

# Implications of ‘*Khaki v. Rawalpindi*’\* -A Decision for Pakistan’s Transgender\*\* Community

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\* Dr. Mohammad Aslam Khaki v. Senior Superintendent of Police (Operation) Rawalpindi – H/R Constitution Petition No. 63 of 2009 (on file).

\*\* “A variable, umbrella term (adj. for people whose gender identity and/or gender expression differs from the sex they were assigned at birth.” The Gay & Lesbian Alliance against Defamation’s (GLAAD’s) Media Reference Guide: Transgender Glossary of Terms <<http://www.glaad.org/reference/transgender>> accessed 26 October 2017.

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## **Abstract**

*This paper offers a critical examination of the legal implications of Dr. Mohammad Aslam Khaki v. Senior Superintendent of Police (Operation) Rawalpindi, a landmark case of the Supreme Court of Pakistan (SCP) concerning Pakistan's transgender persons, by focusing on what the official identification of a 'third gender' means for their future. It then juxtaposes Pakistan's example with the existing mechanisms available for transgender persons in the international human rights framework, and discusses whether it can prove to be effective in Pakistan given its unique cultural context. The paper also details the problematic aspects of the SCP judgment while observing how the court attempted to carve a legal right to recognition for transgender persons in Pakistan. It then delves into how the rights framework for transgender individuals in Pakistan fares in comparison to similar examples from other parts of South Asia.*

## Introduction

The identity-based categories of the “third sex” and “third gender”<sup>1</sup> refer to individuals who do not fall under the male-female sex binary; they identify with a gender role that revolves more around their “inner experience”<sup>2</sup> of gender and socialization, and less on the sex assigned to them at birth on the basis of genitalia or other biological criteria. One’s gender identity, therefore, may defy simple, reductive categorization and the many biological factors that constitute sex.

Legally speaking, ‘third gender’ individuals fall into the rights system of laws related to transgender or non-binary individuals. The Human Rights Watch<sup>3</sup> outlines the consequences of extending gender-based rights in such a way by stating that, “Whenever the law currently allows for men and women to be treated differently, despite the general prohibition on discrimination on the grounds of sex, the law would need to be rewritten to take account of this ‘third’ category, and across societies measures would be required to adjust to this new legal framework.”<sup>4</sup> Hence, according to International Human Rights Law, states must consider the issue of official recognition of an individual’s gender identity to be quintessential for safeguarding the right to recognition as a person before the law, something that is both a right in itself, guaranteed in numerous human rights instruments, and a significant means for the exercise of other rights. Many

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<sup>1</sup> A term that attempts to encapsulate the pluralistic nature of genders as a social construct, and rejects the biological determinism of the male-female sex binary.

<sup>2</sup> For the purposes of this paper, the meaning of gender identity follows the Yogyakarta Principles (*infra*) – “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.”

<sup>3</sup> Hereafter referred to as HRW.

<sup>4</sup> Human Rights Watch, ‘Controlling Bodies, Denying Identities: Human Rights Violations against Trans\*\* People in the Netherlands’ (*HRW*, 13 September 2011) 80 <<https://www.hrw.org/report/2011/09/13/controlling-bodies-denying-identities/human-rights-violations-against-trans-people>> accessed 2 November 2017.

academics and human rights advocates have highlighted the need for legal recognition of the multiplicity of gender identities that exist in the world today, entailing an absolute right of choosing one's gender identity that reflects the person's understanding of the self.

The recognition of a transgender community in South Asia<sup>5</sup> emanated from the unique history of *Hijras*<sup>6</sup>. Their historical, cultural and religious role<sup>7</sup> is an important factor accounting for contemporary and monolithic identification of transgender persons in the region. Describing the *Hijra* subculture<sup>8</sup> of the South Asian region – or of Pakistan<sup>9</sup> - to a foreigner, however, would prove to be a complicated task, as it does not neatly fit into the global descriptors of sex and gender, but rather loosely falls under the universal gender construct of what it means to be a transgender person. Therefore, when speaking of law for transgender individuals, the way domestic legal systems define 'third gender' and then place those classifications within the context of the current international human rights legal system may prove to be useful.

In the latter half of the 2000s, the Supreme Court of Nepal and the Delhi High Court delivered two of the world's most significant contemporary judgments vis-à-vis the constitutional and fundamental rights

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<sup>5</sup> Particularly in India, Nepal and Pakistan.

<sup>6</sup> According to Serena Nanda in *Hijras: An Alternative Sex and Gender Role in India*, pg 37 [Brian Keith Axel 'Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History' (1998) 25 *American Ethnologist* 373, 373-418. "The cultural notions of *hijras* as 'intersexed' and 'eunuchs' emphasize that they are neither male nor female, man nor woman. At a more esoteric level, the *hijras* are also man *plus* woman, or erotic and sacred female men."

<sup>7</sup> The works of anthropologists such as Serena Nanda and Gayatri Reddy talk about these factors in detail.

<sup>8</sup> In her recent ethnography of 'transgendered' identities in Southern India, Gayatri Reddy asserts that a *hijra*'s identity tends to be multifaceted and hence debatable. Gayatri Reddy, '*With Respect to Sex: Negotiating Hijra Identity in South India*' (Chicago: University of Chicago Press, 2006) 44-77.

<sup>9</sup> It must be noted that many communities in urban areas of Pakistan no longer prefer the term *Hijra*, even though the term is still widely used due to its popularity, and sometimes because of its historical significance. However, it is still the most common term used in India.

of LGBTQIA individuals<sup>10</sup>, including transgender persons. The way these judgments internalized the rights discourse within their respective domestic legal systems is a constructive example of cultural relativism challenging the universalistic notions of International Human Rights Law through incorporation. This realization of the unique position of South Asia's transgender communities eventually entered Pakistan's legal sphere with the landmark decision of the Supreme Court of Pakistan in the constitutional petition<sup>11</sup> of *Dr. Mohammad Aslam Khaki v. Senior Superintendent of Police (Operation) Rawalpindi*. The Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, considered the way the historical depiction of social roles within Pakistan's transgender communities had led to the marginalization of *khawaja siras*<sup>12</sup>, and how this section of Pakistani society should be appreciated for its own unique characteristics. The court therefore reconsidered the prevalent issues facing this community in the context of fundamental human rights by stating that widespread ignorance regarding this particular community was no longer reason enough to deny it legal standing and access to state services protected under the Constitution of Pakistan.

This article takes up Pakistan as a case study to observe how the rights movement behind the official identification of a 'third gender' category touches upon the issue of the right to recognition through the way gender-based concepts are understood in Pakistan, and in the South Asian region by association. It then aims to juxtapose Pakistan's example with the existing mechanisms available for transgender individuals in the International Human Rights regime, and whether these can prove to be effective in furthering the legal recognition of not only Pakistan's *khawaja siras* but all transgender persons residing in the country. The first two sections encapsulate the descriptive and analytical elements of this article.

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<sup>10</sup> The rights of people who are lesbian, gay, bisexual, transgender, queer (or questioning), intersex, and asexual (or allies) (LGBTQIA), though this article is strictly concerned with relevant progress made with regards to transgender persons.

<sup>11</sup> Under Article 184 (3) of the Constitution of Pakistan, "... the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order..."

<sup>12</sup> *Khawaja sira* is now the preferred terminology in Pakistan instead of *hijra*.

Section A will look into the emergence of the rights regime for *khawaja siras* introduced by the SCP with the help of a brief historical background and details of the verdict itself, before examining how the SCP attempted to carve a legal right to recognition for transgender persons in Pakistan. After that, Section B will outline the right to recognition for transgender individuals as per the enforcement mechanisms provided by International Human Rights Law, with a brief analysis of key International Human Rights instruments in this regard. The last section engenders the comparative aspect of this article, and will delve into whether the rights regime for transgender individuals in Pakistan corresponds effectively with that of International Human Rights Law, as well as an overview of relevant examples of existing domestic legal policies from South Asia and from around the world.

### **A. The Supreme Court of Pakistan’s Verdict on the *Khawaja Siras’* Right to Recognition**

The SCP, under *suo motu*<sup>13</sup> jurisdiction, has passed various landmark rulings with regards to the treatment of “eunuchs”<sup>14</sup> in Pakistan. The apex court attempted to rectify the situation of the denial of legal rights to transgender persons by ordering the Federal Government of Pakistan, along with the Provincial Governments of Punjab, Sindh, Balochistan and Khyber Pakhtunkhwa, to make reparations with regards to victims of state violence and discrimination from the *khawaja sira* community. This intervention and decision on part of the SCP marks a historically substantive change in protecting the civil rights of transgender persons in Pakistan, in

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<sup>13</sup> Latin legal term for “on its own motion” – the SCP acting “on its own cognizance” (as per the definition of the Latin term on Wikipedia) in a time of increased judicial activism in Pakistan.

<sup>14</sup> It is important to state, at the outset, that the terms used in the relevant case were “she-male”, “eunuch”, “unix” and “*khawaja sira*”. The usage of all these terms, except for *khawaja sira*, is fairly problematic, and there was no mention of “transgender” individuals in any of the hearings and orders issued. The term “eunuch” comes with its own historical baggage – be it in a South Asian or Western context – and will therefore be mentioned in quotes as it was referred to by the SCP very often in the case.

that it granted them legal recognition without requiring that they give up one gender identity for another, thereby establishing a new legal precedent against the discrimination and violence previously projected towards many of Pakistan's transgender persons.

### 1. Background of *Hijras* or *Khawaja Siras* in Pakistan:

The presence of *hijras* - or *khawaja siras* - in South Asia predates the creation of Pakistan and is therefore deeply embedded within the culture of modern South Asian societies. Details regarding the history and socialization of *khawaja siras* have been deliberately avoided for the most part in this section; the concern here is only with respect to factors and events that brought about the rights system for transgender individuals in Pakistan, particularly, their right to recognition vis-à-vis their gender identity.

#### a. *Legal Legitimization of Injustice against Pakistan's Trans-gender Persons:*

Born male, the majority of *khawaja siras* of South Asia, including Pakistan, identify themselves as female by adopting the dress and mannerisms of women<sup>15</sup>, and generally choose to live in their own community setups under their *gurus*<sup>16</sup> in isolation from their biological families. Before the relevant verdict on *khawaja siras* came about, most of Pakistan's transgender community inhabited the margins of mainstream society due to antiquated policies that degraded their unique way of life. There was no acknowledgement of the domestic human rights protections available to them due to which they were regular victims of gender violence, with their civil and political rights generally being violated as well. Articles 8 to 25 of the Constitution of Pakistan<sup>17</sup> detail civil and political rights, and loosely define what it means to be a recognized Pakistani citizen, something that should have applied equally to not only the country's *khawaja siras* but

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<sup>15</sup> As they feel they have a feminine soul born in a 'male' body.

<sup>16</sup> Leaders and guardians of individual *hijra* groups; provide *hijras* with food and a percentage of their salary in exchange for their total earnings and services.

<sup>17</sup> Hereafter referred to as the Constitution.

all transgender citizens of Pakistan. Despite this, there was blatant violation of their basic constitutional rights as they were marginalized, coerced and exploited into such activities as begging, dancing and sex work<sup>18</sup> in order to make a living. There was also a violation of their right to enjoy the “protection of law and to be treated in accordance with law”, which is considered to be “the inalienable right of every citizen” since “no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law”<sup>19</sup>. Hence, the way they were treated before the SCP verdict came about showcases a flagrant violation of their rights, particularly that of their “life or liberty”<sup>20</sup> and the inviolability of the dignity and respect accorded to a Pakistani citizen which also prohibits their torture<sup>21</sup>.

Because the Constitution generally seemed to be silent on granting an explicit right to this community<sup>22</sup>, ‘*khusras*’<sup>23</sup> - as they came to be known - were considered to be third class citizens, stigmatized, ridiculed and dehumanized by the bulk of Pakistani society. This derogatory perception of them slowly became permanent and so they were mistreated under the sport of a custom<sup>24</sup> that led to their marginalization – henceforth they were given no legal protection, and no institution sought to protect their fundamental rights. Their social rights, enshrined under Articles 37<sup>25</sup> and 38<sup>26</sup> of the Pakistani Constitution, were also violated as a consequence.

For that reason, it was up to the Pakistan’s higher judiciary to rule that the Constitution needed to be able to grant full citizenship rights for

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<sup>18</sup> The Constitution, art 3: Elimination of Exploitation.

<sup>19</sup> The Constitution, art 4: Right of Individuals to be Dealt with in Accordance with Law, etc.

<sup>20</sup> The Constitution, art 9: Security of Person.

<sup>21</sup> The Constitution, art 14: Inviolability of Dignity of Man, etc.

<sup>22</sup> The Constitution, particularly art 31: The Islamic Way of Life, and Articles 34 & 35 on Women and Minorities.

<sup>23</sup> A derogatory slur commonly used to describe *hijras* in Pakistan and India.

<sup>24</sup> The sources of Pakistani law are i) Parliament, ii) Precedent, iii) Customs and iv) Secondary Sources & Research.

<sup>25</sup> The Constitution – Promotion of Social Justice and Eradication of Social Evils.

<sup>26</sup> Ibid- Promotion of Social & Economic Well-being of the People.



Pakistani citizens to the 'third gender', as well as nullify discriminatory laws against them by introducing protective legislations specifically regarding their social and economic lives.

*b. The Case that Began It All: Dr. Mohammad Aslam Khaki v. Senior Superintendent of Police (Operation) Rawalpindi*<sup>27</sup>

Landmark court cases have the force to forever change a country's legal system for the better – and so in February 2009, Dr. Aslam Khaki<sup>28</sup> filed a petition before the SCP for ensuring the provision of basic rights to “eunuchs” after being approached by members of civil society to look into their molestation, humiliation and arrest at the hands of the Rawalpindi police force<sup>29</sup>. His petition observed that the “she-male” community of Pakistan “is the most oppressed section of life whose fundamental rights are infringed by their parents, society, and also the government”. He therefore asked the SCP to take action against the Rawalpindi police and direct both the Pakistani government and civil society to make useful steps towards providing protection to *khawaja siras* in a way that would bring them into the “mainstream of life”<sup>30</sup>. In turn, Pakistan's higher judiciary, in this watershed decision, responded by ordering the Federal and Provincial governments of Pakistan to better provide for the country's *khawaja siras*, thereby granting legal recognition to “unix”<sup>31</sup>, along with the promise to protect their fundamental human rights.

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<sup>27</sup> n \*, hereafter referred to as *Khaki v. Rawalpindi*.

<sup>28</sup> A prominent lawyer and Islamic jurist.

<sup>29</sup> n \*, (2).

<sup>30</sup> Ibid Prayer.

<sup>31</sup> A term fashioned by the SCP out of the term originally used in the hearings (“eunuchs”) to describe *khawaja siras*. Please note that this term stems from “eunuch”, which refers to people who are partially or completely castrated. *Narbhans* (a more respectful way to describe individuals who have undergone castration) come under the umbrella of *khawaja sira* or *hijra*, and were respected immensely for their spirituality in the past. The word “eunuch”, however, is mostly used in a derogatory manner in South Asia, and therefore avoided by LGBTQIA advocates and activists.

Hence the decision and Dr. Aslam Khaki's contentions effectively drew attention towards the way *khawaja siras* were being humiliated and victimized in the private, domestic and social spheres of contemporary Pakistani society, particularly towards State violence perpetrated against them. Before this decision came about, the *khawaja sira* community was being deprived of their rightful social, economic, cultural, political, and civil rights. Consequently, they were unable to avail the services and benefits provided by the state.

## 2. Implementation of the Right to Recognition of *Khawaja Siras*

It was because of Dr. Khaki's request for an order directing the government to recognize a set of rights for *khawaja siras* that the court began to observe the way the state of Pakistan had previously discriminated against them on the basis of their gender identity, as well as ways in which such discrimination could be prohibited. The court ordered that the government "protect the rights and welfare of *khawaja siras*" as they are rightful citizens of Pakistan, because of which legal provisions should be made to provide for them. It is important to note that the legal recognition of a third gender category is central to the new rights regime established by the SCP for *khawaja siras* as it automatically paved the way for other quintessential human rights such as citizenship, ownership of property, and franchise – hence it will evidently become the crux of the discussion that will follow. Basically, the focus here is not on all or each of the legal provisions specifically, with their content, but on the SCP's acknowledgement of the need for a set of rights based on the gender identity of *khawaja siras*.

The court took the unprecedented step of directing the Federal and Provincial governments of Pakistan to undertake some specific tasks to further aid the legal provisions by holding hearings and issuing various orders<sup>32</sup> to them. In its third hearing, the court observed that, "No doubt eunuchs engage themselves in professions for the purpose of earning for their livelihood, but as per (the) Islamic injunction there should not be (any)

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<sup>32</sup> 12 to be exact – the first hearing was held on 16<sup>th</sup> June, 2009. The case was successfully disposed of on 25<sup>th</sup> September, 2012.

element of insult against them.”<sup>33</sup> The Supreme Court elaborated on *khawaja siras*’ right to recognition and non-discrimination in a subsequent hearing<sup>34</sup>, stating that, “needless to observe that eunuchs in their own rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973 – their rights (and) obligations including (the) right to life and dignity are equally protected. Thus, no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned.”

The court summed up the progress made with regards to Pakistan’s transgender persons in its final hearing<sup>35</sup> whilst also pointing out that “eunuchs” are entitled to be respected by all the segments of society, like all other citizens. It noted that in the past, there had been practices which were being followed invariably and because of which *khawaja siras* were not being treated at par with other human beings and Pakistani citizens, but now, with the cooperation of relevant government bodies and organizations, they could:

- Live as represented and dignified citizens of Pakistan, in view of the fact that their rights are fully protected under the Constitution;
- Possess inherited property rights;<sup>36</sup>
- Possess the right to get education;<sup>37</sup>

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<sup>33</sup> Order issued on 17<sup>th</sup> August, 2009, (5).

<sup>34</sup> Order dated 22<sup>nd</sup> March 2011, (2).

<sup>35</sup> Order dated 25<sup>th</sup> September, 2012.

<sup>36</sup> In the orders issued on 23<sup>rd</sup> December, 2009, the District Coordination Officers of each province were requested to ensure the provision of shares of inherited property to “eunuchs” - provided their registration was completed - by tracing their family roots. The court further directed that “family members who had deprived them from their due shares are also advised not to deny their rights, otherwise the law will take its own course.” These instructions follow Articles 23 (Right to Property) and 24 (Protection of Property Rights) of the Constitution.

<sup>37</sup> Ibid – the Secretaries Education and Higher Education were requested to provide educational and vocational training facilities to “eunuchs” through enrolment and admissions in relevant institutions. Their progress was gauged through official reports and discussed in subsequent hearings. These instructions follow Articles 22

- Possess the right of franchise; and
- Will be able to participate and possess jobs in all walks of life.<sup>38</sup>

With respects to implementing the aforementioned objectives, the court ordered the Social Welfare Departments of all four provinces to liaise with various stakeholder departments<sup>39</sup> of each province. The National Database and Registration Authority<sup>40</sup> of Pakistan was required to adopt a strategy to record the gender of *khawaja siras* in the columns meant for male or female citizens after having them take hormone-based medical tests<sup>41</sup>. The court also outlined the need for entering the names of *khawaja siras* in the electoral list for establishing their right of franchise. It was stressed by the court that “as far as the question of casting the vote is concerned, it could be decided separately, because they can, if need be, exercise the right of franchise.”<sup>42</sup>

The court instituted the ‘third gender’ category by instructing NADRA to issue official identity (ID) cards to *khawaja siras* “to categorize the ‘sex’ status of ‘eunuchs’”. In the beginning, *khawaja siras* were being

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(Safeguards as to Educational Institutions vis-à-vis Minorities) and 25 (Equality and Non-Discrimination) of the Constitution.

<sup>38</sup> Nanda (n 6). The court gave the example (with the help of an extract) of the Indian state of Bihar, where a strategy had evolved to give respectable jobs to *hijras* like that of tax recovery from habitual defaulters. This was the only time the court drew an analogy with respect to a separate legal system – there was no mention of any other case relating to transgender persons either in South Asia or the international human rights system in any of the hearings.

<sup>39</sup> Order issued on 17<sup>th</sup> August, 2009, *supra* – Departments of Interior, Health and Education, (6). In the orders issued before this, on 14<sup>th</sup> July, 2009, all four provinces were required to contact administrative secretaries of the Home, Industry and Higher Education departments to take necessary actions as per the court’s directions.

<sup>40</sup> This is a government body which along with other data primarily maintains records for the issuance of Identity Cards. Hereafter referred to as NADRA.

<sup>41</sup> As per order dated 20<sup>th</sup> November, 2009, (2), though this was the first and last time that these tests were mentioned. Moreover, both the nature of these tests and the very important question of gender reassignment surgeries were not addressed in any of the hearings.

<sup>42</sup> *Ibid*.

erroneously categorized as male, but the court mentioned that NADRA was further contemplating amendment in the relevant Regulation<sup>43</sup> to add the category of “she-male”. However, Almas Bobi<sup>44</sup>, who was the focal person for *khawaja siras* in Punjab, later appeared in court to state that ID cards now included the “Male *Khawaja Sira*” category for transgender individuals. The court went on to note that the Chairman and Deputy Chairman of NADRA had shown significant progress in resolving the issue of “recording (the) parentage and sex” of *khawaja siras* and appreciated them “for making efforts to resolve the problems of ‘eunuchs’ about their identity”<sup>45</sup>.

The Election Commission of Pakistan<sup>46</sup> was further instructed to issue their instructions to concerned parties for the purpose of recording the names of *khawaja siras* in the voters’ list, “and if the date has already expired, the instructions shall be issued to the officials concerned to record their (‘eunuchs’) names either in the original or ‘revisional’ jurisdiction, and all possible cooperation in this behalf shall be extended to them (‘eunuchs’)”<sup>47</sup>. The Secretaries of the Social Welfare Departments of all four Provinces were directed to produce photocopies of the National ID Cards and extracts of the voters’ lists from respective constituencies as proof of the implementation of court orders. Subsequently, Syed Sher Afghan, Joint Secretary of the ECP, stated that in response to the relevant court order<sup>48</sup>, field workers had been directed to register the names of *khawaja siras* into the voters’ lists.<sup>49</sup>

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<sup>43</sup> Regulation No. 13, mentioned in Order dated 25<sup>th</sup> April, 2011, (1).

<sup>44</sup> Order dated 12<sup>th</sup> October, 2011, (2) – “Mr.” Almas Bobi (as mentioned in the order), President of ‘She-male’ Rights of Pakistan.

<sup>45</sup> Supra note 37, (1).

<sup>46</sup> Hereafter referred to as the ECP.

<sup>47</sup> n 43, (3).

<sup>48</sup> Order dated 14 November 2011.

<sup>49</sup> Order dated 12 December 2011, (4).

### 3. Evaluation of the Decision's Impact:

Now that the SCP has delineated a system of rights for Pakistan's transgender individuals, it is important to critically examine its endurance as a rights system set within Pakistan's legal climate, and then of the right to recognition it has chalked out for not only *khawaja siras* but all of Pakistan's transgender persons, while keeping the diversity of gender identities in mind. It would also be useful to see whether this verdict has led to more visibility of *khawaja siras* within different sectors of contemporary Pakistani society.

#### *a. SCP's Enforcement Mechanisms*

It is important to assess the viability of the SCP verdict as an *authority* on the rights of transgender persons in order to see whether it has significant traction within Pakistan's legal system as a whole. As the apex court of Pakistan, the directions issued by the SCP's orders for action should evidently be binding on all courts below it, including the High Courts and government authorities of Pakistan. Indeed, according to Article 189 of the Constitution "any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan."

However, as was stated in the judicial order issued on 17<sup>th</sup> August 2009<sup>50</sup>, "the Office has treated this matter as a Human Rights Case whereas it should be treated as a Petition under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan, 1973... Let this case be treated as a petition accordingly, instead of treating the same as a Human Rights Case, as it involves fundamental rights of 'she-males' ('eunuchs')."

Article 184 (3) dictates that, "Without prejudice to the provisions of Article 199<sup>51</sup>, the Supreme Court shall if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the

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<sup>50</sup> n 39, (1).

<sup>51</sup> The Constitution – Pertaining to the Jurisdiction of the High Court.

power to make an order of the nature mentioned in the said Article.” But an order, or a series of orders as in *Khaki v. Rawalpindi*, cannot enunciate a “question” or “principle of law” brought forward by the parties concerned, and cannot therefore pave the way for a right or a question of law to be codified in light of a constitutional violation in the future. Since no legal judgment was passed over here that could bring about a point of law at a future date as mentioned in Article 89<sup>52</sup>, the Pakistani legislature was far removed from the premise of this rights regime from the very beginning.

Consequently, in *Khaki v. Rawalpindi*, non-compliance could only be dealt with in contempt proceedings<sup>53</sup>. In order to gauge whether non-compliance had taken place or not and assess the overall strength of the regime itself. Lawyers and legal activists could have looked into the extent to which the orders were complied with by looking at the reports submitted along with the commitments and statements made in court. It would have been another work task to draw up a list in this regard to check non-compliance and file criminal contempt cases, which are not as effective as judgments in accordance with Article 189. Judgments occur in cases where there has been a violation of the Constitution, but the SCP, perhaps mistakenly, decided not to treat Dr. Khaki's petition in such a way, despite the fact that orders clearly lack the strength and clout in Pakistan that judgments seem to possess.

Nevertheless, despite these procedural shortcomings, the concerned authorities did comply with the majority of prayer made by Dr. Khaki, and took necessary actions in light of the orders issued by the SCP. Hence the third gender category has been implemented in Pakistan slowly but gradually since the SCP's decision. One pertinent question, of course, is whether the Supreme Court of Pakistan has the authority to direct the Legislature to enact legislation with respect to the protection of transgender persons.

In brief, the complete implementation of the rights accorded to transgender persons in Pakistan still remains to be seen. The bigger

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<sup>52</sup> The Constitution- Power of President to promulgate Ordinances.

<sup>53</sup> The Constitution- Article 204 (Contempt of Court).

loopholes were the absence of instruction on part of Pakistan's higher executive bodies, particularly the police force, and the need for an amendment in the Constitution – a provision with regards to the protection of *khawaja siras* as minorities needs to be introduced and codified to further their legal recognition as citizens of Pakistan. This would assist them in becoming an active part of society – however, it is not within the mandate of the SCP to take any further actions in this regard as it has done everything in its power to bring them into the mainstream. Unfortunately, the Federal Government and executive bodies of Pakistan completely failed to address this issue at the time and make any positive contributions for the recognition and non-discrimination of Pakistan's transgender individuals. Thus, it is clear that domestic law needs to be developed and put into practice with regards to legislative enactments and executive policies. Giving transgender persons legal recognition beyond face value and allowing them the right of franchise in a democratic state would help in including them within Pakistan's key decision-making processes, as well as strengthen democratic values in the country.

*b. Impact of Granting the Right to Recognition*

This unexpected ruling on the non-discrimination of *khawaja siras* was a conspicuously positive achievement according to observers of Pakistan's politics and laws, as it further showcased the willingness on part of the country's apex court to build up the democratic system of the country, as well as achieve the unthinkable with regards to the rights of transgender persons in a country as religiously and socially conservative as Pakistan.

The judgment simultaneously resulted in much bewilderment, as a politically sensitive verdict on gender-based rights had emanated from a conservative Muslim country where disdainful views regarding transgender persons and their "sexual deviance" were entrenched in history, and where the issue of LGBTQIA rights cannot be mentioned without some form of backlash. This attitude was specifically evident when the decision was being reported on Pakistani private media channels with levity – news reporters showcased amusement towards the apex court over deliberating on such a matter when there were so many other "important" matters needing their



attention. The case, therefore, is a clear example of the constraints on the SCP, and even the Pakistani legislature, in terms of implicitly ensuring that the rights granted to transgender persons did not violate the Islamic<sup>54</sup> provisions of the Constitution<sup>55</sup>. Further, in a country where adultery is taboo and same-sex relations are criminalized as per Section 377 of the Pakistan Penal Code<sup>56</sup>, any inclination towards rights based on sexual orientation were avoided by the court at all costs. This is why the option of a right to family and private life was not addressed in the SCP verdict, and why *khawaja siras* were termed “eunuchs”, implying that they were incapable of having sexual relations and that they lived within their unique family setups headed by *gurus*. As a result, rights for transgender persons had to be acknowledged separately in Pakistan instead of falling under the supposedly un-Islamic<sup>57</sup> umbrella of LGBTQIA rights.

Nevertheless, what needs to be lauded is the court's overt acceptance of the right to legal recognition and relief on the basis of a non-discriminated ‘third gender’ identity of *khawaja siras* under Pakistani law. One would hope that this would have positive implications with regards to all the other civil rights of transgender Pakistanis without the need for them to give up one gender identity for another. For instance, this has already had a particularly formidable impact on the recognition of the property and inheritance rights<sup>58</sup> of *khawaja siras*<sup>59</sup>. Moreover, since the laws of inheritance for Muslims in Pakistan entail different shares for men and women, the inclusion of *khawaja siras* in this framework is a positive indicator of the advancement of gender-based rights in this regard.

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<sup>54</sup> The primary sources of Islamic law - or *Shariah* - are the Quran and *Sunnah* (sayings of Prophet Muhammad).

<sup>55</sup> As per Article 31: The Islamic Way of Life. More specifically, Islam is the State religion of Pakistan as per Article 2A of the Constitution.

<sup>56</sup> Pakistan Penal Code (Act XLV of 1860), s 377: Unnatural Offences. It must be noted that this section on “sodomy” is a colonial-era law.

<sup>57</sup> Even though such views owe largely to undemocratic and antiquated colonial-era ‘sodomy’ laws, as can be seen by the retention of s 377 in the PPC.

<sup>58</sup> *Supra* Articles 24 (Provision as to Property) and 25 (Protection of Property Rights) of the Constitution.

<sup>59</sup> n 35.

Besides this, *Khaki v. Rawalpindi* also shows that the official acknowledgement of the ‘third gender’ status of *khawaja siras* offers a basis upon which to check official as well as private acts of exploitation and violence against this marginalized community<sup>60</sup>. On a whole, government identification documents are a quintessential means of recognition before the law, and though not having them should obviously never come in the way of the enjoyment of other rights, the fact of the matter is that personal identification is needed for myriad everyday aspects of private life in modern-day society, such as for bank transactions, job applications and access to various other public facilities. Moreover, in “situations of heightened security”, these documents can “make the difference between accessing life-saving services and being excluded from them”.<sup>61</sup> This is evident from such incidences as when Pakistan was hit by floods in 2011, which resulted in many *khawaja siras* in the Pakistani Province of Sindh not having access to relief services and aid because they did not possess national ID cards at the time<sup>62</sup>. Hence the significance of properly gendered identification cannot be played down at any cost as it is linked to the issue of legal recognition without which infringement of a transgender individual’s rights becomes very likely, and more often than not, results in an increased risk of harassment and exploitation.

Nevertheless, there remains an uncertainty with regards to determining the actual subjects of the SCP’s newly announced rights regime. As far as the right to a ‘third gender’ itself is concerned, the first most problematic aspect of the ruling, according to Jeffrey Redding<sup>63</sup>,

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<sup>60</sup> The United Nations’ Committee Against Torture has observed that "actual or perceived non-conformity with socially determined gender roles" further increases an individual’s vulnerability to violence and harassment. General Comment No. 2, Implementation of Article 2 by States Parties, para 11, UN Doc. CAT/C/GC/2, 24th January 2008 (as cited in Michael Bochenek and Kyle Knight’s *Establishing a Third Gender Category in Nepal: Process and Prognosis*, (2012) 11 *Emory International Law Review* 39.

<sup>61</sup> *Ibid* (Bochenek and Knight), 27.

<sup>62</sup> Samia Saleem, ‘For the transgender, there is no place for refuge’ (*Express Tribune*, 22 October 2011) <<http://tribune.com.pk/story/279423/for-the-transgender-there-is-no-place-for-refuge>> accessed 27 October 2017.

<sup>63</sup> Jeff A Redding, *From ‘She-Males’ to ‘Unix’: Transgender Rights and the Productive Paradoxes of Pakistani Policing, Anthropology of Criminal Cases in South Asia* (Daniela Berti & Devika Bordia eds., 2012).

entailed the highly confusing articulations as to what it means to be a transgender person, that were presented within the court in the events following Dr. Khaki's petition<sup>64</sup>, thereby showcasing myriad complex perceptions on gender and identity in Pakistan. This problem also surfaced when NADRA and the Social Welfare Departments were faced with the daunting task of devising a holistic category that best defined the gender identity of Pakistan's transgender individuals.

Secondly, the court's finding that Pakistan's transgender individuals suffer from a type of "gender disorder"<sup>65</sup>, and how this was the basis of understanding for its actions on behalf of *khawaja siras*, is another problematic cause for concern. As articulated by Redding, "The Court's finding...that transgenderism is a kind of 'gender disorder' - as a predicate for the Court's action on behalf of transgendered individuals - was just one of several aspects of the Court's 'benevolence' that gave many people (including many progressives) cause to worry about what the court was up to."<sup>66</sup>

Thirdly, though the International Commission of Jurists<sup>67</sup> does consider *Khaki v. Rawalpindi* to be a "transgender recognition case"<sup>68</sup>, but it simultaneously noted<sup>69</sup> that, unlike what was done in most of the other transgender recognition cases, the SCP failed to examine and consider the "surgical question" of gender reassignment surgery when it permitted the legal establishment of a 'third' sex. Therefore, according to the ICJ, *Khaki v. Rawalpindi* was an exception even with respect to other transgender

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<sup>64</sup> This point needs no further explanation as the different terminology used to describe the status of *khawaja siras* has already been mentioned in quotes beforehand.

<sup>65</sup> n 41, (2). Where the court declared that "unix" had "been neglected merely on account of gender disorder in their bodies."

<sup>66</sup> Redding (n 63) 1.

<sup>67</sup> One of the hosts for the meeting in which the Yogyakarta Principles were developed. Hereafter referred to as ICJ.

<sup>68</sup> 'In Pakistani transgender political candidates, history and hope', (*429 Magazine*, 1 April 2013) <<http://dot429.com/articles/1802-in-pakistani-transgender-political-candidates-history-and-hope>> accessed 27 October 2017.

<sup>69</sup> International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (ICJ, 2011) 174.

recognition cases<sup>70</sup> because in the other cases, the concerned individuals had undergone gender reassignment surgery for attaining legal recognition of their gender identity. The explanation the casebook offers for this is that the SCP was operating in a cultural context that appreciated the historical role of *hijras* in society<sup>71</sup>.

In a nutshell, the SCP should have looked into the rights of transgender persons as a right of choice that does not just relate to people who happen to be biologically different from men and women, but primarily non-binary individuals, who want to be able to choose their gender identity in today's society. Therefore, a broader understanding of gender identity and expression should have been presented to the SCP as this could have assisted Pakistan's transgender persons in fully realizing their gender identity as citizens of Pakistan, instead of being pigeonholed by those who possess a vague understanding of their unique background and their "self-feeling"<sup>72</sup>. As Redding rightly pointed out, the SCP's verdict was an act of "benevolence" for a marginalized and downtrodden section of Pakistan's society; this "Othering"<sup>73</sup> of *khawaja siras* by treating them as individuals "suffering" from a gender disorder could further lead to their discrimination and stigmatization.

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<sup>70</sup> The other cases concerning transgender persons spotted in the casebook were from Argentina, Malaysia, South Korea and the Philippines.

<sup>71</sup> Orders issued on 1st February, 2012, (7) – While appreciating the unique social position of Pakistan's *khawaja siras*, the court, quite confusingly, also stated, "It shall also be ensured that only *khawaja siras* are being registered, after ascertaining that he or she is a 'she-male' and anybody else, who is pretending to be she-male, shall not be registered as a she-male." Therefore, whether the rights system even applies to transgender individuals other than *khawaja siras* is also open to debate.

<sup>72</sup> "Legal provisions should be made to provide for gender identity to the people of transgender or third gender, under which female third gender, male third gender and intersexual are grouped as per the concerned person's self-feeling." *Sunil B. Pant and others v The Government of Nepal*, Writ No. 917 of the year 2064 BS (2007 AD), National Judicial Academy Law Journal (2008), 281.

<sup>73</sup> A means of distinguishing between two sets of values and juxtaposing society and its minorities in a way that treats the former as the norm and the latter as the subordinate, and thereby excluded, exception.

Pakistan's laws, therefore, need to be able to accurately reflect the consensus regarding the legal recognition of transgender persons. In making the decision, the court should have perhaps closely examined developments within other jurisdictions - particularly the landmark cases in India and Nepal, which are discussed further on in this research - along with the international treaties to which the country is a party in order to come to the realization that the identity of a transgender person does not entail a mental perversion or a mere biological disorder in need of a cure.

*c. Visibility of Transgender Persons in Pakistani Society*

Since the establishment of the rights system for *khawaja siras*, many transgender individuals have bravely come forward to embrace their newfound right to legal recognition and gain prominent positions in society. Organizations advancing the rights of transgender persons in the country include TransAction Alliance, *Khawaja Sira Society*, Gender Interactive Alliance and Forum for Dignity Initiative. While many *khawaja siras* are still unwilling to acknowledge their new rights because of continued neglect and violence on part of the society they live in<sup>74</sup>, others are finally pushing their agendas and further advancing the cause for the rights of transgender persons in the country<sup>75</sup>. This is illustrated by the fact that some transgender persons in the Province of Sindh are now permanently employed as tax collectors<sup>76</sup>, whereas others are aiming to hold political office<sup>77</sup> and are presently running for elections. Pakistan has also had its first transgender model: Kami Sid, who is also a transgender activist<sup>78</sup>. Moreover, the court's

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<sup>74</sup> AFP, 'Pakistan's transgender community seeks a reformation' (*Dawn*, 20 February 2017) <<https://www.dawn.com/news/1315908>> accessed 27 October 2017.

<sup>75</sup> Sana Saleem, 'I wasn't made to be raped and ridiculed' (*The Guardian*, 7 September 2016) <<https://www.theguardian.com/global-development-professionals-network/2016/sep/07/i-wasnt-made-to-be-raped-and-ridiculed-trans-woman-makes-a-stand-in-pakistan>> accessed 27 October 2017.

<sup>76</sup> Jon Boone, 'Pakistan's tax dodgers pay up when the hijra calls' (*The Guardian*, 8 June 2012) <<http://www.guardian.co.uk/world/2012/jun/08/pakistan-hijra-transgender-tax-collectors>> accessed 27 October 2017.

<sup>77</sup> n 74.

<sup>78</sup> Saba Imtiaz, 'Pakistan's first trans model: 'People think we're sex workers but we can be doctors' (*The Guardian*, 1 May 2017)

decision has allowed transgender citizens to register in order to be able to vote as a ‘third gender’ individual, with the help of the ECP. NADRA has recently upgraded its policy for issuing identity cards to transgender people: they can now obtain CNICs without providing information regarding their parents<sup>79</sup>. Transgender persons have also been counted in Pakistan’s census for the very first time<sup>80</sup>. Further, a religious *fatwa*<sup>81</sup> has also declared the marriage of a transgender person, to someone who is discernably of the opposite sex, to be legal<sup>82</sup>.

Pakistan’s transgender community, therefore, is making the best use of its legal status to advocate change on its own, and also highlight the importance of legislation along with the enforcement mechanisms that grants them their constitutional rights. Pakistan’s Parliament is finally preparing to pass the country’s very first laws recognizing the rights of transgender persons and further criminalizing the injustices meted out against them<sup>83</sup>. In August, two bills were introduced in the National Assembly: The Transgender Persons (Protection of Rights) Bill 2017<sup>84</sup>, and the Transgender Persons (Protection of Rights) Criminal Law (Amendment)

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<<https://www.theguardian.com/lifeandstyle/2017/may/01/pakistans-first-trans-model-people-think-were-sex-workers-or-beggars-but-we-can-be-doctors-or-engineers>> accessed 27 October 2017.

<sup>79</sup> Kalbe Ali, ‘Transgender people having no information about their parents can now obtain CNICs: NADRA’ (*Dawn*, 30 August 2017)

<<https://www.dawn.com/news/1354833>> accessed 27 October 2017.

<sup>80</sup> Waqar Mustafa, ‘Pakistan counts transgender people in national census for first time’ (*Reuters*, 9 January 2017) <<http://www.reuters.com/article/us-pakistan-transgender-census/pakistan-counts-transgender-people-in-national-census-for-first-time-idUSKBN14T1XK>> accessed 27 October 2017.

<sup>81</sup> A decree, with no legally binding effect.

<sup>82</sup> ‘Pakistan’s transgender community cautiously welcomes marriage fatwa’ (*BBC*, 28 June 2016) <<http://www.bbc.com/news/world-asia-36648141>> accessed 27 October 2017.

<sup>83</sup> Mehreen Zahra-Malik, ‘Transgender Pakistanis Win Legal Victories, But Violence Goes On’ (*The New York Times*, 19 August 2017)

<<https://www.nytimes.com/2017/08/19/world/asia/pakistan-transgender-bill.html>> accessed 27 October 2017.

<sup>84</sup> The draft can be viewed at

[http://www.na.gov.pk/uploads/documents/1502192618\\_626.pdf](http://www.na.gov.pk/uploads/documents/1502192618_626.pdf).

Bill 2017<sup>85</sup>, drafted by activists from The Feminist Collective and *Khawaja Sira* Society. This is a significant development that will certainly help transgender persons make their claim as rightful citizens of Pakistan. Human rights activists have rightly pointed out existing loopholes in the rights system established in the past with the help of these advancements, and hope to see substantive changes in the existing human rights system for transgender persons in the near future.

## **B. The Legal Recognition of a 'Third' Gender in International Human Rights Law**

It is important to realize, as a forethought, that an area as multifaceted as gender rights law revolves less around legal systems - be it domestic or international - and tends to be more focused on the identity and lived experiences of the individual. Unfortunately, International Law is mostly concerned with non-interference in relation to States, and their affairs and sovereignty, which has proven to be quite detrimental towards the goal of the protection of human rights. The enforcement mechanisms of any legal system would obviously tend to be weak when law is incapable of interfering and rectifying everyday practices on behalf of aggrieved parties. The International Human Rights regime, therefore, will need to strike the right balance between the interests of the state and the individual so it can prove to be a viable system that is capable of dealing with the innumerable issues present in today's world.

Needless to say, the relationship of the legal recognition of an individual and the attainment of other rights is the key component of any human rights regime. As far as rights for transgender persons are concerned, "the notion that there are two and only two genders is one of the most basic ideas in our binary Western way of thinking. Transgender people challenge our very understanding of the world. And we make them pay the cost of our

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<sup>85</sup> Hassan Belal Zaidi, 'First ever bills on transgender rights tabled in NA' (*Dawn*, 9 August 2017) <<https://www.dawn.com/news/1350508/first-ever-bills-on-transgender-rights-tabled-in-na>> accessed 27 October 2017.

confusion by their suffering.”<sup>86</sup> Hence at present, there is not a lot of international jurisprudence that can expound the need for equality in the remit of gender identity and expression.

Furthermore, the bulk of the current authority on international law related to transgender persons has emerged from legal reform in the West<sup>87</sup>. At the same time, it must be observed that the anti-sodomy laws that exist in many countries to this day are actually a result of colonialism. Even in India, it was actually the British who turned the full realization of a *hijra* identity into a criminal offence<sup>88</sup>.

According to HRW, "States have legitimate reasons for registering people's sex at birth, and hence for regulating the manner in which people can change their gender marker in civil status records later in life."<sup>89</sup> But the problem of defining "gender" is a formidable complication when it comes to implementing existing international human rights protections for transgender persons around the world. As Currah and Mulqueen explain<sup>90</sup>, "When an individual's cultural legibility is not affirmed by their identity papers, even everyday quotidian transactions become moments of vulnerability."

According to Michael O' Flaherty and John Fisher<sup>91</sup>, transgender persons are often vulnerable subjects of violence because society seeks to "punish" them for "transgressing gender barriers or for challenging

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<sup>86</sup> Findlay, as cited in Michael O' Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles' (2008) 8 Human Rights Law Review 207, 209.

<sup>87</sup> This involves either repealing or decriminalizing laws, or the legal recognition of an individual to sexual orientation.

<sup>88</sup> 'This Alien Legacy: The Origin of Sodomy Laws in British Colonialism' (HRW, 17 December 2008) <<https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>> accessed 20 October 2017.

<sup>89</sup> HRW (n 4) 5.

<sup>90</sup> Paisley Currah & Tara Mulqueen, 'Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport' (2011) 78 Soc. Research 557, 561-2. as cited in Bochenek and Knight (n 60) 14.

<sup>91</sup> Flaherty and Fisher (n 86).



predominant conceptions of gender roles”<sup>92</sup> – they then give the example of transgender youth and how they are considered to be “among the most vulnerable and marginalized young people in society”<sup>93</sup>.

The right to choose one's gender identity, therefore, entails the possession of both the rights to one's human dignity and legal recognition. This is essential for other general human rights protections, especially that of non-discrimination<sup>94</sup>. Individuals of different gender identities should therefore be able to enjoy legal acceptance in all walks of life, as their self-defined gender is integral to their personality and is one of the most basic aspects of their identity, dignity and liberty.

### **1. Fundamental Protections for Transgender Persons in UN Human Rights Instruments**

Implementing a ‘third gender’ category in the realm of International Human Rights Law is no easy task, especially when so many nations seek to challenge the universalism encapsulated by the human rights efforts of the United Nations<sup>95</sup>. Nevertheless, the foundation laid down by the UN does provide an essential means of granting transgender individuals the right to recognition, and effectively highlights their dignity and worth as well as the universal humanistic goals of the International Human Rights regime. Therefore, an overview of the key legal instruments it provides will outline how exactly legal recognition can be granted to an individual in the remit of gender-based rights.

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<sup>92</sup> Ibid; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (United Nations General Assembly, 3 July 2001) A/56/156.

<sup>93</sup> Ibid; ‘Report of the Special Rapporteur on the sale of children, child prostitution and child pornography (Commission on Human Rights, 5 January 2004) E/CN.4/2004/9.

<sup>94</sup> The African Charter on Human and Peoples' Rights rightly considers both these rights to be inextricably linked, as per Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”

<sup>95</sup> Hereafter referred to as the UN.

*a. Provisions under Universal Declaration of Human Rights*<sup>96</sup>

The UDHR, issued in 1948, provides the groundwork for International Human Rights protection. It does not reflect binding law but instead expounds key guiding principles for the recognition of basic human rights within the international community. The right to recognition everywhere as a person before the law is reified in the UDHR, and further guaranteed in other human rights treaties through the foundation laid down by the Declaration.

Article 2 of the Declaration provides that all individuals are “entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind” over factors such as sex, political or other opinion, national or social origin, or birth or “other” status. While these do not include gender specifically, the inclusion of the “other” status as a category could be interpreted to comprise marginalized identities. If this is considered to be an all-encompassing term, it could be used persuasively to address human rights violations against individuals who fall in this category, like transgender individuals. Article 7 further expounds that all individuals are equal before the law and condemns discrimination on the whole. The Declaration, therefore, encapsulates fundamental rights that grant equal protection to individuals all over the world, regardless of personal differences, which will always continue to serve as markers for the international protection of human rights.

However, a problem with interpreting the UDHR this way, which is considered to be customary international law, is that it could infringe upon State sovereignty, as mentioned before – therefore it needs to be interpreted on a case-by-case basis and not abused to the extent that States would acknowledge their human rights obligations that they were unaware of.

*b. Contributions of the International Bill of Human Rights*

The International Bill of Human Rights encompass codified binding law centered around two key legal instruments – The International Covenant

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<sup>96</sup> Hereafter referred to as UDHR.

on Civil and Political Rights<sup>97</sup> and The International Covenant on Economic, Social and Cultural Rights<sup>98</sup>. Both instruments are centered on binding principles of equality and non-discrimination on an international level. The language of both instruments derives from the principles of UDHR. Both Covenants are binding upon all signatories; the UN Human Rights Committee monitors the compliance of States to both these treaties.

The first Article of ICCPR delineates the right to self-determination. Article 2 of the ICCPR states that each State undertakes to respect and ensure the rights recognized to individuals within a territory and subject to its jurisdiction, without distinction of any kind over factors such as sex or the other status. Article 26 specifically provides for equality before the law with non-discrimination on grounds of factors such as sex or the other status.

Article 3 of the ICCPR provides for the equal rights of men and women – maybe it should be rephrased to include the ‘third gender’ category so that its focus is shifted from the male-female sex binary to reflect the multiplicity of gender identities that exist today. Article 19 could perhaps be able to substantiate this proposed view further as it advocates freedom of opinion and expression. Articles 21 and 22 further entails the basic civil liberties of right to freedom of association and that of peaceful assembly. Article 23 - on children's rights - highlights their right to recognition and registration after birth, a right that can be reinterpreted to include registration of a person's separate gender identity in case of biological differences at birth. Moreover, the first Optional Protocol to this Covenant provides individuals with access to mechanisms that would help them address their grievances in case of a violation of a right granted by the Covenant.

It is also important to note Parts I and II of the ICESCR. Article 1, like the first Article of the other Covenant, encapsulates the principle of self-determination. Article 2 emphasizes the need for the “progressive realization” of all the Covenant rights, and subsequently underscores the principle of non-discrimination as well. The fact that it mentions the “other status” also, just like Article 2 of UDHR and Articles 2 and 26 of the ICCPR,

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<sup>97</sup> Hereafter referred to as ICCPR.

<sup>98</sup> Hereafter referred to as ICESCR.

makes the principle of non-discrimination with respect to transgender individuals binding on all signatories. However, again, Article 3 reinforces the sex binary – all Articles with this sort of emphasis should perhaps be rephrased to be able to accurately reflect the panoply of gender identities that exist today.

## 2. Gender-Based Protections under International Human Rights Law

As discussed earlier, the biggest obstacle when it comes to gender-based protection in mainstream legal systems is that they are, more often than not, couched in terms reflecting the male-female “sex” binary that excludes the pertinent issue of gender identity. The latter is a more encompassing term that is capable of addressing culturally relative examples like those of *hijras* or *khawaja siras*. As will be shown in this section, the bulk of International Human Rights legal system faces the same problem. Key International Human Rights instruments should instead be able to reflect contemporary issues related to sex and gender so that the international protection of fundamental rights mirrors reality and fosters greater equality in a more proficient manner.

On 18<sup>th</sup> December 2008, on the 60<sup>th</sup> anniversary of the UDHR, a statement before the General Assembly demanded the elimination of human right abuses based on gender identity<sup>99</sup>. This statement was endorsed by more than 50 countries around the world<sup>100</sup>, and while it is non-binding in nature, it acknowledged the need for effective measures to ensure that the principle of non-discrimination prevailed with regards to the existing International Human Rights regime.

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<sup>99</sup> UN General Assembly, ‘Statement on Human Rights, Sexual Orientation and Gender Identity’ (*HRW*, 18 December 2008) <<https://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>> accessed 20 October 2017.

<sup>100</sup> ‘UN: General Assembly to Address Sexual Orientation and Gender Identity, HRW’ (*HRW*, 1 December 2008) <<http://www.hrw.org/news/2008/12/11/un-general-assembly-address-sexual-orientation-and-gender-identity>> accessed 27 October 2017.

a. *Narrow Focus of the Convention on Elimination of Discrimination of Women*<sup>101</sup>

This section includes an analysis of CEDAW as the only gender-based legal instrument of the UN – its critique, however, will be focused on its overall premise and viability instead of its Articles individually. As expounded by Darren Rosenblum in his article<sup>102</sup>, in CEDAW the focal nature of the term “women” pretends to be a universal indicator of the principle of non-discrimination on the basis of sex and gender, but in actuality, fails to define the problem of discrimination on the basis of gender on a whole by assuming a seemingly innocuous, generalized stance. This leaves transgender individuals in the “difficult position of questionable international law subjectivity”<sup>103</sup>. As mentioned before, the sex binary has been enshrined in the foundation of International Human Rights Law – these categories need to be eradicated as they are imprecise and do not seem to achieve much. The solution to gender-based discrimination must include everyone, i.e. all men, women, and transgender individuals. Having an isolated category in a gender-based document deviates from the more accurate and all-encompassing term “gender”, which encapsulates myriad gender identities - such as “men”, “women”, “transgender” - that represent many unique cultural contexts from around the world: “Unsexing CEDAW would flip the architecture of human rights by focusing on gender, with women included under that rights umbrella as opposed to being its sole focus.”<sup>104</sup>

Developing such a treaty would provide a better solution with respect to the inequalities that exist in the world today by promoting gender issues “as a human rights question for all people”<sup>105</sup>, as opposed to unfairly excluding an individual’s right to determine an appropriate gender identity<sup>106</sup>.

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<sup>101</sup> Hereafter referred to as CEDAW.

<sup>102</sup> Darren Rosenblum, ‘Unsex CEDAW, or What’s Wrong with Women’s Rights’ (2011) 20 Columbia Journal of Gender and Law 98.

<sup>103</sup> *Ibid*, 175.

<sup>104</sup> Rosenblum (n 102) 193.

<sup>105</sup> Rosenblum (n 102) 194.

<sup>106</sup> Rosenblum (n 102) 175. – “It seems strange to think that a transgender individual, born as a man who becomes a woman (whether by virtue of surgery or

*b. The Yogyakarta Principles – A Step towards Change?*

One potential source for the type of change discussed above with respect to gender-based rights is the 29 Yogyakarta Principles, which emphasize a more comprehensive guide for such rights under the International Human Rights Law and is couched in terms that can accurately address issues of gender identity very effectively.

The Principles encapsulate the rights contained in key International Human Rights treaties such as the UDHR, the International Bill of Human Rights, and CEDAW, and take the social context of LGBT rights, including gender identity, into account. Former President of the Supreme Court Bar Association (SCBA) Pakistan and human rights lawyer, Asma Jahangir, alongside 29 global human rights specialists gathered in Yogyakarta, Indonesia in November 2006 and published the principles a year later. These principles are not legally binding, and are instead soft law, but they do signify a viable interpretation of authoritative legal texts and codified human rights instruments that are binding on their signatories. Moreover, one formidable achievement on part of these Principles is the adoption of the definitions of gender identity in their Preamble by States and legal systems all over the world<sup>107</sup>.

In the Preamble, gender identity refers to “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.” Furthermore, the right to recognition before the law with respect to an individual’s gender identity is considered as “integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”<sup>108</sup> This Principle is the most important as it reinforces other

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even just self-identity) suddenly also is transformed into the bearer of rights under CEDAW. Equally strange is the reality that a woman who becomes a man loses that set of rights.”

<sup>107</sup> Such as Nepal.

<sup>108</sup> Yogyakarta Principles, Principle 3. the Right to Recognition before the Law.

rights, thereby underscoring the need for States to officially recognize one's self-defined gender identity. Not granting this right with respect to identification documents may, for example, violate the right to freedom of opinion and expression as this right "includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means."<sup>109</sup>

According to Principle 3, "States shall:

- Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- Take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity;
- Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person's gender or sex including birth certificates, passports, electoral records and other documents reflect the person's profound self-defined gender identity;
- Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- Ensure that changes to identity documents will be recognized in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment."<sup>110</sup>

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<sup>109</sup> Yogyakarta Principles, Principle 19.

<sup>110</sup> *Ibid*; n 110.

The possibility of using the Yogyakarta Principles in the context of domestic legal systems has proved to be important with respect to the UN as well – the issue of gender identity has now been added to the strategic plan of the Office of the High Commissioner for Human Rights for the first time. The former High Commissioner for Human Rights, Louis Arbour publicly supported the principles by releasing a statement regarding their launch and affirming the commitment of her office<sup>111</sup>. Navanethem Pillay, the current UN High Commissioner for Human Rights, carried this vision further by making a Statement during a High-Level Meeting in New York<sup>112</sup> on Human Rights, Sexual Orientation and Gender Identity that expressed full support for the UN Joint Statement on Gender Identity<sup>113</sup>. She did not quote the Principles, falling just short of official endorsement, but gave a categorical written statement from the UN's highest authority on human rights issues, thereby suggesting a trend towards a broader acceptance of gender concerns.

Since CEDAW has not been able to live up to its commitments, the reach and use of these Principles could have the potential to make a more lasting impact in the world, as they are culled from myriad key human rights documents, and together ably emphasize upon the principle of universality and non-discrimination for all.

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<sup>111</sup> “The Yogyakarta Principles are a timely reminder of these basic tenets”, as quoted in Professor Douglas Sanders, *International: The Role of the Yogyakarta Principles* (International Gay and Lesbian Human Rights Commission, 8 April 2008).

<sup>112</sup> ‘UN, General Assembly Statement Affirms Rights for All’ (*HRW*, 19 December 2008) <<http://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>> accessed 27 October 2017.

<sup>113</sup> ‘Combating Discrimination Based on Sexual Orientation and Gender Identity’ (*Office of the High Commissioner of Human Rights*) <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>> accessed 27 October 2017.



### C. Correspondence of Pakistani and International Law for Transgender Persons

In an address to an LGBT forum, Louis Arbour articulated the need for a more holistic account of such rights within International Human Rights Law: “It is precisely in this meeting between the normative work of States and the interpretive functions of international expert bodies that a common ground can begin to emerge.”<sup>114</sup>

Pakistan is party to various International Human Rights treaties that recognize the civil and political rights of individuals. Before Dr. Khaki's petition, laws related to transgender persons were virtually non-existent in Pakistan. No significant action has been taken by the Executive until very recently, and no legislation has surfaced in the past to reflect the success of the decision. The absence of action by the Legislature and the Executive technically is a violation of international principles, as Pakistan is a signatory of the UDHR and has ratified both the International Covenants that together make up the International Bill of Rights<sup>115</sup>. Moreover, Pakistan acceded to CEDAW, the 2<sup>nd</sup> most widely subscribed international treaty, in 2006, though with a reservation<sup>116</sup>. All these commitments go on to show that Pakistan does have a legal obligation towards the International Human Rights regime with respect to the inclusion of laws that are protective of the rights of transgender persons within its domestic legal sphere. Therefore, the way both these systems correlate can help in determining how useful the establishment of the right to recognition for transgender individuals is for Pakistan in the greater scheme of things. Moreover, examples of the way other domestic legal systems have carved out the necessary rights for their own transgender individuals can assist Pakistan in continuing to move forward in a similar direction.

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<sup>114</sup> Presentation of the UN High Commissioner for Human Rights – Louis Arbour to the International Conference on LGBT Rights, Montreal, 26 July 2006.

<sup>115</sup> It ratified the ICCPR in 2010 and the ICESCR in 2008, but has not ratified the relevant Optional Protocols.

<sup>116</sup> “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of Article 9 of the Convention” meaning that Pakistan has still not ratified CEDAW's Optional Protocol.

However, in 2014, Pakistan actively voted no in relation to a UN Human Rights Council<sup>117</sup> Resolution that condemned the discrimination of individuals on the basis of their sexual orientation or gender identity<sup>118</sup>, thereby setting a troubling precedent for the future of the LGBTQIA movement in the country, and making way for more hate-based crimes and discrimination for transgender persons in Pakistan. Furthermore, the country remained absent when another resolution was passed by the HRC that guaranteed protection against violence and discrimination on the basis of one's sexual orientation or gender<sup>119</sup>. Pakistan's willingness, or lack thereof, to engage with the UN human rights system is, perhaps, a refusal of a top-down approach, especially considering its colonial past and the harm it has caused for transgender persons in Pakistan and India till date<sup>120</sup>. Nevertheless, it is high time the country's top institutions take the rights of transgender persons seriously and do whatever it takes to develop a humane rights system for them.

### 1. Pakistan and the International Human Rights System

The verdict of the SCP marks a critical point in the transgender rights movement by creating a path for the incorporation of laws related to transgender persons into the Pakistani domestic legal system as well as the International Human Rights legal system as a whole. As discussed earlier, the decision has both been lauded and criticized by the media with respects to its implementation methods vis-à-vis oft-contested terms and categorizations. As for the Yogyakarta Principles, the years since they were delineated in late 2007 are hardly enough for them to amount to a big change with regards to the treatment of transgender persons around the world, as

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<sup>117</sup> Hereafter referred to as HRC.

<sup>118</sup> 'Human rights, sexual orientation and gender identity' (*United Nations General Assembly*) adopted on 26 October 2014, A/HRC/Res/27/32 <[http://hrlibrary.umn.edu/hrcouncil\\_res27-32.pdf](http://hrlibrary.umn.edu/hrcouncil_res27-32.pdf) > accessed 27 October 2017.

<sup>119</sup> 'Protection against violence and discrimination based on sexual orientation and gender identity' adopted on 20 June 2016, A/HRC/Res/32/2 <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/RES/32/2](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2)> accessed 27 October 2017.

<sup>120</sup> Mehlab Jameel, 'Rainbows and Weddings: The Neoliberal and Imperialist Politics of LGBT Rights' (*Solidarity*, 6 July 2015) <<https://solidarity-us.org/rainbowsandweddings>> accessed 27 October 2017.

“their role in the development of legislation, judicial decisions, and executive policy is a story that is just beginning to unfold.”<sup>121</sup> However, the guidance they have provided has already helped some states acknowledge the relevance of laws based on gender identity under International Law, as they effectively chalk out all the pertinent issues faced by transgender individuals today. Moreover, they are repeatedly referred to as encapsulating binding international legal standards – Pakistan can therefore adhere to these principles in order to better articulate the rights it has provided for its transgender communities.

As far as the rest of the International Human Rights system goes, unique examples of gender identity showcase the extent to which the theme of universalism overlooks gender's cultural construction. The sex binary tends to prune the diversity of gender identity and the personal component of “self-identity”, a concept that has multiple socio-political meanings, as was seen in Pakistan's case. While the SCP should have sought assistance from the definitions of the Yogyakarta Principles in order to attach less rigid gender roles regarding Pakistan's transgender citizens based on the physical appearance of *khawaja siras*, Pakistan's example does go on to show that discrimination on the basis of gender identity should not be supported by the state at any cost, and that the gradual internalization of progressive human rights practices should proceed in the country.

The examination of the Preamble of the Yogyakarta Principles along with the provisions of the ICESCR and ICCPR has also shown that Pakistan's Constitution could be amended accordingly in the future. Doing so would help Pakistan fulfill its international legal obligations in accordance with its commitments, enshrined in the treaties it has signed. This could simultaneously ensure the possibility of the rights of transgender citizens being reflected in the Constitutional provisions.

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<sup>121</sup> Paula L. Ettelbrick, Esq. and Alia Trabucco Zerán, ‘The Impact of the Yogyakarta Principles on International Human Rights Law Development: A study of November 2007 – June 2010’ (Final Report) 11  
<[http://www.ypinaction.org/files/02/57/Yogyakarta\\_Principles\\_Impact\\_Tracking\\_Report.pdf](http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf)> accessed 27 October 2017.

Pakistan is in the novel position of having a distinctive transgender community, and its unique example is reflected in the many struggles taken by the country's transgender individuals in various walks of life, as their gender identity and subculture subvert patriarchal societal norms. Now that some semblance of a rights system for transgender persons exists in the country, the increasing visibility and inclusion of *khawaja siras* in Pakistan's contemporary socio-political spaces can have a viable impact on the development of this system as well as on the representation of Pakistan's transgender persons both at a domestic and international level. So, although Pakistan's initial recognition of rights for transgender persons does not suffice, the country is still headed in the right direction, and hence has the potential to have a substantial impact on the international recognition of rights of transgender persons as well as the ability to send a message to other countries regarding a need for such awareness.

It is evident that both domestic law and international treaties do not suffice on their own when it comes to officially addressing the rights of transgender persons. The Yogyakarta Principles are very comprehensive in this regard but are also unfortunately soft law. Pakistan's community of *khawaja siras* provide a unique example, and their inclusion in modern-day society can make a formidable difference on an international level, as they have already started making progress with respect to having their identity officially recognized in Pakistan.

## **2. Lessons from other Domestic Legal Systems**

There are other nations that have also set the standard for rights for transgender persons in their own way; Pakistan can look towards them in order to better address this issue within its own legal system.

One of the world's most groundbreaking judicial decisions that internalized the Yogyakarta Principles into its verdict and domestic legal system is the Nepalese case of *Blue Diamond Society et al v. Nepal Government*<sup>122</sup>, where the judges decided to interpret the term "other" in the

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<sup>122</sup> n 69.

aforementioned Articles 2 (1)<sup>123</sup> and 26<sup>124</sup> of the ICCPR, while juxtaposing both these Articles with the constitutional and legal rights available in Nepal. They then considered the inclusion of a 'third gender' category and the right to non-discrimination on this basis by articulating the concept of an individual's "self-feeling"<sup>125</sup>. The Supreme Court of Nepal also referenced a European Court of Human Rights<sup>126</sup> case in its pursuit to delineate the rights of 'third gender' people – *Goodwin v United Kingdom*<sup>127</sup>, a 2002 verdict that explicitly recognized the rights of 'transsexual' individuals. In *Goodwin*, the UK government had declined to prepare the legal identity papers of individuals in accordance with their present sex following a gender reassignment operation. The court unanimously disagreed with the government's arguments and held that such changes were essential in identity papers as they entailed the right to respect one's private life. This approach on Nepal's part is considered to be a revolutionary achievement for rights for transgender persons on a whole as it simultaneously acknowledges and venerates the right of individuals to demand enforcement of their legal rights in accordance with the International Human Rights regime.

India has also recently<sup>128</sup> employed a 'third gender' category in various everyday capacities. In 2005, the country's 'third gender' citizens were allowed to register for passports as 'eunuchs', under the identity-based "E" category – this designation was included in voter registration documents

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<sup>123</sup> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>124</sup> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>125</sup> n 69.

<sup>126</sup> Hereafter referred to as ECtHR.

<sup>127</sup> *Goodwin v United Kingdom* (1996) 22 EHRR 123.

<sup>128</sup> *Naz Foundation v Government of NCT* (2009) 160 DLT 277, W.P (C) No. 7455/2001 of 2009 (Delhi High Court).

in 2009, and in 2011, the Unique Identification Authority of India executed a unique citizen identity number system with the inclusion of ‘transgender’ as a ‘third gender’ category. Jennifer Rellis considers this to be a “noteworthy” achievement<sup>129</sup> – moreover, the Indian government, just like in Pakistan, does not require any medical proof of one’s transgender status, so individuals have an actual right to choose in this regard.

A recent verdict in Australia<sup>130</sup> has introduced new policies that highlight not only the implementation of comprehensive identity-based gender categorization, but also show how such categorization can offer a legitimate rights-based option for transgender individuals. In the first case, Australian documents require a certifying letter from a doctor that confirms a person’s ‘intersex’ status or mentions sex reassignment surgery, but in case this is not possible, Australian nationals can obtain a Document of Identity and leave the gender field blank – they can obtain a passport or any other documentation for travelling in any case, even if they do not change their gender status on other official documents.

The aforementioned examples encapsulate the global nature of transgender rights when discussed together, although they individually compel thinkers to consider them in less universalistic terms and in a more cultural and individual-focused, complex manner. Moreover, they obviously cannot capture the breadth of developments that have taken place in society, rather than in courtrooms. The way domestic courts develop such rights in accordance with relevant constitutional laws is still noteworthy as it highlights their willingness to interpret their own laws in the remit of the enforcement mechanisms available to them domestically, instead of blindly following what is dictated to them by the inherently western, and often vague, norms of the international legal system. Thus, perhaps Pakistan can also benefit by looking into cross-cultural attempts at enforcing the rights regime it has introduced for its transgender individuals.

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<sup>129</sup> Jennifer Rellis, “‘Please Write ‘E’ in this Box’ Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India’ (2008) 14 Michigan Journal of Gender and Law 223.

<sup>130</sup> *AB v Western Australia* (2011) HCA 42.

## Conclusion

The legal implementation of the right to recognition for *khawaja siras* showcases how defining non-binary identities can be a complex and daunting task for Pakistan's legal fraternity. For instance, the ruling remains restricted to a specific subset of the transgender community, and does not speak of other transgender persons, specifically transgender men. Moreover, the panoply of problematic terms used throughout the hearings of the Supreme Court case showcases the legal fraternity's understanding (or lack thereof) of the issue<sup>131</sup>. It must be noted that 'transgender' is not a fixed term, and its evolution over time has depended on the different meanings it has been given in different geographies and contexts. It simply refers to a person who does not identify with the gender that they were assigned to at birth, unlike cisgender<sup>132</sup> people. Some transgender people choose to undergo partial or complete 'transitioning' (medical or social), but others do not.

One can understand why the SCP attempted to retain the element of cultural relativism within its rights system as a challenge to the generality of the International Human Rights system, due to Pakistan's unique context in this regard. While the SCP does ask for full citizenship rights and non-discrimination for Pakistan's 'third gender' individuals in its cultural context, there is, at present, no protective legislation available to support these rights, something that is ultimately quintessential for granting Pakistan's transgender community a proper constitutional right to recognition.

Therefore, the importance of the SCP's "landmark" verdict cannot be overstated at this point; rather the existing rights system in Pakistan needs to be strengthened in order to better provide for Pakistan's transgender

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<sup>131</sup> Maham Javaid, 'Understanding trans terms' (*The News on Sunday*, 4 December 2016) <<http://tns.thenews.com.pk/understanding-trans-terms>> accessed 27 October 2017.

<sup>132</sup> "Of, relating to, or being a person, whose gender identity corresponds with the sex the person had or was identified as having at birth." (*Merriam Webster*) <<https://www.merriam-webster.com/dictionary/cisgender>> accessed 27 October 2017.

individuals as well as allow the country to fully meet the requirements of its international human rights obligations. Given Pakistan's position as a country with a unique transgender community, it should not risk alienating its own transgender citizens for its lack of viable, fundamental protections for them.

Nevertheless, one still needs to be able to see the far-reaching impact of the SCP verdict in the developing world generally as well as in the South Asian region, where three countries are gradually embracing their transgender communities through the initiation of breakthrough legal reforms. Apart from this, in Pakistan the success cases have been underpinned by relentless work by its human rights activists, despite all the administrative quandaries coupled with the failure on the part of the legislative and executive bodies of the country. While the question of the accurate implementation of an identity-based 'third gender' category still remains, Pakistan, as a predominantly Muslim country acknowledging the recognition of gender-based rights, has succeeded in showing that it has the potential to lead as a pioneer in this area and contribute meaningfully towards the international protection of the rights of transgender persons.

What however sets Pakistan's example apart - and simultaneously makes it the odd one out - is the way the relevant rights system comes distinctly under laws exclusively for transgender persons, and not under the remit of rights for LGBTQIA persons on a whole. Despite this, most observers deem the inclusion of a legal 'third gender' in Pakistan to be a positive occurrence in a line of successful verdicts in South Asia. Pakistan has proven that it can comprehensively introduce a legal 'third gender' category for people who do not identify within the male-female binary, despite the struggles involving the understanding, defining and implementing of this category.

Of course, establishing such a category is only a first, very small step towards legally recognizing transgender individuals around the world, and while international law is shown to support an individual's right to choose his or her gender identity on official documents, it clearly does not provide authoritative mechanisms for implementation, especially in terms of the damage colonization has caused across the world in this regard. In



fact, the international human rights system, on a whole, has not been very favorable towards individuals to date, as the nature of the sovereignty and independence of states happens to be its underlying premise, at the expense of the individuals it should ideally be helping across the globe. Moreover, in Pakistan, although the SCP ruling in 2009 was a direct result of a police brutality case, such cases continue to take place even now, 8 years later.

Hence, on an international level, transgender individuals would, as a result, lack the means through which they can ensure that human rights violations against them are addressed and curbed. Formal recognition of rights for transgender people, and ultimately human rights protection for *khawaja siras*, are certainly limited in the contemporary international human rights framework and within the Pakistani legal regime as well, so in order to fully establish a rights system for transgender people, Pakistan must rectify all its inefficiencies to come forward and take its human rights commitments further by establishing a system of rights for transgender people in a manner that is holistic, just and humane.

Therefore, both Pakistani and international law are in need of reviewing existing jurisprudence in this regard so that they can strengthen the international human rights system on a whole and empower transgender individuals everywhere. This will ultimately reflect a growing understanding of how human rights law can operate for individuals and take their lived experiences into account, regardless of their gender identity, so that various existing legal systems can be propelled into bringing about meaningful, pioneering reforms and changed in this regard.

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