

# Islamic challenges to Pakistan's transgender rights law

Pakistan broke ground in 2018 with its legislation of the Transgender Persons (Protection of Rights) Act. This legislation was cutting-edge within South Asia and globally with the Act's declaration that gender identity inheres in the individual. The Act broadly defines a 'transgender person' to include intersex persons, *khwaja siras* (an Islamicate gender), and also '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.' Moreover, the Act goes on to declare that '[a] transgender person shall have a right to be recognized as per his or her self-perceived gender identity.'

The 2018 Act was also significant for its efforts to resolve questions and tensions about how transgender people fit into Pakistan's enforcement of (sometimes) gendered Islamic laws of inheritance. The Act declares that '[t]here shall be no discrimination against transgender persons in acquiring the rightful share of property as prescribed under the law of inheritance' and, further, that '[t]he share of transgender persons shall be determined as per the gender declared on [their national identity card].' Where gender is relevant to inheritance law then, a male-identifying transgender person will receive more than a female-identifying transgender person. As well, the Act seems to apply its detailed Islamic inheritance provisions to all transgender people in Pakistan, Muslim or non-Muslim. The reality of non-Muslim transgender persons in Pakistan is demonstrated by legal scholar Vanja Vanja Hamzić's previous work, where he has described his Christian transgender interlocutors in Lahore.

With these Islamic inheritance provisions, the relevance of the 2018 Act to Pakistan's longstanding Islamic politics was cemented. Unsurprisingly, litigation has recently been launched in the Lahore High Court and the Federal Shariat Court (FSC) in Islamabad either implicating or directly challenging the Islamic credentials of the 2018 Act. However, the litigation has not centered around an argument that the Act fails to implement Islamic inheritance properly, but rather that it seemingly encourages homosexuality and same-sex marriage—allegedly forbidden under Islamic law.

The issue of same-sex marriage emerged in *Syed Amjad Hussain Shah v. Ali Akash*

*alias Asima Bibi and five others* (W.P. No. 1421 of 2020), a case decided by the Rawalpindi bench of the Lahore High Court on 14 September 2020. This case involved a petition brought by an aggrieved father attempting to halt the relationship his adolescent daughter had formed with an older school teacher (who also happened to live with the family at one point in time). The father's claim was brought using section 491 of the Pakistan Code of Criminal Procedure. Section 491 reads, in part: 'Any High Court may, whenever it thinks fit, direct . . . that a person illegally or improperly detained in public or private custody within such limits be set at liberty.'

According to the father, the school teacher had changed their name and official gender from female to male, presumably using the provisions of the Transgender Persons (Protection of Rights) Act of 2018. With this legal change, the older (male) teacher was able to enter into an officially heterosexual marital union with the father's young daughter. In his petition to the Lahore High Court, the father further narrated a series of events where he, the petitioner:

*'having knowledge about the above said illicit relation of [the teacher] with detainee [detained] daughter . . . immediately removed the detainee daughter from above mentioned [learning] institution but even then [the teacher] secretly connected with detainee daughter and subsequently [the teacher] changed her name from Asma BiBi to Ali Aakash, just for playing fraud with courts of law as well as illegal act and design for in continuation of above said illegal relation with detainee daughter and after changing of named, [the teacher] managed a nikah nama with detainee daughter. . . . [E]ven in Sharia/Islam a marriage within same sex/gender is not only prohibited but also define [sic] as adultery as well as Gunah [sin]'.[1]*

With such a statement, the father clearly raised the stakes for the Lahore High Court, daring it to condone a marriage that would have been a same-sex marriage but for the 2018 Act and its legal recognition of Ali Akash's male gender self-identification.

Ultimately, the Lahore High Court avoided delving into the Islamic view on same-sex marriage. The case was resolved by the Court on relatively narrow grounds due to an intervening (and convenient) divorce between the daughter and teacher and the Court's reading of judicial precedent to mandate that the daughter's freedom of movement and residence be respected—and, specifically, that her father (and brother) should not try to restrain her. That being said, a perusal of judicial records related to this case shows that a gender-determination medical inspection of the

teacher was at one point ordered by the Lahore High Court in the process of adjudicating this matter. Further, the final order of the Lahore High Court appeared to both sidestep and revive the issue of the teacher's gender, ordering:

*the National Database & Registration Authority (NADRA) [to] pass a fresh order regarding the change of entry in the column relating to **gender** made in the [national identity card] relating to Ali Akash alias Asima Bibi . . . in accordance with the law . . . including the provisions of the Transgender Persons (Protection of Rights) Act, 2018) [sic] and after providing fair opportunity of hearing to all the parties concerned.[2]*

The prospect that 'all the parties concerned' should be heard here is both confusing and alarming, however, since the 2018 Act contemplates that there is only one concerned party with regards a person's gender identity—namely, the individual who is contemplating their own gender identity.

The contention that the 2018 Act might condone homosexuality within Pakistan has also been central to ongoing litigation at the FSC. The FSC was established in 1980 during the 11-year reign of U.S.-supported dictator, General Zia ul Haq. The court's jurisdiction is outlined in Article 203D of the Constitution of Pakistan and includes the power 'either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government [to] 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.' The FSC's determinations can be appealed to a special bench of the Supreme Court of Pakistan, called the Shariat Appellate Bench.

In this instance, the FSC was petitioned by multiple persons aggrieved with the 2018 Act. I have been able to collect two of the relevant petitions, one initiated by a Hammad Hussain from Islamabad, and another initiated by a Muhammad Irfan Khan from Wah Cantonment. Other information I have been able to collect indicates that a Muhammad bin Sajid has been yet another petitioner.

The two petitions to the FSC that I have collected are very similar—both, in fact, prominently misspell the name of the court as the 'Federal Shariyat Court'—and for brevity I will focus on the Hammad Hussain petition here. This petition opens with a bracing claim that the 2018 Act:

*is providing legal recognition of gays and lesbians rights in the name of transgender rights and [Pakistan's] legislature intentionally or unintentionally committed serious blunders wherein:*

- i. The definition of transgender person is not limited to real transgenders but also includes gays and lesbians.*
- ii. The requirement of a medical board authorization for recognition of a transgender person is absent.*
- iii. Every citizen of the country has been given the right to be recognised as transgender.*

This last claim—that the 2018 Act is un-Islamic because it grants every Pakistani citizen the right to claim transgender identity—is especially interesting not only in its particularity and peculiarity but also because it echoes a claim made in a 2020 article entitled ‘Transgender Law in Pakistan: Some Key Issues’ and published by a Pakistani journal, *Policy Perspectives*. The lead author of this article, Syed Nadeem Farhat, is a senior researcher at the Institute of Policy Studies (in Islamabad) which also publishes *Policy Perspectives*. The Institute of Policy Studies was founded by a well-known Pakistani senator, Dr. Khurshid Ahmad, who has also been a senior leader in Pakistan’s well-known Islamist political party, the Jamaat-e-Islami. In their 2020 article, Nadeem Farhat and his three co-authors characterise the 2018 Act’s definition of ‘transgender person’ as:

*‘allow[ing] any and every person to be a transgender. . . . [I]t grants the right to self-perceived gender unconditionally. The definition of transgender person and [other portions of] the Act read together would mean that any person may at any time pronounce change in gender without any physical or mental condition requiring it and put the whole body of law as well as the social construct to arbitrariness.*

This fear of legal and social chaos—and, moreover, an international gay and lesbian agenda using transgender rights as a Trojan horse to enter and disturb Pakistani society—saturates this article. Write the authors:

*[T]he [2018 Act] has been conceived in the context of the lesbian, gay, bisexual, transgender and queer (LGBTQ) campaign and has totally ignored the constitutional framework for legislation on the basis of a controversial interpretation of international law. The Act is therefore alien to Pakistani society and is likely to disrupt its social structure. . . . Th[is] paper argues that the slogan of the human rights of gender-variant persons has been manipulated to introduce a fundamental*

*change in Pakistani society.*

As harsh as that assessment is of the Act, it pales in comparison to the accusation contained in the opening paragraphs of the FSC petition brought by Hammad Hussain. Describing the consequences of leaving undisturbed the 2018 Act, the petitioner writes: '[I]f the same blunder[ing] is carried on, this will open gates to a flood of immorality and haram practices in the Islamic society, which will ultimately give a shoulder to the International Satanic Agenda of lesbians and gays being promoted in the western world.'

However, the (alleged) existence of a Western conspiracy does not provide the FSC sufficient legal reason to overturn or modify a law. As described above, there must be an 'Injunction of Islam' that can be invoked by the court and not just 'personal fears and apprehensions,' a point stressed by well-known transgender advocate Aisha Mughal through her attorney Asad Jamal. To be sure, Hammad Hussain invokes a Qur'anic verse (4:119) and *ahadith* too. However, these invocations occur alongside allegations about satanic conspiracies mimicking the worst of the rhetoric that came out of former Egyptian dictator Hosni Mubarak's regime when it perversely hunted down gay men in the streets of Cairo in the opening years of this century.

Curious too is this petition's seeming advocacy for Pakistan's Islamic republic to follow the approach of officially secular India, whose 2019 Transgender Persons (Protection of Rights) Act contemplates district magistrates medically assessing transgender persons who have undergone surgery in order to determine if these persons have adequately transitioned and hence 'deserve' either a male or female identification document.

There are many paths that the FSC could take here, including simply ignoring such a hastily drafted petition that would clearly benefit from more research, fact-checking, and contemplation of its true goals. Admonishing petitioners to develop careful and thoughtful petitions would benefit the FSC as it enters its fifth decade of existence. If the FSC takes up this petition, one hopes that it will exhibit not only care and thoughtfulness, but compassion for and celebration of the diversity that Pakistan encompasses.

**[1] Syed Amjad Hussain Shah v. Ali Aakash Alice [sic] Asma Bibi Etc., Writ Petition No. 1421/2020, Lahore High Court, 11 July 2020 Petition, para. 6.**

**[2] Syed Amjad Hussain Shah vs. Ali Akash alias Asima Bibi and five others, W.P. No.1421 of 2020, Lahore High Court, 14 September 2020 Judgment., para. 13.**

*Image: Protesters demanding protection for the transgender community, March 28, 2022 in Peshawar. Credit: Asianet-Pakistan/Shutterstock.*