



Constitutional Change and Participation of LGBTI Groups

A case study of Nepal

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CONSTITUTIONAL CHANGE AND PARTICIPATION OF LGBTI GROUPS

A CASE STUDY OF NEPAL

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INTRODUCTION

For the thousands of backpackers, yoga-tourists and other visitors who land at Kathmandu airport every day, the airport arrival forms contain an interesting feature. Along with the options of male and female under the category of gender, there is a third option of 'other'. The story of how this box came into being is linked to my own story, that of a Nepali NGO called the Blue Diamond Society (BDS) and the story of political transition in Nepal.

Before describing the advocacy efforts made before and during the Nepal constitution building process, I describe below some of the events which led to my rather accidental career as a lesbian, gay, bisexual, transgendered and intersex (LGBTI) activist and politician – as I think they are instrumental in understanding how the movement unfolded, and may resonate with fellow accidental activists reading this paper.

I grew up in a small village in the rural district of Gorkha, north-west of Kathmandu, and eventually moved to Kathmandu to study commerce at the university. Growing up in Gorkha, and even at university, male bonding was common and relationships between males and females were rare, so I never thought about my sexuality during those years. Following university, I went to Belarus to take an advanced degree in computer science and it was there that I came across the word 'homosexuality' for the first time. It was on a sign I saw during a hospital check-up: 'Beware of homosexuals and drug users!'. There was a picture of evil looking men, and it reminded me of a 'Beware of the Dog!' sign.

Back home I could not get the sign out of my mind. I started exploring my own sexuality and paying more attention to gay culture and issues. I started seeing that foreigners were being deported for homosexuality, and realized for the first time that my sexuality might cause problems in certain cultures.

After Belarus, I went to Japan to do some voluntary environmental work. I stayed with my brother for three months, hoping to earn some money before returning to Nepal. I was looking for a job in an Indian or Nepali restaurant, and one day wandered into a bookshop. (I love reading, and can never walk past a bookshop without going in.) I picked up a book that happened to be about sexuality and was full of homoerotic pictures. I suddenly felt embarrassed, dropped the book and ran out of the shop, but when I arrived home I couldn't sleep. I was so intrigued by the shop that I had to go back the next day.

The shopkeeper explained that the bookshop was in a gay neighbourhood. I didn't even know the word 'gay' and he had to explain. I was so fascinated that I gave up looking for a job and went to the bookshop every day to learn about gay movements and cultures

around the world. That Tokyo bookshop was my education on the political struggles of gay movements.

After further brief sojourns abroad – studying in Hong Kong, and volunteering for disaster relief in India – I went back to Nepal. I spent a lot of time in Kathmandu, hoping to learn about the local LGBTI population and soon discovered Ratna Park – a common place for LGBTI sex workers to spend time and look for clients. I was not looking for anything more than to talk to people, and soon realized that nobody was using protection, as they knew little about the dangers and realities of HIV/AIDS.

I asked a friend in New York to send a shipment of condoms. This suddenly made me very popular as I was the only one in the country distributing them. I started telling everyone what I knew about gay movements in other countries, and soon realized there was a need to be more organized. With a small grant of USD 500 from UNAIDS, I trained a group of six people to conduct community education on HIV/AIDS for the wider LGBTI community in Kathmandu. This was my first experience of community work.

Through this experience, I started to learn about the vast array of problems facing LGBTI people in Kathmandu, from personal security to employment, police harassment, and so on. Once I realized the scale of the problem I saw the need to register a formal organization to tackle these challenges.

However, even registering the organization was a problem, as when it came to listing its functions, we could not use the word homosexuality. A list of names of people to serve on the board was needed, but most of my peers were too afraid to use their names. In the end, we registered an organization to work on gender, health and human rights issues for marginalized groups, and my family agreed to be included on the board. Thus the Blue Diamond Society was born. ‘Blue’ because this was used as a synonym for ‘gay’ in some parts of Eastern Europe, and diamond because in Buddhist culture it signifies mastering compassion.

ACTIVISM

The Blue Diamond Society was founded in 2001, in the middle of the Maoist insurgency (1996–2006) in Nepal. BDS was registered as a sexual health and rights organization in the same year that 10 members of the royal family were massacred inside the palace and the violent internal armed conflict reached its peak. The massacre sent the state deeper into political chaos. The combination of the massacre and the Maoist insurgency overwhelmed the monarchy and led to its abolition. The war ended in 2006 and populist protests filled the streets in what became known as the second people’s movement (*Jana Andolan II*), the most powerful people’s movement Nepal has witnessed in modern history. It resulted in the declaration of Nepal, the world’s last Hindu kingdom, as a secular democratic republic.

The story of BDS is intertwined with the political history of Nepal, particularly in the most crucial stages of Nepal’s transition to a democratic republic. The grounds for this transition were set in motion in 1996, by the Maoist-led movement that coalesced around issues of social exclusion. The high-caste Hindu-dominated elite in

the capital had long dominated politics and enshrined legal and social exclusion. Non-governmental organizations (NGOs) mushroomed in the 1990s, as they did in other parts of the world following the collapse of the Soviet Union. As Nepal democratized in the 1990s, international donor attention shifted away from working principally with the government and started to focus instead on empowering civil society. During the decade-long armed conflict, many NGOs shifted from basic service provision to more politically salient but controversial rights-based work, including reporting on human rights abuses related to the conflict. NGOs were seen to be more effective in this work as their networks spanned the far reaches of the country and were more reliable than the government or political parties in some cases.

For the most part, when BDS was established, it was oriented towards service delivery (e.g. condom distribution and training) and health issues rather than a robust human rights frame-work. Nobody – including the international community – even thought of talking about gay rights at that point, and donors had no policy or funding to support sexuality and gender rights advocacy. The questions around sexual and gender minorities were therefore approached only tangentially. Our initial activities centred on HIV prevention programmes, condom distribution and AIDS activism.

Informal contacts and networks among sexual and gender minority (SGM) people in Kathmandu began to grow in 2000. Through our initial discussions, those of us who met in parks and temples to discuss our lives as sexual and gender minorities realized that the problems we faced – discrimination from the security forces, exclusion from our family homes, social stigmatization, and difficulties finding jobs and apartments — were systemic and, while deeply intertwined with HIV and health issues, connected to broader social and political issues as well. In discussing our shared experiences and sentiments, we decided to get organized and work towards raising social and political awareness of SGM issues.

Even though the LGBTI community faced many challenges in Nepal, we realized in comparing our society to India, Pakistan and Bangladesh, that Nepal was perhaps the most inclusive place for LGBTI people in South Asia, even before the Supreme Court legalized homosexuality in 2007 (see below). Nepali culture has been generally socially accepting of the idea of a third gender. Long before the BDS started participating in Gai Jatra, a Nepali festival celebrated by the Newars and the Tharus to commemorate the dead, parents used to cross-dress their children and bring them to the festival. In the Ropai jatra (planting festival), men dress as women, and in Bahun-Chettri marriages, a woman usually dresses as a man when they come as a ‘janti’ to take the bride.¹

The word Metta, which is used for the LGBTI community in Nepal, comes from the word ‘Mi-trata’, which means loving kindness. This can be partly traced to the use of this word to signify transgender persons, who have long been accepted in Nepali culture.

In addition to the pre-existing cultural acceptance of gender fluidity in Nepal, there is now a growing acceptance in civil society of LGBTI demands since the Supreme Court recognized the community’s legal rights. On 21 Dec 2007, the Supreme Court of Nepal ruled on a writ petition submitted by BDS, giving a historic verdict in favour of sexual

¹ *Bahun, Chettri, Newar and Tharu are ethnic groups within Nepali society.*

and gender minority communities. This case and verdict, discussed below, changed the course of the LGBTI movement across the continent, making Nepal an optimal example of equality and inclusion. The media, political parties and local government started to include LGBTI groups in the political decision-making processes.

The inclusion of an LGBTI discourse in Nepal's political process was aided by two factors, and BDS took advantage of both. First, the Maoist movement was already in an ongoing struggle against monarchical absolute rule, to re-establish democracy and to ensure the full inclusion of the marginalized populations within Nepal. The existence of this movement allowed BDS to carry out joint public activities or join protests wherever we felt the state compromised human rights and freedom. We were able to *join* a people's movement for democratization and think about political rights that included all minorities. The second factor that allowed BDS to push for inclusion of an LGBTI discourse in the social and political sectors in Nepal was the shift in international funding and donor-driven development with the opening up of a global discourse on sexual orientation and gender identity. The Yogyakarta Principles were promulgated in 2006. These principles, although non-binding, proved crucial in our efforts because when engaging with entrenched prejudices within the establishment, such as government and donor bureaucracies, it is important to mobilize influence from all angles: religion, law and public opinion.

BDS realized early on that it was important for us to be nimble in our approach and deliver our message using several voices and arguments – ranging from international human rights standards, to health investment, to local inclusion politics. The Yogyakarta Principles gave us a legal platform of international recognition that we could rely on in our struggle. Having participated in the drafting of the Yogyakarta Principles in 2006 and in 2007, I had a deep familiarity with their content and intent and was therefore able to think of ways to use them to promote our advocacy efforts. I decided to file a case against the Government of Nepal to argue for adherence to the principles in the Nepalese context.

Participating in the drafting of the principles not only gave me the confidence to use them as a legal tool but also taught me how to forge linkages between LGBTI rights and broader civil rights and human rights movements, which helped BDS recognize and act on the commonalities between our agenda and those of the people's movement in Nepal.

The streets of Kathmandu and Nepal in general were heavily militarized during the final years of the internal armed conflict. There was a marked escalation in the abuse of the marginalized by the security forces, which had such an unchecked public presence on the streets. Until the signing of the Comprehensive Peace Accord (CPA) in 2006, the LGBTI community faced regular attacks from the Nepal security forces.² In 2004, things came to a head regarding unlawful arrests. In one of the most horrifying cases, a member of the police slit a *metti's* throat after forcing her to perform oral sex. Three days later, 39 individuals associated with the BDS were arrested and detained without charge for 13 days. They were picked up from their homes, the streets, taxis or even restaurants and discotheques. BDS activists had to spend several weeks in police stations bailing out arrested LGBTI people who were being held without charge. These visits

² <http://www.asylumlaw.org/legal_tools/index.cfm?category=537&countryID=233>.

were significant at the time, as they indicated to the police that there was a group of people aware of and concerned about what was going on. Our hope too was that the visits would prevent future abuse and beatings in detention.

The arrests received a lot of international attention from the media and human rights organizations. The police had used the Public Offences Act as a pretext, relying on a general and vague provision related to public nuisance. States can use a variety of laws to dictate what is acceptable in terms of sexual expression. The law does not have to expressly deny same sex activity. Instead, agents of the state can use any law to attack people who are not seen to be conforming to a prevalent norm. This is what happened with the use of the Public Offences Act in Nepal.

By 2004, the people's movement against King Gyanendra and Nepal's monarchical system was fully under way. As sexual health and human rights activists, we were faced with a choice: we could either join the people's protest in the fight to reinstate democracy or choose to remain on the outside. We realized that if it is not possible to feel free of fear in public and in the street, this defeats the very purpose of being a free citizen. We therefore built our political consciousness and made a productive shift from the service provider health paradigm to a human rights activist stance, and decided to join the movement for democracy in Nepal.

THE COUNTRY FIRST, OUR RIGHTS SECOND: JOINING THE MOVEMENT FOR DEMOCRACY

In 2004, the same year in which the high-profile arrests of LGBTI persons occurred in Kathmandu, King Gyanendra, who had assumed power following the Royal massacre described above, suspended parliament and assumed absolute power to govern by himself. BDS was faced with a situation in which we did not have a state to appeal to for the protection of minority rights. Human rights cannot exist in a political vacuum, and it became clear early on that in the absence of a democratic space, our movement did not stand a chance. What solidified our commitment to join the people's movement was the widespread anger over the crack-down on the media and NGOs initiated under the king's rule. This was done in the name of morality and national security, but in fact served to shrink the space for dissent and erode the right to freedom of expression. Our small LGBTI community was divided over whether we should become engaged in broader issues of human rights and democracy, but I convinced them that *if democracy is in crisis, it is impossible for sexual and gender minorities to advocate for our own position in the polity*. This realization compelled us to invite various civil society activists and political leaders to the Blue Diamond Society to discuss the general human rights situation. Given the difficulty involved in calling a public meeting at that time, as the security forces would routinely harass or crack down on such gatherings, it was heartening to see a large presence of human rights activists, as well as some political leaders. *These experiences allowed us to further strengthen the links between our movement and the broader democracy movement in Nepal*. In their absence, we realize the power and importance of basic democratic rights such as freedom of expression and of association.

I believe this meeting was also a turning point in the general attitude to sexual and gender minorities in Nepal. It was a situation in which there was little to lose, owing to the harassment people were facing on a regular basis. The crackdown on dissent and protest had created a culture of fear, and the broader activist community was, I believe, very heartened that we were joining the cause, and were not afraid to lead from the front by hosting a meeting which could have landed us in jail. It was also at this time that I first came into contact with the Maoist leaders, who were also impressed by our willingness to take up the fight against oppression. The visible participation of traditionally disempowered groups such as women, ethnic minorities, and sexual and gender minorities had a positive impact on other activists and marginalized communities – the belief spread that it was possible to create a new and inclusive Nepal. The LGBTI movement was in turn bolstered and strengthened because we were no longer fighting from the fringes but as part of a larger movement with common goals and solidarities. We began mobilizing all our resources, going door to door, creating a network on a broader mandate of democracy and human rights for Nepal. *Before expecting support and solidarity from other stakeholders, civil society and the media, one must express the same to others who are in need of support and solidarity, then strategic partnership and back-up support is possible*. This was a crucial lesson that we learned.

The most important achievement of our participation in political agitation was the intervention we were able to make as a consequence in the national constitution-making process. *If we had not participated in the broader people's movement, it is likely that our demands to be included in the constitution-writing process would have been dismissed as those of yet another group of fringe activists.* However, our deep involvement in the people's movement had allowed us to gain allies, both domestically within the constitution-writing process itself, and among the international community. For example, when we held events for the International Day Against Homophobia, we obtained support from diplomats, international figures, such as Justice Edwin Cameron from South Africa, who I had met at an international AIDS conference in Toronto in 2006, government officials and other civil society activists. Thus, when the time came to write Nepal's new constitution, LGBTI activists had a seat at the table.

In planning our intervention in the constitution-writing process, we were able to look to the histories, movements and political processes of other countries. South Africa and its pioneering constitutional protection of the LGBTI community was a highly illustrative case study for LGBTI activists in Nepal. We hope that one day our experience in Nepal might inspire changes in other parts of the world in the way the South African experience was able to bolster our own movement and the tactics that we chose. Inspired by the work on LGBTI rights in South Africa, we handed out pamphlets during the 2007 civil unrest. We were able to generate a conversation around LGBTI lives, on which there had been a near silence for so long, primarily through informal and casual visits to Ratna Park. A concerted effort to engage with human rights and public law is required to make it possible for gender variant people to exist with freedom and dignity.

Meetings, face-to-face interactions and door-to-door campaigning are the most effective tools for political organizing around issues, especially misunderstood or stigmatized topics such as sexuality. I remember when I met with the Maoist leader Dev Gurung, and asked his view on LGBTI issues. He said homosexuality was a by-product of capitalism; when the Soviet Union and China were pure communist countries they did not have a single homosexual. Later, when I met the intellectual leader of the Maoist party, Dr Baburam Bhattarai, and explained the World Health Organization's declassification of homosexuality as a mental disorder, and how Lenin was supportive of homosexuality at the end of his life, Bhattarai became an advocate for our cause. Dr Bhattarai, who later became first finance minister and then prime minister, was from the same district as me, and was thus willing to give me more time than perhaps he would otherwise. BDS organized various events inviting international human rights leaders such as Ian Martin from OHCHR Nepal and Edwin Cameron. Events like these proved to be effective ways to affect the understanding of and commitment to LGBTI issues of decision makers such as judges, lawyers, political leaders and government bureaucrats.

In addition to our growing activist network in Kathmandu, BDS built a network in 15–20 districts around sexual health and sexual politics. Once we decided to participate in the wider efforts to secure a new nation and stake our claim as part of that new national identity, we attended local events across the country to gain grassroots support for our inclusion and enlist the help of our supporters around the country in the people's movement.

THE LEGAL BATTLE TO ESTABLISH OUR IDENTITY

Our foray into the constitution-building process was not without its obstacles. Although plans were made to draft the Interim Constitution, which served as the framework for the Constituent Assembly, in an inclusive way, and suggestions were invited about what it should include, public input was not given meaningful consideration during the drafting meetings. Government officials turned a deaf ear to our requests and concerns. At the time, we had two primary demands: official recognition for a third gender category in Nepal; and an end to state-sponsored discrimination against the LGBTI community.

In relation to our first demand, the central discussions around the third gender category focused on whether this would truly help people to think of gender as a fluid entity, or whether it would only create another static gender category. In Nepal, based on international precedent, our impetus has been to focus on ‘gender variance’, that is, to think of the introduction of a third gender as inspiring a more fluid understanding of gender in general. There are two main reasons to think of this as progressive and necessary. Third gender is merely an umbrella term that indicates a rupture in the binary notion of male-female identity. By third gender, we are intended to imagine a spectrum of identities that is in no way monolithic or static, but a range of self-identifications that may not fit within the two traditional options. Some are concerned that introducing a third gender category could undermine LGBTI community members’ right to self-identification, by including some while excluding others. However, BDS believes that identification as male or female at birth always confines our notion of self-identification. As such, a third option at least introduces a notion of progressive ambiguity and fluidity to an already enclosed and historically determined legal field.

After years of struggle, and given the lack of responsiveness from the government, it became clear that our second demand – an end to state-sponsored discrimination and violence in Nepal – was not going to happen at the government’s volition. We therefore decided to appeal to the Supreme Court. BDS hired lawyers to draft a petition, trained these lawyers on LGBTI rights and issues,³ followed-up during the pleading process, and informed and engaged with all the necessary partners and media organizations.

Finding the right lawyer was important, so BDS identified someone we knew was genuinely supportive of universal human rights and trained them on LGBTI issues. For example, we steered away from arguments about natural versus unnatural behaviour, from any mention of physical relationships and from any mention of same-sex marriage,

³ For more information on the training of the primary lawyer, Hari Phuyal, see <<http://www.caravanmagazine.in/reportage/spark>>.

and instead focused on the issue of forced marriage – as many gay men are forced to marry against their will.

PANT AND OTHERS VS GOVERNMENT OF NEPAL AND OTHERS

On 18 April 2007 the Blue Diamond Society petitioned the Supreme Court of Nepal to issue a direct order to the government to end all kinds of violence and discrimination against sexual and gender minorities.⁴ After four hearings, on 21 December 2007 the Supreme Court judgment surpassed our expectations. It ruled that all sexual and gender minorities are as ‘natural’ as anybody else and deserve equal rights and opportunities. I feel that the judges were, in general, more progressive than wider society, but they were particularly moved by individual stories from young persons from the LGBTI community who told of the cruelty they had suffered – often at the hands of their own family.

The Court issued three groundbreaking directives. The first and most progressive ordered the government to recognize a third gender category on an equal standing with male and female. The second directive was to amend or repeal all laws that discriminate against gender and sexual minorities in Nepal. On this point, the Court 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. (Pant v. Nepal)

The third and final directive called on the Government to establish a seven-member committee to draft a same-sex marriage law.

IMPLEMENTATION OF THE JUDGMENT IN PANT ET AL. VS THE GOVERNMENT OF NEPAL ET AL.

Despite this progressive judgment, government follow-up was slow, demonstrating its persistent institutional bias against the LGBTI community. While nothing on paper should have prevented the Home Ministry from immediately issuing government and citizenship forms that include ‘other’ as an option, this was not done until 2012. This was largely because of bureaucratic inaction, but also because of the general bias that is built into the system. The institutional bias against the LGBTI community is not bound to any one actor or body. Since the Supreme Court ruling in 2007, there have been three interim governments in Nepal, all of which displayed a certain amount of homophobia and transphobia. *Our experience shows, therefore, that despite the existence of a positive court judgment, it is possible for true societal change to be held back by an unwilling government administration.*

⁴ For further details on the case see <<http://www.gaylawnet.com/laws/cases/PantvNepal.pdf>>.

As per the second directive, which called for the amendment of existing discriminatory laws and policies on sexual orientation and gender discrimination, the government appointed the Ministry of Women, Children and Social Welfare to conduct an audit of existing laws. The ministry identified approximately 20 laws as discriminatory, and made proposals for their amendment. In conducting its work, the ministry hosted thorough consultations throughout the five development regions of Nepal, with the constant support and facilitation of the Blue Diamond Society, as well as national consultations. This constant pressure was essential to move the process forward. On more than one occasion we had to threaten ministry officials that we would sue them for being in contempt of court if they did not complete their tasks. Although not binding on the government, the ministry's work and final report were significant. Legislation can often be used to continue to discriminate against a group of people despite the existence of a progressive constitution. The current rape law, for instance, does not recognize male or third gender survivors of sexual violence, leaving many LGBTI people who are sexually abused or raped without any hope for or access to justice.

Regarding the third directive, the Government formed a seven-member committee to study same-sex marriage bills from other countries in order to draft one for Nepal. The Committee is composed of seven members as dictated by the Supreme Court decision. It is chaired by the Health Secretary and composed of lawyers, anthropologists and representatives of the National Human Rights Commission and the Nepal Police. Members conducted consultations with various stakeholders from among academia, religious leaders and LGBTI communities and activists, among others. The Committee also studied the same-sex marriage laws of other countries. It recently submitted its report to government with a recommendation to grant full marriage to same-sex couples.

Following the court order, BDS observed positive impacts on the day-to-day lives of LGBTI people. The court decision received widespread coverage in the press, which resulted in both a boost in self-confidence for the LGBTI community, and a warning to the police that continued harassment was not going to be acceptable.

Now the police in the streets protect rather than threaten sexual and gender minorities. The government has started issuing citizenship certificates to those who do not wish to be identified as 'man or woman', but as 'other'. As mentioned at the outset of the article, the government has changed 'departure and landing cards' at the international border crossing points to list three genders, although it has failed to issue passports or international identity cards identifying people as third gender. The media has been further emboldened to write, talk and report about these issues more openly than it used to. The court decision also had a significant impact on the outward orientation of political parties, which was hugely significant. Given the importance of political parties in Nepal, we realized that engaging with them would provide the best opportunity to bring long-term change to the way in which the LGBTI community is viewed and treated in Nepal.

ENGAGEMENT WITH POLITICAL PARTIES IN NEPAL'S FIRST ELECTIONS TO THE CONSTITUENT ASSEMBLY

Before the dates for the 2008 Constituent Assembly elections were finalized, BDS decided to capitalize on the moment by mobilizing and actively reaching out to the different parties. Soon, the LGBTI community began to be seen as a significant vote bank. We urged different parties to include LGBTI rights in their respective party manifestos, if they wanted to win our votes. When our cause was taken up as a public mandate, we began to envisage ourselves as an empowered voting bloc, able to make a difference in the electoral process. The distinction between the personal and the political realms began to dissolve. This complicated the question of public and private life, especially given the context of our activism. We were going public and the visibility of our movement was growing, but at the same time we were demanding that sexuality was a private matter and hence state interference was unacceptable. Some people found this confusing but we clarified the two difference aspect of our lives: Members of the LGBTI community wanted to be able to live a and participate in public life, but at the same time the choice of who to love and how to self-identify must remain a private matter.

In engaging with political parties and the election commission around the first elections to the Constituent Assembly, I was able to collaborate with Bhojraj Pokhrel, the election commission chief at the time. I knew him from his time working for USAID on HIV/AIDS in Nepal in 2004–2006. I lobbied with him to reinvigorate the question of the visibility of LGBTI lives. In particular, we asked him to be more proactive in ensuring that political parties were aware of the legal protections afforded LGBTI persons, and ensured he was informed of the challenges for LGBTI persons who wished to vote. *This was critical for the success of our movement as making personal connections in the political realm and using them wisely to resolve problems that might not be able to be resolved with loud protests in the streets is an essential strategy in South Asia.*

The Maoists who led the people's movement against the monarchy from 1996 to 2006 were registered as a political party under the 2006 Comprehensive Peace Agreement. The Maoists were the first to include the issue of sexual and gender minorities in their manifesto. At the time, they were looking for the broadest possible support and were very approachable, and the shared connection with Dr Bhattarai also helped with access. Other parties such as the Nepali Congress (NC) and the United Marxists and Leninists (UML) soon followed. This is not an uncommon trend. While there is a widespread and perhaps understandable mistrust of the Maoist agenda in Nepal, especially regarding how genuinely committed they are to the constitution-writing and democratization processes, they have always been far more progressive than the other parties in Nepal on the questions of the marginalized and minority rights issues. *This progressive leadership has encouraged other parties to be more inclusive too.*

Following our lobbying activities and engagement with political parties, my involvement in politics unexpectedly went a step further. On the last day of filing nominations, I had a surprise call from the Communist Party of Nepal (United). The president of party was interested in BDS' activities and wanted someone from BDS to be a candidate in the proportional representation (PR) segment of the Constituent Assembly elections. I therefore decided to propose my candidacy. The president wanted to get the candidacy endorsed by the party's central committee within two hours, so I had little time to make what I realized was a difficult choice about my political participation. I never expected to be a politician. In fact, I never liked politics, particularly as practiced in Nepal. I was happy doing human rights work as a member of civil society. After discussions with the BDS staff, however, we decided to move ahead to further our political involvement, although without harbouring any expectations. Having realized the importance of being part of the broader movement for democracy in Nepal, we believed that my candidacy and the related LGBTI involvement in mainstream politics would send a positive message that, as a community, we were actively supporting the constitution-building process.

We decided to campaign in the districts where the party did not already have strong support. Our campaign was a great source of interest for both the Nepali and the international media, as it provided an unusual spectacle with party workers carrying the rainbow flag in one hand and the communist flag in the other! We mobilized BDS offices at the district level to garner votes.⁵

In terms of the electoral process, Nepal has a mixed first past the post and proportional representation (PR) electoral system. Since the CPN (United) was a small party, past trends suggested that even if it won one seat, this would be a success. Once BDS joined forces with it, however, there was a notable increase in indications of support for the party. At one point, predictions reached as high as 155,000 votes. In the end, although CPN (United) received a significant number of votes, the party did not win any seats in the first past the post race, but did win five seats under PR. Once seats have been won in the PR race, a party must go through the list of PR candidates previously submitted to the Election Commission to approve the names of its choice of parliamentarians. CPN (United) did this by assessing those districts where the most votes were cast in favour of the party. It was found that the 15 districts in which BDS activists had campaigned and networked yielded the most favourable results. Through our capacity for organization and mobilization, and the fact we had a local presence in so many districts, it was undoubtedly the BDS vote that carried the campaign. In recognition of this, I was chosen as one of the party's representatives and became a member of the Constituent Assembly.

The above explains how I came to be elected to Nepal's first Constituent Assembly (2008-12) and how I began my campaign to contribute to the historic task of writing a new constitution for the Federal Democratic Republic of Nepal. Below I discuss my participation in the Constituent Assembly and Nepal's historic constitution-writing process.

⁵ BDS at that time had offices in 15 of Nepal's 75 districts; these offices would report back to the central office in Kathmandu on their work on programme implementation and outreach. BDS has since expanded to 40 districts.

PARTICIPATION IN NEPAL'S FIRST CONSTITUENT ASSEMBLY, 2008—2012

It was only once I became a member of the Constituent Assembly that I realized how effective and influential it is to be inside the halls of power. In 2008, at a meeting with Prime Minister, Prachanda and Baburam Bhattarai, who had been appointed finance minister, Dr. Bhattarai agreed to allocate a small budget from the state budget for programmes relevant to sexual and gender minorities. This was a historic moment. After that, the national budget for LGBTI programmes grew incrementally each year throughout the term of the Constituent Assembly. Although this could be seen as a tokenistic form of support, it had a huge impact in terms of expressing state endorsement. In 2011, 25 of the 75 districts contributed to this budget of their own accord, while also introducing their own development programmes targeted at LGBTI communities.

The New York Times: Saturday Profile

By TILAK POKHAREL, September 19, 2008

In Conservative Nepal, a Tribune for the 'Third Gender' Speaks Out

Mr. Pant, 35, a computer engineer by training, opens his laptop — an object of fascination to many in the assembly, who come from the rural hinterlands — and gives a PowerPoint presentation wherever he finds his audience.

'Kalpanaji, come join me', Mr. Pant said during a break recently to a fellow parliamentarian, Kalpana Rana, inside a tent that serves as a canteen. Other lawmakers, there to kill time, began to move closer to his laptop.

'I have prepared this presentation for members of this assembly', he said, giving them a beaming smile. The female members were too shy to join the crowd.

'There are some people on earth who consider themselves neither male nor female', he continued. 'They like to be called third gender, which comprises roughly 10 per cent of the total population'.

A man interrupted. 'Oh, yes, I had seen this term in a medical book I have at home', said the man, Mathabar Singh Thapa, of the rightist Janamukti Party in the 601-member assembly. 'But I have a question: Do they have genitals?'

'They do' said Mr. Pant, trying not to giggle. 'But, they don't have natural sexual orientation'.

He then put a political spin on his presentation. 'South Africa's Constitution already has a provision that the third genders are not to be discriminated against', he said. 'Following the 1917 Bolshevik Revolution, led by V. I. Lenin and Leon Trotsky, Russia became the first nation to legalize homosexuality'. The members listen attentively until the bell rings, summoning them back to the assembly hall.

In addition to meeting the political elite, I started a campaign among the younger members against the traditional ways the older generation of leaders were thinking about and guiding the nation. The National Democratic Institute (NDI) provided support for our meetings. The group of young assembly members ran an interaction programme, inviting the senior leadership of the major parties to determine a way and a timeline to resolve the political deadlock around key constitutional issues. Our activities were informal but the senior leaders started to listen to and to some extent include young leaders in policy and decision-making processes. We collected the signatures of 250 members, urging the Speaker and the senior leaders not to hijack the process and to allow wider participation by all members, and especially to ensure that young assembly members were provided with meaningful roles in constitution-building. The older generation trusts neither the youth nor themselves. Thus, I made it my objective to continually advocate for youth to be given responsibilities in order to make a difference in strategic decisions. I think the deadlock that the first Constituent Assembly faced in 2012 could have been resolved if all the young members had been able to exert pressure on their respective leaders.

In addition to partnering with youth, I also chaired Parliamentary Action on Environment, Climate Change and Disaster Risk Reduction (PAECD), an informal committee of assembly members, and facilitated discussions around climate change matters. I expressed solidarity with other gender and marginalized peoples' issues and built relationships with parliamentarians who were fighting other forms of discrimination. I also hosted a television programme, *The Focus*, in which I invited political leaders and assembly members to discuss developments in the Constituent Assembly process and informed the public about constitutional issues. The show was later broadcast on national television networks under the name *Pahichan*.

Overall, I was satisfied with my participation in the first Constituent Assembly. I believe that I was among the most active and involved members, and was keen to assist other assembly members who had had less access to education than me or who had lower levels of literacy, if they had questions about the business of the Constituent Assembly. I devoted myself fully to drafting a new constitution that would embrace equality for all. In the Preliminary Draft Constitution released by the legislature in 2014, the chapter drafted by the Fundamental Rights Committee was agreed by all major parties. It includes provisions to ensure non-discrimination on the grounds of gender and sexual orientation. As a member of the Fundamental Rights Committee, I ensured that the section on sexual identity and rights was comprehensive. This met with little resistance, in part because I had conducted a lot of advocacy with the same members prior to the establishment of the committee. As we were only a five-member committee, there was a lot of work to be done. I think my willingness to take on a heavy workload helped gain me respect on the committee, which helped my advocacy for LGBTI recognition. The committee drafted language on the inclusion of three genders and citizenship rights, a call for equal pay, and a provision on same-sex marriage. The chapter is gender inclusive and contains gender-neutral language.

Interestingly, we received some resistance from other minority groups – many of which had been staunch allies until that point – on the issues of affirmative action and inclusive representation. There was some feeling that the 'pie was being cut into smaller and smaller pieces' and that the inclusion of another minority group would take something away from other groups. In the end this resistance was overcome, however,

as people accepted the principle that minority and disempowered groups collectively needed recognition and rights protections.

The proposed article 6 on citizenship provides everyone with the right to a citizenship identity that accords with their gender identity. The language of the provision makes the inclusivity aspect unambiguous. It reads: 'Every citizen shall be entitled to a citizenship certificate indicating his/her mother's or father's ancestry as well as his/her gender identity'. The chapter on Fundamental Rights, which prohibits non-discrimination, includes those vulnerable because of their sexual orientation. Article 3 on the Right to Equality states in part (2):

There shall be no discrimination in the execution of general laws against any citizen on grounds of religion, colour of the skin, caste, ethnicity, gender, sexual orientation ... or any other similar grounds.

Provided that, nothing shall prevent the state from making special legal provision for protecting, empowering or development of women, dalits, indigenous and ethnic peoples, Madhesis peasants, workers, oppressed regions of the country, Muslims, backward classes, minorities, marginalized peoples, endangered communities or impoverished people, youths, children, senior citizens, sexual and gender minorities...

The commitment in article 3(2) to positive discrimination measures is reinforced by article 3(j)(17), which holds that: 'Special provisions will be made to ensure the right of gender and sexual minorities to lead a dignified and respectful life'. Under article 27, the Right to Social Justice, gender and sexual minority communities are guaranteed the right to participate in state structures and public services on the basis of the principle of proportional and inclusive representation. Rights to health and education were specifically extended to sexual and gender minorities. Some of the articles, such as the Right to Marriage and Right to Family, were drafted in gender-neutral language in order to be inclusive. Most notably, an agreed concept paper on Gender and Sexual Minority Communities, attached as section 2.2.2.2.27.15 of the Report of the first Constituent Assembly's Fundamental Rights and Directive Principles Committee, includes broad but explicit commitments to increased sensitivity and responsiveness by the state to the LGBTI community (see Annex I).

Although the first Constituent Assembly failed to promulgate a constitution, significant progress was made in thinking about and providing legal recognition of the rights of sexual and gender minorities between 2008 and 2012.

NEXT STEPS: THE SECOND CONSTITUENT ASSEMBLY

The Constituent Assembly was dissolved in 2012 because agreement could not be reached on a number of complex issues: federalism, power-sharing arrangements between the branches and levels of government, and the design of the electoral system. This failure to promulgate a constitution pushed the country into more political and social uncertainty. The senior leaders, who were supposed to consider the national interest and apply themselves seriously to constitution building, the peace process and building a national consensus, became more entrenched in political power struggles. Nonetheless, I can proudly say that the Constituent Assembly was able to complete about 80 per cent of the draft constitution. We, the Assembly members of the new generation, took pride in our contribution, knowing we worked hard over those four years.

The stigma and discrimination against sexual minorities is gradually changing. We believe that we should neither be discriminated against nor treated as special, and we were able to get that message across clearly in the Constituent Assembly. We are the same as any other citizens in this society. We also urge people from sexual minorities to respect their identity and be honest with their families and society, by discouraging them from engaging into heterosexual marriage without informing their spouses, and not reinforcing 'being in the closet' by not coming out and living a double life. The rights secured in the draft constitution prepared by the first Constituent Assembly would promote these ends. My lobbying work within the first Constituent Assembly also pushed Nepalese politicians on LGBTI issues and secured more recognition and support from the state to accommodate the needs and demands of my community.

The relationships and trust that I built during the tenure of the first Constituent Assembly attracted many political parties, and by 2010 many different political parties, such as Nepali Congress, the UML and the RPP started recruiting LGBTI members as party cadres. Now, in 2014, almost all the political parties have SGM people as party members because, with the second Constituent Assembly approaching, LGBTIs joined different political parties and parties either called on them to join or welcomed them when they did. Despite these gains in representation within political parties, there is no one from the LGBTI community in the second Constituent Assembly. I did not stand as I am currently spending most of my time in United Kingdom, busy looking after my partner who is unwell. Other LGBTIs tried to, but the major parties did not give them a chance to run in the elections. Four smaller parties each included one LGBTI candidate's name on their candidate lists, but ultimately did not nominate them as PR members.

The good news is that the second Constituent Assembly has agreed to adopt the first Constituent Assembly's work up to the point where there was consensus. Fortunately, there was no opposition to SGM people's rights, so it seems likely that the

accomplishments of the first assembly will be protected. Although 80 per cent of the members of the second Constituent Assembly are new, I do not believe that the section on fundamental rights will be changed dramatically as there is no controversy about the work that has already been done. The Supreme Court of Nepal has also written a legal notice to the Constituent Assembly, in place of a directive, which it does not have the mandate to send, calling for the inclusion of LGBTI rights in the forthcoming constitution. Now, it is all about how strong the language will be.

Although I am hopeful about the content of the fundamental rights chapter in the forthcoming constitution, there are causes for concern about how the government will continue to address the needs of the LGBTI community. In 2009–2011, the law ministry silently set to work undermining the protections extended to the LGBTI community. For example, the ministry is completing a new criminal code for Nepal and the final draft, which was submitted to parliament for consideration, has reintroduced the homophobic language that was so painstakingly removed from other laws. Provisions included in this draft can be seen as a setback for the rights of many of Nepal's vulnerable communities, including women, Dalits, people living with HIV, those with disabilities and religious minorities. The draft code introduces provisions that criminalize LGBTI people's identities and behaviour; marriage is strictly defined as between men and women; and penile-vaginal sex is the only natural sex defined in the code – leaving all other sexual acts deemed *aprakritic* (unnatural).

These retrograde steps are a matter for concern and have led the BDS and myself to realize that we must continue to lobby on other fronts alongside our efforts within the constitution-writing process.

CONCLUSION: ADVICE TO OTHER ACTIVISTS

When the Blue Diamond Society began its work, we did not make long-term plans about the LGBTI rights movement or other interventions. Our efforts were not calculated but evolved over time in response to emerging challenges. Many people think the BDS is highly strategic and always has a plan, but that is not true. We do what is necessary from moment to moment, situation to situation. If I need to go fight, I fight. If I need to get papers, I do that. If the situation demands one-to-one consultations: I can do that too. My approach changes as the environment and situation change. Timing is important and identifying which move helps you lead the change is key. For example, at the first Constituent Assembly in 2011, a small group of ‘expert MPs’ was convened to draft the language of the constitution to make the language ‘legally sound and consistent’; and essentially to erase the phrases ‘sexual/gender minority’ and ‘people with disability’ from the definition of minorities. Realizing what the politicians were trying to do, I publicly protested in the Constituent Assembly for an expansion of the understanding of minority communities. I recognized an opportunity to raise my voice on the issue and took advantage of it to create change.

We pushed to get our rights of recognition in 2007 because we saw an opportunity to ally with the Maoists we had fought alongside as revolutionaries in 2006 but who by this time were in government. They did not want to meet with us, however, and did not respond to us – so we took the government to court. I always think of immediate local needs and see if there is a need for immediate intervention. I think most activists probably work like that. If you start planning every move, I do not think that is activism. This reflects our view that, while knowing what you need to achieve at the outset in terms of fairness and respect is key, to be able to achieve your goals requires flexibility and an ability to respond quickly to changing situations.

A lot of activists I see are always angry. They may make enemies for life, and I think that is what leads to failure. I took opportunities to educate people instead of fighting with them. A compassionate education is the key. That is how I have been successful.

As an activist, you never have enough time. You work 24 hours a day. It is a multiparty, multi-industry approach. You have to work with everyone. There are gaps in every aspect of life for the LGBTI community, so we are trying to mend all those holes. This is time-consuming and exhausting but we must continue our struggle.

While I was a member of the first Constituent Assembly, I found that while we struggle for equality, we should not have low self-esteem: why beg? I see this in a lot of people who are fighting for equality. For example, a lot of women in the assembly were fighting for equal rights. They would protest for equal seats by shouting and rallying, but the next minute they would be shaking hands with the men they were demanding seats

from. Yes, these men might have the power: but why beg? When you beg, it puts your adversary in a giving position and you in a receiving one. This is yielding too much power to the government and weakens your negotiating position. You should never beg for equality. You should treat yourself to equality first.

Another lesson from our experience is that it paid in our case to be bold. I recall discussions with the renowned constitutional law expert, Yash pal Ghai from Kenya, who provided helpful guidance and advice but also warned sometimes that we should be wary of pushing too hard as we might then experience a backlash. While I can imagine this might be true in other contexts, in Nepal we felt that we had a unique opportunity to claim our rights and could not let the opportunity pass by without trying to take maximum advantage.

Overall, it has been a terrific journey. We are very happy and proud that we have made such progress in Nepal: efforts that can be shared and communicated with many other countries. We must build alliances globally as well as with historically disempowered communities within our own nation states. People with disabilities, Dalits, sexual minorities, gender minorities and women all stand to gain by joining together to build solidarity in our fight for recognition of human dignity and equality.

ABOUT THE AUTHOR

Sunil Pant is a former member of Nepal's Constituent Assembly (2008–12), and the first openly gay politician in Nepal. He is the founder of the Blue Diamond Society (BDS) – the only gay rights group in Nepal, which works with sexual minorities in the areas of human rights, sexual health and HIV/AIDS. Sunil also promotes Nepal as a gay-friendly destination to create jobs and contribute to Nepal's economy by offering honeymoon packages for lesbian, gay, bisexual, transgendered and intersex (LGBTI) tourists from abroad. Sunil is the author of a 2005 report on the reasons for, extent and impact of the social exclusion of sexual minorities in Nepal. He has also trained Nepalese politicians, bureaucrats, media, teachers, student unions and trade unions, among others, on LGBTI issues over the past eight years, and conducted sensitization training for the police and security forces in Nepal. Sunil and BDS offer training to local activists and organizations in order to strengthen their capacity to document human rights abuses and conduct successful advocacy campaigns. His relentless advocacy has resulted in greater understanding of the rights of sexual minorities as one of the national development, social and political issues in Nepal. In 2007, Sunil, BDS and others filed a writ petition in the Supreme Court of Nepal demanding equal rights and recognition for sexual minorities. On 21 December 2007, the Court made the historic decision to protect and defend equal rights for sexual minorities.



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