

Unofficial translation:

Supreme Court, Joint Bench
Honorable Justice Mr. Tanka Bahadur Moktan
Honorable Justice Mr. Hari Prasad Phuyal
Order
079-WO-0198
Subject: Certiorari, Mandamus

Adheep Pokhrel, son of Bhoj Raj Pokhrel, resident of Kathmandu District,
Kathmandu Metropolitan City, Ward No. 11.....1
Tobias Volz (Passport No. C4JCLNF5L), son of Late Harald Volz, permanent Petitioners
resident of Goethe Strasse 47, Marsh 76316, Baden, Wurttemberg, Germany,
currently residing in Kathmandu District, Kathmandu Metropolitan City,
Ward No.
11.....1

versus

Ministry of Home Affairs, Department of Immigration, Kalikasthan, Dilli
Bazaar.....1 Respondents

Director General, Department of Immigration, Kalikasthan, Dilli
Bazaar.....1

A synopsis of the facts and order of the writ petition, which was filed pursuant to Article 133(2) of the Constitution of Nepal, and which falls within the jurisdiction of this Court, is as follows:

Facts Section

1. Among the petitioners, I, Adheep Pokhrel, am a Nepali citizen who deserves to fully enjoy the rights provided by the Constitution of Nepal and the law. I had been working outside of Nepal, but I returned recently and have been living here. As a gay man, I fall under the sexual and gender minority category based on my sexual orientation. I met the other petitioner, Tobias Volz in Nepal, who is also gay, and we got married after becoming more intimate. Likewise, I, Tobias Volz, the other petitioner, am a German citizen and hold a German passport, issued by the German government. I have been living in Nepal for work for many years and have worked for international organizations such as the United Nations office in Nepal, the German international agency GTZ, and UNAIDS. In this connection, I met Adheep Pokhrel, who is among the petitioners. As we were both gay and liked each other, we got married in accordance with German law on October 19, 2018. We registered our marriage at the registration office in Malsch, Kreis Karlsruhe in Germany and received a certificate with Registration Number E37/2018. After the wedding, Tobias Volz, one of the petitioners and the spouse, went to the Department of Immigration. When he applied for a non-tourist visa for the first time on 07/19/2022, the application was refused. Petitioner Adheep Pokhrel sought a marriage registration certificate from the local government unit at the place of his residence. When he went to register his marriage at the Ward Office of Ward No. 11 of the Kathmandu Metropolitan

City in the Kathmandu District, he was informed that same-sex marriages could not be registered as there was no provision for it. Thereafter, when we learned that the Honorable Supreme Court had issued an order to the respondent Department of Immigration regarding non-tourist visas, I, Tobias Volz applied for a visa again on 08/19/2022, together with a written petition and a copy of the order (issued on 10/23/2017 on the writ of certiorari mandamus in the case of Suman Panta v. Ministry of Home Affairs, Department of Immigration, et al.). But I, Tobias Volz, was once again denied a visa and only provided verbal information.

2. The Constitution of Nepal has established the rights of gay and lesbian individuals, or the gender and sexual minorities, providing that citizens or individuals shall not be discriminated against and that equal protection shall be provided in the eyes of the law. There is a provision in Section 7 of the Immigration Act, 2049 (1992), which states that the Director General of the Department of Immigration may issue visas as prescribed by law and extend their validity. Similarly, there is a legal provision in Rule 8 of the Immigration Rules, 2051 (1994), which states that a non-tourist visa shall be granted to a foreigner who has a marital relationship with a citizen of Nepal and furnishes the marriage registration certificate. Based on these provisions, a foreign national married to a Nepali citizen who furnishes the marriage registration certificate may be granted a non-tourist visa pursuant to Rule 8, and the Director General of the Department of Immigration is responsible for granting the visa accordingly. Similarly, Private International Law contains various treaties on marital relationships and family matters. Nepal has also incorporated the provisions of these treaties into its law. Sections 692-721 of the Civil Code have incorporated the issues of marriage, divorce, property, succession, contract agreements, implementation of court decisions, and others. As mentioned in the preceding paragraphs, the denial of a non-tourist visa to Tobias Volz is contrary to the Constitution of Nepal, the provisions contained in the various international instruments on human rights ratified by Nepal, the orders and directives issued by the Honorable Supreme Court, in addition to the precedent set forth in the writ of certiorari mandamus in Suman Panta, et al. v. Department of Immigration, et al. A joint writ petition filed by the petitioner-duo of Adheep Pokhrel and Tobias Volz contains the above particulars and requests that any decisions, correspondences, and other matters relating to the decisions made, if any, by respondents that violate the rights of the petitioners be quashed. Furthermore, the petitioners request that an order of mandamus or any other suitable order be issued in the name of the respondents to grant a non-tourist visa to Tobias Volz effective immediately.
3. On 09/04/2022, this Court set aside an order that reads as follows: The Court seeks to determine whether an order as sought by the petitioner should be issued and orders the respondents to submit their rejoinder through the Office of the Attorney General within 15 days from the receipt of this order, excluding the period of travel. The Court further orders the execution of the summon in the name of the respondents, along with a copy of this order and a copy of the writ petition. A carbon copy shall be provided to the Office of the Attorney General. The case is to be submitted upon the submission of the rejoinder or the expiry of the limitation period. As it appears appropriate to reach a decision after a discussion has taken place between both parties regarding the seeking of an interim order, the Court further orders the respondents to be summoned to be present for a discussion on 09/11/2022, regarding whether an interim order should be executed or not.

4. A rejoinder submitted by Director General Rishi Ram Tiwari on behalf of the Department of Immigration reads as follows: At the Department of Immigration, visa applications have been online for the past several years. According to the records of this department, it appears that the petitioner has been on a tourist visa until 09/29/2022 and it does not appear from the Nepali Port Software that he has applied for another visa. If the concerned individual submits an application through this Department's online portal, together with necessary documents pursuant to the legal provisions contained in the following legislation, the submitted documents will be reviewed, and the necessary decision will be made: Section 7(c) of the Immigration Act, 1992; Rule 8(1)(h) of the Immigration Rules, 1993; Point No. 4.4(5)(a) of Paragraph 4 of the Immigration Procedures, 2008; Sections 67 and 76 of the National Civil (Code) Act, 2017; Section 18 of the National Identity Card and Registration Act, 2020; and Rule 16 of the National Identity Card and Registration Rules, 2021.

Order Section

5. Upon reviewing the documents contained in the case file, including this writ petition submitted before the Bench after being recorded in the cause list in accordance with the rules, the learned advocate Mr. Rup Narayan Shrestha, present on behalf of the petitioners, made the following deliberations: Tobias Volz and Adheep Pokhrel are both gay men who got married in accordance with German law on October 19, 2018. Their marriage was registered at a registration office in Germany, and they obtained a certificate with Registration Number E37/2018. According to Nepal's immigration law, there is a legal provision to grant a non-tourist visa to a foreign national who is married to a Nepali citizen and presents their marriage registration certificate. In the writ of certiorari mandamus in *Suman Panta v. Department of Immigration, Dilli Bazaar*, the Honorable Supreme Court elaborated on the rights of gender and sexual minorities and issued an order to grant a non-tourist visa to the spouse of the petitioner. In a situation where the petitioners are married, and the prescribed documents, including the marriage certificate, have been submitted pursuant to the law, they cannot be refused a non-tourist visa and denied the rights conferred by the existing law to cohabitate post-marriage just because they are members of the gender and sexual minority. Therefore, considering the Constitution of Nepal, existing law, the provisions of the various international treaties ratified by Nepal, and the precedent set by the Court in the writ petition of *Suman Panta v. Department of Immigration, et al.*, which concerns this very matter, it is requested that an order be issued to grant a non-tourist visa to the petitioner, Tobias Volz.
6. Mr. Sanjiv Raj Regmi, the learned joint attorney present on behalf of the Department of Immigration, et al., the respondent, made the following deliberations: As apparent from the rejoinder submitted by the Department of Immigration and according to the Department's records, the German citizen Tobias Volz was on a tourist visa until 09/29/2022 and did not apply for another visa. The Immigration Act, 1992, and the Immigration Rules, 1993 contain a provision for a foreign national married to a Nepali citizen to receive a non-tourist visa by presenting their marriage registration certificate. Point No. 4.4(5)(a) of Paragraph 4 of the Immigration Procedures, 2008 lists the documents required to obtain a non-tourist visa based on a marriage. If the petitioner submits an application with the necessary documents according to legal provisions, and if their marriage is not contrary to the prevailing law of Nepal, the

relevant body will make a decision at the time of the application regarding whether the requested visa can be granted or not. Therefore, it is hereby requested that this writ petition be quashed.

7. The main claim made in the petition seems to be as follows: Among the petitioners, Adheep Pokhrel, a Nepali citizen, and the German citizen Tobias Volz got married in accordance with German law on October 19, 2018. They registered their marriage at the registration office in Malsch, Kreis Karlsruhe in Germany and received a certificate with Registration Number E37/2018. Among the petitioners, Tobias Volz applied for a non-tourist visa on 07/19/2022 at the Department of Immigration, but any further action on the matter was refused. After the Department sought a certificate of marriage registration in Nepal, Adheep Pokhrel [among the petitioners] went to the Ward Office of Ward No. 11 of the Kathmandu Metropolitan City in the Kathmandu District to register the marriage accordingly, but was informed that same-sex marriages could not be registered as there was no provision for it. An application for a visa was made again on 08/19/2022, together with a copy of the order issued on 10/23/2017 on the writ of mandamus in *Suman Panta v. Ministry of Home Affairs, Department of Immigration, et al.*, which ordered the granting of a non-tourist visa based on same-sex marriage. However, the visa was denied, and information thereof was provided only verbally. [The petitioner] is entitled to a visa in accordance with the rules pursuant to the rights provided by Articles 16, 17, and 18 of the Constitution of Nepal; the provisions relating to the private international law in Section 6 of the National Civil Code, 2017; Section 7 of the Immigration Act, 1992; and Rule 8(1)(h) of the Immigration Rules, 1993. [The petitioner] has been deprived of his right due to the requirement to mention the applicant's spouse in Point No. 11 under Schedule-2A of the Immigration Rules, 1993. Therefore, [the petitioners] hereby request that the matter be addressed and that an order of mandamus or any other suitable order be issued in the name of the respondents.
8. A rejoinder submitted on behalf of the respondents makes the following claim: Among the petitioners, while Tobias Volz claims that he applied for a non-tourist visa, it was not seen in the Nepali Port Software. The documents necessary for submission to obtain a non-tourist visa pursuant to the Immigration Procedures, 2008 include a photocopy of the marriage certificate or an official letter from the relevant embassy attesting the marriage, if the marriage took place outside of Nepal. There are legal provisions pursuant to which the marriage can be registered under Sections 67 and 76(1) or (2) of the National Civil Code Act of 2017 and to notify of the marriage pursuant to Section 18(2) of the National Identity Card and Registration Act of 2020. If the concerned individual submits an application through this Department's online portal, together with necessary documents pursuant to these legal provisions, the submitted documents will be reviewed, and the necessary decision will be made. Therefore, this writ petition deserves to be quashed. It is hereby requested that it be quashed.
9. In light of the aforementioned facts, and after hearing the arguments and pleas from both parties and reviewing the documents in the case file, it has become evident that the following questions must be addressed in relation to this writ petition when considering the judgment:
 - (a) What provisions have been made in the Constitution of Nepal regarding the rights and marriage of the gender and sexual minority community?
 - (b) What is the perspective of the court thus far on the rights and marriage of the gender and sexual minority community? What is the court's opinion thus far on granting a non-tourist visa to a foreign spouse of a Nepali gay individual?

- (c) What provisions have been made in federal law regarding the rights and marriage of the gender and sexual minority community?
- (d) Should the order sought by the petitioner be issued or not?

10. The first question is regarding the provisions in the Constitution of Nepal for the rights and marriages of the gender and sexual minority community. *Sunil Babu Pant* filed a writ petition, stating that during the drafting of Nepal's constitution, discrimination based on sexual orientation and gender identity had been imposed by Nepal's law, administration, and society on the minority group. The petition requests the cessation of such discrimination, enabling them to enjoy their human rights equally. In response to the writ petition, it appears that the Court's interpretation was: ***"A clear provision must be included in the constitution of Nepal, which is currently being drafted by the Constituent Assembly, to state that no discrimination should be made concerning an individual's gender identity and sexual orientation, in addition to male and female, as provided in the Bill of Rights of South Africa, as the term 'sex' also encompasses the third gender."***¹ Given the judicial commentary, a recommendation was made regarding citizenship in the concept paper prepared by the committee formed by the Constituent Assembly during the constitution drafting process to examine fundamental rights and the state's directive principles. The recommendation stated that **"a certificate of citizenship should be provided to every Nepali who is at least 16 years old in an easy and simple way, without discrimination based on gender. The certificate of citizenship should also state Male, Female, and Third Gender, to recognize the third gender."**² Article 12 of the Constitution of Nepal includes a provision that appears to allow for **obtaining Nepali citizenship based on gender identity**. Regarding the rights of gender and sexual minorities, sub-article (1) of Article 18 on the right to equality under the Constitution of Nepal provides that all citizens are equal before the law and that no person shall be denied equal protection under the law. This provision suggests that members of gender and sexual minorities are equal to other citizens before the law. Additionally, sub-article (3) includes a restrictive phrase which mentions the creation of special provisions by law for the protection, empowerment, or advancement of "sexual and gender minorities," indicating that members of these minorities receive additional protection. Sub-article (4) provides that there shall not be any *gender*³ discrimination regarding remuneration for the same work and social security, while sub-article (5) provides that there shall be no gender discrimination regarding the right to parental property with regard to ***all family members***.⁴ Based on these provisions, the Constitution of Nepal does not seem to make any gender-based discrimination against citizens who belong to gender and sexual minorities concerning the exercise and enjoyment of any right. According to the report by the Committee on Fundamental Rights and Directive Principles of the Constituent Assembly, in relation to the

¹ Sunil Babu Pant, et al. v. Government of Nepal, et al., Ne. Ka. Pa. 2065 BS, Volume 4, Decision No. 7958, p. 524.

² Report 2066 BS, p. 145.

³ It has been observed that the term "gender" in Article 18(4) of the Constitution of Nepal has replaced the terms "men and women" used in Article 13(4) of the Interim Constitution of Nepal, 2007.

⁴ It has been observed that the phrase "all family members" in Article 18(5) of the Constitution of Nepal has replaced the term "son or daughter" used in Article 20(4) of the Interim Constitution of Nepal, 2007.

core principles of gender equality as guaranteed by Article 18 of the Constitution of Nepal, it is stated that “**the concept of gender equality should not be limited to male and female, but should also encompass gender and sexual minorities.**”⁵ ... **Instead of formal equality, the concept of gender equality seems to be oriented towards attaining substantial equality.**⁶ ... **The objective is to ensure gender inclusion that encompasses not only men and women, but also sexual and gender minorities, and to provide equal treatment in the acquisition, distribution, and exercise of rights.**⁷ ... **Gender and sexual minorities include intersex individuals, whose biological sex may not conform to traditional male or female categories. ... In simple terms, the biological sex of male and female children, as well as intersex individuals, is determined by their physical sex organs, while social gender is the internal experience of an individual's identification as male, female, or third gender. Sexual orientation reflects the direction of an individual's sexual or emotional attraction, which may be towards members of the opposite sex, same sex, or all genders.**”⁸ Based on this, it can be inferred that the drafters of the constitution intended for citizens from the gender and sexual minority community to be able to enjoy and exercise their rights, including their gender identity, on an equal basis and with dignity. The report recommends that “**the new constitution should guarantee the human rights of the gender and sexual minority community, and provide for appropriate compensation in case of rights violations. Additionally, gender-neutral language should be utilized in the constitution, and if the terms "male" and "female" are used, the term "third gender" should also be included.**”⁹

11. The Constitution of Nepal, in its Preamble, states that “by ending discriminations relating to class, caste, region, language, religion and **gender discrimination** including all forms of racial untouchability, we also express our determination to create an **egalitarian** society on the basis of the principles of proportional inclusion and participation, to ensure equitable economy, prosperity and social justice.”¹⁰ To achieve the vision of an **egalitarian** society, it appears that ending any type of discrimination that exists in society is a prerequisite.
12. The use of derogatory terms such as “*chakkā*,” “*hijaḍā*,” “*napuṃsak*,” “*meṭi*,” “*gāṇḍi*,” “*maugī*,” “*kothī*,” “*maugmehar*,” “*maugīyāhā*,” “*meti*,” and “*maibābu*,” which have been present in Nepali society for years, to humiliate members of the sexual and gender minority community is still widespread. The Constitution of Nepal, in its Preamble, envisions a constitutional scenario to create an **egalitarian society** by ending **gender-based discrimination**. The drafters of the Constitution of Nepal were found to be guided by this vision and to have stayed within the concept proposed by the Committee on Fundamental Rights and Directive Principles, incorporating various articles relating to this aspect of the Constitution. As a result, the phrase “gender identity and sexual orientation” entered the Nepali legal language and literature after

⁵ The Constituent Assembly Committee on Fundamental Rights and Directive Principles, a report on the thematic concept paper and preliminary draft, 2066 BS, p. 184.

⁶ Ibid., p. 184.

⁷ Ibid., p. 332.

⁸ *Supra note 5* at p. 359.

⁹ The Constituent Assembly Committee on Fundamental Rights and Directive Principles, a report on the thematic concept paper and preliminary draft, 2066 BS, p. 184.

¹⁰ The Constitution of Nepal, Preamble.

Sunil Babu Pant's case. In the same case, the Court made a legal comment stating that discrimination should not be made based on gender identity and sexual orientation. The phrase gender identity and sexual orientation is included in the Constitution of Nepal under provisions relating to the right to equality and the right to social justice. Its aim is to protect, empower, enhance, and consolidate the sexual and gender minority community. However, it is necessary to recognize that the phrase "gender identity and sexual orientation" must be interpreted to encompass LGBTIQA+¹¹ and SOGIESC¹² overall, providing a more comprehensive meaning and scope.

13. The initial draft of fundamental rights, submitted by the Committee on Fundamental Rights and Directive Principles, appears to have included the **right to family**. According to this provision, subject to the law, **every person shall have the freedom to marry and divorce; no marriage may be conducted against the will of the marrying party or without their full and free consent; the married couple shall have an equal right to property and family affairs; parents shall have equal rights and responsibilities regarding the raising, care, and overall development of their children; every child shall have the right and responsibility to respect and take care of their parents. The act of having one or more than one husband or wife, and a marriage undertaken against a party's will and without full and free consent, shall be punishable by law.**¹³ The draft does not state that marriage is a relationship only between a man and a woman, and linguistically neutral terms such as "**person**" and "**citizen**" have been used. In this way, the draft appears to accept marriage as a **relationship between two individuals**, ensuring the rights of sexual and gender minorities regarding their marriage and family.

14. When the Constitution of Nepal was promulgated, the proposed right relating to the family was not fully incorporated into the Constitution. However, sub-article (6) of Article 38 on the **Rights of Women** provides that the *dampatī (husband and wife)*¹⁴ shall have *equal rights* to property and family affairs, making it apparent that the right regarding the family has been ensured. Pursuant to Article 18, the right to equality embraces the principle of non-discrimination and incorporates the identity of the sexual and gender minority community. It provides that discrimination may not be made on grounds of gender identity and sexual orientation. Therefore, the provision on equal rights to property and family affairs, which is guaranteed by Article 38(6), also applies to the sexual and gender minority community. It appears that a constitutional basis has been prepared to consider that the gender and sexual

¹¹ Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual, and the "+" symbol encompasses other gender and sexual minorities that are not represented by the LGBTIQA acronym.

¹² SOGIESC refers to the diverse range of Sexual Orientations, Gender Identities, Gender Expressions, and Sex Characteristics that may deviate from the traditional, binary understanding of gender and sexuality.

¹³ Report of the Constitutional Records Study and Determination Committee of the Constituent Assembly Committee, 2071 BS, p.95.

¹⁴ These terms are found to have been used as replacements for "*logne swāsnī*" or "*śrīman śrīmatī*," which were in use in the laws prior to the promulgation of the Constitution of Nepal. For example, "*Logne Swāsniko Mahal*" (the Chapter on Husband and Wife) of *Muluki Ain*, 2020 (General Code, 1963).

minority community has the right to marriage and family affairs. While sub-articles (1), (2), (3), (4), and (5) of Article 38 specifically refer to the rights of women, it can be interpreted from the use of the linguistically neutral term "*dampatī*" (spouse) in sub-article (6) that this term also denotes same-sex spouses.

15. The Constitution of Nepal guarantees the right to live with dignity in Article 16, the right to freedom in Article 17, and the right to equality in Article 18. The Court has interpreted those provisions from time to time, and it has been established that the gender and sexual minority community also has the right to their identity, feeling of ownership, dignified living, and family life. While offering a harmonious interpretation of Article 38(6) in a way that is in sync with these interpretations, it appears that the linguistically neutral term "*dampatī*" mentioned in Article 38(6) also encompasses same-sex couples. Therefore, same-sex couples are entitled to the right to property and family, which is entitled as a result of marriage. Likewise, Article 50(1) of the Constitution of Nepal provides for a directive principle "*to establish a public welfare system of governance, by establishing a just system in all aspects of national life through the values and norms of human rights, gender equality, proportional inclusion, participation and social justice.*" Embracing an objective in accordance with this directive principle, Article 51(c)(5) provides that it shall be the policy of the state "*to eliminate all forms of discrimination, inequality, exploitation and injustice in the name of religion, custom, usage, practice and tradition existing in society.*" Against this provision, the centuries-old narrative among most people that marriage and families should only occur between members of the opposite sex was viewed during the process of building the prevailing constitution, as well as by the promulgated constitution, through the right perspective. An inclusive constitution, which includes the excluded or those individuals not noticed by the general public, is under implementation. Given this background, as the fundamental rights provided by Part 3 of the Constitution of Nepal must be interpreted in harmony with each other, it appears to fall within the responsibility of the state to maintain the access to the fundamental rights, including the right to "marriage" and "family," for members of the gender and sexual minority community.

16. Given the background that the Court made a judicial comment in the judgment of *Sunil Babu Pant*'s case, stating that the Constituent Assembly must advance the constitution-building process in a way that does not discriminate against the gender and sexual minority community, the concept paper of the Committee on Fundamental Rights and Directive Principles was prepared. When the terms "men" and "women" were used in the Constitution, it was recommended that the term "third gender" should also be added. Under the "Right to Family" section of the initial draft of the constitution, it was provided that every person shall have the right to marry freely in a gender-neutral manner. The provision was incorporated into Article 38(6), providing that the couple shall have equal rights to property and family affairs. Given this background, during the process of Nepal's constitution building, the Constituent Assembly was committed to safeguarding the rights of members of the gender and sexual minority community, which Article 38(6) appears to have embraced. **Article 38(6) of the Constitution of Nepal challenges the traditional gender binary roles of husband/wife and father/mother, deconstructing long-held beliefs in Nepali society. This Article promotes the values of comprehensive inclusion and pluralism by rejecting historical, social, and legal norms that perpetuate gender-based hierarchies. It recognizes that adherence to the gender binary can result in exploitative power imbalances in personal and family dynamics, and the**

marginalization of individuals who do not conform to these traditional roles. By embracing this Article, the Constitution embraces a more inclusive approach that recognizes and respects diverse identities beyond the confines of the gender binary. Therefore, the issue of the identity of the gender and sexual minority community was included during the process of building this constitution, and the achievement, enjoyment, and exercise of discrimination-free human rights were emphasized. Given this background, it appears that same-sex marriage should be considered a subject that is envisioned by the constitution in accordance with the Constitution of Nepal, the decisions made by this Court, the report by the committee formed in accordance with the order by this Court, and the human rights treaties ratified by Nepal.

17. **The second question concerns the Court's opinion on the rights and marriage of the gender and sexual minority community, as well as granting a non-tourist visa to the foreign spouse of a Nepali same-sex individual.** When considering this matter, the Court appears to have set a judicial precedent regarding the identity of the gender and sexual minorities and the protection of their rights, including the right to live with dignity and the right to marriage. The writ petitions filed at this Court from time to time concerning the rights of members of the gender and sexual minority community form the basis of this consideration. The petition filed in *Sunil Babu Pant*'s case states that the current society, law, and state reject the existence and identity of the gender and sexual minority community; they have been excluded from their own homes, families, and society; the prevailing law has failed to provide appropriate protections for them; they have not been able to enjoy the fundamental rights provided by the constitution, international human rights, and the rights provided by law; and Nepal's law, administration, and society have been discriminating against the gender and sexual minority community. The petition requests that an order of mandamus and any other suitable order be issued to eliminate such discrimination, to make provisions without delay for the protection and achievement of legal rights to allow equal enjoyment of human rights, to issue certificates of citizenship pursuant to gender identity, and to repeal other discriminatory laws and build laws based on equality. In response to the petition, the case verdict appears to interpret that the state should also accept the identity of the third gender in addition to male and female and not deprive them of the constitutionally provided rights either. The right to privacy is protected for members of the gender and sexual minority community regarding matters concerning their sexuality. The legal provisions that do not allow them to enjoy the fundamental rights provided by the constitution and the rights provided by various human rights conventions for their own identity are arbitrary, baseless, and discriminatory. The verdict includes a judicial comment stating that the term "sex" also encompasses the third gender, in addition to male and female. Therefore, a provision must be included in the Constitution of Nepal, which is currently being drafted by the Constituent Assembly, stating that no discrimination should be made based on an individual's gender identity and sexual orientation, in addition to the male and female sex, when granting them their rights. It appears that a directive order was issued by the Court in the name of the Government of Nepal, requiring it to make appropriate laws in a way that the constitution does not mention the terms male or female but only uses the term "sex." This term encompasses male, female, as well as the third gender in a way that individuals with different gender identities and sexual orientations are also able to enjoy their rights without discrimination like other individuals.

18. Similarly, concerning same-sex marriage, it is the inherent right of consenting adults to enter into a marital union based on their own will and desire. Hence, it is imperative to consider all aspects of same-sex marriage, including the rights of the individuals involved, as well as the social and familial implications.¹⁵ Moreover, it is essential to examine the traditions and legal frameworks of other nations regarding this matter to conduct a comprehensive study and analysis. Therefore, an order was issued to establish a committee to undertake the study, and the Government of Nepal was ordered to make the necessary legal decisions to make legal provisions based on the committee's opinions and recommendations. Pursuant to the order, the committee set up by the Government of Nepal submitted a report on same-sex marriages in 2071 BS (2014/15). The report suggested that *"the Government of Nepal should revise the law to recognize same-sex marriage legally. To achieve this, the National Penal Code and the National Civil Code must treat marriage between different-sex and same-sex couples equally and extend marriage from a man-woman relationship to a relationship between any two individuals."*¹⁶ The committee presented the following recommendations:¹⁷

- It would be appropriate for the Government of Nepal to remove legal provisions that restrict marriage to only occur between a man and a woman, and instead recognize same-sex relationships by acknowledging that marriages can occur between two individuals,
- After recognizing that marriage is a relationship that occurs freely between two individuals, the legal provisions that affect this concept should be revised. Instead of providing rights to property and cultural rights based on gender (son or daughter), these rights should be provided to the child. The provision for providing rights after one's death to a husband or wife should be revised to state that such rights should be provided to the spouse of the deceased person. Additionally, the offense of rape or gender-based violence should not be considered as committed by men against women, but as an offense committed by one person against another. Accordingly, the penal and civil codes and procedures, as well as laws related to marriage registration and property, should be amended and modified in this direction,
- The gender and sexual minority community should be provided with opportunities for education, income generation, and trade in a gradual manner. Empowerment measures should be adopted to support their inclusion and participation in society. Policies, both legal and social, that acknowledge and respect the diversity of society should be implemented. Steps should be taken to integrate this community into the mainstream, including public appeals to protect their sexual and family life. Efforts should also be made to ensure their representation at political and administrative levels,
- In light of the information received that various couples have been in same-sex relationships for a significant duration, it is recommended that legal recognition be granted to such couples. After the grant of legal recognition, provisions should be made to establish a legal framework that allows these couples to pursue adoption after a specified period of time.

¹⁵ *Sunil Babu Pant (Rule No. 7954)*, Paragraph 6.

¹⁶ The committee established by the Government of Nepal in compliance with the Supreme Court's order, "A Study Report on Same-Sex Marriages," p. 55 (2071 BS/2014-15 AD).

¹⁷ *Ibid.*, p. 56.

19. It has been legally established by the Court, in the case of *Sunil Babu Pant*, that members of the gender and sexual minority community have the right to identity and the right to live with dignity. The Court has affirmed that they are entitled to freely enjoy their constitutional and fundamental rights, as well as human rights, while expressing their identities without facing discrimination. The judgment explicitly states that existing legal provisions that discriminate against the gender and sexual minorities should be repealed immediately, and discriminatory laws should not be enacted in the future. The judgment also affirms the lawfulness of same-sex relationships. Despite the government's acceptance of the report by the study committee, which recommends granting legal recognition to same-sex marriage and amending related laws, it appears that the necessary process for legal amendment has not yet moved forward.¹⁸ **The case of *Sunil Babu Pant* and the report by the committee set up by the government to study same-sex marriages, as well as the Constitution of Nepal, seem to have deconstructed the disputes present in our society and family values, and have declared legal values, principles, and provisions in a way that recognizes the feelings and experiences of those who have not been identified by society and recognized by the law, but who are experiencing a special life process. This recognition is contrary to the opinion of the general public, which is based on their facsimile. It aims to bring these individuals within the scope of society and law. However, it appears to be the responsibility of the state to further implement such declarations and protect the full freedom of these individuals.**
20. Similarly, upon reviewing the rulings delivered by the Court, it appears that the Court has provided an interpretation on same-sex relationships in response to the case of **Prem Kumari Nepali v. National Women's Commission, et al.**¹⁹ The case pertains to Rajani Shahi, a lesbian petitioner, who had married a man before coming to terms with her true sexual orientation. After expressing her lesbian identity and filing for divorce, her husband responded by confining her to their home, thereby violating her individual freedom. The Court appears to have interpreted that an individual's sexual orientation, even if different from their physical identity, may not be restricted, and that all individuals, regardless of gender or sexual orientation, can enjoy their constitutionally provided rights equally under the Constitution and prevailing law.
21. In the same case, it has been stated that *if a man or a woman wishes to live or spend their life with another person of the same sex, the court may not place legal restrictions on that relationship, indicating an acknowledgment of the lawfulness of same-sex relationships. However, there is an interpretation that merely stating the lack of state intervention in same-sex relationships is not sufficient, and that comprehensive measures consistent with the law and policy should be in place to address such relationships.*²⁰ Furthermore, an interpretation has been provided that recognizes the lawfulness of same-sex relationships, stating that individuals may choose to live apart or as partners with a member of the same sex, whether married or not, and that the prevailing law and tradition which only recognizes marriage

¹⁸ National Human Rights Commission. (2077 BS). A study report on the status of human rights of gender and sexual minorities, p. 68.

¹⁹ Prem Kumari Nepali v. National Women's Commission, et al., Ne. Ka. Pa. 2070 BS, Volume 1, Decision No. 8954.

²⁰ *Prem Kumari Nepali (Decision No. 8954)*, Paragraph 8.

between members of the opposite sex is inadequate for same-sex relationships. It is emphasized that an individual's choice of life partner is a personal decision.

22. Similarly, in **Dilu Buduja v. the Government of Nepal, et al.**,²¹ wherein the Department of Passports denied issuing a passport to the petitioner Dilu Buduja, a lesbian, that reflected her gender identity as an individual of the third gender, the Court issued a directive order. The order stated that passport-related laws, including the Passports Act, 2072 (1967), and the Passport Rules, 2067 (2010), do not discriminate against individuals of the third gender, and directed the necessary changes to be made to the machine-readable passport software and to amend Schedule-2 of the Passport Rules, 2010, to provide provisions for issuing passports to individuals of the third gender and recognizing their gender identity at the earliest. In compliance with the order, amendments were made to the Passport Rules and the technical issue with the machine-readable passport was resolved. As a result, it appears that a legal system was established to allow citizens from the gender and sexual minority community to obtain machine-readable passports with the "Other" or "O" category included under the field of sex, reflecting their gender identity.²²

23. Additionally, a writ petition on the case of **Yam Bahadur Rana Anik v. the Government of Nepal, et al.**²³ states that due to the provision allowing the obtaining of a certificate of citizenship at the age of 16, when the petitioner was not fully aware of their gender and sexual identity, a certificate of citizenship was issued with "male" or "female" indicated in the field for "sex." The writ petition requests the ability to amend citizenship and other personal documents with "Others" indicated in the field of "sex." It appears that the Court has issued an order in response to the demands in the writ petition. The order emphasizes the right of individuals to self-determination in achieving their gender identity based on self-realization, and highlights that it is not relevant for others, society, state, or law to determine an individual's biological sex. It further states that provisions that offend an individual's freedom, integrity, and self-respect are not acceptable from the perspective of human rights. Given that citizenship-related laws have acknowledged the existence of the third gender and expressed commitment to the rights of this community, it would be appropriate for the petitioner to have their certificate of citizenship, which was issued based on their biological sex at a time when their sexual identity was not known, amended to indicate "Others" in the field of "sex" and obtain citizenship reflecting their gender identity. Additionally, a directive order appears to have been issued to the Government of Nepal, requiring it to create an atmosphere where members of the gender and sexual minorities do not experience discrimination or humiliation from anyone.

²¹ Dilu Buduja v. Government of Nepal, et al., Ne. Ka. Pa. 2070 BS, Volume 8, Decision No. 9048.

²² It appears that under Schedule-2 of the currently prevailing Passport Regulation, 2077 (2020), in the Passport Application Form included in "A" of an application to be submitted for a passport and travel document, "O for Others" has been included under the field of "Sex" in Point No. 6. Similarly, in the ePassport Application Form included in "B", "X for Others" has been included under the field of "Sex" in Point No. 6, thereby providing a legal provision based on gender identity.

²³ Yam Bahadur Rana Anik, et al. v. Government of Nepal, et al., Ne. Ka. Pa., Volume 9, Decision No. 9875.

24. Similarly, in response to the writ filed in the case of **Pushpa Raj Pandey v. the Government of Nepal, Office of the Prime Minister and Council of Ministers**, the Court ordered that surrogacy services should not be made available to same-sex spouses (*dampatī*). However, it can be argued that the mention of "**Nepali same-sex spouses**" appears to provide lawfulness to same-sex marriage.²⁴ Likewise, in response to the writ petitions filed regarding the implementation and enjoyment of rights of women, the Court has, in the course of interpreting the right to equality for members of the gender and sexual minority community, stated in response to the writ petition of **Jyoti Lamsal Poudel**²⁵ that **for marriage to be considered lawful, it needs to have full consent from both parties, whether between same-sex individuals or a man and a woman**.²⁶ Furthermore, the interpretation provided in the case of **Jyoti Lamsal Poudel**²⁷ appears to state that the Universal Declaration of Human Rights of 1948 provides that all men, women, (and third gender individuals) are equal before the law and entitled to equal protection of the law, and under the International Covenant on Economic, Social and Cultural Rights of 1966, society is composed of men, women, (and third gender individuals), therefore, the state must address all of these components and not discriminate between men, women, and third gender. In response to the case of **Prakash Mani Sharma, et al. v. the Office of the Prime Minister and Council of Ministers**,²⁸ the Court appears to have interpreted the right to equality for members of the gender and sexual minority community. It stated that Article 13 of the Interim Constitution of Nepal, 2063 (2007) provides that all citizens shall be equal before the law. In a country where fundamental rights are safeguarded by a written constitution, gender-based discrimination cannot be imposed solely based on someone's gender, whether they are a man, woman, or third gender individual. Laws that discriminate based on gender would not have legal status and would not be considered lawful from the perspective of the constitution. Sons, daughters, and third gender children have equal rights to parental property. In the course of interpreting the right to equality guaranteed by Article 13 of the Interim Constitution of Nepal, 2007 in the context of **Jyoti Lamsal Poudel**'s case,²⁹ it appears to be stated that the Article is a provision to make constitutional or legal provisions to eliminate discrimination against individuals based on their sexual orientation, including LGBTI individuals. Similarly, **the case of Saroj Nath Pyakurel**³⁰ involved an order which stated that women and individuals belonging to the third gender are entitled to receive the citizenship of Nepal as per their choice. Additionally, the order mandates that measures should be taken to issue certificates of Nepali citizenship to those who are eligible, and to include them in the voter list.

²⁴ Ibid., Paragraph 16.

²⁵ Jyoti Lamsal Poudel, et al. v. Government of Nepal, Office of the Prime Minister and Council of Ministers, Decision No. 8282.

²⁶ Ibid., Paragraph 16.

²⁷ Jyoti Lamsal Poudel v. Government of Nepal, Office of the Prime Minister and Council of Ministers, Decision No. 8507.

²⁸ Prakash Mani Sharma, et al. v. the Office of the Prime Minister and Council of Ministers, Decision No. 8456.

²⁹ Jyoti Lamsal Poudel v. Government of Nepal, Office of the Prime Minister and Council of Ministers, Writ Petition No. 064-WO-0186.

³⁰ Saroj Nath Pyakurel v. Government of Nepal, Ne. Ka. Pa. 2068 BS, Volume 1, Decision No. 8536.

25. Given the aforementioned orders and judgments, it is evident that the Court remains sensitive to the subject of rights, identity, and respect for the gender and sexual minority community. In interpreting the right to equality provided by the Interim Constitution of Nepal, 2007 and the Constitution of Nepal, this Court has issued judicial commentary and directive orders to make appropriate amendments to legal provisions for citizenship and passports, to ensure the identities and self-determination rights of the gender and sexual minority community, and to provide lawfulness to same-sex marriages and relationships. In this sense, it can be observed that the Court has interpreted gender justice and *vidhiśāstra* (science of law) to some extent and made efforts to translate the principle of equality into practice. It appears that the Court has also made efforts to consider the issue of rights for the members of the gender and sexual minority community as an integral part of progressive society and to make state entities continually responsive and accountable for the exercise of those rights. Based on the aforementioned judgments made thus far, it has already been interpreted that the members of the gender and sexual minority community shall have equal rights in the enjoyment and exercise of the constitutionally provided rights, including their identity, dignified living, and marriage. Therefore, it does not seem that the Court can state otherwise. However, the Court has been addressing the members of the gender and sexual minorities generally as the "third gender," and it appears that this needs to be reconsidered. **Generally speaking, the term "third gender" is used to indicate communities other than men and women. In several documents, the use of "third gender" also refers to the transgender community.³¹ Given the current context where various terms of gender identity have been developed and individuals are openly identifying themselves with those identities, "third gender" cannot denote everyone and, therefore, the use of such a term can potentially diminish the identity of the members of the gender and sexual minority community as a whole. At a time when there seems to be a general agreement to use the more inclusive term SOGIESC instead of LGBTIQA+, which cannot represent the entire non-binary community, the use of "third gender" to address the entire non-binary community would seem contrary to the principle of inclusion as well.**

26. **The restrictive phrase in Article 18(3) of the Constitution of Nepal and the phrase "gender and sexual minorities" used in Article 42(1) can encompass individuals with all gender identities and sexual orientations other than "male" and "female." Therefore, it is appropriate to use "gender and sexual minorities" as recognized by the Constitution of Nepal instead of the term "third gender."** Although the term "third gender" was used in the interpretations and judgments by the Court in the context of rights for the gender and sexual minority community prior to the promulgation of the Constitution of Nepal, it would be more appropriate to use "gender and sexual minorities" from now onwards. In the case of Sunil Babu Pant and others, the term "third gender" was used in the court verdict on the basis that it was more respectful than the humiliating terms such as "*hijrā*" and "*chakkā*" used otherwise at that time. However, the phrase "gender and sexual minorities" appears to encompass all groups from this community, whereas "third gender" is a respectful term that is only used in colloquial

³¹ In the report by the National Human Rights Commission on the status of human rights of gender and sexual minorities in Nepal (2077 BS), the term "third gender" is used as the Nepali translation for "transgender." Similarly, in Suman Panta's case, the term "third gender" has been used interchangeably with "transgender."

language. On the other hand, there is a legal compulsion for members of the gender and sexual minority community to use "Others" as their gender identity. Therefore, the issue that transgender men and women should be able to choose "male" or "female" as their gender identity according to their will, and the issue that other gender and sexual minorities should be able to state their third gender or binary gender identity on their personal documents and certificates should be viewed with high humanitarian sensitivity. **There may not be only one composition and existence of a human being, and objectively, their visible face and identity is one truth. But the invisible identity and experience of the same human being may be different. Understanding and acknowledging that experience is another truth. Therefore, truth may vary and should not be viewed from only one perspective. Just as there is natural diversity, there is human diversity, with plural identities and values. It appears that the Court must view this truth from a thoughtful and humanitarian perspective, and given the current situation where the value of identity and rights for members of the gender and sexual minority community is being acknowledged, the Court must be more aware and mindful of global values of gender justice and *vidhisāstra*.**

27. Similarly, upon reviewing the Court's opinions thus far on the granting of non-tourist visas to foreign spouses of Nepali same-sex individuals, it appears that the visa application of Tobias Volz, a gay man married to Adheep Pokhrel, who is also a petitioner in this writ petition, was denied when he applied at the Department of Immigration. In a similar case, **Suman Panta v. the Ministry of Home Affairs, Department of Immigration**,³² the Court has previously established a judicial precedent by issuing an order of mandamus to grant a non-tourist visa to a foreign lesbian woman who was in a marital relationship with a Nepali lesbian citizen. It is relevant to further discuss the basis used in deciding the case of Suman Panta. The writ petition states that Suman Panta, the Nepali lesbian petitioner, entered into a court marriage with Leslie Luis on December 18, 2015, in Sacramento County, Sacramento, California, United States. After arriving in Nepal, Leslie applied for a non-tourist visa at the Department of Immigration, but her visa was verbally denied by the respondent Department of Immigration. Despite the fact that the Director General, the respondent, should have granted the visa in accordance with Section 7 of the Immigration Act, 1992, no decision was made on the matter. It is worth noting that the Constitution of Nepal has already acknowledged the rights of gender and sexual minorities, and Rule 8(1)(h) of the Immigration Rules, 1994, allows foreign nationals who submit a valid marriage certificate establishing marriage with a Nepali citizen to be eligible for a non-tourist visa. The writ petition claims that these provisions, as well as the rights provided by Articles 17, 18, 18(2), 18(3), 38(1), and 133, were violated, and seeks an order of mandamus in the names of the respondents, requiring that non-tourist visas be granted to spouses of members of the gender and sexual minority group, such as the petitioner herself, should they choose to obtain a non-tourist visa upon their arrival in Nepal after their same-sex marriage, and that laws relating to this matter be formed and implemented immediately.

28. The Court, when issuing an order of mandamus to grant a non-tourist visa to Leslie Luis, the spouse of the petitioner, Suman Panta, in response to the writ petition, interpreted that ***“Part 3 of the Constitution of Nepal guarantees fundamental rights, where the rights including right to live with dignity, the right to freedom, the right against torture, the rights relating to***

³² *Suman Panta (Decision No. 9921)*.

*justice are guaranteed to persons, while the rights including the right to equality, the right relating to property, and the right to communication are guaranteed to citizens. The terms “person” or “citizen” used in the Constitution are gender-neutral. These terms are not limited to men or women alone. Therefore, it cannot be argued that the fundamental rights guaranteed by the Constitution are exclusively for men or women; that they have not been guaranteed for those who do not conform to traditional gender categories of men or women or those who do not wish to identify as such; and that they do not have equal access to constitutional protection under the law. They should not be deprived of the rights guaranteed in such a way.”*³³ In this sense, because the constitutionally provided rights are gender-neutral, it appears that the gender and sexual minorities cannot be denied the equal protection of law and that no situation may be created where they are deprived of enjoying any right. In interpreting the right to live with dignity, as guaranteed by Article 16 of the Constitution of Nepal, the Court further stated that *“the Constitution has guaranteed the right to live with dignity, which also includes their right to identity as a person. Equality cannot be achieved unless a person’s physical existence and identity are acknowledged. Likewise, until the autonomy which makes a person’s life whole as a person is not respected, their dignity cannot be considered to be respected. The Court emphasized that laws, policies, and behaviors should be consistent with the constitutionally provided rights to prevent situations where individuals’ rights are not recognized.”*³⁴ Prior to this, the Court appears to have interpreted that the right to identity was inherent in the right to live with dignity under Article 12(1) of the Interim Constitution of Nepal, 2007. The Court appears to have continued this interpretation and established the judicial precedent that failure to acknowledge an individual's identity in the judgment of Suman Panta’s case would undermine their respect.

29. In discussing the discriminations that occur or could occur from the state, the Court interpreted that *“in light of the comprehensive context of human rights law and the provisions made by our Constitution on fundamental rights, all types of discrimination, whether through action or omission, against the gender and sexual minorities appear to be illegal. No discrimination can be made based on sex, physical condition, or marital status, and that no situation should be created where adverse effects are imposed on the existence, identity, dignity, or desires of groups, including gender and sexual minorities, or where abstinence, deprivation, or restriction diminishes their enjoyment or exercise of rights or renders it meaningless.”*³⁵ The Court further highlighted that discrimination can occur not only due to the state's positive enactments or actions, but also due to omissions. If any action or omission by the state results in adverse impacts on the dignity of groups, including gender and sexual minorities, or diminishes their enjoyment of rights, such action or omission is considered illegal, and the state should not create conditions that allow for such action or omissions to occur.

30. Similarly, the Constitution does not deprive members of the gender and sexual minority community of their constitutionally provided rights, including the right to live with dignity and the right to equality. According to the Immigration Act and Rule 8(1)(h) of the Immigration

³³ *Suman Panta v. the Ministry of Home Affairs, et al., Case: Certiorari/Mandamus, Ne. Ka. Pa. 2074 BS (2017), Decision No. 9921, Volume 12, Paragraph 6.* (Judgment date: 10/23/2017).

³⁴ *Ibid.*

³⁵ *Suman Panta (Decision No. 9921), Paragraph 13.*

Rules, 1994, a foreign national who presents a valid marriage certificate establishing marriage with a Nepali citizen is eligible for a non-tourist visa. In response to the decision by the Department of Immigration denying a non-tourist visa to the petitioner's spouse Leslie Luis Melnik, the Court interpreted that ***“if a foreign national claiming to be married to a Nepali citizen submits a marriage registration certificate and the Nepali citizen confirms the marriage in their visa application, then the issuance of visa to the foreign national cannot be denied. When it comes to the question of an individual's rights, it is important to be mindful that individuals are entitled to their rights, except in cases that are expressly restricted by the law. The Constitution not only guarantees rights but also justice, acknowledging the different identity of gender and sexual minorities and prohibiting discrimination based on gender. While the Immigration Act and Rules do not reject such an identity, it is unfair that the application form's terms husband/wife diminish their constitutionally provided rights. Therefore, the respondent's omission in not granting a non-tourist visa is not acceptable.”***³⁶ Further interpreting the self-determination rights for members of the gender and sexual minority community, the Court stated that ***“the right to conduct one's personal life, gender identity, and soul calling is a matter of self-determination. Thus, interfering with the petitioner's personal life would also contravene the Constitution, human rights law, and Immigration Rules.”***³⁷ Interpreting further, the Court stated that ***“a non-tourist visa cannot be denied to a person who is married to a member of the gender and sexual minority community.”***³⁸

31. The issue of a foreign national who is married to a Nepali citizen from the gender and sexual minority community obtaining a non-tourist visa is closely tied to the identity and dignity of the community member. While foreign spouses of traditional male or female citizens can obtain a non-tourist visa, the same service is not made available to foreign spouses of individuals from the gender and sexual minority community, which goes against human rights law, the Constitution of Nepal, the Immigration Act, and the Immigration Rules. This omission of not granting a non-tourist visa does not appear to be consistent with law. In the case of ***Suman Panta***, the Court issued a mandamus order to the Department of Immigration to grant a non-tourist visa to Leslie Luis Melnik, who is the same-sex spouse of the petitioner. This writ petition is similar to ***Suman Panta***'s case in terms of legal questions, claims, and facts. Therefore, based on the principle of stare decisis, the appropriate reasons for granting a non-tourist visa to Tobias Volz, spouse of Adheep Pokhrel, could have been drawn from ***Suman Panta***'s case. However, the denial of a non-tourist visa to Tobias Volz by the Department of Immigration is not acceptable. Hence, based on the judgment and interpretations and precedents established in Suman Panta's case, the omission of not granting a non-tourist visa to Tobias Volz by the respondent Department of Immigration appears to be inconsistent with the Constitution and the law.

32. **The third question pertains to the provisions made in federal law regarding the rights and marriage of the gender and sexual minority community.** In considering this question, it would be necessary to examine how civil, criminal, and other thematic laws address issues such as identity, dignity, marriage, property, and family for members of the gender and sexual

³⁶ *Suman Panta (Decision No. 9921), Paragraph 18.*

³⁷ *Ibid.*, Paragraph 18.

³⁸ *Suman Panta (Decision No. 9921), Paragraph 19.*

minority communities. It appears that gender-neutral terms, such as "persons" and "citizens," have been used in various sections of the National Civil Code, 2017. Under Chapter 3 on Provisions Relating to Civil Rights of Part 1 of the National Civil Code, 2017, every citizen is to be equal before the law. Section 18 prohibits discrimination in the application of general law on the grounds of sex, and Section 19 further clarifies that any special provision made by law for the protection, empowerment or development of citizens, including gender and sexual minorities, shall not be considered discriminatory. Additionally, Section 30 ensures that every person shall be recognized as a person and entitled to exercise rights under the law from birth, and Section 36 allows any person to undergo sex change, subject to the law. Therefore, it appears that there are provisions in place to ensure that members of the gender and sexual minorities are treated equally before the law, that no discrimination can be made in the application of general law, and that they are entitled to enjoy their rights under the law. However, under Family Law in Part 3, Section 67 defines marriage as follows: **"If a man and a woman accept each other as the husband and wife through any occasion, ceremony, formal or other act, a marriage shall be deemed to have been concluded."** The committee established pursuant to the order of this Court to study same-sex marriages has recommended that it is necessary to amend this section to extend marriage beyond a man-woman relationship and recognize it as a relationship between any two individuals.³⁹ Section 69 of the National Civil Code, 2017 guarantees every person the freedom to conclude a marriage, and the inviolability of their family life. However, the provisions relating to marriage under the Code use terms such as "man," "woman," "husband," and "wife" with reference to rights and obligations resulting from marriage, which do not encompass the gender and sexual minorities and do not reflect the Court's previous order⁴⁰ and the various provisions of the Constitution. These provisions appear to be worth considering in light of the principles of equality and non-discrimination.

33. Similarly, according to Section 76 of the National Civil Code, 2017, **"Both husband and wife shall get their marriage registered by filing an application in the authority specified by the law."** However, it has been observed that local-level government units refuse to register same-sex marriages, citing that Nepal's law does not recognize the registration of same-sex marriages. The provisions related to divorce, parental and child relationships, maternal and paternal authority, guardianship, curatorship, adoption, inter-country adoption, partition, and succession under Part 3 on Family Law of the Code use gender-specific terms such as man, woman, grandfather, grandmother, father, mother, son, daughter, daughter-in-law, brother, and sister. Even though the Constitution and Court judgments have recognized the rights of gender and sexual minorities to freely live their family lives, the Code does not seem to have incorporated such orders and provisions. **In reality, binary terms such as son or daughter carry inherent hierarchies. While these words may carry sentimental value in general contexts, their legal usage may result in the suppression or control of individuals who do not fit within their traditional meanings in power relations.** In this context, laws that employ such gender-specific language can be seen as questionable and in need of reform. Similarly,

³⁹ Committee established by the Government of Nepal pursuant to the order of the Supreme Court, A Report on Same-Sex Marriages, p. 56 (2071 BS)

⁴⁰ Sunil Babu Pant, et al. v. Government of Nepal, et al., Ne. Ka. Pa. 2065 BS, Volume 4, Decision No. 7958, p. 524.

Section 257 of Part 4 on Law Relating to Property under the National Civil Code, 2017 uses gender-specific terms such as husband, wife, father, mother, son, and daughter, and provides for their rights to property in common. Although the gender-neutral term "citizens" has been used in the provisions relating to marriage⁴¹ in Part 6 on Provisions Relating to Private International Law under the National Civil Code, gender-specific terms such as "father," "mother," "son," and "daughter" are still used in other provisions such as those relating to adoption⁴² and maternal and paternal authority.⁴³ These provisions are still using the terms that should be amended in accordance with the Constitution and the judgments of the Court.

34. Sections 171, 172, 173, 174, and 175 under the Offenses relating to marriage in Chapter 11 of Part 2 of the National Penal Code, 2017 use the gender-neutral term "person." However, Section 175, which prohibits bigamy, specifically uses the terms "man" and "woman." Likewise, Section 189, which deals with abortion, clearly refers to "woman." Section 192(2)(k) mentions the "removal of a woman's breasts." Section 219 in Chapter 18 on Sexual Offenses defines rape in the following way: "Where a man has sexual intercourse with a woman without her consent or with a girl child below eighteen years of age even with her consent, the man shall be considered to commit rape on such woman or girl child." This provision implies that only *women* can be victims of rape. Similarly, gender-specific terms also appear in Section 220. Section 224 prohibits sexual harassment and mentions "husband" or "wife," which appears to be gender-specific. Section 226 of the National Penal Code, 2017 states that if a person has, or causes to have, unnatural sexual intercourse with another person without their consent, it shall be considered an offense. Although this section only criminalizes non-consensual unnatural sexual intercourse, the term "unnatural intercourse" was used in British colonial law⁴⁴ to refer to same-sex relationships. Historically, these terms entered Nepali legal traditions and carried the intention to imply that homosexual relationships are against nature. Therefore, such terms are humiliating for members of the gender and sexual minority community. Likewise, under the Offense Relating to Medical Treatment, Section 233(3) prohibits carrying out a physical examination of anyone without their consent with the intention to breach the privacy of a "woman." The National Criminal Procedures Code, 2017 also provides that if a woman is to be arrested or detained, a female police officer shall be assigned as far as possible.

35. Efforts have been made to promote gender equality and remove gender-specific words from some thematic laws through an Act to amend Some Nepal Acts to ensure gender equality and elimination of gender-based violence.⁴⁵ However, despite these efforts, some laws still

⁴¹ Sections 699, 700, and 701 on provisions relating to marriage recognition under the National Civil Code, 2017.

⁴² Ibid., Section 703.

⁴³ *Supra note 43*, Section 702.

⁴⁴ While homosexuality was criminalized under British law, it is worth noting that in British colonies, it was often referred to as "unnatural intercourse" and was also criminalized. For instance, the Indian Penal Code of 1860 and the Bangladesh Penal Code of 1860 both had Section 377 which criminalized homosexuality. This was challenged in the case of *Navtej Singh Johar & Ors. v. Union of India & Ors.*, resulting in a landmark decision by the Supreme Court of India in 2018 (AIR 2018 SC 4321).

⁴⁵ Act No. 8 of the year 2072 BS.

continue to use gender-specific terms, such as "mother", "father", "son", "daughter", "adopted son", and "adopted daughter", which exclude members of the gender and sexual minority community. Despite attempts to remove gender-specific words from certain laws and maintain gender equality, gender-neutral terms are not consistently used in all laws. Examples of such laws include:

- The Interpretation of Nepal Laws Act, 2010 (1954) uses gender-specific terms⁴⁶ including "father," "son," "daughter," "adopted son," and "adopted daughter." Section 12(1) of the Act states that "words importing the masculine gender shall be taken to include the females," but even this provision itself is not gender-inclusive as it continues to use male-oriented language,
- Sections 39(2)(d1) and (d2) of the Police Act, 2012 (1955) contain provisions for making rules and orders for separate housing for "female" and "male" personnel,
- Sections 2(c) and 52(c) of the Lands Act, 2021 (1964) define family using gender-specific words such as "husband," "wife," "son," and "daughter,"
- In Section 2(d) of the Civil Service Act, 2049 (1993), the definition of "family" includes gender-specific terms such as "husband," "wife," "son," "daughter," "adopted son," "adopted daughter," "man," and "woman,"
- In Section 2(h) of the Working Journalists Act, 2051(1993), the definition of family includes gender-specific terms such as "husband," "wife," "son," "daughter," "adopted son," "adopted daughter," "man," and "woman,"
- In the Human Body Organ Transplantation (Regulation and Prohibition) Act, 2055 (1998), Sections 2(j) and 2(l) define "family member" and "close relative" using gender-specific terms such as "husband," "wife," "son," "daughter," "adopted son," "adopted daughter," "brother," "sister," "grandson," and "granddaughter,"
- The Child Labor (Prohibition and Regulation) Act, 2056 (2000) uses the terms "male child" and "female child,"
- Section 2(w) of the Income Tax Act, 2058 (2002) define relatives using gender-specific words such as "husband," "wife," "son," and "daughter,"
- In Sections 3, 5, 8, and 17 of the Nepal Citizenship Act, 2063 (2007), provisions have been made for "female" foreign or Nepali citizens. Similarly, in Section 5, gender-specific terms such as "son" and "daughter" have been used,
- Section 47 of the Electronic Transactions Act, 2063 (2008) considers acts of teasing, harassing, and humiliating women as illegal, but it does not include gender and sexual minorities as victims of that offense,
- In the Companies Act, 2063 (2006), Section 2(z9) defines "close relative" using gender-specific terms such as husband, wife, son, daughter, and daughter-in-law,
- In the Act Relating to Federal Parliament Secretariat, 2064 (2007), Section 2(q) defines family using gender-specific terms such as "husband," "wife," "son," "daughter," "adopted son," and "adopted daughter,"
- In the Banking Offense and Punishment Act, 2064 (2008), Section 2(j) defines family members using gender-specific terms such as "husband," "wife," "son," and "daughter,"
- In the Non-resident Nepali Act, 2064 (2008), Section 2(f) defines family using gender-specific terms such as "husband," "wife," "son," and "daughter,"

⁴⁶ Mentioned in Sections 2(f), 2(y) and 2(y1) of the Interpretation of Laws Act, 1954

- In the Domestic Violence (Offense and Punishment) Act, 2066 (2009), Section 2(b) defines domestic relationship using gender-specific terms such as "adopted son," and "adopted daughter,"
- The Act Relating to Children, 2075 (2018) uses terms such as "male child" and "female child,"
- Section 2(w) of the Bank and Financial Institution Act, 2073 (2017) defines relatives using gender-specific words such as "husband," "wife," "son," "daughter," and "daughter-in-law,"
- Section 2(d) of the Cooperatives Act, (2074) 2017 defines "family" using gender-specific words such as "husband," "wife," "son," and "daughter,"
- The Right to Safe Motherhood and Reproductive Health Act, 2075 (2018), while providing rights to women's motherhood and reproductive health, does not include members of the gender and sexual minority community,
- Section 15 of the Prisons Act, 2079 (2022) states that separate houses and toilets shall be provided for "male" and "female" prisoners,
- Section 2(e) of the Insurance Act 2079 (2022) defines "family" using gender-specific words such as "husband," "wife," "son," "daughter-in-law," "daughter," "adopted son," and "adopted daughter."

36. In this way, some federal laws still do not appear to use gender-neutral and inclusive terms in a way that encompasses citizens from the gender and sexual minority community. **When gender neutrality and inclusion are not adopted in simple language use, it appears that the ability of the gender and sexual minority community to freely enjoy their rights relating to identity is obstructed, and the enjoyment of rights provided by any thematic laws will also diminish. If the objective of any law is not to exclude any group from the exercise of their rights, that objective must also be reflected in the language used in that law. In determining the legislative intent of any law, the court must first adopt the literal rule of interpretation of the words used in that law, and therefore, it must be clearly stated whether the language used in the law includes any group or not.** Despite Section 12(1) of the Interpretation of Nepal Laws Act, 1954 stating that "words importing the masculine gender shall be taken to include the females," this provision may not be adequate for the gender and sexual minority community. **Members of this community are entitled to equal enjoyment of rights provided by the Constitution of Nepal, as evident from Article 18 and established precedents and principles. Hence, the language used in the law should be inclusive from a gender perspective and able to encompass the gender and sexual minority community. However, federal laws still use gender-specific terms such as "husband," "wife," "son," "daughter," "adopted son," "adopted daughter," and "daughter-in-law," particularly when defining "marriage" and "family," which may exclude members of the gender and sexual minority community. Such definitions in the law that solely denote "man" and "woman" appear to deprive the gender and sexual minority community of their rights related to family and marriage.** Given that gender-specific terms in laws have deprived members of the gender and sexual minority communities, it is important to highlight that the government should undertake legislative efforts to incorporate gender-inclusive terms in these laws to recognize the identity and rights of these communities, and take additional initiatives towards inclusion.

37. With regard to how the issue of the rights for the gender and sexual minorities can be incorporated in the law, "They, Them, and Theirs," an article published in Harvard Law Review argues that "the law can recognize nonbinary gender using familiar civil rights tools and concepts. Nonbinary gender rights might take the form of recognition of a third gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of nonbinary people into roles or spaces that require binary categories."⁴⁷ While gender neutrality may be appropriate in some contexts to discourage unnecessary gender classification, in other contexts, gender classification may be necessary, and it is important to determine how gender and sexual minorities can be integrated based on that classification. For instance, using the term "child" instead of gender-specific terms like "son" or "daughter" can prevent unnecessary gender classification, as embraced in Article 18(5) of the Constitution of Nepal. However, it may not be feasible to use gender-neutral terms for terms like "father" or "mother." Appropriate considerations need to be made on how to integrate the gender and sexual minority community into the definition of "parents." In the case of Sunil Babu Pant, the report by the committee established following the Court order to study same-sex marriages, along with the recommendations from the National Human Rights Commission,⁴⁸ recommended the following: positive attitude to legal recognition of same-sex marriages; legal provisions for recognition of same-sex marriage and divorce, property partition, and succession; and legal provisions allowing them to adopt a child (male, female, or other) after reaching a certain age, regardless of their marital status.⁴⁹ The usage of gender-specific language and legal gender classification in the current law has resulted in a diminishment of rights for individuals belonging to the sexual and gender minority community in the context of marriage and family. These issues call for attention and may require changes in the existing laws, particularly in relation to legal gender classification.

38. **The fourth question pertains to whether the order sought by the petition should be issued.** According to the writ petition, Tobias Volz, a German national among the petitioners, applied for a non-tourist visa at the respondent Department of Immigration. However, he was asked for a certificate of marriage registration in Nepal. When [his spouse Adheep Pokhrel] went to Ward No. 11 of the Kathmandu Metropolitan City in the Kathmandu District to register the marriage, registration was refused citing the lack of provision for registering same-sex marriage. When the petitioner applied for a non-tourist visa again, the information of denial was provided only verbally, and no decision was communicated. Consequently, the claim made in the writ petition seeks the granting of a non-tourist visa. The rejoinder submitted by the respondent states that documentation was to be presented in accordance with the provision on marriage registration pursuant to the National Civil Code, 2017, and the registration of notice of marriage pursuant to the National Registration Act, 2020. The petitioners have explicitly stated in the main contents of the writ petition that they did not file it to challenge the lawfulness or significance of their marriage. They have submitted the marriage registration certificate with Registration Number E37/2018 for the marriage that took place in accordance with German law

⁴⁷ Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. Law Rev. 894, 901 (2019).

⁴⁸ National Human Rights Commission, a study report on the status of human rights of gender and sexual minorities, p. 78-81 (2077 BS).

⁴⁹ Committee established by the Government of Nepal pursuant to the order of the Supreme Court, a study report on same-sex marriages, p. 56 (2071 BS)

on October 19, 2018, and was registered at Malsch, Kreis Karlsruhe. The marriage registration certificate, which was attested by the German Embassy, is included in the case file. Considering this context, the position put forward by the respondent Department of Immigration requiring the submission of documentation pursuant to the National Civil Code, 2017, and the National Registration Act, 2020 does not appear to be reasonable.

39. Section 7 of the Immigration Act, 1992 states that the Director General of the Department of Immigration may issue visas as prescribed by law. Rule 8(1) of the Immigration Rules, 1994 states that non-tourist visas shall be granted to certain foreigners and their family members, including "foreigners who have marital relations with citizens of Nepal and provide a marriage registration certificate," as stipulated in Clause (h). Regarding this issue, Paragraph 5.3 of the Protocol and Consular Handbook⁵⁰ issued by the Ministry of Foreign Affairs states that diplomatic visas are issued to certain diplomats and their dependent family members holding diplomatic passports, including the "same-sex partner of a diplomatic agent holding a diplomatic passport issued by the sending state (reciprocity condition applies)," as provided in Point No. 2 under the same paragraph. Similarly, Paragraph 5.4 of the Protocol states that official visas are issued to certain officials and their dependent family members holding official/service passports, United Nations Laissez-Passer (UNLP), and regular passports on formal request from foreign missions, including the "same-sex partner of an official of a diplomatic mission holding an official/service passport (reciprocity condition applies)," as provided in Point No. 3 under the same paragraph. According to the provisions mentioned above, same-sex spouses of foreign diplomats are entitled to obtain non-tourist visas. While the spouses of diplomats and various foreign officers are able to obtain visas and live in Nepal without restrictions, the respondent's argument against granting a non-tourist spouse visa to a foreign same-sex spouse of a Nepali citizen goes against the provisions of the Immigration Act, Rules, and other related laws. This argument appears to be based on prejudice against the petitioner's gender and sexual orientation, and constitutes a discriminatory act. In today's globalized context, marriages and divorces can occur not only among Nepalis but also between Nepalis and foreign nationals. The National Civil Code of 2017 includes provisions for private international law, specifically in Sections 692, 699, and 701, which recognize marriages conducted overseas. Additionally, in the case of habeas corpus of Kanika Goel v. Karan Goel, the Court has ordered that matters such as marriage, divorce, child custody, etc. should be dealt with based on private international law. This decision is based on the legal provisions and exercise of the Court. In light of these provisions, a marriage that has taken place in a foreign country should be considered valid in the context of this writ petition. **The main documents required for obtaining a spouse visa include an official certificate certifying the marriage, or a certificate of marriage registration, and a certificate of citizenship of the Nepali citizen among the spouses, based on which a non-tourist visa is granted. Both spouses must be present at the Department of Immigration for identification purposes in order to obtain this type of visa. Therefore, if the certificate of citizenship of the Nepali citizen, the certificate certifying the marriage, and the identification of both spouses are provided, the Department of Immigration does not have the authority to deny the granting of a non-tourist visa, as per the provisions of the Immigration Act, 1992 and Rule 8(1)(h) of the Immigration Rules, 1994.** Asserting that these provisions do not acknowledge the different

⁵⁰ Ministry of Foreign Affairs, Protocol Division, Protocol and Consular Handbook (May 2018).

identity of the gender and sexual minority community, and using the terms "husband/wife" on the application form to diminish their constitutionally provided rights, is unjust. The omission of granting a non-tourist visa, contrary to the Constitution, is unacceptable. Members of the gender and sexual minority community have the right to enjoy their constitutional rights on an equal basis, including the right to identity and to conduct their family lives freely, as established by long-standing precedent of this Court under the right to equality. During the drafting of the Constitution of Nepal, the "Right to Family" heading in the draft of fundamental rights included a provision stating that "the husband and wife (referred to as "*dampatī*") shall have equal rights to property and family affairs." This exact same sentence was replicated in sub-article (6) of Article 38 when the Constitution was promulgated. Notably, the use of the gender-neutral term "*dampatī*" in sub-article (6), unlike the other five sub-articles under the "Rights of Women," implies that spouses from the gender and sexual minority community also have equal rights to property and family affairs, without necessitating any further debate. Therefore, the denial of a non-tourist visa to the petitioner by the respondent Department of Immigration, which goes against human rights law, the Constitution of Nepal, the principles established by the Court, the Immigration Act, and the Immigration Rules, does not appear to be consistent with the law, considering the wisdom demonstrated by the Constituent Assembly in the process of constitution building and the study report on same-sex marriage submitted by the committee formed by the Government of Nepal pursuant to the order of this Court.

40. The concept of human rights has evolved based on the inherent integrity and dignity and value of every person. The principle that no person should be deprived of their rights based on their identity also applies to the rights of the gender and sexual minority community.⁵¹ Also, based on the principle of equality ratified by the Universal Declaration of Human Rights in 1948, the discrimination faced by members of gender and sexual minority groups, in both social and legal contexts, is inconsistent with the principles of human rights and human rights law.⁵² Similarly, in accordance with the rights to life, equality, dignity, integrity, and privacy guaranteed through the International Covenant on Civil and Political Rights (1966), as well as the provisions against torture outlined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Yogyakarta Principles,⁵³ the

⁵¹ United Nations General Assembly. The Universal Declaration of Rights (UNDHR), New York: United Nations General Assembly, 1948, Art. 1; All human beings are born free and equal in dignity and rights.

⁵² *Id.* at Art. 2; Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁵³ The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006.

Yogyakarta Principles plus 10,⁵⁴ and the report by the United Nations High Commissioner for Human Rights,⁵⁵ it is the responsibility of the state to protect the rights, including the right to self-respect, of individuals within the gender and sexual minority community. This responsibility also encompasses the duty to ensure the right to marriage and other rights. There are examples of countries acknowledging this responsibility by recognizing same-sex relationships and moving away from the traditional notion that marriage can only occur between men and women, as they strive towards ensuring the rights of gender and sexual minorities. Same-sex relationships are recognized through lawful practices such as registered partnership, civil partnership, civil union, same-sex marriage, domestic partnership, *pacte civil de solidarité*, and unregistered cohabitation, which can lead to the recognition of non-binary marital relationships. For example, in the Netherlands, where same-sex relationships were decriminalized in 1811, provisions were made for same-sex couples to formalize their relationship through cohabitation or joint cohabitation agreements, or registered partnership. In 2000, the Netherlands further amended its Civil Code to grant same-sex couples the right to marry, which recognizes same-sex relationships on equal footing with opposite-sex relationships.⁵⁶

41. Similarly, in 2003, various provinces in Canada implemented laws to recognize same-sex marriage. Following that, a federal proposal, called "*An Act respecting certain aspects of legal capacity for marriage for civil purposes*," was introduced at the federal level to legalize same-sex marriage. The federal parliament of Canada referred this proposal to the Supreme Court of Canada for an opinion on its constitutionality. In the resulting case of *Re: Same Sex Marriage*,⁵⁷ a progressive interpretation of the constitution was provided, and same-sex marriages were legalized. Subsequently, in 2005, the Civil Marriage Act was enacted, which defined marriage as a lawful union of two persons. Despite pressure from the Roman Catholic Church, laws to recognize same-sex marriages were developed at the local government level in Spain starting in 1998. Then in 2005, the central parliament in Spain amended the civil code to formally recognize same-sex marriages.⁵⁸ The constitutionality of Spain's same-sex marriage law was challenged at the Constitutional Court, and in a 2012 judgment, the court ruled that the law was indeed constitutional.⁵⁹ In 2005, the Constitutional Court of South Africa, in the case of the Minister of Home Affairs and anr. v Fourie and anr.,⁶⁰ ruled that Section 30 of the Marriage Act, which had been in place since 1961 and did not legalize same-sex couples, was

⁵⁴ The additional Yogyakarta Principles (YP+10): Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017.

⁵⁵ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, November 2011.

⁵⁶ Acts of 21 December 2000, Stb. 2001, nos. 9 and 10 (allowing registration that grants similar legal effects as marriage in the Netherlands).

⁵⁷ *Re: Same Sex Marriage*, [2004] 3 S.C.R. 698.

⁵⁸ *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*. 13/2005 Act of 1 July 2005.

⁵⁹ Constitutional Court Judgment No. 198/2012 of November 6, SCT 198/2012.

⁶⁰ Minister of Home Affairs and anr. v. Fourie and anr., Case CCT 60/04, [2005] ZACC19.

unconstitutional. As a result, the Civil Union Act was enacted in 2006, granting legal recognition of same-sex marriages. Similarly, in Argentina, same-sex marriages had been legalized in Buenos Aires, Rio Negro, Villa Carlos, and Rio Cuarto before 2009. In 2010, a law was enacted at the central level to legalize same-sex marriages nationwide. In 2015, the previous Civil Code was replaced by the Civil and Commercial Code, which further legalized same-sex marriages and ensured other marriage-related rights.

42. The Civil Partnership Act, 2004 was enacted in the United Kingdom to regulate and recognize the legal relationship between two individuals of the same gender. Subsequently, with the implementation of the Marriage (Same Sex Couples) Act of 2013, same-sex marriages were also granted legal recognition in the United Kingdom. In 2015, the U.S. Supreme Court interpreted in the case of *Obergefell v. Hodges*⁶¹ that the right to marriage for same-sex couples is ensured through the due process clause and the equal protection clause under the 14th Amendment of the United States Constitution, while challenging the constitutionality of laws enacted by any state to restrict same-sex marriages. As a result of the case of *Toonen v. Australia*,⁶² brought before the United Nations Human Rights Committee in 1994, Australia repealed its sodomy law. In 2017, the Marriage Act 1961 was amended through the Marriage Amendment (Definition and Religious Freedoms) Act to grant recognition to same-sex marriages including those conducted in foreign countries.

43. In Pakistan, there have been legal and judicial developments concerning gender and sexual minorities. In 2009, the Pakistani Supreme Court issued various interim orders in the case of *Dr. Muhammad Aslam Khaki & anr. v. S.S.P. (Operation), Rawalpindi & others*,⁶³ to protect the rights of gender and sexual minorities, including property rights, voting rights, education rights, and safety rights. Additionally, in 2018, Pakistan passed the Transgender Persons (Protection of Rights) Act, 2018, which introduced legal provisions to protect the right to equality and other rights for members of this community. In India, the case of *National Legal Services Authority v. Union of India and others*⁶⁴ in 2014 acknowledged the notion that every person has the right to make their own decision regarding their gender identity. Similarly, in the case of *Navtej Singh Johar & Ors. v. Union of India & ors.*⁶⁵ in 2018, it was deemed unconstitutional to the extent that Section 377 of the Penal Code of India criminalized consensual sexual relationships, labeling them as "unnatural intercourse." The case also referred to the case of *Sunil Babu Pant* from Nepal. The conclusion drawn was that "the constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection."⁶⁶

⁶¹ *Obergefell v. Hodges*, 576 US 644.

⁶² *Toonen v. Australia*, 448/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁶³ *Dr. Muhammad Aslam Khaki & anr. v. S.S.P. (Operation), Rawalpindi & ors.* [2009] Const. Pet. No. 43, SC (Pak.).

⁶⁴ *National Legal Services Authority v. Union of India and others*, AIR 2014 SC 1863.

⁶⁵ *Navtej Singh Johar & Ors. v. Union of India & ors.*, AIR 2018 SC 4321.

⁶⁶ *Navtej Singh Johar* at para. 124.

44. Similarly, the Constitutional Court of Taiwan, in the case of Interpretation No. 748, found unconstitutional a provision in the Civil Code that does not recognize same-sex marriage.⁶⁷ In December 2020, Bhutan passed the Penal Code (Amendment) Act of Bhutan of 2021, which decriminalized same-sex intercourse. The amendment clarified that sexual activity between same-sex adults is not considered "unnatural sex" according to the law. Taking into account the case of *Sunil Babu Pant* on same-sex marriage, the report on same-sex marriages by the committee established pursuant to the order of this Court, the precedents set by the supreme courts of India and other South Asian nations, and the development of same-sex laws in European countries, it is evident that the legal recognition of same-sex marriages is undergoing gradual evolution. Moreover, in the context of South Asia, the case of *Sunil Babu Pant* stands as a guiding principle in relation to the rights of gender and sexual minorities. The acknowledgment of same-sex marriage as equivalent to marriage between a man and a woman was recognized in Nepal through the case of Sunil Babu Pant on behalf of the Blue Diamond Society. The committee established to study same-sex marriages in response to the Court order recommended equal marriage as a suitable modality for legalizing same-sex marriages. The committee's report has been submitted to the Government of Nepal and is currently under consideration. Under the Immigration Rules of 1994, Schedule-2(a) provides an application form for non-tourist visas, including spouse visas. Point No. 11 of the application form requires choosing one of the spouses and filling out their details. Therefore, it can be argued that individuals from the gender and sexual minority community are not precluded from obtaining a non-tourist visa. If, during an application for a non-tourist visa by the writ petitioner Tobias Volz, the other petitioner Adheep Pokhrel physically identifies Tobias Volz as his spouse, and the application is submitted along with the required documentation, including petitioner Adheep Pokhrel's certificate of citizenship and a marriage certificate certifying their marriage, then it is possible that an order of mandamus may be issued in the name of the respondents, requiring the issuance of a non-tourist visa to the writ petitioner Tobias Volz pursuant to Rule 8(1) of the Immigration Rules of 1994 as the basis for granting the visa.

45. Now, with regards to the petitioner's claim that he has been denied his rights due to the requirement to mention his spouse in Point No. 11 of the application form under Schedule-2(a) of the Immigration Rules of 1994, and his request for an order of mandamus or any other appropriate order to address this matter, the Court has issued a directive order in the name of the Government of Nepal, in response to the case of *Sunil Babu Pant*. The directive order mandates **"the creation or amendment of laws, as needed, to ensure that individuals with diverse gender identities and sexual orientations can fully enjoy their rights without encountering discrimination, in the same manner as other citizens."**⁶⁸ During the case of *Suman Panta*, the learned Joint Attorney General, on behalf of the government, informed the Bench that **the government is studying the matter to implement the order.**⁶⁹ The order stated that, **given the confidence that the federal legislature will take proactive measures in light of the ongoing implementation of the constitution in the nation, and with the expectation**

⁶⁷ J.Y. Interpretation No. 748 (2017/05/24).

⁶⁸ *Sunil Babu Pant, et al. v. Government of Nepal, et al.*, Ne. Ka. Pa. 2065 BS, Volume 4, Decision No. 7958, Paragraph 6.

⁶⁹ *Suman Panta v. the Ministry of Home Affairs, et al.*, Ne. Ka. Pa. 2074 BS (2017), Volume 12, Decision No. 9921, Paragraph 20.

that the order will be promptly enforced, no directive order has been issued at this time.⁷⁰

Even though almost six years have passed since the order was issued in that case, no amendments have been made, and the rights of individuals from the gender and sexual minority community have been violated, prompting the filing of this writ petition. Similar to the case of **Suman Panta**, this writ petition also argues that the requirement to mention the spouse and provide their details in Point No. 11 under Schedule-2(a) of the Immigration Rules, 1994 violates the rights of individuals from the gender and sexual minority community. Since no directive order was issued in the case of **Suman Panta**, it is now essential to amend that provision and protect the rights of same-sex spouses. The requirement to mention the spouse and provide their details in Point No. 11 under Schedule-2(a) of the Immigration Rules, 1994 obstructs the procedures for granting non-tourist visas to foreign spouses of Nepali citizens from the gender and sexual minority community and poses a high risk of diminishing the enjoyment of rights for this community, including their rights relating to identity, dignity, marriage, and family life. Therefore, the Court has issued a directive order in the name of the respondents, requiring the necessary amendments to be made to Point No. 11 and provisions to be made to facilitate the issuance of non-tourist visas to foreign nationals who enter into marital relationships with Nepali citizens from the gender and sexual minority communities in the future.

46. The use of terms in prevailing laws that demonstrate hierarchy, particularly in personal and family power relations where one term denotes more power over the other (e.g., "husband" in "husband and wife"), calls for attention due to the potential impact of gender-specific terms. Accordingly, it is ordered to send a copy of this order to the Office of the Attorney General for the information of the Ministry of Law, Justice and Parliamentary Affairs, the high authority on lawmaking and amendment, as well as the respondents. Furthermore, to facilitate the implementation of the calls for attention and directive orders mentioned in this order, it is ordered to provide information about this order to the Judgment Execution Directorate in compliance with Rule 127(4) of the Supreme Court Rules, 2074 (2017). Furthermore, the registration of the writ petition is directed to be removed, an electronic copy of the order is to be entered into the electronic system, and the case file is to be handed over to the Records Section in accordance with the applicable rules.

[Signed]
Justice
(Hari Prasad Phuyal)

I concur with the above opinion.

[Signed]
Justice
(Tanka Bahadur Moktan)

Bench Officer: Manoj Baral (Under Secretary)

⁷⁰ Ibid.

Investigation Aides: Laxmi Rana (Section Officer), Rakesh Bom (Intern), Ravi Nayak (Intern)
Executed on Monday, December 19, 2022 AD (4th Day of the Month of Poush of the Year 2079 BS) ..