



INTERNATIONAL GAY AND LESBIAN
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REPORT

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Nepal Supreme Court Case on Relief for Sexual and Gender Minorities: Observers' Report¹

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On November 21, 2007, the Supreme Court of Nepal heard a writ petition submitted by Blue Diamond Society (BDS) and three sexual minority groups, demanding protection of their legal rights. Their demands were threefold: to recognize the civil rights of transgender people without requiring them to renounce one gender identity for another; to create a new law preventing discrimination and violence against LGBT communities; and to require the state to make reparations to LGBT victims of state violence and/or discrimination. This petition was premised on the unique relationship between Nepal's Supreme Court and its legislature. In response to a request by BDS for legal observers to be present at the hearing, the International Gay and Lesbian Human Rights Commission (IGLHRC) commissioned a team of lawyers from India, Vivek Divan and Arvind Narrain, to serve as court observers and share legal strategy with BDS legal counsel. Their report outlines the history behind the proactive litigation by LGBT groups in Nepal and provides a legal analysis of the November 21 proceedings, which includes some precedent-setting remarks by the Court. The Supreme Court is expected to make a final decision on December 21.

Background and Context

After some years of considerable instability, 2006-07 has been a period of significant transition in the political life of Nepal. This state of flux is ongoing and has been marked by a shift from the country's status as a monarchy to one that has been framed as a modern democracy by the Interim Constitution. A first draft of the Interim Constitution was prepared in early 2007 but due to dissatisfaction from some quarters of

civil society the government was petitioned to incorporate further changes (including affirmative action for *dalits*, 1/3 reservation in government institutions for women etc.). Anti-discrimination protection for sexual minorities were not included in the Interim Constitution despite lobbying efforts by Blue Diamond Society (BDS), Nepal's premier NGO supporting sexual minorities, and its allies. The Interim Constitution was originally meant to be finalized by November 2007, but due to continued

disagreements between Nepal's major political parties this has been postponed indefinitely.

BDS has been doing seminal work for the protection and promotion of the rights of sexuality minorities since 2002 with great success amidst considerable political and social upheaval. It has extensively documented the severe violence faced by *metis* (transgendered males) from law enforcement authorities. Through a multiplicity of advocacy strategies, BDS has brought these atrocities to the attention both of international agencies concerned with human rights and also key local stakeholders, including the media, policymakers, the legal community, and authorities such as Nepal's National Human Rights Commission. Yet, sexual minorities remain on the fringes of the Nepalese legal system and society.²

This is particularly so for *metis*, individuals whose gender non-conformity disentitles them to basic civic rights. Nepal has a unique system hitherto unpracticed in the rest of South Asia: the provision of a Citizenship Card to all men and women in Nepal after they reach the age of majority and satisfy certain domiciliary or ethnic conditions. This document gives the holder access to all kinds of entitlements, including a ration card, a passport, residential rights, etc. However, with rare exceptions, this card is denied to *metis*, who wish to register as a third gender and not as male or female. *Metis* are either told that they cannot be given a card because they do not fit in the category of 'male' or 'female,' or are given a card only if they are willing to be considered 'male.'³ Additionally, Nepal's *Muluki Ain* (or Country Code), comprehensive legislation that includes criminal law provisions, explicitly criminalizes bestiality but also ambiguously punishes 'unnatural' sexual intercourse.⁴ Although not used by law enforcement authorities, this has the potential to criminalize same-sex behavior and discriminate against sexual minorities.

BDS' Case for Non-Discrimination of Sexual Minorities

On April 18, 2007, BDS filed a writ petition in the Nepal Supreme Court seeking non-discrimination provisions for sexual minorities (particularly *metis* in relation to citizenship

rights),⁵ Asking for full citizenship rights for members of the third gender, the nullification of discriminatory laws against sexual minorities and the introduction of protective legislation. Unlike jurisdictions such as India where courts do not have the authority to direct the legislature to enact legislation, in Nepal the Supreme Court has been vested with such authority, and has exercised it in the past, such as in a case related to enforced disappearances in July 2007.⁶ BDS' case is timely as it attempts to influence discussions within Nepal's Constituent Assembly before finalization of the Constitution.

At the first hearing, the Supreme Court issued a "show cause" notice to the defendants, the Nepal government, Prime Minister and Council of Ministers, the Ministry of Law & Justice and the Parliament Secretariat. All the defendants responded by raising one main argument: that there was no need for special legal protection of the petitioners since the Interim Constitution guaranteed the right to non-discrimination on the basis of religion, sex, caste, origin, race, language or belief within which the petitioner's rights were protected as such.

On 24 October, when the Supreme Court next heard the case, BDS counsel described international judicial and legislative developments related to the rights of sexual minorities. The judges asked for more information to be provided at the next hearing, including an interpretation of the term "other status" in Articles 2(1) and 26 of the International Covenant on Civil & Political Rights (ICCPR), comparative constitutional and legal provisions recognizing persons of a third gender, scientific evidence about the immutability of sexual orientation, and academic articles on the issue of sexual orientation. The case was then adjourned to November 21.

Supporting BDS' Efforts

After the court's request for information, BDS contacted allies in the region who have been working on sexual minority rights, seeking assistance in collecting the data sought by the court. Organizations such as the Alternative Law Forum, Bangalore, sent in materials. At the same time, IGLHRC, which has had a long association with BDS, decided to send observers to the next



hearing of the case. The authors of this report then visited Kathmandu between November 18 and 22 to interact with BDS and its lawyers and observe the hearing. Meetings were held during this period to gain an understanding of the situation of sexual minorities in Nepal and discuss legal strategy and arguments with the lawyers. The observers also collected documents as requested by BDS and its lawyers for submission to the Supreme Court: texts of constitutions guaranteeing non-discrimination on the basis of sexual orientation (e.g. South Africa, Ecuador, Fiji); WHO ICD-10, which removed homosexuality from its list of diseases; a summary of the legal rights of sexual minorities internationally; a government order from the state of Tamil Nadu in India, which protects the rights of *aravanis* (persons of a third gender); and the Indian passport office's application form, which recognizes a sex other than male/ female.

Discussions with BDS and its lawyers raised several interesting points. Most significantly, it became clear that the *metis* who suffered most abuse and violence at the hands of police and others experienced prejudice because of their gender identity/ expression rather than their sexual orientation. Discrimination on the grounds of gender identity/ expression was also responsible for the denial of basic civic rights to *metis* (the Citizenship Card and its attendant benefits). The primary task therefore became convincing the court that gender identity/ expression should be the basis for non-discrimination. If relief could be obtained on this basis (i.e. the recognition of a non-discriminated third gender under Nepali law) then a significant gain would be made.

However, very little international jurisprudence provides for equality in the context of gender identity/ expression. Most jurisprudence that exists has emerged from legal reform in the West, involving either the quashing of sodomy laws or the provision of equality guarantees on the basis of sexual orientation. Transgender rights, where they exist at all, have been recognized as applying to transsexual persons and not to those who do not undergo surgical procedures but nevertheless express their gender in ways that do not conform to societal norms.

In the discussions with BDS and its lawyers, the question arose as to whether an expanded understanding of 'sexual orientation' that includes 'gender identity/ expression' should be presented to the court, or whether these should be seen as conceptually distinct. It was concluded that arguments should state that although 'gender identity/ expression' and 'sexual orientation' are distinct concepts, they are closely related; it requires the imaginative use of existing jurisprudence to create additional grounds for equality that would apply to transgender people in Nepal (and have implications for transgender people living elsewhere in South Asia and beyond). A suggestion was also made to place the Indian case of *Khairati v Emperor* before the court in order to clarify the notions of 'gender identity' and 'sexual orientation.' In this case, a 'eunuch' was arrested on the presumption that s/he would commit sodomy but released by the court after it distinguished between the gender identity of the person and the sexual activity they might or might not perform.

Other possible approaches were also discussed including arguing that the freedom of expression guaranteed by the Interim Constitution covers the gender expression of *metis*. Similarly, discussions around the interpretation of the Sanskrit word "ling" (meaning either 'sex' or 'gender'), which was guaranteed as a ground for non-discrimination under the Interim Constitution, also took place.

The Supreme Court Hearing

The Supreme Court hearing was before a bench of two judges (Justice Bala Ram KC and Justice Pavan Kumar Ojha).⁷ The bench began by expressing the possibility that the case could be resolved through a consultative process (implying the setting up of a court- or government-appointed committee, which would report back to the court with recommendations—a practice that the Nepal Supreme Court has often followed in the past). Thereafter the court asked Hari Phuyel, counsel for BDS, to proceed with his arguments and submit the additional materials that it had sought. Mr. Phuyel addressed the court for over an hour and took the judges through the documents he submitted. These included the materials compiled by the



observers (mentioned above) and articles from various academic publications. He also submitted the ICJ submissions made to the court in the present case. The court was also presented with and taken through documents such as the Yogyakarta Principles, Amnesty International and Human Rights Watch reports referring to violence against sexual minorities in Nepal; the amicus brief filed before the US Supreme Court in the case of *Lawrence v Texas* by the American Psychiatric Association; BDS' explanation of distinctions between 'sexual orientation' and 'gender identity;' General Comment 18 of the ICCPR; draft legislation from the Philippines recognizing a third gender; and a Singapore law which provides protection to those with alternative gender identities.

Mr. Phuyel covered a wide range of issues in his arguments. He explained the notion of a 'third gender' in the context of Nepal and related it to similar gender identities in India (based on the People's Union for Civil Liberties-Karnataka report referring to *kothis*). This included an explanation of 'gender identity' vis-à-vis *metis*. At this stage the court inquired whether *hijras* in India were recognized as a separate sexual identity and if they received facilities like ration cards, etc.

Thereafter Mr. Phuyel explained the concepts of 'gender identity' and 'sexual orientation' to the court and took the judges briefly through *Lawrence v Texas*. The court asked whether sexual orientation was a matter of choice and if different categories existed among transgender people. Explanations were then given about transvestites, and transsexuals. At another point in the hearing the court sought clarification about the meaning of 'other status' in the ICCPR and whether this includes sexual orientation and/ or gender identity. Mr. Phuyel pointed out that 'gender identity' is an emerging concept requiring protection whereas 'sexual orientation' has been protected by various jurisdictions. After being shown the Yogyakarta Principles, the court then sought clarification on whether the petitioner sought the recognition of a third gender. It was submitted that such recognition would open up several opportunities and full citizenship. Finally, the court expressed concern about whether indecent behavior could increase if the right to gender identity or sexual

orientation was protected. In response, Mr. Phuyel submitted a study by Ryan Goodman demonstrating the positive impact of rights-sensitive law reform in South Africa and stating that concern around indecent behavior would be best met by ensuring the rights of sexual minorities are protected. The court then adjourned the case to November 24.

As the observers were unable to remain in Kathmandu for the hearing on November 24, the following is a summary of that day's hearing based on correspondence with Mr. Phuyel. The government's lawyer addressed the court and gave a positive response to the petitioner's case stating that people whose sexual orientation or gender identity differs from that of the majority deserve rights on a par with others and that the new constitution should include non-discrimination provisions on these grounds. Importantly, during the hearing a *meti* provided a personal testimonial to the court about her female gender identity despite her male physiology. The court pointed out that they are in agreement with the principle of non-discrimination on the grounds of sexual orientation or gender identity after sexual reassignment surgery but need to be convinced about such a right for those who have not undertaken such a medical procedure. It then asked BDS to prepare a legal brief on the substantive arguments that it presented and submit it before December 16, 2007. The court is expected to make its final decision on December 21, 2007.

Conclusion: Looking Ahead, Taking Opportunities Forward

There is much to be learnt from this experience with BDS and the litigation in Nepal. First is the manner in which cross-regional interaction and assistance has been a mutually rewarding experience.

Second, this has been a clear instance where pre-existing jurisprudence on sexual rights may not be sufficient to address the discrimination faced by sexual minorities in Nepal. The Yogyakarta Principles are significant because of their equal stress on the related but distinct notions of 'gender identity' and 'sexual orientation.' By



stressing the category of 'gender identity,' the Nepali efforts could possibly contribute to righting the balance in queer activism by placing equal emphasis on the concerns of the transgender community. International efforts to convert the Yogyakarta Principles into 'hard' law need to be a priority among queer activists.

Thirdly, the significance of a positive judgment from the Nepal Supreme Court cannot be overstated. Its impact in the developing world generally and in the South Asian region in particular would be far-reaching. For instance, activists and lawyers involved in an Indian case challenging the constitutional validity of sodomy laws, which has been languishing for 6 years, are bound to get a boost and further ammunition against arguments related to 'culture' and 'tradition' that often stain the debate around queer rights.

Fourthly, times of crisis are also times of opportunity. Nepal is at present going through a

moment which arises but rarely in a nation's history when the basic social compact between the state and its people is being negotiated. In this context, the international community needs to focus its efforts and support all ongoing activism which aims at creating an inclusive Nepali state by specifically including the categories of sexual orientation and gender identity in the Interim Constitution.

Lastly, it is important to continue helping BDS and its lawyers—be this help in the form of research and drafting of submissions, or advocacy and interactions with Nepal's media, Bar Association, National Judicial Academy and National Human Rights Commission. It would be fair to say that despite conservatism from certain quarters, which should be expected, there is a sense that Nepal is on the cusp of a new progressive and enlightened phase and there may be no better time than now to push for such enlightenment within the extensive constitutional legal reform that is taking place there.



ENDNOTES

¹ The *International Gay and Lesbian Human Rights Commission* would like to thank Vivek Divan and Arvind Narrain for their work on this report.

² The violence that *metis* have been subjected to over the years is well-documented. Despite attempts to reform Nepal's army in 2006, a story in the Kathmandu Post reported the recent firing of two women officers from the army on charges of 'lesbianism.' ("Lack of NA regulations delays justice delivery," *Kathmandu Post*, November 19, 2007.) Yet, the leadership role played by BDS and the progress of queer activists becomes clear when one reads editorial page articles in a mainstream newspaper like the *Kathmandu Post*, where the writer, who rues Nepal's missed opportunity to create history by electing a Constituent Assembly, states that, "after a free, fair, independent and fearless election, the CA would have represented everyone: from the world famous Sherpas to the fiercest Gurkhas.... the Chepangs to the Rautes.... the religious minorities; as well as the sexual minorities such as gays or lesbians, to the transgendered community." (Surendra Phuyal, "Post-Nov 22 quest for constitutional legitimacy," *Kathmandu Post*, November 21, 2007.)

³ Only two exceptional instances have been documented where a gender transgressive person's right to identity papers was acknowledged. The first was the case of Chanda Mussalman, a *meti* who was recognized as "both" sexes on a government-issued Citizenship Card. The second was an instance when the parents of a hermaphrodite child sought to obtain its birth certificate, and discovered that the registry was confused about the 'sex' of the child. In a panic, the parents took the child to India for surgery, which they were advised was extremely risky. BDS advised the parents to try to register the child as a third sex with the local department. The concerned government authority directed the department to register the child as such, stipulating that on reaching majority the child would be entitled to decide which of the three sexes (male, female, third sex) is the appropriate registration category.

⁴ Part 4, Chapter 16 of Nepal's Country Code states:

"Sex with animals

No 1: No one may penetrate an animal or make an animal penetrate him/her or may do or make another person do any kind of unnatural sex.

No 2: If someone penetrates a cow among female animals one may be sentenced to two years jail and if not the cow then one year jail or 500 Nrs fine.

No 3: If a woman makes an animal penetrate her, she may be sentenced to one-year jail or 500 Nrs fine.

No 4: In this chapter, not mentioned in other sections, anyone who does or makes someone practice unnatural sex may be sentenced to one-year jail or 5000 Nrs fine.

No 5: All the cases related to the law written in this chapter need to be reported within one year of the act taking place."

In 2004, Achut Kharel, a lawyer practicing in Nepal, filed a case in Nepal's Supreme Court asking the government to enact specific legislation to criminalize homosexual sex. This case has not progressed further since its filing.

⁵ It should be noted that all the legal documents in the case were in Nepali and as translations of the same were not available, the observers were limited in their ability to follow the precise tenor and emphasis in the petition.

⁶ This judgment, delivered in 2007, has been translated by the Nepali Bar Association with the assistance of the International Commission of Jurists (ICJ). As was noted by the Nepali Bar Association in its preface, "It is believed that this decision will inspire the neighboring jurisdictions as persuasive material in the similar cases and would be used by other jurisdictions, professional organizations, academic institutions and human rights organizations around the world." *Judgment of the Supreme Court of Nepal on Enforced Disappearance*, June 1, 2007.

⁷ Since the hearing was conducted in Nepali the observers were unable to follow every detail and nuance of the case despite able translation provided by a colleague.

