

## THIRD GENDER: A CONSTITUTIONAL PERSPECTIVE

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*The Article highlights mainly about the transgender or the 'third sex'. This article explores into the legislations and privileges available to transgender in other countries, and highlights the lack of such legislations in our country. Our Constitution recognizes certain basic fundamental rights to all citizens irrespective of their gender, the 'third sex' as they are commonly called, lacks even their right of self- recognition and self-expression. A stark analysis of how certain basic Human Rights are being denied to the transgenders and a detailed discussion about the constitutional ambit and status of transgenders with respect to various Articles of the Constitution are also dealt in this Article. Even though our Constitution provides that no person shall be discriminated on any grounds, still the transgenders are being harassed and abused for their sexual orientation. To live a life of one's own choice is a basic human right bestowed upon all, and yet those people who are born having defects in their sexual orientation (who the society commonly calls as transgenders) are being constantly victimised by the society. This article recognises the fact that the need of the hour is a legislation which can provide the transgenders a lawful existence in our country.*

### INTRODUCTION

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex<sup>1</sup>. TG may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who, describe themselves as "third gender" and they do not identify as either male or female. They are generally called transsexual persons. It refers to all non-cisgender identities and expressions which includes both trans-men and trans women. A trans woman is one who is assigned gender male at birth but identifies with the gender female. On the other hand, a trans man is a person who is assigned gender female at birth but identifies with the gender male<sup>2</sup>. The person may or may not have undergone sex reassignment surgery or procedures<sup>3</sup>.

Resultantly, the term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited

<sup>1</sup> American Psychological Association Fact Sheet: Vol. A-1: p 1

<sup>2</sup> Expert Committee Report on the 'Issues relating to Transgender Persons' 2014, at p.7

<sup>3</sup> Ibid FN 2

to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.

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## GENDER IDENTITY AND SEXUAL ORIENTATION

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Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons who may be born with bodies which incorporate both or certain aspects of both male and female physiology. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category<sup>4</sup>.

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

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## HISTORICAL BACKGROUND OF TRANSGENDERS IN INDIA

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TG Community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts. The Concept of tritiya prakrti or napunsaka has also been an integral part of vedic and puranic literatures. Lord Rama, in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings. Jain Texts also make a detailed reference to TG which mentions the concept of 'psychological sex' We notice that even though historically, Hijras/transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically.

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<sup>4</sup> NALSA v. Union of India, (2014) 5 S.C.C 438.

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## UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES – ON GENDER IDENTITY AND SEXUAL ORIENTATION

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United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6<sup>5</sup> of the Universal Declaration of Human Rights, 1948, Article 16<sup>6</sup> and Article 17<sup>7</sup> of the International Covenant on Civil and Political Rights, 1966 (ICCPR) highlights the importance of promotion and protection of the sexual minorities. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity.

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## RECOGNITION OF THIRD GENDER IN FOREIGN JUDGEMENTS.

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Various countries have given recognition to the gender identity of such persons, mostly, in cases where transsexual persons started asserting their rights after undergoing SRS of their re-assigned sex. In *Corbett v. Corbett*<sup>8</sup>, the Court in England was concerned with the gender of a male to female transsexual in the context of the validity of a marriage. Learned Judge expressed the view that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. Later, in *R v. Tan*<sup>9</sup>, the Court of Appeal upheld the former decision.

Corbett principle was not found favour by various other countries, like New Zealand, Australia etc. and also attracted much criticism, from the medical profession. It was felt that the application of the Corbett approach would lead to a substantial different outcome in cases of a post-operative inter-sexual person and a post-operative transsexual person. In New Zealand in *Attorney-General v. Otahuhu Family Court*<sup>10</sup>, Justice Ellis stated that

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<sup>5</sup> every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right.

<sup>6</sup> Everyone shall have a right to recognition, everywhere as a person before the law.

<sup>7</sup> no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks.

<sup>8</sup> (1970) 2 All E.R. 33.

<sup>9</sup> (1983) Q.B. 1053.

<sup>10</sup>(1995) 1 N.Z.L.R 603.

the while deciding a case on gender identity the adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex. *In Re Kevin*<sup>11</sup>, an Australian case, Chisholm J., held that there is no 'formulaic solution' to determine the sex of an individual and all relevant matters need to be considered, including the person's life experiences and self perception. Lockhart, J. in *Secretary, Department of Social Security v. "SRA"*<sup>12</sup>, and Mathews, J. in *R v. Harris & McGuiness*<sup>13</sup>, made an exhaustive review of the various decisions with regard to the question of recognition to be accorded by Courts to the gender of a transsexual person who had undertaken a surgical procedure. In fact, Lockhart, J. in SRA observed that the development in surgical and medical techniques in the field of sexual reassignment, together with indications of changing social attitudes towards transsexuals, would indicate that generally they should not be regarded merely as a matter of chromosomes, which is purely a psychological question, one of self-perception, and partly a social question, how society perceives the individual. The House of Lords in *Bellinger v. Bellinger*<sup>14</sup> rejected the claim of "psychological factor".

Judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the "Biological test", but the "Psychological test", because psychological factors and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria" which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity.

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## LEGISLATIONS IN OTHER COUNTRIES ON TG

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We notice, following the trend, in the international human rights law, many countries have enacted laws for recognizing rights of transsexual persons, who have undergone either partial/complete SRS, including United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc. The Equality Act, 2010 (UK) has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act, 1986. The Act defines certain characteristics to be "protected characteristics" and no one shall be discriminated or treated less favourably on grounds that

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<sup>11</sup> (2001) Fam C.A 1074.

<sup>12</sup> (1993) 43 F.C.R. 299.

<sup>13</sup> (1988) 17 N.S.W.L.R. 158.

<sup>14</sup> (2003) 2 All E.R. 593.

the person possesses one or more of the “protected characteristics”. Gender reassignment has been declared as one of the protected characteristics under the Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act. 36. In Australia, there are two Acts dealing with the gender identity, (1) Sex Discrimination Act, 1984; and (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013. The European Union Legislations on transsexuals, Recital 3 of the Preamble to the Directive 2006/54/EC of European Parliament and the Council of 5 July 2006 made an explicit reference to discrimination based on gender reassignment for the first time in European Union Law.

European Parliament also adopted a resolution on discrimination against transsexuals on 12th September, 1989 and called upon the Member States to take steps for the protection of transsexual persons and to pass legislation to further that end. Following that Hungary has enacted Equal Treatment and the Promotion of Equal Opportunities Act, 2003, which includes sexual identity as one of the grounds of discrimination. 2010 paper on ‘Transgender Persons’ Rights in the EU Member States prepared by the Policy Department of the European Parliament presents the specific situation of transgender people in 27 Member States of the European Union. Around 15 States and District of Columbia in the United States have legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination. The Parliament of South Africa in the year 2003, enacted Alteration of Sex Description and Sex Status Act, 2003, which permits transgender persons who have undergone gender reassignment. The Senate of Argentina in the year 2012 passed a law on Gender Identity that recognizes right by all persons to the recognition of their gender identity as well as free development of their person according to their gender identity. In Germany, a new law has come into force on 5th November, 2013, which allows the parents to register the sex of the children as ‘not specified’ in the case of children with intersex variation.

### **INDIA TO FOLLOW INTERNATIONAL CONVENTIONS**

International Conventions and norms are significant for the purpose of interpretation of gender equality. Above-mentioned International Human Rights instruments which are being followed by various countries in the world are aimed to protect the human rights of transgender people since it has been noticed that transgenders/transsexuals often face serious human rights violations, such as harassment in work place, hospitals, places of public conveniences, market places, theaters, railway stations, bus stands, and so on. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person’s sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. Unfortunately, we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence

the necessity to follow the International Conventions to which India is a party and to give due respect to 56 other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. Article 21 has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance. Article 253 of the Constitution of India states that the Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. Generally, therefore, a legislation is required for implementing the international conventions.

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## ARTICLE 14 AND TRANSGENDERS

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Article 14 of the Constitution of India states that the State shall not deny to “any person” equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom<sup>15</sup>. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution<sup>16</sup>. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word ‘person’ and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the

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<sup>15</sup> National Legal Services Authority v. Union of India (UOI) and Ors A.I.R.2014S.C.1863., see also Pranay Kumar Podderv. State of Tripura and Ors. MANU/SC/0306/2017

<sup>16</sup> Mohammad Emrul Kayes and Ors. v. of the People's Republic of Bangladesh and Ors., 2015 35 B.L.D. 94., see also Delhi International Airport Pvt. Ltd. v. Union of India and Ors. MANU/DE/0921/2017

ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

### **ARTICLES 15 & 16 AND TRANSGENDERS**

Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'<sup>17</sup>. In fact, both the Articles prohibit all forms of gender bias and gender based discrimination. Article 15 states that the State shall not discriminate against any citizen, inter alia, on the ground of sex, with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Article 16 states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office under the State. Article 16 not only prohibits discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State<sup>18</sup>. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs

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<sup>17</sup> Ashoka Kumar Thakur v. Union of India (UOI) and Ors., 2008(56)B.L.J.R.1292.

<sup>18</sup> Gurvinder Singh and Ors. v. State of Rajasthan and Ors., MANU/RH/1162/201.

could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

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### ARTICLE 19(1)(a) AND TRANSGENDERS

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Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

The Supreme Court of the *State of Illinois in the City of Chicago v. Wilson et al.*<sup>19</sup>, struck down the municipal law prohibiting cross-dressing. In *Doe v. Yunits et al.*,<sup>20</sup> the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression." Principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgenders personality could be expressed by the transgenders behavior and presentation. State cannot prohibit, restrict or interfere with a transgenders expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. Therefore, the values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

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### ARTICLE 21 AND THE TRANSGENDERS

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Article 21 of the Constitution of India reads as follows: Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law." Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that

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<sup>19</sup> 75 III.2d 525(1978)

<sup>20</sup> 2000 W.L.33162199.

right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In **Francis Coralie Mullin v. Administrator, Union Territory of Delhi**<sup>21</sup>, the Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".

Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In **Anuj Garg v. Hotel Association of India**<sup>22</sup>, Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

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## CONCLUSION

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Self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender. Many states like Tamil Nadu, has taken lot of welfare measures to safeguard the rights of TGs, which we have to acknowledge, and Few States like Kerala, Tripura, Bihar have referred TGs as "third gender or sex". Our neighboring countries have also upheld their fundamental rights and right to live with dignity. The Supreme Court of Nepal in **Sunil Babu Pant & Ors. v. Nepal Government**<sup>23</sup>, stated that the homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well. Thus, the people other than 'men' and 'women', including the people of 'third gender' cannot be discriminated. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution. The Supreme Court of Pakistan in **Dr. Mohammad Aslam Khaki & Anr. V. Senior Superintendent of Police**

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<sup>21</sup> (1981) 1 S.C.C. 608, . See also. Suresh Kumar Koushal and Anr. v. NAZ Foundation and Ors A.I.R .2014 S.C.563.

<sup>22</sup> (2008) 3 S.C.C. 1.

<sup>23</sup> Writ Petition No.917 of 2007 decided on 21st December, 2007.

**(Operation) Rawalpindi & Ors.**<sup>24</sup> decided on 22nd March, 2011 held that -“Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens.

We, as a country and society must accept the third gender and must provide all facilities which are available to all the citizens of this country. It's not because they are a minority that we must extend a helping hand, but it is because they like us are human beings and deserve an equal stature in the society. They as a community have faced a lot of atrocities throughout the centuries. Without waiting for a legislation to be formulated, (which definitely is the need of the hour) which recognize the rights of transgender, let's as a society -up our mind and attitude towards them ,which definitely can add lights to their life.

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<sup>24</sup> Constitution Petition No.43 of 2009.