

**Submission to the UPR mechanism for the Third Cycle review of
Nepal**

Human Rights Issues Related to LGBTIQ in Nepal

Submitted by :

Submitted by the coalition of the stakeholders working for human rights issues of LGBTIQ people in
Nepal

Executive Summary:

This is a joint civil society report submitted by Mitini Nepal and networks and organizations working on the rights of sexual and gender minorities of Nepal (the list is provided in the Annex), which has been prepared for the submission of the third UPR cycle of Nepal.

As the civil society, space is shrinking and issues of exclusion of the feminist organizations are becoming more prevalent, groups representing minorities of different fronts are discriminated against mainly because of their gender identities, sexual orientation, geography, caste, class, race, ethnicity, and religion. This calls for the separate UPR report to hold the government of Nepal accountable to implement the UPR recommendations, which have been noted, and which have been undertaken by the government. This report traces the situational analysis, the achievements at different fronts, gaps and challenges of the planning and the implementation and the recommendation for future actions. It relies on recommendations Nepal received during UPR reviews and by the CEDAW, and also references the parallel report submitted by civil society for the CSW 64, national legal provisions, and consultation reports with the Lesbian, Bisexual, Transgender, Intersex, Queer(LGBTIQ) community. The thematic areas and the relevant sub themes were classified under various headings.

As to ensure the inclusive participatory process to prepare this report, different participatory tools were adopted, the wide geographical ranges were covered and stakeholders were reached out. Mitini Nepal organized provincial level consultations ensuring the participation from districts within the respective provinces. Altogether 5 provincial consultations were carried out with involvement of right holders from all the 7 provinces of the country, between January and March 2020 with altogether of 138 participants representing diversity within the LGBTIQ community. The national validation consultation was conducted in Kathmandu on 1st March 2020 where different networks, organizations and groups working for the rights of LBTIQ were invited and a wider validation of the information and discussion was held for constructive feedbacks and inputs.

Mitini Nepal team is grateful to Gyanbodh Research and Development Pvt. Ltd for the sharing of expertise in facilitation and for the preparation of this report and Amplify Change for the financial support catered during the whole process of consultations. Nevertheless, Mitini Nepal is thankful to the LGBTIQ community members, executive board members, staff, volunteers, network partners for all the support and solidarity throughout the movement. Together we will move forward better, envisioning a better world for LGBTIQ with fulfillment of human rights.

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1. Introduction

This submission complements the joint UPR NGO Submission. It was prepared by Mitini Nepal, organization working for the rights of LGBTIQ in Nepal. The report focuses on the human rights issues of Lesbian, Bisexual, Transgender, Queer, Intersex (LBTQI) people, related to their sexual orientation, gender identity and expression, and sex characteristics and the how it devalues and denies the exercising of human rights of LGBTIQ compounded with the social stigma and the discriminatory provisions reflected at the Constitutional and legislative framework and the different acts that are based on this.

Recommendations from Nepal's first and second UPR review on sexual and gender minorities have been reviewed throughout while preparing this report.

Key Words: *LGBTIQ Nepal ; gender identity and sexual orientation ; discrimination; right to life, security; education ; health ; right to marriage and family; equality ; constitutional and legal provisions*

1.1 Recommendations from the previous UPR cycle to the government related to LGBTIQ issues

UPR first cycle reports also recommend undertaking the participatory efforts to implement UPR recommendations such as A/HCR/17/5, para 1-6.56 (Norway) which has not been implemented. The implementation of the Supreme Court's 2008 decisions A/HRC/17/5 para-106.23 United States of America and A/HRC/17/5, para. 106.23 –Norway was recommended and there have been some positive steps taken but still discrimination exist against LGBTIQ people. The recommendation from first UPR 2011, also has been provided to ensure non –discrimination based on sexual orientation A/HRC/17/5, para 106.23 – New Zealand however this hasn't been implemented. The UPR recommendations from UPR 2011 should be implemented and further to this, the Criminal Code Section 226 has provision against LGBTIQ, which needs to be reviewed and amended. The first UPR 2011 and Second UPR 2015 has recommendations to establish mechanisms to investigate and punish culprits of case of discrimination against LGBTI A/HRC/31/9,para 122.42- Spain, the sexual harassment prevention act 2015 which came into action, but still there aren't any special mechanisms in place. The first UPR 2011 and second UPR 2015, has recommended on the strengthening the protection of LGBTI people and work towards the full implementation of the current laws (recommended by Israel) however this hasn't been fully reflected at the implementation level. The recommendation from UPR first and second cycle under the theme Human rights policies provided by Sweden and Israel are yet to be adopted and the implementation at the levels of Article 18 of the Constitution, inclusion of the LGBTIQ people in the list of minority as defined by the Ministry of Home Affairs of Nepal, Citizenship act, non discriminatory participation in election, provision on right to marriage needs

to be reviewed and amended.

1.2 Framework with issues and the recommendations:

1.2.1 Constitutional and legislative framework

Nepal's Constitutionⁱⁱⁱ promulgated in 2015, has recognized rights of LGBTIQ communityⁱⁱⁱⁱ, legally decriminalized same-sex relationships^v, and introduced new laws strengthening the community, which is commendable. Despite of this, the provision of citizenship^{vi}, the property transfer for the people from LGBTIQ community has not been implemented even after the recommendations of second cycle of UPR. The constitutional rights for LGBTIQ people are still not exercised. The 2015 Constitution has ensured the rights to equality before the law ^{vii} but the right to non-discrimination for sexual and gender minorities in Nepal hasn't been mentioned. Now, for the people to get citizenship card, the medical certificate of sex change surgery is needed to get the citizenship under the gender identity preferred as stated in the Citizenship Act, 2017. In respect to the Social Inclusion Act, 2017 and social security act, 2020; separate specific provision that enlists the protection and upliftment of the LGBTIQ community do not exist.

1. Recommendations

- i.** The Government of Nepal (GON) should amend the Constitution to ensure equality before the law ^{viii} for LGBTIQ community people. Firstly, this can be achieved by amending Article 12 of the Constitution which will guarantee citizenship to them without any requirement for the sex change surgery certificates and the ability to acquire the citizenship and to transfer the citizenship to their children with rights to have family.
- ii.** In the spirit of the Constitution of Nepal 2015, the GON should enact the necessary federal provincial laws, policies and guidelines which must develop in such a way to ensure that minority groups are able to enjoy their rights by strictly specifying the LGBTIQ people under the government definition of minorities. Furthermore this should be complemented by the enactment of necessary and adequate local government level laws and provisions to achieve better security for this community through easy access to justice.
- iii.** The GON should amend these inconsistencies in the Civil Code by drafting and approving a Marriage Equality Act for every individual regardless of their gender identity and sexual orientation.
- iv.** The GON needs to update and make additional provisions regarding the safety and security of this community. This needs to be considered by the government in the country where the sexual and gender minor groups exist more than six lakhs

- (600,000) population.^{ix}
- v. UPR first cycle report also recommended undertaking the participatory efforts to implement UPR recommendations^x which has not been implemented.
 - vi. The implementation of the Supreme Court's decisions^{xi} was recommended and there have been some positive steps taken but still discrimination exists against LGBTIQ which needs to be addressed.

1.2.3 Right to non-discrimination and Gender Equality

Government has adopted the Gender Equality Act^{xii} in 2063 but implementation is lacking. Nepal has progressively recognized the terminology 'third gender', which is still debatable in the community as the majority of the people from this group also have reservation to this terminology as this doesn't reflect their gender identity but rather portray the subordination. From the consultation with the different groups of LGBTIQ people, they preferred using the terms and gender identity as decided on their own rather than putting the whole groups in the blanket terminology of 'third gender.' The recommendation from first UPR 2011^{xiii}, has been provided to ensure non –discrimination based on sexual orientation. However this hasn't been implemented.

1. Recommendations

- i. Government should amend the Gender Equality Act and reflect the “*non –binary*” gender reality of Nepal and also initiate necessary policies to engage the right holders to institutionalize the identity they define.
- ii. The UPR recommendations from UPR 2011 should be implemented. Also, the Criminal Code^{xiv} has provision that prohibits persons to have “unnatural sexual intercourse” with another person without his or her consent, which is entirely against LGBTIQ community. Hence the definition and the understanding of the “unnatural and natural sexual intercourse” need to be reviewed and amended. Government needs to repeal all criminal provisions that are discriminatory in the basis of sexual orientation, including the prohibition of unnatural sexual intercourse.

1.2.4 Right to life, liberty and security

The identity of LGBTIQ people has often been named synonymous to the subject of mockery and harassment both in the private and public spheres. Various names, which are derogatory such as 'Mangmehra', 'Mogiyahawa', 'Natuwa', 'Nachaniya', etc., are used as slurs.^{xv} The LGBTIQ people are portrayed in the media as jokes and useless characters, which is then reflected back in the day-to-day life. This creates a threat to the lives of LGBTIQ people as even in the case of serious violence, the authorities would be reluctant to proceed with the legal cases and the

security for LGBTIQ is more challenged.

1. Recommendations

- i. Political leaders and other influential figures should speak out against stigmatization and hate speech directed at the LGBTIQ people. This can be achieved by making necessary provisions in law, where it should mention that no discriminatory remarks to be made against people of LGBTIQ community and also there should be avoidance of derogatory words against LGBTIQ community people and perpetrators should be brought *under the jurisdiction in the law*.
- ii. The government should provide awareness raising and education programmes around LGBTI issues for police and local administration^{xvi}

1.2.5 Right to Life free of Violence

The gender binary is highly practiced in the everyday life and this is also reflected in the policies and the enactment. The different types of violence committed prominently against LGBTIQ are physical abuse, sexual harassment, verbal and mental abuse. The first and second cycle UPR have recommendations to establish mechanisms to investigate and punish culprits of case of discrimination against LGBTIQ and although, the sexual harassment prevention act 2015 came into action, but still no special mechanisms have been in place.

1. Recommendations:

- i. Enact consolidated law addressing all types of violence effectively, including adequate victim and witness protection mechanisms; compensation from state; no limitations on the statute on the violence like rape; and measure to address the special cases handling it with the cautiousness as it is done in the cases of Violence Against Women (VAW).
- ii. Adopt and adhere to the Supreme Court decision about the nature of rape stating that “rape not confined between only biological men and women but that could be acted by people between same sexes.” The notion of women should be broadened in the legal policies and its implementation for the protection of women should not only include women but also women who are transgender and intersex that have accepted their identity beyond the gender binary norms.
- iii. The GON should amend the Sexual Harassment at Workplace Prevention Act, 2015 and define the term “workplace” more clearly and vividly where it should also mention clearly that the workplace office also means schools, hospitals and other institutions and also make specific reference to the prevention of sexual harassment of LGBTIQ people.

1.2.6 Right to Quality Education^{xvii}

The LGBTIQ individuals face discrimination from the school administration, bullying, mistreated from teachers and peer circle^{xviii}. The infrastructures in academic institutions of not having unisex toilets make things difficult for students from these groups. All these various reasons, lead to the early dropouts and hindrance towards the rights to education^{xix}. For the ones, who attain the education have mismatched names after they reveal their gender identity and the names in their academic certificates do not match with their identity creating terrible impacts on opportunities of further higher education and employment opportunities.

1. Recommendation:

- i. The academic curriculum structure of students (from the beginning of primary level to upper higher education) needs to be revised, restructured, remade and in it there should be inclusions of chapters regarding the gender identity and the sexual orientation that will build a base of awareness among people of younger generation.
- ii. The teachers and the administration of the academic institutions should be properly oriented and guided to deal with any of the situations that may hinder the progress and growth of educational, skill and knowledge during the premises of such institution. Furthermore the professionals / lawmakers, parents, teachers, administration and students should be involved in educational infrastructural development by making necessary progressive laws and provisions that will help in the achievements and insurance of the human rights entitled “right to quality education” of LGBTIQ people.

1.2.7 Right to quality health

Due to social discrimination and lack of access of the health services, LGBTIQ people are unable to exercise their right to health, as granted by the Constitution^{xx}. The inappropriate interrogation by health personnel during diagnosis and sometimes refusal to provide the service to LGBTIQ persons had caused severe frustration and hesitance in the access and the use of the health services. Moreover, due to lack of awareness and comprehensive education regarding safe sex education, lot of people from this community who are engaged in sex work are contacted with HIV virus due to unsafe sexual activity. ^{xxi} The issues of taking of hormones is stigmatized and Transgender and Intersex people are using it unsupervised by doctors, getting them in black market which have created lot of health difficulties due to side effects ^{xxii}, which is not considered in the discourse of the issues of health discussions by the community and the government.

1. Recommendations

- i. Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality.
- ii. Easy, legal and affordable legal supply of hormones should be made to the trans and intersex persons who want to use it so that the proper recommendations could be made to every individuals without any other medical complications.
- iii. Pursuant to the Right to Safe Motherhood and Reproductive Health Act 2018^{xxiii} the GON should ensure universal access to safe abortion regardless of one's gender identity, and ensure accessibility, availability, affordability, adequacy, awareness on comprehensive sex education and quality of sexual and reproductive health services to LGBTIQ.

1.2.8 Employment Sector

The prevailing biasness and discrimination towards people of gender and sexual minority have impacted heavily in employment sector. There is also no reservation/quota (which is particular case of reservation of seats in educational institutions and jobs given by the government for the progress and growth of certain group of people) guaranteed to the LGBTIQ community people as a minority group whereas other minority groups are able to exercise this right^{xxiv}. There is no inclusion of LGBTIQ communities in job and employment sector and the gendered division of work leaves people from LGBTIQ group behind. The vacancy announcement prioritizes different people to ensure inclusion such as women, Dalit's, indigenous and disabled people but do not include people from LGBTIQ group.

1. Recommendations

- iv. The GON should amend the Labor Act 2017 to ensure gender equality at work. The Labor Act have addressed welfare provision related to women , pregnant women , disabled , particular attention should be paid to equal pay between all genders ^{xxv}. There should be reservation for LGBTIQ group as a part of inclusion during foreign employment, government jobs, army and military jobs and also private jobs.
- v. In line with recommendations made to Nepal by the CEDAW in 2018^{xxvi}, the GON should adopt temporary special measures with clear timelines in line with constitutional provisions on “special opportunities”^{xxvii}. This will enhance access for personnel facing intersecting and multiple forms of discrimination by virtue of being in LGBTIQ community and also including indigenous, Dalit women, rural women, women with disabilities and widows in the Hindu

community, as well as women affected by conflict and natural disasters, to health services, education, safe water and sanitation services, food, fertile land, natural resources, housing, credit and income-generating opportunities, including through the presidential programme to uplift women.

- vi. Government should strengthen the policy of foreign employment and give security to the personnel's who are going to foreign employment by identifying themselves as LGBTIQ group.

1.2.9 Legal Gender Recognition

Acquiring the vital registration documents for LGBTIQ community people is troublesome due to mismatch gender identity in their legal documents such as citizenships card, passports, certificates etc. The provision of showing medical certification of sex change as a mandatory provision of acquiring these documents is problematic which them the *right to nationality and right to their vital registration documents*. Both of these discriminatory provisions and the negative attitude and behavior of service providers have hindered the acquisition. The National Civil (Code) Act, 2017 establishes the act of marriage as between a man and woman .The very same Section 67 of civil code ^{xxviii} reads out marriage as "men and women accepting each other as husband and wife “, this is a major concern for marriage equality advocates because it limits the existence of marriage between biological male and female only. This provision is against the Supreme Court verdict^{xxix} and against the constitution and international mandates.

1. Recommendations

- i. The government should recognize the concept of marriage equality and amend the civil code of 2017^{xxx} that inhibits marriage right to only binary forms of gender in Nepal.
- ii. There should be amendment in Constitution regarding right to property^{xxxi} , ensure equality before the law^{xxxii} and mention the provision where the people from the sexual and gender communities can have equal and easy access to inheritance of ancestral property and bank transfers . Also, the state legislature also should make necessary provisions to allow the partners of LGBTIQ community to achieve their share of partition of property from their partners in case of the separation or death.

1.2.10 Government networks, policies and politics:

The participation and the representation of LGBTIQ people in the decision making processes is negligible. There are least LGBTIQ people affiliated to the political parties and negligible number has been nominated for election seats. In many of the provinces and election campaigns, the individuals from LGBTIQ community are used as entertainers. They are used

during political campaigns but are treated like invisible after the party and or political leader's vested interest is completed.^{xxxiii}

The budget in the local government and provincial government is not allocated for the capacity development, skill trainings and awareness raising programs. During the first UPR (2011) and second (2015) UPR cycles, Israel has recommended on the strengthening the protection of LGBTI people and work towards the full implementation of the current laws-Israel however this hasn't been fully reflected at the implementation level.

1. Recommendations:

- i. There should be proper budget allocation in the local and provincial government, which should be used as per the need and the political parties need to have mandate of inclusion of people during formation of different party committees and also during the elections.
- ii. LGBTIQ issues should be included in the national agenda and the state organs, government, quasi government institutions should also have provision to recruit and address LGBTIQ issues throughout. GON should amend the Social Security Act of 2018 in order to include provisions on the security of the LGBTIQ community.
- iii. The government should implement the recommendations from UPR first and second cycle under the theme Human rights policies provided by Sweden and Israel at the levels of Article 18 of the Constitution, inclusive LBTIQ people in the list of minority as defined by the Ministry of Home Affairs and also as candidates in the election from political parties.

1.3 Endnotes :

ⁱ Constitution of Nepal 2015,
<http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal>

ⁱⁱ Constitution of Nepal 2015

ⁱⁱⁱ Nepal charter to grant gay right at the "Wayback Machine"

^{iv} Nepal charter to grant gay right at the "Wayback Machine"

1.2.2 ^v Supreme court decision on **Sunil Babu Pant and Others v. Nepal Government**
; www.pradhanlaw.com. June 2018. Retrieved 2019-05-10

^{vi} Constitution of Nepal , Article 12

^{vii} Constitution of Nepal 2015 , Article 18

^{viii} Constitution of Nepal , Article 18

^{ix} News , article published on "The new indian express",for-the-first-time-nepal-to-count-lgbt-population-in-census- <https://www.newindianexpress.com/world/2020/feb/06/for-the-first-time-nepal-to-count-lgbt-population-in-census-2099836.html>

^x A/HCR/17/5, para 1-6.56 (Norway)

- ^{xi} *Supreme Court 's 2008 decisions A/HRC/17/5 para-106.23 United States of America and A/HRC/17/5,para. 106.23 –Norway*
- ^{xii} Gender Equality Act - <http://www.lawcommission.gov.np/wp-content/uploads/2015/laws/ACTIVITIES/gender-equality-english.459.pdf>
- ^{xiii} A/HRC/17/5,para 106.23 – New Zealand
- ^{xiv} National Criminal Code 2074of Nepal , section 226
- ^{xv} Id 3 on topic of *Right to Life , Liberty and Security*
- ^{xvii} YP 16 <https://www.refworld.org/pdfid/48244e602.pdf>
- ^{xvi} YP 30, https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf
- ^{xvii} YP 16 <https://www.refworld.org/pdfid/48244e602.pdf>
- ^{xviii} the news article of "the rising Nepal "- Rights of LGBTI people should be protected: Pinky <https://therisingnepal.org.np/news/23500>
- ^{xix} Consultation done at Kathmandu datedwith LGBTIQ people
- ^{xx},Constitution of Nepal 2015, *Article 3*
- ^{xxi} News article published on Kathmandu Post , "*For most transgender women, sex work remains the only way to make a living*" , <https://kathmandupost.com/national/2020/01/24/for-most-transgender-women-sex-work-remains-the-only-way-to-make-a-living> *Hyperlink this pls*
- ^{xxii} Consultation done at kathmandu datedwith LGBTIQ people
- ^{xxiii} Right to Safe Motherhood and Reproductive Health Act 2018, <http://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Right-to-Safe-Motherhood-and-Reproductive-Health-Act-2075-2018.pdf> *Hyperlink this pls*
- ^{xxiv} National Inclusive Commission Act, 2074 (2017) , *Section 1* www.ilo.org/dyn/natlex/docs/ELECTRONIC/106084/129941/F1734326526/NPL106084_Npl.pdf
- ^{xxv} Labor Act 2017 , Part "*Provisions Related To Remuneration*" https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=105434
- ^{xxvi} <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx>
- ^{xxvii} Constitution of Nepal 2015 ,Article 18 ,sub article 3
- ^{xxviii}Muluki Ain Civil code ,*Chapter on Marriage*
- ^{xxix} Id 3
- ^{xxx} Civil Code of Nepal 2017,part 3 , chapter 1 : provisions relating to marriage , <http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Civil-code.pdf>
- ^{xxxi} Id 3 , Article 25
- ^{xxxii} Constitution of Nepal , *Article 18*
- ^{xxxiii} Id 3

1.4. Annex

List of coalition of organizations jointly part of the consultation at the districts and provinces and submitting the report

- Mitini Nepal (Coordinated the consultation process)

Blue Diamond Society, Dhanusha Nepal

- Sunaulo Bihani Samaj - Nepal
- Jiwan Jiti Samaj - Nepal
- Chautari Nepal
- Ekata Nepal
- Sudur Paschim Samaj Nepal
- Naulo Sirjana Nepal
- WNS, Nepalgunj -Nepal
- Sahara Samaj -Nepal
- Lead Nepal
- Pariwartanshil Samaj - Nepal
- Friends Hetauda - Nepal
- Manav Sachet Samaj – Nepal