[**FSC on transgender persons**](https://www.dawn.com/news/1755630/fsc-on-transgender-persons)

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ON May 19, the Federal Shariat Court [declared](https://www.dawn.com/news/1754516) that key provisions of the landmark Transgender Persons (Protection of Rights) Act, 2018, are repugnant to Islam. The FSC has called for invalidating a law that serves to protect some of the most marginalised persons in our society. Unless the FSC decision is appealed before the Supreme Court, its ruling will become effective in six months.

The FSC finds that the definition of “transgender persons” in the law conflates a range of identities, each of which has distinct physical characteristics and also a distinct status in Islam. Crucially, the FSC has held that Section 3 of the 2018 Act which recognises the right of transgender persons to their self-perceived gender identity is contrary to Islam. The ‘voluntary change of sex’ on the basis of self-perceived gender identity is also against Islam.

The FSC states that the definition of “transgender persons” under the 2018 Act includes intersex, eunuchs and khwaja siras, transgender men and transgender women. Intersex persons are “special” and “deprived”. Eunuchs and khwaja siras, according to the FSC, refer to the same category of persons “with serious and permanent sexual infirmity in their male sexual organs”.

Transgender men and women on the other hand are persons whose self-perceived gender identity differs from the sex assigned to them at birth. The FSC considers the latter un-Islamic because Islam does not recognise any distinction between sex and gender identity.

It is far-fetched to extrapolate that transgender persons as a whole and in all contexts are repugnant to Islam.

At the outset, the FSC’s understanding of these sexual and gender identities is flawed. Contrary to what it says, khwaja siras are persons with distinct gender identities and it must not be assumed that they suffer from infirmities or disabilities. The identification of a person as khwaja sira is based on the self-perceived identity of the individual. There is no physical or medical assessment undertaken by the khwaja sira community when admitting new members. Indeed, there are no set physical or biological characteristics that make a person khwaja sira; rather it is a combination of psychological, physical and cultural factors that shape the identity.

Further, the FSC’s reasoning that any distinction between sex and gender identity is contrary to Islam is based on flawed reasoning. The FSC acknowledges that in “some cultures and societies a person or a human being is defined and identified by his or her ‘gender’ and not by his or her ‘sex’”, but then goes on to assert that “in Islam the defining factor for a human being in this context is ‘sex’ not ‘gender’”.

This conclusion is based on an obvious error of logic. The FSC relies on verses of the Holy Quran which declare that God created men and women. Since no other sex is specified, the FSC concludes that Islam does not recognise any other sex or gender. However, it does not logically follow from the verses acknowledging the creation of men and women that any other sex is repugnant to Islam, and that sex alone is the basis of gender identity. Indeed, none of the Quranic verses or hadith referred to by FSC support its conclusion that recognition of any distinction between sex and gender is contrary to Islamic injunctions.

The error of logic is obvious when we break down the argument as follows: a) The Quran recognises two sexes; b) the Quran does not explicitly recognise any distinction between sex and gender identity; c) Therefore, Islam forbids recognition of any distinction between sex and gender identity.

It is obvious why ‘a’ and ‘b’ does not entail ‘c’. If the Quran is silent on a matter, it does not entail that it finds that matter repugnant.

The FSC also relies on hadith that the Prophet (PBUH) disapproved of “effeminate men”. However, the ahadith cited involve only two incidents — one where the Prophet turned an “effeminate man” away from his house and the other where he banished a man who applied henna. Historians of the early Islamic period conclude that the “effeminate” men or “mukhannath” were common in society and played visible roles. However, there is no evidence to suggest that there was a blanket ban on these persons and these two incidents could well be isolated and context-dependent. It is far-fetched to extrapolate from these ahadith that transgender persons as a whole and in all contexts are repugnant to Islam.

It is similarly far-fetched to extrapolate from these ahadith, as the FSC does, that “in Islam males as well as females are not allowed to act and behave as an opposite sex” to the one assigned to them at birth. The FSC does not consider whether the categories of “effeminate” men or “mukhannath” as used in early Islamic society almost 15 centuries ago are identical to transgender identities as we understand and perceive them today. Today, there is a growing global consensus that gender identity falls on a spectrum, and is based on a range of biological, social and cultural traits.

The range of acceptable gender expression changes significantly over time. Is there any item of clothing, or hairstyle or even gait that can be deemed exclusively for ‘men’ or ‘women’? Who will make this determination? For example, are women with short hair and men with long hair expressing a gender identity contrary to their sex? Under the FSC’s reasoning the range of behaviour deemed repugnant to Islam is not only extremely broad but also impossible to identify.

What is particularly disappointing is that the FSC has ignored the distinct cultural status of the khwaja sira community in the subcontinent prevailing for several centuries. The fact that the FSC deems khwaja sira persons to have a disorder amounts to the stigmatisation and erasure of this community.

It is striking that the FSC has not considered fundamental rights provisions in Pakistan’s Constitution that guarantee life, dignity and equal protection under the laws to all persons. Its ruling could possibly vitiate the hard-won rights of transgender persons who face persecution and marginalisation on a daily basis. Surely the protection of their right to exist as equal citizens cannot be deemed contrary to Islam.

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