

# Engendering Minorities in Nepal: The Authority of Legal Discourse and the Production of Truth

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## Introduction: Mobilizing Rights in Nepal

Since the promulgation of the 1990 constitution, conflicts over the rights it enshrines have proliferated in Nepal. Throughout the same period, negotiations between social groups and political institutions have been increasingly phrased in the language of rights, echoing the growing importance of the “rights-based” approach in the international development circuit.<sup>1</sup> Although this is a general trend world-wide, what is peculiar to Nepal is that, besides articulating the dialectics of some of the major social conflicts unfolding in the country, the discourse on rights was also at the core of the drafting of the new constitution and one of the main tools of the “New Nepal” building process. In this article, I will underline three features of this discourse and its mobilization in Nepal.

The first is its close connection with the sphere of law and, more generally, with legal discourse. Rights are indissolubly linked to the law and legal discourse is one of the frameworks within which the public debate unfolds in Nepal nowadays; as a result, the judiciary is playing an increasingly important role in social struggles. The centrality of law in the new form of the Nepali state was already stated in the preamble to the 1990 constitution, which solemnly underlines the commitment to “transform the concept of the Rule of Law into a living reality,” a commitment reiterated by the interim constitution (2007) and confirmed by the newly-promulgated constitution (2015).

The second feature is the predominance of group rights over individual rights in the Nepali context; indeed, individual rights granted in the 1990 constitution had not proven very efficient in addressing the rights gap in Nepali society, and the debate over rights was dominated by the issue of group rights (Gellner 2001; Malagodi 2013), which became a central theme in the

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<sup>1</sup> In the 1990s a shift occurred in the global development paradigm, as the Cold War economic model was replaced by the post-Cold War rights-based model. The international development actors selected respect for human rights as a key indicator through which to evaluate development and reframed international relations accordingly (Cowan, Dembour, et al. 2001:12): “As the human rights regime becomes increasingly entrenched at a global level in international declarations, conventions and agreements which are negotiated, implemented and monitored by national, international, and transnational institutions, this understanding of rights as a structuring discourse seems increasingly persuasive. Many analysts already talk about human rights culture as a core aspect of a new global, transnational culture, a *sui generis* phenomenon of modernity.”

conflicts surrounding the drafting of the new constitution.<sup>2</sup> The appropriation of the language of rights for collective action, by caste and ethnic groups and social movements alike, is also linked to the third feature: the growing presence in Nepalese public debate of allegedly non-political groups, such as civil society associations, organizations, federations, and the like, alongside political groups. These associations are admittedly constituted in order to “raise the voice” of the people they represent and to advocate for their recognition and rights in the public arena.

These “voices,” however, need to be legitimized in order to impose their presence in the social field, and to establish their claims and viewpoints on social realities. Such a legitimization is sought by activists through different strategies and at different levels: the social, political, and legal ones. I will here give an example of these dynamics in the legal arena by considering the use of a specific tool, Public Interest Litigation (PIL). This tool was conceived to facilitate access to justice on behalf of marginal and disadvantaged sectors of the population, who were prevented from resorting to the courts by their weak social position and lack of education or by their lack of economic means.<sup>3</sup> Through an analysis of one of these litigations, I suggest how local associations attempt to mobilize the power of the law to legitimize their own counter-discourse about rights, that is, their own “discourse of truth,” according to Foucault’s terminology, about a specific social reality.

The question of “truth” is constantly highlighted by local associations, and can be considered a key term in their claims and self-representations (as well as one of the central issues in the debate on New Nepal). Beside the study of the structures underpinning discourses of “truth,” pertaining to the domain of epistemology, Foucault (2009) points out the interest of investigating forms and conditions through which the subject represents himself/herself and is recognized by others as saying the truth: following this approach, I will consider how the power

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<sup>2</sup>In 2006, a large-scale people’s movement, known as Jana Andolan II, restored multi-party democracy in Nepal after four years of direct rule by King Gyanendra. The Comprehensive Peace Agreement (CPA) that followed, signed between the major parties and the rebel Maoist Party (CPN-M), put an end to the decade-long Maoist insurgency and led to the restoration of the parliament. The latter promulgated an interim constitution in 2007, abolished the monarchy and declared Nepal a federal republic; general elections were held in 2008, but the constitutional assembly thus formed failed to pass a new constitution—primarily because it could not resolve the issue of the federal structure—and was dissolved in 2012. Another constitutional assembly was elected in 2013 and produced a new constitution that came into effect in September 2015.

<sup>3</sup>This procedure originally began in the United States and has by now become widespread almost everywhere in the world, but it has developed in a very specific way within the Indian context. The exceptional character of the Indian PIL lies in the relaxing of procedural requirements and *locus standi*, the rule imposing a direct relation between the litigant and the court, according to which only the aggrieved party is allowed to demand legal remedy. As opposed to this rule, and in order to guarantee a legal representation to under- or non-represented groups or interests, Indian judges allow a third party (individuals or social actions groups not directly affected by the alleged violation) to take the matter to the Supreme Court, acting *pro bono publico*, that is, on behalf of disadvantaged sectors of the population or public interest issues.

Moreover, the relaxing of procedural requirements enables the elimination of financial and bureaucratic obstacles linked to the filing of a writ petition, because, in this case, courts’ attention can be drawn even by writing a letter or sending a telegram. Thus, in order to permit fuller access to courts, Indian PIL has been marked by a departure from procedural rules. This explains why civil society associations and social activists that—by definition—work on behalf of disadvantaged groups or public interest issues have, since its creation, utilized PIL as a privileged tool to achieve social justice. Nepal has not only fully adopted, from a juridical point of view, these developments of the Indian PIL, but has actually enshrined this procedure in specific provisions of its 1990 (art. 88), 2007 (art. 107), and 2015 constitutions.

of law is enlisted in the construction of discourses that are given, and are received, as discourses of “truth.”

This power of the law cannot be overemphasized: as Bourdieu (1987) has shown, the law shares with other authoritative discourses the mechanisms of symbolic efficacy, and its specific acts of codifying, naturalizing, and instituting, are socially recognized as producing truth. This power of uttering the truth, of resolving conflicts and negotiations by publicly proclaiming the truth about them, is embodied in the judgement of a court (838):

The judgment is the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone. These performative utterances, decisions publicly formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized. They thus succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.

The case study I will focus on here tells the story—and suggests the limits—of one of these “magical acts” in contemporary Nepal, through which the authority of the legal speech has transformed certain socially invisible and unnameable people into an official community.

### **The Case: Context and Implications**

This recent PIL, registered as *Sunil Babu Pant and Others v. Nepal Government and Others*,<sup>4</sup> is one of the most sensational legal cases ever discussed in Nepal and has had echoes all over the world. It was filed against the government by a group of local NGOs<sup>5</sup> at the Supreme Court of Nepal in 2007. It concerns the rights of LGBTI, or Lesbian, Gay, Bisexual, Transgender, and Intersexual people;<sup>6</sup> the consortium that filed the petition was headed by Blue Diamond Society (BDS), the most important Nepali association active in the field of LGBTI rights.

BDS was founded in 2001 and, since its creation, has been very active in advocating LGBTI rights. Initially focused on the sector of HIV prevention, the organization has progressively widened the scope of its activities to include human rights programs on behalf of LGBTIs, which culminated in the filing of this litigation.

The main objective of the petitioners was to obtain legal recognition of LGBTI rights: to this end, while denouncing social discrimination, abuses, and ill-treatment against LGBTI people as well as the state’s inefficiency and reluctance to protect them, they demanded the amendment of discriminatory laws, the promulgation of new ones to specifically uphold LGBTI rights and the formal decriminalization of homosexuality. It should be noted that homosexuality was not at that time, in the National Code (Muluki Ain 1963), considered as a crime in itself, but belonged

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<sup>4</sup>Writ No. 917 of the year 2064 BS (2007 CE).

<sup>5</sup>Mitini Nepal, Cruse AIDS Nepal, Parichaya Nepal, and Blue Diamond Society.

<sup>6</sup>The terminology used in this case and in this context varies between LGBT and LGBTI.

to the larger category of “unnatural intercourses,” *arū aprākritik maithun* (Chapter 16 on “Bestiality,” *paśu karani-ko*). In particular, this chapter specifies that sexual relations with animals, as well as other “unnatural intercourses,” shall not be practiced, and are punishable by a maximum penalty of up to three months imprisonment, or by a fine not exceeding 100 rupees (Fezas 1983:338).<sup>7</sup>

Indeed, the opposition natural/unnatural is central to the procedure: in this regard, one may suggest that the symbolic task of this PIL was to transform individuals with “unnatural” orientations into “natural” persons, whose rights are protected by laws. As we shall see, however, the legal recognition of LGBTI rights also entailed—not unambiguously in the specific context of Nepal, with its 102 officially recognized minority and caste/ethnic groups—the recognition of LGBTI people as disadvantaged minorities because, in order to successfully enlist the power of the law by resorting to the PIL procedure, and thus to legitimize their claim to LGBTI rights (which is tantamount to validating their own discourse of “truth” about non-heteronormative sexualities), activists themselves need to be legitimized as representing a group.

Because such a process of legitimization takes life through the legal discourse, the text of the litigation offers a good example of how the authority of the legal discourse can shape social realities in a context of conflicting public meanings. The present analysis will therefore focus mainly on the text of the judgement itself, with the aim of exploring some mechanisms through which legal discourse may transform dominant public meanings by legitimizing (or delegitimizing) public representations, that is, by establishing the “truth” about them.

In particular, I will try to show how the power of the law (in what seems currently to be one of its most authoritative forms, the language of rights) has been enlisted by the activists and deployed by the Nepalese Supreme Court, through the three acts of codifying, naturalizing, and instituting highlighted by Bourdieu, in order to introduce new gender and sexual categories into the public discourse, and thus to institutionalize a “new” minority based on these categories.

I also wish to point out the central role of activists and associations (as well as the ambiguities tied to this role), within the transnational proliferation of gender/sexual categories,<sup>8</sup> in disseminating the “language of rights.” I would finally like to suggest that the modalities of such a creation of a gender/sexual minority may, in the specific context of Nepal, jar with local experiences of non-heteronormative sexualities. Such a dissonance, however, must be set against the undeniable importance and success of this PIL, which has transformed LGBTI people from individuals with “unnatural” orientations, into “natural” persons whose rights are protected by

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<sup>7</sup>There is no evidence of the use of this statute in Nepali legal records after the promulgation of the new Muluki Ain, in 1963, when the chapter on sodomy of the old Muluki Ain was suppressed and “crimes against nature” were incorporated in chapter 16 (see *infra*) (Fezas 1983:338).

<sup>8</sup>On the increasingly global phenomenon of the proliferation of gender/sexual categories and identities, as well as their “officialization” in public discourses, see, for instance, Altman (1996 and 1997); Jackson (2000); Broqua and Eboko (2009).

laws, and whose newly-acquired visibility comes out in such events as the gay pride parades held in Kathmandu and other cities, which would have been unimaginable only a few years ago.<sup>9</sup>

### **The Articulation of the Litigation: Positions and Discourses of the Petitioners, the Respondents and the Court**

Let us now take into consideration the text of the litigation, starting with the incipit of the activists' petition, in which they present their discourse on non-heteronormative sexualities and lay the foundations of the "new" sexual/gender minorities, through a collective coming out (NJA 2008:262):<sup>10</sup>

We, the petitioners, are involved with organizations which represent a minority of people in terms of sexual orientation and gender identity. We have been denied by the . . . society, law and state mechanisms a proper position in the community. [We are] Expressing our dissenting view with the prevalent social structure and norms as well as with the legal provisions adopted by the state, based on the interest of the majority people, i.e. heterosexual male and female persons. Because of such practices and provisions, we have many instances of being ourselves subjected to physical and mental torture. We, the four petitioners, representing at least 60 thousand people, are demanding an appropriate place in the society and the recognition of our rights.

Such a statement ran directly counter to the socio-cultural denial of non-heteronormative sexualities at the time of the litigation: in 2004, for instance, as opposed to the figure of 60,000 LGBTI people claimed by the petitioners,<sup>11</sup> a senior officer of the Kathmandu police declared that "homosexuals are maximum 150 in our country, and we know what to do with them" (BDS 2005:3).

Looking now at the position of the respondents,<sup>12</sup> we may note that they enact the opposite strategy. Firstly, we do not find in it the polemical opposition to the activists' claims

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<sup>9</sup>Although gay pride parades started a little before this strategic litigation, at that time they were not presented as such by the activists organizing them: held during the Gaijatra (the "Cow Festival," held in memory of the recently deceased), they were justified as funeral processions commemorating the HIV/AIDS victims. This is one of the elements suggesting the strong connection between recognition of the LGBTI minority and HIV-related activities, as highlighted below (see Conclusion). However, besides its association with death, there is also another aspect of the Gaijatra that should be underscored, in order to appreciate its recent appropriation by the LGTBI community, that is, its carnival-like subversion of the social order. The festival is traditionally filled with jokes, songs, satire against authority, mockery, and humor, and people often cross-dress.

<sup>10</sup>Page numbers refer to the English version of the original Nepali text, published in 2008 in the *National Judicial Academy Law Journal (NJALJ)*. However, for the purposes of this paper, I have utilized the text translated by BDS, and have re-translated from the Nepali version the points whose content was unclear. This explains the minor differences (mainly corrections of grammar and spelling mistakes) as well as some more important textual variations between the *NJALJ* version and the one quoted here.

<sup>11</sup> 300,000 is a more recent figure claimed by BDS (see Conclusion).

<sup>12</sup> The respondents in the case were the following: 1. Office of the Prime Minister and Council of Ministers; 2. Legislature-Parliament; 3. Ministry of Law, Justice, and Parliamentary Affairs.

which characterizes other, earlier PILs in Nepal: in this case, the respondents limit themselves to denying the alleged infringement of rights denounced by the petitioners, claiming that the state has imposed no obstacles upon them and that they are “independent and able to enjoy all the constitutional and legal rights to be obtained in the capacity of a person” (NJA 2008:265). They further assert that “. . . in case the petitioners were treated in a discriminatory manner . . . and . . . [in case of any] violence against them, there seems to be no restrictions depriving them from having remedy, specifying their sexual identity distinct from a male or a female” (NJA 2008:264). They also emphasize that “only concerned individuals can enter into the court for the enforcement of such legal rights, with evidence in case of infringement” (*ibid.*).

In other words, the respondents’ position consists in denying that the issue is a collective one and in presenting it as a purely individual matter. By stating that “only concerned individuals can enter into the court for the enforcement of such legal rights,” they deny the *locus standi*<sup>13</sup> of the petitioners, because this kind of representative *locus standi* can be used only by individuals or associations advocating for public interest or representing a group (a procedure authorized by article 107(2) of the Interim Constitution). This strategy indirectly underlines the preeminence of group rights over individual rights in the Nepali context: what is at stake for the respondents is not the recognition of the individual rights of LGBTIs, which seem to remain a rather abstract (and irrelevant) category for them, but the potential recognition of the rights of LGBTIs as a group, and therefore the validity of their recourse to PIL.

Let us now come to the discourse of the Court which, it should be noted, parallels that of the activists. For this reason, I will consider here the activists’ and the judges’<sup>14</sup> discourse jointly because, unlike what occurs in other PIL cases, they happen to coincide in this litigation, having the same structure and a very similar content; one might even interpret the judges’ discourse as an expansion, a strengthening, of the activists’ discourse.

The judicial discourse starts by summarizing the themes of the litigation and the respective positions of the litigants. Judicial reframing of narratives is a constant characteristic of litigations and has a specific function: to produce juridical facts. Indeed, “[s]ince juridical facts are the products of juridical construction, and not vice versa, a complete retranslation of all of the aspects of the controversy is necessary, in order, as the Romans said, to *ponere causam* (to “put” the case), that is to institute the controversy as a lawsuit, as a juridical problem that can become the object of juridically regulated debate” (Bourdieu 1987:831-2).

In order to state their case, the judges formulate the main questions structuring the litigation in the following way (NJA 2008:266):

- 1) Whether the writ petition concerning the rights of homosexuals and the people of third gender, considered as a minority (on the basis of gender identity or sexual orientation), falls under the category of public interest litigation (PIL) or not?
- 2) What is the basis of identification of homosexual or third gender people?

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<sup>13</sup> See note 3.

<sup>14</sup> The Supreme Court Division Bench for this litigation was composed by Justice Balram K. C. and Justice Pawan Kumar Ojha.

- 3) Whether it happens because of the mental perversion of an individual or such a characteristic appears naturally?
- 4) Whether the state has made discriminatory treatment with the citizens whose sexual orientation is homosexual and gender identity is third gender, or not? and
- 5) Whether the order as sought by the petitioners is worth issuing or not?

Let us now consider how the above-mentioned questions concur in articulating the operations of codifying, naturalizing, and instituting, through which the court enacts its authoritative speech about non-heteronormative sexualities.

### **Codification: The Power of Naming**

This operation starts by taking into consideration the first question of the *ponere causam* (“Whether the writ petition concerning the rights of homosexuals and the people of third gender, considered as a minority, on the basis of gender identity or sexual orientation, falls under the category of PIL or not”). In answering this question, which justifies the overall procedure, the Court firmly asserts that the petitioners do have *locus standi*, therefore affirming that they represent a group and thus implicitly nullifying the defense strategy of the government (NJA 2008:266, 268):

It is a constitutional duty and responsibility of the state to make the deprived and socially backward classes and communities able to utilize the opportunity [of using PIL] and to enjoy the rights equally as other people do, according to the principles of distributive justice and social justice. In our judicial practice, the issue of social justice is being recognized as an issue of public interest or the issue of public interest litigation (PIL). Definitely, because of many reasons including social, economic, cultural, etc. as well as the inaction of the state, the question of the protection of the rights of disadvantaged people or groups falls under the category of PIL.

. . .

The third genders shall still be considered as a disadvantaged class of citizens, because of social perception and social behavior towards them, as well as lack of education, knowledge and economic backwardness within the society of third gender [people].

Once they have established that the “third genders” are a disadvantaged class of people and are thus entitled to resort to PIL, that is, once they have officially acknowledged their existence as a “backward and disadvantaged” community, the judges move to the second question structuring the *ponere causam* (“What is the basis of identification of homosexual or third gender people?”), in order to properly define the difference between sex and gender, as well as the various categories of LGBTI people. The latter should be codified and defined in order to be explained and, eventually, “legitimized.” To this end the Court engages in a process of categorization of non-heteronormative sexualities, by deploying an impressive taxonomic effort, focusing firstly on the LGBTI minority as a whole and then on the various categories composing it.

These categories, whose utilization is so recent in Nepal, are conceived and defined by the judges through an almost literal Nepali translation of the corresponding English terms:<sup>15</sup> *mailasamalingi*, (“female homosexual”), *purushasamalingi* (“male homosexual”), *duilingi* (“bisexual”), *tesro lingi* (“third sex”), *antarlingi* (“intersex,” or people affected by Disorders of Sex Development, a condition where the appearance of external genitalia is atypical in respect to the gonads or chromosomes). In this sense, judges are here not only writing a historical page of the Nepalese jurisprudence, but also inaugurating a new page in the Nepalese vocabulary.

By deploying this effort, through the codification of the categories composing the sexual/gender minorities, the judges enlist the inherent performative power of the legal discourse, namely its specific linguistic efficacy: the power of naming, a power that “creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects” (Bourdieu 1987:838). This public utterance, that makes things real *simply by saying them*, and which makes it therefore possible to speak about, think about, and admit a conduct that had previously been tabooed, is one of the specifically symbolic effects of the law (Bourdieu 1987).

If the power of naming, however, makes possible the materialization of a certain reality, the actual form which the latter will acquire depends upon the “names” that are chosen, that is, the sources upon which the classificatory operation lies. In this regard, it is worth noticing that the judges perform a long review of the international literature concerning the subject, an operation of definition and codification carried out with great accuracy and detail. Indeed, the bibliographical sources the Court draws on are very eclectic, ranging from UN reports and Covenants to the *Cambridge Advanced Learner’s Dictionary*, as well as Wikipedia entries, but they mostly consist in UN treaties or international human rights publications, which will eventually—as we shall see—constitute the basis of the “discourse of truth” on non-heteronormative sexualities as ratified by the Court. Among these sources, the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007), elaborated by an international group of human rights experts, is particularly relevant. These principles, which affirm binding *legal standards* with which all states must comply, have become an important tool for judges, lawyers, and activists all over the world. Their use here is revealing as it suggests the complete alignment of the

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<sup>15</sup> Nepali definitions are not utilized; if such an omission is perfectly understandable in the case of the Nepali terms that have derogatory connotations (for example, *chakka*, a very derogatory term for effeminate males, or *hijra*, transvestites or transsexuals, and so on), the exclusion of terms employed by LGBTI people to represent themselves or their partners is more problematic. A UNDP/WI survey (2014) of these terms reported the local use of at least 21, non mutually exclusive, different definitions. As far as transsexual/transgender people are concerned, one of the most common local terms is *meti*: “In Nepal, some LGBTI members speak of being a *meti*—a semi-urban, even modern term appropriated from Darjeeling, that does not take its ideas about transgenderism from the globalized models of sexual identities. *Metis* are usually transvestites, who were born male but who do not identify as men. They seek the company of men, whom they call *ta* or *panthi* or ‘real men,’ who desire sex with *metis* but who elude the homo-hetero binary altogether. The phrase ‘*dui atma bhayeko*,’ or ‘two-spirited,’ is also in use in Nepal, a concept that not only implies an almost mystical consciousness but also draws on local imageries of androgyny” (KC 2008). This omission of local self-representations seems to be indicative of an (at least partial) non-coincidence between global and local representations of non-heteronormative sexualities (see Conclusion).



Nepalese judiciary (and civil society associations) with the positions of the UN<sup>16</sup> and other transnational institutions, as opposed to more conservative attitudes characterizing some of their judgements of the 1990s.<sup>17</sup> It also suggests the way in which such evolutions in Nepal are linked to a transnational network of activists, which includes national and international associations as well as individual activists and pro-active judges. This associational network, of which the *Principles* are one of the products, can thus be considered as the site where the discourses of “truth” of world-wide activists meet and coalesce. In this regard, it is perhaps worth mentioning that one of the signatories of the *Yogyakarta Principles* is Sunil Babu Pant, the former executive director of BDS and himself the petitioner of this litigation.

### **Naturalization: The Legal Construction of Normality**

After this taxonomic operation of codification, the court undertakes a “normalization” of non-heteronormative sexualities. This, the second act manifesting the symbolic efficacy of its authoritative discourse about gender/sexual minorities, is, from a “technical” point of view, related to the third question of the *ponere causam* (“Whether it happens because of the mental perversion of an individual or such a characteristic appears naturally?”).

This legal normalization<sup>18</sup> can take place because the law has the power of imposing (and thus disseminating) the conception of normality it has endorsed, a conception that results from the application of specific juridical standards. In this sense the case illustrates the authority and the strategies of the judiciary in defining (or re-defining) what is normal and what is moral.<sup>19</sup>

But let us see in more detail how this authority is enacted in our litigation, starting with the juridical standards applied by the Nepalese judges. As it emerges from the text of the PIL, the legal construction of normality is centered here on the demonstration of the non-pathological and non-immoral dimension of sexual/gender non-conformity.

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<sup>16</sup> The UN position itself was until recently not lacking in ambiguity: if the UN system de-pathologized homosexuality back in the 1980s, it is only very recently (June 2011) that the UN’s Human Rights Council passed its historic resolution condemning violence and discrimination against gays, lesbians, and transgender people.

<sup>17</sup> Although such an alignment was theoretically established by the Nepal Treaty Act 2047 (1991), decreeing that international treaties ratified by the country are tantamount to national laws, in several early PIL cases related to gender justice filed during the 1990s the Court did not automatically apply international treaties; see, for instance, the famous PIL known as “Daughter’s Property Rights” (PIL of Meera Dhungana on behalf of FWLD v. HMG, Ministry of Law and Justice, Writ No. 3392, 2052, Decision No. 6013 of 2059, Timalena 2003:164-74), where the Court did not draw on the tenets of the CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Nepal) to define women’s right to equality, evoking the risk of social disruption inherent in suddenly upsetting “traditional norms and values.”

<sup>18</sup> The normalizing role of the law has been repeatedly underlined. See, for instance, Bourdieu (1986); Lochak (1993); Dupret (2001).

<sup>19</sup> Indeed, morality and normality are linked in an ambiguous relation, as normality, that is, what refers to “nature” and common sense, enjoys a status that is considered as legitimate in itself and—for this very reason—morally desirable. Law proceeds from this double dimension of legitimacy and morality and at the same time creates it (Dupret 2001).

Such a demonstration, which is organized around several oppositions (natural/unnatural, science/superstition, customary perceptions-assumptions/international legal standards), is based, again, on the review of a large amount of documents, that constitute the juridical standards of the litigation. These standards pertain to two main categories: medical, psychiatric, and neuropsychiatric documents, as well as international legal treaties and judicial decisions, abundantly quoted throughout the litigation. This double benchmarking has a precise function in the economy of the judicial construction of “truth”: to confer to the latter both the scientific authority of positive science and the normative authority of ethics.

Indeed, as again Bourdieu suggests (1987:818), the enactment of this double authority is a central feature of the power of law, through which the latter can appear as “a system of norms and practices founded *a priori* in the equity of its principles, in the coherence of its formulations, and in the rigor of its application, . . . and thus capable of compelling universal acceptance through a necessity which is simultaneously logical and ethical.” So, relying upon this double authority, the Court can now produce a series of statements through which it articulates its discourse of truth about non-heteronormative sexualities. This concerns, first of all, their non-pathological dimension (NJA 2008:274, 281, and 280):

Scientific evidences are backing up to establish that [homosexuality/transsexuality] is a natural process in the course of physical and emotional development of a person rather than a mental perversion or a psychological disorder.

. . .

The medical science has already proved that [homosexuality/transsexuality] is a natural problem rather than a psychiatric one. We cannot ignore facts that are proved by the medical science. Any provision that hurts the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights point of view. The fundamental rights of an individual should not be shrunk on any grounds like religion, culture, customs, values etc.

. . .

There are also opinions in the society stating that sexual activities among the homosexuals and transsexuals are not natural; they do not have reproductive capacity; it is a social pollution; therefore, such unnatural relations . . . shall not be legalized. Such opinions are based on the traditional approach of gender identity that recognizes only male and female.

We can note here an opposition between medical science and human rights, on the one hand, and religion, culture, customs, and so forth, on the other hand. This opposition also characterizes the discussion about the ethical and moral dimension of non-heteronormative sexualities, which is based on encyclopedic references and a detailed analysis of recent international legal treaties and foreign judicial decisions (for example, by the Australian court, the European Court of Human Rights, the Constitutional Court of South Africa, the Supreme Court of United States of America, and the Constitutional Court of Ecuador) that have decriminalized homosexuality (NJA 2008:274, 278):

After considering the above-mentioned various international legal contexts, it seems that the traditional norms and values in regards to the sex, sexuality, sexual orientation, and gender identity are changing gradually.

It is an uncontroversial fact that only two sexes—male and female—are being recognized on the basis of sex in our traditional society. . . . Homosexuals and third gender people are also human beings like other men and women and they are also the citizens of this country as well . . . The state should recognize the existence of all natural persons including the people of third gender other than men and women and it cannot deprive the people of third gender of enjoying the fundamental rights provided by part 3 of the Constitution.

It is important to underline that what has disappeared from this case (and more generally from the series of PILs that began in the 2000s) is the reference to the values of Nepalese tradition and religion, which were sometimes evoked in the first generation of PILs (1990-2000), according to the survey I have conducted. In the present approach we no longer find the call to protect the traditional social system or the religious order, as was the case in certain less recent PILs on gender issues: on the contrary, when evoked, “customs” and “traditions” have, as is the case here, negative connotations, as they are considered as obstacles in the path of truth, and more specifically the “international truth,” as the normative power of morality now seems to be firmly grounded in the international human rights standards. The following statement of the Court is a clear example of this position (NJA 2008:280-81):

We . . . should gradually internalize the international practices regarding the enjoyment of the rights of an individual and practices of respecting the rights of minorities in the changing context of global society. Otherwise, our commitment towards human rights will be questioned internationally, if we ignore the rights of such people only on the ground that it might be a social pollution.

Thus, this legal construction of normality involves, interestingly, a deconstruction of traditional morality, as enshrined in orthodox Hindu values. It should be noted that the latter values constituted the basis of the first legal code of the country—the Muluki Ain (MA) of 1854—which can be considered, according to Höfer (2004 [1979]), as a “codification of traditional social conditions,” as well as a means to officially impose these “social conditions” (that is, the caste system, religion, and values of the Hindu Parbatya rulers) on the overall population of Nepal.<sup>20</sup> In this sense, the old MA was not only the epitome of orthodox Hindu values, but also the instrument ensuring the perpetuation of a Hindu caste society by means of the most stringent

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<sup>20</sup> “The MA’s idea of social order consisted of a single social universe recognized in terms of its people of various *varnas*, the four traditional social classes of Hindu societies, and *jātis*, a term that refers both to castes and ethnic groups in the MA, residing in its territory. People of all castes as well as multiple ethnic, cultural and linguistic groups were all made inclusive parts of it, and ranked in a hierarchy of the high to the low. The basis for the gradation of high and low was embedded in the Hindu ideology of ‘pure-impure,’ a ritual notion” (Sharma 2004 [1979]:xxii).

laws possible (Höfer 2004 [1979]; Sharma 2004 [1979]).<sup>21</sup> It is therefore not surprising, when one knows the importance of the control of sexual intercourse for the preservation of ritual purity and social hierarchy in Hindu caste society, to find that “more than one third of the MA deals with sexual relations, both inter-caste and intra-caste. The scrupulous accuracy of the legislator amply confirms the importance these relations have for the maintenance of the hierarchy” (Höfer 2004 [1979]:35). This is particularly evident in the chapter “On Sodomy” (*gār mārā-ko*)<sup>22</sup> of the old Muluki Ain, which was suppressed in the 1963 edition.<sup>23</sup> This chapter, analyzed by Fezas (1983), considered sodomy from the point of view of the caste system, and was divided into two parts. The first specified the different penal and socio-religious sanctions (penalties)<sup>24</sup> according to the respective castes of the active and passive sodomites, while the second dealt with the degree of contamination that sexual intercourse or commensality with the culprit entailed on his wife and children, as well as with the consequences of such a contamination on their social and familiar status (Fezas 1983:309). Sanctions varied according to the hierarchic gap between partners: intercourse obeying the hierarchical order was punished by a moderate fine; intercourse contrary to the hierarchical order<sup>25</sup> was more severely punished and could entail enslavement, caste degradation, and branding,<sup>26</sup> the more so if commensality was also involved.<sup>27</sup>

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<sup>21</sup> “The old MA [was] the epitome of orthodox Hindu values, and given to protecting the pre-1951 political order of Nepal as well as the social and religious values it had stood for” (Sharma 2004 [1979]:xv).

<sup>22</sup> Literally: “On he who hits the anus.” For a detailed philological analysis, see Fezas (1983).

<sup>23</sup> Following the legal abrogation of the caste system (Civil Liberties Act 1955), the 1963 reform of the Muluki Ain led to the suppression of all the passages of the Code regarding caste relations, thus reducing the latter to one fifth of its original length (Fezas 1983).

<sup>24</sup> As Gaborieau (1977) points out, there was a complementarity in the Nepalese system between the king, supreme judge who decides in the last resort, and the Dharmādhikār, the brahman expert in law. This complementarity emerged also at the level of sanctions, which were of two sorts: punishments (*danda*) imposed by the king, and penances (*prāyaścīta*), executed under the direction of the Dharmādhikār.

<sup>25</sup> And especially those infringing the “purity border” between groups whose water can be accepted (*pāni calanyā jāt*) and those whose water cannot be accepted (*pāni nacalanyā jāt*).

<sup>26</sup> Branding was evidently directed at avoiding water commensality (and the resulting necessary expiations) between the degraded member and those of superior castes (Fezas 1983:317-18).

<sup>27</sup> As specified in § 10 of this chapter (Fezas 1983:313):

“If [a man belonging to] a high caste sodomizes [a man belonging to] a caste whose water cannot be accepted [but] which does not need purification after contact (whose contact doesn’t require purification aftermath):

- if he has not taken rice and water from the hand of the person [he has sodomized], a fine of 100 rupees shall be imposed on him, [and] after having had him accomplished a pilgrimage to Kāsi [or] Muktināth, he shall be granted an expiation (*prāyaścīta*);

- if after having sodomized [him] he has consumed rice and water from the hands of the [passive sodomite], he will not obtain expiation (*prāyaścīta*). He must be, after having had him marked with the letter [indicating] the caste of the person whose rice [and] water he has taken after having sodomized him, assimilated to [a member of] the caste of the latter and free him; the passive sodomite shall be punished with a fine of 50 rupees.”

As this extract of the chapter “On Sodomy” shows, in case of intercourse contrary to the hierarchical order, sanctions were more severe for the active sodomite than the passive one, thus suggesting the idea that sodomitic relations were considered as aggressions of the passive sodomite, which were to be punished the more severely as the hierarchical gap was greater between the two parties.

Proceeding from the same logic of preserving caste hierarchy, the second section of the chapter on sodomy specified that the status of the culprit's wife did not incur any detriment if her husband had been sodomized by somebody whose caste status was equal or superior to his own, but was degraded if her husband had been sodomized by an inferior or had sodomized a man whose contact necessitated purification. In short, degradation of caste status did not proceed from the act of sodomy itself but rather from the contact, which entailed a voluntary impurity (Fezas 1983:330-31). In this sense sodomy, as well as the other kinds of "unnatural sexual intercourse"—incest, adultery, rape, perversion—mentioned in the Code, constituted a threat to the social order and hierarchy. Such illicit or unnatural practices imply varying degrees of fault, generating an impurity that can be transferred to other people and entail a degradation in caste status both for the persons immediately involved and—eventually—for their offspring and their fellow caste members (Höfer 2004 [1979]:35). This explains why these infractions must be dealt with by the legislators.<sup>28</sup>

Such is the conceptual basis of the old Muluki Ain, which partially survives in the present version, despite the many amendments and radical revisions it has undergone. It is precisely in order to eliminate these "lingering vestiges" (Sharma 2004 [1979]:xxvii) of Hindu legacies of the old Muluki Ain, still reflected in the new code of 1963 (especially concerning gender issues), that activists have, since 1990, regularly utilized PIL as a tool through which the government can be made to amend discriminatory laws. More broadly, activists have used these legal struggles as an arena where the dominant traditional morality concerning gender roles can be officially contested.

The intention of the judiciary (and the activists), in this case, was to effect a revolutionary legal, and eventually social, transition from a notion of "natural" sexual relations established by traditional morality (that is, those permitted in the context of legitimate marital relations and ensuring social reproduction and the protection of social hierarchy) to one defined by international legal standards (that is, based on the concepts of citizens' rights, human rights, individual sexual orientation, personal choice, privacy) (NJA 2008:275):

There is a legal provision for the criminalization of same sex marriage in the name of unnatural coition in our country. However, the sexual preferences and choices of every individual cannot be defined unnatural coition. Hence, it is the appropriate time to think to decriminalize and destigmatize the same sex marriage by amending the definition of unnatural coition.

In short, through this litigation, the underlying morality defining natural sexual relations officially shifts from a relational logic of group alliances, social reproduction, and the preservation of social hierarchy, according to which any form of extra-marital intercourse (homosexual or heterosexual alike) is, in fact, "unnatural," to a logic relying on the legal

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<sup>28</sup> This also explains the high degree of social exclusion faced by "third gender" people, who are often evicted by their families or otherwise excluded from the common activities marking integration in the social group, especially ritual activities and commensality. As a "third gender" member of BDS comments (BDS 2005:106): "My family members are traditional and they could not believe in the law of nature. Therefore, my parents do not even drink water from my hands; they do not allow me to participate in social functions. We sexual and gender minorities are facing this bitter situation everyday."

concepts of person, privacy, and rights. The revolutionary operation attempted by the judges was therefore to make a transition from a notion of “normal and licit” sexuality conceived as a collective matter (because its consequences bear on the group) to one conceived as a private, individual matter, whose consequences bear only on the individual (NJA 2008:280):

The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one shall have the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. If the right of privacy is ensured to the sexual intercourse between two heterosexual individuals, such a right should equally be ensured to the people of third gender having different gender identity and sexual orientation as well. Therefore there should not prevail such a situation where the gender identity and sexual orientation of the third gender and homosexuals would be overlooked by treating the sexual intercourse as unnatural. When an individual identifies her/his gender identity according to the self feelings, other individuals, society, state or law are not the appropriate ones to decide as to what type of genitals s/he has, what kind of sexual partner s/he needs to choose and with whom s/he should have the marital relationship; rather it is a matter falling under the sole right of self-determination of an individual.

It would be a mistake, however, to assume that this opposition reflects a more general dichotomy in the approach to sexuality and gender non-conformity, opposing customary norms, typical of traditional societies, to formal legal systems protecting individual rights, typical of the rule of law. On the contrary, the legal criminalization of sodomy was introduced in many countries only during the colonial period, and exactly coincided with the diffusion of the rule of law, as was the case in India for instance, where the British rulers introduced section 377 of the Indian Penal Code criminalizing “unnatural relations” in 1861,<sup>29</sup> an article that was only very recently (2009) abrogated.<sup>30</sup>

In this sense, the real opposition dominating this litigation is not one between customary norms and the rule of law, but one between the “morality of tradition” and the “morality of human rights.” Indeed, the idea of an emancipation based on gender identity is deeply entrenched in the language of rights, which emerges in this litigation as the authoritative discourse about non-heteronormative sexualities.

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<sup>29</sup> Sodomy, in the few classic normative texts (*śāstra*) overtly mentioning it, was considered a minor offense: according to *Manusmṛti*, for instance, sodomy was a moderately severe religious fault, atoned for by penance; the *Arthaśāstra* and the *Yājñavalkyasmṛti* punished it with moderate sanctions (fines), probably imposed only on the active sodomite (Fezas 1983:317-22). Although the *Kāmasūtra* alludes only briefly to it, it is interesting to note that in the 1935 Bombay edition the editor specifies that sodomy was a “perversion against nature” and that the “present government” (the British) was adopting increasingly harsh sanctions to eliminate this practice (323).

<sup>30</sup> It should be noted that the amendment to the Indian Code—again obtained through a PIL filed in 2009 by Naz Foundation (a prominent Indian NGOs advocating for LGBTs’ rights) in the Delhi High Court—was passed shortly after this landmark decision of the Nepalese Supreme Court, and that its passing was probably made easier by the international approval the latter had received.

### **Institutionalization: Ratifying the Rights of LGBTI People**

The final act needed for the institutionalization of the *tesro lingi* as a juridical entity and the ratification of LGBTIs' rights, is articulated through the last two questions formulated by the Court in its *ponere causam* ("Whether the state has made discriminatory treatment with the citizens whose sexual orientation is homosexual and gender identity is third gender or not?" and "Whether the order as sought by the petitioners is worth issuing or not?").

In order to deal with the first point, the Court, quoting and reformulating the discourse of the petitioners, lists a series of abuses LGBTI citizens have been subjected to, along with the concomitant rights that these abuses have infringed (NJA 2008:275):

The petitioners have alleged that the state has made discriminatory treatment of citizens whose sexual orientation is homosexual and gender identity is trans-gender. The contentions of the petitioners also seem that the people of this community are being victimized by the family, [and by] domestic, social as well as state violence; they are deprived of the social, economic, cultural, political, and civil rights as well; they have been humiliated in the society and family; they have been deprived of the enjoyment of services and benefits provided by the state; and they have also been deprived of the basic rights such as employment, marriage, and citizenship, etc.

In this way, the Court—following the activists' approach—reformulates in the language of rights some of the social and legal consequences of the traditional attitude toward the "third gender." In particular, it should perhaps be specified that the "deprivation of basic rights" (such as citizenship) here mentioned, is one of the legal consequences of social discrimination in Nepal: we have seen that, traditionally, the "non natural" condition of gender non-conformity is a source of pollution and shame for the whole social group and that, for this reason, non-conforming individuals are often forced to leave their families. From a legal point of view, such an eviction implies not only that they will be divested of their right to ancestral property and inheritance, but also that they will be prevented from obtaining citizenship or other legal certificates, as the latter can only be issued if they are acknowledged by their relatives (through the Relationship Verification Certificate, *Nata Pramanit*).<sup>31</sup>

Thus, in order to institutionalize the new minority, such a legal and administrative "invisibility" needs to be officially acknowledged, and structurally—as well as symbolically—reversed, which is exactly what the judges attempt to do in this PIL. The need for such a reversal explains, for instance, the emphasis on introducing the mention of a "third gender" category into official documents, census forms, and so on (NJA 2008:281):

The legal provisions like the chapters "On Bestiality," "On Marriage," "On Husband and Wife" of the Country Code (*Muluki Ain*), 2020 (1963 AD) as well as other provisions incorporated in other statutory laws in regards to the citizenship, passport, voter list, security check, etc. and our legal practices have not only refused to provide an identity to the people of

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<sup>31</sup> More generally, the legal exclusion of "third gender" individuals is ubiquitously present in the *Muluki Ain*, which maintains a deeply "gendered" structure, as most of its rules are strictly defined along gender lines and according to gender traditional roles (that is, "son" or "daughter," "husband" or "wife").

third gender but also declined to accept their existence as well. It seems apparent, analyzing the situation, that the people of third gender are not living their lives easily according to their behavior and character because of the attitude of the administrative body and social context as well.

But the Court here goes beyond the simple recognition of legal discrimination: it also denounces the abuses and ill-treatment perpetrated against sexual minorities, highlighting the causal link between suffering and deprivation of rights. This is a recurrent feature of the language of rights, where suffering and social exclusion are recodified in terms of “human rights violations.” Not surprisingly, such a parallelism between rights infringement and the denunciation of suffering is also typical of this type of litigation (PIL), which can in fact be considered as a consequence of the language of rights. We can appreciate the power of this legal acknowledgement through the tremendous impact that this litigation has had on the press and in other public arenas, where the discussion of these previously tabooed subjects suddenly became legitimate.<sup>32</sup>

This systematic connection between suffering and infringement of rights has another important consequence: the framing of social problems as injustices, a device that lies at the very basis of the language of rights. One of the consequences of this device is the professionalization of social problems because, once they are framed as injustices, they become the prerogative of a group of professionals upon whom lies the responsibility for their redressing in court. It is therefore not surprising that, apart from the judiciary, the great protagonists of the PILs that have marked the “era of rights” in Nepal have been Nepalese human rights associations, largely composed of lawyers. And even when they are not mainly composed of lawyers, as is the case of BDS, the work of these associations in developing, structuring, and disseminating the human rights discourse cannot be underestimated. It is enough to mention, as far as this litigation is concerned, how this discourse has been progressively articulated within BDS, together with its main strategy: the parallel systematic denunciation of rights violations and of the suffering that these violations entailed, which has effectively undermined the taboos surrounding the verbalization of these “unspeakable” matters. In this respect, the endorsement and ratification by the Court of such a discourse on suffering and rights violations is a very important achievement for the activists, and can be read as the official dismissal of a culture of silence, as well as a proof of the authority of the language of rights.

It should be noted however that, despite the many references made by the Court to the interim constitution, the source of this authority ultimately emanates from the international normative framework. This explains why, in order to be authoritative, the Court’s denunciation of human rights violations needs to be buttressed by the international discourse on rights: the judges, after mentioning the articles of the interim constitution guaranteeing the protection of

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<sup>32</sup> See Khanna (2009) for India.



fundamental rights, extend the discussion to the international legal framework on human rights violations, quoting extensive passages on discrimination and ill-treatment of sexual minorities.<sup>33</sup>

This reference to the international context, while allowing the Court to affirm that “incidents of ill-treatment against the third gender and homosexuals are taking place not only in Nepal but also at the . . . international level as well,” also legitimizes the pertinence of the application of the international legal framework to the Nepali context. The Court can thus explicitly enlist the authority of the “universal norms of human rights” contained in the international treaties and conventions ratified by the Nepalese government,<sup>34</sup> which are tantamount to national laws (NJA 2008:276):

Nepal has shown its commitment towards the universal norms of the human rights by ratifying the significant international conventions adopted for the protection of human rights. . . . Being a party to these international treaties and conventions, the responsibility to implement the obligations created by instruments to which state is a party rests on the Government of Nepal according to the Vienna Convention on International Treaties, 1969 and the Nepal Treaty Act, 2047 (1991 AD[CE]).

The recourse to the superior and exogenous authority of the international treaties is, again, a constant feature of PILs in Nepal, together with the role that the international evaluation missions concerning human rights protection, an integral part of certain treaties ratified by the government of Nepal (like the CEDAW for instance), have played in supporting the “discourse of truth” of the activists and in reinforcing the latter’s power of negotiation vis-à-vis the government and the Court itself.

To return to the judges’ discourse: after the official denunciation of discrimination, which represents the last passage needed to legitimize the activists’ “discourse of truth” on gender and sexual non-conformity, comes the verdict itself, which summarizes the previous steps of codification and naturalization, and culminates in the endorsement of the petitioners’ demands. Technically speaking, the verdict constitutes the answer to the last question of the *ponere causam* (“Whether the order as sought by the petitioners is worth issuing or not”), and is articulated according to the major demands of the petitioners, namely (NJA 2008:281):

- 1) the amendment of existing laws to ensure that the third gender people (under which female third gender, male third gender and intersexual are grouped) shall not be discriminated on the basis of sexuality, as well as the promulgation of new legal provisions to provide such people with a gender identity as per the concerned person’s self feelings;

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<sup>33</sup> For example, in the following instance: “members of sexual minorities are disproportionately subjected to torture and other forms of ill treatment because they fail to conform to socially constructed gender expectation. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill treatment to take place” (from the Report of the Special Rapporteur of the United Nations).

<sup>34</sup> Nepal has already ratified the International Convention on Elimination of All Forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on Elimination on all Forms of Discrimination against Women (CEDAW), 1979, and the Convention on the Rights of the Child, 1989.

- 2) the protection of the fundamental rights of LGBTIs by making appropriate legal provisions enabling them to live their lives with freedom as other heterosexual people and by recognizing them legally and socially as minorities (on the basis of their sexual orientation) being entitled to constitutional protection from the state and society.

As this second demand shows, the petitioners base their request for protection of LGBTI people's fundamental rights not only on "appropriate legal provisions," but also on their recognition as minorities "entitled to constitutional protection." The Court endorses this vision, where LGBTI people are not only considered as individuals deprived of their rights but also emerge positively as a group with its own identity, whose position is similar to that of the other castes, religious and ethnic groups that make up Nepal's society (NJA 2008:278):

According to the data published by the Center Bureau of Statistics/Government of Nepal in 2005, there are different religious groups in Nepal such as Hindu, Buddhist, Muslim, Kirat, Jain, Christian, Sikh, Bahai and others. The state cannot discriminate these religious groups. According to the data of the Government of Nepal, there are 102 identified ethnic groups and castes in Nepal. As the state cannot discriminate on the ground of religion, race and caste, similarly it cannot discriminate on the basis of sex also. Not to be discriminated on the basis of sex is a fundamental right of every citizen.

This excerpt inverts the historical evolution of the language of rights, where group rights are conceptually derived from individual rights: here, on the contrary, it seems that the Court needs to previously refer to the rights of the ethnic/caste/religious minorities as guaranteed by the constitution in order to then derive from them the individual, fundamental rights of "every citizen." This reveals that, once more, the only way to accommodate these individual rights within the Nepalese society is to ascribe them to collective entities, that is, minorities. To this end, the Court, ratifying the approach of the activists, turns gender non-conformity into the defining element of a minority whose rights can be claimed and negotiated.

In keeping with this approach, the Court, in its verdict, then issues an order to amend discriminating existing laws, and to promulgate new ones in order to "ensure an appropriate

environment” for LGBTI people to enjoy their rights.<sup>35</sup> The Court also stresses the need to avoid further discrimination in the future legislation/constitution, in a judicial comment addressed to the constituent assembly (NJA 2008:285): “it looks necessary to keep a clear provision in the new constitution guaranteeing that no discrimination will be perpetrated on the ground of gender identity and sexual orientation, alike to the Bill of Rights of the Constitution of South Africa.” Finally, it concludes the verdict by mentioning the question of same-sex marriage, by instructing the government to form a committee in order to study “legal provisions and practices of other countries regarding the gay and lesbian marriage” and “international instruments relating to the human rights, the values recently developed in the world in this regard, the experience of the countries where same sex marriage has been recognized and its impact on the society” (286).

The word “rights” rings through the verdict like a mantra: the centrality of the language of rights could not be clearer. In fact, one could hardly find one single sentence of the verdict without the word “rights” in it. The language of rights emerges from the litigation as the most powerful language, and indeed, its authority cannot be denied: through its power, those who were only “invisible people” are now an official minority.

## Conclusions

This PIL displays in condensed form the stages through which the activists’ discourse on sexual orientation and gender non-conformity has become a discourse of truth. It shows how the judicial operations of codification, normalization, and institutionalization have been instrumental in this process. It also shows how the overlapping authorities of the scientific medical discourse, of the international juridical framework, and of the language of rights concur in structuring and empowering the activists’ claims and the parallel discourse of the judges.

I would like to suggest, however, that they also concur, in a more problematic way, in defining the morphology of the “new” LGBTI minority and its official representations. In particular, as far as the scientific medical discourse is concerned, it should be noted that its link

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<sup>35</sup> “There should not be discriminatory constitutional and legal provisions that restrict the people having third gender identity from enjoying their fundamental rights. The LGBTI people generally have normal characteristics. They should not be deprived from the enjoyment of their fundamental rights only because of their sexuality, which means they are not attracted by the people of opposite sex as heterosexual persons and because of their cross dress. The state should make necessary arrangement for the people of third gender. . . . If there are legal provisions that restrict the people of third gender in enjoying the fundamental rights and other human rights provided by Part 3 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 law enforcement function of the state shall also be considered as arbitrary, unreasonable and discriminatory” (NJA 2008:282).

“All fundamental rights provided in Part 3 of the Interim Constitution of Nepal, 2063 (2007 AD[CE]) from Article 12 to 32 have been guaranteed to every Nepali citizens and persons. The enjoyment of these rights with their own identity is a fundamental right of the petitioners as well though they are a minority. . . . The people with third type of gender identity other than male and female and different sexual orientation are also Nepali citizens and natural persons as well, so they should be allowed to enjoy the rights with their own identity as provided by the national laws, constitution and international human rights instruments. The state has the responsibility to ensure an appropriate environment and legal provisions for the enjoyment of such rights. It does not mean that only men and women can enjoy such rights and other people cannot enjoy them only because of their different gender identity and sexual orientation” (NJA 2008:283-84).

with LGBTI people is double: on the one hand, as the litigation shows, activists and judges alike use it to establish the “truth” about non-heteronormative sexualities, that is, its natural and non-pathological dimension. On the other hand, we have to acknowledge the specific role that international aid programs on HIV prevention have played in the “coming out” of the LGBTI minority. It is not a coincidence if the only way to register BDS, in 2001, was to declare it as an association involved in HIV prevention, as the relevant governmental department (the Welfare Council) had refused to register the association under its real *raison d’être*, the advocacy of LGBTI rights (BDS’s staff, personal communication, 2011). At that time, the only way of openly speaking about homosexuality in Nepal was through the medical discourse on the spread of the virus. However, if these programs were the starting point of sexual/gender non-conformity verbalization and recognition in Nepal (for example, through the identification of “groups at risk”), they eventually also imposed their specific terminology (like MSM, that is, “men who have sex with men”) and their essentialist stance on local self-representations. The very idea of a gay or MSM “community” was initially introduced in South Asia by international agencies and organizations, in line with their programs’ implementation strategies and exigencies, as Shivananda Khan<sup>36</sup> aptly remarks (2010:160):

A range of international and national agencies working in the field of HIV have recognized that, for effective and sustainable strategies to prevent the spread of HIV and to control emergent epidemics in a range of localities, countries and regions, MSM should be seen as a vulnerable “group” or “population,” and their sexual health concerns need to be addressed in ways that enable “community-based” responses.

Through this logic, MSM has often been taken to mean a specific and exclusive sexual identity in opposition to heterosexuality, where MSM form an exclusive and bounded group/community: “Too often programmatic decisions are taken within this limited view of what is essentially a behavioural term, while agencies and individuals speak of an ‘MSM’ community” (157).

Thus, the recognition of the LGBTI people has been tied to their integration into the development industry of Nepal and to their formatting according to the essentialist template imposed by this industry, which has conditioned the overall struggle of the activists. From the HIV prevention programs to the more recent rights programs, the terminology, sectors of intervention, and representations have depended on donors’ priorities, approaches, and categorizations, in a process that does not necessarily reflect local perceptions and self-representations. As Boyce and Pant note in relation to the category of MSM, in what was perhaps the first ethnographic enquiry on this issue in Nepal (Boyce and Pant 2001:9):

Preliminary indications are that a considerable number of men who have sex with men in Kathmandu are married and/or have female sexual partners other than their wives, including in some instances women who sell sex. . . . Indeed it is misleading to conceptualize men who have

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<sup>36</sup> Khan is an Indian activist and the founder of the Naz Foundation, a prominent activists’ organization advocating for LGBTI rights in India.

sex with men as a distinct and contained target population. Male-to-male sex does not exist in isolation. Rather sex between men takes place within socio-sexual networks and sexual activity patterns that are intimately integrated into the sexual lives of the so-called “general population,” of which men who have sex with men are themselves a part. This is particularly so in a country such as Nepal where sexual culture is such that there is no firm or predictable division between men who have sex with men and men who have sex with women.

Overall, research in Nepal and India (Boyce and Pant 2001; Tamang 2003; Khan 2010; Khanna 2009; Coyle and Boyce 2015) has largely confirmed this divergence between Western categorizations and South-Asian same-sex subjectivities and sexual practices, highlighting how the latter may not be conceived as an explicit aspect of identity but as an implicit aspect of intimacy, “querying but not necessarily overtly countering apparently hetero-modes of kinship and community” (Coyle and Boyce 2015:9).

The institutionalization of the LGBTI minorities in Nepal entails therefore an ambiguous process, as the local, multiform, indeterminate (and individual!) ways in which sexuality can be experienced and represented are being compressed into the dominant European-North American framework of understanding sexuality, historically constructed through the bio-medical register,<sup>37</sup> the binary opposition between homosexuality and heterosexuality, and the language of identity rights, which are at the basis of the process of legitimization of non-heteronormative sexualities in Nepal (Cowan, Dembour, et al. 2001:11):

To the extent that claimants are compelled to use a certain language of rights in pursuit of what they need or want, and to portray themselves as certain kinds of persons, when these may be alien to their self-understandings, it is evident that rights discourses are not ethically unambiguous or neutral. While emanating an emancipatory aura, their consequences both for those who use them and for those asked to recognize them are more contradictory. . . . This is the paradox of the language of rights, the ways in which rights discourses can be both enabling and constraining.

Though such a strategy can be politically efficient, its symbolic, psychological, and social implications remain problematic, as, in order to obtain the legal recognition of a minority whose rights can be asserted, it ties sexual and gender non-conformity to the bio-medical premise according to which desire determines identity.<sup>38</sup>

Certainly, this process has enabled the activists’ discourse to acquire authority, reinforcing their claims for their rights. In this respect, it seems, the transformation of LGBTI individuals into “sexual and gender minorities” was unavoidable, not only as it reflects the general position of the LGBT global movement, but also because it was consonant with the logic of the identity politics that is now dominant in Nepal, where group rights have more weight than individual rights. It is interesting in this connection to note that, somewhat ironically, the activists’ essentialist strategy to assert their existence as a minority stresses and validates the

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<sup>37</sup> Foucault (1976). See Khanna (2007) for an analysis of the construction of sexuality through public health interventions in the Indian context.

<sup>38</sup> On this point, see also Khanna (2009).

same principles on which the conception of ethnic groups and castes are based in Nepal. As Gellner (2001:190) writes: “What all Nepali political parties, pressure groups and revolutionaries seem to agree on is an essentialist view of the . . . divisions they argue over. All seem to agree that everyone in the country: (1) belongs to one and only one ethnic or caste group; (2) is born in that group; (3) cannot change their group.” These features also affect the activists’ and the judges’ conception of the new gender/sexual minority, by linking it to “birth” or “nature” and making it a feature that is essential in the definition of the individual’s identity.<sup>39</sup>

In this context, the institutionalization of new minorities based on sexual orientation and gender identity marks a major departure from local practices of non-heteronormative sexuality,<sup>40</sup> which are “not always reducible to culturally explicit and socially evident claims to identities, or fixed across entire lifespans” (Coyle and Boyce 2015:9-10). While bolstering rights, such a process may turn fluid local practices into markers of globalized identities.

## Epilogue

The authoritative dimension of the discourse mobilized by the activists and the judiciary through this PIL can be measured through the multiple impacts that this litigation has had. There is, firstly, a social and psychological impact: whoever discriminates against or abuses LGBTI people is now liable to legal prosecution; more and more people are starting to overtly oppose the culture of silence and shame surrounding their sexual orientation, calling for their rights and denouncing cases of abuse (with the support of the BDS legal team), as is shown by the tremendous growth of BDS, which—under the name of Federation of Sexual and Gender Minorities<sup>41</sup>—boasts up to 40 local branches and at least 120,000 members. Nowadays, around 300,000 community members are regularly in touch with the Blue Diamond Society and its partner organizations, accessing services and sharing information, according to the last figures provided by BDS (BDS staff, personal communication, 2011).

Secondly, there is a political impact. A few months after this litigation (April, 2008), Sunil Babu Pant, founder and former executive director of BDS, who submitted the petition to the Supreme Court, was elected to the first constituent assembly, where he advocated for gender/sexual minorities’ rights to be included in the new constitution. The election of the first openly gay lawmaker (with more than 15,000 votes), as well as the inclusion of LGBTI people’s rights in the agendas of the main political parties, demonstrate how sexuality has become a political

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<sup>39</sup> See also Boyce and Coyle (2013) on this point.

<sup>40</sup> The increasing influence of Western categories is suggested for instance by the difference between the Boyce and Pant enquiry on same-sex terminology in 2001, when only a few people identified with the acronym LGBTI, and the more recent UNDP/WI survey (2014), when ninety-two percent of the sample chose one of the following seven terms as defining their primary identity: third gender, *meti*, gay, lesbian, bisexual, heterosexual, or MSM. See also Tamang (2003), who notes the progressive adoption of the term “drag” by *metis*, compared to the older generation’s use of “going as a girl.” This author also notes the “shame” of certain *metis* in BDS to admit that they had intercourse with women.

<sup>41</sup> This name echoes the “Federation of Indigenous Nationalities” (NEFIN) formed by the ethnic groups of Nepal, another sign of the way in which LGBTI people have adopted the dominant identity politics of the country.

object in Nepal. In the same year, the Nepal government (Minister of Finance) allocated a 3 million NPR budget to the “community”<sup>42</sup> (marking the first governmental recognition of LGBTI minority). The report of the commission in charge of the issue of same-sex marriage, as per the Supreme Court directive, was issued in 2015 (February). The report recommended legalization of same-sex marriage and elimination of discriminatory provisions from the civil and criminal codes.<sup>43</sup>

Thirdly, there is a normative impact, resulting in the inclusion of the third gender category in official documents and procedures: in 2010, the Nepal Election Commission permitted citizens to register as “third gender” in their electoral certificate, “without requiring the registered gender to match any other documents but basing the registration process entirely on self-identification as per the court’s order” (Bochenek and Knight 2012:32). In 2011, the third gender category was also included in the basic data form of the 2011 National Census.<sup>44</sup> In 2012 the Government of Nepal officially instructed district offices to issue citizenship documents listing male, female, and other genders: LGBTI people can now obtain official documents (passports and ID documents), with the mention “others” in the sex line, if they so choose;<sup>45</sup> a choice backed up by the 2015 order of the Supreme Court to the Government to issue passports for three genders (Knight 2015).

But the most far-reaching impact, which can be directly related to the 2007 judgement, is the inclusion of the rights of sexual and gender minorities in the new constitution of Nepal (issued in September 2015), a historical achievement both for the LGBTI activists and for the judges who (first) legitimized their rights, converting their voice into a “discourse of truth” now enshrined in the country’s constitution.

However, the transformation of these rights into a “living reality,” to quote the preamble of the 1990 constitution, will now depend on the capacity of “New Nepal” to tackle present

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<sup>42</sup> As related on the BDS web site <http://www.bds.org.np/23-2/>.

<sup>43</sup> TKP 07-08-2015.

<sup>44</sup> The census, however, failed to provide figures on “third gender” (see Knight 2011): although this failure was blamed on administrative and logistical problems, two others factors may be suggested. The first is a terminological one, as many LGBTI people do not define themselves as “third gender” (UNDP/WI 2014). This definition is interpreted in diverse ways, either including all sexual/gender minorities or merely transgender, but is usually refused by non-transgender people. The other factor is the unwillingness of many individuals to identify as “others,” because if this *volonté de savoir* finds its justification in the economy of development programs and in the politics of identity (where numbers are strategic for advocacy), it is often felt as an embarrassing and intrusive procedure from a personal perspective (see Knight 2015 on the issue). Here again we find an opposition between the logic of development/rights and personal perspectives.

<sup>45</sup> Recently Saurav Jung Thapa (August 2015), in the blog for the Human Rights Campaign (HRC), reported that “11 transgender people chose this designation on their citizenship documents to date, which is a prerequisite before seeking a passport with the same designation.”

patterns of patriarchy and social and gender hierarchies, which, it can be argued, lie at the very root of the discrimination against LGBTI people.<sup>46</sup>

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<sup>46</sup> It is worth mentioning, in this regard, some results of Naz Foundation researches on Indian LGBTs (Khan 2010:159): "One of the central issues that have arisen . . . is that often it is effeminacy and not the factual knowledge of male-to-male sexual behavior that leads to harassment and violence. That harassment and sexual violence results from the fact that many *kothis* [male transsexuals] do not live up to the expected normative standards of masculine behavior. It is this belief that leads to the notion that those who are feminized can be exploited and abused, and that being feminized somehow weakens the person, a notion often harbored by the *kothis* themselves. Accepted notions around effeminacy are therefore one of the major factors that lead to disempowerment and opens *zenanas/kothis/metis* to abuse and assault and to a refusal of service provision." Similar conclusions have been drawn in the Nepalese context (BDS 2005:104): "Those who are seen traditionally as masculine enjoy their sexuality and control those who are not masculine. Non-masculine sexuality is there to be dominated and used. Thus sexual rights and sexual health rights of non-masculine people are denied." See also Tamang (2003) on the relation between patriarchy and homo-erotic behavior in Nepal.



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