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The Legal Rights of Transgender (Khansa) in Islamic State

Abstract *The Gender may be divided into three types: male, female, and a mix of both. The last one is known by different names, i.e., transgender, hermaphrodite, eunuch, mukhannath, khansa, etc. Due to their special physical features, they are given less importance in most of societies. The present research highlights the legal status and rights of transgender in Islamic society. The research finds that under Islamic law, there are no separate laws for the transgender except a few. Transgender has no fewer rights than a man or woman. Although transgender are accepted and recognized in the Islamic world, even then, examples of their rejection are also found. Therefore, it is necessary to educate society that every person is equally respectable, whether it is a male, a female, or a transgender. Where a transgender is similar to a male person, he is treated as a male person, and where a transgender is similar to a female person, she is treated as a female person. And where it is difficult to ascertain a transgender as a male or female, a transgender is to be treated like a human being. The doctrinal method of research has been adopted to conduct the present study.*

Key Words: Transgender, Hermaphrodite, Khansa, Kantha, Mukhannath, Hijra, Islamic Law, Human Rights

Introduction

Gender, on the basis of sex organs, may be divided into three types: male, female, and a mix of both. The last one is known by different names, i.e., transgender, hermaphrodite, eunuch, *khansa, mukhannath,* etc. Due to their special physical features, they are given less importance in most the societies. Transgender is born with biological insufficiencies due to the mixture of masculine and feminine physiognomies. Transgender has been accepted and acknowledged in Islamic jurisdictions around the world. Despite of this recognition, in some Islamic jurisdictions, transgenders suffer from rejection (Antonia 2018). Islamic scholars use the term *khansa* for transgender. *Khansa* is defined as a person who has both characteristics of man and woman. A *khansa* may be divided into three groups:

1. *khansa* women (where female organs dominate the body)
2. *khansa* men (where male organs dominate the body)
3. *khansa mushkel* (where apparently it is difficult to ascertain)

The first two among the above three, are entitled to exercise their rights and duties as per their gender domination. In some cases, where sex is undefined, the rights and duties are defined according to the different opinions of the Islamic scholars.

Under Islamic Law, different prescribed methods are used to ascertain the gender of transgender people at childhood and at the later stages of age. At first, gender may be determined at the age of early childhood from the fact that how and from which organ the urine is discharged. The transgender may be recognized as a female if the discharge of urine is through the female uterus. But if the urine is discharged by the male genitalia, the transgender may be recognized as a male. Transgender will not be considered as female or male if the urine is discharged from both the sex organs immediately. Under the Islamic jurisprudence, this situation would be recognized as a third category of transgender called as the dubious *khansa*.

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Secondly, transgender people can be identified when secondary sexual features appear with the start of puberty. The growing of the breasts that secrete milk and the beginning of the period of menstruation, as well as the capability to conceive, are sufficient to declare a transgender as *khansa* female. The appearance and growth of beard and whiskers and the dominance of masculine features in the personality are enough to declare a transgender as *khansa* Male.

The Holy Qur'an clearly states that there are certain people who are neither men nor women.

"Allah's is the kingdom … He grants to whom He pleases daughters and grants to whom He pleases sons" (42:49). *"Or He makes them of both sorts, male and female…"* (42:50).

The Holy Quran again calls:

هُوَ الَّذِي يُصَوِّرُكُمْ فِي الْأَرْحَامِ كَيْفَ يَشَاءُ ۚ لَا إِلَٰهَ إِلَّا هُوَ الْعَزِيزُ الْحَكِيمُ

"He it is Who shapes you in the wombs as He likes; there is no god but He, the Mighty, the Wise" (3:6).

It is, thus, clear that all forms and shapes, including physical features and sexual feelings of the human beings are a blessing of Almighty Allah. since every person – a male, a female, or a *khansa* has been a creation of the Almighty Allah, then there left no justification or scope of discrimination due to the ground of gender sexuality and identity. It suggests that the *khansa* must be accepted as a decree of Almighty Allah (Afif, 2019), and it must not be taken as a tool of fun and amusement. Islam positively supports the presence of all those who are neither regarded as a man nor even a woman. (Bund, 2017).

The Holy Prophet of Islam, Hazrat Muhammad (SAWW) also treated the transgender people with reverence and forbade their maltreatment. He never looked down upon them. According to a hadith, a man (who had tinted his hands and feet with *henna*) was presented before the Holy Prophet (SAWW). The Prophet inquired what was the matter with that man? The people replied to the Holy Prophet (SAWW) that he used to affect female get-up. So the Prophet directed to send that man to an-Naqi. The people asked the Holy Prophet (SAWW) about the killing of that man. The Prophet replied that it was unjust to kill that man (Sunan Abu Dawud, 41:4910)

According to Bauman (2014), it is pertinent to mention that there is the scope of third gender even in plants and animals.

Methodology

The current study has been conducted by adopting the doctrinal method of research. The data is mainly collected through books and research articles. The research is limited to the transgender who are transgender, not by choice. All the other types of transgender are not part of the discussion. A person who is a male develops feminine tendencies intentionally, or a natural-born female who intentionally develops masculine tendencies, and both of these try to behave like the opposite gender, are excluded from the research. Only the transgender with biological features by birth have been discussed with reference to their rights and status. The broad term of LGBT or LGBTQ, which covers all the unusual entities, is entirely different from the Islamic perspective regarding the transgender community. Because Islamic Law does not recognize this vast term due to its negative consequences on society.

Rights of Transgender

It is said that in Asian Islamic countries, the gender is governed by the "conservative" theocratic elucidation of Islam and that a transgender person is a sinful person who is not allowed to practice Islamic life, and therefore, a transgender person is often deprived of internal religious peace (Köllen, 2016). There may be a group of people who may, due to lack of knowledge, have the above view regarding *khansa*, but it has no concern with Islam (Hamzic, 2019).

The Holy Quran says:

"O, people! Certainly, We have created you from a male and female, and divided you among tribes and families so that you may recognize each other; certainly the most respectable among you in the

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eyes of Almighty Allah is that one among you who is the most careful (of his duties); certainly Almighty Allah is Knowing, Aware" (49:13).

The explanation of the above verse is that no person is superior to others in any terrain, be it language, race, color, sex, or wealth. A person is noble before the Almighty Allah only on the ground of *Taqwa*. *Taqwa* means fear of Almighty Allah and avoidance from sins. Islam discusses in detail the legal status of transgender people. A *khansa* enjoys all the human rights under Islamic thought like other Muslims. A *khansa* performs all the Divine duties, i.e., to say prayers, to pay zakat, to observe fast, to perform Hajj, etc. Therefore, there is no special duty imposed on them due to their sex. All humans are equal, and no person has any superiority according to gender.

Right to Life

Transgender people have the right to live like other humans. Islam always imparts to respect the humanity. The life and liberty of every human are sacred and cannot be encroached on the basis of sex or any other reason. Islam condemns the unlawful killing of humans, including *khansa* (The Holy Qur'an, 5:32; 6:151 & 4;93). The life and blood of all Muslims is declared equally precious (Sunan Abu Dawud & Sunan Ibn Majah).

Right to Equality

All humans are created equal (The Holy Qur'an, 49:13) and deserve equal protection of laws and are supposed to be treated in accordance with the laws of the land. All human beings are respectable in the eyes of Islam (The Holy Qur'an, 49:10 & 9:11); thus, it gives them equal freedom, opportunity, rights, etc. Transgender is the creation of Almighty Allah, have similar rights regarding culture, religion, expression, etc. Islam equally treats the men, the women, and the *khansa* in respect of accessibility to numerous political, social, and economic services. It may be assured that equivalent rights are offered when it comes to the domain of Islam (Bund, 2017).

Right to Mutual Respect

Respect is an inherent and born right of every human, including *khansa*. Islam, being a religion of peace, teaches the concept of love, tolerance, and mutual respect (Whiteman, 2020). It is reminded again and again that every Muslim should do good deeds to others because it is fruitful and beneficial in this world and in the world hereafter. There are high rewards for the good deeds and sincerity done to fellow human beings. The Holy Quran does not allow us to call anyone with insult or with bad names (3:159 & 49:11). It instructs to control anger (3:134), to be a good human to other fellows (4:36), not to be egotistical (7:13), to ignore and excuse the mistakes of the people (7:199), to speak with others gently (20:44), not to backbite or spy (49:12) and to be just (5:8).

Rights for Education

The *khansa* community also has the right to get education and knowledge in Islam. Seeking knowledge is right of all humans, whether they be men, or women, or elderly, or children, or even transgender community. A Hadith of the Holy Prophet says that seeking knowledge is mandatory for everyone (Sunan Ibn Majah, 1:244). Another Hadith instructs to seek knowledge from cradle to grave. It is also said that when a person goes to seek knowledge, he remains in Allah's cause until his return (Jami at-Tirmidhi, 39:2647). According to the Holy Quran, the status of educated people is high than those who are uneducated (39:9). The Transgender Persons Act, 2018 of Pakistan also provides for the right to education of the transgender without any discrimination (Section 8).

Rights to Employment

Being a minority and due to their special appearance, often, transgender is discriminated against in the society. Due to this discrimination, they find no reasonable jobs in the public and private sectors. Most of them become a sex worker or join the dance groups which become able to earn by amusing the people. Many transgender persons have been looking for decent and lawful work. In Islam, there is no restriction to employ these people into local, provincial, or federal posts. However, it is

suggested that a special quota should be fixed for these people in job opportunities. The Transgender Persons Act, 2018 of Pakistan also provides for the right to employment U/S 9.

Transgender was used to be treated as a privileged class during the Mughal era in the Sub-Continent. They were given the designation of *khwajasaras*, as a symbol of dignity and respect. Believing that transgender were dearer to Almighty Allah, some Muslim rulers (including the Ottoman and the Mughal) also appointed them as intercessors in royal palaces. The Mughals of India appointed transgender to positions of trust and power. Transgender used to serve as councils and courtiers, advisers to princes and princesses. They, being familiar with royal protocol and knowing the internal workings of households, worked as domestic insiders, i.e., security heads of female sections. This job *"was assigned to transgender in imitation of their historic role in holy cities where transgender served as facilitators between men and women performing prayers and pilgrimage. In most parts of the Muslim world, transgender commanded respect and were considered holy and special in the eyes of God* (Khan, 2017)."

Protection of Property Rights

In Islam, everybody including *khansa*, has the right to enjoy property rights, and is entitled to buy, hold and dispose of the property. No one can deprive transgender from their property rights. The property whether it is inherited or earned, can be appropriated by them.

Right of Inheritance

Under the Islamic law of inheritance, *khansa* is entitled to receive a share that is equal to a woman. According to the view of Tanzil-ur-Rehman (2007), the share of male person will be awarded to *Khansa* who can be recognized as male by its physical appearance, and the share of female person may be awarded to a *Khansa* who can be identified as female by its physical appearance. If the *khansa* is a *khansa mushkel* because its gender is not determined and difficulties arise in its identification, the person whose share is less than the other in inheritance will be given to *khansa*. The logic is that *khansa* will leave no legal heir when he is dead and the property could not be used by his relative/s. It is, thus, better than the share be delivered to another member of the family. For example, a deceased left three offspring: daughter, son and *khansa*. How the estate will be divided? The answer is that it will be divided according to the ratio of 2 : 1 : 1. The son will get two shares, the daughter will get one share, and *khansa* will also get one share.

The division of inheritance in case of son and *khansa (being the only legal heirs) is as follows:*
Son 2/3, Khansa 1/3

The division of inheritance between daughter and *khansa (being the only legal heirs) is as under:*

Daughter ½, *Khansa* ½

A number of Islamic scholars also hold a different view regarding inheritance of the transgender, but it may be discussed in detail in a separate research, because the current study is concerned with the overall rights of the transgender. The Transgender Persons Act, 2018 of Pakistan also provides for the right to inherit U/S 7.

Transgender's Circumcision

In Islam, circumcision of male transgender is obligatory. When a male transgender attains puberty, he must buy a *"loundi"* (maid) who will circumcise the transgender. The maid may look at his sexual organs and may examine it during the process of circumcision.

Marriage of Transgender

In Islam, there are no restrictions for the wedding of *khansa*. A woman and man can marry transgender, that is, the man can marry female transgender and the woman can marry male transgender. The condition that Islamic law imposes is that the transgender can marry a person of opposite sex, where one should be a male person, and the other should be a female person.

Transgender's Competence as a Witness

Under Islamic law, an adult person of sound mind is competent to testify, who comes under the moral and legal requirement of Tazkia-al-Shahood. The person who has a flexible body and who speaks softly, if he meets the mandate of Tazkia-al-Shahood, may testify as a competent witness. A *Khansa* male may be treated equally to a male witness, while a *Khansa* female may be treated as a female witness. However, a *Khansa mushkel* may be treated like a female witness.

Prayers by Transgender

The procedure of offering prayers for a *khunsa* is similar to other genders. However, a *khansa* male is required to follow the male way of prayers, and a *khansa* female is required to follow the female way of prayers. Where the gender cannot be determined, the khansa may follow the way which the women follow. It is, however, necessary that the female *khansa* keep the veil, and there is no prohibition if the veil is worn by the male *khansa* (Haskafi & Dayal, 1970).

Ghussal, Taya'mum, and Funeral for corpse of Transgender

If *Khansa* dies in childhood, he should be given taya'mum (the way of ablution) instead of ghussal (bath). Whether man or woman, tayammum will not be performed by a stranger. However, if due to non-availability of family members, tayammum may be performed by a stranger. In such a case, the body should be covered, and the person doing taya'mum should use gloves or cover his hands with clothes.

When *khansa* dies after attaining puberty or in adulthood, a family member gives him a ghussal, but during the bath, no stranger is allowed to enter that place, either male or female. Transgender's funeral prayer and burial will be done in the same way as is done for a woman.

Transgender Casket

In general, in Muslim society, the male coffin consists of three dresses, while the coffin of the woman of five pieces of cloth (Raz, 2013). The transgender coffin consists of five dresses. It is because the burial of male *khansa* can be done in a coffin of three pieces of cloth, while that would not be reasonable for *khansa* female or *khansa mushkel*. Thus, five garments will be arranged for the *khansa* female and *khansa mushkel*, and that their face should also be covered and that the burial must be done by the family members.

Gender Alteration

Subject to medical limitations, the sexual category of a person may be changed from a man to a woman or a woman to a man. In 1983, the Asian countries in Malaysia conducted a conference on the theme *"Can a person change his sex or not?"*., The conference, after considerations, reached the conclusion that with the exception of *khansa* people, no other human being was allowed to change the sex.

In 1988, the supreme Sunni authority in Egypt, imposed a limitation to operate for change of sex of a *khansa* person and held that the transgender person could only change their sex on the medical grounds, not otherwise.

The Shia concept with regard to sex change is that a *khansa* person can change his sex through a surgical operation. According to Imam Khomeini, as explained by Abdi (2021), there is no prohibition on sex change. However, it would give rise to legal implications like change in family titles because of the negation of the former of the previous marriage.

Position in Pakistan

In Pakistan, the recognition of transgender people by the Supreme Court of Pakistan has introduced new dimensions for jurists. It took a long period of 60 years to legally acknowledge them as an equal human. The Supreme Court directed to register them as *'Khwaja Sara*.' The direction was issued when a petition was filed in 2009 by a lawyer, namely Dr. Mohammad Aslam Khakhi (2013) when in Texila

policemen attacked and sexually abused a group of transgender people who were on their way back after attending a wedding. This incident motivated the said lawyer to speak on behalf of transgender.

It is an obligation of the State to shield the right to life, liberty, and dignity of transgender. Government officials, at all levels, are obliged to give them with life protection and guarantee their honour just like the other citizens. Besides directing the National Database and Registration Authority (NADRA) to register the transgender as a new category, the court also directed the social welfare department to work for the transgender community. The foremost important right granted by the Supreme Court is the right to vote of transgender. Previously, they were deprived of the right to vote. The Supreme Court has also addressed the issue of abandoning transgender children by their parents and forcing them to beg and prostitute when facing criminal proceedings. In 2018, the Supreme Court directed to issue CNICs to the transgender applicants within 15 days (Geo, 2018).

The *Khawaja Sara Society* claimed that there were more than half a million transgender in Pakistan, but only 10,418 were recorded under 2017 census. In spite of the poor situation of transgender in Pakistan, the transgender community successfully managed to catch legislative attention, which lead to the passing of the transgender law in 2018, i.e., the Transgender Persons (Protection of Rights) Act, 2018 (Rana, 2020). The said law has been providing a variety of rights to transgender community, including due to recognition (Section 3), prohibition of discrimination (Section 4), prohibition against harassment (Section 5), right to inherit (Section 7), right to education (Section 8), right to employment (Section 9), right to Vote (Section 10), right to hold public office (Section 11), right to Health (Section 12), right to assembly (Section 13), Right to access public places (Section 14), Right to property (Section 15) and other fundamental rights (Section 16).

Conclusion

Islamic and Western societies have different concepts about transgender people. Persons having unusual biological structure different from that of a man or a woman are identified as transgender in the Islamic world, but in other societies, the persons who voluntarily change their gender as also known as transgender. All over the world history, transgender people's rights have not been given importance. No society gives them equal rights to other citizens. In the present and past, they have not been treated on equal footings. Even today, in many States, they are not awarded basic rights.

Transgender have inadequate opportunities of earning a living; they do not have any choice of professions to opt for and adopt. Even they are not accepted by their parents, relatives, family members, friends, and society. They are considered as a stigma. Sooner or later, they are sent to the transgender community. They are usually harassed in even public places. It feels as if they were born for the enjoyment of others. They are expected to entertain others.

In Islamic Law, there are no separate laws to deal with the issues of transgender except few. Therefore, the same laws are applicable to all humans. The transgender community enjoys the same set of rights which are enjoyed by other men and women. In Islamic society, every human has equal status, irrespective of any difference. However, intentional change of getting up of opposite sex is not allowed in the Islamic teachings. Islam provides for equal treatment without any discrimination. If these principles are not being followed in any Islamic society, it is the fault of the people of that area who failed to understand and obey the teachings of Islam. The Islamic concepts are universal and perpetual.

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