

Rights of Transgender Persons

A Case for More Regional Cooperation in South Asia

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Introduction

This article makes a case for a regional convention on the rights of transgender persons in light of the legal developments in transgender rights across key member nations of the South Asian Association for Regional Co-operation (SAARC). It focuses on the right to self-identification of gender. An overview of key legal developments in South Asia on transgender rights is provided and, in light of this, it suggests that a regional convention on the rights of transgender persons by SAARC will be a step in the right direction. Such a step would achieve a twofold purpose. First, it would enforce the internationally-recognized rights of transgender persons throughout societies in South Asia and provide an opportunity to address regionally specific concerns. Second, it would enable the strengthening of SAARC by realizing some of its key charter goals mentioned in Article 1 (a) and 1 (b) of promoting “welfare of the peoples of South Asia...to improve their quality of life,” and providing “all individuals the opportunity to live in dignity and to realise their full potential.”¹

Rights of Transgender Persons

In 2014, the Supreme Court of India affirmed the rights of transgender persons in the landmark case, *National Legal Services Authority (NALSA) v. Union of India*.² It provided specific directions to the Central and State governments to implement policy recommendations, which were created by an expert committee, within a period of six months.³ This decision upheld the rights to equality, non-discrimination, freedom of expression, and right to life with dignity for transgender persons. Most importantly, it also upheld the right to self-identification of gender.

¹ South Asian Association of Regional Cooperation, *Charter of the South Asian Association of Regional Cooperation*, (Dhaka: 1985), <http://saarc-sec.org/saarc-charter>.

² *NALSA v. Union of India*, WP 400 of 2012.

³ *Ibid*, Para 130.

Despite certain inconsistencies, the judgment is unambiguous about these rights. In paragraph 76, the court holds, gender identity “forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.”⁴ Further, on paragraph 20, it is held that, “no one shall be forced to undergo medical procedures, including SRS (sex reassignment surgery), sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.”⁵ The court concludes on paragraph 129 that, transgender persons have the right to “decide their self-identified gender” and that local, state, and national governments must “grant legal recognition of their gender identity such as male, female or as third gender.”⁶

In making their decision, the Court relied on judgments from various jurisdictions, including the Yogyakarta Principles, to arrive at its conclusion. These are a set of international principles on sexual orientation and gender identity, drafted by international human rights experts at Yogyakarta, Indonesia in 2006. These principles set out international legal standards that States must comply with.⁷ Principle No. 3 of the Yogyakarta Principles states, “Each 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. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity”⁸.

Despite being only a set of best practices compiled by civil society organizations, the Yogyakarta Principles have since been incorporated in India’s domestic legal code.⁹ These principles are in line with international law and draw primarily upon the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰ and other international human rights conventions.¹¹

⁴ Ibid, Para 76.

⁵ Ibid, Para 20.

⁶ Ibid, Para 129.

⁷ Philip Alston, Maxim Anmeghichean, Mauro Cabral, Edwin Cameron, Sonia Onufer Corrêa, Yakin Ertürk, and Elizabeth Evatt, “Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,” *International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity* (2009).

⁸ Ibid, Para 22.

⁹ David Brown, “Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles,” *Michigan Journal of International Law* 31 (2010): 821.

¹⁰ Ibid, 879.

¹¹ Ibid, 821.

The NALSA judgment has been enforced by various High Courts¹² throughout India, which are required to abide by the decisions of the Supreme Court. There have been legislative attempts, through multiple iterations, to ensure the rights of transgender persons. These efforts started with a private members bill that was unanimously approved by the Upper House. Even as this bill was pending discussion in the Lower House, a different bill was introduced by the Ministry of Social Justice and Empowerment. Civil society organizations criticized the Ministry's bill as it was contrary to the NALSA judgment and did not demonstrate any understanding of the lives of transgender persons. Subsequently, the bill was referred to a Standing Committee and a further revised draft was approved by the Lower House. These competing legislative efforts created much confusion.¹³ Now, the most recent version awaits passage in the Upper House and has been met with severe resistance by transgender persons for being against the spirit of the NALSA judgment.¹⁴

Various individuals, organizations, and networks of transgender persons have publicly condemned the bill.¹⁵ Sections 5, 6, and 7 of this pending legislation would establish screening committees that issue certificates of identity to transgender persons. The committee would include a medical officer, the District Social Welfare Officer, a psychiatrist or psychologist, a transgender person, and an officer appointed by the government. This process, in requiring various procedures, including a determination by medical officers, is antithetical to the right to self-determination set out in the NALSA judgment. Some other key criticisms include the absence of affirmative action provisions, inadequate penalties or an absence of consequences for non-compliance of certain provisions, and the criminalization of begging, which many transgender women rely upon due to lack of livelihood options. All of these proposed components of the legislation stand against the spirit and directions of the NALSA judgment.¹⁶

¹² *Jeeva M v. State of Karnataka, Department of Pre-University Education* W.P. No. 12113/2019, *Reshma Prasad v. Union of India* Civil Writ Jurisdiction Case No. 13861 of 2015, *Rano v. State of Uttarakhand* WP Criminal No. 1794 of 2018, *Ashish Kumar Misra v. Bharat Sarkar* Misc Bench No. 2993 of 2015, *S Tharika Banu v. The Secretary to Government* W.P. No. 26628 of 2017, *K Prithika Yashini v. The Tamil Nadu Uniformed Services Recruitment Board*. *Ganga Kumari v State* Civil Writ Petition No. 14006/2016.

¹³ "Legal Framework to Affirm Rights of Transgender Persons: The Chaotic Legal Landscape," *PUCL Bulletin*, 36.5 (May 2016).

¹⁴ All India Coalition Against the Transgender & Anti Trafficking Bills, "Statement," *Orinam.net*, December 28, 2018, http://orinam.net/content/wp-content/uploads/2019/01/2.-AT-BILL-PARCHA_English_Delhi-Protest_28th-December_Colored.pdf; National Alliance of People's Movements, "Statement," *Orinam.net*, December 28, 2018, http://orinam.net/content/wp-content/uploads/2019/01/NAPM_on-transgender-Bill-281218.pdf; LABIA, "Stop Criminalizing our Bodies and Lives! A Press Statement by LABIA – A Queer Feminist LBT Collective, Bombay" *Orinam.net*, December 28, 2018, <http://orinam.net/content/wp-content/uploads/2019/01/LABIA-press-release-english.pdf>.

¹⁵ *Ibid.*

¹⁶ Sylvia Karpagam. "Why Transgender Persons Bill is a Healthcare Nightmare for the Community," *The News Minute*, December 30, 2018, <https://www.thenewsminute.com/article/why-transgender-persons-bill-2018-public-health-nightmare-community-94206>

Even without this pending legislation and despite the NALSA judgment, there has been mass incarceration of transgender persons for begging.¹⁷

Even as the legislative path has faced sharp resistance, the judgments of the High Courts have been welcomed by the transgender community. The most recent judgment that follows the NALSA decision is the case of *Arunkumar v. The Inspector General of Registration* from the Madras High Court.¹⁸ In this case, the court upheld the right to marry of the transgender petitioner and affirmed that the word ‘bride’ in section 5 of the Hindu Marriage Act includes transgender persons who identify as women. It is noteworthy that the marriage was between a man from an oppressed caste and a woman from a dominant caste. This was a welcome move by the court especially following a high-profile incident of an inter-caste couple being burnt alive.¹⁹ This is the most recent case where NALSA has been affirmed but there are many other cases in which the High Courts have progressively applied the principles in the NALSA judgment to grant admissions and services of transgender persons.

Developments Across South Asia

In the rest of the region, progress has been made in Nepal, Pakistan, Bangladesh, and Sri Lanka on recognizing transgender persons. Including India, this means that five out of the eight member states of SAARC have recognized the rights of transgender persons. Unfortunately, there have been no substantial developments in Afghanistan, the Maldives, or Bhutan.

In 2007, the Supreme Court of Nepal affirmed the rights of transgender persons in the case of *Sunil Babu Pant v. Nepal Government*.²⁰ On page 283–284, the court held:

It cannot be construed that the legal rights and fundamental rights as well as human rights provided to the individuals by the Constitution and other human rights related international instruments to which Nepal is a party, may be enjoyed only by men and women merely because the term ‘sex’ — meaning male and female — is mentioned in the Constitution. As the people with third type of gender identity other than the male and female and different sexual orientation are also Nepali citizens and natural person they should be allowed to enjoy the rights with their own identity as provided by the national laws, the Constitution and international human rights instruments. It is the responsibility of the state to create appropriate environment and make legal provisions accordingly for the enjoyment of such

¹⁷ Prerna Kodur and Gowthaman Ranganathan. “A Report on the Human Rights Violations Against Transgenders in Karnataka, 2014,” *ONDEDE*, <http://www.scribd.com/doc/277108005/Final-Report-on-Human-Rights-Violations-of-Transgender-Persons> (last visited 23rd October, 2015)

¹⁸ *Arunkumar v. Inspector General of Registration*, WP (MD) No. 4125 of 2019 and WMP (MD) No. 3220 of 2019

¹⁹ “Couple Set on Fire for Inter-Caste Marriage in Maharashtra, Woman Dies,” *The Wire*, May 06, 2019 <https://thewire.in/caste/couple-set-on-fire-for-inter-caste-marriage-in-maharashtra-woman-dies>

²⁰ *Sunil Babu Pant v Nepal Government*, Writ No. 917 of the year 2064 BS (2007 AD)

rights. It cannot be construed that only ‘men’ and ‘women’ can enjoy such right and other people cannot enjoy it only because they have a different gender identity and sexual orientation.²¹

It is important to note that, like in India, the Supreme Court of Nepal also relied on the Yogyakarta Principles, the ICCPR, and the ICESCR. Subsequent to this decision, there have been many developments including the inclusion of a third gender category in the voter rolls, census, immigration forms, and applications to the civil service examination.²² The Asia Pacific Transgender Network and the United Nations Development Program conducted a detailed survey of these developments in the report titled “Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia” in 2017.²³

In the case of *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi*, the Supreme Court of Pakistan has recognized various rights of transgender persons including the right to identity and rights of inheritance.²⁴ Subsequently, in 2017, the Lahore High Court recognized the right of a transgender person to receive a Computerized National Identity Card (CNIC). In this case, *Mian Asia v. The Federation of Pakistan*, the court held that, “gender identity is one of the most fundamental aspects of life which refer to a person intrinsic sense of being male, female or transgender. Everyone is entitled to enjoy all human rights without discrimination on the basis of gender identity. Everyone has the right to recognition everywhere as a person before the law.”²⁵ Pakistan’s Senate has also passed the Transgender Persons (Protection of Rights) Act in 2018. The emphasis on self-perceived identity in the law has been praised by the transgender community.

Bangladesh has recognized the right to gender recognition of transgender persons through a Cabinet decision in 2013.²⁶ The implementation of this right, however, has been unsatisfactory. Nevertheless, recognition in-principle allows for the possibility of full realization in the case of a judicial challenge.²⁷

Sri Lanka has recognized the right to gender identity through a circular of the Health Ministry issued in 2016, which requires medical determination and does not live up to the threshold of self-identification of gender.²⁸

A Case for More Regional Co-Operation

The brief overview of legal developments on the rights of transgender persons in the SAARC member states allows us to come to certain conclusions. The development of

²¹ Ibid.

²² UNDP & APTN (2017) *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*. P. 24.

²³ Ibid.

²⁴ *Dr. Muhammad Aslam Khaki v Rawalpindi*, Const. Petition No. 43/2009

²⁵ *Mian Asia v The Federation of Pakistan*, W.P. No. 31581/2016 at para 11

²⁶ UNDP & APTN (2017) P. 31.

²⁷ Ibid.

²⁸ UNDP & APTN (2017) P. 9.

the right to self-identification of gender identity can be observed at various stages of realization in all five of the countries analyzed. Pakistan's recent law remains a progressive step forward but its implementation in the days to come will have to be observed. India's legislative efforts are not in line with its Supreme Court's decision, but the transgender community remains vocal in guiding the new legislation. Nepal has made significant progress as well through various cases. Bangladesh and Sri Lanka have attempted reforms through executive measures, although they lack judicial affirmations and legislative efforts to support these reforms. However, Bhutan, the Maldives, and Afghanistan have yet to initiate the process of recognizing transgender persons. A regional convention on transgender rights might be the mechanism for change needed in these countries.

As noted earlier, the decisions of the Supreme Court of Nepal and India significantly draw upon the Yogyakarta Principles, which are based on the ICCPR and the ICESCR. Except Bhutan, all other SAARC nations are signatories to both covenants and hence agree to affirm the rights of transgender persons. Though this article has focused primarily on the right to self-identification of gender, various other rights of transgender persons including the right to health, inheritance, family, employment, housing, and protection against violence and discrimination. All of these rights must be advanced in South Asia. The Yogyakarta Principles can be used as the guiding force for a regional convention on the rights of transgender persons by SAARC. The regional organization has conventions on promotion of welfare of children, combating and preventing the trafficking of women and children for prostitution, suppression of terrorism, and mutual assistance on criminal matters. Therefore, it is feasible to also establish a SAARC convention on the rights of transgender persons.

There has been a lot of writing on the many things that divide South Asia given its complex history.²⁹ These differences have often justified the mild nature of SAARC, which is the only regional organization in the world with no enforcement mechanism.³⁰ Given the significant progress in some SAARC member states on transgender rights, it is important for SAARC to come together on this issue to further its charter goals. Such an effort will also bring a unifying factor in the now vastly different processes for recognition of rights of transgender persons.

Transgender persons, in particular, trans women, have been recognized in various socio-cultural contexts in South Asia for centuries. This ranges from mentions in mythology to prevalence of socio-cultural groups like the *Hijra*, *Khwaja Siras*, *Kinnar*, *Jogappas* etc. Many variants of the transgender identity exist in different parts of the region and these identities are often subsumed into the larger transgender umbrella. An umbrella identity is important for legal recognition; however, it is also crucial to ensure that

²⁹ Rakhi Sehgal. "South Asian Regionalism: A People's Movement Perspective," *India International Centre Quarterly*, 41.3/4, (WINTER 2014 - SPRING 2015): 210-215

³⁰ "SAARC is world's only regional organization not having human rights body to tackle issues related to International Covenants" *Counter View*, August 30, 2017 <https://counterview.org/2014/08/26/saarc-is-worlds-only-regional-organization-not-having-human-rights-body-to-tackle-issues-related-to-the-intern%E2%80%A6>

socio-cultural identities are not erased and are explicitly recognized under the transgender identity for legal purposes. These socio-cultural identities are not present in the West. Therefore, this will be a significant opportunity to bring recognition of rights specific to these identities into regional and global conversations. The fact that SAARC has no enforcement mechanism may be helpful to convince members countries like Afghanistan, the Maldives, and Bhutan, who do not have laws for transgender persons, to agree on a regional convention. This would allow them the pace to bring forth suitable legal changes and also provide them with regionally specific guidance through the form of a convention.

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