

Supreme Court
Order passed by the Division Bench
comprising of
Honorable Justice Mr. Balram K.C.
Honorable Justice Mr. Pawan Kumar Ojha
Writ No. 917 of the year 2064 BS (2007 AD)
Case: Let an appropriate order including the order of
Certiorari, Mandamus, Prohibition be issued

1. Sunil Babu Pant, Executive Director of Blue Diamond Society
Petitioners
2. Meena Nepali, Vice Chairperson of MITINI Nepal
3. Sanjeev Gurung, Chairperson of Cruse AIDS Nepal
4. Manoranjan Kumar Vaidya, Executive Director of Parichaya Nepal ...

versus

1. Nepal Government, Office of the Prime Minister and Council of Ministers
Respondents
2. Legislature-Parliament
3. Nepal Government, Ministry of Law, Justice and Parliamentary Affairs

The summary of the writ petition filed in this court, under Article 107(2) of the Interim Constitution of Nepal, 2063 are as follows:

The writ petitioners in their writ petition state that, we, the petitioners, are involved with the organizations which represent the minority people in

terms of sexual orientation and gender identity. We are being denied by the existing society, law and state mechanism to provide us proper position in the existing society. Expressing our dissenting view with the prevalent social structure or norms as well as legal provisions adopted by the state based on the interest of majority people i.e. heterosexual male and female persons, we are demanding for the appropriate place in the society for recognition of our rights. Because of such practices and provisions we have ample of instances of being ourselves subjected of physical and mental torture. We, four petitioners, have represented at least 60 thousand people.

That the writ petitioners further state that the female homosexuals (lesbians), male homosexuals (gays) as well as the people of the third gender are considered as minority people on the basis of sexual orientation and gender identity. Such people introduce themselves as third types of people. Those people are also known as third gender and homosexuals internationally in general parlance. We have been categorized under the five different groups. Those are known as lesbian, gay, bi-sexual, trans-gender and inter-sexual. Such identities of human beings are not hypothetical but a scientifically proved fact. Even in a report of the World Health Organization has acknowledged the fact of the existence and birth of such types of people. By confirming the existence of such types of people, the report has also emphasized that it is a natural phenomenon instead of a disease. Despite the facts that the aforesaid persons born naturally, the existing society mistrusts their existence in the name of unnatural phenomenon. We have been boycotted with the family and the society as a whole. Even the state has ignored us. In such situation of being socially boycotted, we would had been protected by the law but the law is not seemed serious in this issue. The state has not taken any initiative to solve our problem. The state is

responsible to provide equal status to all citizens by making sufficient laws in this issue.

The writ petition states that, the Interim Constitution of Nepal, 2063, in part 3 and 4, has incorporated the provision of Fundamental Rights and Responsibility and Directive Principles and Policies of the State. Being the citizens of this country we have sufficient rights to claim and exercise all fundamental or human rights incorporated therein. The international human rights instruments, including the Universal Declaration of Human Rights have prohibited any provision of discrimination on the basis of race and origin. Many countries including the European countries have made remarkable legal provisions to protect the rights of the people in regards to the sexual orientation and gender identity. The latest country is South Africa to make the constitutional provision to ensure non-discrimination on the basis of sexual orientation. Similarly, the constitution of Fiji has incorporated similar provision. Number of instances can be found regarding this issue in the decisions of the courts in the United States of America and Canada as well as the European Court of Human Rights. There are many groups in different places of this category. In India, there is a group known as *Hijaras* and there is the provision of specifying their own sexual identity as *Hijara* in their passport and other identity cards.

The writ petitioners further states that there is no doubt that all Nepali citizens have equal standing in the eyes of the constitutional provisions of Nepal and rights enshrined by these provisions. It is the obligation of the state to treat all people equally as well as to guarantee all fundamental rights of the people. Nepal has been the party of various international conventions and treaties after signing and ratifying them and according to section 9 of

Nepal Treaties Act, 2047 (1991 AD), the provisions of international treaties and conventions, to which Nepal is a party, should be adopted as national law. Thus there are fundamental rights guaranteed by the constitution on one hand and the international human rights standards on the other hand, therefore, as a party to such conventions, Nepal is responsible to fulfill the obligations set by such conventions. From the point of view of talking practically and legally, one segment of the population based on the sexual orientation and gender identity are deprived of exercising their human rights. The people of this community are suffered from the domestic, social and state violence day to day. Police administration and other state mechanisms are not sensitive towards the condition of such people. Even the officials of the concerned government agencies are also in a dilemma in the matter of issuing citizenship certificate to us mentioning our sexual identity because our sexual identity is neither male nor female. We do not want to get the citizenship certificate as indicated other than of our identity. While going to the police administration to bring forward the issues of violation of our human rights as well as other violence and inhuman behaviors done against us, they seem reluctant to handle the case. The UN report also has mentioned this fact with emphasis. Even in the schools, colleges, government and private organizations including other public places, such people are facing offensive behavior and the perpetrators are not being subjected to the punishment and they are always being deprived of the utilization of other privileges provided by the state. The state is relied on the tradition of not to allow to marry with a person of one's own choice. All these practices are contrary to the self esteem of a person and the right to life as well as right to live with dignity.

That the writ petitioners state in their writ petition that, we, the people based on sexual orientation and gender identity being minority in number, are denied from enjoyment of the rights guaranteed by the constitution and international human rights laws and we are compelled to live as a second class citizen, we the petitioners have filed the writ petition, requesting for issuance of the order of *mandamus* and other appropriate order for the protection and acquisition of our rights on the basis of constitution and laws, international law, precedent propounded by the Supreme Court in regards to the right to life of every person and other precedents, principles and values established by the United Nations in regards to the human rights. Moreover, we, the petitioners, hereby, request for the issuance of an order directing the opponents for granting the citizenship certificate and to make the laws based on the equality by repealing other discriminatory laws as well as for making necessary legal and institutional arrangements immediately by drafting new laws with the appropriate participation of concerned people to protect the rights of those people who have been suffered from the discrimination and violence and none of the state owned institutions be involved in the discriminatory activities and violence, if they involved in such activities there should be the provision of appropriate compensations. Further, the writ petitioners have also sought for issuance of an ad hoc based order for the period until the law is made as this court had passed in the case of *Gopal Siwakoti Chintan vs. Ministry of Finance et al.*

The Legislature-Parliament Secretariat, in its affidavit submitted before this court, has stated that the writ-petitioners have mentioned in their petition that they do not want to obtain the citizenship certificate other than that of their own identity. The government also cannot issue such citizenship certificate. There does not seem any legal hindrance to obtain Nepalese

citizenship certificate by choosing any other gender in the application form in case of not falling under the male or female category while mentioning their sex. Only concerned individual can enter into the court for the enforcement of such legal rights with evidence in case of being rejected to issue the citizenship certificate even after submission of the applicant. This writ petition seems to have been based on hypothetical presumption describing and analyzing only the issue without mentioning any example of discriminatory provisions against the people of different gender identity. In case the petitioners were treated in a discriminatory manner and in case of being degraded or caused violence against them, there seems no any restriction depriving the petitioners for having remedy specifying their sexual identity distinct from a male or a female. Hence, the writ petition should be rejected.

The Office of the Prime Minister and Council of Ministers, in its affidavit submitted before this court, has stated that the rights provided by the constitution and other prevalent Nepal laws are equally applicable to all citizens. The writ petition has not mentioned anything as to how they were obstructed from enjoying the rights conferred to them. So far the question of making a separate law for the group of people based on sex orientation and gender identity is concerned, the rights of the petitioners can be protected under the existing legal framework and it is not necessary to make a separate law for the said purpose. Since it is the absolute jurisdiction of the legislature to decide as to what type of law should be made and amended on a particular issue and this matter does not fall under the jurisdiction of this office therefore there does not seem any pertinent reason and valid ground to make this Office as a respondent. Let the writ petition be dismissed on the

ground that the unconcerned Office is being made as an opposite party in the case.

Likewise, the Ministry of Law, Justice and Parliamentary Affairs in its affidavit submitted before this court has stated that the state has not imposed any restriction to the writ petitioners in enjoying the fundamental rights conferred to them by part 3 of the Interim Constitution of Nepal, 2063 (2007 AD). It seems obvious that the petitioners are natural persons. They are independent and able to enjoy all constitutional and legal rights to be obtained in the capacity of a person. The state has made no discrimination to the petitioners. Therefore, the claim made by the petitioners does not appear reasonable. So far the question of citizenship is concerned, the Nepal Citizenship Act, 2063 (2007 AD) has defined the term 'person' and this Act has not imposed any restriction to the petitioners from obtaining citizenship in the capacity of a person as every natural person may obtain the citizenship by birth and by descent according to the provision of this Act. Since the Ministry has not done any activities that may infringe the human rights of the writ petitioners and from enjoying the fundamental rights conferred to them as the citizens, therefore the writ petition should be dismissed

In course of hearing of the case which has being presented before the bench as per the rules, Learned Advocate Mr. Hari Phuyal appearing on behalf of the writ petitioners argued that the state has a responsibility of mandatory nature to protect the human rights of its citizens. The international instruments relating to human rights have guaranteed the rights such as all human beings being equal before the law, having equal protection of law and ensuring non-discrimination on any grounds. The interpretation made by the South African Constitutional Court ensuring such human rights

to the third sexes also may be taken into consideration in our context. The Constitutional Court has construed that no person is subjected to the discrimination on the ground of sexual orientation which includes the third genders as well. As Nepal being a party to the major international conventions relating to human rights, the state should make arrangements for complying with such conventions in accordance with the provisions of Nepal Treaty Act, 2047 (1991 AD). As the people of third gender are not treated equally and no any effort has been made towards the protection of their rights, the order should be issued as sought by the writ petitioners. Likewise, the learned Advocates Mr. Hari Prasad Upreti, Mr. Chandra Kant Gyawali, Mr. Rup Narayan Shrestha, Mr. Bhuvan Prasad Niraula, Mr. Premchandra Rai and Ms. Sharmila Dhakal also put their arguments on behalf of the petitioners stating that the present writ petition was filed analyzing the troubles and difficulties faced by the people of third gender occurring due to nonexistence of the relevant legal frameworks and not fulfilling the responsibility by the state to protect the civil, political, economic, social and cultural rights of the people in minorities from the point of view of gender identity and sexual orientation by analyzing the international practices in this regard. It is the responsibility of the state to provide the documents including the birth certificate, citizenship certificate, passport, voter-identity card etc .specifying the sex as per their interest to the people of gender minorities to make them free from the practice of gender discrimination. Accordingly the word “sex” should be so defined by the law which may cover the third sex and group representing sexual orientation. And therefore, an order should be issued **declaring the legal provisions, which seem inconsistent with these principles, as null and void** as sought by the writ petitioners.

Appearing on behalf of the respondents including the Government of Nepal, Learned Deputy Government Attorney Mr. Krishnajibi Ghimire putting his argument before the bench said that the Interim Constitution of Nepal, 2063 (2007 AD) has guaranteed that no citizen shall be discriminated in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction. The writ petitioners have not been restricted by anyone to enjoy such rights. If any violence or misbehavior happens against the people of different gender identity, they also have equal rights to get remedy as other individuals. Hence, the writ petition must be rejected.

After making perusal of the case file and hearing the arguments presented by the learned lawyers of both sides, the bench has to decide the following questions:-

- a. Whether the present writ petition filed in regards to the rights of homosexuals and the people of third gender considered as minority on the basis of gender identity or sexual orientation, falls under the category of public interest litigation (PIL) or not?
- b. What is the basis of identification of homosexual or third gender people? Whether it happens because of the mental perversion of an individual or such characteristic appears naturally?
- c. Whether the state has made discriminatory treatment with the citizens whose sexual orientation is homosexual and gender identity is third gender or not? and
- d. Whether the order as sought by the petitioners is worth to be issued or not?

So far the first question as to whether or not this writ petition, filed in regards to the rights of homosexual and the people of third gender considered as minority on the basis of gender identity or sexual orientation falls under the category of public interest litigation (PIL), the society is an integrated form of different religion, race, origin, language, class, sex, gender, caste, community. All societies cannot be of the same structure and characteristics. There may be the situation in the society, where all classes of society have not got equal opportunities. So, it is a constitutional duty and responsibility of the state to make the deprived and socially backwarded classes and communities able to utilize the opportunity and to enjoy the rights equally as other people do. It is usually called the distributive justice in jurisprudence and it is also kept under the dimension of social justice as well. 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 inaction of the state, the question of the protection of the rights of disadvantage people or groups is falls under the category of PIL. Our judicial practice and constitutional provisions is developing towards this trend.

This writ petition seems to have been filed pursuant to Article 32 and Article 107 (2) of the Interim Constitution of Nepal, 2063 (2007 AD). The right of constitutional remedy conferred under Article 32 is also a fundamental right. However, despite the fact that right guaranteed by Article 32 is not an absolute right in itself, instead it is the right to file a petition before this court under its extraordinary jurisdiction in pursuance of Article 107 (2) for the enforcement of other fundamental rights conferred by Article 12 to Article 31 of Part 3 subject to infringement of such rights. Further, the

right under Article 32 is to be considered as a right to provide the *locus standi* to file a petition before this court in case of infringement of various fundamental rights enshrined to the citizens by Part 3 of the Constitution. In other words, the right under Article 32 is a right to move the Supreme Court for the remedy in case of infringement of fundamental rights.

Likewise, there are two types of extraordinary jurisdictions of this court as provided by Article 107. The extraordinary jurisdiction of sub-article (1) of Article 107 is the jurisdiction to make the judicial review of legislative power of legislature for scrutinizing whether the statutes enacted under the legislative power and the rules issued under the delegated legislative power are inconsistent with the Constitution or not. Sometimes either due to the aversion of the legislature or mistake or error made by the draftsman, the statutes inconsistent with the Constitution in course of drafting may be passed as a bill. It may also be passed because of the oversight of the legislature. There shall be no room to any statutory law which is inconsistent with the Constitution because the legislature has supremacy only in the law making process in the country where the constitutional supremacy prevails like in Nepal. The Constitution is the only standard for this. The Constitution is enacted under the constituent power of the delegates chosen by the sovereign people using their inherent sovereign power of enacting the Constitution.

The legislature is a creation of the Constitution. Hence, while exercising the legislative power the legislature, created by the constitution, cannot enact the law which contradicts with its own creator the Constitution. The law which is inconsistent with the Constitution may be repealed or amended only through the constitutional process. However, it may take time

to do so. There may not be sufficient time to summon and convene the session of the legislature to repeal and amend such laws that are seen enacted in contradistinction with the constitutional provision. The rights of the people protected by the constitution shall be at stake when it takes such a long time to repeal or amend these unconstitutional enactments. The Article 107 (1) of the Constitution has provided the extraordinary power to this court to declare such laws unconstitutional in order to protect the citizens from such risks. Hence, further analysis need not be required as the issues raised in this writ petition does not seem directly related to the provision of Article 107 (1).

Article 107(2) has also granted the extraordinary power to this court. Under this Article, this court shall impart full justice by exercising its extraordinary power in the situation given below:

- for the enforcement of rights conferred by the Constitution; or
- for the enforcement of any other legal right for which no other remedies have been ensured or such remedies appeared inadequate or ineffective; or
- for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.

Under the provision of Article 107 (2) as mentioned above or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern which is also known as Public Interest Litigation (PIL) or Social Action Litigation (SAL), this court shall issue the appropriate orders and writs including *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto* for the enforcement of infringed rights.

The interest of the petitioner must be seen in a dispute where an individual is requesting for the enforcement of rights of personal interest. Otherwise the petition shall be rejected. On the other hand the petitioners need not to establish and prove the *locus standi* in a dispute of public interest where any constitutional or legal question is to be settled. Any public spirited individual can file a petition *pro bono publico* and the petitions are entertained by the court and such rights shall be enforced under Article 107 (2). In other words, the concept of traditional and conservative *locus standi* has been, and must be, widened for the settlement of any constitutional or legal questions involved in the public interest litigation (PIL). If the *locus standi* is not being widened in such disputes, the groups of victims may be deprived from the justice and it is worthless whatever extraordinary power has been provided to this court unless the *locus standi* is widened accordingly.

This writ petition seems to have been filed by the Executive Director of the NILHIRA SAMAJ on behalf of the organization and others. It is seen from the brief-note submitted by the learned advocates on behalf of the petitioners, the English name of the organization appears as the Blue Diamond Society (BDS established in 2057 (2000 AD) for the protection of the rights and the interests of third gender community. It is also seen that the petitioner organization is working for the protection of the rights of sexual minorities in Nepal. Upon perusal of the writ petition it is seen that the writ petitioners have sought the issuance of order of *mandamus* and other appropriate orders to be issued regarding lesbian, gay, bisexual, transsexual and intersex (LGBTI) people of sexual minorities in order to provide the gender identity on the basis of their gender feelings and to recognize their co-habitation as accordance with their own sexual orientation.

A case where a constitutional or a legal question is involved is known as the public interest litigation where the issue as mentioned in the Article 107 (2) of the Constitution is raised. There are some norms and values behind such provisions which ensures that there shall not necessarily be infringed the rights of an individual who comes to the court for the enforcement of rights rather anyone can file a petition before this court on behalf of such victims.

The Constitution has guaranteed different fundamental rights to the citizens. All individuals and citizens of different classes, groups and castes are not educated and aware in the Nepalese society. The people of different class, communities and castes have become disadvantaged as well as they are not aware of their rights and they do not have sufficient knowledge towards the enforcement of their infringed rights only because of the lack of proper attention by the state and prevailing illiteracy, lack of proper knowledge, social values, traditional practices, customs and economic backwardness or poverty etc. It is therefore, they are to be remained as the disadvantaged classes of people.

All citizens and groups in the society are not economically sound. As disadvantaged group of people are not aware of towards their rights conferred by the constitution and infringement of these rights as well as ignorance towards the rights can be enforced by this court due to the lack of education, ignorance or poverty, the Article 107 (2) of the Constitution has provided the rights to any public spirited individual to file the petition on behalf of such disadvantaged groups by widening the traditional rule of *locus standi* for the settlement of constitutional or legal question involved in a dispute of public interest or concern and any individual, on behalf of them,

can file a petition for the enforcement of the rights of such disadvantaged groups under this Article 107 (2), who are not aware on it.

Since our traditional society has recognized only two types of sexes i.e. male and female and therefore there is dominant role of these two sexes male and female in the society. There have been practices of looking differently to the people of third sex. The court should take this matter into the judicial notice. Different tradition and practices to look at the third genders other than the male or female seem to be found not only in our society but also in other country as well due to the lack of awareness, education and knowledge as well. Therefore, the fact cannot be taken otherwise that the people of third gender may not file the petition on their own behalf.

The various fundamental rights have been conferred to the Nepali citizens by the Part 3 of the Constitution. Directive principles and policies of the state of Part 4 of the Constitution have kept the state in centre for uplifting and the development of the citizens. All human beings including child, the aged, women, men, disabled, incapacitated, third genders etc. are Nepali citizens. All the territory of this country including these all citizen collectively constitutes the nation. The third genders among the population are also part of the Nepalese population as a whole. The third genders shall still be considered as a disadvantaged class of citizens because of the social perception towards them and social behavior as well as lack of education, knowledge and economic backwardness within the society of third gender. The concept of public interest litigation has been developed by the court for the settlement of constitutional or legal questions involved in the dispute of public interest or concern. In other words, the provision of Article 107 (2) of

the Constitution has been incorporated for allowing any public spirited individual can file a petition *pro bono publico* on behalf of the backwarded people due to the reason of economic, social and educational etc.

Part 3 of our Constitution provides for several fundamental rights. However all citizens are not educated to enjoy such rights. All citizens are not economically sound. They are ignorant too. Such multiple factors play important role to make people backwarded. Hence, if the court remains in the narrow concept of *locus standi* and traditional pattern of court on such issues, there can be no access to the fundamental rights and justice for the disadvantaged group of people. Because of such notions, the provision of filing the petition by any individual on behalf of the disadvantaged group of people has been made.

In spite of the provision of the concept of public interest litigation similar to the Article 107 (2) of our constitution has not been incorporated in the Indian Constitution, the decision of the Supreme Court of India in the case, *S.P.Gupta and others vs. President of India* is significant in regards to the issue of public interest litigation where the constitutional or legal questions are involved for the settlement. The judgment of this case should be considered as a model for the concept of public interest litigation. Justice P.N. Bhagwati's opinion in this regard has clarified the concept of PIL. He states:

"...where a legal wrong or a legal injury is caused a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision without authority of law or any such legal wrong or legal injury or illegal

burden is threatened and helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief any member of the public can maintain and application for an appropriate direction or order."

There are provisions of fundamental rights in Part 3 and responsibilities, directive principles and policies of the state in Part 4 of the Interim Constitution of Nepal. Such provisions have been incorporated with the approach of the well being of citizens by transforming the country into welfare state. Furthermore, after the year 2047 BS (1990 AD) Nepal has ratified more than 18 international conventions including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of All Forms of Discrimination against Women (CEDAW) etc. While formulating the policies, enacting and enforcing the laws, the executive should keep in mind the constitutional provisions regarding the fundamental rights of the citizens and directive principles and policies of the state and international conventions relating to the human rights which are ratified by the country. If the executive does not work accordingly, provisions of Article 32 and 107 (2) will be activated. Therefore the executive should fulfill its constitutional responsibility keeping in mind the above mentioned provisions. While observing the working style of the executive till now, it does not seem these provisions have been complied with by the executive properly.

The provision that allows everyone to file a petition for the settlement of constitutional or legal questions involved in a dispute of public interest or concern has been incorporated not only in the Article 107 (2) of present

constitution but also in the Article 88 (2) of the previous Constitution of the Kingdom of Nepal, 2047 (1991 AD) now repealed. In spite of this court has issued appropriate and proper orders in different writ petitions filed by various non-governmental organizations (NGOs and/or INGOs) and other public spirited individuals on behalf of the disadvantaged groups of people because of this court has widened *locus standi* under its extraordinary jurisdiction in PIL cases where the constitutional or legal questions are involved for the settlement, however, the question of *locus standi* is being raised time and again. Hence, it is seen necessary to interpret as to what type of dispute falls under the concept of PIL in which constitutional or legal questions involved are to be settled. In the context of Article 107 (2) of the present Interim Constitution of Nepal, 2063 (2007 AD), the following disputes can be considered as PIL for the settlement of any constitutional or legal questions involved on it:

- the issues in regards to the citizens of various classes, castes, tribes, sex, groups, language who have been deprived from the enjoyment of their fundamental rights due to the inaction of the state;
- the issue in regards to the depriving of enjoying the fundamental rights due to the negligence in implementing the directive principles that are to be gradually implemented by the state;
- in the situation when the state contradicts, while working, the letter and the spirit of the fourth paragraph of the preamble of the present constitution;
- the issue of the intervention on the independence of judiciary and other constitutional bodies;
- the issue of environmental pollution;

- the issue in regards to the interest and rights of the people of different castes or classes for whom special provisions can be made for the protection and empowerment as mentioned in the proviso of the Article 13 (3);
- the issue in regards to the interest and rights of other persons or group or class as mentioned in the Part 3 and 4 of the constitution;
- the issue falling under the public trust doctrine and the natural resources of Nepal viz. public land, rivers, forests etc;
- the historical and archeological issues regarding the cultural heritage of Nepal;
- the issue of suffering of the citizens of any class or group or caste due to the negligence in upholding its constitutional duty by the executive; etc.

Above mentioned issues are the issues of public interest litigation in our context. Any public spirited individual or group may file the petition on these issues on behalf of the disadvantaged group of people under Article 107 (2) of the Constitution. However, this is not an exhaustive list of the issues; some other issues may also fall under this category in time to time as per the constitutional provisions. It cannot be limited by making a list of such issues.

The issues raised in the writ petition such as gender identity, gender discrimination and facing obstacles due to it as well as gender recognition etc. are the issues of social justice and social interest. This court has enunciated the principles in several cases by emphasizing the right to move to the court on such issues for necessary remedies.

This writ petition, which is filed for the rights and interest of their group which represents the homosexuals and third genders on the issues of gender identity and sexual orientation by protesting the behavior of the state and the society towards them, seems within the scope of public interest litigation. Moreover, the petitioners seem to have substantial interest and meaningful relation with the issues that is raised in the writ petition. Hence as analyzed above, the court does not agree with the arguments of the defendants that the organizations established for the protection of the interest and rights of LGBTI people lack the *locus standi* to file this petition. So, the court opines that the writ petitioners have the *locus standi* to file this writ petition.

So far the second question raised above as to what is the basis of identification of homosexual or third gender people and whether it happens because of the mental perversion of an individual or such characteristic appears naturally is concerned, the practice is being seen that the term 'sex' is used to be defined as the differences between the individuals on the basis of genitals whereas the term 'gender' is defined as the role assigned by the society on the basis of sex. There are people having the identity of third genders in minority in the society other than the male and female who are considered as the mainstream on the basis of gender identity.

It is found that the medical science and psychology have categorized three types of people of different sexual attraction on the basis of sexual orientation. According to this practice, sexual relation or sexual attraction with the people of same sex is called homosexual relation. On the contrary, sexual relation or sexual attraction with the people of opposite sex is called heterosexual relation and the sexual relation or the sexual attraction with the

both people either of same sex or of opposite sex equally is called bi-sexual relation. From the point of view of the sexual orientation, the heterosexual people are considered as the mainstream of the society because of their presence in majority alike to the men and women are considered as the mainstream of the society on the basis of gender identity's point of view. On the other hand, the number of homosexual and bi-sexual people is not large in the society quantitatively. Two types of homosexuals, one is female homosexual (lesbian) and other is male homosexual (gay), are found within the category of homosexuality. Similarly, a person who is born with the physical characteristics of one sex but psychologically feels and behaves like a member of opposite sex are called transsexual.

The other category of sexual minority is an intersexual who is born naturally with the both genetic sex organs of male and female. The rarest of the rare people are found under this category. Their gender will be determined on the basis of their sexual orientation when they are grown up. In totality, the five categories can be found within the group of sexual minority, namely lesbian, gay, bisexual, transgender, intersexual which are known as LGBTI in an abbreviated form. The main contention of the writ petitioners is that this group has not been recognized yet on the basis of sexual orientation and gender identity.

Prior to considering the contention of the petitioners, it seems relevant to define the term 'sexual orientation' and 'gender identity'. A meeting of the human rights experts working in the field of sexual orientation and gender identity held in Yogyakarta, Indonesia from 6th to 9th November 2006 had adopted The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

The definition of sexual orientation and gender identity as defined in the principles is as follows:

Sexual Orientation is understood to refer to each person's capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

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

In this context, it seems relevant to mention dictionary's definition of some words and phrases frequently used in this petition which are as follows:-

Lesbian - *A woman who is sexually attracted to other woman.*

Gay - *A homosexual person especially a man.*

Bisexual - *a person who is attracted to both man and woman.*

Transsexual - *A person especially a man who feels that he should have been opposite sex, and therefore behaves and dresses like a member of that sex.*

Homosexual - *A person, especially a man, who is sexually, attracted people of the same sex and not to people of the opposite sex.*

Source - Cambridge Advanced Learner's Dictionary (online version)

Transgender - *Transgender is the state of one's "gender identity (self-identification as woman, man, or neither) not matching ones "assigned sex" (identification by others as male or female based on physical/genetic sex). "Transgender" does not imply any specific form of sexual orientation; transgender people may identify as heterosexual, homosexual, bisexual, pansexual, polysexual, or asexual. The precise definition for transgender remains in flux, but includes:*

- *"Of, relating to, or designating a person whose identity does not conform unambiguously to conventional notions of male or female gender roles, but combines or moves between these."*
- *"People who were assigned a sex, usually at birth and based on their genitals, but who feel that this is a false or incomplete description of themselves."*
- *"Non-identification with, or non-presentation as, the sex (and assumed gender) one was assigned at birth."*

Intersexuality- *Intersexuality is the state of a living thing of a gonochoristic species whose sex chromosomes, genitalia, and/or secondary sex characteristics are determined to be neither exclusively male nor female. An intersex organism may have biological characteristics of both the male and female sexes. Intersexuality is the term adopted by medicine during the 20th century applied to human beings who cannot be classified as either male or female. Intersexuality is also the word adopted by the identity-political movement, to criticize medical protocols in sex assignment and to claim the right to be heard in the construction of a new one.*

Source-wikipedia

In this context, it also seems relevant to state this segment published in a book, *Sexual Orientation and Gender Identity in Human Rights Law*, published by the International Commission of Jurists.

Discrimination on the grounds of sexual orientation and gender identity may give rise to the most egregious human rights violations, such as extrajudicial killings, torture and ill-treatment and arbitrary detention. Demonstrating that discrimination has consequences in the deprivation of enjoyment of all other guaranteed human rights. These include inter alia the right to life, right to liberty, right to a fair trial by an independent and impartial tribunal, right to privacy, freedom of conscience, freedom of opinion, freedom of assembly and freedom of association, equal access to public services, equality before the law and equal protection of the law, right to work, right to social security including social insurance, right to the enjoyment of the highest attainable level of health, right to education, and right to adequate housing. The social sexual orientation exposes them more to violence and human rights abuses; this stigmatisation also increases the climate of impunity, in which such violations frequently occur.

In some countries, sexual relationships between same-sex consenting adults or "unnatural behaviour", such as the manifestation of transgender behaviours, are criminalized under "sodomy laws" or under the abuse of morality laws, which violate the right to privacy and the equal protection of the law without discrimination. Such criminalization reinforces attitudes of discrimination between persons on the basis of sexual orientation. In some countries such acts are punishable by corporal punishments or the death penalty impairing

the right to be free from cruel, inhuman or degrading punishment and the right to life. Treaty bodies, the former Commission on Human Rights and special procedures have expressed concern at such criminalization, called on States to refrain from such criminalization and where such laws exist repeal them, and urged all States that maintains the death penalty not to impose for sexual relations between same-sex consenting adults.

Violence taking place in some countries against lesbian, gay, bisexual or transgender (LGBT) persons, including killing, "social cleansing", torture and ill-treatment, impairs the right to life, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the right to security and is also a matter of concern of treaty bodies and special procedures of the former Commission. Victims of criminal offences suffer.

From discrimination because of their sexual orientation and gender identity, as they are often perceived as less credible by law enforcement agencies and police officials frequently show prejudice towards such persons. These particular in cases of abuse, ill treatment, including rape or sexual assault, torture, or sexual harassment, and may be disinclined to investigate promptly and thoroughly extrajudicial executions of LGBT persons. The refusal to bring those responsible for such killings to justice and to ensure that such killings particularly disturbing. The special procedures and the treaty bodies have repeatedly asked the States to take action to protect the right to life of LGBT persons, including proper investigation in cases of violence against LGBT persons. They have also called on

states to take initiatives against homophobia and hate crimes, including policies and programmes aimed towards overcoming hatred and prejudice against LGBT persons.

While making observation on the exercise and practices in regards to the gender identity, the High Court of the United Kingdom has decided in 1970 and stated that the gender identity should be determined on the basis of three inherent elements of an individual like genital sex, chromosomal sex and gonadal sex. However, dissenting with this precedent, a Family Court of Australia enunciated that the actual sex is being used to be identified while determining the gender for the purpose of marriage and the biological, physical and psychological characteristics (e.g. brain sex) should also be taken into consideration for this purpose. This decision has accepted the self perception of the concerned individual. It seems relevant to mention some portion of the decision of the Australian Family Court here:

It is wrong to say that a person's sex depends on some limited range of factors, such as the state of the person's gonads, Chromosomes or genitals (whether at birth or at some other time)... the relevant matters include the person's biological and physical characteristics at birth; ... the person's self perception as a man or woman; ... and the person's biological, psychological and physical characteristics at the time of the marriage, including any biological features of the person's brain that are associated with a particular sex.

The European Court of Human Rights has accepted the concept of this decision in the case of *Goodbin v. United Kingdom*. Similarly, the scientific and medical facts has also drawn conclusions on the basis of research that

only genitals at birth does not determine an individual's gender identity whereas mental characteristic has also an impact on it.

The issue of sexual orientation is also being raised in the writ petition. The petitioner has stated that the homosexuals are being treated differently by the society only because of their sexual attraction towards the person of similar sex. The interpretation of the Constitutional Court of South Africa is significant in this context. It seems relevant to quote here some portion of the judgment of this court in the case of *National Coalition for Gay and Lesbian Equality and others v. Minister of Justice and others*:

"..... Sexual Orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbian, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to member of his or her own sex."

Similarly, in a publication of the Human Right Watch states that *"... Sexual Orientation generally refers to the way in which a person's Sexual and emotional desires are directed. The term categorizes according to the sex of the object of desire- that is, it describes whether a person is attracted primarily toward people of the same or opposite sex or to both."*

The Supreme Court of United States of America in the case of *Lawrence et.al. v. Texas (2003)* has declared a law unconstitutional which considered an act of sexual relation between the adult people of same sex was illegal and pronounced as a crime. It is also found that the Constitutional Court of Ecuador has also declared a provision of the national law that pronounced a homosexual relation as a crime, null and void. The

court found this provision as contrary to the Section 516 of Criminal Code of the country as well as to the constitution and the Article 26 of the ICCPR and declared null in 1997.

After considering above mentioned various 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 also seen that the concept specifying that the gender identity should be determined according to the physical condition and psychological feelings of a person is being established gradually. The concept, homosexuals and third gender people are not mentally ill and it is their normal life style is in the process of establishment. In this context, it seems contextual to quote the relevant portion of the report of Interdepartmental Working Group, of the UK:

"...there is zero evidence that psychiatric intervention can 'cure' transsexualism, just as there is zero evidence that psychiatry can 'cure' homosexuality."

According to a report (Kinsey Report) there are 5 to 8 percent people in the society who are included within the group that is covered by the abovementioned definition of the sexual orientation. This fact has reflected the life style of a certain number of people who are in minority in the society on the basis of gender identity and sexual orientation. It seems that this fact is also backing up to establish the thought that it is a natural process in course of physical development of a person due to the self emotion among others rather than due to the mental perversion, emotion and psychological disorder.

Now let's discuss the third question as to whether the state has made discriminatory treatment with the citizen whose sexual orientation is

homosexual and gender identity is trans-gender or not. The petitioners have alleged that the state has made discriminatory treatment to the citizen 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, domestic, social as well as state violence; they are deprived from the social, economical, cultural, political and civil rights as well; they have been humiliated in the society and family; they have been deprived from the enjoyment of service and benefits provided by the state; and they have also been deprived from the basic rights such as employment, marriage and citizenship etc.

The issue to establish the gender identity of third gender is not the problem of our country only. It has been an issue of intense debate all over the world. Definitely, the third gender people cannot easily be established in the society with their natural characteristics. It seems relevant to state a portion of the Report of the Special Rapporteur of the United Nations in regards to the problem which has been facing by this community:

...member 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.

The Yogyakarta Principles has also clearly stated the problem which has been facing by the people of different sexual orientation and gender identity other than the traditional concept of it. The portion stated in the preamble of the principles is as follows:

"...Disturbed that violence, harassment, discrimination, exclusion, stigmatisation and and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity, that these experiences are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and that such violence, harassment, discrimination, exclusion, stigmatisation and prejudice undermine the integrity and dignity of those subjected to these abuses, may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility;

Aware that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity."

The incidents against the gender minority in Columbia have been stated in a Report of the High Commissioner for Human Rights published on the 16th May 2006 as follow:

"... Lesbians, gays, bisexual and transgender were exposed to murder and threats in the name of "social cleansing." Generally speaking the results of investigations into the identities of perpetrators are very inadequate. Those groups were the victims of arbitrary detentions and cruel, inhuman or degrading treatment by member of

the police force. There have also been allegations of harassment of homosexuals by members of the illegal armed groups. There are no specific public policies to prevent or penalize such actions or to eliminate discrimination against those groups, especially in educational establishments, in the field of employment, in the police force and in detention centers..."

These facts show that the incidents of ill-treatment against the third gender and homosexuals are taking place not only in Nepal but also in national and international level as well.

Let us consider the context of Nepal by keeping the abovementioned facts and contexts in background. Article 13 of the Interim Constitution of Nepal, 2063 (2006 AD) has guaranteed the right to be equally treated on the basis of non-discrimination on the grounds of sex, race and caste for all. Similarly, Articles 33 and 34 have accepted the provisions of repealing all discriminatory laws and providing social justice respectively. Likewise, 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. 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, 1979 and the Convention on the Rights of the Child, 1989. The provisions such as protection and promotion of human rights of the individual and elimination of all forms of discriminations have been accepted in these conventions. Being a party to these international treaties and conventions, the

responsibility to implement the obligations created by instruments to which state is a party vest on the Government of Nepal according to the Vienna Convention on International Treaties, 1969 and the Nepal Treaty Act, 2047 (1991 AD).

It has already mentioned that the term 'sex' denotes the men and women only. The concepts like the people of third sex other than the men and women are found rarely and it is an old concept that the people of third sex are the results of sexual deviation. There shall be no any importance of such old concepts, if the concept is being accepted that the welfare states, dedicated to the human rights should protect the right to life of every citizen. The voices are being raised in other countries like India, USA, Brazil, Mexico, United Kingdom, Spain, Belgium, The Netherlands, and Colombia etc. by demanding the identity of third gender people and to legalize and destigmatize the same sex marriage. If looking at our neighboring country, India, it can be seen that thousands of Hijras and Kothis are there. To be a homosexual or third gender is not a disease itself. 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 may not be the 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 this context it is significant to state the provision of Article 26 of the International Covenant on Civil and Political Rights- ICCPR.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of law. In this respect, the law shall prohibit any discrimination and guarantee to

all person's equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The above mentioned Article 26 has emphasized that all persons are equal before the law and they all are entitled to the equal protection of law. It has also accepted the principle of non-discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national origin, property, birth or other status.

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

The Committee has mentioned that "...Sexual Orientation needs to be understood as link inseparably to the equality of men and women. Thus discrimination on grounds of Sexual Orientation is connected to discrimination against people who do not live out socially accepted norms for "masculinity" and "Femininity". The concept of "Gender Identity" cannot be separated from that of "Sexual Orientation" as prohibited grounds of discrimination."

The European Court of Human Rights has also articulated the similar kind of jurisprudential concept which has out rightly denied any discrimination on the ground of gender identity by developing the principle of non-discrimination on the grounds of sexual orientation and privacy as jurisprudence. In the case of *Van Kuck vs. Germany*, which was filed against the discriminatory insurance provision which does not take the responsibility of the surgical operation for sex change, the court has interpreted that *"...the*

applicant's freedom to define herself as a female person, one of the most basic essentials of self determination the very essence of the European Convention of Human Right being respect for human dignity and human freedom. Protection is given to the right of transsexual personal development and physical and moral security."

Likewise, this court has significantly and strongly recognized the rights of the third gender individual in 2002 AD in two cases e.g. *Goodwin vs. United Kingdom* and *I vs. United Kingdom* when the UK denied to prepare the legal identity papers of an individual corresponding with the present sex after changing it through the surgical operation. The court has articulated that *changes in their identity papers holding their right, to respect for their private lives and also their right to marry had been violated.*

Article 26 of the International Covenant on Civil and Political Rights, 1966 is an article in regards to the rights to equality of the human being. The right provided in this Article is accepted under the provision of right to equality which is guaranteed by the constitutions of all the independent and sovereign states. The Article 13 of our Constitution can be taken as an example. This Article provides the right to equality for all citizens which states as:-

Article 13. Right to Equality:

(1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

(2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement women, Dalits, indigenous ethnic tribes, Madeshi or peasants, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated.

(4) There shall be no discrimination with regard to remuneration and social security between men and women for the same work.

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 races 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. The male and female have been clearly mentioned under the category of sex in the data published by the Center Bureau of Statistics whereas the identity of third gender has not been accepted there. Only male and female are mentioned in all reports. The third genders have not been mentioned even under the 'others' category.

A general belief is that a child generally is born normal at birth. However, sometimes abnormal children such as having more than five

fingers in a hand or blind or Siamese twins or handicapped are born. Similarly, on the basis of genitals, intersex children, other than the male and female having both genitals may also born. Sometimes even if a child is born having a genital of one sex, due to the biological and natural process it can be developed with the genitals other than that of the birth. It is not appropriate to think that they are not human being or the citizens only because of such changes. It is an uncontroversial fact that only two sexes- male and female are being recognized on the basis of sex in our traditional society. The human beings, sex or gender are fundamentally different terms. The fundamental rights comprised under the part 3 of the Constitution are enforceable fundamental human rights enshrined to the citizens against the state. Therefore, the fundamental rights under part 3 are the rights entitled equally to the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women and they are also the citizen of this country as well.

The words 'citizen' or 'sex' are used instead of men and women everywhere in the Constitution except in Article 13(4) which refers to the equal remuneration in the Interim Constitution. It can be possible to classify the natural person under various categories. For example child, aged, adult and old on the basis of age or tall and short on the basis of height or black and white on the basis of complexion. Similarly, a natural person should be classified as male or female or third gender on the basis of gender. Thus, the people other than the men and women including the people of third gender cannot be discriminated on the ground of sexual orientation. The state should recognize the existence of all natural persons including the people of third gender other than the men and women and it cannot deprive the people

of third gender enjoying the fundamental rights provided by part 3 of the Constitution.

The word 'person' has been used in the Article 26 of the ICCPR unlike the words 'men' and 'women' used in Article 13 of our Constitution. It has been provided in Article 26 that every person shall not be treated discriminatorily on the ground of sex. In the constitution of some countries, to make equal treatment to the people of third gender, the term 'sex' has been stated as a ground instead of 'women' and 'men' to eliminate the discrimination that may occur on the ground of sexual orientation by considering the provision of Article 26 of the ICCPR. No citizen is allowed for the discrimination on the ground of sexual orientation. South Africa may be the first country which has incorporated the provision of non discrimination on the ground of sexual orientation in the 'Bill of Rights' of its constitution. Under the provision of right to equality, the Sub Article (3) of Article 9 of the constitution which was adopted on 8 May 1996, amended on 11 October 1996 and came into effect from 7 February 1997 reads as follows:

Article 9 (3) : The state may not unfairly discriminate directly or indirectly against any one on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

In this way, it is clearly mentioned in this constitution that no person can be treated discriminatorily on the ground of sexual orientation.

Similarly, the interpretation made by the Constitutional Court of South Africa on equal protection of the homosexuals and the people of third gender seems significant in this regard. By guaranteeing the constitutional protection against all forms of discrimination on the ground of gender identity, the court has emphasized that *"...the concept 'Sexual Orientation' as used in S. 9(s) of the 1996 constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex."*

The decision made by the Constitutional Court of South Africa can be considered as a fundamental document for the right and interest of the people of third gender.

Likewise, Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women has stated all type of prejudiced and customary social practices that make people inferior or superior on sexual ground are required to be modified. The Article states that *"... States parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority or either of the sexes or on stereotyped roles for men and women."*

The jurisprudential concept which shows that the rights of sexual minorities need to be protected is being stronger after all these efforts.

The sensitivity and awareness have been developing towards the sexual feeling and natural behavior of a human being. Social norms that

accept the natural behavior of human conduct are begun to take as natural phenomenon. It seems pertinent to quote a portion written by Paul Hunt in an UN report on rights and health. It reads "*...sexual rights include the right of all persons to express their sexual orientation with due regard for the well being and rights of others, without fear of persecution, denial of liberty or social interference.*"

There have been articulated various opinions in regards to the rights of homosexuals and the people of third gender. Some countries especially Muslim countries are in the opinion that the homosexuality cannot be recognized as a right because of the religious and cultural norms and values. However, nowadays it is not the issue of mere debate. It is begun to consider widely as an interest at the national and international level. The view of Luis Arbo, the UN High Commissioner for Human Rights in the International Conference of Homosexuals and Transsexuals in Montreal on 26 July 2006 is as follows:

"Freedom of religion is a right that also protects the freedom not to share in religious beliefs or be required to live by them. Under the broad and ill-defined mental of 'culture' states may fail to recognize the diverse voices within their own communities, or may deliberately chose to suppress them. Such an approach stems from an ossified vision of culture, however, which ignores the indisputable transformation of social mores as well as the obligation to promote tolerance and respect for diversity required by human rights law as core aspects of the right to privacy.

...respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental right to life, security and privacy by

criminalizing harmless private relation between coveting adults. Even when such laws are not actively enforced or worse when they are arbitrarily enforced, their mere existence fosters an atmosphere of fear, silence and devil of identity in which LGBT persons are confined. Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killing that gay, lesbian, bisexual and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT person is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.

Still various opinions are found there on the contrary to the abovementioned opinions which are developed in regards to the recognition of the sexual orientation and gender identity.

There are also opinions in the society stating that sexual activities among the homosexual and transsexual are not natural; they do not have reproductive capacity; it is a social stigma; therefore, such unnatural relation of these people shall not be legalized. Such opinions are based on the traditional approach of gender identity that recognizes only male and female. 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 that 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 right should equally be ensured to the people of third gender with having different gender identity and sexual orientation as well. Therefore there should not prevail such situation where the gender identity and sexual orientation of the third gender and homosexuals would be over looked 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 one to decide as to what type of genital s/he has, what kind of sexual partner s/he need to choose and with whom s/he should have the marital relationship rather it is the matter falling under the sole right of self-determination of an individual.

In consideration with the backgrounds as mentioned hereinabove in various paragraphs, it seems that efforts have not been made to protect and promote the interest and rights of the homosexuals and the people of third gender under the Nepalese laws. Although, there is no any comprehensive law declaring the relation between homosexuals as crime, it cannot be denied that the state mechanism has made discrimination because of the negative attitude of the society towards these people. However, such sexual activities are kept under the definition of unnatural coition. It also cannot be said otherwise that the transsexual and homosexual peoples are not living their lives easily by keeping their own identity as the concept of transsexuality has not been legally accepted. These people have been compelled to appear in the public life with the identity as determined according to their genital instead of their own characteristics and it is very important to reconsider the prevalent values in the context of human rights and fundamental rights.

We also should gradually internalize the international practices in regards to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. Otherwise, our commitment towards the human rights will be questioned internationally, if we ignore the rights of such people only on the ground that it might be a social stigma. It cannot be said that it will be a social stigma only because of their behavior, activities, and conduct in accordance with their self feeling as well as their cross dress other than that is imposed by the society according to their gender identity because an individual does not change his own natural identity merely to imitate other people. The medical science has already proved that this is a natural problem rather than a psychiatric one. Now there cannot be a situation ignoring the facts that are proved by the medical science. Any provision that hurt 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.

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 the identity to the people of third gender but also declined to accept their existence as well. It seems apparent to analyze 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 administrative body and social context as well. For example an individual who is born having a male genital shows the feminine character when he becomes an adult and dresses like a woman but he holds the identity card of

a man as provided by the state and the society. In this case it is obvious to face the problem of identity. The same masculine character and behavior.

So far the fourth question as to whether the order as sought by the petitioners is worth to be issued or not is concerned, the writ petition seems to have been filed on behalf of the minority people on the basis of sexual orientation and gender identity. The major contentions of the petitioners can be classified as follows:

- ❖ Let the legal provisions be made to provide the gender identity to the people of trans-gender or third gender, under which female third gender, male third gender and intersexual are grouped, as per the concerned person's self feeling and let such people be not be discriminated on the basis of sexuality.
- ❖ Let the fundamental right of the lesbians, gays, bisexual and transgender people be protected by making appropriate legal provisions ensuring them to live their lives with freedom as other heterosexual people and by recognizing them legally and socially as minorities being entitled to constitutional protection from the state and society on the basis of their sexual orientation.

In consideration of the first contention, it is seen after making perusal upon the writ petition that the people of third gender are neither men nor women, they are deprived of receiving the identity papers including the citizenship certificate from the government offices with their own sex and the benefits from the educational institutions as well as other public offices and they are also being dishonored and disrespected by the concerned public office bearers. Therefore the petitioners seek for the protection of the basic

fundamental rights and human rights as well by providing gender identity according to their self feelings and by repealing the discriminatory laws which are either man or woman centered too.

The people under the category of LGBTI grow up with the natural process except that of the people who have been changed through the sex change operation either from male to female or female to male. On the one hand, there may be the people with good health and full development who born and grow naturally and on the other hand, sometimes the disabled and handicapped like blind, deaf, dwarf, deaf-mute people may born other than of the LGBTI. They were considered simply either man or woman because of their genitals. There cannot be seen any barrier for the enjoyment of fundamental rights to the clearly identified people as man and woman. However, there should not be discriminatory constitutional and legal provisions that restrict the people having third gender identity for 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 do not attract towards the people of opposite sex as other heterosexual person and because of their cross dress. The state should make necessary arrangement for the people of third gender. It shall not be reasonable to say that the people, with different gender identity and sexual interest but other conditions are normal, cannot enjoy their fundamental rights and human rights guaranteed by the constitution and other international instruments relating to the human rights whereas other people with the identity of either a male or a female but having other abnormal physical conditions like either handicapped or dwarf or deaf-mute etc. can enjoy such rights with their own identity. 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.

In this context it seems pertinent to quote here some provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR):

ICESCR - Article 10:

...marriage must be entered into with the free consent of the intending spouses.

ICCPR - Article 2:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or

other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

As it has been already mentioned that it is an established fact by different scientific research, analysis and experiments that the lesbian, gay, bisexual, trans-sexual and intersex, commonly referred as LGBTI are also natural person regardless their sex which may be either male or female as well as their gender which may be either masculine or feminine. Therefore, it is not possible to exclude these people from the full enjoyment of the provisions of the international covenants mentioned above by any reasons. It is also not possible to make restrictions in enjoying the fundamental human rights of an individual on any other grounds, once s/he gets the recognition as a person before the law. The LGBTI people, obviously, have equal rights as others for the enjoyment of the rights guaranteed by these international covenants such as right to marry with free consent, right to found a family, non-interference on privacy, non-discrimination on the grounds of race, colour, language, religion, political or other opinions, national or social origin, birth or other status.

All fundamental rights provided in Part 3 of the Interim Constitution of Nepal, 2063 (2007 AD) from Article 12 to 32 have been guaranteed to every Nepali citizens and persons. The enjoyment of these rights with their own identity is the fundamental rights of the petitioners as well though they are in minority. It is the petitioner's right to have been benefited from the state policies with their own identity. It shall not be meant that the legal rights and fundamental rights as well as human rights provided to the individuals by the constitution and other human rights related international instruments to which Nepal is a party, may be enjoyed by men and women only merely because of only two 'sex' - male and female is mentioned in the Constitution. The people with third type of gender identity other than the male and female and different sexual orientation are also Nepali citizens and natural person 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 appropriate environment and legal provisions for the enjoyment of such rights. It does not mean that only men and women can enjoy such right and other people cannot enjoy it only because of their different gender identity and sexual orientation.

Article 12 of the Constitution has provided the right to freedom. Article 12 (1) provides that every person shall have the right to live with dignity and Article 12 (2) provides that except as provided by law no person shall be deprived of his/her personal liberty. Article 12 is related to the right to life of a person. The terms 'men' and 'women' are not mentioned in this article. The freedom provided by Article 12 is the right of every person. The word 'person' indicates to the natural person as well. Being the natural person LGBTI are entitled to live in the society enjoying all the freedoms

with dignity. The Article 12 (2) has provided minimum freedoms to the human being. The freedoms provided by this article can be enjoyed with one's own identity irrespective of sex. The freedoms provided in sub-clauses (a) to (f) of Article 12 (3) can be restricted by making of laws only. However, such laws should not be arbitrary, discriminatory and unreasonable. Such freedoms shall be restricted reasonably by making law if an act undermines the sovereignty and integrity of Nepal, or it jeopardizes the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities. There are two significant words - 'with dignity' in the article 12 (1) and 'except for the provision in law' in the article 12 (2). While interpreting these two words it should be made in such way that the furtherance of fundamental rights or human right of all people including women, men and LGBTI be ensured.

Similarly, Article 13 of the Constitution has guaranteed the right to equality. According to sub article (1) all citizens shall be equal before the law and no person shall be denied of equal protection of the laws whereas sub article (2) provides that there shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these. Similarly, sub-article (3) reads that the State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. However there is a proviso in this sub-article which provides that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement women, Dalits, indigenous ethnic tribes, Madeshi or peasants, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are

physically or mentally incapacitated. The sub-article (4) provides that there shall be no discrimination with regard to remuneration and social security between men and women for the same work.

All these equality related constitutional provisions have guaranteed the equality before the law, equal protection of law, non-discrimination on the application of law, non-discrimination by the state on any ground and non-discrimination on the social security as well.

In Article 12 (2) of our Constitution provides that except for the provision in law no person shall be deprived of his/her personal liberty. By analyzing this provision it seems that such liberty can be restricted by making law for the public interest. The right provided by Article 12 is the right to life which is a very important right for the human beings. In brief, every citizen and every person shall obtain such rights on equality basis as the right to have one's own identity. Such freedoms cannot be restricted by making discriminatory or arbitrary law as well. However, existing property law, other personal identity including citizenship related law, law of marriage as well as some other law seem male and female sex specific. Even, such laws do not accept the existence of the people other than the male and female.

It has been a recognized fact that the gender identity of an individual is determined not only by the physical sex but also by her/his behavior, character and perception. Generally a person physically may be either a male or a female at birth but during the process of physical development s/he may have the character as per her/his identity that may either be the masculine or the feminine. However, all people may not be viewed with the same approach. In the case of some people they should have different manners,

character and behavior contrary to their physical sex at birth. It is already observed that it happens because of the natural process. However, there does not seem any provision in our existing law that allows these people to practice any profession as well as to maintain conjugal relationship with their changed sexual identity. The law may be considered as discriminatory which does not allow the people to enjoy their fundamental rights and freedoms with their own identity. While making the harmonious interpretation of the provisions of Articles 2, 16 and 17 of the ICCPR, it seems that the state has to recognize every individual with their own identity or every person has the right to have one's own identity in spite of the Article 10 of the ICESCR and the Article 23 of the ICCPR, to which Nepal has already ratified and applied as national laws, have provided the right to marry only to the men and women. The Article 17 of the ICESCR provides the right to privacy of the family life to an individual as well as it also guarantees the right of not to be subjected of an unlawful attacks on her/his honour and reputation. As provided by section 9 of the Nepal Treaty Act, 2047 (1991 AD), the ICCPR and the ICESCR should also be considered as the national laws of Nepal, it seems that the LGBTI shall be allowed on the basis of right to have one's own identity for the enjoyment of the rights guaranteed by the Nepalese law without being discriminated and with their own identity as other individuals. Therefore, this directive order is hereby issued to the Government of Nepal to make necessary arrangements towards making the appropriate law or amending the existing law for ensuring the legal provisions which allow the people of different gender identity and sexual orientation in enjoying their rights as other people without any discrimination after accomplishment of the necessary study in this regard.

Likewise, according to the provisions of the Fundamental Rights of Part 3 and Directive Principles and Policies of the State of Part 4 of our Constitution, it seems that the state has the responsibility for making of special provisions by law for the upliftment of the oppressed and disadvantaged people like women, children, the aged, incapacitated, indigenous, dalits etc. It should be taken into consideration that the words men and women would have been mentioned in this provision instead of using the word 'sex'. It seems that if only the word 'sex' is mentioned in the Constitution instead of men and women, it will include the people of third gender as well including other men and women. As the word 'sex' refers not only to the men and women but also to the people of third gender, this judicial comment is hereby made that it looks necessary to keep the clear provision which guarantees that the gender identity and the sexual orientation should be the grounds of non-discrimination among others alike to the Bill of Rights of the Constitution of South Africa in the new constitution which is going to be made by the Constituent Assembly.

The second contention of the writ petition is seen that the fundamental right of the lesbians, gays and bisexual people be protected by making appropriate legal provisions which ensure them for living their lives with freedom as other heterosexual people and by recognizing them legally and socially from the state and society on the basis of their sexual orientation. In fact, this request is specific in regards to the issue of same sex marriage or co-habitation of such couple. Looking at the issue of same sex marriage, it is an inherent right of an adult to have marital relation with another adult with her/his free consent and according to her/his will. The same sex marriage should be viewed with the interest and rights of the concerned people as well as from the point of view of the society, family and

all other aspects. It seems appropriate to draw the conclusion after making study on the legal provisions and practices of other countries regarding the gay and lesbian marriage. It has already been recognized in some countries whereas in some countries yet to be recognized. Therefore, it is essential to carry out a thorough study and analysis of 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 as well. The Government of Nepal has hereby been directed to form a committee as mentioned below in order to undertake the study on over all issues in this regard.

Formation of the Committee

a.	A Specialist Medical Doctor as assigned by the Ministry of Health	Coordinator
b.	One Representative of National Human Rights Commission as assigned by the commission	Member
c.	A Representative of the Ministry of Law, Justice and Parliamentary affairs	Member
d.	One Sociologist as assigned by the Government of Nepal	Member
e.	A Representative of Nepal Police (Specialist on this issue)	Member
f.	A Representative of Ministry of Population and Environment	Member
g.	Advocate Hari Phuyal, who represents the petitioners	Member

The committee is directed to undertake the study on the issues of same sex marriage and marital status of overall LGBTI persons as well as the legal provisions of other countries amongst the issues raised by the petitioners and the Government of Nepal is directed to make the legal provisions after considering recommendation made by the said committee. It does not seem appropriate to set the terms of reference for the committee by this court

because it may be appropriate to provide this task to the government due to the gravity and seriousness of the subject matter. The directive order is also hereby issued to the respondent Government of Nepal to submit a copy of the report to this court that is submitted by the committee.

It is hereby further directed to write to the Office of the Attorney General to inform the respondents supplying the copy of this order as well as to the Monitoring and Inspection Division of this court for the regular monitoring of the implementation of this order. It has also hereby been ordered that the notification of this order be provided to the petitioners including the copy of the order and the file be delivered to as per the rules.

s/d

Justice Balram K.C

I concurred on the aforesaid decision.

s/d

Justice Pawan Kumar Ojha

Bench Officers: Shyam Kumar Bhattarai
Yadav Raj Pokharel

Date: - 6th day of the month of Paush, 2064 BS (corresponding to 21st December, 2007 AD)