

India, Nepal, and Pakistan: A Unique South Asian Constitutional Discourse on Sexual Orientation and Gender Identity

Sean Dickson and Steve Sanders

INTRODUCTION

The global movement for lesbian, gay, bisexual, and transgender rights has achieved remarkable success over the past three decades, particularly in constitutional courts and human rights tribunals. In this chapter we focus on recent decisions from constitutional courts in India, Nepal, and Pakistan, and how these decisions have advanced the rights and equality of minority groups that are defined by sexual orientation and/or gender identity (SOGI).

These South Asian decisions add to a growing body of global jurisprudence that has advanced SOGI rights and equality. However, they do not represent a triumph of Western-style gay/lesbian advocacy, which has increasingly emphasized narratives of similarity between homosexuals and heterosexuals. Rather, these constitutional decisions have mandated respect for diversity and difference, and they have been driven as much or more by the negotiation of gender variation than of sexual identity. In particular, we highlight the role that has been played in each country by *hijras*, a transgender population whose members are physiologically male and have sex with men, but who adopt a feminine gender identity. Hijras, who are increasingly recognized as embodying a distinctive third gender, have occupied a unique space in South Asian history and culture since ancient times. It is especially noteworthy, then, that they have played such a visible and important role in contemporary South Asian constitutional discourse of SOGI minority liberation.

In this chapter, we use the term SOGI rather than LGBT (Lesbian, Gay, Bisexual, and Transgender) to highlight not only the different constructions of sexual behavior and gender in South Asia but also to offer a more inclusive term that accounts for indeterminacy and intentional lack

of identity. The process of naming, identification, and coming out are Western concepts that impede a nuanced understanding of South Asian sexual minority jurisprudence. Perhaps more importantly, Western sexual minority labels can also damage the lives and efforts of non-Western sexual minorities, as anti-gay sentiments are often simply reframed anti-Western sentiments. Using the term SOGI instead of LGBT allows us not only to heighten the difference in the process of liberation in South Asia but also to intentionally understand it on its own terms.

Indeed, we believe the South Asian experience also confounds the doctrinal legal categories that have become familiar to Western scholars of sexuality and gender identity, a theme we explore further in our conclusions at the end of this chapter. The major constitutional decisions we discuss are all concerned prominently with nondiscrimination and non-persecution at the hands of the government. But, especially in India and Nepal, the decisions also include prominent themes of autonomy and constitutional protection for the individual's ability to construct and act on personal identity without harassment or interference from the state.

We should note as well that some of the events reported in this chapter are relatively recent and have not previously been documented or discussed in Western academic writing. For example, while others have noted the role of third-gender persons in the *Naz Foundation* decision in India,¹ discussion of the past successes of *aravanis*² in receiving legal recognition in the Indian state of Tamil Nadu has been limited. The recency of the events we describe in Pakistan also means that these court decisions have not been debated or examined by Western scholars. Due to lack of access to court records from these countries and the recency of events, much of our information is based on media reports and cannot be confirmed with original documents. However, we have endeavored to discuss only events that have been covered by prominent South Asian media outlets and confirmed by other media sources. Particularly in Pakistan, where the Supreme Court has been quite active in this area, new developments may have occurred while this chapter was in press. Nonetheless, we hope that our analysis encourages further scholarly examination of these important developments.

¹ See Siddharth Narrain, "Crystallising Queer Politics: The *Naz Foundation* Case and Its Implications for India's Transgender Communities," *NUJS Law Review* 2 (2009): 455; Sonia K. Katyal, "The Dissident Citizen," *UCLA Law Review* 57 (2009): 1415.

² The preferred local term for hijras in Tamil Nadu.

CONTEXTUALIZING THE SOUTH ASIAN CONSTITUTIONAL
DISCOURSE

The right to be free from discrimination on the basis of sexual orientation or gender identity has emerged as a prominent theme in the global human rights discourse. The Yogyakarta Principles, propagated in 2006 by a group that included human rights activists, judges, academics, NGO officials, and a former UN High Commissioner for Human Rights, call on the international community to recognize that “[h]uman beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights,” and that “[e]ach person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”³

The most familiar Western judicial decisions in this arena, starting with the European Court of Human Rights case of *Dudgeon v. the United Kingdom*,⁴ have dealt specifically with laws that criminalized same-sex sexual conduct. Where such sodomy laws have been eradicated in the West, the next wave of political and legal activism has focused on recognition for same-sex relationships. The U.S. Supreme Court struck down American sodomy laws in 2003, when no U.S. state yet authorized same-sex marriage; ten years later, marriage equality had come to thirteen of the fifty states, and the Supreme Court struck down a law banning recognition by the federal government of same-sex marriages. In Ireland, legislation approved in 2010 gave certain legal rights and obligations to same-sex couples twelve years after the European Court of Human Rights declared that country’s sodomy laws to be in violation of the European Convention on Human Rights. Same-sex marriage has been legal in South Africa since 2006, eight years after the constitutional court struck down that country’s laws prohibiting consensual sex between men.

Much of the global gay rights discourse speaks with an American accent. One commentator has described “gay pride” as “America’s global gay export,”⁵ and another has observed that “[g]ay culture . . . like

³ The Yogyakarta Principles Web site, accessed May 19, 2013, http://www.yogyakartaprinciples.org/principles_en.htm.

⁴ 45 Eur. Ct. H.R. (ser. A) (1981).

⁵ Sonia Katyal, “Exporting Identity,” *Yale Journal of Law & Feminism* 14 (2009): 97, 98 (quoting Frank Browning, *A Queer Geography* (New York: Farrar, Straus and Giroux, 1998), 24).

Coca-Cola, Madonna, and Calvin Klein underwear, has become a potent American export.”⁶ (Indeed, when Nepal, one of the countries we examine in this chapter, hosted South Asia’s first Lesbian, Gay, Bisexual, Transgender, and Intersex Sports Festival in 2012, the guest of honor was the openly gay American Olympic diving champion Greg Louganis.⁷)

In the United States, since the time when marriage rights became the defining issue for gay/lesbian equality in the late 1990s, political and legal arguments for gay/lesbian rights have focused on similarities between homosexual persons and dominant cultural narratives. Gays and lesbians, it is said, want the same things out of life and relationships that heterosexuals do, and prejudices against them should be discarded in the same way as discriminations against racial minorities and women. As the American group Freedom to Marry says on its Web site,

Marriage matters to gay people in similar ways that it matters to everyone. Gay and lesbian couples want to get married to make a lifetime commitment to the person they love and to protect their families. . . . Gay and lesbian couples may seem different from straight couples, but we share similar values – like the importance of family and helping out our neighbors; worries – like making ends meet or the possibility of losing a job; and hopes and dreams – like finding that special someone to grow old with, and standing in front of friends and family to make a lifetime commitment.⁸

Compared to the advancements in rights and equality for gays and lesbians, progress has been slower and more recent for transgender individuals, who seek protections based on gender identity rather than sexual orientation. In the United States and Europe, transgender activists have united in the past decade with established gay/lesbian advocacy groups to pursue their goals under the common banner of an LGBT quest for civil rights, civic equality, and human dignity. At the risk of oversimplifying the matter, advancements in gay and lesbian rights – as reflected in social attitudes, legislative victories, and constitutional doctrine – have tended to be seen as “door openers” for similar advancements in transgender rights. Protections for gender identity in local laws and corporate

⁶ Neville Hoad, “Between the White Man’s Burden and the White Man’s Disease,” *Gay & Lesbian Quarterly* 5 (1999): 559, 563.

⁷ “American Olympian Greg Louganis supports LGBTI rights in Nepal,” October 10, 2012, <http://nepal.usembassy.gov/pr-10-10-2012.html>.

⁸ “Marriage 101: Frequently Asked Questions,” accessed May 19, 2013, <http://www.freedomtomarry.org/pages/marriage-101#faq1>.

employment policies, while growing, still lag behind protections for sexual orientation. As same-sex couples were celebrating legal unions in various jurisdictions around the world in 2011, including the United States, Mexico, the Netherlands, and Spain, transgender rights advocates considered it a major advancement that the European Parliament had called on the World Health Organization to stop classifying gender dysphoria as a “mental and behavioural disorder.”⁹

Kenji Yoshino and Michael Kavey have observed that “[i]n the context of sexual orientation, constitutional arguments often assume a categorical, ‘always/everywhere’ tenor that exposes them to contestation on comparative grounds.”¹⁰ Moreover, the “global gay rights” model has been criticized for a “presumed equation between identity and conduct” and a “fail[ure] to recognize and incorporate different social meanings for same-sex sexual practices.”¹¹ Against this backdrop, we submit that recent constitutional decisions in India, Nepal, and Pakistan provide a unique South Asian foil for critical inquiry into the nature of dominant Western rights-based discourses surrounding sexuality and gender identity.

As in the West, various identity groups within the broader South Asian SOGI rights community have proffered competing visions of equality and competing strategies for advocacy. And, as in the West, these divisions often have highlighted differences grounded in class and gender. But what is unique about the experience of India, Nepal, and Pakistan has been the remarkable success of transgender (more properly understood in cultural context as third-gender) groups in attaining recognition of their goals, relative to the success of groups advocating for gay, lesbian, or other same-sex loving constituencies. In these three countries, a mix of legislative, executive, and judicial actions have recognized the long-standing presence of third-gender communities.¹² Moreover, the recognition of transgender

⁹ “European Parliament: World Health Organization Must Stop Treating Transgender People as Mentally Ill,” September 29, 2011, <http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/>.

¹⁰ Kenji Yoshino and Michael Kavey, “Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michael Rosenfeld and Andras Sajó (New York: Oxford University Press, 2012), 1080.

¹¹ Katyal, “Exporting Identity,” *supra* n. 5, 123.

¹² Bangladesh is also reported to have begun to recognize the rights of third-gender hijras. However, conflicting news reports paint a convoluted picture of what rights have been recognized and by which authorities. As such, a discussion of Bangladesh is omitted from this analysis. For more information, see, e.g., Anbarasan Ethirajan, “Bangladesh rally to support transgenders,” *BBC News South Asia*, October 21, 2011, <http://www.bbc.co.uk/news/world-south-asia-15398437>.

rights has preceded judicial recognition of rights for other same-sex loving groups.

Indeed, in the discussion that follows, we suggest that the South Asian experience has been somewhat the opposite of the American and European experience: in India and Nepal (although not in Pakistan, as we shall see) transgender rights have served as the door opener to gay and lesbian rights. Or perhaps it is more accurate to say that the constitutional discourse in India and Nepal around questions of sexuality and gender identity has not been defined and limited by the “global gay rights” model, but instead has recognized that the phenomena of sexuality and gender identity are naturally interrelated (an insight that feminist and queer theory have long emphasized). For example, in these countries, hijras are biological males who have sex with men (MSM), but they also occupy a distinctive, centuries-old cultural space in which their defining characteristic is their unique third gender; other subgroups of men who have sex with men identify with indigenous sexualities rather than a homogenized Westernized model of what it means to be gay. In both India and Nepal, when constitutional courts have recently condemned government laws and practices that persecuted and discriminated against MSM, the practical effect of these decisions has been to extend legal rights and equality to all SOGI minorities, regardless of their particular sexual or gender identities or practices.

Thus, the path of SOGI rights in South Asia forms a counterpoint to the current Western model of legal and social advocacy for LGBT rights, which promotes narratives of similarity and assimilation over those of diversity or the forthright embrace of sexual difference and gender variation. The South Asian experience demonstrates how norms for the treatment of sexual orientation and gender identity have been negotiated and implemented in ways that arise from indigenous or culturally specific practices of sex and gender and local understandings of constitutional equality and dignity.

INDIA

Of all the constitutional jurisprudence we discuss in this chapter, the landmark decision of India’s Delhi High Court invalidating Section 377 of the Indian Penal Code, a colonial-era provision outlawing sodomy, has received the most notice and commentary, likely owing to India’s growing global profile and influence. The decision was the culmination of years of work by SOGI activists, but it occurred against the backdrop of

considerable success hijras had already experienced in their quest for recognition and protection against discrimination, particularly in the Indian state of Tamil Nadu.

The 2009 decision in *Naz Foundation v. Government of NCT of Delhi*¹³ provided an expansive view of SOGI rights, invoking the concept of constitutional morality to forbid government interference with private, self-regarding actions, even when such actions might run contrary to social mores. To fully appreciate the constitutional implications of *Naz Foundation*, it is important to understand the events that led to the decision, particularly how the advocacy of (and rivalries between) a broad spectrum of groups – some reflecting Western notions of gay rights, others reflecting traditional Indian sexualities – contributed to a broad constitutional ruling that expanded rights and liberty for all SOGI minorities.

Paving the Way to Naz Foundation: SOGI Rights Activism in India

India has the longest history of organized SOGI mobilization in South Asia. For more than two decades, a diverse set of advocacy organizations representing persons of third-gender, gay, lesbian, and indigenous same-sex loving identities have advanced a social and legal dialogue around SOGI rights, sometimes working together and sometimes competing. It is difficult for outsiders to fully understand all the various histories and fault lines among these groups, but the available accounts suggest that many of the divisions have been driven by differing conceptions of class, gender, and social acceptability among SOGI groups.

To be sure, contemporary India has well-defined groups that identify with Western conceptions of gay and lesbian rights and identity; often these groups have been funded by Western organizations in conjunction with LGBT rights movements or HIV/AIDS programs.¹⁴ Individuals who

¹³ *Naz Found. v. Gov't of NCT of Delhi*, W.P.(C) No. 7455/2001 (Delhi H.C. July 2, 2009) [hereinafter "*Naz Found.*"].

¹⁴ The relationship between gay men and lesbian women in India is deeply complicated, in large part because the movements have evolved differently across cities, regions, and in connection with broader issues of HIV/AIDS, feminism, and sexual identity politics. For a more in-depth analysis of this relationship, particularly regarding the debate about decriminalization of sodomy, see Naisargi Dave, *Queer Activism in India: A Story in the Anthropology of Ethics* (Durham, NC: Duke University Press, 2012). Dave provides a rich discussion of how gay men's access to funding through grants targeting HIV/AIDS shaped the evolution of other SOGI minority groups in India as well as a broader commentary on the effects of increasing NGO-ization on indigenous sexual minority

self-identify as gay or lesbian tend to be English speaking, better educated, of a higher social class, and urban. Subgroups defined by indigenous conceptions of gender and sexuality, however, form vibrant and much larger communities. For example, *kothis* are typically non-English-speaking men who exhibit feminine characteristics and identify as preferring a receptive role in sexual intercourse. *Panthis* are men perceived as more masculine and who typically penetrate *kothis*, although *panthi* is a term used mostly by *kothis* to identify these men; *panthis* do not organize themselves as a distinct sexual minority and are unlikely to identify as gay. Both *kothis* and *panthis* are often married to women. Alok Gupta, through his own experiences as an openly gay man in India, suggests four distinct subgroups of the queer male community: *kothis*; working-class, non-*kothi*-identified gay and bisexual men (*panthis*); middle- and upper-class gay- and bisexual-identified men; and *hijras*.¹⁵ Within India, advocacy groups representing *kothis*, gay- and bisexual-identified men, and *hijras* are well-established, whereas advocacy on behalf of *panthis* falls to organizations that claim a broader mission of safeguarding the health and welfare of men who have sex with men (so called MSM). The term MSM, adopted by the HIV/AIDS and health communities, is often used to avoid labeling men with an identity construct with which they might not identify, but it obscures the variation among the distinct subgroups that fall within this classification.

Although not within the Western canon of sexualities, *hijras* are the predominant third-gender or transgender community in India. Historically referred to as *eunuchs*, *hijras* occupy a long-standing social and cultural role. They are “phenotypic men who wear female clothing and, ideally, renounce sexual desire and practice by undergoing a sacrificial emasculation – that is, an excision of the penis and testicles – dedicated to the goddess *Bedhraj Mata*.”¹⁶ In this sense, *hijras* are distinct from the Western concept of transgenderism, as they do not adopt the gender attributes of their non-birth sex; instead, *hijras* occupy a unique gender space with distinctive behaviors not traditionally associated with either

identities. For an additional perspective on how HIV/AIDS funding has shaped SOGI identities in India, see Aniruddha Dutta, “An Epistemology of Collusion: *Hijras*, *Kothis* and the Historical (Dis)continuity of Gender/Sexual Identities in Eastern India,” *Gender & History* 24 (2012): 825.

¹⁵ Alok Gupta, “Englishpur ki *Kothi*,” in *Because I Have a Voice: Queer Politics in India*, ed. Arvind Narrain and Gautam Bhan (New Delhi: Yoda Press, 2005), 119.

¹⁶ Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (Chicago: University of Chicago Press, 2010), 17.

males or females. Although the terms are often used loosely or interchangeably, hijras are best understood as occupying a third gender rather than identifying as transgender.¹⁷ Hijras have come to represent the historic sexual difference of India, and they have been the subject of scholarly and journalistic accounts seeking to chronicle their unique role in Indian and South Asian society.¹⁸

Within India, hijras are not welcomed or particularly respected by the population at large, but they are accepted for their traditional social roles of performing dances at weddings, births, and other ceremonial functions. At the same time, increased Westernization has reduced the demand for many of these historical performances, and thus many hijras engage in sex work (hence, their typical inclusion among MSM groups) and alms seeking as a source of income.¹⁹ Even though they are often the objects of social disdain, hijras' long-standing place in Indian society seems to explain the success of their constitutional and legislative claims for equal rights.

As measured both over time and as a matter of degree, hijras have been more successful than other sexual minorities in convincing Indian legislative bodies and courts to recognize their rights. At least in theory, hijras became eligible for government pensions and ration cards, as well as voting rights, as far back as 1936,²⁰ although the real articulation of their rights did not begin until the 1990s. In 1994, hijras were allowed to register to vote as either male or female – a progressive step from their previous ability to register only as male, although not a true recognition

¹⁷ Contemporary conceptions of “genderqueer” or “agender”/“gender-neutral” are also not appropriately descriptive of hijras, as these conceptions reject the construct of gender and recognize individual performativity of a wide variety of gender-associated behaviors. Hijras occupy a more defined gender space, with recognized expectations of behavior distinct from male or female. See generally, Reddy, *With Respect to Sex*, *supra* n. 16.

¹⁸ A 2007 BBC documentary is a prominent example. “The Hijras of India,” last updated February 22, 2007, http://news.bbc.co.uk/2/hi/programmes/documentary_archive/16386171.stm. For a more detailed analysis of the historical Western orientalist interest in hijras and a review of contemporary scholarly ethnographies, see Dutta, “An Epistemology of Collusion,” *supra* n. 14.

¹⁹ See Reddy, *With Respect to Sex*, *supra* n. 16, 78–84.

²⁰ Anna Livia and Kira Hall, *Queerly Phrased: Language, Gender, and Sexuality* (New York: Oxford University Press, 1997), 431. Although the authors provide a citation for this claim, it is a non-English source that cannot be authenticated. Other publications provide the same citation, and there appears to be no independent verification for the claim.

of their distinct gender identity.²¹ Since then, hijras have become increasingly engaged in electoral politics. In 1999, Shabnam Mausi was elected to the provincial legislature of Madhya Pradesh and has remained active in politics.²² The same year also saw Kamala Jaan elected to a mayorship in Madhya Pradesh (although Jaan was stripped of the position in 2003 on grounds that Jaan was a male in a position reserved for females).²³ In 2000, Asha Devi was elected as the mayor of a city in Uttar Pradesh, although a court later stripped her of this position on the reasoning that the mayorship was reserved for females and Devi was a male.²⁴

²¹ Reddy, *With Respect to Sex*, *supra* n. 16, 223. Reddy also notes that hijras were granted the right to run for political office in 1977.

²² “Shabnam Mausi wants to join Cong,” *Indian Express*, June 19, 2007, <http://www.indianexpress.com/news/shabnam-mausi-wants-to-join-cong/34082/0>.

²³ Sadiq Ali & others v. Kamala Jaan, Election Petitions No. 12/2000, 13/2000, 18/2000 & 21/2000 (First Additional District Court, Katni) (Unreported); see also Suchandana Gupta, “Eunuch’s election as mayor annulled,” *Times of India*, December 11, 2011, http://articles.timesofindia.indiatimes.com/2011-12-11/bhopal/30505026_1_eunuch-kamla-jaan-mayor; “HC upholds invalidation of Eunuch’s Election,” *Economic Times*, February 4, 2013, http://articles.economictimes.indiatimes.com/2013-02-04/news/27548390_1_election-petition-women-candidates-eunuch. A link to a fee-based version of court order is available at <http://www.lawyerservices.in/Kamala-Alias-Kamala-Jaan-Alias-Hijrah-Versus-Sadiq-Ali-2003-02-03>.

Siddharth Narrain provides an excellent account of the events of the trial:

“The Katni Sessions Judge Virender Singh, while deciding this, addressed the question: Were hijras male or female? The judge quoted from the Shatapath Brahman, the Mahabharata, the Manusmriti and the Kamasutra; in historical sources – from the courts of Akbar, Alauddin Khilji, to say that there was a category of persons who were neither male nor female (napunsaks). The judge (Justice Singh) said that all the medical and historical evidence before him showed that hijras could be of two categories—male or female but to ascertain this, there had to be a medical examination (which the respondent had refused to undertake). But, after all this, the judge came back to the simplistic reasoning that the dictionary meaning of female is ‘one who can produce’ a child and therefore hijras cannot be females. Justice Singh came to the conclusion that hijras are castrated males, and therefore Kamala Jaan was not female. This decision was upheld by the Madhya Pradesh High Court despite a direction from the Election Commission (hereinafter E.C.) in September 1994 that hijras can be registered in the electoral roles either as male or female depending on their statement at the time of enrolment. This direction was issued by the E.C. after Shabnam Mausi, a hijra candidate from the Sohagpur Assembly constituency in Madhya Pradesh, wrote to the Chief Election Commissioner enquiring as to which category hijras were classified under.”

Narrain, “Crystallising Queer Politics,” *supra* n. 1, 460.

²⁴ “Court unseats Eunuch Mayor of Gorakhpur,” *Rediff*, May 13, 2003, <http://www.rediff.com/news/2003/may/13up.htm>.

The state of Tamil Nadu (where hijras are known locally as *aravanis*) has historically been the most progressive toward hijra rights. In 2003, the state government ordered that a committee be formed to study sexual exploitation and other issues affecting hijras.²⁵ The local hijra community subsequently filed a petition in the Chennai High Court requesting ration cards (ration cards then only available to women). A 2004 decision allowed hijras to register as either males or females on their ration cards, although this did not meet the community's demand to be recognized as a distinct third gender.²⁶ Although it characterized hijras as having a "disorder" and requiring treatment, a 2006 state government order prohibited schools and colleges from denying hijras admission, established vocational and skills training for hijras, provided counseling for hijras and their families, established a grievance procedure for hijras unable to obtain ration cards or identification documents, and ordered a panel to consider legalizing sexual reassignment surgery.²⁷ (This order was cited by the Delhi High Court in the *Naz Foundation* decision.) The Tamil Nadu government continued its support of hijras by forming and funding the *Aravani* Welfare Board in 2008,²⁸ which includes hijra representatives, and by establishing guaranteed seats for hijras in state universities.²⁹ A 2009 state report also details that 219 transgenders had received family ration cards, although it recognized that a separate method for obtaining ration cards had not been established for them.³⁰

While Tamil Nadu was leading the way in establishing rights and services for hijras, similar developments began to emerge elsewhere across

²⁵ Government of Tamil Nadu, Social Welfare and Nutritious Meal Programme Department, G.O. (Ms) No.201, October 23, 2003, <http://www.tn.gov.in/gorders/social/sw-e-201-2003.htm>.

²⁶ Padma Govindan and Aniruddhan Vasudevan, "The Razor's Edge of Oppositionality: Exploring the Politics of Rights-Based Activism by Transgender Women in Tamil Nadu" (Law and Social Sciences in South Asia Conference, 2009, <http://www.lassnet.org/2009/readings/govindan-vasudevan2008razors-edge.pdf>), 4–5.

²⁷ Government of Tamil Nadu, Social Welfare and Nutritious Meal (SW8) Department, G.O. (Ms) No.199, December 21, 2006, <http://www.tn.gov.in/gosdb/gorders/social/sw-e-199-2006.htm>.

²⁸ "TN constitutes welfare board for transgenders," *Indian Express*, April 10, 2008, <http://www.indianexpress.com/news/tn-constitutes-welfare-board-for-transgenders/295359>. For a discussion of the founding of the board and the politics involved, see Govindan and Vasudevan, "The Razor's Edge of Oppositionality."

²⁹ Government of Tamil Nadu, Higher Education (G1) Department, G.O.(1D) No.75, May 10, 2008, <http://www.tn.gov.in/gosdb/gorders/hedu/hedu.e-75-2008.D.pdf>.

³⁰ Government of Tamil Nadu, Food and Consumer Protection Department, Policy Not for the Year 2008–2009, Demand No. 13, <http://www.tn.gov.in/policynotes/archives/policy2008-09/pdf/food.pdf>, 6.

India. In 2004, hijra Sonia Ajmeri ran unsuccessfully for the national parliament, attracting substantial media attention.³¹ In 2005, the national government officially recognized a third gender on government identity documents when it allowed hijras to select “E” (for eunuch) on passport forms.³² After the 2006 self-immolation of a hijra who had been brutally tortured and raped by police for three weeks, the High Court of Madras recognized the transgender identity of the deceased and awarded the family 500,000 rupees (approximately USD\$10,000).³³ This decision, also cited in *Naz Foundation*, was the first to explicitly recognize police mistreatment of hijras. In 2009, the Indian electoral commission approved a third-gender category – “O”, for Other – on voter registration forms.³⁴

The first challenge to Section 377, which would eventually be struck down in *Naz Foundation*, was filed in 1994 by the organization AIDS Bhedbhav Virodi Andolan (ABVA), a nonprofit founded by a gay man but mostly made up of progressive heterosexual activists focusing on HIV/AIDS issues.³⁵ The case³⁶ was filed largely because of concerns about increasing HIV infection among prison inmates who were frequently engaging in homosexual sex. Although there was apparent public support for the repeal of Section 377 because of its public health consequences, the petition was lost in the administrative shuffle of the courts and was neither decided nor disposed of.³⁷

Although the ABVA petition failed for technical reasons, it was likely also doomed by the meager interest among SOGI rights groups in pursuing a strategy for legal rights. Anthropologist Naisargi Dave characterizes

³¹ Peter Foster, “Six-ft Sonia aims to be MP with a difference,” *Telegraph*, April 20, 2004, <http://www.telegraph.co.uk/news/worldnews/asia/india/1459792/Six-ft-Sonia-aims-to-be-MP-with-a-difference.html>.

³² Jennifer Rellis, “‘Please Write ‘E’ in this Box’: Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India,” *Michigan Journal of Gender & Law* 14 (2007): 223, 233.

³³ *Jayalakshmi v. Tamil Nadu et al.* W.A.No. 1130 of 2006 and WP.No.24160 of 2006, http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=10866.

³⁴ Harmeet Shah Singh, “India’s third gender gets own identity in voter rolls,” *CNN*, November 12, 2009, <http://www.cnn.com/2009/WORLD/asiacpf/11/12/india.gender.voting/index.html>; “India’s eunuchs recognised as ‘others,’” *Telegraph*, November 13, 2009, <http://www.telegraph.co.uk/expat/expatnews/6560733/Indias-eunuchs-recognised-as-others.html>.

³⁵ Dave, *Queer Activism in India*, *supra* n. 14, 172. We are heavily indebted to Dave’s account of the relationships between various SOGI rights organizations in India regarding the Section 377 cases, collected through her extensive anthropological fieldwork.

³⁶ *ABVA v. Union of India and Others*, Civil Writ Petition No. 1784 (1994).

³⁷ Dave, *Queer Activism in India*, *supra* n. 14, 174.

the period 1994 to 2001, between the ABVA petition and the filing of the Naz petition, as demonstrating rapid growth in SOGI organizations, but

law reform was not central to any group's agenda. Lesbian groups . . . sought to . . . gain support from women's organizations and to establish . . . an infrastructure for domestic crisis intervention. Predominantly men's groups . . . prospered through the funding, international attention, and legal non-interference necessitated by the HIV/AIDS crisis. . . . To lesbian collectives, the state seemed politically out of reach; to the organizations serving gay men, kothis, and MSM, HIV provided a reason to feel beyond the punitive practices of the state.³⁸

During this period, SOGI subgroups' activities were often incongruous, and relationships between groups were often fraught, if not antagonistic. Dave documents the gender hierarchy³⁹ that persisted between MSM-oriented groups and lesbian organizations in India even as leading groups of each constituency worked together to provide services.⁴⁰

The divisions ran even deeper between MSM groups and hijras. Gay and lesbian communities intentionally distanced themselves from hijras, even though hijras were much more visible and accepted, if not embraced, as a social group. Although hijras constructed and performed their gender identity publicly, homosexuality was seen as a private matter.⁴¹ According to Dave, "gay respectability" was "intimately tied with gender normativity" and thus required "a distancing between the concept of gayness . . . and various forms of transgender."⁴² The rejection of hijras out of a classist notion of respectability was evident in the refusal of South Indian queer activists to allow hijras to attend a press conference because they were "too flamboyant" and were "camera hogs." A representative of the Naz Foundation was quoted as saying that hijras had to become "more ethical" and "less flamboyant" if they wanted to be embraced by organizations that were advocating on behalf of gay men.⁴³ One MSM

³⁸ Ibid., 175.

³⁹ Ibid., 40.

⁴⁰ Ibid., 78–79, 85–86.

⁴¹ Hijras are frequently reported to expose their genitals, particularly if castrated, as a form of insulting an individual in public and extorting money. The relative frequency of this practice is difficult to catalog, as it seems to be over-reported by Westerners scandalized by such behavior.

⁴² Dave, *Queer Activism in India*, *supra* n. 14, 221 n. 42.

⁴³ Ibid., Here, "ethical" presumably means abandoning sex work.

group demanded that its hijra employees stop engaging in sex work and adopt a more conventional dress code.⁴⁴

At the same time, many hijras – as well as kothis, the men who exhibit feminine characteristics and identify as preferring a receptive role in sexual intercourse – also spurned traditional MSM- or gay-focused organizations, demanding instead to be seen as separate, insular sexual minority groups.⁴⁵ Kothis, in particular, viewed self-identified “gay” men as urban elites who did not share the traditional kothi embrace of femininity.⁴⁶ In organizing support groups for various MSM communities, the Naz Foundation developed one group for kothis and *hijras*, another for higher-class, English-speaking gay men, and a third group for non-English-speaking, lower-class men who did not identify as kothi or hijra.⁴⁷

In summary, in the years leading up to India’s major court decision that decriminalized sodomy and underscored the constitutional dignity of all SOGI minorities, it was hijras – a group whose identity is defined by gender variation rather than conventional categories of sexual orientation – who were the most successful in having their rights recognized by the government and their presence acknowledged by the broader society. Hijras were able to convince the population at large to elect them to office and to obtain welfare benefits and acknowledgement of their identity on official documents from Indian state and national governments. They also were prominent members of the coalition that challenged Section 377, and the continuing discrimination and stigma they faced would be acknowledged by the court as a serious problem of constitutional dimensions.

The Naz Foundation Decision

Although it was not the first Asian decision to recognize SOGI rights, *Naz Foundation* is the most important decision in Asian SOGI jurisprudence because of Indian courts’ reputation for well-developed constitutional interpretation. *Naz Foundation* decriminalized sodomy and recognized the fundamental rights of SOGI persons to engage in consensual adult relationships of their choosing, free of government interference. It

⁴⁴ *Ibid.*, 222–23, n. 54. Dave notes, however, that most progressive queer groups rejected this behavior.

⁴⁵ Gupta, “Englishpur ki *Kothi*,” *supra* n. 15, 127.

⁴⁶ *Ibid.*, 128.

⁴⁷ *Ibid.*, 129.

recognized that Section 377 was a relic of the British colonial period and noted that since the 1861 adoption of the Indian Penal Code, judicial interpretation of the provision had shifted from prohibiting non-procreative sex to criminalizing “sexual perversity.”⁴⁸ Several conservative organizations appealed the decision to the Supreme Court of India, which sometimes takes years to consider and decide a case. The government did not appeal.⁴⁹

Four parties submitted arguments in the case: the petitioner Naz Foundation India, which portrayed itself as “working in the field of HIV/AIDS intervention and prevention;”⁵⁰ two government respondents with contradictory positions on the litigation, the Ministry of Home Affairs and the Ministry of Health and Family Welfare; and Voices Against 377, a coalition of twelve organizations supporting repeal of Section 377 and working with Naz Foundation.⁵¹

The Naz Foundation’s arguments focused on the adverse impact of Section 377 on HIV prevention efforts, noting that while recent prosecutions under the law have been limited to child sexual assault,⁵² the law continued to stigmatize homosexual activity and force it underground, thus increasing participants’ vulnerability to HIV infection.⁵³ Naz Foundation’s constitutional arguments alleged a violation of the rights to privacy and dignity inherent in the Indian Constitution’s Article 21 right to life and liberty,⁵⁴ Article 14 right to equality,⁵⁵ and Article 15 prohibition on discrimination based on sex, which Naz argued includes sexual orientation.⁵⁶ Throughout these arguments, Naz urged a right of SOGI individuals to engage in private homosexual conduct, focusing on sexual activity rather than group identity.⁵⁷

The group Voices Against 377 represented a broad constituency of lesbians, gays, bisexuals, transgenders, hijras, and kothis. Voices argued that Section 377 “has created an association of criminality towards people with same sex desires. It . . . fosters a climate of fundamental rights violations of the gay community, to the extent of bolstering their extreme

⁴⁸ *Naz Found.*, *supra* n. 13, ¶¶ 3–4.

⁴⁹ The Delhi High Court issued the *Naz* decision; high court decisions on constitutional issues have national precedential value. The Supreme Court was apparently displeased with the government’s decision not to take a position, calling it “a new phenomenon” for the state to remain neutral in such a case. See <http://www.legalindia.in/supreme-court-assails-states-neutrality-on-gay-sex>.

⁵⁰ *Naz Found.*, *supra* n. 13, ¶ 6.

⁵¹ *Ibid.*, ¶ 19.

⁵² *Ibid.*, ¶ 7.

⁵³ *Ibid.*, ¶ 8.

⁵⁴ *Ibid.*, ¶ 8.

⁵⁵ *Ibid.*, ¶ 9.

⁵⁶ *Ibid.*, ¶ 9.

⁵⁷ See *ibid.*, ¶ 10.

social ostracism.”⁵⁸ Voices presented examples of hijras raped by gangs and subsequently tortured by police. It documented the Tamil Nadu case of a hijra who committed suicide after police rape, harassment, and torture; a magistrate who had extended Section 377 to prohibit a romantic relationship between two lesbian adult women; testimony by a gay man who had been raped by police;⁵⁹ and police harassment of HIV outreach workers.⁶⁰ Taken together, these arguments emphasized the rights of SOGI individuals to be free from harassment or stigmatization based on their status, rather than a right to engage in private sexual content.

The two government respondents presented contradictory arguments.⁶¹ The Ministry of Home Affairs argued that social disapproval of homosexuals justified criminalizing their private conduct.⁶² It observed that India had not yet adopted the public toleration of homosexuality found in other countries and argued that public morality could serve as a compelling state interest in keeping Section 377 on the books.⁶³ On the other hand, the Ministry of Health and Family Welfare focused on the difficulty that Section 377 caused in effectively reaching MSM for HIV prevention activities due to the men’s fear of police harassment and prosecution.⁶⁴

The varied arguments presented against Section 377 reflected divergent priorities that can be at least partly explained by differences in social class. Naz Foundation had a strong relationship with privileged, English-speaking gay men and the international LGBT movement, and its constituency has greater access to private spaces and is less susceptible to police harassment. Thus, its arguments tended to focus more on a right to engage in sexual conduct than on freedom from discrimination.⁶⁵ The groups represented by Voices, on the other hand, tended to be smaller and to represent more marginalized sexual communities. Their legal arguments emphasized an end to discrimination and the right of SOGI minorities to live openly without harassment.

⁵⁸ *Ibid.*, ¶ 20.

⁶⁰ *Ibid.*, ¶ 21.

⁶² *Ibid.*, ¶ 12.

⁶⁴ *Ibid.*, ¶ 18.

⁵⁹ *Ibid.*, ¶ 22.

⁶¹ *Ibid.*, ¶ 11.

⁶³ *See* *ibid.*, ¶¶ 13, 14, 24.

⁶⁵ This is an admittedly overly broad description of Naz Foundation’s programming and members. Although the tensions between Naz Foundation’s gay membership and hijras have provoked conflict, Naz has consistently provided services for hijras and other lower-class and income SOGI individuals. However, the organization maintains a reputation as affiliated with the upper-class international LGBT movement, and Naz’s English-language and urban origins continue to differentiate the group from other grassroots movements.

The Delhi High Court issued its decision on July 2, 2009, to considerable international fanfare. The court held that Section 377 violated SOGI individuals' rights to dignity and autonomy, as well as a broader constitutional right of privacy, and it said that public morality was not a sufficiently compelling state interest to justify abridging these rights. Although a detailed discussion of the court's constitutional analysis is beyond the scope of this chapter, several points are important to understanding how the *Naz* court reasoned its way toward expanding rights and liberty for all SOGI minorities in India.

First, the court affirmed a right to privacy in both its decisional and spatial varieties. Nodding to decisional privacy, the court said the Constitution protected "autonomy of the private will and a person's freedom of choice and of action,"⁶⁶ as well as "the right to be left alone."⁶⁷ In this passage, the court says that privacy deals with "persons and not places."⁶⁸ However, in a later passage the court seems to refer to spatial privacy by finding that "Section 377 IPC grossly violates [homosexuals'] right to privacy and liberty . . . insofar as it criminalises consensual sexual acts between adults in private."⁶⁹ The difference is important, because the protection of sexual acts within private spaces is more readily available to upper-class individuals in India – as one commentator has observed, the "difficulty with privacy is that not everyone can afford it."⁷⁰ Those most at risk of persecution under Section 377 were lower-class men who frequented parks and other public spaces for sexual activity, and a purely spacial privacy framework would fail to recognize the source of their vulnerability to harassment.

Second, having found that Section 377 impinged on fundamental rights, the court assessed whether the infringement was justified by a compelling state interest.⁷¹ It was not. Citing the U.S. Supreme Court's decision in *Lawrence v. Texas*, which found that criminal sodomy laws "further[] no legitimate state interest which can justify [their] intrusion into the personal and private life of the individual,"⁷² the *Naz Foundation* court similarly held that "enforcement of public morality does not amount to a 'compelling state interest' to justify invasion of the zone

⁶⁶ *Naz Found.*, *supra* n. 13, ¶ 26.

⁶⁷ *Ibid.*, ¶ 38.

⁶⁸ *Ibid.*, ¶ 39.

⁶⁹ *Ibid.*, ¶ 52.

⁷⁰ Sumit Baudh, "Sodomy in India: Sex Crime or Human Right?" *IDS Bulletin* 37(5) (2009): 61.

⁷¹ *Ibid.*, ¶ 37.

⁷² *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.”⁷³

Third and perhaps most significantly, *Naz Foundation* did more than invalidate a provision of the criminal code. It also declared an expansive view of SOGI rights under a framework of constitutional morality. As a doctrinal matter, it did so by interpreting textual constitutional references to sex as including sexual orientation.⁷⁴ As a rhetorical matter, the decision provided a clarion call for principles of Indian constitutionalism, underscoring the “role of the judiciary” in “protecting the counter majoritarian safeguards enumerated in the Constitution.”⁷⁵ The court described at length the Constitution’s role in mediating social difference and advancing the core principles of Indian democracy:

[T]he Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. . . . The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.⁷⁶

* * *

If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or “different” are not on that score excluded or ostracised.⁷⁷

Naz Foundation is in step with progressive global sexuality jurisprudence, and the casual reader could be forgiven for assuming that the decision arose out of a litigation strategy driven by a Western-style narrative of gay/lesbian rights – that it is simply the Indian counterpart to the U.S. Supreme Court’s *Lawrence* decision a few years earlier, which struck down American sodomy laws. The court describes Section 377 as

⁷³ *Naz Found.*, *supra* n. 13, ¶ 75.

⁷⁴ *Ibid.*, ¶ 104.

⁷⁶ *Ibid.*, ¶ 80.

⁷⁵ *Ibid.*, ¶ 120.

⁷⁷ *Ibid.*, ¶ 130.

violating rights of the “gay community,” thus seeming to rhetorically marginalize indigenous sexualities and non-male genders.⁷⁸ When describing violence against hijras, the court repeatedly refers to the victims with masculine pronouns – he, him, his – thus implicitly rejecting a transgender identity, much less a third-gender category.⁷⁹ These processes of naming are consistent with Western sexuality jurisprudence, particularly when contrasted with the hijra-focused government practices in Tamil Nadu (which, it must be noted, the court cited with approval).⁸⁰ The court’s construction of SOGI identities often seems grounded in Western typologies. For example, although the court expressly recognizes the distinct communities of hijras and kothis who helped impel the litigation and who were represented by the petitioners, as well as the discrimination and violence some hijras faced at the hands of police and others, the court frequently uses the label “LGBT” to describe the persons whose rights were affected by Section 377, thus lumping hijras and kothis into a Western category that does not accurately describe their sexual identities.⁸¹ In short, as a piece of legal rhetoric, *Naz Foundation* often seems more like a model of Western, rather than grassroots Indian, sexuality jurisprudence.

In other places, however (at 105 pages, *Naz Foundation* is a very long and often discursive opinion), the court demonstrates a more sophisticated understanding of gender and sexuality that eschews Western categories. It observes that “the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home.”⁸² The court also warns against the dangers of categorizing and labeling individuals within a democratic society. Harkening back to the memory of the Criminal Tribes Act of 1871, a British colonial law that registered and de facto criminalized certain tribes and communities, the court condemns

⁷⁸ *Ibid.*, ¶ 20. The court also frequently uses the terms *MSM* and *homosexuals*.

⁷⁹ *Ibid.*, ¶ 22.

⁸⁰ The court cites to the liberal practices in Tamil Nadu, where government orders addressing hijras use the term *aravani* in lieu of gendered pronouns. *Naz Found.*, *supra* n. 13, ¶ 51. Other Indian cases addressing hijras have also used masculine pronouns to describe victims, reflecting a set of broader cisgendered practices within the legal community. See, e.g., *Jayalakshmi v. Tamil Nadu et al.* W.A.No. 1130 of 2006 and WP.No. 24160 of 2006, http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=10866.

⁸¹ *Naz Found.*, *supra* n. 13, ¶ 19. However, the court does note that the affidavit submitted on behalf of Voices uses the term LGBT to refer to all represented members.

⁸² *Ibid.*, ¶ 47.

“criminalisation by virtue of . . . identity” and acknowledges that hijras remain stigmatized because of their historic treatment under the act.⁸³

Moreover, the court explicitly recognizes the construction of homosexuality as a colonial import and notes that India has historically been accepting of sexual difference, citing with approval comments to that effect by the solicitor general of India in an appearance before the United Nations Human Rights Council.⁸⁴ The court also cites anti-sodomy law decisions from numerous non-Western nations, notably Nepal, Hong Kong, and Fiji, reflecting a distinctly non-Western approach to sexuality jurisprudence.⁸⁵ As noted by one Indian commentator, these “decisions are particularly important because they remind the cynic that gay rights aren’t some luxurious Western construct.”⁸⁶

In summary, categorizing *Naz Foundation* as simply a Western-style gay/lesbian rights case would fail to understand the decision in its social and cultural context. Doing so would fail to account for the victories and struggles that preceded the case, the diverse constituencies included under the heading of “men who have sex with men,” and the way in which hijras – India’s most visible SOGI minority group – had begun winning greater rights and acceptance even before the nation’s constitutional court stepped into the fray. And it would fail to appreciate that, whereas *Lawrence* overtly invokes assimilationist themes and what Katherine Franke has archly criticized as “domesticated liberty,”⁸⁷ the *Naz Foundation* court justifies its decision by reaffirming the Indian Constitution’s commitment to values of diversity and anti-subordination.

NEPAL

Although SOGI activism in Nepal is more nascent than in India, Nepal’s constitutional court is responsible for the most far-reaching and progressive SOGI rights decision in South Asia. The country’s current constitutional impasse – Nepal has been operating under an interim constitution and has long passed the deadline for developing a permanent replacement – may yet limit the decision’s efficacy. Nevertheless, Nepal’s

⁸³ Ibid., ¶ 50.

⁸⁴ Ibid., ¶ 84.

⁸⁵ Ibid., ¶ 58.

⁸⁶ Vikram Raghavan, “Navigating the Noteworthy and Nebulous in *Naz Foundation*,” *NUJS Law Review* 2 (2009): 397.

⁸⁷ Katherine Franke, “The Domesticated Liberty of *Lawrence v. Texas*,” *Columbia Law Review* 104 (2004): 1399.

recognition of SOGI rights remains relevant for understanding the unique cultural understandings and discourses that have culminated in constitutional protection for sexual minority rights in South Asia.

The Supreme Court of Nepal's 2007 decision in *Pant v. Nepal*⁸⁸ had somewhat unusual origins in that Nepal had no anti-sodomy or other anti-SOGI statutes that were being challenged.⁸⁹ Rather, the case was brought as Public Interest Litigation spurred by allegations of general discriminatory treatment by the state. The challenge was led by Sunil Pant, a gay and SOGI rights activist in Nepal and founder of the Blue Diamond Society (BDS), an advocacy group for gender and sexual minorities.⁹⁰ The *Pant* opinion's language is prosaic and at times convoluted, but its legal conclusions are clear and unmistakable. The decision creates a third legal category of gender, declares that all sexual minorities deserve full protection of their human rights, and orders substantial government action to enforce the court's holdings. The court relies on Article 13 of the Nepali Constitution (an equality guarantee) as well as Article 9(3) (a nondiscrimination mandate that includes sexual orientation),⁹¹ but it also cites

⁸⁸ *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in *National Judicial Academy Law Journal* (Nepal), 2008, at 262 [hereinafter "*Pant*"].

⁸⁹ The court notes that there is a law criminalizing same-sex marriage on the grounds of unnatural coition, but the case did not specifically challenge this law directly. *Pant*, *supra* n. 88, 276. Unlike India and Pakistan, Nepal was never subjected to colonial rule by Britain and therefore was never forced to adopt a version of the colonial penal code and its anti-sodomy provisions.

⁹⁰ Blue Diamond Society Web site, accessed May 19, 2013, <http://www.bds.org.np>.

⁹¹ The court constructs the provision to include sexual orientation by reference to the ICCPR, although the reasoning employed is rather blunt:

"Taking note of Art 26 of the ICCPR, in the constitutions of several countries, the term 'sex' has been used instead of 'men' and 'women'. This is for the purpose of eliminating possible discrimination on the ground of sexual orientation. No citizen is allowed to be discriminated on the ground of sexual orientation. South Africa may be said to be the first country which has incorporated the provision of non-discrimination on the ground of sexual orientation in the 'Bill of Rights' of its Constitution. Under the provision of right to equality, the Sub Article (3) of Article 9 of the Constitution which was adopted on 8 May 1996, amended on 11 October 1996 and came into effect from 7 February 1997 reads as follows:

"Article 9 (3): The state may not unfairly discriminate directly or indirectly against any one on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

"Thus, it is clearly mentioned in this Constitution that no person can be discriminated on the ground of sexual orientation."

Pant, *supra* n. 88, 278–79.

a wide variety of other authorities including international court decisions, the International Covenant on Civil and Political Rights (ICCPR), Alfred Kinsey's classic studies of sexuality, the Yogyakarta Principles, and Wikipedia.

The court began by identifying two substantive questions: "What is the basis of identification of homosexual or third gender people? Whether it happens because of the mental perversion of an individual or such characteristic appears naturally." "Whether or not the state has made discriminatory treatment to the citizens whose sexual orientation is homosexual and gender identity is third gender."⁹²

Throughout the opinion, the court speaks to both gender identity and sexual orientation, but the framework of its inquiry is predominantly gender based. The court declares that "[a]ll human beings including the child, the aged, women, men, disabled, incapacitated, third genders etc. are Nepali citizens. . . . The third genders among the population are also part of the Nepalese population as a whole."⁹³ It further observes that "[t]he issues raised in the writ petition such as gender identity, gender discrimination and obstacles faced due to it as well as the issue of gender recognition etc. are matters concerning social justice and social interest."⁹⁴

After canvassing international SOGI rights decisions and finding that neither third-gender identity nor same-sex sexual orientation are mental perversions, the court assesses changing social norms:

[I]t seems to us that the traditional norms and values in regards to the sex, sexuality, sexual orientation and gender identity are changing gradually. *It is also seen that the concept specifying that the gender identity should be determined according to the physical condition and psychological feelings of a person is being established gradually. The concept that homosexuals and third gender people are not mentally ill but leading normal life style, is in the process of entrenchment.*⁹⁵

Later, the court recognizes gender as a self-defined category and not a biological construct, repeatedly referring to gender "self-feeling."⁹⁶ It observes that "[i]t has now been accepted that the gender identity of an individual is determined not only by the physical sex but also by her/his behavior, character and perception."⁹⁷ While not attempting to assess the prevalence of SOGI minorities in Nepal, the court observes that "[i]f one

⁹² Ibid., 266.

⁹⁴ Ibid., 270.

⁹⁶ Ibid., 280–81.

⁹³ Ibid., 268.

⁹⁵ Ibid., 274 (emphasis in original).

⁹⁷ Ibid., 285.

looks at the situation prevailing in our neighboring country, India, one will find thousands of *Hijras* and *Kothis* there. To be a homosexual or a third gender is not a disease in itself.”⁹⁸

Finally, the court concludes that formal legal recognitions for gender-variant individuals and the protection of fundamental constitutional rights of all “LGBTI” persons⁹⁹ are necessary, and it calls for affirmative measures by the government to foster and protect these rights.¹⁰⁰ For example, the court calls for the new constitution to include formal protections for gender identity and sexual orientation in addition to sex, using the South African Constitution as a benchmark.¹⁰¹ The court also holds that adults have an “inherent right” to consensual relationships and calls on the government to form a committee to study and implement the legalization of same-sex marriage. The petitioner, Sunil Pant, was appointed by the court as a member of the committee.¹⁰²

The prominent role of gender-based language and reasoning in the court’s opinion, even when it is also articulating rights based on sexual orientation, may be due in large part to how these questions were framed by the Blue Diamond Society, which brought the litigation. A 2005 report by BDS prefaced its description of the categories of gender and sexual minorities in Nepal by stating:

Nepal’s sexual and gender minorities include a number of different groups and types of people involving differing physical features, sexual orientations, identities, and choices. Many of these people may take on, or have, more than one of these ‘identities’ or some of these characteristics involving both issues of sexuality and gender. These may change over time. The definitions are quite complicated and in some cases overlap.¹⁰³

This understanding of gender and sexual orientation as interconnected reflects the persistence of non-normative gender identities in South Asia. The BDS report recognizes not only the same *kothis* and *hijras* as India, but also *metis* and *strains*, *kothi*-like identities that privilege the feminine aspects of the male-identified person, as well as *tas*, who are similar to

⁹⁸ *Ibid.*, 276.

⁹⁹ The court uses the term LGBTI – lesbian, gay, bisexual, transgender, and intersex – presumably based on the terminology in briefs submitted by the Blue Diamond Society.

¹⁰⁰ *Pant*, *supra* n. 88, 284–85.

¹⁰¹ *Ibid.*, 285.

¹⁰² *Ibid.*, 286.

¹⁰³ Sunil Pant, “Blue Diamond Society, Social Exclusion of Sexual and Gender Minorities: Final Report,” October 2005, <http://www.asylumlaw.org/docs/sexualminorities/NepalBDSreport05.pdf>, 7.

Indian panthis.¹⁰⁴ Although there is little historical scholarship on the presence of hijras in Nepal, BDS describes them as the “most visible gender minority in South Asia,” lending support for the assumption that they play a similarly visible social role in Nepal as in India.¹⁰⁵

Since the decision in *Pant*, Nepal has moved swiftly to implement the court’s ruling, although there have been missteps along the way. In 2008, Sunil Pant was elected to the national legislature.¹⁰⁶ Later that year, the Supreme Court ordered the government to implement the recommendations of the commission on same-sex marriage provided for in the *Pant* decision.¹⁰⁷ From this point on, Nepal began to embrace its SOGI-friendly reputation, encouraging same-sex couples to marry in Nepal¹⁰⁸ and even attracting an Indian prince to announce that he will marry there.¹⁰⁹

In 2011, the government officially counted third-gender persons in the census.¹¹⁰ The same year, government officials announced plans to build the first South Asian center to harbor victims of violence motivated by sexual orientation or gender identity,¹¹¹ although this announcement was followed by attempts from several government ministries and parliamentarians to criminalize sodomy and define marriage as between a man and a woman.¹¹² In 2012 the Nepali Home Ministry allowed third-gender individuals to register as “Other” on citizenship documents.¹¹³ The inaugural

¹⁰⁴ Ibid., 7.

¹⁰⁵ Ibid., 8.

¹⁰⁶ “Sunil Babu Pant,” Blue Diamond Society Web site, accessed May 19, 2013, http://www.bds.org.np/sunil_pant.html.

¹⁰⁷ Achal Narayanan, “Nepal’s Supreme Court OKs same-sex marriage,” *Religion News Service*, November 21, 2008, <http://www.pewforum.org/Religion-News/Nepals-Supreme-Court-OKs-same-sex-marriage.aspx>.

¹⁰⁸ One campaign focused on encouraging couples to marry on Mt. Everest. Dean Nelson, “Nepal ‘to stage gay weddings on Everest,’” *Telegraph*, January 19, 2010, <http://www.telegraph.co.uk/news/worldnews/asia/nepal/7027736/Nepal-to-stage-gay-weddings-on-Everest.html>.

¹⁰⁹ “Prince’s marriage stokes gay issue,” *India Today*, November 1, 2009, <http://indiatoday.in/story/Prince’s+marriage+stokes+gay+issue/1/68792.html>.

¹¹⁰ Manesh Shrestha, “Nepal census recognizes ‘third gender,’” *CNN*, May 31, 2011, http://articles.cnn.com/2011-05-31/world/nepal.census.gender_1_gender-identity-citizenship-first-openly-gay-lawmaker?_s=PM:WORLD.

¹¹¹ “Nepal to offer shelter to South Asia’s battered gays,” *Times of India*, June 22, 2011, http://articles.timesofindia.indiatimes.com/2011-06-22/south-asia/29689088_I_sunil-babu-pant-blue-diamond-society-gay-rights-organisation.

¹¹² “New law threatens to crush Nepal’s gays,” *Times of India*, June 9, 2011, http://articles.timesofindia.indiatimes.com/2011-06-09/south-asia/29638154_I_sunil-babu-pant-gay-rights-gay-bar.

¹¹³ Utpal Parashar, “Nepal 3rd Asian nation to recognise sexual minorities,” *Hindustan-times*, May 24, 2012, <http://www.hindustantimes.com/world-news/Nepal/Nepal-3rd-Asian-nation-to-recognise-sexual-minorities/Article1-860479.aspx>.

South Asia LGBTI Sport Festival was held in Nepal in 2012.¹¹⁴ And continuing its progressive sexuality jurisprudence, the Nepali Supreme Court in November 2012 allowed a lesbian-identified woman to live with her female partner over the objections of her family and former husband, who together had institutionalized her for falling victim to the hypnotism of her female partner.¹¹⁵

In summary, Nepal's rapid recognition of SOGI minority rights emanated from the court's embrace of an interconnected gender and sexuality framework. Although the history of hijras in Nepal is not well documented, the use of a third-gender framework in developing constitutional protections for SOGI minorities parallels India's recognition of the visible social position occupied by third-gender persons. Indeed, the Nepali Court's recognition of both self-defined gender identity and sexual orientation as immutable traits seems to belie any socially reinforced background understanding of gender difference. Unlike Western approaches that rely on narratives of similarity between sexual minorities and heterosexuals, Nepal, led by its Supreme Court, has embraced constitutional protections for individuals who are part of the fabric of Nepali society yet different enough to require special legal recognition and protection.¹¹⁶

PAKISTAN

Of all the developments in SOGI rights within South Asia, Pakistan's experience most challenges the Western model of progressive rights realization, reinforcing the uniqueness of South Asian experience. The Pakistani Supreme Court has recognized the rights of hijras¹¹⁷ under the Pakistani Constitution and aggressively moved to require the national

¹¹⁴ "Nepal hosts South Asia's first gay sports tournament," *BBC News Asia*, October 12, 2012, <http://www.bbc.co.uk/news/world-asia-19929010>. The London committee for the 2018 Gay Games bid recognized this achievement in a letter to BDS. Alex Davis, Letter to Sunil Babu Pant, November 8, 2012, <http://www.bds.org.np/images/Letter-from-Alex.jpg>.

¹¹⁵ Ananta Raj Luitel, "SC allows live-in lesbian relationship," *Himalayan Times*, November 5, 2012, <http://www.thehimalayantimes.com/fullNews.php?headline=SC+allows+live-in+lesbian+relationship&NewsID=353395>.

¹¹⁶ The explicit counting of third-gender persons in the national census is a strong example of this accommodation.

¹¹⁷ Pakistani press and court opinions frequently use the term *eunuchs* or *unix* to refer to third-gender persons or. This practice stems from the title used for castrated hijras who historically served as court attendants. However, because the hijra community in Pakistan is closely related to its Indian counterpart, third-gender persons in Pakistan often refer to themselves as hijras; because many third-gender persons do not engage in cast-

government to affirmatively protect hijras and increase their access to employment and land inheritance. The lawyer who has led the charge for hijra rights, Muhammad Aslam Khaki, is an Islamist legal scholar who is also famous for challenging Pakistan's restrictions on alcohol and conjugal visits for prisoners as being inconsistent with the Qur'an.¹¹⁸ Unlike India or Nepal, however, increased recognition of hijra rights has not led to similar gains for other SOGI minorities. Indeed, while Pakistan seems to be in the vanguard of advancing third-gender rights, its society and legal institutions remain notably hostile toward homosexuality as such. Sodomy is still criminalized, and gay/lesbian groups operate in the shadows.¹¹⁹

The recent and rapid recognition of hijra rights in Pakistan began when Khaki filed a case in 2009 alleging that hijras were suffering significant discrimination, stigma, and harassment at the hands of state actors.¹²⁰ The Supreme Court immediately ordered provincial governments to issue reports on the status of hijras within their provinces. Two months later, the court held that hijras had been "neglected" on the basis of "gender disorder in their bodies" but were "entitled to enjoy all rights granted to them by the Constitution."¹²¹ The court singled out inheritance and voting as rights that hijras could not be denied on the basis of their

ration, we use the term hijra rather than eunuch to describe third-gender persons in Pakistan.

¹¹⁸ Khaki challenged the punishments for drinking alcohol and the prohibition on conjugal visits as being harsher than that required by the Qur'an. Declan Walsh, "Harassed, intimidated, abused: but now Pakistan's hijra transgender minority finds its voice," *Guardian*, January 29, 2010, <http://www.guardian.co.uk/world/2010/jan/29/hijra-pakistan-transgender-rights>.

¹¹⁹ Meghan Davidson Ladly, "Gay Pakistanis, Still in Shadows, Seek Acceptance," *New York Times*, November 3, 2012, <http://www.nytimes.com/2012/11/04/world/asia/gays-in-pakistan-move-cautiously-to-gain-acceptance.html>.

¹²⁰ Dr. Mohammad Aslam Khaki & another Vs. S.S.P. (Operations) Rawalpindi and others, Const.P.43/2009, Supreme Court of Pakistan, filed on September 7, 2009. A companion case, Dr. Mohammad Aslam Khaki & another Vs. S.S.P. (Operations) Rawalpindi and others, Human Rights Const.P.63/2009, Supreme Court of Pakistan, was filed on February 6, 2009. However, the case appears to have been dropped or consolidated with the September case, and the Pakistani Supreme Court maintains no record of this earlier case in its online case status database. In this case, the court appears to have ordered that all hijras be registered by the government as a method of better integrating them into society. This registration system is referred to in subsequent court opinions requiring local governments to work with the national government to ensure that all hijras are included in electoral databases. See Basim Usmani, "Pakistan to register 'third sex' hijras," *Guardian*, July 18, 2009, <http://www.guardian.co.uk/commentisfree/2009/jul/18/pakistan-transgender-hijra-third-sex>.

¹²¹ Dr. Mohammad Aslam Khaki & another Vs. S.S.P. (Operations) Rawalpindi and others, Const.P.43/2009, Supreme Court of Pakistan, order dated 11-20-2009.

gender identity. Further noting that qualified hijras were subjected to hiring discrimination, the court required provinces to implement laws rectifying discriminatory practices.¹²²

One month later, the court issued a wide-ranging order recognizing hijra rights. The court observed that family members were illegally withholding inheritances from hijras, stating that “this order shall be treated as judgment in [hijras’] favour for the purpose of getting right of inheritance etc. from . . . their predecessors.”¹²³ Building on its previous orders, the court required the government to issue national identity cards with a third gender for hijras, though it allowed the registration authority to conduct medical hormone tests as part of the identification process. The court then required the provincial electoral authorities to work with the national government to ensure that hijras were added to the electoral rolls. Similarly, the court ordered provincial authorities to ensure hijras were able to enroll in educational facilities and were appropriately accommodated, consistent with constitutional rights to education, and it also permitted the reservation of seats for hijras in technical and vocational institutes.¹²⁴ The court required that policies be developed to stop police harassment of hijras. Fully embracing hijras’ role in society, the court lauded the efforts of one provincial government to provide jobs for hijras during a polio vaccination program and recommended that local governments follow the policy of an Indian state that hired hijras to act as tax collectors.¹²⁵

In 2011, the national election authorities allowed hijras to self-identify and register as third-gender persons for national identity cards without any medical demonstration of their gender difference, apparently

¹²² Ibid.

¹²³ Dr. Mohammad Aslam Khaki & another Vs. S.S.P. (Operations) Rawalpindi and others, Const.P.43/2009, Supreme Court of Pakistan, order dated 12–23–2009.

¹²⁴ Ibid.

¹²⁵ These schemes typically involve hijras dancing and performing outside of the house of taxpayers in default as a form of public shaming. Interviews with hijras indicate that they enjoy the work, as it is consistent with their traditionally recognized skill in shaming individuals into giving them alms, typically by exposing their genitals. See <http://www.siasat.com/english/news/hijras-should-be-loan-recoverers> (“Almas Bobby, the president of a hijra association welcomed the suggestion and said they were prepared to shame such people by clapping and dancing outside their homes. ‘We will go to their homes and sing, dance and clap outside their doors and ask them to return what they have looted from the country. We will *gherao* their homes and ask them to return the loans or wear bangles and join us,’ Bobby said.”). *Gherao* is a Hindi word that means encirclement and refers to a typical Indian form of protest in which a group surrounds a person or building until their demands are met.

in response to a Supreme Court order.¹²⁶ This development led to the independent candidacy in provincial assembly elections of the leader of a hijra organization, Shahana Abbas.¹²⁷ Subsequent hijra protests led to the cancellation of fees for hijras to register to vote.¹²⁸ The court continued by requiring the Punjab government to provide documentation of the inheritance transfers it reported hijras had received and commended the Sindh provincial government for allocating land for the construction of a hijra colony.¹²⁹

The year 2012, however, saw the greatest advancements in hijra rights in Pakistan. The court required affirmative action for hijras in government hiring, meaning a hijra with a tenth-grade education would be considered equivalent to a non-hijra with a bachelor's degree.¹³⁰ After three years of interim orders and requiring provinces to implement policies recognizing and enforcing hijra rights, the court finally decided the 2009 case filed by Khaki by holding that hijras were entitled to all constitutional rights.¹³¹ In particular, the court required provinces to appoint a focal person in every district to monitor the security of the local hijra community and ordered all federal and provincial health and education officials to work with local hijra representatives to ensure that free health care and education were available to all hijras.¹³² The court also referenced its earlier requirement to register hijras for elections, noting the number

¹²⁶ Qaiser Zulfiqar, "Enfranchising the fringe: SC orders registering eunuchs for 2013 polls," *Express Tribune*, November 15, 2011, <http://tribune.com.pk/story/292018/enfranchising-the-fringe-sc-orders-registering-eunuchs-for-2013-polls/> ("[Registration] centres across the country are already serving eunuchs for registration, which is carried out without any medical proof on their given particulars and details at the time of registration,' said the [government] spokesman in the statement. He added that as per the Supreme Court's instructions, third genders can have male transgender, female transgender or 'Khunsa-e-mushkil' written on their ID card as per their own will.").

¹²⁷ Owais Jafri, "President of transgender association to contest elections," *Express Tribune*, December 26, 2011, <http://tribune.com.pk/story/312257/president-of-transgender-association-to-contest-elections/>.

¹²⁸ "Dream come true: Transgender community celebrates CNICs, voter registration," *Express Tribune*, January 25, 2012, <http://tribune.com.pk/story/326911/dream-come-true-transgender-community-celebrates-cnics-voter-registration/>.

¹²⁹ Ibid.

¹³⁰ Michele Langevine Leiby, "For transgender Pakistanis, newfound rights," *Washington Post*, February 10, 2012, http://www.washingtonpost.com/world/for-transgender-pakistanis-newfound-rights/2012/02/04/gIQAMojG4Q_story.html.

¹³¹ Qamar Zaman, "Ensuring equality: Transgenders equal citizens of Pakistan, rules SC," *Express Tribune*, September 26, 2012, <http://tribune.com.pk/story/442516/ensuring-equality-transgenders-equal-citizens-of-pakistan-rules-scl>.

¹³² Ibid.

of hijras (31) registered in a decision on an unrelated election case.¹³³ Pakistan's hijra jurisprudence goes well beyond that of its South Asian peers in imposing so many specific affirmative obligations on government officials.

From the Western frame of reference for SOGI rights jurisprudence, it might be easy to assume that all this progress for hijras in Pakistan has been the result of evolving, more favorable social views toward hijras that recognize their similarity to dominant social groups. Such changes in public attitudes, after all, have been crucial to the advancement of lesbian and gay rights in the West, a trajectory that is now beginning to benefit transgender individuals as well. Yet the fact is hijras are still viewed by most Pakistanis as aberrant and disfavored. A 2010 poll found that only 14 percent of Pakistanis would be friends with a hijra who wanted to be friends with them.¹³⁴ Notwithstanding such attitudes, 55 percent of Pakistanis believed that quotas should be set to reserve educational and employment positions for hijras.¹³⁵ Thus, as with India and Nepal, the Pakistani experience challenges conventional Western thinking that courts will most readily extend constitutional rights and recognition to minorities that emphasize their similarity to, and desire to assimilate with, dominant social groups.

CONCLUDING THOUGHTS

Sonia Katyal has observed that “the presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought, tends to swiftly unravel when viewed in a cross-cultural framework.”¹³⁶ The South Asian experience with SOGI rights and equality bears out this observation. In India, historic familiarity with hijras, as well as the government's earlier extension of rights to them as a distinct group suffering discrimination, seemed to lay the foundation for the extension of rights to self-identified gays and lesbians. In Nepal, the court

¹³³ Khan & others v. Electoral Commission of Pakistan & others, Const. Petitions 31 of 2011, 45 of 2007, 111 & 123 of 2012, Supreme Court of Pakistan, December 5, 2012, http://www.supremecourt.gov.pk/web/user_files/File/Const.P.31of2011etc.pdf.

¹³⁴ Gallup & Gilani, “Cyberletter: Gilani Weekly Poll” Week #24 (2010), <http://www.gallup.com.pk/News/Gilani%20Poll%20Cyberletter%20June%202010.pdf>, 8. The poll found that 60 percent would not want to be friends with a hijra, whereas 24 percent were unsure.

¹³⁵ Ibid.

¹³⁶ Katyal, “Exporting Identity,” *supra* n. 5, 99.

supplemented its own very young and limited jurisprudence by looking to international judicial decisions and human rights statements. In Pakistan, a country that remains hostile toward homosexuality as such, the Supreme Court has been solicitous of a visible, familiar third-gender group whose members sometimes engage in homosexual prostitution to survive. (According to an account in a Zurich newspaper, a Pakistani hijra “said that a policeman threatened her once with arrest for immoral behavior, and she told him simply, ‘My behind belongs to me, not the Pakistani state.’”) India, Nepal, and Pakistan all have applied constitutional principles to mediate difference between the mainstream and their countries’ SOGI minorities. But they have done so by their own cultural and constitutional lights.

As we explained at the beginning of this chapter, recent South Asian SOGI jurisprudence, with its emphasis on nondiscrimination, has tended to highlight narratives of difference and tolerance rather than similarity and assimilation. This approach is in contrast to Western rights jurisprudence, which emphasizes “an identity-based approach to equality that inevitably leads to the exclusion of some and the homogenization of others.”¹³⁷ A criticism of such narratives of similarity is that they make it more difficult for non-normative sexual identities and practices to challenge traditional heterosexual hegemony. The creation of a distinct sexual minority for the purpose of advancing rights may simultaneously create a target for further oppression.¹³⁸ As Elaine Craig has argued, “An equality movement that fails to disrupt these hetero-normative standards perpetuates a model of justice that remains exclusionary for many sexual minorities.”¹³⁹

It is especially noteworthy, we think, that the South Asian model of SOGI rights jurisprudence tends to avoid this problem because, as we have attempted to document in this chapter, its emphasis on nondiscrimination has been closely linked to a recognition of the diversity and non-binary nature of gender and sexuality. For example, the Indian court in *Naz* recognized how naming a group creates a target for oppression, citing

¹³⁷ Elaine Craig, “I Do Kiss and Tell: The Subversive Potential of Non-Normative Sexual Expression from within Cultural Paradigms,” *Dalhousie Law Journal* 27 (2004): 403, 405.

¹³⁸ *Ibid.*, 414 (citing Nancy Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Postsocialist’ Age,” in *Justice Interruptus: Critical Reflections on the “Post-socialist” Condition*, ed. Nancy Fraser (New York: Routledge, 1997), 11).

¹³⁹ *Ibid.*, 412.

the colonial construction of homosexuality and its perversion of historical Indian tolerance.¹⁴⁰ The Nepali court expressly refused to require an identity-based category as the marker for SOGI rights, privileging individual “self-feeling” over categorical labels and relying on the concept of citizenship as the basis for the abolition of state discrimination.¹⁴¹ *Naz Foundation* and *Pant* are somewhat difficult to categorize doctrinally, because they both contain themes of nondiscrimination, equality, privacy, and individual liberty and autonomy. However, it is the theme of nondiscrimination that comes through most clearly, and the same can be said of the Pakistani hijra jurisprudence.

Of course, mandates of nondiscrimination and tolerance are not enough to disrupt heteronormative hegemony, because they still tend to treat sexual subalterns as “a ‘perversion’ to be tolerated within the framework of liberal democracy . . . tolerance is deployed to deal with the excess that formal equality has failed to accommodate.”¹⁴² By using strategies that accept difference without creating formal group structures that can advocate for power and challenge heteronormative hegemony, courts and advocates do not effectively undermine oppression. The difference of sexual minorities remains a negative attribute that the majority is required to accept as part of a contemporary liberal society.

Moreover, although third-gender persons have been the vanguard of SOGI minority rights in South Asia, the historic presence of hijras does not challenge traditional male dominance, because hijras are understood to be a categorical other. Martha Nussbaum’s powerful argument that opposition to male homosexuality arises from a fear of contamination and being defiled by male body fluids¹⁴³ has no import in the hijra context: cisgendered, heterosexual males will not be penetrated or inseminated by hijras because these behaviors are not manifest in the long-standing gender category hijras inhabit. Hijras are not men who have been tainted by effeminacy and thus present a threat to other males; rather, they are a unique gender with clearly defined roles that do not challenge the existing patriarchy. The Pakistani example is crucial: only 14 percent of Pakistanis would be friends with a hijra who wanted to be friends with them, but 5

¹⁴⁰ See *supra* note 83 and accompanying text.

¹⁴¹ See *supra* note 96 and accompanying text.

¹⁴² Ratna Kapur, “Out of the Colonial Closet, but Still Thinking Inside the Box: Regulating Perversion and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns,” *NUJS Law Review* 2 (2009): 381, 384.

¹⁴³ Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010), 19.

percent believe educational and employment positions should be reserved for hijras.¹⁴⁴ Were there a fear that hijras would contaminate men in power, opposition similar to that previously seen toward homosexuality in the West would be expected. The gender-based approach to South Asian SOGI jurisprudence, then, has the perhaps ironic effect of insulating patriarchy from challenge and contestation.

In the end, of course, jurists sitting on constitutional courts cannot change long-standing cultural and social attitudes with the stroke of a pen, and there is no disputing that the decisions from India, Nepal, and Pakistan are fascinating decisions that rightfully occupy a prominent place in the broader global movement for SOGI rights. Debates over the effects of these decisions surely will continue as SOGI minorities embrace the new South Asian jurisprudence, increase their visibility, and continue to work for their goals within local cultural and political contexts that have become part of broader transnational conversations.

Note on Supreme Court of India decision in Naz Foundation

As this book was going to press, the Supreme Court of India issued a decision in the appeal by several conservative groups to the Delhi High Court's Naz Foundation decision. In a decision that surprised most observers, the Supreme Court reinstated Section 377 and chastised the Delhi High Court for relying too heavily on foreign precedent respecting SOGI rights. *Koushal v. Naz Found.*, Civil Appeal No. 10972/2013 (Sup. Ct. Dec. 11, 2013), available at <http://judis.nic.in/supremecourt/imgst1.aspx?filename=41070>. The court reasoned that SOGI individuals are a minority in India and that the legislative will of the majority should control. Because the Delhi High Court read down the law rather than declaring it unconstitutional, the Supreme Court held that the Delhi High Court cannot read the law out of effect while still finding it constitutional. At press time, it was too soon to evaluate what effect the decision will have on the future of SOGI rights in India, but we believe that the political and social forces that have expanded SOGI rights will persist and grow.

¹⁴⁴ See *supra* note 134.

