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## An Appraisal of the Transgender (Protection of Rights) Act, 2018 in the Light of Islamic Law

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### Abstract

*In Pakistan, a bill was passed in 2018 under the pretext of safeguarding the rights of transgender persons. Since its enactment, it stirred controversy and remains a subject of debate to this day in terms of its corresponding consistency with Shariah (Islamic Law). However, due to a lack of proper understanding, the confusion is not just limited to ordinary citizens but is widespread among highly educated citizens as well. The Constitution of 1973 declares that the state religion shall be Islam and holds that no law contrary to the injunctions of the Holy Quran and Sunnah shall be made. It is in this context that this article examines the controversial law making a comparison with the corresponding rules of Islamic Law over the subject and suggests that the legislature shall, after seeking proper assistance, revisit and amend it to bring it in conformity with the Shariah Law.*

**Key Words:** The Transgender (Protection of Rights) Act 2018, Rights of the Transgender, Gender Identity, Mukhanas, Constitution of Islamic Republic of Pakistan 1973

### Introduction

Generally speaking, we human beings overwhelmingly identify one another as male and female based upon physical and biological features like facial appearance, tone of voice, genital organs etc. and to each one of these sexes, assign certain roles in society and develop expectations. Resultantly, most of our social and cultural norms, traditions, and laws have evolved in the same context and they accommodate these two genders only. A person whose gender is identified beyond male and female faces difficulty for his identity is not welcomed by many. People who belong to a category that could not be identified as male or female are not well-accepted as they do not fit within the traditional framework which recognizes only two kinds of gender. It is very often that they face ridicule, and humiliation at the hands of others and are discriminated against in society. The Constitution of Pakistan declares that all citizens are equal and further guarantees that they shall be treated equally by law (article 25). Article 3 of the constitution emphasizes the elimination of the exploitation of every kind and declares that everyone is equal before the law and has got equal protection of the law. Furthermore, it also prohibits discrimination among citizens on any grounds including sex and gender (ibid).

In 2013, a petition was filed in the Supreme Court of Pakistan wherein the petitioner, who was a social activist, inter alia, prayed for the registration of transgender persons and to recognize them as equal citizens of the country. The Supreme Court accepted the petition and directed the state authorities to make necessary arrangements for their registration, issuance of a national identity card and given opportunity to participate in jobs and services. The court condemned their discrimination and declared that transgender, like other citizens, the transgender can acquire and hold property both movable and non-movable (PLD 2013 SC 188).

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This judgment was hailed by almost all segments of society and was a landmark decision to protect the rights of people suffering from some biological sexual disorder. It is, perhaps, for the same reason that the same judgment is presented as a pretext for the passing of the law on transgender rights. However, the judgment has never mentioned the bifurcation between sex and gender or, for that matter, elaborated the terms gender identity and gender expression. The community whom the court has addressed and given directions for the protection of their rights is the one whose members are suffering from medical conditions. Suffice it to say that the Supreme Court did not issue any direction regarding the need for separate legislation exclusive to this segment of society (PLD 2013 SC 188).

## **The Transgender (Protection of Rights) Act, 2018**

The act comprises 11 sections and its preamble aims at securing the rights of transgender and protecting, providing relief and rehabilitating them. Under section 2 of the act titled 'definitions', the act classifies transgender into the following three categories:

- i. Intersex (*khunsa*)
- ii. Eunuch; and
- iii. A person whose inner-most perception about his sexual identity is different from the one assigned to him at birth and perceived by society.

### **Intersex**

It has been defined as 'a person having a mixture of male and female genital features or congenital ambiguities'. In other words, a person whose sex cannot be determined easily on apparent examination due to a disorder of sexual development and whose genital features are uncertain or ambiguous (Zainuddin & Mehdy, 2016).

### **Eunuch**

The act defines a 'eunuch' as a person who, at the time of birth was assigned male sex but now ceases to be a male due to castration. As apparent from the definition that this class does not refer to any patients suffering from a sexual disorder like in the first category, rather the act of castration per se is the cause for their distinct recognition. It is also debatable how removing a genital organ could change the sexual identity of a person as this is not due to any biological hormonal changes.

### **Transgender/Khwaja Sara**

This class may include any person whose innermost self-perception about his sexual identity does not correspond to the one that is perceived by others and/or is not based upon the sex so assigned as per the birth certificate. This means, as would be discussed ahead that such a person shall be free to opt for a gender of his own choice based upon his own perception. Before going to understand the meaning of 'gender identity' and 'gender expression', the two terms 'sex' and 'gender', though often used interchangeably, some argue that are different, need to be explained:

According to the glossary published by UNICEF titled Gender Equality; Glossary of terms (2017), 'sex' refers to the biological and physiological reality of being male and female. It means the existence of certain determinable biological features and apparent physiological characteristics that may enable a doctor to assign an identity to a newborn as being a male or female. Whereas, the word 'gender' means 'a social and cultural construct, which distinguishes differences in the attributes of men and women, girls and boys, and accordingly refers to the roles and responsibilities of men and women' (UNICEF Gender Equality: Glossary of Terms, 2017). In other words, gender refers to the role associated with or expected from a person by society, based upon the sex assigned to such person at the time of birth. Such a role is deep-

rooted in the social and cultural norms of society and may change over time or even differ from society to society.

## **Gender Identity and Gender Expression**

The act defines 'gender identity' as the innermost sense of a person perceiving him or herself as a male or a female or even none of them which may or may not correspond to the identity assigned to such person by others (section 2). It defines 'gender expression' as '(it) refers to a person's presentation of their gender identity, and/or one that is perceived by others'. Thus, it is possible that a person may prefer to be identified as of gender different from the one that is perceived by others and, if so desired, may not correspond to the sex assigned at the time of birth. Furthermore, it is the individual's own will as to how he/she wants to present either as male or female or both or even none of them. These definitions, as will be discussed ahead, if read with the proceeding sections of the act creates confusion and, resultantly, controversies about the legal effects of such provisions.

## **Recognition of Identity of Transgender Person**

According to section 3 of the Act, it is the right of every person to be recognized as of the gender that has been perceived by his innermost self. It also duty bounds all governmental institutions to register such a person as belonging to the gender opted by him. Thus a person who was previously 'perceived' as a male can choose to register himself as a female and from then onwards shall be treated as such. The same would be the case for females. Likewise, a person may present him or herself as belonging to a gender that may not correspond to the sexual identity perceived by others or the one which is assigned to him or her at the time of birth based upon apparent biological features. Every transgender person after the attainment of 18 years of age may also be allowed to change his or her gender as perceived by his/her innermost sense and to get registered accordingly. The state institutions are duty-bound to respect such requests (ibid).

## **Right of Inheritance**

The act further declares, under section 7, that transgender persons shall not be discriminated against while acquiring their rightful share of the property as prescribed under the law of inheritance. To such an extent, it is perfectly fine and acceptable under the prevailing law of inheritance for Muslims which is based on the principles of *Shari'ah*. However, the fourth mentioned provision further goes that the inheritable share of a transgender is to be calculated upon the self-perceived sexual identity duly registered as such and which has been declared in the Identity Card issued by the relevant governmental functionary. It has been previously mentioned that section 3 of the act gives the exclusive right to an individual to opt for his or her gender identity and in some cases can even change it, different from the one perceived by others. This creates complications and has far-reaching results which are against the rules of Islamic Law of Inheritance.

A simple example could be given that under Islamic Law, a brother gets a shared double of the inheritable share of his sister. But as warranted by the provisions of this act, if the sister opts to get identified and registered as a male, this rule would not apply as she, for all practical purposes, shall now be treated as a male.

The act elaborates on how shares of inheritance shall be distributed in the case of a transgender. Section 7 provides for the classification of such legal heirs for the purpose of distributing the inheritable property. A brief explanation is given as under:

- a. if a transgender perceives himself as a male and gets so registered then he will get the share of a male i.e. double the share of a corresponding female heir;

- b. In a case where the self-perceived identity of a transgender is female, then the inheritable share will also be accordingly i.e. half of the share of a corresponding male heir;
- c. in the case where a transgender perceives and identifies him or herself as neither a female nor a male, in other words, that it is ambiguous, then an average of the shares of a male and female will be given. In simple math, it means that he will get 1.5.

As for as Islamic Law is concerned regarding the legal share of an heir suffering from some biological condition that makes it difficult to ascertain his or her sex, it has been narrated that such an ambiguous case was brought before the Prophet Muhammad (PBUH) about the inheritable share of a person with both genital organs. The Prophet (PBUH) has been reported to reply that if he urinates from the male genital organ, be considered male and if from the female genital organ, her share would be of a female (Abu-Da'ud: Vol.4, p.228). It means that such an ambiguous case would first need proper examination, in today's times by a medical expert, and afterwards in the light of such findings being ascertained as male or female.

### Islamic Perspective of Gender

Allah Almighty has ordained in Qur'an that He has created mankind into male and female (Al-Quran, 75:39) and that all men and women are the children of common ancestors i.e. Adam and Eve (Al-Quran, 4:1). The Islamic Law bifurcates in these two kinds of genders and assigns roles, rights, duties and responsibilities to them accordingly. Although the injunctions of *the Quran* and *Sunnah* are binding upon both men and women, however, when it comes to application, gender is given due weightage and importance. For example, during the menstruating period, women are exempted from all acts of worship. They are not allowed to offer prayers or fast or recite the Holy Quran etc. as a concession for many women who do not feel comfortable during those days.

Having said the above, it is pertinent to mention that Quran does acknowledge the existence of people suffering from biological sexual disorders which may affect them to the extent that their behaviour is changed from what could be expected as normal. Thus, at a point where the Quran ordains females to be careful about matters of chastity and to guard their houses at times when they are alone against all males unfamiliar to them not falling within the lawful family relatives and such servants or attendants who are apparently male but are 'free from sexual desire' (Quran: 24: 31). The Arabic term used for such persons in the holy Quran is '*ghayr uli alarbah*' and some prominent commentators of the Quran have held that this means certain effeminate males which have no desire for or attraction towards women (Qurtubi, d. 1273 C.E).

Islam gives greater importance to the family system and considers it the basic unit of society. The Islamic Personal Law revolves around the concept of family. Both men and women have been assigned important roles to raise their kids and maintain the family. Relationships within the family are well defined and their roles have been well explained. According to scholars Islam does not only signify an individual's role in building an Islamic society but it does also insist upon collective structures, like family, for their preservation, interwoven and connected by a religiously significant bond to integrate the Muslims into a single people. This is called the concept of a single nation or *Ummah* (Nasr, 1993).

The Muslim jurists have classified genders into four different categories namely male, female, intersex or *khunsa* and effeminate male or *mukhannas* and the legal rules would apply accordingly to each of such categories (Hanif, 2011). Along with male and female, the intersex (*khunsa*) gender is recognized by Islamic Law as a case reported to the Holy Prophet (PBUH) of the inheritable share of a baby who, due to some biological disorder, was born with both genital organs. The Prophet (PBUH) has been reported to respond that for the purpose of determining the lawful share in the inheritable property, after proper examination, the determining factor would be the fact through which genital organ he urinates. So if the baby urinates from the male genital organ he should be treated as a male and vice versa (Abu-Da'ud: Vol.4, p.228). The

Muslim jurists have defined 'khunsa' or intersex as a person who, due to some biological disorder, is born while carrying both genital organs i.e. a penis and a vagina at the same time (Ibn-Quddamah, d. 1223 C.E).

The definition of transgender as provided under the Transgender Act, *khunsa* as defined by the Muslim jurists corresponds to the first category mentioned in the relevant provision of the act. However, it differs in another aspect as the act gives an exclusive right to a transgender to determine his/her gender as per inner-most self-perception and not by the sex which was identified at the time of birth and based upon the apparent biological features. On the other hand, the litmus test for determining the sex as well as the gender of a person born with such a disorder is more physiological as per narrations from the Holy Prophet (PBUH) and their subsequent interpretation by the Muslim jurists.

### **Classification of *Khunsa* by Muslim Jurists**

The *khunsa* or intersex are then further classified into *khunsa Ghayr Mushkil/wadiah* and *khunsa Mushkil/ghayr wadiah*. This classification is based on the level of difficulty to determine the sex of a person. If the case is clear, less problematic and can be solved easily, it is termed *Khunsa Wadiah*, if otherwise; it would be *Khunsa Mushkil/Ghayr Wadiah* (Al-Bakri, 2011).

So *Khunsa Wadiah* would mean such a person who has developed both male and female genital organs but of which one plays the dominant role. During the determination of the sex of such person other prominent features like breast development, urination, ejaculation, menstruation etc. would also be considered. If the male characteristics are dominant, he should be treated as a male for all legal purposes and vice versa (Tak, 1998).

The *Khunsa Mushkil/Ghayr Wadiah* would refer to a person whose sex cannot be identified easily as being a male or female and who urinates by both organs i.e. the disorder is more complicated (Hanif, 2011).

### **Legal Rule about *Mukhannas***

The fourth category of gender according to Muslim jurists, as mentioned above, is that of *Mukhannas* or an effeminate male. A person who is male by birth and has no biological disorder like in the previous case but behaves or presents himself like a female. In its literal sense, it means a man who resembles or tries to express himself as a woman through showing effeminate characteristics like the softness of voice, lack of vigour or strength etc. (Meisami, 2006).

The Transgender (Protection of Rights) Act, 2018, as mentioned earlier, gives an exclusive right to 'any person' to get registered as, and shall be treated as, belonging to a gender that is perceived by his or her innermost self. Every person, guided by the such inner-most perception of his gender identity, may also present him/herself as the gender opposite to the sex which was assigned at birth. Under Islamic Law, however, doing so without any biological disorder and in case of such disorder without seeking proper medico-legal assistance, is not allowed.

It has been narrated by Ibn-Abbas that the Prophet (PBUH) ordained to turn such people out of their houses and cursed them who imitate the opposite gender. Those men try to resemble and behave like women and such women try to imitate or resemble men in their manners. He further narrated that the Prophet turned out such-and-such man, and "Umar turned out such-and-such woman" (Bukhari: 5886).

It is clear from the above authentic narration that a man who assumes the manners of women or a woman who imitates the manners of men, both have been cursed and such an act on their part is strictly prohibited.

## Gender Identity and the Constitution

Many people use the words 'sex' and 'gender' interchangeably and they carry the same meaning for them. Male and female are not just sexes but these are also regarded as the two traditional and vastly accepted genders in society. Thus, each one of them plays its role in society.

In the constitution of Pakistan, both terms have been used and upon careful reading, one can easily infer that it does not differentiate between them. For example article 25 guarantees the right of equality for every citizen and clause 2 specifically prohibits any sort of discrimination that is based upon 'sex'. It should be noted that the constitution does not mention the term 'gender'.

Likewise, the proceeding articles which prohibit discrimination among citizens also mention, *inter alia*, discrimination on the grounds of 'sex'. A closer look at all these clauses makes it clear that it has been used in the same meaning in which gender is understood and there is no difference between these two terms. For example, article 27 which is about safeguarding against discrimination in services has two provisos under clause (1). The word sex has been used twice in this article and with the same meaning. There is no mention of the word gender as, for the purpose of interpretation, both sex and gender carry the same meaning and can be used interchangeably.

This becomes further clear when we look at the definitions of certain words and phrases which have been used in the constitution. Article 263, titled gender and number, its clause (1) sub-clause (a) declare that words which are used to import the masculine gender (male) shall also be considered to include the other gender i.e. female.

The purpose of the above assertions is to clarify that Constitution makes no differentiation between these two terms and both are used interchangeably. It does not bifurcate between or even mention terms like gender identity or expression. Whereas the act just not only mentions them but also draws a line to differentiate between them. It should also be noted that in the Constitution, the word 'sex' is used to cover both aspects i.e. the identity assigned to a person at the time of birth as well as the one which has been assigned to such a person while playing a role in the society whereas, as mentioned earlier, the act makes a clear distinction in both.

The transgender community is part of our society and no doubt they suffer at the hands of others. It is also true that they are equal citizens of this country and their rights need to be protected. However, as it is clear from the above discussion, certain provisions of the act are contradictory to Islamic Law and their misuse may amount to uprooting the family system, which may be revised after proper assistance. The meanings assigned to certain terms under the act are not supported by the constitutional provisions which do not differentiate as such between them and are based on the general and traditional understanding of such terms.

## Conclusion and Suggestions

Pakistan was founded in the name of Islam and its slogan inspired the Muslims of the Indian sub-continent for the same reason. Article 1 of the constitution declares Pakistan as an Islamic republic whereas the succeeding article declares Islam being the state religion (article 2). Furthermore, article 2A incorporates the objectives resolution as a substantive part of the constitution which empowers the judiciary to take cognizance of legislative as well as executive actions if they contravene any provision contained therein. The preamble declares that sovereignty exclusively belongs to Allah almighty and that the people's representatives shall exercise their authority within the limits ordained by Him. It holds the authority which resides within the state as a sacred trust which shall be dispensed within the terms and conditions put by Almighty Allah. It further declares that the principles of democracy, freedom, equality, social justice and tolerance shall be observed but in accordance with their concepts as mentioned in Islam. Then there is Article 31 which holds that the state shall take steps so that the people may enable themselves to live the

Islamic way of life. Article 227 categorically declares that legislation that is existing or which will be done in the future shall be scrutinized in order to bring it in conformity with the rules of Islam as inferred from the Holy Quran and *Sunnah*.

In light of the above constitutional provisions, it is necessary that any doubt or controversy regarding the law as to whether it is in conformity to the *Shariah* or not should be addressed properly. As it has been clear from this analysis that there are indeed certain provisions which are against Islamic Law and are needed to be revisited. This author suggests that there could be two possible ways for such rectification. Either the controversial provisions may be put before the Parliament, in form of an amendment bill, after seeking proper legal advice and thereafter should be amended accordingly. Another way is to place the bill before the Federal Shariah Court which has the power to scrutinize any law on the touchstone of Islamic Injunctions as mentioned in the Holy Quran and *Sunnah*. It has also got the constitutional power to hold any law which is in question before him, as void for being against Quran and *Sunnah*.

Out of these two solutions, it is suggested that the way of amending the law would be more appropriate. Firstly because it would prove to be more speedy than bringing it under judicial scrutiny and secondly, as legislation is the exclusive domain of the parliament, representative of the people of Pakistan, it would be more proper if it revisits the controversial law and rectifies it as per the mandate of the constitution.

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