

An Islamic State Requires Islam to be the Basis for All Laws and Judgments, Not Just Some Laws Passed by a Pseudo Shariah Court

Debate over the Transgender Act

A key judgment has been passed by the Federal Shariat Court of Pakistan. It declared a few clauses of Transgender act 2018 as contrary to Islam. Hence, they will cease to be applicable, whilst the rest of the act will remain applicable. This has once again led to a hot debate among the secular and liberal intelligentsia, on one side, and the Islamic-minded 'ulema and political parties on the other side. In order to understand the full implication of this judgment and this act we need to summarize it.

Gender Identity in the Transgender Act

Transgender Act section 2(f) attempts to define terms, stating, "gender identity, means a person's innermost and individual sense of self as male, female or a blend of both or neither: that correspond or not to the sex assigned at birth."

Section 2(n) says, a "Transgender Person" is a person who is, "(i) Intersex (Khunsa) with mixture of male and female genital features or congenital ambiguities, or (ii) Eunuch assigned male at birth, but undergoes genital excision or castration; or (iii) a Transgender Man, Transgender Woman, Khawajasira or any person whose gender identity and/or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth."

Choice over Gender Identity in the Act

The issue of the right to choose gender identity is covered in Section 3 of the act, which states under the heading, 'Recognition of identity of Transgender person' that, "(1) A transgender person shall have a right to be recognized as per his or her self-perceived gender identity, as such, in accordance with the provisions of this Act. (2) A person recognized as transgender under sub-section (1) shall have a right to get himself or herself registered as per self-perceived gender identity with all government departments including, but not limited to NADRA. (3) Every Transgender person, being the citizen of Pakistan, who has attained the age of eighteen years shall have the right to get himself or herself registered according to self-perceived gender identity with NADRA on the CNIC, CRC, Driving License and passport in accordance with the provisions of the NADRA Ordinance, 2000 or any other relevant laws. (4) A Transgender person already issued CNIC by NADRA shall be allowed to change the name and gender according to his or her self-perceived identity on the CNIC, CRC, Driving License and passport in accordance with the provisions of the NADRA Ordinance, 2000."

Rights of Transgender Individual in the Act

Another section elaborates further on their rights, section 7 of the said act says under the heading, "Right to Inherit" that, "(1) There shall be no discrimination against Transgender Persons in acquiring the right full share of property as prescribed under the law of inheritance. (2) The share of Transgender persons shall be determined as per the gender declared on CNIC in accordance with the law of inheritance in Pakistan (3) The share of inheritance for transgender persons will be as follows (i) For Transgender Male, the share of inheritance will be that of man; (ii) For Transgender Female, the share of inheritance will be that of woman (ii) For person who has both male and female or ambiguous characteristics, such as their state is difficult to determine upon birth, following shall apply:- (a) Upon reaching the age of 18 years, if the person's self-perceived gender identity is Transgender Male, the share of inheritance will be that of man; (b) Upon reaching the age of 18 years, if the person's self-perceived gender identity is Transgender Female, the share of inheritance

will be that of woman; (c) Upon reaching the age of 18 years, if the person's self-perceived gender identity is neither Transgender Man nor Transgender Woman, the share of inheritance will be an average of two separate distributions for a man and a woman; and (d) Below the age of eighteen years, the gender as, determined by medical officer on the basis of predominant male or female features.”

Activism Regarding Discrimination and Harassment Clauses in the Act

The rest of the sections of the Act relate to prohibition of discrimination, harassment and rights to education, employment, vote, health, assembly and rights to hold public office and access to public spaces as well as guarantee of fundamental rights under the constitution of Pakistan.

The current situation is related to the action of the Federal Shariat Court, which has struck down section Section 2(f) containing definition of “gender identity.” It has also struck down Section 2(n) (iii), Section 3 and Section 7 of the impugned Act, titled, “The Transgender Persons (Protection of Rights) Act, 2018.” It has struck them down stating that they are against the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet (saw). It has declared that these will cease to have any legal effect immediately.

Constitutional Basis for the Shariat Court

There has been a lot of vocal opposition from the human rights organizations and LGBTQ community in Pakistan against this judgment. Therefore, it is important to first understand not only the detailed judgment but also the constitutional value of the Federal Shariat court itself. Federal Shariat Court was constituted on 26th May, 1980 by the President’s Order No.1 of 1980 as incorporated in part VII of the Constitution of Pakistan, 1973 under the title of chapter 3A.

These and few other so called Islamic clauses were made part of the constitution to give the impression to the general public that this is an Islamic Constitution.

The “[Preamble](#)” states, “Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.”

Article 2(A) of the “[The Objectives Resolution](#)” states, “Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust.”

PART IX, “[Islamic Provisions](#)” states, “227. Provisions relating to the Holy Qur’an and Sunnah” and elaborates, “(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”

In Part VII, “[The Judicature](#),” Chapter 3A provides for the creation of a Federal Shariat Court. It is stated, under “203D Powers, Jurisdiction and Functions of the Court,” that, “(1) The Court may, either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.”

Constitutional Right to Appeal Against the Decision of the Shariat Court

A right to appeal has been given in the constitution against the order of Federal Shariat Court. It appears under article 203F Appeal to Supreme Court. It states that, (1) Any party to any proceedings before the Court under Article 203D aggrieved by the final decision of the Court in such proceedings may, within sixty days of such decision, prefer an appeal to the

Supreme Court: Provided that an appeal on behalf of the Federation or of a Province may be preferred within six months of such decision.”

Under (2A), it is said “(2A) An appeal shall lie to the Supreme Court from any judgment, final order or sentence of the Federal Shariat Court.” It goes on to say, “(3) For the purpose of the exercise of the jurisdiction conferred by this Article, there shall be constituted in the Supreme Court a Bench to be called the Shariat Appellate Bench.”

Human rights organizations and transgender activists have condemned the above-mentioned judgment and they intend to file an appeal in Supreme Court as soon as possible as they deem this decision as an infringement of their rights. They claim that this will subject them to inhumane treatment. Amnesty International has also demanded that the Government of Pakistan should take immediate and urgent steps to stop the reversal of essential protections. They say that without such intervention, transgender and gender diverse people will be even more at risk of harassment, discrimination and violence.

Issues Regarding the Judgment Over the Transgender Act

The Federal Shariat court has given a detailed judgment spanning over 108 pages after hearing all the petitioners and respondents including some intersex persons who also joined as petitioners against this act. The Court also heard medical experts and psychologists in this regard.

The pertinent questions here are,

1. Whether the rights of intersex, eunuch, and transgender men or women are protected under the said act, or even the Constitution of Pakistan?
2. Are the definitions of transgender people correct according to Islam?
3. Does the right of appeal in the Supreme Court, against the Federal Shariat Court give its orders only recommendatory status and hence not binding?
4. As Parliament is supreme under the constitution and can legislate on any matter in whatever way the members deem fit, does it have the right to overrule any judgment of the Shariat court or Shariat appellate bench of the Supreme Court?
5. Do the Islamic articles of the constitution make it an Islamic Constitution? And is it according to Islam to first legislate according to the human mind and then try to find out its contradictions with Quran and Sunnah?
6. What is the correct definition of Intersex people and what are their rights given by Islam?

Conflict with Western Viewpoints

Most human rights organizations and transgender activists, who are raising this issue, adopt their ideas and concepts from the western definitions of rights and duties. They abide by Western freedoms including freedom of expression and personal freedom. They are utterly disgusted by even the mention of the word Islam or Shariah. They hold ambiguous, flawed and completely misunderstood concepts about Islam, Islamic law, and the Ahkam of Shariah.

In their view, Islam does not recognise intersex persons. They then claim they are forbidden to exist in Islamic society. It is an absolutely ridiculous idea. It seems that they are intentionally trying to confuse intersex persons, who are born with ambiguous genitalia, with eunuchs, who are born as male but lost male genitalia, due an accident or deliberate injury. They also want to confuse intersex with a group of people who want to change their gender intentionally, based on their feelings and perceptions of themselves as males or females, following an agenda of Western capitalist ideology. Hence, they have created this confusion due to which the real intersex persons were also forced to challenge this Transgender Act, as infringement and violation of their rights.

Under the conditions of the original act, it became possible for any person to change his or her identity based, on his confused perception of himself as male or female. On human will alone he or she can register himself or herself in government documents, institutions and get National Identity Cards on this basis.

This created a mess. Such people being men would get access to all female spaces like public parks, toilets, girl's colleges and hostels. We are already witnessing this chaos in Western countries where there are big debates going on regarding such issues.

Islamic Law Regarding Ambiguous Genitalia

Islamic law regarding intersex persons is absolutely clear, wherein they are called *Khuntha*. The term *khunthā* literally means “doubled” or “doubling.” The word is applied to the child who is born with both male and female genitalia or with ambiguous genitalia. The words eunuch and hermaphrodite are being avoided here, as they can mean different things. The word *khunthā* will be used to convey the meaning.

Allah (swt) says, ﴿وَلَيْسَ الذَّكَرُ كَالْأُنثَى﴾ **“And the male is not like the female.”** [TMQ Surah Aali Imran 3:36]. In Islam, there are two genders in origin. The two genders are determined by biological considerations alone. Gender is not determined by the decision of the individual or self-perception. The ambiguous gender is determined by experts, as being one of the two genders.

The word ‘*khuntha*’ applies to a person who cannot be easily characterized, as male or female, on biological considerations. It is the human-being who has both male and female anatomy, or one who has neither. In Islam, the expert assigns the ambiguous gender one of the two genders, male or female, after study of the biological reality. The classical jurist Ibn Qudamah said in his book *Al-Mughni*, regarding the ambiguous genitalia, “It is not excluded from being male or female. Allah (swt) said, ﴿وَأَنَّهُ خَلَقَ الذَّكَرَ وَالْأُنثَى﴾ **“And He created the spouses, males and females”** [Surah An-Najm 53:45]. And He (swt) said, ﴿وَبَيَّنَّا مِنْهُمَا رَجَالًا﴾ **“and through both He spread countless men and women”** [Surah An-Nisaa 4:1] and so there is not a third creation.”

Thus, Islam does not assign a third gender. A trustworthy Muslim doctor who specializes in the matters of congenital malformations, gender anatomy, genetics and gender behavior, confirms the gender. So he, compassionately and sensitively, examines in detail the biological, anatomical, physical characteristics, first, to see what is preponderant, of male or female characteristics. He examines physical matters, such as genitalia, and the urinating genitalia, as well as considering the X and Y sex chromosomes, that constitute the gender. If, in the very rare cases, that anatomical and genetic characteristics alone do not resolve the ambiguity, the matter of male and female biological, sexual inclinations and urges are also considered, before determining the gender. Thereafter, the Islamic rulings apply according to the determined gender, including marriage, gender roles and responsibilities.

An early medical examination, at the request of the parents, or when a national identity card is being issued, may help resolve intricate issues to a great extent. So, the intersex is then assigned a male or female status.

The matters are well known within Fiqh, including that of Hanifi Fiqh, with opinions and position taken by Imam Abū Ḥanīfah, Imam Muḥammad ash-Shabaani and Imam Abū Yūsuf. These detailed laws have a long and lengthy compilation in the books of Fiqh for centuries and were implemented throughout the Muslim lands with precision.

Hence, the aforementioned examples make it clear that Islam has given us a detailed set of rules and laws regarding each and every issue of human society. Allah (swt) is our Creator and who better to know us than Him? His laws are fair, just, and in harmony with human nature. It is absolutely disastrous to believe that Shariah is silent on some issues, hence humans should make laws for themselves. The human mind is limited in its understanding, as being humans we all know our limitations and imperfections. Also, all humans have their

own understanding of issues, under the influence of their own set of right or wrong beliefs, upbringing and societal influence, due to which there are numerous contradictions within the laws, resulting in new set of problems.

Gender is not By Self-Perception Alone, in Islam

The definitions of transgender persons as those who being born as male perceive themselves or feel themselves to be females, or vice versa has no place in Shariah. Such persons will be deemed mentally sick or psychologically diseased. They need urgent therapy. If they are not ill, they can be punished according to Islamic law. This is if they are declared mentally fit, but they insist upon such vile behavior. Therefore, in order to clarify the confusions created by West, it is better to leave their terminologies and stick to the Shariah term *Khuntha* as explained above.

Failure of the Current Constitution to Protect Islam

Now we come to the question, if the said act or the constitution of Pakistan can protect the rights of *Khuntha*? When we study the constitution, it becomes absolutely clear that it is not an Islamic constitution. Defective statements in the name of Islamic clauses have been added to a completely colonialist constitution, based on Government of India Act, 1935.

This Act changed shapes and phases as the constitutions of 1956, 1962 and then 1973, wherein 26 major amendments have been made so far. The clauses called Islamic are nothing but a sham and façade to protect the secular and liberal basis of the constitution.

For example, consider the article that “sovereignty over the entire universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.” It is effectively granting the power of law making to people of Pakistan through their representatives, while expressly stating that sovereignty belongs to Allah alone. Hence, a clear cut contradiction in this one article alone is obvious. Instead of stating that source of all laws will be the Noble Quran, Prophetic Sunnah, *Ijma us Sahaba* and *Qiyas*, this article makes human mind as source of law.

It further goes on to say that this is a sacred trust and should be within limits prescribed by Allah (swt). Under this article it is assumed that the Shariah only gives broad principles, while rest is left upon humans to decide. So, *Zakah* is considered a duty and interest is considered forbidden, however, the rest of the economic system like currency, land laws, company structure, ownership of public properties, funds of state, taxes and custom duties become play-ground for human reasoning. In addition, the government does not enforce non-payment of *Zakah*. As for interest, it has become widespread, whilst the case against it is shuffled back and forth, over decades.

Therefore, the lawmakers sitting in assemblies legislate on these issues according to their whims and desires. They adopt from the capitalist or other systems of the world, irrespective of the fact that we have detailed Islamic laws regarding each and every aspect of economic, social, judicial, ruling systems and education and foreign policies.

It becomes interesting to note that various notable Islamic scholars were part of drafting this constitution of 1973. However they intentionally or unintentionally ignored the detailed Islamic law and *Fiqh* being present in thousands of books and implemented till 1918. It is apparent that these Islamic clauses were just added to pacify the majority of public who were demanding implementation of *Nizam e Mustafa* and Shariah law. The drafters and promulgators knew well that this is not an Islamic constitution and Islam will not and can never be implemented under it. They accordingly added articles wherein gradual implementation of Islam was envisaged as the goal of the state of Pakistan.

Hence, under article Article 227, it is stated, “All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant

to such Injunctions.” This was enforced through the Council of Islamic Ideology and Federal Shariat court. This again clarifies that the intention was not to implement the Islamic law in a complete and comprehensive way from day one. Instead it is to deceive public in the name of Islam.

The Federal Shariat Court that was created to bring the laws of land in conformity with the injunctions of Quran and Sunnah, does not hold supreme authority. Its judgments and orders can be challenged in the Shariat Appellant bench of the Supreme Court, which decides the cases according to the secular constitution of Pakistan. The secular constitution determines that the rights of people are subject to the definitions of Western jurists, secular ideals of freedoms and human rights. Islamic law remains helpless in front of the desires of members of the National Assembly and the Senate, as well as the President of Pakistan. The Shariah is not the supreme law in Pakistan as the ruling are the ultimate authority. They hold the power to pass any Islamic law in the form of bill in the parliament with a majority vote. They can strike off any law with 51% majority or even amend the constitution with two-thirds majority. So how can the Islamic rights of any group of people be safeguarded in Pakistan?

In contrast, Islam gives rights of getting basic necessities like food, shelter, clothing, healthcare and education to all people irrespective of their religion, cast, creed, gender or ethnicity. Moreover Islam makes it obligatory upon the state to provide them to each and every citizen. These rights were fulfilled since the beginning of Islamic rule under Prophet Muhammad (saw), until the end of Ottoman Khilafah. In Pakistan, however, under the capitalist constitution the state claims to provide these facilities, but has failed to do so in over seven decades.

This act will not protect the rights of anyone, as the state is governed by capitalist system and constitution. These amendments in the Transgender Act can be overruled by the Supreme Court under the constitution of Pakistan. Even if the decision of Shariat Court is upheld by Supreme Court, the legislature can pass new laws according to whims and desires of the members of parliament. Shariah has been put up for voting in front of humans. It carries no absolute value in Pakistan.

If the rights of people of Pakistan, irrespective of their gender, cast, creed, ethnicity or religion are to be protected, there is only one way which is complete abrogation of the current constitution and system, and the implementation of Islamic laws in a complete and comprehensive way under the ruling system of Khilafah.

Written for the Central Media Office of Hizb ut Tahrir by

Irum Noreen