

LGBT Global Development Partnership

**BRIDGES TO JUSTICE:
CASE STUDY OF LGBTI RIGHTS IN NEPAL**



Astraea LESBIAN FOUNDATION FOR JUSTICE

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This report was produced by the Astraea Lesbian Foundation for Justice as part of the Lesbian, Gay, Bisexual and Transgender (LGBT) Global Development Partnership. The Partnership was founded in 2012 and brings together the United States Agency for International Development (USAID), the Government of Sweden, the Arcus Foundation, the Astraea Lesbian Foundation for Justice, the National Gay & Lesbian Chamber of Commerce, the Gay & Lesbian Victory Institute, the Williams Institute, the Swedish Federation for LGBT Rights (RFSL) and other corporate, non-profit and non-governmental organization resource partners to promote equality, human rights and economic empowerment of LGBTI people in the developing world. The contents of this publication do not necessarily represent an official position or policy of these partners.

Cover photo: Kyle Knight

Pages 4, 11, 16, 17, 27, 28, 40, 44, 46, 47: Blue Diamond Society

Pages 7, 9, 26, 30, 34, 36, 38, 39: Kyle Knight

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POLITICAL AND SOCIAL CONDITIONS FOR LGBTI RIGHTS: 1990 TO PRESENT

- 1990** End of Panchayat (party-less) political system in Nepal; space for civil society opens up
- 1992** First HIV/AIDS foreign donor funding arrives in Nepal
- 1996** Maoists launch a “People’s War” to oppose oppressive rule
- 2000** Informal organizing among sexual and gender minorities begins in parks in Kathmandu
- 2001**
- June 1**
10 members of the Nepali royal family are massacred inside the royal palace grounds, sending the country into political chaos
 - September**
Sunil Babu Pant registers the Blue Diamond Society (BDS) with the Social Welfare Council, making it Nepal’s first NGO dedicated to sexual health and rights
- 2004**
- June**
A lawyer files a case at the Supreme Court, saying BDS’s activities—and the promotion of homosexuality—are illegal under Nepali law; the court delays hearings multiple times
 - August**
39 members of BDS are arrested and held without charge for 13 days, drawing unprecedented international media and human rights attention
- 2005**
- February 1**
King Gyanendra suspends the Parliament, appoints a government led by himself, and enforces martial law
 - April 13**
A group of transgender people are attacked and arrested in Kathmandu, drawing international condemnation
- 2006**
- January–March**
Police carry out “sexual cleansing drive” in Kathmandu as insecurity in the city remains high
 - November 6–9**
Sunil Babu Pant is invited as one of 29 people to attend the final consultation meeting for the Yogyakarta Principles
 - November 21**
Maoists and government sign a Comprehensive Peace Accord, ending the civil war
- 06/07** The second people’s movement is catalyzed; citizens fill the streets demanding inclusion and the end of the monarchy; LGBTI activists join the protests and build alliances

2007

January

In anticipation of spring elections, LGBTI activists bring in South African Justice Edwin Cameron and UN officials to talk about diversity and representation in politics

April

Four LGBTI NGOs petition the Supreme Court to end discriminatory laws on the basis of sexual orientation and gender identity

December 21

The Supreme Court issues a landmark decision to: 1. end laws discriminating against LGBTI individuals; 2. legally recognize a third gender; 3. establish a committee to study same-sex marriage

The International Gay and Lesbian Human Rights Commission awards BDS the Felipa de Souza Award

2008

April

A group of gay men stand for Nepal's first post-war parliamentary election; Sunil Pant is chosen by the CPN-U (Communist Party of Nepal-United) for a proportional representation seat, making him the first openly-gay federal-level elected official in all of Asia

September

The Maoist Minister of Finance includes sexual and gender minorities in the national budget, the first acknowledgment of the population after the 2007 Supreme Court decision

2009

Sexual and Gender Minority Student Forum is established; assembly with 1,500 students is held to kick it off

2011

June

Nepal's national population and housing census is launched, including categories for male, female, and third gender on its basic data form

2012

May

Nepal's Constituent Assembly and Parliament dissolves, having not produced a constitution

June

The government of Nepal officially tells all district offices to begin issuing citizenship documents listing male, female, or other genders

2013

April

Supreme Court issues a decision in favor of a lesbian woman, a decision activists have hailed as a strong message toward same-sex marriage recognition

July 3

62 LGBTI people declare their candidacy in the upcoming parliamentary election

2015

January

The Supreme Court, building on its 2007 judgment, orders the government to issue passports in three genders.

February

The same-sex marriage committee mandated by the 2007 Supreme Court judgment releases its extensive report recommending policies for the government.



BRIDGES TO JUSTICE:
CASE STUDY OF LGBTI RIGHTS IN NEPAL

■ On July 3, 2013, in a small conference room a stone’s throw from the Nepal Government’s main administrative complex, a group of lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights activists held a press conference to announce their candidacy in the upcoming national election for a Parliament and Constituent Assembly¹. Journalists poured into the room to listen. To open the event, a transgender woman sang a ballad *a capella* about the rights of Nepal’s third gender², beseeching the crowd with the chorus, “Listen, eh hoi, where is my right in New Nepal?” It was the debut performance of what media would dub the country’s “LGBTI national anthem.”³

Addressing the crowd, Prem Thapa, a lawyer for the Blue Diamond Society, Nepal’s leading organization dedicated to the health and rights of LGBTI people, said: “We know only the wearer knows where the shoe hurts their foot. Only if these communities are represented at the Constituent Assembly, will they be able to talk about where they have been treated unfairly or discriminated against by the State.”⁴

In total, 62 people from across Nepal announced their candidacy that day. They pledged that, if they reached Parliament, they would attempt to draft a new, more inclusive constitution for the country of 27 million.

“We know only the wearer knows where the shoe hurts their foot. Only if these communities are represented at the Constituent Assembly, will they be able to talk about where they have been treated unfairly or discriminated against by the State.” – Prem Thapa

Twelve years after Nepal’s LGBTI rights movement became formally organized, the announcement of a contingent of openly-LGBTI political candidates came not as a surprise, but also not as a guarantee. While the movement has enjoyed success and improved the lives of LGBTI people, Nepal’s protracted political instability has meant activism continues as a daily struggle to maintain its foothold

and continue to chart progress. In the face of political uncertainty, as well as demands and expectations from donors, media, and the government, activists have used a variety of tactics—not always conventional—to fight for consistent human rights outcomes and better lives for LGBTI people.⁵

How did we get here? Where is the movement today? What kinds of action and innovation spurred the changes that have occurred in Nepal? What types of support are needed to continue on this trajectory? And what can Nepal teach us about potential in-roads for LGBTI action and inclusion in other contexts?

This report examines Nepal’s contemporary LGBTI rights movement as a case study for effective activism. It considers the circumstances that contributed to the formalization of the movement, the legal and social progress activists have been able to achieve, and what this means for the lives of LGBTI people in Nepal today.

- 1 Elections took place on November 19, 2013. No LGBTI candidates were elected. Despite this, their visibility and presence was an important milestone for LGBTI political participation in Nepal.
- 2 Starting with a 2007 Supreme Court decision, Nepal legally recognizes a third gender category, which citizens can select on official documents based on self-identification. The category, called *anya* or “other,” has been said to represent transgender people and also all sexual and gender minorities (or LGBTI people) depending on the source.
- 3 *Gay Star News*, “LGBTs get their national anthem in Nepal,” July 21, 2013, <http://www.gaystarnews.com/article/lgbts-get-their-%E2%80%98national-anthem%E2%80%99-nepal210713>
- 4 Blue Diamond Society press conference at Union House, Anamnagar, Kathmandu, July 3, 2013; recorded and transcribed by Astraea Lesbian Foundation for Justice.
- 5 For a speech by UNAIDS country coordinator Dr. Ma. Elena Filio-Borromeo about how LGBTI or MSM HIV issues can get lost in the mix of political change in Nepal, see <http://www.spotlightnepal.com/News/Article/-MSM-TG-and-LGBTI-at-risk-to-HIV-infection-in-Nep>

In the process, the research explores crucial moments in the movement's history: the political situation during the years when the movement formalized and grew; the processes of non-governmental organizations (NGOs) forming and carrying out meaningful activism while supported by HIV-specific funding; the 2007 Supreme Court decision adopting broad human rights standards in relation to sexual orientation and gender identity; and the 2008 election of an openly-gay politician to the country's Constituent Assembly and Parliament.

This report examines Nepal's contemporary LGBTI rights movement as a case study for effective activism.

The wins and challenges of Nepal's LGBTI rights movement are foregrounded by the significant political changes that took place in the 1990s. Centrally, these include the opening up of space for civil society actors and the introduction of

large amounts of money targeted at HIV/AIDS. A ten-year Maoist insurgency, including armed conflict, repositioned marginalized people vis-à-vis the state and, after a post-war people's movement, ushered in a fresh era of representative governance in Nepal when the Hindu monarch abdicated in 2008. The end of the conflict and subsequent ambitious political transition in Nepal meant LGBTI rights activists have operated in an unpredictable social and political environment fraught with challenges but pregnant with potential as they asserted and expanded their demands, goals, and movement.



THE MAKING OF A MOVEMENT

■ The 1990 reinstallation of democracy in Nepal, ending nearly 30 years of “Panchayat rule,” an autocratic party-less monarchal governance system, opened increased space for the emergence of civil society organizations, which mostly took shape as incorporated non-governmental organizations (NGOs). NGO registration mushroomed: there are more than 30,000 registered in Nepal today.⁶ As NGOs emerged, international donors shifted substantial focus away from the state’s work on poverty alleviation and economic growth to NGOs. Some have argued that this shift was partially due to donors believing the state was ineffectual and corrupt, and NGOs more functional and accountable.⁷

In 1994, bitter rivalries aggravated the political scene and eroded the efficacy of the state, and by 1996 a People’s War, metastasized around centuries of social exclusion, had been launched by a Maoist movement.⁸ It developed into a full-scale armed conflict by 2001. NGOs previously focused on development and service delivery increasingly paid attention to human rights issues by appealing to international human rights instruments, often for the safety of their development work. This was paired with heightened sensitivity to social exclusion, which was exacerbated by the extreme violence, poverty, and internal migration spurred by the conflict.⁹ The Maoists also deployed inconsistent but appealing human rights rhetoric, construing rights standards alternatively as universal and beneficial when—and typically only when—they were in service of the revolution.¹⁰

Organizations that began by focusing on service delivery transitioned into programs focused on “conscience-raising” and other more political work. Little is known about the conditions of sexual and gender minorities in Nepal at this time. Fleeting attempts to hold group meetings during the 1990s are often mentioned, however, most believe these ended when participants either moved abroad or entered into arranged different-sex marriages. Early research indicates fluidity in sexual identities and practices and little knowledge among men having sex with men about HIV risk or safer sex practices.¹¹ Some women joined early gatherings, but most participants were male-assigned at birth people—*metis*,¹² transgender women, or gay men.

Four years into the insurgency, in the winter of 2000 in a park in central Kathmandu known as a place where prostitutes gathered,¹³ conversations among gay, lesbian, and transgender people prompted one of the participants, Sunil Babu Pant, to send emails to some American AIDS activists he knew from the organization ACT UP. Pant, a computer engineer recently returned home after half a decade abroad studying and working, had found that a combination of blackmail at the hands of police and unsafe sex

6 Government of Nepal, Social Welfare Council, “NGOs affiliated with Social Welfare Council,” http://www.swc.org.np/SWC_NGOs_Total.pdf

7 UNDP Human Development Report 1998, <http://hdr.undp.org/en/reports/national/asiathepacific/nepal/name,2785,en.html>, cited in Program for Accountability in Nepal, “The Political Economy of Social Accountability in Nepal” 2010, <http://siteresources.worldbank.org/NEPAL-EXTN/Resources/223554-1296055463708/PoliticalEconomy.pdf>

8 For more information on Nepal’s Maoist People’s War, see Aditya Adhikari. *The Bullet and The Ballot Box*. 2014. London: Verso Publishers; and Prashant Jha. *Battles of the New Republic*. 2014. London: Hurst Publishers.

9 Masako Tanaka, “The Changing Roles of NGOs in Nepal,” *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations*, September 2011, <http://link.springer.com/article/10.1007%2Fs11266-010-9173-1>

10 “A Comprehensive Peace? Lessons from Human Rights Monitoring in Nepal,” *Nepal in Transition*, eds. Einsiedel, Malone, and Pradhan, Cambridge University Press, 2012.

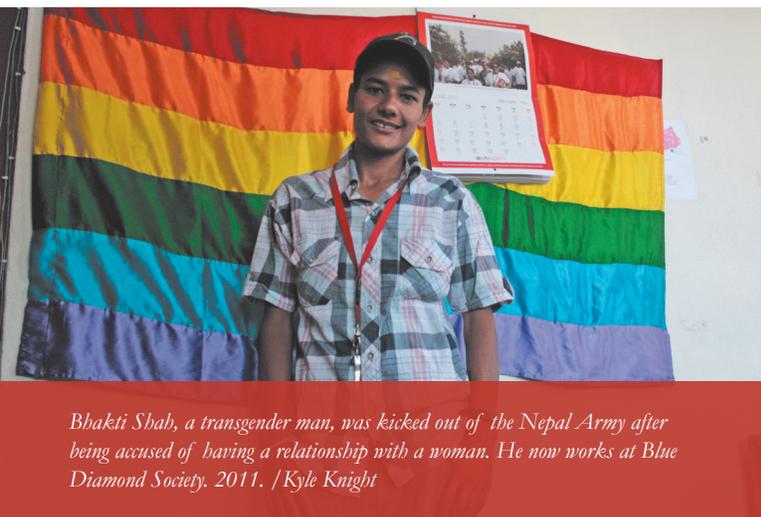
11 Family Health International, “Rapid Ethnography of Male to Male Sexuality and Sexual Health, Kathmandu, Nepal,” December 2001: <http://www.hivpolicy.org/Library/HPP000564.pdf>

12 *Meti* is a Nepali identity term for people assigned male at birth who have a feminine gender identity and expression. For more information on Nepali gender and sexual identity terms, see: The Williams Institute. “Surveying Nepal’s Sexual and Gender Minorities: An Inclusive Approach,” 2014, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Nepal-Survey-Oct-2014.pdf>

13 Mark Liechty, “Carnal Economies: the Commodification of Food and Sex in Kathmandu,” *Cultural Anthropology*, Volume 20, Issue 1, 2005, <http://www.jstor.org/discover/10.2307/3651575?uid=3738752&uid=2&uid=4&sid=21102554678627>

practices were putting many sexual and gender minorities at risk of violence, sexually transmitted infections, and extortion.

The New York activists responded. As one explained, “The emails got forwarded around, no one really knew what was going on, but we liked the guy’s perseverance and he seemed genuine, so a bunch of us pitched in to help him.” The group sent FedEx boxes of condoms and lubricant to Kathmandu, which Pant handed out in the park.¹⁴



Bhakti Shab, a transgender man, was kicked out of the Nepal Army after being accused of having a relationship with a woman. He now works at Blue Diamond Society, 2011. / Kyle Knight

After several months of these interactions in the park, Pant submitted NGO registration forms to the Social Welfare Council (SWC), the government body that oversees all NGO activities in Nepal. “The clerk at the office looked at the papers and said he could only register the organization if its goal was to convert people back to heterosexuality,” said Pant. As a result, the NGO, called Blue Diamond Society (BDS), was registered as a sexual health and human rights organization—with no explicit mention of homosexuality.¹⁵

BDS was both emblematic and groundbreaking in LGBTI activism in Nepal. Its emergence signaled the rise of more visible and consolidated goals of LGBTI

inclusion, safety, and rights. At the same time, the cloaked mission responded not only to local concerns, but also came to reflect the tenuous position of Nepalese NGOs in seeking international funding. The framing—and, at times, actions—of BDS and Nepal’s LGBTI movement more broadly sits squarely within the rise of HIV/AIDS funding that both bolstered and threatened the locally-driven solutions. BDS would go on to become a nationally and internationally recognized leader in LGBTI rights.

When HIV-targeted donor money first entered Nepal in the early 1990s, dozens of NGOs clamored to be a part of the new development paradigm. However, the introduction of awareness and prevention programs in the country, which at that point had a 40% literacy rate,¹⁶ highlighted some of the tensions between international development and health paradigms and local needs, access, knowledge, and power. Explained a social worker who volunteered with AIDS organizations in the early days of their emergence in Kathmandu: “People wanted the money at the time, so they registered NGOs, but no one wanted the actual work—because you had to deal with dirty people, people who were seen as social dirt like sex workers or drug users. And transgender people too, but no one talked about that at all those days.”¹⁷ The result was a substantial disconnect between seeking funds and delivering effective services.

14 IRIN, “Nepal: HIV awareness among MSM still low,” April 22, 2007, <http://www.irinnews.org/report/71738/nepal-hiv-awareness-amongst-msm-still-low>

15 Dalia Nori, “The loudest whisper in society: Knowledge, Attitudes and Practice in regards to sexual health of Transgender male to female in Kathmandu, Nepal,” https://gupea.ub.gu.se/bitstream/2077/33386/1/gupea_2077_33386_1.pdf; Jo Becker, “Campaigning for Justice: Human Rights Advocacy in Practice,” Stanford University Press, 2013.

16 Government of Nepal, Central Bureau of Statistics, 2011 Nepal Population Report, http://www.mohe.gov.np/english/files/new_publications/Nepal%20Population%20Report%202011.pdf

17 Interview, Kathmandu, June 2013.

A medical anthropologist observed at the time: “The need to discuss sex-related topics as part of one’s professional work created contradictory situations in which the lines between professionalism, prurience, and personal moral propriety often blurred.”¹⁸ The reactions among those professionals involved were mixed, she observed—some pushing for open discussions about sex and others dismissing the idea as socially inappropriate.

At the same time, the armed conflict continued, and BDS built its foundations during tense years for Nepal. Said Pant: “Vulnerable and marginalized people who were abused by the security forces faced increased violence during this time... There was not a week that I was not in a police station, trying to bail out arrested transgender, gay and lesbian people.”

Like many other NGOs, BDS initially focused on service delivery and then gradually moved into more political projects such as “awareness-raising, public education and social mobilization.”¹⁹ According to Pant:

We started by having conversations about condoms and lube and sexual health but then once we realized the problems we faced were systematic and not just about health issues, we decided it was time to get organized. After we were officially registered, we got some donor funds and could do condom outreach—but that was only the beginning of the work we needed to do.²⁰

Aside from the regular work of bailing out transgender people who were arrested (often as “public nuisances”) and providing basic sexual health education to people engaged in same-sex sexual activity, BDS began to build confidence and create a community around a rights-based social movement. Early research on LGBTI organizing identified police and other security forces as common sex work clients for *metis*,²¹ so when the situation turned violent, BDS’s protection work and advocacy was directly targeted at ending violence carried out by an arm of the state.²²

“...once we realized the problems we faced were systematic and not just about health issues, we decided it was time to get organized.”

– Sunil Babu Pant

Said one former BDS employee who started as a volunteer in 2002: “Before it was different. We would get arrested and harassed and we would just manage. But when we got some support, some confidence from BDS telling us that we were not sick people and it was a problem with society instead, we became some-

times more bold than before.” BDS’s combination of one-on-one outreach that evolved into drop-in centers and more formal events has been noted as a good public health practice because it cultivates community and

18 Stacey Pigg, “Languages of Sex and AIDS in Nepal: Notes on the Social Production of Commensurability,” *Cultural Anthropology*, Vol. 16, No. 4, Anthropology and/in/of Science, November 2001.

19 Program for Accountability in Nepal, “The Political Economy of Social Accountability in Nepal,” 2010, <http://siteresources.worldbank.org/NEPALEXTN/Resources/223554-1296055463708/PoliticalEconomy.pdf>
This shift has been critiqued. For example, Thapa argued: “Nepal is a darling of the aid industry. In the aid industry, ‘advocacy’ is the call of the day. (This is as opposed to providing services, that is building taps, schools, hospitals, or directly helping the poor). The advocates of advocacy argue that informing people about their rights ‘empowers’ them to better their lives. A fine enough logic. As work, though, advocacy often boils down to seminars, conferences, workshops and interaction programs held in five-star hotels.” In: Manjushree Thapa, *The Lives We Have Lost: Essays & Opinions on Nepal*. 2011. New Delhi: Penguin Books.

20 Interview, Kathmandu, June 2013.

21 *Meti* is a Nepali term that, according to some academic accounts, originated in Darjeeling, India, and carries connotations of being the person to ‘quench one’s thirst’ meaning *metis* sexually satisfy men. *Metis* self-identify as transgender, trans-women, third gender, or gay men.

22 Seira Tamang, “Patriarchy and the production of homo-erotic behavior in Nepal,” *Studies in Nepali History and Society*, 2003, http://martinchautari.org.np/files/2_%20Seira%20Tamang.pdf

security: "...BDS has been providing different kinds of opportunities for the community members themselves to come and gather and share their experiences, and through their experiences [to] create an awareness among themselves about their own sexuality, their gender, and their basic human rights..."²³



A gathering of constituents at the first BDS office in 2002. /Blue Diamond Society.

Individuals negotiated visibility delicately.²⁴ Said a *meti* who volunteered at BDS from its initial days: "We didn't know how to be 'out' or if we should. We were busy staying safe, we didn't really have a vocabulary to explain 'coming out' to our families, and so it was usually just better to keep somewhat quiet so we could continue doing our work. Sunil coming out in the media was a big step—it sort of showed us that it could be done."²⁵ Pant, the visible leader of the movement, came out first to reporters after the arrest of some transgender people.²⁶ Research on sexual minorities has explained this struggle as "an evident tension between the need for sexual

dissidents' visibilisation in order to push agendas and their right to privacy."²⁷ The contours of comfort remain delicate and highly individualized. This also affected how and when individuals became affiliated with organizations or the movement. One interviewee, a gay man, said: "I don't think I will ever affiliate myself with BDS staff and their work. BDS is very public and there is no confidentiality of one's identity."²⁸ Even today, some LGBTI people decline to associate with the movement or its organizations because of fears of social ostracization or "outing."²⁹

As the movement grew, LGBTI organizations encountered privacy and visibility issues at several junctures, most notably when it came to estimating the size of the sexual and gender minority populations—a crucial factor in garnering financial and political support. While there was pressure to delineate a "target community" for service provision and associated funding, visibility and privacy—while supported by NGOs—were often negotiated on a personal level. Similar issues have been observed with regards to data collection about LGBTI populations, namely that deeply-personal often-contested definitions, combined with discretion being used as a tool for protection, can mean that many people keep their sexual orientation or gender identity private—or "closeted." From a measurement perspective, as one demographer noted, it can mean "we are attempting to measure a population that, by definition, does not want to be measured."³⁰

Reluctance and resistance did not come from local social prejudice or government intransigence alone. BDS emerged before there were major international frameworks for engaging in "LGBTI rights." The

23 Alexandra Lesnikowska, "Raising awareness about sexual health and human rights through civic engagement and community empowerment: The case of Blue Diamond Society and the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) community in Nepal," Institute for Health and Social Policy Case Study Vol. 3 No. 1, December 2009, McGill University: <http://resources.cpha.ca/CPHA/Conf/Data/2010/A10-274e.pdf>

24 Niranjan Kunwar, "On Visibility," *La.Lit*: <http://www.lalitmag.com/2014/08/on-being-visible/>; and see: "An Identity I Couldn't Hide," *Pride Climbing Higher: Stories from LGBT people in Nepal*. 2014.

25 Interview, Kathmandu, June 2013.

26 ILGA, "Interview with Sunil Pant," April 26, 2009, <http://ilga.org/ilga/en/article/mhWtjKX1dD>

27 Institute of Development Studies, "Working Paper 294: Whose Sexuality Counts? Poverty, Participation and Sexual Rights," November 2007, <http://www.ids.ac.uk/files/dmfile/Wp294.pdf>

28 Interview, Kathmandu, July 2013.

29 Bibek Rajbhandari, "I'm Not Ready, Living Gay Nepal," <http://www.livinggaynepal.info/imnotready.html>

30 Interview, Kathmandu, July 2013.

organization's intrepid focus on rights and sexual identities sometimes made donors uncomfortable. A researcher who engaged with BDS in its first two years wrote:

In a recent conversation with a FHI [Family Health International] personnel, they had no knowledge that any steps had been taken by BDS to provide outreach services to MSMs in Pokhara. This is indicative of the manner in which BDS as a NGO funded by donors for “men’s sexual health” has in the past and continues today to pursue a political “gay” rights agenda of its own. The conflict between the two is most evident in the manner in which BDS donors continue to remain silent about the physical and sexual abuses of MSMs, mostly employees of BDS, at the hands of police and other people. Members of BDS have expressed their dismay at what appears to be the “lack of concern” of donors of their rights beyond that of general health.³¹

BDS's experience with Nepal-based development donors, who have a mixed sixty-year record of success and reputation³² in the country, mirrors the emergence of discussions of sexuality (and sexual orientation, gender identity, and human rights) within the international community, explored later in this report. International actors have played a crucial role in BDS's emergence, however the pressures—programmatically and morally—put on activists have sometimes created additional barriers.

Said Pant: “I remember getting emails from donors in the early days. They were upset that I spoke to the press about police abuse or human rights—or LGBTI rights, that made them uncomfortable. They told me it would risk our programs. They said that we need to stay quiet and work on condoms and HIV.”³³ Some BDS staff lament that, especially when early funding came in, they were encouraged to only target males who were deemed at risk of HIV, and not others, such as lesbian women.

31 Seira Tamang, “Patriarchy and the production of homo-erotic behavior in Nepal,” *Studies in Nepali History and Society*, 2003, http://martinchautari.org.np/files/2_%20Seira%20Tamang.pdf

32 For a thorough discussion of the history and politics of foreign aid in Nepal, including topics often overlooked in discussions of aid's influence on politics and society, see: Seira Tamang, “Civilizing Civil Society: Donors and Democratic Space,” *Studies in Nepali History and Society*, 2002 [http://martinchautari.org.np/files/seira_tamang_7\(2\).pdf](http://martinchautari.org.np/files/seira_tamang_7(2).pdf)

As one observer put it, “donors prefer to hobnob with their contacts in Kathmandu – who consist largely of other members of the aid industry, and the Nepali elite. Again let me say this simply. 1) The Nepali elite does not understand basic home truths about contemporary Nepal; 2) What truths about Nepal they do understand, the Nepali elite actively obfuscate.” In: Manjushree Thapa, *The Lives We Have Lost: Essays & Opinions on Nepal*. 2011. New Delhi: Penguin Books.

33 Interview, Kathmandu, July 2013.

While the HIV/AIDS epidemic in many ways forced the issue for reluctant governments to discuss sexuality and, specifically, at-risk populations such as men who have sex with men (MSM) in ways that at least partially avoided official or public condemnation or violence, service gaps remain.³⁴ Research on HIV funding streams in some countries that criminalize homosexual conduct has revealed significant blind spots concerning male sexual health.³⁵ Such tepid engagement may have strategic value, however. For example, the distribution of personal lubricants, which have been deemed an essential commodity for safe anal sex, is more difficult in countries with anti-gay laws. Nonetheless, development agencies have managed through the matrix of HIV programing—effective distribution by framing it as a public health commodity.³⁶



Members of Mitini Nepal and Blue Diamond Society meet with international representatives in 2007. /Kellea Miller

34 UNAIDS has subsequently shifted terminology from “at-risk” to “key” populations in an attempt to reduce the use of stigmatizing acronyms. See: “UNAIDS Terminology Guidelines,” 2011, http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf

35 amfAR, The Foundation for AIDS Research and Center for Public Health and Human Rights, Department of Epidemiology, Johns Hopkins School of Public Health, “Achieving an AIDS-Free Generation for Gay Men and Other MSM in Southern Africa,” May 16, 2013, http://www.amfar.org/uploadedFiles/amfarorg/Articles/Around_The_World/GMT/2013/MSM%20Exec%20Summary%20050813_Final.pdf

36 IRIN, “Lack of lube hurts HIV prevention,” February 21, 2013, <http://www.plusnews.org/Report/97517/Lack-of-lube-hurts-HIV-prevention>

Gender and the problem of patriarchy

While the LGBTI rights movement in Nepal inarguably advanced public debate, understanding, and acceptance of non-heterosexual and gender non-conforming people, a powerful system of patriarchy pervades formal and informal systems and tinges many interactions from high politics to daily life. Despite a well-funded and highly-lauded women's rights movement achieving successes in recent years, strong residue of state-endorsed patriarchy remains.

As one political scientist argued, the male-dominated political elite superficially advanced women's rights without meaningful commitments, in effect "sanitizing" the pervasive patriarchy.³⁷ In an op-ed, Pant described patriarchy as a cruel binary of pride and shame, a tacit phenomenon "hidden in the survivors of rape who don't report it while the perpetrators walk free, proudly."³⁸ He argued that sexual and gender minorities, in interrupting and challenging this binary, were often socially degraded to the lowest common denominator, a phenomenon he had documented in several cases, including the trafficking and abuse of an effeminate gay boy in 2005.³⁹

A 2011 CEDAW shadow report prepared by a group of Nepali women's rights organizations underscored the problem: "Nepali society has enforced behavioral norms for women, which emphasize suppressing sexuality and prescribing codes for keeping their bodies 'pure'. This limits women's control over their sexuality. Different standard[s] are used to determine sexuality of men and women."⁴⁰ One sociological study claimed that some families have strong gender-based expectations for their children and sexual and gender minority children upset and challenge these so deeply they can trigger extra mistreatment.⁴¹ A 2011 anonymous op-ed construed the struggles LGBTI people face in spite of legal progress as symptomatic of "a society struggling to come to terms with open heterosexuality" and indicative of the "juxtaposition between our liberal legislature and conservative society."⁴²

Such constraints and expectations can pose serious challenges for LGBTI people grappling with the public and private understandings of their lives, identities, and expressions. The difficulties can be particularly pronounced for lesbian women. Explained one veteran staff member at a donor agency that supports LGBTI rights organizations:

37 *The Kathmandu Post*, "Sanitized Patriarchy," January 7, 2013, http://www.ekantipur.com/the-kathmandu-post/2013/01/07/related_articles/sanitized-patriarchy/243831.html

As another Nepal observer put it, in reference to Nepal's lethargic change: "Bureaucratic incomes derive precisely from not reforming," and "the words 'development' and 'democracy' do not so much describe what's going on as conceal the system that exists." See: Thomas Bell, *Kathmandu*. 2014. Delhi: Random House India. Excerpted here: <http://setopati.net/opinion/3307/Nepal's-failed-development/>

38 *The Kathmandu Post*, "No Matter The Sex," April 3, 2012, <http://us.ekantipur.com/2012/04/03/related-article/no-matter-the-sex/351694.html>; for more on the *chaupadi* practice, see: The Pulitzer Center on Crisis Reporting, "Separation During Menstruation: Tradition or Torment?," <http://pulitzercenter.org/reporting/nepal-cultural-practice-women-childbirth-maternal-mortality-chaupadi-separation-menstruation-tradition>

39 Pukaar, "Trafficking of boys," July 2005, <http://www.nfi.net/NFI%20Publications/Pukaar/2005/July2005.pdf>

40 Shadow Report on the Fourth and Fifth Period Report of the Government of Nepal on CEDAW, 2011, http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/FWLD_NepalCEDAW49.pdf

See also: Rabin Pathak, "Gender Identity: Challenges to Accessing Social and Health Care Services for Lesbians in Nepal," *Global Journal of Health Science* Vol. 2, No. 2, October 2010.

41 Dhan Bahadur Sunar, "Segregates LGBTI from the Social Fabric? A Sociological study of the Nepalese Sexual and Gender Minorities (LGBTI Communities) against the Normative Social Life," 2012, http://www.socialinclusion.org.np/new/files/Dhana%20Bd%20Sunar_1365491792dWdW.pdf

42 *The Kathmandu Post*, "On Sexuality," September 2, 2011, <http://www.ekantipur.com/the-kathmandu-post/2011/09/01/editorial/on-sexuality/225815.html>

For women in Nepali culture it is more difficult than men because we are already at a positional disadvantage. That means more than just “social prejudice” or the soft things, it means our daily lives are impacted by our gender—the things we are expected to do, the ways we are expected to behave and react and support our husbands.⁴³

As a result of these social and structural constraints, lesbians often found themselves in a position one report, which included research on sexual violence against lesbians, called “a three layered oppression: for being women, for being a minority, and for being subordinates.”⁴⁴

The role of lesbian and bisexual women in LGBTI and women’s movements has been tenuous, often characterized by invisibility. Initial HIV/AIDS funding streams that supported LGBTI communities even in part, focused almost exclusively on MSM and transgender populations. Despite attempts at inclusion, the health emphasis, paired with the lack of a more encompassing framework for sexual rights in international norms, strengthened primarily gay male and transgender women’s leadership in central roles.

Similarly, as women’s organizations fought for legal and social gains, such as the 2002 Supreme Court ruling that established marital rape as a crime, their engagement with sexuality and gender identity was inconsistent. Some leading women’s rights organizations have openly supported LGBTI rights actions at key junctures, including the Forum on Women, Law and Development, which helped BDS file a case against the Nepal Army when two lesbians were expelled.⁴⁵ However, explained a donor whose agency funds both women’s rights and LGBTI rights projects:

Women’s organizations aren’t taking up lesbian issues as much because it’s too sensitive and they don’t know what to do and say. It’s socially risky. The LGBTI organizations have carved out space, but people still whisper. Women’s organizations have fought for their space against a strong force of patriarchy in Nepal, so they are not going to take a lot of risks with what they have. Issues like fighting for lesbians could take this space away from them—it’s a risk.⁴⁶

The risk is not only political. A report by the Association for Women’s Rights in Development (AWID) found: “WHRDs [women human rights defenders] in Nepal are more at risk when defending women accused of sorcery or witchcraft, sexual and reproductive rights, housing and land rights, domestic violence, gender identity and sexual orientation, and equality for lesbian, gay, bisexual, and transgender (LGBT) people.”⁴⁷

In 2005, BDS supported a lesbian couple, Laxmi Ghalan and Meera Bajracharya, escaping threats of rape and death from their families. The two would go on to establish Mitini Nepal, initially an offshoot of BDS, to provide services to lesbian, bisexual, and transgender individuals who identify as women.⁴⁸ The group became Nepal’s first women’s rights LBT organization.

43 Interview, Kathmandu, July 2013.

44 WOREC-Nepal and ISIS-Wicce, “Unveiling Justice: Rape survivors speak out—a Research Report on access to Justice for Rape survivors in Nepal 2007-2010,” 2011, <http://www.isis.or.ug/wp-content/uploads/downloads/2012/02/Nepal-report-final-web1.pdf>

45 *UK Gay News*, “Still No Hearing Date for Sacked Soldiers Accused of Being Lesbians,” November 17, 2007, <http://www.ukgaynews.org.uk/Archive/07/Nov/1602.htm>

46 Interview, Kathmandu, July 2013.

47 Katherine Ronderos, “Lack of Proper Legislature and a Constitution in Limbo Increases Risk to Women Human Rights Defenders in Nepal,” Association for Women’s Rights in Development, August 28, 2013, <http://www.trust.org/item/20130823164108-fr2gk/>

48 Mitini Nepal: <http://www.mitininepal.org.np/>

The combined forces of gender- and sexuality-based discrimination take different forms for LGBTI people. Patriarchy, donor priorities, and NGOs' political engagement strategies continue to shape the landscape for LGBTI rights. Even within the context of major legal and social gains in Nepal, these differences deeply affect the daily lives—and inform the responses needed—for inclusion and protection.

Ghalan described the harrowing story of their escape and the formation of Mitini:

After Meera and I fell in love, we planned to run away to Kathmandu because our families would not let us be together. I ran away first, but Meera's family locked her in her house and beat her before she could run. She got so depressed so took poison to kill herself. She was unconscious for 17 days. As soon as she woke up in the hospital she asked them to call me and I came running to her. Then we found a house and started living together. My father came and found us, then he beat us both and tried to take us home on the bus. When the bus stopped on the way, we ran into the bushes. We walked for 12 hours and slept in an empty house. We had no food or money but one bus driver understood our problem and let us travel back to Kathmandu for free. We were the first lesbian couple to come out in Nepal so the press started coming and now more people know about the problems we are facing.

Many lesbians are scared to come out in case of violence. They get thrown out of their job for no reason. Men rape them because they think they deserve it and will not complain. We suffer daily threats of violence. We had many problems registering our organization with the authorities. Now we want to help others who are in the same position we were in. We are able to help them through coming out, educating their families and empowering them to provide facilities for themselves. In this way we can help them escape persecution and live in peace with the woman that they love.⁵¹

49 Green Tara Trust, "Mitini Nepal," <http://www.greentaratrust.com/our-work/overview/mitini.html>



FROM GRASSROOTS TO THE HIGH COURT:
LEGAL SUCCESS

■ Nepal's LGBTI rights movement formalized at a time of considerable political foment backgrounded by a history of state-influenced (if not explicitly imposed) oppression and a unique and complex legal system. Never colonized, Nepal's domestic laws include a skein of parallel structures influenced by Hinduism, British colonial legal legacies in neighboring India, tinges of other European histories, and international law. BDS's engagement with the law involved not only navigating a complex environment, but also took place before much international legal attention was paid to LGBTI people, and as the international presence in Nepal was growing substantially.

In 2004, as the conflict continued to affect daily life in Kathmandu, LGBTI people in the city began feeling the burdens of increased rates of violence and insecurity. The security forces in place to control the city were hardly a respite.⁵⁰ A July demonstration protesting sexual abuse and violence against sexual minorities featuring fifty BDS members was violently disbanded by police.⁵¹

On June 18 of that year, a law student named Achyut Prasad Kharel filed a case with the Supreme Court demanding that the government disband Blue Diamond Society because the organization's activities fell under the bestiality/unnatural sexual intercourse clause in Nepal's *Muluki Ain* (country code).

He went on to argue that BDS's activities "campaigning, sloganeering and rallying, organized by the NGO named the Blue Diamond Society ... to promote the 'right to homosexuality'" are illegal and the state has been passive in its response.⁵²

The petition was quickly dismissed as *darpath*, or endorsed rejection, by the Supreme Court's registrar, who wrote:

From a study of relevant legislation and documents, in relation to the registration of this petition, it did not seem that the sexual activities conducted by adult homosexual persons, in private or personal locations, could become a subject for criminal law. Against Nepal's current legal scenario, the issue raised by the petition is not found to be a matter of public concern.⁵³

But the petitioner filed the case again, calling the rejection illegal. The second petition was reviewed by a single-judge bench and the initial *darpath* deemed invalid.

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- 50 CREA, *Count Me In*, Sunil Babu Pant, June 2011, <http://www.youtube.com/watch?v=sdnyrulnwn>
As early as 2003, BDS was able to convince Kathmandu police to issue an official order to investigate violence against MSM, but follow-through was limited. See: Forum For Women, Law, and Development, "Women and Sexuality in Nepal: A Study Report," 2007 <http://www.fwld.org/uploads/pdf/Sexuality%20Cover1.pdf>
- 51 Human Rights Watch, "Nepal: Sexual Rights Group At Risk of Closure," July 22, 2004 <http://www.hrw.org/news/2004/07/22/nepal-sexual-rights-group-risk-closure>
- 52 Sixty-six chapters of the original *Muluki Ain* (almost 250 pages of text, or one-third of the document) are dedicated to regulations of sexual relations. The meticulous regulations are focused principally on intra- and intercaste sexual relations; the document discusses sodomy: According to the [*Muluki Ain*], a "Cord-Wearer" [specific caste designation] having committed sodomy with a cow will be degraded to a "Non-enslavable Alcohol-Drinker," and a "Nonenslavable Alcohol-Drinker" to an "Enslavable Alcohol-Drinker". The animal involved must be assigned to an Untouchable [lowest caste]; and only members of the impure castes may thereafter drink her milk. In sum, the animal is degraded to the status of an untouchable, as it seems. Similar regulations are laid down with regard to sodomy with sheep, goats, and buffaloes. Andras Hofer, *The Caste Hierarchy and the State in Nepal: A Study Of The Muluki Ain Of 1854*, 1979: Universitatsverlag Wagner Innsbruck.
- 53 Supreme Court of Nepal, Writ No. 3736 of 2061 BS (2004): *His Majesty's Government, Ministry of Home Affairs, District Administration Office, Kathmandu vs. Achyut Prasad Kharel*

The petitioner elaborated by contrasting his “clear legal basis” (including the negative space in international law regarding sexual orientation and gender identity) with BDS’s activities: “Blue Diamond Society has been established with the main objectives to campaign for such an illegal activity, to provide recognition to the right to homosexuality and to attract people towards homosexual intercourse.” In specific, he rejected the idea that homosexuality could be protected under human rights measures because, he claimed, it was not included in any of the international treaties Nepal had ratified to date, and because “same sex (homosexual) relationships are a character demerit in a human.”

BDS reached out to partners, and the petition soon drew international attention. In a letter to the Minister of Home Affairs dated August 5, ARC International, an organization dedicated to LGBT issues at the United Nations, drew attention to the July demonstration in which BDS members faced police violence as a violation against human rights defenders:

Article 5 of the U.N. General Assembly’s “Declaration on Human Rights Defenders” affirms that “everyone has the right, individually and in association with others, to meet or assemble peacefully,” and “to form, join, and participate in non-governmental organizations, associations or groups.” Article 7 affirms the right “to develop and to discuss new human rights ideas and principles and to advocate for their acceptance.”⁵⁴

The letter then pointed to a mention of sexual orientation at the UN:

Indeed, the Special Representative of the U.N. Secretary General on Human Rights Defenders has called attention to the “special importance” of the work of “human rights groups and those who are active on issues of sexuality, especially sexual orientation. These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by state forces but by other social actors.”⁵⁵

ARC encouraged the government of Nepal to “support the elimination of grounds for ambiguity in Nepalese law through the repeal of the criminalization of ‘unnatural sex’ in paragraphs 1 and 4 of Part 14, Chapter 16 of Nepal’s Civil Code of 1963 (*Muluki Ain*).” This call was echoed and explained in a letter to the Home Minister by Human Rights Watch. LGBT program director Scott Long explained: “No express prohibition of adult, consensual homosexual conduct exists in Nepalese law. Paragraphs 1 and 4 of Part 4, Chapter 16 of Nepal’s *Muluki Ain* (National Civil Code) penalize ‘unnatural sex’ with up to one year’s imprisonment. ‘Unnatural sex’ is undefined in the Code.”⁵⁶

When Kharel re-filed, the Supreme Court issued a “show cause” order requiring the government entities named in the petition to respond to the case; all four replied rejecting the arguments of the petition.

That same week thirty-nine BDS members were arrested for protesting the alleged brutal police murder of a *meti* and imprisoned for thirteen days without charges. Jo Becker, a professor of human rights advocacy at Columbia

54 ARC International letter contained in: Supreme Court of Nepal, Writ No. 3736 of 2061 BS (2004): *His Majesty’s Government, Ministry of Home Affairs, District Administration Office, Kathmandu vs. Achyut Prasad Kharel*

55 United Nations Commission on Human Rights, “Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders in accordance with Commission resolution 2000/61,” E/CN.4/2001/94, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d6c1b351bf405ad3c1256a25005109bc/\\$FILE/G0110638.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d6c1b351bf405ad3c1256a25005109bc/$FILE/G0110638.pdf)

56 Human Rights Watch, Nepalese Supreme Court’s Proposed Ban: Letter to the Minister of Home Affairs, July 23, 2004, <http://www.hrw.org/news/2004/07/22/nepalese-supreme-court-s-proposed-ban>

University, identified this as a major turning point for the movement due to the amount of local and international attention BDS was able to draw to the violence and the detention.⁵⁷ While the government bodies named in the petition prepared their responses to the case, BDS garnered support demanding the release of its members and delivered food to them in a police jail. BDS's work to publicize the arrests catalyzed unprecedented attention from international NGOs and media, sparking coverage or statements from Amnesty International, Human Rights Watch, the BBC, UNAIDS, the Coalition of Asia-Pacific Regional Networks on HIV/AIDS, the Naz Foundation International, and Sidaction and Act Up-Paris.⁵⁸ The thirty-nine were released after thirteen days and dubbed a "public nuisance" by the police, portending a trend of the use of the Public Offenses Act⁵⁹ to target, charge, and fine LGBTI people and others⁶⁰ and reinforce a climate of fear surrounding interactions with law enforcement.⁶¹

A week later the government entities named in the petition began to respond. The Ministry of Home Affairs (MoHA) denied the petitioner's argument on two grounds: that Nepal has "not framed any law to take action against the homosexual persons," and that "there is no clear legal provision to take action against homosexual persons under Number 4 of Bestiality."⁶² The Kathmandu District Administration Office, which is headed by the Chief District Officer (CDO) responded with the same arguments. The cabinet secretary wrote on behalf of the Prime Minister and the Council of Ministers: "What activities and proceedings of this Office have violated which of his particular rights ... The writ petition annulment is worthy of annulment. I request for its annulment." And the Secretary of the Ministry of Law, Justice, and Parliamentary Affairs dismissed the petition on similar grounds that the Law Ministry had in no way violated the petitioner's rights, and that legal mechanisms for addressing bestiality were sufficient and unobstructed, so no change to the law was necessary.

However, the Supreme Court deferred hearings for this case several times, pushing the date back by months. In the wake of the initial media attention, violence toward LGBTI people increased. "Public opinion in Kathmandu can be infectious and create a certain amount of permissiveness regarding bad behavior from authorities," a political observer noted.⁶³ On February 1, 2005 King Gyanendra suspended Parliament, appointed himself the head of a new government, locked up several influential political leaders, and instituted martial law in the name of controlling the Maoist insurgency. BDS began to call attention to an uptick in harassment of and attacks on transgender people in particular and galvanized international support by reaching out to contacts in human rights organizations to draw attention to the violence.⁶⁴

57 Jo Becker, "Campaigning for Justice: Human Rights Advocacy in Practice," Stanford University Press, 2013.

58 Kyle Knight and Michael Bochenek, "Establishing a Third Gender in Nepal: Process and Prognosis," *Emory International Law Review*, vol. 26: http://www.law.emory.edu/fileadmin/journals/eilr/26/26.1/Bochenek_Knight.pdf

59 Some Public (Crime and Punishment) Act, 2027 (1970), NEPAL LAW COMMISSION, http://www.ncf.org.np/upload/files/182_en_some-public-crime-and-punishment-act-2027-english.pdf

60 The Heartland Alliance, "The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal," June 2013, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GlobalInitiativeForSexualityAndHumanRights_Nepal108.pdf; Agence France-Presse (AFP), "Nepal Police Accused of Long-Hair Crackdown," March 5, 2013, <http://www.ndtv.com/article/world/nepal-police-accused-of-long-hair-crack-down-338422>

61 Sonal Singh, et al, "Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation," *BMC International Health and Human Rights* 2012: <http://www.biomedcentral.com/content/pdf/1472-698X-12-7.pdf>

62 Supreme Court of Nepal, Writ No. 3736 of 2061 BS (2004): *His Majesty's Government, Ministry of Home Affairs, District Administration Office, Kathmandu vs. Achyut Prasad Kharel*

63 Interview, Kathmandu, June 2013.

64 "Nepal: Police Attack Transgender People, Pattern of Police Abuse Highlights Broader Threat to Civil Society," April 20, 2005, <http://www.hrw.org/news/2005/04/17/nepal-police-attack-transgender-people>
Kyle Knight. "The Spark," March 2014, *The Caravan*, <http://www.caravanmagazine.in/reportage/spark>

The large and influential UN presence in Nepal gave BDS a unique and novel advocacy target. By 2005, the United Nations Mission in Nepal was one of the largest UN human rights field operations in the world.⁶⁵ Meanwhile the United Nations itself was slowly warming to discussions of sexuality and sexual rights and the incorporation of sexual orientation and gender identity (SOGI) in human rights standards.⁶⁶

At the same time, global norms were shifting. The Yogyakarta Principles, a set of twenty-nine guiding principles on the application of international human rights law in relation to sexual orientation and gender identity, were created in 2006 by a group of international human rights experts, including UN officials and activists.⁶⁷ Sunil Pant was a signatory. Despite the fact that the Yogyakarta Principles are a non-binding document, their uptake in international and domestic laws and policies around the world has been swift. An anthropologist analyzing the effect of the Principles argued that “the modesty of their demands, the stability of their foundations, and the strategic, inventive ways that activists have framed and deployed them from multiple points of entry in the global system” have contributed to their widespread and rapid application.⁶⁸

In 2006, LGBTI rights activists documented another uptick in attacks against LGBTI people, especially in Kathmandu. In what Human Rights Watch would call a “sexual cleansing drive” by the police in 2006, *metis* were frequently the targets of police violence and harassment.⁶⁹ The campaign targeting LGBTI people continued for months, resulting in multiple arrests of BDS outreach workers.⁷⁰

Ultimately, the Supreme Court rejected the petition, citing the government agencies’ objections.⁷¹ The culmination of local and international outcry around the legal case, the visibility of LGBTI rights violations under the conditions of the conflict, and the emergent development agency engagement with SOGI-rights globally and in Nepal were transforming the political and legal landscape.

LGBTI activists, led by BDS, Mitini Nepal, CruiseAids Nepal, and Parichaya Nepal, returned to the Supreme Court proactively in April 2007 to file their own case. The petition asked the court to force the government to end its discriminatory policies and practices in terms of sexual orientation and gender identity.

65 “A Comprehensive Peace? Lessons from Human Rights Monitoring in Nepal,” *Nepal in Transition*, eds. Einsiedel, Malone, and Pradhan, Cambridge University Press, 2012.

66 Until 1993 the only mention of anything “sexual” in an international intergovernmental document was in a discussion of protecting children from sexual abuse in the Convention on the Rights of the Child (1989). Relegated to implicit discussions about health rights, family rights, or reproductive rights, scholars have argued this construction left little space for anything other than heterosexual reinforcement of social norms. Annexed under reproductive rights, sexuality made fleeting appearances in various development charter drafts over the next few years, was occasionally used as a straw-man bargaining chip for other issues, and was usually stricken from the final record by states who openly opposed either homosexuality, female autonomy, or both. Francoise Girard, *Sex Politics: Reports from the Frontlines: “Negotiating Sexual Rights and Sexual Orientation at the UN,”* http://www.sxpolitics.org/frontlines/book/pdf/capitulo9_united_nations.pdf

67 Yogyakarta Principles: <http://www.yogyakartaprinciples.org/>

68 Ryan Richard Thoreson, “The Yogyakarta Principles and the Norm That Dare Not Speak Its Name,” *Journal of Human Rights*, Taylor & Francis Group, 2009, http://www.ypinaction.org/files/50/Norm_that_Dares_Not_Speak_Its_Name.pdf

69 “Nepal: Police on ‘Sexual Cleansing’ Drive: Transgender People Routinely Subjected to Physical and Sexual Abuse,” January 14, 2006, <http://www.hrw.org/news/2006/01/11/nepal-police-sexual-cleansing-drive>

70 Human Rights Watch, “Nepal: ‘Sexual Cleansing’ Drive Continues New Arrests of Transgender People, HIV Workers,” March 19, 2006, <http://www.hrw.org/news/2006/03/16/nepal-sexual-cleansing-drive-continues>

71 It is worth noting that court precedents around thorny socio-political issues have not always been overwhelmingly positive in the immediate sense. For example, a landmark gender and land inheritance rights case in 1995 (*Mira Dhungana v. Ministry of Law and Justice*, NKP, 1995/2052, Vol. 37, No. 6, p. 462) resulted in the Supreme Court declaring fundamental differences between men and women and deciding that women have two roles—as daughters and as wives—before sending the deliberations to the parliament. Nonetheless, legal scholars have “succeeded in opening the door of Nepal’s apex court to matters of gender justice.” See: Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equity, Identity Politics, and Democracy in Nepal*, Oxford University Press, 2013.

Said Hari Phuyal, the lawyer who represented the LGBTI organizations in the case: “Our purpose was simple—we didn’t expect anything big, just a show cause from the court to force the Nepal government to tell us why they support this discrimination. Why is there discrimination against these people?”

The Court issued a show cause order after a single-justice bench heard Phuyal’s argument.⁷² The case was conducted as a “continuous hearing.” “The justice in charge wanted more information, I had to use all of the case law from around the world to explain how these concepts mattered legally,” said Phuyal.

The case dragged on for several hearings. Phuyal recalls:

I spoke over three days, many hours, there was a huge crowd, and still the judge was not convinced. And he said, looking out at the gallery: “Is there anyone homosexual here? Is there any people with different sexual orientation (*pharak pahichaan*) from the lawyers present?” There was no one on the lawyers’ side.

And he asked: “Is there anyone in the audience side?”

Manisha stood and she dared to speak: “Yes, I am.” And the judge said: “Can you speak about who you are and how you feel?” And she perfectly spoke for around five minutes about who is she, what is her family background and how she felt from the beginning—she said you know biologically I am male but my body has changed now and I have breasts and my identity is of female. She said: “I’m male but I have breasts, I feel like female, so my whole orientation is like that.”

I think many hours of my argument to the court were less powerful than her short statement. She gave such a powerful statement. I wish it had been recorded for the history of Nepal.⁷³

Phuyal said it took a three-pronged argument to convince the court: human rights, comparative case law, and a constitutional example. He specifically referenced *Goodwin v. the United Kingdom*, a landmark case at the European Court of Human Rights, and South Africa’s 1994 Constitution, the first in the world to mention sexual orientation.

“At the end of that, the judge still said he was going to have trouble writing the decision, but the way he said it we knew he was going to write a positive decision. So we gave him *amicus curiae* from experts like Human Rights Watch.”⁷⁴

In its *curiae*, Human Rights Watch explained that the UN Human Rights Committee’s 1994 decision in *Toonen v. Australia*: “adult consensual sexual activity in private is covered by the concept of ‘privacy,’” while noting that domestic moral opinion condemning homosexuality is an insufficient reason to permit an exception allowing the criminalization of homosexual acts. “Moral issues [cannot be] exclusively a matter of domestic concern.”⁷⁵

72 *Annapurna Post Daily*, “Show Cause Order Issued (*kearan dekhanu adesh jari*),” April 20, 2004.

73 Interview, Kathmandu, July 2013.

74 Interview, Kathmandu, July 2013.

75 *Amicus Curiae*, Human Rights Watch, submitted to the Supreme Court of Nepal by Scott Long, Director, Lesbian, Gay, Bisexual, and Transgender Rights Program, November 16, 2007.

The initial decision issued by the court on December 21, 2007 (and the subsequent full decision drafted the following year) was an overwhelming victory for the petitioners. A leading women’s rights activist called it “a historic victory”⁷⁶ as the court vehemently demanded the government eliminate discriminatory laws.

The Court dictated three substantial points:

1. the establishment of a committee to study same-sex marriage;
2. the creation of a legally-recognized third gender category;
3. and abolition of all Nepali laws that discriminate on the basis of sexual orientation or gender identity.

The Court’s requirement of equal space for a legally-recognized third gender category stood out as a major gain and international precedent. The case stated:

If any legal provisions exist that restrict the people of third gender from enjoying fundamental rights and other human rights provided by Part III of the Constitution and international conventions relating to the human rights which Nepal has already ratified

and applied as national laws, with their own identity, such provisions shall be considered as arbitrary, unreasonable and discriminatory. Similarly, the action of the state that enforces such laws shall also be considered as arbitrary, unreasonable and discriminatory.⁷⁷

Bala Ram KC, now retired, the Supreme Court justice who was the primary author on the decision in the case, recalled:

Concerning marriage, I thought it is not the business of the government to peek inside the room and see if two men are occupying the same bed or two females are occupying the room. It is not the duty of the government or the right of the government to look in there and see if they are having sex or whatnot. They must have the right to enjoy their lives and they must have the right to marry also.⁷⁸

At this time, same-sex marriage was nationally legal in five countries—the Netherlands, Canada, Belgium, South Africa, and Spain.⁷⁹ More than eighty countries criminalized same-sex content (though an exact count is complicated).⁸⁰ In this context, Nepal’s Supreme Court ruling was an unflinching commitment to LGBTI legal protections and marked a landmark victory that resonated around the globe.

Notably, the use of human rights language and international precedent used in Nepal showcased the potential for international law to inform national policy. Indeed, the Supreme Court success in Nepal holds promise for other countries seeking legal change, with the powerful ruling serving as a potential comparative model for formal legal protections elsewhere.

Within weeks of the decision, Richard Bennet, the representative for the Office of the United Nations High Commissioner for Human Rights (OHCHR-Nepal), publicly lauded the decision: “... congratulations to BDS

76 *Balkrishna Basnet*, Kantipur Daily, “Order to grant Identity to Third Gender (*tesro lingi lai pahichaan din adesb*)” December 22, 2007

77 *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT’L JUD. ACAD. L.J., 2008.

78 Interview, Kathmandu, July 2013.

79 Pew Forum, “Gay Marriage Around the World,” July 16, 2013, <http://www.pewforum.org/2013/07/16/gay-marriage-around-the-world-2013/#allow>

80 Human Rights Watch, “This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism,” 2008, http://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf

and the other organizations and individuals who supported the Supreme Court challenge; to the lawyers who argued on their behalf; and to the Justices who delivered what is truly a ground-breaking decision on gender identity and sexual orientation in South Asia and perhaps worldwide.”⁸¹

The Supreme Court success in Nepal holds promise for other countries seeking legal change, with the powerful ruling serving as a potential comparative model for formal legal protections elsewhere.

Many felt the Court decision had a large impact on public opinion. Said KC, the retired justice: “The Nepal Supreme Court influences public opinion a lot. It doesn’t influence the government very much, the government is always reluctant to implement our decisions. But the people and the society they always come forward after the decisions.”⁸²

Explained a donor agency staff member:

Once the Supreme Court decision said they supported this movement, people followed it. The movement has been successful like the *Dalit*⁸³ movement was in India. There they got reservations and quotas, those aren’t here yet for LGBTI but it’s sort of like the same thing—they’ve made public space for themselves, made people understand the marginalization and the need for their inclusion.⁸⁴

In the wake of the decision, activists began carving out social space based on the instructions of the decision, most notably the introduction of a legally-recognized third gender category. Creating logistical recognition for a third gender category was an ambitious project, but allowed for several steps toward practical implementation to be taken, each of which has been heralded by Nepali activists as meaningful boons for protection and access. For example, *metis* who presented as feminine have reported in the past that in certain social spaces they were now able to “get the ladies’ discount,” signifying a cultural legibility and degree of respect.⁸⁵ However, discrimination against gender-variant people such as *metis* or transgender people remained rampant. Activists saw the implementation of a third gender category—and its full protections—as a necessary next step.⁸⁶

Said one *meti* who lived in a village outside Kathmandu:

When I come into the city, I need to take a bus. Some of the buses now have women’s-only seats to keep the women comfortable and safe. I don’t have a wig, and I usually wear men’s

81 Statement by Richard Bennett, Representative of the United Nations High Commissioner for Human Rights in Nepal at a Discussion Program on the Supreme Court decision on Sexual Minorities Organized by Blue Diamond Society, January 12, 2008, Kathmandu, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2008/2008_01_12_SexualMinorities_E.pdf

82 Interview, Kathmandu, June 2013.

83 According to the National Campaign on Dalit Human Rights, “The word “Dalit” comes from the Sanskrit root dal- and means “broken, ground-down, downtrodden, or oppressed.” Those previously known as Untouchables, Depressed Classes, and Harijans are today increasingly adopting the term “Dalit” as a name for themselves. There are an estimated 170 million Dalits in India. <http://www.ncdhr.org.in/>. Human rights violations on the basis of Dalit caste status have been well-documented, for more reading see: “Hidden Apartheid Caste Discrimination against India’s ‘Untouchables,’” Center for Human Rights and Global Justice and Human Rights Watch, February 2007, http://www.hrw.org/sites/default/files/reports/india0207webwcover_0.pdf

84 Interview, Kathmandu, June 2013.

85 Seira Tamang, “Patriarchy and the production of homo-erotic behavior in Nepal,” *Studies in Nepali History and Society*, 2003, http://mar-tinchautari.org.np/files/2_%20Seira%20Tamang.pdf

86 Humanitarian Practice Network, “Making disaster risk reduction and relief programmes LGBTI inclusive: examples from Nepal,” Issue 55, <http://www.odihpn.org/humanitarian-exchange-magazine/issue-55/making-disaster-risk-reduction-and-relief-programmes-lgbtiinclusive-examples-from-nepal>

clothing at home because my family teases me if I don't. But I appear to be transgender so I try to sit in the women's seats and they yell at me until I go away. I'm not comfortable sitting with the men because they ask me to have sex with them or tease me. One time recently I yelled this at them—"Where should I sit? I'm transgender! No one will let me sit where I belong." This is why we need our own seats and spaces.⁸⁷

Despite enthusiasm, the legal recognition of a third gender was novel and complicated, and few models existed anywhere else in the world.⁸⁸ Introduction of the third category in administrative systems ranging from voter rolls to the 2011 federal population and housing census⁸⁹ to citizenship certificates all posed unique challenges.⁹⁰ Inspired by the progressive self-identification-based gender identity policies in New Zealand and Argentina, BDS helped the Ministry of Home Affairs draft its policy, specifically targeting citizenship certificates, which are crucial for many basic functions in daily life and, for the first time, required for voter registration in the 2013 election.⁹¹ Much like the legal cases brought before the Supreme Court, the combination of local lived experiences and international examples informed advocacy and, later, policy implementation.

Nepali LGBTI activists continue to undertake tremendous work to garner inclusion on official government registers and programs, including the 2011 census, and have even lobbied international actors in Kathmandu to be more inclusive. Securing the rights guaranteed under these laws has remained elusive, and as of 2012, only two citizens had received a third-gender identity card.⁹² For example, the United Nations office in Nepal now includes measures about sexual-orientation and gender-identity-based workforce diversity in its national surveys.⁹³ An internship for an LGBTI person at the National Human Rights Commission has been established, reflecting an increase in visibility and access.⁹⁴ Other governmental and non-governmental entities have started to include a third gender category as well. For example the Federation of Nepali Journalists has pledged to include the third gender in its programming documents;⁹⁵ the Department of Prison Management has planned to construct separate detention cells for third gender detainees;⁹⁶ and the arrival and departure

87 Interview, July 2013, Kathmandu.

88 Kyle Knight and Michael Bochenek, "Establishing a Third Gender in Nepal: Process and Prognosis," *Emory International Law Review*, vol. 26, http://www.law.emory.edu/fileadmin/journals/eilr/26/26.1/Bochenek_Knight.pdf

89 *The New Republic*, "What We Can Learn From Nepal's Inclusion of 'Third Gender' on Its 2011 Census," July 18, 2011, <http://www.newrepublic.com/article/world/92076/nepal-census-third-gender-lgbt-sunil-pant>; *The Kathmandu Post*, "Separate and Unequal," August 31, 2011: <http://www.ekantipur.com/the-kathmandu-post/2011/08/31/oped/separate-and-unequal/225780.html>; *The Kathmandu Post*, "Zero in 26,620,809," October 1, 2011: <http://www.ekantipur.com/the-kathmandu-post/2011/10/01/oped/zero-in-26620809/226915.html>

90 The World Policy Institute, "Dividing By Three: Nepal Recognizes a Third Gender," February 1, 2013, <http://www.worldpolicy.org/blog/2012/02/01/dividing-three-nepal-recognizes-third-gender>

91 IRIN, "Nepal: Undocumented residents excluded from state services," May 17, 2012, <http://www.irinnews.org/Report/95469/NEPAL-Undocumented-residents-excluded-from-state-services>

92 Kyle Knight and Michael Bochenek, "Establishing a Third Gender in Nepal: Process and Prognosis," *Emory International Law Review*, vol. 26: http://www.law.emory.edu/fileadmin/journals/eilr/26/26.1/Bochenek_Knight.pdf
Nonetheless, progress is evident.

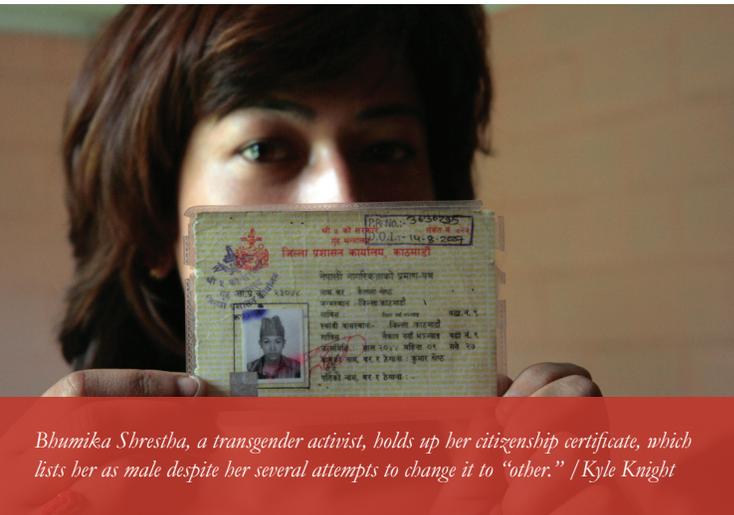
93 United Nations Resident and Humanitarian Coordinator's Office, "Workforce Diversity in NGOs: Gender Equality and Social Inclusion status of NGOs in an Eastern Hill district," June 9, 2011, http://un.org.np/sites/default/files/Field%20Bulletin%20-%20Issue%20-%209_Workforce%20diversity_GESI%20status%20in%20NGOs_June-2011.pdf

94 IDLO/UNDP, "Nepal: Assessing the Capacity of National Human Rights Institutions in South Asia to Address Discrimination and Human Rights Relating to HIV, Sexual Orientation and Gender Identity," June 2012, http://regionalcentrebangkok.undp.or.th/practices/hiv_aids/documents/HIV-2013-NHRI-Background-Brief-Nepal.pdf

95 Pahichan Media, "FNJ to include sexual minorities in its planning projects," November, 2014, <http://pahichan.com/fnj-to-include-sexual-minorities-in-its-planning-projects/>

96 Pahichan Media, "DoPM to construct separate lock-ups for third gender inmates," November, 2014, <http://pahichan.com/dopm-to-construct-separate-lock-ups-for-third-gender-inmates/>

forms at the international airport added a third gender tick box.⁹⁷ “It means a lot that our government is now counting us, but that data has to lead to action—we are here, now we are proving we are here through their methods, and we have to be included by everyone,” said Pant.⁹⁸



Bhumika Shrestha, a transgender activist, holds up her citizenship certificate, which lists her as male despite her several attempts to change it to “other.” / Kyle Knight

In the wake of the 2011 census, Blue Diamond Society partnered with The Williams Institute of the University of California at Los Angeles to pilot a follow-up survey of a sample of sexual and gender minorities in Nepal. The survey data revealed patterns of discrimination and abuse, socio-economic disparities among sub-populations, and that the population sampled used twenty-one different sexual orientation and gender identity terms to refer to themselves—including but not limited to third gender.⁹⁹

97 BDS, “Arrival and Departure forms add Third Gender,” June 2014: <http://bds.org.np/news/test-flash-two/>

98 Interview, June 2011, Kathmandu.

99 The Williams Institute, “Surveying Nepal’s Sexual and Gender Minorities: An Inclusive Approach,” 2014, <http://williamsinstitute.lawucla.edu/wp-content/uploads/Nepal-Survey-Oct-2014.pdf>

CATALYTIC ACTION: ADAPTIVE STRATEGIES, SUSTAINED ALLIANCES, AND POLITICAL ACUMEN

- ▶ Securing HIV-specific funding, **activists creatively developed programs and pushed for human rights** alongside their health outreach work, in spite of donor trepidation that they were going outside their mandate.
- ▶ Activists **engaged with United Nations** leaders who were in Nepal to monitor the conflict and transition, putting LGBTI rights on their radar and using their official presence to increase the visibility of their work.
- ▶ Leaders invited to international forums **insisted that emerging international standards on LGBTI rights be made useful for developing countries.**
- ▶ Sexual and gender minority rights activists **joined a broad people's movement**, leveraging populist sentiments fueled largely by demands for comprehensive inclusion.
- ▶ **Substantive and ongoing engagement with donor agencies** in Kathmandu resulted in an expansion of donor attention to LGBTI people and specific issues beyond HIV outreach.
- ▶ A **sustained push for political participation** during a tumultuous transitional period ensured LGBTI rights were continuously taken seriously and remained in the focus of political parties and individual politicians and power brokers.



“NEPAL’S MOST REPRESENTATIVE ELECTED BODY”:
POLITICAL REPRESENTATION AND
CONSTITUTIONAL REFORM

■ As Nepal emerged from war, there were more political questions than answers. The country had seen swells of populism before, but cries of “New Nepal” this time reflected widespread sentiment that change was at the people’s fingertips. LGBTI activists positioned themselves as part of the broader struggle—from street protests, to engaging with post-apartheid South Africa as a gold standard, to endeavoring to gain political representation for their minority population.

In 2006 citizens filled city streets across the country, demanding an end to the monarchy and a “New Nepal” in a movement described as “neither fully planned nor fully spontaneous.”¹⁰⁰ The Comprehensive Peace Accord signed by the government and the Maoist party in November 2006 brought the ten-year armed conflict to a formal close. The protests in 2006 were distinct from others in Nepal’s history in that, while they were sparked by a coalition of political parties, the demonstrations soon gained their own citizen-driven momentum. Despite the intense security force presence on the streets, crowds violated curfews. Media coverage relayed information between pockets of protesters, and their voices were echoed in demonstrations across the country.¹⁰¹ Adding to the significance of the people-centered, rather than party-inspired, protests was the fact that they continued despite efforts by the international community to halt them in favor of compromise.¹⁰²

LGBTI organizations and individuals joined in the street marches and other activities¹⁰³ with ambitions to shape the country’s new constitution. “This is a grey time,” Pant told the International Gay and Lesbian Human Rights Commission (IGLHRC) in 2007, “it’s an unclear time, we don’t know what will happen. But it’s also a hopeful time, because lots of things are changing.”¹⁰⁴ As Manjushree Thapa noted, “It is not the Nepali way to settle ... glaring questions ahead of time; the country is inexorably in the throes of a slapdash, last-minute, make-it-up-as-you-go ethos.”¹⁰⁵ And so went the transitional politics with which LGBTI activists were beginning to engage.

In May of 2006, to mark the International Day Against Homophobia, Ian Martin, who was then serving as the representative of the UN’s OHCHR in Nepal, gave a speech on LGBTI rights, citing specific examples of the UN offices intervening:

As recently as March this year, we witnessed the mass arrest and detention of *metis* in Kathmandu. Our Office met with officials on a number of occasions after the arrests, but were unable to obtain satisfactory explanations for the legal basis of the arrests and detentions. It was clear that *metis* were targeted as a class and arrested, and not because of any specific conduct on the part of individuals. Those arrested included a number of BDS staff and

100 International Crisis Group, “Nepal: From People Power to Peace?,” Asia Report N°11510, May, 2006, <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/115-nepal-from-people-power-to-peace.aspx>

101 International Crisis Group, “Nepal’s Crisis: Mobilising International Influence,” Asia Briefing N°49, April 19, 2006, <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/B049-nepals-crisis-mobilising-international-influence.aspx>

102 International Crisis Group, “Nepal: From People Power to Peace?,” Asia Report N°11510, May 2006, <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/115-nepal-from-people-power-to-peace.aspx>

103 Mark Schoffman, “Gay community joins Nepal protests,” Pink News, April 19, 2006, <http://www.pinknews.co.uk/2006/04/19/gay-community-joins-nepal-protests/>

104 International Gay and Lesbian Human Rights Commission (IGLHRC), “A Celebration of Courage,” 2007, <http://www.iglhrc.org/sites/default/files/222-1.pdf>

105 Manjushree Thapa, “Monarchists Versus Maoists,” *The London Review of Books*, July 3, 2008, <http://www.lrb.co.uk/v30/n13/letters#letter4>

volunteers conducting outreach work. These cases remain pending as the *metis* were finally released on bail, after being held in detention in unacceptable conditions for over two weeks.

None of this is acceptable.¹⁰⁶

He cited South Africa's constitution and its pioneering protections based on sexual orientation.¹⁰⁷

Drawing inspiration from South Africa's post-apartheid transition, Pant and BDS began to hand out copies of the South African constitution to political parties. The pressure to incorporate SOGI-rights into Nepal's new constitution was beginning to mount.

In January 2007, in anticipation of June elections, civil society groups organized a conference called "Nepal's New Constitution and the Fundamental Rights of Minorities." LGBTI activists invited South African justice Edwin Cameron, the country's first openly gay and openly HIV-positive judicial leader. Cameron spoke passionately about South Africa's 1994 constitution and outlined the subsequent steps—primarily court decisions—the country had undertaken to make the constitutional promise a reality. Discussing South Africa's post-apartheid negotiations on how to shape justice and the state, he expressed hope for Nepal:

Nepal has had to walk a painful and fraught path to come to this point in negotiating its own constitutional future. That pain, and the depth of its struggle, may have a meaning. They may signal a lesson about how inclusive Nepal's future commitment to justice and equality could be.

Cameron's speech set the stage for what he admitted was a difficult but crucial path to including LGBTI people in basic rights protections:



A volunteer from the Sexual and Gender Minorities Student Forum works at the 2013 Gai Jatra/LGBT Pride parade in Kathmandu. / Kyle Knight

It is easy to profess that there shall be justice for women and minority cultural, religious and ethnic groups. No self-respecting constitution-maker anywhere would put these in dispute. What is more difficult is to fulfill that commitment in the case of unfashionable, unpopular and socially reviled groups. These include gays and lesbians, transsexuals, transvestites, intersexed and transgendered persons. For homosexuality and other non-abusive forms of sexual variance test the fundamental core of human rights philosophy. A society that aspires to respect human rights cannot disrespect people because of sexual orientation.

106 Address by Ian Martin, Representative of the United Nations High Commissioner for Human Rights in Nepal, at the Blue Diamond Society Dialogue on Sexual Orientation/Gender Identity and Constituent Assembly in Nepal On the Occasion of International Day Against Homophobia, May 17, 2006, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2006/2006_05_17_HCR_speech_BDS_E.pdf; In Nepali: http://nepal.ohchr.org/en/resources/Documents/Nepali/statements/HCR/Year2006/2006_05_17_HCR_speech_BDS_N.pdf

107 International Gay and Lesbian Human Rights Commission (IGLHRC), "A Celebration of Courage," 2007, <http://www.iglhrc.org/sites/default/files/222-1.pdf>

During the same program, OHCHR representative Lena Sundh urged the understanding of non-discrimination beyond legal developments: “The commitment to nondiscrimination is required in law, and to be enforced by the authorities; it is also for communities, families and each of us individually to make sure that as we live our day-to-day lives that we do not discriminate against anyone.”¹⁰⁸ Later in the year, the OHCHR–Nepal spokesperson delivered a speech on a human rights day program organized by BDS in which he encouraged the National Human Rights Commission (NHRC) to pay attention to rights violations against sexual minorities and BDS to continue supplying information about violations to UN bodies.¹⁰⁹ The European Union (EU) urged the NHRC to pay particular attention to outreach to marginalized groups, including “third gender people.”¹¹⁰

After delays and negotiations, Nepal’s new governmental structure was decided. A 601-member elected body would serve as both Constituent Assembly and Parliament. This meant that the electoral body would both govern the country and define the new constitution. The potential was clear: the composition of Parliament could, for the first time, include representation from ethnic and sexual minorities, as well as women.

In the lead-up to the election, political volatility continued and LGBTI rights activities drew attention to scapegoating and other anti-gay actions and rhetoric on the part of political parties, including a famous instance where a Maoist leader called homosexuals “pollutants.”¹¹¹ Parties assessed the landscape for available candidates, and activists pressured parties to include their issues in their manifestos, successfully garnering explicit support from three parties including the Maoists.¹¹² “We were making decent progress, but we knew that given the instability, and the likelihood that it would continue for some time, that we needed to get involved in Kathmandu politics,” Pant said.¹¹³

The elections were pushed to April 2008, but by then parties had warmed and a group of gay men stood confidently for the election. Wrote one journalist: “Pant feels he has a good chance of winning, saying there are hundreds of thousands of gay and transgender voters across the country to whom he will appeal.”¹¹⁴

On April 10, 2008 election results were announced and the Communist Party of Nepal (United) had garnered 154,968 votes,¹¹⁵ winning them five seats under proportional representation in the new Constituent Assembly.¹¹⁶ The party called Pant and asked him to take one of the seats.

Pant joined what Martin called “Nepal’s most representative elected body to date,” referencing the inclusion

108 Lena Sundh, Representative of the United Nations High Commissioner for Human Rights, Address at the Blue Diamond Society Talk Programme on “Nepal’s New Constitution and the rights of minorities (based on sexual orientation and gender identities): experience from South Africa,” January 9, 2007, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2007/2007_01_09_BDS_E.pdf

109 Statement by Marty Logan, Spokesperson, Office of the United Nations High Commissioner for Human Rights in Nepal, Delivered at a Program on Tackling Violence Against Sexual and Gender Minorities, Organized by Blue Diamond Society Human Rights Day, December 10, 2007, Kathmandu, http://nepal.ohchr.org/en/resources/Documents/English/statements/Reg/year2007/2007_12_10_BDS_Marty_E.pdf

110 Conflict Mitigation Programme II WYG International - Kathmandu Europe Aid/122531/C/SER/NP, Report to the European Commission to Nepal, “WITNESS AND VICTIM PROTECTION PROGRAMME,” September 2008.

111 Human Rights Watch letter to the Ministry of Women, Children & Social Welfare, “Keep Promise, Condemn Abduction Based on Sexual Orientation,” April 17, 2007, <http://www.hrw.org/news/2007/04/15/nepal-keep-promise-condemn-abduction-based-sexual-orientation>

112 Jo Becker, “Campaigning for Justice: Human Rights Advocacy in Practice,” Stanford University Press, 2013.

113 Interview, Kathmandu, June 2013.

114 Reuters, “Nepali gay men contesting poll hope to end taboo,” February 26, 2008, <http://in.reuters.com/article/2008/02/26/idINIndia-32155720080226>

115 Election Commission of Nepal, Proportional Representation voting results: <http://www.election.gov.np>

116 The Carter Center, “Observing Nepal’s 2008 Constituent Assembly Election,” http://cartercenter.org/resources/pdfs/news/peace_publications/election_reports/FinalReportNepal2008.pdf

of people across caste, gender, ethnic, and other categories.¹¹⁷ Within months of the opening sitting of the twenty-five-party strong assembly, however, suspicion increased that inclusiveness was superficial. Politically elite men haggled and horse-traded over power, and the assembly meetings were routinely postponed.¹¹⁸ Throughout the four-year tenure of the assembly, attendance at votes—especially by key leaders—and genuine obeisance for the rules of procedure within debates was abysmal.¹¹⁹

In spite of stalemates in Parliament, Pant's presence had almost immediate impact.

On an international level, it vaulted him to the forefront of gay politics and got him invited into increasingly powerful (and notably rights-oriented, not HIV-oriented) forums.¹²⁰ “At the very least I got in to the government buildings more easily,” he said.¹²¹ His ascent to political office and exposure to the functioning of political power had widespread implications for the movement, both explicitly and more subtly. Almost immediately after the Constituent Assembly (CA) took office, Pant began meeting with powerful ministers, especially those from parties that had pledged support for LGBTI people in the run-up to the election. Babu Ram Bhattarai, a leader in the Maoist movement, assumed the office of Finance Minister and became an early advocacy target for Pant. “It was in his party manifesto already, it was just a matter of making sure words became action,” said Pant.

In September 2008, Bhattarai delivered his first budget speech to the legislature, saying: “The state will accord special priority to solve the core problems of Nepali people relating to sexual and gender minorities and a common house for 50 people will be provisioned to live together for their socialization.”¹²²

Such strides . . . stood as statements of powerful support in an environment in which informal negotiations and allegiances often held more weight in decision-making than formal mechanisms or procedures.

Such strides were not only significant because they established formal recognition of sexual and gender minorities and associated issues, but because they stood as statements of powerful support in an environment in which informal negotiations and allegiances often held more weight in decision-making than formal mechanisms or procedures.

Nepali civil servants have anonymously admitted that they operate in entrenched patronage networks, and servicing these hierarchies is their top priority. One interviewee confided, “While at work if you take special care of powerful clients, your performance in terms of quality of service, non-delivery of services and non-

117 UN Dispatches from the Field, “Nepal’s legislature: Setting the gold standard on inclusion of minorities,” http://www.un.org/News/dh/infocus/nepal/nepal_legislature.htm

118 International Crisis Group, “Nepal’s New Political Landscape,” Asia Report N°1563, July 2008, <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/156-nepals-new-political-landscape.aspx>

119 *The Kathmandu Post*, “Democratically debilitated,” March 25, 2013: http://www.ekantipur.com/the-kathmandu-post/2013/03/24/related_articles/democratically-debilitated/246803.html

120 Victory Fund Annual Report 2008: http://www.victoryfund.org/files/victory_annual_08.pdf

See also: Centre for Advocacy and Research, “A Framework for Media Engagement on MSM and Transgender Persons in South Asia: Engagement Framework, Literature Review and Case Studies,” New Delhi, 2013, http://asia-pacific.undp.org/content/rbap/en/home/library/hiv_aids/a-framework-for-media-engagement-on-human-rights--sexual-orienta.html

121 Interview, Kathmandu, July 2013.

122 Budget Speech of Fiscal Year 2008-09, Ministry of Finance, Government of Nepal, September 19, 2008, [http://www.mof.gov.np/uploads/document/file/Final%20Translation%20Bud%202008-09%20\(1\)_20130812025501.pdf](http://www.mof.gov.np/uploads/document/file/Final%20Translation%20Bud%202008-09%20(1)_20130812025501.pdf)

responsive behavior to the clients—common people—does not matter, it is excused.”¹²³ But the relationships Pant cultivated while in office were a valuable, if formally invisible, contribution to the movement.

Said a development partner who has worked with BDS for several years:

Sunil as a Member of Parliament turned many things in his favor and made things better for the LGBTI community. It got him access to all of the powerful people, both to speak with them and to see them and how they behave when the public can't see them. He is a soft man. He can have dialogues with them and slowly convince them without the same threat as a street protest, which they may just ignore. Access to politicians and bureaucrats inside Singha Durbar [government compound in Kathmandu] was a major difference from what he could previously accomplish.¹²⁴

For the LGBTI activist community, Pant's election was an instant symbolic victory. Said one BDS staff member: “When we announced [four years ago] that we will also have a representative, this community became extremely happy. When we nominated Sunil and he won, it was a moment of overall happiness for us, right from the time of the establishment of the Blue Diamond Society.”¹²⁵

In what limited studies exist about the relationship between the presence of “openly LGBTI” legislators and inclusive laws and policies, scholars have discerned a positive correlation. Further, Pant's election as a proportional representation candidate falls in line with other patterns in the election of minority candidates.¹²⁶

In a 2011 op-ed in *The Kathmandu Post*, Pant wrote that while the Constituent Assembly's term had been largely disappointing, he felt he was able to change minds and persuade some other members to support LGBTI rights.¹²⁷ Pant's presence and conversations put LGBTI people on the agenda and sparked discussion that would not have occurred otherwise. Activists have credited similar tactics of strategic participation by LGBTI individuals in international arenas, such as in the negotiations with governments over the 1995 Beijing Platform for Action's “Paragraph 96,” the right of women to control their sexuality.¹²⁸

Despite the promise, on May 27, 2012, Nepal's Constituent Assembly was dissolved, having failed to draft the country's new constitution, which, among other things, had promised to address the concerns of many marginalized groups. The inability to produce the charter has been attributed to political parties retaining “the well-documented dysfunctions that hobbled democratic politics throughout the 1990s,” including reliance on

123 Program for Accountability in Nepal, “The Political Economy of Social Accountability in Nepal,” 2010, <http://siteresources.worldbank.org/NEPALEXTN/Resources/223554-1296055463708/PoliticalEconomy.pdf>

124 Interview, Kathmandu, July 2013.

125 Blue Diamond Society press conference, transcribed by Astraea Lesbian Foundation for Justice, July 3, 2013.

126 Andrew Reynolds, “Representation and Rights: The Impact of LGBT Legislators in Comparative Perspective,” *American Political Science Review*, Vol. 107, No. 2: May 2013; for a discussion on the electoral system employed in Nepal's 2008 elections and its impact on minorities, see: “The 2008 Constituent Assembly Election,” *Nepal in Transition*, eds. Einsiedel, Malone, and Pradhan, Cambridge University Press, 2012.

127 *The Kathmandu Post*, “A question of trust, backbreaking work,” January 12, 2011, http://www.ekantipur.com/the-kathmandu-post/2011/01/11/related_articles/a-question-of-trust-backbreaking-work/217114.html

128 Recalled one activist who attended the Beijing negotiations: “This was a success for us because there were four or five days of discussion on sexual orientation. Beijing, so far, has been the only space where governments have spent so much time on this subject.” See: Francoise Girard, *Sex Politics: Reports from the Frontlines: “Negotiating Sexual Rights and Sexual Orientation at the UN,”* http://www.sxpolitics.org/frontlines/book/pdf/capitulo9_united_nations.pdf

patronage networks and corruption.¹²⁹ Without a new constitution, many LGBTI activists felt deflated, and the actual guarantees of equality for LGBTI people and marriage equality have been threatened in practice. Still, the precedent set by the Supreme Court decision and the political in-roads made during this time have provided a valuable blueprint for spurring policymakers to implement LGBTI-friendly policies in some areas.

129 International Crisis Group, “Nepal’s Constitution II: The Expanding Political Matrix,” Asia Report N°234, August 27, 2012, <http://www.crisis-group.org/~media/Files/asia/south-asia/nepal/234-nepals-constitution-ii-the-expanding-political-matrix.pdf>

CONDITIONS AND CONTEXT: FACTORS OF SUCCESS FOR LEGAL AND SOCIAL GAINS IN NEPAL

- ▶ Post-1990 Nepal saw **increasingly open space for civil society** to establish a foothold, expand presence thanks to donor funds shifting away from the government, and participate in politics as knowledge-producers, social movements, and political actors.
- ▶ A violent conflict that began in 2006 served to swell Kathmandu's population, sending **sexual and gender minorities to the urban center**, where they met each other and organized casually, which led to formal organizing.
- ▶ The **post-war people's movement** opened up populist space and filled the streets with citizens demanding social and political inclusion, which emboldened a range of minorities to demand their inclusion and their own space.
- ▶ **Political actors eager to garner domestic and international attention and legitimacy** saw social movements such as the LGBTI rights activism taking place as an opportunity to symbolically and substantively support marginalized populations.
- ▶ A **charismatic leader** enabled LGBTI activism to take center stage in broader human rights and social inclusion debates in the elite capital city.
- ▶ During a prolonged period of political uncertainty, activists **petitioned the Supreme Court**, knowing that the bench was progress-oriented and understanding the gender and human rights cases that had preceded their petition.



CHANGING MINDS

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“स एक नागरिक-
4th INTERNATIONAL
Organized by
Blue Diamond

Sexual
&
Gender
Minorities
Students
Forum,
Nepal

“Matters”
सहत्व छु,”
2013

सुप

■ After he joined Nepal’s Constituent Assembly and Parliament in 2008—making him Asia’s first openly-gay federal-level elected official—*The New York Times* published a short profile of Pant, highlighting the conversation-turned-stump-speech advocacy he does with fellow parliamentarians.¹³⁰ Pant has revised and toured this presentation around the country over a decade of activism. In its current state, it is neatly divided into three parts: religion, science, and human rights. In the matter of forty-five minutes, he talks bureaucrats, community leaders, donor agency staff, students, and whoever else will listen through a queer understanding of the world. “Different people respond to different aspects,” said Pant. “It depends on their own background, what else they have learned and heard. Some know the religious stories—about the Hindu transgender deities—and some know that human rights is something the country is striving for on behalf of all citizens. Different angles convince different people,” he said.¹³¹ Other LGBTI rights activists, including staff at BDS, Mitini, the Federation of Sexual and Gender Minorities-Nepal, and the newly-founded Inclusive Forum-Nepal¹³² have developed training and outreach modules and present them regularly around the country.

Nepali queer activists’ approaches negotiate a careful middle ground between what some have construed as “international norms versus local understandings” and the process of “developing LGBTs.”¹³³ The delicate argument for LGBTI rights—highly contingent on how the concepts of “gay” or “rights” or “gender” or “Nepali culture” are understood—departs from some of the struggles observed in the early days of AIDS education in Nepal.

“Peoples’ backgrounds vary greatly across Nepal,” explained a staff member at a human rights NGO in Kathmandu. “The past twenty years have made that clear as groups of people have gained social power, voice, and begun to be more well-known. If you’re going to teach people about your population or community or

movement, and you want to be effective, you have to tell the story in more than one way. It might be a way international donors or experts don’t like or understand. It might be a way some Nepalis don’t like or understand.”¹³⁴ Discussing the significance of a Nepali lesbian romance film (put up for an Academy Award in 2013),¹³⁵ a veteran Nepal

“If you’re going to teach people about your population or community or movement, and you want to be effective, you have to tell the story in more than one way.” – Human rights worker in Kathmandu

anthropologist said: “A film like this—to see it produced—shows how the LGBTI rights movement in Nepal has had impact.... But a film like this can also expand that impact. Viewers in Kathmandu will take it differently from viewers outside in rural areas.”¹³⁶

130 “In Conservative Nepal, a Tribune for the ‘Third Gender’ Speaks Out,” *The New York Times*, September 19, 2008, http://www.nytimes.com/2008/09/20/world/asia/20pant.html?pagewanted=all&_r=0

131 Interview, Kathmandu, June 2013.

132 *The Advocate*, “Gay Rights Spread Slowly in Nepal but Queer Women Suffer,” November 5, 2014, <http://www.advocate.com/commentary/2014/11/05/op-ed-gay-rights-spread-slowly-nepal-queer-women-suffer>

133 Sjoerd Warmerdan, “Developing LGBTs: NGOs, (Dis)Empowerment, and Normalization of Gender and Sexuality in ‘New Nepal,’” University of Amsterdam, 2012, <http://dare.uva.nl/document/476639>

134 Interview, Kathmandu, July 2013.

135 Patrick Frater, “Lesbian Drama ‘Soongava’ Is Nepal’s Oscar Contender,” *Variety*, August 26, 2013, <http://variety.com/2013/film/news/lesbian-drama-soongava-is-nepals-oscar-contender-1200588744/>

136 *The Huffington Post*, “Brokeback Everest,” http://www.huffingtonpost.com/kyle-knight/nepal-lesbian-movie_b_1016865.html; As one interviewee told Astraea researchers about the power of this lesbian film: “It is a very strong tool. For example, the movie ‘Sungava’ depicted lesbian story, which was based more in human emotions, than a LGBT movement. I think people get more touched and aware with such kind of human sentiment and can show positive sympathy and consideration towards LGBT (as in Brokeback Mountain and other gay themed movie). It teaches people about the existence of same sex behavior.” Interview, Kathmandu, July 2013.

Explained a development partner who expressed concern that Nepal’s dominant patriarchy was the main force holding back acceptance of LGBTI people:

In conversations with people who don’t understand, we always try to relate it to the gods. Shiva was in one story half man and half woman. You can talk about these things in a very traditional way and that can help ... That’s the way we can talk about it openly and people start to understand—the logic begins with the tradition and then they conceptualize it that way, we can see that in the conversations we have.¹³⁷

Activists have countered widespread reports of harassment and discrimination against LGBTI children in schools by urging the government to incorporate LGBTI topics first in the university curriculum¹³⁸ then recently in the secondary school curriculum as well. Said one BDS employee involved in drafting the teachers’ guide: “I am told by teachers I know that they would like to be able to answer the questions their students have—even they hear their students whispering about sex or LGBTI people—but they don’t have knowledge so we hope this guide can help them.”¹³⁹ In 2014 the World Bank supported a pilot program through BDS to train teachers how to make schools safer for LGBTI students; a few months later, a teacher’s group in another part of the country worked with the Global Alliance for LGBT Education to conduct a similar workshop.¹⁴⁰

The “Sexual and Gender Minorities Student Forum” was also established in 2009 in the “hope to strengthen the unity of LGBTI students and to create a robust support system for young students burdened with having to cope with an often times prejudiced society.” The Forum started modestly as a volunteer organization, and hosted a 1,500-participant strong assembly within a few years.¹⁴¹ Its founder, Roshan Mahato, has emerged as an influential leader.¹⁴² According to other student leaders, the Forum has had impact, making it “clear that helping LGBTI students feel welcome and safe needed to be a priority for us.”¹⁴³

For several years in cities around Nepal, LGBTI activists have staged marches on “Gai Jatra,” a festival described as “traditionally a day synonymous with free expression, satire and mockery”¹⁴⁴ which one cultural critic explained as “Rulers were oppressive, but they need feedback too, to understand what the people thought of them. Since they did not let people speak on other days, they used this day to find out what people felt.”¹⁴⁵

137 Interview, Kathmandu, July 2013.

138 *The Kathmandu Post*, “LGBTI issues in TU course,” September 7, 2011, <http://www.ekantipur.com/the-kathmandu-post/2011/09/07/metro/lgbt-issues-in-tu-course/226020.html>; the curriculum includes attempts to deconstruct gender discrimination and patriarchy, including “The process of gender socialization appears to have been constructed based on such discriminatory norms in our society. It portrays women as the weaker sex.” Tribhuvan University Sociology Curriculum, “Chapter Three Gender and Sexuality.”

139 Interview, Kathmandu, July 2013.

140 LGBT Education, “Nepal successfully pilots a teacher training project,” May 7, 2014, http://www.lgbt-education.info/en/news/local_news/news?id=738; and, LGBT Education, “Nepalese Chetana teacher group organizes strategic workshop,” http://www.lgbt-education.info/en/news/local_news/news?id=780

141 Augustus Nasmith, The Foundation for Integrated AIDS Research (FIAR), “A report on the Sexual and Gender Minority Student Forum, Nepal (SGMSFN),” 2011, <http://www.fiar.us/Gus-SGMSFMRpt.pdf>

142 Bibek Rajbhandari, “Living Gay: Out and Open,” <http://livinggaynepal.info/outandopen.html>

143 Kyle Knight, *Wave Magazine/The Huffington Post*, “Patient Courage: A Leader for LGBTI Students in Nepal,” May 11, 2012, http://www.huffingtonpost.com/kyle-knight/roshan-mahato-nepal-lgbti-student-forum_b_1495121.html

144 *La.Lit*, “Pride Jatra @ Gai Jatra,” August 27, 2013, <http://www.lalitmag.com/2013/08/pride-jatra-gai-jatra/>

145 Sewa Bhattacharai, “Gai Jatra : The Androgynous Connection,” *DREAMS Magazine*, September 1, 2013, <http://mydreamsmag.com/article/gai-jatra-the-androgynous-connection/>

A prime-time television show called *Pahichaan* (“Identity” in Nepali) launched in 2011 and further vaulted LGBTI people and rights into the public sphere. Activists invited celebrities to join them on the weekly program. Said one guest, a movie star: “There is still some discrimination against LGTB people, but I didn’t hesitate to be a guest on this show. This TV programme gives the country an opportunity to discuss these things in their homes.”¹⁴⁶ In 2012 the program was spun into an FM radio show,¹⁴⁷ which commentators have noted is an important medium in Nepal that “transcends literacy, load shedding [routine power outages], poverty, even geography.”¹⁴⁸



The cast of Pahichaan, a weekly prime-time TV talk show, prepares to film an episode. / Kyle Knight

Just as the LGBTI legal and political gains have required multiple and varied approaches, changing social awareness is taking many different and complementary forms, from one-on-one interactions to classroom curricula to multimedia programming. These efforts are gaining traction and slowly shifting perceptions and inclusion of LGBTI people as vibrant and vital members of Nepali society.

146 Radio Netherlands Worldwide, “LGBT Rights Get Prime Time in Nepal,” March 27, 2012, <http://www.rnw.nl/english/article/lgbt-rights-get-prime-time-nepal>; to view episodes of the program visit here: <http://bluediamondsociety.wordpress.com/tv-show-pahichan/>

147 Blue Diamond Society radio program: <http://bluediamondsociety.wordpress.com/radio-program/>

148 Anna O’Kain, “Feminine FM,” *Nepali Times*, March 21, 2013, <http://nepalitimes.com/article/nation/Feminine-FM,244>



LASTING CHANGE?

■ In 2013 two reports published within months of each other underscore the contradictory status of LGBTI rights today. One proclaims Nepal's LGBTI rights movement "under serious threat,"¹⁴⁹ the other calls Nepal "Asia's most gay-friendly country."¹⁵⁰ Reconciling these two accounts highlights both the hopes and fissures in social, legal, and political gains described throughout this report.

Social change and the LGBTI rights movement

Despite legal progress, some observers caution that linear social acceptance cannot be taken for granted. One former Kathmandu newspaper editor explained:

Backlash can be triggered here by knee-jerk territorialism—the perception of a group of people as an encroaching threat—not just some sort of deep prejudice. People who don't mind gay people or who even support the LGBTI rights movement might do so because gays are "over there" and not in their workplace or their home—it could change, especially given how other marginalized groups have simultaneously been emboldened and faced harsher backlash from the elite, as the movement progresses and more people open up and come out in "their" ranks.¹⁵¹

An anthropologist described similar social retraction of support he observed as "middle-class moral anxiety," tied to and triggered by women's independence in a patriarchal society.¹⁵²

In Nepal, LGBTI activists have experienced the shifting ideological alliances of political parties and the calcification of bureaucratic powers. For example, in 2012-2013, BDS's services were disrupted for a prolonged period when Kathmandu's Chief District Officer refused to renew BDS's operating license for several months.¹⁵³ During this time, bail amounts for arrests of transgender people skyrocketed.¹⁵⁴

LGBTI rights are currently supported by some forty community-based organizations (CBOs) around Nepal. The majority of them are affiliated with Blue Diamond Society, but some, such as Mitini Nepal, operate independently. On September 2, 2013, some 366 LGBTI people formally joined the Unified Marxist Leninist (UML) Party, which repeated earlier promises to give Constituent Assembly seats to LGBTI candidates.¹⁵⁵

149 Human Rights Watch, "Climate of Fear Imperils LGBT People," <http://www.hrw.org/news/2013/04/01/nepal-climate-fear-imperils-lgbt-people>

150 *Bangkok Post*, "Asia's Most Gay-Friendly Country," <http://www.bangkokpost.com/business/news/361485/asia-s-most-gay-friendly-country>

151 Interview, Kathmandu, August, 2013.

152 Mark Liechty, "Carnal Economies: the Commodification of Food and Sex in Kathmandu," *Cultural Anthropology*, Volume 20, Issue 1, 2005, <http://www.jstor.org/discover/10.2307/3651575?uid=3738752&uid=2&uid=4&sid=21102554678627>—"Women in the market were the targets of powerful moral condemnation (by women as often as men). I often had the impression that, in the minds of members of Kathmandu's middle class, an unmarried woman who was working and appeared to have money ... was, almost by definition, a prostitute—especially if she had no clear ties to the community."

153 Research by a leading human rights NGO exposed that Chief District Officers (appointed officials with extensive powers) exercise quasi-judicial powers thanks to vague and easily-manipulated laws such as the Public Offence Act and the Arms and Ammunition Act. These laws empower the CDOs to try, fine, and sentence people to jail. See: Advocacy Forum, "Torture of Juveniles in Nepal: A Serious Challenge to Justice System," June 2010, http://www.advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal_26_June_2010.pdf

154 Human Rights Watch, "Nepal: climate of fear imperils LGBT people," April 1, 2013, <http://www.hrw.org/news/2013/04/01/nepal-climate-fear-imperils-lgbt-people>

155 Republica, "Sunil Babu Pant, 365 other 3rd gender join UML," September 2, 2013, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=60687

Reports of arrests under the Public Offenses Act continue to surface regularly. The 2007 Supreme Court decision, while a valuable tool for activists today, continues to be implemented slowly—at pace with the six percent implementation rate of other Public Interest Litigation cases in the country.¹⁵⁶

At the same time, the ascent of NGOs and the movements they represented, combined with the lack of a formal oversight mechanism for NGO operations, has also led to their increased targeting for social and political mudslinging, including accusations of corruption and nepotism, and rhetoric construing NGOs as using foreign funding to meddle in domestic affairs.¹⁵⁷ Observers have noted that the lack of formal civil society oversight or coordination has resulted in organizations that are principally accountable to donors. This threatens to limit transparency, but also increases organizations' vulnerability to public criticism and donor-driven priorities.¹⁵⁸ Nonetheless, the importance of NGOs to the establishment of genuine democracy in Nepal, others argue, must be respected: “the new constitution by itself, will not be the magic wand that will deliver us a fully formed ‘new’ Nepal. In all sectors of society, many intermediate agents will be key to this transformation. Among them for sure will be NGOs in their knowledge production avatars.”¹⁵⁹

Legal rulings

The enduring effects of the Supreme Court ruling have been piecemeal. Implementation at a district level occurs in some places and not in others, but activists see it as overwhelmingly progressive in concept and helpful in daily life.¹⁶⁰ Community-based LGBTI organizations have been able to construct gender-neutral public toilets in some cities, including with support from government funds.¹⁶¹ While only a limited number of individuals have been able to obtain citizenship documents marked “third gender” or “other,”¹⁶² international pressure to recognize third gender citizenship rights has continued, such as with the OHCHR pressure in Nepal¹⁶³ and Universal Period Review (UPR) pressure in Geneva in 2011.¹⁶⁴

Later court decisions have built on the judicial progress LGBTI activists achieved.

156 Gani Ansari, “Implementation status of SC verdicts on PIL poor: report,” August 25, 2013, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=60198

157 Chaitanya Mishra, “New Predicaments of ‘Humanitarian’ Organization,” NGO, *Civil Society and Government in Nepal: Critical Examination of their Roles and Responsibilities*, 2001.

158 Program for Accountability in Nepal, “The Political Economy of Social Accountability in Nepal,” 2010, <http://siteresources.worldbank.org/NEPALEXTN/Resources/223554-1296055463708/PoliticalEconomy.pdf>; For a discussion on the “cartelization of credibility” and other donor-driven fetishizing of specific organizations and its impact on their work, including over-taxing of staff due to burdensome and shifting reporting requirements, see: Seira Tamang, “Civilizing Civil Society: Donors and Democratic Space,” *Studies in Nepali History and Society*, 2002, [http://mar-tinchautari.org.np/files/seira_tamang_7\(2\).pdf](http://mar-tinchautari.org.np/files/seira_tamang_7(2).pdf)

159 *The Kathmandu Post*, “NGOs as Knowledge Producers,” March 28, 2009, <http://www.ekantipur.com/the-kathmandu-post/2009/03/29/related-articles/ngos-as-knowledge-producers/186747.html>

160 *429Magazine*, “Nepal pioneers a third gender on official documents, but concerns persist,” March 6, 2013, <http://dot429.com/articles/1599-nepal-pioneers-a-third-gender-on-official-documents-but-concerns-persist>

161 Kyle Knight, *The Kathmandu Post*, “Flushing Out Genderism,” April 28, 2012, <http://www.ekantipur.com/2012/04/28/opinion/flushing-out-genderism/353100.html>

162 The World Policy Institute, “Dividing By Three: Nepal Recognizes a Third Gender,” February 1, 2012, <http://www.worldpolicy.org/blog/2012/02/01/dividing-three-nepal-recognizes-third-gender>

163 Remarks by Jyoti Sanghera, Representative of OHCHR-Nepal On the Occasion of an Interaction on Equal Rights to Sexual Minorities: Right to Citizenship Certificate Hotel Everest, Kathmandu, July 7, 2011, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2011/July/2011_07_07_Jyoti's_Speech_sexual_minorities_E.pdf

164 UN Human Rights Council, seventeenth session, Report of the Working Group on the Universal Periodic Review of Nepal, A/HRC/17/5, March 8, 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement>

A 2013 decision from the Supreme Court sent a strong signal in favor of same-sex marriage.¹⁶⁵ The petitioner, a thirty-year-old woman named Rajani Shahi, told the Court that she left her husband because she was attracted to other women. Her husband allegedly rejected that claim and sought her return, asking for help from Nepal's National Women's Commission to get her back. According to the decision and media reports, the Commission recommended Shahi enter a women's shelter, but then later transferred her to a facility where women and girls who have been victims of trafficking undergo rehabilitation.

In the process of ordering Shahi released from the rehabilitation facility in Kathmandu, the Court discussed her sexual orientation and related rights. The decision proceeded:

Individuals can decide as to choosing their ways of living either separately or in partnership together with homosexuals or heterosexuals—with or without solemnizing marriage. Although in the prevailing laws and tradition “marriage” denotes legal bond between heterosexuals—male and female; the legal provisions on the homosexual relations are either inadequate or mute [sic] by now.¹⁶⁶

Activists interpreted the decision as an expression that “people can discover their sexual orientation even later in life, even after having married it’s a step toward the recognition of same-sex marriage.”¹⁶⁷

Politics as usual

Nepal's protracted post-conflict transition to a republic has been fraught with political in-fighting among powerful elites. The bickering in Kathmandu has stalled several processes, including the drafting of a new constitution, often leading marginalized groups to perceive the government as out of touch, and to opt for street movements, including protests and violence.¹⁶⁸ In the absence of a predictable and stable government, neo-patrimonial relationships continue to dominate many of the decision-making processes for officials, activists, and citizens.¹⁶⁹ Despite—or perhaps as a result of—ever-increasing amounts of foreign aid money pouring into Nepal and “rapid social change” becoming popular rhetoric for the upper class elite, people in powerful positions have often retained their desire to maintain a traditional framework for the country, including by propagating patriarchal norms.¹⁷⁰

Political participation has borne mixed results, and the uncertain political future of the country and constantly shifting alliances continue to affect how LGBTI rights activists engage with political parties and how political parties refer to and treat sexual and gender minorities in public. On one hand, public courtship of LGBTI candidates in the lead-up to 2013 elections by the Nepali Congress and United Marxist-Leninist (UML) party,

165 *Rajani Shah v. National Women Commission et.al*, Supreme Court of Nepal, April 11, 2013, Writ No. 069-WH-0030

166 *Rajani Shah v. National Women Commission et.al*, Supreme Court of Nepal, April 11, 2013, Writ No. 069-WH-0030

167 Interview with leader of a lesbian community-based organization (CBO) in Kathmandu, July 2013.

168 <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/op-eds/needakantan-nepal-moment-of-truth.aspx>

169 Program for Accountability in Nepal, “The Political Economy of Social Accountability in Nepal” 2010: <http://siteresources.worldbank.org/NEPALEXTN/Resources/223554-1296055463708/PoliticalEconomy.pdf>

170 Chaitanya Mishra, “Foreign Aid and Social Structure: Notes on Intrastate Relationships,” *Essays on the Sociology of Nepal*, Lalitpur, Nepal: Fine Print Books, 2007.

two major opinion-shaping parties,¹⁷¹ has signaled for some a new era for acceptance of LGBTI people.¹⁷² Women's parliamentary representation has boomed from between three and six percent from 1990 – 2002 to thirty-three% since 2009.¹⁷³ However, reports of persistent sexism in political negotiations have called out the lag between formal and substantive representation.¹⁷⁴

A significant trust gap, frequently described as the “cooling of relations between the state and citizen,”¹⁷⁵ remains. For example, Bhattarai, the man who as finance minister proudly included a budget line for sexual and gender minorities, years later referred to an opposition party, the United Marxist-Leninist (UML) party as, the “tesro lingi” (third gender) party, which observers have interpreted as masculine posturing¹⁷⁶ or, as one columnist wrote: “The metaphor, a prime example of male chauvinism, stuck. PM Bhattarai did not even have to explain what he meant by it. Everybody interpreted it according to his or her prejudice. Tesro lingi meant being unnatural, a threat to male masculinity, indecisive.”¹⁷⁷ This came within months of his reportedly pandering to LGBTI activists with promises to implement the court-ordered third gender category on citizenship certificates in order to garner Pant's vote for his bid for Prime Minister—a promise he ultimately failed to keep while in office.¹⁷⁸

In this context, LGBTI rights activists praise parties when freshly elected, welcoming their commitments to inclusion,¹⁷⁹ and condemn political actors strategically when they failed to live up to their promises on LGBTI rights. At the LGBTI political candidacy press conference in July 2013, one candidate said: “Today, things have gone wrong in the country because of corruption. Today, things have gone wrong in the country because of irregularities. We want to bring an end to all those vices. We want to clean up this country; we want to make it fair; we want to make it the Nepal you and I all aspire for.”¹⁸⁰

Looking forward

After the sixty-one LGBTI candidates were announced in July, activists spoke about the importance of the upcoming election. An activist who had been kicked out of the Nepal Army on accusations that she was a lesbian, told

171 International Crisis Group, “Nepal's Constitution (II): The Expanding Political Matrix,” August 27, 2012, <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/234-nepals-constitution-ii-the-expanding-political-matrix.aspx>

172 Republica, “UML expresses commitment for including rights of third gender,” http://www.myrepublica.com/portal/index.php?action=news_details&news_id=59146; *The Kathmandu Post*, “Former CA Member Pant to Join UML,” <http://www.ekantipur.com/2013/08/07/headlines/Former-CA-member-Pant-preparing-to-enter-UML/376056/>

173 UNData, Seats held by women in national parliament, percentage: <http://data.un.org/Data.aspx?q=nepal&d=MDG&f=seriesRowID%3A557%3BcountryID%3A524>

174 Alexandra Delaney, “Nepal's Women Have a Voice in Politics But No One Is Listening,” *The Guardian*, May 27, 2011, <http://www.theguardian.com/global-development/poverty-matters/2011/may/27/nepal-women-in-politics>

175 Program for Accountability in Nepal, “The Political Economy of Social Accountability in Nepal,” 2010, <http://siteresources.worldbank.org/NEPALEX/TN/Resources/223554-1296055463708/PoliticalEconomy.pdf>

176 Sanjeev Uprety, “Third Gender UML, Boyish Maoists, and a Senile Congress: Gendered Representations of Political Parties of Nepal,” http://events.berkeley.edu/index.php/calendar/sn/sseas.html?event_ID=61663

177 Gyanu Adhikari, “Family Matters,” *The Kathmandu Post*, February 25, 2013, <http://www.ekantipur.com/the-kathmandu-post/2013/02/25/oped/family-matters/245712.html>

178 The New Civil Rights Movement, “Nepal: New Prime Minister Must Keep Promise To LGBTI Community,” September 25, 2011: <http://thenewcivilrightsmovement.com/nepal-new-prime-minister-must-keep-promise-to-lgbti-community/civil-rights/2011/09/25/27547>

179 CREA, *Count Me In*, Sunil Babu Pant, June, 2011, <http://www.youtube.com/watch?v=sdnyrulnwn>

180 Blue Diamond Society press conference, Union House, Anamnagar, Kathmandu, transcribed by Astraea Lesbian Foundation for Justice, July 3, 2013.

the crowd: “those with the most urgent need for a constitution are not only the sexual and gender minorities but the entire minority communities.”¹⁸¹

As the candidacy press conference¹⁸² wound to a close, Manoranjan Kumar Vaidya stood at the podium and charted the movement’s success:

Eleven years ago, when we came out in public, we were not treated as humans. We were not even given the status of animals.... Whether I win or lose, that’s not a big deal for me.... What I want is that the next Constituent Assembly election elects an assembly of truthful, impartial people, who are capable of doing something for the country and that [our] rights are ensured in the new constitution. We are seeking to get there for our rights, our human rights and the rights we have been entitled to.¹⁸³

Prior to the 2013 election, Pant and other LGBTI activists were courted by all the major political parties.¹⁸⁴ He and several hundred other LGBTI people eventually joined the CPN-UML with promises from the party to reserve between one and five seats for LGBTI representatives. The UML went on to secure 175 seats in the new assembly, however just before the election it announced that it would not put forward any candidate who had served in the previous CA, ruling Pant out.¹⁸⁵ Laxmi Ghalan, a lesbian activist and Mitini founder, fought the election from Makawanpur district for the royalist Rastriya Prajatantra Party. “The parties used us as a vote bank, only to exclude us,” Pinky Gurung, BDS’s chairperson, told reporters at a press conference.¹⁸⁶

Writing about Nepal’s post-war transition in 2011, Manjushree Thapa, a writer who wrote early op-eds in support of LGBTI rights and participated in a BDS press conference in 2003, wrote of Nepal’s “transition”:

Pressed to identify real progress, I can point only to intangibles: There is a new lack of servitude, now, in the way Nepalis relate to one another. There is greater social equality than

181 The army claimed that the women were dismissed for “failing to maintain minimum discipline,” not based on sexual orientation. “Nepal’s Army Denies Discrimination in Discharging Two Soldiers Alleged to Be Lesbian,” Advocate.com, August 7, 2007, <http://www.advocate.com/news/2007/08/08/nepals-army-denies-discrimination-discharging-two-soldiers-alleged-be-lesbian>

182 At the press conference, a leaflet with the LGBTI community’s demands was distributed, reading: *In the context of the forthcoming election to the Constituent Assembly, our demands to the political parties, the Election Commission and the Government of Nepal are as follows:*

1. Create policies, legislation and an environment in a way that the entire sexual and gender minority community will get to vote.
2. Ensure when launching/introducing the Election Act that Nepali citizens, who have come of age and belong to the sexual and gender minority community, will get to contest as candidates with their respective identities.
3. Change the political parties’ policy to ensure the inclusion of the sexual and gender minority community during the selection of candidates.
4. Include a mention in [political] parties’ documents, including constitution, manifesto and constitutional concept paper, to ensure the rights, opportunities and inclusion of the sexual and gender minority community.
5. Facilitate the easy implementation of the Government of Nepal’s decision to issue citizenship certificates to members of the sexual and gender minority community under the “others” category.
6. Make no discrimination of any kind against the other citizens in terms of the services, facilities, opportunities and responsibilities they are entitled to by the State.
7. Include the sexual and gender minority community in the [political] party structures from the central level to the local level.

Thank you.
Sexual and Gender Minority Family
Blue Diamond Society

183 BDS press conference, transcribed by Astraea Lesbian Foundation for Justice, July 3, 2013.

184 Blue Diamond Society, “62 LGBT Candidates In Nepal To Run In Upcoming Elections,”: <http://bluediamondsociety.wordpress.com/2013/07/04/62-lgbt-candidates-in-nepal-to-run-in-upcoming-elections/>

185 Republica, February 2, 2014, “LGBTs warn of protests if excluded from CA,”: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=69707 (Accessed June, 2014)

186 *The Himalayan Times*, January 10, 2014, “Sexual Minorities Seek Representation in the CA,” <http://thehimalayantimes.com/fullTodays.php?headline=Sexual+minorities+seek+representation+in+CA&NewsID=402579>

before, and some changed attitudes. There is a new understanding of exploitation, and a sense of being vested with rights. There is some experience of individual power and agency. And a desire not to be cheated out of democracy again, as has happened so often before.¹⁸⁷

There is no question Nepal's LGBTI activists have gained important ground in stride with the country's ambitious and tumultuous transition.



Courtney Mitchell and Sarah Welton, an American lesbian couple, were married at a temple near Kathmandu in June 2011. Mitchell (R), a former US Peace Corps volunteer, donated some of the first furniture to BDS. / Kyle Knight

187 Manjushree Thapa, *The Lives We Have Lost: Essays & Opinions on Nepal*. 2011. New Delhi: Penguin Books.



PROMISING PRACTICES AND RECOMMENDATIONS

LGBTI advocates have woven targeted policy advocacy, rights-based community support, and media and awareness raising strategies to affect broad-based change in Nepal. The strategies, actions, and alliances that generated these outcomes cannot be divorced from years of bloody conflict and the politics and reconstruction in its aftermath or the changing global norms, funding streams, and legal precedents directly tied to LGBTI rights. At the same time, a number of promising practices emerge that have the potential to inform legal and social change more broadly.

In the course of this research, organizations in the field have presented the following recommendations for engaging with LGBTI movements.

RECOMMENDATIONS FROM THE FIELD FOR ACTIVISTS/ADVOCATES

- ▶ **Leverage international legal precedent, including global norms and national policies:** build legal cases that draw on increasing standards for LGBTI rights, including Nepal’s Supreme Court ruling.
- ▶ **Practice rights-based and locally-driven programming:** a rights perspective addresses more than services and access—it enables people to claim their own rights and hold institutions and individuals accountable for guaranteeing those rights. Programs should also reflect the needs articulated by LGBTI populations themselves.
- ▶ **Take security concerns and identity seriously:** visibility for LGBTI people often carries real threats of violence and backlash. Create safe spaces where people can remain anonymous or confidential and can define their own identity.
- ▶ **Cultivate symbolic support and informal networks:** statements of support and informal alliances can have a big impact on formal equality down the road. Even where legal change is not guaranteed, symbolic gains can lay important groundwork to changing minds and practices.
- ▶ **Develop multimedia strategies:** from publicly endorsing—or condemning—political actions on the radio to television programs that attract celebrities to offer their support, multimedia efforts can slowly change perceptions and reach millions of people. Develop relationships with media outlets, where possible and strategic.

- ▶ **Meet audiences where they are to change their minds:** shifting perceptions takes time. One-on-one relationships, public presentations inviting key political leaders as guests, or creative arts projects can educate different audiences at crucial junctures.
- ▶ **Practice strategic political participation:** joining policy negotiations requires access and opportunity. When such spaces open up, supplying practical recommendations, insisting on LGBTI inclusion, and building support can prove crucial.
- ▶ **Sustain international networks:** from international NGOs to the United Nations to peer organizations, international supporters can help galvanize resources and attention, particularly when these networks act in support of local efforts.
- ▶ **Consult with constituents regularly, even during periods of progress:** legal progress may appear to be a firm step forward, but constituents might experience the implementation differently from how it was intended, and differently from one another. Bridging this gap can improve roll-out of hard-fought progress.
- ▶ **Gather and share data and information:** to establish a track record of credibility in terms of human rights reporting, keep careful track of violations when they occur, taking care to protect the identities of those involved, and maintain dialogue with national and international rights mechanisms, including. These can and should serve your work, not only address donor reporting requirements.
- ▶ **Grasp opportunities to engage with new forms of funding:** “LGBTI rights activism” does not exist in a vacuum. Education, arts, rights, and other funding streams offer excellent opportunities not only for expanding the reach of LGBTI activism, but also to tap into the talents of communities and build new alliances. Work with donors and partners to explore how funding streams can promote cohesion.
- ▶ **Find allies in politically influential places, in and out of politics:** activists know their own political landscapes well. Identifying potential supporters is key to making change. Donors and well-positioned allies can help them access various circles.

RECOMMENDATIONS FROM THE FIELD FOR DONORS AND DEVELOPMENT AGENCIES

- ▶ **Make reporting burdens match impact:** develop sophisticated systems that encourage accountability and transparency, but ensure that reporting requirements do not over-tax NGOs to the point where they cannot complete their work, or to the point where NGO politics and behavior become more important than substantive impact. Investigate mismanagement cases rigorously and impartially, taking into account how corruption allegations can be leveraged as a corrosive political tool.
- ▶ **Assess networks activists have created and allocate sufficient funding to sustain them:** LGBTI activism does not take place in isolation, and activists employ creative measures to build alliances and garner support. A careful assessment of successes—especially those outside of the “box”—could lead to creative and influential funding mechanisms.
- ▶ **Incorporate LGBTI issues into political and security analysis:** understanding that LGBTI people can become scapegoats or targets for violence or moral scrutiny during times of political tumult, donors must assess and include considerations of these populations’ experiences in tough or unpredictable political situations.
- ▶ **Create grant solicitation, application, and reporting materials in multiple languages:** accessibility is everything. Having grant materials in local languages can increase the number of activists who will access and use your materials, exposing you to more diverse perspectives on the needs of beneficiaries and ideas regarding how to disburse funds.
- ▶ **Prioritize and fund programs targeting women and female-bodied people:** because much LGBTI organizing has been undergirded by HIV/AIDS funding, people assigned female at birth (women and transgender-men, depending on the legal scenario) are often sidelined due to (male) health reporting requirements.
- ▶ **Make grants to “core funds” or other flexible accounts:** LGBTI rights organizing requires quick decision-making and nimble alliance-building. Supporting NGOs’ core funds allows activists to make decisions based on their analysis, which can help the movement and also feed data about effective funding back into donor databases.

RECOMMENDATIONS FROM THE FIELD FOR RESEARCHERS

- ▶ **Avoid extractive methodologies:** research should be accessible and meaningful in the local context, not an exercise in gathering data to serve a foreign theory.
- ▶ **Engage with local researchers and institutions:** to understand the research landscape, read local publications and meet with think tank and research institution leaders.
- ▶ **Respect local research ethics and processes:** study the best practices in terms of ethics board approval, data collection methods, collaboration, language, and dissemination, and follow the advice of the communities you are working with.
- ▶ **Read background literature on your topic and location:** arm yourself with theoretical and historical background sufficient to engage with your topic and location, including local politics, in a sensitive and meaningful way.
- ▶ **Compensate people who help you for their time:** local researchers, especially LGBTI people who have access to and knowledge of various queer (and other) communities can be extremely helpful to research. However, they must be compensated fairly for their time and labor, must be fully informed of the processes and expectations, and should be considered partners as opposed to employees.
- ▶ **Understand and use terms used by local populations:** as high-level gender and sexuality-based rights work expands globally, it is crucial that research on “LGBTI rights” respect the substantial amount of work that takes place outside of the “LGBTI rights” matrix, or off the radar of official instruments.
- ▶ **Maintain humility in method and presentation:** when in doubt, defer to local actors’ ideas, language, and arguments—understanding that this will not necessarily be monolithic. Present research findings as evidence-driven, avoiding either pole of local romanticism or dismissive universalism.
- ▶ **Design projects realistically:** research must be carried out with respect to your and your team’s capacities, including but not limited to: deadlines, language abilities, training, and conceptual clarity. Research that overshoots the team’s capacity, no matter how well-intentioned, can have an adverse effect on local activism.

ASTRAEA LESBIAN FOUNDATION FOR JUSTICE

The Astraea Lesbian Foundation for Justice is the only philanthropic organization working exclusively to advance LGBTQI rights around the globe. We support hundreds of brilliant and brave grantee partners in the U.S. and internationally who challenge oppression and seed social change. We work for racial, economic, social, and gender justice, because we all deserve to live our lives freely, without fear, with profound dignity.

LGBT GLOBAL DEVELOPMENT PARTNERSHIP

The Lesbian, Gay, Bisexual and Transgender (LGBT) Global Development Partnership was founded in 2012 and brings together the United States Agency for International Development (USAID), the Government of Sweden, the Arcus Foundation, the Astraea Lesbian Foundation for Justice, the National Gay & Lesbian Chamber of Commerce, the Gay & Lesbian Victory Institute, the Williams Institute, the Swedish Federation for LGBT Rights (RFSL) and other corporate, non-profit and non-governmental organization resource partners to promote equality, human rights and economic empowerment of LGBTI people in the developing world.

LGBT GLOBAL DEVELOPMENT PARTNERSHIP

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