

**WHO AM I? A QUEST FOR GENDER-IDENTITY BY TRANSGENDER PEOPLE:
ANALYTICAL STUDY**Naureen Akhtar,¹ Atia Madni,² Amna Mahmood,³ & Rais Nouman Ahmed⁴**Abstract**

The purpose of this research is to look into the matter of gender-identity of the transgender community in Pakistan. The paper explores who are they? Third-gender or Transgender persons (TGPs) have always been discriminated against on account of gender disorder in their bodies. Such a discriminatory behavior, nevertheless, is a clear infraction of Article 25 of the Constitution of Pakistan 1973 which provides that there shall be no discrimination on the grounds of gender. TGPs, one of the most marginalized sections of our society, are now finally accorded basic human rights through the Transgender Persons (Protection of Rights) Act, 2018. The purpose of the study is to critically assess the sufficiency of the said enactment. It follows a discussion on Shari'ah viewpoint regarding the issue of gender-identity and recommends treatment of it. The study also propose recommendations that could make true changes in the plight of TGPs.

Key Words: Gender, identity, transgender, Shariah, legislation, discrimination, rights, eunuch.

INTRODUCTION

Who am I? This is a question that strikes the people who are usually named as third-gender or transgender persons (TGPs). Gender identity needs clarification at the time of the birth of a child. It is generally believed that a transgender is a person who is confused about his/her sex assigned to him/her at the time of parturition. This confusion makes them vulnerable either at home or in society. A stigma is attached to transgender people and they are considered socially not acceptable. The whole society mimics the gender identity of such a child. Such a child should be given an opportunity to identify himself as not Cisgender.

Gender based discrimination persists in our society for long. In recent decades there was an increase in a public discussion with reference to the underlying rights of transgender or third-gender persons because such people openly struggle for their basic human rights. Eunuch population finds difficulty primarily in the area of determination of their gender along with the areas of inheritance, registration of identity, voting, employment, and schooling.

Notable progress has been seen, in recent years, on the subject of the rights of people belonging to a third gender population in Pakistan. The Government of Pakistan (GOP) hit the nail on the head when the bill on the protection of rights of third-gender persons was sanctioned by the Senate, on March 08, 2018, and by the National Assembly on May 08, 2018, respectively. A few days later, on May 24, 2018, the bill was promulgated as an Act of the

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parliament. Individuals belonging to the transgender community in Pakistan celebrated groundbreaking gender identity laws. It was a beam of hope for third-gender community in Pakistan, but the analytical study of this law reveals that there is a direful need to revisit it, in order to make it more effective owing to the fact that it lacks in several facets.

It is the need of the time to address cultural or traditional justifications for violations of fundamental rights of TGPs and to confront the shortcomings in the legal instrument relating to the rights of those people who are disrespected, slighted and affronted in society because of their gender identity, sexual orientation and physical appearance issues.

This article mainly addresses the subject of gender-identity, discrimination, and harassment against TGPs. Moreover, it provides the Sharī'ah viewpoint on the issue and also discusses the groundbreaking judgment of the Supreme Court of Pakistan (SCP) regarding the identification of fundamental rights of this particular community. Furthermore, it expounds the law which provides the mechanism for the protection of the rights of TGPs. The paper also includes recommendations to take further necessary steps to build the legislative instrument to be a more efficacious and efficient shield regarding the rights of TGPs in Pakistan.

Meaning of Transgender Persons (TGPs)

According to the Cambridge Dictionary, "Trans" is a Latin word that means "across or beyond." The expression "gender" is derived from a Latin word *Genus* that classifies for a male and female. So literally the word transgender signifies a person who is beyond the classification of male and female.

It is pertinent to define the term third-gender or transgender in the technical sense here before going into the details of the issue of gender identity of persons that are ordinarily known as third-gender or transgender. Cambridge Advanced Learner's Dictionary and Thesaurus defined the term transgender as, "person who feels that they are not the same gender (sex) as the one they had or were said to have at birth." This definition reflects the opposite sex of what they were assigned at the time of their birth. So, TGP means a person who does not belong to Cisgender, and does not know to which gender he belongs to at the time of his birth.

Section 2 (n) of the Transgender Persons (Protection of Rights) Act, 2018, hereinafter referred to as TGP (PFR) Act, 2018, defines a TGP as:

A person who is intersex (*Khusra*) with a mixture of male and female genital features or congenital ambiguities or eunuch assigned male at birth, but undergoes genital excision or castration or a transgender man, transgender woman, *Khawaja Sira* or any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

The above-cited definition is open to serious criticism by the masses belonging to the religious section of the society, Muslim clerics, because it legitimates the act of castration which is understandably against the injunctions of the Holy Quran and Sunnah. Furthermore, the definition includes and presents in itself two broad categories of TGPs that are,

transgender by birth and transgender by choice (Siddique, Gang, Mirbehar, Batool, & Ahmad, 2017). Being Trans is not a topic of choice, Shari'ah, Islamic law, and Jurisprudence presumed this fact and, thus, have a soft corner for such people. However, becoming transgender by choice is not valued in Islam rather it is disallowed.

SHARĪ'AH PERSPECTIVE ON GENDER-IDENTITY OF TGPs

Besides, Cisgender, male and females, Shari'ah recognized the existence of a third gender and called them *Khansā*. Being Transgender or *Khansā* is not a sin; it is a clear stance of Shari'ah regarding the gender identity. Allah Almighty says in the Holy Quran,

لِلَّهِ مُلْكُ السَّمَوَاتِ وَالْأَرْضِ يَخْلُقُ مَا يَشَاءُ يَهَبُ لِمَن يَشَاءُ إِنثًا وَيَهَبُ
لِمَن يَشَاءُ الذَّكَورَ ﴿٤٩﴾

أَوْ يُزَوِّجُهُمْ ذُكْرَانًا وَإِنثًا وَيَجْعَلُ مَن يَشَاءُ عَقِيمًا
إِنَّهُ عَلِيمٌ قَدِيرٌ ﴿٥٠﴾

For Allah is the Kingdom of the heavens and the earth, He creates whatever He likes. He bestows daughters on whomsoever He likes and He bestows sons on whomsoever He likes. Or He mixes both, the sons and the daughters, and He makes whomsoever He likes barren. Undoubtedly, He is knowing, Authoritative (Sūrah Al-Shūrā: 49-50).

Allah Almighty says in the Holy Quran,

هُوَ الَّذِي يُصَوِّرُكُمْ فِي الْأَرْحَامِ كَيْفَ يَشَاءُ لَا
إِلَهَ إِلَّا هُوَ الْعَزِيزُ الْحَكِيمُ ﴿٦﴾

“It is He Who forms your shape in the wombs of the mothers as He pleases. Besides Whom none is to be worshiped the Dominant, the Wise” (Sūrah Al-‘Imrān: 6).

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ
مِّمَّنْ خَلَقْنَا تَفْضِيلًا

“And we have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what we have created, with (definite) preference” (Sūrah Banī Isrā’eel : 70).

Above mentioned verses of the Holy Quran from Sūrah Al-Shūrā, Sūrah Al-‘Imrān, and Sūrah Banī Isrā’eel respectively, clearly point out that it is only the virtue of Allah Almighty to create people and shape them in the wombs of their mothers. He creates whatever he wants to be it male, female or transgender and nothing happens without the divine concurrence. This means that all human beings, including male, female and transgender are the creation of Allah

Almighty and there is no reason for discrimination against anyone on the grounds of their gender characteristics and individual traits. It is an integral part of the faith of a Muslim that nothing happens without the concurrence of Allah Almighty. Quran, all the same, does not explicitly employ the word transgender, but we find their references in the Sunnah and Islamic jurisprudence which refer to them as *Khansā*. By acknowledging them as members of the community Islamic jurisprudence not only offer them a share in the inheritance but also stipulates equity and fairness (Government of the Punjab (GOP), 2018).

Thus, by a stint of no vision, it can be claimed that Shari'ah recognizes TGPs as distinct from Cisgender, male and female. Shari'ah clearly recognizes all the basic needs of *Khansā* even allow such individuals to marry, but their gender-identity is mandatory to be revealed to the partner. Shari'ah law, however, forbids the conversion of a person into transgender on his own will and called them *Mukhanas* (Musnad Ahmed, Hadith No: 6681).

In recent times, almost fifty (50) Muslim scholars of Pakistan issued a *fatwā* been pronounced that allows the marriage of a female-born transgender person "having visible signs of being a male" with a woman. Similarly, marriage between male-born TGP "having visible signs of being female" may marry a man. Nevertheless, the marriage of TGPs carrying visible signs of both genders is forbidden on the guise of the general proscription of same-sex marriages in Shari'ah (Sahi, 2016). This *fatwā* was given by the group of Tanzeem Ittehad-e-Ummat (TIU). This group was directed by Zia-ul-Haq Naqshbandi and he said, "We need to take them as God's creation too. Whoever treats them badly, be it members of society, the government or their own parents, they are sinners" (Cockburn, 2016). Though the *fatwā* issuing organization, TIU, is not a famous group, but such fatwa should initially be seen as a tolerant behaviour of people in society towards TGPs. The issuance of such progressive *fatwā* is the demand of the time.

Almas Bobby, a transgender rights activist, said, "We are glad that somebody's talked about us. By Shari'ah, we have the right (to marry), but unless measures are called for the removal of misconceptions about us in society, the shape of our community will not be changed" (Cockburn, 2016).

The *fatwā* issued by Muslim scholars has also been criticized by some members of the TGPs. A famous transgender rights activist, Bindiya Rana, said, "I don't quite understand it. They said Trans men can marry women and trans women can marry men. The transgender identity is nowhere" (Nauman, 2016). Homosexuality is banned in Pakistan; therefore, they could not marry previously.

Legislative History of The Transgender Persons (Protection of Rights) Act, 2018

The Human rights activist Aslam Khaki brought a petition in SCP, the apex court, of Pakistan on behalf of the TGPs in Pakistan. The then Chief Justice of Pakistan (CJP), Iftikhar Muhammad Chaudhary recognized and protected the underlying rights of the transgender community while disposing of the constitutional petition of Khaki and another Vs. SSP (Operations) Rawalpindi and others. SCP assured the execution of legal obligations by parents of persons belonging to the transgender community and barred the discriminatory behaviors with such

people on account of disability because of which they have not been treated at par with the other citizens of the state. SCP guaranteed all constitutional rights to them via disposing of the writ petition. Moreover, the apex court directed NADRA to record the true status of such people in the column of gender identity besides male and female. Furthermore, the right to the franchise is also acknowledged by the apex court in its opinion.

After the judgment of the apex court, the pressure was building up for the government to do legislation on transgender rights. At the inception, a private member bill on the protection of the rights of eunuch people was tabled in Senate by Senator Baber Awan. After its rejection, two more bills were put off in the Senate, namely, The Transgender and Intersex Persons (Promotion and Protection of Rights) Bill, 2017 and The Transgender Persons (Protection of Rights) Criminal Law (Amendment) Act, 2017 respectively (Wasif, 2018). These two bills were, later on, turned down together with the consensus of the members of the Functional Committee of Senate on Human Rights. Considerations were made among the Senators on the bill presented and finally, on March 08, 2018, Senate passed a bill to protect the rights of the eunuch community in Pakistan (Khan, 2018).

The GOP took an iconic step and tabled the bill, for the security of rights of Transgender or third-gender community in a society, in the month of May 2018, in the National Assembly. The National Assembly approved the bill on the protection of rights of third-gender people on May 08, 2018. This bill purports to "provide for shelter, protection, alleviation, and rehabilitation of the rights of the transgender persons." This Bill is anticipated to bring empowerment to the eunuch people in Pakistan with respect to their social, educational and economic position. Furthermore, this bill guarantees basic human rights to the transgender community in Pakistan which had been denied to them for so long. Moreover, this bill ensures that TGPs live their life with dignity and equality as a Pakistani citizen (Wasif, 2018). Prior to this bill, TGPs faced hard problems in Pakistan. In the last two years, more than forty-five (45) eunuchs were killed in the province of Khyber Pakhtunkhwa (Cockburn, 2016). The whole community of transgender was deprived of basic human rights and privileges. It was in these state of affairs that the negotiation and debate were conducted in this Bill on the basis of sanction of the Council of Islamic Ideology (CII). Chairman CII, Dr Qibla Ayaz said,

I truly believe that 70 % of the Council of Islamic Ideology suggestions have been adopted in the bill passed by the National Assembly. However, Council of Islamic Ideology will recommend the federal government to rectify the remaining flaws so that the bill would fully serve the purpose it has been passed for.

The TGP (PFR) Bill, became an Act or statute in May 2018 has guaranteed and protected the rights to the eunuch community in Pakistan. TGP (PFR) Act, 2018 aims to address and revolutionize the miseries of TGPs in Pakistan. This Act contains VII chapters and 21 subdivisions. Later on the promulgation and dissemination of the above-said legislation, eunuch population was, for the very first time in the history of Pakistan, estimated in each province of Pakistan. The provision of the TGP (PFR) Act, 2018 include, inter alia, the right to make their gender identified in CNIC (section 3 of the said Act), right against harassment and

discrimination (section 4 & 5 of the said Act) are also catered to them as basic rights. The next portion of the research evaluates these rights as they are offered in the TGP (PFR) Act, 2018 and their efficacy to resolve the matter of identification and harassment being faced by TGPs in Pakistan.

In order to ensure the carrying out of The TGP (PFR) Act, 2018 recently SCP publicized the Transgender Persons Welfare Policy (TGPWP) which ultimately complements the TGP (PFR) Act, 2018. This policy provides the guiding rules for initiation of future programs regarding the protection of wellbeing of the eunuch community in Pakistan (GOP, 2018).

Issue of Gender-Identity of TGPs

When a child is born, everyone around is conscious to hear from the parents of a newly born child when they unlock the enigmas of the gender identity of the baby. A newly born child is designated sex and is called as a baby boy or a baby girl on the footing of biology that includes chromosomes, anatomy, and hormones. Gender identity depends upon the inner spirit of the person that does not always match with the biology. The researchers indicate that transgender is not about sexual orientation or the way such persons dress, the factual reality is that it is how they feel deep down.

The matter of recognition of the identity of TGPs is addressed in Section 3 of The TGP (PFR) Act, 2018 which provides that,

A transgender person shall have a right to be recognized as per his or her self-perceived gender identity. A person recognized as a transgender person shall have a right to get himself or herself registered as per self-perceived gender identity with all government departments but not limited to NADRA.

This The act ensures transgender persons to be identified as a third gender. At present they cannot be called "other gender" or as "others." National Identity Card (CNIC) of TGPs would be a legal proclamation of their gender identity. The SCP took suo-motu notice for issuance of CNIC to TGPs on 27th August 2018. As a result of this suo-motu action by SCP, Law and Justice Commission of Pakistan conducted a workshop and deliberations were made to institute a policy involving the identification and protection of rights of TGPs. Consequently, the TGPWP was made public. Issuance of CNIC to TGPs is a sensitive topic that needs to be addressed in earnest.

CJP Chaudhry, while disposing off the Constitutional Petition No. 43 of 2009, also averred the conduct of medical tests based on hormones to define their gender-identity before entering their names in the column of gender. Recognition as per "self-perceived identity" cannot figure out the matter of identification of transgender. A District Screening Committee (DSC) or Medical Board, comprising of medical practitioners having expertise in this field of scientific discipline must be instituted for the intention of assuring the identification and recognition of TGPs. On the basis of the report of the DSC or Medical Board, the person declared as transgender should be registered as third-gender and should be provided with all the fundamental rights of this class. The mere self-perceived gender identity of such individuals is not sufficient yardstick to cover the subject of gender identification of such masses.

Issue of Discrimination and Harassment Against Eunuchs or Transgender Persons

The most of the people in society have disrespectful behaviour towards TGPs. A myth has been formed about such people that they cannot earn their livelihood except by singing, dancing, begging, etc. alongside the roads or in private parties (Akhtar, 2016). Opportunities are limited for them even if a few get higher education (Fross & Israr, 2016). They are often treated as sex objects and often become the victims of sadistic stabbing and physical attacks. There is widespread discrimination against TGPs in society. To combat the commission of barbarous crimes against TGPs and to also do away discrimination against them section 4 of the TGP (PFR) Act, 2018 provides the prohibition of discrimination and harassment against TGPs.

Section 2 (h) of The TGP (PFR) Act, 2018 defines harassment as,

It includes sexual, physical, mental and psychological harassment which means any aggressive pressure or intimidation intended to coerce, unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes causing interference with living, mobility or work performance or creating an intimidating, hostile or offensive work or living environment including the attempt to punish the complainant for refusal to comply with such requests or to bring forth the complainant.

The above-mentioned section only provides a list of those acts or omissions which may be included in harassment of a transgender person. Unfortunately, the provisions of the law on the protection of the rights of the TGPs did not provide any penalty for the alleged person who breaches the above stated statutory provision. Hence, no deterrence will be created for the evildoers and the rate of committing crimes against TGPs cannot be belittled in a society. Moreover, the Pakistan Penal Code (PPC) is silent about the sexual abuse of TGPs. Nonetheless, besides the need for the prohibition of offenses against TGPs, there is a desperate need to provide strict punishments for those who disgrace such persons through hate crimes to mollify their filthy wishes.

The TGP (PFR) Act, 2018 lacks in providing effective remedies in case of harassment of a TGP. The provisions of said legislation must invoke the jurisdiction of the National Commission of Human Rights (NCHR). This lacking or loophole in the law furnishes a safe passage for the offender of harassment against TGPs to get an acquittal. It is witnessed recently, that the accused Muhammad Farooq shot a trans woman, namely Nazo at a wedding ceremony because she complained about him and impeached him of harassing her. Unfortunately, not only he murdered her, but also he dismembered her dead body through an axe. Lastly, he attempted to get rid of the mutilated dead body in a sack (Baume, 2018).

Gender Dysphoria or Gender-Identity Disorder: A way Forward to its Treatment

Besides gender identity issue of TGPs, this article sheds light along the modern issue of transgender sex-reassignment surgery as one of the alternatives of treatment of gender disorder besides psychological and hormonal treatments and Shari'ah viewpoint on it.

Gender dysphoria or Gender identity disorder need to be recognized at the initial stage and subsequently, it needs to be treated through the new technique of sex reassignment surgery (SRS) apart from psychological and hormonal treatments (Rehman & Polimenopoulou, 2013). Furthermore, homosexuality differs from trans-sexualism as the former refers to the desire of a partner of a same-sex while later refers to the desire of living as the other sex than assigned to him at the time of his birth. Trans-sexuality is treated via SRS of TGPs. SRS of TGPs got attention when USA media reported the case of George Jorgenson. The report on the medical and surgical treatment was published in a Journal of the American Medical Association (Drescher, n.d).

Broadly speaking, Muslim Scholars do not allow SRS and consider such an act to be the transgression from the limits of Shari'ah. The researchers recommend that decision of the Medical Board, on the subject of the genital issues of TGPs should be given weight and if the cure to such persons can be provided through SRS, by invoking the principle of *Maṣlahah Mursalah* of Shari'ah, authorization should be contracted to do so.

In recent times, the Consortium of five institutions from Europe and the US looks into the genome or complete set of DNA of a person to answer a question, whether a TGP is born that way? The research conducted by geneticists in the last two decades on the brain provided a clue to the biological roots of being a TGP. To date, this conclusion is rebuttable (Trotta, 2017).

Aside from the above-cited consortium, two institutions, namely, International Statistical Classification of Diseases of WHO and Diagnostic and Statistical Manual of American Psychiatric Association played a vital part in diagnosing both, mental and physical disorder in the gender of a person who feels and also gives the idea different from the sex assigned to him at the time of his birth (Drescher, n.d). With the passage of time, the field of gender pathology got thoughtfulness in the twenty-first century.

CONCLUSION

In a nutshell, it can be reasoned from the above discussion, TGPs are those whose gender identity and expression do not correspond with the sex assigned to them at the time of their birth. Such people are seen as gender non-conforming and are well recognized by Shari'ah in terms of their share in the inheritance, primarily, in the property of their parents or siblings. It can be concluded, by a stint of no imagination, that the fundamental rights of third-gender or third gender persons have been recognized theoretically only on documents and the hardheaded situation is widespread. The GOP has yet to enforce the SCP decision in letter and spirit. Therefore, they face discrimination in society at every stride.

It is a bitter reality that people in society mocked them in whatever way possible instead of supporting them. There is a desperate need to change this behavior and outlook of people in society that can simply be done through the promulgation of effective legislation protecting the rights of TGPs. Furthermore, effective and efficient machinery must also be acquired by the state machinery to get the implementation of such legislative acts.

Despite the fact that some efforts have been induced in previous epochs to protect the rights of TGPs, notwithstanding a lot is demanded to be performed to convey them out of social and civil seclusion. We need to focus on a question, what are the ways in which society can vary to assure equal rights for TGPs? The TGP (PFR) Act, 2018 should not be recommendatory or persuasive in nature. It should be conclusive in nature.

TGPs should not hide their identity and they should be clear that they are not Cisgender. Moreover, people in a society have to accept the existence of third-gender persons. In this respect, the provincial governments should take initiatives out of the box and offer solutions to the issue of gender identity of TGPs.

Effective mechanism should be developed by the government pragmatically to ensure the implementation of rights of TGPs as provided to them recently through legislation. Parents should not be allowed to let their children who have been declared by doctors to be transgender to go astray. Punishment should be given to such parents. While preparing this scheme or policy at the state level, to subdue the issue, the government should arrange separate shelter homes for the proper governance of such people.

Legislation should throw a light along the importance of the existence of the Medical Board consisting of competent doctors in the discipline of genetic that should be given sanction to announce the gender of the newly born child and if the child belongs to the transgender community he should be given proper medical treatment at early-stage and parents should be bound to bring such a child to the eligible doctor for treatment till the disorder is cured to its possible extent. Moreover, the TGP (PFR) Act, 2018 should provide that free legal assistance be provided to TGPs so that their case can be advocated in the best manner.

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