

1. Introduction

Background

Nepal is one of the sexual and gender minorities (SGM) friendly countries of the world and the only country in Asia that constitutionally guarantees their fundamental rights. Just recently, on 14 May 2020, Nepal joined the United Nations LGBTI Core Group and became the second Asian country to join the LGBTI Core Group. Nepal's 2015 Constitution clearly mentions the rights of the sexual and gender minorities in *Article 12* (Right to have citizenship as per their self-identified gender), *Article 18* (Prohibition from discrimination by the state or anyone on the basis of sexual orientation) and *Article 42* (Right to social justice and protection and calls for specific protective measures from discrimination).

Nepal also provides citizenship and issues passports to sexual and gender minorities reporting their sex as "other". Similarly, in 2007, the Supreme Court of Nepal made a groundbreaking decisions to recognize the rights of the sexual and gender minorities, including equal recognition under the law and ordered Nepal Government to end all forms of discrimination against third gender individuals by formulating appropriate laws and amending existing laws to ensure their rights. However, the rights, laws, policies, acts, regulations, government services and programs are insufficient to address the issues and concerns of the sexual and gender minority community in Nepal.¹ The sexual and gender minorities continue to experience stigma, discrimination and victimization across the course of their lives throughout the country. In the present context, the COVID-19 pandemic has exacerbated further tensions. The COVID-19 pandemic is having devastating impacts on the delivery of services and the ability of already marginalized sexual and gender minorities to access them.

Methodology

The methodology used for the preparation of this joint report included a dual process of desk review and national as well as regional consultations.

Desk Review: Before conducting stakeholder consultations, a thorough desk review of published literature on several areas including the discrimination faced by sexual and gender minority people, their legal rights in Nepal, access to and coverage of services, programs and budget allocation targeting sexual and gender minorities etc. was done. As a result of the desk review and briefing, discussion points were developed, which was shared and discussed during the national and regional consultations.

Stakeholder Consultations: To gather input and generate recommendations for this report, Women Act and Blue Diamond Society conducted 2 regional and 2 national thematic and stakeholder consultation workshops with people from sexual and gender minority

¹ FHI 360, *Assessment of the Strengths and Gaps on the Constitutional Provisions, Laws, and Policies related to the human rights of Sexual and gender Minorities in Nepal*, CS: MAP-HRS Study, January 2020.

communities, sexual and gender minority rights activists, CSOs working for sexual and gender minorities' human rights and other relevant stakeholders who identified the most pressing issues related to sexual and minority populations' rights in Nepal and made recommendations for addressing them.

In addition to these review and consultations, Women Act and BDS have conducted a series of discussions on the issues identified under this report. Furthermore, thematic experts have also reviewed the report and provided their feedback.

2. Priority Issues

This joint submission examines the following key priority issues relating to the human rights of Nepal's sexual and gender minorities: (i) citizenship, (ii) same sex marriage and marriage equality, (iii) social justice; employment, reserved positions/quotas in Nepal, (iv) implementation of previous UPR recommendations regarding sexual orientation and gender identity, and (v) impact of the COVID-19 pandemic on LGBTIQ community of Nepal. Below presented priority issues and recommendations are the product of a thorough desk review, four thematic stakeholder consultations and the review from thematic experts.

Priority Issue I: Citizenship

In 2017, in one of the landmark decisions (In a writ filed by Sunil Babu Pant et.al), the Nepali Supreme Court issued a Mandamus order in the name of Nepal Government to provide citizenship to "other" as a gender category without any technical obstacles. By doing so, the Supreme Court recognized the right to a citizenship certificate with one's identified gender to be constitutionally allowed as per Article 12. The Supreme Court accepted that any person belonging to the sexual and gender minority community eligible to obtain citizenship as per the prevailing law can get the citizenship with "other" category in gender column based on his/her gender identity. The Supreme Court also said that any person is entitled to enjoy all the rights with dignity by obtaining the citizenship certificate with gender identity as per his/her feelings as ensured by the law. The Supreme Court rejected the written response of the respondents that the persons with different gender identity can get their citizenship amended only when it is recommended in writing by the local body and as per the record of their educational institution with the "other" mentioned in the gender column.

The Supreme Court accepted that the citizenship certificate received based on biological organ at the time when they were unaware of their gender identity cannot be amended mentioning their real gender identity in the citizenship certificate means equivalent to the denial of existence of persons of gender minority community. The Supreme Court opined that to deny petitioners to get their citizenship certificate received based on their biological organ amended mentioning the word "other" in the space of gender is discrimination against them and it is infringement of their constitutionally guaranteed fundamental rights and legally guaranteed citizenship rights. It also deprives them of their right to self-determination. Therefore, it is

found reasonable that the petitioners should get the citizenship certificate with their own gender identity and the citizenship certificate received based on the biological organ should be amended with "other" mentioned in the gender column.

The mandamus order was issued in the name of the respondents as the petitioners should be allowed to get their citizenship certificate amended with "other" indicated in the gender column on the ground of above-mentioned basis and reason. The Supreme Court felt that it is reasonable to amend their educational certificate obtained based on the biological organ including all the important personal documents with the amendment of gender column to them in the situation of realization of their real gender identity lately. Directive order was issued for the amendment and reform of the required laws in this regard and make appropriate laws in order to address the possibility of misuse of citizenships with "other" indicated in the gender column maintaining a separate record of such citizenship certificates.

Also directive order was issued in the name of the opponents (the Government of Nepal), Office of the Prime Minister and the Council of Ministers (OPMCM) and the Ministry of Law, Justice and Parliamentary Affairs to institutionalize the principle of equality before the law and create the environment to ensure that no one should be discriminated by conducting necessary coordination among the concerned agencies on the subject matter of rights, interests and liabilities of persons of sexual and gender minorities. The Supreme Court also asked to send a decision in writing to the Monitoring and Inspection Division of the Supreme Court to conduct regular monitoring and inspection of implementation status of the decision.

Despite of this landmark decision of the Supreme Court and legal and constitutional assurance, discrimination does exist in the way to obtain a citizenship with gender identity for this group. Citizenships are not easily available to those who want to obtain for the first time as "other" gender as well as for those who want to obtain a new one by amending their name and gender in the existing one. Despite constitutional guarantees and clear circulation from the Ministry of Home Affairs, directives regarding the issuance and amendment of citizenship to sexual and gender minority people have been purely the discretion of the Chief Districts Officers.

Recommendations

- Implement the Supreme Court decision interpreting article 12 of the Nepal Constitution of 2072 guaranteeing the rights of all citizens regardless of gender identity by 2020.
- Amend the law requiring medical proof and surgery for recognition of one's gender identity in the citizenship amendments bill.
- Orient locally elected representatives on SOGI.
- Implement Supreme Court's Mandamus Order guaranteeing citizenship as others.
- Amend all laws that do not allow changes to official government documents, including birth certificate, school and other educational documents, when marked with the wrong gender.

Priority Issue II: Same Sex Marriage and Marriage Equality

In accordance with the historic decision made by the Supreme Court of Nepal in December 20, 2007, which has ordered Nepal Government:

- To identify all sexual and gender minority people as natural persons.
- To consider the laws as discriminatory which does not allow the people to enjoy their fundamental rights and freedoms with their own identity.
- To reform any legislation referring exclusively to men and women and not sexual and gender minorities.
- To form a seven-member committee whose task would be to explore the institutions regulating same sex marriage in other countries, and to subsequently recommend appropriate institutions for Nepal.

Detail study about the future of same sex marriage in Nepal, began a year after the decision of the Supreme Court through the formation of seven-member committee by the Government of Nepal by the decision of Council of Ministers. Based on the decision of the Supreme Court of Nepal, Government of Nepal formed a committee on 4 May 2009 to undertake the study on the issues of same sex marriage and status of sexual and gender minorities in Nepal. The committee submitted a detailed and comprehensive report to the Government of Nepal in 2015 through the Office of the Prime Minister and the Council of Ministers (OPMCM) after the careful consideration and study of international human rights archives, values of same sex marriage, experiences of those nations that have already legalized same sex marriage, national laws and social implications of such legalization. Therefore, legalizing of same sex marriage with the reference to the decision of Supreme Court has become compulsive to the Government of Nepal in this instance. This report has not been implemented and currently still under the review of the Ministry of Women, Children and Senior Citizen.

Being one of the most liberal countries in the region in terms of safeguarding the rights of sexual and gender minorities, Nepal is yet to legalize same-sex marriage. Marriage equality is yet to be obtained despite the right to equality guaranteed by the constitution. New legal provisions (Civil Codes) have made it even more difficult for them to get legal status, and live in dignity.

The Civil Code which came into force from 2018, section 67 mentioning union between and men and women as marriage thus failed to recognize same sex marriage despite it was newly enacted law after the promulgation of Constitution in 2015. Recognizing union of men and women only as marriage is against the Supreme Court decision and the rights guaranteed by the constitution. The Criminal Code however has the word person in crime of marriage but this has no value as the law fails to recognize marriage itself in first instance. Hence, crime is of no meaning until marriage is recognized. Same sex couples are living without any interference only because right to privacy has been guaranteed by the constitution and it has been guaranteed by the Supreme Court in many instances via its decisions.

In another landmark decision (Writ filed by Suman Panta), the Apex Court recently has recognized same sex marriage done in any country recognizing those marriages if registered there are eligible to obtain spouse visa here in Nepal. Due to non-recognition of same sex marriage in Nepal, sexual and gender minority people have been living together without recognition of their relation, deprived of adopting child and transfer their property and vice versa.

It is mandatory for the Government to adhere to the committee's recommendations as ordered by the Supreme Court. Government of Nepal should be aware of the fact that any delay in the implementation is the contempt of court. There is a huge international pressure over Nepal to legalize same sex marriage as there have been frequent pressures from other countries during UPR asking status of same sex marriage in Nepal. Yet, this has not manifested till this day, despite these pressure and obligations. The implementation of unanimously agreed comprehensive same sex marriage report, which analyze legal to social impacts and aspects will make Nepal one of the most sexual and gender minority friendly country in the world.

Recommendations

- Amend the 'Definition of Marriage' in all existing policies and acts to make it uniform and gender neutral.
- Include the 'Definition of Marriage' in the Civil Code Act, 2017, Section 67 to align it with the definition used in the Criminal Code Act, 2017, Section 171, which uses person and not man and women.
- Implement the recommendation submitted to the government of Nepal by the Same Sex Marriage Committee on same sex marriage legalization, surrogacy, adoption and property rights, based on the 2007 Supreme Court verdict. The same sex marriage recommendations were made by Brazil in the second UPR cycle, which was noted by the Government of Nepal.
- Legalize marriage equality enacting the commitment made by the International Covenant on Civil and Political Right (ICCPR), 1996, Article 23, which provides equal legal protection for every individual, self-choice for marriage for those of legal age and the right to establish a family.

Priority Issue III: Social Justice; Employment, Reservations/Quotas

Article 42 guarantees social justice and inclusion but there is no employment guaranteed for sexual and gender minority people. They are not included in any level of government. Neither representation in political level nor in government services has been a serious concern for this community.

Despite rights guaranteed by Article 42 of the constitution, employment, reservation, quotas and inclusion have been far cry for the community that other minorities have been able to enjoy or have been enjoying.

Recommendations

- Sensitize provincial and local governments on sexual and gender minority issues.
- Ensure all laws, including those related to elections, civil service, police, army and government service allows reserved positions and quotas for sexual and gender minorities.
- Create a mechanism for sexual and gender minorities to be represented at sub-national and federal governance levels.
- Gather statistics on sexual and gender minority people via the routine, national census.
- Amend and repeal all discriminatory laws, such as those related to rape, “unnatural” sex and the provision of HIV in the criminal code, enact news laws that are sexual and gender minority friendly.
- Amend Home Ministry’s categorization of minorities that fails to include sexual and gender minorities for elections.
- Properly implement the Constitution via laws, policies and programs addressing the rights of sexual and gender minorities, such as in employment, education, access to health and other services and inclusion of sexual and gender minority children in Child Act and policies.
- Enact laws that ensure legal gender recognition.

Priority Issue IV: Implementation of Previous UPR Recommendations Related to Sexual Orientation and Gender Identity

In terms of above prioritized issues, most recommendations were made by other countries in both the first and second UPR cycle which were supported or noted by the Government of Nepal. In the second UPR cycle of 2015, Nepal received 195 recommendations from 73 countries, of which, Nepal accepted 152 and rejected 43 recommendations. Among accepted and noted recommendations, 7 recommendations from 7 countries were related to SOGI issues. Nepal had categorized these 152 recommendations into 18 headings to make further strategic move to SOGI issues under Women, Children, Senior Citizen and SOGI clusters and Nepal has assigned Ministry of Women, Children and Senior Citizens as a line ministry to implement SOGI related programs in its draft Human Rights Action Plan.

Implementation of Article 12 about citizenship has been more problematic than ever before despite Supreme Court interpreting rights guaranteed by Article 12 in another landmark decision. Only a few have been able to receive citizenship as “others” in the gender category and those who have already received citizenship have not been able to change their gender. This recommendation is thus partially implemented. Article 12 of the Constitution guarantees citizenship on the basis of gender identity and despite the fact that the Ministry of Home Affairs has issued circular and amended Citizenship Regulation to provide citizenships as “others” in gender column, sexual and gender minority communities are getting difficulties getting citizenship as “others” in gender column. Despite Supreme Court mandamus order to issue citizenship as “others”, newly introduced bill made it mandatory to change sex to obtain citizenship. This has been a worrisome factor and major setback for the sexual and gender

minority community. In addition, a new citizenship amendment bill that is under consideration of the lower house has added necessary investigation and medical proof of gender identity to obtain citizenship which has made it terrible for sexual and gender minority communities to receive citizenship as “others”. In recent times, there has been a rare case of issuance of citizenship mentioned in “other” gender columns. This recommendation is partially implemented.

Article 18 of the Constitution has the provision of right to equality under which all citizens shall be equal before law and shall not be discriminated on the basis of origin, religion, race, caste, tribe, sex, physical conditions, disability, health condition, matrimonial status, pregnancy, economic condition, language or geographical region, or ideology or any other such grounds as a fundamental right. Despite the constitutional guarantee, de facto equality is a challenge. The 16 laws that have been recently enacted to implement fundamental rights on Safe Motherhood and Reproductive Health Rights in article 29 have guaranteed inequality on the basis of sexual orientation and gender identity, which means the recent laws enacted have failed to incorporate the issues of the sexual and gender minorities. Further same sex marriage has not been recognized.

Right to education has not been that easy for sexual and gender minority children as children and education policy fail to address these children’s issues. In spite of the assurance given to this community by law and constitution to end all sort of discrimination and ensure their rights and equality, yet discrimination prevails in our society across the country in the matter of marriage equality, property rights and child adoption, surrogacy etc. State has not yet been able to maintain the data/statistics of this community. Hence, recommendations to enact sexual and gender minority friendly laws have been partially implemented.

Although mentioned as social justice by the State, due to the lack of proper action, the social justice system like employment and education are still out of the reach for the sexual and gender minority community. Similarly, Election Acts also fail to identify this community as minorities and other government-endorsed laws fail to allocate reservation and quotas for this community.

No mechanisms specific to easy access to administration and access to justice have been made as recommended by Spain. There have been series of murder cases against transgender people in recent years. The rape law does not cover rape case regarding transgender women. For instance, Ajita Bhujel, a transgender woman, was murdered after rape on 17 January 2020 but only murder case was filed and charged.

Priority Issue V: Impact of the COVID-19 Pandemic on LGBTIQ Community of Nepal

Due to current catastrophic situation caused by COVID -19 pandemic, transgender people of Nepal have become more vulnerable. Many transgender people have been experiencing discrimination and violence due to traditional rigid gender roles, stereotypes and socio-cultural norms and lack of proper legal gender recognition. Transgender people were discriminated

during the distribution of relief materials in the initial phase from the local governments as these agencies need citizenship card for distribution. Many trans-women do not have citizenship card and others have wrong ID which do not match their gender. There are many incidents of conflict between transgender people and their families recently. One transgender woman committed suicide in Nawalparasi district (Province 5 of Nepal) because of the conflict she faced with her family. Other two members of sexual and gender minorities also committed suicide in Dang and Sunsari districts. It is difficult to say whether that was a suicide or murder as many activists are forced to live in their homes due to the countrywide lockdowns, hence, they are unable to go to the police to file a complaint.

Moreover, many trans-women who are involved in sex work, labor and who were working in different informal sectors have been facing challenges for their livelihood, which is severely damaged. Many transgender people are unable to get their regular hormone which affects their gender affirming process. Recently, the Government of Nepal announced its plan, policy and budget for the next fiscal year, which failed to address need and issue faced by the sexual and gender minorities of Nepal. the Government of Nepal should adopt a more thoughtful approach to gender in order to meet the humanitarian objective of serving those who are the most in need. As an equal citizen of the country, the needs of sexual and gender minorities cannot be overlooked during the crisis such as COVID-19. Their needs should be met and the issues should be addressed properly. Government need to ensure COVID-19 responses are LGBTI sensitive and non-discriminatory and integration of LGBTI community's specific needs and concerns in COVID-19 relief and recovery plans, programs and budget of the government with proper mechanism to address violence and discrimination against LGBTI community

3. Conclusion

Despite all the landmark legal achievements, sexual and gender minority community of Nepal continue to be the victims of human rights violations including stigma, discrimination and deprivation of the right to identity and dignity. In addition, sexual harassment, abuses, forced marriage, illegal detention, inhuman behavior and degrading treatment by police are a common human rights violation against the community members. This makes Nepal's sexual and gender minority community one of the most disadvantaged and marginalized groups of Nepal.

Existing laws, policies, acts, regulations and government services and programs are not sufficient to adequately address their current needs and concerns. There is a lack of inclusion of and the mainstreaming of issues facing sexual and gender minorities in national development planning. There are no reserved positions or quotas in various service sectors such as education and health or in private sector jobs. The sexual and gender minority community is not represented in the political sphere or the government services. Hence the prioritized issues and the last UPR recommendations remain unaddressed. Recommendations are partially implemented and need full commitment from Government of Nepal so that sexual and gender minority community can enjoy their rights in fullest.

