IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(ORIGINAL JURISDICTION)

PRESENT
MR. JUSTICE DR. SYED MUHAMMAD ANWER, ACTING CHIEF JUSTICE
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH, JUDGE

SHARIAT PETITION NO.5/I OF 2020

Hammad Hussain son of Muhammad Hussain Pervez Butt, R/O House No.39, Street No.01, Sector E, DHA Phase-1, Islamabad.

……Petitioner

versus

1. Federation of Pakistan through Secretary Ministry of Law and Justice, 3rd Floor, R&S Blocks, Pak Secretariat, Red Zone, Islamabad.
2. Ministry of Human Rights, through its Secretary, 9th Floor, New Pak Secretariat, Kohsar Block, Sector F-5, Islamabad.
3. SAFFR (Shemale Association for Fundamental Rights) through its representative Ms. Nadeem Kashish, Member of the National Committee for Implementation of the Transgender Persons (Protection of Rights) Act, 2018 officially constituted by the Ministry of Human Rights, having its registered office at Near Falahi Markaz, Quaid-e-Azam University Road, Bari Imam, Islamabad.
4. Nayyab Ali, father's name Muhammad Asif, Resident of House No.250, Street No.83, Sector I-10/2, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.6/I OF 2020

Muhammad Irfan Khan son of Lal Khan Sehraee, R/O House No.CB-66/A, Gulshan Colony, Tehsil Taxila, Wah Cantt.

……Petitioner

versus

1. Federation of Pakistan through Secretary Ministry of Law and Justice, 3rd Floor, R&S Blocks, Pak Secretariat, Islamabad.
2. Ministry of Human Rights, 9th Floor, New Pak Secretariat (Kohsar Block), Sector F-5, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.5/I OF 2021

Muhammad Bin Sajid son of Sajid Iqbal, R/O Flat No.801, Qurtuba Heights, Street No.15, E-11/4, Islamabad.

……Petitioner

versus

1. Federation of Pakistan through Secretary Ministry of Law and Justice, Pak Secretariat, Islamabad.
2. Ministry of Human Rights, Government of Pakistan through Secretary, Ministry of Human Rights, Pak Secretariat, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.6/I OF 2021

1. Hammad Hussain son of Muhammad Hussain Pervez Butt, R/O House No.39, Street No.01, Sector E, DHA Phase-1, Islamabad.
2. Muhammad Irfan Khan son of Lal Khan Sehraee, R/O House No.CB-66/A, Gulshan Colony, Tehsil Taxila, Wah Cantt.

……Petitioners

versus

1. Federation of Pakistan through Secretary Ministry of Law and Justice, 3rd Floor, R&S Blocks, Pak Secretariat, Islamabad.
2. Ministry of Human Rights, 9th Floor, New Pak Secretariat (Kohsar Block), Sector F-5, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.2/I OF 2022

Abdur Rehman Advocate, S/O Muhammad Bashir, Office No.62, First Floor, Justice Retd. Khawaja Muhammad Sharif Block, District Courts, Rawalpindi.

……Petitioner

versus

1. National Database and Registration Authority (NADRA) having its Head Office at State Bank of Pakistan Building, Shahrah-i-Jamhuriat, G-5/2, Islamabad through its Chairman.
2. Federation of Pakistan through Secretary, Ministry of Interior, R Block, Pak Secretariat, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.3/I OF 2022

Hammad Hussain son of Muhammad Hussain Pervez Butt, R/O House No.39, Street No.01, Sector E, DHA Phase-1, Islamabad.

……Petitioner

versus

1. Federation of Pakistan through Secretary Law & Justice, 3rd Floor, R&S Blocks, Pak Secretariat, Red Zone, Islamabad.
2. NADRA through its Chairman, State Bank Building, G-5/2, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.6/I OF 2022 a/w **Sh. Misc. App. No.7/I of 2022**

Hammad Hussain son of Muhammad Hussain Pervez Butt, R/O House No.39, Street No.01, Sector E, DHA Phase-1, Islamabad.

……Petitioner

versus

1. Federation of Pakistan through Secretary Ministry of Human Rights, Human Rights Division, State Life Tower, Building No.5, Service Rd., F 6/4, Blue Area, Islamabad.

……Respondent

LINKED WITH
SHARIAT PETITION NO.7/I OF 2022

RJS Life Care (NGO) through its Executive Director Mr. Safdar Hayat son of Sikandar Hayat, Office No.6, 3rd Floor, Al-Janat Arcade, Sector G-11 Markaz, Islamabad.

……Petitioner

versus

2. Federation of Pakistan through Secretary Ministry of Law and Justice, 3rd Floor, R&S Blocks, Pak Secretariat, Islamabad.
3. Ministry of Human Rights, 9th Floor, New Pak Secretariat (Kohsar Block), Sector F-5, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.14/I OF 2022

Jamiat Ulema-e-Islam Pakistan, through its Incharge Legal, Masjid Farooq-e-Azam, Street No.41, Sector I-9/4, Islamabad.

……Petitioner

versus

Federation of Pakistan through Secretary Ministry of Law and Justice, Pak Secretariat, Islamabad.

……Respondent

LINKED WITH
SHARIAT PETITION NO.18/I OF 2022

1. Muhammad Younus Qureshi S/O Abdullah Qureshi, Masjid Al Forqan Ahel Hadith St:54, Sector G-9/4 (President Ulama-e-Mashaiakh Yakjethi Council Pakistan, Islamabad)
2. Ehtesham ul Haq Kayani S/O Ashan ul Haq Kayani, House No.NA-163/E, Mohal New Mulpur, 7th Road Satellite Town, Rawalpindi.
3. S. Tayyab ur Rahman Zaidi S/O S. Fayyaz Muhammad Zaidi, Masjid Usman bin Afan, Sector G-11/2, Islamabad.
4. Syed Talib Hussan Zaidi S/O Faiz Muhammad Zaidi, Masjid Alsafa Satellite Town, Rawalpindi.
5. Fazal ur Rehman S/O Akram Khan, Abbottabad.

……Petitioners

versus

1. National Database and Registration Authority (NADRA) having its Head Office at State Bank of Pakistan Building, Shahrah-i-Jamhuriat, G-5/2, Islamabad through its Chairman.
2. Federation of Pakistan through Secretary, Ministry of Interior, R Block, Pak Secretariat, Islamabad.

……Respondents

LINKED WITH
SHARIAT PETITION NO.20/I OF 2022

Nauman Ashraf, Advocate son of Muhammad Ashraf, Resident of Kot Allah Rakha Bhatti, Hanjar A Kalan, Post Office Khas, Tehsil Pattoki, District Kasur.

……Petitioner

versus

1. Federation of Pakistan through Secretary Ministry of Law and Justice, Pakistan Secretariat, Presidency Road, Islamabad.
2. Ministry of Law and Justice, through its Secretary, 3rd Floor, R&S Blocks, Pak Secretariat, Red Zone, Islamabad, Islamabad Capital Territory.

……Respondents

3. Council of Islamic Ideology, through its Secretary, Office at 46, Ataturk Ave, G-5/2, Islamabad.

……Performa Respondent

LINKED WITH

SHARIAT PETITION NO.01/I OF 2023

1. Tanzim-i-Islami Pakistan through its Nazim-e-Aala (Administration and Legal Affairs) Azhar Bakhtiyar Khilji, having Head Office at Darul-Islam 23KM Chung Multan Road, Lahore.
2. Muhammad Asghar son of Pinnu Khan, Zonal Nazim, Tanzeem-i-Islami Pakistan, resident of Village Sagot, Tehsil Kalar Syedan, District Rawalpindi.

……Petitioners

versus

Federation of Pakistan through Federal Ministry of Law, Justice and Human Rights, Islamabad.

……Respondent

For Petitioners: Mr. Kamran Murtaza and Mr. Rizwan Aijaz, Advocates for petitioner in S.P. No.14/I/2022
Mr. Imran Shafique, Advocate for Senator Mushtaq Ahmad Khan, petitioner in S.P.No.05/I/2020
Mr. Umar Farooq Malana and Mr. Mazhar ul Haq Hashmi, Advocates in-person in S.P.No.05/I/2020
Mr. Abdur Rehman, Advocate/petitioner in-person in S.P.No.2/I/2022, S.P.No.05/I/2020 and S.P. No.6/I/2021
Mr. Muhammad Younas Mayo, Advocate for petitioners in S.P. No.1/I/2023
Syed Sikander Abbas Gillani and Mr. Faiz Rasool Jalbni, Advocates for petitioner Syed Iftikhar Hussain Naqvi Al-Najfi in S.P.No.05/I/2020
Ch. Ehsan Majeed Gujjar and Mr. Ghulam Mujtaba Ch., Advocates for petitioner in S.P. No.20/I/2022
Ms. Misbah Akram, Advocate in-person in S.P.No.05/I/2020
Orya Maqbool Abbasi, petitioner in-person in S.P.No.05/I/2020
Hammad Hussain, petitioner in-person in S.P.No.05/I/2020, S.P. No.6/I/2021, S.P. No.3/I/2022 & S.P. No.6/I/2022
Muhammad Irfan Khan, petitioner in-person in S.P. No.06/I/2020 and S.P. No.6/I/2021
Muhammad Bin Sajid, petitioner in-person in S.P. No.5/I/2021
Safdar Hayat, Executive Director, RJS Life Care (NGO), petitioner in-person in S.P.No.7/I/2022
Muhammad Younas Qureshi, petitioner in-person in S.P.No.18/I/2022
Najib-ul-Haq and Muhammad Irfan, petitioners in-person in S.P.No.05/I/2020
Saad Mehmood, petitioner in-person in S.P.No.05/I/2020
Ms. Almas Bobby, petitioner in-person in S.P.No.05/I/2020
Muhammad Shoaib, petitioner in-person in S.P.No.05/I/2020, S.P.No.06/I/2021 and S.P. No.02/I/2022
Mr. Ansar Javaid, Chairman Birth Defects Foundation in S.P.No.05/I/2020

For Respondents: Ch. Ishtiaq Mehrban, Mr. Khaleeq Ahmad and Mian Muhammad Faisal Irfan, DAGs for Federation
Raja Muhammad Jawad Arsalan and Mr. Sarbuland Khan, Asst. Attorney General for Federation
Ms. Shazeen Abdullah and Mr. Imran Shaukat Rao, Assistant A.G., Punjab
Barrister Ahsan Hameed Dogar on behalf of Advocate General, Sindh
Mr. Muhammad Bashar Naveed, Mr. Naseer-ud-Shah, Asst. Advocate General, KP
Mr. Zahid Yousif, AOR/Law Officer, KP.
Mr. Fareed Ahmad Dogar, Assistant A.G., Balochistan
Mr. Adeel Obaid, Mr. Ghulam Hassan, Ms. Maimana Khattak, Raja Qaiser Mehmood, and Mr. Muhammad Hassan, Law Officers, Ministry of Human Rights, Islamabad
Mr. Ali Raza Bhutta, Secretary, Ministry of Human Rights
Mr. Muhammad Hassan Mangi, D.G., Ministry of Human Rights
Ms. Rubina Kausar, Focal Person, Ministry of Human Rights
Mr. Iqbal Pasha, Director, Ministry of Human Rights
Mr. Naveed Ahmad, Mr. Inayat Ali Khan, Mr. Mohsin Matloob, Ubaid-ur-Rehman and Ms. Sameera Maqsood (Law Officers), NADRA
Mr. Kashif Nazar (Director Operations), Mr. Saqib Jamal (Director Legal) Mr. Mujahid Khan and Ch. Muhammad Farooq (Deputy Director-Legal) and Hassan Iqbal (Asst. Director), NADRA.
Mr. Farhat Ullah Babar, Advocate in-person in S.P.No.05/I/2020
Ms. Sara Malkani, Advocate for Shahzad Ahmed Ujjan alias Shahzadi Rai in S.P.No.05/I/2020
Muhammad Sherkan Malik, respondent in-person in S.P.No.05/I/2020
Mr. Attaullah H. Kundi, Advocate for respondent Muhammad Sarim Imran alias Saro Imran in S.P.No.05/I/2020
Nadeem-uz-Zafar Khan alias Kashish and Julie Malik, respondents in-person in S.P.No.05/I/2020
Barrister Qasim Nawaz Abbasi, Advocate for Nayyab Ali in S.P.No.05/I/2020
Mr. Asad Jamal, Advocate for respondent Malik Rizwan Mehmood alias Bubbli Malik and Aisha Mughal
Mr. Ibrar-ul-Hassan, Deputy Director and Malik Zafar Ali, Assistant Director (Legal), BISP.
G.M. Jakhrani, Deputy Director, Ministry of Health.
Muhammad Asim Sharif alias Reem Sharif, respondent in-person

As Experts: Ms. Rabiya Javeri Agha (Chairperson), Muhammad Arshad (D.G), Mian Waqar Ahmed, Mr. Muhammad Mubeen and (Law Officers), National Commission for Human Rights
Mr. Asif Sohail, Director (Lit), Ministry of NHSR&C
Ms. Fozia Jalal (Director) Council of Islamic Ideology, Islamabad.

Mufti Muhammad Zubair, Member Council of Islamic Ideology, Karachi
Mr. Muhammad Ali, Law Officer, Transgender Protection Center, Islamabad.
Awais Malik, Child Protection Officer, Child Protection Institute, Islamabad.
Mr. Azizullah Khan, Section Officer (Hajj Policy), M/o Religious Affairs
M/s Muhammad Irfan Gondal (PCRDP Director Programs), Muhammad Shahid Rana (Director), Iftikhar Ahmad Buttar (Dy. Director), Tariq Ismail and Umme Umaira, (Litigation Officer), Social Welfare Department and Bait-ul-Mal, Punjab.
Mr. Muhammad Qayyum, Deputy Director on behalf of Secretary Social Welfare Department, KP.
Ibrar Ullah, A.D., Social Welfare Department, KP
Syed Atta Ullah Shah, Additional Secretary, Social Welfare Department, Sindh
Social Welfare Department and Bait ul Mal, Rawalpindi.
Ms. Saeeda Manan, Director Social Welfare Department, Balochistan
Zamurrad Khan, CEO, Pakistan Sweet Home and Khurshid Malik, Pakistan Sweet Home
Mr. Azam Nazir Hashmi, Advocate on behalf of Akhuwat Foundation
Dr. Syed Imran Murtaza (Medical Superintendent), Mudassar Ali (Manager Research Associate) and Muhammad Ashraf (Project Manager - Khawaja Sira Support Program), Akhuwat Fountain House, Lahore.

Dates of Institution:

Shariat Petition No.05/I of 2020 **(19.03.2020)**
Shariat Petition No.06/I of 2020 **(03.12.2020)**
Shariat Petition No.05/I of 2021 **(06.04.2021)**
Shariat Petition No.06/I of 2021 **(06.05.2021)**
Shariat Petition No.02/I of 2022 **(16.12.2021)**
Shariat Petition No.03/I of 2022 **(02.12.2021)**
Shariat Petition No.06/I of 2022 **(24.01.2022)**
Shariat Petition No.07/I of 2022 **(26.01.2022)**
Shariat Petition No.14/I of 2022 **(26.09.2022)**
Shariat Petition No.18/I of 2022 **(13.10.2022)**
Shariat Petition No.20/I of 2022 **(22.10.2022)**
Shariat Petition No.01/I of 2023 **(26.01.2023)**

Dates of Hearing:

30.09.2020, 21.10.2020, 18.11.2020, 22.12.2020, 05.05.2021, 27.10.2021, 02.12.2021, 17.01.2022, 17.02.2022, 03.03.2022, 04.03.2022, 24.03.2022, 11.04.2022, 20.09.2022, 18.10.2022, 02.11.2022, 10.11.2022, 24.11.2022, 29.11.2022, 07.12.2022, 13.12.2022, 15.12.2022, 10.01.2023, 17.01.2023, 25.01.2023, 07.02.2023, 15.02.2023, 21.02.2023,

28.02.2023, 02.03.2023, 09.03.2023, 15.03.2023, 22.03.2023, 28.03.2023, 04.04.2023, 06.04.2023, 10.04.2023, 13.04.2023, 26.04.2023, 02.05.2023, 03.05.2023, 06.05.2023, 09.05.2023, 10.05.2023,

Date of Last Hearing: 11.05.2023

Date of Judgment: 19.05.2023

JUDGMENT

DR. SYED MUHAMMAD ANWER, ACJ: Through this single judgment, we intend to decide all the twelve Shariat Petitions, through which several petitioners have challenged various sections of the Transgender Persons (Protection of Rights) Act, 2018 (hereinafter referred to as "**Impugned Act / Law**") and provisions of the Transgender Persons (Protection of Rights) Rules, 2020 made under Section 20 of the impugned Act. In addition to that some of the petitioners have challenged Regulation 13(1) of the National Database and Registration Authority (Application for National Identity Card) Regulation, 2002 made under the National Database and Registration Authority Ordinance, 2000. They also challenged policy followed by the National Database and Registration Authority (hereinafter referred to as "**NADRA**") regarding registration of transgender persons pursuant to the Transgender Persons (Protection of Rights) Act, 2018 i.e. the impugned Act.

2. In response to these petitions, the departments, which are arrayed as respondents in these petitions, duly submitted their written replies. In addition to that, some persons who are intersex and also those persons who identified themselves as either "intersex" or "transgender women" also appeared before this Court and requested to be impleaded as party in these cases. Apart from that, some psychologists, therapists, gender experts, scholars and members of civil society also requested this Court to be heard

being experts in the captioned Shariat Petitions. All such requests from both the sides were accepted and they have been granted an opportunity to submit their arguments, verbal or written.

3. All the petitioners as well as the respondents and subsequently impleaded parties have been heard at length and were also given the chance to submit their written arguments.

ARGUMENTS OF THE PETITIONER

i. Hammad Hussain and some other petitioners

4. They mainly argued that in the garb of the impugned Act homosexuality will get a legal cover and it will become easy for sexually perverted people to indulge in such a major sin. They also argued that the teachings of Islam in the light of Holy Quran and *Sunnah* are clear regarding the permissible and impermissible sexual activities between the human beings. According to these petitioners the impugned Law will help in promoting illegal sexual activities, especially homosexuality in the society. Islam clearly restricts and limits sexual relations except between duly wedded male and female persons. Any immoral sexual activity outside the wedlock by any person, male or female, is termed as "*Al-Fahishah*" (الفاحشة). The word *Fahishah* literally means anything that exceeds the bounds of rectification or rectitude.

فحش اس فعل یا قول کو کہتے ہے جو قباحت میں حد سے بڑا ہو۔(راغب)

5. In the Holy Quran, this word is used in many verses but in the following verses, this word can be translated in English as "gross, immodest, lewd, obscene, etc." The Almighty Allah has directed us to stay away from indulging in immoral and shameful activities. Allah has also associated such acts with *Shaitan* and termed these gross and immoral activities as major sins. Some of which are even punishable crimes according to the Holy Quran and *Sunnah* of

the Holy Prophet (ﷺ). In the following verses, Allah (SWT) categorically directs that these immoral activities are acts of *Shaitan*, therefore, keep yourself away from them. They relied on the following verses of the Holy Quran:

Surah An-Nahl (Verse-90), Surah Al-Imran (Verse-135), Surah An-Nur (Verse-21), Surah Al-A'raf (Verse-33) and Surah Al-Baqarah (Verse-219)

6. They also argued that the Holy Quran discusses some of the arguments forwarded by the non-believers to justify in some way these immoral activities. Some of the people say that they indulge in different immoral activities considering it as part of their tradition and culture. The Holy Quran rejected this argument for justification of immoral and shameful activities being part of tradition or culture, hence considers it as deed of *Shaitan*, therefore, forbidden in Islam. In this regard Verse-28 of *Surah* Al-A'raf (7:28) states as follows:

وَإِذَا فَعَلُواْ فَـٰحِشَةً قَالُواْ وَجَدْنَا عَلَيْهَآ ءَابَآءَنَا وَٱللَّهُ أَمَرَنَا بِهَا ۗ قُلْ إِنَّ ٱللَّهَ لَا يَأْمُرُ بِٱلْفَحْشَآءِ ۖ أَتَقُولُونَ عَلَى ٱللَّهِ مَا لَا تَعْلَمُونَ۔

(اور جب کوئی اور بے حیائی کا کام کرتے ہیں تو کہتے ہیں کہ ہم نے بزرگوں کو اسی طرح کرتے دیکھا ہے اور خدا نے بھی ہم کو یہی حکم دیا ہے۔ کہہ دو کہ خدا بے حیائی کے کام کرنیکا حکم ہرگز نہیں دیتا۔ بھلا تم خدا کی نسبت ایسی بات کیوں کہتے ہو جس کا تمہیں علم نہیں۔

"And when they commit an immorality, they say, "We found our fathers doing it, and Allah has ordered us to do it." Say, "Indeed, Allah does not order immorality. Do you say about Allah that which you do not know?""

Similarly, there are people who stress that by indulging in some immoral activities one can earn some money which can save that person from hunger or poverty. The Holy Quran also refuted these arguments because according to the Holy Quran the Provider of Food and Sustainer of the Universe is only Allah the Almighty. Such feeble arguments are forwarded by *Shaitan* to misguide or derail the human beings from straight path. Verse-268 of *Surah* Al-Baqarah is relevant in this regard, which is reproduced as under:

ٱلشَّيۡطَٰنُ يَعِدُكُمُ ٱلۡفَقۡرَ وَيَأۡمُرُكُم بِٱلۡفَحۡشَآءِۖ وَٱللَّهُ يَعِدُكُم مَّغۡفِرَةٗ مِّنۡهُ وَفَضۡلٗاۗ وَٱللَّهُ وَٰسِعٌ عَلِيمٞ۔

شیطان تمہیں تنگدستی کا خوف دلاتا اور بے حیائی کے کام کرنے کو کہتا ہے اور خدا تم سے اپنی بخشش اور رحمت کا وعدہ کرتا ہے اور خدا بڑی کشائش والا اور سب کچھ جاننے والا ہے۔

"Satan threatens you with poverty and orders you to immorality, while Allah promises you forgiveness from Him and bounty. And Allah is all-Encompassing and Knowing."

Hence on the basis of these verses, the petitioners stated that in the light of abovementioned verses:

i) There is no space for sex industry including homosexuality and other sexual perversions and sexual degeneracies in any manner and form, hence there is no concept of sex workers, etc. in an Islamic state.

ii) In an Islamic state, any immoral, shameful and lewd activity cannot be allowed to continue being a part of tradition of any community within the society.

7. According to the petitioners, in Islamic law there is a concept of having preventive steps by the State in a society regarding these actions which may lead to some illegal or immoral activities and result into a crime or a major sin. In this regard the Holy Quran clearly declares the publicizing of any immoral act as an act of *Shaitan* and declared it as prohibited. Verse-19 of *Surah* An-Nur (24:19) states this phenomena as follow:

إِنَّ ٱلَّذِينَ يُحِبُّونَ أَن تَشِيعَ ٱلۡفَٰحِشَةُ فِي ٱلَّذِينَ ءَامَنُواْ لَهُمۡ عَذَابٌ أَلِيمٞ فِي ٱلدُّنۡيَا وَٱلۡأٓخِرَةِۚ وَٱللَّهُ يَعۡلَمُ وَأَنتُمۡ لَا تَعۡلَمُونَ۔

اور جو لوگ اس بات کو پسند کرتے ہیں کہ مومنوں میں بے حیائی پھیلے ان کو دنیا اور آخرت میں دکھ دینے والا عذاب ہو گا اور خدا جانتا ہے اور تم نہیں جانتے۔

"Indeed, those who like that immorality should be spread [or publicized] among those who have believed will have a painful punishment in this world and the Hereafter. And Allah knows and you do not know."

8. The petitioners vehemently stressed that homosexuality is strictly prohibited in Islam. Likewise all the other Abrahamic religions have also declared homosexuality as one of the major sin. In this regard, the following verses of the Holy Quran are most relevant:

Surah Al'Ankabut (Verse-28)

وَلُوطًا إِذْ قَالَ لِقَوْمِهِۦٓ إِنَّكُمْ لَتَأْتُونَ ٱلْفَـٰحِشَةَ مَا سَبَقَكُم بِهَا مِنْ أَحَدٍ مِّنَ ٱلْعَـٰلَمِينَ۔

اور لوط (کو یاد کرو) جب انہوں نے اپنی قوم سے کہا کہ تم (عجب) بے حیائی کے مرتکب ہوتے ہو تم سے پہلے اہل عالم میں سے کسی نے ایسا کام نہیں کیا۔

"And [mention] Lot, when he said to his people, "Indeed, you commit such immorality as no one has preceded you with from among the worlds."

Surah Al-A'raf (Verse-80 and 81)

وَلُوطًا اِذْ قَالَ لِقَوْمِهٖٓ اَتَاْتُوْنَ الْفَاحِشَةَ مَا سَبَقَكُمْ بِهَا مِنْ اَحَدٍ مِّنَ الْعٰلَمِيْنَ ﴿۸۰﴾اِنَّكُمْ لَتَاْتُوْنَ الرِّجَالَ شَهْوَةً مِّنْ دُوْنِ النِّسَآءِ ؕ بَلْ اَنْتُمْ قَوْمٌ مُّسْرِفُوْنَ ﴿۸۱﴾

اور جب ہم نے لوط کو پیغمبر بنا کر بھیجا تو اس وقت انہوں نے اپنی قوم سے کہا تم ایسی بے حیائی کا کام کیوں کرتے ہو کہ تم سے پہلے اہل عالم میں سے کسی نے اس طرح کا کام نہیں کیا؟(۸۰)یعنی خواہش نفسانی کو پورا کرنے کیلئے عورتوں کو چھوڑ کر لونڈوں پر گرتے ہو۔حقیت یہ کہ تم حد سے گزرنے والے ہو۔(۸۱)

"And [We had sent] Lot when he said to his people, "Do you commit such immorality as no one has preceded you with from among the worlds?" (80) Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people." (81)

Further, the following references of the bible were quoted by the petitioners to support their arguments that even in Judaism and Christianity, homosexuality is a major sin, hence prohibited:

1. *Leviticus 18:22: "You shall not lie with a male as with a woman; it is an abomination."*

   مرد دوسرے مرد کے ساتھ جنسی تعلقات نہ رکھے۔ایسی حرکت قابلِ گھن ہے۔

2. *Leviticus 20:13: "If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them."*

   اگر کوئی مرد کسی دوسرے مرد سے جنسی تعلقات رکھے تو دونوں کو اِس گھناؤنی حرکت کے باعث سزائے موت دینی ہے۔وہ اپنی موت کے خود ذمہ دار ہیں۔

3. *Romans 1:26-27: "For this reason God gave them up to dishonorable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error."*

یہی وجہ ہے کہ اللہ نے اُنہیں اُن کی شرم ناک شہوتوں میں چھوڑ دیا۔ اُن کی خواتین نے فطرتی جنسی تعلقات کے بجائے غیر فطرتی تعلقات رکھے۔ اِسی طرح مرد خواتین کے ساتھ فطرتی تعلقات چھوڑ کر ایک دوسرے کی شہوت میں مست ہو گئے۔ مردوں نے مردوں کے ساتھ بے حیا حرکتیں کر کے اپنے بدنوں میں اپنی اِس گم راہی کا مناسب بدلہ پایا۔

4. *1 Corinthians 6:9-10: "Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the kingdom of God.*

کیا آپ نہیں جانتے کہ ناانصاف اللہ کی بادشاہی میراث میں نہیں پائیں گے؟ فریب نہ کھائیں! حرام کار، بُت پرست، زناکار، ہم جنس پرست، لونڈے باز، چور، لالچی، شرابی، بدزبان، لٹیرے، یہ سب اللہ کی بادشاہی میراث میں نہیں پائیں گے۔

ARGUMENTS OF THE SENATOR MUSHTAQ AHMED KHAN

9. Senator Mushtaq Ahmad Khan argued his case in person as well as through his counsel at length and stated that the terms “gender” and “sex” in the impugned law are considered as two different things, whereas in Islam there exists no difference between the terms “gender” and “sex”. They referred and relied on many injunctions of Islam from Quran and *Sunnah* of the Holy Prophet (ﷺ), wherein the injunctions of Islam are subjected to the biological sex of a person. According to him, some of the injunctions of Shariah or *Ahkamaat* (احکامات) are based on the sex of a person like injunctions regarding marriage (نکاح), divorce (طلاق) inheritance (وراثت), ablution (احکامِ طہارت) and dressing of women (احکامِ پردہ) as well as directions regarding different types of worships and prayers like *Salat* (صلاۃ), *Som* (صوم) and *Hajj* (حج) etc. In support of this part of his arguments he relied upon many verses of the Holy Quran and abundance of *Ahadith* of the Holy Prophet (ﷺ).

10. He vehemently argued that the term "transgender" is not defined in the impugned law according to the general principle of legislative drafting because according to the principles of legislative drafting a term in any law, which is to be defined, normally begins with the words "means" or "includes", whereas under Section 2(1)(n) of the impugned Act, the phrase "transgender person" is listed in the section 2 of the impugned Act that contains definitions but the term "transgender" itself is not defined as required, because it does not follow up with the words "means" or "includes" like "transgender means" or "transgender includes", instead the Section 2(1)(n) of the impugned Law states as follows:

> *(n) "**transgender person**" is a person who is-*
> *(i) intersex (khusra) 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, Khawaja Sira or 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.*

Under Section 2(1)(n) of the impugned Act, the phrase "transgender person" is defined in three categories.

11. Senator Mushtaq Ahmed stated that according to Section 2(1)(n)(i) of the impugned Act, the "transgender person" is a person who is "intersex" (*Khusra*) with mixture of male and female genital features or congenital ambiguities. The petitioner conceded that to this extent he has no objection if any special legislation is made for the intersex persons.

This stance has been clearly and categorically supported by all the petitioners. They jointly stated that Islamic injunctions accept the existence of intersex and consider intersex persons as the persons who are entitled to special care and treatment being persons who are suffering from some

infirmity in their sexual organs or some physical and biological problems in the functions of their sexual organs. They also stated that in this regard the classic books of Islamic Fiqh (Islamic Jurisprudence) contain elaborative chapters and sections for intersex persons who are referred to in Islamic Fiqh terminology as *Khunsa* (خُنثیٰ).

He further stated that he has no objection upon the term "Eunuch" as mentioned in Section 2(1)(n)(ii) of the impugned Act, because it is considered as an infirmity that a male child is born with, or in certain cases due to some accident or disease a person can develop later in life and becomes a eunuch at a later stage in his life. However, the process of genital excision or castration is not permitted in Islam if somebody wants to do it voluntarily.

He reiterated his stance discussed above that the Holy Quran and Islam recognizes only two sexes i.e. male and female, in support of this he relied upon the following verses of the Holy Quran:

1. Surah Nisa (Verse 1)
2. Surah Nahal (Verse 72)
3. Surah Aaraf (Verse 189)
4. Surah Hujarat (Verse 13)
5. Surah Najam (Verse 45)
6. Surah Qiyamah (Verse 39)
7. Surah Layl (Verse 3)

He raised serious objections on Section 2(1)(n)(iii) which acknowledges that a transgender person is a person who is:

> *"(iii) a transgender man, transgender woman, Khawaja Sira or 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."*

12. He also pointed out that the phrases "social norms" and "cultural expectations" are very vague and can differ from person to person and

culture to culture. The subjective definition of any term cannot provide basis to any legal definition as is done in Section 2(1)(n)(iii) of the impugned Act. He further stated that the word "transgender" is relatively a new term coined in the English language.

13. The petitioner stated that the impugned Act contains contradictions in itself as the law considers medical examination for determination of gender of a person below the age of eighteen and does not consider medical examination necessary for a person above the age of eighteen. He referred to the Section 7(3)(iii)(d) of the impugned Act which provides for the mandatory medical examination of a person for determination of gender who is under the age of eighteen:

> *"Below the age of eighteen years, the gender as, determined by medical officer on the basis of predominant male or female features."*

The counsel for Senator Mushtaq Ahmed argued that if any change in gender of a person is necessary and medically required from the sex which was assigned to him or her at the time of birth can be determined through medical examination for a person up to the age of 18 years, then why it should not be so determined on the basis of medical examination for persons above the age of 18 years? He stressed the point that any change in sex or gender of any person should be determined by way of medical examination and such a change cannot be allowed to be made only on the basis of mere statement to NADRA without any supportive medical evidence. It cannot be done by any person only on the basis of his or her inner feelings or self-perception.

14. He also relied upon the "Gender Recognition Act, 2004" of the United Kingdom (UK), and laws of some other jurisdictions according to which change in gender of any person other than the sex assigned at the time of

birth is recognized under the law after showing any evidence of medical diagnosis by a transgender person who wants to change the gender. He quoted that according to that law in UK in order to change their legal gender, a transgender person must fulfill certain conditions according to which they will be considered, and allowed or denied legal gender change, by the Gender Recognition Panel. To name some such conditions, (i) they must have or have had gender dysphoria; (ii) they must have been living in the claimed gender for two years before their application to the panel; (iii) they must intend to live in their claimed gender for the rest of their life; (iv) they must be at least 18 years of age or, (v) if the applicant is married, the marriage will have to be dissolved before a gender change can be recognized legally, until then an interim gender recognition certificate will be supplied.

Additionally, they must also supply either a report made by a registered medical practitioner practicing in the field of gender dysphoria and a report made by another registered medical practitioner (who may, but need not, practice in that field), or a report made by a registered psychologist practicing in that field and a report made by a registered medical practitioner (who may, but need not, practice in that field).

Once all the requirements are met, the applicant will receive a Gender Recognition Certificate which will allow them to have documents representing their claimed gender and also clear the path to gender affirming treatments and surgeries.

Arguments Forwarded by Ansar Javaid, Chairman, Birth Defects Foundation As An Expert and Petitioner

15. A petitioner namely Ansar Javaid, who is the Chairman of an organization called “Birth Defects Foundation”, argued that his organization

is helping the intersex persons by providing them specialized medical aid to treat their respective sex related medical problems in order to remove the physiological ambiguities, which are there in such persons since their birth in one form or other and are considered as defects in their respective genitals or reproductive organs including chromosomal disorder etc. by birth.

16. He categorically made a statement being an expert of this field that no person is born as a "transgender person". According to him such persons normally suffer from "Gender Dysphoria", which is a subsequent psychological development in any person after the birth and is a curable disease.

Arguments Forwarded by Professor Dr. Najib-ul-Haq and Professor Dr. Muhammad Irfan from Pakistan Islamic Medical Association (PIMA)

17. Professor Dr. Najib-ul-Haq and Professor Dr. Muhammad Irfan from Pakistan Islamic Medical Association (**PIMA**) also appeared as experts and forwarded their opinion in the case. The latter being an expert of psychology stated that gender dysphoria was listed as a sexual disorder and a disease in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (**DSM-5**) as well as in the International Classification of Diseases (**ICD**). He further stated some basic reasons for the cause of this mental disorder, namely (1) dissatisfaction, (2) anxiety and (3) perception problem in someone's mind due to his or her surroundings in which he or she remains. He also pointed out that the "gender dysphoria", which was earlier included as a mental disorder has recently been excluded from the list. He also stated that now some new terms like "other-kin" and "trans-species" are also being introduced which are more disturbing than the term transgender. He concluded his arguments by reiterating that gender dysphoria is a curable disease and if any society accepts the concept of transgender, as stated in the impugned law, then there will be nothing to stop the sexual perversions and

sexual degeneracies spreading in the society. He further argued that there are cases of "detransition" also, meaning those persons who changed their genders according to their self-perceptions subsequently desire to rechange their gender and decide to align their genders according to the sex they have and which was assigned to them at the time of their birth. They also referred a few such cases of "detransition" also arguing that the impugned law is silent about "detransition", which creates further complications about this law that what would happen if a "transgender woman" or a "transgender man" perceives differently or opposite to his or her earlier perception about the gender he or she adopted.

Arguments of Jamiat Ulema-e-Islam Pakistan through Mr. Kamran Murtaza Senior Advocate Supreme Court of Pakistan

18. One of the petitioners in S.P. No.14/I/2022 (Jamiat Ulema-e-Islam Pakistan v. Federation of Pakistan) has challenged the Transgender Persons (Protection of Rights) Act, 2018 as a whole. Mr. Kamran Murtaza, Senior Advocate Supreme Court appeared on behalf of the petitioner and made detailed arguments objecting each and every section of the impugned law.

19. Fundamentally, he challenged a portion of definition of the term "transgender person" as defined in Section 2(1)(n) of the impugned Act. He categorically mentioned that he has no objection regarding the term "intersex" (*Khusra*) as defined in Section 2(1)(n)(i) of the impugned Act. He further stated that Islam recognizes intersex persons i.e. persons who are born with some biological infirmity in their sexual organs or sexual functions who are called as *Khusra* in Urdu. Islam gives them all the rights, which are elaborately mentioned in the books of Islamic Jurisprudence. Therefore, the petitioner is not objecting the definition of intersex as it is defined in the impugned law. He also stated that all the rights, which are mentioned in the impugned law, must be given to the intersex people, rather they deserve

much more rights than that, which are mentioned in the impugned Law. He stated that rights like protection of intersex persons in old age, when they become more vulnerable and require more attention of the State. Intersex persons are special persons suffering from serious biological infirmity.

20. While arguing Section 2(1)(n)(ii) of the impugned Act, Mr. Kamran Murtaza, Sr.ASC argued that he has no objection on the definition of "eunuch" as mentioned in the impugned Act, however he raised an objection that if the castration of a male person is done intentionally or if some male person willingly undergoes genital excision then it is not permissible in Islam because it will amount to illegal medical intervention in human body or it will be considered as an attempt to change the creation of the Creator, which is forbidden in the light of teachings of the Holy Quran and *Sunnah*. In this regard, he relied on Verses 117-119 of *Surah* An-Nisa. Furthermore, he made it clear that if some male is castrated due to some disease or by an accident or by some criminal assault of some other person then such a person deserves to have all the rights mentioned in the impugned Act. Such persons should not be discriminated against in the society and should be treated by the society and State as a special person.

21. The whole focus of the arguments of Mr. Kamran Murtaza, Sr.ASC was on the expressions "transgender man", "transgender woman" and "*Khwaja-Sira*" as defined in Section 2(1)(n)(iii) of the impugned Act. He raised serious objections vehemently that the gender of any person cannot be defined in accordance to his or her perception, which is different from the sex assigned at the time of birth. He further elaborated in his arguments that such perception of a person about his or her gender, which is different from the sex assigned to him or her at the time of birth can be an incorrect perception; or it can be a result of some mental or psychological disorder; or, a person can pretend himself or herself to

be a person of opposite sex from the one he or she actually and biologically has on the basis of some malice or criminal intent.

22. He further argued that the "gender identity" as defined in Section 2(1)(f) and "gender expression" as defined in Section 2(1)(e) of the impugned Law can also be a result of a perception of a person:

i) Based on some temporary or momentary feelings or timely mental condition, which can be changed; or

ii) Are result of some kind of mental disorder, or mental disease.

He further stressed that a person can opt for change of gender with some criminal intent and ulterior motive or due to mala fide or malice. He said that the *malafide* of a person in this regard can either be based on criminal intention of committing some sexual assault or other crimes under the guise of self-perceived identity.

He also made a point that according to Islamic teachings, sex and gender are assigned by the Creator to every person and it is not the right of the creations to define their gender according to their whims and wishes.

He also pointed out that impugned law does not contain any provision which provides the consequence of non-compliance of the impugned law, like any punishment or fine, etc. More prominently the impugned law does not contain any provision as safeguard of its misuse because in the present form, there are ways and means existing in the impugned law, through which the impugned law can be abused and misused thus infringing the rights of the intersex persons for whom this law was meant to be enacted on the one hand and can make females and minors in a society more susceptible to sexual assaults.

Any biological male person can get access to all the places which are secluded specifically for female genders, like girls educational institutions,

schools and universities etc., girls' hostels, hospitals and other places, where services are provided to women only.

Similarly, the services and jobs, which are specially and specifically allocated to females can easily be misused by biologically male persons having a CNIC of "X" Gender Mark issued by NADRA identifying him as a 'transgender woman' under this law, because by doing so after having CNIC with Gender Mark 'X' by NADRA, that biological male person cannot be stopped to avail any facility or privilege meant for women only. The learned counsel gave a long list of such situations where this law can be misused and abused under this pretext.

23. Mr. Kamran Murtaza, Sr.ASC forwarded his arguments verbally as well as he made objections in his petition on every section of the impugned Act. In this regard his arguments were adopted by other petitioners which are as follows:

> *4. That when the Transgender Persons (Protection of Rights) Bill was introduced in 2017, its 'statement and objects and reasons' defined the primary purpose of the Bill and the first reason given for the introduction of this Bill was to "define a Transgender Person". The third objective of the Bill was stated as to "confer right upon Transgender persons to be recognised as such, and a right to self-perceived gender identity". The matters of their discrimination, rights and welfare were subsequent "objects and reasons" of the Bill. From the objectives the Bill alone, it is clear that the primary aim of the law was recognizing a transgender person and giving persons a right to self-perceived gender identity.*
>
> *5. That as stated in para 3 supra, the Act aims to use a marginalized community to give rights to persons who want to have a gender identity of their choice. This conflation of intersex person, with transgender person, through this Act is not only recognized and objected to by the petitioner, but also by 'International Commission of Jurists', comprising of 60 eminent jurists, including senior judges, attorneys and academics, which in its briefing paper dated March 2020 regarding the Transgender Persons (Protection of Rights) Act, 2018 stated as under:*
>
> > ***"4 (a) Difference between intersex and transgender***
> >
> > *Subsuming individuals with intersex characteristics within transgender people is erroneous and a mischaracterization. Intersex people*

> *are individuals born with a wide range of natural variations in their sex characteristics (or differences of sex development) that do not fit the typical definition of male or female, including, for example, with respect to their sexual anatomy, reproductive organs or chromosome patterns as such being intersex is distinct from a person's gentler identity.*
>
> *As with everyone else, an intersex person may identify - as in, they may self-identify their gender — as female, male, both, neither or transgender."*

The briefing paper further goes on to explain how the Act does not address the problems faced by the intersex persons:

> ***"4 (b) Rights of intersex people***
> *Since the Transgender Persons (Protection of Rights) Act includes intersex people in the definition of transgender, the above-mentioned rights and protections guaranteed by the law are also available to intersex people.*
>
> *However, the Act leaves some of the most serious human rights violations faced by intersex people unaddressed. These include subjecting intersex children and adolescents to medically unnecessary hormonal treatment, surgical and other procedures for the purpose of trying to forcibly make their appearance conform to binary sex stereotypes and societal expectations about female and male bodies."*

6. That the briefing paper by 'International Commission of Jurists' states that the Act in question was passed "in light of Pakistan's obligations under international law" and aptly observes that:

> *"While a bare acknowledgment at the societal and governmental level exists for the historically recognized khawajasira community, in which all other transgender identities are then folded in through this law, it remains to be seen whether the protections afforded by the legislation will extend to transgender people who may also identify as lesbian, gay, pan or bisexual "*

Thus, it is abundantly clear, from the view of petitioner as well as that of the highly reputable International Commission of Jurists, that the Act of 2018 has little to do with protection and rights of intersex persons, rather it is using the disenfranchisement of intersex persons to advance its goals of recognizing transgender persons.

7. That the Act of 2018 does not deal with sexual orientation, i.e. rights of homosexual or bisexual people, which is different from gender identity, however, the role of this legislation in promotion of homosexuality cannot be underscored since the Act creates

loopholes which can and will be misused. Under the Act, a person born with the biological sex of a male can assume the gender identity of a female on attaining the age of majority. Whether such a person with a gender identity of a female can marry a person who is both born a male and identifies as one? Whether the overriding effect of the 2018 legislation means that such extramarital relationships cannot be prosecuted?

MEANING OF A TRANSGENDER PERSON

8. That the Merriam-Webster dictionary defines transgender as:

> *"of, relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth.*
>
> *especially: of, relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth",*

9. That 'webmd.com', a known credible source for medical and health information, gives the following explanation about transgender:

> *"Transgender is a general term that describes people whose gender identity, or their internal sense of being male, female, or something else, does not match the sex they were assigned at birth. By contrast, the term cisgender describes people whose gender identity aligns with the sex they were assigned at birth."*
>
> *"...Some transgender people don't identify with one gender exclusively. Their gender identity may combine both female and male elements, for instance, or they may not feel like either gender. These transgender people are often described as being "non-binary."*

That 'webmd.com' also makes a distinction between transgender and intersex persons, which is conflated by the Act of 2018, whether intentionally or unintentionally, is open to interpretation. The relevant portion is as under:

> *"While these terms are often confused, they do not mean the same thing. A transgender person is typically born with a body that has unambiguous sexual characteristics (either male or female) but they don't match the person's gender identity. By contrast, an intersex person is born with a body that is not clearly male or female."*
>
> *"A transgender person may also be intersex, and vice versa, though that's not usually the case."*

OBJECTIONABLE PROVISIONS

10. That the first provision that contravenes with the Quran and Sunnah is section 2 of the Transgender Persons (Protection of

Rights) Act, 2018 which lays down the definitions. The definitions under objection seek to create a distinction between biological sex and gender identity. A woman who is biologically and physically a healthy woman can take the gender identity of a man or can choose to be neither a male or a female simply because she does not feel she is a woman. The definitions claim that the biological sex of a person is merely "sex assigned at birth" and is subject to change over the choice of the individual. The objectionable definitions are as under:

> *"2.* ***Definitions.- (1)*** *In this Act, unless there is anything repugnant in the subject or context,-*
>
> *(a) ----*
> *(b) ----*
> *(c) ----*
> *(d) ----*
>
> *(e) "**Gender expression**" refers to a person's presentation of his gender identity, the one that is perceived by others;*
>
> *(f) "**Gender identity**" means a person's innermost and individual sense of self as male, female or a blend of both or neither: that can correspond or not to the sex assigned at birth:*
>
> *(k) ----*
> *(I) ----*
> *(m) ----*
>
> *(n) "**Transgender Person**" is a person who is-*
>
> *(i) Intersex (Khusra) 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.*** *"*

11. That the second provision which is against the injunctions of Islam is section 3 of the Transgender Persons (Protection of Rights) Act, 2018 under which people can get themselves officially registered to any gender of their choice. The implementation of this provision will lead to many complicated situations, including a situation in future where the father of a person in reality could be registered as a woman as per NADRA records. For reference, section 3 is reproduced as under:

> *"**3. Recognition of identity of Transgender person. - (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 Licence and passport in accordance with the provisions of the NADRA Ordinance, 2000 or any other relevant laws.*
>
> ***(4)** A Transgender person to whom CNIC has already been issued by NADRA shall be allowed to change the name and gender according to his or her self perceived identity on the CNIC, CRC, Driving Licence and passport in accordance with the provisions of the NADRA Ordinance, 2000. (VIII of 2000)*

It is pertinent to mention here that under section 20 of the 2018 Act, the Federal Government on 19th January 2021 made the Transgender Persons (Protection of Rights) Rules, 2020, which under Rule 3 allowed the change of gender for existing CNICs from male or female to "X". Such change will be allowed once, however, if cogent reasons are given then change can be made even more. Although the inclusion of "X" in the Rules is not a requirement of the Act and likely conflicts with the wordings of the Act as well, however, it has perhaps been made to stop potential same-sex (biologically same-sex) marriages happening pursuant to the main legislation.

However, under Rule 4 of the 2020 Rules, a first-time applicant can get his choice of gender upon registration without mention of "X" in the gender column

12. That the most absurd as well as un-Islamic provision in the 2018 Act is its section 7 as it makes a complete mockery of the Islamic inheritance law. An example of it can be that if a son of a deceased is unsure whether he is a male or female, under section 7, he will get a share from a deceased parent that is an average of the son and a daughter. Islamic inheritance law does not have any vacuum which can be filled with such explanations. Similarly, a daughter wanting more share in her deceased's parent's property can get herself registered as per self-perceived gender identity of a man and can then claim a share as a son. Furthermore, a son who

had decided to perceive himself as a female will get lesser share as a daughter. Section 7 of the Act is reproduced for reference as under:

> *"**7. Right to Inherit.-(1)** There shall be no discrimination against Transgender Persons in acquiring the rightful 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;*
> >
> > ***(iii)** 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."*

13. That Section 8 of the 2018 Act deals with right to education of Transgenders. Under this provision, a person with biological sex of a boy can get admission in a Girls School if he identifies his gender as a female and a girl can study in a Boys School. This section calls for no discrimination in all aspects including even sports. It means that a person who is biologically a boy but

identifies his gender as a girl will get to compete and outperform all girls in every sports activity. Section 8 is reproduced as under.

> *"**8. Right to Education. (1)** There shall be no discrimination against Transgender Persons in acquiring admission in any educational institutions, public or private/ subject to fulfillment of the prescribed requirements*
>
> ***(2)** All educational institutions shall provide education and opportunities for sports, recreation and leisure activities without any discrimination, and on an equal basis with others,*
>
> ***(3)** The Government shall take steps to provide free and compulsory education to Transgender Persons is guaranteed under Article 25A of the Constitution of the Islamic Republic of Pakistan, 1973.*
>
> ***(4)** It is unlawful for an institution whether private or public, to discriminate against a person on the ground of person's sex, gender identity and/or gender expression, including but not limited to:*
>
> ***(a)** in determining who should be offered admission; or,*
>
> ***(b)** in the terms or conditions on which admission is offered; or*
>
> ***(c)** by denying the person's access, or limiting the person's access, to opportunities, training or to any other positive externalities associated with the education, or*
>
> ***(d)** by denying access to appropriate student facilities based on a person's sex, gender identity and/or expression.*

14. That one of the most controversial sections of the Act is section 12(c). It claims to be dealing with non-discrimination of transgender persons but apparently getting gender reassignment surgeries of persons who are dissatisfied with their biological sex is legalized through this section. Section 12(c) of the 2018 Act is reproduced as under:

> ***"12. Right to Health.** - The Government shall take the following measures to ensure non-discrimination in relation to Transgender Persons, namely:-*
>
> *(a) ----*
> *(b) ----*

> *(c) to ensure Transgender Persons access to all necessary medical and psychological gender corrective treatment;"*

15. That section 14 of the 2018 Act challenges the sanctity of religious places. This section makes it unlawful to deny entry to any person in a Mosque or other religious places on the basis of sex, gender identity and gender expression. Its implementation would lead to situations where a Mosque which does not have partition for women will have to allow women to pray along side men. Section 14 is reproduced as under:

> ***14. Right of access to public places. - (1)*** *No Transgender person shall be denied access to public places, places of entertainment or places intended for religious purpose solely on the basis of his sex, gender identity and / or gender expression.*
>
> ***(2)*** *The Government must ensure Transgender persons access to public places in view of Article 26 of the Constitution of the Islamic Republic of Pakistan.*
>
> ***(3)*** *It shall be unlawful to prevent Transgender Persons to access facilities available for access of general public and public places mentioned in sub-section (1).*

16. That section 19 of the 2018 Act has been given an overriding effect on all other laws. As already cleared in para 7 above, that although this Act does not deal with sexual orientation/ legalization of homosexuality, however, due to the genders being defined at will of persons, prosecuting persons for homosexuality will not remain possible as this Act will override the penal offences which were made keeping only the biological sex of persons involved. Through this Act, biological sex of a person has been made irrelevant. Section 19 is reproduced below for reference:

> ***"19. Act having over-riding effect to any other law.****- The provisions of this Act shall have an over-riding effect on any other law for the time being in force."*

17. That apart from above, the entire Act i.e. Transgender Persons (Protection of Rights) Act, 2018 is against the spirit and injunctions of Islam, and the relevant verses of Quran and Hadiths which come in conflict of the concept of Transgender Persons as enunciated in the Act are as under:

<u>QURANIC VERSES AND HADITHS</u>

A. *That the Quran states in first verse of Surah An-Nisa (4) as under:*

يَـٰٓأَيُّهَا ٱلنَّاسُ ٱتَّقُواْ رَبَّكُمُ ٱلَّذِى خَلَقَكُم مِّن نَّفْسٍ وَٰحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَآءً ۚ وَٱتَّقُواْ ٱللَّهَ ٱلَّذِى تَسَآءَلُونَ بِهِۦ وَٱلْأَرْحَامَ ۚ إِنَّ ٱللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا۔

"O humanity! Be mindful of your Lord Who created you from a single soul, and from it He created its mate, and through both He spread countless men and women. And be mindful of Allah—in Whose Name you appeal to one another—and honour family ties. Surely Allah is ever Watchful over you."

B. *That the Quran has been explicit in stating that men and women are different. The Quran in Surah Al'Imran (3) in its verse 36 states that:*

فَلَمَّا وَضَعَتْهَا قَالَتْ رَبِّ إِنِّى وَضَعْتُهَآ أُنثَىٰ وَٱللَّهُ أَعْلَمُ بِمَا وَضَعَتْ وَلَيْسَ ٱلذَّكَرُ كَٱلْأُنثَىٰ ۖ وَإِنِّى سَمَّيْتُهَا مَرْيَمَ وَإِنِّىٓ أُعِيذُهَا بِكَ وَذُرِّيَّتَهَا مِنَ ٱلشَّيْطَـٰنِ ٱلرَّجِيمِ۔

"When she delivered, she said, "My Lord! I have given birth to a girl,"-and Allah fully knew what she had delivered-"and the male is not like the female. I have named her Mary, and I seek Your protection for her and her offspring from Satan, the accursed."

C. *That the Quran in Surah An-Nisa mentions how Satan said that he will mislead the people to change the nature of Allah's creation. The same is applicable to the Transgenders Act as it is promoting and legalizing the change of nature of Allah's creation. Surah An-Nisa (4) in verse 119 states as under:*

وَلَأُضِلَّنَّهُمْ وَلَأُمَنِّيَنَّهُمْ وَلَـَٔامُرَنَّهُمْ فَلَيُبَتِّكُنَّ ءَاذَانَ ٱلْأَنْعَـٰمِ وَلَـَٔامُرَنَّهُمْ فَلَيُغَيِّرُنَّ خَلْقَ ٱللَّهِ ۚ وَمَن يَتَّخِذِ ٱلشَّيْطَـٰنَ وَلِيًّا مِّن دُونِ ٱللَّهِ فَقَدْ خَسِرَ خُسْرَانًا مُّبِينًا۔

"I will certainly mislead them and delude them with empty hopes. Also, I will order them and they will slit the ears of cattle and alter Allah's creation." And whoever takes Satan as a guardian instead of Allah has certainly suffered a tremendous loss."

D. *That Quran and Hadiths have heavily emphasized on the different roles undertaken by a man and a woman and there is no distinction in Islam in biological sex of a person and the gender. Even something as simple as a dress code of both men and women has been defined by Quran, which emphasizes the need for distinction between men and women. The Quran in Surah An-Nur (24) states in verses 30-31 as under:*

قُل لِّلْمُؤْمِنِينَ يَغُضُّواْ مِنْ أَبْصَـٰرِهِمْ وَيَحْفَظُواْ فُرُوجَهُمْ ۚ ذَٰلِكَ أَزْكَىٰ لَهُمْ ۗ إِنَّ ٱللَّهَ خَبِيرٌۢ بِمَا يَصْنَعُونَ۔

"O Prophet! Tell the believing men to lower their gaze and guard their chastity. That is purer for them. Surely Allah is All-Aware of what they do."

وَقُل لِّلْمُؤْمِنَـٰتِ يَغْضُضْنَ مِنْ أَبْصَـٰرِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا ۖ وَلْيَضْرِبْنَ بِخُمُرِهِنَّ عَلَىٰ جُيُوبِهِنَّ ۖ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا لِبُعُولَتِهِنَّ أَوْ ءَابَآئِهِنَّ أَوْ ءَابَآءِ بُعُولَتِهِنَّ أَوْ أَبْنَآئِهِنَّ أَوْ أَبْنَآءِ بُعُولَتِهِنَّ أَوْ إِخْوَٰنِهِنَّ أَوْ بَنِىٓ إِخْوَٰنِهِنَّ أَوْ بَنِىٓ أَخَوَٰتِهِنَّ أَوْ نِسَآئِهِنَّ أَوْ مَا مَلَكَتْ أَيْمَـٰنُهُنَّ أَوِ ٱلتَّـٰبِعِينَ غَيْرِ أُو۟لِى ٱلْإِرْبَةِ مِنَ ٱلرِّجَالِ أَوِ ٱلطِّفْلِ ٱلَّذِينَ لَمْ يَظْهَرُواْ عَلَىٰ عَوْرَٰتِ ٱلنِّسَآءِ ۖ وَلَا يَضْرِبْنَ بِأَرْجُلِهِنَّ لِيُعْلَمَ مَا يُخْفِينَ مِن زِينَتِهِنَّ ۚ وَتُوبُوٓاْ إِلَى ٱللَّهِ جَمِيعًا أَيُّهَ ٱلْمُؤْمِنُونَ لَعَلَّكُمْ تُفْلِحُونَ۔

"And tell the believing women to lower their gaze and guard their chastity, and not to reveal their adornments except what normally appears. Let them draw their veils over their chests, and not reveal their hidden adornments except to their husbands, their fathers, their fathers-in-law, their sons, their stepsons, their brothers, their brothers' sons or sisters' sons, their fellow women, those bondwomen in their possession, male attendants with no desire, or children who are still unaware of women's nakedness. Let them not stomp their feet, drawing attention to their hidden adornments. Turn to Allah in repentance all together, O believers, so that you may be successful."

The Quran in Surah AI-Ahzab (33) states in Verse 59 as under:

يَـٰٓأَيُّهَا ٱلنَّبِىُّ قُل لِّأَزْوَٰجِكَ وَبَنَاتِكَ وَنِسَآءِ ٱلْمُؤْمِنِينَ يُدْنِينَ عَلَيْهِنَّ مِن جَلَـٰبِيبِهِنَّ ۚ ذَٰلِكَ أَدْنَىٰٓ أَن يُعْرَفْنَ فَلَا يُؤْذَيْنَ ۗ وَكَانَ ٱللَّهُ غَفُورًا رَّحِيمًا۔

"O Prophet! Ask your wives, daughters, and believing women to draw their cloaks over their bodies. In this way it is more likely that they will be recognized as virtuous and not be harassed. And Allah is All-Forgiving, Most Merciful."

A Sahih Hadith in Sunan Abi Dawud 4930, (Book 43, Hadith 158) mentions that Ibn 'Abbas said that:

حَدَّثَنَا مُسْلِمُ بْنُ إِبْرَاهِيمَ، حَدَّثَنَا هِشَامٌ، عَنْ يَحْيَى، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، أَنَّ النَّبِيَّ ﷺ لَعَنَ الْمُخَنَّثِينَ مِنَ الرِّجَالِ وَالْمُتَرَجِّلاَتِ مِنَ النِّسَاءِ وَقَالَ " أَخْرِجُوهُمْ مِنْ بُيُوتِكُمْ وَأَخْرِجُوا فُلاَنًا وَفُلاَنًا " . يَعْنِي الْمُخَنَّثِينَ ۔

"The Prophet (May peace be upon him) cursed effeminate men (mukhannathan) and women who imitated men, saying: Put them out of your houses, and put so-and-so out. (that is to say, the effeminate men)."

Another Sahih Hadith narrated by Abu Hurayrah in Sunan Abi Dawud 4928 (Book 43, Hadith 156) as under:

حَدَّثَنَا هَارُونُ بْنُ عَبْدِ اللَّهِ، وَمُحَمَّدُ بْنُ الْعَلاَءِ، أَنَّ أَبَا أُسَامَةَ، أَخْبَرَهُمْ عَنْ مُفَضَّلِ بْنِ يُونُسَ، عَنِ الأَوْزَاعِيِّ، عَنْ أَبِي يَسَارٍ الْقُرَشِيِّ، عَنْ أَبِي هَاشِمٍ، عَنْ أَبِي هُرَيْرَةَ، أَنَّ النَّبِيَّ ﷺ أُتِيَ بِمُخَنَّثٍ قَدْ خَضَبَ يَدَيْهِ وَرِجْلَيْهِ بِالْحِنَّاءِ فَقَالَ النَّبِيُّ ﷺ " مَا بَالُ هَذَا " . فَقِيلَ يَا رَسُولَ اللَّهِ يَتَشَبَّهُ بِالنِّسَاءِ . فَأُمِرَ بِهِ فَنُفِيَ إِلَى النَّقِيعِ فَقَالُوا يَا رَسُولَ اللَّهِ أَلاَ نَقْتُلُهُ فَقَالَ " إِنِّي نُهِيتُ عَنْ قَتْلِ الْمُصَلِّينَ " . قَالَ أَبُو أُسَامَةَ وَالنَّقِيعُ نَاحِيَةٌ عَنِ الْمَدِينَةِ وَلَيْسَ بِالْبَقِيعِ .

"An effeminate man (mukhannath) who had dyed his hands and feet with henna was brought to the Prophet (ﷺ). He asked: What is the matter with this man? He was told: "Messenger of Allah! He imitates the look of women." So he issued an order regarding him and he was banished to an-Naqi'. The people said: Messenger of Allah! Should we not kill him? He said: I have been prohibited from killing people who pray. Abu Usamah said: Naqi' is a region near Medina and not a Baqi'."

E. *That the distinct role of men and women has been talked about in Quran in terms of their rights. In Islam there is similarity in rights of men and women, however, Islam focuses more on equity than equality. Men hove control and responsibilities over women. Surah An-Nina (4) is verse 34 states that:*

ٱلرِّجَالُ قَوَّٰمُونَ عَلَى ٱلنِّسَآءِ بِمَا فَضَّلَ ٱللَّهُ بَعْضَهُمْ عَلَىٰ بَعْضٍ وَبِمَآ أَنفَقُواْ مِنْ أَمْوَٰلِهِمْ ۚ فَٱلصَّٰلِحَٰتُ قَٰنِتَٰتٌ حَٰفِظَٰتٌ لِّلْغَيْبِ بِمَا حَفِظَ ٱللَّهُ ۚ وَٱلَّٰتِى تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَٱهْجُرُوهُنَّ فِى ٱلْمَضَاجِعِ وَٱضْرِبُوهُنَّ ۖ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُواْ عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ ٱللَّهَ كَانَ عَلِيًّا كَبِيرًا۔

"Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them first, if they persist, do not share their beds, but if they still persist, then discipline them gently. But if they change their ways, do not be unjust to them. Surely Allah is Most High, All-Great."

Similarly, Quran in Surah Al-Baqarah (2) verse 228 states that:

وَٱلْمُطَلَّقَٰتُ يَتَرَبَّصْنَ بِأَنفُسِهِنَّ ثَلَٰثَةَ قُرُوٓءٍ ۚ وَلَا يَحِلُّ لَهُنَّ أَن يَكْتُمْنَ مَا خَلَقَ ٱللَّهُ فِىٓ أَرْحَامِهِنَّ إِن كُنَّ يُؤْمِنَّ بِٱللَّهِ وَٱلْيَوْمِ ٱلْءَاخِرِ ۚ

وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ فِي ذَٰلِكَ إِنْ أَرَادُوا إِصْلَاحًا ۚ وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ ۚ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ ۗ وَاللَّهُ عَزِيزٌ حَكِيمٌ۔

"Divorced women must wait three monthly cycles before they can re-marry. It is not lawful for them to conceal what Allah has created in their wombs, if they truly believe in Allah and the Last Day. And their husbands reserve the right to take them back within that period if they desire reconciliation. Women have rights similar to those of men equitably, although men have a degree of responsibility above them. And Allah is Almighty, All-Wise."

24. Further arguments have been forwarded by Mr. Kamran Murtaza, ASC very vehemently which were supported and adopted by other petitioners that the impugned law in its present form has made it very easy for any person to commit serious crimes and the impugned law will make it easy for criminals to fulfill their criminal intents of committing sexual assault or bodily harm to females and children in the society. It is easy for a person who is biologically male to imposter himself as a "female" and:

i) get access to places exclusively reserved for females, hence a "transgender women" (a person who is male biologically) will have right to get access to female hospital wards and other health facilities on the basis of Section 12 (Right to Health) read with section 14 (Right of Access to Public Places) and Sections 2(1)(e) and 2(1)(n) of the impugned Act, girls hostels, women colleges, girls' schools under Section 8 (Right of Education), women workplaces, women gyms, women changing rooms, women restrooms under Section 14 (Right to Access to Public Places), jail cell which are exclusive for female etc.

ii) get access to the gatherings exclusively arranged and meant for females religious and social gatherings like for offering prayers in

female section of masjids, female *Majalis* and females gathering of *Milaad Shareef*, marriage functions and other socio-religious exclusive gatherings of females in public places etc. Under Section 14(1) of the impugned Act which says: "*No transgender person shall be denied access to public places, places of entertainment, or <u>places intended for religious</u> purpose solely on the basis of his sex, <u>gender identity or gender expression.</u>*" Islam specifies a proper dress code for males and females to be observed strictly in places intended for religious purposes. Accordingly, males and females are supposed to observe decent dress code. Nobody is allowed to make or adopt "gender expression" in a manner that people perceive them different from their biological sex. The petitioner relied on following *Ahadith*:

> عَنِ الْحَسَنِ يَرْفَعُهُ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ : لُعِنَ مِنَ الرِّجَالِ الْمُتَشَبِّهُ بِالنِّسَاءِ وَلُعِنَ مِنَ النِّسَاءِ الْمُتَشَبِّهةُ الْمُتَرَجِّلَة۔ (۲۷۰۲۵)
> حضرت حسن نبی کریم (ﷺ) کی مرفوعاً حدیث بیان کرتے ہیں کہ نبی کریم (ﷺ) نے ارشاد فرمایا : ان مردوں پر جو عورتوں کی مشابہت اختیار کریں لعنت کی گئی ہے، اور ان عورتوں پر جو مردوں کی مشابہت اختیار کریں لعنت کی گئی ہے۔(ابن ابی شیبہ:جلد ہفتم:حدیث نمبر 3146 مکررات 0 متفق علیہ۔

> عَنِ الشَّعْبِيِّ قَالَ : لَعَنَ رَسُولُ اللهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْمُتَشَبِّهِينَ مِنَ الرِّجَالِ بِالنِّسَاءِ ، وَالْمُتَشَبِّهات مِنَ النِّسَاءِ بِالرِّجَالِ۔ (۲۷۰۲۴)
> امام شعبی فرماتے ہیں کہ رسول اللہ (ﷺ) نے ان مردوں پر جو عورتوں کی مشابہت اختیار کریں اور ان عورتوں پر جو مردوں کی مشابہت اختیار کریں ، لعنت فرمائی۔ (ابن ابی شیبہ:جلد ہفتم:حدیث نمبر 3145 مکررات 0 متفق علیہ ۔(۲۷۲۸۰۲۴)

iii) under the provisions of the impugned law a 'transgender women' (who is biologically a male) can compete with females in sports and athletics events.

25. Similarly it is easy for person who is biologically female to imposter herself as a "male" and get access to places of prayer like in Masjids and in other religious gathering of cisgender males like *Mahafil-i-Milaad* and *Majalis* etc. will

also be disturbed if some 'transgender male' (who is biologically a female) will get access to such gatherings and places. According to Islamic Injunctions the participation of women in religious congregations, prayers and gathering is not prohibited but it is subject to certain rules and in such a situation those rules will be violated and may cause serious or even violent situation.

26. The petitioners supported their arguments by a number of reported cases from other jurisdictions where females were assaulted sexually, even raped, by "transgender women" i.e. a person, who "perceived" himself as female, but physically and sexually that person was male. Recently a case in the international media highlighted that a jail inmate who identified himself as transgender women raped a female inmate and was convicted. In this regard the petitioners provided few other cases of similar nature also as follows:

i) HMA V Isla Bryson (United Kingdom)

A transgender woman known as Isla Bryson was found guilty of raping two women - one in Clydebank in 2016 and one in Glasgow in 2019. Isla Bryson was sentenced to 11 years in prison with custodial sentence of 8 years and an extension period of 3 years.

The case caused controversy after Bryson was remanded to a women's prison to await sentence, and raised questions about women's safety following the Scottish Parliament's passage of the Gender Recognition Reform (Scotland) Bill, a piece of legislation designed to make it easier for transgender people in Scotland to change their legally recognized gender. The legislation raised concerns about the potential for the new system of self-identification to be abused by violent men.

ii) Katie Dolatowski case (United Kingdom)

A transgender woman known as Katie Dolatowski was convicted of sexually assaulting a 10-year-old girl in 2018 inside a toilet of a Fife supermarket in the UK. The attack came a month after Dolatowski had filmed a 12-year-old girl on the toilet in another supermarket in Fife. For the sex offences, she was placed on a three-year community payback order and banned from having contact with children.

iii) Cherlye Kempton V Karen White (United Kingdom)

In this case the Leeds Crown Court heard a transgender woman named Karen White (formerly known as David Thompson) who had a history of sexual crimes and posed a serious threat to women and children.

White, who was born male but later identified as a woman and was transitioning, was jailed for two counts of rape, two sexual assaults while being held on remand and one offence of wounding. Karen White used her "transgender persona" to put herself in contact with vulnerable women, the court heard.

iv) Davina Ayrton Case (United Kingdom)

This case involved a transgender woman called Davina Ayrton (formerly called David). Ayrton, 34 from Hampshire, stood trial at Portsmouth Crown Court in 2016 and was remanded to a male prison after being found guilty of rape. Davina Ayrton was found guilty of attacking a 15-year-old girl in 2004 and was sentenced to 8 years in prison.

27. Mr. Kamran Murtaza, Senior ASC also argued that, if a person, who is biologically and physically male, converted his gender to female in accordance with the above referred Section 3 of the impugned Act, he will become a female person "legally". In such a case that person will legally be justified to:

i) Have an access to any place which are exclusively dedicated for girls or women, like educational institutions (schools, colleges or universities), girls' hostels, ladies swimming pool or any other workplace or a section at workplace dedicated only for women.

ii) Use freely the places dedicated for ladies only, like toilets, saloons, etc.

iii) Not be searched by a male police officer as being a woman, a female police officer will be required to perform the body search. In this way, it will create unnecessary security problems in law enforcements.

iv) Take part in women sports being a female person legally or be a part of women's team. Since the world has witnessed many problems by considering trans women persons as females and allowing them to take part and compete in athletics and sports with females. The World Athletics bans transgender women from taking part in female events. According to international Olympic Committee which was dealing with this matter, states that the majority of those consulted, stated that transgender athletes should not be competing in the female category.

v) It will create problems for jailors while managing the settlement of jail inmates as in Scotland a transwoman found guilty of committing rape was moved to men's prison. According to this case Isla Bryson a transgender women found guilty of raping two women before transitioning, had been moved from Scotland all-female Cornton Vale prison to a male facility after an intervention by Scottish First Minister Nicola Sturgeon.

vi) Such a person can also pose a serious problem for children as in Kindergarten or primary schools, females are encouraged or dedicated to take care of the minor children and also to teach them, the settings in which the males are not generally allowed to be part of care-takers

or teachers, per se, such a person will pose a problem because legally being a lady, "she" cannot be denied.

28. In all such situations and many more, which can be imagined from these few examples that a person, who is physically and biologically a male person, but is recognized as "female" legally by virtue of Section 3 of the impugned Act, will adversely affect the female rights and activities in our society, which are duly protected by the law and Constitution, which specially provides Article 25 for provisioning of special rights to women and children and which are in accordance with the injunctions of Islam and *Sunnah*.

29. The learned counsel argued that on the other hand, if a female person "legally" converted her gender as a male under Section 3 of the impugned Act, she will be recognized as male person and will be justified to:

i) Get the inheritance share of a male person, which is obviously in clear violation of the direction of the Holy Quran regarding the distribution of inheritance share between male and female. One can well imagine that how un-Islamic it will be if a female person gets the inheritance share of a male only on the basis of making a statement that she feels that she is a male person. Consequently, she will become a male person in all the registration documents of **NADRA**, etc. and she will get a right of inheritance of a male person according to Section 7 of the impugned Act.

ii) Will get access and admission to the places exclusively meant for male persons or men, like men's hostels and educational institution, etc.

iii) The jailors would also face problems in placing such a prisoner amongst other inmates.

Sub-Section 4 of Section 3 of the impugned Act makes it mandatory upon NADRA to change the gender and name of any person very easily just upon the basis of his or her perception without any supportive medical

evidence for change of gender, which is otherwise a very difficult process if a person wants to change his or her name in the CNIC, driving license, passport, etc. This ease of changing the identity will pose a threat even to the national security in certain cases.

30. This "facility" of changing the identity under Section 3 of the impugned Act just on the basis of their statements will provide the criminals, terrorists, spies and refugees a camouflage to hide their identity, which may create a serious problem in anti-terrorist activities in the country.

31. The functioning of Section 3 of the impugned Act will also disturb the working of the society as per Article 27 of the Constitution which provides safeguards against discrimination in services. According to provisions of Section 9 of the Impugned Act, the government must ensure the right to enter into any lawful profession or occupation etc. for the transgender persons which means that a physically male person can compete and avail any post or position which is specified for women, merely on the basis of his self-perceived gender identity. Hence it will open a flood gate for systematic abuse of the rights and advantages provided by the Constitution to the female citizens.

32. On the other side the Ministry of Human Rights, which was impleaded as the main respondent in addition to the Federation of Pakistan submitted its initial detailed reply, dated 16.02.2022 in Shariat Petitions, which is reproduced as follows:

> ***Preliminary Objections:***
> *It is respectfully submitted as under:*
>
> *A. That the Transgender Persons (Protection of Rights) Act, 2018 (hereinafter referred to as the 2018 Act) was enacted in May 2018 after series of consultations over a period of almost a year.*
>
> *B. That the stakeholders that participated in drafting of the law were not only the Khawaja sira community but the transgender activists, the National Commission on Human Rights (NCHR), the Federal Ombudsman's taskforce on*

transgender people, non-governmental organizations working on issues of gender and sexuality, the Council for Islamic Ideology (CII), parliamentarians from across party lines, feminist groups, civil society allies and UN agencies, such as the UNDP. A specific transgender Task Force was also established to review this law before submission in Assembly technically.

C. *That the 2018 Act aims to recognize the identity of transgender persons and entitles them to several rights, which are guaranteed under the Constitution of the Islamic Republic of Pakistan as Pakistani citizens. The Act however does not protect their right to marry or the right to choose partners/spouses. The entire text of Transgender Persons (Protection of Rights) Act 2018 does not use any phrase or expression which may make reference to Lesbians & Gays or any other person who commits homosexual acts.*

D. *That there is no single definition of a transgender person in international standards. Most working definitions are premised on the notion that people may have a gender identity that is different from the gender assigned to them at birth, as well as those people who wish to portray their gender identity in a different way from the gender assigned at birth. This is starkly different from the notion of sexual orientation which refers to an enduring pattern of romantic or sexual attraction to persons of the opposite sex or gender, the same sex or gender, or to both sexes or more than one gender.*

E. *That therefore, the 2018 Act does not in any manner legitimize or include gays or lesbians. It only deals with gender identity. The 2018 Act defines a transgender person in Section 2 (n), which is reproduced below: "Transgender Person" is a person who is:-*

   (i) "Intersex" (khusra) with a "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, Khawaja Sira or 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."

F. *That the definition provided in Section 2(n) does not deal with the issue of sexual orientation and restricts itself to gender identification alone.*

G. *Furthermore, Gender identity is a private matter, concerning someone's deeply felt individual conviction, which should not be subject to arbitrary third-party scrutiny (including a medical board). Requiring someone seeking legal recognition of their self-identified gender to undergo treatment, purportedly for "medical reasons", or to require them to accept*

"to be treated" in connection with a certain diagnosis (e.g. "gender dysphoria") is, among other things, a breach of their right to protection against attacks on their dignity, as well as their physical and mental integrity under Article 7 of the ICCPR. It is also a violation of the State obligation to respect for their private life under Article 17 of the ICCPR.

H. *Moreover, the right of privacy as protected in the Constitution means the right of a person to take decisions in respect of deeply personal matters without government intervention. In this sense privacy is associated with interests in autonomy, dignity and self-determination.*

I. *It is also pertinent to highlight that Rules under the Act have also been notified and are annexed herewith as* ***Annex A****.*

Para-wise Comments:

1. *The contents of Para 1 are formal and therefore need no comments.*

2. *The contents of Para 2 are formal and therefore need no comments.*

3. *The contents of Para 3 are not denied to the extent of the Quranic Verse quoted however the verse is subject to various interpretations/tafsir by religious scholars.*

4. *The contents of Para 4 are not denied to the extent of the Hadith quoted however, however the verse is subject to various interpretations/tafsir by religious scholars.*

5. *The contents of Para 5 are not denied to the extent of the Hadith quoted however, their nexus with the 2018 Act is subject to interpretation.*

6. *The contents of Para 6 are formal and need no response.*

7. ***The contents of Para 7 are denied. Intersex people are individuals born with a wide range of natural variations in their sex characteristics (or differences of sex development) that do not fit the typical definition of male or female, including, for example, with respect to their sexual anatomy, reproductive organs or chromosome patterns. It is also pertinent to mention here that sexual orientation of an individual is an entirely different phenomenon from gender identity. The Petitioner has erroneously confused the two and has misinterpreted the definition of a transgender person. In this regard it is further submitted that;***

    i. ***Sexual orientation refers to an enduring pattern of romantic or sexual attraction to persons of the***

opposite sex or gender, the same sex or gender, or to both sexes or more than one gender, whereas gender identity as defined in the Act already and according to Yogyakarta principles means each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

ii. *Furthermore, the 2018 Act does not protect or upholds the right to marry for Transgender persons and therefore does not address aspects relating to sexual orientation of these transgender persons.*

iii. *Under international human rights law and standards, a person's declaration of their preferred gender identity for the purpose of obtaining gender recognition should not require validation by a medical expert, judge or any other third party. Requiring someone seeking legal recognition of their self-identified gender to undergo treatment, purportedly for "medical reasons", or to require them to accept "to be treated" in connection with a certain diagnosis (e.g. "gender dysphoria") is, among other things, a breach of their right to protection against attacks on their dignity, as well as their physical and mental integrity under Article 7 of the ICCPR, in addition to being a violation of the State obligation to respect for their private life under Article 17 of the ICCPR. Gender identity is a private matter, concerning someone's deeply felt individual conviction, which should not be subject to arbitrary third-party scrutiny.*

iv. *Furthermore, as upheld in 2021 CLC 204, the right of privacy as protected in the Constitution means the right of a person to take decisions in respect of deeply personal matters without government intervention. In this sense privacy is associated with interests in autonomy, dignity and self determination.*

8. *The contents of Para 8 are denied to the extent that section 2(n)(ii) is repugnant to the injunctions of Islam and Hadith. Furthermore, no justification has been provided as to why the definition of 'Eunuch' comes under the purview of LGBT.*

9. *The contents of Para 9 are denied to the extent of the petitioner's "beliefs" narrated in the paragraph. Sexual orientation of an individual is an entirely different phenomenon from gender identity and the Petitioner has erroneously and with malafide intention confused the two and has misinterpreted the definition of a transgender person. The response to Para 7 may be read as an integral part of the response for the sake of brevity.*

10. The contents of Para 10 are admitted. The preliminary objections stated in para H may be read as an integral part of the reply to this para.

11. The contents of Para 11 are denied. The contents of preceding paragraphs may be read as an integral part of the reply to this para.

12. The contents of Para 12 are not denied to the extent of law cited. However, the Petitioners have misstated the law and have concealed relevant facts from this Honourable Court. The facts are that in November 2020, the Indian Government notified the Transgender Persons (Protection of Rights) Rules 2020 which now state that the District Magistrate will "subject to the correctness of the applicant's particulars, get the application processed based on the affidavit submitted declaring the gender identity of any person, without any medical or physical examination, and thereafter, issue an identification number to the applicant, which may be quoted as proof of application." It is submitted that these rules were notified after the Indian Law attracted much criticism as it violates the rights of transgender people rather than respecting and uplifting these long-persecuted communities. The Rules, first released as a draft in July, inviting objections and suggestions, had been criticized by the LGBTQ community for "taking away" their dignity by mandating that a third person, such as a District Magistrate, would verify, and subsequently certify the gender of a person. Therefore, there is now no more requirement of a medical examination and reliance is placed solely on self perceived identification.

13. The contents of Para 13 are factual and are not denied to the extent of facts quoted in the news articles.

14. The contents of Para 14 are not denied to the extent of the law cited. However, it is submitted that the Petitioner has concealed important information regarding the notification of the Transgender Persons (Protection of Rights) Rules 2020, which have now done away with the requirement of any medical board or medical examination through Rule 4. Earlier in 2014, the Indian Supreme Court in NALSA v. India had ruled that transgender people should be recognized as a third gender and enjoy all fundamental rights, while also being entitled to specific benefits in education and employment. Justice K.S. Radhakrishnan, writing for the bench, ordered that "Transgender persons' right to decide their self-identified gender" should be recognized by state and federal authorities. The court made clear that "any insistence for [sex reassignment surgery] for declaring one's gender is immoral and illegal."

15. The contents of Para 15 are admitted to the extent of description of rights provided in the 2018 Act. However, it is vehemently denied that these provisions provide legal cover to the registration of same sex marriages. The Act does not protect their right to marry or the right to choose partners/spouses. The entire text of Transgender Persons (Protection of Rights) Act 2018 does not use any phrase or expression which may make reference to Lesbians & Gays or any other person who commits homosexual acts.

PRAYER

It is therefore most respectfully prayed that this Honorable Court may dismiss the instant petition and grant any other appropriate relief as it may deem appropriate.

[emphasis added]

33. After submission of the above referred reply, the Petitioners pointed out that the Ministry of Human Rights (hereinafter referred to as **"MoHR"**) has admitted their stance that the Impugned Act was enacted to promote LGBTQI+ agenda, hence it will promote homosexuality in Pakistan as Ministry of Human Rights, *inter alia*, acknowledged in its reply at para 7(i) that:

"(7) i. Sexual orientation refers to an enduring pattern of romantic or sexual attraction to persons of the opposite sex or gender, the same sex or gender, or to both sexes or more than one gender, whereas gender identity as defined in the Act already and according to Yogyakarta Principles means each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."
[emphases added]

To support their arguments, the petitioners referred to Yogyakarta Principles 2006 and 2017, upon which Ministry of Human Rights relied upon in its reply to these Shariat Petition. Based on such objection of the petitioners, the Ministry of Human Rights requested for amendment of its reply, including but not limited to deletion of the reference of the Yogyakarta

Principle mentioned in Para 7(i) of their reply. Consequently, the Ministry of Human Rights was allowed to amend its reply in the light of its request, as a result whereof the Ministry of Human Rights submitted the amended reply, dated 18.03.2022, in the following manner:

Preliminary Objections:

It is respectfully submitted as under:

A. That the Transgender Persons (Protection of Rights) Act, 2018 (hereinafter referred to as the 2018 Act) was enacted in May 2018 by the Parliament.

B. That the 2018 Act aims to recognize the identity of transgender persons and entitles them to several rights, which are guaranteed under the Constitution of the Islamic Republic of Pakistan as Pakistani citizens. The Act however does not protect their right to marry or the right to choose partners/spouses. The entire text of Transgender Persons (Protection of Rights) Act 2018 does not use any phrase or expression which may make reference to Lesbians & Gays or any other person who commits homosexual acts.

C. That therefore, the 2018 Act does not in any manner legitimize or include gays or lesbians. It only deals with gender identity. The 2018 Act defines a transgender person in Section 2 (n), which is reproduced below: "Transgender Person" is a person who is:-

(i) "Intersex" (khusra) with a "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, Khawaja Sira or 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."

D. That the definition provided in Section 2(n) does not deal with the issue of sexual orientation and restricts itself to gender identification alone.

E. Furthermore, Gender identity is a private matter, concerning someone's deeply felt individual conviction, which should not be subject to arbitrary third-party scrutiny (including a medical board). Requiring someone seeking legal recognition of their self-identified gender to undergo treatment, purportedly for "medical reasons", or to require them to accept "to be treated" in connection with a

certain diagnosis (e.g. "gender dysphoria") is, among other things, a breach of their right to protection against attacks on their dignity, as well as their physical and mental integrity under Article 7 of the ICCPR. It is also a violation of the State obligation to respect for their private life under Article 17 of the ICCPR. Pakistan is a party to this Convention.

F. Moreover, the right of dignity as protected in Article 14 of the Constitution also means the right of a person to take decisions in respect of deeply personal matters without government intervention. In this sense dignity is seen to be associated with privacy, autonomy, and self-determination.

*G. It is also pertinent to highlight that Rules under the Act have also been notified and are annexed herewith as **Annex A**.*

Para-wise Comments:

1. *The contents of Para 1 are formal and therefore need no comments.*
2. *The contents of Para 2 are formal and therefore need no comments.*
3. *The contents of Para 3 are not denied to the extent of the Quranic Verse quoted however the verse is subject to various interpretations/tafsir by religious scholars.*
4. *The contents of Para 4 are not denied to the extent of the Hadith quoted however, the verse is subject to various interpretations/tafsir by religious scholars.*
5. *The contents of Para 5 are not denied to the extent of the Hadith quoted however, their nexus with the 2018 Act is subject to interpretation.*
6. *The contents of Para 6 are formal and need no response.*
7. *The contents of Para 7 are denied. Intersex people are individuals born with a wide range of natural variations in their sex characteristics (or differences of sex development) that do not fit the typical definition of male or female, including, for example, with respect to their sexual anatomy, reproductive organs or chromosome patterns. It is also pertinent to mention here that sexual orientation of an individual is an entirely different phenomenon from gender identity. The Petitioner has erroneously confused the two and has misinterpreted the definition of a transgender person. In this regard it is further submitted that;*
   i. *Gender identity is defined in the Act as a person's innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth;*
   ii. *Furthermore, as upheld in 2021 CLC 204, the right of privacy as protected in the Constitution means the right of a person to take decisions in respect of deeply personal matters without government intervention. The Court in this case held that that the court may give directions of a medical examination however, the*

Respondent could not be forced to take this examination and may refuse such examination. In this sense privacy is seen to be associated with interests in autonomy, dignity and self-determination.

8. *The contents of Para 8 are denied to the extent that section 2(n)(ii) is repugnant to the injunctions of Islam and Hadith.*
9. *The contents of Para 9 are denied to the extent of the petitioner's "beliefs" narrated in the paragraph. Sexual orientation of an individual is an entirely different phenomenon from gender identity and the Petitioner has erroneously and with malafide intention confused the two and has misinterpreted the definition of a transgender person.*
10. *The contents of Para 10 are admitted. The preliminary objections may be read as an integral part of the reply to this para.*
11. *The contents of Para 11 are denied. The contents of preceding paragraphs may be read as an integral part of the reply to this para.*
12. *The contents of Para 12 are not denied to the extent of law cited. However, the Petitioners have misstated the law and have concealed relevant facts from this Honourable Court. With reference to Indian law, the facts are that in November 2020, the Indian Government notified the Transgender Persons (Protection of Rights) Rules 2020 which now state that the District Magistrate will "subject to the correctness of the applicant's particulars, get the application processed based on the affidavit submitted declaring the gender identity of any person,* ***without any medical or physical examination****, and thereafter, issue an identification number to the applicant, which may be quoted as proof of application." Therefore, there is now no more requirement of a medical examination and reliance is placed solely on self perceived identification.*
13. *The contents of Para 13 are factual and are not denied to the extent of facts quoted in the news articles.*
14. *The contents of Para 14 are not denied to the extent of the law cited. However, it is submitted that the Petitioner has concealed important information regarding the notification of the Transgender Persons (Protection of Rights) Rules 2020, which have now done away with the requirement of any medical board or medical examination through Rule 4.*
15. *The contents of Para 15 are admitted to the extent of description of rights provided in the 2018 Act. However, it is vehemently denied that these provisions provide legal cover to the registration of same sex marriages. The Act does not protect their right to marry or the right to choose partners/spouses. The entire text of Transgender Persons (Protection of Rights) Act 2018 does not use any phrase or expression which may make reference to Lesbians & Gays or any other person who commits homosexual acts.*

PRAYER

It is therefore most respectfully prayed that this Honorable Court may admit these amended comments and dismiss the instant petition and grant any other appropriate relief as it may deem appropriate.

34. Likewise, the Law and Justice Division being one of the respondent and representing Federal Government argued that it duly consulted the Bill of the Impugned Act with the Council of Islamic Ideology before its promulgation, upon which one of the petitioners namely Mr. Orya Maqbool Abbasi, objected to the veracity of the statement and placed before the Court a letter, dated 18.11.2021, of the Chairman of the Council of Islamic Ideology, Dr. Qibla Ayaz, stating that the Bill of the Transgender Persons (Protection of Rights) Act, 2018 was never forwarded to the Council of Islamic Ideology by the Government of Pakistan or by the Ministry of Human Rights for consultation. Copy of that letter of the Chairman of the Council of Islamic Ideology is reproduced herein below:

نمبر ایف:3/(1)/2021ء-آر-سی آئی آئی/۱۳۲

مؤرخہ:۱۸/نومبر ۲۰۲۱ء

محترم جناب اوریا مقبول جان صاحب!

السلام علیکم ورحمۃ اللہ وبرکاتہ!

روزنامہ ۹۲ نیوز مؤرخہ ۱۳/نومبر ۲۰۲۱ء بروز ہفتہ میں آنجناب کا کالم بعنوان "پاکستان: ہم جنس پرستی کا محافظ" پڑھا، جس سے یقیناً ہماری معلومات میں اضافہ ہوا۔ اس کالم کی روشنی میں، میں نے مناسب سمجھا کہ کچھ معلومات آپ کی اطلاع کے لیے ارسال کروں۔

۲- خواجہ سراء افراد کے حقوق کا تحفظ ایکٹ ۲۰۱۸ء (Transgender Persons (Protection of Rights Act, 2018)) اسلامی نظریاتی کونسل میں کبھی زیر بحث ہی نہیں آیا ہے، اسلامی نظریاتی کونسل کی سفارشات "فوجداری قانون (ترمیمی) (مخنث افراد کے حقوق کا تحفظ) ایکٹ ۲۰۱۷ء سے متعلق ہیں، جو کونسل کے اجلاس نمبر ۲۰۹ مؤرخہ ۱۷/جنوری ۲۰۱۸ء بروز بدھ میں زیر بحث آیا۔

۳- اس اجلاس میں اسلامی نظریاتی کونسل نے (Self Perceived Gender Identity) اور دیگر شقوں سے متعلق تفصیلی رائے دی۔ اس کے متن کو پڑھنے سے بخوبی اندازہ ہوتا ہے کہ کونسل نے کسی طے شدہ جنس کے حامل فرد کو قطعاً اس بات کی اجازت نہیں دی کہ وہ محض احساسات وجذبات کی بنیاد پر اپنی جنس تبدیل کرالے، بلکہ خنثیٰ فرد کہ جس میں دونوں طرح کی علامات موجود ہوں اور اسے والدین کی طرف سے کوئی جنسی شناخت نہ دی گئی ہو تو وہ جس شناخت کے ساتھ زندگی گزار رہا ہو اسی کے ساتھ زندگی بسر کر سکتا ہے۔ کونسل کی سفارش حسب ذیل ہے:

بل بعنوان "فوجداری قانون (ترمیمی) (مخنث افراد کے حقوق کا تحفظ) ایکٹ ۲۰۱۷ء ایک اچھی کاوش ہے، مخنث

افراد کو خاندان، معاشرہ اور ملک کا مفید شہری بنانے کی غرض سے ان کے حقوق کے تحفظ کے لیے قانون سازی کا عمل قابل ستائش ہے، تاہم زیر بحث بل متعدد شرعی و معاشرتی خامیوں پر مشتمل ہے اس لیے از سر نو جامع مسودہ قانون مرتب کرنے کی ضرورت ہے۔

- مخنث / خنثیٰ (Transgender) وغیرہ کی تعریف جامع مانع نہیں، بالخصوص اس حوالے سے کہ غیر مخنث افراد کو بھی مخنث اور خنثیٰ قرار دیا گیا۔
- مخنث افراد کی تعیین و تصدیق کے لیے کسی معتبر و معتمد طریقہ کار کی وضاحت نہیں کی گئی ہے۔
- بل کی دفعات بالخصوص تعریف پر مشتمل دفعہ ۳۷۷(اے) سے عمومی تاثر قائم ہوتا ہے کہ اخصاء (خصی ہونے یا کرنے کا عمل) جائز ہے، حالانکہ عمل اخصاء ازروئے شرع ممنوع ہے۔ ضروری ہے کہ اس قبیح عمل کو قانونی طور پر ممنوع قرار دیا جائے۔

خنثیٰ کی درست تعریف حسب ذیل ہے:

ایسا شخص جو مردوں اور عورتوں والے دونوں اعضاء رکھتا ہو، یا ایسا شخص جو دونوں قسم کے اعضاء نہ رکھتا ہو، صرف ایک سوراخ رکھتا ہو، جس سے پیشاب نکلے۔

- مخنث افراد کے خلاف جرائم اور ان جرائم پر سزا تو بیان کی گئی ہے، لیکن مخنث افراد کے جرائم اور سزا کو بالکل نظر انداز کیا گیا ہے۔
- مخنث افراد کے خلاف جن جرائم اور سزاؤں کا تذکرہ کیا گیا، وہ پہلے سے تعزیرات پاکستان میں موجود ہیں۔ اگرچہ ان میں "مخنث" یا "خنثیٰ" کا لفظ صراحۃً شامل نہیں، لیکن پرسن (فرد) کے لفظ کے عموم میں جس طرح خواتین شامل ہیں، اس طرح مخنث اور خنثیٰ بھی شامل ہے۔ تاہم جہاں ابہام ہو جس کو دور کرنے کے لیے وضاحت کے ساتھ مخنث / خنثیٰ افراد کا تذکرہ ضروری ہو تو تعزیرات پاکستان کی متعلقہ دفعات میں جزوی ترمیم کے ذریعے مخنث / خنثیٰ کے لفظ کا اضافہ کیا جائے۔
- بل کی آخری دفعات اگرچہ درست ہیں۔ لیکن ان کی ڈرافٹنگ پر نظر ثانی کی ضرورت ہے بالخصوص میراث سے متعلق دفعہ ۳۷۷ (کیو) میں ترمیم کرتے ہوئے حسب ذیل مندرجات شامل کیے جائیں۔

(۱) اگر مخنث میں مردانہ علامات غالب ہوں تو اس کو وراثت میں مرد والا حصہ دیا جائے گا۔

(۲) اور اگر اس میں زنانہ علامات غالب ہیں، تو اس کو عورت والا حصہ دیا جائے گا۔

(۳) اور اگر دونوں علامات برابر ہیں، کہ کسی ایک طرف کا تعین نہ ہو سکے، تو یہ خنثیٰ مشکل ہے، اس کو وراثت میں سے آدھا حصہ مرد والا اور آدھا حصہ عورت والا دیا جائے گا۔

- ایک عمومی ملاحظہ یہ بھی ہے کہ عمل اخصاء کے علاوہ محض عادات واطوار اور چال چلن میں مخالف صنف کی نقل اتارنا، ازروئے شرع درست نہیں۔ بل میں اس کی ممانعت نہیں کی گئی، بلکہ اس کو تحفظ دینے کی کوشش نظر آتی ہے۔
- سب سے اہم ملاحظہ یہ ہے کہ مخنث برادری کے حقیقی مسائل کے حل کے لیے، معاشی طور پر بحالی کے لیے اور طبی طور پر علاج کے لیے کوئی طریقہ تجویز کیا گیا، اور نہ اس کی ضرورت محسوس کی گئی۔

اب جبکہ معاشرہ کے اس مظلوم و مقہور طبقے کے حقوق کے تحفظ کے لیے قانون سازی ہو رہی ہے تو ضروری ہے کہ پاکستانی مسلمان ہونے کی حیثیت سے قانون میں شرعی احکام، آئین پاکستان کی عکاسی ہو، مخنث کے حقیقی مسائل کا ادراک ہو، مسائل و مشکلات کے حل کے لیے راستے تجویز کئے جائیں، اس طبقے کے خلاف ہونے والے جرائم کا سد باب ہو۔ اور اس طبقے کے خلاف ہونے والے جرائم کی بیخ کنی ہو تا کہ ایک جامع قانون مرتب ہو سکے۔

مخنث افراد کی جنس کی شناخت میں اصل کردار والدین کا ہے۔ انہیں کی طرف سے ان کی جنسی شناخت کا تعین ہونا چاہیے اور اسی پر عمل ہونا چاہیے تاہم جن مخنث افراد کو والدین نے اپنانے سے انکار کر دیا ہو تو وہ معاشرہ میں جس شناخت کے تحت گزر بسر کر رہے ہوں اسے ہی حتمی شناخت کے طور پر تسلیم کیا جائے البتہ بوقت ضرورت، جیسے وراثت کے مسائل میں، عدالت طبی معائنے کے ذریعے جنس کے تعین کا فیصلہ کرے گی۔ (اجلاس نمبر 209 / سالانہ رپورٹ 2017-18، ص 194-196)

خیر اندیش
قبلہ ایاز
(پی ایچ ڈی، ایڈ نبرا)
چیئرمین

35. Upon the disclosure of this letter by one of the Petitioners to whom this letter was addressed and its production before this Court, the Federal Government through the Ministry of Human Rights sought time with the request that it (MoHR) will refer the Transgender Persons (Protection of Rights) Act, 2018 to the Council of Islamic Ideology for its consultation. Their request was allowed by this Court vide order dated 11.04.2022 and resultantly the Council of Islamic Ideology reviewed the impugned Act and submitted its detailed report, dated 18-19.05.2022, to the Ministry of Human Rights. The Ministry of Human Rights duly submitted the said report before this Court, however the said report was also addressed to this Court by the Council of Islamic Ideology. The said report is considered necessary to be made part of this judgment, which reads as follow:

نمبر ایف:۳ (۱) / ۲۰۲۰ - آر۔ سی آئی آئی / ۷۳

مورخہ:۲۰ مئی ۲۰۲۲، اسلام آباد

عنوان: **خواجہ سراؤں (کے حقوق کے تحفظ کا) ایکٹ، ۲۰۱۸ - --اسلامی نظریاتی کونسل کی سفارشات**

بحوالہ اجلاس نمبر ۲۲۸، منعقدہ مورخہ ۱۹۱۸/ مئی ۲۰۲۲ء

مذکورہ بالا قانون سے متعلق اسلامی نظریاتی کونسل نے اپنے اجلاس نمبر ۲۲۸، مورخہ ۱۸-۱۹/ مئی ۲۰۲۰ء میں قرار دیا کہ:

"(1) خواجہ سراؤں (کے حقوق کے تحفظ کا) ایکٹ، ۲۰۱۸ء میں "تعریفات" کے باب میں دفعہ ۲ (۲)۔ صنفی اظہار "اور" دفعہ ۲ (ایک)- صنفی شناخت"، اسی طرح "باب دوم- خواجہ سرا کی شناخت کو تسلیم کرنا" شریعت کی روح اور شرعی اصول وضوابط کے خلاف ہیں کیونکہ ان دفعات میں خواجہ سرا کو پیدائشی جنس کے برعکس اپنی مرضی کے مطابق منفی شناعت تسلیم کرنے کا حق دیا گیا ہے۔ احادیث مبارکہ میں اس پر سخت وعیدیں وارد ہوئی ہیں۔ علاوہ ازیں اسی بنیاد پر وہ دفعات، جن میں "صنفی اظہار" اور "صنفی شناخت" کا ذکر آتا ہے، بھی شرعاً قابل اعتراض ٹھہرتی ہیں۔

(۲) موجودہ قانون میں تعریفات کے باب میں "خواجہ سرا (Transgender)" کی تعریف کی گئی ہے اور تین قسم کے افراد کو اس کا مصداق قرار دیا گیا ہے، یہ تعریف شرعی طور پر قابل اعتراض امور پر مشتمل ہے اور بیشتر تکنیکی خامیاں بھی اس میں پائی جاتی ہیں۔ اس تعریف کی رو سے کئی ایسے افراد، جو خواجہ سرا نہیں ہیں یا نہیں ہونے چاہئیں، خواجہ سرا کے زمرے میں شامل ہو جاتے ہیں۔ خواجہ سرا کی وضع کردہ تعریف بالواسطہ خود کو نامرد بنانے کے عمل کو قانونی جواز فراہم کرتی ہے، جس کی شریعت میں ممانعت ہے۔ مزید بر آں! خواجہ سرا کی یہ تعریف اس تاریخی پس منظر سے بھی ہم آہنگ نہیں، جس کے لیے خواجہ سرا کی اصطلاح اصلاً وضع کی گئی تھی۔

(۳) موجودہ قانون میں "باب پنجم - دفعہ (۷)- حق وراثت" اور اس کی ذیلی دفعات بھی خلاف شرع امور پر مشتمل ہیں، کیونکہ ان دفعات کی بنیاد وہ دفعات ہیں، جن کے تحت اپنی مرضی کی صنفی شناخت کی اجازت دی گئی ہے۔ اس باب میں عطا کردہ حق وراثت شرعی حکم کے مطابق نہیں ہے، جس کی تفصیل یہ ہے کہ:

اگر کوئی شخص قانوناً خواجہ سرا مرد ہے تو اسے مرد کا حصہ دیا گیا ہے، حالانکہ یہ فرد در حقیقت عورت ہے۔
اسی طرح خواجہ سرا عورت کو عورت کا حصہ دیا گیا ہے، جو کہ در حقیقت مرد ہے۔
یہ خامیاں اپنی مرضی کی منفی شناخت اختیار کرنے (self-perceived identity) کی اجازت دینے کی وجہ سے پیش آرہی ہیں۔

(۴) اس قانون کو خواجہ سرا (Transgender) کے نام سے موسوم کرنا بھی محل نظر ہے، اس کی دو وجوہات ہیں:

(الف) تکنیکی طور پر خواجہ سرا در اصل برصغیر میں مغل دور کی اختیار کردہ ایک اصطلاح ہے۔ مغل دور میں خواجہ سرا وہ افراد ہوتے تھے جنہیں باقاعدہ سرجری کے ذریعے نامرد کیا جاتا تھا اور حرم یا خواتین خانہ میں ان سے خدمت لی جاتی تھی، اس اصطلاح کے مطابق خواجہ سرا در حقیقت مرد ہوتا ہے۔ زیر بحث قانون تو خواجہ سرا سے موسوم ہے لیکن اس کی ذیلی دفعات میں خنثیٰ مشکل، نامرد افراد اور وہ افراد جن کی پیدائشی جنس ان کے جذبات و احساسات سے مختلف ہوں، سب کا تذکرہ و تفاصیل موجود ہیں۔ اس بنیاد پر قانون کو خواجہ سرا کے عنوان سے پیش کرنا درست معلوم نہیں ہوتا۔ لہٰذا اس قانون کو درست عنوان جیسے:۔ مشتبہ الجنس افراد یا خنثیٰ افراد سے موسوم کیا جائے۔

(ب) شرعی طور پر بھی خواجہ سرا کا نام رکھنا درست نہیں کیونکہ موجودہ دور میں خواجہ سرا سے مراد وہ افراد لیے جاتے ہیں جن کی پیدائشی جنس ان کے جذبات و احساسات سے الگ ہو اور وہ پیدائشی جنس کے برعکس اپنے جذبات و احساسات کے تابع زندگی گزار رہے ہوں جبکہ شریعت اس امر کی اجازت نہیں دیتی کہ کوئی شخص اپنی پیدائشی جنس کے برعکس صنفی میلانات اور احساسات کی بنیاد پر کسی جنس کو اختیار کرے۔ احادیث مبارکہ میں پیدائشی جنس کے مخالف جنس کا لباس پہننے یا مشابہت اختیار کرنے پر لعنت وارد ہوئی ہے اور یہ عمل گناہ کبیرہ ہے۔ اس لیے خواجہ سرا کے نام سے قانون کو موسوم کرنا در حقیقت اس مزاج اور فکر کی حوصلہ افزائی کے مترادف ہے، جس سے شریعت نے منع کیا ہے۔

(۵) خواجہ سراؤں کے حقوق سے متعلق موجودہ قانون اس حوالے سے بھی محل نظر ہے کہ اس میں وراثت اور دیگر حقوق تو بیان کیے گئے ہیں لیکن حق ازدواج کا ذکر نہیں کیا گیا۔ اس حوالے سے قانون خاموش ہے، جو شرعی طور پر کئی خامیوں اور مفاسد کا باعث ہے۔ یہ امر تو معلوم و معروف ہے اور یہی فطرت انسانی کا تقاضا ہے کہ شادی مرد و عورت کے درمیان ہی ہو سکتی ہے۔ اسلام اور اسلام سے قبل تمام ادیان سماویہ و غیر سماویہ کا اس پر اجماع ہے۔ اب اس قانون کی رو سے خواجہ سرا مرد، جو کہ در حقیقت عورت ہے، کی شادی کس سے ہو گی؟ اگر مرد سے کرے

گا تو شرعاً اگرچہ یہ درست ہے لیکن قانون میں تفویض کردہ صنفی شناخت کی بنا پر چونکہ وہ مرد ہے، لہذا یہ عمل قانون کی رو سے ہم جنس پرستی کے زمرے میں آئے گا۔ اگر عورت سے شادی کرے گا تو قانون کی رو سے اگرچہ درست متصور ہو گا لیکن شرعاً یہ ہم جنس پرستی کے زمرے میں آنے کی وجہ سے ناجائز ہو گا کیونکہ یہ در حقیقت عورت ہے۔ یہی اعتراضات ''خواجہ سرا عورت'' والی صورت پر بھی وارد ہوتے ہیں کیونکہ وہ در حقیقت مرد ہے۔

(۶) خواجہ سراؤں کی اپنی مرضی کی جنسی شناخت کی حمایت میں اس سے استدلال کیا جاتا ہے کہ جنس اور صنف دونوں الگ الگ ہیں۔ اس حوالے سے شریعت اور فقہ کا موقف یہ ہے کہ فقہی احکام کے اعتبار سے جنس اور صنف دونوں ایک ہیں اور ان میں کوئی فرق نہیں ہے۔ اس لیے اس بنیاد پر Self-perceived Identity کو جواز فراہم کرنا درست نہیں ہے۔

(۷) مذکورہ بالا شرعی و تکنیکی خامیوں کی بنا پر اس قانون کی از سر نو تسوید کی ضرورت ہے۔ ان تمام خامیوں کو دور کیا جانا ضروری ہے۔ کونسل اپنے اجلاس نمبر ۲۰۹، منعقدہ مؤرخہ ۱۷ جنوری ۲۰۱۸ء کی سفارشات کا اعادہ کرتی ہے، جن کا متن حسب ذیل ہے:

- مخنث / خنثیٰ (Then gender) وغیرہ کی تعریف جامع مانع نہیں، بالخصوص میں حوالے ہے کہ غیر مخنث افراد کو بھی مخنث اور خنثیٰ قرار دیا گیا۔
- مخنث افراد کی تعین و تصدیق کے لیے کسی معتبر و معتمد طریقہ کار کی وضاحت نہیں کی گئی ہے۔
- بل کی دفعات بالخصوص تعریف پر مشتمل دفعہ ۳۷۷ (اے) سے عمومی تاثر قائم ہوتا ہے کہ اخصاء (خصی ہونے یا کرنے کا عمل) جائز ہے، حالانکہ عمل اخصاء از روئے شرع ممنوع ہے۔ ضروری ہے کہ اس قبیح عمل کو قانونی طور پر ممنوع قرار دیا جائے۔

خنثیٰ کی درست تعریف حسب ذیل ہے:۔

ایسا شخص جو مردوں اور عورتوں والے دونوں اعضاء رکھتا ہو، یا ایسا شخص جو دونوں قسم کے اعضاء نہ رکھتا ہو، صرف ایک سوراخ رکھتا ہو، جس سے پیشاب نکلے۔

- مخنث افراد کے خلاف جرائم اور ان جرائم پر سزا تو بیان کی گئی ہے، لیکن مخنث افراد کے جرائم اور سزا کو بالکل نظر انداز کیا گیا ہے۔
- مخنث افراد کے خلاف جن جرائم اور سزاؤں کا تذکرہ کیا گیا، وہ پہلے سے تعزیرات پاکستان میں موجود ہیں۔ اگرچہ ان میں ''مخنث'' یا ''خنثیٰ'' کا لفظ صراحتہً شامل نہیں۔ لیکن پرسن (فرد) کے غلط کے عموم میں جس طرح خواتین شامل ہیں، اس طرح مخنث اور خنثیٰ بھی شامل ہے۔ تاہم جہاں ابہام ہو جس کو دور کرنے کے لیے وضاحت کے ساتھ مخنث / خنثیٰ افراد کا تذکرہ ضروری ہو تو تعزیرات پاکستان کی متعلقہ دفعات میں جزوی ترمیم کے ذریعے مخنث / خنثیٰ کے لفظ کا اضافہ کیا جائے۔
- بل کی آخری دفعات اگرچہ درست ہیں۔ لیکن ان کی ڈرافٹنگ پر نظر ثانی کی ضرورت ہے بالخصوص میراث سے متعلق دفعہ ۳۷۷ (کیو) میں ترمیم کرتے ہوئے حسب ذیل مندرجات شامل کیے جائیں۔

(۱) اگر مخنث میں مردانہ علامات غالب ہوں تو اس کو وراثت میں مرد والا حصہ دیا جائے گا۔

(۲) اور اگر اس میں زنانہ علامات غالب ہیں، تو اس کو عورت والا حصہ دیا جائے گا۔

(۳) اور اگر دونوں علامات برابر ہیں، کہ کسی ایک طرف کا تعین نہ ہو سکے، تو یہ خنثیٰ مشکل ہے، اس کو وراثت میں سے آدھا حصہ مرد والا اور آدھا حصہ عورت والا دیا جائے گا۔

- ایک عمومی ملاحظہ یہ بھی ہے کہ عمل اخصاء کے علاوہ محض عادات واطوار اور چال چلن میں مخالف صنف کی نقل اتارنا، از روئے شرع درست نہیں۔ بل میں اس کی ممانعت نہیں کی گئی، بلکہ اس کو تحفظ دینے کی کوشش نظر آتی ہے۔
- سب سے اہم ملاحظہ یہ ہے کہ مخنث برادری کے حقیقی مسائل کے حل کے لیے، معاشی طور پر بحالی کے لیے اور طبی طور پر علاج کے لیے کوئی طریقہ تجویز کیا گیا، اور نہ اس کی ضرورت محسوس کی گئی۔

اب جبکہ معاشرہ کے اس مظلوم و مقہور طبقے کے حقوق کے تحفظ کے لیے قانون سازی ہو رہی ہے تو ضروری ہے کہ پاکستانی مسلمان ہونے کی حیثیت سے قانون میں شرعی احکام، آئین پاکستان کی عکاسی ہو، مخنث کے حقیقی مسائل کا ادراک ہو، مسائل و مشکلات کے حل کے لیے راستے تجویز کئے جائیں، اس طبقے کے خلاف ہونے والے جرائم کا سد باب ہو۔ اور اس طبقے کے خلاف ہونے والے جرائم کی بیخ کنی ہو تا کہ ایک جامع قانون مرتب ہو سکے۔

مخنث افراد کی جنس کی شناخت میں اصل کردار والدین کا ہے۔ انہیں کی طرف سے ان کی جنسی شناخت کا تعین ہونا چاہیے اور اسی پر عمل ہونا چاہیے تاہم جن مخنث افراد کو والدین نے اپنانے سے انکار کر دیا ہو تو وہ معاشرہ میں جس شناخت کے تحت گزر بسر کر رہے ہوں، اسے ہی حتمی شناخت کے طور پر تسلیم کیا جائے البتہ بوقت ضرورت، جیسے وراثت کے مسائل میں، عدالت طبی معائنے کے ذریعے جنس کے تعین کا فیصلہ کرے گی"۔

قبلہ ایاز
(پی ایچ ڈی، ایڈنبرا)
چیئرمین

جناب ڈاکٹر سید محمد انور
قائم مقام چیف جسٹس فیڈرل شریعت کورٹ
اسلام آباد

کاپی برائے
رجسٹرار، فیڈرل شریعت کورٹ

ڈاکٹر انعام اللہ
ڈائریکٹر جنرل (ریسرچ)
9207434-051

Arguments of the Respondents

36. In response to the arguments advanced by the petitioners, the Federation of Pakistan, MoHR, NADRA and some other experts including gender experts and some persons who identified themselves as transgender

women also argued the case at length as respondents. Following persons, in addition to the Federal Government and departments forwarded their arguments in the following manner.

37. The Ministry of Law & Justice stressed that this Impugned law is to protect the marginalized communities of transgender persons and their rights. Amongst other points, the Ministry of Law & Justice submitted as follows:

a) *In 2009, the Supreme Court delivered a ruling, recognizing the dignity of transgender and declaring them the third gender under the equal protection clause of the Constitution of Pakistan. The Court ordered Provincial and Federal Governments to protect transgender's gender identification, right to inherit property, right to vote, right to education, and right to employment.*

b) *The transgender community was one of the most marginalized in the country because they don't fit into existing gender categories. Consequently, they face problems ranging from social exclusion to discrimination, lack of education facilities, unemployment, and lack of medical facilities. The Transgender Persons (Protection of Rights) Act, 2018 attempted to solve the issues of transgender and give them a life of dignity.*

c) *The Act prohibits discrimination against a transgender person in areas such as education, employment, and healthcare. It directs the central and state governments to provide welfare schemes in these areas.*

d) *Under the Act offences like compels or entices a transgender person to indulge in the act of begging, forced or bonded labor denying a transgender person the right of passage to a public place, force or causes a transgender person to leave house-hold, village, harms or injures or endangers the life, safety, health, or mental and physical well-being, causing physical abuse, sexual abuse, verbal emotional abuse and economic abuse are punishable with imprisonment for a term which shall not be less than six months or with fine or with both.*

e) *Under the Act the government is taking steps to provide health facilities to transgender persons including sex reassignment surgeries and bring health curriculum reform to address basic health issues of transgender and intersex community etc.*

f) *Under the Act the government is taking measures to ensure the full inclusion and participation of transgender in*

> *mainstream society via rehabilitation, vocational training, employment schemes etc.*

It is general practice and unwritten principle of pleadings and proceedings before any Court of law that the Government is supposed to be a good and honest litigant, which means the Government is supposed to give true and correct picture about the facts of the case but to our dismay we noticed that the Federal Government through the Ministry of Human Rights as well as through the Law and Justice Division failed to perform its duty properly while responding to the Petitions and making some submissions regarding the process of promulgation of the impugned law, firstly when MoHR referred the Yogyakarta Principles as the basis of the impugned Law and subsequently the statement of Law and Justice Division regarding the official consultation of the Council of Islamic Ideology under Article 227 of the Constitution of the final draft Bill of the Transgender Persons (Protection of Rights) Act, 2018, which later on became an Act of the Parliament and has been impugned by the petitioners through these Shariat Petitions. Consequently, upon challenging these statements by the petitioners the Ministry of Human Rights had to submit the amended reply and also sent the impugned law to the Council of Islamic Ideology for consultation. Similarly during arguments MoHR presented the Supreme Court's orders as the reason for enactment of the impugned Act. However, we noted that the words "transgender" or "transgender person", similarly "transgender man and transgender woman" are not used in the Supreme Court's Orders reported as *Dr. Muhammaed Aslam khaki and others v. S.S.P. (Operations) Rawalpindi and others (PLD 2013 SC 188)* and *Dr. Muhammad Aslam khaki and others v. S.S.P. (Operations) Rawalpindi and others (2013 SCMR 187)*.

Response of NADRA

38. Similarly, the response of NADRA remained elusive on certain points like its policy for issuance of CNICs with "X" Gender Mark. The crux of the response of NADRA in reply to most of the questions remained that it does not have any Rules or Regulations that specify procedure to follow for issuance of CNICs under the impugned Law, rather it only follows the policy. Obviously this position of NADRA is questionable because making actions of NADRA subject to an un-notified policy makes the system vulnerable to serious abuses of law and even crimes in some cases. Some of the petitioners have challenged Regulation 13(1) of the National Database Registration Authority (Application for National Identity Card) Regulations, 2002 made under the National Database and Registration Authority Ordinance, 2000 together with the policy followed by NADRA regarding registration of transgender persons in pursuant to the Impugned Act. Prior to the promulgation of the impugned Act, NADRA used to issue cards to eunuch persons under Regulation 13(1), but during the proceedings of these Shariat Petitions, even that Regulation, instead of amendment or correction, was altogether deleted leaving a deficiency in the National Registration Authority (Application for National Identity Card) Regulations, 2002 in this regard.

39. **Farhat Ullah Babar, Advocate** submitted detailed arguments as respondent in these Shariat Petitions and argued that this Law will not open floodgates to change the sex at will. He further gave response to certain points raised by the petitioners in the following manner:

> ***Objection# 1:*** *How will the Trans persons be segregated into separate spaces in jobs, in academic institutions and in health facilities/ hospitals?*
>
> *Response: Employment: Rule 18 (1) states "All government authorities shall formulate and maintain a transgender employment policy for the integration of transgender persons...."*

So the segregation has to be provided for in the policy framed by each department to ensure segregation into separate spaces in jobs, academic institutions and health facilities.

Education: Rule 17 about education says "the departments shall provide incentives aimed at the inclusion of transgender persons in all educational institutions...."

"Incentive" means motivating or encouraging someone to do or abstain from doing something. It can thus be argued that transgender education will not be encouraged if there is no segregation. However, the language used in the Rules can be made more specific if needed.

Health: Rules 9, 11 (5) (a), 12, 13, 14, 15 and 16 adequately provide for segregation. However Rules can be amended if considered necessary.

Objection #2: *Gender identity of under the 18 years of age is determined by a medical doctor but for above 18 years of age no medical certificate is required for determining gender identity. It is considered unwarranted intrusion and against human rights. Why? Are the human rights of the under 18 years not violated by leaving a determination of their gender to medical certification?*

Response: Minimum age for the exercise of different categories of rights is determined by law. For instance there is age condition for marriage, for driving license, for voting, for admission in schools etc. Recently the Hon Federal Shariat Court also ruled that government can make a determination of minimum age for marriage and petitions against Child Marriage Act were dismissed.

At the time of birth the sex assignment can only be determined by a medical doctor/ parents on the basis of predominant organs. A new born cannot be expected to declare his sex/gender assignment himself. So initially such determination has to be by a doctor.

Objection #3: *What will be the consequences if a married person on the basis of self-perceived identity declared himself of different gender?*

Response: It will automatically annul the marriage because the marriage can be registered in Nikahnama only between M (Male) & F (Female). There is no provision in any law and any rule for the registration of marriage between a X (Transgender) & M (Male), or between X (Transgender) and & F (Female) or between X and X.

Moreover is it conceivable? Has any single case been reported? Are any statistics available?

Objection#4: *There is no such this as 'self perceived' gender identity. It is a disease of the mind called 'gender dysphoria'-a sexual condition whereby there is marked and persistent difference between a person's perceived gender based on innermost feelings and the sex assigned to him/her at birth. That*

this condition is also recognized by the WHO which call is as "gender incongruence"

Response: This may have been the case until 2019. In May 2019 the WHO Assembly declared that transgender health issues will no longer be classified as mental and behavioral disorder. "It was taken out of the mental health disorder because we had a better understanding that his was not actually a mental health condition and leaving it there was causing stigma".

In addition section 12(c) of the Act encourages all transgender "access to all necessary medical and psychological gender corrective treatment". If a transgender feels the need to seek medical/psychological advice he may but he cannot be forced.

Objection#5: *That Quran recognizes only two genders Male and Female and there is no provision for a third gender. Verses 49 & 50 of sura 42 were quoted in support on 10-4-23.*

لِلّٰهِ مُلْكُ السَّمٰوٰتِ وَالْاَرْضِ ۚ يَخْلُقُ مَا يَشَآءُ ۚ يَهَبُ لِمَنْ يَّشَآءُ اِنَاثًا وَّيَهَبُ لِمَنْ يَّشَآءُ الذُّكُوْرَ(49) اَوْ يُزَوِّجُهُمْ ذُكْرَانًا وَّاِنَاثًا ۚ وَيَجْعَلُ مَنْ يَّشَآءُ عَـقِيْمًا ۚ اِنَّهٗ عَلِيْمٌ قَدِيْرٌ (50)

Response: It is important to point out some characteristics.

The word 'Yahabu' is used in the first verse meaning to bestow but in the second verse (50) the word 'Aw yuzawwijuhum' has been used. It does not mean here 'bestow'. Otherwise the word 'yahabu' would have been used.

Clearly the meaning of 'Aw yuzawwijuhum' is not the same as bestowing male and female off springs. Here it means the mingling of male and female.

-The words 'what He wills' is repeated four times emphasizing that the creation of the people mentioned in it are created according to Allah's will, not as a result of a mistake.

-The words 'Ibn' (son) or 'Bint' (daughter) for son and daughter have not been used. Instead the words 'Inathan wa Ath-thukura' used.

-The aim of these verses was to show Allah's power in creation: "He bestows upon whom He wills the masculine gender and He bestows upon whom He wills the feminine gender."

As these verses explicitly refer to Male & Female in first verse, and to other kinds of gender in the second verse, the word 'yuzawwijuhum' means mingled or mixed gender.

Pickthall translates it as: 'He mingles both male and female' (Pickthall, 2011),

Egyptian scholar Ahmad Muhammad Shakir (1892-1958) translates it as:

'He makes them of both sorts'

Objection#6: *The Act is liable to be misused and there is no provision in it to prevent its misuse.*

Response: A law is liable to be misused particularly if it offered special incentives to persons addressed in the law. The Transgender Protection Act 2018 confers no special privileges on transgender like reserved seats in parliament, in professional colleges etc. The 2018 Act only gives the transgender persons basic human rights available to every citizen including the right to vote, to contest elections, to seek education etc. If ever reserved quota had to be provided for transgender persons in any walk of life it has to be regulated by appropriate rules. For instance special reserved seats for technocrats etc are governed by legislation/rules framed by the Election Commission.

Secondly, is it conceivable that anyone will willingly want to be recognized as member of the most dispossessed, the most vulnerable community whose members are threatened, intimidated, ridiculed and harmed on a daily basis? In return for what any person will want to be part of the transgender community?

Objection#7: *Section 15 (2) of the Act is problematic as it takes away owner's right to rent out or deny property/hotel room to transgender, for any reason. The owner of property also has rights which are violated by this law.*

Response: There must be some basis for refusal to rent out hotel room to anyone. It is unlawful and wrong to discriminate against or deny hotel room on the basis of sex/gender alone. But if there is a valid reason like risk of riots, protection of property, a person declared non-grata then it is permissible to deny him/her hotel accommodation.

Section 15 (2) of the 2018 Act only prohibits discrimination on basis of sex'. It does not foreclose the right of the owner of property to disallow tenancy to any person (transgender or unisex) on the basis of valid legal reasons.

Objection #8: *Section criminalizes only 'compelling to beggary' and there is no remedy if there are other crimes.*

Response: The Act makes violations of any of the basic rights of transgender person's rights a crime. Laws are already there for punishing any crime. Beggary is already unlawful. Forcing transgender to beggary is a specific crime committed against transgender when they are forced to beg. It is for this reason that it has been so mentioned. Beggary will remain a crime even if not mentioned in the 2018 Act. Compelling someone to beggary makes it even more serious.

Objection 9: *What will happen if someone kept on changing his self perceived identity from one perception to another?*

Response: There is not a single case thus far. Is it conceivable? Why anyone will resort to it, for what benefit? If there are special reserved benefits specifically to transgender persons then rules will have to be framed by each department for availing those benefits.

> *In any case second change is not automatic. Rule 3 (5) of NADRA governs procedure for it.*
>
> ***Objection#10:*** *Someone may perceive himself F (Female) or M (Male) contrary to the sex assigned to him at birth and he/she may like to imagine himself anything. That is his/her business. Why should he/she insist on legal recognition of his status as F (Female) or M (Male)?*
>
> *Response: The transgender persons do not demand recognition as F (female) or M (Males). They only want to be legally recognized as X for the purpose accessing basic rights.*
>
> ***Objection #11:*** *That Anderson's latest book "When Harry Became Sally: Responding to the Transgender Moment" is scientific evidence that self perceived identity is a "myth".*
>
> *Response: The book is largely based on junk science. Neither the contents of the book nor the reviews on it have been by transgender people or by doctors who care for transgender people or by anyone who advocate for transgender people. The book is based on the premise that self perceived gender identity is a mental illness, a postulate already rejected by the WHO and latest medical sciences.*

Muhammad Sherkan Malik

40. Similarly, Muhammad Sherkan Malik, Director Programs at Transgender Rights Consultants appeared as an expert and forwarded his arguments explaining the term “gender dysphoria” and the guidelines issued by the “American Psychological Association” regarding the gender conversion therapy etc., and said that gender dysphoria is not a disease, but a mental condition. He also relied on the definition of transgender and the difference between sex and gender as explained by the American Psychological Association by stating that:

> *“Gender dysphoria refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and / or surgery are not available.”*

41. Ms. Nayab Ali, transgender expert, who identified herself as a “transgender woman” argued in response to the petitions that this law will not promote homosexuality or LGBT’s rights in the country. In support of her

stance, she argued that in 1988, gender reassignment surgery was declared acceptable under Islamic law by scholars of Al-Azhar University at Egypt, whereas in Iran, Ayatollah Khomeini declared transgender surgical operations permissible in the year 1987.

42. Another person named Julie Malik, who also identified herself as an intersex person, explained an old-ordeal which she faced being an intersex person by birth that she was disowned by her real parents and how later on in the life during her childhood she was badly abused sexually, physically and psychologically and she was even tortured by person who kept her under the garb of "Guru".

We took a serious notice of such dilemma and gave our observations vide our order dated, 13.12.2022. The relevant part of the said order is reproduced as under:

> *"2. --- --- Nadeem-uz-Zafar Khan alias Kashish, who identified herself as an intersex, has raised some points, on which the Ministry of Human Rights is required to submit a report positively by 15.12.2022 showing whether there is any facility for the protection of children born with some defects in their sexual organs. Consequently, who are unfortunately abandoned by their own families, as a result whereof they are abused by the criminals and fall prey to pedophiles and other predators in our society, which is a scar on the face of this society. Similarly, the lives of same category of persons become more miserable as they turn old. The Section 6(a) of the impugned Law bounds the Government and Ministry of Human Rights to ensure the rescue, protection and rehabilitation of transgender persons in addition to providing medical facilities, psychological care, counseling, etc. Allah Almighty has bestowed dignity on every human being and this is our believe as stated in the Holy Quran, even it has also been enshrined in the Constitution of the Islamic Republic of Pakistan, 1973. Therefore, there should be exclusive protection homes for such children, who are intersex and are abandoned by their families, as well as for the older persons falling under the category of intersex (Khusra) as defined in section 2(n)(i) of the impugned Law.*
>
> 3. In addition to above, the office is directed to issue notice to the Chairperson of the National Commission for Human Rights to appear as an expert along with Zammurd Khan, who is running Pakistan Sweet Home, which is an orphanage for abandoned children across the country providing basic

> necessities of life to them. Likewise, Dr. Muhammad Amjad Saqib, who is running Akhuwat Foundation and has experience to run protection centers for old-aged intersex persons, may also be summoned as an expert in order to provide consultation to the Ministry of Human Rights."

In response to above mentioned order, the Federal Government in the Ministry of Human Rights took some steps in the manner that they notified a "Monitoring Committee" of experts, held meetings on day-to-day basis with the representatives of the intersex community and also established few centers for the protection of intersex children to protect them from all kinds of abuses. Likewise, they also made Protection Centers for Intersex Children and Old-Age Transgender Persons, who are normally disowned by the society and are ridiculed publically. The intersex persons have also some grievances which they made in writing as follow:

> مؤدبانہ گزارش ہے کہ پچھلے 3 سال سے ہم کھنسہ افراد عدالت عالیہ سے X ایکس شناختی کارڈ جو کہ خواجہ سراؤں کے لئے مخصوص کیا گیا ہے اُس پر شرعی احکام کیا ہیں جس میں X کارڈ کے جنازے، شادی اور پردے اور دیگر احکامات کیا ہوں گے۔ مگر ابھی تک کوئی جواب نہیں ملا جبکہ دوسری طرف گورنمنٹ اور انٹرنیشنل ادارے X کارڈ ہولڈر کو خواجہ سراء کھنسہ تسلیم کرتے ہیں اور اُن ہی کو سرکاری اور غیر سرکاری نوکریاں دی جاتی ہیں اور ہم کھنسہ افراد اپنے خاندانی کارد جس میں جنس مرد لکھا ہے ان سب حکومتی اور انٹرنیشنل جاب کوٹہ اور فنڈنگ سے محروم ہیں اور نام نہاد خواجہ سراء جو کہ خود کو ٹرانس جینڈر کہتے ہیں وہ ہمارے تمام حقوق پر سہولیات لے رہیں ہیں ہماری حق تلفی ہو رہی ہے جبکہ عدالت نے ایک کمیٹی بنائی تھی جسمیں مجھے ندیم کشش کھنسہ افراد کی طرف سے ممبر بنایا۔ زمرد خان صاحب، ثاقب صاحب کو بھی شامل کیا مگر ہیومن رائٹس نے ہمیں صاف انکار کر دیا کہ X کارڈ کے بغیر آپ کو کوئی مراعات نہیں ملیں گی لہٰذا عدالت عالیہ سے گزارش ہے کہ ہمیں کوئی حکم نامہ دیا جائے، کوئی نوٹیفکیشن دیا جائے جب تک کہ عدالت کسی نتیجے پر نہیں پہنچتی کیا ہم X کارڈ بنوا سکتے ہیں۔ آپ کی بڑی مہربانی ہو گی۔

They also submitted that they want to lead a normal and decent life but they do not want to make ID Cards with Mark "X" because with that ID Card they cannot perform *Umrah* or *Hajj*, which is a serious hindrance in performing their religious duties and obligations. On the other hand, without having ID Card with gender Mark "X" they cannot avail the benefits extended for "transgender persons" under the impugned Law. To avoid such contradiction, they vehemently pleaded that although they are born with

some infirmity in their sexual organs but they want to be a full male or full female, as the case may be, in individual case of any intersex person, therefore, the Government should issue them ID Cards with gender Marks "F" or "M" as happening in majority of the international jurisdictions.

43. The question was put to the Government of Pakistan and the registering authority i.e. NADRA but the latter failed to satisfy this Court on such question, instead they replied that in the backend of their database they are feeding in all the details of an applicant and consider them as male, female, intersex or eunuch, as the case may be, but to all these four categories i.e. intersex, eunuch, transgender woman and transgender man, NADRA issues an ID Card with gender Mark "X" under the impugned Law.

We have analyzed the arguments of the parties and concluded that the point raised by the intersex persons that they cannot perform *Umrah* or *Hajj* with ID Card having gender Mark "X", is a very serious issue, therefore, NADRA must develop some rules or criteria of issuing ID Cards to *Khunsa* (خنثیٰ) persons so that they can perform *Hajj*.

44. Full opportunity of hearing was awarded to both the sides. Out of the diverse contentions pertaining to various issues involved in the captioned Shariat Petitions, the core issue involved in these Shariat Petitions is the manner in which the phrase "***Transgender Person***" is defined in Section 2(1)(n) of the impugned Act along with the phrases "***Gender Expression***" and "***Gender Identity***" as defined in Sections 2(1)(e) and 2(1)(f) of the impugned Act, respectively. The said sub-sections of Section 2 are reproduced as follows:

> ***2. Definitions.*** *(1) In this Act, unless there is anything repugnant in the subject or context:*
> ***----------***
> ***----------***
> ***----------***

> ***2(e)*** ***"Gender expression"*** *refers to a person's presentation of his gender identity, and the one that is perceived by others;*
>
> ***2(f)*** ***"Gender Identity"*** *means a person's innermost and individual sense of self as male, female or a blend of both or neither; that can correspond or not to the sex assigned at birth.*
>
> *---*
>
> *---*
>
> *---*
>
> ***2(n)*** ***"Transgender Person"*** *is a person who is:-*
>
> *(i) Intersex (Khusra) 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 or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.*

45. Although, all provisions of the impugned Act are challenged, but since the aforementioned definitions have pivotal role in the points involved in these Shariat Petitions, all the issues raised by the petitioners are offshoots to these three definitions of "Gender Expression", "Gender Identity" and "Transgender Person", therefore, we have decided to determine the questions relating to these definitions at the first instance.

46. All the other issues which were highlighted in the Shariat Petitions are related to the implementation of concepts stemming from the above mentioned three definitions, like the provision of recognition of identity of transgender person in Section 3 of the impugned Act and protection of other rights of "transgender persons", as mentioned in Chapter 5 and prohibition of certain acts as mentioned in Chapter 3 of the impugned Act etc.

47. Therefore, we have formulated the following Points of Determination:

I. Whether the five terms (Intersex (*Khusra*), Eunuch, Transgender Man, Transgender Woman and *KhawajaSira*), which are included in the definition of "transgender person" in Section

2(1)(n) of the impugned Act are identical and similar, hence they are included in the definition of one term or are they different?

II. Whether sex or gender provides basis for gender identity of a person as male or female in the light of the injunctions of Islam as laid down in the Holy Quran and *Sunnah*?

III. Whether the terms 'gender identity' as defined in Section 2(1)(f) and the term 'gender expression" as defined in section 2(1)(e) of the impugned Act and as they are used in different provisions of the impugned Act are in accordance with injunctions of the Quran and Sunnah or not?

IV. Whether Islam permits medical treatment for those persons who suffer from physical infirmity in their reproductive system or in sexual organs related to their sex etc.?

48. We have gathered from the arguments of the parties and their pleadings that inclusions of five different terms under one umbrella term of 'transgender person' in section 2(1)(n) is a source of conflation and confusion regarding the impugned law, therefore, we have formulated this as a point of determination being necessary point to be dilated upon at the first place.

Determination Point-I

Whether the five terms (Intersex (*Khusra*), Eunuch, Transgender Man, Transgender Woman and *KhawajaSira*), which are included in the definition of "transgender person" in Section 2(1)(n) of the impugned Act are identical and similar, hence they are included in the definition of one term or are they different?

Section 2(n) of the impugned Act contains the definition of 'transgender person as:

> "***Transgender Person****" is a person who is:---*
> *(i) Intersex (Khusra) 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 or gender expression*

> *differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth."*

Difference between Intersex and Transgender Person

49. The inclusion of term 'intersex' within the meaning of term 'Transgender person', as is done in the impugned Act, is one of the main sources of misunderstanding and confusion regarding this law; the inclusion of two terms within the meaning as synonym to one another is a main source of conflation. Both the terms 'intersex' and 'transgender' have two different meanings. This is a fundamental flaw in the term 'transgender person' as defined in the impugned Act, because the "gender identity" of Intersex persons is associated with the sex assigned to them at the time of birth; whereas "Transgender" is a term, which describes people whose internal sense of being male or female, does not match with the sex they were assigned at the time of birth.

The National Center for Transgender Equality (USA) defines the difference between "transgender" and "intersex" as under:

> *"People sometimes confuse being transgender and being intersex. Intersex people have reproductive anatomy or genes that don't fit typical definitions of male or female, which is often discovered at birth. Being transgender, meanwhile, has to do with your internal knowledge of your gender identity. A transgender person is usually born with a body and genes that match a typical male or female, but they know their gender identity to be different."*[1]

UNHCR has published an Emergency Handbook in which it contains the definitions of different terms related to different sexual orientations. The said handbook contains the definitions of "intersex" and "transgender" as under:

> *"Transgender, umbrella term used by persons whose gender identity and, in some cases, gender expression differ from what is typically associated with the sex they were assigned at birth. They can also have a range of sexual orientations."*

[1] https://transequality.org/issues

> *'Intersex, an umbrella term describing a wide range of natural bodily variations in sex characteristics (including genitals, gonads, reproductive organs and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex people are not necessarily people who have a different gender identity or sexual orientation to the norm. Rather, their bodies have different sex characteristics to the norm. They are not to be considered the same as transgender persons."*[2] *[emphasis added]*.

The Amnesty International on the International Intersex Awareness Day, which is 26th of October, initiated a campaign to clarify five basic misunderstandings about Intersex persons. One of them is that intersex persons should not be confused with the transgender person. These two are completely different terms. Amnesty international explains this as:

> *"Being intersex has nothing to do with being transgender. Our physical sexual characteristics have nothing to do with how we consider our gender identity, or with who we are attracted to. The word "transgender" – or trans – is an umbrella term for people whose gender identity is different from the sex they were assigned at birth. The word "intersex" relates to physical sexual characteristics, and not to an internal sense of identity. An intersex person may also identify as trans, but they are separate things, because gender and sex are separate. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither. Both intersex and trans people have the right to choose their own gender identity, and should never be forced to live with bodies or identities they do not feel comfortable with."*[3] *[Emphasis added]*

The Oxford University LGBTQ+ Society published a Glossary of Trans and Intersex terms according to which the terms intersex and transgender are defined as:[4]

> *"Intersex - A term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't fit the typical definitions of female or male. Intersex people are born with physical, hormonal or genetic features that*

---

[2] https://emergency.unhcr.org/entry/62590/lesbian-gay-bisexual-transgender-and-intersex-lgbti-persons

[3] https://www.amnesty.org/en/latest/news/2018/10/its-intersex-awareness-day-here-are-5-myths-we-need-to-shatter/

[4] https://www.oulgbtq.org/trans-and-intersex-glossary.html

> *are neither wholly female nor wholly male, or are a combination of female and male."*
>
> *"Transgender or trans — [adjective] Used as an umbrella term for people whose gender identity differs from what is typically associated with the sex they were assigned at birth."*

The societies that promote LGBTQIA+ rights (This acronym stands for lesbian, gay, bisexual, transgender, queer, intersex, asexual, and the '+' holds space for the expanding and new understanding of different parts of the very diverse gender and sexual identities) clearly differentiate intersex from transgender. For Example LGBTQIA+ Resource Center explains the difference between the two as[5]:

> *"Intersex is an umbrella term that describes a wide range of natural bodily variations that do not fit typical definitions of male and female bodies. These variations may include, but are not limited to, unique chromosome compositions, hormone concentrations, and external and internal biology. Being transgender means one's internal sense of self does not correlate with the sex one was assigned at birth. Transgender people are often born with typical male or female anatomy or genes but know that their gender identity is something different than what they are born with."*

The Intersex Society of North America defines intersex as[6]:

> *"A general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male."*

The Medical News Today further clarifies the difference of intersex and transgender as:[7]

> *"Sex chromosomes determine the biological sex of a baby. Intersex people may have chromosomes typical to a male or female but have no internal or external anatomy that corresponds to biological male or female anatomy."*
>
> *Transgender people are usually born with genetics and anatomy that match a biological definition of male or female. Transgender people may feel they have a different gender identity to their assigned sex at birth."*

---

[5] https://lgbtqia.ucdavis.edu/trans-101
[6] https://www.medicalnewstoday.com/articles/what-is-transgender#vs-intersex
[7] Ibid.

The Huffington Post UK[8] explains the difference between intersex and transgender as:

> *"**Intersex**:*
> *This is the definition for people born with physical sexual or reproductive qualities (which include chromosomes and hormones) that do not fit into the binary male/female distinctions. In intersex cases, the biological sex of a person is ambiguous.*
>
> ***Transgender**:*
> *Being transgender means that there is a mismatch between the sex you were assigned at birth and your gender identity. For example, in the case of transgender women – they would have been assigned as male when they were born for displaying the physiological characteristics that are typically male, but may identify as female in terms of how they see themselves within the social constructs of the world.*
>
> *It is possible to be both intersex and transgender, but they are not the same thing. Intersex relates to a physiological designation – which sex a person is assigned based on the physiological traits they display – while being transgender is about how someone expresses their gender identity."*

50. From all the above definitions of intersex and transgender and on the basis of many more available different references, it becomes evident that 'intersex' and 'transgender' are two different categories of persons and a 'transgender' person cannot be called an 'intersex' person or vice versa. Whereas, the Impugned Act includes the term intersex within the definition of 'Transgender Person' in Section 2(1)(n) which is one of the causes of confusion and misunderstanding in the impugned legislation.

51. We have also observed this difference very clearly during the hearing of this case when certain persons who identified themselves as intersex persons and who are also parties to this case (namely Nadeem-uz-Zafar Khan alias Kashish, Julie Khan and Almas Bobby, etc.) stressed the need to differentiate themselves from those persons who are identifying themselves as transgender persons within the definition of Section 2(1)(n) of the impugned Act.

---

[8] https://www.huffingtonpost.co.uk/2017/02/08/intersex-vs-transgender-heres-what-you-need-to-know_a_21709480/

52. It is observed that many people in Pakistan who are either not well versed in the subject or with the English language terminologies being used nowadays think that the word 'Transgender' is an English translation of Urdu word *Khusra* (خسرہ), whereas that is not the case. The English word for *Khusra* is intersex as is mentioned in the section 2(1)(n)(i) of the impugned law. Islamic law recognizes the "gender identity" of intersex person which is based on some physical attributes or biological feature of a person, but does not recognize the "gender identity" of a transgender persons which is based on their self-perception and innermost feelings about their sex.

Medical Treatment of Intersex persons

53. Islam being pro-life religion promotes protection and promotion of life or *Hifz al-nafs* (حفظ النفس) and, protection and promotion of progeny or *Hifz al-Nasl* (حفظ النسل) are two of the five basic goals of Shariah (*Maqasid Al Shariah*). Therefore, on the basis of these two principles of Shariah, the medical treatment of intersex persons to treat any physical and biological infirmity in the sexual organs and reproductive system of intersex persons is not only permissible but desirable under Shariah Law according to the Islamic injunctions, therefore, in accordance with these principles of Shariah, any medical treatment and cure of intersex persons which helps them in their complete sex affirmation as either male or female is preferable under the principles of *Maqasid Al Shariah* mentioned hereinabove.

Difference Between Eunuch and Transgender Person

54. Historically, the term eunuch refers to a man who had been castrated, often for social or cultural reasons. The term is considered outdated and may be considered derogatory by some. In contemporary usage, the term is sometimes used to refer to individuals who have had their testes removed

either due to some serious medical conditions like cancer, etc. or due to some accident.

In sub-section (ii) of Section 2(1)(n) of the impugned Law the term 'eunuch' is defined as:

> *"(ii) eunuch assigned male at birth, but undergoes genital excision or castrated;"*

According to Black's Law Dictionary word eunuch means:
"A male of the human species who has been castrated."[9]

According to Corpus Juris Cecundum eunuch means:

> *"In its primary and general signification, a castrated male of the human species. In its secondary meaning, unproductive; barren.(Kan. –Eckert v. Van Pelt, 76 P. 909, 910, 69 Kan. 357, 66 L.R.A. 266) "*[10]

Section 2(1)(n)(ii) of the impugned Law talks about a eunuch person, which includes male person who undergoes excision or castration. Such persons are referred to in Arabic by the term *Khassi* (خصی), which is also used in Urdu in the same meaning, whereas in Urdu the terms of "*Khawaja Sira*", and "*Aakhta*" are used for castrated male person. According to Oxford English-Urdu Dictionary, the term 'eunuch' is translated as *'KhwajaSira'* and defined as:

"آختہ کیاہوامرد، خصوصاً محل میں مامور خواجہ سرا" ۔[11]

The term "*Khawaja Sira*" (خواجہ سرا) is defined in different Urdu dictionaries as:

1. "وہ مرد (خصوصاً غلام) جو خصی کر دیا گیاہو اور زنانے مکان میں آمد ورفت اور خدمت پر مامور ہو (شاہی کے زمانے میں بعض غلاموں اور نوکروں کو خصی کر دیا جاتا تھا جو شاہی بیگمات کے محل میں بے روک ٹوک آتے جاتے اور کام کاج کرتے تھے)، نامرد، ہیجڑا، مخنّث" ۔[12]

---

9 Henry Campbell Black, M.A., *Black's Law Dictionary,* Revised 4th Ed., 1968, St. Paul, Minn. West Publishing Co.

10 Ref. Corpus Juris Secundum by Francis J. Ludes and Harold J. Gilbert (Vol.31), 3rd Reprint (1980)

11 Shan ul Haqq Haqqi, Oxford English-Urdu Dictionary, ISBN-13: 978-0195793406

12 اردو لغت، قومی تاریخی وادبی ورثہ ڈویژن، حکومت پاکستان، https://bit.ly/3CPeJHG

2. "خواجہ سَرا بَنانا: مرد کے خصیے نکلوا کر اس کی قوت مردمی کو ختم کر دینا، خصّی کرنا"۔[13]

3. "وہ غلام جو نامرد ہو، اور گھر میں زنانہ کام کرتا ہو۔" [14]

4. "خواجہ سرا، اسم مذکر، وہ خصی غلام جو گھر میں آ جا سکے، ناظر۔[15]"

5. "خواجہ سرا گھر سے تعلق رکھنے والے ان عضو بریدہ اشخاص کو کہتے ہیں جو امراء و وزرا، سلاطین اور رؤساء وغیرہ کے محل سراؤں میں بطور دربان یا چوبدار حاضر باش رہتے اور احکام رسانی کی خدمات بجالاتے ہیں۔ ہیجڑے کا اعزازی نام خواجہ سرا قرار پایا تھا"۔[16]

For castrated male there are many terms used in Urdu in addition to *Khawaja Sira* and are generally considered as derogatory terms, which are described as under:

(1) وہ شخص جس کے خصیے اور آلہ تناسل کاٹ دیا گیا ہو۔ آختہ، خصی

(2) مخنث، زنخا، ہیز، خوجہ، خواج سرا

(3) (صفت): نامرد، زنخا، زنانہ"۔[17]

ہیجڑا: اسم مذکر (از ہیز بمعنی مخنث)

(1) خصی، آختہ، فوطے نکالا ہوا شخص جس کے خصیے اور آلہ تناسل کاٹ ڈالا (گیا) ہو۔

(2) مخنث، ہیز، نپنسک، خوجہ، خواجہ سرا

(3) (صفت): نامرد، زنخا، زنانہ، زن صفت، مادہ رو، بودا رست، وہ شخص جو بہادر نہ ہو"۔[18]

ہیجڑا بَنانا: نامرد بنانا، زنخہ بنانا، نپنسک بنانا، لڑکے کا عضو تناسل مع خصیتین کاٹ کر مخنث بنانا، ہیجڑوں کے پنتھ یا فرقے میں داخل کرنا، ہیجڑوں میں ملانا" ۔[19]

According to these dictionaries the term "*KhwajaSira*" is used for eunuch or for a castrated male. So far as the term "*KhawajaSira*" is concerned as it is used in the impugned Act in Section 2(1)(n)(iii), it is inappropriately used, because, it is an Urdu translation of the English word eunuch or castrated male. Hence, this misplacement of the term of *KhwajaSira* in the impugned

---

13 اردو لغت، قومی تاریخی و ادبی ورثہ ڈویژن، حکومت پاکستان، https://bit.ly/3CPeJHG

14 مولوی نور الحسن، نور اللغات، (اردو)، ج 2، ص 305، ط: حلقہ اشاعت، لکھنؤ، ہند، سن اشاعت: 1917ء

15 سید احمد دہلوی، فرہنگ آصفیہ، ج 2، ص 207

16 سید احمد دہلوی، فرہنگ آصفیہ، ج 2، ص 207، مزید تفصیلات و تاریخی پس منظر بھی کتاب میں موجود ہے۔ نیز دیکھئے: سالانہ رپورٹ برائے سال 2015-2016ء، اسلامی نظریاتی کونسل، اسلام آباد، ص 256، 257

17 خواجہ عبد الحمید، جامع اللغات، جلد دوم

18 سید احمد دہلوی، فرہنگ آصفیہ، ج 2، ص 207

19 سید احمد دہلوی، فرہنگ آصفیہ، ، ج 4، ص 207

Act is a source of another confusion regarding this law and can be a source of abuse of this Law very easily. The process of undergoing genital excision or castration cannot be left upon the personal will and whim of a person. Furthermore, the procedure of castration is only associated to male persons. It may only be done in response to serious medical requirement in exceptional cases because generally under Islamic law no one is allowed to undergo genital excision or castration.

55. In the impugned Act this term of *KhawajaSira* instead of being mentioned in Section 2(1)(n)(ii) as an Urdu translation of an English word eunuch, is erroneously mentioned in Section 2(1)(n)(iii) which not only causes irregularity in the legislation but also makes a source of confusion in understanding the law. The placement of this term (*KhawajaSira)* at improper place i.e. in Section 2(1)(n)(iii) instead of Section 2(1)(n)(ii) is affecting and undermining the purpose of this law, castration is a physical problem related to genitals part of a male person. Encyclopedia of Fiqh (*Al-Mawsoo'ah al-Fiqhiyyah*) discussed this issue in detail. The relevant portion of it is as under:

> *"Castration of the human being is prohibited, whether he is a child or an adult. Ibn Hajar said: it is prohibited, therefore it is haraam, and there is no difference of opinion concerning that in the case of human beings."*[20]

It is prohibited for a person to do castration deliberately to himself or to someone else. The act of castration generally comes under a prohibited act that amounts to, alteration of creation of Allah, as Allah says in al Quran:

> وَّلَاُضِلَّنَّهُمْ وَلَاُمَنِّيَنَّهُمْ وَلَاٰمُرَنَّهُمْ فَلَيُبَتِّكُنَّ اٰذَانَ الْاَنْعَامِ وَلَاٰمُرَنَّهُمْ فَلَيُغَيِّرُنَّ خَلْقَ اللّٰهِ ؕ وَمَنْ يَّتَّخِذِ الشَّيْطٰنَ وَلِيًّا مِّنْ دُوْنِ اللّٰهِ فَقَدْ خَسِرَ خُسْرَانًا مُّبِيْنًا[21].
>
> *And I will lead them astray, and I will tempt them with false hopes, and I will command them, whereby they shall slit the ears of cattle, and I will command them, whereby they shall alter the creation of Allah. Whoever takes the Satan for friend, instead of Allah, incurs an obvious loss.*

---

[20] . Al -Mawsoo'ah al-Fiqhiyyah vol. 19 pages 120, 121

[21] . النساء الاية 119

This opinion of Islamic law is based on following *Ahadith* which confirm the prohibition of castration:

عَنْ ابْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ قَالَ كُنَّا نَغْزُو مَعَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَيْسَ لَنَا نِسَاءٌ فَقُلْنَا يَا رَسُولَ اللَّهِ أَلَا نَسْتَخْصِي فَنَهَانَا عَنْ ذَلِكَ[22].

Narrated Ibn Masud (RA):
We used to fight in the holy battles in the company of the Prophet (ﷺ) and we had no wives with us. So we said, "O Allah's Apostle (ﷺ)! Shall we get castrated?" The Prophet (ﷺ) forbade us to do so.

عن سعد بن أبي وقاص : رد رسول الله ﷺ على عثمان بن مظعون التبتل ، ولو أذن له لاختصينا .[23]

According to the hadeeth of Sa'd ibn Abi Waqqaas: The Messenger of Allah (blessings and peace of Allah be upon him) forbade 'Uthmaan ibn Maz'oon to be celibate. If he had given him permission, we would have gotten ourselves castrated.

The Holy Prophet (ﷺ) prohibited us from castrating even the animals.[24] He (ﷺ) said, "Castration is not permitted in Islam."[25]

56. In the light of all the above mentioned references and *Ahadith* of the Holy Prophet (ﷺ), we have decided:

(a) That as far as the definition of eunuch is concerned, as it is defined in Section 2(1)(n) (ii), it is against the Injunctions of Islam, because no one is allowed to undergo genital excision or castration in the light of Islamic Injunctions.

(b) However, the genital excision or castration is only permissible in exceptional cases where it is so advised by expert medical professionals in order to cure certain disease. The provision for this exception is missing from the impugned Act, which has to be there compulsorily because otherwise it gives room for interpretation that

---

[22] رواه البخاري (4787) ومسلم (1404.
[23] رواه البخاري (4786 ومسلم (1402
[24] Nayl al-Awtar min Hadith Sayyid al-Akhyar, 8/249.
[25] Al-Sunan al-Kubra, 10/24; Mustadrak al-Wasa'il wa Mustanbat al-Masa'il, 8 287, No. 9463 (Quoted from the Commander of the Faithful Imam 'Ali – A.S.).

'excision of genitals' or 'castration' of a male person is legal and permissible without any restriction.

(c) Causing genital excision or castration of another person is sin and a crime under Islamic law, which is also punishable under different sections of Pakistan Penal Code under Chapter 19, which is relevant to offences affecting the human body including the crime of committing *Itlaf-i-Udw* (اتلافِ عضو) and *Itlaf-i-Salahiyat-i-Udw* (اتلافِ صلاحیت عضو).

57. So far as the term "*KhawajaSira*" is concerned, as it is used in the impugned Act in Section 2(1)(n)(iii), it is misplaced because it is Urdu translation of the English word "eunuch" or "castrated male"; therefore, such misplacement of this term is a source of confusion and misuse of this law because under Islamic law no one is allowed to undergo genital excision or castration without any valid medical reason. Hence, the process of undergoing genital excision or castration cannot be left upon the personal will and whim of a person without any medical requirement in exceptional cases.

58. The definition of term ' transgender person ' as contained in section 2(1)(n) of the Impugned Act suffers from serious mistakes of the legislative drafting. As by combining the different terms of (i) intersex, (ii) eunuch, (iii) transgender man, (iv) transgender woman and (v) *KhwajaSira* under one definition of 'transgender person' can be considered a circular definition fallacy as it implies that all these terms are the same or interchangeable. The terms Intersex, Eunuch and *KhawajaSira* refer to biological variations in sex characteristics, while 'transgender man' and 'transgender woman, refer to individuals whose self-perceived gender identity differs from the sex they were assigned at birth or from the sex they have biologically. The inclusion of all these different terms in one single term is the main cause of confusion and conflation about the impugned Act because not only all those persons who

fall within the category of any of the five categories of persons used in section 2(1)(n) are different physically but the ruling of Islamic injunctions according to Quran and *Sunnah* about them are also different.

59. Islamic injunctions recognize the existence of intersex person. In Arabic such persons are called *Khunsa* (خنثیٰ) and in Urdu they are called *Khusra* (خُسرہ) as is also mentioned in Section 2(1)(n)(i) of the impugned Law. Islamic law and jurisprudence provide intersex person all those rights which are mentioned in the impugned Act, even an Islamic State may take affirmative actions to support intersex persons and their communities being special persons, deprived and discriminated community.

60. Similarly, Islamic injunctions do recognize the existence of eunuch persons, which are called as *Khasi* (خصی) in Arabic and in Urdu, in Urdu they are also called *KhawajaSira* (خواجہ سرا), which term is wrongly placed in Section 2(1)(n)(iii) instead of Section 2(1)(n)(ii) being Urdu translation of English word, eunuch. Furthermore, according to Islamic injunctions a person cannot do castration to become eunuch at his will. It is only allowed due to health concerns or on medical grounds. Eunuchs are considered as male persons with serious and permanent sexual infirmity in their male sexual organs. They also fall in the category of special persons and deserve special attention of the society and the State. Hence, Section 2(ii) is not against the injunctions of Islam but needs clarity as identified hereinabove.

61. However, Section 2(1)(n)(iii) of the impugned Act is against the injunctions of Islam for the reason stated and discussed hereinabove because many Islamic injunctions and direction are subjected to and are based on the biological sex of a person (male or female) which cannot be based on the basis of the innermost feelings or self-perceived identity of a person (male or female) about his or her “gender” being different from the

sex he or she has since birth, therefore, Section 2(1)(n)(iii) of the Impugned Act is against the injunctions of Islam as laid down in the Holy Quran and *Sunnah* of the Holy Prophet (ﷺ).

Determination Point II

Whether sex or gender provides the basis for gender identity of a person as male or female in the light of the injunctions of Islam as laid down in the Holy Quran and *Sunnah*?

62. Sex and gender are two different words or terms. To decide this point of determination it is imperative to understand the meaning of terms "sex and "gender" in English, Urdu and Arabic in order to understand the use of these terms, especially the term of "gender" in different phrases, like "gender identity", "gender expression" or "gender recognition".

In the English language the word 'sex' in light of standard English language / dictionaries, legal and medical dictionaries and encyclopedias etc. means as follows:

Collins English Dictionary defines sex[26] as:

1. (Biology) the sum of the characteristics that distinguish organisms on the basis of their reproductive function.
2. (Biology) either of the two categories, male or female, into which organisms are placed on this basis.
3. (Physiology) short for sexual intercourse
4. Feelings or behaviour resulting from the urge to gratify the sexual instinct
5. sexual matters in general
6. of or concerning sexual matters: sex education; sex hygiene.
7. based on or arising from the difference between the sexes.

Webster College Dictionary defines sex[27] as:

1. either the female or male division of a species, esp. as differentiated with reference to the reproductive functions.

---

[26] Collins English Dictionary – Complete and Unabridged, 12th Edition 2014 © HarperCollins Publishers 1991, 1994, 1998, 2000, 2003, 2006, 2007, 2009, 2011, 2014

[27] Random House Kernerman Webster's College Dictionary, © 2010 K Dictionaries Ltd. Copyright 2005, 1997, 1991 by Random House, Inc. All rights reserved.

2. the sum of the structural and functional differences by which the female and male are distinguished.
3. the instinct or attraction drawing one individual sexually toward another, or the cultural phenomena, behavior, or activities that it motivates.
4. sexual intercourse.
5. genitalia.

[1350–1400; Middle English < Latin sexus]

The term sex is defined in American Heritage Dictionary as[28]

1. (a) Sexual activity, especially sexual intercourse.
   (b) The sexual urge or instinct as it manifests itself in behaviour.
2. (a) Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions.
   (b) The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male.
3. Females or males considered as a group
4. One's identity as either female or male.
5. The genitals.

[Middle English, from Latin sexus.]

According to Medical Dictionary the term sex[29]means:

1. The biologic character or quality that distinguishes male and female from one another as expressed by analysis of the person's gonadal, (internal and external), chromosomal, and hormonal characteristics.
2. The physiologic and psychological processes within a person that prompt behaviour related to procreation or erotic pleasure.

[L. sexus]

The Columbia Encyclopaedia elaborates word sex as:[30]

---

[28] American Heritage® Dictionary of the English Language, Fifth Edition. Copyright © 2016 by Houghton Mifflin Harcourt Publishing Company. Published by Houghton Mifflin Harcourt Publishing Company. All rights reserved.

[29] https://medical-dictionary.thefreedictionary.com/sex

> The term sex used to refer both to the two groups distinguished as males and females, and to the anatomical and physiological characteristics associated with maleness and femaleness. Sex relates to the type of reproduction in which specialized reproductive cells (gametes) form and, when united by fertilization, produce a zygote (fertilized egg) that develops into a new individual. The female gamete is called an egg or ovum, and the male gamete a sperm.

The Law Dictionary defines sex[31] as:

1. The physical difference between male and female in animals.
2. In the human species the male is called man, (q.v.) and the female, woman. (q.v.) Some human beings whose sexual organs are somewhat imperfect, have acquired the name of hermaphrodite.

63. In the light of above mentioned definitions of the word sex and on the basis of many other similar references the term "sex" refers to the physical differences between people who are male or female. The sex assigned to a person at birth based on physiological characteristics, including their genitalia and chromosome composition. This assigned sex to a person is also called a person's "natal sex".

64. The "sex" of any person is present in every sex cell of a male and female as the combination of XX or XY chromosomes. Females have two copies of "X" chromosome, while males have one "X" and one "Y" chromosomes. Hence, the sex of any person is an integral part of the body of a person.

65. Similarly, in English language the word "gender" in the light of English dictionaries, legal dictionary and international law has been defined as under:

Cambridge Dictionary defines term gender as:

> "A group of people in a society who share particular qualities or ways of behaving which that society associates with being male, female, or another identity"

The Britannica Dictionary explains the meaning of gender as:

---

[30] J. Maynard-Smith (1978).The Columbia Electronic Encyclopedia™ Copyright © 2022, Columbia University Press. Licensed from Columbia University Press. All rights reserved.
[31] A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier.

1. a person's own sense of being male, female, some combination of male and female, or neither male nor female
   - young people who are questioning their gender [who are questioning whether their sense of being male, female, etc. matches what they or others previously assumed]
     — often used before another noun
   - people of different gender identities [people who have different senses of being male, female, etc.]
   - gender fluidity [the state of not having a fixed sense of being male, female, etc.]
2. the state of having one of two major body forms (male or female) that occur in many species : sex
3. the ways of thinking, behaving, etc. that are typically or traditionally associated with one sex
4. Grammar: one of the categories (masculine, feminine, and neuter) into which words (such as nouns, adjectives, and pronouns) are divided in many languages

Oxford English Dictionary:

a) In some (esp. Indo-European) languages, as Latin, French, German, English, etc.: each of the classes (typically masculine, feminine, neuter, common) of nouns and pronouns distinguished by the different inflections which they have and which they require in words syntactically associated with them; similarly applied to adjectives (and in some languages) verbs, to denote the appropriate form for accompanying a noun of such a class. Also: the fact, condition, or property of belonging to such a class; the classification of language in this way.

b) In extended use. Esp. in non-European languages: any of several other analogous categories into which nouns may be divided (regardless of any connection with sex).

c) A class of things or beings distinguished by having certain characteristics in common; (as a mass noun) these regarded collectively; kind, sort. Obsolete.

d) That which has been engendered (gender v.1 2b); product, offspring. Obsolete. Rare

e) gen. Males or females viewed as a group; = sex n.1 1. Also: the property or fact of belonging to one of these groups.

f) Psychology and Sociology (originally U.S.). The state of being male or female as expressed by social or cultural distinctions and differences, rather than biological ones; the collective attributes or traits associated with a particular sex, or determined as a result of one's sex. Also: a (male or female) group characterized in this way.

The Law Dictionary (Featuring Black's Law Dictionary, 2nd Ed):

"Gender: Defined difference between men and women based on culturally and socially constructed mores, politics, and affairs. Time and location give rise to a variety of local definitions. Contrasts to what is defined as the biological sex of a living creature."

The term "Gender" in International Law

Rome Statute of the International Criminal Court 1998, Article 7

(Para 3):

"For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

66. The World Health Organisation summarizes the difference between sex and gender in the following way:

"Sex refers to "the different biological and physiological characteristics of males and females, such as reproductive organs, chromosomes, hormones, etc."

"Gender refers to "the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. The concept of gender includes five important elements: relational, hierarchical, historical, contextual and institutional. While

most people are born either male or female, they are taught appropriate norms and behaviours – including how they should interact with others of the same or opposite sex within households, communities and work places. When individuals or groups do not "fit" established gender norms they often face stigma, discriminatory practices or social exclusion – all of which adversely affect health."[32]

67. The Council of Europe Convention on preventing and combating violence against women and domestic violence is an international human rights document that contains a definition of gender. In Article 3, gender is defined as "*socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.*"[33]

68. It is a well-known fact that in many languages there are no different words for Sex and Gender. In Arabic language:

'Gender' and 'sex' both defined in a medical dictionary (English – Arabic) as:

"جنس – ذكر أو أنثى"[34]

According to Al-Mawrid, 'gender' is:

(1) الجنس (من حيث الذكورة والأنوثة)

(2) الجنس (من حيث التذكير والتأنيث في اللغة)[35]

According to the same dictionary, 'sex' is:

(1) الجنس (مج):

(أ) الذكورة أو الأنوثة،

(ب) مجموع الذكور أو مجموع الإناث[36]

In another modern dictionary of English-Arabic, An-Nafees, 'Gender' is:

الجنس (من حيث التذكير والتأنيث في اللغة)[37]

And 'Sex' is:

---

32 Council of Europe at: https://www.coe.int/en/web/gender-matters/sex-and-gender

33 The Council of Europe Convention on preventing and combating violence against women and domestic violence.

34 Kamal El-Din El-Hennawi, Medical Terms Dictionary, English-Arabic, Manshurat al-Maktaba-tul-Asriyyah, Beirut, Lebanon

35 Munir Ba'albaki, Al-Mawrid, A Modern English-Arabic Dictionary, 2005, 49th Ed., DAR El-Ilm Lil-Malen, Beirut, Lebanon

36 Munir Ba'albaki, Al-Mawrid, 2005, 49th Ed., DAR El-Ilm Lil-Malen, Beirut, Lebanon

37 Magdi Wahba, An-Nafees, The 21st Century English-Arabic Dictionary, 2000, Librairie du Liban Publishers SAL, Beirut, Lebanon

(1) الجنس (من حيث الذكورة والأنوثة)
(2) فرد من أفراد الجنس المقابل (أو الآخر)[38]

Member of the opposite

Whereas, the term "sex" is translated in Urdu as *Jins* (جنس) and term gender is translated in Urdu as *sinf* (صنف).

69. 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'. In those cultures and societies the gender of a person has precedence over his or her sex. This is relatively a recent phenomenon but is getting ground very fast in some cultures and societies. However, in Islam the defining factor for a human being in this context is "sex" not the "gender". According to the teachings of Islam, a person has to be identified from his or her biological and physiological identity which is his or her **"**sex".

70. In many cultures and languages "sex" and "gender" are considered two different terms in characterizing a person as male or female. Some cultures and societies give "gender" a precedence over the sex of a person and characterize a person as male or female according to their roles in society or as they perceive themselves irrespective of their "sex", whereas other societies and cultures give the physical sex of a person a precedence over the "gender" of that person to characterize him or her as a male or female.

71. According to the following verse of the Holy Quran, Allah has created human beings as male or female and through them He has created couples, which ensures the procreation and continuation of the human race. Islam only recognizes two sexes i.e male and female, with the sexual union of whom the birth of a human being is possible. Therefore, Islam requires both the male and female persons to make their gender subject to their respective

---

38 Magdi Wahba, An-Nafees, The 21st Century English-Arabic Dictionary, 2000, Librairie du Liban Publishers SAL, Beirut, Lebanon

sexes. The procreation of human race through Shariah compliant legal means is one of the purposes of the Shariah which is called *Hifz-ul-Nasal* (حفظ النسل). This is unanimously recognized as one of the goals of Shariah by all the Muslim Jurists. Islam only gives recognition to only two sexes i.e. male sex and female sex and, therefore, it makes the sex as the basis of identity of a male person and a female person and not their gender. Gender is subject to the sex of a person according to the following verses of the Holy Quran which are the basis for the promotion and protection of human race and progeny:

يٰۤاَيُّهَا النَّاسُ اتَّقُوْا رَبَّكُمُ الَّذِيْ خَلَقَكُمْ مِّنْ نَّفْسٍ وَّاحِدَةٍ وَّخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيْرًا وَّنِسَآءً ۚ وَاتَّقُوا اللّٰهَ الَّذِيْ تَسَآءَلُوْنَ بِهٖ وَالْاَرْحَامَ ؕ اِنَّ اللّٰهَ كَانَ عَلَيْكُمْ رَقِيْبًا ﴿۱﴾[39]

"O humanity! Be mindful of your Lord Who created you from a single soul, and from it He created its mate, (i.e., Adam and Eve.) and through both He spread countless men and women. And be mindful of Allah—in Whose Name you appeal to one another—and ˹honour˺ family ties. Surely Allah is ever Watchful over you."

هُوَ الَّذِيْ خَلَقَكُمْ مِّنْ نَّفْسٍ وَّاحِدَةٍ وَّجَعَلَ مِنْهَا زَوْجَهَا لِيَسْكُنَ اِلَيْهَا ۚ فَلَمَّا تَغَشّٰىهَا حَمَلَتْ حَمْلًا خَفِيْفًا فَمَرَّتْ بِهٖ ۚ فَلَمَّاۤ اَثْقَلَتْ دَّعَوَا اللّٰهَ رَبَّهُمَا لَئِنْ اٰتَيْتَنَا صَالِحًا لَّنَكُوْنَنَّ مِنَ الشّٰكِرِيْنَ ﴿۱۸۹﴾[40]

"He is the One Who created you from a single soul, then from it made its spouse so he may find comfort in her. After he had been united with her, she carried a light burden that developed gradually. When it grew heavy, they prayed to Allah, their Lord, "If you grant us good offspring, we will certainly be grateful."
[Emphases Added]

In the following verse of the Holy Quran the Allah (SWT) says that He has created only two sexes hence all the human being are divided into these two sexes of male and female.

يٰۤاَيُّهَا النَّاسُ اِنَّا خَلَقْنٰكُمْ مِّنْ ذَكَرٍ وَّاُنْثٰى.[41]

"O Mankind! We created you from a male and a female."

وَبَثَّ مِنْهُمَا رِجَالًا كَثِيْرًا وَّنِسَآءً ۚ [42]

"and from the two of them, He spread forth multitudes of men, and of women."

---

39 An-Nisaa, 4:1
40 Al-A'raf, 7:189
41 Al-Hujuraat, 49:13
42 An-Nisaa, 4:1

This concept is further endorsed by another verse:

ثُمَّ كَانَ عَلَقَةً فَخَلَقَ فَسَوّٰى ﴿٣٨﴾ فَجَعَلَ مِنْهُ الزَّوْجَيْنِ الذَّكَرَ وَالْاُنْثٰى ﴿٣٩﴾

43

"Then he became a clot; then He created him and formed him. And made of him the two sexes, male and female."
[Emphases Added]

The above mentioned verses of the holy Quran direct us that human beings are divided into two sexes i.e. male and female and we call them in Urdu *Mard* (مرد) and *Aurat* (عورت), respectively. Hence, according to the injunction of Islam there is no other sex or gender other than male and female. Any human being who has some 'defect' or 'deficiency' in his or her sexual, biological, physiological or hormonal characteristic from his or her natal sex then Islamic Law or Shariah does not consider such a human being as a person of some other sex or gender. Islam clearly refers to such a person as member of either of the two sexes i.e. male or female. Such persons are called Khunsa in Arabic which are divided into "male *Khunsa'* and 'female *Khunsa'* and which are closely translated into English as 'intersex' persons.

72. Since in Islam 'sex' is the basis of identity of male and female therefore, Islam does not allow the voluntary change of sex by any male or female, either by way of medical or hormonal etc. intervention. The basis of this is the Hadith of the Holy Prophet (ﷺ) in which he categorically forbade castration of male persons. In addition to that to castrate someone like any slave or any captive is forbidden in Islam. There are many *Ahadith* in this regard, some of which are as under:

عَنْ ابْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ قَالَ كُنَّا نَغْزُو مَعَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَيْسَ لَنَا نِسَاءٌ فَقُلْنَا يَا رَسُولَ اللَّهِ أَلَا نَسْتَخْصِي فَنَهَانَا عَنْ ذَلِكَ[44].

Narrated Ibn Masud (RA):

We used to fight in the holy battles in the company of the Prophet (صلى الله عليه وآله وسلم) and we had no wives with us. So we said, "O

---

43 Al-Qiyaama, 75: 38-39

44 رواه البخاري (4787) ومسلم (1404).

Allah's Apostle (ﷺ)! Shall we get castrated?" The Prophet (صلى الله عليه وآله وسلم) forbade us to do so.

عن سعد بن أبي وقاص : رد رسول الله ﷺ على عثمان بن مظعون التبتل ، ولو أذن له لاختصينا .[45]

According to the hadeeth of Sa'd ibn Abi Waqqaas: The Messenger of Allah (blessings and peace of Allah be upon him) forbade 'Uthmaan ibn Maz'oon to be celibate. If he had given him permission, we would have gotten ourselves castrated.

عن سَعْدَ بْنَ أَبِي وَقَّاصٍ يَقُولُ رَدَّ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَلَى عُثْمَانَ بْنِ مَظْعُونٍ التَّبَتُّلَ وَلَوْ أَذِنَ لَهُ لَاخْتَصَيْنَا حَدَّثَنَا أَبُو الْيَمَانِ أَخْبَرَنَا شُعَيْبٌ عَنْ الزُّهْرِيِّ قَالَ أَخْبَرَنِي سَعِيدُ بْنُ الْمُسَيَّبِ أَنَّهُ سَمِعَ سَعْدَ بْنَ أَبِي وَقَّاصٍ يَقُولُ لَقَدْ رَدَّ ذَلِكَ يَعْنِي النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَلَى عُثْمَانَ بْنِ مَظْعُونٍ وَلَوْ أَجَازَ لَهُ التَّبَتُّلَ لَاخْتَصَيْنَا

Narrated Sad bin Abi Waqqas (RA):

Allah's Apostle (صلى الله عليه وآله وسلم) forbade 'Uthman bin Maz'un to abstain from marrying (and other pleasures) and if he had allowed him, we would have gotten ourselves castrated. (1) Narrated Sad bin Abi Waqqas (RA) :

The Prophet (صلى الله عليه وآله وسلم) prevented 'Uthman bin Mazun from that (not marrying), and had he allowed him, we would have got ourselves castrated.

These *Ahadith* provide the legal basis of the fact that Islam does not allow to alter the sexual organs because in Islam sex is what defines the identity of a human being as male or female.

73. Therefore, in Islam males as well as females are not allowed to act and behave as an opposite sex to the one which was assigned to him or her at the time of his or her birth. Following *Ahadith* of the Holy Prophet (ﷺ) are the basis of this concept that both the persons male or female should conform to the sex at which they were born.

حَدَّثَنَا مُعَاذُ بْنُ فَضَالَةَ، حَدَّثَنَا هِشَامٌ، عَنْ يَحْيَى، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، قَالَ لَعَنَ النَّبِيُّ ﷺ الْمُخَنَّثِينَ مِنَ الرِّجَالِ، وَالْمُتَرَجِّلاَتِ مِنَ النِّسَاءِ وَقَالَ " أَخْرِجُوهُمْ مِنْ بُيُوتِكُمْ ". قَالَ فَأَخْرَجَ النَّبِيُّ ﷺ فُلاَنًا، وَأَخْرَجَ عُمَرُ فُلاَنًا.[باب إِخْرَاجِ الْمُتَشَبِّهِينَ بِالنِّسَاءِ مِنَ الْبُيُوتِ]

Narrated Ibn `Abbas:

The Prophet (ﷺ) cursed effeminate men (those men who are in the similitude (assume the manners of women) and those women who assume the manners of men, and he said, "Turn them out of

[45] **رواه البخاري (4786 ومسلم (1402**

your houses." The Prophet (ﷺ) turned out such-and-such man, and `Umar turned out such-and-such woman.[Bukhari]

حَدَّثَنَا مَالِكُ بْنُ إِسْمَاعِيلَ، حَدَّثَنَا زُهَيْرٌ، حَدَّثَنَا هِشَامُ بْنُ عُرْوَةَ، أَنَّ عُرْوَةَ، أَخْبَرَهُ أَنَّ زَيْنَبَ ابْنَةَ أَبِي سَلَمَةَ أَخْبَرَتْهُ أَنَّ أُمَّ سَلَمَةَ أَخْبَرَتْهَا أَنَّ النَّبِيَّ ﷺ كَانَ عِنْدَهَا وَفِي الْبَيْتِ مُخَنَّثٌ، فَقَالَ لِعَبْدِ اللَّهِ أَخِي أُمِّ سَلَمَةَ يَا عَبْدَ اللَّهِ إِنْ فُتِحَ لَكُمْ غَدًا الطَّائِفُ، فَإِنِّي أَدُلُّكَ عَلَى بِنْتِ غَيْلاَنَ، فَإِنَّهَا تُقْبِلُ بِأَرْبَعٍ وَتُدْبِرُ بِثَمَانٍ. فَقَالَ النَّبِيُّ ﷺ " لاَ يَدْخُلَنَّ هَؤُلاَءِ عَلَيْكُنَّ ". قَالَ أَبُو عَبْدِ اللَّهِ تُقْبِلُ بِأَرْبَعٍ وَتُدْبِرُ بِثَمَانٍ يَعْنِي أَرْبَعَ عُكَنٍ بَطْنِهَا، فَهْىَ تُقْبِلُ بِهِنَّ، وَقَوْلُهُ وَتُدْبِرُ بِثَمَانٍ. يَعْنِي أَطْرَافَ هَذِهِ الْعُكَنِ الأَرْبَعِ، لأَنَّهَا مُحِيطَةٌ بِالْجَنْبَيْنِ حَتَّى لَحِقَتْ وَإِنَّمَا قَالَ بِثَمَانٍ. وَلَمْ يَقُلْ بِثَمَانِيَةٍ. وَوَاحِدُ الأَطْرَافِ وَهْوَ ذَكَرٌ، لأَنَّهُ لَمْ يَقُلْ ثَمَانِيَةَ أَطْرَافٍ.

Narrated Um Salama:
That once the Prophet (ﷺ) was in her (Um-Salama) house, and an effeminate man was there too. The effeminate man said to `Abdullah, (Um Salama's brother) "0 `Abdullah! If Ta'if should be conquered tomorrow, I recommend you the daughter of Ghailan, for she is so fat that she has four curves in the front (of her belly) and eight at the back." So the Prophet (ﷺ) said (to his wives) "These effeminate (men) should not enter upon you (your houses). [Bukhari]

Abu Hurayrah (May Allah be Pleased With Him) reported that an effeminate man who had dyed his hands with henna (as women do) was brought to the Holy Prophet (ﷺ), and it was said, "*O Messenger of Allah! This man is imitating women*." So he banished him to al-Naqi' (as a punishment, sending him to an isolated place, and to protect others). It was said, "*Why do you not kill him?*" He said, "*I have been forbidden to kill those who pray*." (Reported by Abu Dawood, 4928, and others. See Saheeh al-Jaami', 2502).

حَدَّثَنَا مُحَمَّدُ بْنُ بَشَّارٍ، حَدَّثَنَا غُنْدَرٌ، حَدَّثَنَا شُعْبَةُ، عَنْ قَتَادَةَ، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا قَالَ: «لَعَنَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ الْمُتَشَبِّهِينَ مِنَ الرِّجَالِ بِالنِّسَاءِ، وَالْمُتَشَبِّهَاتِ مِنَ النِّسَاءِ بِالرِّجَالِ» **صحيح البخاري (7/ 159)**

حضرت ابن عباس (رض) کہتے ہیں کہ نبی (صلی اللہ علیہ وآلہ وسلم) نے مخنث مردوں اور مردوں کی صورت اختیار کرنے والی عورتوں پر لعنت فرمائی ہے ۔

صحیح البخاري(7/ 159)، حدیث نمبر5885

حَدَّثَنَا مُعَاذُ بْنُ فَضَالَةَ، حَدَّثَنَا هِشَامٌ، عَنْ يَحْيَى، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، قَالَ: لَعَنَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ الْمُخَنَّثِينَ مِنَ الرِّجَالِ، وَالْمُتَرَجِّلاَتِ مِنَ النِّسَاءِ، وَقَالَ: «أَخْرِجُوهُمْ مِنْ بُيُوتِكُمْ»

حضرت ابن عباس (رض) کہتے ہیں کہ نبی (صلی اللہ علیہ وآلہ وسلم) نے مخنث مردوں اور مردوں کی صورت اختیار کرنے والی عورتوں پر لعنت فرمائی ہے اور فرمایا کہ ان کو اپنے گھروں سے نکال دو۔

صحیح البخاري(7/ 159)حدیث نمبر5886

حدثنا أبو بكر بن خلاد الباهلي قال: حدثنا خالد بن الحارث قال: حدثنا شعبة، عن قتادة، عن عكرمة، عن ابن عباس، أن النبي ﷺ «لعن المتشبهين من الرجال بالنساء، ولعن المتشبهات من النساء بالرجال»

حضرت ابن عباس (رض) سے روایت ہے کہ نبی اکرم نے عورتوں کی مشابہت اختیار کرنے والے مردوں پر لعنت فرمائی اور مردوں کی مشابہت اختیار کرنے والی عورتوں پر بھی لعنت فرمائی۔

سنن ابن ماجہ(1/ 614)حدیث نمبر1904، سنن أبي داود(4/ 60)حدیث نمبر4097

- حَدَّثَنَا مَحْمُودُ بْنُ غَيْلَانَ قَالَ: حَدَّثَنَا أَبُو دَاوُدَ الطَّيَالِسِيُّ قَالَ: حَدَّثَنَا شُعْبَةُ، وَهَمَّامٌ، عَنْ قَتَادَةَ، عَنْ عِكْرِمَةَ، عَنْ ابْنِ عَبَّاسٍ، قَالَ: «لَعَنَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْمُتَشَبِّهَاتِ بِالرِّجَالِ مِنَ النِّسَاءِ وَالْمُتَشَبِّهِينَ بِالنِّسَاءِ مِنَ الرِّجَالِ»: «هَذَا حَدِيثٌ حَسَنٌ صَحِيحٌ»

حضرت ابن عباس (رض) سے روایت ہے کہ نبی اکرم نے عورتوں کی مشابہت اختیار کرنے والے مردوں پر لعنت فرمائی اور مردوں کی مشابہت اختیار کرنے والی عورتوں پر بھی لعنت فرمائی۔

سنن الترمذي شاكر(5/ 105)، حدیث نمبر2784

- حدثنا زهير بن حرب، حدثنا أبو عامر، عن سليمان بن بلال، عن سهيل، عن أبيه، عن أبي هريرة، قال: «لعن رسول الله ﷺ الرجل يلبس لبسة المرأة، والمرأة تلبس لبسة الرجل»

زہیر بن حرب، ابوعامر، سلیمان، سہیل، حضرت ابوہریرہ (رض) فرماتے ہیں کہ حضور اکرم (صلی اللہ علیہ وآلہ وسلم) نے اس مرد پر لعنت فرمائی ہے جو عورت کا لباس پہنتا ہو اور اس عورت پر لعنت فرمائی جو مرد کا لباس پہنتی ہو۔ سنن أبي داود (4/ 60)، حدیث نمبر4098

- حَدَّثَنَا يَحْيَى بْنُ إِسْحَاقَ، أَخْبَرَنَا ابْنُ لَهِيعَةَ، عَنْ أَبِي الْأَسْوَدِ، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ: «أَنَّ رَسُولَ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، لَعَنَ الْوَاصِلَةَ وَالْمَوْصُولَةَ، وَالْمُتَشَبِّهِينَ مِنَ الرِّجَالِ بِالنِّسَاءِ، وَالْمُتَشَبِّهَاتِ مِنَ النِّسَاءِ بِالرِّجَالِ»

آپ (صلی اللہ علیہ وآلہ وسلم) نے بال جوڑنے والی اور جڑوانے والی پر لعنت کی ہے اور عورتوں کی مشابہت اختیار کرنے والے مردوں پر لعنت فرمائی اور مردوں کی مشابہت اختیار کرنے والی عورتوں پر بھی لعنت فرمائی۔

مسند أحمد مخرجا(4/ 123)، حدیث نمبر2263

- حَدَّثَنَا مُحَمَّدُ بْنُ جَعْفَرٍ، وَحَجَّاجٌ قَالَا: حَدَّثَنِي شُعْبَةُ، عَنْ قَتَادَةَ، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، قَالَ: «لَعَنَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ» ، قَالَ حَجَّاجٌ فَقَالَ: «لَعَنَ اللَّهُ الْمُتَشَبِّهِينَ مِنَ الرِّجَالِ بِالنِّسَاءِ، وَالْمُتَشَبِّهَاتِ مِنَ النِّسَاءِ بِالرِّجَالِ»

آپ (صلی اللہ علیہ وآلہ وسلم) نے لعنت فرمائی عورتوں کی مشابہت اختیار کرنے والے مردوں پر لعنت فرمائی اور مردوں کی مشابہت اختیار کرنے والی عورتوں پر۔

مسند أحمد مخرجا(5/ 243)حدیث نمبر3151

74. The concept which are considered as relatively new by some cultures and societies that a female person can act and behave like a male and a male can act and behave like a female is explained in a Hadith mentioned herein above, such females are called *Mutarajilat Min al-Nisa* (المترجلات من النساء)

and the males who act like females are called (*Mukhanaseena min al-rejal*) (المخنثين من الرجال) both are cursed by Allah according to the saying of the Holy Prophet (ﷺ). This means that according to Islam if such persons are involved in lewd talk or activities then they can be put under restrictions by law.

75. To answer this question that whether sex should conform to gender or gender should conform to sex, the injunctions of Islam according to the Quran and *Sunnah* of the Holy Prophet (ﷺ) are very clear that gender of a person should conform to the sex of that person. The Quran has categorically stated in many verses that Allah has created human being either male or female. Every Human being is an offspring of male and female upon which the concept of sex and gender of Islam is based according to the teachings of Islam. This clearly means that no one is allowed to act opposite to his or her sex.

76. Hence, according to Islamic injunctions as laid down in the Holy Quran and *Sunnah* of the Holy Prophet (ﷺ), the sex (جنس) of any person has precedence over gender (صنف) of any person, be it male or female, therefore, any law, rule or regulation which gives gender of a person a legal precedence over sex is illegal and void being against the injunctions of Islam as laid down in the Holy Quran and *Sunnah* of the Holy Prophet (ﷺ).

<u>Determination Point III</u>

Whether the terms 'gender identity' as defined in section 2(1)(f) and the term 'gender expression" as defined in section 2(1)(e) of the impugned Act and as they are used in different provisions of the impugned Act are in accordance with injunctions of the Quran and *Sunnah* or not?

77. The impugned law makes "gender" as the basis of" "gender identity" and permits any person to identify himself or herself in accordance to his or her innermost and individual sense as either "transgender man" or transgender woman" in accordance with section 3(1)(n) (iii) of the impugned Act. For having this form of "gender identity" of a person, male or female,

which is different from the sex of person assigned to him or her at birth Section 2(1)(f) of the impugned Act makes it possible for a person to be identified as:

i) Male;

ii) Female;

iii) A blend of both, or;

iv) Neither of them.

Section 2(f), of the impugned Act states as under:

> *"**Gender identity**" means a person's innermost and individual sense of self as male, female or a blend of both or neither; that can correspond or not to the sex assigned at birth."*

This definition of "gender identity" does not conform to the criteria of identity of a male person and a female person according to the injunctions of Islam. It was argued by some respondents before us that according to many studies in the field of Psychology, it is a fact that a person, male or female, can have different perception about his or her gender to the sex assigned to him or her at the time of birth. Consequently, in many cases, such a person acts and behaves differently from what a society expects from them on the basis of the sex assigned to them at the time of birth. In Islam, the basis of "gender identity" of a male or female is the sex of that person. It is the sex of a person which defines a person as a male and female. In Islam, the gender should conform to the sex, and not the sex should be made to conform to the gender. Gender is a social construct as it is being referred nowadays which is dependent on different variables and may be associated with a person or the societal surroundings of that person. Whereas, sex of a person has physiological representation associated with physical, biological and bodily functions of a person. In Islam self-perception of a person which is opposite to the biological sex of that person does not make the basis of 'gender

identity" of a person (male or female) the basis of 'gender identity' of a person is only the biological sex of a person.

78. Islam assigns many religious roles and duties to every Muslim on the basis of their sex, like:

i. All the directions and injunctions regarding marriage in the Holy Quran and *Sunnah* of the Holy Prophet (ﷺ) are based on sex, and not the basis of "self-perceived gender" of a person, like consummation of marriage, the solemnization of *Nikah*, settlement of *Mehr* and pronouncement of *Talaq* and *Khula*, etc. All the directions (احکامات) of Allah and the Holy Prophet (ﷺ) regarding marriage are divided upon the male and female persons. Such directions (احکامات) cannot be executed in accordance with the injunctions of Islam based on Holy Quran and *Sunnah* if the gender identity of a person is allowed to be made on the basis of the term "gender identity" as defined in Section 2(1)(f) of the impugned law.

ii. Some of the directions regarding *Taharah* (طہارہ) in Islam are based on sex of a person, and not on the gender of a person, like the directions to women for the period of menstruation (حیض) have direct linkages with the performance of *Salat* (صلٰوۃ), *Soam* (صوم), and even the *Hajj*. Meaning thereby a person whose sex is female by birth or who is woman and feels that her gender is that of a male and on this basis of her "innermost feelings" and starts "self-perceiving" herself as "male" and thinks it is permissible for her to perform *Salat* (صلٰوۃ) or keep fasting during the period of menstruation (حیض) cannot be allowed in Islam. This change in her "gender identity" will also affect the religious rights of the public at large because for example such a physically female person, who becomes a 'male' on the basis of her self-

perception, will not be allowed to stand in between the *Suf* (صف) of males in a Masjid (مسجد), there are rules for males and for females of making *Suf* in a Masjid to offer prayer.

iii. Similarly, all the directions of Islam regarding division and distribution of inheritance shares are based on the basis of sex of the legal heirs of a deceased. It is the sex of a person, which has the defining status to decide how much share that person will get from the inheritance. A male person cannot get the share of a female person and a female person cannot get the share of a male person. Therefore, the right to inherit as mentioned in Section 7(2) of the impugned Act is against the injunctions of the Islam, which states that:

> *"The share of Transgender Persons shall be determined as per the gender declared on CNIC in accordance with the law of inheritance in Pakistan.*

According to the wordings of Section 7(2) of the impugned Act, the share of inheritance shall be determined as per the gender declared on CNIC by any person, which means if a woman starts feeling that she is a male person and gets herself registered as a male person in the record of NADRA and accordingly gets CNIC, then she will be entitled to get the share of a male out of the inheritable property.

It was also argued before us as that this provision of the impugned Act can be misused by a male also , for example that Civil Servant Pension Rules of some provinces allow that " unmarried daughters are entitle to get benefits from the pension of their parent", so according to the petitioners even a male person in such situation can 'legally' get an advantage by getting a CNIC of 'Transgender female" which means a son of deceased person can legally become "a daughter" of that person by getting himself registered as a "transgender women"

from NADRA in pursuance of some provisions of the impugned Act. In support of their arguments, they relied on a case titled "*Rukhsar versus Govt. of KP and four others" (W.P. No.1277-A/2021)*.

iv. In performance of *Hajj*, if the gender as perceived by someone for himself or herself will be made the basis of 'gender identity' and not the sex, then there may occur a serious problem in performance of *Hajj*, as the *Ahram* (احرام) for male and female persons is different. If a person, who is a female by sex and perceived herself as male, and consequently changes her identity as a man in the documents of NADRA, etc. and accordingly she insists to wear the *Ahram* (احرام) of man to perform *Hajj*, then naturally she cannot be allowed. Likewise, a male person, whose sex is male by birth and subsequently he started perceiving himself as a female and changes the documentation with NADRA and accordingly insists to perform *Hajj*, by wearing female *Ahram* (احرام) on the basis of his right of "gender expression' which is defined in section 2(1)(e) and seeks permission to have accommodation with females while performing *Hajj* on the basis of Section 14, which provides the right of access to public places , then naturally it cannot be allowed. These are serious problems, which the people will face and as a result of which they are not permitted to perform *Hajj* in accordance with the injunctions of Islam.

79. In addition to that we noted that, during hearing of the cases in hand on 18.10.2022, a person namely Shahana stated at bar that under the impugned Act, NADRA issued CNIC with Gender Mark "X" to intersex person , due to which such persons are unable to perform *Umrah* and even *Hajj.* Some other petitioners who appeared before us and identified themselves either as intersex persons or eunuch persons reaffirmed that this is a practical

problem being faced by them regarding inability to perform *Hajj and Umrah* with Gender Mark X Card and that this hindrance is a product of the impugned Act. This shows that the issuance of ID Cards with Gender Mark "X" to intersex persons is creating practical and procedural difficulties and hurdles in performing the religious duty of *Hajj and Umrah*. Upon our query NADRA replied that they do not have any Rules or Regulations for issuance of CNIC with Gender Mark "X", and that it follows the impugned Rules made under the Impugned Act

80. Some intersex persons also filed petitions challenging the impugned law on the ground that the way the term "transgender" is defined in Section 2(1)(n)(iii) of the impugned Act is wrong and the right granted to persons (male and female) to get their gender identity even the name changed in CNIC and other identity document provides the easy way of committing deception and impersonation by some in the society. According to the provision contained in Section 2(1)(f) of the impugned law regarding 'gender identity' on the basis of self-perception, the persons who are either male or female biologically are allowed to change their names and their gender in CNIC issued by NADRA under the category of cards issued by NADRA as "X" gender cards. This Act has opened the gates for badly infringing upon the rights of intersex (*Khunsa*) persons because intersex persons are the persons who are physically impaired and disabled sexually and this law is enacted for the protection of such category of persons which fall within the definition of intersex or eunuchs within the definition of this law. Generally intersex persons are less educated in Pakistan and face worst form of discrimination from the society and the State has no mechanism whatsoever to provide them shelter and support. These intersex person who are called as "*Khusra*" alleged that the Government has promulgated this law supposedly for them because they are

"handicapped" or special persons ; but on the contrary those persons who are physically and mentally fit, male or female persons, just by changing the gender identity in the registration documents of NADRA and identifying them as "transgender man " or "transgender woman" get special benefits provided by the State, whereas the intersex and eunuch persons remained deprived. They categorically stated that the impugned law is a sham law and promulgated with malice. According to them some NGOs only want to forward their agenda. The gist of the written arguments submitted by a person who called herself "Kashish" is reproduced as under:

اس ایکٹ کے تحت خواجہ سراؤں کی شناخت کے لئے قومی شناختی کارڈ میں جنس کے خانے میں X کا اندراج کیا گیا ہے اور یہ اندراج بغیر کسی میڈیکل بورڈ کے پاکستان کا کوئی بھی شہری چاہے وہ مرد ہو یا عورت اپنی مرضی کی صنفی شناخت بنا کر X شناختی کارڈ لے سکتا ہے اور اس ایکٹ کی کلاز III کے تحت (سیلف پرسیوایڈ ینٹی) کے ذریعے کوئی بھی صنفی شناخت کی وجہ سے جو وہ محسوس کرتا ہے اس کو X کارڈ کے ساتھ ملازمت اور معاشرے میں برابری کے حقوق اور خواہش کے مطابق وہ اپنے جنسی اعضاء تولید کو کٹوا کر آپریشن کے ذریعے بھی اس شناخت کو لے سکتا ہے اور یہ سب قانونی طور پر اور اسلامی طور پر قومی اسمبلی میں متفقہ رائے سے منظور ہو چکا ہے اور 4 سال سے اس پر عمل درآمد بھی ہو رہا ہے۔ اس پر عدالت عالیہ کے سامنے مختلف دلائل پیش کئے جا رہے ہیں جو کہ قانونی ماہرین قانون کی روح سے اور اسلام کی روح سے پیش کر رہے ہیں اور یقینا یہ بحث عدالت کو اور معاشرے کو آگاہی دینے میں آسانی پیدا کرے گی۔ میں اس بل میں موجود جو اعتراضات ہیں ان کی طرف آپ کی توجہ دلوانا چاہتی ہوں اور اعتراض اور دلائل کے ساتھ کچھ ایمنمینٹ بھی لکھ رہی ہوں۔ میری محترم عدالت سے گزارش ہے میرے اس تحریری بیان کو ایک Witness اور Victim کی حیثیت سے دیکھے اور خواجہ سراء کلچر کے اندر رہ کر جو قابل اعتراض رسومات اور باتیں ہیں اُس پر عدالت کی توجہ کروانا چاہتی ہوں جس سے عدالت کو فیصلہ کرنے میں کچھ راہنمائی ہو گی۔

اعتراضات اور دلائل برائے حقوقِ خواجہ سراء

(1) 2018 ایکٹ کے تحت وراثت کے حقوق:

اِس ایکٹ میں کوئی بھی عورت اپنا صنفی اظہار مرد بتا کر جنس کے خانے میں X کا اندراج کرواتی ہے اُسے مرد کا حصہ وراثت میں دیا جائے اور اسی طرح پیدائشی مرد جو خود کو عورت سمجھتا ہو اُس کو عورت والا حق دیا جائے، دونوں کو صرف شناختی کارڈ میں X جنس کا اندراج کرانا لازمی ہو گا۔

اعتراض اور دلیل:

2018 ایکٹ کے تحت جو طریقہ کار وراثت کے لئے استعمال کیا ہے اُس نے شریعت کو واضح طور پر بدل دیا گیا ہے۔ شریعت اس کی اجازت نہیں دیتی۔ اس طرح سے فساد کا خطرہ اِس لئے بھی زیادہ ہو جائے گا کہ مثال کے طور پر کسی لڑکی کو 50 لاکھ روپے وراثت میں مل رہا ہے تو اُس کو X شناختی کارڈ بنوانے سے ایک کروڑ مل رہا ہے تو اِس لالچ میں بھی X کارڈ بنوا سکتی ہے۔ اس سے ایک بہت بڑا فساد اور فتنہ پھیل جائے گا۔ سب کی ایک ہی شناخت کس طرح کی جا رہی ہے۔ اسمبلی میں آپ سیٹ تو دینے کی بات کر رہے ہیں جبکہ آپ کو پتہ ہی نہیں خواجہ سراؤں کی تعداد کتنی ہے جب آپ

X کارڈ اکٹھا کریں گے تو X کارڈ جیل میں سے خواجہ سراؤں کی تعداد تو علیحدہ کرنی پڑے گی۔ ہمیں کیا معلوم آپ نے کون کون سی صنفی شناخت کے ساتھ X کارڈ دیا ہے۔

2018 ایکٹ کے مطابق شادی کے حقوق:

جناب عالی! اس ایکٹ کے مطابق X کارڈ سے شادی حق ختم ہو جاتا ہے چاہے وہ شادی کے قابل بھی ہو، میڈیکل فٹ بھی ہو اور اگر وہ پہلے سے شادی شدہ بھی ہو اور بچے بھی ہوں تو وہ ایکس X کارڈ بنواتا ہے تو اُس کے پاس رائٹ آف میرج کا حق ختم ہو جاتا ہے۔

اعتراض اور دلیل:

جناب عالی! اس میں متنازعہ بات یہ ہے کہ ایک مرد خود کو عورت کے طور پر شناخت کرتا ہے اور اُس مرد کی شادی ہوئی ہوئی ہے اور وہ X کارڈ بنوانا چاہتا ہے اور وہ ایک عورت سے جنسی تعلقات بنوا کر بچے پیدا کر چکا ہے تو وہ نادرا میں حلف نامہ جمع کرواتا ہے اور اُس میں وہ بیوی بچوں سے لاتعلق کا اظہار کرتا ہے اور بیوی کو طلاق دے گا تو سوال یہ ہے کہ زوجیت کا حق کہاں گیا، ولدیت کا حق کہاں گیا، بچے کس طرح سے اپنے والد کے شناخت کریں گے۔ X کارڈ کی کیا شناخت ہو گی۔ یہ ایک بہت بڑا مسئلہ ہے۔ اِس کے اندر رائٹ آف میرج کیوں ختم کر دیا ہے۔ صرف اس بناء پر کہ ہم خود کو ایک مختلف صنف سمجھتے ہیں۔ اس پر ہماری شادی کا حق چھین لیا گیا۔ رائٹس آف فیملی، رائٹس آف میرج ہیومن رائٹس کا بنیادی حق ہے۔

2018 ایکٹ کے مطابق والد کی جگہ گرو کو سربراہ بنانا:۔

جناب عالی! ٹرانس جینڈ ایکٹ کے تحت شناختی کارڈ بنوانے کے لئے اگر والد یا بھائی کوئی بھی نہ آئے تو اِس کی جگہ گرو کا شناختی کارڈ نادرا میں جمع کروا کر بھی X کارڈ لیا جا سکتا ہے۔

اعتراض اور دلیل:

جن خواجہ سراؤں کو X کارڈ دیا جا رہا ہے فیملی نظام میں ان کو نہیں رکھا جا رہا۔ اِس بل میں ولدیت ختم ہی کر دی ہے کہ والد یا کسی گھر والے کا شناختی کارڈ ضروری نہیں، آپ کسی بھی گرو کا شناختی کارڈ لے آئیں کافی ہے۔ یہاں پر یہ وضاحت ضروری ہے کہ گرو کون ہے، گرو کی حیثیت کا کس طرح سے تعین کیا گیا، اِس کی قانونی اور شرعی حیثیت کے آپ نے یہ کس طرح سے تعین کر لیا کہ کسی ایک شخص کو آپ گرو بنا کر اس کے نام پر آپ X شناختی کارڈ بنا رہے ہیں۔ اِس طریقہ کار سے ہمارے فیملی نظام کو ختم کیا جا رہا ہے۔ یہ ایک فساد اور فتنے کے سوا کچھ بھی نہیں اور کون بنے گا گرو، کس طرح تعین ہو گا۔

2018 ایکٹ کے مطابق سیاسی حقوق:

جناب عالی! اس ایکٹ کے مطابق X کارڈ والوں کو مخصوص سیٹ اور پارلیمنٹ کا حصہ بنانا اور ووٹ کا حق دیا گیا ہے۔

اعتراض اور دلیل:

جناب عالی! X کارڈ تو دو مختلف صنفی شناخت کی ایک ہی علامت X ہے تو جب خواجہ سراؤں کی مخصوص سیٹ کا اعلان کریں گے تو یہ کیسے پتہ چلے گا کہ X شناختی کارڈ والا خواجہ سرا ہے کہ جینڈر Over کیور ہے۔ انر سیکس ہے، ٹرانس مین ہے یا ٹرانس وومن ہے۔ سب کو ایک ہی امبریلا میں لا کر۔

2018 ایکٹ میں رائٹ ٹو ہیلتھ:

جناب عالی ! اس ایکٹ کے مطابق (سیکس ری سائنمنٹ سرجری) جینڈر کوریکٹو سرجری یہ الفاظ استعمال کیے گئے ہیں، رائٹ ٹو ہیلتھ میں پاکستان کا کوئی بھی شہری اس سرجری کے ذریعے اپنی جنس تبدیل کروا سکتا ہے۔ قانونی طور پر اس کو حق حاصل ہے۔ رائٹ ٹو ہیلتھ کے ذریعے ایسے مردوں کو یونیک کا نام دیا گیا ہے۔

81. In addition to that another person namely Almas Bobby identifying as an intersex person (she also appeared before the august Supreme Court in a case reported as 2013 SCMR 187, and was appointed as the focal person in such matters) raised serious objections to the impugned law stating that the same has been promulgated by the State without the consultation of the intersex persons, instead under the pretext of term "transgender" some non-governmental organizations hijacked the issue of actually sexually disabled persons falling within the definitions of intersex persons. She presented her lengthy arguments before the Court. Some of the contents of her written arguments are as follows:

۲۔ یہ کہ من مظہر سپریم کورٹ آف پاکستان میں پٹیشن نمبری 43/2009، بعنوان 'اسلم' خاکی بنام SSP راولپنڈی' میں فریق تھا/ تھی۔ جس میں مؤقر عدالت عظمیٰ نے خواجہ سراؤں کے بنیادی دستوری حقوق کے تحفظ اور نفاذ کا حکم جاری فرماتے ہوئے NADRA کو حکم دیا تھا کہ خواجہ سراؤں کو خصوصی شناختی کارڈ جاری کیے جانے کا مناسب انتظام و بندوبست کیا جائے۔

۳۔ یہ کہ بعد ازاں جب ٹرانس جینڈرز ایکٹ 2018 بنایا جارہا تھاتو من مظہر نے بطور نمائندہ خواجہ سرا کمیونٹی متعلقہ حکومتی ذمہ داران سے متعدد مرتبہ رابطہ کیا لیکن دانستہ طور پر خواجہ سراؤں اور ان کی برادری نمائندگان کو متذکرہ قانون کو بنانے اور تیاری میں مشاورت سے دانستہ دور اور علیحدہ رکھا گیا۔ حالانکہ من مظہر کو سپریم کورٹ آف پاکستان اور حکومت پنجاب کی جانب سے خواجہ سراؤں کی فوکل پرسن مقرر کیا گیا تھا۔ نقل لف ہے۔

۴۔ یہ کہ متذکرہ متنازعہ قانون بناتے وقت خواجہ سراؤں کی شمولیت و مشاورت لازم وملزوم تھی لیکن غیر خواجہ سرا کمیونٹی (جس میں Lesbian, Gay, Homosexual افراد یعنی LGBTQI+) کو شامل کر دیا گیا جو کہ نہ صرف شریعت بلکہ آئین پاکستان اور سپریم کورٹ کے متذکرہ بالا پٹیشن میں حکم نامے کی صریح خلاف ورزی ہے۔ لہٰذا ٹرانسجینڈرز ایکٹ 2018 کو کالعدم قرار دیا جانا از بس ضروری ولازم ہے۔

۵۔ یہ کہ متنازعہ Transgender Act 2018 میں خنثی اور خواجہ سراؤں کے مفادات اور حقوق کا ہر گز تحفظ نہ کیا گیا ہے بلکہ خنثی اور خواجہ سراؤں کی آڑ لے کر ہم جنس پرستوں اور ٹرانسجینڈر نامی عالمی فتنے کو قانونی تحفظ دیا گیا جو کہ غیر اخلاقی، غیر قانونی، اور غیر شرعی ہے جس کی دستور پاکستان اور شریعت مطہرہ میں بھی کوئی گنجائش نہیں ہے۔

۶۔ یہ کہ شریعت مطہرہ میں حقیقی خنثی اور خواجہ سرا افراد کے حقوق کا ہر ممکن تحفظ کیا ہے لیکن ٹرانسجینڈر ایکٹ 2018ء میں خنثی اور خواجہ سرا افراد کا استحصال کرتے ہوئے دیگر بہروپیوں کو جس میں transwoman, transman, cross-dressers اور جنسی متغیر افراد کو نہ صرف نوازا گیا بلکہ قانونی جواز و تحفظ دیا گیا ہے جو کہ شرعی اصولوں اور ضابطوں کے خلاف ہے نیز خنثی اور خواجہ سرا افراد کے ساتھ سنگین ظلم، زیادتی اور ناانصافی کے مترادف ہے۔

۷۔ یہ کہ من مظہر اور من مظہر کی برادری کے بہت سارے لوگ عینی شاہد ہیں کہ نام نہاد ٹرانسجینڈرز sex-workers ہیں اور ہم جنس پرستی جیسی ملعون سرگرمیوں میں نہ صرف فعال ہیں بلکہ مختلف غیر ملکی NGOs کی وظیفہ خوری کرتے ہوئے پاکستان بھر میں AIDS اور safe sex کی خاطر condomes کی مفت ترسیل وفراہمی میں دن رات مصروف عمل ہیں۔ اور ایک اسلامی معاشرہ میں ان قبیح خدمات کے عوض بھاری غیر ملکی فنڈنگ باقاعدگی سے وصول کر رہے ہیں۔

۸۔ یہ کہ متذکرہ متنازعہ قانون Transgender Act 2018 خواجہ سرا اور خنثی برادری کو ہرگز منظور نہ ہے کیونکہ یہ قانون درپردہ ہم جنس پرستی کے فروغ اور پرچار کے لیے بنایا گیا ہے۔

۹۔ یہ کہ متذکرہ متنازعہ قانون میں خنثی / خواجہ سرا افراد کو شرعی حق وراثت کی منصفانہ شرعی تقسیم سے بھی محروم کیا گیا ہے جو کہ معتبر مسلمہ فقہی اصولوں کے خلاف ہے لہٰذا متذکرہ متنازعہ قانون کو کالعدم قرار دیا جانا نہ صرف عین قرین انصاف بلکہ قانوناً، دستوراً اور شرعاً بھی درست ہوگا۔

عدالت حضور سے مؤدبانہ اور عاجزانہ التماس ہے کہ متنازعہ قانون Transgender Persons (Protection of Rights Act 2018) کو خلاف شریعت ہونے کی بناء پر کالعدم قرار دیا جائے۔

82. In view of above, it is concluded that according to injunctions of Islam the gender identity of a person cannot be based on inner most feelings or as per self-perception of a person which is other than the biological sex of that person as stated in Section 2(1)(f) of the impugned Law while defining the "gender identity", which states as under:

> *"2(1)(f) "Gender identity" means a person's innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth."*

Similarly, the gender identity of a person cannot be based only the basis of his or her attire or outer look or a person presents his or her gender as stated in Section 2(1)(e) of the impugned Law, which states as under:

> *"2(1)(e) "Gender expression" refers to a person's presentation of his gender identity, and the one that is perceived by others."*

Determination Point-IV

Whether Islam permits medical treatment for those persons who suffer from physical infirmity in their reproductive system or in sexual organs related to their sex etc.?

83. Islam being a pro-life religion permits all types of medical cures and treatment for human beings that are lifesaving and promote the cure and health in human beings in the following Hadiths of Sahih Bukhari, in Kitab al Tib the Holy Prophet (ﷺ) said:

> حَدَّثَنَا مُحَمَّدُ بْنُ الْمُثَنَّى، حَدَّثَنَا أَبُو أَحْمَدَ الزُّبَيْرِيُّ، حَدَّثَنَا عُمَرُ بْنُ سَعِيدِ بْنِ أَبِي حُسَيْنٍ، قَالَ حَدَّثَنِي عَطَاءُ بْنُ أَبِي رَبَاحٍ، عَنْ أَبِي هُرَيْرَةَ ـ رضى الله عنه ـ عَنِ النَّبِيِّ صلى الله عليه وسلم قَالَ " مَا أَنْزَلَ اللَّهُ دَاءً إِلاَّ أَنْزَلَ لَهُ شِفَاءً ".
>
> *Narrated Abu Huraira R.A: The Prophet (ﷺ) said, "There is no disease that Allah has created, except that He also has created its treatment."*

In the light of above referred hadith, any kind of medical treatment and cure is legal and permissible which is related to the cure of reproductive infirmity.

84. In this regard, we consider the relevance of the resolution which was passed by the specialized agency of an international organization i.e. OIC of which Pakistan is a member. The Council of the International Islamic Fiqh Academy of the Organization of Islamic Cooperation (OIC), in its twenty-fifth session's meeting in Jeddah, Kingdom of Saudi Arabia, from 29 *Rajab* 3 *Shabaan* 1444 AH, corresponding to 20-23 February 2023, reviewed the research submitted to the Academy on the subject of "Statement of the ruling on changing the gender in Islam", and resolved as follows vide **Resolution No. 251 (25/13)**, **Explaining The Ruling On Gender Reassignment In Islam:**

> ***"FIRST:*** *"Gender Reassignment means the transformation of a male into a female, or the transformation of a female into a male.*
>
> ***SECOND:*** *Gender reassignment is forbidden by Shariah, because it is a change of Allah's creation, which is included in the Almighty's saying: "And surely I will*

lead them astray, and surely I will arouse desires in them, and surely I will command them and they will cut the cattle' ears, and surely I will command them and they will change Allah's creation. (Al-Nisa: 119), and for the hadith narrated by Al-Bukhari on the authority of Anas - may Allah be pleased with him – He said: The Prophet (may Allah's peace and blessings be upon him) cursed the effeminate men and the masculine women, and said: "Expel them out of your houses."

THIRD: *If the husband outwardly transforms himself into a female, then the wife has the right for annulment / dissolution of the marriage contract due to a defect, and if the wife outwardly transforms herself into a male, then the husband may pronounce divorce.*

FOURTH: *The legal provisions relating to males and females, including religious and civil rights and duties, remain constant as they were before one of them apparently transformed himself from male to female, or from female to male, especially with regard to the provisions of custody of minors, maintenance, and inheritance, because his transformation of himself into a female or a male is not considered a real change, but rather an apparent change as decided by the doctors, so it has no effect on the provisions that were proven before one of them against this action.*

The International Islamic Fiqh Academy ***RECOMMENDS****:*

1- *Calling on governments and states to prevent these operations, raising awareness of their dangers and their destructive consequences for the perpetrator and societies, and directing people who have disorders or obsessions in gender identity for psychological or other reasons to be treated.*

2- *Raising awareness of the seriousness of calls that defend homosexuality and gender change, and aim to spread vice and spread obscenity under the pretext of defending individual rights and freedoms.*

3- *Returning to Allah Almighty and resorting to Him and to what is permitted by the true Sharia, and assigning to Him the reasons for medication, for it is healing from all problems, especially mental disorders and others."*

قرارداد کا اردو ترجمہ مندرجہ ذیل ہے:

بسم اللہ الرحمن الرحیم

قرارداد نمبر 251 (13/25)

اسلام میں تبدیلی جنس کے احکامات

اسلامی تعاون تنظیم کے زیرِ سایہ کام کرنے والی بین الاقوامی اسلامی فقہ اکیڈمی کونسل نے اپنے پچیسویں اجلاس منعقدہ از 29 رجب تا 3 شعبان 1444 ہجری بمطابق 20 تا 23 فروری 2023ء سعودی عرب کے شہر جدہ میں اپنے اجلاس اور اکیڈمی کے سامنے پیش کی گئی تحقیق بعنوان: " **اسلام میں تبدیلی جنس کے احکامات** " کا جائزہ لینے، اور اس بارے میں ہونے والی بحث ومباحثہ کو سننے کے بعد، اکیڈمی کے ممبران اور ماہرین کی موجودگی میں مندرجہ ذیل فیصلہ کرتی ہے:

اول: " **تبدیلی جنس** " سے مراد کسی مرد کا عورت کے روپ میں تبدیل ہونا، یا کسی عورت کا مرد کے روپ میں تبدیل ہونا۔

دوئم: جنسی تبدیلی از روئے شریعت حرام ہے، کیونکہ یہ اللہ کی تخلیق میں تبدیلی ہے، جیسا کہ ارشاد باری تعالی ہے: " (شیطان کہے گا) کہ میں ان کو گمراہ کرتا اور امیدیں دلاتا رہوں گا اور یہ سکھاتا رہوں گا کہ جانوروں کے کان چیرتے رہیں اور (یہ بھی) کہتا رہوں گا کہ وہ خدا کی بنائی ہوئی صورتوں کو بدلتے رہیں"۔ (سورۃ النساء: 119)۔

اور امام بخاری نے حضرت انس رضی اللہ عنہ سے روایت نقل کی ہے کہ انہوں نے فرمایا: " رسول اللہ ﷺ نے زنانہ وضع قطع اور چال ڈھال اختیار کرنے والے مردوں پر اور مردوں کی چال چلن اختیار کرنے والی عورتوں پر لعنت بھیجی" اور فرمایا کہ "ان کو اپنے گھروں سے باہر نکال دو" ۔

تیسرا: اگر شوہر ظاہری طور پر عورت کی شکل میں تبدیل ہو جائے تو بیوی کو نکاح کے فسخ کا حق حاصل ہے اور اگر بیوی ظاہری طور پر خود کو مردانہ شکل میں تبدیل کرلے تو شوہر اسے طلاق دے سکتا ہے۔

چہارم: مرد اور عورت سے متعلق قانونی احکامات، بشمول مذہبی اور شہری حقوق اور فرائض، اسی طرح برقرار رہیں گے جیسا کہ ان میں سے کسی ایک کے بظاہر خود کو مرد سے عورت، یا عورت سے مرد میں تبدیل کرنے سے پہلے تھے۔ اور خاص طور پر بچوں کی حضانت، نفقہ، میراث کے حوالے سے، کیونکہ اس کا اپنے آپ کو عورت یا مرد میں تبدیل کرنا کوئی حقیقی تبدیلی نہیں سمجھا جاتا، بلکہ ایک ظاہری تبدیلی ہے جیسا کہ اطباء کا فیصلہ ہے، پس اس پر جو احکامات ثابت ہو چکے اس کے اس اقدام سے ان پر کوئی اثر نہیں پڑے گا۔

اسلامی فقہ اکیڈمی مندرجہ ذیل کی سفارشات کرتی ہے:

1- حکومتوں اور ریاستوں سے مطالبہ کیا جائے کہ وہ اس طرح کی سرجریوں کو روکیں اور ان کے مجرم کی ذات پر اور معاشروں پر جو خطرناک اور تباہ کن نتائج مرتب ہوتے ہیں کے بارے میں بیداری پیدا کریں۔ اور جن لوگوں کو نفسیاتی یا دیگر وجوہات کی بنا پر جنسی شناخت کی خرابی یا جنون ہے ان کا علاج کروائیں۔

2- ہم جنس پرستی اور جنسی تبدیلی کا پرچار کرنے والوں کی سنگینی کے بارے میں بیداری پیدا کریں، جن کا مقصد انفرادی آزادی اور حقوق کے دفاع کے بہانے برائی کی ترویج اور فحاشی پھیلانا ہے۔

3- اللہ تعالیٰ کی طرف اور جس کی شریعت میں اجازت ہے کی طرف رجوع کرنا، اور دوائی کے لئے ذریعے اس کا علاج کرنا، کہ جس میں تمام مسائل، خاص طور پر ذہنی امراض اور دیگر مسائل سے شفا ہے۔

85. Hence, according to the injunctions of Islam in accordance with the principle of *Hifz al-Nasl* (حفظ النسل) i.e. protection of life, the treatment of any infirmity in the sexual organs or reproductive system does not make any male or female into a person of a gender differing from the one which conforms to his or her biological sex. If a woman loses her ability to reproduce due to any reason, then that does not change her gender. Even in case of the complete loss of her reproductive ability, her gender will remain the same, and all the injunctions of Islam i.e *Ahkamat* (احکامات) according to directions of Allah and the Holy Prophet (ﷺ) which are meant for women will continue to apply on her. Same is the case of male persons that in the event of any infirmity in their sexual organs or reproductive system, their gender will not change. Therefore, any kind of corrective surgery in the reproductive organs is permissible according to the injunctions of Islam on the basic principles of Shariah i.e. *Hifz al- Nafs* (حفظ النفس) i.e. protection of life and *Hifz al-Nasl* (حفظ النسل) i.e. protection of progeny. Any kind of medical intervention in a human body which adversely affects the sexual ability and reproductive ability of that person without any valid medical reason is not permissible. All such medical treatments must be carried out in accordance with the governing principle that the gender of a person must conform to the sex of a person.

86. Senators Mushtaq Ahmad Khan and Kamran Murtaza, Senior ASC along with other petitioners argued that complete impugned Law is against the injunctions of Islam as laid down in the Holy Quran and *Sunnah* because nobody is allowed to change his or her gender identity on the basis of their innermost feelings or self-perceived gender which is different from his or her biological sex assigned to him or her at the time of birth.

87. We have heard the arguments of the parties and experts at length, reviewed the research and other material provided by the parties as discussed hereinabove and we have come to the conclusion to firstly declare that according to Islamic injunctions as laid down in the Quran and *Sunnah*, the gender of a person is subject to the biological sex of a person, therefore, gender of a person must conform to the biological sex of a person. The basis of this declaration is that , there are ,many rulings or *Ahkamat* (احکامات) and *Ibadaat* (عبادات) of Islam which are subject to biological sex of a person and not the gender of a person, such *Ahkamat* (احکامات) include performance of *salat* (صلاۃ), keeping of *Som* (صوم), performance of *Haj* (حج), and distribution of inheritance, etc.

88. We have noticed that in section 2(1)(n) of the Impugned Act five different terms; namely (i) intersex, (ii) eunuch, (iii) transgender man, (iv) transgender woman and (v) *KhwajaSira* are included in one definition of 'transgender person'. Whereas, the terms Intersex, Eunuch and *KhawajaSira* refer to biological variations in sex characteristics of a person that do not fit into male or female classification, while 'transgender man' and 'transgender woman, refer to individuals whose self-perceived gender identity differs from the sex they were assigned at birth or from the sex they have biologically. The inclusion of all these different terms in one single term is the main cause of confusion and conflation about the impugned Act because not only all those persons who fall within the category of any of the five category of persons used in section 2(1)(n) are different physically but the ruling of Islamic injunctions according to Quran and *Sunnah* about them are also different on the basis of their biological sex.

89. Islamic injunctions recognize the existence of intersex person. In Arabic such persons are called *Khunsa* (خنثیٰ) and in Urdu they are called *Khusra* (خُسرہ) as is also mentioned in Section 2(1)(n)(i), therefore this section 2(1)(n)(i) of the impugned Act which defines the term Intersex (*Khusra*) is not against the injunctions of Islam. Islamic law and jurisprudence provide intersex person all those rights which are mentioned in the impugned Act, even an Islamic State may take affirmative actions to support intersex persons being special persons who are members of a discriminated community and are deprived of their fundamental rights which are guaranteed by our religion. They are entitled to each and every fundamental right provided by the Constitution of Pakistan 1973 to every citizen of Islamic Republic of Pakistan.

اسلام عورت اور مرد ہونے کا تعین ان کی جنس (sex) سے کرتا ہے نہ کہ صنف (gender) سے ، لہٰذا ایسے تمام بچے جو کسی جنسی عارضے کے ساتھ پیدا ہوتے ہیں ان کو احادیث کی اصطلاح میں ''خنثیٰ'' کہا جاتا ہے۔ اسلامی احکامات کے مطابق اسلام ان کو مکمل انسانی و بنیادی حقوق دیتا ہے جو کہ ہمارے آئین میں درج ہیں۔ ایسے افراد کو زیرِ بحث قانون Transgender Persons (Protection of Rights) Act, 2018 کی شق 2(n)(i) کے مطابق Intersex اوراردو لفظ خُسرہ سے موسوم کیا ہے۔ان کی جنس کا تعین جسمانی طور پر غالب جنسی اعضاء کے تحت ہوتا ہے ۔ یعنی اگر ایسے افراد میں مردانہ جنسیت کے جسمانی اثرات غالب ہیں تو ان کو اسلامی احکامات کے مطابق مرد تصور کیا جاتا ہے اور اگر نسوانی جنسی اعضاء کے وجود اور اثرات غالب ہیں تو ایسے افراد کو عورت تصور کیا جاتا ہے اور تمام دینی احکامات کا اطلاق ان پر ان کی جنس کے مطابق ہوتا ہے۔

مقاصد الشریعہ کے دو مقاصد یعنی حفظ النفس اور حفظ النسل کے اصولوں کے تحت ان کو اپنے اعضاء کی اصلاح اور تحفظ کے لئے ہر قسم کی طبّی امداد لینا جائز ہے۔ بلکہ حکومت اس بات کی پابند ہے کہ ایسے افراد کو زیادہ سے زیادہ طبّی، تعلیمی اور معاشی حقوق کے حصول کے لئے سہولیات فراہم کرے۔

90. Similarly, Islamic injunctions do recognize the existence of eunuch persons, who are called *Khasi* (خصی) in Arabic as well as in Urdu (they are

also called *KhawajaSira* (خواجہ سرا) in Urdu)[46], which term is wrongly placed in Section 2(1)(n)(iii) instead of Section 2(1)(n)(ii) being the Urdu translation of English word, eunuch. Eunuchs are considered as male person with serious and permanent sexual infirmity in their male sexual organs. They also fall in the category of special persons and deserve special attention of the society and the State. Hence, Section 2(1)(n)(ii) of the Impugned Act is not against the injunctions of Islam but needs clarity as identified hereinabove that according to Islamic injunctions a person cannot undergo castration to become eunuch at his will. It is only allowed on medical requirement and on medical grounds.

91. However, Section 2(1)(n)(iii) of the impugned Act is against the injunctions of Islam for the reasons stated and discussed in this judgment that many Islamic *Ahkammat* (احکامات) and *Ibadat* (عبادات) are applicable on the basis of biological sex of a person (male or female) which cannot be based on the innermost feelings of a person (male or female) or self-perceived identity about his or her "gender" being different from the sex he or she has since birth, therefore, we have declared Section 2(1)(n)(iii) of the Impugned Act as against the injunctions of Islam.

92. Section 3 of the impugned Act allows a person to get his or her "gender identity" changed from his or her biological sex in identity documents including with NADRA on the CNIC, CRC, Driving Licence and passport etc. Hence, by permitting any person, male or female, to change his or her gender in accordance to his or her inner feelings, or self-perceived identity, which may not conform to the sex assigned to that person at the time of birth, will create many serious religious, legal and social problems in society under section 3 of the impugned Act by having gender identity of a "transgender

---

[46] اردو لُغت (تاریخی اُصول پر) جلد ہشتم

women" a person who is biologically male will be legally able to get access to socio-religious gathering of females or public places meant exclusively for females, and same will be the case of a person who is biologically a female and gets the gender identity of " transgender man" under Section 3 of the impugned Act, she will legally be considered as male, which will pave the way towards many socio-religious problems in the society.

93. We are also inclined to accept the arguments of the petitioners that on the basis of 'prohibition against discrimination' as envisaged in section 4 of the impugned Act, the right to privacy of females in our society will become vulnerable and can be violated. As stated herein before that this law will pave the way for criminals in society to easily commit crimes like sexual molestation, sexual assault and even rape against females because this law makes it easy for a biological male to get access to the exclusive spaces and gatherings of females in the disguise of a "transgender woman". Hence, blocking the way of evil in a society is the duty of the State under the principles of *Sadd az-Darai* or the principle of blocking of evil. Hence, Section 3 of the Impugned Act is declared against the injunctions of Islam as laid down in the Holy Quran and *Sunnah* as the biological sex of a person can only determine the gender identity of a person male or female.

94. Section 7 of the impugned Act which talks about the "Right of inheritance" of "transgender person" is also against the injunctions of Islam as laid down in the Holy Quran and *Sunnah*; because no one can get any share of inheritance on the basis of "self-perceived gender identity" which is possible under Section 7 read with other sections of the impugned Act. According to the Injunction of Islam as laid down in the Quran and *Sunnah* all the legal shares of inheritance are to be divided among the legal heirs of the deceased on the basis of their biological sex.

95. As we have already decided hereinabove in the light of verses of Holy Quran and the *Ahadith* of the Holy Prophet (ﷺ) a person's sex has precedence over gender of that person, be it male or female. Therefore, the gender of a person cannot be made the basis of identity of that person. Hence, the use of term "transgender" for gender identity on the basis of self-perceived identity, which is contrary to the biological sex of the person, is also against the injunctions of Islam.

96. For these reasons stated hereinabove, we declare Section 2(1)(f) containing definition of "gender identity", Section 2(1)(n)(iii), Section 3 and Section 7 of the impugned Act, titled, "The Transgender Persons (Protection of Rights) Act, 2018" as against the injunctions of Islam as laid down in the Holy Quran and *Sunnah* of the Holy Prophet (ﷺ) and will cease to have any legal effect immediately. Hence, the Shariat Petitions challenging the Transgender Persons (Protection of Rights) Act, 2018 are ***accepted*** in view of above terms. Consequently, the provisions of the Transgender Persons (Protection of Rights) Rules, 2020 relating to the above mentioned Sections of the impugned Act, which have been declared as against the injunctions of Islam, shall also cease to have legal effect. However, the pending Shariat Misc. Application having become infructuous is hereby ***disposed of***. Similarly, the captioned *S.P. No.02/I/2022 (Abdur Rehman, Advocate v. NADRA & another), S.P. No.03/I/2022 (Hammad Hussain v. Federation of Pakistan & another)* and *S.P. No.18/I/2022 (Muhammad Younas Qureshi, etc. v. NADRA & another)* challenging Regulation 13(1) of the National Database and Registration Authority (Application for National Identity Card) Regulation, 2002 are hereby ***disposed of*** being infructuous as the impugned Regulation 13(1) has been deleted by NADRA during the proceedings of these petitions through the

National Database and Registration Authority (Application for National Identity Card) (Amendment) Regulations, 2022.

(JUSTICE DR. SYED MUHAMMAD ANWER)
ACTING CHIEF JUSTICE

(JUSTICE KHADIM HUSSAIN M. SHAIKH)
JUDGE

Announced in Open Court
on 19.05.2023 at Islamabad.

*Khalid/**

APPROVED FOR REPORTING.

(JUSTICE DR. SYED MUHAMMAD ANWER)
ACTING CHIEF JUSTICE