

Transgenders and justice in Islam

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In refusing to allow Ashraf Hafiz Abdul Aziz to change his name, the courts may have adhered to the letter of the law but did they lack the compassion for transgenders, asks MOHAMMAD HASHIM KAMALI.

THE untimely death of Ashraf Hafiz Abdul Aziz at 26 and the difficulties he faced put many in a reflective mood as to what could have been done better to address his suffering when he was alive. By refusing to grant Ashraf his plea to change and register his name as Aleesha Farhana, the courts may have adhered to the letter of the law but it is questionable whether they were compassionate enough.

If one were to learn a lesson, it would be to find better answers through suitable legislation and grant of flexibility in the adjudication of intensely humanitarian cases such as Ashraf's. The Birth and Deaths Registration Act 1957 only allows amendment in personal identity if an error had been made in the first place. The gender reassignment surgery Ashraf had two years ago apparently did not warrant such an amendment.

There are an estimated 10,000 to 20,000 transgenders in the country, most of whom are grappling with stigma and prejudice. They get little comfort from the authorities, and even religious leaders tend to lecture them on how they should reform themselves. They have low self-esteem and often get involved in the vice trade.

Ashraf's case evidently invoked voices of compassion in the media and elsewhere, although the media coverage on him seemed more interested in the colour and make-up of his clothes rather than his emotional trauma and pain.

Islam is cognizant of the predicament of transgender individuals, and even though the fiqh tradition provides a certain amount of detail, it is the general guidelines of the Quran and Hadith that need to be looked at first.

Islam identifies itself as *din al-fitrah*, a religion that manifests harmony with human nature, which implies that Islam seeks to respond positively to the legitimate needs of people. Our natural need and reason, informed by the available guidelines in Islam and scientific evidence, should guide us in our quest to provide fair responses to issues.

Justice is a cardinal principle of Islam, yet it is to be tempered with fairness (*ihsan*) -- as in the Quranic verse "God commands justice and fairness" (*al-Nahl*, 16:90).

God's affirmation that "We have bestowed dignity on the children of Adam" (17:70) is unqualified and absolute in that human dignity is divinely ordained and inheres in all individuals by virtue of their humanity. This should be duly reflected in our social and family relations, business transactions, laws and governance.

All of this is to be further moderated by the principle that "God makes no soul responsible for what is beyond its capacity" (2:233).

Prophet Muhammad also said that "people are God's children and the most beloved of them to God is the most compassionate of them to His children". There is acknowledgement in the Quran also of "men who have no wives with women", side by side with minors and elderly persons with whom women can behave more freely within the home environment (24:31 and 24:60).

The fiqh discourse on transgenders draws a certain distinction between two categories of persons, namely the khuntha and the mukhannath. The former is a male person who resembles a female in speech, movement and appearance due to an inherent condition that is beyond his ability to control, and there is, therefore, no sin, shame or blame attached to it.

Juristic discourse concerning the khuntha is almost entirely focused on their rights in respect of privacy, clothing, burial ceremonies, inheritance rights and others. This is a language not of denial but affirmation that such persons do exist among us and that society should allow space for them to lead a life of dignity.

The mukhannath is, on the other hand, a person who conceals his masculinity and much of his feminine behaviour is deemed to be of his own making. There is blame attached to this and the case is treated differently to that of the khuntha.

To differentiate one from the other may admittedly not be self-evident, in which case scientific evidence plays a crucial role, although the fiqh tradition, too, has moved beyond simplistic categories to discern shades of differences between them.

Fiqh and science both confirm that sexual orientation is latent within each individual, emerging in complex interactions between one's biological make-up and early childhood. Current research is pushing slowly but steadily towards the conclusion that sexual orientation is largely inherent.

Khuntha is further divided into two types: easy to discern (khuntha ghayr mushkil), as opposed to khuntha mushkil, whose condition is difficult to determine.

The former is a person who exhibits both masculine and feminine traits, but one of these is predominant. This is basically a man with feminine tendencies, or a woman with masculine tendencies, and it is possible to determine the application of fiqh rules pertaining to their rights.

The khunsa mushkil, or transgender in the full sense, is a person who may have both male and female sexual organs, or has neither but whose urinary tract ends with an aperture. If the former, an attempt is made to determine the manner of urination. If this proves reliable, and natural inclinations, whether towards men or women, also fail to provide a clue, the case is treated as one of indeterminable hermaphrodite.

Jurists and schools of law have differed as to details in the application of fiqh rules pertaining, for example, to inheritance, by taking an average of two separate

distributions for a male and a female respectively, or the lower of the two, depending on which school of fiqh one follows, to be assigned to the hermaphrodite.

Some of these questions can now be better determined perhaps in light of advances in science, in which case the rules of ijtiḥād would suggest recourse to scientific evidence, general guidelines of the Quran and Hadith, as well as the enlightened aspirations and insights of our society and our quest to finding more refined answers.

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