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Navigating Nepal's Legal Requirements For Transgender Inclusion Beyond Labels

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Krishna Silwal

Navigating Nepal's Legal Requirements for Transgender Inclusion Beyond Labels

WGSS 350

Kiki Kosnick

Spring 2024

Navigating Nepal's Legal Requirements for Transgender Inclusion Beyond Labels

In 2007, Nepal was the first South Asian country to legally recognize a third gender category beyond the traditional male or female binary. This law allowed individuals to choose Other in their legal documents according to their “self-feeling”. The law also used the third gender category as an umbrella term and grouped “female third gender”, “male third gender”, and “intersex individuals” under it (Writ). By resisting the western belief of the gender binary prevalent in the Global South, Nepal has been widely recognized as a queer-friendly nation that strives to protect the rights of the queer community. There have been multiple discussions around how Nepal can be the “next big LGBTQ+ travel destination.” Nepal has also ranked 44th among 203 countries in a LGBTQ+ Travel Safety Index (Bhandari). However, the right for individuals to identify as Other within the administrative system did not fully meet the diverse needs of the community it aimed to support. Undoubtedly, the establishment of the Other category offered non-binary and gender non-conforming individuals a choice to identify in a way that aligned with their gender identity. However, the same law also forced transgender individuals who did not want to identify under the umbrella term of Other to identify as such. It created a barrier for transgender individuals who identify with the binary genders to access the legal recognition and rights that they deserve. This hindrance is evident in a survey conducted by UNDP, which revealed that out of nearly 1200 participants, only five had attempted to change their gender on citizenship documents (UNDP).

Rukshana Kapali, one of many transgender women in Nepal, was subjected to marginalization due to the establishment of this law. She was compelled to identify as Other in her legal documents, ignoring the fact that she identifies as a woman. To resist this othering, she initiated legal action against the government, seeking the right to identify as a female in her legal documents. To grant Rukshana this right, the government established specific requirements

for Rukshana to fulfill. These requirements for individuals seeking to alter their gender identity uphold the established power structures as the prerequisites are very difficult to fulfill, making them inaccessible. The intersection of wealth and caste also influences this accessibility of gender recognition, further maintaining the status quo.

Positionality

As a South Asian Woman studying queer theories in the Global North, I have noticed a gap in my exposure to South Asian queer theories. Before India was colonized, queerness was a large part of Indian and Nepalese history. Both of the countries are a Hindu-majority state and Hinduism has a diverse conceptualization of god from gender non-conforming to bi-gender (both female and male) which has influenced ancient epics and scriptures to medieval prose, poetry, art and architecture (“God and gender in Hinduism”). However, colonization led to the criminalization and stigmatization of queer communities in India subsequently affecting Nepal and leaving both the countries with no formal documentation of queer theories. This absence means that I have to draw from western ideas of queerness and queer theories to analyze a requisite situated in South Asia. This also means that my paper comes with limitations. As a cisgender heterosexual woman belonging to the upper-caste in Nepal, my positionality also adds a layer of limitations to this research. My social positionality in Nepali society comes with a lot of privileges which may affect the depth of my understanding of the lived experience of transgender individuals, particularly those from marginalized castes and socioeconomic backgrounds. My background could shape how I interpret or prioritize certain issues, potentially overlooking nuances within the queer community and unintentionally reflecting mainstream societal views. In the context of this paper, I do not have enough vocabulary to address the different identities of individuals categorized under the umbrella term ‘transgender’ as people

define their gender identity in a multitude of ways. A survey conducted by the United Nations Development Programme, the Williams Institute, and the Blue Diamond Society revealed the complexity, with nearly 1,200 participants using 21 different terms to articulate their gender identity (UNDP). However, even in their analysis, they grouped all of the individuals into ‘Four Primary Groups.’ This oversimplified classification of the various gender identities leaves me with a limited understanding and access to correct terms needed to accurately address the unique gender identities expressed by individuals within the transgender community. I also plan to use the term People of Marginalized Sexual Orientation, Gender Identity, and Sex Characteristics (PoMSOGIESC) while referring to the LGBTQ+ community in Nepal as it is a preferred term coined by activists in Nepal (“LGBT rights in Nepal”).

Given the intricate nature of legal research and the complexities surrounding transgender rights in Nepal, recounting a portion of my research journey is essential to convey not just the findings, but also the underlying issues of transparency, power dynamics, and their impact on legal advocacy and reform efforts. During my initial stages of researching the legal framework for transgender individuals in Nepal, I read several articles that indicated the existence of specific criteria for a legal gender identity change. As I attempted to locate this law in various sources, I discovered that it was only highlighted during a hearing of the parliamentary State Affairs and Good Governance Committee and has not been published anywhere. (Queer Youth Group & Trans Rights Collective) This lack of transparency while publishing a law document not only posed a challenge to my research but also highlighted how it contributes to the maintenance of power structures. Since the law is not publicly available, those in power can control the narrative of the law and enforce it in inconsistent ways to grant some individuals access to legal rights and exclude others. It also creates barriers for individuals pushing towards legal reforms, affecting their ability to understand, critique and

challenge the existing law. This contributes to the reinforcement of power structures.

In an effort to gain a better understanding of the law, I reached out to Rukshana, a transgender woman who successfully changed her gender identity from 'Other' to 'Female' on her citizenship. Through my interaction, I learned that she had applied to get it changed, and the government had responded by sending her a document outlining the requirements she needed to fulfill to access this right.

One of the requirements of the government for Rukshana stated: “हस्पिटलबाट शल्याक्रिया गरी लिङ्ग परिवर्तन गर्नु भएको भनी प्रमाणित गरिदिएको पत्र र Discharge Sheet” (Kapali). Here, the Ministry of Home Affairs outlines that Rukshana needs to provide documented proof of gender-affirming surgery and a discharge sheet. This requirement mandated by the government reflects a narrow understanding of gender that is closely tied to physical characteristics and is a manifestation of cisnormativity. In this context, this requirement by the government enforces transgender individuals to align with a performative idea of gender that is parallel to the heteronormative ideals. Not only that, it completely disregards the autonomy of transgender individuals and assumes that every transgender individual experiences gender in a linear and uniform path. It also restricts the way individuals experience gender to a single physical criterion.

The government that is mandating this law is dominated by Khas Arya (upper-caste) and heterosexual individuals as 62.85% of the government is upper-caste individuals (Manabi, 16). When examining the requirements for aligning one's gender identity in legal documents and how it maintains power structure, an intersectional lens becomes imperative. Intersectionality, a term coined by Kimberle Crenshaw, emphasizes the interconnectedness of social categories like race, gender, sexuality, caste, wealth, etc. in creating unique forms of oppression for individuals belonging to multiple marginalized groups and forms of privilege for other groups (Crenshaw

1244-1245). The caste system in Nepal is an intricate and deeply entrenched system of social stratification that is closely parallel with the socio-economic status of individuals. Traditionally, individuals belonging to higher castes have enjoyed ownership of land, political involvement, and economic privileges. In contrast, those belonging to lower castes have faced significant barriers to political representation and have been denied the right to own land, limiting their economic opportunities (Pariyar, Lovett). For those belonging to marginalized castes within the poMSOGIESC community, the oppression becomes layered. In the case of Dalit community, the most marginalized social group of Nepal who are also regarded as the 'untouchables', this cycle of oppression is intensified by limited access to education as only 1.6 % of the Dalit community have completed high-school and only 0.8% of those hold a Bachelors' degree (Manabi,16). This further affects the Dalit Queer community disproportionately as they often face increased bullying in schools creating a hostile environment and compelling them to drop out, perpetuating a cycle of diminished employment prospects and restricted participation in public life.

This systemic limitation on education access contributes to the absence of poMSOGIESC in positions of power and influence within the government as only 1.94% of the Dalit Community are represented in the government. Even within this meager 1.94% representation, there is no data regarding the inclusion of individuals from the queer community. Some individuals might argue that the lack of representation of marginalized communities in decision making bodies is not an intentional exclusion but rather a consequence of individuals not meeting the qualifications for such roles. However, till date, only one openly gay man has been elected in the parliament of Nepal, and that too was over a decade ago. Sunil Babu Pant, the first openly gay man to be elected in the Parliament of Nepal belongs to an upper-caste Brahmin family. This persistently low representation over an extended period of time suggests deeper systemic issues. This can be traced back to the lack of access to education, social stratification

ingrained in the caste system, and lack of economic advancement in the case of Dalit community which call for a structural change in Nepal.

Moreover, there have been multiple efforts from the government to represent marginalized communities in the government by mandating that some jobs should be reserved for people from certain castes, ethnic minorities, and women but this has never extended for transgender individuals (Knight). This lack of representation in decision-making bodies systematically sidelines the voices and experiences of the queer community, especially those from lower castes and socio economic background.

The government dominated by Khas Arya individuals fail to account for the fact that due to the limited economic opportunities transgender individuals who want gender affirming surgery might not be able to afford the cost associated with it. The cost of gender-affirming surgeries in countries like Thailand and India, the most popular go-to countries for such procedures exceeds \$4000 as there is a lack of comprehensive facilities in Nepal (Manandhar). This very high cost serves as a significant barrier for individuals belonging to the lower socio-economic class like the Dalit Community. The annual per capita income for Dalit community ranges from \$46 to \$273 (Bhattarai). The very existence of this requirement upholds the existing power structures by establishing a system where only transgender individuals with higher socio-economic backgrounds and upper caste system have access to legal recognition, further marginalizing those from lower socio-economic backgrounds and castes. Moreover, the lengthy nature of these treatments adds another layer of challenge for people seeking gender-affirming surgeries. These surgeries often require you to stay in the hospital for three days, with a recovery period of about six to eight weeks (“Vaginoplasty”). Additionally, ongoing medical attention is necessary, restricting an individual’s ability to work or study. This, again, affects people from lower socioeconomic backgrounds as they cannot afford the inability to work. Not being able to work

not only decreases their income but also pushes them into another cycle of financial instability and economic disadvantage.

Another requirement of the government stated: “मेडिकल बोर्डको सिफारिस” which means recommendation from the medical board of Nepal is required. This requirement by the government places the burden on transgender individuals to seek external validation, particularly from medical establishments that contribute to their marginalization. Similar to the representation in government, medical fields lack queer representation. This under-representation often extends to queer people from lower castes and these establishments are often dominated by heterosexual individuals from higher castes and socio-economic backgrounds. In my research, I encountered a notable gap in data regarding the representation of queer individuals, especially those from lower castes, within the medical field. The data available through the Nepal Medical Council primarily categorized individuals based on the binary distinctions of male and female, overlooking the spectrum of diverse gender identities and the existence of intersex people that exist. This binary approach undertaken by the Medical Council of Nepal shows how the system lacks the language and recognition needed to affirm the identities of poMSOGIEC. There are countless articles exploring “doctors’ perspectives on the LGBTQ+ community” suggesting that People of Marginalized Sexual Orientation, Gender Identity, and Sex Characteristics cannot be a part of the medical profession. Given these systemic issues present in the medical field, the government should be questioning the eligibility of these systems to provide the recommendation without perpetuating any stereotypes. However, by making legal recognition contingent upon the recommendation of the medical board that adheres to heteronormative standards, it maintains a hierarchical structure by giving the power of validating an individual’s gender identity to a medical board and not the queer individuals themselves.

The document includes additional information “येस्टा निर्णयहा न रूको तथ्याङ्कगत

विवरण सम्बन्धमा हलसम्म १० जना नागरिकहरूको नाम तथा लिङ्ग परिवर्तनर्त सम्बन्धी निर्णाय भयेको” which states that till date only 10 people have been granted this right to change their name and gender identity. This statistics reflects the significant inaccessibility to this legal process. Examining this through the lens of social capital theory which suggests that individuals accumulate resources through their social connections and its barriers are based on class, gender, and race reveals a recurring cycle of exclusion (Ihlen). Access to information about the process, requirements, and support networks are often obtained through social connections. Transgender individuals from the Dalit community often lack these connections as they have been systematically excluded from academic and public participation. As the law document stating the requirements to be fulfilled for gender identity recognition is inaccessible itself, individuals from lower socio economic background with limited social networks might struggle to navigate this legal system effectively. Even if individuals have access to the law documents, the process of applying for the right also requires individuals to navigate the bureaucratic systems.

The civil servants in Nepal have anonymously admitted that their priority is serving influential people within established networks (Knight, pp. 32). Given the underrepresentation of transgender individuals in the government, establishing connections with civil servants is very difficult. This lack of connection is even more pronounced for the Dalit queer community due to the severe underrepresentation of Dalit community in general in government roles. Consequently, navigating these bureaucratic structures becomes a significant challenge, resulting in obstacles to transgender individuals accessing their legal rights. Similarly, given the small number of people who successfully navigated through these systems and accessed their legal rights, it becomes incredibly difficult to establish connections with them and utilize their experiences as a support network in the struggle against government policies.

For many transgender individuals, the label of 'third gender' has far-reaching

consequences on their sense of self. According to Sagun Thapa Magar, a transgender man, it acts as more than a legal classification; it shapes personal narratives, affecting how individuals perceive themselves and how society perceives them (Khadgi). When assessing gender recognition in legal documents becomes inaccessible for these individuals, the consequences of the ‘third gender’ label are further magnified. The bureaucratic hurdles and the strict requirement set forth by the existing legal framework not only limits the scope of self-identification but also perpetuates a system that denies transgender individuals the agency to define their own narrative. The process that was designed to affirm and recognize different identities becomes a web of challenges, reinforcing the struggles for those seeking to identify within the binary.

Due to this, Trans Rights Collective and Queer Youth Group along with trans men and women across seven provinces of Nepal, released a demand sheet titled ‘National Transgender Demand Sheet. This document demands a change in the rules, so that transgender men can choose ‘Male’ as their gender marker and transgender women can choose ‘Female’ as theirs. This document also emphasizes that self-declaration should be the only basis and requirement for transgender individuals to change their names and gender marker and there should be a simple administrative process to do this (Queer Youth Group & Trans Rights Collective).

In addition to these immediate concerns outlined in the National Transgender Demand Sheet, the government should also take actions to dismantle the systemic barriers faced by transgender individuals, particularly those from lower caste and socio-economic backgrounds in Nepal. To do so, Bell Hooks’ concept of margin to center can be implemented which involves the intentional relocation of marginalized voices from the margin to centering their voices and experiences in discussion, policies and narratives (Hooks). In the context of Nepal, the

government should reorient their focus to prioritize the needs and rights of transgender individuals, especially those within lower caste and socio-economic background. This means that the policymakers should not only acknowledge these issues but take deliberate actions to center them. Initiative should include providing accessible and inclusive education, breaking the cycle of limited educational opportunities for Dalit community. Additionally, efforts should be directed towards creating an environment that allows these individuals to thrive academically and personally. Similarly, economic empowerment should also go hand in hand with these efforts by starting initiatives that provide economic opportunities and dismantle barriers to economic advancement, ultimately breaking the cycle of poverty.

However, as we advocate for these policy reforms and systemic changes to dismantle barriers faced by marginalized communities, it is imperative to center the voices and experiences of individuals like Rukshana. Only by acknowledging the complex layers of oppression individuals like Rukshana face, including caste-based discrimination, economic marginalization, and gender identity stigma, we can develop policy interventions that directly target these systemic inequities.

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