

# ESTABLISHING A THIRD GENDER CATEGORY IN NEPAL: PROCESS AND PROGNOSIS

*Michael Bochenek\**

*Kyle Knight\*\**

## INTRODUCTION

In December 2007, the Supreme Court of Nepal issued a groundbreaking verdict in favor of sexual and gender minorities. The decision in *Pant v. Nepal*<sup>1</sup> quickly became famous for declaring full, fundamental human rights for all “sexual and gender minorities”—lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) citizens.

In no uncertain terms, the court decided in favor of the petitioners, a group of LGBTI rights NGOs represented by Sunil Babu Pant, president of Blue Diamond Society, the largest of the represented NGOs.<sup>2</sup> In addition to ordering the government to scrap all discriminatory laws,<sup>3</sup> the court legally established a gender category in addition to male and female—calling it “third gender”<sup>4</sup>:

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\* J.D., Columbia University; Director of Law and Policy for the International Secretariat of Amnesty International. This Article reflects the views of the Authors and not necessarily those of Amnesty International.

\*\* A.B., Duke University; 2011–2012 Fulbright Scholar in Nepal. The Authors would like to thank the Shelly & Donald Rubin Foundation for their generous support in supplying rare research materials for this project.

<sup>1</sup> *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT’L JUD. ACAD. L.J., 2008, at 262.

<sup>2</sup> *Id.*

<sup>3</sup> It is important to note that the court in *Pant* struck down laws that could be interpreted to be discriminatory. No express prohibition of adult, consensual homosexual conduct existed in Nepali law. Numbers 1 and 4 of Part 4, Chapter 16 of Nepal’s *Muluki Ain* penalize “unnatural sex” with up to one year in prison. MULUKI AIN (NATIONAL CIV. & CRIM. CODE) pt. 4, ch. 16, nos. 1, 4. “Unnatural sex” is not defined, but rather only appears in this chapter under the heading “Sex With Animals.” *Id.* In *Pant*, the court did not deal with laws such as those discussed in the 2008 Delhi High Court case that repealed Section 377 of India’s penal code, which had made sodomy a criminal offense. *Naz Found. v. Gov’t of NCT of Delhi*, WP(C) No. 7455/2001, 160 Delhi L. Times 277 (Del. High Ct. July 2, 2009), <http://lobis.nic.in/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>. The Nepal court decision, in comparison reads:

Although, there is no distinct law that declares the relation between homosexuals as crime (it is kept within the definition of unnatural coition), there is a claim that the state mechanism has implicitly contributed to the discrimination created due to negative attitude of the society towards these people which cannot be ignored. As the concept of trans-sexuality has not been legally accepted, one cannot also dismiss the claim that the transsexual and homosexual peoples are not living their lives easily by keeping their own identity. These people have been compelled to

If any legal provisions exist that restrict the people of third gender from enjoying fundamental rights and other human rights provided by Part III of the Constitution and international conventions relating to the human rights which Nepal has already ratified and applied as national laws, with their own identity, such provisions shall be considered as arbitrary, unreasonable and discriminatory. Similarly, the action of the state that enforces such laws shall also be considered as arbitrary, unreasonable and discriminatory.<sup>5</sup>

Since the court's decision, the Government of Nepal has implemented the third gender category in piecemeal but progressive moves. However, full implementation as the court mandated remains far from a reality.

Human Rights Watch explains the potential effects of introducing a third gender category:

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appear in the public life with the identity as determined according to their genitals instead of their own characteristics, and, it is very important to reconsider the prevalent values in the context of human rights and fundamental rights.

...

The legal provisions in our prevailing laws such as the chapters 'Of bestiality', 'Of Marriage', 'Of Husband and Wife' of the Country Code (*Muluki Ain*), 2020 (1963 AD) as well as provisions incorporated in other statutes and rules with regard to the citizenship, passport, voter list, security check etc and similar legal practices have not only refused to accept the identity of the people of third gender but also declined to acknowledge their existence. Similarly, it seems necessary to analyze the situation in which due to administrative thinking and social environment the people of third gender are not finding it conducive to lead the life springing from their behavior and character and dictated by their nature.

*Pant*, Writ No. 917, at 280–281. Sixty-six chapters of the *Muluki Ain* (almost 250 pages of text, or one-third of the document) are dedicated to regulations of sexual relations. ANDRAS HÖFER, *THE CASTE HIERARCHY AND THE STATE IN NEPAL: A STUDY OF THE MULUKI AIN OF 1854*, at 69 (1979.) The meticulous regulations are focused principally on intra- and intercaste sexual relations; the document discusses sodomy:

According to the [*Muluki Ain*], a “Cord-Wearer” [specific caste designation] having committed sodomy with a cow will be degraded to a “Non-enslavable Alcohol-Drinker”, and a “Non-enslavable Alcohol-Drinker” to an “Enslavable Alcohol-Drinker”. The animal involved must be assigned to an Untouchable [lowest caste]; and only members of the impure castes may thereafter drink her milk. In sum, the animal is degraded to the status of an untouchable, as it seems. Similar regulations are laid down with regard to sodomy with sheep, goats, and buffaloes.

*Id.* at 88.

<sup>4</sup> In 2007, Nepal created the “third gender category for gender-variant people.” Kyle Knight, *Dividing by Three: Nepal Recognizes a Third Gender*, WORLD POL’Y BLOG (Feb. 1, 2012, 11:43 AM), <http://www.worldpolicy.org/blog/2012/02/01/dividing-three-nepal-recognizes-third-gender>.

<sup>5</sup> *Pant*, Writ No. 917, at 282.

[W]henever the law currently allows for men and women to be treated differently, despite the general prohibition on discrimination on the grounds of sex, the law would need to be rewritten to take account of this third category, and across societies measures would be required to adjust to this new legal framework.<sup>6</sup>

This Article examines exactly that adjustment: it uses Nepal as a case study for the introduction of a third gender category in a legal and political system. It first examines *Pant* and discusses what the decision accomplished. The Article then discusses the significance of the legal recognition of gender, focusing specifically on identification documents. It then explains the definition of the Nepali third gender as the court established it and puts this definition in the context of non-binary gender definitions according to academic literature and other cases and systems that explicitly or implicitly refer to a third gender category. It then outlines the path to legal implementation that has taken place in Nepal. This Article concludes by examining how non-male, non-female gender categories are supported and afforded protections under international human rights law and the implications of such protections.

## I. THE THIRD SEX/THIRD GENDER OF NEPAL

Third gender is a term used in Nepal to describe biological males who have “feminine” gender identity or expression and biological females who have “masculine” gender identity or expression.<sup>7</sup> Activists and government officials have agreed that the term “other” (*anya*) will be used to represent this category on official documents.<sup>8</sup>

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<sup>6</sup> HUMAN RIGHTS WATCH, CONTROLLING BODIES, DENYING IDENTITIES: HUMAN RIGHTS VIOLATIONS AGAINST TRANS PEOPLE IN THE NETHERLANDS 80 (2011), available at <http://www.hrw.org/sites/default/files/reports/netherlands0911webwcover.pdf> [hereinafter CONTROLLING BODIES, DENYING IDENTITIES].

<sup>7</sup> See, e.g., ALEXANDRA LESNIKOWSKI, INST. FOR HEALTH & SOC. POLICY, RAISING AWARENESS ABOUT SEXUAL HEALTH AND HUMAN RIGHTS THROUGH CIVIC ENGAGEMENT AND COMMUNITY EMPOWERMENT: THE CASE OF BLUE DIAMOND SOCIETY AND THE LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX (LGBTI) COMMUNITY IN NEPAL (2009), available at <http://resources.cpha.ca/CPHA/Conf/Data/A10-274e.pdf> (discussing the LGBTI community in Nepal); Manesh Shrestha, *Nepal Census Recognizes ‘Third Gender,’* CNNWORLD (May 31, 2011), [http://articles.cnn.com/2011-05-31/world/nepal.census.gender\\_1\\_gender-identity-citizenship-first-openly-gay-lawmaker](http://articles.cnn.com/2011-05-31/world/nepal.census.gender_1_gender-identity-citizenship-first-openly-gay-lawmaker).

<sup>8</sup> Interview with Sunil Babu Pant, President, Blue Diamond Soc’y, in Kathmandu, Nepal (Mar. 28, 2012).

Discussions of sexual orientation and gender identity, as well as discussions of sex and gender, require clarification of often-contested terms.<sup>9</sup> However, this Article does not aim to offer a definitive or universal definition of third gender, but instead aims to consider how Nepal's contemporary legal system defines third gender in the context of Currah and Mulqueen's argument:

The meanings of [sex and gender] are widely contested in the hard and soft sciences, in the humanities, in legal theory, in women's and gender studies, and increasingly in popular discourse. Ultimately, the only thing we know for sure about what sex means, or what gender means, is what state actors, backed by the force of law, say those words mean.<sup>10</sup>

The term third gender entered the Nepali legal sphere with the decision in *Pant*. A substantial amount of the decision's text is dedicated to discussing the rights of third gender citizens, including the right to be recognized as third gender on official citizenship documents—the keystone to accessing all state services in Nepal.<sup>11</sup>

Third gender categories have appeared throughout history in various forms. Signifying gender variance outside the male–female binary, the categories have taken shape differently in different contexts. Herdt explains, “[T]here is no ready-made formula that will produce divergent sex or gender categories and roles, suggesting that special conditions—demographic, symbolic and

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<sup>9</sup> For the purposes of this Article, the definitions of sexual orientation and gender identity follow the Yogyakarta Principles:

- 1) Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
- 2) Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

*Introduction to Conference of International Legal Scholars, Yogyakarta, Indon., Nov. 6–9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Mar. 2007), at 6 nn.1–2 [hereinafter *Yogyakarta Principles*], available at [http://yogyakartaprinciples.org/principles\\_en.pdf](http://yogyakartaprinciples.org/principles_en.pdf).

<sup>10</sup> Paisley Currah & Tara Mulqueen, *Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport*, 78 SOC. RESEARCH 557, 577 n.1 (2011).

<sup>11</sup> *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT'L JUD. ACAD. L.J., 2008, at 284–85.

historical—combine to create the necessary and sufficient basis for the conventionalization and historical transmission of the third sex or gender.”<sup>12</sup> It has been suggested that Nepal’s third gender falls within a global “berdache” tradition (males who dress in female garb);<sup>13</sup> however, such categorization at least somewhat neglects the role that biologically female third gender people have played in the emergence of the Nepali category. While thorough academic research on Nepal’s third gender category is lacking, among the explanations for its local cultural relevance are: the historical presence and, thus, contemporary cultural acknowledgement of gender-variant people such as *hijras*;<sup>14</sup> the local religious traditions containing important third gender (non-male/female gender performing) characters;<sup>15</sup> and the intense media focus on the violence against gender-variant people as the contemporary sexual and gender minority rights movement emerged in Nepal.<sup>16</sup>

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<sup>12</sup> Gilbert Herdt, *Introduction: Third Sexes and Third Genders*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 21, 22 (Gilbert Herdt ed., 1996) [hereinafter *THIRD SEX*].

<sup>13</sup> William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1463 (1993).

<sup>14</sup> See Herdt, *supra* note 12, at 61 (“[T]he presence of androgynous figures, of ontological beings and entities, especially gods and spirits, is critical in understanding the emergence of culturally constituted third-sex and third-gender roles.”). In the case of Indian *hijras*, despite the frequent use of female identity markers, including female pronouns, in recent political history the group has advocated to be recognized not as women but as a third gender. See Paul Watson, *Offering India’s Voters a Unique Perspective*, L.A. TIMES (May 9, 2004), <http://articles.latimes.com/2004/may/09/world/fg-eunuchs9>.

<sup>15</sup> See Nanda Serena, *Hijras: An Alternative Sex and Gender Role in India*, in *THIRD SEX*, *supra* note 12, at 373, 373, 375, 377, 381–82 (“The cultural notions of hijras as ‘intersexed’ and ‘eunuchs’ emphasize that they are neither male nor female, man nor woman. At a more esoteric level, the hijras are also man *plus* woman, or erotic and sacred female men. . . . As eunuch-transvestites, a major identification is made between hijras and Arjun, hero of the Mahabharata, who lives for a year in the guise of a eunuch, wearing bangles, braiding his hair like a woman, dressing in female attire . . . . The portrayal of Arjun in popular enactments of the Mahabharata in a vertically divided half-man, half-woman form highlights this identification. . . . The ancient Hindu depiction of alternative genders among humans and deities is reinforced by the historical role of the eunuch in ancient India and, in particular, Muslim court culture, which has a five-hundred-year history in India. This historical role has merged with those described in Hindu texts as a source of contemporary hijra identification. . . . The collapsing of the categories ‘intersexed’ and ‘eunuch’ as well as those of sex and gender is confusing to the Westerner who makes a distinction between these categories. Furthermore, while sexual impotence with women is a culturally defined sign of the hijra, it is only a necessary but not a sufficient condition for being a hijra.”).

<sup>16</sup> See, e.g., RAJU RAM BHANDARI, BLUE DIAMOND SOC’Y, DOCUMENTATION OF HUMAN RIGHTS ABUSE AND MEDIA REPORT, available at [http://www.bds.org.np/publications/Human%20rights%20violations%20and%20media%20report\\_Review.pdf](http://www.bds.org.np/publications/Human%20rights%20violations%20and%20media%20report_Review.pdf). Many people who identify as third gender have traditionally worked as itinerant dancers or sex workers. See Knight, *supra* note 4. After Nepal opened to foreigners in 1950, the economy shifted slowly. See YUBA RAJ KHATIWADA & SUMAN K. SHARMA, INST. FOR INTEGRATED DEV. STUDIES, NEPAL: COUNTRY STUDY REPORT 7 (2002), available at <http://www.saneinetwork.net/pdf/grp/GRPNepal.pdf>. Liechty explains how this affected sex work:

The sudden surge in prostitution around 1980 seems to stem from a combination of four components: *cash, mobility, anonymity, and fantasy*. . . . As the local economy became

The court in *Pant* first defines third gender in its discussion of the Government of Nepal's challenge to the standing of third gender people to file the petition.<sup>17</sup> The court rebutted the government's proposal, arguing that widespread ignorance about the lives of third gender people was insufficient to deny the group standing.<sup>18</sup>

In its work to define third gender people, the court begins, "[P]ersons who are born with the physical characteristics of one sex but psychologically feel and behave like members of opposite sex are called transsexual."<sup>19</sup> It then adds, "The other category of sexual minority are intersexuals who are born naturally with . . . both genetic sex organs of male and female."<sup>20</sup> The court then defines gender identity by quoting the Yogyakarta Principles.<sup>21</sup>

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increasingly infused with cash (and as growing demands for cash left those on the social margins increasingly vulnerable), as Nepalis and foreigners became more physically mobile (moving out of the morally constraining orbits of kin and community), as commercial venues arose to meet the needs of a mobile population (restaurants, lodges, etc.) forming transient, anonymous zones in the city, the supply and demand for—indeed the possibility of—large scale prostitution emerged.

MARK LIECHTY, *OUT HERE IN KATHMANDU: MODERNITY ON THE GLOBAL PERIPHERY* 237 (2010) (citation omitted).

<sup>17</sup> *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT'L JUD. ACAD. L.J., 2008, at 262, 266–67.

<sup>18</sup> *Id.* at 268.

<sup>19</sup> *Id.* at 271.

<sup>20</sup> *Id.* It is worth noting that North American intersex advocates have attempted to differentiate intersex conditions from transsex conditions and oppose a third gender category. See April Herndon, *Why Doesn't ISNA Want To Eradicate Gender?*, INTERSEX SOC'Y N. AM. (Feb. 17, 2006, 1:28 PM), [http://www.isna.org/faq/not\\_eradicating\\_gender](http://www.isna.org/faq/not_eradicating_gender) ("At [the Intersex Society of North America ("ISNA")], we've learned that many intersex people are perfectly comfortable adopting either a male or female gender identity and are not seeking a genderless society or to label themselves as a member of a third gender class."). Noa Ben-Asher explains:

ISNA offers a definition of intersex as an anatomical condition and a biological variation. For ISNA and its medical allies, intersex is an *anatomical condition*, which is "neither a medical nor a social pathology": "Intersex is a relatively common anatomical variation from the 'standard' male and female types; just as skin and hair color vary along a wide spectrum, so does sexual and reproductive anatomy."

Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 66 (2006) (quoting Alice Dreger, *Shifting the Paradigm of Intersex Treatment*, INTERSEX SOC'Y N. AM., <http://www.isna.org/compare> (last visited Nov. 20, 2005)).

According to ISNA, intersex identities do not fall into a third gender category because intersex people can exist in the male–female binary. Ben-Asher writes, "While at first glance it does not seem that there is much of a difference between 'variation' and 'third sex/gender,' the presentation of intersex as a 'variation' and not as a third sex or gender is situated at the core of ISNA's . . . position." *Id.* at 67.

However in terms of gender identity politics, ISNA's position has been challenged. ISNA is vehemently against surgeries on children that will assign them a sex, but simultaneously advocates assigning all children a male or female gender and not an ambiguous or third gender. Ben-Asher argues that "challenging

There are few legal cases from around the world that either explicitly or implicitly acknowledge a third gender category. As such, the Nepali Supreme Court draws on cases concerning transgender rights, but these cases do not necessarily refer to transgender people as identifying with or occupying a third category. Thus, the court uses these cases to establish gender-variant, but not necessarily third gender, people as “natural” and, therefore, deserving of citizenship and rights. One case referenced in particular, Australia’s *In re Kevin*,<sup>22</sup> helps the court explain that gender is not dependent solely on genitalia:

It is wrong to say that a person’s sex depends on some limited range of factors, such as the state of the person’s gonads, Chromosomes or genitals (whether at birth or at some other time) . . . . [T]he relevant matters include the person’s biological and physical characteristics at birth; . . . the person’s self perception as a man or woman; . . . and the person’s biological, psychological and physical characteristics at the time of the marriage, including any biological features of the person’s brain that are associated with a particular sex.<sup>23</sup>

Examining current law in Nepal, the court points out that only once is the male–female binary mentioned in the interim constitution:

Except in Article 13(4) which refers to equal remuneration, the terms ‘citizen’ or ‘sex’ are used instead of ‘men’ and ‘women’ everywhere in the Interim Constitution. But it can be possible to classify the natural person under various categories not only the above mentioned categories. For example child, aged, adult and old

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sex assignment while using the same logic to justify gender assignment deserves rethinking. . . . ISNA and others preserve the masculine-feminine binary in the realm of gender.” *Id.* at 72.

Various cases deal with intersex individuals, but most focus on parental consent and surgery that will ultimately assign a male or female gender to the child, setting aside the option of a third gender. *Id.* at 63–64.

<sup>21</sup> *Pant*, Writ No. 917, at 271–72.

<sup>22</sup> *In re Kevin* [2001] Fam CA 1074 (Austl.), <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2001/1074.html?stem=0&synonyms=0&query=re%20kevin>. Julie Greenberg summarizes the holding of the Family Court of Australia as follows: “legal sex should be determined as of date of marriage and not birth. In holding that a [female-to-male] transsexual is legally a male, the court relied on self-identity, gender perception of others, hormonal and surgical intervention, and acceptance of his legal status as a man for other purposes.” Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 *ENDOCRINOLOGIST* 277, 281 tbl.1 (2003), available at <http://www.isna.org/pdf/greenberg2003.pdf>. In addition, the court specifically rejected the decision of *In the Marriage of C and D*, in which the court had granted a female wife’s petition for marriage annulment because her husband was declared legally “neither a man nor a woman,” and therefore ineligible for marriage, which was restricted to one man and one woman. *In re Kevin* [2001] Fam CA, para. 160; see Julie A. Greenberg & Marybeth Herald, *You Can’t Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 *WASH. L. REV.* 819, 835 (2005).

<sup>23</sup> *Pant*, Writ No. 917, at 273 (citing *In re Kevin* [2001] Fam CA, paras. 328–29).

on the basis of age or tall and short on the basis of height or black and white on the basis of complexion. Similarly, a natural person can be classified as male or female or third gender on the basis of gender.<sup>24</sup>

Applying international law, the court writes:

The Human Rights Committee of the United Nations has asserted that in order to construe the Article 26 of ICCPR, the article includes the term sexual orientation within this definition.

The Committee has mentioned that “. . . *Sexual Orientation needs to be understood as link [sic] inseparably to the equality of men and women. Thus discrimination on grounds of Sexual Orientation is connected to discrimination against people who do not live out socially accepted norms for “masculinity” and “Femininity”. The concept of “Gender Identity” cannot be separated from that of “Sexual Orientation” as prohibited grounds of discrimination.*”<sup>25</sup>

The Nepal court also references two European Court of Human Rights (“ECtHR”) transgender law cases in its attempt to define the rights of third gender people:

*Goodwin vs. United Kingdom* and *I vs. United Kingdom* in 2002 explicitly recognized the rights of the third gender individuals. In this case the UK government had declined to prepare the legal identity papers of individuals corresponding to the present sex following the change through surgical operation. The court held that *changes in their identity papers holding their right, to respect for their private lives and also their right to marry had been violated.*<sup>26</sup>

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<sup>24</sup> *Id.* at 278.

<sup>25</sup> *Id.* at 277.

<sup>26</sup> *Id.* In *Van Kuck v. Germany*, the European Court of Human Rights (“ECtHR”), on the basis of individual integrity rights, held that health insurance providers were required to pay for gender reassignment surgery as a treatment for a medical condition. *Van Kuck v. Germany*, Eur. Ct. H.R. paras. 53–57, 82–84 (Dec. 9, 2003), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Van Kuck” in the “Case Title” box and “Germany” in the “Respondent State” box); *see also* Gregory A. Knott, Comment, *Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict*, 54 ST. LOUIS U. L.J. 997, 1018 (2010). In *Goodwin v. United Kingdom* and *I v. United Kingdom*, the ECtHR held that classifying post-operative transgender persons according to their pre-operative sex violated Articles 8 and 12 of the European Convention—the rights to privacy and marriage, respectively. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 31–32, 33–35; *I v. United Kingdom*, Eur. Ct. H.R. paras. 69–73, 77–84 (July 11, 2002), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “I” in the “Case Title” box, “United Kingdom” in the “Respondent State” box, and “01/01/2002” and “31/12/2002” in the “Date” box); *see also* INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE: A COMPARATIVE LAW CASEBOOK 173–74 (2011) [hereinafter

The court reads the U.K. cases as explicit recognition of a third gender.<sup>27</sup> The bulk of the Nepali court's legal argument relies on transgender recognition cases, and the decision also includes intersex people. The court references cases that call on governments to issue post-operative transgender people gender-appropriate ID and respect their other rights (namely marriage) in their post-operative gender.<sup>28</sup> However, in line with the Yogyakarta Principles, the Nepali decision departs from the cases it cites in that it states that the sole criterion for being legally recognized as third gender in Nepal would not be based on any medical (or other) criteria, but rather on self-identification: "Legal provisions should be made to provide for gender identity to the people of transgender or third gender, under which female third gender, male third gender and intersexual are grouped, as per the concerned person's self-feeling."<sup>29</sup>

Blue Diamond Society ("BDS")<sup>30</sup> research has documented several identity categories that, through self-identification, have fallen under the third gender category—ranging, in English, across an array of sexual orientation and gender identity labels.<sup>31</sup> In a report submitted to the Department for International

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SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE], available at [http://www.icj.org/dwn/database/Sexual%20Orientation,%20Gender%20Identity%20and%20Justice-%20A%20Comparative%20Law%20Casebook\[1\].pdf](http://www.icj.org/dwn/database/Sexual%20Orientation,%20Gender%20Identity%20and%20Justice-%20A%20Comparative%20Law%20Casebook[1].pdf).

<sup>27</sup> *Pant*, Writ No. 917, at 277.

<sup>28</sup> *See, e.g., id.* at 273–74.

<sup>29</sup> *Id.* at 281.

<sup>30</sup> Founded in 2001, BDS is registered with the Nepali government as a health and HIV/AIDS outreach organization for sexual and gender minorities. *About Blue Diamond Society*, BLUE DIAMOND SOC'Y, <http://www.bds.org.np/aboutus.html>. The organization, founded by Sunil Babu Pant, now conducts regular human rights fact-finding and advocacy projects, and it employs more than 1,000 employees across the country. Lisa Dazols, *Nepal Video: Everest Dreams and Equality for All*, OUT & AROUND (Dec. 14, 2011), <http://www.outandaround.com/nepal-video-everest-dreams-and-equality-for-all/2011/12>.

<sup>31</sup> Nepal's population is almost incomparably diverse. The federal government recognizes 102 ethnicities (the largest of which makes up approximately fifteen percent of the population), and less than forty-eight percent of the population considers Nepali (the national language) their mother tongue. NAT'L PLANNING COMM'N SECRETARIAT, CENT. BUREAU OF STATISTICS, STATISTICAL YEAR BOOK OF NEPAL: 2009, at 1.7, available at [http://www.cbs.gov.np/statis\\_2009\\_content.html](http://www.cbs.gov.np/statis_2009_content.html); *Country Profile: Nepal*, NEPAL GERMAN CHAMBER COM. & INDUS., <http://www.ngcci.org/index.php?nav=resources&page=nepal>. Seira Tamang explains:

Nepal has had a unique history in a continent that was embraced as the jewel of the British Empire. The absence of colonial rule in Nepal has meant that the state and bureaucratic framework that emerged in Nepal was not part and parcel of a colonial state enterprise that was later inherited by Nepali state elites.

Seira Tamang, *Dis-embedding the Sexual/Social Contract: Citizenship and Gender in Nepal*, 6 CITIZENSHIP STUD. 309, 313 (2002).

Development in 2005,<sup>32</sup> BDS listed and defined the following terms: inter-sexed, transgendered people, homosexuality, *metis* and *kothis*,<sup>33</sup> *tas*, other terms for homosexuals, bisexuals, *hijras*, transsexuals, and transvestites.<sup>34</sup>

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<sup>32</sup> SUNIL BABU PANT, BLUE DIAMOND SOC<sup>Y</sup>, SOCIAL EXCLUSION OF SEXUAL AND GENDER MINORITIES: FINAL REPORT (2005), <http://www.asylumlaw.org/docs/sexualminorities/NepalBDSreport05.pdf>.

<sup>33</sup> Lawrence Cohen explains the construction of the *kothi* (*meti*) and *Ta* (*panthi*) identities thus:

This gendered framework is constructed within a *kothi/panthi* dynamic, where the *kothi* perceives himself and his desire for other males in the context of gender roles in South Asia, i.e., the “penetrated” partner. *Kothis* construct their social roles, mannerisms and behaviors in ways which attract what they call *panthis*—“real men”, identifying as feminised males. In this context *kothis* are usually the visible MSM in a range of public environments and neighborhoods, but *panthis* are not, for they could potentially be any “manly” male.

Lawrence Cohen, *The Kothi Wars: AIDS Cosmopolitanism and the Morality of Classification*, in *SEX IN DEVELOPMENT: SCIENCE, SEXUALITY, AND MORALITY IN GLOBAL PERSPECTIVE* 269, 287 (Vincanne Adams & Stacy Leigh Pigg eds., 2005) (internal quotations omitted).

<sup>34</sup> According to the BDS study:

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.

PANT, *supra* note 32, at 7. Several of these definitions follow:

**Inter-sexed**—Inter-sexed people are those who are born without either a distinctive penis or vagina. These people are often referred to as the third gender.

**Transgendered people**—Broadly speaking, transgender people are individuals whose gender expression and/or gender identity differ from conventional expectations based on the physical sex they were born into.

**Homosexuality**—Homosexuals are people who are sexually, romantically, and emotionally attracted towards the same sex. In Nepal homosexuals are called *lingies* or *samalingies*. The western term ‘gay’ is also used for homosexuals and is the term of choice for many homosexuals to describe their own identity. Homosexual women are called lesbians.

**Metis and kothis**—Many homosexuals act like the opposite sex. Effeminate homosexual men are called *metis* in Nepal’s hills areas, *singarus* in the western hills and *kothis* in the Terai areas. A 2004 report by the Naz Foundation International advocacy organisation defines *metis* and *kothis* as “self-identifying labels for males who feminise their behaviours (either to attract “manly” male sexual partners and, or, as part of their own gender construction, and usually in specific situations and contexts).”

**Tas**—Many homosexual men and women appear and act no differently to heterosexual people except as regards their sex lives. In Nepal the sexual partners of *metis* and *dohoris* are known as *tas*. They see themselves as masculine and mostly act like heterosexual males. In fact they often consider themselves as heterosexuals.

**Other terms for homosexuals**—homosexual or bisexual males who see themselves as feminine and mostly take receptive sexual roles are sometimes known as ‘strains’ in Nepal whilst homosexual or bisexual men who are not necessarily feminine and take both receptive and

Even given these definitions, many of these terms and their definitions overlap and are contested locally and globally. A discussion of the various terms used in media and NGO reports of a historically significant human rights violation incident in Kathmandu demonstrates the range of identity terms that can fall into Nepal's third gender category.

On June 18, 2004, a private lawyer filed a case in Nepal's Supreme Court, demanding that the government dismantle BDS because the organization's work "promoted homosexuality," which the petition claimed was against Nepal's culture.<sup>35</sup> In the wake of the petition, state violence against LGBTI people increased.<sup>36</sup> From August 9 to August 24, 2004, thirty-nine members of BDS were imprisoned and held without charges in Kathmandu.<sup>37</sup> BDS's work to publicize this abuse catalyzed unprecedented attention from international NGOs and media. The initial BDS press release referred to the thirty-nine members alternatively as "men who have sex with men" ("MSMs") and "sexual minorities."<sup>38</sup>

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active/penetrative sexual roles, depending upon the sexual partner, are known as dohoris. There are many other associated local terms in Nepal's local languages.

**Bisexuals**—bisexuals are people who are attracted to both their own and the other sex—they are both hetero- and homosexual [*sic*]. Note that in some cases people's sexual orientations can change over time.

**Hijras**—Hijras or eunuchs are the most visible gender minority in South Asia. They are people who are born biologically male and wish to be female. They undergo castration (surgical removal of male sexual organs) and join the Hijra community. Some are born inter-sexed. They are found mostly in the Terai region in Nepal.

**Transsexuals**—Transsexuals are people who have had a sex change, usually through a surgical operation, and as a result have changed from being male to female or female to male. Hijras are usually transsexuals.

**Transvestites**—Transvestites are cross-dressing men who are often but are not necessarily homosexual. In Nepal marunis are a type of transvestite. They are male dancers wearing women's clothing in Nepal's Gurung community.

*Id.* at 7–8.

<sup>35</sup> *Nepal: Sexual Rights Group at Risk of Closure*, HUM. RTS. WATCH (July 23, 2004), <http://www.hrw.org/news/2004/07/22/nepal-sexual-rights-group-risk-closure>.

<sup>36</sup> *Id.*

<sup>37</sup> *Nepal: 39 Transvestites Arrested and at Risk of Torture*, AMNESTY.ORG.UK (Aug. 13, 2004), [http://www.amnesty.org.uk/news\\_details.asp?NewsID=15548](http://www.amnesty.org.uk/news_details.asp?NewsID=15548) [hereinafter *Nepal: 39 Transvestites Arrested*].

<sup>38</sup> PANT, *supra* note 32, at 33.

A BBC article on the events referred to the detainees as “gays and transsexuals”;<sup>39</sup> a press release from Amnesty International UK called them “transvestites” and “‘metis’ (male transvestites)”;<sup>40</sup> a press release from UNAIDS identified the group as “AIDS activists” and “sexual minorities”;<sup>41</sup> the Coalition of Asia-Pacific Regional Networks on HIV/AIDS (the “Seven Sisters”) used “metis” and “Transgendered and/or Cross-dressing Males”;<sup>42</sup> in a letter to the Nepali Embassy in Paris, Sidaction and Act Up-Paris wrote that “39 homosexual [men] were put to jail”;<sup>43</sup> the Naz Foundation’s letter on the incident and other human rights abuses refers to the BDS members as “metis,” and “gendered males who are feminised,” and uses “his” as a possessive pronoun.<sup>44</sup>

In a routine presentation BDS delivered to policy makers and civil society groups, Pant stated, “There are some people on earth who consider themselves neither male nor female. . . . They like to be called third gender.”<sup>45</sup> Locating a third sex/gender definition within the framework of gender identity and sexual orientation can be complicated. Historical and contemporary practices and social role understandings conflate and complicate the categories of sexual orientation and gender identity and challenge assumptions that they are indeed distinct.

The circumstances creating a third gender category can be varied and complex.<sup>46</sup> Intellectual and legal history so often disaggregate information along a male–female binary that records of non-binary genders may be sparse simply because they were not recognized in popular, legal, or academic

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<sup>39</sup> *Human Rights Watch Nepal Gay Plea*, BBC NEWS (Aug. 12, 2004, 9:56 GMT), [http://news.bbc.co.uk/2/hi/south\\_asia/3557794.stm](http://news.bbc.co.uk/2/hi/south_asia/3557794.stm).

<sup>40</sup> *Nepal: 39 Transvestites Arrested*, *supra* note 37.

<sup>41</sup> *UN Agency Concerned About Detention of AIDS Activists in Nepal*, UN NEWS CENTRE, <http://www.un.org/apps/news/story.asp?NewsID=11648&Cr=nepal&Cr1>.

<sup>42</sup> *Statement on the Arrest of 39 Metis and the Proposed Ban on Homosexual Activities in Nepal*, SEVEN SISTERS (Sept. 21, 2004), [www.ahm.net/index2.php?option=content&do\\_pdf=1&id=45](http://www.ahm.net/index2.php?option=content&do_pdf=1&id=45).

<sup>43</sup> PANT, *supra* note 32, at 25.

<sup>44</sup> *Id.* at 30.

<sup>45</sup> Tilak Pokharel, *In Conservative Nepal, a Tribune for the ‘Third Gender’ Speaks Out*, N.Y. TIMES, Sept. 20, 2008, at A6 (internal quotation marks omitted).

<sup>46</sup> “[T]here is no ready-made formula that will produce divergent sex or gender categories and roles, suggesting that special conditions—demographic, symbolic, and historical—combine to create the necessary and sufficient basis for the conventionalization and historic transmission of the third sex or gender.” Herdt, *supra* note 12, at 22.

literature.<sup>47</sup> Herdt argues that this has contributed not only to erasure, but perhaps also to pathologization and marginalization, stating, “Over the past century, the theme of sexual dimorphism has recurred throughout social theory, with the consequent relegation of the third sex to the clinical laboratory of ‘biological deviance’ and the third gender to quaint textbooks of anthropology.”<sup>48</sup> The third gender in Nepal is an identity-based category for people who do not identify as male or female. This can include people who perform or present as a gender role other than that which was assigned to them at birth based on genitalia or other criteria, or people who do not feel the male or female gender roles that their culture dictates match their social, sexual, or gender role identity. Like men and women, third gender people can also identify as a range of sexual orientations. For example, one twenty-four-year-old third gender explained, “I am biologically male, but I am not a man. I do not desire women sexually. Men in my culture desire women sexually. Therefore I am third gender.”<sup>49</sup> He preferred male pronouns, and he reported that he dressed in male clothing about half the time and female clothing the other half.<sup>50</sup>

The emergence of the third gender category as reflected through its implementation indicates it is broader than a simple combination of intersex and transgender categories. Part III of this Article discusses the implementation process in Nepal.

## II. IMPLEMENTING A THIRD GENDER

The importance of having properly gendered government documents cannot be understated. Government identification documents signify recognition before the law and are necessary for many basic functions in society, including opening bank accounts, owning land, and voting. The right to recognition everywhere as a person before the law is reaffirmed in the Universal Declaration of Human Rights and guaranteed in other human rights

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<sup>47</sup> “The idea of applying the male/female dyad to domains of society and culture, including the sexual division of labor, promoted by turn-of-the-century social theorists such as French sociologist Emile Durkheim, thus became an assumptive core of social theory.” *Id.* at 32.

<sup>48</sup> *Id.* at 33.

<sup>49</sup> Interview with BDS Peer Outreach Educator, in Pokhara, Nepal (Sept. 11, 2011) (name omitted at interviewee’s request).

<sup>50</sup> *Id.*

treaties.<sup>51</sup> The Yogyakarta Principles highlight legal recognition before the law based on one's self-defined identity as a fundamental right.<sup>52</sup>

In Nepal, third gender citizens have struggled in many aspects of their lives because their appearance, name, or identity expression does not match the gender listed on their citizenship ID cards. For example, one third gender citizen, when trying to purchase land, was suspected of fraud because her appearance did not match the photo on her ID card.<sup>53</sup> She reported the she had

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<sup>51</sup> Universal Declaration of Human Rights, art. 6, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; *see also* Convention on the Rights of the Child arts. 7–8, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 20, 1990) [hereinafter CRC]; International Covenant on Civil and Political Rights art. 16, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>52</sup> *Yogyakarta Principles*, *supra* note 9, princ. 3. Principle 3: The Right to Recognition Before the Law states:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. 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, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

A. Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

B. Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

C. Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person's profound self-defined gender identity;

D. Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

F. Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

*Id.* at 11–12.

<sup>53</sup> Anjali Subedi, *Govt Still Coy over 3rd Gender Citizenship*, REPUBLICA SOC. AFF. (Dec. 17, 2011, 7:45 AM), [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=39632](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=39632).

to tell the entire story of the LGBTI rights movement to explain she was transgender, and had the rights to citizenship.<sup>54</sup> Another third gender woman encountered invasive questioning at the Qatar airport while traveling to the United States.<sup>55</sup> Her feminine appearance and preferred name did not match the photo of her as a boy on her passport or the male name listed.<sup>56</sup> Daily administrative tasks are often fraught with difficulty, loss of privacy, and vulnerability for third gender citizens. Currah and Mulqueen explain, “[W]hen an individual’s cultural legibility is not affirmed by their identity papers, even everyday quotidian transactions become moments of vulnerability.”<sup>57</sup> For many gender-variant people, one of the most stressful consequences of having the wrong gender on their identity documents is that they in many daily transactions are forced to reveal to strangers (and potentially discriminating interlocutors) the details of their gender identity and associated aspects of their private lives.<sup>58</sup> This can make gender-variant people especially vulnerable.

Governments and international bodies have found a legitimate interest in recording the sex of people. Human Rights Watch explains: “States have legitimate reasons for registering people’s sex at birth, and hence for regulating the manner in which people can change their gender marker in civil status records later in life.”<sup>59</sup>

The use of sex as an identifying characteristic is relevant in national security administration as well as in state obligations to protect people. For example, sex segregation in prisons, an essential protection measure reflected in international and virtually all domestic detention standards, would be impossible without knowing the sex of citizens. Similarly, programs such as public health rely on sex-specific data as males and females have different health needs.<sup>60</sup> However, argues Spade, “[gender] also frequently operates in contexts where it is an ineffective proxy for determining some other piece of information.”<sup>61</sup> Human Rights Watch argues that “while the state may have a legitimate interest in regulating the manner in which people can change their

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<sup>54</sup> *Id.*

<sup>55</sup> Kyle Knight, *Documents and Disasters: Can Proper ID Save the Lives of Transgender People in Emergencies?*, HUFFINGTON POST (Nov. 15, 2011, 8:06 PM), [http://www.huffingtonpost.com/kyle-knight/documents-and-disasters-c\\_b\\_1092721.html](http://www.huffingtonpost.com/kyle-knight/documents-and-disasters-c_b_1092721.html).

<sup>56</sup> *Id.*

<sup>57</sup> Currah & Mulqueen, *supra* note 10, at 561–62.

<sup>58</sup> CONTROLLING BODIES, DENYING IDENTITIES, *supra* note 6, at 4.

<sup>59</sup> *Id.* at 80.

<sup>60</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 814 (2008).

<sup>61</sup> *Id.* at 803.

legally recognized gender, it should do so in ways that do not violate an individual's human rights."<sup>62</sup>

The task of legally assigning sex or gender to citizens has come up only recently, and often only in countries whose medical institutions have developed extensive technologies that can alter bodies, indicating a physical sex or gender change.<sup>63</sup> Much of the legislation and court decisions have focused on legally assigning sex or gender to post-operative transsexual persons, and many of these decisions have dealt with issues of legally recognizing marriage.<sup>64</sup>

To understand the effects of official documents and identity discrepancy, it is useful to examine the ways in which gender is listed on passports. Passports always list a person's sex. Some governments require that, in order to obtain a passport listing a certain sex/gender, citizens must present government ID documents that list that marker already. Thus, the sex/gender listed on the passport can reflect having navigated a change in other nodes of the government bureaucracy *and* the agency that issues passports.

The International Civil Aviation Organization ("ICAO") adopts "international standards and recommended practices and procedures dealing with . . . [c]ustoms and immigration procedures."<sup>65</sup> According to ICAO standards, name, date of birth, nationality, and sex are mandatory personal data on all international travel documents.<sup>66</sup> ICAO standards for Machine Readable Passports indicate that sex may be listed as unspecified. In the Visual Inspection Zone of the passport, the "sex" field must be filled in as follows:

Sex of the holder, to be specified by use of the single initial commonly used in the language of the State where the document is issued and, if translation into English, French or Spanish is necessary,

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<sup>62</sup> CONTROLLING BODIES, DENYING IDENTITIES, *supra* note 6, at 5.

<sup>63</sup> Greenberg & Herald, *supra* note 22, at 825.

<sup>64</sup> *See id.* at 852-53. *See generally* Debbie S. L. Ong, *The Test of Sex for Marriage in Singapore*, 12 INT'L J.L. POL'Y & FAM. 161 (1998).

<sup>65</sup> Convention on International Civil Aviation art. 37, signed Dec. 7, 1944, 15 U.N.T.S. 295. Standards for machine-readable passports were published in *Doc 9303*. INT'L CIVIL AVIATION ORG., DOC 9303: MACHINE READABLE TRAVEL DOCUMENTS (6th ed. 2006), available at <http://www.icao.int/Security/mrtd/Downloads/Forms/AllItems.aspx?RootFolder=/Security/mrtd/Downloads/Doc%209303/Doc%209303%20English>.

<sup>66</sup> INT'L CIVIL AVIATION ORG., *supra* note 65, pt. 2, vol. 1, fig.III-1.

followed by a dash and the capital letter F for female, M for male, or X for unspecified.<sup>67</sup>

In the Machine Readable Zone of the passport, sex must be marked as “F = female; M = male; < = unspecified.”<sup>68</sup> X is replaced with a “<” filler symbol, which is used in other places, for example, in place of hyphens in names.<sup>69</sup>

Airports are high-security environments. Despite the fact that ICAO standards allow sex to be marked as unspecified, as one of four required data points, it can be a highly scrutinized fact about a person during routine security checks. This can cause problems for gender-variant people. Currah and Mulqueen explain that “a perceived mismatch between the gender marker on [an] ID and the gender [presented] is flagged as an anomaly,” triggering higher levels of scrutiny, and possibly inappropriate treatment, in the security protocols.<sup>70</sup>

While their discussion focuses principally on the concerns of transgender people, Currah and Mulqueen note that “genderqueer or third-gender individuals who eschew the M/F gender binary altogether confound the unity of the category even more.”<sup>71</sup> In other situations of heightened security, properly gendered identification documents can make the difference between accessing life-saving services and being excluded from them.<sup>72</sup>

Two countries provide important case studies for changing gender on official documents, including passports. The policies of Australia and New Zealand shed light not only on the implementation of increasingly progressive and identity-based criteria for gender change, but also demonstrate how a third gender category can be introduced to provide a respectful, accessible, and rights-based option for gender-variant people.

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<sup>67</sup> *Id.* pt.1, vol. 1, § IV, para. 8.6.

<sup>68</sup> *Id.* pt. 1, vol. 1, § IV, para. 9.7.

<sup>69</sup> *Id.* pt. 1, vol. 1, § IV, paras. 9.6–7.

<sup>70</sup> Currah & Mulqueen, *supra* note 10, at 562.

<sup>71</sup> *Id.* at 572.

<sup>72</sup> See INT’L GAY AND LESBIAN HUMAN RIGHTS COM’N & SEROVIE, THE IMPACT OF THE EARTHQUAKE, AND RELIEF AND RECOVERY PROGRAMS ON HAITIAN LGBT PEOPLE 8 (2011), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/504-1.pdf>; CHAMAN PINCHA, OXFAM, INDIAN OCEAN TSUNAMI THROUGH THE GENDER LENS: INSIGHTS FROM TAMIL NADU, INDIA 25, 46–47 (2008), available at [http://www.gdnonline.org/resources/Pincha\\_IndianOceanTsunamiThroughtheGender%20Lens.pdf](http://www.gdnonline.org/resources/Pincha_IndianOceanTsunamiThroughtheGender%20Lens.pdf); In *Pakistan’s Floods, Transgender People ‘Languishing Silently in Pain,’* LGBT ASYLUM NEWS (Oct. 22, 2011), <http://madikazemi.blogspot.com/2011/10/in-pakistan-floods-transgender-people.html>.

Changing gender on Australian documents is possible with a certifying letter from a doctor.<sup>73</sup> Sex reassignment surgery is not required to issue a passport in the preferred gender.<sup>74</sup> However, a letter from a medical practitioner confirming intersex status or appropriate clinical treatment for gender transition is required.<sup>75</sup> If Australian nationals cannot obtain a letter from a doctor, they can apply for a Document of Identity with the gender marker field left blank.<sup>76</sup> They do not need to change their sex on birth or citizenship certificates to be issued a passport or other travel document in the preferred gender.<sup>77</sup> The Australian government applies the ICAO standards thus: “[S]ex is one of four mandatory personal identifiers contained in a passport. [Therefore] a passport must include either the letter M (male), F (female) or X (unspecified).”<sup>78</sup> Even though the X category is denoted as “unspecified,” a non-male, non-female gender category is suggested by this administrative measure.<sup>79</sup>

In New Zealand, transgender and gender-variant people have the option of changing the gender on their passports.<sup>80</sup> In order to make a name change on birth records, however, an appeal must be made to the New Zealand Family Court.<sup>81</sup> The court must be satisfied, along with other matters, that the gender change “will be maintained.”<sup>82</sup> Full gender assignment or reassignment surgery is not necessary.<sup>83</sup> If the court is satisfied, the passport can be changed as well.<sup>84</sup> Absent a declaration from the court, a passport may be issued showing an “X” in the gender field.<sup>85</sup> To obtain the “X,” citizens must submit a statutory declaration indicating how long they have been living in their current

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<sup>73</sup> *Sex and Gender Diverse Passport Applicants: Revised Policy*, AUSTRALIAN PASSPORT OFF., <https://www.passports.gov.au/web/sexgenderapplicants.aspx> (last visited Jan. 27, 2012).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> It should be noted that in at least one case in Australia, despite the government’s issuing a Recognised Details Certificate absent the M/F marker (to an individual who identifies as neither male nor female), the government subsequently declared the certificate genderless and, therefore, invalid. *See* Sean Nicholls, *States To Consider Rights of Genderless People*, SYDNEY MORNING HERALD, Dec. 9, 2010, at 6.

<sup>80</sup> *Information for Transgender Applicants*, DEP’T INTERNAL AFF., <http://www.passports.govt.nz/transgender-applicants> (last visited Jan. 27, 2012).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

gender identity.<sup>86</sup> The declaration must also promise that should their gender identity change in the future through the Family Court process, a new application and full fee will apply in order to have the new gender identity recorded in the passport.<sup>87</sup> Citizens are not required to change their name to apply for a change in gender (including a gender X) passport.<sup>88</sup>

In the 2009 case *Khaki v. Rawalpindi*, the Supreme Court of Pakistan issued a decision ensuring the rights of unis (eunuchs) and establishing legal recognition of a third gender category.<sup>89</sup> International Commission of Jurists categorizes the case as a “transgender recognition case” but notes that, unlike in most transgender recognition cases, the Pakistani Supreme Court did not focus its analysis on the question of gender reassignment surgery when it ordered that a third sex ought to be legally established.<sup>90</sup>

The court ordered that the government “protect the rights and welfare of unis,” and noted that “as far as existing laws are concerned, there are no provisions on the basis of which they can be deprived from their legitimate rights to inherit the properties.”<sup>91</sup> The decision also reinforced that unis are complete citizens of Pakistan like other people and reiterated the unis fundamental right to access education.<sup>92</sup> Similar to Nepal, the court instituted the third gender category by ordering that national identity cards list citizens as such.<sup>93</sup> However the implementation of the order regarding ID cards has yet to take place.<sup>94</sup>

India has used a third gender category in several administrative capacities. In 2005, India’s third gender citizens could start registering for passports as eunuch, denoted by an “E.”<sup>95</sup> In 2009, an “E” designation was added to voter registration documents.<sup>96</sup> And in 2011, the Unique Identification Authority of

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE, *supra* note 26, at 174, 194–95.

<sup>90</sup> *Id.*

<sup>91</sup> *Khaki v. SSP (Operations) Rwp*, Order, (Nov. 20, 2009) (Pak.).

<sup>92</sup> SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE, *supra* note 26, at 174, 194–95.

<sup>93</sup> Zeeshan Haider, *Pakistan’s Transvestites To Get Distinct Gender*, REUTERS, Dec. 23, 2009, available at <http://in.reuters.com/article/2009/12/23/us-pakistan-transvestites-idINTRE5BM2BX20091223>.

<sup>94</sup> *Pakistan Transgressors Pin Hopes on New Rights*, BBC NEWS (Apr. 25, 2011), <http://www.bbc.co.uk/news/world-south-asia-13186958>.

<sup>95</sup> *‘Third Sex’ Finds a Place on Indian Passport Forms*, INFOCHANGE (Mar. 10, 2005), <http://infochangeindia.org/human-rights/news/-third-sex-finds-a-place-on-indian-passport-forms.html>.

<sup>96</sup> *EC’s Decision Comes as Big Reprieve for Eunuchs*, DNA (Nov. 22, 2009, 1:37 AM), [http://www.dnaindia.com/india/report\\_ec-s-decision-comes-as-big-reprieve-for-eunuchs\\_1314939](http://www.dnaindia.com/india/report_ec-s-decision-comes-as-big-reprieve-for-eunuchs_1314939).

India, administering a new government citizen ID number system, allowed “transgender” as a third gender option.<sup>97</sup>

“The ‘E’ designation is noteworthy because it allows the individual to self-identify outside the male-female binary,” argues Rellis.<sup>98</sup> The Indian government—in all of these three processes—requires no proof, medical or otherwise, of third gender status.<sup>99</sup> It is an identity-based category.

In terms of establishing third gender categories, the above considerations of criteria and urgency for appropriate ID are germane: if a third category is going to be adopted across government agencies, how ought these agencies—related to documents and other administrative procedures—develop criteria for identifying people as third gender?

The Nepal Supreme Court’s definition of third gender situated it as a minority encompassing a broad range of identities. However, the court did make clear that the sole criterion for being legally recognized as third gender was based on individual “self-feeling.”<sup>100</sup>

This declaration is in line with Yogyakarta Principle 3, which holds that states must “[t]ake all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person’s profound self-defined gender identity.”<sup>101</sup>

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<sup>97</sup> *Over 12,500 Eunuchs Get ‘Aadhaar,’* ECON. TIMES (Nov. 6, 2011, 9:32PM), [http://articles.economictimes.indiatimes.com/2011-11-06/news/30366592\\_1\\_aadhaar-numbers-uidai-12-digit-unique-identification-number](http://articles.economictimes.indiatimes.com/2011-11-06/news/30366592_1_aadhaar-numbers-uidai-12-digit-unique-identification-number).

<sup>98</sup> Jennifer Rellis, “Please Write ‘E’ in This Box”: *Toward Self-identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223, 233 (2008).

<sup>99</sup> *See id.* (“The passport application does not require detailed proof to request the ‘E’ status; it is as simple as checking the box. Advocates applaud the ‘E’ designation and say it will make travel easier, as hijras will no longer have to dress as men if they leave the country in order to match the gender identity on their passports.”).

<sup>100</sup> *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), *translated in* NAT’L JUD. ACAD. L.J., 2008, at 281 (“Legal provisions should be made to provide for gender identity to the people of transgender or third gender, under which female third gender, male third gender and intersexual are grouped, as per the concerned person’s self-feeling.”).

<sup>101</sup> *Yogyakarta Principles*, *supra* note 9, princ. 3.

### III. IMPLEMENTING THIRD GENDER IN NEPAL

Following the court order, the implementation of Nepal's third gender category sheds light on how self-reporting of an identity in various capacities can be complicated.

The first implementation measure after the decision in *Pant* was the inclusion of a line for sexual and gender minorities in the 2008 federal budget.<sup>102</sup> While the budget does not specifically reference the third gender, this marked the first time a government agency in the country mentioned the umbrella term “sexual and gender minorities” in a fashion unrelated to arrests or human rights violations.<sup>103</sup>

Since 2007, three citizens have successfully registered under a third gender category.<sup>104</sup> On September 17, 2008, Bishnu Adikhari became the first Nepali citizen to gain official legal recognition as third gender on his citizenship ID card.<sup>105</sup> Badri Pun staged a two-week sit-in at the local issuing office in his district and was the next Nepali citizen to receive a third gender ID card in April 2011.<sup>106</sup> Both of these third gender citizens were born biologically female, which underscores the breadth of the third gender category in Nepal going beyond the “berdache” or *meti* category.<sup>107</sup>

Each success case was underpinned by relentless personal advocacy at a local district level. However, none of the three officially recognized third gender citizens has suffered any discrimination since obtaining the ID cards—just administrative hassles. In September 2011, Pun applied for a passport with

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<sup>102</sup> *Bhattarai Unveils Annual Nepal Budget for 2008/09*, NEPAL MONITOR (Sept. 20, 2008, 11:31 AM), [http://www.nepalmonitor.com/2008/09/bhattarai\\_unveils\\_an.html](http://www.nepalmonitor.com/2008/09/bhattarai_unveils_an.html).

<sup>103</sup> *Id.* (“The state will accord special priority to solve the core problems of Nepali people relating to sexual and gender minorities and a common house for 50 people will be provisioned to live together for their socialization.”).

<sup>104</sup> Knight, *supra* note 55. In 2007, one citizen was able to register her gender as “both.” Charles Haviland, *Nepali Becomes Both Man and Woman*, BBC NEWS (Feb. 4, 2007, 3:19 GMT), <http://news.bbc.co.uk/2/hi/6329613.stm>.

<sup>105</sup> Rachel Charman, *Nepalese Lesbian Recognized as ‘Third Gender,’* PINK NEWS (Sept. 22, 2008, 11:02 AM), <http://www.pinknews.co.uk/news/articles/2005-9066.html>.

<sup>106</sup> Sunil B Pant, *Third Gender Badri Pun Got Citizenship from Myagdi District Administration Despite Home Ministry’s Reluctance*, BLUE DIAMOND SOC’Y, [http://www.bds.org.np/badri\\_pun.html](http://www.bds.org.np/badri_pun.html) (last visited Apr. 9, 2012); *Third Gender Issued Citizenship Certificate*, HIMALAYAN TIMES (Apr. 15, 2011, 6:57 PM), <http://www.thehimalayantimes.com/fullNews.php?headline=Third+gender+issued+citizenship+certificate&NewsID=284117>.

<sup>107</sup> See Charman, *supra* note 105; Pant, *supra* note 106; *Third Gender Issued Citizenship Certificate*, *supra* note 106.

his third gender citizenship ID card in hand; his request was denied.<sup>108</sup> The Ministry of Foreign Affairs claimed they did not have the capacity to issue third gender passports because their software would not allow it, and that they were not obligated by law to issue such passports; the Home Ministry (the agency responsible for issuing ID cards) supported this claim despite the fact that the petitioner held a third gender ID card.<sup>109</sup> BDS filed a petition<sup>110</sup> in the Supreme Court of Nepal, and the court has asked the Ministry of Foreign Affairs to show cause for this rejection.<sup>111</sup> To date, the Ministry has not replied.

Since 2010, the Nepal Election Commission has allowed citizens to register to vote as a third gender.<sup>112</sup> The commission based the registration process entirely on self-identification per the court's order, and it did not require the registered gender to match any other documents.<sup>113</sup>

The most far-reaching implementation of the third gender category in Nepal, however, was the introduction of a third gender option on the 2011 federal census.<sup>114</sup> Heralded as the world's first national census to include a gender category other than male or female,<sup>115</sup> Nepal's federal census takes place in two phases: a Household Registry, which visits every home in the country; and a full census, which visits every eighth home.<sup>116</sup> The forms used by the Central Bureau of Statistics ("CBS") in the Household Registry phase—

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<sup>108</sup> Shirish B Pradhan, *Third Gender Denied Passport in Nepal*, MSN NEWS (July 24, 2011, 5:14 GMT), <http://news.in.msn.com/international/article.aspx?cp-documentid=5313870>.

<sup>109</sup> Anil Giri, *MRP Regime Can't Read 'Third Gender'*, KATHMANDU POST (July 25, 2011, 10:16 AM), <http://www.ekantipur.com/2011/07/25/national/mrp-regime-cant-read-third-gender/337969.html>.

<sup>110</sup> *Buduja v. Nepal*, Order of Mandamus According to Article 32 and 107(2) of Interim Constitution of Nepal 2063 (unofficial translation used) (on file with authors).

<sup>111</sup> Interview with Sujan Panta, Advocate, Blue Diamond Soc'y, in Kathmandu, Nepal (Apr. 4, 2012).

<sup>112</sup> *Efforts To Boost 'Third Gender' Rights in Nepal*, UNITED NATIONS DEV. PROGRAMME (Aug. 9, 2011), <http://www.undp.org.np/newsroom/details.php?n=1338>.

<sup>113</sup> Sunil B Pant, *Third Genders Is Being Counted by Nepal's Election Commission for the Upcoming Election's Voter's List*, US NEPAL ONLINE (Nov. 11, 2010, 8:52 PM), <http://usnepalonline.com/english-section/third-genders-is-being-counted-by-nepals-election-commission-for-the-upcoming-elections-voters-list.html>.

<sup>114</sup> India added a third gender category to its 2011 census as well, shortly after the Nepal announcement was made. Tom Basgil Jr., *Nepal Includes Transgender People in Census*, CHANGE.ORG (Jan. 14, 2011, 2:02 AM), <http://news.change.org/stories/nepal-includes-transgender-people-in-census>.

<sup>115</sup> Shrestha, *supra* note 7.

<sup>116</sup> Kyle Knight, *Separate and Unequal*, KATHMANDU POST (Aug. 31, 2011), <http://www.ekantipur.com/the-kathmandu-post/2011/08/31/oped/separate-and-unequal/225780.html> [hereinafter Knight, *Separate and Unequal*]; Kyle Knight, *What We Can Learn from Nepal's Inclusion of 'Third Gender' on Its 2011 Census*, NEW REPUBLIC (July 18, 2011, 12:00 AM), <http://www.tnr.com/article/world/92076/nepal-census-third-gender-lgbt-sunil-pant>.

which visited every home in the country to collect basic demographic data—allowed Nepali citizens to identify as male, female, or third gender (*tesro lingi*).<sup>117</sup>

In theory, including the category on the household registry would give an official count of the number of people in the country who identify as third gender. But the enumeration proved problematic, and the data collected were limited. Many third gender citizens had to fight to be recorded properly; reports of discrimination and fraud surfaced, accusing enumerators of using pencil to record their gender instead of the CBS-mandated blue ink.<sup>118</sup> There were also issues of disclosure. Some people brave enough to identify themselves report that they were teased or harassed by census enumerators when they asked to be listed as third gender.<sup>119</sup>

Compounding these research complications, citizens were allowed to register only as male or female on the second census form (which was administered at every eighth household in the country to capture a sample), which asked more than fifty questions ranging from religion to water source to occupation.<sup>120</sup> The enumerators employed for this phase visited every eighth household recorded on the Household Registry Form, but failed to record third gender citizens as such. Thus, the data recorded in the broader census was only linked to male and female categories.<sup>121</sup>

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<sup>117</sup> CENT. BUREAU OF STATISTICS, NATIONAL POPULATION CENSUS 2011-NEPAL: HOUSE/HOUSEHOLD LISTING FORM (2011), <http://www.census.gov.np/images/pdf/HHListing%20FormEng.pdf>.

<sup>118</sup> Knight, *Separate and Unequal*, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> CENT. BUREAU OF STATISTICS, NATIONAL POPULATION CENSUS 2011-NEPAL: SCHEDULE 1 (2011), [http://census.gov.np/images/pdf/Nepal%20PopCensus%202011%20Questionnaire%20Schedule%201%20\(sample\).pdf](http://census.gov.np/images/pdf/Nepal%20PopCensus%202011%20Questionnaire%20Schedule%201%20(sample).pdf).

<sup>121</sup> The CBS guidelines for census enumerators (published in the *Handbook for Enumerators*), geared only toward the second phase implementation, read as follows:

1. Male 2. Female

In this section, you should confirm the biological sex of the person and tick 1 if he is a male and tick 2 if he is a female. Every enumerated person shall be identified whether they are male or female. In time of collecting the information, if the person is before you, you shall ask and write it down. Most of the time, you can figure out the sex through their names. But in some cases, the names could be same for male and female. And also, in account of the small children, you shall ask the respondent about their sex. If it is hard to figure out whether the respondent is male or female, you should ask the respondent and write down whatever they prefer to put under, male or female.

Two months later, the CBS conducted a “post-enumeration survey of approximately 10,000 homes,”<sup>122</sup> and asked

six questions: name, age, relationship to head of household, interviewee location during the initial census, arrivals in the household, departures from the household, and gender. But similar to the second form of the census, citizens, no matter how they registered in the household survey, [were] only able to identify as male or female.<sup>123</sup>

Preliminary data published by the CBS revealed a zero count for third gender citizens.<sup>124</sup> Advocacy groups spoke out against the lack of real counting as had been promised.<sup>125</sup>

Observers have noted Nepal’s third gender as a positive development. For example, Nepal’s report to the UN General Assembly Special Session on HIV and AIDS identifies the legal recognition of a third gender as a “best practice” for combating HIV.<sup>126</sup> The bureaucratic processes of implementing an identity-based third gender category shed light on the complexity of such a category existing in a society. However, as Nepal (and the other countries discussed) has demonstrated, the task is not impossible.

#### IV. A THIRD GENDER IN INTERNATIONAL LAW

There are several possible arguments in human rights law for requiring states to recognize one’s gender identity and give individuals the option of indicating their gender identity or declining to specify a gender on identity documents and in other official records.

First, official recognition of one’s gender identity is required to guarantee the right to recognition as a person before the law. Recognition as a person before the law is both a right in itself, guaranteed in numerous human rights

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<sup>122</sup> Knight, *Separate and Unequal*, *supra* note 116.

<sup>123</sup> *Id.*

<sup>124</sup> Kyle Knight, *Zero in 26,620,809*, KATHMANDU POST (Oct. 2, 2011, 8:16 PM), <http://www.ekantipur.com/the-kathmandu-post/2011/10/01/oped/zero-in-26620809/226915.html>.

<sup>125</sup> Gopal Sharma, *Nepal’s Gay Say ‘Cheated in Census Count,’* TR. L. (Sept. 30, 2011, 11:46 PM), <http://www.trust.org/trustlaw/news/nepals-gays-say-cheated-in-census-count>.

<sup>126</sup> MINISTRY OF HEALTH & POP. ET AL., UNGASS COUNTRY PROGRESS REPORT NEPAL 2010, at 53 (2010), [http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/progressreports/2010countries/nepal\\_2010\\_country\\_progress\\_report\\_en.pdf](http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/progressreports/2010countries/nepal_2010_country_progress_report_en.pdf).

instruments,<sup>127</sup> and a critical means for the exercise of other rights. The link between legal recognition and the enjoyment of other rights is reflected in some of the international instruments. For example, in the American Declaration of the Rights and Duties of Man, the “right to be recognized everywhere as a person having rights and obligations” is coupled with the right “to enjoy the basic civil rights.”<sup>128</sup> The Convention on the Rights of the Child addresses aspects of the right to recognition as a person in two detailed articles, requiring birth registration and providing for the right to a name and the right of the child to preserve his or her identity.<sup>129</sup>

More generally, recognition as a person is essential to reflect the dignity and worth of every person and reaffirm our common humanity. Such recognition gives effect to the reminder in the Universal Declaration of Human Rights that “[a]ll human beings are born free and equal in dignity and rights.”<sup>130</sup> Indeed, the African Charter explicitly links the right to have one’s human dignity respected with recognition of legal status: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”<sup>131</sup>

Along similar lines, in the Yogyakarta Principles, the principle reaffirming the right to recognition before the law specifies 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

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<sup>127</sup> See, e.g., Convention on the Rights of Persons with Disabilities art. 12, *opened for signature* Mar 30, 2007, 999 U.N.T.S. 3 (entered into force May 3, 2008); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 24, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93 (entered into force July 1, 2003); CRC, *supra* note 52, arts. 7, 8; African Charter on Human and Peoples’ Rights art. 5, *opened for signature* June 26, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986) [hereinafter African Charter on Human and Peoples’ Rights]; Convention on the Elimination of All Forms of Discrimination Against Women art. 15, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); American Convention on Human Rights. art. 3, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978); ICCPR, *supra* note 51, art. 16; UDHR, *supra* note 51, art. 6; see also Guiding Principles on Internal Displacement, Annex, § II, princ. 20(2), U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

<sup>128</sup> American Declaration of the Rights and Duties of Man art. 17, May 2, 1948, OAS Res. XXX.

<sup>129</sup> CRC, *supra* note 51, arts. 7, 8.

<sup>130</sup> UDHR, *supra* note 51, art. 1.

<sup>131</sup> African Charter on Human and Peoples’ Rights, *supra* note 127, art. 5; see also International Convention for the Protection of All Persons from Enforced Disappearance art. 19(2), *opened for signature* Feb. 6, 2007, U.N. Doc. A/HRC/RES/2006/1 (entered into force Dec. 23, 2010) (“The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.”).

freedom.”<sup>132</sup> The preamble to the Yogyakarta Principles usefully notes that gender identity is used:

to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>133</sup>

Second, reading the right to recognition as a person together with other rights strengthens the conclusion that states must give official recognition to one’s self-defined gender identity.

For example, the right to preserve one’s identity is guaranteed by Article 8 of the Convention on the Rights of the Child.<sup>134</sup> Article 8 specifies three aspects of identity—nationality, name, and family relations—but it is clear that that list is not exclusive.<sup>135</sup> Accordingly, it should protect against other forms of interference in children’s identity. Read together with the right to protection from arbitrary interference in privacy<sup>136</sup> and the general provisions on recognition as a person before the law contained in other instruments, the right to preserve one’s identity reasonably extends to the way one’s identity is reflected on state-issued documents.

Because some people do not grapple with issues of gender identity until they are adults, and those who do may not confront the challenges presented by identification documents until they have reached adulthood, the provisions of the Convention on the Rights of the Child may not be directly applicable, although they can usefully inform the discussion.

But even if the right to preserve one’s identity vanishes with adulthood—a conclusion that seems unlikely—the state’s refusal to record a person’s self-identified gender identity on official documents touches, or very nearly so, the core of one’s sense of self. Such an intrusion on the core self arguably violates

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<sup>132</sup> *Yogyakarta Principles*, *supra* note 9, princ. 3.

<sup>133</sup> *Id.* pmb1.

<sup>134</sup> CRC, *supra* note 51, art. 8.

<sup>135</sup> *Id.* art 8(1) (“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”) (emphasis added).

<sup>136</sup> *See, e.g., id.* art. 16; ICCPR, *supra* note 51, art. 17.

the right to privacy. It also treats differently those whose gender identity does not necessarily correspond with the sex they were assigned at birth, and it does so without a reasonable basis in violation of the right to freedom from discrimination.

Several cases from the ECtHR essentially apply this analysis. For example, that court held that refusal to change identification documents and legal identities to reflect post-operative gender amounted to discrimination and violated the right to respect for private lives.<sup>137</sup> In another case, that court found that Germany had failed to respect “the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination.”<sup>138</sup> The ECtHR also stated in that decision that “the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.”<sup>139</sup>

Third, the refusal of states to reflect chosen gender identity on documents may also violate the right to freedom of opinion and expression. As the Yogyakarta Principles note, “the right to freedom of opinion and expression . . . includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means.”<sup>140</sup> Accordingly, the principles call on states to take all necessary measures “to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means.”<sup>141</sup> The jurisprudential notes to the Yogyakarta Principles suggest that the drafters had in mind violence prompted by, and state criminalization of, particular choices of dress,<sup>142</sup> but the designation of gender is an expression of identity or personhood of the same order as a choice of name. A state’s refusal to accept a person’s self-identified gender identity for identification documents effectively compels that person to express another identity.

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<sup>137</sup> See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 33–37; *I v. United Kingdom*, Eur. Ct. H.R. (July 11, 2002), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “25680/94” in the “Application Number” box); *B. v. France*, Eur. Ct. H.R. 1992 Eur. Ct. H.R. 33, 50–53.

<sup>138</sup> *Van Kuck v. Germany*, 2003-VII Eur. Ct. H.R. 1, 23.

<sup>139</sup> *Id.* at 22.

<sup>140</sup> *Yogyakarta Principles*, *supra* note 9, princ. 19.

<sup>141</sup> *Id.* princ. 9(c).

<sup>142</sup> JURISPRUDENTIAL ANNOTATIONS TO THE YOGYAKARTA PRINCIPLES 44 (2006), <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf>.

Fourth, it is possible to argue that it is a violation of a person's freedom of conscience to force that individual to identify publicly as a gender other than the one with which the individual identifies. The innate nature of gender identity makes it more akin to a matter of conscience than one of opinion or expression. The International Convention on Civil and Political Rights protects the right to freedom of thought and freedom of conscience along with the right to freedom of religion and belief.<sup>143</sup> As the Human Rights Committee has noted, the right to freedom of thought, conscience, and religion "is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others."<sup>144</sup> The Human Rights Committee further observes that "the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief."<sup>145</sup>

Freedom of thought and conscience and the freedom to have or adopt the religion or belief of one's choice are absolute; they cannot be limited in any way.<sup>146</sup> Nor can one be coerced to have or adopt a religion or belief. However, outward manifestations of religion or belief can be restricted if the limitations are "prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."<sup>147</sup> For that reason, the distinction between holding and manifesting a thought, matter of conscience, religion, or belief is important.

A requirement to indicate on identity documents a gender different from one's actual gender identity is arguably a form of coercion to have or express a particular thought, matter of conscience, or belief. But even if such a requirement is read as controlling only the manifestation of thought, conscience, or belief, the requirement would not appear to pass the test of necessity. The fact that international standards permit travel on passports that do not indicate sex casts considerable doubt on any public safety or public order justification; nor are there any compelling public health or moral

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<sup>143</sup> ICCPR, *supra* note 51, art. 18; *see also* U.N. Hum. Rts. Comm., General Comment No. 22, para. 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) [hereinafter General Comment No. 22] (noting that freedom of religion includes freedom of belief).

<sup>144</sup> General Comment No. 22, *supra* note 143, para. 1.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at para. 3.

<sup>147</sup> ICCPR, *supra* note 51, art. 18(3); *see also* General Comment 22, *supra* note 143, paras. 3, 8.

interests in forcing people to bear documents listing a gender other than their own.<sup>148</sup>

Fifth, official acknowledgement of third gender status may serve as a check on official and private acts of harassment and violence. The Committee Against Torture has noted that “actual or perceived non-conformity with socially determined gender roles”<sup>149</sup> increases the risk that an individual will be subjected to harassment and violence. Reports of violence at the hands of police in Nepal<sup>150</sup> and elsewhere in the world against those who do not

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<sup>148</sup> Without applying the test for limitation of the right to freedom of religion or belief, the ECtHR found that Turkey violated the right by compelling individuals to list a religion on their identity cards, observing that the freedom to manifest one’s religion or beliefs has a negative aspect, meaning that an individual has the right not to be obliged to disclose his or her religion or to act in a manner that might enable conclusions to be drawn as to whether or not he or she held such beliefs. *See Affaire Sinan Işık v. Turquie*, Eur. Ct. H.R. para. 52 (Feb. 2, 2010), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Affaire Sinan Işık” in the “Case Title” box and “Turquie” in the “Respondent State” box).

<sup>149</sup> Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, para. 22, UN Doc. CAT/C/GC/2 (Jan. 24, 2008), available at <http://www.unhcr.org/refworld/docid/47ac78ce2.html>.

<sup>150</sup> The Special Representative of the Secretary-General on the Situation of Human Rights Defenders states:

According to information received, on the evening of 14 July 2007, Mr Chimling was approached for help by an acquaintance who informed him that herself and four other transgender persons or ‘metis’ were subject to beatings and sexual abuse by three policemen from Janasewa Police Station in Ratna Park, Kathmandu. Mr Chimling called the emergency number to alert the police. When two policemen from Durbar Marg Police Station arrived, they, together with Mr Chimling, continued to the park where the three policemen from Janasewa Police Station, including the Sub-Inspector Pradeep Chand, were beating the four remaining metis. However, the policemen only watched the incident without wanting to intervene. The Sub-Inspector recognised Mr Chimling and started searching his bag while simultaneously beating him with batons, and kicking him on the back, legs and face. When the Sub-Inspector found that Mr Chimling was carrying condoms in his bag, he proceeded to verbally abuse him and said that he was behaving in an immoral and illegal manner. The Sub-Inspector then instructed the two policemen from Durbar Marg Police Station to take Mr Chimling and one of the other metis into custody.

Special Representative of the Secretary-General on the Situation of Human Rights Defenders, *Addendum: Summary of Cases Transmitted to Governments and Replies Received*, para. 1,493, U.N. Doc. A/HRC/7/28/Add.1 (Mar. 5, 2008) (by Hina Jilani). The report goes on to state:

The Government response stated that, the location of the alleged incident, Thamel, was one of the most crowded areas in Kathmandu, and as such was the scene of regular clashes and arguments. The letter further stated that the police were merely engaged in facilitating the smooth flow of traffic and had not been involved in taking photographs or filming the activities of the aforementioned, nor had they verbally abused or harassed them.

*Id.* para. 1,516; *see also* Special Representative of the Secretary-General on the Situation of Human Rights Defenders, *Addendum: Summary of Cases Transmitted to Governments and Replies Received*, para. 485, U.N. Doc. A/HRC/4/37/Add.1 (Mar. 27, 2007) (by Hina Jilani) (reporting a July 2006 incident in which police

conform to such gender roles bear out the committee's observation.<sup>151</sup> In addition to the possibility that official acknowledgement of a person's self-identified gender identity may decrease such acts of violence, official documentation gender reflecting third gender status would put police on notice that individuals who are legitimately arrested and detained should be held separately from men and women.<sup>152</sup>

Sixth, official acknowledgement has positive implications for other human rights. Although the lack of accepted identity documents should not preclude the enjoyment of other rights, the reality is that identification is often required to attend school, hold a job, open a bank account, receive medical care, vote, and conduct many other aspects of daily life. The lack of legal recognition can therefore lead to infringements on the rights to an education, to work, to an adequate standard of living, to the highest attainable standard of health, and to political participation, among other rights. It can increase the risk of exploitation and can impede the right to freedom of association.<sup>153</sup> In addition, lack of legal recognition increases the risk of exploitation. It has obvious implications for the right to marry and found a family and the right of children

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forced *metis* to show their faces for photos and video, verbally harassed them, and threatened them with arrest and detention when asked why photos and video were being taken); Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Addendum: Communications to and from Governments*, para. 454, U.N. Doc. A/HRC/4/34/Add.1 (Mar. 19, 2007) (by Yakin Ertürk) [hereinafter U.N. Doc. A/HRC/4/34/Add.1] (reporting the beating of three *metis* in January 2005 by police, one of whom said, "These *hijras* . . . pollute the society and must be cleaned out").

<sup>151</sup> See, e.g., Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Addendum: Summary of Information, Including Individual Cases, Transmitted to Governments and Replies Received*, para. 317, U.N. Doc. A/HRC/4/33/Add.1 (Mar. 20, 2007) (by Manfred Nowak) (reporting that police in the United Arab Emirates arrested twenty-six men in November 2005, "apparently act[ing] in response to allegations that the men were carrying out homosexual acts and that some of the men were wearing women's clothing or make-up").

<sup>152</sup> For example, in a 2007 case in Honduras involving perceived sexual orientation, the NGO Arcoiris reported that four other detainees beat, stripped, and raped a detainee after a police agent announced, once the detainee was locked in a cell with fifty-seven other men, "[M]iren, aquí les traigo a una princesita, ya saben lo que tienen que hacer" ("Look, here I'm bringing you a little princess; you know what you have to do"). Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Addendum: Summary of Information, Including Individual Cases Transmitted to Governments and Replies Received*, para. 80, UN Doc. A/HRC/7/3/Add.1 (Feb. 19, 2008) (by Manfred Nowak).

<sup>153</sup> In Argentina, for example, the state denied legal recognition to a trans organization in 2003 because it concluded that the goals of the organization—that the state and society accept *travestismo* as an identity and recognize that *travestí* and transsexual culture make positive contributions to society—were not objectives in the public interest. See U.N. Doc. A/HRC/4/34/Add.1, *supra* note 150, para. 29. The government responded that the public interest (*bien común*) required not only that the purposes of an organization be lawful but also that the organization be "socially useful" for the community as a whole; in its view, the promotion of equality for *travestís* and transsexual persons benefitted only those individuals. See *id.* para. 36.

to know and be cared for by their parents. In some cases, lack of legal recognition can result in deprivation of citizenship and even statelessness.

### CONCLUSION

Nepal stands as the world's example of comprehensively introducing a third gender category for people who do not identify within the male–female binary. Nepal's constitution—which includes rights for people who identify as a third gender—is in the final stages of drafting, and a new civil and criminal code will follow. Both the 2007 *Pant* decision and its subsequent implementation shed light on the struggle to properly define and implement a gender category. And while establishing a third gender category is far from the only way to legally acknowledge gender-variant people, international law supports individuals' rights to identify on documents and in registries as a third category, and Nepal's experience demonstrates how it can be conducted in a human rights-compliant way. The endurance of Nepal's third gender as a legal category remains to be seen. However as a protective measure and a mode of access to rights for gender-variant people, the category appears to be an effective method.