

DIRECT AND STRUCTURAL VIOLENCE AGAINST TRANSGENDER POPULATIONS: A COMPARATIVE LEGAL STUDY

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Abstract

This Article is a comparative study exploring how the law impacts Transgender rights and Transgender access to justice. In countries where the law is hostile to Transgender rights, such law perpetuates structural violence, promotes discrimination and persecution, causing direct violence against Transgender populations. In countries where the law is more progressive, an interesting phenomenon exists. In these countries, where Transgender lives can be more openly lived, Trans-violence rates are noticeably higher than in countries where Transgender rights are restricted. This scholarship was developed with an eye towards reforming the law in countries with problematic legal structures and continuing efforts to protect Transgender lives in more progressive countries. I hope that this Article, researched and written at the intersection of Transgender life and law, provides an engine for greater discussion on how Transgender populations can be better protected, allowing them to live freely under the letter and spirit of the Universal Declaration of Human Rights.

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INTRODUCTION

In recent years, recognition of lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights has received a vast amount of attention. Examples include a United Nations Resolution on human rights, sexual orientation and gender identity in June 2011¹ and the subsequent Report of the United Nations High Commission for Human Rights on Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity in 2014;² progressive court rulings in Colombia in 2011;³ a reversal of discriminatory national legislation in Malawi in 2012;⁴ and the 2013 Inaugural Address and the 2014 State of the Union Address of the United States President Barack Obama. These examples signal the seemingly continued expansion of the protection and promotion of the basic rights of LGBTQ communities. However, the rights of Transgender persons, standing alone, often are merely lumped in with the other groups in the LGBTQ acronym, and rarely is the issue of Transgender rights, standing alone, discussed and addressed. There are moments where Transgender rights rise to the forefront, as was the case in 2014 in *National Legal Services Authority v. Union of India*, where the Supreme

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1. Human Rights Council Res. 17/19, U.N. Doc. A/HR/RES/17/19 (July 14, 2011).
2. Human Rights Council Res. 29/23, U.N. Doc. A/HRC/29/23 (May 4, 2015).
3. *Colombian Court Says Congress Must Decide on Gay Marriage*, CNN WORLD, (July 27, 2011), <http://www.cnn.com/2011/WORLD/americas/07/27/colombia.gay.marriage/index.html>. The Constitutional Court of Colombia ruled that "gay couples in de facto unions constitute a family" and gave the Congress two years to create legislation addressing same-sex marriages.
4. Godfrey Mapondera & David Smith, *Malawi Suspends Anti-Gay Laws as MPs Debate Repeal*, THE GUARDIAN (Nov. 5, 2012), <http://www.guardian.co.uk/world/2012/nov/05/malawi-gay-laws-debate-repeal>. In November of 2012, President Joyce Banda of Malawi announced a moratorium on sections 153 and 156 of the national penal code, which criminalizes sexual conduct between men and section 137A, which criminalizes "indecent practices between females," until Parliament decides the issue.

Court of India provided for legal recognition of a third gender.⁵ But, in the aggregate, global attention to the rights of Transgender persons is greatly muted in comparison to the dialogue in support of LGBQ rights.

However, Transgender persons are vulnerable in the same way that LGBQ populations are vulnerable, as the victims of both direct violence and structural violence and discrimination and persecution. For example, in March 2012, around seventy Iraqi Transgender males were murdered in and around Baghdad, for dressing in tight-fitting, androgynous clothing, nose rings, studded leather belts and bracelets, dyed hair, and these presumed links to non-traditional gender identity.⁶ Similarly, planned violent attacks on Transgender persons have occurred with increasing regularity in Russia. On August 20, 2013, in Moscow, five men ambushed a Transwoman in a public park during daylight hours. The victim was severely beaten while being dragged around the park by her attackers. Her assailants videoed the attack and posted the video on a Russian equivalent of Facebook.⁷ This is one example in a series of videoed attacks in Russia, and Russia is not alone in this phenomenon. Transgender persons in many countries suffer from endemic hostility, persecution, and violence.⁸

Violence against Transgender persons also takes a less overt form. Inequality in social and legal structures exclude Transgender persons from basic rights such as the right to adequate healthcare and equal access to justice. As one report shows through case studies on Transgender rights across the globe, structural inequalities lead to poverty, marginalization, and “may also prevent Trans people from accessing health care services.”⁹ This lack of access to basic rights exemplifies a form of structural violence. These forms of “violence of injustice and inequity” are “embedded in ubiquitous social structures” and can become normalized by state institutions and frequent experience by Transgender

5. National Legal Services Authority v. Union of Indian and others, (2014) AIR 2014 SC 1863 (India).

6. Jack Healy, *Threats and Killings Striking Fear Among Young Iraqis, Including Gays*, N.Y. TIMES (Mar. 11, 2012), <https://www.nytimes.com/2012/03/12/world/middleeast/killings-strike-fear-in-iraqi-gay-and-emo-youth.html>.

7. James Nichols, *Russian Transgender Woman Beaten In Public Park Caught On Tape*, THE HUFFINGTON POST (Aug. 20, 2013), https://www.huffpost.com/entry/russian-transgender-woman-beaten_n_3779723.

8. Mashal Shah, *The Kwaja Seras: Pakistan's Endangered Minority*, THE HUFFINGTON POST (Aug. 13, 2013), http://www.huffingtonpost.com/mashal-shah/pakistans-endangered-spec_b_3732591.html; INT'L HIV/AIDS ALLIANCE, IMPUNITY AND VIOLENCE AGAINST TRANSGENDER WOMEN HUMAN RIGHTS DEFENDERS IN LATIN AMERICA (2012).

9. OPEN SOCIETY FOUNDATION, TRANSFORMING HEALTH: INTERNATIONAL RIGHTS-BASED ADVOCACY FOR TRANS HEALTH, <https://www.opensocietyfoundations.org/uploads/29ab7a11-c8c1-49dc-9c6c-1d8401905639/Transforming-health-20130213.pdf>.

communities.¹⁰ Such policies and laws can institutionalize and codify discrimination against Transgender people, leading to persecution, inciting Trans-violence, and exacting practices that compromise Transgender legal rights.

While structural violence abounds and perpetrators of Trans-violence are not investigated or prosecuted such as in Guyana, Malawi, Saudi Arabia, and Uganda, a number of countries have created national laws and policies for the protection and promotion of Transgender rights and prevention of rights violations against Transgender populations. Examples of such countries include India, Nepal, and Pakistan.

This Article is a comparative study exploring how domestic laws impact Transgender rights and access to justice for Transgender communities. In those countries where the law is hostile to Transgender rights and Transgender access to justice, such legal practices perpetuate structural violence, promote discrimination and persecution, and cause direct violence against Transgender populations. In other countries where the law is more progressive, an interesting phenomenon exists. In countries where Transgender lives are lived more outside of the shadows, Trans-violence rates are noticeably higher than in countries where Transgender rights are restricted. It is important to investigate domestic laws affecting Transgender populations to both demand reforms of hostile laws and to also consider the role that the international community can play in protecting Transgender rights in those countries where domestic law refuses or is incapable of doing so. Additionally, is it vital to continue efforts to protect Transgender lives in those countries whose laws are progressive, since rates of Trans-violence skyrocket as Transgender communities feel freer to live outwardly Transgender lives.

I. VIOLENCE AGAINST TRANSGENDER PERSONS AND COMPARATIVE LAW

“All we want from people is to stop treating us like trash. People think that we are God’s curse, so they mistreat us. How are we to blame for God’s doing? If he created us this way, there must be a deeper wisdom that we as human beings are incapable of comprehending.”¹¹ Laila Naz, Age 39, Lahore, Pakistan

A. *Trans Murder*

Trans-violence, including Trans murder, is a reality for Transgender persons in many countries. The organization Transgender Europe

10. Barbara Rylko-Bauer and Paul Farmer, *Structural Violence, Poverty, and Social Suffering*, in OXFORD HANDBOOKS ONLINE (David Brady and Linda M. Burton, eds., 2016); Deborah Winter and Dana C. Leighton, *Structural Violence Section Introduction*, in PEACE, CONFLICT, AND VIOLENCE: PEACE PSYCHOLOGY FOR THE 21ST CENTURY at 99 (D.J. Winter, R.V. Wagner, and D.D. Winter, eds., 2001).

11. Email from Laila Naz to Mashal Shah (email record on file with author).

(TGEU) established a “Trans Murder Monitoring Project” that releases quarterly reports of the murder count of Transgender individuals across the world.¹² The March 2013 update reveals a total of 1,123 reported killings of Transgender people in fifty-seven countries worldwide from January 1, 2008 to December 31, 2012.¹³ The update shows a significant and constant increase in reported killings of Transgender people over the last five years. In 2008, one-hundred and forty-eight cases were reported, in 2009 two-hundred and seventeen cases, in 2010 two-hundred and twenty-nine cases, in 2011 two-hundred and sixty-two cases, and in 2012 two-hundred and sixty-seven cases.¹⁴

Cases have been reported from all major regions. Most reported cases were from Central and South America, which amount to eight-hundred and sixty-four reports in twenty-two countries and account for seventy-seven percent of the globally reported murders of Transgender people since January 2008.¹⁵ In Brazil, the country with the most reported killings (four-hundred and fifty-two in total), there has been a steady increase (2008: 57, 2009: 68, 2010: 99, 2011: 103, 2012: 125).¹⁶ In Mexico, one-hundred and six cases have been reported in total, showing an even more drastic yearly increase (2008: 4, 2009: 9, 2010: 14, 2011: 33, 2012: 46).¹⁷ In Colombia, sixty-five killings have been reported since 2008 (2008: 13, 2009: 13, 2010: 15, 2011: 18, 2012: 6).¹⁸ TGEU research also shows that in the last five years:

- One-hundred and five killings of Trans people have been reported in Asia (2008: 17, 2009: 17, 2010: 29, 2011: 25, 2012: 17), in fifteen countries (Afghanistan: 1, Azerbaijan: 2, Bangladesh: 1, Cambodia: 1, China: 6, India: 24, Indonesia: 7, Iran: 1, Iraq: 3, Malaysia: 6, Pakistan: 19, Philippines: 28, Republic of Korea: 1, Singapore: 1, and Thailand: 4).¹⁹
- Seventy-one killings of Trans people have been reported in Europe (2008: 13, 2009: 20, 2010: 10, 2011: 14, 2012: 14), in eleven countries (Albania: 1,

12. TRANS RESPECT VERSUS TRANSPHOBIA WORLDWIDE, TRANS MURDER MONITORING RESULTS: TMM MARCH 2013 UPDATE (2013), http://www.Transrespect-Transphobia.org/en_US/tvt-project/tmm-results/march-2013.htm. Of course, Trans-violence encompasses more than solely Trans murder, but Trans murder may best capture the attention of the reader and the general public, thus the focus on Trans murder at this juncture.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

France: 2, Germany: 2, Italy: 20, Poland: 1, Portugal: 1, Russia: 2, Serbia: 1, Spain: 6, Turkey: 30, and UK: 5).²⁰

- Seventy-one killings of Trans people have been reported in North America (2008: 19, 2009: 13, 2010: 9, 2011: 16, 2012: 14), in two countries (Canada: 2, USA: 69).
- Eight killings of Trans people have been reported in Africa (2008: 2, 2009: 1, 2010: 0, 2011: 1, 2012: 4), in four countries (Algeria: 1, Mauritius: 1, Uganda: 1, South Africa: 5).²¹
- Four killings of Trans people have been reported in Oceania (2008: 3, 2009: 1, 2010: 0, 2011: 0, 2012: 0), in four countries (Australia: 1, Fiji: 1, New Caledonia: 1, and New Zealand: 1).²²

B. *The Underreporting of Trans-Violence as a Constant*

In many countries, Transgender life is lived with the constant danger of suffering physical violence at the hands of private citizens and police forces, and a corresponding lack of response and/or hostility from police after victimization. In fact, “[r]esearch suggests that Transgender people are one of the most victimized groups in society and are more likely to be abused by police than other members of society.”²³ The combined forces of Trans-violence and a lack of police response after such violence have caused a chilling effect on the reporting of victimization. In Kuwait, for example, a 2012 Human Rights Watch (HRW) report stated that interviewees “said they rarely report . . . police mistreatment, abuse, and sexual assault they encounter for fear of re-arrest, retaliation, and direct threats by the perpetrators, whether civilian or police.”²⁴ HRW claims that Transgender and gay Iranians “are often the targets of harassment, abuse, blackmail, extortion, and torture because of their sexual orientation or gender identity. Yet because the law criminalizes same-sex conduct, LGBTQ Iranians cannot avail themselves of the general protections afforded under the law because they fear further

20. *Id.*

21. *Id.*

22. *Id.*

23. Toby Miles-Johnson, *They Don’t Identify With Us: Perceptions of Police By Australian Transgender People*, 16 INT’L J. OF TRANSGENDERISM 169 (2015).

24. HUMAN RIGHTS WATCH, *THEY HUNT US DOWN FOR FUN: DISCRIMINATION AND POLICE VIOLENCE AGAINST TRANSGENDER WOMEN IN KUWAIT* (2012), <https://www.hrw.org/report/2012/01/15/they-hunt-us-down-fun/discrimination-and-police-violence-against-Transgender-women>.

discrimination and possible prosecution.”²⁵ In Kyrgyzstan, HRW documented a series of interviews with LGBTQ persons, all of whom indicated a general mistrust of the police and an unwillingness to bring complaints of violence to the police for investigation and potential prosecution.²⁶ In India, evidence demonstrates that Transwomen sex workers, when victimized attendant to their work, avoid taking their complaints to the police because they have engaged in homosexual sex, which is illegal under the Indian Penal Code.²⁷ Discussing police abuse of India’s LGBTQ community and its chilling effect upon the willingness of LGBTQ victims of crime to file complaints with the police, Tripti Tandon, deputy director of the Delhi-based human rights NGO Lawyers Collective stated that “[r]ape, blackmail, violence and extortion by the police is pretty endemic. When the police are perpetrating the violence, then how do you resort to the same machinery to make a complaint?”²⁸ Research in Australia demonstrates that “Transgender people avoid police contact and are cautious of police interaction and . . . do not trust the police or do not consider the police to be a legitimate organization.”²⁹ Finally, in the United States, in the 2011 National Transgender Discrimination Survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Taskforce, forty-six percent of respondents “reported that they were uncomfortable seeking help from police while only thirty-five percent reported that they were comfortable doing so.”³⁰

The combination of high rates of Trans-violence and low reporting rates of such violence in countries around the world demonstrates that

25. HUMAN RIGHTS WATCH, *WE ARE A BURIED GENERATION: DISCRIMINATION AND VIOLENCE AGAINST SEXUAL MINORITIES IN IRAN* (2010), <https://www.hrw.org/report/2010/12/15/we-are-buried-generation/discrimination-and-violence-against-sexual-minorities>.

26. HUMAN RIGHTS WATCH, *THESE EVERYDAY HUMILIATIONS: VIOLENCE AGAINST LESBIANS, BISEXUAL WOMEN, AND TRANSGENDER MEN IN KYRGYZSTAN* (2008), <https://www.hrw.org/report/2008/10/06/these-everyday-humiliations/violence-against-lesbians-bisexual-women-and>

27. *Transgenderism in India: ‘People just use us for sex,’* THE GUARDIAN (July 4, 2008), <http://www.theguardian.com/world/2008/jul/04/india-gender>. The legality of consensual homosexual sex in India is an interesting one. Section 377 of the Indian Penal Code forbids homosexual sex. On 2 July 2009, in *Naz Foundation v. Govt. of NCT of Delhi* (2009), the Delhi High Court found Section 377 to be unconstitutional with respect to sex between consenting adults. On December 11, 2013, the Supreme Court of India overturned that ruling and returned the issue to the Indian Parliament for clarification.

28. Sonia Paul, *Living in Fear: LGBTs in India*, AL JAZEERA (Apr. 17, 2014), <http://america.aljazeera.com/articles/2014/4/17/living-in-fear-lgbtsinindia.html>.

29. Miles-Johnson, *supra* note 23, at 170.

30. JAIME M. GRANT & LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN, AND MARA KEISLING, WASHINGTON: NATIONAL CENTER FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 162 (2011).

Transgender populations are not currently being fully protected by domestic criminal law. Such a lack of protection is partially attributable to structural violence against Transgender populations.

C. *A Theory of Structural Violence*

Violence against Transgender populations takes many forms, including structural violence.

Structural violence is a broad umbrella term that includes ‘a host of offensives against human dignity: extreme and relative poverty, social inequalities ranging from racism to gender inequality, and the more spectacular forms of violence that are uncontestably human rights abuses.’³¹ The term structural violence describes the systems of institutionalized discrimination that target Transgender people in areas of everyday life, such as health care, housing, employment, education, and legal identity status.³²

The term structural violence was first introduced in 1969 by Johan Galtung, often considered the founder of peace and conflict resolution studies. In “Violence, Peace, and Peace Reacher,” Galtung laid out definitions and models of peace and violence. Galtung discussed three types of violence—the triangle of violence—which includes direct, cultural, and structural violence.

Structural violence refers to social systems embedded with injustice and exploitation. Institutionalized practices harm certain groups and perpetuate inequities in their relation to other groups. Structural violence can take on many forms, including laws that exacerbate issues of marginalization and policies or practices that prevent equal access to social institutions such as health or education for marginalized groups.³³ Structural violence is largely invisible because it is so ingrained in the fabric of society. In visualizing the triangle of violence, Galtung explains that structural violence often causes direct violence, which in turn is justified and normalized by cultural violence.³⁴ So while structural violence may be less apparent as a form of violence in society, when closely tied with direct violence, it gives rise to phenomena such as racial violence, state violence, gender violence, and family violence.³⁵

31. Paul Farmer, *PATHOLOGIES OF POWER HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* (2005).

32. OPEN SOCIETY FOUNDATION, *supra* note 9.

33. HARVARD DIVINITY SCHOOL, RELIGIOUS LITERACY PROJECT, *TYPLOGIES OF VIOLENCE AND PEACE*. <https://rlp.hds.harvard.edu/our-approach/typologies-violence-and-peace>.

34. William Hathaway, *Varieties of Violence: Structural, Cultural, and Direct*, TRANSCEND MEDIA SERVICES (Oct. 21, 2013), <https://www.Transcend.org/tms/2013/10/varieties-of-violence-structural-cultural-and-direct/>.

35. James Gilligan, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 196 (1997).

Since Galtung, scholars have expanded upon structural violence literature, including applying it to LGBTQ populations. Padilla et al., in “Globalization, Structural Violence, and LGBT Health: A Cross-Cultural Perspective,” discuss how structural violence is present in societies through institutionalized discrimination that has critical implications for the livelihoods of LGBTQ populations.³⁶ Such institutionalized policies and laws keep structural violence against LGBTQ populations embedded in political, legal, and social structures. Below are a number of countries in which law has been used to discriminate against Transgender populations or exclude them from access to justice—a form of structural violence.

II. DISCRIMINATORY LAW AS A FORM OF TRANS-VIOLENCE

A. Guyana

Section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act, Chapter 8:02 of the Laws of Guyana bans public display of Transgenderism/cross-dressing for any undefined “improper purpose.”³⁷ Section 153(1)(xlvii) states that any person is subject to a fine if “being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper purpose, appears in male attire.”³⁸ In 2009, this law was challenged after seven Guyanese Transwomen were arrested and fined under this provision.³⁹ The seven contended that their arrest and fine was unconstitutional.⁴⁰ On September 6, 2013, the Honourable Chief Justice (Ag.) of Guyana, Mr. Ian Chang, delivered his judgment in the case. While Chief Justice Chang reversed the conviction and fine against the accused because they engaged in cross-dressing for a so-called “not-improper purpose,” he found the law itself constitutional and, thus, cross-dressing in a public place is still an offense if done with a still-

36. Mark B. Padilla & Ernesto V. Del Aguila, and Richard G. Parker, *Globalization, Structural Violence, and LGBT Health: A Cross-Cultural Perspective*, in *THE HEALTH OF SEXUAL MINORITIES* 215 (Ilan Meyer & Mary Northridge eds., 2007).

37. Summary Jurisdiction (Offences) Act (Cap. 8:02) (No. 17 of 1893), § 153(1)(xlvii) (1895).

38. *Id.*

39. Joint Press Release, Society Against Sexual Orientation Discrimination, Guyana Trans United, Caribbean Vulnerable Communities United, Caribbean Forum for Liberation and Acceptance of Genders and Sexualities, and the Faculty of Law University of the West Indies Rights Advocacy Project, Constitutional Court Rules Cross-Dressing is Not a Crime if Not for “Improper Purpose” (Sept. 27, 2013), <http://sasod.org.gy/sasod-blog-constitutional-court-rules-cross-dressing-not-crime-if-not-%E2%80%9Cimproper-purpose%E2%80%9D-rights>.

40. *Quincy McEwan, Seon Clarke, Joseph Fraser, Seyon Persaud and the Society Against Sexual Orientation Discrimination (SASOD) vs. Attorney General of Guyana*.

undefined “improper purpose.”⁴¹ While the reversal of the conviction against McEwan *et al.* was met with some measure of joy from the Transgender community of Guyana, Chief Justice Chang’s ruling that the law itself is constitutional was met with derision. The decision is being appealed by Transgender rights advocates, who find that the law, in any form, is discriminatory based on the grounds of both sex and gender and that the term “improper” is unconstitutionally vague.⁴²

B. Malawi

In other countries, the anti-gay and anti-Transgender sentiment is passed in the form of codified law and serves as another form of structural violence. Malawi is one such case. In its recent history, Malawi passed stringent anti-gay laws that also criminalized some Transgender sexual relationships. Penal Code Cap. 7:01 of the Laws of Malawi criminalized sexual acts between two men and reads, in pertinent part, as follows:

Section 153. Unnatural offences

Anyone who –

(a) has carnal knowledge of any person against the order of nature; or...

(c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

Section 154. Attempt to commit unnatural offences

Any person who attempts to commit any of the offences specified in the last preceding section shall be guilty of a felony and shall be liable to imprisonment for seven years, with or without corporal punishment.

Section 156 Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with

41. Cynthia Miley, *Guyana Judge Rules Cross-Dressing Only Criminal when Done for 'Improper Purposes'*, JURIST (Sept. 9, 2013), <http://www.jurist.org/paperchase/2013/09/guyana-judge-rules-cross-dressing-only-criminal-when-done-for-improper-purposes.php>.

42. Joint Press Release, Society Against Sexual Orientation Discrimination and the Faculty of Law University of the West Indies Rights Advocacy Project, Constitutional Court Reserves Judgment in Guyana Cross Dressing Case (June 6, 2013), <http://sasod.blogspot.com/2013/06/press-release-constitutional-court.html>.

another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.⁴³

Similarly, Section 137(a) of the Malawian Penal Code criminalizes lesbian sex and stipulates that any woman who commits “any act of gross indecency with another female” shall receive a prison sentence of five years.⁴⁴

In 2012, then-President Joyce Banda, under significant international pressure and threat of the loss of international aid, suspended these laws. While announcing the suspension, President Banda called for a review of Malawi’s anti-gay laws and proposed that they be repealed, but insisted that it be done slowly, as she felt Malawi was not ready for such immediate change. However, after significant outcry from the country’s conservative religious leaders, the laws were reinstated. The laws remained virtually unenforced until 2014 when an official review was completed, and the laws were again suspended. These laws currently remain suspended, but a national debate on the topic is ongoing.

The legal situation for LGBTQ persons in Malawi remains tenuous, and recent events have negatively impacted the legal landscape. On April 17, 2015, The Marriage, Divorce, and Family Relations Law (TMDFRL), signed by President Peter Mutharika, made same-sex marriages and unions illegal and also codified the immutability of gender for purposes of Malawian law. This law fixed a person’s sex/gender as the one assigned to them at birth, eliminating the ability of Transgender persons to establish their preferred gender identity if it lies outside of their identified birth sex.⁴⁵ Malawi’s law codifying sex/gender immutability not only flies in the face of almost forty years of comparative global legal development on gender identity but, if the aforementioned anti-gay sex laws are ever reinstated in Malawi, the re-criminalization of same-sex sexual acts combined with TMDFRL’s provision of immutability will criminalize some Transgender sex by not allowing legal changes to sex/gender that would establish lawful heterosexual sexual relationships.

C. Saudi Arabia

Laws in other countries, while not addressing Transgender rights directly, negatively affect Transgender rights more obliquely through

43. LUCAS PAOLI & JINGSHU ZHU, INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX ASSOCIATION, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION OF SAME-SEX LOVE 4 (2014).

44. *Id.*

45. Aaron Morrison, *Malawi Gay Rights: New Marriage Law Further Criminalizes LGBT Relationships And Identities, Group Says*, INT’L BUS. TIMES (Apr. 17, 2015), <http://www.ibtimes.com/malawi-gay-rights-new-marriage-law-further-criminalizes-lgbt-relationships-identities-1886670>.

anti-gay and lesbian laws. The Saudi Arabian Penal Code does not mention homosexual sexual relations or Transgender issues.⁴⁶ Instead, Saudi Arabia applies a strict interpretation of Sharia law, whereby all forms of sodomy are criminalized.⁴⁷ If a married man commits an act of sodomy, the penalty is death by stoning.⁴⁸ The penalty for an unmarried man is 100 lashes from a whip and banishment from the country for a year.⁴⁹ If a non-Muslim commits sodomy with a Muslim, the penalty for the non-Muslim is death by stoning.⁵⁰ Sexual relations between women are also illegal,⁵¹ but enforcement of such seems less stringent. As often seems the case, the line between gay, lesbian, and Transgender is unclear when it comes to enforcement of such laws. For example, a news report from March 18, 2012, stated that forty-nine gay men were arrested when police affiliated with the Commission for the Promotion of Virtue and the Prevention of Vice raided a party in Taif.⁵² The article indicates that the men arrested were gay, but also mentioned that some of the men engaged in cross-dressing.⁵³ The article states that some of the men arrested “wore dresses that show most parts of their bodies . . .” while the article cites the Arabic language daily Sabq as reporting that the men “were caught dancing and hugging each other indecently and wearing obscene clothes . . .”⁵⁴ In another example, three men were arrested and referred for prosecution in Fujairah for walking in public while dressed as women.⁵⁵ According to the Al Khajeel newspaper, the men confessed to “wearing cosmetics and acting feminine.”⁵⁶ In yet another case, a wedding in Jeddah was raided in 2005, and over 100 men were arrested for “dancing and behaving like women.”⁵⁷ These men were sentenced to up to a year in prison and flogging for such behaviors,⁵⁸ which could be classified as homosexual, Transgender, or both. HRW indicated that each

46. PAOLI & ZHU, *supra* note 43.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. 49 *Gays Arrested in Saudi*, EMIRATES 24/7 (Mar. 18, 2012), <https://www.emirates247.com/crime/region/49-gays-arrested-in-saudi-2012-03-18-1.449008>.

53. *Id.*

54. *Id.*

55. *Three Men Held for Cross-dressing in Fujairah*, EMIRATES 24/7 (May 1, 2011), <https://www.emirates247.com/news/emirates/three-men-held-for-cross-dressing-in-fujairah-2011-05-01-1.387355>.

56. *Id.*

57. HUMAN RIGHTS WATCH, SAUDI ARABIA: MEN ‘BEHAVING LIKE WOMEN’ FACE FLOGGING (2005), <https://www.hrw.org/news/2005/04/06/saudi-arabia-men-behaving-women-face-flogging>.

58. *Id.*

man was pardoned shortly after sentencing.⁵⁹ The same article documents yet another mass arrest of gay and Transgender persons, discussing the arrest of sixty-seven men who were arrested in Riyadh in June 2009 for wearing women's clothing.⁶⁰ What seems clear from the above examples is that Transgender life in Saudi Arabia is criminalized through the application of strict Sharia law principles on homosexuality and alleged homosexual sexual activity.

D. *Uganda*

Uganda is another example of the victimization of Transgender persons under laws that place homosexuals and Transgender persons together. Laws prohibiting same-sex relations have existed since British Colonial Rule, with Penal Code Act of 1950:

Chapter XIV—Offences against Morality

Section 145. Unnatural offences. Any person who-

(a) has carnal knowledge of any person against the order of nature; [or]...

(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.⁶¹

More recently, the virulent Anti-Homosexuality Act (AHA) was passed by the Ugandan Parliament on December 20, 2013, and was signed by President Museveni on February 24, 2014, appearing in the official Uganda Gazette on March 10, 2014, when it entered into law.⁶² Although this legislation is overtly directed towards homosexuals, it also targets the Transgender community. The lead drafter of the bill and prominent Ugandan Member of Parliament (MP), David Bahati, summarized the intentions of the bill as follows:

protect the traditional family by prohibiting (i) any form of sexual relations between persons of the same sex; and (ii) the promotion or recognition of such sexual relations in public institutions and other places through or with the support of any Government entity in Uganda or any non-governmental organization inside or outside the country.

59. HUMAN RIGHTS WATCH, SAUDI ARABIA DROP 'CROSS-DRESSING' CHARGES (2009), <https://www.hrw.org/news/2009/06/24/saudi-arabia-drop-cross-dressing-charges>.

60. *Id.*

61. Penal Code Act 1950, Cap. 120 (2000) § 145 (Uganda).

62. Anti-Homosexuality Act 2014 (2014) (repealed 2014) (Uganda).

strengthening the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family.

to protect the cherished culture of the people of Uganda, legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.

protect the children and youths of Uganda who are made vulnerable to sexual abuse and deviation as a result of cultural changes, uncensored information technologies, parentless child developmental settings and increasing attempts by homosexuals to raise children in homosexual relationships through adoption, foster care, or otherwise.⁶³

Fortunately for LGBTQ Ugandans, the Constitutional Court of Uganda ruled the AHA invalid—but not on substantive grounds of constitutional unfairness or human rights grounds. The Constitutional Court invalidated the law on the procedural ground that there was not the required quorum of MPs present at the time of voting on the bill.⁶⁴ Despite this setback for supporters of the AHA, national sentiments towards homosexuals and gender minorities remain harsh, and the specter of the return of the AHA remains quite real.

According to a HRW report, LGBTQ Ugandans “have faced a notable increase in arbitrary arrests, police abuse and extortion, loss of employment, evictions, and homelessness, and scores have fled the country” following the AHA.⁶⁵ One week after President Museveni signed the AHA, a Transwoman was attacked and killed by a man she met in a bar in Kampala.⁶⁶ In the aftermath of the attack, the victim's friends told HRW that they were afraid to report her murder to the police out of fear for their own safety.⁶⁷ A Ugandan Non-governmental Organization (NGO), Sexual Minorities Uganda (SMUG), reported that “the full force of the State, particularly the legislative and executive

63. The Anti-Homosexual Bill, Bill No. 18 (2009) 47 Uganda Gazette 102, Bills Supplement 13 (Uganda), <https://www.wthrockmorton.com/wp-content/uploads/2012/02/ahb-2009feb2012.pdf>.

64. *Uganda Court Annuls Anti-Gay Law*, BBC NEWS (Aug. 1, 2014), <http://www.bbc.com/news/world-africa-28605400>.

65. HUMAN RIGHTS WATCH, UGANDA: ANTI-HOMOSEXUALITY ACT'S HEAVY TOLL (2014), <https://www.hrw.org/news/2014/05/14/uganda-anti-homosexuality-acts-heavy-toll>.

66. *Id.*

67. *Id.*

branches of government, is being used to hunt down, expose, demean and suppress Uganda's LGBTI people."⁶⁸

In these nations and others, domestic law is being used to persecute Transgender populations. In these countries, domestic law is the enemy of Transgender persons and demonstrates "the magnitude of physical and structural violence directed at Trans people." This Article will continue on a more uplifting note by discussing countries with laws that are more supportive of Transgender rights. Perversely, in these countries with more supportive laws, levels of Trans-violence systematically rise.

III. SUPPORTIVE LAW AND RAMPANT TRANS-VIOLENCE

A number of countries enjoy laws that are generally respectful of Transgender life, demonstrate a deeper understanding of issues of gender identity, and the notion of gender fluidity. Unfortunately, visible Transgender communities and strong Transgender rights movements also create higher levels of Trans-violence. According to TGEU's Trans Murder Project, "[t]hroughout all six world regions, the highest absolute numbers [of Trans murders] have been found in countries with strong Trans movements and the strong visibility of Trans and gender-diverse people, and/or Trans or LGBTQ organizations that do professional monitoring: Brazil (689), Mexico (194), Colombia (85), Venezuela (85), Honduras (77), Guatemala (39), Argentina (35), and the Dominican Republic (34) in Central and South America, the USA (108) in North America, India (48) and the Philippines (35) in Asia and Turkey (37) and Italy (28) in Europe."⁶⁹ Essentially, the freedom to live outwardly Transgender lives has made those same Transgender persons easily identifiable targets for Trans-violence.

A. *Argentina*

Argentina's law regarding gender identity rights is quite progressive. On May 8, 2012, The Argentinean Senate unanimously passed the Gender Identity Law (GIL).⁷⁰ Article 1 of the GIL reads as follows:

Article 1 – Right to gender identity. All persons have the right,

68. SEXUAL MINORITIES UGANDA, FROM TORMENT TO TYRANNY ENHANCED PERSECUTION IN UGANDA FOLLOWING THE PASSAGE OF THE ANTI-HOMOSEXUALITY ACT 2014 (2014), <https://sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf>.

69. TRANS RESPECT VERSUS TRANSPHOBIA WORLDWIDE, TRANSGENDER EUROPE IDAHOT TMM 2015 (2015), <http://Transrespect.org/en/Transgender-europe-idahot-tmm-2015/>.

70. TRANSGENDER EUROPE, ENGLISH TRANSLATION OF ARGENTINA'S GENDER IDENTITY LAW AS APPROVED BY THE SENATE OF ARGENTINA ON MAY 8, 2012 (2012).

- a) To the recognition of their gender identity;
- b) To the free development of their person according to their gender identity;
- c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image, and sex recorded there.⁷¹

Article 3 of the GIL grants the right to amend one's sex in accordance with their preferred gender identity, stating that "[a]ll persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not correspond with the self-perceived gender identity."⁷²

Article 11 of the law grants the sweeping right to free personal development for Transgender persons, stating that:

All persons older than eighteen (18) years, according to Article 1 of the current law and with the aim of ensuring the holistic enjoyment of their health, will be able to access total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization.

There will be no need to prove the will to have a total or partial reassignment surgery in order to access comprehensive hormonal treatment. The only requirement will be, in both cases, informed consent by the individual concerned. . . .⁷³

Public health officials, be they from the state, private or trade union-run health insurance systems, must guarantee in an ongoing way the rights recognized by this law. All medical procedures contemplated in this article are included in the Compulsory Medical Plan (that is, they are not subjected to additional costs for those having private or trade union-run insurance plans), or in whatever system replaces it, as decided by the enforcing authority.⁷⁴

Article 12 of the law grants the right to dignified treatment of one's chosen gender identity, by mandating that the desired name of the individual be used in both the public and private sectors, while Article 13 mandates that

71. *Id.*, at Art. 1.

72. *Id.*, at Art. 3.

73. *Id.* at Art. 11.

74. *Id.*

every norm, regulation or procedure must respect the human right to gender identity. No norm, regulation, or procedure must limit, restrict, exclude or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favors access to this right.⁷⁵

However, Trans-violence remains a problem and seems to have been exacerbated by the passage of the GIL. TGEU's Trans Murder Project documented thirty-five cases of murders of Trans persons between January 2008 and December 2014.⁷⁶ Similarly, 2015 was a deadly year for Argentina's Transgender population. In September 2015, a Transwoman, Marcela Estefanía Chocobar, was decapitated, and her body dumped in a vacant lot in Río Gallegos.⁷⁷ In the same month, in Santa Fe, a Transwoman named Fernanda "Coty" Olmos was found dead in her home with multiple stab wounds, and a plastic bag pulled over her head.⁷⁸ Most prominently, Diana Sacayán, a leader of Argentina's Transgender rights movement, was stabbed to death in her Buenos Aires apartment in October 2015.⁷⁹ Sacayán had previously gained national attention when President Fernandez personally presented her with her gender identity card following the passage of the GIL.⁸⁰ To date, no one has been charged with her murder.⁸¹

B. Brazil

In Brazil, the reported killings of Transgender persons (452), not only represents the highest total number of Trans murders in any country in the world, but accounts for 52.31% of all Trans murders in Central and South America, and 40.25% of all reported Trans murders between these two dates.⁸² The Trans murder rate in Brazil continues to rise on a yearly basis (2008: 57, 2009: 68, 2010: 99, 2011: 103, 2012: 125),⁸³ and the outlook shows no signs of improvement.

75. *Id.* at Art. 12–13.

76. TRANS RESPECT VERSUS TRANSPHOBIA WORLDWIDE, *supra* note 69.

77. Jonathan Gilbert, *Transgender Argentines Confront Continued Murder and Discrimination*, N.Y. TIMES (Nov. 28, 2015), <https://www.nytimes.com/2015/11/29/world/americas/transgender-argentines-confront-continued-murder-and-discrimination.html>.

78. *Id.*

79. Clies Abeni, *Prominent Activist Becomes Third Trans Woman Recently Murdered in Argentina*, ADVOCATE (Oct. 15, 2015), <https://www.advocate.com/transgender/2015/10/15/prominent-activist-becomes-third-trans-woman-recently-murdered-argentina>.

80. Hugh Bronstein, *Outcry over the Killing of Three Transgender Women in Argentina*, REUTERS (Oct. 14, 2015), <https://www.reuters.com/article/argentina-Transgender/outcry-over-the-killing-of-three-Transgender-women-in-argentina-idUSL1N12E1XZ20151014>.

81. *Id.*

82. *Id.*

83. *Id.*

Brazil's leadership of the global LGBTQ rights movement stands in stark contrast to the dangerous realities of Transgender life in the country. "Brazil is a leading state in the international, domestic, and regional battle against LGBT discrimination through the Brazilian government and several active, civil society organizations. . ."⁸⁴ Brazil was the catalyst for the so-called "Brazilian Resolution" in the United Nations, which called for non-discrimination relating to sexual orientation and gender identity. Brazil withdrew the resolution in the face of strong opposition from the Organization of the Islamic Conference and the Holy See, but Brazil's efforts served as the first resolution dedicated to gender identity issues and helped pave the way for the Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity in 2011.⁸⁵ Brazil was also a thought leader on the creation of the Yogyakarta Principles with Sonia Onufer Corrêa, Research Associate of the Brazilian Interdisciplinary AIDS Association, serving as one of the co-chairs of the process.⁸⁶ On a national level, former President Luiz Inácio Lula da Silva announced "his support of free gender-reassignment surgery to all qualified citizens as a legitimate medical procedure and a basic constitutional right for all Brazilians."⁸⁷ Finally, on a regional level, Brazil presented the Human Rights, Sexual Orientation, and Gender Identity Resolution to the Organization of American States in August 2008, which was approved by the thirty-four member countries of the organization.⁸⁸ Brazil is a world leader in the top-down approach to Transgender rights, and in fact, they were given a 2006 award from HRW for their progress on LGBTQ rights issues.⁸⁹ However, despite these gains, Brazil remains "the most dangerous place to be Transgender."⁹⁰

C. Pakistan

Pakistan's Transgender population, called *khwaja seras*, or the less polite term *hijras* or *khusras*⁹¹ have a complicated relationship with the

84. Adrienne Rosenberg, *The Brazilian Paradox: The Lesbian, Gay, Bisexual, and Transgender Battle for Human Rights* 2 HUMAN RIGHTS AND HUMAN WELFARE, 16, 17–18 (2002).

85. Human Rights Council Res. 17/19, *supra* note 1.

86. Rosenberg, *supra* note 84, at 18.

87. *Id.*

88. *Id.*

89. *Id.*

90. Erica Hellerstein, *Brazil at a Crossroads for LGBT Rights*, THE NATION (Apr. 5, 2011), <http://www.thenation.com/article/brazil-crossroads-lgbt-rights/>.

91. Mashal Shah, *The Kwaja Seras*, HUFFINGTON POST (Aug. 13, 2013), https://www.huffpost.com/entry/pakistans-endangered-spec_b_3732591?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAANCaQiRNAvAZ2MmVj73bD43xcUW4SdDSMVLtZE9P0HNqBKKwl8PsbncdfUb5-BmWDgK2Egxy6yEVt2Pf0CsNh_9YRiIyXFP1F_xkKUUhEn9YPAJSuBF-dDAW2EWva3mEjXBrEnbmoeHx9fr3yYGfkZCN8dzAfOSw1FKBuhMdTbJ2S.

rest of Pakistani society, but they enjoy a higher range of legal freedoms and privileges than many countries, mainly facilitated by The Pakistani Supreme Court. The Chief Justice of the Supreme Court of Pakistan, Iftikhar Ahmed Chaudhry, issued a landmark judgment in 2009, recognizing the existence of Transgender as a third sex. This ruling moved beyond the male-female binary associated with the concept of a heteronormative society. Under the ruling, the Pakistan National Database and Registration Authority (NADRA) was required to introduce a third category of sex on the country's National Identity Card (NIC) through which a Transgender [person] would be able to record her biological preference.⁹² As a response to the slow implementation of its ruling, Chief Justice Chaudhry ordered that election officials allow Transgender persons to register to vote as a third gender using their new identification.⁹³ Additionally, Chief Justice Chaudhry also ruled that Transgender persons are allowed to inherit and mandated a two-percent quota for employing Transgender persons in both the public and private sectors.⁹⁴ Out of irritation at the slow pace of implementation of his orders, Chief Justice Chaudhry has monitored the progress of compliance to his orders through a series of hearings, twenty of which had occurred by 2012.⁹⁵

With these rulings, the Transgender community seems to be gaining new confidence in the Pakistani legal system.⁹⁶ There exists an overall feeling of optimism that basic protections are being secured, and some institutional discrimination is being curtailed.⁹⁷ A Washington Post interview with a Transgender activist from Rawalpindi is demonstrative of that:

Police used to beat us and take money from us. It was painful for us. Now we go to the police station, and they respect us

92. USAID, SILENT NO MORE TRANSGENDER COMMUNITY IN PAKISTAN: A RESEARCH STUDY (2016), <http://sxpolitics.org/wp-content/uploads/2017/01/Transgender-Community-in-Pakistan6.pdf>.

93. Majeed Babar & Ron Synovitz, *Despite Gains, Pakistan's Transgender Community Under Attack*, RADIO FREE EUROPE (Oct. 26, 2013), <http://www.rferl.org/content/pakistan-Transgender-eunuchs/25148690.html>.

94. Nadia Rasul, *Interview: Pakistani Transgender Activist Looks to 'New Dawn' of Rights, Dignity*, ASIA SOCIETY (Aug. 29, 2013), <http://asiasociety.org/blog/asia/interview-pakistani-Transgender-activist-looks-new-dawn-rights-dignity>; Michele Langevine Leiby, *For Transgender Pakistanis, Newfound Rights*, WASH. POST (Feb. 10, 2012), http://www.washingtonpost.com/world/for-Transgender-pakistanis-newfound-rights/2012/02/04/gIQAM0jG4Q_story.html.

95. Michele Langevine Leiby, *For Transgender Pakistanis, Newfound Rights*, WASH. POST, Feb. 10, 2012.

96. *Id.*

97. *Id.*

and they are afraid of us. They take our cases first. Now they feel we have rights.⁹⁸

However, recent developments do not diminish the gaps in protection and eliminate societal marginalization that exists against Transgender Pakistanis. While the Supreme Court has been active, its reach is limited and its rulings have not been implemented through the passage of law from the Pakistani legislature.⁹⁹ It remains difficult for Transgender persons to find suitable employment and the police and society as a whole continue to marginalize Transgender persons.¹⁰⁰ Many Transgender persons resort to begging and prostitution.¹⁰¹ Access to healthcare, education, and proper housing are still major areas of concern.¹⁰²

Legal protection for Transgender persons is growing, but there is still considerable social stigma attached to being Transgender. This stigma often results in violence. One prominent example of Trans-violence was a mob campaign against a Transgender community in Peshawar in October 2013.¹⁰³ A group of police officers and civilians broke into the homes of Transgender persons and set about destroying their property, harassing them, and beating some of them.¹⁰⁴ This attack was part of a larger campaign by local leaders to force Transgender persons from the neighborhood.¹⁰⁵ The Transgender community rallied together following the attacks, but the resulting protests were broken up by the police when opposition groups used the protest as another opportunity to attack Transgender protesters.¹⁰⁶ Another notable episode of Trans-violence occurred in 2009 in the city of Taxila, where a group of police officers attacked, robbed, and raped eight Transgender wedding dancers.¹⁰⁷ This episode seems to have been the catalyst for Chief Justice Chaudhry's interest in protecting Transgender rights and led to much of the legal progress in Pakistan.

D. *India*

After conducting a fascinating historical exploration of the role of Transgender persons in Hindu mythology and other religious texts, The

98. *Id.*

99. Rasul, *supra* note 94.

100. Babar and Synovitz, *supra* note 93.

101. *Id.*

102. Rasul, *supra* note 94.

103. Babar and Synovitz, *supra* note 93.

104. *Id.*

105. *Id.*

106. *Id.*

107. Declan Walsh, *Harassed, Intimidated, Abused: But Now Pakistan's Hijra Transgender Minority Finds Its Voice*, THE GUARDIAN (Jan. 29, 2010), <https://www.theguardian.com/world/2010/jan/29/hijra-pakistan-Transgender-rights>.

Supreme Court of India, in the case of *National Legal Services Authority v. Union of Indian and Others* (2014), ruled that *hijras* and other Transgender persons must be recognized as a third gender and that non-recognition of a third gender violates the right to equality under Article 14 of the Indian Constitution and also the right to protection of life and personal liberty under Article 21.¹⁰⁸ The Supreme Court then directed India's States to take actions to ensure full recognition of a third gender, including a third gender option on government documents, and also set quotas for Transgender persons at government jobs and universities.¹⁰⁹ In addition, the Supreme Court indicated that the States should take steps to guarantee medical care and social welfare to Transgender persons, both common areas of discrimination.¹¹⁰ They also asked the States to "take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life."¹¹¹

This ruling represents a landmark moment for Transgender rights but has faced considerable resistance. The government, led by the conservative Baharatia Janata Party, asked the Supreme Court to reconsider some portions of their ruling, and also asked for clarification on some points. Colin Gonsalves, a Supreme Court lawyer and founder of the Delhi-based Human Rights Law Network, stated that "[t]he government is stonewalling. They had no intention of implementing this judgment."¹¹² The Attorney General, Mukul Rohatgi, responded by stating that it is not stalling, but merely seeking clarification as to the extent to which accommodations must be made for Transgender persons.¹¹³

However, the entirety of the Indian government has not resisted the call of progress on Transgender rights. The Tamil Nadu state has been far more progressive than the rest of India.¹¹⁴ For example, Transgender persons are issued third gender ID cards with great regularity, and they are also eligible for special ration cards that also denote them as being third gender.¹¹⁵ Also, the state government of Tamil Nadu has ordered that no Transgender persons be denied access to education or any

108. *National Legal Services Authority v. Union of Indian and others*, *supra* note 5.

109. *Id.* at 109–10.

110. *Id.*

111. *Id.* at 110.

112. South Asians for Human Rights, *Indian Government Objects to Supreme Court Ruling on Transgender Rights*, INDIA REAL TIME (Sept. 12, 2014), <http://www.southasianrights.org/indian-government-objects-to-supreme-court-ruling-on-transgender-rights/>.

113. *Id.*

114. Anupama Sekhar, *Tamil Nadu Pioneers Transgender Inclusion*, INFOCHANGE (July 22, 2017), <http://infochangeindia.org/agenda-issues/social-exclusion/7471-tamil-nadu-pioneers-transgender-inclusion-.html>).

115. *Id.*

necessary counseling.¹¹⁶ The state's welfare has even established a special panel to directly aid the Transgender community.¹¹⁷ It seems that these reforms have started the process of restoring respect and place in Tamil Nadu society for Transgender persons as envisioned by the Supreme Court in *National Legal Services Authority*.¹¹⁸

As the Indian Transgender community gained the right to designate themselves as a third gender in *National Legal Services Authority*, Transgender rights within the four corners of Indian criminal law have moved in the opposite direction. First, Section 377 of the Indian Penal Code (IPC), established during British colonial rule in 1860, criminalizes homosexual intercourse, while also criminalizing a considerable portion of Transgender intercourse.¹¹⁹ "Section 377 reads as follows:

Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, as a felony, punishable by up to a life sentence in prison.¹²⁰

In *Naz Foundation (India) Trust v. Government of NCT of Delhi and Others*, the petitioners challenged the constitutionality of Section 377 "on grounds of violation of right to privacy, dignity and health under Article 21, equal protection of law and non-discrimination under Articles 14 and 15 and freedom of expression under Article 19 of the Constitution."¹²¹ On July 2, 2009, The High Court of Delhi at New Delhi ruled "that Section 377 IPC, insofar it criminali[z]es consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution."¹²² The decision in *Naz Foundation* led to a rapid increase in awareness of homosexual issues in India.¹²³ Acceptance of homosexuals in major cities grew quickly and led to the inclusion of homosexual characters in popular culture.¹²⁴ However, the *Naz Foundation* decision was reversed by the Indian Supreme Court on December 11, 2013. The ruling invalidated the ruling of the High Court of Delhi, holding that only Parliament, not the

116. *Id.*

117. *Id.*

118. *Id.*

119. LAWYERS COLLECTIVE, LGBT SECTION 377 (2010), <http://www.lawyerscollective.org/vulnerable-communities/lgbt/section-377>.

120. *Id.*

121. *Id.*

122. *Naz Foundation (India) Trust v. Government of NCT of Delhi and Others* (2009) WP(C) No.7455/2001, § 132 (India), https://www.escri-net.org/sites/default/files/Court_decision.pdf.

123. Paul, *supra* note 28.

124. *Id.*

judicial branch, has the power to change a law.¹²⁵ The Naz Foundation has appealed, but, at the moment, Section 377 of the Penal Code is back in effect, criminalizing homosexual sex, as well as all portions of consensual Transgender sex that would also be considered “against the order of nature.”¹²⁶

Other recent developments in Indian criminal law have proven to be detrimental to Transgender rights. On December 16, 2012, a twenty-three year-old woman was gang-raped by six men on a bus that was driving around New Delhi.¹²⁷ Thirteen days later, the woman died of injuries sustained during the assault.¹²⁸ In response, Indian civil society rose up in protest against a lack of protection under Indian criminal law for victims of sexual assault.¹²⁹ In response to the protests, the government charged a commission, led by Former Chief Justice J.S. Verma, to propose reforms to India’s sex crime law.¹³⁰ Among numerous areas of reform, the commission recommended that India change its sexual assault statute which stated that only a woman could be a victim of such a crime and institute a gender-neutral sexual assault statute, allowing for any person, female, male or Transgender, to be protected.¹³¹ However, when the Criminal Law Amendment Act was released in 2013, the final product left the law gender-specific, designating women as the only possible victims of sex crimes. Essentially, the Criminal Law Amendment Act has denied the ability to pursue criminal charges when Transgender persons who may identify as women but were not born female, or who identify as a third gender, are victims of sexual assault.¹³²

E. Nepal

The history of Trans-violence in Nepal is well documented, and Transgender persons were often beaten by police simply because they were easy targets. Police abuse reached its peak in 2005–2006, in what

125. Deepshikha Ghosh, *Supreme Court Says Gay Sex is a Criminal Offence, Activists to Seek Review*, NDTV (Dec. 11, 2013), <http://www.ndtv.com/india-news/supreme-court-says-gay-sex-is-a-criminal-offence-activists-to-seek-review-544125>.

126. *Transgender Rights in India*, N.Y. TIMES (Apr. 25, 2014), <https://www.nytimes.com/2014/04/26/opinion/transgender-rights-in-india.html>; *Advocacy*, NAZ INDIA, <https://nazindia.org/advocacy/>.

127. Heather Timmons & Sruthi Gottipati, *Woman Dies After a Gang Rape That Galvanized India*, N.Y. TIMES (Dec. 28, 2012), <https://www.nytimes.com/2012/12/29/world/asia/condition-worsens-for-victim-of-gang-rape-in-india.html>.

128. *Id.*

129. *Id.*

130. GOI Notification No. SO (3003)E (2012), <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary>.

131. Justice J.S. Verma, Justice Leila Seth, and Gopal Subramaniam, *Report on the Committee on Amendments to Criminal Law*, Part II ¶ 3 (Jan. 23, 2013).

132. The Criminal Law (Amendment) Ordinance, 2013, No. 13 of 2013, INDIA CODE (2013).

was described as a “sexual cleansing.”¹³³ Amidst this process, the police beat and sexually abused Transgender persons in an effort to humiliate and intimidate them.¹³⁴ On December 28, 2005, a Transwoman was arrested and forcibly stripped by police officers, where they then ridiculed her, inspected her genitals, and threatened to cut her hair.¹³⁵ On January 3, 2006, three Transgender Nepalese in Kathmandu were beaten by four police officers.¹³⁶ One was beaten with a baton and then threatened with the officer’s gun as the officer stated that these “Hijras pollute the society and must be cleaned out.”¹³⁷ Four days earlier, a Transgender woman was detained by the police and beaten before escaping.¹³⁸ On March 14, 2006, the police arrested twenty-six Transgender persons in Kathmandu and held them for several days without allowing them to speak with lawyers.¹³⁹ On December 7, 2006, eleven Transgender women were arrested in a raid at a hotel and were held for multiple days before being released without charges.¹⁴⁰

In response to such violence, the Nepalese Supreme Court acted in *Pant v. Nepal* in 2007. *Pant* has been lauded as “arguably the single most comprehensive judgment affirming protections for gender identity anywhere in the world.”¹⁴¹ In *Pant*, the Blue Diamond Society, led by its founder Sunil Babu Pant, and three other groups sued Nepal for the recognition of the basic human rights of Nepal’s LGBTQ population.¹⁴² Pant’s “demands were threefold: to recognize the civil rights of Transgender people without requiring them to renounce one gender identity for another; to create a new law preventing discrimination and violence against LGBT communities; and to require the state to make reparations to LGBT victims of state violence and/or discrimination.”¹⁴³

133. HUMAN RIGHTS WATCH, NEPAL: POLICE ON ‘SEXUAL CLEANSING DRIVE (Jan. 14, 2006), <http://www.hrw.org/news/2006/01/11/nepal-police-sexual-cleansing-drive>.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. HUMAN RIGHTS WATCH, NEPAL: ‘SEXUAL CLEANSING DRIVE CONTINUES (Mar. 19, 2006), <http://www.hrw.org/news/2006/03/16/nepal-sexual-cleansing-drive-continues>.

140. *Id.*

141. Kyle Knight, *Nepal’s Third Gender and the Recognition of Gender Identity*, HUFFINGTON POST (Apr. 24, 2012), http://www.huffingtonpost.com/kyle-knight/nepal-third-gender_b_1447982.html; Jenni Chang & Lisa Dazols, *Nepal’s Sunil Pant Keeps His Country at The Forefront Of LGBT Rights*, HUFFINGTON POST (Apr. 20, 2012, updated Dec. 6, 2017), https://www.huffpost.com/entry/sunil-pant_b_1427377.

142. Writ No. 917, (2064 BS) 2 Nat’l Jud. Acad. J. 262 (Nepal), <https://njanepal.org.np/index.php/research-publication/nja-law-journal?download=18:nja>.

143. INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, NEPAL SUPREME COURT CASE ON RELIEF FOR SEXUAL AND GENDER MINORITIES: OBSERVER’S REPORT (2007), <https://outrightinternational.org/sites/default/files/111-1.pdf>.

On December 21, 2007, the Supreme Court ruled in the case, legalized same-sex marriage, and ordered that the government eliminate all laws that discriminated based on gender identity or sexual orientation. In addition, “the court took the unique approach of establishing a third-gender category.”¹⁴⁴ According to Pant himself, the judges in this case were moved by the level of violence and discrimination suffered by LGBTQ persons in Nepal, leading up to the case and wanted to implement some sense of equality.¹⁴⁵ Pant also remarked upon the high level of empathy the judges felt for the plight of Nepal’s LGBTQ populations and the extent to which the judges decided to mandate radical change.¹⁴⁶ The Supreme Court ruling established a committee to study and adapt same-sex marriage policy, and Nepalese citizens can now choose third gender or “other” on government documents.¹⁴⁷ As evidence of the impact of the *Pant* ruling, in its 2011 census, Nepalese were allowed to designate themselves as a third gender for the first time.¹⁴⁸

As Nepal established laws to allow for third gender identification, its bureaucracy had trouble catching up with the pace of legal reform. Pant himself has noted that the Supreme Court was far more open-minded than a majority of Nepalese society, meaning that implementation of new laws designed to aid the Transgender community was slow.¹⁴⁹ Perhaps the most apparent lapse in the transition from Supreme Court ruling to actual government policy was the delay in the issue of third gender ID cards. As of 2012, only two such ID cards had been issued in almost five years since *Pant*.¹⁵⁰ Without ID cards that properly reflect their gender identity, Transgender persons continue to face many legal difficulties, such as being unable to receive loans or inherit.¹⁵¹ They are also subject to harassment, particularly from police, based on gender incongruence between the gender on ID cards and the physical manifestation of the gender of the actual person before the police.¹⁵²

However, progress has been made. On August 10, 2015, Monica Shahi became the first person to hold a Nepalese passport that listed the gender as “O” for other.¹⁵³ On October 24, 2015, Transgender activist Bhumika Shrestha traveled on such a passport from Nepal to Taiwan for

144. Knight, *supra* note 141.

145. Chang & Dazols, *supra* note 141.

146. *Id.*

147. Knight, *supra* note 141.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. KYLE KNIGHT, HUMAN RIGHTS WATCH, DISPATCHES: NEPAL’S TRANSGENDER PASSPORT PROGRESS (2015), <https://www.hrw.org/news/2015/08/10/dispatches-nepals-Transgender-passport-progress>.

the 2015 International Lesbian and Gay Association's Asia conference.¹⁵⁴ These events represent some of the progress since *Pant* in the realization of Transgender human rights.

On September 20, 2105, the new Nepalese Constitution came into force, and Nepal became one of a small handful of countries that specifically mentions protections for LGBTQ persons in their constitution.¹⁵⁵

Article 12 states that citizens will be allowed to choose their preferred gender identity on their citizenship document. The choices available are male, female, or other. Article 18 states that gender and sexual minorities will not be discriminated against by the state and by the judiciary in the application of laws. It further adds that the government may make special provisions through laws to protect, empower, and advance the rights of gender and sexual minorities and other marginalized and minority groups. Article 42 lists gender and sexual minorities among the groups that have a right to participate in state mechanisms and public services to promote inclusion.¹⁵⁶

In these countries, national laws and policies have been adopted that better support and protect the rights of their Transgender populations. However, as mentioned earlier, the link between the existence of visible Transgender communities, strong Transgender rights movements, and high levels of Trans-violence is very real. In these nations, rising levels of Trans-violence, despite improvements in the law affecting Transgender populations, are cause for alarm and concern.

CONCLUSION

Stories of Transgender persons are reaching the forefront of national and international media, and as a result, the world is becoming increasingly aware of the presence of Transgender individuals and the existence of a gender spectrum. Such awareness and attention have coincided with mounting reports of violence against Transgender persons. The combination of increased media attention and increasing violence against gender minorities necessitated an examination of the failures and successes of comparative national law affecting Transgender populations. The purpose of this Article is to explore ways that comparative domestic law protects and fails to protect Transgender

154. Kyle Knight, *Nepal's Third-Gender Passports May Be the Future of Trans Travel*, THE ADVOCATE (Oct. 26, 2015), <https://www.advocate.com/commentary/2015/10/26/third-gender-passports-may-be-future-trans-travel>.

154. *Id.*

155. HUMAN RIGHTS CAMPAIGN, THE NEW CONSTITUTION OF NEPAL AND LGBT HUMAN RIGHTS (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/NepalConstitution-LGBTRights.pdf>.

156. *Id.*

communities and to recognize that law is used to discriminate and persecute.

One would hope that with greater visibility of Transgender life and the corresponding increase in violence against Transgender persons, domestic laws would respond in a fair, even-handed, and just manner, protecting Transgender rights and Transgender victims of crime. In many countries, considerable progress has been made, where the law grants Transgender persons their basic rights and where criminal law responds to incidents of Trans-violence with the full force of the rule of law. In other countries, however, Transgender persons do not receive equitable treatment before the law. In these countries, neither basic rights nor legal protections are available to Transgender populations due to discrimination, bias, and inequalities inherent in the social fabric of these countries. In other countries, exclusionary or discriminatory laws and policies have been enacted and enforced, effectively sanctioning Trans discrimination and Trans-violence. It is my hope that this Article, researched at the intersection of Transgender life and comparative law, will provide an engine for greater discussion on how Transgender populations can be better protected from harm, allowing them to live freely under the letter and spirit of the Universal Declaration of Human Rights.