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Gender and sexual minorities' right to
recognition: A paper victory?
With a focus on Nepal, Bangladesh, and
India

Right to recognition of gender and sexual minorities in
India, Nepal and Bangladesh

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor:
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Term: Spring 2023

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Preface

It has been a difficult journey but I would do it all over again if I could.

Thank you to Lund University for granting me the Global scholarship that made this journey easier.

I dedicate my thesis to my parents, Dr. Renu Mishra and Prashant Mishra. Thank you for your unwavering support.

I dedicate my thesis to Dr. Sebastian Wrighton and Sharmita Sawant. Thank you for your love and encouragement.

To anyone reading this for their research, thank you. I hope it helps.

Arushi Mishra

Lund, 18 May 2023

List of Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OHCHR	The Office of the High Commissioner for Human Rights
UN	United Nations
YP+10	Yogyakarta Principles + 10
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
NGO	Non-governmental Organisation

Chapter I: Summary

Gender and sexual minority groups in Nepal, Bangladesh, and India have been systematically discriminated against in their States and ignored by the international community, for decades. While the three States have made progress concerning legal gender recognition, including recognizing a third gender on specific documents such as passports or identification cards, issues remain in ensuring equality in education, employment, and social participation. This is because the policy decisions, legislations, and judgements that Nepal, Bangladesh, and India have made to protect their respective queer communities, ignores the societal context as much as international law does.

This thesis will use arguments brought forth by activists and academics within local queer movements to argue how the right to recognition of a legal identity is redundant in protecting human rights of unrepresented people.

To analyse the legal avenues of protecting differing gender expressions and sexualities in South Asia it is important to assess the ways these identities manifest in their social, economic, and political context. I first expand on the complexities of different local identities within the three States. Then, I analyse the legal protections currently available and applicable in a national and international setting. Consequently, to understand how States are informed by international law, I explain the interplay of national and international understanding of queer minorities in the three States. This interplay is explained by analysing the disconnect as well as interdependence between national and international law. Then I explain the arguments and critiques brought forth by queer movements in the three States. This is done through an analysis of the implementation of current laws and the response of activists to them. Finally, I expand on different potential approaches to the protection of gender and sexual minorities available in the three States.

I conclude that the reliance on gender binary while advocating for queer rights yields minimum results. The right to recognition is a paper victory, promoted by the three States for gaining respect of the international community.

Chapter II: Introduction

Topic:

Gender and sexual identities like hijra, kothi, and meti are in focus in this thesis to argue the redundancy of right to recognition as means for protection of their rights. The main arguments emerging from the discussions of the thesis are:

1. Recognition of identity by the State should not be the priority when fighting for recognition of human rights.
2. States have used recognition of identity as the ultimate sign of fulfilment of human rights obligation because they wish to be seen as progressive in the international community.
3. States have used this right to create a mechanism of control. Agency to identify has thus been lost in an effort to be legally recognised.
4. Umbrella terms and bureaucratic processes for confirming gender identity legally have led to identity wars within the community. Identity wars are a result of fights within the community to gain access to the limited welfare benefits available to them because of their gender identity.

Motive and justification of choice:

Despite the praises received by Nepal, Bangladesh and India for their recognition of third gender identities, violations of the human rights of such identities continue¹. This begs the question, what aim did the right serve? This question is best answered within the context of each State, yielding different answers. The common thread in the answers is the presence of a State wishing for better status within the international community. This thread becomes clear with the language and methods used by each State to recognise identities that have existed for centuries. These identities were recognised by their State's culture but not its legal system. This has not changed with the right of recognition.

¹ Sanju Gurung, 'Nepal, the Beacon of LGBTQ+ Rights in Asia? Not Quite' (The Diplomat, 10 February 2021) < <https://thediplomat.com/2021/02/nepal-the-beacon-of-lgbtq-rights-in-asia-not-quite/> > accessed 20 April 2023

I chose these States for the following reasons:

- a. India: This was a convenient choice as I am very familiar with its legal structure. Additionally, because a lot of the research, history, and jurisprudence in India is available in English, it makes it easier to explain to those unfamiliar.
- b. Bangladesh: Since I was interested in how the State shares a history with India and has developed since independence. There is an overlap of local cultures but there are also interesting deviations. In my opinion these are important to highlight the fluidity of gender and sexuality identities.
- c. Nepal: As a South Asian State that was never colonised and has been praised for being progressive in its protections of queer people, it makes for a very interesting case study.

Lastly, since all three States recognise the legal identities of gender variant people in some sense, there was more room to analyse problems within their legal systems. Specifically, whether the test of efficacy of a right, end at the drafting stage. In essence, these States were chosen since they represent different approaches to the same legal right. This in turn, helps to support my main argument.

Research objective:

The objective of the thesis is to analyse the merits and demerits of right of recognition in its current conception in the three States. In general, the objective is to analyse the reliance on gender binary assumptions for protecting non-conforming gender and sexual identities. This analysis is done with reference to the specific context of such identities in Nepal, Bangladesh, and India as well as relevant international human rights law. Right to recognition of previously unrepresented and subjugated identities is analysed to see whether the intent of protecting such identities is fulfilled by this right. Or does this right instead 'others' these identities and grants the State control over the self-formation of their identities.

Research question:

Is the legal protection of varying gender identities in Nepal, Bangladesh and India inhibited by the current focus of the human rights movement on right to recognition?

Structure:

This thesis employs a comparative approach to analyse common trends in South Asian countries such as Nepal, India, and Bangladesh, while also exploring the challenges of human rights universalism in relation to the right of recognition. Initially, an overview is provided of legislative changes in Bangladesh, Nepal, and India. This focuses on how the adoption of ‘Western’ gender and sexuality categories has often marginalized indigenous identities and hindered the effective legal recognition of these minority groups. Furthermore, the limitations of legal reform strategies and the politics of recognition for advancing queer emancipation are discussed.

Theory:

Judith Butler once said, ‘identity categories are never merely descriptive, but always normative, and as such, exclusionary’². This quote suggests the social construction of gender binary. It succinctly explains why it is impossible to be inclusive while categorising several identities under one ‘correct’ way of expression. This idea of gender expression is used in this thesis to explain the redundancy and harm implicit in right of recognition when trying to protect such non-conforming gender and sexual identities. The arguments posed by Dianne Otto and Ratna Kapur on the tension between national and international human rights law, in regards to right to recognition, were heavily relied upon in this thesis³. Both authors argue for the queering of human rights law, which would require the abandonment of gender binary in its language.

Methodology:

The thesis utilizes a blend of doctrinal and applied legal research methods. Through a doctrinal approach, the paper examines the existing legal framework, including concepts, provisions, and principles. Specifically, it employs analytical legal research to delve into the precise meanings and interpretations of the law by analysing and deciphering rules. This methodology seeks to comprehend the law’s objectives and underlying intentions.

² Judith Butler, ‘Contingent Foundations: Feminism and the Question of “Postmodernism”’ in Benhabib, S., Butler, J., Cornell, D., Fraser, N. (eds.), *Feminist Contentions: A Philosophical Exchange* (Routledge, New York 1994), p 15

³ Dianne Otto, ‘Queering Gender [Identity] in International Law’ (2016) 33 *Nordic Journal of Human Rights* 4; Ratna Kapur, ‘The (im)possibility of queering international human rights’ in Dianne Otto eds *Queering International Law* (Routledge 2017)

This thesis uses critical queer theory alongside a law in context approach to understand the limits of national law on right to recognition of gender and sexual minorities.

Limitations:

2. Reliance on reports of lived experience from secondary sources: As seen by the example of hijra who accepted their gender expression as a disability in Bangladesh because it would give them welfare benefits - it is clear that often interviewees change their answers to suit the narrative of foreign NGOs⁴. Since the marginalised community representatives are usually not literate in English human rights language and gender studies vernacular, discretion is needed.
3. There is a relative emphasis on the hijra community compared to other underrepresented gender identities from Nepal, India, and Bangladesh. This is due to two reasons. Firstly, there is simply more academic research available on the hijra community that takes into account their lived experiences. Secondly, journalistic reports on several other communities are motivated less by fairly representing the community for securing their rights and more by the use of the community's visibility as a tool for promoting the queer movement. See for instance, an article on religious rituals practiced by Shiva Shaktis in Hyderabad (India)⁵. It mentions a three-day festival where Shiva Shaktis marry God Shiva at special temples. It recounts the personal experience of a Shiva Shakti as they express their gender freely at the festival. Following this it states to support Alliance for Aids Action - a gay rights NGO that works on HIV prevention. Albeit an important cause and relevant for the queer movement, it is already legally and financially supported by the international community. Social exclusion from the queer movement has played its part in lowering media and academic coverage of several communities' causes⁶.

⁴ Sibsankar Mal, 'The Hijras of India: A Marginal Community with Paradox Sexual Identity' (2018) 34(1) *Indian Journal of Social Psychiatry* p 79, 85; Adnan Hossain, 'The paradox of recognition: hijra, third gender and sexual rights in Bangladesh' (2017) 19 *An International Journal for Research, Intervention and Care*, p 1425

⁵ Amateur finalist, 'Religion and sexuality' (*The Guardian*, 22 November 2008)

<<https://www.theguardian.com/journalismcompetition/religion-sexuality>> accessed on 7 March 2023

⁶ M.V. Lee Badgett, 'The economic cost of stigma and the exclusion of LGBT people : a case study of India' (2014) Working Paper < <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/527261468035379692/the-economic-cost-of-stigma-and-the-exclusion-of-lgbt-people-a-case-study-of-india>> accessed on 9 May 2023

4. Lack of research on female born gender and sexual minorities in queer settings: There seems to be a lack of a similarly intricate classification system for women who are attracted to or engage in relationships with other women, or who adopt a more masculine gender expression. Instead, alternative terms such as ‘single women’ or ‘same-sex loving women’ have been suggested as substitutes for the term ‘lesbian’ but these alternative terms have not gained widespread usage. In the context of India, the challenge of studying lesbians is evident, as there is limited availability of English-language survey data specifically focusing on women who identify as lesbians or who have same-sex relationships⁷. In fact, recent efforts to collect survey data have faced difficulties in recruiting large enough samples for quantitative analysis⁸.
5. As it is impossible to confirm with every gender variant person and community which pronoun they prefer, I have used they/them pronouns unless specified otherwise by a source.
6. Use of ‘queer’: The term ‘to queer’ and its derivative ‘queering’ refer to the act of challenging and subverting traditional binary classifications related to gender, sexuality, and identity. It involves resisting the rigid distinctions between man/woman, heterosexual/homosexual, cisgender/transgender, and the normative/abnormal or natural/unnatural constructs⁹.

⁷ Sunil Mohan, Sumathi Murthy, ‘Towards Gender Inclusivity: a study on contemporary concerns around gender’ (2013) *LesBiT* p 32

⁸ *Ibid* p 28

⁹ Morgan Carpenter, ‘Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles Plus 10’ (2020) 23(4) *Culture Health & Sexuality*, p 217

Chapter III: Background

The different gender identities and sexualities in South Asia (Nepal, India and Bangladesh in focus)

To analyse the legal avenues of protecting differing gender expressions and sexualities in the three States, it is important to assess the ways these identities manifest in their social, economic and political context. The thesis at large will use these examples to prove its argument on identity recognition that is relevant in all three States. The queer movements and legal jurisprudence surrounding queer rights within this region (Nepal, India and Bangladesh specifically) have their own culture that deserves a more in-depth analysis to realise the deficiencies in current legal protection.

1. India –

1.1 The gender identities in question

I begin with India as Bangladesh shares its religious and mythological history with India, thus its cultural background.

According to a report by the Indian government, its queer population is estimated to be around 2.5 million in 2012 and a more recent global estimate suggests at least 10% of the State's population i.e., 135 million people¹⁰. Since this thesis concerns the right to legal recognition, the portion of the population under discussion is the represented yet unprotected one. This includes identities like Kinner, Hijra, Aravani, Kothi, Shiv-Shakthi and Jogta. '**Hijra**' (term for singular and plural) is an umbrella term that can include women, kothis or 'biological males who reject their "masculine identity"'¹¹ to identify instead as women or gender-fluid. They unify by identifying with their own initiation rituals ('reet') as well as professions. The rituals signify their beliefs in sexuality and religion. Similarly, their professions are often based in their role in religious customs. Developed out of ostracization and systematic condemnation faced

¹⁰ Chahat Rana, 'In Another Realm' (*Indian Express*, 26 January 2020) <<https://indianexpress.com/article/india/in-another-realm-lgbtq-community-networking-population-in-india-stigma-around-homosexuality-6235390/>> accessed on 2 March 2023

¹¹ National Legal Services Authority (NALSA) Vs. Union of India AIR 2014 SC 1863, p 55

by their community during British colonisation, they often converse in their own language called Hijra Farsi; derived from Persian and Hindustani¹². **Kinnar** is a term for hijra in northern region of India, often used by better educated hijra for themselves. **Aravani** or **Thirunangi** similarly is a term for hijra in Tamil Nadu. They differ in their gender expression as they identify themselves as ‘women trapped in male bodies’¹³. **Kothi** – common in India and Bangladesh – are defined by the NALSA judgement from the Indian Supreme Court¹⁴ as ‘biological males who show varying degrees of ‘femininity’ – which may be situational’. Their sexuality varies, as they may engage in same-sex relationships and also marry women. There is an overlap in these identities as hijra sometimes identify themselves as Kothi. **Jogtas** or **Jogappas** identify as servants of goddess Renukha Devi. Her temples are common in southern regions of India – like the state of Karnataka and Maharashtra. Jogta is the title for male servants and Jogti or Devdasi for female servants. Similar to hijra, they have initiation rituals that require finding a guru who would accept them as their disciple. Male-to-female transgender persons who are servants of Goddess Renukha Devi identify as ‘Jogti Hijra’ as not all jogti express as women while worshipping. **Shiv-Shakthi** identify as such if they feel ‘possessed by or particularly close to a goddess and who have feminine gender expression’¹⁵. Similar to Jogtis, their community resides in southern Indian states. Similar to hijra, they have initiation rituals led by senior gurus. Such rituals include becoming a bride of the sword by marrying a sword that represents male power or God Shiva. Their gender expression is feminine. Their professions are often similar to hijra as they are based on their faith. Professions like astrologers, soothsayers etc¹⁶.

As observed, the terminology for the myriad of identities can get confusing as they overlap and often intersect with cisgender expression as well. The definitions relied upon above are sourced from a landmark Supreme Court judgement, however, in academic publications the definitions are often contradictory. This makes it difficult

¹² Aarefa Johari, ‘Hijra, kothi, aravani: a quick guide to transgender terminology’ (*Scroll*, 17 April 2014) <<https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology>> accessed on 2 March 2023

¹³ Ibid

¹⁴ National Legal Services Authority (NALSA) Vs. Union of India AIR 2014 SC 1863, p 56

¹⁵ National Legal Services Authority (NALSA) Vs. Union of India AIR 2014 SC 1863, p 57

¹⁶ Ibid

to pin down one ‘correct’ way to be hijra. This supports the main argument of the thesis. Historically they were defined in several confusing and derogatory ways – eunuchs¹⁷, hermaphrodites¹⁸, boy prostitutes¹⁹, passive homosexuals²⁰ and as a third gender with cultural purpose²¹. This confusion lends into confusion between gender expression and sexuality as well. Often hijra, jankhas (transvestites) and gay men are put under the same umbrella²². The lack of lived experience visible in these definitions lends to the argument for their right to recognition. However, as will be argued at length in Chapter VII, recognition does not imply understanding. Even the NALSA judgement, used above, failed to help in this understanding as the Transgender Persons Bill of 2019²³ conflates hijra, genderqueer and intersex people under the category of transgender. The context and implications of this categorisation will be discussed under Chapter IV and V respectively.

1.2 Religion

As seen above, religion plays an important role in most communities. Their notion of community is similarly, closely tied to their religious beliefs. As a marginalised subculture existing outside of the norm, it is important to understand the different hierarchical frames that work through religious practices. In order to understand the religious aspect of their gender expression, I will use the example of hijra in North India. The hijra communities in the state of Gujarat are large, as they congregate annually to pay respect at the Bahuchara Mata Shrine²⁴. Every new member needs to pay their guru an amount (called ‘dand’) to join the hijra community²⁵. This amount is decided by the panchayat i.e., the community elders. This panchayat is not to be

¹⁷ See Hildebeitel, ‘Siva, the Goddess, and the disguises of the Pandavas and Draupadi’ (1980) 20 *History of Religions* 1-2 147, 174; Mehta, ‘Eunuchs, pavaiyas, and hijaras’ (1945) *Gujarat Sahitya Sabha Part 2*, 3-75

¹⁸ See M.E Opler, ‘The hijra (hermaphrodites) of India and Indian national character: A rejoinder’ (1960) *American Anthropologist* 62, 505-511.

¹⁹ See Carstairs, G.M., ‘Hinjra and jiryān: Two derivatives of Hindu attitudes to sexuality’ (1956) *British Journal of Medical Psychology* 29, p 130

²⁰ *Ibid* p 60

²¹ See Serena Nanda, ‘Hijra: An alternative sex and gender role in India’ (Gilbert Herdt (Ed.), *Third sex/third gender* 373-418, 1996)

²² See Serena Nanda, ‘The hijra of India: Neither man nor woman’ (Belmont: Wadsworth 2nd edn. 1999)

²³ The Transgender Persons (Protection of Rights) Bill 2019, section 2(k)

²⁴ Sandeep Bakshi, ‘A Comparative Analysis of Hijra and Drag Queens: The Subversive Possibilities and Limits of Parading Effeminacy and Negotiating Masculinity’ (2004) 46 *Journal of Homosexuality* 3-4, 214

²⁵ *Ibid* p 213

confused with informal rural government representatives, as this panchayat functions only for the hijra community.

Bahuchara mata is a Hindu goddess mostly worshipped by people around the state of Gujarat and hijra community.²⁶ Hijra are generally excluded from the caste hierarchy. The caste system being a system of social stratification still practiced in Hinduism in India despite several legal changes against it. This is not to say that caste does not always affect the kinship formed in hijra community. There are recorded observations of gurus rejecting initiation of aspiring hijra from joining because of their lower caste²⁷. However, since hijra represent a threat to the heteronormative structure of caste system, they are excluded from its practice. Many hijra are known to forgo their surnames (sign of their caste) after their initiation²⁸.

The goddess Bahuchara mata is a part of the collective conscious of the hijra community in India. She is a source of strength during the process of emasculation, i.e., severing of male genitals, as it is usually done without anaesthesia²⁹. Her name is uttered by the hijra during the process as the ritual is supposed to unite them and transform the hijra into a devotee³⁰. The ritual ends forty one days post operation. Forty one days spent praying to the goddess and finally ending in a pledge of allegiance to her, in front of their new community. This religious process being an integral part of the ‘emasculation operation’ for many in the hijra community in India indicates firstly, how the right to practice ones religion is also tied to their gender expression. Secondly, it indicates how this right is also often under threat by the caste hierarchy i.e., Hindu society. Therefore, how this right should also be considered while legislating protections for transgenders.

1.3 Origins in mythology

²⁶ Susan Deborah Selvaraj, ‘Bahuchara Mata (Deity of Transgenders)’ (2018) *Hinduism and Tribal Religions*. Encyclopedia of Indian Religions. Springer, Dordrecht https://doi.org/10.1007/978-94-024-1036-5_831-1 accessed on 3 March 2023

²⁷ Ina Goel, ‘Chapter 5: Understanding Caste and Kinship within Hijra, a “Third” Gender Community in India’ *Gendered Lives* (SUNY Press Open Access, 2022) < <https://soar.suny.edu/handle/20.500.12648/7026> > accessed 3 March 2023

²⁸ Ibid

²⁹ Susan Deborah Selvaraj, ‘Bahuchara Mata (Deity of Transgenders)’ (2018) *Hinduism and Tribal Religions*. Encyclopedia of Indian Religions. Springer, Dordrecht https://doi.org/10.1007/978-94-024-1036-5_831-1 accessed on 3 March 2023

³⁰ Kunal Kanodia, ‘Bahuchara Mata’ (2016) 7 *IMW J Relig Stud* 1

The existence of Hindu and Islamic history that appreciates hijra as an identity, especially as a source of respect and power, is immensely powerful for hijra and their identity. From 15th to 19th century, Muslim rulers (Mughal empire) were patrons of hijra; granting them respectable administrative positions of power³¹. Some hijra who are part of the Bahuchara Mata community also maintain Islamic traditions like Ramadan. Similar to their stance on gender, they are often not bound to one religion³². There are although some deviations in the practices of Hindu hijra compared to Muslim hijra – sexuality of Muslim hijra historically was often asexual unlike Hindu hijra³³.

Many prehistoric myths on the descent of hijra in Hindu mythology talk about descent from Shiva, also called ‘Ardhanariswar’ (half man half woman). This trait of the god of destruction, according to hijra, give them the power to curse (shraap)³⁴. The power to curse is a common practice used by hijra as a tactic to regain power. It is common practice to hire hijra for Hindu wedding ceremonies to get their blessings. If hijra find unfair treatment of them during such ceremonies – like refusal to pay – it is handled by threatening to curse the groom with impotency³⁵. The ritual of emasculation is similarly seen as a source of strength partly because of its significance in Mahabharata (a book of religious significance in Hinduism). Arjun, the protagonist of the story, cross-dresses as a woman called Brihannada during the war of Kurukshetra. This is seen as an instance of voluntary emasculation³⁶.

1.4 Livelihood

³¹ Harvard Divinity School Case Study ‘The Third Gender and Hijra’ (2018) https://hwpi.harvard.edu/files/rpl/files/gender_hinduism.pdf?m=1597338930 accessed on 3 March 2023

³² Ibid

³³ Michael H. Fisher, ‘Islam in Mughal India’ (2018) Oxford Research Encyclopedia of Religion <<https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-648>> accessed on 3 March 2023

³⁴ Serena Nanda, ‘The hijra of India: Neither man nor woman’ (Belmont: Wadsworth 2nd edn. 1999)

³⁵ Thomas, ‘The Curse of the Hijra’ (*ContemporaryNomad* 7 June 2009) <<https://www.contemporarynomad.com/the-curse-of-the-hijra/>> accessed on 3 March 2023

³⁶ Hildebeitel, ‘Siva, the Goddess, and the disguises of the Pandavas and Draupadi’ (1980) 20 *History of Religions* 1-2 147, 174; Mehta, ‘Eunuchs, pavaiyas, and hijaras’ (1945) *Gujarat Sahitya Sabha Part 2*, p 166

As a marginalised community that was systematically excluded from the mainstream society by legal and societal tactics³⁷, hijra community suffer in many ways including social exclusion and limited access to education³⁸. Despite operating within normative cultural spaces like weddings and other avenues for their livelihood. Thus, their right to a livelihood is under constant threat³⁹. In this context, Hindu hijra enjoy the benefit of religious and cultural legitimacy. As their blessings during Hindu wedding and birth ceremonies are usually a compulsory ritual⁴⁰. Due to this social custom attached to a mainstream and unmoving institution like marriage, their presence is reinforced by tradition even when undesired. If hijra are absent from wedding ceremonies, newlyweds often visit their residency to seek their blessings⁴¹.

Speaking from my personal experience, their blessings at weddings are usually accompanied by a performance of dance or song where they display both feminine and masculine traits – in a way working to disrupt the gender binary within one of the oldest institutions. Their blessings are the blessing of fertility on the new couple. Their sacrifice of their ‘procreative ability to the goddess’⁴² grants them the power to bless or curse others. After the performance is over, ‘The hijra invariably lift up their ghagras or saris (unless warned not to do so by the adult male members of the audience)... to show that the hijra are “real” hijra (i.e., without penis), and not fake ones (i.e., men posing as hijra), or just effeminate men, zenanas, for whom the hijra

³⁷ Abritty Abdullah, ‘Living Through Resistance: A Feminist Analysis of Bangladeshi Hijra and Gender Non-Conforming Identity Representation in Media Spaces and the Documentary Films, Call Me Salma (2010) and Are We So Different (2012)’ (2018) Masters Thesis; Oregon State University.

³⁸ Dr Rajkumar, ‘Education of Transgenders in India: Status and Challenges’ (2016) 6 International Journal of Research in Economics and Social Sciences 11, 15-24

³⁹ Outlook Web Desk, ‘The Transgender And Unemployment In India’ (*Outlook India*, 16 February 2022) <<https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617>> accessed on 3 March 2023

Also see relevant to Bangladesh: Amanullah ASM, Abir T, Husain T, Lim D, Osuagwu UL, Ahmed G, et al., ‘Human rights violations and associated factors of the Hijra in Bangladesh—A cross-sectional study’ (2022) 17 PLoS ONE 7

See Nepal: OHCHR ‘BORN FREE AND EQUAL’ UN Doc HR/PUB/12/06 p 23

⁴⁰ Sandeep Bakshi, ‘A Comparative Analysis of Hijra and Drag Queens: The Subversive Possibilities and Limits of Parading Effeminacy and Negotiating Masculinity’ (2004) 46 Journal of Homosexuality 3-4, p 216

⁴¹ Ibid

⁴² Harvard Divinity School Case Study ‘The Third Gender and Hijra’ (2018) <https://hwpi.harvard.edu/files/rpl/files/gender_hinduism.pdf?m=1597338930> accessed on 3 March 2023

community reserves disdain⁴³. Thus, even within this community, there are arguments to be made on the ‘correct’ way to express one’s gender. However, what is to be gained from their association with a majority religion in a political climate that favours its believers⁴⁴ - is a platform to protest against the gender binary, with relative safety.

Not all gender identities in India are Hindu or hijra. Hence, without the social net of Hinduism, several sections of the community fall to desperate times and engage in mostly unregulated sex work. Since it is a marginalised community, the hierarchies within the community become more stringent and powerful. This can be seen in how gurus fill the varying role of ‘den mother, godfather, spiritual leader and pimp’⁴⁵. All roles that invariably carry control with them. Mid-ranking gurus instruct new disciples or ‘chelas’ and they are in turn under the authority of gurus, who have their own gurus. The control and money of younger disciples is sacrificed for protection from abusive State actors (usually police officers) and abusive clients⁴⁶.

1.5 Sexuality

Cisnormativity is the common assumption of cisgender identities. In such structures, experiences of gender identities like hijra, jogta, shiv shakthi etc. are ignored. When gender is performed and ‘constituted through interaction’⁴⁷, self-formation of an identity that threatens cisnormativity is difficult to accept, much less communicate and advocate for. Finding a place for this identity in the international sphere is even more difficult. This is because the Global North and the Global South also reproduce identities according to the established hierarchical understanding of race and gender⁴⁸. It is no wonder why right to legal recognition was at the forefront of the queer movement in the Global South.

⁴³ Serena Nanda, ‘The hijra of India: Neither man nor woman’ (Belmont: Wadsworth 2nd edn. 1999), p 217

⁴⁴ Arvind Sharma, ‘On the Difference Between Hinduism and Hindutva’ (2020) 25 *Asian Philosophies and Religions* 1, 43-47

⁴⁵ Jeffrey Gettleman, ‘The Peculiar Position of India’s Third Gender’ (*NYTimes*, 17 February 2018) <<https://www.nytimes.com/2018/02/17/style/india-third-gender-hijra-transgender.html> > accessed on 2 March 2023

⁴⁶ Ibid

⁴⁷ West Candace, Zimmerman Don H., ‘Doing Gender’ (1987) 1 *Gender & Society* 2, 125–51

⁴⁸ Edward W. Said, ‘Orientalism’ (New York: Pantheon Books, 1978) Pp. xiii 368

However, self-formation is an individual act and as an identity it is difficult to mirror it in another's identity. Similar to the formation of hierarchies that excluded gender identities, heteronormativity also excluded non-hetero sexualities. In the context of such cisgender and heterosexual norms, asexual agender identities face the greatest threat of erasure. Hijra in India, to a large extent, identify themselves as neither man nor woman⁴⁹. Sexuality or the absence thereof is a disputed subject when it pertains to hijra in Bangladesh, India, and Nepal. Certain factions maintain that emasculation is an obligatory religious ceremony signifying dedication to the Goddess, functioning as a type of offering⁵⁰. Thus, hijra as an identity, in this sense, does raise important issues that argue against cis-heteronormative structures.

2. Bangladesh

2.1 The gender identities in question

As discussed before, hijra are individuals who do not identify themselves as either male or female, but rather as a distinct third gender category specific to South Asian cultures. The terminology used to describe other gender identity groups within this 'third gender' label varies depending on the specific region within South Asia and the local language spoken. Examples of such identities include kothi, panthi, khwaja sara, kinnar, khusra, zenana, and various others⁵¹.

In the context of Bangladesh, individuals who self-identify as kothi typically come from working-class backgrounds. Unlike hijra, they do not reside in segregated communities. While many kothi engage in sexual relationships with both men and women, they often assume a more feminine role in their interactions with men. It is worth noting that some hijra also identify as kothi or as transgender, and some individuals who identify as kothi or transgender also identify as hijra⁵².

⁴⁹ Sayan Bhattacharya, 'The Transgender Nation and its Margins: The Many Lives of the Law' (2019) 20 *Sedition, Sexuality, Gender, and Gender Identity in South Asia*

⁵⁰ Lawrence Cohen, 'The pleasures of castration: The postoperative status of Hijra, Jankhas and Academics' (1995) *Sexual Nature/Sexual Culture*, Chicago: University of Chicago Press

⁵¹ Abdul Aziz and Sameena Azhar, 'Social Exclusion and Official Recognition of Hijra in Bangladesh' (2019) 9 *Journal of Research on Women and Gender*, 3-19

⁵² *Ibid* p 4

These identities are not entirely distinct from each other, nor do they completely coincide. Part of the confusion can be attributed to previously mentioned difficulties associated with self-formation of identities within a context that ignores it. Many identify with labels that have garnered the most international or national respect – like transgender – as opposed to kothi, to be one step closer to accessing rights. This hurdle to self-formation can be partly associated to the debilitating consequence of taking right to recognition at its face value. The Government of Bangladesh made strides in its efforts to mainstream the ‘hijra’ identity⁵³. However, it was unsuccessful in representing the true identity as it designated hijra to be an innate disability⁵⁴. Yet, since this recognition brought with it welfare benefits that hijra desperately needed, many succumbed to identify as disabled. As recounted by Adnan Hossain, at a traffic light, when angered by refusal to pay alms, hijra claimed “You do not know how to behave with a disabled person. We are now recognised by the government.”⁵⁵

2.2 Sexuality and rituals

Over the past few decades, the beliefs surrounding the sacred power and ritual significance of hijra due to their lack of genitals have gradually faded away in Bangladesh. Presently, people perceive and envision hijra as individuals born with ambiguous genitalia, but they no longer attribute any exceptional powers to this bodily condition⁵⁶. Those with penises are called janana and those without are called chibry. Genital status of both does not influence perception of their identity as hijra⁵⁷. Here it is clear that post-independence, hijra (gender identity) and kothi (sexuality) from Bangladesh, have formed their own culture and practices distinct from India.

In Bangladesh, hijra define themselves based on their ability to engage in hijragiri, which encompasses various ritual practices. This includes performing the ‘badhai’ ritual, where they bless new-borns after holding them in their arms while dancing.

⁵³ Sabrina Toppa, ‘In Photos: Bangladesh’s Trans Pride Parade Was Massive and Fabulous’ (Vice, 23 November 2014) < <https://www.vice.com/en/article/wjy95q/in-photos-bangladeshs-trans-pride-parade-was-massive-and-fabulous> > accessed on 3 March 2023

⁵⁴ Adnan Hossain, ‘The paradox of recognition: hijra, third gender and sexual rights in Bangladesh’ (2017) 19 *Culture, Health & Sexuality* 12, p 1425

⁵⁵ *Ibid* 45, p 1428

⁵⁶ *Ibid*

⁵⁷ Adnan Hossain, ‘Beyond Emasculation: Being Muslim and Becoming Hijra’ (2012) 36 *South Asia, Asian Studies Review* 4, 497

They also participate in cholla, which involves collecting tolls within their designated ritual jurisdiction, known as ‘birit’ in the hijra community. Additionally, hijra must master the ‘ulti’ or secret language⁵⁸. It is through the mastery of these skills and the acquisition of expertise related to their occupation that one becomes a hijra. However, it is important to note that not just anyone can become a hijra. According to the accounts of Adnan Hossain’s hijra informants, only individuals assigned male at birth with a desire for relationships with masculine-identified men are eligible to receive training and become hijra under the guidance of senior hijra⁵⁹. This tells us that sexuality plays a role in their formation of gender identity as well. Furthermore, despite the fading out of beliefs in powers of impotency, their professions still include blessing new-borns. This could be attributed to low-income opportunities and/or the reliability of the marriage and reproduction institutions to carry on traditions. Traditions including excluding hijra from participating in the marriage institution, as same-sex marriage is still illegal in Bangladesh and India.

2.3 Livelihood

According to government records, the estimated number of hijras in Bangladesh is 10,000, but hijras themselves claim that the figure could be as high as 50,000⁶⁰. The majority of hijras do not have the privilege of holding mainstream jobs. Their means of livelihood primarily revolve around traditional hijra activities, such as singing, dancing, and bestowing blessings on new-borns in exchange for monetary contributions. Additionally, hijras have a customary practice of requesting food from marketplaces, known as ‘cholla/bazar tola’, and this act should not be equated with traditional begging⁶¹. Such traditions are not ancient but are old as they have been reduced to such measures since colonial times. Due to their semi-sacred presence,

⁵⁸ Ibid

⁵⁹ Ibid p 1420

⁶⁰ Md. Fosiul Ahsan and Zahid Al Amin, ‘Celebration of the third gender’ (The Daily Star, 1 September 2015) <https://www.thedailystar.net/op-ed/politics/celebration-the-third-gender-135667> accessed on 3 March 2023

⁶¹ Ibid

hijras often receive special considerations from the general public, albeit mixed with fear⁶².

2.4 Religion

Since Islam is the majority religion in Bangladesh and hijragiri is steeped in Hindu traditions, Muslim hijras practice a tough balancing act while practicing their Islamic faith. Numerous hijras strive to become recognized as devout and righteous Muslims. This necessitates navigating their own and societal expectations regarding what constitutes appropriate Islamic practices, while also addressing the perceived traits associated with hijra identity⁶³.

This balancing act is evident in hijra criticisms of other hijra who dressed in feminine attire during the ritual celebration of Shab-e-Barat⁶⁴. Paradoxically, the practical tolerance and accommodation of hijras have faced challenges in recent times due to the emergence of NGO-led sensitization and training programs among imams⁶⁵. Consequently, some imams who underwent such training began routinely condemning hijra as sinners during their weekly preaching in various mosques.⁶⁶ While these training programs aim to promote safe sex messages during sermons, they have also heightened awareness among imams about hijra sexual activities.

Additionally, the irrelevance of genital status in deciding the authenticity of hijra in Bangladesh can be owed in parts to their worship of Maya Ji and Tara Moni (different iteration of Bahuchara Mata). As both Maya Ji and Tara Moni were janana and used ligam potano ('vanishing the penis'), i.e., an art form for disguising one's penis to appear feminine⁶⁷. Similar to Indian hijra though, Bangladeshi hijra celebrate sinni,

⁶² Rezwana Snigdha, 'Beyond Binaries: An Ethnographic Study of Hijra in Dhaka Bangladesh' (2021) PhD Thesis Jahangirnagar University
https://www.researchgate.net/publication/353943920_Beyond_Binaries_An_Ethnographic_Study_of_Hijra_in_Dhaka_Bangladesh accessed on 4 March 2023

⁶³ Adnan Hossain, 'Beyond Emasculation: Being Muslim and Becoming Hijra' (2012) 36 South Asia, Asian Studies Review 4, 497, p 503

⁶⁴ Ibid

⁶⁵ Ibid p 504

⁶⁶ Ibid p 504

⁶⁷ Ibid p 506

a Sufi-identified religious practice in remembrance of the saint Khaja Moinuddin Chisti, an influential and popular Sufi saint⁶⁸.

As seen above, there is a ritualistic practice of combining Hindu and Islamic traditions during the practice of their faith. However, according to Adnan Hossain, this comingling is not regarded by them as a contradiction of their allegiance to any of the faiths⁶⁹.

3. Nepal

3.1 Sexualities and fluidity

There is a community of hijra in Nepal as well. Since this community was covered in depth in the States above, in this section differing sexualities in Nepal and their interesting fluidity will be elaborated upon.

In Nepal, certain identities are geographically rooted, while others are associated with class distinctions, and a significant number of identities are fluid in nature. One such group includes metis, singlarus, or kothis, who are effeminate homosexual men. Another group is made up of dohoris, who are gay or bisexual men but may not necessarily present themselves in a feminine manner. Tas, on the other hand, are the sexual partners of metis and dohoris. They see themselves as masculine and typically exhibit masculine behaviour⁷⁰. It is clear through the descriptions of these sexualities that gender expression plays a role in their identity formation as well; i.e., whether they are feminine or masculine. Nepal has a unique depiction of gender and sexuality that differs from Western norms. In Western contexts, gender and sexuality are typically viewed as separate but intertwined aspects of identity. Nepali sexual and gender identities however, encompass and convey multiple dimensions simultaneously, including biological sex, gender identity, sexual orientation, and preferred roles in intimate relationships⁷¹. For instance, meti, who is biologically

⁶⁸ Ibid p 509

⁶⁹ Ibid p 510

⁷⁰ Sonal Singh, Sunil Pant, Suben Dhakal, Subash et al., 'Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation' (2012) 12 BMC Int Health Hum Rights 7, 8

⁷¹ Kyle Knight, 'Outliers: Sunil Babu Pant, the Blue Diamond Society, and Queer Organizing in Nepal' (2014) 19 Studies in Nepali History and Society 1, 113-176

male and has feminine gender identity. They are also assumed to be attracted to masculine men and assume the role of the receptive partner during sexual encounters⁷². This description alludes to the role sexuality is given in gender expression in Nepal.

Moreover, this is a shining example of how the culture of *meti* has transformed since independence. The emphasis on sexuality should not be taken lightly as Nepal is the only State of the three that has legalised same-sex marriage since 2008⁷³. Sexuality and gender expression thus work in unique ways for the self-formation of *meti* identity. While a typical *meti* identity may encompass the criteria mentioned earlier, certain aspects hold greater importance than others. For instance, playing the receptive role during sexual intercourse is a significant component of *meti* identity, whereas gender expression exhibits considerable variation⁷⁴.

The identities in Nepal are far more fluid in their formation as it is observed often there is an overlap. As per a report by the Blue Diamond Society, there exists a range of Nepali gender and sexual identities, such as *meti*, *Ta*, *dohori*, *singar*, *maruni*, *strain*, *kothi*, *fulumulu*, *hijra*, *lesbian*, *gay*, *bisexual*, *transgender men*, *transgender women*, and numerous others. As mentioned before, it should be noted that these terms are not given equal weight, and many individuals may adopt more than one identity simultaneously⁷⁵. In a 2012 study, it was found that around one-third of self-identified *gay* men expressed some level of attraction towards women. Similarly, approximately one-quarter of individuals identifying as *Ta* reported attraction to *panthis*, despite the fact that these terms typically refer to masculine men who assume

⁷² Paul Boyce and Daniel Coyle, 'Development, Discourse and Law: Transgender and Same-Sex Sexualities in Nepal' (2013). Evidence Report 13, Brighton: Institute of Development Studies

⁷³ 'Nepal: Court Orders Recognition of Same-Sex Spouse' (*HRW*, 2 May 2023) <<https://www.hrw.org/news/2023/05/02/nepal-court-orders-recognition-same-sex-spouse>> accessed on 4 March 2023

⁷⁴ United Nations Development Programme (UNDP), 'Surveying Nepal's Sexual and Gender Minorities: An Inclusive Approach' (2015) Williams Institute <<https://www.undp.org/asia-pacific/publications/surveying-nepals-sexual-and-gender-minorities-inclusive-approach>> accessed on 4 March 2023, p 34

⁷⁵ Rezwana Snigdha, 'Beyond Binaries: An Ethnographic Study of Hijra in Dhaka Bangladesh' (2021) PhD Thesis Jahangirnagar University <https://www.researchgate.net/publication/353943920_Beyond_Binaries_An_Ethnographic_Study_of_Hijra_in_Dhaka_Bangladesh> accessed on 4 March 2023

the role of the penetrating partner in relationships with metis and kothis⁷⁶. This finding highlights the complexity and nuances within Nepali sexualities. It suggests that individuals may not strictly adhere to the predefined definitions and roles associated with these terms, indicating a more fluid and varied understanding of attraction and sexual preferences among the studied population.

⁷⁶ Sonal Singh, Sunil Pant, Suben Dhakal, Subash et al., 'Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation' (2012) 12 BMC Int Health Hum Rights, p xviii

Chapter IV Part A: Current national legal protections in Nepal, Bangladesh, and India

This chapter focuses on the available legal and policy decisions that regulate gender and sexual minorities in Nepal, Bangladesh, and India. The intent here is to examine the approaches taken by each State and its implementation.

1. Nepal

1.1 Recognition

In 2007, Nepal's Supreme Court decreed recognition of the right of self-determination for gender identity and sexual orientation. This judgement held three important guarantees. First, it forbade discrimination against sexuality and gender minorities⁷⁷. The judgement directed the government to 'create appropriate environment and make legal provisions accordingly'⁷⁸. As the State was bound to treat all 'Nepali citizens and natural persons' equally, as provided by 'national laws, the Constitution and international human rights instruments'⁷⁹. Secondly, the judgement recognised that gender identity is based on a 'self-feeling' and thus not subject to medical certification⁸⁰. Thirdly, the judgement created an 'other' gender marker for identification in official government documents⁸¹.

A considerable portion of the judgement is spent discussing international human rights laws.⁸² Specifically, the Yogyakarta Principles⁸³ and its retelling of discrimination faced by gender and sexuality minority groups around the world⁸⁴. The judgement also juxtaposed its own Constitution's Article 13 (right to equality)⁸⁵ with

⁷⁷ Sunil Babu Pant and Others v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007) 2 NJA Law Journal 2008, pp. 284

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid p 281

⁸¹ Ibid p 278

⁸² Ibid p 273, 285

⁸³ International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (10 November 2017) <<https://www.refworld.org/docid/5c5d4e2e4.html>> accessed on 16 March 2023

⁸⁴ Ibid p 275

⁸⁵ Part 3 of the Interim Constitution of Nepal, 2063 (2007 AD)

the international obligations of Article 26 of International Covenant on Civil and Political Rights (equal treatment before the law without discrimination)⁸⁶. This comparison was done to justify its reasoning, but it perhaps also indicates who the judgement was trying to convince – not the locals. Interestingly, the judgement refers to Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (‘modification of all types of prejudiced and customary social practices that make people inferior or superior on sexual ground’)⁸⁷. This is interesting because the Committee on the Elimination of Discrimination Against Women has itself shied away from using this argument to protect all gender and sexuality minority groups (discussed further in Chapter IV Part B). There is a reference to Articles 2 (positive obligations on the State), Article 16 (right to recognition), Article 17 (right to privacy), Article 23 (positive obligations on State to ensure equality in marriage) of the ICCPR, and Article 10 of the International Covenant on Economic, Social and Cultural Rights (free consent in marriage)⁸⁸. Although not in focus as an issue, there is an inclusion of ignored rights of non-conforming sexual orientation minority groups, through these Covenants. The judgement also spent a considerable portion analysing the trajectory of national courts around the world’s treatment of right to ‘gender’ identity recognition and treatment of non-heterosexual sexual orientations⁸⁹. A probable reason for Nepal’s judiciary playing a huge role in the application of the Yogyakarta Principles +10 at the national level might be Sunil Pant’s role in the development of the Principles⁹⁰.

The Supreme Court ruling in the case of *Rajani Shahi v. The National Women Commission and Others*⁹¹ indicated that laws defining marriage solely between a man and a woman are insufficient or silent on the matter of non-heterosexual relationships.

⁸⁶ UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series vol. 999 art 26

⁸⁷ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 December 1979) UN Treaty Series vol. 1249, p. 13; Ibid p 279

⁸⁸ UN General Assembly, International Covenant on Economic, Social and Cultural Rights (16 December 1966) United Nations Treaty Series vol. 993, p. 3

⁸⁹ Ibid p 272, p274

⁹⁰ Arvind Narrain, ‘The Yogyakarta Principles on Sexual Orientation and Gender Identity: Six Conceptual Advances enabled by the Principles’ (26 April 2017) Presentation at the APF-UNDP Conference on the Yogyakarta Principles: What have we learnt and where to now? < http://arc-international.net/research-and-publications/new-arc-reports/the-yogyakarta-principles-on-sexual-orientation-and-gender-identity-six-conceptual-advances-enabled-by-the-principles/#_ftn1 > accessed 9 May 2023

⁹¹ *Rajani Shahi v. The National Women Commission and Others* (2013) Writ No. 069-WH-0030

The court suggested that such laws should be replaced with ones that recognize and allow for relationships between individuals who are not heterosexual. The Court guaranteed the right of a lesbian couple to freely express themselves and emphasised that any form of limitation on personal freedoms is akin to detention⁹². Additionally, the Court expressed disagreement with the interference of the State or society in matters related to sexual preferences⁹³. Furthermore, the Court drew attention to the absence of specific laws and policies addressing homosexual relationships in Nepal. It stressed the importance of enacting national legislation that provides legal protections for individuals of all sexual orientations⁹⁴.

In the case of *Suman Panta v. Ministry of Home Affairs*⁹⁵, the Court acknowledged the rights of individuals who identify as lesbian, gay, bisexual, and transgender (LGBTQ+). The Court declared that the refusal to recognize same-sex spouses goes against Nepal's Constitution and its international commitments to uphold human rights⁹⁶. It should be noted, implementation of the legal protections promised by these judgements (discussed further in Chapter VI), the Supreme Court directive as well as associated Committee's recommendations from 2007 judgement⁹⁷, have yet to manifest as of May 2, 2023⁹⁸.

This tendency to buttress the court's reasoning by mentioning Nepal's commitment to its international human rights law obligations, is observed in the case of *Adheep Pokharel v. Ministry of Home Affairs*⁹⁹. This judgement was about the legislative definition of marriage. As an extension of the guarantee of right to family life, this judgement served as a reminder to the government to make family laws gender

⁹² Ibid; Since most Nepali judgements are unavailable in English See: Kyle Knight 'LGBT Global Development Partnership BRIDGES TO JUSTICE: CASE STUDY OF LGBTI RIGHTS IN NEPAL' (2015) Astraea Lesbian Foundation for Justice p 41

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ (2017) NLR 2017, Issue 9

⁹⁶ Ibid para 6

⁹⁷ *Sunil Babu Pant and Others v. Nepal Government and Others*, Supreme Court of Nepal (21 December 2007) 2 NJA Law Journal 2008, para 8.4

<https://www.hrw.org/sites/default/files/media_2023/05/Same%20sex%20marriage%20recommendations%20-%20English.pdf> accessed on 22 May 2023

⁹⁸ Jesselina Rana, 'LGBTI Rights | Nepal's Supreme Court upholds Yogyakarta Principles advancing SOGIESC issues' (*International Service for Human Rights*, 17 May 2023) <<https://ishr.ch/latest-updates/lgbti-rights-nepals-supreme-court-upholds-yogyakarta-principles-advancing-sogiesc-issues/>> accessed 22 May 2023

⁹⁹ *Adheep Pokharel v. Ministry of Home Affairs* (2022) 079-WO-0198

neutral¹⁰⁰. It was recognized that the notion of international human rights law has evolved based on the inherent dignity and respect for every individual, emphasizing that no person should be denied any right based on their identity¹⁰¹. The Court noted that several countries have started recognizing various forms of same-sex relationships, such as registered partnership, civil partnership, civil union, same-sex marriage, domestic partnership, and non-binary marital relationships. Examples of these countries include the Netherlands, United Kingdom, United States of America, and Australia, among others. These countries have either amended their laws to protect the rights of the LGBTQ+ community or repealed discriminatory laws. The Court in Nepal also referred to two significant decisions by the Supreme Court of India¹⁰², which have contributed to the goal of inclusivity for queer individuals. Currently, Article 18 and Article 42 of the Nepali Constitution further protect the rights of sexuality and gender minority groups¹⁰³.

When it comes to how relevant laws regulate change of legal identities there are not many that make provisions. Two of them are mentioned here for clarity on why no clarity is provided by the State. The Correction of Age, Name, and Surname Rules of 2017 gives absolute power to the Chief District Officer and allows amendment request for only a year after issuance of national identity card. Since in Nepal most get their national identity card at the age of sixteen, it is difficult to determine how amendments related to gender markers can be made later¹⁰⁴. Article 18 makes room for special provisions by law for empowerment of ‘gender and sexual minorities’¹⁰⁵. Article 42 meanwhile includes such minorities within its guarantee for right to social justice¹⁰⁶.

¹⁰⁰ Ibid para 15 and para 36

¹⁰¹ Ibid para 40

¹⁰² Ibid para 44; National Legal Services Authority v. Union of India (2014) 5 SCC 438; Navtej Singh Johar v. Union of India (2018) 10 SCC 1

¹⁰³ Part 3 of the Interim Constitution of Nepal, 2063 (2007 AD) art 18; art 42

¹⁰⁴ Queer Youth Group And Queer Rights Collective, ‘The reality of transgender rights in Nepal’ (*Record Nepal*, 25 September 2020) <<https://www.recordnepal.com/the-reality-of-transgender-rights-in-nepal>> accessed on 8 April 2023

¹⁰⁵ Part 3 of the Interim Constitution of Nepal, 2063 (2007 AD) art 18

¹⁰⁶ Part 3 of the Interim Constitution of Nepal, 2063 (2007 AD) art 42

Since gender variant minorities like meti form a sizable portion of the sex work industry in Nepal¹⁰⁷, there is a need for targeted legal protection for them against sexual violence. The Muluki Criminal Code 2074 serves as the guiding legal framework for rape-related offences in Nepal. According to Chapter 14(7) ‘prostitutes’ as victims are referred to only as ‘her’, thus excluding male prostitutes from its protection. On a positive note, the 2007 judgement resolved the legal uncertainty surrounding use of Section 226(1) of Muluki Criminal Code 2074 to arrest men having sex with men or masculine gender identities¹⁰⁸. This was done by recognizing sexual and gender minorities as natural persons¹⁰⁹. This effectively eliminated the possibility of using the previous clause prohibiting ‘unnatural sex’ against sexual and gender minorities.

2. Bangladesh:

2.1 Recognition

In 2013, through a policy decision, the State recognised hijra as the third official gender¹¹⁰. This was seen as a major achievement by the international community¹¹¹. However, the definition of hijra, the varying identities covered under it and the authority tasked with the decision-making power remains unclear¹¹². The taboo surrounding the hijra community is still present within the government’s reasoning for this policy decision as the hijra identity is associated with disability or the

¹⁰⁷ United Nations Development Programme (UNDP), ‘Surveying Nepal’s Sexual and Gender Minorities: An Inclusive Approach’ (2015) Williams Institute < <https://www.undp.org/asia-pacific/publications/surveying-nepals-sexual-and-gender-minorities-inclusive-approach>> accessed on 4 March 2023 p 61

¹⁰⁸ Katie Nguyen, “‘Bad’ laws hurt sex workers, gays from Uganda to Nepal, AIDS meeting told’ (Reuters, 21 July 2014) < <https://www.reuters.com/article/health-aids-criminalisation-idUSL6N0PW2MA20140721>> accessed on 20 May 2023

¹⁰⁹ Sunil Babu Pant and Others v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007) 2 NJA Law Journal 2008, pp. 284

¹¹⁰ Press Release Bandhu Bangladesh Organisation, ‘Bangladesh has officially recognised hijras, or transgenders as a separate gender or the third sex.’ (2013) <https://www.bandhu-bd.org/bangladesh-has-officially-recognised-hijras-or-transgenders-as-a-separate-gender-or-the-third-sex/> accessed 29 March 2023

¹¹¹ Pantha Rahman Raza, ‘Bangladesh’s Hijras Win Official Recognition as Separate Gender’ (*Global Voices*, 13 November 2013) < <https://globalvoices.org/2013/11/13/bangladeshs-hijras-win-official-recognition-as-separate-gender/>> accessed 29 March 2023

¹¹² Adnan Hossain, ‘The paradox of recognition: hijra, third gender and sexual rights in Bangladesh’ (2017) 19 *An International Journal for Research, Intervention and Care*, p 1423

derogatory colonial term eunuch¹¹³. Along with the recognition, the National Election Commission has included ‘third gender’ as an option for voters in 2018¹¹⁴.

One of the biggest examples of poor implementation of right to legal recognition in Bangladesh is the gender test conducted by the government’s social welfare department. In an effort to provide employment and portray inclusivity, the department planned to hire fourteen hijra in low-level positions. However, only two of the fourteen qualified for the job because of gender tests they were put through. The tests revealed that the twelve had penises and thus according to authorities were not hijra¹¹⁵.

2.2 Welfare benefits

However, there are still attempts worthy of note announced by the State for the protection of this marginalised community. The Minister of Social Welfare stated in a 2019 interview that ‘conditional tax benefit for firms who provide work for the “third gender”. Employers must hire at least 10% of their overall staff or 100 transgender workers in order to qualify for a special tax rebate provision’¹¹⁶. This is an important step, however, as is the problem in Nepal and India, the word of the government rarely becomes reality. According to chairperson of Women with Disabilities Development Foundation, similar efforts were previously announced and never implemented. She said, “In addition, this year’s budget hasn’t brought any change in allowances for persons with disabilities. Can you imagine how will they survive with Tk 750 per month, and even for that, they need to wait for three to six months...In fact, many need to bribe employees of social welfare department to receive the allowance”¹¹⁷.

¹¹³ FP Staff, ‘Transgenders officially a ‘third gender’ in Bangladesh’ (*First Post*, 14 November 2013) <<https://www.firstpost.com/world/transgenders-officially-a-third-gender-in-bangladesh-1229221.html>> accessed 29 March

¹¹⁴ Shakil Bin Mushtaq, ‘Bangladesh Adds Third Gender Option to Voter Forms’ (*The Diplomat*, 19 January 2018) <<https://thediplomat.com/2018/01/bangladesh-adds-third-gender-option-to-voter-forms/>> accessed on 10 May 2023

¹¹⁵ Independent Online Desk, ‘Bangladesh hijras voice anger at gender test failures’ (*The Independent Bangladesh*, 2 July 2015) <<https://theindependentbd.com/post/6130>> accessed on 9 April 2023

¹¹⁶ Arup Barua and Shehreen Khan, ‘Addressing violence against transgender people in Bangladesh: A call for policy intervention’ (2022) 7 *Frontier Sociology* p 3

¹¹⁷ Nilima Jahan, ‘Tax rebate proposed for employing transgender people’ (*The Daily Star*, 4 June 2021) <<https://www.thedailystar.net/city/news/tax-rebate-proposed-employing-transgender-people-2104601>> accessed 9 March 2023

Corruption and lack of cohesion at the lower levels of the government is an unfortunate part of the legal structure of all three States.

2.3 Political representation

One significant outcome of being granted third gender status is the opportunity to be officially recognized by the government as a member of a scheduled caste¹¹⁸. Scheduled caste implies being from a socially and economically backward group, since hijra is not a caste. This official recognition enables hijra individuals to access specific privileges from the state, akin to affirmative action; such as reserved seats on panchayats and eligibility for ration cards. In the absence of the ability to register as a third gender individual, hijra individuals are unable to avail themselves of these social privileges. It is important to note that hijra individuals typically do not identify as women. The inability to effectively register as a third gender, despite the legal changes, highlights the shortcomings of this policy. Since 2019, eight hijra ran for national parliament under the fifty reserved seats for women¹¹⁹. Nadira Begum, university educated transgender woman, was nominated in a local election.¹²⁰ An admirable improvement, as any political representation is appreciated, when none is available. Although, allowing hijra to only contest through reserved seats for women raises several questions on the understanding of the marginalisation faced by this community and whether women in Bangladesh agree with this compromise.

According to a study conducted in 2019, where 346 hijra participants were interviewed in urban cities of Bangladesh, human rights violations (like, lack of access to medical help) was linked to lack of identification documents¹²¹. However, since the right to legal recognition of hijra identity was secured by the State well before 2019, the study illustrates how violations of human rights against hijra stem, in reality, from discrimination. It was clear from the study that economic class background heavily influenced the rate of reports of violation as well as rate of

¹¹⁸ Abdul Aziz and Sameena Azhar, 'Social Exclusion and Official Recognition of Hijra in Bangladesh' (2019) 9 *Journal of Research on Women and Gender* p 9

¹¹⁹ Arup Barua and Shehreen Khan, 'Addressing violence against transgender people in Bangladesh: A call for policy intervention' (2022) 7 *Frontier Sociology* p 3

¹²⁰ *Ibid*

¹²¹ Amanullah S. M. Amanullah, Tanvir Abir et al, 'Human rights violations and associated factors of the Hijras in Bangladesh—A cross-sectional study' (2022) 17(7) *PLoS ONE*

economic violations. For instance, higher wages allowed better opportunities to have legal claims against employment discrimination¹²². Since, lower wages force hijra into the unregulated informal sector where they are left without legal recourse.

3. India:

3.1 Healthcare

The current law that is relevant to gender variant identities is the Transgender Persons (Protection of Rights) Act, 2019 ('the Act'). Despite demands for specific provisions on right to medical care there is no provision for the same. However, High Courts from several states (Madras and Delhi High Court) have urged the government to create infrastructure for this measure, specifically infrastructure for gender neutral toilets¹²³. Instead, Section 11 of the Act demands sex reassignment surgery for fulfilment of the right to recognition. To support the process of such surgeries, in 2022 the Aushman Bharat TG Plus scheme was launched. The implementation of the Ayushman Bharat TG Plus scheme marked the introduction of a healthcare initiative specifically designed for transgender individuals. Under this program, transgender ID holders are entitled to insurance coverage of 500,000 rupees (\$6,000) per year, catering to various aspects of transition-related healthcare (sex reassignment surgery and hormonal therapy). However, due to a limited availability of medical specialists with expertise in transgender healthcare, certain surgeons take advantage of the situation by performing experimental surgical procedures on transgender individuals who may not be fully informed about the associated risks¹²⁴.

Section 376 of the Indian Penal Code, 1860 punishes rape of women with at least 10 years in prison extendable to a life sentence and in rare instances, with a death sentence¹²⁵. The death sentence in India is a debated subject where rape is often cited

¹²² Ibid, Table 1

¹²³ Shagun Suryan, 'International Transgender Day of Visibility: 9 years on, have we met the benchmark of the Supreme Court's NALSA judgment?' (Bar and Bench, 31 March 2023) <<https://www.barandbench.com/news/litigation/international-transgender-day-visibility-nine-years-on-benchmark-nalsa-judgment>> accessed 20 April 2023

¹²⁴ ET Government, 'Ayushman Bharat TG Plus card to be issued to transgender persons for healthcare facilities' (*ET Government*, 25 August 2022) <<https://government.economictimes.indiatimes.com/news/governance/ayushman-bharat-tg-plus-card-to-be-issued-to-transgender-persons-for-healthcare-facilities/93771100?redirect=1>> accessed 10 March 2023

¹²⁵ Sec 376(1)

by supporters of the punishment¹²⁶. This law does not protect any gender other than women. The Act has a penalty for rape and sexual assault against transgender people as fine and imprisonment from six months up to two years¹²⁷. Ethics and barbarity of the death sentence aside, the drastic difference in the severity of punishment is important to note. It indicates the level of effort the State is willing to commit to, to protect transgender people. This conclusion is further supported by a 2016 study of 60,000 transgender participants across 17 states, that found the highest perpetrators of violence were agents of the State – law-enforcement officials¹²⁸.

3.2 Recognition

During the same-sex marriage equality arguments, the Chief Justice of India questioned the need for recognition. He stated recognition could mean recognition of marriage or even association and questioned if live-in relationships are guaranteed similar rights akin to a marriage in India; ‘why is there a need for recognising same-sex couples specifically?’¹²⁹ The intent of this question was to say that granting of status means nothing if it does not bring down previous barriers to justice with it.

Aside from the Act, the judgement most relevant and appreciated is the NALSA judgement¹³⁰. In NALSA, the Supreme Court of India drew on various international human rights standards in upholding the right of individuals to their self-determined gender identity. The Court cited the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and Yogyakarta Principles, and examined foreign precedents and legislations that dealt

¹²⁶ Geeta Pandey, ‘Supreme Court: India shocked as men sentenced to death for rape freed’ (*BBC*, 8 November 2022) <<https://www.bbc.com/news/world-asia-india-63554474>> accessed on 10 April 2023

¹²⁷ Section 18(d)

¹²⁸ Shreya Ila Anasuya, ‘The Gender Beat: Most Harassment of Transgender People is by Police; Kolkata Student Assaulted by Moral Police’ (*The Wire*, 19 April 2016) <<https://thewire.in/gender/the-gender-beat-most-harassment-of-transgender-people-is-by-police-kolkata-student-assaulted-by-moral-police>> accessed on 10 April 2023

¹²⁹ LiveLaw News Network, ‘Can Same-Sex Couples Be Granted Certain Rights Without Legal Recognition As Marriage? Supreme Court Asks Centre’ (*LiveLaw*, 27 April 2023) <<https://www.livelaw.in/top-stories/supreme-court-same-sex-marriage-equality-lgbtq-social-benefits-insurance-bank-account-227354#:~:text=%22When%20we%20say%20recognition%2C%20it,benefits%22%2C%20Justice%20Bhat%20stated.>>> accessed on 19 May 2023

¹³⁰ National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863

with transgender persons' rights¹³¹. It secured the recognition of varying gender identities and regarded their marginalisation with consideration and thought. As a Supreme Court judgement, it binds future laws to its standards and reasonings. The Act has been accused of not living up to the standards of NALSA. However, only unconstitutionality can strike down a law. Article 21 of the Constitution¹³² guarantees the right of self-determination of gender, according to NALSA interpretation¹³³. Section 11 of the Act contradicts this right by requiring surgery for self-determination. The insistence of sex reassignment surgery was categorically declared illegal and immoral by the NALSA judgement¹³⁴ as self-determination is linked to one's dignity not one's organs.

Worthy of note: even the NALSA judgement is not without faults as it repeatedly used the derogatory term 'eunuch' in its judgement without caution¹³⁵.

The options for identification also remain limited to transgender. Expanding the gender binary by one. Such identities were considered underrepresented in law until the 2014 NALSA judgement. According to the Transgender Persons Bill 2019¹³⁶, 'transgender person' is the designated legal term that is to include all such identities under law. It includes 'a person whose gender does not match with the gender assigned to that person at birth' notwithstanding the person undergoing 'sex reassignment surgery', intersex, genderqueer and people with socio-cultural identities such as kinner, hijra, aravani, and jogta. Despite this legal recognition, this definition is restrictive in its choice of words, as will be further discussed in Chapter V. This section intends to highlight how singular and consistent identification requirement for accessing human rights under law is inefficient.

¹³¹ Ibid pg 18, 22; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 December 1979) UN Treaty Series vol. 1249; International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (10 November 2017)

<<https://www.refworld.org/docid/5c5d4e2e4.html>> accessed on 16 March 2023; UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series vol. 999; UN General Assembly, Universal Declaration of Human Rights (10 December 1948) 217 A (III)

¹³² The Constitution of India 1949

¹³³ National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863, para 67

¹³⁴ Ibid, para 129

¹³⁵ National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863, para 34

¹³⁶ Section 2(k)

To ensure cohesiveness, various applications, and forms, including those related to the Life Insurance Corporation of India and the Indian Railways, as well as essential identification documents such as Passport, PAN, and Voter ID, have been modified. These changes align with the Supreme Court's ruling and now incorporate the option of selecting a 'third gender'. According to the government, the Act is well within the confines of the Constitution as well as in line with progressive sentiments surrounding gender¹³⁷. However, the government continues this narrative under the assumption that all identities are born into clear boxes and stay within them. This assumption is inconsiderate of the fluid nature of gender and sexuality in India.

3.3 Socially and educationally backward group

The NALSA judgement directed the Centre and state governments to treat hijra and other marginalised gender groups as socially and educationally backward classes of citizens¹³⁸. This was intended, similar to Bangladesh, to secure reservations for the group. Many High Courts in India (Karnataka government already providing one percent horizontal reservation for transgender people in service¹³⁹) strongly advocated for transgender reservations¹⁴⁰ especially in education. There was an attempt to include transgender women within the thirty percent reservation quota meant for women applying to public universities, but it was held by Madras High Court¹⁴¹ to be violative of right to equality under the Constitution as well as the NALSA judgement¹⁴². Although it should be noted that adding a gender identity group within

¹³⁷ Rintu Mariam Biju, 'Transgender Act permits self-perceived gender identity, safeguards against discrimination: Central govt defends Act before Karnataka High Court' (*Bar and Bench*, 9 August 2021) <<https://www.barandbench.com/news/litigation/transgender-act-2019-union-govt-defends-act-before-karnataka-high-court>> accessed on 30 April 2023

¹³⁸ National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863, Para 129(3)

¹³⁹ Special Correspondent, 'Govt. notifies 1% reservation for transgender persons in jobs' (*The Hindu*, 7 July 2021) <<https://www.thehindu.com/news/national/karnataka/govt-notifies-1-reservation-for-transgender-persons-in-jobs/article35181785.ece>> accessed 30 April 2023

¹⁴⁰ Shagun Suryan, 'International Transgender Day of Visibility: 9 years on, have we met the benchmark of the Supreme Court's NALSA judgment?' (*Bar and Bench*, 31 March 2023) <<https://www.barandbench.com/news/litigation/international-transgender-day-visibility-nine-years-on-benchmark-nalsa-judgment>> accessed 20 April 2023

¹⁴¹ LiveLaw News Network, 'Transgender Persons Self-Identifying As Females Can't Be Clubbed Under Women Quota, Should Be Given Special Reservation: Madras High Court' (*LiveLaw*, 2 March 2022) <<https://www.livelaw.in/news-updates/transgender-persons-self-identifying-as-females-cant-be-clubbed-under-women-quota-should-be-given-special-reservation-madras-high-court-193209>> accessed on 20 May 2023

¹⁴² The Constitution of India 1949 art 14 and 16(1)

the same category of reservations as lower-caste group ignores the privilege of upper-caste members of the gender identity group.

The Act is another legal instrument that focus most of its attention on defining transgender and barely three provisions on how to protect transgender persons in India. Is identifying a transgender person a priority to know if the discrimination they faced is because of their identity? Will the victim of discriminatory employment practices need to show a certificate to have cause for action? This is not a new line of argument in India as caste certificates are often under scrutiny to start assessment of a discrimination suit¹⁴³. In a 2015 case, it was argued that Rohith could not be considered a victim of caste discrimination since he allegedly did not belong to the Dalit (lower caste) community. In his final letter, Rohith extensively described his encounters with discrimination both in his family, school, and later at the university. Out of respect for Rohith's account as a deceased individual, his narrative was not challenged, but rather the interpretation of the experience was debated. Although the experience was acknowledged as distressing, there were objections to categorizing it as caste discrimination due to the illegitimate acquisition of Rohith's caste certificate. With a father from a backward caste and a non-Dalit maternal grandmother, Rohith's caste certificate was deemed either improperly granted or obtained. As he lacked a valid caste certificate, the late scholar was unable to make allegations of caste discrimination. The perception of him as Dalit was not of importance. A caste certificate, much like a transgender certificate can similarly be demanded when it comes to reservation quotas. It should not be the reason for prima facie dismissal of a discrimination lawsuit.

3.4 Homosexuality

In 2018, a five-judge bench unanimously struck down the colonial provision Section 377 (the same law exists in Bangladesh) which prohibited 'unnatural offences' like sex between people of the same sex¹⁴⁴. This was rightfully hailed as a brilliant step forward in securing the rights of homosexual people in India. The judgement did not

¹⁴³ The Wire Staff, 'My Birth is My Fatal Accident: Rohith Vemula's Searing Letter is an Indictment of Social Prejudices' (*The Wire*, 12 January 2017) < <https://thewire.in/caste/rohith-vemula-letter-a-powerful-indictment-of-social-prejudices>> accessed on 4 April 2023

¹⁴⁴ Navtej Singh Johar v UOI; Akkai Padmashali v UOI (2018) WP (C) 572/2016

consider sexuality as fluid but stuck to the importance of right to equality and freedom of expression under the Constitution for its reasoning¹⁴⁵. The judgement was important in its discussions on gender expression and sexual orientation as something different and as identities systematically discriminated against. The queer community within and outside India celebrated the judgement as a sign of support from the Hindu majority government, especially activists aligned with the government's Hindu Right ideals¹⁴⁶. This portrayal of tolerance ignored the violence of the caste system in and outside the queer community. This portrayal is an indication of the government's stance on queer rights – a tool for painting a happy picture of progression to the international community. This tool was used particularly by Hindus to support global Islamophobic ideologies. This is seen in constant arguments by the Centre Government against same-sex marriage equality to the Supreme Court. The arguments raised often try to dismiss homosexuality as an urban and Western concept, despite eras of history in India proving otherwise¹⁴⁷. It was also observed in 2017 when India rejected UN resolution on abolishing death penalty for queer people¹⁴⁸. The change of stance is not reflective of change in morality but change in international affairs tactics.

¹⁴⁵ The Constitution of India 1949 art 14 and Article 19(1)(a)

¹⁴⁶ Oishik Sircar and Dipika Jain, 'Neoliberal Modernity and the Ambiguity of its Discontents: Post/Anti-colonial Disruptions of Queer Imperialism.' (2013) 4(2) *Jindal Global Law Review* 1, 22

¹⁴⁷ Padmakshi Sharma, 'Marriage Equality Petitions | Indian Culture Extraordinarily Inclusive, British Victorian Morality Code Was Imposed On Us: CJI DY Chandrachud' (*LiveLaw*, 27 April 2023) <<https://www.livelaw.in/top-stories/marriage-equality-petitions-indian-culture-extraordinarily-inclusive-british-victorian-morality-code-was-imposed-on-us-cji-dy-chandrachud-227381?infinitemscroll=1>> accessed on 22 May 2023

¹⁴⁸ TNM Staff, 'India votes against UN ban on death penalty for same-sex relations' (*TheNewsMinute*, 4 October 2017) <<https://www.thenewsminute.com/article/india-votes-against-un-ban-death-penalty-same-sex-relations-69415>> accessed on 20 April 2023

Chapter IV Part B: International Law

This section is meant to elaborate on international law jurisprudence surrounding rights of queer people that is applicable in Nepal, Bangladesh and India. Furthermore, this section is intended to analyse the various avenues available to queer people for seeking justice. Although this section will attempt to cover all grounds of avenues available for seeking justice, the focus will remain on analysing the efficiency of the right to recognition of gender identities and sexualities from the three States.

This section is divided into two parts. The second of which is further divided in to three parts. The first part mentions all the different applicable international human rights law instruments. The second part elaborates on the various methods of using these instruments available to people in the three States. This second part is meant to explain how these legal instruments can be developed for use in the future; i.e., interpretations suggested are not necessarily how these instruments are interpreted currently. The second part is divided in to general possibilities, possibilities within (CEDAW) Convention for Elimination of Discrimination Against Women)¹⁴⁹ and possibilities from the Yogyakarta Principles + 10¹⁵⁰.

International law is not irrelevant to the legal jurisprudence of South Asia. Especially with reference to queer rights, international human rights law obligations are heavily relied upon by the judiciary of Nepal¹⁵¹ and India¹⁵². Bangladesh, India and Nepal have ratified CEDAW, International Covenant on Civil and Political Rights (ICCPR)¹⁵³, International

¹⁴⁹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 December 1979) UN Treaty Series vol. 1249, p. 13

¹⁵⁰ International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (10 November 2017) <<https://www.refworld.org/docid/5c5d4e2e4.html>> accessed on 16 March 2023

¹⁵¹ Sunil Babu Pant v. Nepal (2007 AD) 917/2064BS p 262

¹⁵² National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863p 60

¹⁵³ UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series vol. 999

Covenant on Economic, Social Cultural and Rights (ICESCR)¹⁵⁴ and Convention against Torture (CAT)¹⁵⁵.

1. Avenues under international human rights law available

1.1 Protection from hate motivated violence: States are obligated to protect their people from hate motivated violence by non-state actors as well as state actors. The life, liberty and security of queer people in these States is under constant threat¹⁵⁶. Therefore, Article 3 of the Universal Declaration of Human Rights (UDHR)¹⁵⁷ and Articles 6 and 9 of ICCPR guarantee the right to life, liberty and security. States are obligated to protect these rights.

1.2 Prevent torture and cruel, inhuman and degrading treatment: States are obligated to protect queer people from torture and other cruel, inhuman or degrading treatment. This obligation includes the positive obligation to investigate and adjudicate allegations of torture and other cruel, inhuman or degrading treatment. Additionally, prohibition of such ill treatment is not sufficient, there is a need to provide means of redressal for victims of such treatment¹⁵⁸. These rights are guaranteed under Article 7, 9(4) of ICCPR, Article 2 of CAT and Article 5 of UDHR.

According to the Special Rapporteur on torture, there is documented ill treatment of queer people observed by the hands of state agents like police, prison guards and other

¹⁵⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights (16 December 1966) United Nations Treaty Series vol. 993, p. 3

¹⁵⁵ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) United Nations Treaty Series vol. 1465, p. 85,
See Ratification status by country available at

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN
accessed on 16 March 2023

¹⁵⁶ UN OHCHR, 'BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law' (2012) UN Doc HR/PUB/12/06

<https://www.ohchr.org/sites/default/files/Documents/Publications/BornFreeAndEqualLowRes.pdf>
accessed on 13 March 2023, p 12

¹⁵⁷ UN General Assembly, Universal Declaration of Human Rights (10 December 1948) 217 A (III)

¹⁵⁸ UN OHCHR, 'BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law' (2012) UN Doc HR/PUB/12/06

<https://www.ohchr.org/sites/default/files/Documents/Publications/BornFreeAndEqualLowRes.pdf>
accessed on 13 March 2023, p 20

executive agents¹⁵⁹. According to The Special Rapporteur on violence against women, in Nepal for instance, there is reported patterns of allegations against police officers beating metis and demanding money and sex¹⁶⁰. Queer people are in these circumstances disproportionately subject to such forms of ill treatment as they threaten social norms surrounding gender binary identities and sexualities¹⁶¹. This threat is attacked to dehumanise and humiliate queer people during the process of ill treatment¹⁶². Similarly, sexual abuse is also used as a tool for subjugation and ill treatment of queer people, by police or while in custody.¹⁶³

1.3 Prevent discrimination based on sexual orientation and gender identity: Here the obligation includes prevention from discrimination based on listed grounds as well as equal protection of the law. Article 2(1), Article 26 of ICCPR, Article 2 of UDHR and Article 2(2) of ICESCR list prohibited grounds for discrimination. The grounds include ‘other status’. Although the treaties do not list sexual orientation or gender identity as a prohibited ground, United Nations’ jurisprudence on discrimination does¹⁶⁴. Additionally, this interpretation was confirmed in the *Young v. Australia* 2003 case and *X v. Colombia* 2007 case as they held violation of the right to be free from discrimination based on sexual orientation¹⁶⁵.

1.4 Right to work, health and education: The Committee on Economic, Social and Cultural Rights has affirmed the non-discrimination guarantee of its Covenant to

¹⁵⁹ Committee against Torture ‘General Comment 2’ (2007) UN Doc CAT/C/GC/2, para. 21; Concluding observations of the Human Rights Committee on the United States of America (2006) UN Doc CCPR/C/USA/CO/3, para 25

¹⁶⁰ UNHCR ‘Report of the Special Rapporteur on violence against women’ (2006) UN Doc E/CN.4/2006/61/Add.1, paras. 1 and 2; UN Doc A/HRC/4/34/Add.1, paras. 448-454.

¹⁶¹ UNHCR ‘Report of the Special Rapporteur on violence against women’ (2011) UN Doc A/HRC/17/26/Add.2, paras 28-29

¹⁶² UNHCR ‘Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2001) UN Doc A/56/156, para. 19

¹⁶³ UNHCR ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2016) UN Doc A/HRC/31/57, p 14

¹⁶⁴ UN Committee on Economic, Social and Cultural Rights ‘General Comment 20’ in ‘Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) UN Doc E/C.12/GC/20, para. 32

¹⁶⁵ *Young v. Australia* (2003) HRC 941/2000 UN Doc CCPR/C/78/D/941/2000, at para. 10.4; *X v. Colombia* (2006) HRC 1361/2005 UN Doc CCPR/C/89/D/1361/2005, para. 9

include sexual orientation¹⁶⁶ and gender identity¹⁶⁷. This is an important step towards guaranteeing of rights queer people are deprived of in the three States. Namely, right to work, health and education¹⁶⁸. Employment, education and healthcare are essential parts of the State system that excludes and demeans identities of queer people.

2. Avenues available under international human rights law:

Under the human rights treaties mentioned above, there are four avenues for addressing concerns related to ‘sexual orientation, gender identity, expression and sex characteristics’ (SOGIESC); i.e., through Concluding Observations on State reports, through General Comments published by the treaty bodies, individual communications of violations by State and through the inquiry procedure¹⁶⁹. The second and third part of this section will further expand on potential for redressal under CEDAW and then through the Yogyakarta Principles + 10.

2.1.1 Concluding Observations are official feedback and recommendations issued by human rights treaty bodies to states regarding their compliance with specific human rights treaties. They (comprised usually of independent experts¹⁷⁰) provide guidance on areas of improvement and specific actions that states should take to fulfil their human rights obligations¹⁷¹. These observations are based on the examination of state reports and are governed by the respective treaty body’s rules of procedure, such as the ICCPR and CEDAW. For instance, the Concluding

¹⁶⁶ Committee on Economic, Social and Cultural Rights, ‘General Comments 20’ in ‘Non-discrimination in economic, social and cultural rights’ (2 July 2009) E/C.12/GC/20, para. 32; Committee on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, ‘General Comment 19’ in ‘Right to social security’ (23 November 2007) E/C.12/GC/19, para. 29; Committee on Economic, Social and Cultural Rights, ‘General Comment 18’ in ‘Right to work’ (6 February 2006) E/C.12/GC/18, para. 12(b); Committee on Economic, Social and Cultural Rights, ‘General Comment 15’ in ‘Right to water’ (20 January 2003) E/C.12/2002/11, para. 13;); Committee on Economic, Social and Cultural Rights, ‘General Comment 14’ in ‘Right to the highest attainable standard of health’ (11 August 2000) E/C.12/2000/4, para. 18.

¹⁶⁷ Committee on Economic, Social and Cultural Rights ‘General Comment 20’ in ‘Non-discrimination in Economic, Social and Cultural Rights’ (2 July 2009) E/C.12/GC/20, para. 32

¹⁶⁸ UN OHCHR, ‘BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law’ (2012) UN Doc HR/PUB/12/06 <https://www.ohchr.org/sites/default/files/Documents/Publications/BornFreeAndEqualLowRes.pdf> accessed on 13 March 2023, p 36

¹⁶⁹ Gabrielle Simm, ‘Queering CEDAW? Sexual orientation, gender identity, expression and sex characteristics (SOGIESC) in international human rights law’ (2021) 29 Griffith Law Review 3, 374-400

¹⁷⁰ ICCPR art 28; CEDAW art 17; UNCAT art 17

¹⁷¹ ICCPR art. 40; CEDAW art 18.

Observations Human Rights Committee for Honduras included statements on patterns of detention based on sexual orientation of detainee¹⁷². In the statement, violations of Article 9 of ICCPR (concerning right to liberty and security of person) was mentioned as cause of concern. Moreover, suggestions were made to amend laws to include more legal protections against arbitrary detention¹⁷³. Such official responses to patterns of violations of human rights law obligations are important to shed light on the suffering of marginalised communities ignored by the State. In of light these observations, to suggest mere legal recognition of such communities is enough to fulfil these obligations, is a difficult argument to make. These Observations are however not binding on States.

2.1.2 General Comments (ICCPR or CAT) or General Recommendations (CEDAW) help in expanding the possible ways of interpreting current binding human rights law¹⁷⁴. These Comments are context driven yet more wide in margin than Concluding Observations as they relate to laws instead of reports. These Comments are also not binding but carry persuasive value for interpretation of treaties. Civil Society use these Comments to prepare Shadow Reports for furthering their advocacy nationally and internationally¹⁷⁵. In this regard, Committee Against Torture has acknowledged the risk of torture faced by marginalised groups because of gender identity and sexual orientation, through General Comment 2¹⁷⁶. Human Rights Committee has similarly acknowledged the risk of discrimination faced due to non-conforming gender identities or sexual orientation¹⁷⁷. CEDAW Committee in its Comments and Recommendations focuses only on protection of women, but includes their intersectional

¹⁷² Honduras (27 October 2006) UN Doc CCPR/C/HND/CO/1,

¹⁷³ Ibid para 14

¹⁷⁴ ICCPR art 40; CAT art 19; CEDAW art 21

¹⁷⁵ Committee on the Elimination of Discrimination against Women ‘Concluding Observations on Singapore’ (10 August 2011) UN Doc CEDAW/C/SGP/CO/4/2011, para 22(a)

¹⁷⁶ Committee Against Torture ‘General Comment 2’ on ‘Implementation of Article 2 by States Parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 21

¹⁷⁷ Human Rights Committee, ‘General Comment 37’ on ‘Right of Peaceful Assembly (Article 21)’ (27 July 2020) UN Doc CCPR/C/GC/37, paras 25 and 46; Human Rights Committee, ‘General Comment No 26: Article 6 (Right to life)’ (3 September 2019) UN Doc CCPR/C/GC/36, paras 36 and 61; Human Rights Committee, ‘General Comment 4’ on ‘Implementation of Article 3 of the Convention in the Context of Article 22’ (4 September 2018) UN Doc CAT/C/GC/4, para 45; Human Rights Committee, ‘General Comment 35’ on ‘Article 9 (Liberty and Security of the Person)’ (16 December 2014) UN Doc CCPR/C/GC/35, paras 3 and 9

marginalisation because of sexual orientation and sex i.e., lesbian, bisexual, transgender and intersex women¹⁷⁸.

2.1.3 Individual Communications: Such interpretation was observed in practise in the case of *Rosanna Flamer-Caldera v Sri Lanka*¹⁷⁹ which quoted General Recommendation No. 33, 35, 19, 21 and 28. This brings the section to the next avenue- individual communications. Individual communication is a procedure for individuals to complain about alleged State violations to relevant Committees¹⁸⁰. The Committee's opinion is not binding but is highly persuasive as expert interpretation of human rights law.

The case of *Rosanna Flamer-Caldera* and her lesbian partner for instance, was brought forth with the assistance of Dianne Otto. A known academic in queer rights within human rights law. The case involved Sri Lankan law that criminalised same-sex sexual conduct. Albeit the law had origins in 19th century British colonial law, the government of 1995 ignored recommendations to repeal the law¹⁸¹. Instead opting to replace 'male person' to 'person' and thus only including women under its applicability¹⁸². The Committee decided that her right to non-discrimination (Article 2 (a) and (d)-(g)), her right to be protected from gender-based violence (Article 2(c)-(f), Article 5(a)), her right to participate in the public and political life of the country (Article 7(c)), her right to equality before the law (Article 15(1), and her family rights (Article 16) were violated by Sri Lanka¹⁸³. This case illustrates the benefits of Comments and Concluding Observations in expanding the scope of international human rights law.

¹⁷⁸ CEDAW Committee 'General Recommendation 27' on 'Older women and the Protection of Human Rights' (16 December 2010) UN Doc CEDAW/C/GC/27, para 13; CEDAW Committee 'General Recommendation 28' on 'Core Obligations of States Parties under Article 2' (16 December 2010) UN Doc CEDAW/C/GC/28, para 18

¹⁷⁹ *Rosanna Flamer-Caldera v Sri Lanka* (21 February 2022) CEDAW Committee 134/2018

¹⁸⁰ (First) Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (23 March 1976) art 1; Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (26 June 2006) art 22 (OP CAT); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2131 UNTS 83 (22 December 2000) art 2 (OP CEDAW).

¹⁸¹ Tessa Wong, '377: The British colonial law that left an anti-LGBTQ legacy in Asia' (*BBC*, 29 June 2021) < <https://www.bbc.com/news/world-asia-57606847> > accessed on 15 March 2023

¹⁸² *Rosanna Flamer-Caldera v. Sri Lanka* (21 February 2022) CEDAW/C/81/D/134/2018, para 2.3

¹⁸³ *Ibid* para 10

2.1.4 Inquiry procedure: The inquiry procedure in human rights law refers to the mechanism by which human rights treaty bodies can investigate allegations of systematic and grave violations of human rights by a state party to a particular treaty. It allows the treaty body to conduct a thorough examination, including gathering evidence, interviewing witnesses, and reviewing relevant documents. This procedure is governed by the rules of procedure of the specific treaty body, such as the Optional Protocol (OP) to the CEDAW or the OP CAT¹⁸⁴. The inquiry process is initiated upon receipt of credible information and requires the cooperation of the concerned State. The treaty body then presents its findings and recommendations to the State party, aiming to ensure accountability.

States that are party to certain human rights conventions have the option to exclude themselves from the inquiry procedure. This can be done by making a declaration that they do not recognize the competence of the relevant committee to conduct inquiries¹⁸⁵. When credible information is received regarding serious violations of the conventions being monitored, the Committee against Torture (in accordance with Article 20 of the Convention against Torture), the Committee on the Elimination of Discrimination against Women (in accordance with Article 8 of the Optional Protocol to CEDAW), and other relevant committees may initiate inquiries to investigate the violations. Bangladesh declared to not recognise the competency of CEDAW Committee in conducting an inquiry procedure for the obligations under CEDAW¹⁸⁶.

2.1.5 Mainstreaming SOGIESC: The above avenues can be utilised through several ways already observed within international human rights law jurisprudence. This includes mainstreaming SOGIESC by incorporating the regard for this marginalised group within all issues highlighted by General Comments and Recommendations. This gradual expansion of the scope of human rights law will

¹⁸⁴ OP CEDAW, art 8; UNCAT, art 20

¹⁸⁵ art 28 CAT; art 10(1) OP CEDAW; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (5 March 2009) 999 U.N.T.S. 171 art 11(8)

¹⁸⁶ OP CEDAW art 8(b) (6 October 1999) A/RES/54/4

face less resistance from member States than adoption of a new treaty or complaint forum. Additionally, the benefit of international human rights jurisprudence already treating gender identity and sexuality as a valid consideration is that it encourages States inclined to protect their international status, to make legal changes.

The demerit for this strategy is the loss of specific attention that queer identities require for sufficient legal protection. According to Gabrielle Simm, ‘it is difficult to say that international human rights law has radically changed; rather, the categories of persons whose rights are protected have expanded, without the categories of rights, or the rights system, having changed’¹⁸⁷. The categories of rights here could imply the implicit gender binary underlying the construction of language of rights currently. Inclusion in this sense does not address the complex layers of identities and their subjugation by the State. Moreover, Muslim hijra in India face a different type of discrimination by state and non-state actors, compared to Hindu hijra or transwomen¹⁸⁸. Arguments in favour of a new treaty are similarly countered with the observed ‘othering’ of Global South issues while tackling discrimination under current treaties¹⁸⁹. A new treaty would be important in creating binding obligations but would risk playing into the argument promoted by Aeyal Gross – of Global Gay Governance¹⁹⁰. The treaty could be interpreted as a type of Global Gay Governance, that mobilises past colonial powers and economic hegemony through policy arguments in support of SOGIESC. This perspective is beneficial for States willing to portray non-conforming gender identities and sexualities as a Western imposition and violation of their sovereignty¹⁹¹.

¹⁸⁷ Gabrielle Simm, ‘Queering CEDAW? Sexual orientation, gender identity, expression and sex characteristics (SOGIESC) in international human rights law’ (2021) 29 Griffith Law Review 3, para 4.1

¹⁸⁸ Sibsankar Mal, ‘The Hijras of India: A Marginal Community with Paradox Sexual Identity’ (2018) 34 Indian Journal of Social Psychiatry 1 79, 85

¹⁸⁹ Hakimeh Saghaye-Biria, ‘Decolonizing the “Universal” Human Rights Regime: Questioning American Exceptionalism and Orientalism’ (2018) 4 ReOrient 1 59, 77

¹⁹⁰ Aeyal Gross ‘Homoglobalism: The Emergence of Global Gay Governance’ in Dianne Otto (ed) *Queering International Law* (2017 Routledge) 148

¹⁹¹ Annika Burgess, ‘With staunch religious and political opposition, will same-sex marriage be accepted in conservative India?’ (*ABC News*, 3 May 2023) < <https://www.abc.net.au/news/2023-05-04/india-marriage-same-sex-lgbt-rights-religion/102266472> > accessed on 19 March 2023

2.2 CEDAW and the gender binary

CEDAW as it currently stands, lends no sympathy to issues faced by gender identities besides women. Despite references to lesbian, bisexual, intersex and transgender women, the widening interpretation of CEDAW's scope ends at intersectionality¹⁹². It is clear from Article 1 of CEDAW that its aim is to prohibit and prevent discrimination against women. Despite this, since it is the only treaty solely constructed to prevent discrimination based on sex it is the most suitable structure of human rights treaty to protect minority gender identities and sexualities. Since the Human Rights Committee has already expanded 'sex' to include 'sexual orientation'¹⁹³ – CEDAW can perhaps include gender identity within its scope in the future.

2.2.1 CEDAW Article 5(a) and the Preamble¹⁹⁴: The third stanza of the Preamble to CEDAW emphasizes two important and relevant points. Firstly, that for full equality to be realised between men and women, there is a need to change traditional conceptions of role men and women play in society and in the family. Secondly, that this supports the reasoning behind Article 5 and 10 of CEDAW. Which obligate States to not only make legal changes but also obliges them to modify 'social and cultural patterns of individual conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women..."¹⁹⁵ The obligation of the State to change discriminatory customs and practices within society is also mentioned under Article 2(f) of CEDAW. This implies that States are not bound to measures solely within the realm of law and policy but more importantly, it implies that gender roles are socially produced and governed.

¹⁹² CEDAW Committee 'General Recommendation 37' on 'Gender-related dimensions of disaster risk reduction in the context of climate change' (2 February 2018) UN Doc CEDAW/C/GC/37, para 57(c)

¹⁹³ *Toonen v. Australia* (1994) UN Doc. CCPR/C/50/d/499/1992, para. 8.7; *Young v. Australia* (2003) HRC 941/2000 UN Doc CCPR/C/78/D/941/2000, at para. 10.4; *X v. Colombia* (2006) HRC 1361/2005 UN Doc CCPR/C/89/D/1361/2005, para. 9

¹⁹⁴ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 December 1979) UN Treaty Series vol. 1249, Preamble, art 5(a)

¹⁹⁵ *Ibid*

CEDAW could thus assist in protection against discrimination and violence suffered by varying sexualities and gender identities. As it is similarly caused because of their socially imposed stereotypes and roles in society. However, CEDAW's current stance on gender remains binary¹⁹⁶. This is observed from policy documents attempting to 'mainstream gender' still relying on a male-female gender binary¹⁹⁷. Still, relying on the language of gender as a social construction, it is possible in the future to draw an interpretation of gender fluidity. As the only constraint is socially constructed. If such an interpretation were to be permitted, discrimination experienced by men, transmen, hijra, kothi and meti would also be within CEDAW's jurisdiction.

2.2.2 Benefits of this potential: The conception of gender as socially constructed was instrumental in developing human rights law for women. This is seen in inclusion of domestic violence as a violation of right to security¹⁹⁸ and right to abortion as a part of right to life¹⁹⁹. Such interpretations would not be possible without human rights bodies giving attention to lived experiences of women. Driving focus away from rights that help women 'catch up' to men²⁰⁰. Systemic discrimination requires attention to lived experiences. If the expansion of gender were to include not only women, then discrimination faced by men would also be possible. Such as discriminatory rape laws that ignore male victims²⁰¹. This expansion would assist gender identities like hijra, kothi and meti because it would highlight the specific ways the systemic violence of patriarchy manifests for their identities. Access to healthcare, employment and education for them is impeded because of socially constructed stereotypes attached to them. This expansion would also assist women as it would

¹⁹⁶ For instance: Commission on Human Rights, 'Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into United Nations Human Rights Activities and Programmes' (20 November 1995) UN Doc E/CN.4/1996/105 Annex 13; UNESCO 'UNESCO'S Gender Mainstreaming Implementation Framework (GMIF) for 2002-2007' (2003) <https://unesdoc.unesco.org/ark:/48223/pf0000131854.locale=en> accessed 19 March 2023

¹⁹⁷ UN Division for the Advancement of Women, DESA, 'Chapter IV A. Mainstreaming the gender perspective into all policies and programmes in the United Nations system' (2019) <https://www.un.org/womenwatch/daw/followup/main.htm> accessed 19 March 2023

¹⁹⁸ Human Rights Committee, 'General Comment 28' on 'Article 3: The equality of rights between men and women' (2000) UN Doc HRI/GEN/1/Rev.9 (Vol I) 228, p 11

¹⁹⁹ Ibid, p 10

²⁰⁰ Dianne Otto, 'Queering Gender [Identity] in International Law' (2016) 33 Nordic Journal of Human Rights 4 p 305

²⁰¹ Anushka Gupta, 'Male Victims of Sexual Assault and the Indian Laws' (*Public Policy India* 29 November 2021) < <https://publicpolicyindia.com/2021/11/29/male-victims-of-sexual-assault-and-the-indian-laws/>> accessed on 20 March 2023

reduce protectionist policies that prevent women from escaping the trap of their gender role. For instance, a common policy in Bangladesh and India for protection against sexual violence is curfews and segregated working spaces for women²⁰². These policies often hinder the employment opportunities for women, especially in the informal sector²⁰³.

The silver lining in this line of argument is past successful attempts at expanding the depth of ‘women’ as a basis of discrimination. The International Gay and Lesbian Human Rights Commission (IGLHRC) submitted a memo to the Committee on Elimination of Discrimination Against Women titled ‘Why Sexual Orientation and Gender Identity Must be Specifically Referenced in the Forthcoming CEDAW General Recommendation on Girls’ and Women’s Access to Education’²⁰⁴ attempting just that. This memo intended to convince the Committee of sexuality dimensions of inequality faced by women. It listed past instances of the Committee interpreting inequality to include disproportionate discrimination faced by ‘rural women, women with disabilities, and women with HIV/AIDS’²⁰⁵ i.e., inequalities amongst women. This was meant to imply the existence of the Committee’s authority to expand understanding of inequality in CEDAW. In 2017, the case of ON and DP v. Russian Federation²⁰⁶ saw the application of this expanded understanding. The submission was by a lesbian couple alleging violation of Russia’s obligation to protect them from hate motivated violence as they suffered assault because of their sexual orientation. The case held violation of rights under articles 1, 2 (b)–(g) and 5 (a) of CEDAW²⁰⁷ because of the State’s failure to eliminate barriers for seeking justice, including

²⁰² Sanhati Banerjee, ‘The Patriarchy’s Curfew Won’t Save Indian Women from Violence’ (*The Wire*, 8 March 2023) <https://thewire.in/women/the-patriarchys-curfew-wont-save-indian-women-from-violence> accessed on 23 March 2023

²⁰³ UN Bangladesh, ‘NATIONAL DIALOGUE ON Actions Against Sexual Violence’ (25 November 2019) Dhaka < <https://asiapacific.unwomen.org/en/news-and-events/stories/2019/12/national-dialogue-on-actions-against-sexual-violence> > accessed on 17 March 2023

²⁰⁴ IGLHRC, ‘Why Sexual Orientation and Gender Identity Must be Specifically Referenced in the Forthcoming CEDAW General Recommendation on Girls’ and Women’s Access to Education’ (20 June 2014)

<<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/WomensRightEducation/IGLHRCContribution.pdf>> accessed on 19 March 2023

²⁰⁵ Ibid, p 2

²⁰⁶ ON and DP v. Russian Federation (decided on 24 February 2020) UN Doc CEDAW/C/75/D/119/2017

²⁰⁷ Ibid p 14

removing negative stereotypes attached with lesbian women²⁰⁸. This illustrates an expanded understanding of inequality that includes the intersection of sexual orientation and sex of women.

2.2.3 Limitations of this potential: This potential of CEDAW as suggested by Dianne Otto²⁰⁹, carries limitations. The focus of the Committee and feminist jurisprudence on maintaining the gender binary might affect attempts at queering CEDAW. This focus, when it comes to the case of ON and DP for instance, is understandable. Since without any previous General Comments arguing for gender fluidity, an argument that did not rely on intersectionality would risk the Russian Federation rejecting the Committee's decision, alleging its jurisdiction. Similarly, as argued by Aeyal Gross, decisions by an international human treaty body that defy cultural norms risk enabling nationalist arguments that use the decisions as proof of Western imposition and not as proof of expanding human rights protections²¹⁰. Maintaining a balance between Global Gay Governance and expanded human rights requires staying within the existing rights language. Therefore, it would be most beneficial if this potential of CEDAW was utilised.

Queering of international human rights law as imagined by Ratna Kapur²¹¹, unbound by pitfalls of the formal justice system, is a long shot. The utility of CEDAW's potential would require assimilation of queer identities within the State's system. According to Ratna Kapur, this end requires queer to 'become implicated in the production of governmental power through which it also acquires visibility and presence, ultimately collaborating with the very power it sets out to challenge.'²¹²

This attempt at assimilation, within CEDAW so rigidly built around the gender binary, also risks othering of queer identities as exceptions to the rule. Heteronormative assumptions of womanhood already treat lesbian and bisexual women as the 'other' or the exception. As sexual orientation is still considered only in reference to rigid

²⁰⁸ Ibid para 7.10

²⁰⁹ Dianne Otto, 'Queering Gender [Identity] in International Law' (2016) 33 *Nordic Journal of Human Rights* 4 p 307

²¹⁰ Gabrielle Simm, 'Queering CEDAW? Sexual orientation, gender identity, expression and sex characteristics (SOGIESC) in international human rights law' (2021) 29 *Griffith Law Review* 3, p 391

²¹¹ Ratna Kapur, 'The (im)possibility of queering international human rights' in Dianne Otto eds *Queering International Law* (Routledge 2017)

²¹² Ibid p 13

identities like ‘lesbian’ and ‘bisexual’²¹³, not pansexual or asexual for instance. This exclusion is because sexuality is also not considered fluid but fixed. Therefore, there is a likelihood of treating lesbians and bisexual women as an exception to the norm within CEDAW’s language of rights. Interestingly, it is possible that CEDAW, despite its focus on women’s rights, may exhibit more resistance to incorporating queer perspectives into international human rights law compared to ‘mainstream’ human rights treaties like ICCPR and ICESCR. Unlike these treaties, which assert universal applicability without singling out a specific gender group for protection, CEDAW focuses its attention on women, which may complicate efforts to queer the framework.

2.3 Yogyakarta Principles²¹⁴

The updated Yogyakarta Principles (YP+10) since 2017 reflect novelties of international human rights law and challenge the idea of gender as a static and binary legal category²¹⁵. Although YP+10 is not binding, it is an important asset for interpretation of rights language preferred by the queer community.

2.3.1 Principle 31²¹⁶ This Principle refers to the Right to Legal Recognition. Underpinned by Article 16 of ICCPR i.e., right to recognition everywhere as a person before the law. This right is argued to be the foundational right required for the enjoyment of all other rights²¹⁷. The right to recognition has been realised in Nepal under the umbrella term ‘third gender’ (category listed as ‘O’ for other on legal documents), in Bangladesh under the umbrella term ‘hijra’ and in India under the umbrella term ‘third gender/transgender’²¹⁸.

²¹³ ON and DP v. Russian Federation (decided on 24 February 2020) UN Doc CEDAW/C/75/D/119/2017

²¹⁴ International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (10 November 2017) <<https://www.refworld.org/docid/5c5d4e2e4.html>> accessed on 16 March 2023

²¹⁵ Lena Holzer, ‘Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10’ (2020) 1 International Journal of Gender, Sexuality and Law, p 99

²¹⁶ International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (10 November 2017) <<https://www.refworld.org/docid/5c5d4e2e4.html>> accessed on 16 March 2023, principle 31

²¹⁷ Taylor PM, ‘Article 16: Recognition as a Person Before the Law’ (2020) Cambridge University Press Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights

²¹⁸ Meenakshi Ganguly, ‘South Asia’s Third Gender Court Judgments Set Example Netherlands Court Cites India, Nepal Cases’ (*HRW*, 6 June 2018) <<https://www.hrw.org/news/2018/06/06/south-asias-third-gender-court-judgments-set-example>> accessed on 10 March 2023

Principle 31 of the YP+10 addresses the issue of many transgenders and some intersex individuals being officially registered with a gender that does not align with their gender identity, expression, or physical appearance, based on a binary framework. This mismatch between their legal gender and personal identity can lead to outing and scrutiny in various everyday situations, including job applications and identity checks. Studies have revealed that this mismatch often exposes transgender and intersex individuals to harassment, physical violence, and discrimination, resulting in difficulties finding housing or employment²¹⁹. Deprivation of rights on the basis of legal gender is also common while attempting to access right to marriage. Thus, it is considered an important right under international human rights law for the protection of queer people. In fact, Sweden is widely noted as the pioneer in this regard, as it reportedly became the first State to permit legal gender changes in 1972²²⁰.

2.3.2 Benefits of Principle 31: Principle 31 however deviates from its predecessor Principle 3 by rejecting the use of gender markers for identification. This is because of observed exploitation of gender identities because of their perceived non-conformity²²¹. This increase in scrutiny on perception of a person's gender and their legal gender led to arguments deeming gender markers as not always reasonable or reliable. Thus, Principle 31 states that personal identity should only be registered for legitimate purposes, i.e., when 'relevant, reasonable and necessary'.

2.3.3 Limitations of Principle 31: Since the YP+10 still describes gender identity as "to each person's deeply felt internal and individual experience of gender"²²² it presumes having a gender identity as an essential experience felt by all. This refutes the idea of gender identities being a fluid concept. Agender, hijra and meti often describe their identity as shifting according to social influences. Specifically, since queer identities

²¹⁹ Sonal Singh, Sunil Babu Pant, Suben Dhakal, Subash Pokhrel et al, 'Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation' (2012) 12 BMC Int Health Human Rights 7

²²⁰ 'Why Do We Need a New Gender Recognition Act?' (*RFSL*, 27 January 2022) https://www.rfsl.se/en/organisation/vard-for-transpersoner/gender_recognition/ accessed on 2 March 2023

²²¹ Lena Holzer, 'Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10' (2020) 1 International Journal of Gender, Sexuality and Law p 102

²²² International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (10 November 2017), principle 8

like hijra require initiation rituals and acceptance of peers to be recognised. Thus, not being an innate feeling always. Although Principle 31 allows for ‘multiplicity of gender marker options’, this option emphasises again a categorisation of each identity. Which demands conceptions of how to correctly identify as one gender. This line of thought inevitably ends in exclusion.

Chapter V: Interplay of national and international understanding of human rights protections for queer people in Nepal, Bangladesh, and India

This chapter is meant to show the various ways international law and its reasonings have influenced national law in Nepal, Bangladesh, and India. How laws and policies define the word ‘transgender’ or local identity terms, including those for third gender identities, has a significant impact on whether and to what extent queer community’s universally protected human rights are protected under the national law. Similarly, definitions of terms such as ‘sex’, ‘gender’, ‘gender identity’, and ‘gender expression’ can either recognize or limit the universal application of human rights.

This chapter will first pay attention to the ruptures that arise during the translation of globalized approaches into local settings and the factors that contribute to the ruptures post-adoption of international obligation into domestic law. The first part is further divided into a State based analysis and then an analysis of the usefulness of international human rights law for local queer rights, based on arguments proposed by Dianne Otto and Ratna Kapur. The second part of this chapter will discuss the benefits of the interdependency between State’s approaches and international human rights law’s approaches.

1. Disconnect between international and national understanding of the legal protections

According to Francis K. and Deepa K., in States with inherited legal systems there is a ‘transplant effect’ of an alien institution to the social views of the State²²³. The legacy of inherited systems in Bangladesh and India is visible in several laws- for instance Section 377 of both their penal codes²²⁴ which criminalised same-sex relations. This law was a remnant of both the States’ British colonisation period. In Nepal, there is a different kind of transplant visible – the system of international

²²³ Francis Kuriakose, Deepa Kylasam Iyer, ‘Rights through Resistance What Lies beyond Legalism for the LGBT Movement?’ (2020) 55(17) Economic & Political Weekly, p 30

²²⁴ The Penal Code, 1860; Indian Penal Code 1860

human rights law. Nepal's status as a beacon of international human rights law follower when it comes to queer rights is short sighted. Nepal is often cited as the first to legally protect right of recognition as well as right to marriage equality for same-sex couples²²⁵. Despite such steps there is practically no change visible in the discrimination faced by queer people in Nepal²²⁶. According to Francis K. and Deepa K. this transplant effect of foreign legal principles, that carry with them foreign culture, result in 'legal rights on paper with little normative assimilation in the society.'²²⁷ This effect is clearly visible in all three States when it comes to the right of recognition.

The arguments of this section are constructed to show how this transplant effect is consistently ignored by the governments of each State. This ignorance is a stepping stone to create an image of 'progressiveness' in the eyes of the international community. The fact that this seems to be working, as all three States have been praised for their legal/policy decisions, supports the main argument of this section. The main argument being that a paper victory that uses international human rights language but has no practical consequences is inefficient in protecting marginalised groups in these States.

1.1 Bangladesh

1.1.1. Language:

Despite the recognition of the hijra identity, is still based on the perception of them as having a disability. The term used in Bengali to acknowledge hijra is 'jouno o lingo protibondhi', which translates to 'sexually and genitally disabled'²²⁸. Notably, the cabinet also decided against translating the term hijra into English in official documents. While some sections of the local media objected to this decision due to the negative associations with the term hijra, it was crucial in ensuring recognition for

²²⁵ Sanju Gurung, 'Nepal, the Beacon of LGBTQ+ Rights in Asia? Not Quite' (The Diplomat, 10 February 2021) < <https://thediplomat.com/2021/02/nepal-the-beacon-of-lgbtq-rights-in-asia-not-quite/> > accessed 20 April 2023

²²⁶ Sanju Gurung, 'Nepal, the Beacon of LGBTQ+ Rights in Asia? Not Quite' (*The Diplomat*, 10 February 2021) < <https://thediplomat.com/2021/02/nepal-the-beacon-of-lgbtq-rights-in-asia-not-quite/> > accessed 20 April 2023

²²⁷ Francis Kuriakose, Deepa Kylasam Iyer, 'Rights through Resistance What Lies beyond Legalism for the LGBT Movement?' (2020) 55(17) *Economic & Political Weekly*, p 30

²²⁸ Adnan Hossain, 'The paradox of recognition: hijra, third gender and sexual rights in Bangladesh' (2017) 19 *An International Journal for Research, Intervention and Care*, p 1425

hijra individuals²²⁹. The use of the Bengali word hijra in official and policy documents aimed to portray them as physically impaired rather than acknowledging their existence as individuals with diverse sexual orientations. The draft law on anti-discrimination for hijra similarly uses lingo protibondhita to refer to hijra²³⁰ – thus drafting to institutionalise the apparent disability of being hijra.

The confusion apparent in the self-formation of hijra identity in such a system is apparent from the confusion of the State (refer to Chapter III (2.1)). Bangladeshi ministries funded an initiative titled “Integration of the Transgender (hijra) Population into Mainstream Society” in 2011 to give them vocational training as well as to spread awareness campaigns that paint hijra in a more positive light. Although the initiative was seemingly in good faith, one of the spokespersons described hijra as ‘victims of genetic defects’ in a television appearance²³¹. Along this line of thought, since hijra were considered handicapped in mainstream society but remained outside of the purview of official disability protections, the Ministry of Social Welfare introduced a disability allowance for hijra. This attempt to rehabilitate them has had several consequences on the self-formation process of hijra as well as transwomen fighting for welfare benefits. This will be further discussed in Chapter VI (3).

1.1.2. Intent v. Reception

To mark the one-year anniversary of legal recognition of hijra, UNAIDS, non-governmental organisation (NGO) Bandhu and Ministry of Social Welfare organised a hijra pride parade in 2014²³². This event was confusing to the locals for two reasons. Firstly, because the event mostly consisted of foreigners and representatives of a right-wing government (Bangladesh Awami League). Secondly, because the government has often side lined, if not rejected, the queer rights movement when it comes to protection of sexual minorities. Bangladesh has consistently denied the existence of lesbian, gay, bisexual, and transgender communities at the United Nations, which

²²⁹ Ibid

²³⁰ Ibid

²³¹ Akbar Hossain, ‘Hijra community in Dhaka’ (*BBC Bangla*, 21 October 2011) <https://www.bbc.com/bengali/news/2011/10/111006_mb_bd_hijra> accessed on 30 March 2023 ; Ibid p 1424

²³² Sabrina Toppa, ‘In Photos: Bangladesh’s Trans Pride Parade Was Massive and Fabulous’ (*Vice*, 23 November 2014) <https://www.vice.com/en/article/wjy95q/in-photos-bangladeshs-trans-pride-parade-was-massive-and-fabulous> accessed on 10 April 2023

contrasts with their recognition of hijra as a third gender²³³. Annoya Banik, the spokesperson hijra at the event is reported to have stated her disapproval ‘Although she’s grateful the government recognized hijra as a separate gender, she has yet to see last year’s recognition impact her life in a practical way, referring to it as nothing more than “a fake law.”’ Still the focus of the pride remained on the many achievements of the current government²³⁴. This contradiction seemed perplexing from the perspective of international lesbian, gay, bisexual, transgender, and intersex groups. However, it is important to note that hijra do not primarily represent an alternative sexuality to the government. Moreover, neither the government nor the general population in Bangladesh perceive hijra within the framework of lesbian, gay, bisexual, and transgender activism or as part of a global movement centred around sexual orientation or gender identity²³⁵. The taboo around hijra has manifested itself in perceptions of disability and not pride. Therefore, unbeknownst to the foreign civil society representatives at the pride, the hijra pride was essentially a disability pride.

1.2 India

1.2.1 Language

The language used for identification by a person change with context. This context-based change indicates the implicit assumptions of each identity for a person. Alyssa Lynne uses the example of kathoey in Thailand to show how local and global identities are socially constructed. Moreover, how use of global identities does not always end in liberation. According to her, the tension between categories of subjugated local identity – kathoey and dominant global identity – transgender influences the self-formation of a kathoey’s identity²³⁶. The tension results in essentialised ideas of local/global and modern/traditional. This tension is also visible

²³³ OHCHR, ‘Joint UPR Submission on Sexual Orientation and Gender Identity in Bangladesh’ (2013) <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session16/BD/JS3_UPR_BGD_S16_2013_JointSubmission3_E.pdf> accessed on 23 March 2023

²³⁴ Sabrina Toppa, ‘In Photos: Bangladesh’s Trans Pride Parade Was Massive and Fabulous’ (Vice, 23 November 2014) <https://www.vice.com/en/article/wjy95q/in-photos-bangladeshs-trans-pride-parade-was-massive-and-fabulous> accessed on 10 April 2023

²³⁵ Adnan Hossain, ‘The paradox of recognition: hijra, third gender and sexual rights in Bangladesh’ (2017) 19 *An International Journal for Research, Intervention and Care*, p 1425

²³⁶ Alyssa Lynne, ‘Paired Double Consciousness: A Du Boisian Approach to Gender and Transnational Double Consciousness in Thai Kathoey Self-Formation’ (2021) 68 *Social Problems* 2 250, 266

in India as the government chooses to lump varying local identities within 'transgender' to satisfy international obligations. Similar reasoning is observed in Nepal, with the government's reliance on 'third gender' or 'Other' as a gender marker for all its local identities. This hints at similar attempts of transplanting parts of the international legal system into an ill-suited local system.

1.2.2 Asli hijra

India has something to learn from the approach of recognition employed in Bangladesh. The Act²³⁷ meant for protecting transgender persons, including hijra, requiring a sex reassignment surgery, is the hurdle that could have been overcome if the lesson was learned. The request for recognition as a third gender based on physical differences is paradoxical, as it reinforces their marginalization within society instead of integrating them. The key aspect here is the emphasis on genital dissimilarity, which determines the authenticity or genuineness of being a hijra. This aspect though is the end result of being integrated within the community, it is not innate within hijra when they are born. In the Bangladeshi context, it is not the lack of masculinity but the inherent physical differences, genital ambiguity, or indeterminacy that symbolize the genuine status of hijras for the broader public. The discourse of innate genital difference as a form of handicap has been instrumental in legally recognizing hijras as a third gender in Bangladesh²³⁸. Consequentially, this notion of genital difference is increasingly being assimilated into mainstream discussions on disability. This lesson comes back to teach us why requirements for consistency and authenticity for legally recognising a gender or sexual identity, only works to exclude some.

The asli or real hijra is a difficult concept to pin down with mere references to body parts. Within the hijra community, there is a correct way of being hijra – based on religious practices, kinship and sexuality. Only an asli hijra can gain izzat or respect. This strict categorisation of an identity is not the problem. The problem arises when a community's definition of gender identity is applied across the whole State. This problem is heightened when only the right gender expression gets access to rights.

²³⁷ Transgender Persons (Protection of Rights) Act, 2019 ('the Act')

²³⁸ Adnan Hossain, 'The paradox of recognition: hijra, third gender and sexual rights in Bangladesh' (2017) 19 *An International Journal for Research, Intervention and Care*, p 1426

This problem has already manifested in violent reactions within the marginalised group through a video, uploaded on 22nd September 2015, by The Logical Indian, titled ‘A Real Transgender Exposing a Fake One’. It documented a hijra publicly beating up a transwoman whom she suspected of being a ‘man’. The hijra threatened to ‘expose’ the transwoman by stripping her. She was supported by the bystanders. The transwoman’s mistake: being seen begging at the traffic signal (ritual practiced by hijra). The hijra accused the transwoman of making money while not being transgender²³⁹. There have even been arrests made because of allegations of being a fake hijra²⁴⁰. Similar acts were observed by Adnan Hossain who recalls kothis threatening to cut the hair of fake kothis²⁴¹. Right to sue for discrimination based on this identity thus has other direct consequences. These acts implicitly assume if their identity is refused by the State, it will lead to deprivation of welfare benefits. The direct consequence of this, is reliance on the State to legitimise transgender identity as the legal identity for any non-conforming gender identity. This fuels a hateful culture of identity wars.

1.2.3 Binary language

The use of binary terms to categorise hijra, other genders, and sexually variant identities into clean groups recognised globally is a trap for two additional reasons. Use of binary terms like they are ‘neither men nor women’ or ‘two in one’ for explaining hijra identity is not new to hijra community. It is not new because it is only through use of understood binary language that they are understood in the cisgender mainstream society. The first reason therefore is because it reinforces the same gender binary language that others them within their local setting. The second reason is because hijra (as explained in Chapter IV part A and Chapter VI) lack the class and culture capital enjoyed by other queer activists, like gay men. Their lack of cultural capital is a result of the discrimination faced by them in the system of education and

²³⁹ Pheba Matthew, ‘Viral video of a transgender person beating-up a ‘fake’ shows how little we know about them’ (*The News Minute*, 23 September 2015) < <https://www.thenewsminute.com/article/viral-video-transgender-person-beating-fake-shows-how-little-we-know-about-them-34571> > accessed 18 March 2023

²⁴⁰ Ani Dutta, ‘Gatekeeping Transgender’ (*Raiot*, 4 October 2016) < <https://raiot.in/gatekeeping-transgender/> > accessed on 8 March 2023

²⁴¹ Adnan Hossain, ‘The paradox of recognition: hijra, third gender and sexual rights in Bangladesh’ (2017) 19 *An International Journal for Research, Intervention and Care*, p 1426

employment. This unfortunately results in lower knowledge of the language of rights and the power this language carries for national and global advocacy. Being relegated to lower class also forces them to succumb to definitions of their identities as a disability, if it means access to government jobs and citizenship rights²⁴².

1.3 Nepal

1.3.1 Language

Alyssa Lynne recalls one interviewee's statement from Thailand, on the ways they identify themselves - Chimlin said 'When I'm talking about the third-person, mostly I use the word 'transgender' because it's internationally accepted, and I think it's more proper and more polite'. Additionally, another interviewee Mot said 'For people who are close to me, we know each other enough, it's kathoey... for the formal people, I say to them I'm a trans woman'²⁴³. It is important to note here that kathoey as an identity has been used in Thailand to imply being homosexual or intersex as well²⁴⁴. Similar tendencies can be seen in the lack of use of transgender by hijra community in Bangladesh and India (and meti community in Nepal), unless it is for global advocacy. This bifurcation according to Alyssa Lyne is not benign but driven by colonial hierarchies established by the Global North. Where gender variance that does not fit into the understanding of gender in the North is othered. This can be observed in the discussions of Chapter VI – how foreign civil society fail to use or understand local identities while working there.

The stigmatisation attached with local words for such identities permeates through more localised use of international words too. This becomes an issue when NGOs have to appease Global North funders but also be accessible in their local context. NGOs are the individual actors that represent such communities in the international legal community. They have to balance the benefits attached with identity recognition with universal representation. Representation here is different than recognition, as

²⁴² Adnan Hossain, 'The paradox of recognition: hijra, third gender and sexual rights in Bangladesh' (2017) 19 *An International Journal for Research, Intervention and Care*, p 1428

'Laila, a hijra from Hridoypur, said to me that although s/he did not really see her/himself as protibondhi, many of her/his hijra acquaintances would accept this new mode of self-identification so long as it facilitated acceptance'

²⁴³ Ibid p 262

²⁴⁴ Peter A. Jackson and Gerard Sullivan, *Lady Boys, Tom Boys, Rent Boys Male and Female Homosexualities in Contemporary Thailand* (1st ed Routledge 1999) p 5

representation in the international legal sphere often requires categorisation into existing modes of protection. This is important for both social and legal protection to work in a local context too.

The manner in which an individual presents themselves should be comprehended in light of their self-identification and their intentional selection of words, rather than as a definitive and unwavering identity that they wholly embrace. According to Amit Gerstein, for instance, a person in Nepal may describe themselves as transgender when speaking to a Western researcher, refer to themselves as *meti* among their peers, and have the designation of *tesro lingi* (third gender) on official documents. They may express or perceive their own identity distinctively in various circumstances, and the process of shaping identity should be understood as relational, taking into account personal and cultural interpretations associated with such terminology²⁴⁵.

2. Analysis based on Dianne Otto book²⁴⁶ and Ratna Kapur²⁴⁷

2.1 International law is not always the most useful forum for seeking justice, in the short term:

Aeyal Gross, when talking about Global Gay Governance in Dianne Otto's book, uses the example of Indonesia to prove this point. Scholars and activists supported queer rights in Indonesia by using an Islamic perspective instead of an international law perspective²⁴⁸. This is because of two reasons. Firstly, because it is time consuming and costly to negotiate international treaties to reflect local civil society demands and appeals to international human rights law forums take years to come to a decision. This is assuming there are ways of seeking justice within the State itself and that those ways are exhausted. Secondly, because this makes assimilation of a 'new' right easier within the State's legal system. This method of providing support for queer rights is observed in India during the same-sex marriage equality arguments

²⁴⁵ Amit Gerstein, "'So What Are You?': Nepali by Discourse' (2020) 3 GW Undergraduate Review DOI: [https://doi.org/10.4079/2578-9201.3\(2020\).02](https://doi.org/10.4079/2578-9201.3(2020).02), p 20

²⁴⁶ Dianne Otto, 'Queering Gender [Identity] in International Law' (2016) 33 Nordic Journal of Human Rights 4

²⁴⁷ Ratna Kapur, 'The (im)possibility of queering international human rights' in Dianne Otto eds *Queering International Law* (Routledge 2017)

²⁴⁸ Aeyal Gross (2017) 'Homoglobalism: The Emergence of Global Gay Governance' in Dianne Otto (ed) *Queering International Law*, Routledge, 148

at the Supreme Court. The Chief Justice, repeatedly recalls the presence of inclusion within Indian and Hindu society since before British colonisation²⁴⁹. He also raises these arguments in response to doubts raised about queer movement being a Western imposition²⁵⁰.

2.2 Yogyakarta Principles+10²⁵¹ a mere reconfiguration of heteronormative family models:

This argument of Dianne Otto fits into the previous arguments of this Chapter, i.e., a need for consistent and authentic identity formations will always exclude some. Otto argues specifically against Principle 24 (a-g) which covers right to found a family. This Principle directs States to take legislative and policy measures to secure rights available to heterosexual married couples to queer couples as well. The focus of the Principle on interests of children and reproductive rights is questioned by Otto. This is because it ignores queer critiques of monogamous heterosexual families. Critiques being the abuse within power relations of heteronormative family models and the lack of focus on pleasure of sex outside of reproduction²⁵². It could be argued that Principle 24(b) can be interpreted to include diverse family forms that exist outside of monogamous couples striving for procreation, but within the context of the other provisions, it is a difficult interpretation to draw.

This critique is relevant to families found by hijra, kothi and meti as well, since their family model works outside of this model. Otto argues that the inclusion of queer family models within the existing institutions risk loss of identity and reinforcement

²⁴⁹ Padmakshi Sharma, 'Marriage Equality Petitions | Indian Culture Extraordinarily Inclusive, British Victorian Morality Code Was Imposed On Us: CJI DY Chandrachud' (LiveLaw, 27 April 2023) <<https://www.livelaw.in/top-stories/marriage-equality-petitions-indian-culture-extraordinarily-inclusive-british-victorian-morality-code-was-imposed-on-us-cji-dy-chandrachud-227381?infinitemscroll=1>> accessed on 22 May 2023

²⁵⁰ Times of India, 'Centre opposes legal recognition of same-sex marriage in affidavit to SC' (*Times of India*, 12 March 2023) <<https://timesofindia.indiatimes.com/india/centre-opposes-legal-recognition-of-same-sex-marriage-in-affidavit-to-sc/articleshow/98581026.cms>> accessed on 23 March 2023

²⁵¹ International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (10 November 2017)

²⁵² Dianne Otto, 'Queering Gender [Identity] in International Law' (2016) 33 *Nordic Journal of Human Rights* 4, p 315

of ‘normative power of status quo’²⁵³. This status quo could refer to the modern neoliberal State, the international legal system or heteronormative family models. Section 12 of Transgender Persons (Protection of Rights) Bill in 2019 was criticised by the hijra community specifically for this reason²⁵⁴. The provision protects right of residence and protection against discrimination by family members, since hijra and gender variant groups are at risk of social exclusion. However, the contested part of the provision is Section 12(3) which promises to rehabilitate transgender persons kicked out of their family homes. This promise is a threat to exclude hijra family models as a haven to find family for such identities. This provision thus is disappointing but in line with the values of Yogyakarta Principles+10 as the focus remains on assimilation of queer identities into stable and consistent institutions. This assimilation also ignores the long history of family values developed in hijra communities²⁵⁵.

2.3 Recognition/legitimacy is important when the other option is being a deviant:

Ratna Kapur talks about the importance of recognition through rights when it means legitimacy in public standing, economic and social inclusion and citizenship²⁵⁶. This right is obviously important when most gender and sexual minorities were previously criminalised in Nepal, India and Bangladesh. It is the next natural step. However, she warns of the slippery slope of ‘hegemonic communitarian approach’²⁵⁷ which delegates the power of identifying ‘authentic’ queer identities and their ‘correct’ modes of expression to a State. This delegation risks loss of identity. This delegation also risks loss of identity to a State working to please an international market. The answer to universalism or cultural relativism should not be to constitute the identity of the ‘other’. It is problematic to claim that the emergence of the ‘gay international’ influenced by dominant Western ideas of sexuality and sexual subjectivity, is a straightforward demonstration of Western imposition on non-Western cultures (as

²⁵³ Ibid

²⁵⁴ ‘Transgender Community In India Still Struggling For Right To Adopt Or Marry’ (*Outlook India*, 23 May 2023) <https://www.outlookindia.com/magazine/story/india-news-transgenders-in-india-still-struggling-for-right-to-adopt-or-marry/305202> accessed on 23 May 2023

²⁵⁵ Ibid

²⁵⁶ Ratna Kapur, ‘The (im)possibility of queering international human rights’ in Dianne Otto eds *Queering International Law* (Routledge 2017), p 3

²⁵⁷ Ibid p 7

suggested by academics)²⁵⁸. However, it is equally problematic to assume a homogenous ‘Rest’ in this equation, as the non-Western counterparts encompass diverse subsets with distinct cultural specificities, internal variations, and shared yet varied ‘ideologies, groupings, practices, and knowledge paradigms’²⁵⁹.

2.4 Recognition by the State does not imply support of the State or end of discrimination in society:

As evidenced in the definitions of hijra in Bangladesh, recognition does not imply recognition of voices of hijra or their expression. Similarly, in India, post-decriminalisation of homosexuality in 2013, there were several instances of hateful violence against queer people. One case involved the dismissal of Professor Ramchandra Siras from Aligarh Muslim University for gross misconduct. The misconduct in question was being gay. In 2010 a High Court ruling directed his reinstatement as a show of protection of fundamental rights to equality and privacy²⁶⁰. Despite this paper victory, Professor Siras was found dead in his home days after the ruling²⁶¹. This tragic example shows how mere assimilation, in order to be considered less objectionable to the cisgender and heterosexual majority, does not guarantee respect or protection. Instead, queer identities become implicated in the production of State’s power. They gain visibility and lose the ability to challenge State’s power over their identity.

3. The benefits of their interdependency

Discourse is an important asset as it carries the potential to construct and dismantle identities. The approach of discourse in a State, on characterisation of sexual and gender minorities, has the potential to include the excluded. Inclusion of lived experiences alone is a vital step towards actualisation of rights of the marginalised. Therefore, this section will elaborate how reliance on international human rights law

²⁵⁸ Joseph Massad, ‘Re-orienting Desire: The Gay International and the Arab World’ (2002) 14 Public Culture 361

²⁵⁹ Ratna Kapur, ‘The (im)possibility of queering international human rights’ in Dianne Otto eds *Queering International Law* (Routledge 2017), p 9

²⁶⁰ *Dr Shrinivas Ramchandra Siras v The Aligarh Muslim University* (2010) Allahabad HC Civil Misc. Writ Petition No. 17549

²⁶¹ ‘Why a gay Indian professor’s death inspired a film’ (*BBC*, 26 February 2016) <<https://www.bbc.com/news/world-asia-india-35638215>> accessed on 23 May 2023

to provide a platform for voices has gotten States one step closer to actualising its potential.

3.1 The importance given to identity is reasonable and important when it comes to addressing the discrimination within complex socio-economic and political context of each gender identity. To understand how Muslim trans-women face discrimination differently than Hindu hijras in India, there needs to be a context driven analysis of the subject in question. This analysis cannot be codified. It strives through lived experiences. Therefore, legal recognition of third-gender identity is a positive step forward for holding the State accountable to positive obligations of human rights due. It is however, made murky by putting the limelight purely on accessing third-gender/transgender/hijra certificates. This is because such identities can never be fully realised by such strict legal definitions.

3.2 International queer activism provides visibility in places that lack the means for discourse: In an interview for a report on gender identities of meti and hijra in Nepal, Mangala recalls her struggle to form an identity before terms like tesro lingi (third gender) were used²⁶². Nilam, as well, recalls how reading newspaper articles about international queer activism gave her esteem for her gender and sexual identity, ‘I came to know I also belong to them LGBTI community ... [before] I feel people maybe some disease I have something wrong or I did something wrong’²⁶³. This is a very important benefit of the international advocacy of queer rights. On a personal note, I too formed confidence about my sexuality only after learning about Western queer rights on the internet. The taboo and derision attached to non-conforming gender and sexual identities in India, Nepal and Bangladesh is difficult to overcome on an individual basis. Although retrospectively a questionable decision, references to international human rights law in Supreme Court judgements in Nepal and India were initially met with praise as they helped normalise queer identities.

²⁶² Amit Gerstein, “‘So What Are You?’: Nepali by Discourse’ (2020) 3 GW Undergraduate Review DOI: [https://doi.org/10.4079/2578-9201.3\(2020\).02](https://doi.org/10.4079/2578-9201.3(2020).02), p 24

²⁶³ Ibid

3.3 Western legal developments have moved on from gender markers: This change is also observed in the updated Principle 31 of Yogyakarta Principles, which rejects the use of gender markers for identification. It limits its use to only when its ‘relevant, reasonable and necessary’²⁶⁴. Since gender markers were observed to put a target on persons that did not conform to the normative expressions of their gender markers (F, M or X). NGO Transgender Europe applauded this development as according to them gender markers infringe upon right of privacy²⁶⁵. Similar developments can be observed in Dutch transport cards and some United States’ cities²⁶⁶. Additionally, Principle 31 is lauded to some extent for its direction to have ‘quick, transparent and accessible’²⁶⁷ gender recognition procedures. Although a step forward, dependency on the State for gender recognition in order to gain access to human rights, is simply made quicker through this addition.

²⁶⁴ International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (10 November 2017), principle 31

²⁶⁵ Lena Holzer, ‘Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10’ (2020) *International Journal of Gender, Sexuality and Law*, p 104

²⁶⁶ *Ibid*

²⁶⁷ International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (10 November 2017), principle 31

CHAPTER VI. Social Movements

In Nepal, India and Bangladesh, social movements regarding queer rights, ignored by the State are reported and monitored by civil society. The evidence collected by civil society has always been vital for advocacy and political change when it comes to marginalised communities that defy norms²⁶⁸. This section is divided into three parts. The first expands on the theory and background for this section, i.e., the relevance and importance of paying attention to civil society and background of key players in civil society. The second part explains the demands of social movements in Nepal, Bangladesh and India, specifically in reference to queer identities. The third part elaborates on how current legal protections have failed according to civil society. This section is further divided into three parts. The first of which highlights how several identities are excluded in practise because of the commonly used language of rights and its implementation. The second subsection focuses specifically on the right of recognition and how it fails to live up to its promise of legal protection. The final third subsection focuses briefly on a caste, class and religious implications of current laws.

1. Theory and background:

1.2 Theory:

This section is inspired by Alyssa Lynne's analysis of kathoey individuals in Thailand. They are gender non-conforming similar to hijra. She analyses the self-formation of kathoey in Thai society. According to her, they go through 'paired double consciousness'²⁶⁹. In how cisnormative as well as neo colonial oppression draw two veils before self-formation for the kathoey identity. The first veil divides kathoey from dominant cisgender world of Thai society. The second divides their self-formation between dominant transgender narrative in international community and their own community in Thailand. This analysis is used to explain the further oppression suffered by kathoey because of colonial hierarchies embedded within the international as well as national structure of society. This analysis is relevant for this section as it

²⁶⁸ Paul Chaney et al., 'Civil Society Organizations and LGBT+ Rights in Bangladesh: A Critical Analysis' (2020) 15 *Journal of South Asian Development* 2 184, 208

²⁶⁹ Alyssa Lynne, 'Paired Double Consciousness: A Du Boisian Approach to Gender and Transnational Double Consciousness in Thai Kathoey Self-Formation' (2021) 68 *Social Problems* 2 250, 266

aims to discuss where the national and international narrative forgot its civil society origins, in guiding development of language of queer rights.

In India, the development sector and the state adopt the transnational identity over and above the local. The identity of being transgender is prioritised, although it does not sufficiently encompass all queer identities specific to the region. This process according to Aniruddha Dutta and Raina Roy, ‘bolsters the long-standing and continuing (post)colonial construction of hierarchies of scale between transnational, regional, and local levels of discourse’²⁷⁰; i.e., positioning hegemonic anglophone queer identities’ (Lesbian Gay Bisexual Transgender Queer Intersex Asexual+) discourse as being recognised by the State and the development sector while recognising gender/sexual variant identities as regional. This pattern of positioning identities like hijra as ‘local’ is common in Nepali and Bangladeshi State politics as well. In order to have legal identities that are more ‘stable, consistent and authentic’²⁷¹, the use of terms like ‘third gender’ (India), ‘hijra’ (Bangladesh) or ‘other’ (Nepal) work just to distinguish transgender from cisgender and homosexual identities. However, the basis of identity formation within these communities is not just gender but also caste, class, religion, language etc. State’s priority to maintain a consistent, stable and authentic identity to ensure citizenship rights relegates such variance to ‘local’ and thus feeds into the colonial hierarchy of identity formation.

1.3 Background:

In the late-1990s, non-governmental organizations (NGOs) began their efforts concerning the hijra, focusing on various forms of male-to-male sexualities. Initially, two separate organizations emerged with a specific focus on the hijra. The Bandhu Social Welfare Society, an NGO primarily addressing ‘men having sex with men’, established a project-based organization called Sustho Jibon in 2001. Additionally, Care International set up Badhon, another NGO specifically targeting the hijra community in the same year. The decision to establish separate NGOs for the hijra was based on the recognition that this group possesses distinct characteristics and specific sexual health requirements that set them apart from other communities. While

²⁷⁰ Aniruddha Dutta and Raina Roy, ‘Decolonizing Transgender in India’ (2014) 1 *Transgender Studies Quarterly* 3 p 321

²⁷¹ *Ibid*

there was initially a clear distinction between those working for NGOs and those engaged in traditional hijra occupations, over time, the boundaries have become blurred, with hijras associated with NGOs maintaining strong connections with the traditional hijra occupation and vice versa²⁷². Additionally, hailed as the ‘embodiment of NGO hijra’ in Bangladesh is Joka Sikder²⁷³. They were elected as representative of sex workers network of Bangladesh. The voters mostly comprising of female workers. This shows the prevalence of hijra in sex work industry.

Sunil Pant, a previously unemployed computer engineer and queer activist, is now Nepal’s first openly gay member of its Constituent Assembly and thus responsible for helping draft Nepal’s Constitution²⁷⁴. He is credited for registering Blue Diamond Society. The queer rights non-governmental organisation responsible for bringing the Supreme Court petition that helped establish legal recognition of hijra and metis in Nepal²⁷⁵. This example is one of many that indicate the importance of civil society. Importance in not only bringing queer rights into legal fruition but also representing the wants of the marginalised community in a bottom-up approach.

International law also plays a part in how civil society advocacy works with the State. This has its pros and cons. Central interlocutors in the interaction between global civil society and government agencies are queer activists, who facilitate the recognition of sexual minorities within individual nation-states. This recognition is often informed by internationally accepted covenants such as the UDHR or the standards outlined by the World Health Organization (WHO) (for accessing safer gender affirmation surgeries)²⁷⁶. While autonomous decisions are made by each country on how to recognize sexual minorities, the involvement of queer activists bridges the gap between global and local spheres, ensuring that internationally recognized principles inform these processes. The development of Yogyakarta Principles + 10 since 2017 is a positive development as it represents to certain extent the current demands of civil

²⁷² Adnan Hossain, ‘The paradox of recognition: hijra, third gender and sexual rights in Bangladesh’ (2017) 19 *An International Journal for Research, Intervention and Care*, p 1423

²⁷³ *Ibid*

²⁷⁴ *The Constitution of Nepal 2015* (2072.6.3)

²⁷⁵ *Sunil Babu Pant and Others v. Nepal Government and Others*, Supreme Court of Nepal (21 December 2007) 2 *NJA Law Journal* 2008

²⁷⁶ Dipika Jain, ‘Law, gender identity, and the uses of human rights: The paradox of recognition in South Asia’ (2021) 20 *Journal of Human Rights* 1, 2

society. The con of international law's influence, aside from the underlying colonial hierarchy of identities as mentioned above, is its related focus on HIV support NGOs above all else²⁷⁷.

2. What does civil society want?

2.1 Nepal

The Blue Diamond Society is the currently one of the main NGOs holding up the fort for gender and sexual minorities in Nepal. It serves two important functions in the day-to-day of this community. Firstly, they provide access to the State, i.e., they help file complaints against police abuses and work as intermediary in advocating for the minorities to the police and Human Rights Commission²⁷⁸. Their second function is providing access to safe sex resources. There is also the Human Conscious Society, which aims to reduce discrimination against sexual/gender minorities, increase their access to education, income and political representation. These two NGOs are important to note as they work with the community the most according to Amit Gerstein²⁷⁹.

2.2 Bangladesh

NGOs initially wanted recognition of gender variant identities but at its heart was a moral imperative to cure victims of genetic defects under the umbrella of 'hijra'²⁸⁰. Herein comes the strategic activism deployed by NGOs working in a system stacked against them. The imperative to cure hijra came from cultural understanding of their identity as not a choice, as opposed to homosexuality which was seen as a choice imposed by Western influences²⁸¹. NGOs wishing to protect non-conforming gender identities thus turned their focus to public demands for legal recognition instead of discussing sexuality of the marginalised.

2.3 India

²⁷⁷ Ibid p 16 "As Tellis (2012) highlights, the politics of funding that global governance facilitates protects elitism in social justice movements at the expense of radical, grassroots mobilization, and domesticates social justice to a career option." P 9

²⁷⁸ Amit Gerstein, "'So What Are You?'" Nepali by Discourse' (2020) 3 GW Undergraduate Review DOI: [https://doi.org/10.4079/2578-9201.3\(2020\).02](https://doi.org/10.4079/2578-9201.3(2020).02) p27

²⁷⁹ Ibid p16

²⁸⁰ Dipika Jain, 'Law, gender identity, and the uses of human rights: The paradox of recognition in South Asia' (2021) 20 Journal of Human Rights, p 1424

²⁸¹ Ibid

The presence of NGOs in India is difficult to encapsulate in brief as it differs within states as well as along methods of advocacy. A qualitative inquiry by Apoorva Ghosh examined five LGBTQ organizations in India, taking into account the intersections of post-colonial ethnicity, gender, social class, and sexuality. The study suggests that LGBTQ organizations in India can challenge homonormativity and other forms of domination while simultaneously conforming to the diversity politics of non-profit businesses, donors, and social movement organizations, making them ‘respectably queer.’²⁸² The results focused on representation of homosexual identities more than non-conforming gender identities. This is indicative of how queer rights NGOs in India prioritise certain rights above others. Specifically, inclusion of ‘homonormative ‘HIV/AIDS industry’²⁸³ which attract the support of the State, the development sector as well as corporations. Only the NGOs that wish to distance themselves from ‘donor politics’ that involve pleasing foreign donor narratives, focus on supporting rights of hijra communities²⁸⁴.

In 2008, the United Nations Development Programme (UNDP) supporting India’s AIDS program, conducted consultations to identify gaps in HIV/AIDS infrastructure. During these consultations, prominent activists at the upper level advocated for more comprehensive and specific provisions for transgender individuals, encompassing not only hijras but also other transgender identities. However, they also acknowledged the ambiguity surrounding the definition of transgender²⁸⁵. As a response, the UNDP funded regional consultations in 2009, organized by prominent NGOs in major cities, with the aim of developing a unified transregional definition of transgender in collaboration with community representatives. ‘Transgender’ was conceptualized as an inclusive term, encompassing both hijras and kothi individuals. Hence, the strategy to lump several identities under one has been used by civil society as well. The difference being, the interests of all the identities were the same in this instance – protection against HIV AIDs. The same cannot be said of State lumping several identities under one as the interests served vary largely. The interests vary based on

²⁸² Apoorva Ghosh, ‘LGBTQ Activist Organizations as ‘Respectably Queer’ in India: Contesting a Western View’ (2015) 22 *Gender, Work and Organisation* 52, 66

²⁸³ *Ibid* p 55

²⁸⁴ *Ibid* p 59

²⁸⁵ UNDP, ‘Missing Pieces: HIV Related Needs of Sexual Minorities in India.’ (2008)
<http://www.ph.undp.org/content/dam/india/docs/msm_publications.pdf> (accessed April 19, 2023)

class, caste, religion but also vary on the basis of sexuality, culture of the community etc. The interests of legal protection, marriage equality, voter status, healthcare, education and employment differ in relevance in varying degrees, depending on the identity.

The overwhelming presence of NGOs supporting sexual minority rights has overshadowed rights of gender minorities. Even when discussed as a priority, gender minorities tend to be reduced to a monolith that excludes lower caste and Muslim minorities within the community²⁸⁶. This is to say nothing of representation demanded by transwomen and transmen, who are excluded from the narrative in an effort to have a ‘stable, consistent and authentic’ identity for advocacy. This makes it hard for them to explain their identity especially to government officials and medical providers²⁸⁷.

3 Failures in practise:

3.1 Nepal:

There is a tendency for NGOs to assist sexual and gender minorities through sexual health projects like HIV/AIDS research as they attract the most traction from foreign donors²⁸⁸. Terms like MSM (Men who have Sex with Men) are often used in public health discourse but using this term while discussing sexual and gender minority rights excludes several populations as they do not choose this term as a part of their identity²⁸⁹. Meti, the dominant non-conforming gender identity in Nepal, is not formed on the basis of sexuality alone but on the basis of culture. HIV research projects focus on those with higher risk of spreading and contracting HIV and thus fail to account for a more in-depth analysis of other demands of sexual and gender minorities.

²⁸⁶ Ashley Tellis, ‘Disrupting the Dinner Table: Re-thinking the ‘Queer Movement’ in Contemporary India’ (2012) 4 *Jindal Global Law Review* 142, 156

²⁸⁷ Priti Salian, ‘Protecting Trans Lives Goes Deeper Than Laws and Representation’ (*Newint*, 8 March 2023) < <https://newint.org/features/2023/03/08/india-trans-rights-decolonize-how> > accessed on 13 March 2023

²⁸⁸ Amit Gerstein, “‘So What Are You?:’ Nepali by Discourse’ (2020) 3 *GW Undergraduate Review* DOI: [https://doi.org/10.4079/2578-9201.3\(2020\).02](https://doi.org/10.4079/2578-9201.3(2020).02), p19

²⁸⁹ S. L. Pigg, ‘Expecting the Epidemic: A Social History of the Representation of Sexual Risk in Nepal’ (2002) 2 *Feminist Media Studies* 97, 125

This lack of in-depth analysis has had consequences in census data collection even after ‘third gender’ was added as a category in 2011²⁹⁰. Aside from reluctance to identify as third gender and put a target on one’s back, census workers were ill equipped to understand which identities constituted third gender.

The lack of instructions by the State on deciding the extent of this new identity also allowed room for exploitation by state agents. Honey, a meti who is married to a woman and has children, for instance, was considered by officials as unworthy of this identity change. According to her, “I was told by some of the TGs at the central office I should not attempt to change my nàgarikatà [citizenship paper] ...I think after the Supreme Court decision, some people decided it was for them and not for others, but when the decision came, Sunil-sir said it was for all of us, not just the TGs who can afford make-up and [to rent] rooms down town.”²⁹¹ This interaction indicates not only a lack of understanding of meti as an identity but also a wilful neglect on the part of the State to prevent such exploitation by its agents. The need for several levels of bureaucracy to recognise an identity that is self-formed, defeats the purpose of the legal rights that protect them.

Since gender variant minorities like meti form a huge portion of the sex work industry in Nepal²⁹², there is a need for specific legal protection against sexual violence. This need exists because rape is currently defined as ‘Where a man has sexual intercourse with a woman without her consent’²⁹³. This definition excludes any gender variant victims from accessing justice. As sex work remains illegal, police abuse is rampant in the community²⁹⁴.

²⁹⁰ United Nations Development Programme (UNDP), ‘Surveying Nepal’s Sexual and Gender Minorities: An Inclusive Approach’ (2015) Williams Institute < <https://www.undp.org/asia-pacific/publications/surveying-nepals-sexual-and-gender-minorities-inclusive-approach> > accessed on 4 March 2023 p ix

²⁹¹ Kyle Knight, ‘Outliers: Sunil Babu Pant, the Blue Diamond Society, and Queer Organizing in Nepal’ (2014) 19 Studies in Nepali History and Society p 135.

²⁹² United Nations Development Programme (UNDP), ‘Surveying Nepal’s Sexual and Gender Minorities: An Inclusive Approach’ (2015) Williams Institute < <https://www.undp.org/asia-pacific/publications/surveying-nepals-sexual-and-gender-minorities-inclusive-approach> > accessed on 4 March 2023, p 61

²⁹³ Muluki Criminal Code 2074, Chapter 18, Section 219 (2)

²⁹⁴ Tsering D Gurung ‘Death of a transgender woman raises alarm among Kathmandu’s trans community’ (*Kathmandu Post*, 11 March 2019) <https://kathmandupost.com/national/2019/03/11/death-of-a-transgender-woman-raises-alarm-among-kathmandus-trans-community> accessed 24 May 2023

3.2 Bangladesh

Poor implementation of legal protections does not begin to cover the failures of the State. There is an assumed impunity when it comes to attacks against hijra and gender variant groups. This is because police not only fail to investigate incidents but also fail to prevent further abuse. In 2016, Xulhaz Mannon was hacked to death after being named in a published hit list called ‘enemies of Islam’. The eight people recently charged with their murder are found to be linked to al-Qaeda. This hit on their name is also worrying because of the victim’s close friendship to one of the leading activists for the hijra community in Bangladesh- Ananya Banik. As she continues to receive death threats despite the arrest²⁹⁵.

Similar feelings of tokenism as expressed by Nepalis - in the prioritisation of HIV healthcare above other demands, is observed in Bangladesh. Some hijra expressed a sense of being taken advantage of by NGOs who utilize them as symbolic figures in their promotional campaigns. According to one hijra, many NGOs only involve them in events like World AIDS Day or health rallies but neglect them for the rest of the year. Although hijra receive compensation of 350-400 Taka for their participation in these rallies, their interaction with the NGOs does not extend beyond the event. Hijra also shared that while they have engaged in programs supported by international donors and human rights organizations, they often perceive these initiatives as mere superficial gestures towards addressing the health needs of their community²⁹⁶.

Similarly, hijra in Bangladesh often succumb to sex work. This is because of several factors – systems within the State that do not make room for non-conforming identities as well as a society that discriminate against hijra identity at every stage of life. Including early years of education, healthcare services and job seeking²⁹⁷. Many hijra

²⁹⁵ Joe Wallen, ‘Pride and persecution The rise and fall of the world’s oldest transgender community’ (*The Telegraph*, 13 July 2019) <<https://www.telegraph.co.uk/news/hijra-transgender-bangladesh/>> accessed 20 March 2023

²⁹⁶ Abdul Aziz and Sameena Azhar, ‘Social Exclusion and Official Recognition of Hijra in Bangladesh’ (2019) 9 *Journal of Research on Women and Gender* p 10

²⁹⁷ Joe Wallen, ‘Pride and persecution The rise and fall of the world’s oldest transgender community’ (*The Telegraph*, 13 July 2019) <<https://www.telegraph.co.uk/news/hijra-transgender-bangladesh/>> accessed 20 March 2023

do not bother with healthcare services because of the pattern of discrimination faced by most in their community²⁹⁸.

Lack of access to education and class mobility for hijra also implies lack of access to advocacy opportunities. The hopeful consequence of the legal recognition of hijra identity was inclusion within the queer rights movement in Bangladesh. In line with this hope, Boys of Bangladesh initiated a workshop, funded by Norwegian donors, that would pave the way for future collaborative work²⁹⁹. This workshop was also meant as a response to the critique of queer rights movement being too HIV work focused. The unfortunate observance at this workshop according to Adnan Hossain, was the difference in class and cultural capital between community representatives. Gay men were observed to be mostly from middle to upper middle classes while hijra were at the bottom rung. However, because of the recent legal recognition of hijra identity, their political capital was more influential than that of gay men. Hijra representatives were also observed to be the most vocal in terms of asserting their long-running presence in Bangladeshi society. Still, their NGOs were 'subservient to the NGOs working with men having sex with men'³⁰⁰. This is because the hijra NGO representatives' lack of literacy prevented them from persuading foreign donors as well as self-funding their own organisations.

3.3 India

Similar to Nepal, the lack of clear understanding of what constitutes 'hijra' or 'kothi' has caused inter-communal conflicts. This is because access to rights is guarded by inclusion of an identity within this umbrella term. In a conference arranged for new HIV-AIDs intervention program (funded by Global Fund to Fight against AIDS, Tuberculosis and Malaria), Raina Roy recalls an incidence that highlights this conflict. Kothi, during advocacy for HIV-AIDs healthcare, were classified as MSM. This changed with the legal recognition of 'transgender' by the State. Thus began the hunt for rights on the basis of a legal identity. She recalls 'where one set of activists accused other activists, who had previously identified as kothi and MSM, of being

²⁹⁸ Abdul Aziz and Sameena Azhar, 'Social Exclusion and Official Recognition of Hijra in Bangladesh' (2019) 9 *Journal of Research on Women and Gender* p 10

²⁹⁹ Adnan Hossain, 'The paradox of recognition: hijra, third gender and sexual rights in Bangladesh' (2017) 19 *Culture, Health & Sexuality* 12, p 1423

³⁰⁰ Ibid

men who were masquerading as TG (transgender) to gain funds’, another activist mentioned her identity as ‘hijra by profession, TG by gender identity, and MSM by sexual behaviour’³⁰¹. The consequent confusion ended in advocacy groups eventually dropping kothi as a term³⁰². This conflict much like the conflicts in Nepal with Honey illustrate not only a bureaucracy pitfall but also the consequence of creating hierarchies between international identities and local identities. As suggested by Alyssa Lyne (subsection 1.2), self-formation of identity here is under conflict because of two reasons. One layer of conflict is with the mainstream cisgender society. While another layer is caused by the international standard of recognised identities reinforced by the State.

These examples illustrate how legal protections in Nepal, India and Bangladesh are not enough if implementations do not live up to its promises. Currently the legal protections seem to be mere words on paper. The examples also bring to light an important part of this community- being a part of a community. Since gender and sexual minorities are socially excluded and discriminated against in most walks of life, their dependence on their community is huge. This is important to note as efforts to wipe out non-conforming family structures threatens this remaining safety net. This threat is seen in laws designed to ‘rehabilitate’ hijra whose biological family has abandoned them³⁰³.

4. Right to recognition is moot

4.1. Nepal:

Proof of how transposing international understanding of identities into local settings does not always work is the gender markers used for ‘third gender’ in Nepal. This is proven through two reasons. Firstly, to apply for citizenship as the new gender marker the certificates allow only for the term ‘Others’ alongside male and female³⁰⁴. This indicates the treatment of this gender identity by the State. It is not a matter of pride or validity but a recognition of literal otherhood. The second reason is the 2012

³⁰¹ Aniruddha (Ani) Dutta and Raina Roy, ‘Decolonizing Transgender in India: Some Reflections (with Raina Roy)’ (2014) 1.3 *Transgender Studies Quarterly* p 329

³⁰² *Ibid*

³⁰³ *Transgender Persons (Protection of Rights) Act, 2019*, sec 12(3)

³⁰⁴ Rukshana Newa, ‘The intricacy of legal gender recognition in Nepal’ (*YouthVoicesCount Asia Pacific*, 15 January 2020)

directive provided by the Ministry of Home Affairs in interpreting what identities ‘Other’ covers. In Nepali (Parbate Kura), the national language, there is no distinction made between gender and sexuality. Therefore, ‘Other’ according to the State includes ‘Lesbian, Gay, Bisexual, Transgender and Intersex-ed people’³⁰⁵. This inclusion of sexualities with gender identities has only spurred more confusion in the implementation of right to recognition. Especially when it comes to international travel. As evidenced by the confusion at immigration desk of Tribhuvan International Airport in Nepal, where Nepali passports with ‘O’ (other) gender marker were not recognised by their computers³⁰⁶.

Since the Supreme Court verdict³⁰⁷ granting this right only refers to it in the capacity of citizenship, there is no mention of allowing for name change. Additionally, the gender marker ‘Other’ is to be used as a pronoun; i.e., honourific titles included in birth certificates, school certificates and citizenship certificates will be daughter/son/child/other, Mister/Miss/Mrs/M/Other³⁰⁸. This bizarre placement is attributed to the lack of understanding of gender and the purpose of legally recognising minority gender identities. This lack of understanding is not because the concept of gender variant identities is new to Nepali culture. It is because of the State’s disregard for its local identities while attempting to fulfil international obligations. Moreover, since gender markers in legal documents relevant for house ownership, school certificates and birth certificates cannot be changed before changing citizenship certificate, and citizenship certificates require consistency in all other legal documents for change³⁰⁹, there is room for more confusion.

4.2. Bangladesh:

The Bangladeshi government suffers from further misunderstanding of gender variant identities as even their recognition is marred by a classification of disability. According to the press release on the Cabinet’s decision to recognise hijra as a gender,

³⁰⁵ Ibid

³⁰⁶ Rukshana Nawa, ‘The intricacy of legal gender recognition in Nepal’ (YouthVoicesCount Asia Pacific, 15 January 2020)

³⁰⁷ Sunil Babu Pant and Others v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007) 2 NJA Law Journal 2008, pp. 261-286

³⁰⁸ Rukshana Kapali, ‘Moving beyond two, stuck in three’ (*Kathmandu Post*, 16 November 2018) <<https://kathmandupost.com/opinion/2018/11/16/moving-beyond-two-stuck-in-three>> accessed 20 May 2023

³⁰⁹ Civil Registration Act, 2024 (1968); Ibid

‘Biologically, hijras or hermaphrodites or transgenders show both male and female sexual characteristics and organs – usually the result of chromosomal or hormonal defects or complications arising from psychological problems.’³¹⁰

There is similar bureaucratic confusion in Bangladesh. Both the official notification in the Gazette and the decision made by the Cabinet failed to provide a precise process for changing legal gender identity³¹¹. As a result, different government entities had the freedom to implement their own methods of identification. For instance, national identity cards now offer a ‘Hijra’ category alongside ‘male’ and ‘female’, while passports have an ‘Other’ category in addition to ‘male’ and ‘female’. Furthermore, certain government forms, such as account opening application forms for State-run banks, now incorporate a ‘third gender’ category³¹². This confusion is again a result of transposing international gender identities into local settings without consideration of context or culture. The lack of cohesive implementation within the State’s own identification system alludes to this lack of consideration as well.

There is a reported trend of frustration in the community with the process of registering under the new gender category. This frustration has led to hijra from accessing employment opportunities as well as access to making legal claims of discrimination³¹³.

4.3 India

When the current Transgender Persons (Protection of Rights) Act, 2019 (‘the Act’) was introduced, many activists opposed it. There were protests in against it in several parts of India³¹⁴. One of the biggest reasons for the protest as well as a subsequent

³¹⁰ Press Release Bandhu Bangladesh Organisation, ‘Bangladesh has officially recognised hijras, or transgenders as a separate gender or the third sex.’ (2013) <https://www.bandhu-bd.org/bangladesh-has-officially-recognised-hijras-or-transgenders-as-a-separate-gender-or-the-third-sex/> accessed 29 March 2023

³¹¹ Department of Immigration and Passports, Government of Bangladesh, Machine Readable Passport Application Form 12, p 2 http://passport.gov.bd/Reports/MRP_Application_Form%5bHard%20Copy%5d.pdf accessed 23 March 2023

³¹² Abdullah Titir, ‘From Recognition to Realising Rights: Legal Protection of Gender Identity in Bangladesh Law’ (2019) Bangladesh Legal Aid and Services Trust < <https://www.blast.org.bd/content/publications/Policy-Brief-Hijra-and-GDC-Rights.pdf> > p 2

³¹³ Abdul Aziz and Sameena Azhar, ‘Social Exclusion and Official Recognition of Hijra in Bangladesh’ (2019) 9 Journal of Research on Women and Gender p 11

³¹⁴ G. Ram Mohan, ‘Halt Implementation of the Trans Act 2019: Activists’ (*The Wire*, 5 June 2020) < <https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists> > accessed 20 March 2023

petition³¹⁵ is how it violates a previous judgement that guaranteed legal protection for all gender and sexual minorities, i.e., NALSA judgement³¹⁶. The Act passed with minimum changes to its Bill and is now the relevant law for obtaining government issued identity cards that reflect changed gender identities³¹⁷. The petition to declare the Act unconstitutional was submitted by Assam state's first transgender judge Swati Bidhan Baruah. This indicates how firstly, reservations for marginalised communities like gender variant identities, is beneficial for creating better access to employment. It also indicates why it is important to consider the civil society's demands when there is no representation of the marginalised community within the State's system (i.e., the legislature, judiciary and executive branches).

Without delving too deep into Indian law, the petition's arguments posed against the Act include:

1. Whether Section 18(d) of the Act arbitrarily sets the maximum penalty for sexual abuse against transgender persons as less than what it is for sexual abuse against women under Section 376 of the Indian Penal Code, 1860? This is to imply whether the treatment of rape of transgenders under law is unequal to treatment of rape of women. This is a difficult argument to make as there is inequality in the construction of the penal code provision even against men. Yet, this provision is a welcome protection for transgender sex workers in India, which is estimated to be in one million transgender women³¹⁸.
2. Whether Section 7 of the Act violates the right to self-identify one's gender, by making transgender identity contingent on medical surgery? Is Section 7 in contradiction with 'NALSA' and thereby violative of right to life and dignity? Section 7 requires sex reassignment surgery certificate in order to change legal gender. The process of applying for gender change is clearer in India than Bangladesh. However,

³¹⁵ Shruti Mahajan, 'SC agrees to hear petition filed by Assam's first transgender judge challenging validity of Transgender Act, 2019' (*Bar and Bench*, 27 January 2020) <<https://www.barandbench.com/news/litigation/sc-agrees-to-hear-petition-challenging-validity-of-transgender-protection-of-rights-act-2019>> accessed on 19 April 2023

³¹⁶ National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863

³¹⁷ Transgender Persons (Protection of Rights) Act 2019, sec 4

³¹⁸ Michael Edison Hayden, 'After Koovagam, India's Largest Transgender Carnival' (*PulitzerCenter Aljazeera*, 2 July 2014) <<https://pulitzercenter.org/stories/after-koovagam-indias-largest-transgender-carnival#:~:text=In%20the%20meantime%2C%20the%20vast,work%20to%20earn%20a%20living.>>> accessed on 4 May 2023

it does not help in protecting the agency of the community members. Requirements under Transgender Persons (Protection of Rights) Rules, 2020 and the Passport Seva website Form 002/miscellaneous services³¹⁹ create several barriers. First and foremost, there is a need for sex reassignment surgery. This alone violates the Right to Bodily and Mental Integrity under Principle 3 and 32 of the Yogyakarta Principles +10. This right was reiterated by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment as well as the Committee on Economic, Social and Cultural Rights³²⁰.

3. Whether Section 12 restricts the decisional autonomy of adult transgender persons and threatens the alternative family structures of the transgender community? Section 12 of the Act deals with right of residence as transgender people are often socially excluded from their biological families. Section 12(3) of the Act states ‘Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre’. This is what the argument alludes to. It is common knowledge that hijra community in India usually reside together- be it out of necessity or want. This provision removes the autonomy of an adult transgender person from residing within their community and will instead be ‘rehabilitated’. This invalidates the importance of community in gender variant identities like hijra in India.
4. Whether Sections 4, 5 and 6 of the Transgender Persons (Protection of Rights) Act, 2019 constrict the right to self-identity one’s gender and thereby violate the fundamental rights flowing from Articles 19(1)(a) and Article 21³²¹? These sections list the process of changing legal gender identity. They put the burden on the applicant while the control stays with the State. It is argued that these sections violate the fundamental right to life as well as the right to freedom of speech and expression under the Constitution. This argument has certain legal backing as the NALSA

³¹⁹ ‘Documentation of gender change for transpeople’ (*Orinam*, 2017) < <http://orinam.net/resources-for/lgbt/legal-resources/tg-documentation/> > accessed 14 March 2023; See:

<https://www.passportindia.gov.in/AppOnlineProject/search>

³²⁰ Committee on Economic, Social and Cultural Rights UN Doc A/HRC/31/57 paras 49 and 72; Committee on Economic, Social and Cultural Rights ‘General Comment 22’ on ‘the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2 May 2016) UN Doc E/C.12/GC/22, paras 56-57

³²¹ The Constitution of India 1949

judgement of the Supreme Court relied on these fundamental rights to guarantee legal protection to gender variant identities³²².

The protests demand for reservation clause in the Act, as well as classifying transgender people as a socially and economically backward class has met a solid no from the Central Government³²³. According to activists, the welfare provisions (one section, as opposed to four sections of the Act on process of identification) are merely for show³²⁴. The right to appeal under the Act lacks any information on the appellate authority to seek as well as the minimum days of appeal.

The requirements also include attachment of newspaper advertisement and application to employer on the change of identity card³²⁵. This public publication of personal information is an easy way to put a target on a marginalised identity group. Some activists reacted to the intrusive requirements of the Act by calling it a ‘colonial hangover’³²⁶.

It is clear from the construction of the Act that the problem in the case of India is also incohesive administration as well as deliberate attempt to control agency of gender variant identities. Aside from the mentioned drawbacks of lumping several different identities under one umbrella term that is not of local origin (‘transgender’ as opposed to socio-cultural identities like kinner, hijra, nupi manbi/nupi manba, thirunambi/tirunangai, jogta/jogappa, mangalamukhi, aravani and shivashakti among others), there are other practical demerits observed in India. Sharma, a transgender (since no other identity is possible), has been waiting for fourth months for his identity card. This wait has delayed his secondary school exams which require correct legal documents³²⁷. The delays are

³²² National Legal Services Authority (NALSA) v. Union of India (2014) AIR 2014 SC 1863, para 69 and para 66

³²³ Abhinay Lakshman, ‘No separate policy under consideration for jobs to transgender persons: Centre’ (*The Hindu*, 30 March 2023) < <https://www.thehindu.com/news/national/no-proposal-under-consideration-to-provide-suitable-govt-jobs-to-trans-people-govt/article66676109.ece>> accessed 21 April 2023

³²⁴ G. Ram Mohan, ‘Halt Implementation of the Trans Act 2019: Activists’ (*The Wire*, 5 June 2020) < <https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists>> accessed 20 March 2023

³²⁵ ‘Passport for LGBTQ+ Persons’ (*Nyaaya*, 16 June 2022) < <https://nyaaya.org/legal-explainer/passport-for-lgbtq-persons/#:~:text=The%20Passport%20officials%20may%20ask,complain%20to%20the%20Passport%20authorities.>> accessed 20 May 2023

³²⁶ G. Ram Mohan, ‘Halt Implementation of the Trans Act 2019: Activists’ (*The Wire*, 5 June 2020) < <https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists>> accessed 20 March 2023

³²⁷ Priti Salian, ‘Protecting Trans Lives Goes Deeper Than Laws and Representation’ (*Newint*, 8 March 2023) < <https://newint.org/features/2023/03/08/india-trans-rights-decolonize-how>> accessed on 13 March 2023

attributed according to Banu's experience because the relevant authority, District Magistrate or advocates, often ignore the procedure of the Act. They either ask for more proof or ignore applicants entirely³²⁸. The reliance on criminal allegation of 'false claims'³²⁹ by the District Magistrate further removes access to this right of recognition. The loopholes in the system that create red tape barriers is also seen from the estimated 11,159 transgender IDs issued (as of 7 March 2023) from the estimated 1.9 million population (2011 survey)³³⁰. This is further emphasised by Baruah's core argument in her petition 'that the provisions of the Act reinforce prejudice against the marginalised community instead of attempting to eliminate the same.'³³¹.

5. Place of class, caste and religion in an identity

There is an observed attempt by transgender women to distance themselves from hijra community, especially by highlighting their class status. Campaigns by upper class and upper caste transwomen were seen especially by an NGO called Transgender India in 2016, where five professionally successful transwoman held up placards reading 'I am not hijra' in a conversation about their freedom³³². This shows that although the hijra community often benefit from its Hindu affiliation in a Hindu majority nation, the stigma attached with their community is rampant in Indian culture.

In present-day India, there are efforts by transwomen activists from upper caste Brahmin backgrounds to 'saffronize' and 'reclaim' the religious status of transgender individuals within Hinduism. This political agenda, supported by Hindu nationalist parties like the Bharatiya Janata Party (BJP), aims to 'sanitize' certain gender and sexual minorities. Notably, the Kinnar Akhara led by Laxmi Narayan Tripathi openly endorses the construction of a Ram Mandir, a Hindu temple dedicated to Lord Ram, at the Ayodhya

³²⁸ Ibid

³²⁹ G. Ram Mohan, 'Halt Implementation of the Trans Act 2019: Activists' (The Wire, 5 June 2020) <<https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists>> accessed 20 March 2023

³³⁰ Priti Salian, 'Protecting Trans Lives Goes Deeper Than Laws and Representation' (Newint, 8 March 2023) <<https://newint.org/features/2023/03/08/india-trans-rights-decolonize-how>> accessed on 13 March 2023

³³¹ Shagun Suryan, 'International Transgender Day of Visibility: 9 years on, have we met the benchmark of the Supreme Court's NALSA judgment?' (*Bar and Bench*, 31 March 2023) <<https://www.barandbench.com/news/litigation/international-transgender-day-visibility-nine-years-on-benchmark-nalsa-judgment>> accessed 20 April 2023

³³² Durga M Sengupta, 'I Am Not A Hijra: A damaging, offensive Transgender India photo campaign' (*CatchNews*, 10 February 2017) <<https://www.catchnews.com/gender-and-sex/i-am-not-a-hijra-a-damaging-offensive-transgender-india-photo-campaign-1471618717.html>> (Video has since been taken down)

site where the Babri Masjid once stood³³³. This site has been a source of communal tensions between Hindus and Muslims for many years.

However, the transgender movement has strongly opposed this stance. A total of one hundred and eighty-three individuals who identify as trans, intersex, and gender diverse, in addition to various queer groups and ally organizations, expressed their opposition to this action. They utilized social media platforms and penned open letters to denounce the statement of support from Kinnar Akhara³³⁴. They emphasized that such support would harm the inclusive nature of transgender communities and have a negative impact on the secular values upheld by society.

The divide among Hindu and Muslim communities clearly persists within queer communities too. With Hindu NGOs being at the forefront by propagating assimilation of queer movement in a 'Hindu nation'. Humsafar Trust, a well-known non-profit organization in India that supports gay and transfeminine individuals, was founded by Ashok Row Kavi. Kavi, a prominent figure in the Indian gay movement and one of the first individuals to publicly come out in 1984, is known for his affiliation with Hindu right-wing politics according to Sayan Bhattacharya³³⁵. This aspect of Kavi's politics is evident in Nivedita Menon's introduction to the *Sexualities* anthology published in 2007³³⁶. She recounts an incident where the premises of Bharosa, an HIV-AIDS organization in Lucknow partnered with Naz International, were raided by the police in 2001. The employees of Bharosa were charged under previously criminalised homosexuality and obscenity laws. Kavi wrote an article at the time, highlighting and criticising the leadership role of Shivananda Khan, a Muslim of Anglo-Bangladeshi origin, in Naz Foundation. Kavi has consistently advocated for the assimilation of gay individuals within 'Hindu India' and maintains that India, as a Hindu-majority state, is tolerant of minority communities. It is important to mention Kavi's politics to emphasize

³³³ Dipika Jain and Debanuj DasGupta, 'Law, gender identity, and the uses of human rights: The paradox of recognition in South Asia' (2020) *Journal of Human Rights* p 11

³³⁴ Round Table India, 'Trans, Gender Nonconforming & Intersex Collectives Strongly Condemn Kinnar Akhara's Support For Ram Temple At Ayodhya, India' (4 November 2018) <<https://www.roundtableindia.co.in/trans-gender-nonconforming-gnc-intersex-collectives-strongly-condemn-kinnar-akhara-s-support-for-ram-temple-at-ayodhya/>> accessed 1 April 2023

³³⁵ Sayan Bhattacharya, 'The Transgender Nation and its Margins: The Many Lives of the Law' (2019) 20 *Sedition, Sexuality, Gender, and Gender Identity in South Asia*, para 7

³³⁶ Nivedita Menon, 'Outing Heteronormativity: Nation, Citizen, Feminist Disruptions' (2007) in Nivedita Menon (eds) *Sexualities, Women Unlimited and Kali for Women* (2007) p3, 51

that his majoritarian Hindutva politics have a significant influence on the hijras singing the national anthem and identifying themselves as Bharatiya, a Sanskrit term for Indian, during the pride parade. This connection highlights a longer history of using Hindu nationalism as a means for queer and transgender communities in India to assert their citizenship. These instances demonstrate how Hindu nationalism is being utilized as a platform for marginalized groups to claim their 'rightful place' within society.

It is important here to bring up the decriminalisation of homosexuality under BJP administration. This acceptance was not extended during the 2023 Supreme Court arguments on right to marriage equality for same-sex couples. The representative of the government 'discouraged the Supreme Court from guaranteeing sexual orientation as a fundamental right of Indian citizens, lest such a right promote incest, bestiality and sadomasochism' as well as reminding the court of the right's possible effects on the Hindu Marriage Act³³⁷. This indicates that in the eye of the State, marriage is different from sexual relations by being more vital to the family structure of the State. This structure cannot be compromised by the validation of same-sex marriages according to the State³³⁸ but consensual sex is permitted so long as it serves to make the State appear progressive.

³³⁷ Sayan Bhattacharya, 'The Transgender Nation and its Margins: The Many Lives of the Law' (2019) 20 *Sedition, Sexuality, Gender, and Gender Identity in South Asia*, para 9

³³⁸ Annika Burgess, 'With staunch religious and political opposition, will same-sex marriage be accepted in conservative India?' (ABC News, 3 May 2023) < <https://www.abc.net.au/news/2023-05-04/india-marriage-same-sex-lgbt-rights-religion/102266472> > accessed on 19 March 2023

Chapter VII: Theories to consider for future

This Chapter intends to discuss the various modes of removing barriers to justice outside of right of recognition. It is not meant to provide solutions but merely discuss potential approaches based on the previous chapters. It is divided into two parts. The first section lists various approaches. The second section provides counter arguments to probable defences against arguments presented in the thesis.

1.1. Remove identity focus:

The problems observed in Chapter VI and IV - related to poor implementation of rights, can be avoided if the focus is not on identity. In the United Kingdom for instance, there is a pattern of decrease in number of people applying for gender recognition certificate³³⁹. This is because people who identify as transgender ‘no longer need a gender recognition certificate to live free from harm and unfair treatment’³⁴⁰. They are instead protected by anti-discrimination laws and amended hate crime legislations³⁴¹.

1.2. Decolonise social movements:

As seen in Chapter VI, there is a hierarchy within the civil society. It places Global North funders and NGOs at the top and smaller community-based organisations at the bottom. As the guarantor of human rights, the State needs to pay attention to how this hierarchy manifests within the social movements of queer rights. Achieving the decolonization of transgender identities is unlikely to occur independently from the overhaul of the political and economic dynamics within social movements, the dismantling of hierarchies based on class, caste, and race, as well as the reconfiguration of developmental frameworks across different scales³⁴². It is important to emphasize that decolonizing transgender experiences is not merely about incorporating external cultural differences into existing structures and knowledge systems, but it is intricately intertwined with the deconstruction and democratization of queer activism.

³³⁹ FPFW, ‘Why do so few transgender people apply for a Gender Recognition Certificate?’ (*Fair Play For Women*, 13 January 2021) < https://fairplayforwomen.com/grc_numbers/ > accessed on 21 April 2023

³⁴⁰ Ibid

³⁴¹ Ibid: Equality Act 2010; 2012 amendment to Section 146 of Criminal Justice Act 2003

³⁴² Aniruddha Dutta and Raina Roy, ‘Decolonizing Transgender in India’ (2014) 1 *Transgender Studies Quarterly* 3, p 335

An illustration of how identity and recognition are shaped by the government can be seen in the context of forest ‘tribes’ in India. These indigenous communities are subject to contradictory representations, portrayed as the ‘protectors and original inhabitants of forests’ on the one hand and as ‘encroachers and the main agents of deforestation’ on another³⁴³. The categorization of these communities as ‘scheduled tribes’ leads to their inclusion or exclusion based on this classification, highlighting the impact of such governmentalization on their status and rights. Importantly, it serves to disallow them agency. Consequently, a lack of recognised legal identity should not imply exclusion from basic human rights. It is reasonable to categorise a group of similarly marginalised groups for specific anti-discriminatory laws, it is not reasonable to demand control over their identity formation in this process. If legal recognition is meant to remove taboo from the culture, as is suggested by the Preamble and Section 5(a) of CEDAW³⁴⁴, this could be better accomplished through awareness campaigns that give voice to lived experiences. Such campaigns have a better chance at reaching local communities than paragraphs in a Supreme Court judgement.

1.3. Harm of the binary:

Having any binary iterations of gender expression and sexuality is dangerous for the queer movement. This is visible in the arguments of ‘right-wing’ legislators pushing for anti-queer bills in the Global North³⁴⁵. These arguments usually rely on a binary understanding of sexuality and gender as a threat to the ‘natural’. A natural form that can only be attained through medical reassignment surgery, for instance. This structure is to help maintain the image of non-conforming gender expression and sexuality as something that requires medical intervention. That alone should not be a reason to deprive people of their identity and their rights. As long as the structures in place demand identity recognition by the State before rights recognition, it is impossible to safeguard rights of the ‘misunderstood’. The misunderstood being those that do not fit the state recognised identities. Misunderstood by States and their agents, not to be conflated as misunderstandings with themselves.

³⁴³ Prithviraj Bose, ‘Forest tenure reform: exclusion of tribal women’s rights in semi-arid Rajasthan, India’ (2011) 13(2) *International Forestry Review* 220, 232

³⁴⁴ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 December 1979) UN Treaty Series vol. 1249, p. 13, art 5(a)

³⁴⁵ Reuters, ‘Hungary’s anti-LGBTQ law breaches international rights standards - European rights body’ (*Reuters*, 14 December 2021) <<https://www.reuters.com/world/europe/hungarys-anti-lgbtq-law-breaches-international-rights-standards-european-rights-2021-12-14/>> accessed on 9 May 2023

Removal of a binary understanding of gender and sexuality would remove the need for specific rights recognition like marriage equality for same-sex couples. This is a difficult venture that can only be imagined in a distant reality. Social exclusion is a big cause for concern and perhaps legal recognition will help in enhancing their institutional visibility. However, one look at the efforts made by States to address concerns of this marginalised community post-legal recognition, inform us about the limitations of strategic essentialism³⁴⁶. Visibility was never lost to begin with, the vernacular in domestic and international law might have been. Reliance on state to provide this line of argument - towards more effective rights language - is difficult to argue. Similarly, women's rights will only benefit by distancing itself from strategic essentialism. As it would allow for a more heterogenous group of women to be represented in rights language.

1.4 Burden to prove worthy of rights

The blame on lack of ID for violation of human rights is a common theme in quantitative study reports on violations committed against queer people in Bangladesh, Nepal and India. It has now been several years since all three States established legal recognition of 'third gender' identifying people. The reason for continued violations against them is because recognition of identity was not the problem. Their existence was never denied by the larger community even if it was absent in the books of the State. What was denied to them was dignity and respect. This cannot be codified through inclusion of identity. Inclusion of identity instead firstly, enables identity wars between different marginalised groups that fight to establish the correct way to identify as third gender - to access rights held only for the 'third gender'; Secondly, it instates the State with the power to decide gender as the State controls access to the deprived human rights; Lastly, it requires a decision on gender identity that fits the paradigm constructed by the State - to access human rights that are universally recognised.

Such rights being right to health, right to education, right to work and right to equal treatment under law among others. These rights do not rest upon gender identity to be recognised as a State's obligation to its people. The only reason recognition of 'third-gender' identity is important for realisation of these rights is because of the failure of

³⁴⁶ Jane Wong, 'The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond' (1999) 5(2) William & Mary Journal of Women and the Law p 282, 283

States in securing additional protection required for a marginalised community. This failure should not be used to put the impetus on the subject of human rights law³⁴⁷, i.e., the individual instead of the State to prove identity. The need for identification is understandable for ensuring that welfare benefits are not extended unfairly and that specific issues attached with ‘third gender’ identities are addressed. These needs do not justify creation of a bureaucratic mechanism for establishing gender identity. It also does not justify prioritising recognition of this identity as the end and beginning of human rights obligations of the State.

Much like any other gender identity, there is no one right way of expressing one’s gender. However, validity of their religious customs is questioned by members of the community and outside, based on their sexuality. Through this observation it becomes clear that any attempt to legitimise one’s gender identity based on one’s sexuality is difficult, if not impractical. Similarly, attempts to provide legal and political legitimacy to hijra by categorising any expression similar to hijra into the ‘third gender’ category, does more harm than good. As it invites similar questions of how to define hijras. It harms as it pulls focus away from questions like - how to prevent harm to and how to provide access to human rights to people who are discriminated against because of their gender identity.

1.5 Identity is not irrelevant

The importance given to identity is reasonable and important when it comes to addressing the discrimination within complex socio-economic and political context of each gender identity. To understand how Muslim trans-women face discrimination differently than Hindu hijras in India, there needs to be a context driven analysis of the subject in question. This analysis cannot be codified, as it changes constantly. It can be understood though, through attention to lived experiences. Therefore, legal recognition of third-gender identity is a welcome step forward for holding the State accountable to positive obligations of human rights due. It is however, made murky by putting the limelight purely on accessing third gender/transgender/hijra certificates. This is because such identities can never be fully realised by such strict legal definitions. Additionally, such certificates cannot carry with it the complex context of each identity. Positive obligations

³⁴⁷ George Manner, ‘The Object Theory of the Individual in International Law’ (1952) 46(3) The American Journal of International Law, p 428

of the State should instead be raising awareness and penalising discriminatory practices by non-State and State actors.

Expression outside the gender binary is an individual act but it attracts systemic suppression because the system represents the patriarchy. Suffering systemic oppression becomes easier when it is faced as a community with similar values. This should not be equated with a collective uniform identity that represents a uniform political agenda. This is because identity politics is a game that yields no results for the suffering community aside from recognition of suffering, as evidenced in Chapter III.

CONCLUSION

Judith Butler in 1990 conceptualised gender as a performance, she stated, gender as ‘a repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance’³⁴⁸ This idea of gender should inform the way it is conceptualised within the State’s system as well. The harm of the binary alludes to the harm of categorisation of gender binary. The binary that ‘others’ any identity that does not conform but also reduces identities to its rigid practices. This reduction forgets that the identity is constantly changing. Expression of womanhood is constantly changing. To not see gender and sexuality as anything but, especially when codified, threatens the freedom to express that identity outside its codified rigid practices.

This thesis places a specific emphasis on sexual and gender identities, notably hijra, kothi, and meti, to critically examine the fundamental paradoxes underpinning the concept of recognition rights as protective measures for these individuals. A salient argument in this discourse is the potential misplacement of emphasis when the struggle for human rights recognition becomes intertwined with the State's acknowledgment of individual identities.

Recognition of identity by the State is a dynamic element of contention in the ongoing human rights discourse. However, the thesis raises a critical question: should this recognition be prioritized when advocating for the broader scope of human rights? The

³⁴⁸ Judith Butler, ‘Gender trouble: Feminism and the subversion of identity’ (1990) New York: Routledge, p 33

fight for human rights should transcend the boundaries of identity and encompass a wider spectrum of social, economic, and political rights.

The thesis highlights how States, in their efforts to appear progressive and humane, have co-opted identity recognition as the ultimate emblem of their commitment to fulfilling human rights obligations. This narrative is deeply flawed as it tends to reduce human rights discourse to a mere performative gesture. Indeed, the true commitment of States to human rights should be gauged by their effective actions to promote equality, dignity, and justice for all, not merely by their formal recognition of diverse identities.

In addition to this, states have ingeniously utilized the right to recognition as a potent tool to establish control mechanisms over individuals with diverse identities. A paradox where the very right that was supposed to empower individuals is being employed to regulate and control them. Agency in self-identification has been side-lined in the pursuit of legal recognition, leading to a loss of personal autonomy and a diminished sense of self-worth among these individuals. This is evident from the broad, overarching terminologies and bureaucratic processes used for legally confirming gender identity. This framework has inadvertently ignited "identity wars" within the community, fostering divisions and tensions. These identity wars are battles within the community to access the finite welfare benefits available based on their gender identities. The current legal and administrative procedures, in their attempt to generalize and streamline identity, have overlooked the nuances and complexities of these identities, leading to unintended exclusion and marginalization within the community itself.

In summary, the recognition of diverse gender and sexual identities, while an essential aspect of human rights advocacy, should not overshadow the broader fight for equality, justice, and dignity. The discourse surrounding the rights of hijra, kothi, and meti communities can act as a blueprint for other marginalized groups, illuminating the intricate balance required in navigating the intersection of identity, human rights, and State recognition.

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