation of Allah. In religion, Islam, all people are equal in terms of their right to life, property, and human dignity, regardless of religion, race, gender, or ethnicity.⁷

“...كُونُوا قَوْمِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا آغْدِلُوا...”⁸

“...stand out firmly for Allah, As witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice...”⁹ Human beings are ordered to follow the instructions of Sovereignty and remain firm. People are warned to avoid injustice with people.¹⁰

Civic rights include; the right to live, Right of gender recognition, Right of health, Right of education and Right of employment. They are the basic rights which must be acknowledged by every person and society. As in the International Human rights Law, the significance of human rights is very evident. Not any discrimination and injustice should be done with any person having biological/ physical or any abnormality.

Great emphasis has been laid on Human rights in jurisprudence too. No one has a right to take anyone's right including that of transgender. Human are encouraged to fulfil others rights.¹¹ It is narrated in a hadith;

“مَنْ كَانَ لَهُ مَظْلَمَةٌ لِأَحَدٍ مِنْ عِزِّهِ أَوْ شَيْءٍ فَلْيَتَحَلَّلْهُ مِنْهُ الْيَوْمَ...”¹²

“Whoever has oppressed another person concerning his reputation or anything else, he should beg him to forgive him before the Day of Resurrection...”

Civic Rights of Transgender

Entire humanity is created from a pair of male and female, scattered in different nations and tribes. There is no difference but an individual who is more pious, including transgender, is honourable in the sight of Allah. No one has the right to grab any individual's rights as that are endowed by Allah. Following civic rights of transgender are discussed as follows;

1. Right to Live
2. Right of Gender identity
3. Right of Education
4. Right of Employment
5. Right of health

1. Right to Live; Life is a divine gift and must be safeguarded and defended at all costs. It is both an individual and universal responsibility to safeguard the human rights. Tremendous value is attributed to life. It is forbidden to take life without due process of the law. The life and its protection is the central to civic rights that ensures oneself to live in a calm and peaceful way.

The right to live is, indeed, a fundamental human right, and its full enjoyment is a prerequisite to enjoy all other human rights. All other rights are rendered useless if this right is not honoured. Jurisprudence values the life of all human beings and has secured its all endowments.¹³

”وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا“¹⁴

“We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours...” Hence, right to live is the chief right among all civic rights.¹⁵ Right of life act as a driving force for all rights. If there is no life then automatically, there will be no right. Perhaps, no human being has a right to assassinate or kill unlawfully.

The right of life is most broadly recognised in Article 3 of the Universal Declaration of Human Rights, which states that “Everyone has the right to life, liberty, and the security of person”.¹⁶ Article 6 of the International Covenant on Civil and Political Rights affirms that everyone has an intrinsic right to life, which “must be protected by law” and “no one shall be deprived of life arbitrarily.”

Regarding the sanctity of life, Qur’an further inculcates,

”...أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا ۖ وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا“¹⁷

“...if any one slew a person - unless it be for murder or for spreading mischief In the land - it would be As if He slew the whole people: and if any one saved a life, it would be As if He saved the life of the whole people...” A jurist argues that if someone hurts another person without being delinquent, it is likely that he has killed all humanity. This act promotes enmity throughout the country. On the other hand, if a person saves a life, it is the same as if he has saved the lives of the entire human race. There is no difference between a single person's life and the life of humanity. It is a sovereign decree that applies to all living human, whether they are male, female, or transgender.¹⁸

Without distinction or discrimination of any type, everyone has the right to life protection, and everyone has equal and effective access to remedies for violations of this right. Finally, in this concern Abu Hurairah (R.A) reported that the Prophet (S.A.W) said,

”مَنْ قَتَلَ مُعَاهِدًا لَهُ ذِمَّةُ اللَّهِ وَذِمَّةُ رَسُولِهِ لَمْ يَرِخْ رَائِحَةَ الْجَنَّةِ...“¹⁹

“Whoever kills *mu’ahid* who has the protection of Allah and the protection of His Messenger (S.A.W), will not smell the fragrance of paradise...” The right to live is one of the first rights to be declared and incorporated in International Law, and it falls to the category of fundamental rights. Transgender like others must take care of their life. Transgender have equal right of free will, living and defence according to their own choice in Islam.

Individuals enjoy all other rights and freedoms that the basic law stipulates and guarantees as a possible consequence of their right to life. The fact that they are safeguarded by the state through specific procedures is evidenced by their inclusion in the Constitution.

2. Right of Gender Identity; Gender identity, or how gender identity is articulated, is "socially built," according to social constructivists.²⁰ Gender identity basically based on the behaviour of an individual. It is not necessary that the sex of person matches with his respective gender. The activities which the individual perform culturally owe to his gender. Thus, Gender identity of a person is complementary to the gender role.

Transgender individuals exhibit their gender identities in a variety of cultural contexts. Some people dress, act, and behave in ways that correspond to the gender they identify. Some individuals use hormones and may have surgery to alter their bodies to represent their gender identity. Some transgender reject the standard gender binary of "male" and "female," identifying instead as transgender, genderqueer, genderfluid, or anything else. Thus, Gender identities and gender expressions vary greatly among transgender.

Gender identity is intertwined with the concept of gender role, which is described as the outward expressions of personality that reflect one's gender identification.²¹

Identity has a great impact on gender. If the identity is not recognized of any person including transgender, then this affects his personality. When the personality of such individuals is confused then they won't be able to move in a society. Hence, transgender's identity, biologically identified as follows;

- i. Syndrome of Klinefelter, the male have one or more chromosomes genetically. The appearance of the person is male according to the anatomy. But according to the formula XY=boy, he is not male.
- ii. Turner's syndrome; in which the Y chromosome is not present and there is X chromosome. Therefore, such a person will neither be a male of XY chromosomes nor female having XX chromosomes.
- iii. Syndrome of adreno-genital; the excessive amount of androgens are produced by adrenal glands in an organ utero.

Biologically, transgender come under all three categories. They are grouped because of their genetic disorders and suffer from different syndromes.

Jurisprudence has assisted transgender in recognizing their genders. Jurisprudence allows the ambiguity in the gender of transgender till the time of the puberty. Jurists agree that transgender implies to the rulings of male or female after test of their reproductive organs. Jurisprudence while defining their gender identity states that once Prophet (S.A.W) was asked regarding hermaphrodite that how they would get inheritance viz male or female. He (S.A.W) replied

"يُورَثُ مِنْ حَيْثُ يُبُولُ"²².

"The place from where a person urinates". Imam Abul Hussain Al-Baghdadi elucidates that if the child have both the genital organs, then such a child will be a transgender. If he passes urine through male reproductive organ then he will be a boy. Conversely, if the transgender excretes from the female sex organ, then she will come under the female category. More often, if the urine passed through the orifice from where it expels is neither like male nor that of female. Ultimately that kind of transgender would be termed as an ambiguous transgender.²³

Transgender individuals have both the male and female organs. Due to which they are categorize as male transgender or female transgender. Sometimes difficulty arises in their categorization, when both the features of male and Female equally exists, thus categorized as ambiguous transgender.

If the urine from the genital organs ejects mutually, or from anyone outlet at first, then it will be considered in that specific gender. This is the view of Imam Abu Yusuf and Imam Mohammad.²⁴ However, if a child emits urine from both the organs at the same time, its sternness should not be considered. Such a view is presented by Naseer Ahmad Qasmi that whether it urinates from both the genital organs or either from the one. Hence, Imam Abu Hanifah and other schools of thought held that particular child will be categorized in that gender from where it has been discharged in larger quantity. The reason of discharging urine more from one or less from the other is dependent on the size of the cavity. It is the view of Imam Abu Hanifah. As a consequence of which, such transgender will be entitled as an ambiguous transgender.²⁵

Sameer Ahmad Qasmi upheld that if the beard arises or the appearance of women takes place, at the age of puberty, transgender will be classified as male. Furthermore, if the chest grows, milk produces, menstruation or pregnancy starts then such a transgender will characterize as female. On contrary, for ambiguous transgender such features are not present apparently or even biologically. One in which ambiguity exists while examining the organs

will be liable to follow both the males and females obligations. If the urine passes from both the organs in the same volume, then through the physical features it will scrutinize.

If male characters are dominant, then he will be a male. If feminine features prevail, then the transgender will be a female.²⁶

In 2018, Government of Pakistan passed “Transgender Persons (Protection of Rights) Act, 2018” for their rehabilitation, protection and relief. In Act, the meaning of transgender is compatible with the definition of World Health Organization. According to the act, the transgender possesses both the features of male and female congenital and ambiguities. The identity and the expression of gender differ from the norms, expectations of the society and culture of transgender. It depends on the category of sex which was assigned to them when born. It is in case of man, women or, either *Khawaja Siraa*.

Transgender sex differs psychologically, biologically and emotionally from the sex which was recognized when born. NADRA (National Database and Registration Authority) ordinance started in the year 2000 in Pakistan. For the service of public, good governance and state affairs a new method of registration is required for male, females and transgender.²⁷

The statute states that a transgender person has the right to be recognized as such, based on his or her self-perceived gender identity, in compliance with the Act's requirements.

In the first clause of Act-3 of Amending existing CNIC, NADRA shall register their name and gender as an applicant ‘X’ in accordance with his self-perceived identity.²⁸ In accordance with the section 8 of the Act, clause (a), registration and gender change of new admissions and certification documentation to include the ‘X’ gender category.²⁹

Shari'a ruling is quiet enough for acknowledging the gender of transgender. The legal meetings and Ijtihad directed on the genders identity of transgender is the key to all the quandaries to which they come across. Jurist's views are sufficient to drive transgender out from the challenges they confront day by day. After categorization they must follow the obligations and perform duties according to their genders respectively.

3. Right of Education; Education is a right for every person starting from the time period of a childhood till the death, irrespective of any sort of discrimination. In this way the dignity of the person and differences must be respected. Right to education helps in the personality of human development. It includes every type of learning according to the different dimensions of the development, physical, ethical, intellectual, civic, aesthetic, profession and internal.

The importance of education is repeatedly emphasized in Qur'an with frequent injunctions, such as

30 “... يَرْفَعُ اللَّهُ الَّذِينَ ءَامَنُوا مِنْكُمْ وَالَّذِينَ أُوتُوا الْعِلْمَ دَرَجَاتٍ...”

“... and] God will exalt by [many] degrees those of you who have attained to faith and, [above all,] such as have been vouchsafed [true] knowledge...”

31 “... وَقُلْ رَبِّ زِدْنِي عِلْمًا”

“...say: 'O my Sustainer, cause me to grow in knowledge!’” Such ayāt provide a forceful stimulus for humans to strive for education and learning.

The advocates of the human right claim that the right to get education is the right of every child. The first premise of this claim is based on the primary level of education by which they become literate and have basic skills of the. Secondly, despite the recognition of getting right, many transgender fail to get education and are deprived from this benefit. This negative fact had led the advocators to say that education shall be regarded human right like the right to get food and freedom right.

Article 26 of the Universal Declaration of Human Rights states that “Everyone has the right to a free, compulsory, elementary education, with higher levels of education made available to all without discrimination” and Article 9-a of the Cairo Declaration on Human Rights in

Islam states that pursuing knowledge is a religious obligation in Islam, and that education is the responsibility of society and the state.

The right to get education is a legal right that is granted to all people without exception. There shall be no discrimination against transgender persons in obtaining admission to any educational institution, public or private, subject to the fulfillment of the required standards, according to the Transgender Act of Pakistan.

Discrimination based on a person's sex, gender identity, or gender expression, including but not limited to, is unlawful in any institution, whether private or public. In accordance with the section 8 of the Act on transgender rights, clause (a), registration and gender change of new admissions and certification documentation to include the 'X' gender category.³²

In the history of Pakistan, Sarah Gill, a transgender, has become Pakistan's first transgender doctor after clearing the MBBS from Karachi's Jinnah Medical and Dental College. Dr. Gill has been dubbed a "beacon of hope" for the country's underserved transgender minority.

Education's ultimate objective is to assist a person in navigating life and contributing to society as they grow older. So, Education sustains the values of human that contributes to both the individual and collective levels. It gives skills to the human beings so that they shall be aware of the opportunities that are right.

4. Right of health; Health is a fundamental requirement for an individual's existence and development, as well as one of the most significant value objectives of all human endeavours. Prophet (S.A.W) said:

”نِعْمَتَانِ مَغْبُورٌ فِيهِمَا كَثِيرٌ مِنَ النَّاسِ الصِّحَّةُ وَالْفَرَاغُ“³³

“There are two blessings which many people do not appreciate: Health and leisure.” Since, person's health directly affect earning capacity and living conditions, as well as the realisation of other social and economic rights, The right to health is recognised as a natural person's most significant and essential personal interest and right, and the most basic requirement of freedom and happiness.

Human health is the complete state of physical, social, and mental well-being. In 1948, the right to health was formally established as a fundamental human right by the United Nations Universal Declaration of Human Rights. The right to an optimum standard of life was also addressed in the Universal Declaration of Human Rights (1948). The International Covenant on Economic, Social, and Cultural Rights reaffirmed the right to health as a human right (1966).³⁴

Understanding health as a human right imposes a legal obligation on states to provide timely, acceptable, and inexpensive high-quality health care, as well as to address the underlying health determinants such as clean and safe drinking water, sanitation, food, shelter, health-related information and education, and gender equality.

On the basis of equality, Transgender must not be deprived of this right. If they become sick; then they must have the opportunity to consult the doctors and must be provided equal health measures.³⁵ Life of any human irrespective of gender is important.

In March 16, 2021, Gazette on Transgender rights (Pakistan), provided transgender the right for the health department; any Government health providing facilities, hospitals wherever they may be in the country.³⁶ They shall not deprive from this right as it is against the humanity. In case of health or in any fields of life people should help them, instead of harming them.³⁷

There is a hadith which was narrated by Abu Sirmah that Prophet (S.A.W) said,

” مَنْ ضَارَّ أَضَرَ اللَّهُ بِهِ وَمَنْ شَقَّ شَقَّ اللَّهُ عَلَيْهِ ” .

“Whoever harm others, Allah will harm him; and whoever causes hardships to others Allah will cause hardship to him.”³⁸ Health is not just an individual need, but also a "public need,

which establishes the social dimension of the right to health, because its realisation impacts not only the person's health, but also the society's public interest. If a person contracts a contagious disease, for example, not only his own health but also the health of everyone around him is jeopardised. Environmental pollution and infectious illnesses endanger public health and risk the interests of a large number of families. As a result, the government and every citizen have a commitment to defend the right to health, as well as a shared interest in society.

Health is necessary to have for the maintenance of the body along with mental satisfaction. If the transgender cannot afford any health needs, then it is the responsibility of the people living in surroundings to help them. In case, if they cannot make any appropriate efforts then it is the duty of the government to assist them. As a result, they shall overcome such challenges which come in their track of accessing.

5. Right of Employment; Everyone is entitled to labour. The right to work is a prerequisite for the fulfilment of other human rights as well as a dignified living. It involves the ability to make a living through employment that is freely selected or accepted. Jurisprudence emphasis the right means to earn.

39 “...فَانْتَشِرُوا فِي الْأَرْضِ وَابْتَغُوا مِن فَضْلِ اللَّهِ...”

“...disperse freely on earth and seek to obtain [something] of God's bounty...” The right to reasonable and beneficial working conditions, as well as trade union-related rights, are inextricably linked to the right to work. Fair wages, equal compensation for equal effort, and equal recompense for work of equal worth are all obligations of states. Workers should be given a minimum income that permits them and their families to live comfortably. Workplaces must be safe, healthy, and respectful of human dignity.

Working as an employee is one of the most honourable ways to make a living. The law regards "work" to be "worship." In this world and in the hereafter, a worker is rewarded for his efforts because it's lawful act.

40 “طلب كسب الحلال فريضه بعد الفريضه”

“The seeking of a halal earning is the (next) Fard (duty) after the Fard (Salah)” It is our responsibility to go out and work in order to support ourselves. Article 23 of Universal Declaration of Human Rights, stated that “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.” Prophet Muhammad (S.A.W) was asked what type of earning was best and replied;

41 “أَيُّ الْكَسْبِ أَطْيَبُ؟ قَالَ: عَمَلُ الرَّجُلِ بِيَدِهِ وَكُلُّ بَيْعٍ مَبْرُورٍ”

“A man's work with his hand and every business transaction which is approved.” Citizenship confers civic rights on those who are citizens of the nation. Every individual has a responsibility to preserve his or her own rights. In Pakistan, a bill for the protection, alleviation, and rehabilitation of transgender rights clarifies that the government must guarantee that transgender people have the right to engage in any legitimate profession or employment, as well as conduct any lawful trade or business. In any matter relating to employment, no establishment, institution, department, or organisation shall discriminate against any transgender person.

Jurisprudence clearly states that all humans have a responsibility to pursue money in a legal manner and to work hard to gain from all available legal methods. The Supreme Being has outlawed His devotees from eating each other's money through untruth, i.e., illegal commerce and earnings such as Riba and gambling, and any unlawful technique. Due to prejudice, transgender people may lose their jobs and face workplace discrimination. Refusal to employ, privacy breaches, harassment, and even physical and sexual abuse on the job are

all too frequent, and transgender people face these at a greater rate. Due to extreme unemployment and poverty, one out of every ten transgender turns to underground economies for survival, such as prostitution.

Concluding Remarks

It is concluded from Qur'anic ayāt, traditions of the Prophet (S.A.W) and views of Jurists, that there is no difference between the civil rights of transgender, and males and females. Like all human beings, transgender have a right to live. In Pakistan, there are various rights like the other rights of people which have been granted to the Transgender on the basis of their gender self-perceived identity. They have a civil right to categorise in one of the two genders of male or female after the recognition of their genders. So, that they must register themselves for CNIC at NADRA in Pakistan. Likewise, they have a civic right of health needs whether in case of gender, sex or any problem. As well as the right to get education and employment without which the survival of transgenders will be difficult in this world. Protection centers have been made for them to provide medical, legal, social support and psychological care. Under the Pakistan's act, the facilitation center have been built to guide them and protect them in case of danger, harassment or any threat which might impose them in daily lives. So, civil rights are those powerful forces without which the life cannot works.

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