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**Analysing the Coloniality of Gender in the Case of
Khawaja Sira and Hijra Communities in Pakistan – the
Colonial Past and Post-colonial Present**

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List of Acronyms

TPA	Transgender Persons (Protection of Rights Act)
CTA	Criminal Tribes Act
RP	Research Paper
ISS	International Institute of Social Studies
LGBT	Lesbian, Gay, Bisexual, and Transgender
INGO	International Non-governmental Organisation
NCSW	National Commission for the Status of Women
NCHR	National Commission of Human Rights
IPC	Indian Penal Code
PPC	Pakistan Penal Code
NWP	North Western Provinces
SSP	Senior Superintendent of Police

Dedication & Acknowledgements

I dedicate my research paper to my grandmother Meemum who passed away in November. I wish I could have seen you one last time. Thank you for all that you did for me. Being a retired government school teacher and headmistress, you always valued education. I hope to make you proud; I love you.

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Abstract

This research paper aims to analyse certain colonial and postcolonial laws concerning the *khawaja sira* and *hijra* communities in the North Western Provinces (NWP) of India, specifically 1) Section 377 of the IPC, 1860 2) Part II of the CTA, 1871 3) Section 377 of the PPC, 1860 4) the 2009 Khaki v. SSP Rawalpindi Case and 5) the TPA, 2018. These laws and rulings are examined from the coloniality of power and coloniality of gender analytical frameworks developed by Anibal Quijano and Maria Lugones. The paper focuses on how these analytical frameworks led to the policing of gender and sexuality in the case of the *khawaja siras* and *hijras* in India by the colonial state, and investigates the extent to which they prevail in the legal rulings and laws passed by the post-colonial state of Pakistan.

Relevance to Development Studies

In South Asia, gender variant communities like those of the *khawaja siras* and *hijras* have a history of being marginalised and oppressed by the state and the society. By examining the colonialities of power and gender that have policed the lives of *khawaja sira* and *hijra* communities in colonial India, this paper traces back the origin of the otherisation of these communities at the level of the state, and gauges the extent to which the colonialities of power and gender continue to shape laws and rulings concerning these communities in present day Pakistan. In doing so, this paper emphasises on the need to engage in historical reflection to better understand the origins of state policing of gender and sexuality, and its continued survival in contemporary laws. Through this research, a deeper understanding of the oppressive role of the colonial and post-colonial state is brought to light. Such a reflection becomes necessary to resist the colonialities of power and gender in the present, given their severe ramifications for the *khawaja sira* and *hijra* communities of South Asia.

Keywords

Khawaja sira, *Hijra*, Coloniality of power, Coloniality of gender, India, Pakistan.

Chapter 1 Introduction

1.1 What is this Research About?

When it comes to studying gender and sexuality, heteronormativity has dominated our understanding of these terms (Ingraham 2006: 307). Heteronormativity is rooted in the idea that heterosexual attraction is the norm (Barker 2014: 858). It views sexuality and gender in fixed binaries of heterosexual or homosexual and man or woman (Barker 2014: 858). Consequently, today in South Asia, as elsewhere, expressions of gender and sexuality that are non-heteronormative, are policed and otherised (Connell 2021: 219). In India and Pakistan, this policing and otherisation can be traced back to the colonial era of British rule. It is interesting to note that historically, expressions of gender and sexual fluidity were not considered an anomaly in South Asia despite the criticism they faced from certain conservative segments of society (Malhotra and Sachdev 2020). However, since fluidity did not correspond to heteronormative understandings of gender and sexuality, the British outlawed such expressions and bodies in their attempt to control and ‘civilise’ the local Indian population during colonial rule (Malhotra and Sachdev 2020).

Colonial laws such as Section 377 of the Indian Penal Code Act XLV of 1860 (IPC) and Part II of the Criminal Tribes Act, 1871, enacted in the North Western Provinces (NWP) of India, mark the beginning of the state policing and criminalisation of local gender variant communities like the *kbawaja siras* and *hijras*. In the case of Pakistan – a part of the northwest of India prior to the 1947 Partition, *kbawaja siras* and *hijras* are also subjected to policing and marginalisation by the post-colonial state today (Khan 2016; Alizai 2016; Anwar 2018; Munir 2018; S. A. Khan 2020b). This can be seen in the continued application of Section 377 in the Pakistan Penal Code Act XLV of 1860 (PPC), as well as in aspects of other legal measures and rulings concerning gender variant communities. It is only in the last decade or so, from 2009-2018, wherein the process of recognising certain gender variant communities as citizens of the state began and finally materialised in 2018, with the passing of the Transgender Persons (Protection of Rights) Act (TPA) (S. A. Khan 2020b).

My research aims to analyse the colonial and postcolonial laws concerning the *kbawaja sira* and *hijra* communities, specifically 1) Section 377 of the IPC, 1860 2) Part II of the CTA, 1871 3) Section 377 of the PPC, 1860 4) the 2009 Khaki V. SSP Rawalpindi Supreme Court case and 5) the TPA, 2018. I intend to examine these laws and rulings from the coloniality of power and coloniality of gender analytical frameworks developed by Anibal Quijano and Maria Lugones. In doing so, I highlight how the coloniality of power and gender have led to the policing of gender and sexuality in the case of the *kbawaja siras* and *hijras* in India by the colonial state, and investigate the extent to which this prevails in the legal rulings and laws passed by the post-colonial state of Pakistan.

1.2 Research Objectives & Research Questions

The aim of this Research Paper (RP) is to determine the prevalence of the coloniality of power and gender in colonial laws in India and to uncover the extent of their influence in post-colonial laws in present day Pakistan. The research questions that inform my RP are as follows:

1. In the case of the *khawaja siras* and *hijras*, how were coloniality of power and gender enacted with the passing of Section 377 of the IPC in 1860 and the CTA in 1871, in colonial India?
2. To what extent have the coloniality of power and gender prevailed in Section 377 of the 1860 PPC, the 2009-2012 Supreme Court rulings and the 2018 TPA, in contemporary Pakistan?

The sub-questions which shape my research are as follows:

1. What does Section 377 of the IPC, 1860 state?
2. What measures were passed via Part II of the CTA, 1871?
3. How did the above-mentioned laws police gender and sexuality among the *khawaja sira* and *hijra* communities in colonial India?
4. What does Section 377 of the PPC, 1860 state?
5. What was the 2009 Khaki v. SSP Rawalpindi Supreme Court case about?
6. What court orders were issued as a result of the 2009 case?
7. What measures were passed via the TPA, 2018?
8. How do the above-mentioned laws and rulings police gender and sexuality among the *khawaja sira* and *hijra* communities in contemporary Pakistan?

1.3 Why is this Research Being Done?

There is extensive literature available about the culture and struggles of *khawaja sira* and *hijra* communities residing in South Asia (Brown 2005; Chaudhary et al. 2014; Hossain, 2012; Mithani et al. 2003; Mohyuddin, 2013; Shah, 1961; Sultana & Khan, 2012; Awan & Sheraz 2011; Abbas et al. 2014; Abdullah et al. 2012; Ahmed & Umair 2014; Alizai et al. 2016; Jami & Kamal 2015; Majeedullah 2016; Naqvi & Mujtaba 1997; Mughal et al. 2017). Moreover, analyses of the recent laws passed in relation to these communities in Pakistan and India, from a legal perspective are also widely available. At the same time, analyses of colonial laws concerning these communities is also accessible although not in as much depth. The first book-length literature available on this topic was ‘Governing Gender and Sexuality in Colonial India’ authored by Jessica Hinchy and published in 2019. As was the case with Hinchy’s book, the literature available on this theme has mostly been written from a post-colonial perspective, relying particularly on Foucault’s concepts of governmentality and sexuality (Hinchy 2019). Academic works that analyse colonial and postcolonial laws in relation to *hijra* and *khawaja sira* communities from a decolonial lens are rare. Through my RP, I intend to consolidate and build on the above-mentioned works by briefly tracing the history and culture of these communities in colonial India and contemporary Pakistan, and attempting to provide an in-depth analysis of certain laws concerning them from the coloniality of power and gender frameworks.

1.4 My RP Journey & Role as a Researcher

My personal journey in arriving to this topic for my RP began when I had recently started my master's programme at the International Institute of Social Studies (ISS). I had come across an interesting video which discussed gender fluidity in colonial India and how it was policed with the onset of colonisation (Malhotra and Sachdev 2020). I had recently been exposed to the concepts of coloniality of power and the coloniality of gender through the Making of Development course and I was able to understand more clearly how gender fluidity had been restrained in South Asia. I was also surprised to learn in more detail about the diverse local understandings and practices of gender and sexuality. I realised at that point that it is essential to explore these histories and knowledges, and understand that heteronormativity is not 'natural' but was made to be natural with the erasure of other ways of being, particularly during the British colonial rule (Hinchy 2019; S. Khan 2017; Shroff 2021; Moiz in Akber 2021). Otherwise concepts such as gender fluidity, can be traced back to 3000 years in the Indian subcontinent (Zwilling and Sweet in S. Khan 2017: 1285; Menon in Ghias 2021a). My positionality in writing this RP is that of a feminist ally to *kbawaja sira* and *hijra* communities. I intend to expose the role of coloniality of power and gender in policing non-normative bodies in colonial India and its continued prevalence in post-colonial Pakistan. I would like to offer my research contributions to those *kbawaja sira* and *hijra* communities of Pakistan who strive to resist the coloniality of power and gender enacted by the state.

1.5 Structure of the RP

The RP has been structured in a way whereby, it begins with Chapter 2 which provides an insight into the history and customs of *kbawaja sira* and *hijra* communities of South Asia as well as the present culture and struggles of these communities in Punjab and Sindh, in contemporary Pakistan. This is followed by a discussion of decolonial theory in Chapter 3, wherein the analytical frameworks of coloniality of power and the coloniality of gender are discussed at length. Chapter 4 offers an application of these analytical lenses on the colonial and post-colonial laws and rulings. The methodology of the RP is covered in Chapter 5 and the conclusion in Chapter 6. This RP has been written primarily via the collection of secondary research and social media sources.

Chapter 2 Khawaja Sira-ness and Hijra-hood

2.1 Brief History of the Khawaja Siras and Hijras of South Asia

Khawaja siras and *hijras* are among the local gender variant communities of South Asia (S. Khan 2016a). These communities have had a three-thousand-year presence in the region (Zwilling & Sweet 1996; Nanda 1999; S. Khan 2016a; Menon in Ghias 2021a). There are also several other gender variant groups within these broader categories in South Asia, like *zenanas*, *moorats*, *khunsas*, *faqees*, *sakbis*, *bhaguttuah*, etc. (F. Khan 2014; Shroff 2021; Shah 2021; Moiz in Akber 2021). However, this RP focuses specifically on the *khawaja sira* and *hijra* communities. The term *khawaja sira* is most commonly understood to mean a person who has a feminine soul, no matter what their physical appearance may indicate (F. Khan 2014; Moiz in Akber 2021). The term emerged as an honourable title given to such persons in the pre-colonial Delhi Sultanate and Mughal periods of rule in India (F. Khan 2014; Shroff 2021). The term is also associated with Islamic Sufism, wherein the Persian word '*khawaja*' refers to a teacher or mentor, particularly a Sufi saint (Shroff 2021). Usage of the word *khawaja* spread to the Indian subcontinent where it signified meaning "protector, honourable, and master" (Shroff 2021: 265). This led to the emergence of the term '*khawaja sira*' which referred to "master of secrets and guardian of women" (Shroff 201: 265). The former meaning was linked to the roles occupied by *khawaja siras* as advisors and members of royal courts as well as military commanders while the latter meaning was associated with their role as guards of the harem and the ability of *khawaja siras* to be a part of feminine spaces (Shroff in Abbas 2021). *Khawaja siras* who had senior prestigious positions even received income from lands given to them by local rulers (S. Khan 2017). Apart from the above-mentioned occupations, the *khawaja siras* also worked as servants of wealthy households and guards of Muslim tombs and graveyards (Shroff 2021).

Like *khawaja siras*, the *hijras* are also a gender variant community that has historically existed in South Asia (Shroff 2021). Their origins can be traced back to Islam as well as Hinduism (S. Khan 2016a; Reddy in Emon and Garlough 2015; Hossain 2012). In Hinduism, especially in creation myths, one finds gods who embrace the feminine as well as the masculine or transition between the two, like Lord Shiva and Vishnu (Vanita and Kidwai in S. Khan 2016a; Emon and Garlough 2015). *Hijras* also associate their descent with the Hindu goddess Mata Bahuchara and believe to draw their power to bless or to curse from her (Nanda in S. Khan 2016a; Hossain 2020). Others draw their lineage from *klibas* – ancient beings who were neither male nor female (Nanda in Emon and Garlough 2015).

In the case of Islam, the word *hijra* – a part of Urdu, Hindi and Bengali vocabulary, is derived from the Arabic word *hijr* which means separation or migration (Abbas and Ahmed in Shroff 2021; Hossain 2020; Moiz in Akber 2021). *Hijr* also represents the historical migration of the Holy Prophet from Makkah to Madina to flee from persecution in 622 CE (Shroff 2021; Uberman and Shay 2016; Menon in Ghias 2021a). This event marks the beginning of the Islamic calendar known as *hijrah* or *hijri* (Shroff 2021; Uberman and Shay 2016). In this manner, the *hijra* person is seen as one who migrates from the body to the soul (Chavez and Cotton in Shroff 2021; Menon in Ghias 2021a; Moiz in Akber 2021). Moreover, Surah 42, Verse 50, of the Quran is often cited as a source of legitimising those with gender ambiguities, (S. Khan 2016b; Emon and Garlough 2015). There is also a *Hadith* – the sayings of the Holy

Prophet, which refer to “*mukhannathun* or *mukhannatbeen*” who are described as men who are effeminate or share resemblance with women (Nanda in Emon and Garlough 2015). These persons have also been granted the duty of protecting the tomb of the Holy Prophet in Madina and the Holy Kabah in Makkah (S. Khan 2016b). Their asexuality leads them to be perceived as being closer to God (S. Khan 2016b; Emon and Garlough 2015; Moiz in Akber 2021). Interestingly, given the associations with Hinduism and Islam, many *hijras* incorporate both Islamic as well as Hindu practices in their lives (Loh in Emon and Garlough 2015; Hossain 2012).

Historically in South Asia, it is important to note that *hijras* referred to men who may or may not have undergone castration, were impotent, persons who were asexual, had ambiguous genitalia or did not associate with being a man or woman (Reddy and Cohen in Dutta 2012; Hossain 2020; Bohan and Bhattacharyya in Emon and Garlough 2015). Some of the kinds of work *hijras* have been involved in include *badhai*, collecting alms, dance performances in royal courts and sex work (Reddy and Cohen in Dutta 2012; S. Khan 2016a). *Badhai* refers to the tradition of *hijras* granting blessings on the occasions of the birth of children as well as weddings, in return for money or gifts (Dutta 2012; F. Khan 2014).



Figure 1 Royal women and hijras playing a local board game in Lucknow in early 17th century (Kettle 1790)

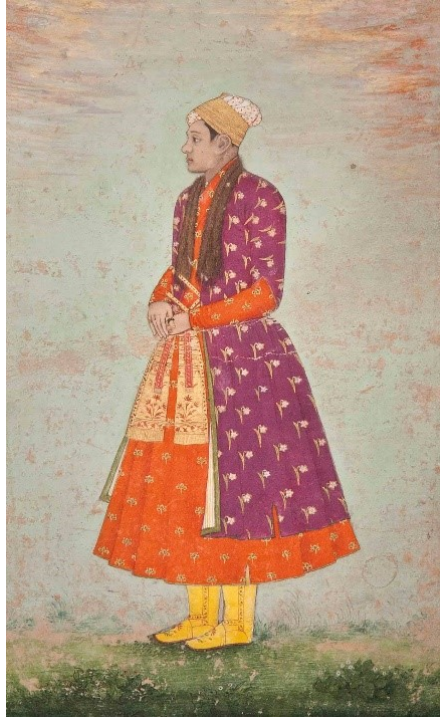


Figure 2 Khawaja sira – Khawas Khan serving the last Mughal ruler Bahadar Shah Zafar in late 17th century (Motamed 2013)

One of the aspects that has played a central role in the lives of *khawaja sira* and *hijra* communities is the relation between the *guru* and the *chela* (S. Khan 2016a; S. A. Khan 2020a). The words *guru* and *chela* find their origin in Sanskrit in Hinduism (Gould in F. Khan 2014). *Guru* refers to a mentor while *chela* refers to a student (F. Khan 2014). The relation can be understood as one based on kinship structure and spiritual discipleship among *hijras* and *khawaja siras* (S. A. Khan 2020a; Hinchy 2019). A similar overlapping relation exists in Islamic Sufism in the form of the *pir-murid* (master-disciple) relation (F. Khan 2014). Some of the famous *guru-chela* relations within *hijra* and *khawaja sira* communities are between the Sufi saints/scholars of the subcontinent and their *chelas* who were *hijras* or *faqees*, like Khawaja Moinuddin Chishti's *chela* Mariom and Ameer Khusro's *chela* Ganga Ram (Hossain 2020; Junejo in Shah et al. 2021). Generally, the *gurus* tend to be the elders within these communities who are in charge of families or households (S. A. Khan 2020a). They fulfil the role and duties of being a father and mother to their *chelas* whom they consider to be like their children and are also allotted responsibilities accordingly (S. A. Khan 2020a). The *guru-chela* relation also sustains these communities economically, whereby whatever is earned by the *chelas* is handed to the *gurus* who spend it on the maintenance of the households and community (S. A. Khan 2020a; Hossain 2020).

The purpose of the *guru* is to serve as a source of guidance to their *chelas*, teaching them the *khawaja sira* and *hijra* ways of being (S. Khan 2020a). These include learning about their creation myths, rituals, ceremonies, speaking their local jargon or what the *khawaja siras* call “*farsi kalam*” (Persian terminology spoken specifically by the *khawaja siras*), (S. A. Khan 2020a: 106; Hossain 2020; Moiz in Ghias 2019a). New members are initiated into the *guru-chela* relation through a ceremony usually known as *rasm-e-chela* (F. Khan 2014; S. A. Khan 2020a). Another rite associated with initiation is called *nirwaan* wherein, the genitals of a person are removed as a means of transcending their sexual needs (Emon and Garlough 2015;

Hossain 2020; Moiz in Salahuddin 2021) The act is generally believed to confer spiritual powers to the person undergoing it (Emon and Garlough 2015). It is important to note that the rituals of these communities may vary in nature geographically (F. Khan 2014).

Given the centuries-old knowledge traditions and rituals passed down via oral transmissions to these communities, the *kbawaja siras* and *hijras* ought to be understood as cultural and kinship structures (Shroff 2021; S.A Khan 2020a). This explains why terms such as “*kbawaja siraityal*” (*kbawaja sira* -ness) and “*hijra-hood*” exist (Moiz in Akber 2021). They signify “a culture, a respectability, a spirituality, a religiosity, a communality, a family, an affective response” (Moiz in Akber 2021; Hinchy 2017: 129). As a result, one becomes aware of the complexity of meaning these terms hold (S. Khan 2016b)

2.2 Khawaja Sira and Hijra Communities in Contemporary Pakistan

Following the end of the Mughal empire and the beginning of colonial rule, the *kbawaja siras* lost their honourable occupations and were forced into the margins of society along with the *hijra* communities (F. Khan 2014; S. Khan 2016a). Consequently, the term *kbawaja sira* eventually disappeared from the public eye until it was reclaimed in Pakistan much later by *kbawaja sira* activists in the early 2000s (F. Khan 2014; Moiz in Akber 2021). After the end of colonial rule and the partition of the Indian subcontinent in 1947, the *kbawaja sira* and *hijra* communities continued to survive in Pakistan but have faced severe marginalisation and violence (S. A. Khan 2020a; S. A. Khan 2020b; S. Khan 2016b; Khattak and Haq 2017; Ramay 2017; Hossain 2020; Shah et al. 2021; Moiz in Ghias 2020; Malik in HoursTv 2021). Several cases of murder, assault, harassment and abduction of members of these communities have been reported in recent years (Dawn no date).

The marginalisation and violence can be attributed to how notions of gender or sexual fluidity are generally frowned upon in Pakistani society today (S. Khan 2016b). Such an attitude cannot be divorced from the “history of colonial and reformist prejudice and notions of morality.” as we will observe later on (S. Khan 2016b: 26-27; Emon and Garlough 2015). Given the social stigma these communities face, many of its members flee from their homes or are disowned by their families and turn to begging, dancing or sex work as sources of livelihood (Emon and Garlough 2015; S. A. Khan 2020b; S. Khan 2017; Nisar 2018; TEDx Habib University 2019). Consequently, the *guru-chela* system remains a significant source of support and identity for *kbawaja siras* and *hijras* (F. Khan 2015; S. Khan 2016a; S.A. 2020a; BBC 2017; Malik in HoursTv 2021; Ghias 2019b).

While discrimination remains a challenge for these communities in Pakistan, considerable progress has also been made over the past two decades towards their acceptance and inclusion in society owing to trans and *kbawaja sira* activism and state rulings and laws (Malik in HoursTv 2021). The 2009 Supreme Court case finally recognised gender variant communities like the *kbawaja siras* and *hijras*, as citizens of the Pakistani state and gave them their fundamental rights which were further substantiated with the passing of the Transgender Persons Act (TPA) in 2018. (Islam 2020; Nisar 2018; Ramay 2017). The first national census which included these communities separately from disabled persons was done in 2017 and represented their population to be more than 10,000 in number (M. Khan in S. A Khan 2020b). However, the consensus was criticised for under-representing the actual numbers which are estimated to be around 500, 000 (S. A. Khan 2020b; Mustafa 2017).

Although in the past, the *khawaja sira* and *hijra* communities were different, such differences became blurred with the deliberate elimination of the *khawaja sira*'s royal duties during colonial rule (S. Khan 2017). These blurred boundaries were carried forward into post-colonial Pakistan (S. Khan 2017). However, in Pakistan, the preferred term for both these communities has become *khawaja sira* as it represents a point in time – the pre-colonial era, when gender variant communities, namely the *khawaja siras*, were held in high esteem and power (S. Khan 2016b; Hossain 2020; Shroff 2021). On the other hand, the term transgender began to gain popularity in Pakistan from 2011 onwards, amid some middle-class gender activists in Karachi (F. Khan 2015). The term became commonly used among internationally funded NGOs working for AIDS, HIV and STD's prevention among local gender variant communities in Pakistan (S. Khan 2016a). The use of transgender was also incorporated by the state as a somewhat umbrella category for certain gender variant persons in the passing of the 2018 Transgender Persons Act (Shroff 2021).

Currently, many gender variant persons use transgender interchangeably with the terms *khawaja sira* and *hijra* while some use it to assert a distinct identity (F. Khan 2015; Shroff 2021; BBC 2017). However, critics have argued that the translation or inclusion of local terms into Western ones leads to “problematic connotations” as parallel understandings in the Western context do not necessarily exist (Hossain 2020: 407; S. Khan 2017; BBC 2017; Moiz 2021a). Nevertheless, the term transgender is often simultaneously used with local terms like *khawaja siras* and *hijras*. An important aspect to keep in mind is that these terms and the meanings they hold are not stagnant but change across time and space (F. Khan 2015; Moiz in 2021b). Examples of this can be observed with the amalgamation of *khawaja siras* with *hijras* in Pakistan as well as the variations in customs within these communities across regions in South Asia.



Figure 3 *Khawaja sira* rights protest in Karachi (Moiz 2021c)

Chapter 3 Decolonial Theory

3.1 Introduction

In my RP, I rely on decolonial theory to aid my understanding of the ways as well as impact of the policing of gender and sexuality in the case of the *khawaja sira* and *hijra* communities in colonial India and contemporary Pakistan. Decolonial theory sheds light on how the colonial mentality formulated particular kinds of thinking and forms of power which continue to influence all spheres of life i.e. political, social, economic, legal, etc. (Mendoza 2016). As a result, decolonial scholars stress on the need to understand and recognise the colonial logics of racialisation and gendering imposed on native societies in the past, in order to work towards transforming the present and envisioning a distinct future (Mendoza 2016). In Chapter 3, I discuss some of the key concepts of decolonial theory that are relevant to my research namely the coloniality of power and the coloniality of gender as well as their critique.

Decolonial scholars situate their theories in the Spanish and Portuguese colonial conquests of Latin America from the 16th to the 19th century (Mendoza 2016). It was during these conquests what Anibal Quijano calls the ‘coloniality of power’ emerged (Mendoza 2016). It is important to clarify here what coloniality means and how it differs from colonialism. Colonialism refers to the historical acts of conquest, whereby a people’s sovereignty was imposed onto others (Mendoza 2016). Coloniality, on the other hand, represents “[the] long-standing patterns of power that emerge in the context of colonialism, which redefine culture, labor, intersubjective relations, aspirations of the self, common sense, and knowledge production in ways that accredit the superiority of the colonizer” (Mendoza 2016: 114).

Now, in order to understand what is meant by the coloniality of power, we first have to look at Quijano’s “model of global, Eurocentered capitalist power” (Lugones 2007: 189). Let us break down these terms and examine them individually. According to Quijano, power is situated in “relations of domination, exploitation and conflict” which become apparent as individuals struggle to control the resources and products associated with what he identifies as the four fundamental areas of human life – sex, collective authority, labour and subjectivity or intersubjectivity (Lugones 2007: 189). Moreover, capitalism is explained as “the structural articulation of all historically known forms of control of labour or exploitation” (Quijano in Lugones 2007: 191). Lastly, Eurocentrism refers to the belief system whereby the European is always positioned as the superior in relation to the non-European (Mendoza 2016: 114). This way of thinking led to the histories and knowledges of the non-Europeans to be condemned as inferior or “less than human” in the colonial conquests (Lugones 2010: 745; Mendoza 2016: 113). Quijano discusses how during the colonial time period, Western Europe became the source of “colonial/modern capitalist power.” (2000: 217-218). From here on we can begin to comprehend what is meant by a global Eurocentric capitalist model of power (Quijano in Lugones 2007). This model is further organised around two axes – modernity and the coloniality of power (Lugones 2007). Modernity can be understood as a “knowledge perspective” that emerged in Western Europe which organised the world into homogenous separate categories that were characterised by hierarchies and dichotomies such as of “superior and inferior, rational and irrational, primitive and civilized, traditional and modern.” (Quijano 2000: 221; Lugones 2010: 742; Lugones 2008: 4). Such a knowledge perspective focused heavily on rational knowledge in line with the Enlightenment paradigm

which completely transformed the relations between Europe and the rest of the world (Quijano 2000; Mendoza 2016; Moiz 2021d).

3.1.1 Coloniality of Power

The second axis of the global Eurocentric capitalist mode of power is the coloniality of power which can be defined as a process of reclassifying native populations in order to assert the superiority of the colonisers (Mendoza 2016). One of the dominant classifications that was created as a result, was of the concept of race (Quijano 2000). Quijano describes race as “a new mental category to codify the relations between conquering and conquered populations: the idea of ‘race’, as biologically structural and hierarchical differences between the dominant and dominated... [which] came to be considered as ‘natural’.” (2000: 216). This category was used to explain not only outer or physiognomic differences but cultural and mental ones as well (Quijano 2000: 216). Consequently, the concept of race was used to prescribe roles within the “division of labour and in the control of resources of production [for capitalism].” (Quijano 2000: 216). Quijano asserts that the category of race led to the creation of historically new identities in societies such as of ‘Spanish’, ‘Portuguese’, ‘Indians’, ‘Negroes’, ‘Whites’ and ‘Europeans’ (Quijano 2000). These identities, Quijano argues have been the most prominent depictions of the coloniality of power since the past 500 years. (2000).

One of the major consequences of the new classification of race was the undermining of existing identities among the colonised peoples (Quijano 2000). When the Castilians arrived to what they named America and the British to North America, they encountered peoples with diverse histories, languages and identities (Quijano 2000). These included the Aztecs, Incas, Mayans, Chibchas, Aymaras, Quechuas among others who were all placed under category of ‘Indians’ by the colonisers (Quijano 2000). Similarly, the Zulus, Yorubas, Congos, Ashantis, Bacongos among other peoples from Africa were homogenised under the category of ‘Negroes’ or ‘Blacks’ (Quijano 2000). The reason behind separating and making these singular categories was to assign these identities particular kinds of work for the purpose of labour exploitation for capitalism (Quijano 2000; Mendoza 2016). This is why the ‘Indians’ were later restricted to serfdom and the ‘Negroes’ to slavery (Quijano 2000).

Aside from classifying these peoples along the lines of race, the colonisers also embarked on a mission to ‘civilise’ these native communities (Lugones 2010; Mendoza 2016). This entailed transforming people’s memories, sense of selves, their relations to the cosmos, their rituals and even their reproductive practices and sexualities (Lugones 2010). These transformations were severely violent and exploitative (Mendoza 2016; Lugones 2010). Interestingly, Christianity and the “rhetoric of salvation” played a central role in enabling the civilising mission to succeed (Lugones 2010: 744-745; Mendoza 2016: 112-113).

It becomes essential to note that any discussion on coloniality and the coloniality of power, ought to be rendered incomplete if it does not touch upon how inherent to these structures of power and categorisations was the act of dehumanising or reducing the conquered peoples to being “less than human” (Lugones 2010: 745, 747, 751; Mendoza 2016: 112-113). The colonised by default were viewed as being inferior, primitive and irrational hence stripped from their knowledges, practices and ways of being (Mendoza 2016; Lugones 2010; Lugones 2008; Quijano 2000). These classifications or labels emerged due to the

relation between coloniality, coloniality of power and modernity which placed people into hierarchical dichotomies and consequently denied them their realities and existence (Lugones 2010). The end result was the separation of the human from the non-human/nature and the dehumanisation of peoples (Lugones 2010). While colonialism may have ended, the coloniality of power remains and it carries on in shaping the interactions between the “the West [Europe and North America] and the Rest” (Mendoza 2016).

3.1.2 Coloniality of Gender

After Quijano introduced the concept of the coloniality of power, many decolonial scholars have built on his work by expanding the concept and applying it to other areas (Mendoza 2016). The coloniality of gender is one such example which was developed by Maria Lugones and has primarily informed my research. I will discuss her work in depth in the present section.

Lugones argues that colonialism led to the imposition of a new gender system – “the modern/colonial gender system” for the colonised peoples (Lugones 2007: 186). Consequently, gender was introduced as a “colonial concept and mode of organization of relations of production, property relations, of cosmologies and ways of knowing” (Lugones 2007: 186). The coloniality of power is what allowed the formation of a colonial gender system because the racial classification of people became a prerequisite for one on the basis of gender (Lugones 2007; Lugones 2008). However, Lugones finds Quijano’s conception of gender too narrow as he only focuses on patriarchal, heterosexual and biologically determinist notions of gender when discussing conflicts that may arise in what he identifies as one of the basic areas of life – sex, its resources and products (2007; 2008; 2010;). As a result, Lugones finds Quijano guilty of conceding to the hegemonic understanding of gender (2008). She however, intends on expanding the meaning of gender while retaining Quijano’s concept of coloniality of power but further complicating it (Lugones 2007: 190; Lugones 2008: 2; Mendoza 2016: 116).

Lugones emphasises on the need to historicise gender so that the focus is not only on patriarchy but also on heterosexualism, capitalism, coloniality of power and the interrelations between them (2007). She names this analysis the ‘coloniality of gender’ and overcoming it ‘decolonial feminism’ (Lugones 2010: 747). Lugones argues that gender and sex are social constructs which place people into clearly defined categories of men and women, even when medical and anthropological insights have shown otherwise (Greenberg in Lugones 2007: 194). The scholar problematises biological understandings of sex by pointing out that these explanations were also produced in a particular social and historical context and then essentialised (Lugones 2007; Lugones 2008; Moiz in Akber 2021). This in turn, led to the naturalisation of gender and sexual differences during colonisation, as was the case with race (Lugones 2007; Lugones 2010; Moiz in Akber 2021). Many indigenous societies recognised individuals existing outside the gender or sexual binary before colonisation (Lugones 2007). However, because such persons were beyond the comprehension of heterosexual and patriarchal relations, presumed on part of the colonisers, they were feared as a threat to colonial power (Lugones 2007; Lugones 2008; Mendoza 2016). Lugones’s analytical framework uncovers the experiences of non-White women and people who could not easily fit into the colonial patriarchal heterosexual society, something which Quijano’s analytical framework had grossly overlooked (2008).

By citing the work of Native feminist scholars, Lugones shows the existence of many indigenous tribes who were matriarchal, egalitarian, recognised homosexuality and were not structured around 'gender' (Allen and Oyewumi in Lugones 2007; Mendoza 2016; Oyewumi in Lugones 2008). For instance, Allen discusses examples of Native American tribes who understood gender from an egalitarian lens rather than one of subordination as was characteristic of the colonial modern gender system (Lugones 2007). Moreover, the third gender which referred to a combination of gender and sexual expressions that did not fit into a binary understanding, were also acknowledged among these tribes (Horswell in Lugones 2007; Allen in Lugones 2008). Horswell recorded the existence of 150 of such tribes (Lugones 2007). Allen also gives examples of several tribes that were governed by women, naming 9 specifically (Lugones 2007; Lugones 2008). She also records 88 tribes which recognised homosexuality in which 35 did so in a positive light and 20 referred particularly to lesbianism (Allen in Lugones 2007).

Interestingly, gender did not play a central role in shaping people's lives in many societies such as the Yoruba originating from West Africa, until a binary and hierarchical version of gender was imposed upon the community via the colonial conquest (Oyewumi in Lugones 2007; Oyewumi in Lugones 2008; Lugones 2010). This marked the beginning of the "European state system" and the "patriarchal colonial state" which imposed the category of 'women' and their subordination to 'men' in all spheres, including the public and political spheres where before colonisation, women had occupied leadership roles, economic power, property and had actively participated in society (Oyewumi in Lugones 2007: 197; Oyewumi in Lugones 2008: 8-9). Oyewumi argues that the translation of the native terms to men and women is inadequate since the local terms did not reflect a hierarchy or binary (Lugones 2008). The scholar does acknowledge that the subordination of 'women' was possible in part due to the collusion of Yoruba 'men' in executing the colonial modern gender system (Lugones 2007). These examples highlight the diverse understandings and roles of gender that had existed apart from the heterosexual and patriarchal ones that characterise modernity and the colonial gender system (Lugones 2007; Lugones 2008). According to Lugones, examples like these evidently show how "European constructions of gender introduced internal hierarchies that broke down the solidarity between men and women destroying previous ties based on complementarity and reciprocity." (Mendoza 2016: 116; Lugones 2008: 1).

Persistent efforts to erase indigenous ways of being were made in order to impose the new gender system by the colonisers (Lugones 2007). These efforts were deeply violent in terms of sexual and labour exploitation as well as in the reduction of local meanings and in the refusal to let people live their lives according to their will and way (Lugones 2007; Lugones 2010; Mendoza 2016; Lugones 2008). This refusal lies at the heart of coloniality (Lugones 2010). The very need to impose this gender system in the first place stemmed from the eroticisation of peoples from Africa, Asia and the Americas and the need to control and civilise their 'aggressive' and 'excessive' sexualities to secure "racial, economic and political power" (McClintock in Lugones 2007: 204-205; Lugones in Mendoza 2016: 117; Lugones 2008: 13). Thus, the indigenous peoples were considered primitive, barbaric, evil, non-human and therefore in need of reformation (Lugones 2010). Christianity also played a vital role civilising and reinforcing patriarchal and hierarchical values among native populations (Allen in Lugones 2007). It replaced the plural and feminine nature of the sacred with a singular and masculine power among the locals (Allen in Lugones 2007; Allen in Lugones 2008).

Like coloniality of power, the coloniality of gender also remains with us today (Lugones 2010). We have internalised the gender binary and its association with civilisation, citizenship and civil society (Lugones 2010). The postcolonial states and their institutions continue to categorise people on the basis of race and sex for the purpose of governance (Greenberg in Lugones 2007). This is precisely why Lugones stresses on the need to decolonise by exercising “a critique of racialized, colonial, and capitalist heterosexualist gender oppression” (2010: 746). For Lugones, the task of decolonial feminism is to not only critique but to resist the modern colonial gender system by transcending colonial difference and by returning to relations of solidarity and communality (2010; 2007).

3.1.3 Critique of Coloniality of Gender

Some scholars have been critical of certain aspects of Lugones’s coloniality of gender framework. Paredes, for instance, asserts that Lugones overlooks the central role gender has played among indigenous patriarchal societies (Mendoza 2016). Others like Segato have questioned the ethnographic data referred to by Lugones, in terms of how valid it is (Mendoza 2016). Based on her own research of the Yoruba, Segato disagrees with Oyewumi’s analysis of gender not being a principal form of social organisation for the Yoruba (Mendoza 2016). Segato argues that while colonisation certainly intensified patriarchal and hierarchal tendencies and led to the severe exclusion and loss of power for indigenous women, her research also shows considerable presence of gender as a discriminatory and differential category among the Yoruba prior to colonisation (Mendoza 2016).

Similarly, in the case of Andean society, Cusicanqui argues that although gender was understood and practiced in an egalitarian manner among the locals, it was very much centred around heterosexuality (Mendoza 2016). Moreover, she holds “republican systems of governance, modernization and development.” responsible for destroying indigenous ways of being (Cusicanqui in Mendoza 2016: 118). According to Cusicanqui, local customs and practices relating to gender were able to survive after colonisation but were severely undermined through “a gradual process of patriarchalization that accompanied modernization and the encroachment of the modern nation-state upon Andean communities.” (Mendoza 2016: 118). However, one factor that all the scholars agree to, including Lugones, is that colonisation forced a European understanding of gender upon indigenous populations which led to substantial changes in the ways their societies were organised, often through extreme violence (Mendoza 2016). The critiques of these scholars raise some interesting reflections which I will discuss in Chapter 4, when I apply the coloniality of gender framework in the case of the *khawaja sira* and *hijra* communities in the past and present. I believe Lugones’s framework provides us with a useful way to examine gender and sexuality and its relation to coloniality and modernity in the context of the *khawaja siras* and *hijras* of South Asia.

Chapter 4 Colonial Policing of Khawaja Siras and Hijras – The Past & Present

In this chapter, I discuss in detail the ways gender and sexuality were policed among the *hijras* and *khawaja siras* in colonial India with the passing of the anti-sodomy law in 1860 and part II of the Criminal Tribes Act in 1871. I then turn to examining some of the laws and legal documents which affect the *khawaja sira* and hijra communities in contemporary Pakistan today, namely Section 377 of the Pakistan Penal Code, the 2009 Supreme Court case – *Khaki v. SSP Operations Rawalpindi* and the Transgender Persons (Protection of Rights) Act, 2018. I will analyse these laws from the coloniality of power and gender lenses and examine the extent of the influence of the colonial era laws in India, on the contemporary ones in Pakistan.

4.1 The Past – Colonial India

By 1858, after the Indian mutiny of 1857, the British monarchy had been firmly established in colonial India (Dutta 2012). However, since the 1850s, there were a series of “moral panics” among the British state officials of the North Western Provinces (NWP) and Oudh regarding ‘eunuchs’, resulting from the spread of stories of a few criminal cases involving murder, abduction or castration in which *hijras* or other gender variant persons were either involved as victims or perpetrators (Hinchy 2013: 199; Hinchy 2019: 7). These anxieties exacerbated after the 1857 mutiny, which had put to the forefront the vulnerability of the colonial state and the lack of information it possessed about the native population, specifically the ‘eunuchs’ (Hinchy 2013; Hinchy in Pament 2021; Hinchy 2019; Moiz in Ghias 2021b). Consequently, the colonial state felt obligated to safeguard law and order, and cleanse society from what it perceived to be ‘moral decadence’ (Hinchy in Pament 2021). It was under these circumstances that the figure of the ‘eunuch’ was viewed as a threat to state power and to “conjugal, heterosexual and reproductive sexualities, and patrilineal inheritance.” (Hinchy in Pament 2021: 265; Hinchy 2019: 3). These notions were quite prevalent in NWP where there was a considerable missionary influence on laws and policies (Hinchy in Pament 2021: 265).

Given these conditions, a stereotype of the ‘eunuch’ had developed among the British, whereby the ‘eunuch’ was seen as a prostitute, a sodomite, a hereditary criminal transgressing masculinity and being addicted to abducting children and castrating them (Hinchy 2013; Hinchy in Pament 2021; Hinchy 2020). Houses of eunuchs were believed to be brothels where the male children would be taught of corrupt sexual practices (Hinchy 2013; Hinchy 2020). The stereotype of the ‘eunuch’ did not conform to British notions of gender, sexuality, modernity and religion, hence became the subject of state policing (Gannon 2009; S. Khan 2016a; S. Khan 2016b; Shroff 2021; Hinchy in Pament 2021).

Colonial rule also deliberately brought an end to the political power of the *khawaja sira* who were initially seen as ‘respectable eunuchs’ by the British (Hinchy 2014: 415; Hinchy 2013). Hinchy sheds light on the fall of the *khawaja sira* “from nobility to impoverishment” in the case of the state of Oudh which she argues highlights the connection between the politics of imperialism and sexuality (Hinchy 2014: 415-416). What became a problem in the

case of the *khawaja siras*, was their ability to navigate between domestic or private as well as official or public spaces (Hinchy 2014). These spheres had become strictly separated in European society with the rise of evangelicalism which associated the former with femininity and the latter with masculinity (Hinchy 2014). As a result, the existence of the *khawaja sira* as a mediator within these areas became difficult for the British to digest (Hinchy 2014). It pointed to a “topsy-turvy gender order” (Hinchy 2014: 422). Consequently, the Victorian ideals of the British led them to introduce laws which undermined the diversity within local structures of domesticity and kinship in order to ‘reform’ Indian society (Hinchy 2014; Moiz 2021a). By the mid-19th century, the British had become increasingly critical of the *khawaja siras* and the roles they served within society (Hinchy 2014).

4.1.1 Section 377 of the Indian Penal Code Act XLV of 1860

One of the ways the colonial state contained its anxieties relating to ‘eunuchs’ in order to maintain civility and eliminate any threats to state authority, was with the insertion of Section 377 of the IPC in 1860, whereby sodomy was declared a criminal act under the title – “Of Unnatural Offences” (Indian Penal Code Act XLV 1860: 310; S. Khan 2016a 223; S. Khan 2017: 1287; Hinchy 2013: 197). The section stated that “Whoever voluntarily has carnal intercourse against the order of nature with any woman, or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine” (Indian Penal Code Act XLV 1860: 310). The section further clarified that for the act to be considered a violation, penetration had to occur (Indian Penal Code Act XLV 1860). This law was the state’s way of policing what they believed to be abnormal male sexualities (Hinchy 2013: 197). In Victorian England, homosexuality was simply unacceptable in society and hence needed to be contained (Hinchy 2013: 201).

4.1.2 Part II of the Criminal Tribes Act (CTA) of 1871

The most intense form of policing against the *khawaja siras* and *hijras* was formulated in the shape of the second part of the CTA of 1871 (Hinchy 2019). The first section of the CTA dealt with criminal tribes i.e. around 200 tribes that were criminalised by the British based on their “hereditary criminal” nature (Samel 2018: 187-188). The second section of the Act was concerned with ‘eunuchs’ and like the first section, assumed eunuchs to be inherently deviant and immoral (Samel 2018; Shroff 2021). The Act was enforced in the NWP in 1871/72 and in Oudh, in 1877 when it became a part of NWP (S. Khan 2016b; Samel 2018; Hinchy 2013; Hinchy 2017). Apart from these provinces, the second part of the CTA was not applied elsewhere in India, largely because the ‘eunuch’ was not perceived as a threat to colonial rule in other areas (Hinchy 2013; Hinchy 2019). Thus, the view of *hijras* and *khawaja siras* being a “problem population” or “ungovernable” was situated in particular provinces and localities (Hinchy 2019: 8). In NWP and Oudh, the CTA was executed with the publication of annual reports highlighting the progress and failures in its execution (Hinchy 2013).

The Policies of Part II of the CTA

According to part II of the CTA, any men who either voluntarily or upon medical examination were discovered to be impotent, had to register with the state and submit to its

surveillance and regulation (S. Khan 2016a; Hinchy 2013; Gannon 2009). Local governments, specifically the district police departments, were given specific guidelines to maintain registers of eunuchs comprising of information about their names, residence, areas they visited frequently, their occupations, the year when they were ‘emasculated’, their properties, etc. (Samel 2018; Hinchy 2013; Hinchy 2019; Hinchy 2017). These measures were undertaken for eunuchs who were under suspicion of abducting or castrating children or violating Section 377 of the IPC (Samel 2018; Hinchy 2013). The measures led to the creation of a “state-centred system of knowledge” for the ‘eunuch’ population (S. Khan 2016a: 224). The colonial registers became the “linchpin of both colonial intelligence and the policing of eunuchs at the local level” (Hinchy 2017: 133). Refusal on part of the ‘eunuchs’ to provide this information would be penalised (Samel 2018). Through the Act, ‘eunuchs’ were also penalised if they wore a female attire, danced in public voluntarily or for money or housed boys under the age of 16 (Samel 2018; Hinchy 2013). They were also banned from adopting children, acting as guardians, writing a will and making gifts (Samel 2018; Hinchy 2013). A violation of any of these laws would lead to a fine, imprisonment for a maximum of two years or both (Gannon 2009).

Intentions Behind Part II of the CTA

There were three motives behind registering ‘eunuchs’: 1) To prevent sodomy 2) To erase their presence from the public 3) To exterminate ‘eunuchs’ altogether (Hinchy 2013). The first two were to be achieved in the short run while the last one was to be attained in the long run (Hinchy 2020). It is interesting to note that for the colonial state, ending the practices associated with ‘eunuchs’ was not enough, but the very existence of these beings had to come to an end (Gannon 2009). The British were determined to outlaw what they perceived to be “transgressive masculinities” (S. Khan 2016b: 20, 24; Hinchy 2013: 197). For the British, all the activities that ‘eunuchs’ were involved in such as wearing feminine attire, singing, dancing, begging, joking or speaking in their “erotic language” were signs of obscenity that were corroding the society and needed to be purged (Hinchy 2019: 9). The *guru-chela* relations among the *khawaja siras* and *hijras* were also scrutinised from the lens of coercion, criminality and sexual deviancy, since they differed significantly from heteronormative familial relations (Hinchy 2014; Hinchy 2019; Hinchy 2017). Given these attitudes of the colonial state, contrary to the case of colonised peoples elsewhere, there was no intention to include ‘eunuchs’ in labour production (Hinchy in Pament 2021).

Impact of CTA on Khawaja Siras and Hijras

The policies of the CTA were a direct attack to many of the core rituals and practices of the *khawaja siras* and *hijras*, and how they expressed their gender and sexualities (Hinchy 2013). The British colonisers denied these gender variant communities like the *hijras* and *zenanas* their femininity which was very much a part of their identity (Hinchy 2019). For instance, members of these communities could no longer dress as they wanted to (Hinchy 2013). ‘Eunuchs’ were also deliberately documented as men in order to depict them as examples of failed men and often labelled “habitual sodomites” which implied that they were men who engaged in sexual relations with other men (Hinchy 2019: 8; Hinchy 2017: 137; Moiz 2021d; Moiz 2021e).

Singing or dancing also aroused fear from the colonial gaze which viewed these activities among the communities as dangerous since they were suspected to encourage people to

commit acts of perversion or immorality like that of sodomy (S. Khan 2016b; S. Khan 2016a; S. Khan 2017). Consequently, performing the ritual of *badbai* – a source of earning for the *hijra* communities also became a challenge. The tradition of *badbai* was only allowed to be carried out in the form of collecting alms or without the use of music or dance (Hinchy in Pament 2021). Moreover, ‘eunuchs’ living with families that had children were forced to leave them (Gannon 2009: 332). By taking away their ability to adopt children or become their guardians, the state actively refused to let these communities have families of their own (Gannon 2009: 333). Many members of these communities would run away to other states where the CTA was not in effect, in order to avoid criminalisation (S. Khan 2016b). However, migration and mobility here were viewed as proof of criminal actions in the eyes of the colonial state who saw them as attempts to destabilise provincial borders or to kidnap or castrate children (Hinchy 2019).

Being deprived of their civil rights and traditional customs also meant these communities were deprived from their major sources of earning thus forced into poverty (Hinchy 2013; S. A. Khan 2020b). The *hijras* had enjoyed a codified right to beg by many states but it was abolished by the British on the grounds of financial extortion (S. Khan 2016b; S. Khan 2016a; S. Khan 2017). Moreover, many of the measures directly affected the *guru-chela* relations of discipleship and succession (Hinchy 2019: 2). *Khawaja siras* and *hijras* who were *gurus* could no longer receive *sanads* - land deeds and cash allowances or pass on their property to their *chelas* unless the *chelas* were also declared ‘eunuchs’ who were living with them at the time of their *guru*’s death, otherwise the properties would be ceased by the state (S. Khan 2016b; S. Khan 2016a; Gannon 2009). Some members of these communities witnessed the loss of *sanads* that had remained in their lineages for 87 years (Gannon 2009). In the case of the *khawaja siras*, the measures of the CTA as well as the overall colonial attitude towards them led to the loss of their status, power and income, resulting in their gradual disappearance from social roles by early 20th-century (Hinchy 2014).

Significance

The homogenisation of the diverse gender variant groups under the term ‘eunuch’ or *hijra* by the British through the CTA was highly problematic. They reductively understood these groups to be castrated men and sodomites hence “embodiments of failed masculinity” (S. Khan 2016b: 14; 2016a: 223; Shroff 2021: 264; Hinchy 2013: 196, 198; Dutta 2012: 828; Hinchy 2017: 130; Gannon 2009: 330). Some examples of the existence of other gender variant groups were those of *zenanas*, *bhanda*s, *sakbis*, *mukbanis* and *bhaguttuab* (Hinchy 2017; Hinchy 2013; Gannon 2009). Interestingly, the colonial archives show discrepancies in the documentation of ‘eunuchs’, wherein persons not fitting into the criteria deduced by the British, were also registered as ‘eunuchs’ (S. Khan 2016b; S. Khan 2016b). This served as a “fracturing of the eunuch stereotype” (Hinchy 2017: 133). For instance, not all ‘eunuchs’ were impotent (Hinchy 2013:). This included *zenanas* who would occasionally dress in women’s attire but otherwise would be men who had families of their own (Hinchy 2013). This goes on to show that the colonisers could not maintain their own reductionist categorisations of the local gender variant communities which unintentionally brought forward the nuances in fluid expressions of gender and sexuality (S. Khan 2016b; Dutta 2012; Hinchy in Pament 2021; Hossain 2012). The British were frustrated themselves in their failure to maintain rigid classifications hence declared the ‘eunuchs’ to be “an unclassifiable in-between” (Hinchy 2013: 198; Hinchy 2019: 9). However, this could not be digested for long and the need to categorise was reinforced with the link to impotency. In the 1880s, the provincial

governments instructed a medical evaluation of eunuchs who had not undergone castration and in the 1890s, this became a precondition for registering ‘eunuchs’ (Hinchy 2013; Gannon 2009). The diverse groups within the category of ‘eunuch’ found these examinations to be extremely invasive but unfortunately were powerless to challenge them (Hinchy 2013).

In 1911, the second part of the CTA was abolished because it was incorrectly believed that the ‘eunuch’ population had been exterminated when in reality, gender variant persons had by then managed to strategically avoid being policed via loopholes (Hinchy in Pament 2021; Hinchy 2020). Through this Act, the colonial gaze had scrutinised and codified the native gender variant population so that it adhered to British Victorian codes of conduct (S. Khan 2016b). Although the second part of the CTA was abrogated in 1911, the colonial laws certainly played an extremely significant role in the marginalisation and impoverishment of the *khawaja siras* and *hijras* in NWP (S. Khan 2016a; S. Khan 2017; Samel 2018; Hinchy 2013). Prior to the onset of colonisation, these communities were able to exist and thrive to a certain extent (S. Khan 2016b: 27). They were not feared or pathologised (S. Khan 2016b). But all this changed drastically with the state sanctioned criminalisation of their being, their sexual desires and customary and economic practices (S. Khan 2016b; Moiz in Ghias 2021b; Menon in Ghias 2021a).

Having said that, the colonial policing of gender and sexuality and the subsequent marginalisation and impoverishment of gender variant communities like the *khawaja siras* and *hijras* would not have succeeded without the involvement and support of certain ruling elites (S. Khan 2016b). Prior to colonisation, there was a presence of fluid forms of gender and sexuality in public spaces and among powerful ranks owing to its acceptance by the local elites (S. Khan 2016b). For instance, there was often a public celebration of same-sex relations in the Mughal Empire (Kidwai in S. Khan 2017). However, this acceptance was not approved by the more conservative local elites as well as the colonial rulers who subsequently began their project of regulating and civilising the “non-normative and decadent sexualities” through the passage of various laws (S. Khan 2016b: 23).

The colonial project of policing gender and sexuality reinforced the opinion of some conservative local reformers and middle class elites who also felt that the *khawaja siras* and *hijras* had undermined normative masculinity which had to be reclaimed in order to overthrow the colonial power and adhere to the righteous principles of religion (S. Khan 2016b; S. Khan 2016a; Hinchy in Pament 2021). Some of the prominent personalities which promoted these views included Sir Syed Ahmad Khan, Shah Waliullah, Aziz Ahmad and Muhammad Faiz Buksh (S. Khan 2017). Some among them like Sir Syed Ahmad Khan, had been educated under the British schooling system, hence had been largely influenced by puritanical Victorian values that encouraged him to re-envision India from a “remote pure past” and to promote heteronormative views around gender and sexuality (Vanita and Kidwai in S. Khan 2016a; Moiz in Akber 2021). Others like Shah Waliullah staunchly criticised fluid gender and sexual expressions from a conservative angle and favoured a return to heteronormativity (Al Ghazali in S. Khan 2016a). There is also evidence of famous literary personalities like Altaf Hussain Hali and Shah Mardan who possessed similar views (Vanita in S. Khan 2016a). These cases point to “a collusion of colonial and reformist interests in determining the fate of those who did not embrace more binary forms of gender and sexuality in the 19th century.” (S. Khan 2016a: 225). The role of indigenous elites therefore explains the continuity in the presence of colonial laws in South Asia long after the end of colonialism – traces of

the colonial gender system remain and undermine aspects of local cultures and histories (S. Khan 2016b; S. Khan 2017; S. Khan 2016a).

4.1.3 The Coloniality of Power & Gender

One finds several parallels when applying Quijano and Lugones's frameworks of analyses to the experiences of *khawaja siras* and *hijras* in India. I believe the application of these frameworks gives us valuable insights into how concerted efforts were made to erase the existence and cultures of these gender variant communities.

Evident in the colonial policing of *khawaja siras* and *hijras* are ideas relating to modernity and the application of the coloniality of power and gender. The attitudes and laws of the colonial state clearly depict the hierarchies and dichotomies that emerged with modernity, wherein the Europeans were understood to be the superior, civilised, rational and modern peoples in opposition to all others (Quijano 2000; Lugones 2007; Lugones 2010). In such a worldview, the colonised populations by default are seen as "less than human" (Lugones 2010: 745). The case with India was no different. However, the *khawaja siras* and *hijras* can perhaps be ranked at the very bottom of the hierarchy of non-human since their existence transcends the gender binary. This was also the case with third gender or gender fluid communities elsewhere, as discussed by Lugones. Consequently, *khawaja siras* and *hijras* have faced the most violent expressions of colonial power in India, whereby their very existence was criminalised and their bodies were severely regulated in terms of what they wore, how they conducted themselves, who they could live with, who they could have sexual relations with, to recall a few of these instances. It is also important to note that the violence was not only limited to their bodies but how their bodies and communities were perceived. The colonial policing of *hijra* and *khawaja sira* communities marked a significant shift in viewing *khawaja sira*-ness and *hijra*-hood from knowledge traditions to a type of sexuality, that too a deviant one, which in turn justified control and violence against them (Hinchy 2017).

We also see the application of the coloniality of power in the drive of the British colonisers to categorise or classify the diverse gender variant groups in order to manage and control them effectively under the term 'eunuch'. This reminds one of the reductive categorisations of 'Indians', 'Negroes' or 'Blacks' which were done in North and Latin America (Quijano 2000). Thus, it is important to point out that colonial classifications ought to be understood as "systems of power that [had] multiple effects on lives and bodies." (Martinez in Hinchy 2017: 130). However, one aspect that is somewhat missing when we apply Quijano's conception of global Eurocentric capitalist power and its axes in the case of the *khawaja siras* and *hijras*, is the one relating to capitalism and labour exploitation. As was mentioned earlier the 'eunuch' population was not employed as labour in India (Hinchy in Pament 2021: 266), perhaps owing to repulsion of their 'sexual deviancies' or viewing them as non-productive objects, but this does not explain similar kinds of deviancies attributed to colonised races who were employed as labour elsewhere.

With regards to the coloniality of gender framework, the state's regulation of gender and sexuality through laws can be clearly understood as the drive to impose the colonial modern gender system. This in turn, was a part of the mission to civilise people, and thereby establish hierarchies along racial, gender and sexual lines in order to strengthen the imperial British

empire (S. Khan 2016a: 222, 234). In this “colonial [gender] order”, there was no room for ‘deviant’ or ‘fluid’ bodies and sexualities such as those of *kbawaja siras* and *hijras* to exist (S. Khan 2016a: 222). The need to civilise the *hijras* or *kbawaja siras* emerged from viewing them as hypersexualised or asexual beings (Hinchy 2014), particularly the former in the case of colonial laws. Lugones has argued that the rhetoric of ‘civility’ and ‘reformation’ played a vital role in enabling the colonial state to maintain its power (Lugones; 2007; Mendoza 2016; Moiz 2021d).

With the implementation of Section 377 of the IPC and Part II of the CTA, it becomes apparent that gender varaint communities’ encounters with the colonial state in the form of legislation, bodies and officials was based on power dynamics and Victorian values and norms concerning gender, domestic and intimate relations (Hinchy 2020). Thus, it can be argued that the colonial state operated in an extremely gendered manner especially when it came to criminalising vulnerable communities in India (Hinchy 2020; Hinchy 2019). The regulation of *kbawaja siras* and *hijras* is a classic example of the problem with essentialist understandings of sex and gender that Lugones has shed light on, in arguing for the need to historicise gender (2007). The dire need for historicisation can most evidently be seen with the anti-sodomy law of 1860 which naturalised heterosexuality but considered homosexuality to be “against the order of nature” (Indian Penal Code Act XLV 1860: 310). Moreover, the placement of homosexuality as an offence along with bestiality also reinforced the conception of the colonised as “less than human” (Lugones 2010: 745). Given their existence beyond the traditional binaries of gender and sexuality, *kbawaja siras* and *hijras* were perceived as a threat to colonial rule, by default.

Parallels can also be drawn in the ways coloniality and the colonial gender system were imposed on the *hijras* and *kbawaja siras* with the ones imposed on native populations in North and Latin America as discussed by Lugones. The exclusion of the *kbawaja siras* from the political sphere reminds one of the exclusion faced by women of the Yoruba tribe (Oyewumi in Lugones 2007). Like them, the *kbawaja siras* also lost their leadership and advisory positions as well as their wealth due to colonial interference in local governance (Hinchy 2014). Similarly, the taking away of lands and criminalisation of customs and sources of earnings for the *hijras* and *kbawaja siras* can be compared to the same kinds of measures employed by the colonisers towards the native populations in North America (Allen in Lugones 2008). Interestingly, the point brought up by Oyewumi and Lugones about men colluding with the colonisers in upholding the coloniality of gender among the Yoruba (2007), can also be compared to the role of some of the ruling elites in India who reinforced and carried on the legacy of the colonial gender system (S. Khan 2016b; Hinchy in Pament 2021). Arguably, the reasons behind such moves could be ideological in terms of being aligned with heteronormative values within one’s own culture or that of Victorian England, or practical in terms of preserving one’s own power at the local level.

One of the critiques directed to Lugones’s claims of gender, hierarchy and patriarchy not being present in certain societies before the onset of colonisation (Segato in Mendoza 2016), would in my opinion, also stand true in the case of the Indian subcontinent. While some have argued that gender was not relevant in South Asia prior to colonial rule (Moiz 2021a; Moiz 2021b; Moiz 2021d; Moiz 2021e), I would disagree. Gender has certainly played a central role among societies found in the subcontinent which have been hierarchical and patriarchal, even before the arrival of the British (Lal 2003). Moreover, notions like the

separation of the *mardana* – the masculine from the *zenana* – the feminine were also regularly practiced in the Mughal Empire and the Delhi Sultanate (Chowdury 1992). Certainly, these societies were far more fluid in expressions of gender and sexuality, but to claim that gender was not relevant or non-existent here, would be an exaggeration. However, documenting one’s gender as a category of identity at the state level certainly did not exist prior to colonisation (Menon in Ghias 2021a; Moiz in Akber 2021; Moiz in Ghias 2021b).

4.2 The Present – Contemporary Pakistan

I now turn to discussing and analysing certain laws that affect the present day *khawaja sira* and *hijra* communities in Pakistan. The relation between these communities and the Pakistani state has been a complex one, owing to the state’s historical discrimination against them on the one hand, and sympathy which translated into the provision of rights, on the other (S. Khan 2016b). In Pakistan, Article 25 of the current constitution guarantees equality and protection to all citizens in the eyes of the law and prohibits any kind of discrimination based on sex (Ramay 2017). The article also allows the state to make any “special provisions” necessary to protect “women and children” (The Constitution of the Islamic Republic of Pakistan 2012). It is important to note that there is no direct mention of any gender variant community within the Constitution of Pakistan such as the *khawaja siras* or *hijras*. In fact, till the 2009 Supreme Court petition – Khaki v. SSP Operations Rawalpindi, no direct relationship between local gender variant communities and the Pakistani state had existed, apart from the inherited colonial law of Section 377 of the IPC, which also does not specifically refer to any particular community (S. Khan 2017).

4.2.1 Section 377 of the Pakistan Penal Code

Section 377 of the IPC is also present in the Pakistan Penal Code (PPC) in the same colonial language. The section states “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.” (Pakistan Penal Code 1860; S. Khan 2016a: 229). The elaboration relating to penetration being ‘enough’ to treat the sexual act as illegitimate is also present within the section (Pakistan Penal Code 1860). Interestingly, by generally referring to gender variant communities like the *hijras* and *khawaja siras* as ‘eunuchs’, who are assumed to be asexual, the state strategically overlooks the need to address laws like Section 377 in relation to these communities (S. Khan 2017).

4.2.2 Constitutional Petition 43 of 2009 - Dr. Muhammad Aslam Khaki v. Senior Superintendent of Police (Operations) Rawalpindi

In 2009, three weeks after a horrifying incident in Taxila, near the city of Rawalpindi, where eight wedding performers from the *khawaja sira* community were assaulted and looted by the police, Advocate Muhammad Aslam Khaki, acting on his own accord, submitted a petition to the Supreme Court of Pakistan, to ensure the provision of fundamental rights for the *khawaja sira* community in accordance with the rights guaranteed to all human beings in the Constitution of Pakistan (Walsh 2010; Nisar 2018; Islam 2020; S. Khan 2017). Till the time the case was being tried, certain orders from the court were issued regarding the legal and social status of *khawaja siras* in Pakistan (Nisar 2018; S. A. Khan 2020b). The

orders instructed the Attorney General to draft a policy in order to safeguard and implement the rights of ‘eunuchs’ – a term used by the court, including their right to inherit property, right to education, the right to work ‘conveniently’, right to contest elections and the right to vote (Khaki v. SSP Rawalpindi 2009). Police authorities were also ordered to protect the community against harassment (Khaki v. SSP Rawalpindi 2009). All relevant ministries were directed to work with the Attorney General and Advocate Generals to draft the policy and implement the measures (Khaki v. SSP Rawalpindi 2009). The Chief Secretaries and Commissioners of all provinces were also mandated to work in collaboration with the Social Welfare Department to follow these orders (Khaki v. SSP Rawalpindi 2009). Recommendations of passing a law and constituting a commission to ensure the protection and dignity of ‘eunuchs’ was also stated by the court (Khaki v. SSP Rawalpindi 2009).

The final judgement of the case was decided in 2012, wherein, the court legally recognised the existence of *khawaja siras* by comprising the third gender category, in order to ensure the provision of the same fundamental rights to *khawaja siras* as other citizens (Islam 2020). In the judgement, the Chief Justice Iftikhar Muhammad Chaudhry had stated – “The eunuchs should be treated equally as other citizens in this country enjoying the same rights under the Constitution of Islamic Republic of Pakistan.” (Khaki v. SSP Rawalpindi 2012). The Supreme Court’s judgement was no doubt a huge milestone for the attainment of rights for the *khawaja sira* community (S. Khan 2017). By being legally recognised by the state, *khawaja siras* could now have access to basic rights and facilities like registering for an identity card, driver’s license, passport, creating a bank account, access to health care, admission into an educational institution, right to work, right to inherit from parents, to vote, to contest in elections, etc. (S. Khan 2017; Khaki v. SSP Rawalpindi 2009). The court after consulting with the *khawaja sira* community, had instructed the National Database and Registration Authority (NADRA) to include the identities of female *khawaja sira*, male *khawaja sira* and “*khunsi mushkil* (intersex)” persons on identity documents (S. Khan 2017: 1301; Islam 2020: 212). The state had finally acknowledged the existence of the *khawaja sira* community as citizens of the state and guaranteed the provision of their basic rights (S. Khan 2017: 1301).

Although the judgement was praised and seen as a progressive step, it was not without its shortcomings (Nisar 2018). The court had declared the identity of the third gender to be determined biologically (Nisar 2018). Moreover, *khawaja siras* or ‘eunuchs’ - were understood to be persons experiencing a ‘gender disorder’ (Khaki v. SSP Rawalpindi 2009). The 2009 ruling had even suggested treating the *khawaja sira* or trans identity within the same legal framework as disabled persons, hence the mention of providing them with ‘convenient’ work opportunities (Shroff 2021; Khaki v. SSP Rawalpindi 2009). These understandings of the *khawaja siras* and transgenders were extremely concerning. They conflated “gender difference” with “gender disability” (Hossain in Shroff 2021: 268). To make matters worse, during the proceedings of the case, based on one of the orders suggested by the court, NADRA had arranged for medical examination of people wanting to identify as transgender or *khawaja sira* (Islam 2020). None of the conventional genders had to undergo any medical testing when registering for national identity cards except *khawaja siras* or transgenders (Rana in Islam 2020; Rana in S. Khan 2017). Thus, the court itself was guilty of gender discrimination (Islam 2020) However, protests organised by the trans activist and President of the Gender Interactive Alliance - Ms. Bindiya Rana, in Karachi, in 2011, challenged the Supreme Court’s ruling concerning medical testing (TEDx Habib University 2019; Islam 2020: 212; Gichki

2020: 32). The protests led to the removal of the order for medical testing by the Supreme Court (Islam 2020; Gichki 2020).

4.2.3 The Transgender Persons (Protection of Rights) Act (TPA), 2018

For the purpose of implementing the Supreme Court's order of drafting a law for the protection of rights of trans communities in Pakistan, a consultative process began among law and policy makers, lawyers, trans activists and members of the trans and *khawaja sira* communities (Ali 2021; S. A. Khan 2020b; Ghias 2019a). The process spanned a period of two years and was spearheaded by trans and *khawaja sira* activists, wherein multiple meetings, discussions and debates were held between the different stake holders (Mughal in iProbono 2020; S. A. Khan 2020b). Government officials were sensitised to the ideas and demands that were being included within the policy (Mughal in iProbono 2020). The Chair of the Council of Islamic Ideology ¹(CII), Doctor Qibla Ayaz was also on board with the passage of the draft policy (Mughal in iProbono 2020).

As a result, in 2017, the Pakistani Senate proposed the passing of a bill to safeguard the rights of transgenders in Pakistan (Ramay 2017). Consequently, the Transgender Persons (Protection of Rights) Act, 2018 (TPA) was unanimously passed into law, in the National Assembly, in May 2018 (Shroff 2021; S. A. Khan 2020b). Shireen Mazari, the Minister of Human Rights of the newly elected government of Pakistan Tehreek-i-Insaaf (PTI), actively endorsed the transgender bill as part of the human rights discourse (Shroff 2021). The passing of the TPA can also be directly attributed to the advocacy efforts and activism of the *khawaja sira* and trans community as well as their allies (Shroff 2021: 260). The Act aims “to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto” in the state of Pakistan (Act No. XIII 2018: 273).

The TPA comprises of a total of 7 chapters. Chapter 1 of the Act defines the terms and institutions referred to within the legal document. These include terms such as gender expression, gender identity, harassment and transgender person (Act No. XIII 2018). The Act defines a transgender as someone who is intersex or *khusr* – meaning a person with a mix of feminine and masculine genitals or with genital ambiguity, a eunuch – meaning a person identified as a boy by birth but who goes through castration, a trans man or trans woman, a *khawaja sira* or lastly “any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.” (Act No. XIII 2018: 275). Moreover, gender identity is explained to be “a person's innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth;” (Act No. XIII 2018: 274). Meanwhile gender expression is referred to as “a person's presentation of his gender identity and the one that is perceived by others;” (Act No. XIII 2018: 274).

¹ a religious body that advises the Pakistan National Assembly on whether laws are in accordance with the principles of Islam

The second chapter is concerned with recognising the identity of transgender persons and provides them with the right to “self-perceived gender identity” in all of their official identification documents at the age of 18 (Act No. XIII 2018: 275). The Act has particularly been praised for its progressive move towards giving gender variant communities the right to self-identification which is still lacking in countries such as the United Kingdom, where in order to change one’s gender, medical reports of gender dysphoria and corrective treatment are still required under the Gender Recognition Act, 2004 (Capital 51 News 2021; BBC 2021; Moiz 2021b; Ghias 2019a). The third chapter of the TPA discusses the prohibitions against discrimination towards the transgender community, whereby any “denial or discontinuation of, or unfair treatment” in the areas of education, employment, healthcare, mobility and transportation, public services, real estate (rent, sale or purchase of property and residence), inheritance, holding public or private office, owning, working or receiving a service from any public or private organisation is prohibited (Act No. XIII 2018: 276). The last section prohibits harassment towards transgenders based on “their sex, gender identity and gender expression” (Act No. XIII 2018: 277).

Chapter 4 goes on to list the government’s obligations towards the trans community in order to ensure the “full and effective participation of transgender persons and their inclusion in society” (Act No. XIII 2018: 277). These obligations include the creation of safe houses, protection centres, medical and counselling services, separate prison cells, the creation of mechanisms for awareness and sensitization of but not limited to law enforcement and health agencies, establishment of vocational training institutes, and provision of loans, grants and incentives for business purposes (Act No. XIII 2018). Lastly, the chapter states that any other measure deemed essential to fulfil the purpose of the Act can also be taken by the government (Act No. XIII 2018). In chapter 5, the provision of certain rights to the trans community are highlighted, namely the right to inherit, right to education, right to employment, right to vote, right to hold public office, right to health, right to assembly, right to access public spaces, right to property and the guarantee of fundamental rights to the transgender community (Act No. XIII 2018). The final section mentions offences and penalties concerning transgender persons. It criminalises anyone employing, forcing or using a transgender person to engage in begging with six months imprisonment, a fine of 50,000 Rupees or both (Act No. XIII 2018).

The enforcement mechanisms of the Act are covered in chapter 6, whereby any person can register a complaint by referring to the Constitution of Pakistan, The Pakistan Penal Code 1860, the Code of Criminal Procedure 1898 or the Code of Civil Procedure 1908 (Act No. XIII 2018). Moreover, a person can also reach out to the Federal Ombudsman, National Commission for the Status of Women (NCSW) and the National Commission of Human Rights (NCHR) if they feel the rights provided in this Act are “denied to him or her.” (Act No. XIII 2018: 281). The final chapter addresses aspects of the law that are considered miscellaneous. These include the TPA to have the power to override other laws currently in place, the government to pass rules by notification to implement the objectives of the TPA and lastly, the government being granted the power to remove any difficulties that may arise in implementing the measures of the TPA (Act No. XIII 2018). The unanimous passing of the TPA 2018, proved to be a landmark moment in the history of *khawaja sira* and *hijra* communities and their efforts for attaining fundamental rights in Pakistan (Hashim 2018).

4.2.4 The Coloniality of Power and Gender

As can be seen from the discussion of the contemporary laws above, in the 150-160 years since the passing of the colonial laws, the postcolonial state of Pakistan has come a long way in accepting and including the *khawaja sira* and *hijra* communities in mainstream society owing to various social, political, economic and legal factors that are beyond the scope of this RP. The scope of this RP however, has been to examine the influence of the colonialities of power and gender within the colonial as well as contemporary laws. It can be observed that traces of the colonial mentality in relation to gender and sexuality are still present within the Pakistani state and it is crucial to critically single them out. This cannot be possible without a historical reflection of the past in relation to the present.

The coloniality of power and gender can most evidently be seen in the continuation of the application of Section 377 to Pakistan's penal code. The law even remains drafted in relatively the same language, a colonial language which represents the "...importation of British heteronormative ideas to South Asia." (Hinchy in Pament 2021: 265). The law criminalises homosexuality and therefore erases the sexual diversity that existed in the region's past. By continuing to enact this law, the postcolonial state operates from the same mentality as the colonial state did and maintains the implementation of the modern colonial gender system (Moiz in Ghias 2021b). Until now, the Pakistani state has not acknowledged the reality that Section 377 criminalises *khawaja siras*, *hijras* and other gender variant persons who are involved in non-heterosexual or homosexual relations (S. Khan 2016a; S. Khan 2017). Moreover, with the emphasis on penetration, it seems that the state cannot even comprehend the possibility of same-sex relations among women or the idea of non-penetrative sex, which again points to the internalisation of essentialised understandings of sex. This takes us back to Lugones's emphasis on historicisation and the critique of gender and sex being understood solely via the lens of heterosexuality (2007; 2010).

However, it is important to remember that the execution of the modern colonial gender system would not have been successful without the support of certain ruling elites who shared similar conservative views or were influenced by the British Victorian values (Lugones 2007; S. Khan 2016a; S. Khan 2017). Even in the case of Section 377 of the PPC, its endorsement by the conservative ruling elite, especially during the time of the late 70s and early 80s, wherein Pakistan witnessed the Islamisation² era, as well as in the present, among right-wing political parties, is what keeps the law from being expunged (S. Khan 2016b).

The criminalisation of homosexuality and its simultaneous placement with bestiality is also severely problematic under Section 377. What it depicts is that any conception of sexual relations apart from heterosexuality are beneath a human, and therefore plays into the same "less than human" rhetoric used to colonise and exploit populations as discussed by Quijano and Lugones. The same kind of rhetoric is employed in contemporary Pakistani society, whereby *khawaja siras* and *hijras* are seen not as humans but objects of exploitation (Ramay 2017; Emon and Garlough 2015; Hossain 2020; S. A. Khan 2020a).

² A period initiated by military dictator General Zia-ul-Haq which witnessed the implementation of several conservative legal measures claimed to reflect the principles of Islam

In the 2009 *Khaki v. SSP Operations* Supreme Court case, the use of the term ‘eunuch’ by the court, when addressing the *khawaja sira* and *hijra* communities became the subject of much criticism (Islam 2020). As has been discussed, *khawaja sira* and *hijra* cultures and identities have often been reduced to the categorisations of ‘castrated men’ or ‘eunuchs’ (Shroff 2021; S. Khan 2017). These categories can be traced back to the colonial and orientalist perceptions of *khawaja siras* and *hijras* as hypersexual or asexual beings (Shroff 2021). The term ‘eunuch’ carries the colonial connotation of “failed masculinity” and completely overlooks the spectrum of masculine and feminine subjectivities that exist in South Asia (Shroff 2021). Moreover, by referring to ‘eunuchs’ as persons experiencing a gender disorder and equating them with persons with disability, the court clearly perceived trans, *khawaja sira* or *hijra* bodies as abnormal or disordered ones (Shroff 2021). This resembles the “colonial practice of demarcating certain bodies as disorderly...to control colonized and racialized bodies and sanitize public space from sexual ‘disease’.” (McClintock in Shroff 2021: 267; Lugones 2007).

Similarly, the court’s order to NADRA to carry out medical testing of ‘eunuchs’ when documenting their identity, reminds one of the time when the colonial state too had instructed for medical examinations of the ‘eunuch’ population in the 1880s and 1890s, in order to differentiate between ‘real’ and ‘artificial eunuchs’ (Hinchy 2013; Shroff 2021). The same logic had been employed by the court, but fortunately this time, the *khawaja sira* and *hijra* communities were able to mobilise to challenge the court order (Islam 2020; Gichki 2020). Their efforts were successful and the order was later repealed (Islam 2020; Gichki 2020).

Another aspect of the court rulings that needs to be critically examined is the emphasis on ‘respectability’. The orders have stressed on providing trans persons with the ability to live “respectable lives” and have “respectable jobs” (Khan in Shroff 2021: 267). This emphasis is there because many *khawaja siras* and *hijras* work in the informal street economy of sex work, begging and dance shows, owing to their conditions of poverty (Shroff 2021). These activities are considered obscene and unacceptable by the state (Shroff 2021). Consequently, the state’s refusal to decriminalise these activities, leaves those participating in them, extremely vulnerable to violence (Shroff 2021). Instead, the state focuses on including the *khawaja siras* and *hijras* in “the wider framework of respectable citizenship” (Shroff 2021: 267). The efforts of the postcolonial state resemble the colonial state’s mission to civilise the natives by purifying the streets from immorality or decadence, quite a bit (Shroff 2021).

The civilising tendencies are also reinforced to an extent, in the 2018 TPA which also does not address the issues relating to the informal street economy whom gender variant persons are often involved in given their economic oppression (Shroff 2021). The only offence the TPA specifically mentions is the one relating to begging – a remnant of colonial civility introduced during colonial rule. The British had denounced begging as financial extortion even though certain states had given gender variant communities like the *hijras* the “codified right to beg” prior to colonisation (S. Khan 2016a: 223). Moreover, the Act also conveniently overlooks addressing Section 377 of the PPC, another colonial remnant that continues to police non-heterosexual relations and reinforce essentialist views of sex.

One of the ways the Act resists the coloniality of power and gender is by overcoming the predominant use of the reductive colonial term – ‘eunuch’ in defining trans persons and by including the right to self-identify one’s gender. The law also encompasses a much wider

understanding of trans persons than the preceding legal rulings. In its definition of a transgender person, it includes the categories of *kebusra* or intersex, eunuch, trans man, trans woman, *kbawaja sira* and anyone who's gender identity or expression are not aligned with the one given to them at birth, based on cultural norms (Act No. XIII 2018). While the definition is quite broad, it does not include many local vernaculars that are associated with varied forms of gender expression or identity in Pakistan such as *hijra*, *moorat* and *zenana* (Shroff 2021: 272). The exclusion of these local identities or expressions becomes a concern because they end up being homogenised under the more dominant terms for gender variant communities like *kbawaja siras* or transgenders, the latter taking on a somewhat hegemonic position as part of the international LGBTQIA+ discourse (Dutta and Roy in Shroff 2021). It is extremely important to take into account the local diversity within gender and sexuality and its rich history within the region, in order to prevent their erasure through reductive categorisations as was done in the colonial past in the case of race and gender (Quijano 2000; Hinchy 2017).

While the TPA does mention the term *kbawaja sira*, it does not define it. It does not show how *kbawaja sira* is not simply an identity but a familial or cultural system (Khan 2014; Shroff 2021). When the term *kbawaja sira* is understood in its essence, one becomes aware of the layers of meaning it holds. To not elaborate on what the term means at all becomes ignorant on part of the lawmakers and runs the risk of refusing to acknowledge and accept local meanings. Such a refusal is violent as it erases local knowledges, philosophies and ways of being (Quijano 2000; Lugones 2010; Mendoza 2016).

Some have asserted that the Pakistani state's recent attention towards categorising and regulating nonnormative bodies is a part of the state's attempt to come across as 'progressive' in the eyes of the global powers in order to foster global capitalism on its soil (Shroff 2021). Appeasing to the global powers and the international trans discourse via the passage of the recent law may be true to some extent and ties in with maintaining global Eurocentric power. However, it does not explain the continued existence of colonial laws like Section 377. Although one could argue that the recent laws are designed to turn gender variant communities into 'productive citizens' that contribute to the country's capitalist economy (iProbono 2020). Regardless, this marks a significant change from the colonial era, wherein gender variant communities were not only excluded from the labour population altogether, but also intended to be made extinct (Hinchy in Pament 2021).

Chapter 5 Methodology

5.1 My Journey in Methodology – Limitations and Challenges

When I began planning for my RP, I had intended to rely on primary research in the form of field interviews and secondary research for my literature review and analysis. The aim was to begin in-depth secondary research in July and carry out field research in August. However, trying to carry out primary research during the Covid-19 pandemic has proved to be a huge challenge. By early July, it seemed likely that I could not return to Pakistan for field work as I had hoped, owing to the travel restrictions in place in Pakistan and the Netherlands. As a result, I began to reach out to contacts within my network to help connect me with members of the *khawaja sira* community, lawyers and relevant academics in Pakistan, in an attempt to introduce them to my research, to interview them and to receive their feedback. All of this was to occur online now. Adjusting to online communication and interviews was something I had mentally prepared myself for, given the current situation with the pandemic.

What I had not been prepared for was how grave of a struggle it would be. My efforts to connect to potential interviewees in Pakistan did not materialise. Looking back, I realise perhaps it was naive of me to think I would be able to build relationships for my RP from scratch especially with the *khawaja sira* communities, given that I am a complete outsider to them. Not being physically present in the desired spaces certainly did not help either. The people I did contact either did not respond or seemed sceptical of my research, perhaps because they did not know me or my point of reference very well. In the case of *khawaja sira* activists, most already had their hands full with social work especially with the outbreak of the Covid-19 waves in Pakistan. Some expressed their need for funding from International Non-governmental Organisations (INGOs) in order to carry out relief work in times of Covid-19, for the *khawaja sira* community. With regret, I would have to inform them that I was in no position to guarantee any funding from any INGO and that would lead to an end in our correspondence.

What made matters even worse was when I contracted Covid-19 in mid-July. Thankfully my symptoms were mild but my mental and physical health suffered immensely. I was in isolation for two full weeks and my symptoms continued to persist even after. For someone who was living on her own for the first time in her life away from her family in a foreign country, it was a troubling and depressing time to say the least. Physical and mental health of participants as well as researchers themselves ought to be discussed more in academic writing. It only reinforces the reality that we all are human.

5.2 Methods of Research – Strengths & Limitations

The month of August was spent recovering from Covid-19 and slowly trying to pick up the pieces of my RP. I decided to continue with my RP by relying on relevant secondary research that was available to me in the form of online journal articles, books, and news articles. However, a major breakthrough that occurred was the discovery of online social media sources featuring *khawaja siras*, transgenders, activists and academics speaking on relevant themes in my RP. This online material strengthened my research as it enabled my RP to incorporate a *khawaja sira* presence within it to an extent, without which the RP would have

felt incomplete. In September, I also succeeded in taking an interview of a woman lawyer – Khadija Ali, who had been involved in the process of passing the TPA, 2018. These developments helped me further substantiate my research.

The online media sources comprised of 11 podcasts, a TED talk, a news talk show, a webinar, a video interview and an audio podcast. These sources, especially the podcasts, which vary from one to two and a half hours in length, have enriched the research and analytical segments of the RP. In 11 of the total podcasts, Dr. Muhammad Moiz, a researcher and *kbawaja sira* activist has been featured in 9 of them. He has appeared as a solo guest in 4 of them, hosted 4 of them along with Firdaus Gaewalla – a *kbawaja sira* and student of queer studies, and has been featured in 1 group podcast. The remaining 2 podcasts feature the team of a local short film called Darling which revolves around the life of a trans woman/*kbawaja sira* played by Alina – a trans/*kbawaja sira* artist and Dr. Madhavi Menon – an Indian professor and author of ‘Infinite Variety: A History of Desire in India’. The remaining social media sources include *kbawaja sira* and trans activists – Bindiya Rana, Sobo Malik, Nayab Ali, Mahnoor and Aisha Mughal - a researcher, lecturer and the first trans woman representative at the United Nations.

By adopting the lens of coloniality of power and gender, my RP offers one epistemological lens in approaching what notions have influenced the policing of *kbawaja sira*s and *hijras* in the past and present. It is equally important to look at other analytical frameworks which may offer different insights. This becomes even more pertinent given the gap of 150-160 years between the colonial and post-colonial laws under scrutiny in this RP. The various political, economic, social and legal changes during this time period should be taken into account as part of the contextual analysis. However, this was beyond the scope and length of this RP. Having said that, a continuity among the laws has been depicted by briefly discussing the role of conservative ruling elites in the past and present. Moreover, one of the main limitations of the social media sources is the fact that I have heavily relied on the views of Moiz in informing my research. I have attempted to balance this out with the inclusion of other sources and by remaining critical in my analysis of all the sources regardless.

5.3 Ethics

As far as ethical guidelines are concerned, all secondary research was retrieved from online sources accessible to students or teachers. The social media sources used were ones accessible to the general public. The interview was conducted with the consent of the interviewee and after providing background knowledge about the nature of the research. With the secondary research sources, I have included the work of authors who have built long term relations with the *kbawaja sira* community or adopted a feminist and queer of colour ethics in their research of *kbawaja sira* culture, ways of being and laws. Shroff for instance, has stressed on the need to actively address factors such as the “power dynamics, politics of location...language and class privilege.” in conducting research (2021: 263).

Chapter 6 Conclusion

By critically analysing the colonial and post-colonial laws and rulings through Quijano and Lugones's frameworks of coloniality of power and gender in this RP, I shed light on the violence inflicted upon the bodies and ways of being of the *hijra* and *khawaja sira* communities in colonial India and contemporary Pakistan. The passage of Section 377 of the IPC in 1860, and the CTA in 1871, marked the beginning of state sanctioned policing and criminalisation of these communities (Ghias 2021b; Menon in Ghias 2021a). These laws led to the consolidation of the modern colonial gender system in India which left no room for non-heteronormative expressions of gender and sexuality. Consequently, the gender variant communities were reductively classified under the category of 'eunuchs' which stripped away their diverse experiences and ways of being. Customs and practices inherent to the *khawaja sira*s and *hijras* such as the *guru-chela* system and the tradition of *badhai*, became regulated by the state and pushed these communities into impoverishment. The laws also policed their everyday lives by regulating what they could wear, who they could live with, whom they could engage in sexual relations with, etc. These measures were a part of the British mission to civilise the inferior and sexually deviant natives who were conceptualised as "less than human" (Lugones 2010: 745).

While Quijano's and Lugones's frameworks fit well in the context of the colonial policing of *khawaja sira*s and *hijras*, certain aspects remain difficult to apply. For instance, the link between the policing and violence of these communities and the strengthening of the colonial state's capitalist power, is absent. Members of the *khawaja sira* and *hijra* communities were not employed as labour by the state. Moreover, the application of Lugones's argument of patriarchal, hierarchical and gender relations not being present in certain native communities and being entirely imposed by the colonisers also does not hold true in the case of the Indian subcontinent. Others have also been critical of this assertion and discussed how colonisation did introduce certain hierarchies between the colonisers and the colonised, but it intensified existing patriarchal and hierarchical tendencies within local cultures and societies. That being said, the documentation of gender by the state had not occurred prior to colonisation in India as discussed in the RP.

After applying these frameworks of analyses on colonial laws, I shifted to applying them on post-colonial laws concerning the *khawaja sira* and *hijra* communities in contemporary Pakistan. While the post-colonial state of Pakistan has come a long way in accepting and including *khawaja sira*s and *hijras*, and undoing the historical violence and marginalisation experienced by them, one still finds evident traces of the colonialities of gender and power. This can be observed most explicitly in the inherited 1860 Section 377 of the PPC as well as in aspects of the Supreme Court 2009-2012 rulings and the TPA, 2018. The criminalisation of non-heterosexual relations, use of the colonial term – 'eunuch', emphasis on respectability, failure to address and decriminalise practices of the informal street economy, recommendation of medical testing, absence of local terms for gender variant persons and absence of the definition of *khawaja sira*s, are all examples of the continuation of the colonial mentality of reductive categorisations and the policing of gender and sexuality. However, one cannot ignore the significant developments within these laws that resist the colonial mentality such as the guarantee of fundamental rights, the right to self-identification and a more nuanced definition of trans persons. Meanwhile even in the case of post-colonial laws, the link to

strengthening the state's capitalist power is not strong, but it can be argued that the laws intend to make *kehawaja siras* and *hijras* productive citizens by integrating them in the legal capitalist economy. This was certainly not the case in the colonial past.

Based on the above analysis, I can conclude that the frameworks of coloniality of power and gender are very much applicable to the case of the *kehawaja siras* and *hijras* in colonial India and contemporary Pakistan, and although there has been a significant shift in undoing the violence and marginalisation experienced by these communities over the past 150-160 years, there is still a considerable influence of the colonial mentality in informing the laws concerning these communities. Repealing laws like Section 377 and amending others remains a challenge especially given the role of conservative ruling elites in supporting them.

One of the main limitations of the RP has been the lack of engagement with political, social, economic and legal changes over the course of the 150-160 years in shaping the post-colonial laws. Unfortunately, this was beyond the scope and length of the RP. This RP intended to analyse laws from the epistemological lenses of coloniality of power and gender and examine the extent of their continuity into the present. These lenses have offered valuable insights by emphasising the need to engage in historical reflection to better understand the origins of state policing of gender and sexuality and its continued survival in contemporary laws. Through this research, a deeper understanding of the oppressive role of the colonial and post-colonial state is brought to light. Such a reflection becomes necessary to acknowledge and resist the coloniality of gender in the present.

A future area of research that can certainly prove to be more informative would be to engage in deeper contextual analysis of the political, economic, social and legal factors that led to the passing of each of the colonial and post-colonial laws and rulings discussed in the RP. This would enable one to more accurately reflect a continuity or discontinuity between the colonial and post-colonial state when applying Quijano's and Lugones's analytical frameworks. Moreover, the possibility of exploring and including other analytical frameworks would also prove to be resourceful as it expands one's horizons on how a research problem may be approached.

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Appendix

CRIMINAL TRIBES ACT, 1871

CONTENTS

Preamble.

SECTION

1. Short title.
Commencement.
Local extent.

PART I

CRIMINAL TRIBES

2. Local Government to report what tribes should be declared criminal.
3. Report to contain certain particulars.
4. Occupation of wandering tribe to be stated; also proposed residence and means of livelihood.
5. Notification declaring tribe to be criminal.
6. Bar of jurisdiction of Courts in questions relating to notification.
7. Register of members of such tribes.
8. Procedure in making register.
9. Penalties for failing to appear, refusing or giving false information.
10. Charge of register.
Reporting desirable alterations.
11. By whom alterations to be made.
Notice to persons affected.

12. Complaints of entries in register.
13. Settlement of tribe in place prescribed by Local Government.
14. Removal to other place.
15. Arrangements to be made prior to settlement or removal.
16. Transfer of register of persons ordered to be removed.
17. Power to place tribe in reformatory settlement.
18. Power to make rules.
19. Penalties for breach of rules.
20. Arrest of registered person found beyond prescribed limits.
21. Duties of Village-Headmen, Village-Watchmen, & c.
22. Penalty for breach of such duties.
23. Indemnity for past registrations and detentions.

PART II

EUNUCHS

24. Registers of eunuchs and their property.
'Eunuch' defined.
25. Complaints of entries in register.
26. Penalty on registered eunuch appearing in female clothes;
or dancing in public, or for hire.
27. Penalty on registered eunuch keeping boy under sixteen.
28. Maintenance and education of boys whose parents can not be found.
29. Disabilities of registered eunuchs.
30. Power to require information as to registered eunuch's property.
Penalty for refusing such information.
31. Rules for making and keeping up registers of eunuchs.

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Ch. Ijaz Ahmed
Mr. Justice Rahmat Hussain Jafferi

Const. Petition No. 43/2009.

Dr. Muhammad Aslam Khaki & another. ...Petitioners

Versus

S.S.P. (Operation), Rawalpindi & others. ...Respondents

For the petitioners: Dr. M. Aslam Khaki, ASC (in person) with
Almas Shah alias Boby.

On Court notice: Mr. Shah Khawar, A.G.P.
Ch. Khadim Hussain Qaiser, Addl. A.G. Pb.

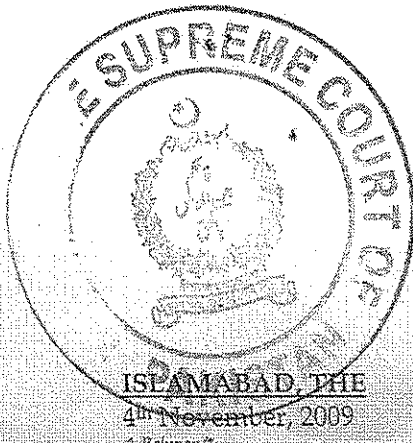
Nemo (for A.G. Sindh, NWFP and Balochistan)

Date of hearing: 04.11.2009

ORDER

Learned Attorney General for Pakistan requests that this case may be adjourned for one week enabling him to contact Chief Secretaries of the respective Provinces as well as the Advocate Generals because they were directed by the Court to furnish reports which they have not furnished so far except the Province of Punjab. Request is allowed. Adjourned to 20.11.2009.

2. In the meanwhile, Attorney General shall also prepare some proposals on the basis of which the Federal and the Provincial Governments can conveniently recognize the status of eunuchs to be the respectable citizens and to protect their right of inheritance in moveable and immovable properties left by their parents/ elders and their legal obligations to provide maintenance to them on account of disability due to which they are not being treated at par with other citizens of the country.



Sd/- Iftikhar Muhammad Chaudhry, C.J.
Sd/- Ch. Ijaz Ahmed, J.
Sd/- Rahmat Hussain Jafferi, J.

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Superintendent
Supreme Court of Pakistan
ISLAMABAD

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Ch. Ijaz Ahmed
MR. Justice Khilji Arif Hussain

Constitution Petition No.43 of 2009

Dr. Muhammad Aslam Khaki
And another ...Petitioners

VERSUS

SSP (Operations) Rwp & others ...Respondents

For the petitioners: Dr. M. Aslam Khaki, ASC
a/w Almas Shah @ Boby

On Court Notice: Mr. Shah Khawar, Attorney General
Mr. Mehmood Raza, Addl. A.G.
Mr. Khadim Hussain Qaiser Addl.AG(Pb)
Mr. Zahid Yousaf, Addl. AG NWFP
Mr. Muhammad Akhtar Ghori,
Dir. Social Welfare (Sindh)
Mr. Afsar Khan, Dir. SW (NWFP)
Mr. Nazar Abbasi, Law Officer

Date of hearing: 20.11.2009

ORDER

Learned Attorney General states that he has convened a meeting with the learned counsel for the petitioners, learned Advocate Generals of the respective Provinces as well as with the representatives of the Social Welfare Department. During course

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whereof it has been decided to prepare a working paper for approval of the Government as well as for this Court, to protect the rights and welfare of unix.

2. It is to be noted that this class of the society has been neglected merely on account of gender disorder in their bodies, otherwise they are entitled to enjoy all the rights granted to them by the Constitution being its subject, including their rights in inherited property because normally to deprive them from their such legitimate rights, some time their families disowned them. As far as existing laws are concerned, there are no provisions on the basis of which they can be deprived from their legitimate rights to inherit the properties. Similarly NADRA is required to adopt a strategy with the assistance of the concern departments of the Govt. to record exact status in the column meant for male or female after undertaking some medical tests based on hormones etc. They are also entitled for entering their names in the electoral list. 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 etc.

3. As number of unix have been registered in all the Provinces as well as in the Federal Territory, therefore, Federal and Provincial Governments can also ensure for extending them opportunity of receiving education in childhood or in higher institutions/schools subsequently. On account of gender disorder in their bodies they can be accommodated against the

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jobs which they can perform quite conveniently. As the Government has already ensured the jobs to the disable persons, therefore, similar policy can also be adopted for them.

4. It has been published in the press that they are being harassed by the police and other agencies taking the benefit of their weaknesses. For this purpose we have already passed order dated 17.8.2009. The Government is required to ensure the implementation of above said order.

5. It is informed that in the name of unix some male and female who are otherwise have no gender disorder in their bodies have adopted this status and commit crimes on account of which a bad name is brought to unix. This aspect is to be checked by the police of the area where such like people are operating.

6. These matters, inter alia, can be considered by the Government quite conveniently with a view to provide them protection and respect so they may also spend their life in a respectable manner.

7. Learned Attorney General states that besides making the policy in this behalf, if need be, the Government will legislate a law in their favour and a Commission can also be constituted. We expect some positive outcome on the next date of hearing.

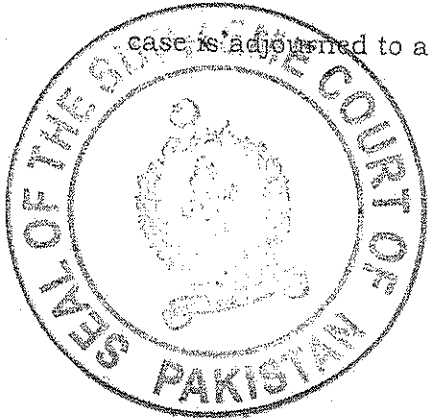
8. Copy of this order be sent to the Chief Secretaries/ Commissioners etc of respective Provinces who, with the consultation of the Secretary, Social Welfare Department and

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Superintendent

DCO will make efforts to implement the same. All the concerned Ministries are expected to cooperate with the learned Attorney General and Advocate Generals for implementation of the same and to prepare a policy in this behalf.

At the request of learned Attorney General for Pakistan case is adjourned to a date in office after one month.



Sd/- Aftikhar Muhammad Chaudhry C.J.
Sd/- Ch. Ijaz Ahmed J
Sd/- Khilji Arif Hussain J

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Superintendent
Supreme Court of Pakistan
ISLAMABAD

Islamabad the,
20th. November, 2009.

Case No:	2784/10	Civil/Criminal
Date of Presentation:	6-4-10	
No. Of Words:	1200	
No. Of Pages:	12	
Requisition Fee Rs:	5.00	
Copy Fee Inc:	7.44	
Court Fee stamps:	12.44	
Date of Completion of Copy:	7/11/10	
Date of delivery of Copy:	21-5-10	
Checked by/Prepared by:	<i>[Signature]</i>	
Received by:		

12A/115

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Anwar Zaheer Jamali
Mr. Justice Khilji Arif Hussain

Constitution Petition No.43 of 2009

Dr. Muhammad Aslam Khaki & another

...Petitioners

Versus

S.S.P.(Operations) Rawalpindi & others

...Respondents

Petitioners: Dr. Muhammad Aslam Khaki, ASC
With Almas Shah, @Boby
On Court Notice: Mr. Shah Khawar, Act. Attorney General
With Mr. Javed Iqbal, SP (Legal), Islamabad
For Govt. of Punjab: Mr. Khadim Hussain Qaiser, Addl. A.G. Pb.
With Mr. Akhtar Ali, SHO, Taxila
Mr. Muhammad Nazir, SI
For Govt. of Sindh: Raja Abdul Ghafoor, ASC
With Dr. Iqbal Saeed Khan, Dir. Social Welfare Dept.
Dr. Saeed Ahmed Qureshi, focal person to Secy. Health,
For Govt. of NWFP: Mr. Ishtiaq Ibrahim, Addl. A.G.
With Waris Khan, S.O (Health)
For Govt. of Baluchistan: Mr. Mehmood Raza, Addl. A.G. Baluchistan
With Mr. Saeed Ahmed Kasi, S.O. Social Welfare Dept.
Date of hearing: 23.12.2009

ORDER

On the last date of hearing it was observed that unix/eunuchs are entitled of shares from inherited property in pursuance whereof their registration has been completed, therefore, the Secretaries Social Welfare Departments are directed that on the basis of such registration they should approach the respective DCOs and communicate the order of this Court to them that after tracing their family roots, it may be ensured that they get their shares of inheritance, if any, and if no inheritance, yet has opened, they should be considered at the time of opening of the same as there is no law of the land, which deprives them from their respective

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S. [Signature]
[Title]

rights. The unix are also directed to cooperate with the authorities in this behalf. However, their family members who have deprived them from their due shares, are also advised not to deny their rights otherwise the law will take its own course. Reports in this behalf shall also be completed and be sent province-wise on the next date of hearing. In the meanwhile this order shall be treated as judgment in their favour for the purpose of getting right of inheritance etc. from moveable and immovable properties left by their predecessors.

2. Mr. Khalid Zaman, Section Officer, Ministry of Interior stated that copy of the order dated 20.11.2009 has been received in their office on 16th December, 2009 therefore, so far, Interior Ministry has not consulted with the NADRA for the purpose of recording exact status of unix in the column, meant for male or female after undertaking some medical tests based on hormones, therefore, on the next date of hearing progress in this behalf shall also be made.

3. Learned Attorney General stated that so far no progress has been made regarding entering the names of the unix in the electoral list. However, Mr. Aslam Khaki, learned ASC stated that names of so many unix have already been registered and some have also contested elections. The Election Authorities of the Provinces are directed to have a contact with the Secretaries Social Welfare Department and after getting the copy of the registration of the unix in the Provinces, they should enter their names in the voter lists on the basis of the I.D. Cards whatsoever they possess and if any change is recorded on the basis of NADRA's entries, the same shall also be carried out in the electoral lists. Copy of this order be also sent to the Chief Election Commissioner for making directions to the concerned authorities.

4. The Provincial and the Federal Governments have also not taken steps for ensuring the admission of the unix in the educational institutions. The Secretary, Social Welfare Department, Sindh, Mr. Iqbal Ahmed stated that steps are being taken for their admission and accommodation in the educational institutions. The remaining Provincial Governments through Secretaries Social Welfare Department, are also directed to follow the same practice and ensure their admission in the educational institutions, because it is their basic and fundamental right to get education in the institution in terms of Article 22 read with Article 25 of the Constitution.

5. Learned Attorney General stated that previously there was a scheme by the name of Adult Education, however, he will inquire from the Federal and the

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Provincial Governments whether such scheme is still there or not. However, in absence of any scheme, the government may ensure admission in the educational institutions including technical and vocational institutions, of all those unix who have not crossed the age of receiving the education so far.

6. It is informed by Mr. Iqbal Saeed, Director Social Welfare Department, Mr. Saeed Ahmed, Director Health, Government of Sindh that unix were involved by these two departments during Polio Vaccination Scheme of this month. Efforts made in this behalf by the Government of Sindh are highly appreciable and we expect that other Provincial Governments shall also follow the same practice. Besides, they shall also accommodate them against other jobs as has already been noticed that steps be made to create some respectable jobs so they may earn their livelihood respectably. In this behalf all the Secretaries of the Social Welfare Department of the Provinces shall submit a comprehensive report.

7. The police authorities apparently had not taken any step to ensure that unix are not being harassed and actions are being taken against those persons who in fact are not unix but by using such status are committing the crimes and ultimately the actual unix are being blamed for the same. In this behalf the IGPs shall instruct their subordinates to adopt a mechanism to ensure that they are not being harassed and their status being of unix be not exercised by other persons etc.

8. Learned Attorney General stated that the Government has decided to prepare a scheme and if need be, legislation shall be made to protect the rights of the unix, being citizens of this Country in terms of Article 25(3) of the Constitution on the same lines as are guaranteed to the other citizens of the Country. Adjourned to a date after one month for receiving the reports.

9. It has been pointed out that in the State of Bihar (India) a strategy has been evolved to provide respectable jobs to the unix like recovery of taxes from the habitual defaulter etc. Extract of such information has been downloaded from the internet which is reproduced herein below:

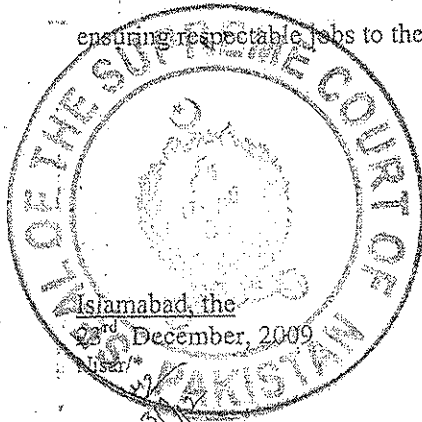
"The Bihar government is trying out innovative ways to involve the eunuchs, also called kinnars or hijras, in socially useful work. It has successfully used the services of eunuchs to recover taxes from habitual defaulters in Patna. Now, the social welfare department plans to rehabilitate them - in a first such rehabilitation scheme for eunuchs. Bihar Social Welfare Minister Damodar Raut told IANS that the government would soon launch a plan for the rehabilitation of eunuchs. "It is in the pipeline. The rehabilitation scheme for rehabilitation scheme for eunuchs will be a reality in the state soon, he said. Eunuchs will be

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provided literacy and vocational training to prepare them for respectable regular employment. It will give them the opportunity to enhance their socio-economic status," said Masood Hassan, director of the social welfare department."

10. The Government of Pakistan, Social Welfare Departments as well as the Provincial Governments may also take this information as well for the purpose of ensuring respectable jobs to the UNIX.



Sd/- Jafikhar Muhammad Chaudhry, C-7
Sd/- Anwar Zaheer Jamali, J
Sd/- Iqbalji Arif Hussain, J

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Case No: 2784/10 Civil/Criminal
 Date of presentation: 6-4-10
 No. of wards: 1200
 No. of pages: 12
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 Date of delivery of Copy: 21-5-10
 Compared by/Prepared by: [Signature]
 Received by: [Signature]

SUPREME COURT OF PAKISTAN

Constitutional Petition No. 43 of 2009

Decided On: 25.09.2012

Appellants: Muhammad Aslam Khaki and Ors.

Vs.

Respondent: S.S.P. (Operations) Rawalpindi and Ors.

Hon'ble Judges:

Iftikhar Muhammad Chaudhry, C.J., Jawwad S. Khawaja and Khilji Arif Hussain, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Party-in-Person and Shahana Abbas, Shazia and Mahwish (Unix)

For Respondents/Defendant: Dil Muhammad Khan Alizai, D.A.G.

ORDER

Iftikhar Muhammad Chaudhry, C.J.

1. In pursuance of this Court's direction, a concise statement has been filed on behalf of NADRA. Copy of the same has been handed over to the petitioner in person who after having gone through the same stated that the arrangement being followed by the NADRA for issuing National Identity Cards to the eunuchs (Khwaja Sraa). He further stated that as now focal person have been nominated by the Provinces, therefore, at present they are not facing any problem and if such problem arises at any time, the same will be solved by the executive/law enforcing

agencies of the concerned Provincial Governments. This petition was instituted for the enforcement of fundamental rights of the person which include eunuchs, guaranteed under the Constitution including security to life and property as they are more vulnerable among humans. The petitioner and all the Provincial Governments through their Advocate Generals have provided assistance and implemented the directions issued by this Court from time to time. We may point out that eunuchs are entitled to be respected by all the segments of society as other citizens deserve. In the past their had been practice being followed invariably when they were not being treated at par* with the other human beings/citizens but now with the cooperation of the Federal and Provincial Governments and other organizations they are being respected and dignified as citizen of this country in view of the fact that their rights are fully protected under the Constitution including the inherited property rights detail of which we have obtained so that the eunuchs are not deprived from their legitimate right in respect of movable and immovable proper, right to get education, right of the franchise and also to ensure their participation/jobs in all walk of life and they should not be intervened either by their relatives or by any other functionary. Copy of this order be communicated to the Commissioner ICT, Home Secretaries to the Provinces and the IGPs for information and strict adherence of the same. The eunuchs should be treated equally as other citizens in this country enjoying the same rights under the Constitution of Islamic Republic of Pakistan. We place our gratitude to the petitioner in person, to the representatives of the Government, the NGOs and all others who have assisted us on the issue for its final disposal through this judgment, Disposed of in the above terms.

The Gazette  **of Pakistan**

**EXTRAORDINARY
PUBLISHED BY AUTHORITY**

ISLAMABAD, THURSDAY, MAY 24, 2018

PART I

Acts, Ordinances, President's Orders and Regulations

NATIONAL ASSEMBLY SECRETARIAT

Islamabad, the 22nd May, 2018

No. F. 23(20)/2018-Legis.—The following Act of *Majlis-e-Shoora* (Parliament) received the assent of the President on the 18th May, 2018 is hereby published for general information:-

ACT NO. XIII OF 2018

AN

ACT

to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto

WHEREAS it is expedient to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto;

(273)

Price: Rs. 20.50

It is hereby enacted as follows:-

CHAPTER I

PRELIMINARY

1. **Short title, extent and commencement.**— (1) This Act may be called the Transgender Persons (Protection of Rights) Act, 2018.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

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

(a) **“Act”** means the Transgender Persons (Protection of Rights) Act, 2018;

(b) **“CNIC”** means Computerized National Identity Card;

(c) **“complainant”** means a transgender person who has made a complaint on being aggrieved by an act of harassment;

(d) **“CRC”** means Child Registration Certificate or B-Form;

(e) **“gender expression”** refers to a person’s presentation of his gender identity and the one that is perceived by others;

(f) **“gender identity”** means a person’s innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth;

(g) **“Government”** means the Federal Government;

(h) **“harassment”** includes sexual, physical, mental and psychological harassment which means any aggressive pressure or intimidation intended to coerce, unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with living, mobility or work performance or creating an intimidating, hostile or offensive work or living environment including the attempt to punish the complainant for refusal to comply with such requests or to bring forth the complaint;

(i) **“NADRA”** means the National Database and Registration Authority.

- (j) “**notification**” means a notification published in the official Gazette;
- (k) “**PMDC**” means The Pakistan Medical and Dental Council constituted under the PMDC Ordinance, 1962 (XXXII of 1962);
- (l) “**prescribed**” means prescribed by rules made by the Government under this Act;
- (m) “**rules**” means the rules made under this Act; and
- (n) “**transgender person**” is a person who is—
 - (i) intersex (khusra) with mixture of male and female genital features or congenital ambiguities; or
 - (ii) eunuch assigned male at birth, but undergoes genital excision or castration; or
 - (iii) a transgender man, transgender woman, *KhawajaSira* or any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

(2) A word or expression not defined in the Act shall have the same meaning as assigned to it in the Code of Criminal Procedure, 1898 (Act V of 1898) or The Pakistan Penal Code, 1860 (Act XLV of 1860).

CHAPTER II

RECOGNITION OF IDENTITY OF TRANSGENDER PERSON

3. **Recognition of identity of transgender person.**—(1) A transgender person shall have a right to be recognized as per his or her self-perceived gender identity, as such, in accordance with the provisions of this Act.

(2) A person recognized as transgender under sub-section (1) shall have a right to get himself or herself registered as per self-perceived gender identity with all government departments including, but not limited to, NADRA.

(3) Every transgender person, being the citizen of Pakistan, who has attained the age of eighteen years shall have the right to get himself or herself registered according to self-perceived gender identity with NADRA on the CNIC, CRC, driving licence and passport in accordance with the provisions of the NADRA Ordinance, 2000 (VIII of 2000) or any other relevant laws.

(4) A transgender person to whom CNIC has already been issued by NADRA shall be allowed to change the name and gender according to his or her self-perceived identity on the CNIC, CRC, driving licence and passport in accordance with the provisions of the NADRA Ordinance, 2000 (VIII of 2000).

CHAPTER III

PROHIBITION OF CERTAIN ACTS

4. **Prohibition against discrimination.**—No person shall discriminate against a transgender person on any of the following grounds, namely:—

- (a) the denial or discontinuation of, or unfair treatment in, educational institutions and services thereof;
- (b) the unfair treatment in, or in relation to, employment, trade or occupation;
- (c) the denial of, or termination from, employment or occupation;
- (d) the denial or discontinuation of, or unfair treatment in, healthcare services;
- (e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment of use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of general public or customarily available to the public;
- (f) the denial or discontinuation of, or unfair treatment with regard to, right to movement, safe travel and use of public facilities of transportation;
- (g) the denial or discontinuation of, or unfair treatment with regard to, the right to reside, sale, purchase, rent or otherwise occupy or inherit any movable and immovable property;
- (h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; or
- (i) the denial of access to, removal from, or unfair treatment in, government or private establishment, organizations, institutions, departments, centers in whose care, custody or employment a transgender person may be.

5. **Prohibition against harassment.**—Harassment of transgender persons, as defined in this Act, both within and outside the home, based on their sex, gender identity and gender expression is prohibited.

CHAPTER IV

OBLIGATIONS BY THE GOVERNMENT

6. **Obligations of the Government.**—The Government shall take following steps to secure full and effective participation of transgender persons and their inclusion in society, namely:—

- (a) establish protection centers and safe houses to ensure the rescue, protection and rehabilitation of transgender persons in addition to providing medical facilities, psychological care, counseling and adult education to the transgender persons;
- (b) establish separate prisons, jails, confinement cells, etc for the transgender persons involved in any kind of offence or offences;
- (c) institute mechanisms for the periodic sensitization and awareness of the public servants, in particular, but not limited to, law enforcement agencies and medical institutions, relating to the issues involving the transgender persons and the requirement of protection and relief of such persons;
- (d) formulate special vocational training programmes to facilitate, promote and support livelihood for transgender persons;
- (e) encourage transgender persons to start small business by providing incentives, easy loan schemes and grants; and
- (f) take any other necessary measures to accomplish the objective of this Act.

CHAPTER V

PROTECTION OF RIGHTS OF TRANSGENDER PERSONS

7. **Right to inherit.**—(1) There shall be no discrimination against transgender persons in acquiring the rightful share of property as prescribed under the law of inheritance.

(2) The share of transgender persons shall be determined as per the gender declared on CNIC in accordance with the law of inheritance in Pakistan.

(3) The share of inheritance for transgender persons will be as follows:—

- (i) for transgender male, the share of inheritance will be that of man;
- (ii) for transgender female, the share of inheritance will be that of woman;
- (iii) for person who has both male and female or ambiguous characteristics, such as their state is difficult to determine upon birth, following shall apply:—
 - (a) upon reaching the age of eighteen years, if the person's self-perceived gender identity is transgender male, the share of inheritance will be that of man;
 - (b) upon reaching the age of eighteen years, if the person's self-perceived gender identity is transgender female, the share of inheritance will be that of woman;
 - (c) upon reaching the age of eighteen years, if the person's self-perceived gender identity is neither transgender man nor transgender woman, the share of inheritance will be an average of two separate distributions for a man and a woman; and
 - (d) below the age of eighteen years, the gender as determined by medical officer on the basis of predominant male or female features.

8. Right to education.—(1) There shall be no discrimination against transgender persons in acquiring admission in any educational institutions, public or private, subject to fulfillment of the prescribed requirements.

(2) All educational institutions shall provide education and opportunities for sports, recreation and leisure activities without any discrimination and on an equal basis with others.

(3) The Government shall take steps to provide free and compulsory education to transgender persons as guaranteed under Article 25A of the Constitution of the Islamic Republic of Pakistan.

(4) It is unlawful for an institution, whether private or public, to discriminate against a person on the ground of person's sex, gender identity and gender expression, including but not limited to,—

- (a) in determining who should be offered admission; or
- (b) in the terms or conditions on which admission is offered; or
- (c) by denying the person's access, or limiting the person's access, to opportunities, training or to any other positive externalities associated with the education; or
- (d) by denying access to appropriate student facilities based on a person's sex, gender identity and expression.

9. **Right to employment.**—(1) The Government must ensure the right to enter into any lawful profession or occupation and to conduct any lawful trade or business for the transgender persons as guaranteed under Article 18 of the Constitution of the Islamic Republic of Pakistan.

(2) No establishment, institution, department, organization, shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion, appointment, transfer and other related issues.

(3) It shall be unlawful for an employer to discriminate against an employee on the ground of his sex, gender identity or gender expression,—

- (a) in determining who should be offered employment; or
- (b) in the terms or conditions on which employment is offered; or
- (c) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training or to any other benefits associated with employment; or
- (d) by dismissing the employee; or
- (e) by subjecting the employee to any other detriment.

10. **Right to vote.**—No transgender person shall be deprived of his right to cast a vote during national, provincial and local government elections:

Provided that the access to polling stations shall be determined according to the gender declared on the CNIC of a transgender person.

11. **Right to hold public office.**—(1) There shall be no discrimination on the basis of sex, gender identity and gender expression for transgender persons if they wish to contest election to hold public office.

12. **Right to health.**—The Government shall take the following measures to ensure non-discrimination in relation to transgender persons, namely:—

- (a) to review medical curriculum and improve research for doctors and nursing staff to address specific health issues of transgender persons in cooperation with PMDC;
- (b) to facilitate access by providing an enabling and safe environment for transgender persons in hospitals and other healthcare institutions and centers;
- (c) to ensure transgender persons access to all necessary medical and psychological gender corrective treatment.

13. **Right to assembly.**—(1) The Government must ensure the freedom of assembly for transgender persons in accordance with Article 16 of the Constitution of the Islamic Republic of Pakistan.

(2) The Government must take steps to ensure appropriate safety measures for transgender persons.

(3) No discrimination shall be made on the basis of person's sex, gender identity and gender expression subject to reasonable restrictions imposed by law in the interest of public order.

14. **Right of access to public places.**—(1) No transgender person shall be denied access to public places, places of entertainment or places intended for religious purpose solely on the basis of his sex, gender identity or gender expression.

(2) The Government must ensure transgender persons' access to public places in view of Article 26 of the Constitution of the Islamic Republic of Pakistan.

(3) It shall be unlawful to prevent transgender persons to access facilities available for access of general public and public places mentioned in sub-section (1).

15. **Right to property.**—(1) No transgender person shall be denied right to purchase, sell, rent or lease property, household or tenancy on the basis of sex, gender identity or gender expression.

(2) It shall be unlawful to discriminate any transgender person with regards to renting, subletting or tenancy on the basis of his sex, gender identity or gender expression.

16. **Guarantee of fundamental rights.**—(1) In addition to rights mentioned in this Chapter, fundamental rights mentioned in Part II of Chapter I of the Constitution of the Islamic Republic of Pakistan shall be available unequivocally for every transgender person.

(2) It shall be the duty of the Government to ensure that the fundamental rights mentioned in sub-section (1) are protected and there shall be no discrimination for any person on the basis of sex, gender identity or gender expression.

17. **Offences and penalties.**—(1) Whoever employs, compels or uses any transgender person for begging shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees or with both.

CHAPTER VI

ENFORCEMENT MECHANISM

18. **Enforcement mechanism.**—In addition to the remedies available under the Constitution or The Pakistan Penal Code 1860 (Act XLV of 1860), the Code of Criminal Procedure, 1898 (Act V of 1898) or the Code of Civil Procedure 1908 (Act V of 1908), the aggrieved transgender person shall have a right to move a complaint to the Federal Ombudsman, National Commission for Status of Women and National Commission of Human Rights (NCHR) if any of the rights guaranteed herein are denied to him or her.

CHAPTER VII

MISCELLANEOUS

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

20. **Power of Government to make rules.**—The Government may, by notification, make rules for carrying out the purposes of this Act.

21. **Power to remove difficulties.**—If any difficulty arises in giving effect to the provisions of this Act, the Government may make such order or give such directions, by order published in the official Gazette, or make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.