

## **Gendered Justice: Constitutions, Trans-genders and Equality**

*Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi*  
PLD 2013 SC 188

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### **Introduction**

The trans-gender community of South Asia has undoubtedly faced deplorable discrimination. However, recently the Supreme Courts of India and Pakistan have attempted to transcend the traditional gender binary by recognizing their distinct gender identity as the ‘third sex’. In 2012, the Chief Justice of the Supreme Court of Pakistan issued a landmark judgment in *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi* which gives legal recognition to the trans-gender<sup>1</sup> community in Pakistan as belonging to the ‘third sex’.<sup>2</sup> Such a definitive inclusion of a traditionally excluded community under the legal umbrella was expected to gradually debunk the gender stereotypes that have historically functioned to marginalize the trans-gender community in Pakistan. However, for all practical purposes, the judgment has changed little. Their bodies continue to be the chief site of contestation, problematized by family, society and the state apparatus, all of which reinforce the rigid gender binary. In contrast, a similar judgment issued by the Indian Supreme Court has had a comparatively positive influence on the social status of *hijras* in India.

This case note will endeavor to analyze the reasons behind the limited impact of the judgment in *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi* as compared to its Indian counterpart in redressing the grievances of the trans-gender community following decades of social exclusion. In doing so, this case note will compare the language of both the judgments, and argue that the discriminatory social attitude towards the trans-gender community cannot be transformed unless the Supreme Court of Pakistan employs a substantive approach towards the interpretation of the fundamental right to equality as enshrined in Article 25 of the Constitution of the Islamic Republic of Pakistan 1973 (‘the Constitution’).

### **Effects of Colonial Encounter on Trans-gender Identity**

The story of the suppression of trans-gender identity is deeply connected to the narrative of colonial displacement.<sup>3</sup> Particularly in the socio-political context of the subcontinent, the social exclusion of trans-genders can be attributed to the rigid dichotomous gender identities under the influence of patriarchal policies adopted by the colonial state.<sup>4</sup> The inconsistency of

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<sup>1</sup> The term ‘transgender’ has been used very broadly to refer to a spectrum of gender experiences and identities that do not fit into the traditional male-female gender binary. However, in this case note, the author uses the terms transgender, eunuchs and *hijras* interchangeably to refer to a particular group of people who are anatomically unidentifiable as male or female.

<sup>2</sup> PLD 2013 SC 188.

<sup>3</sup> The author uses this term with reference to the same meaning as used by Dr. Osama Siddique in his book *Pakistan’s Experience with Formal Law: An Alien Justice* (Cambridge University Press 2013).

<sup>4</sup> Eleanor Newbiggin, ‘A Post-colonial Patriarchy? Representing Family in the Indian Nation-state’ (2010) 44 (1) *Modern Asian Studies* 121.

the social roles that *hijras* played in the pre-colonial India with the colonial ideas of a civilized society resulted in the criminalization of their activities, which gradually led to their systematic exclusion from the domain of active cultural participation.

This was in stark contrast to the vibrant and celebrated role and place of *hijras* in pre-colonial India. The eighteenth-century Maratha State bestowed certain rights and specifically catered to the needs of the *hijra* community. Special cash and land grants were made for their welfare and many were appointed at respectable positions in the royal courts.<sup>5</sup> However, according to Laurence W. Preston, ‘when the British district officers first encountered the *hijras*, their first and immediate supposition was that here was another of the “barbarous practices” of the Indian society’.<sup>6</sup> Preston claims that ‘the British were aghast at the notion that it was their inherited responsibility to support such “abominations” and “wretches”’.<sup>7</sup> After the conquest of the Maratha dynasty, since these activities of the pre-colonial Indian society were not in conformity with the colonial moral sentiments, the British attempted to transform their subjects by seeking to eliminate these ‘barbarous practices’ through coercive legal regimes. An insightful case in this regard is the promulgation of the Criminal Tribes Act 1871 (‘CTA’), which deemed the entire community of eunuchs as inherently criminal and ‘addicted to the systematic commission of non-bailable offences’.<sup>8</sup> This Act was eventually repealed by the national legislatures following Partition in 1947. However, in the colonial era, the police had sweeping powers to arrest, harass, extort and even kill people that belonged to these tribes. In fact, the Act was made part of the police syllabus so that every police officer in the colonial India was aware of the identity of the ‘criminal tribes’. In the subjugated land, the notified tribes became the most watched people, and their movement was recorded and strict controls were placed on their places of travel and residence.<sup>9</sup> Consequently, the state gradually deprived *hijras* of all the rights and liberties that they previously enjoyed under local dynasties, and this caused the destabilization of their social, political and legal identity.

In addition to the criminalization of eunuchs, the enactment of CTA is particularly instructive with regards to how an instrument of control resulted in the transformation of social attitudes towards certain identities. The *hijras* were labelled criminals, denied legitimate rights and forced into prostitution and begging for sustenance. The state deprived them of the agency to actively participate in social activities. This agency was essential for social and economic mobility. The exclusionary legal attitude of the colonial state inevitably led to the transformation of the trans-gender identity from being socially acceptable to becoming culturally abhorrent.

The displacement of the trans-gender identity was perhaps an inescapable consequence of the colonial imperative to effectively govern and control the colonized society. According to Michel Foucault, a key role of the colonial penal system as an instrument of control was to create antagonism among various segments of a particular class so that other identities could be conceived only as ‘marginal, dangerous, immoral, a menace

<sup>5</sup> Lawrence W. Preston, ‘A Right to Exist: Eunuchs and the State in Nineteenth-Century India’ (1987) 21 (2) *Modern Asian Studies* 371, 372.

<sup>6</sup> *Ibid* 377.

<sup>7</sup> *Ibid* 386.

<sup>8</sup> Section 2, the Criminal Tribes Act 1871.

<sup>9</sup> Louis A. Knafla, *Crime, Gender, and Sexuality in Criminal Prosecutions* (17 edn Greenwood Publishing Group 2002) 124.

to society as a whole.’<sup>10</sup> It served as a means to impose certain purportedly universal moral categories that functioned as an ideological barrier between social identities characterized by the binary of ‘us’ and ‘them’. As Foucault points out, the modern penal system first transforms and then solidifies the transformed identities by sanctioning certain social behaviors as ‘appropriate, decent and culturally acceptable’.<sup>11</sup> Foucault’s analysis of the ideals that the colonial penal system aspired to achieve seems justified if we analyze the social attitudes towards the *hijra* community in the post-colonial context of India and Pakistan. *Hijras* have historically been discriminated against, marginalized, denied property rights, sexually molested, tortured and ridiculed into oblivion.<sup>12</sup> Unable to reconcile their psychological experiences of gender with their sexual identity as ratified at the instance of birth, *hijras* have been suffering from an identity crisis. To date, they have been unable to find any place in the male-female gender binary that has characterized the post-colonial normative structures of the state institutions.

### **Comparative Analysis of Indian and Pakistani Judgments**

The displacement of the traditional trans-gender identity and the resulting identity crisis has had a drastic impact on the social, political and cultural status of trans-genders in the post-colonial states. They have gradually degenerated into non-entities and consequently have been denied rights that accrue to a person by virtue of being a citizen of the modern state. However, the Superior Courts in India and Pakistan have recently issued landmark judgments attempting to transcend the gender binary by recognizing the gender of eunuchs as the ‘third sex’. Intuitively, such an approach should have had a positive impact on the social status of eunuchs in both the countries, but the results so far seem surprisingly disparate. This case note will attempt to analyze the respective judgments issued by the Superior Courts of India and Pakistan in order to find the probable reasons for such disparate developments in both the countries.

On 22 March 2013, the Supreme Court of Pakistan in *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi*<sup>13</sup> held that ‘eunuchs should be treated equally as other citizens in this country enjoying the same rights under the Constitution of Islamic Republic of Pakistan 1973’.<sup>14</sup> The Court stated that the fundamental rights of eunuchs are fully protected under the Constitution and ‘it is the duty of Government Functionaries to protect their inherited property rights, right to get education, right of the franchise and to ensure their participation in all spheres of life’.<sup>15</sup> In order to ensure that eunuchs get their due share in inheritance and employment opportunities, the Court directed the chairperson of the National Database and Registration Authority (NADRA) to ensure that a new gender category is created for eunuchs and that they are provided National Identity Cards (NICs) so that their respective fundamental rights may be enforced ‘as they are more vulnerable among humans’.<sup>16</sup> The Court ultimately held that the Federal and Provincial Governments were

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<sup>10</sup> Michael Foucault, ‘On Popular Justice: A Dialogue Discussion with Maoists’ in Colin Gordon (ed) Power/Knowledge: Selected Interviews and Other Writings 1972-1977 (Pantheon Books 1980) 15.

<sup>11</sup> Ibid.

<sup>12</sup> Sheher Bano Khan, ‘Trans-gendered Identity: Shame, Honour and Sexuality’ (*Aawaz*, 2015) 1-17 <<http://aawaz.org.pk/cms/lib/downloadfiles/>> accessed 4 June 2016.

<sup>13</sup> (n 2).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

equally responsible for recognizing the rights of eunuchs and were ‘bound to provide them protection of life and property and secure their dignity’.<sup>17</sup>

The creation of the third gender category and the issuance of NICs to eunuchs is a positive step towards gender equality. However, while seeking to enforce the fundamental rights of eunuchs, the Court seems to address the issue from a very strict, formalistic lens, which contemplates that ‘all persons similarly situated should be treated the same’.<sup>18</sup> Stating that ‘eunuchs should be treated equally as other citizens’<sup>19</sup> underscores the conflict between eunuchs’ psychological experience about gender and their sexual identity, either male or female. The Court, by stating that it ‘is only interested... that in terms of Article 184(3) of the Constitution the fundamental rights of the eunuchs are to be fully protected’,<sup>20</sup> glosses over perhaps the most significant question as to why the social status of the said community has not been improved despite recognition of their fundamental rights by the Constitution. Such a formal approach towards gender equality is problematic because it does not consider that the historical disempowerment of eunuchs is a result of various social, economic and political factors. Saying that the gulf between the State machinery and the trans-gender community is only present due to the lack of ‘representation as they do not have a focal person’<sup>21</sup> understates the point that their disempowerment is deeply linked to the patriarchal norms that are blatantly manifested in the functioning of our inherited formal legal system. By not acknowledging the structural reasons for the exclusion of eunuchs from social life, the Court reinforces the colonial stereotypes about gender identities that it is attempting to shatter by recognizing eunuchs as respectable citizens of the State.

In contrast with the *Aslam Khaki* judgment, the Supreme Court of India seems to have taken a more holistic approach towards the issue of gender identity of eunuchs. In *National Legal Services Authority v Union of India*,<sup>22</sup> the Court read the distinct identity of the *hijra* community into the fundamental rights framework as recognized by the Constitution of India. Justice K. S. Radhakrishnan noted that ‘gender identity is one of the most fundamental aspects of life which refers to a person’s intrinsic sense of being male, female, trans-gender or trans-sexual person’.<sup>23</sup> Delving deeper into the history of the subcontinent, the Court analyzed various historical texts and the pre-colonial socio-political milieu to conclude that ‘*hijras* played a prominent role in Indian society, especially in the Ottoman empire and the Mughal rule in the Medieval India’.<sup>24</sup> It then traced the displacement of the traditional identity of eunuchs in colonial times particularly to the promulgation of CTA and other relevant legal provisions. The Court extensively discussed the relevant international treaties to which India is a signatory, particularly the Yogyakarta Principles, holding that adherence to international norms is essential for the development of democracy in India. Referring to the distinct gender identity of *hijras* in Article 19(1)(a) of the Indian Constitution,<sup>25</sup> the Court

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<sup>17</sup> 2013 SCMR 187, [2].

<sup>18</sup> Eileen Kaufman, ‘Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts’ Equality Jurisprudence’ (2006) 34 (3) GJICL 557, 559.

<sup>19</sup> (n 2).

<sup>20</sup> (n 17) [8].

<sup>21</sup> Ibid [6].

<sup>22</sup> 2014 Indlaw SC 250.

<sup>23</sup> Ibid [19].

<sup>24</sup> Ibid [15].

<sup>25</sup> Article 19(1)(a) of the Indian Constitution guarantees the fundamental right to freedom of speech and expression to all citizens of the Republic of India.

held that ‘gender identity lies at the core of one’s personal identity, gender expression and presentation’,<sup>26</sup> and should be respected by the State.

While recognizing the fundamental rights of the *hijra* community, the Indian Supreme Court did not limit its treatment of the gender identity issue to the Indian Constitution. Discussing the social attitudes towards *hijras* in India, the Court observed that ‘trans-gender people, as a whole, face multiple forms of oppression in this country. Discrimination is terribly large and pronounced especially in the field of health, employment, education, leave aside social exclusion’.<sup>27</sup> While acknowledging that *hijras* have equal rights to all other citizens of the State, the Court noted that ‘despite constitutional guarantee of equality, *hijras* have been facing extreme discrimination in all spheres of life’.<sup>28</sup> In order to address the problem of historical discrimination, the Court held that Articles 15 and 16 of the Indian Constitution emphasize the fundamental right against discrimination on the basis of sex to prevent any direct or indirect attitude towards treating people differently merely due to not being in conformity with the traditional gender binary. The Court specifically asked the State to take affirmative actions ‘so that the injustice done to [the trans-gender community] for decades could be remedied’.<sup>29</sup> Aiming at substantive equality, Justice A. K. Sikri observed:

Equality not only implies preventing discrimination..., but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.<sup>30</sup>

Nowhere in the *Aslam Khaki* judgment do we find such a comprehensive approach towards redressing the historical discrimination suffered by the trans-gender community. The Supreme Court of Pakistan has apparently construed fundamental rights as negatives rights i.e. the protection of individuals against unfavorable treatment by introducing anti-discrimination laws. Such an approach, as discussed earlier, does not address the issue of inability to access these fundamental rights on account of social, political and cultural factors. Acknowledging the harsh reality, Justice A. K. Sikri notes:

The Constitution has fulfilled its duty of providing rights to trans-genders. Now it is time for us to recognize this and to extend and interpret the Constitution in such a manner that ensures a dignified life of trans-gender people.<sup>31</sup>

By recognizing trans-genders as belonging to the ‘third sex’, the Court is not only ensuring the rule of law, but also advancing justice to the marginalized section of the society that has so far been deprived of its natural and constitutional rights. Justice A. K. Sikri observed that ‘the rule of law is not merely social order. The rule of law is social justice based on public order’,<sup>32</sup> which can only be achieved if all segments of the society are provided equal opportunities to live a dignified life. The Court ultimately held that ‘the trans-gender people

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<sup>26</sup> (n 22) [66].

<sup>27</sup> Ibid [45].

<sup>28</sup> Ibid [55].

<sup>29</sup> Ibid [60].

<sup>30</sup> Ibid [88].

<sup>31</sup> Ibid [114].

<sup>32</sup> Ibid [125].

must be treated as “third gender” and the State should take measures so that *hijras* may regain their respect and place in the society which once they enjoyed in our cultural and social life’.<sup>33</sup> By directing the State to consider *hijras* a ‘socially and educationally backward class’,<sup>34</sup> the Court essentially reinforced the colonial stereotypes about their gender identity. However, the affirmative treatment of a historically marginalized community seems to be a necessary evil for bringing them at par with other segments of the society. In doing so, the Court imagined gender as a spectrum of identities and experiences—thus transcending the gender binary that characterized the post-colonial socio-political milieu.

### **Disparate Implications**

The different treatment by the Supreme Courts of India and Pakistan of the issue concerning the trans-gender identity and equal protection has produced starkly different consequences for the social status of the trans-gender community. Not much seems to be happening in Pakistan; no social safety nets have been devised to bring eunuchs at par with the other segments of the society; and, therefore, the judgment of the Court seems to be ineffective in bringing about any change in the social status of the said community.<sup>35</sup> However, the reforms that followed *National Legal Services Authority* include: a comprehensive policy report on the Issues Relating to Trans-gender Persons by the Ministry of Social Justice and Empowerment, a private member bill on the Rights of Trans-gender Persons (2014), admission of some trans-genders in state universities, more judgments upholding the rights of eunuchs, and institution of various commissions with representatives of eunuchs to oversee the formation of safety nets to ensure their active participation in social life.<sup>36</sup>

Such disparate results can be attributed to the difference in treatment of the constitutional guarantee of equality by the Superior Courts. Although both the countries declare equality a core value and prohibit the State from denying equal protection of law, Indian jurisprudence construes the guarantee of equality as a positive right that grants additional power to the State to take affirmative action to actually eliminate inequality. The Court seems to be acknowledging that a rigid formal equality regime will hamper the dispensation of gender-based justice and therefore the State should acknowledge and compensate for disadvantage. Even though labelling a community as ‘vulnerable’ and ‘socially backward’ reinforces, and at times causes expansion of oversimplified stereotypes, yet these affirmative actions seem to be significant for providing redress following decades of social exclusion.

### **Conclusion**

The preceding analysis shows that as long as the society remains riddled with disparity in power relations among various genders, and as long as the gender binary continues to influence the functioning of legal institutions, a formal approach to the principle of equality and liberty will most probably not be very effective in achieving the ideal of gender-based justice. The ultimate ideal of an egalitarian society in a democratic setting can only be achieved if the courts employ a result-oriented methodology while adjudicating on matters

<sup>33</sup> Ibid [129].

<sup>34</sup> Ibid [7].

<sup>35</sup> (n 12) [11], [16]-[17].

<sup>36</sup> Orinam, ‘NALSA and Beyond: Presentation on Trans-gender People and Indian Laws’ *Orinam* (31 August 2015) <<http://orinam.net/trans-gender-laws-siddharth-narrain-nazariya/>> accessed 4 May 2016.

pertaining to the constitutional guarantee of equality. The Supreme Court should acknowledge that ‘the equality imperative does not merely enjoin discriminatory state conduct but also requires positive protection and corrective action by the state in the form of affirmative action, effective minority protection regimes and social safety’.<sup>37</sup> The road leading towards gender-based justice can be traversed more effectively if the courts substantively interpret the equality clauses, and the relevant state institutions play their role in devising policies to ensure effective social and cultural participation of the trans-gender community.

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<sup>37</sup> (n 18) 618.