

# **Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People**

## **Abstract**

The decision given below was handed down in a case filed by Mr Sunil Babu Pant of the Blue Diamond Society and others on behalf of lesbian, gay, bisexual, transsexual and intersex (LGBTI) people where the petitioners prayed for the issuance of an order of mandamus in order to provide the gender identity on the basis of their gender feelings and to recognize their co-habitation as accordance with their own sexual orientation. Here, the Supreme Court acknowledges the growing ascendancy of the notion that homosexuals and third gender people are not mentally ill or sexually perverts. Therefore their rights should be protected and they should not be discriminated in the enjoyment of rights guaranteed by the constitution and human rights instruments. The Court holds that it is an appropriate time to think about decriminalizing and de-stigmatizing the same sex marriage as according to it. The Court takes the view that that no one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural and that the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. The court further holds that gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural. The court takes the view that selection of sexual partner or fixing of marital relation is a matter falling entirely within the ambit of the right to self-determination of such an individual. It also seems to be in favour of gradual internalization international practices in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. It calls upon the state to create appropriate environment and make legal provisions to enable the LGBTI people enjoy fundamental rights and insert provisions in the New constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa. It issues a directive order to the Government of Nepal to form a Committee in order to undertake the study on over all issues in this regard and make the legal provisions after considering recommendation made by the said Committee.

Supreme Court Division Bench\*  
 Hon'ble Justice Mr. Balram K.C.  
 Hon'ble Justice Mr. Pawan Kumar Ojha  
Order

Writ No. . 917 of the year 2064 BS (2007 AD)

**Case: Let an appropriate order including the order of Certiorari, Mandamus, Prohibition  
 be issued**

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

Petitioner

Vs.

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

Respondents

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

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

The writ petitioners further state that the female homosexuals (lesbians), male homosexuals (gays) as well as the people of the third gender are considered as minority people on the basis of sexual orientation and gender identity. Such people introduce themselves as third types of people. Those people are also known as third gender and homosexuals in general parlance. We have been categorized under the five different groups. Those are known as lesbian, gay, bisexual, trans-gender and inter-sexual. Such identities of human beings are not hypothetical but

\* Translated into English by Mr. Yadav Pokharel and reviewed by Mr. Shree Prasad Pandit. At the NJA the text has been further reviewed by the editors to ensure that the translation very closely carries the meaning given in the Nepali text. However, in case of any contradiction/incongruence, the Nepali text should be considered as authentic.

a scientifically proved fact. Even in a Report the World Health Organization has acknowledged the existence and birth of such types of people. By confirming the existence of such types of people, the report has also emphasized that it is a natural phenomenon and not a disease. Despite the fact that the aforesaid persons are born naturally, the existing society mistrusts their existence in the name of unnatural phenomenon. We have been boycotted by the family and the society as a whole. Even the state has ignored us. In the situation of being socially boycotted, we should have been protected by the law but the law does not seem serious in this issue. The state has not taken any initiative to resolve our problem. The state is responsible to provide equal status to all citizens by making sufficient laws in this issue.

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

The writ petitioners further state that there is no doubt that all Nepali citizens have equal standing in the eyes of the constitutional provisions of Nepal and rights enshrined by these provisions. It is the obligation of the state to treat all the people equally as well as to guarantee all fundamental rights to the people. Nepal has been the party to various international conventions and treaties after signing and ratifying them, and according to section 9 of Nepal Treaties Act, 2047 (1991 AD), the provisions of international treaties and conventions, to which Nepal is a party, should be adopted as national law. Thus, while there are fundamental rights guaranteed by the Constitution on one hand there are international human rights standards on the other. Therefore, as a party to such conventions, Nepal is responsible to fulfill the obligations set by such conventions. From the point of view of talking practically and legally, one segment of the population based on the sexual orientation and gender identity are deprived of exercising their human rights. The people of this community have suffered from the domestic, social and state violence everyday. Police administration and other state mechanisms are not sensitive towards the condition of such people. Even the officials of the concerned government agencies are also in a dilemma in the matter of issuing citizenship certificate to us mentioning our sexual identity because our sexual identity is neither male nor female. We do not want to get the citizenship certificate as indicated other than of our identity. While going to the police administration to bring forward the issues of violation of our human rights as well as other violence and inhuman treatment meted to us, they seem reluctant to handle the case. The UN report has also mentioned this fact with emphasis. Even in the schools, colleges, government and private organizations including other public places, such people are facing offensive behavior and the perpetrators are not being subjected to the punishment; they are always being deprived of the utilization of other privileges

provided by the state. The state relies on the tradition of not allowing one to marry a person of one's own choice. All these practices act against the self esteem of a person and the right to life as well as right to live with dignity.

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

The Legislature-Parliament Secretariat, in its affidavit submitted to this Court, has stated that the writ-petitioners have mentioned in their petition that they do not want to obtain the citizenship certificate other than their own identity. The government also cannot issue such citizenship certificate. There does not seem any legal hindrance to obtain Nepalese citizenship certificate by choosing any other gender in the application form in case of not falling under the 'male' or 'female' category while mentioning their sex. Only concerned individual can enter into the court for the enforcement of such legal rights with evidence in case of being rejected the issuance of citizenship certificate even after submission of application. This writ petition seems to have been based on hypothetical presumption describing and analyzing only the issue without mentioning any example of discriminatory provisions against the people of different gender identity. In case the petitioners were treated in a discriminatory manner or given degraded treatment or violence is committed against them, nothing restricts them in getting remedy specifying their sexual identity distinct from a male or a female. Hence, the writ petition should be rejected.

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

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

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

Appearing on behalf of the respondents including the Government of Nepal, Learned Deputy Government Attorney Mr. Krishnajibi Ghimire putting his argument before the Bench submitted that the Interim Constitution of Nepal, 2063 [2007 AD] has guaranteed that no citizen shall be discriminated in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction. The writ petitioners have not been restricted by anyone to enjoy such rights. If any violence or misbehavior happens against the people of different

gender identity, they also have equal rights to get remedy as other individuals. Hence, the writ petition must be rejected.

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

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

So far as the first question whether or not this writ petition, filed in regards to the rights of homosexual and the people of third gender considered as minority on the basis of gender identity or sexual orientation falls under the category of public interest litigation (PIL) is concerned, the society is an integrated form of different religion, race, origin, language, class, sex, gender, caste, community. All societies cannot be of the same structure and characteristics. There may be the situation in the society, where all classes of the people have not acquired equal opportunities. So, it is a constitutional duty and responsibility of the state to make the deprived and socially backward classes and communities able to utilize the opportunity and enable them enjoy the rights equally as other people do. In jurisprudential parlance, it is usually called the distributive justice and is also kept under the dimension of social justice. In our judicial practice, the issue of social justice is being recognized as an issue of public interest or the issue of public interest litigation (PIL). Definitely, because of many reasons including social, economic, cultural etc. as well as inaction of the state, the question of the protection of the rights of disadvantaged people or groups falls under the category of PIL. Our judicial practice and constitutional provisions are oriented towards this direction.

This writ petition seems to have been filed pursuant to Article 32 and Article 107 (2) of the Interim Constitution of Nepal, 2063 (2007 AD). The right to constitutional remedy conferred by Article 32 is also a fundamental right. However, the right guaranteed by Article 32 is not an absolute right in itself. Instead it is a right to file a petition before this court under its extraordinary jurisdiction in pursuance of Article 107 (2) for the enforcement of other fundamental rights conferred by Article 12 to Article 31 of Part 3 in case such rights have been infringed. Further, the right under Article 32 is to be considered as a right to provide the *locus standi* to file a petition before this court in case of infringement of various fundamental rights enshrined to the citizens by Part III of the Constitution. In other words, the right under Article 32 is a right to move the Supreme Court for the remedy in case of infringement of fundamental rights.

Likewise, there are two types of extraordinary jurisdictions vested in this court as provided by Article 107. The extraordinary jurisdiction of sub-article (1) of Article 107 is the jurisdiction to make the judicial review of legislative power of Legislature for scrutinizing whether the statutes enacted under the legislative power and the rules issued under the delegated legislative power are inconsistent with the Constitution or not. Sometimes either due to the aversion of the legislature or mistake or error made by the draftsman in course of drafting the statutes inconsistent with the Constitution may be passed as a bill. It may also be passed because

of the legislative inadvertence. There shall be no room to any statutory law which is inconsistent with the Constitution because in countries including Nepal where the constitutional supremacy prevails, the Legislature has supremacy only in the law making process. The Constitution is the only standard for this. The Constitution is enacted under the constituent power by the delegates chosen by the sovereign people using their inherent sovereign power of enacting the Constitution.

The Legislature is created under the Constitution, in other words it is a creature of the constitution. Hence, while exercising the legislative power, the Legislature cannot enact the law which contradicts with its own creator [i.e. the Constitution]. The law which is inconsistent with the Constitution may be repealed or amended only through the constitutional process. However, it may take time to do so. There may not be sufficient time to summon and convene the session of the Legislature to repeal and amend such laws that are found enacted against the constitutional provisions. The rights of the people protected by the Constitution shall be at stake when it takes such a long time to repeal or amend these unconstitutional enactments. The Article 107 (1) of the Constitution has provided extraordinary power to this Court to declare such laws unconstitutional in order to protect the citizens from such risks. As the issues raised in this writ petition does not seem directly related to the provision of Article 107 (1) no further analysis is required on this matter.

Article 107(2) has also granted the extraordinary power to this Court. Under this Article, this Court imparts full justice by exercising its extraordinary power in situations given below:

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

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

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

This writ petition has been filed by the Executive Director of the NILHIRA SAMAJ on behalf of the organization and others. It is seen from the written memorial submitted by the learned counsels on behalf of the petitioners, the English name of the organization appears as the Blue Diamond Society (BDS established in 2057 (2000 AD) for the protection of the rights and the interests of third gender community. It is also seen that the petitioner organization is working for the protection, of the rights of sexual minorities in Nepal. Upon perusal of the writ petition, it is

seen that the writ petitioners have prayed for the issuance of an order of *mandamus* and other appropriate orders regarding lesbian, gay, bisexual, transsexual and intersex (LGBTI) people of sexual minorities in order to provide the gender identity on the basis of their gender feelings and to recognize their co-habitation as accordance with their own sexual orientation.

A case where a constitutional or a legal question is involved is known as the public interest litigation where the issue as mentioned in the Article 107 (2) of the Constitution is raised. There are some norms and values behind having such provisions which allow the filing of petition on behalf of the victim by anyone in this Court where personal right of the petitioner is not necessarily infringed.

The Constitution has guaranteed different fundamental rights to the citizens. All individuals and citizens of different classes, groups and castes in the Nepalese society are not educated and aware. The people of different class, communities and castes residing in different parts of the country have been exploited and suppressed because of the lack of proper attention by the state and also due to prevailing illiteracy, lack of proper knowledge, social values, traditional practices, customs and economic backwardness or poverty etc. They are not even aware of their rights and do not have sufficient knowledge towards the enforcement of their infringed rights. It is for this reason that they have remained disadvantaged as a class.

All citizens and groups in the society are not economically well off. In other words, due to the lack of education, ignorance and poverty the disadvantaged group of people are not aware of their rights conferred by the constitution or that the rights which are infringed and can be enforced by this Court. Therefore, the Article 107 (2) of the Constitution has provided the rights to any public spirited individual to file the petition on behalf of such disadvantaged groups by widening the traditional rule of *locus standi* for the settlement of constitutional or legal question involved in a dispute of public interest or concern. And any individual, on behalf of such disadvantaged group, can file a petition for the enforcement of their rights under this Article 107 (2).

Since our traditional society has recognized only two types of sexes i.e. male and female. A dominant role has been provided to these two sexes 'male' and 'female' in the society. There exist practices of treating the people of third sex differently. The Court should take this matter into the judicial notice. Due to the lack of awareness, education and knowledge the tradition and practices of treating the third gender, other than the male or female, differently continues not only in our society but also in other countries. Therefore, the claim that the people of third gender may not file the petition on their own behalf cannot be held otherwise.

The Part III of the Constitution confers various fundamental rights to the Nepali citizens. The Directive Principles and Policies of the State stipulated Part IV of the Constitution have kept the State at the centre for the upliftment and development of the citizens. **All human beings including the child, the aged, women, men, disabled, incapacitated, third genders etc. are Nepali citizens. All the territory of this country including all citizens collectively constitutes the nation. The third genders among the population are also part of the Nepalese population as a whole.** The third gender are still considered as disadvantaged class of citizens because of the social perception towards them and social behavior as well as lack of education, knowledge and economic backwardness within the society of third gender. The concept of public interest litigation has been developed by the court for the settlement of constitutional or legal questions involving the dispute of public interest or concern. In other words, the provision of Article 107 (2) of the Constitution has been incorporated for allowing any public spirited individual to file a petition *pro bono publico* on behalf of the backwarded people who due to reasons economic, social and

educational etc can not do so by themselves.

The Part III of our Constitution provides several fundamental rights. However, all citizens who are supposed to enjoy such rights are not educated. All citizens are not economically well off. They are ignorant too. Such multiple factors push the people to backwardness. Hence, if the Court embraces the narrow concept of *locus standi* and traditional pattern of court on such issues, there can be no access to the fundamental rights and justice for the disadvantaged group of people. In view of this, the provision of filing the petition by any individual on behalf of the disadvantaged group of people has been made.

There is no provision in the Indian Constitution, similar to Article 107 (2) of our Constitution that provides for settlement of disputes involving public interest. Nevertheless the decision of Supreme Court of India in the case, *S.P.Gupta and others vs. President of India* is significant in regard to the issue of public interest litigation where the constitutional or legal questions are involved for settlement. The judgment in this case should be considered as a model for the concept of public interest litigation. Justice P.N. Bhagwati while clarifying the concept of PIL observed:

“...where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision without authority of law or any such legal wrong or legal injury or illegal burden is threatened and helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief any member of the public can maintain and application for an appropriate direction or order.”

The fundamental rights are stipulated in the Part III and the Directive Principles and Policies of the State in the Part IV of the Interim Constitution of Nepal. Such provisions have been made with the approach of securing the well being of citizens by transforming the country into welfare state. Furthermore, since the year 2047 BS (1990 AD), Nepal has ratified more than 18 international conventions including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of All Forms of Discrimination against Women (CEDAW). While formulating the policies, enacting and enforcing the laws, the Executive should keep in mind the constitutional provisions regarding the fundamental rights of the citizens and the Directive Principles and Policies of the State and international conventions relating to the human rights which are ratified by our country. But where the Executive fails to do so, provisions of Article 32 and 107 (2) get activated. Therefore, the Executive should fulfill its constitutional responsibility keeping in mind the above mentioned provisions. While observing the working style of the Executive till now, it does not seem that these provisions have been complied with properly.

The provision that allows everyone to file a petition for the settlement of constitutional or legal questions involved in a dispute of public interest or concern has been incorporated not only in the Article 107 (2) of present Constitution but also in the Article 88 (2) of the previous Constitution of the Kingdom of Nepal, 2047 (1991 AD) which is now repealed. This Court has issued appropriate and proper orders in different writ petitions filed by various non-governmental organizations (NGOs and/or INGOs) and other public spirited individuals on behalf of the disadvantaged groups of people and for this purpose this Court has widened *locus standi* under its extraordinary jurisdiction in PIL cases where the constitutional or legal questions are involved

for settlement. However, the question of *locus standi* is being raised time and again. Hence, it is seen necessary to interpret as to what type of dispute falls under the concept of PIL in which constitutional or legal questions involved are to be settled. In the context of Article 107 (2) of the present Interim Constitution of Nepal, 2063 (2007 AD), the following disputes can be considered as PIL for the settlement of any constitutional or legal questions involved:

- Matters pertaining to the deprivation of the enjoyment of fundamental rights provided by Part III of the Constitution to the citizens of various classes, castes, tribes, sex, groups, language to the inaction of the state;
- Matter pertaining to the deprivation of enjoyment of fundamental rights due to the negligence in implementing the Directive Principles that are to be gradually implemented by the State;
- In the situation where the State has acted against the letter and the spirit of the preamble to the present Constitution, especially its fourth paragraph.
- Matter pertaining to the intervention on the independence of judiciary and other constitutional bodies which are required to act independently;
- Matter pertaining to environmental pollution;
- Matter pertaining to the interest and rights of the people of different castes or classes for whom special provisions can be made for the protection and empowerment as provided in the proviso to the Article 13 (3);
- Matter pertaining to the interest and rights of other persons or group or class as mentioned in the Part 3 and 4 of the Constitution;
- The issue falling under the public trust doctrine and the natural resources of Nepal viz. public land, rivers, forests etc;
- The historical and archeological issues regarding the cultural heritage of Nepal;
- Matter pertaining to the suffering of the citizens of any class or group or caste due to the negligence in upholding its constitutional duty by the executive; etc.

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

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

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

The second question raised above, relates to the basis of identification of homosexual or third gender people and whether it happens because of the mental perversion of an individual

or such characteristics appears naturally. It seems to us that there is a practice of using the term 'sex' to depict the difference between the individuals on the basis of genitals whereas the term 'gender' is used for the role assigned by the society on the basis of sex. There are people having the identity of 'third gender' in minority in the society other than the 'male' and 'female', which are categorized as the mainstream on the basis of gender identity.

It is found that the medical science and psychology have categorized three types of people of different sexual attraction on the basis of sexual orientation. According to this practice, sexual relation or sexual attraction between the people of same sex is called homosexual relation. On the contrary, sexual relation or sexual attraction between the people of opposite sex is called heterosexual relation and the sexual relation or the sexual attraction between the people either of same sex or of opposite sex equally is called bi-sexual relation. Similar to what men and women are considered as the mainstream of the society on the basis of gender identity, from the point of view of the sexual orientation, the heterosexual people, because of their number, are considered as the mainstream of that group. On the other hand, the number of homosexual and bi-sexual people is not large in the society. Among the homosexuals also two types female homosexual (lesbian) and male homosexual (gay) are found. Similarly, persons who are born with the physical characteristics of one sex but psychologically feel and behave like members of opposite sex are called transsexual.

The other category of sexual minority are intersexuals who are born naturally with the both genetic sex organs of male and female. The number of such people is very few. Their gender is determined on the basis of their sexual orientation when they become adult. Thus, in totality, the five categories are found within the group of sexual minority, namely lesbian, gay, bisexual, transgender, intersexual which are known as LGBTI in an abbreviated form. The main contention of the writ petitioners is that this group has not been recognized yet on the basis of sexual orientation and gender identity.

Prior to considering the contention of the petitioners, it seems relevant to define the term 'sexual orientation' and 'gender identity'. A meeting of the human rights experts working in the field of sexual orientation and gender identity held in Yogyakarta, Indonesia from 6<sup>th</sup> to 9<sup>th</sup> November 2006 has adopted The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. The definition of sexual orientation and gender identity given in the principles is as follows:

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

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

In this context, it seems relevant to give lexical meaning of some words and phrases frequently used in this petition which are as follows:-

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

**Gay** - A homosexual person especially a man.

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

**Transsexual** - A person especially a man who feels that he should have been opposite

*sex, and therefore behaves and dresses like a member of that sex.*

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

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

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

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

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

**Source-wikipedia**

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

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

In some countries, sexual relationships between same-sex consenting adults or "unnatural behaviour", such as the manifestation of transgender behaviours, are criminalized under "sodomy laws" or under the abuse of morality laws, which violate the right to privacy and the equal protection of

the law without discrimination. Such criminalization reinforces attitudes of discrimination between persons on the basis of sexual orientation. In some countries such acts are punishable by corporal punishments or the death penalty impairing the right to be free from cruel, inhuman or degrading punishment and the right to life. Treaty bodies, the former Commission on Human Rights and special procedures have expressed concern at such criminalization, called on States to refrain from such criminalization and where such laws exist repeal them, and urged all States that maintains the death penalty not to impose for sexual relations between same-sex consenting adults.

Violence taking place in some countries against lesbian, gay, bisexual or transgender (LGBT) persons, including killing, “social cleansing”, torture and ill-treatment, impairs the right to life, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the right to security and is also a matter of concern of treaty bodies and special procedures of the former Commission. Victims of criminal offences suffer. From discrimination because of their sexual orientation and gender identity, as they are often perceived as less credible by law enforcement agencies and police officials frequently show prejudice towards such persons. These particular in cases of abuse, ill treatment, including rape or sexual assault, torture, or sexual harassment, and may be disinclined to investigate promptly and thoroughly extrajudicial executions of LGBT persons. The refusal to bring those responsible for such killings to justice and to ensure that such killings particularly disturbing. The special procedures and the treaty bodies have repeatedly asked the States to take action to protect the right to life of LGBT persons, including proper investigation in cases of violence against LGBT persons. They have also called on states to take initiatives against homophobia and hate crimes, including policies and programmes aimed towards overcoming hatred and prejudice against LGBT persons.

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

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

The European Court of Human Rights has accepted the concept of this decision in the case of *Goodbin v. United Kingdom*. Similarly, the scientific and medical studies have, on the basis of research, drawn conclusions that only genitals at birth do not determine an individual's gender identity. Mental characteristics also have an impact on it.

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

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

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

The Supreme Court of United States of America in the case of *Lawrence et.al. v. Texas (2003)* has declared a law unconstitutional which considered an act of sexual relation between the consenting adults of same sex a crime. It is also found that the Constitutional Court of Ecuador has also declared a provision of the national law that pronounced a homosexual relation a crime, and hence null and void. The said court as early as in 1997 declared Section 516 of Criminal Code of that country null and void for being contrary to the Constitution and Article 26 of the ICCPR.

After considering above mentioned various contexts, it seems to us that the traditional norms and values in regards to the sex, sexuality, sexual orientation and gender identity are changing gradually. **It is also seen that the concept specifying that the gender identity should be determined according to the physical condition and psychological feelings of a person is being established gradually. The concept that homosexuals and third gender people are not mentally ill but leading normal life style, is in the process of entrenchment.** In this context, it seems contextual to quote relevant portion of the Report of Interdepartmental Working Group (of the UK):

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

According to a report (Kinsey Report) there are 5 to 8 percent people in the society who are included in the group that is covered by the definition of the sexual orientation given above. This fact has portrayed the life style of a certain number of people who are in minority in the society on the basis of gender identity and sexual orientation. This helps to substantiate view that sexual orientation is a natural process in course of physical development of a person including self-experience rather than due to the mental perversion, emotional and psychological disorder.

Now let's discuss the third question as to whether or not the state has made discriminatory treatment towards the citizen whose sexual orientation is homosexual and gender identity is trans-gender. The petitioners have alleged that the state has made discriminatory treatment to the citizen whose sexual orientation is homosexual and gender identity is trans-

gender. The contentions of the petitioners also seem that the people of this community have been the victim of violence perpetrated by the family, society as well as the state; that they are deprived of social, economical, cultural, political and civil rights; that they have been humiliated in the society and family; that they have been deprived of the enjoyment of service and benefits provided by the state; and that they have also been deprived of the basic rights such as employment, marriage and citizenship etc.

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

...member of sexual minorities are disproportionately subjected to torture and other forms of ill treatment because they fail to conform to socially constructed gender expectation. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill treatment to take place.

The Yogyakarta Principles has also clearly stated the problem which is being faced by the people of different sexual orientation and gender identity. The portion stated in the preamble of the principles is as follows:

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

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

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

“... Lesbians, gays, bisexual and transgender were exposed to murder and threats in the name of “social cleansing.” Generally speaking the results of investigations into the identities of perpetrators are very inadequate. Those groups were the victims of arbitrary detentions and cruel, inhuman or degrading treatment by member of the police force. There have also been allegations of harassment of homosexuals by members of the illegal armed

groups. There are no specific public policies to prevent or penalize such actions or to eliminate discrimination against those groups, especially in educational establishments, in the field of employment, in the police force and in detention centers..."

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

Let us consider the context of Nepal by keeping the abovementioned facts and contexts in background. Article 13 of the Interim Constitution of Nepal, 2063 (2006 AD) has guaranteed the right to equal protection of laws and has proscribed discrimination on the grounds of sex, race and caste and the like. Similarly, Articles 33 has provided for abolition of discriminatory laws and Art 34 for securing social justice. Likewise, Nepal has shown its commitment towards the universal norms of the human rights by ratifying a significant number of international conventions for the protection of human rights. Nepal has already ratified the International Convention on Elimination of All Forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on Elimination on all Forms of Discrimination against Women, 1979 and the Convention on the Rights of the Child, 1989. The provisions such as protection and promotion of human rights of the individual and elimination of all forms of discriminations have been accepted in these conventions. Being a party to these international treaties and conventions, the responsibility to implement the obligations created by instruments to which state is a party rests on the Government of Nepal according to the Vienna Convention on International Treaties, 1969 and the Nepal Treaty Act, 2047 (1991 AD).

It has already been mentioned that the term 'sex' denotes the men and women only. **It is an old notion considers the people of third sex other than the men and women as rare and that the people of third sex are sexual pervers. Such old notions have no value if one holds the view that welfare states, dedicated to the human rights should protect the right to life of every citizen.** In countries such as India, USA, Brazil, Mexico, United Kingdom, Spain, Belgium, The Netherlands, Colombia etc. voices are being raised for the recognition of third gender people and legalization and de-stigmatization the same sex marriage. If one looks at the situation prevailing in our neighboring country, India, one will find thousands of *Hijras* and *Kothis* there. To be a homosexual or a third gender is not a disease in itself. There is a legal provision in our country that criminalizes same sex marriage on the ground that it is unnatural coition. However, **the sexual preferences and choices of every individual may not be the unnatural coition. Hence, it is an appropriate time to think about decriminalizing and de-stigmatizing the same sex marriage by amending the definition of unnatural coition.**

In this context it is significant to state the provision of Article 26 of the International Covenant on Civil and Political Rights- ICCPR.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of law. In this respect, the law shall prohibit any discrimination and guarantee to all person's equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The above mentioned Article 26 has emphasized that all persons are equal before the law and they all are entitled to the equal protection of law. It has also accepted the principle of non-discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national origin, property, birth or other status. The Human Rights Committee of the United Nations has asserted that in order to construe the Article 26 of ICCPR, the article includes the term sexual orientation within this definition.

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

The European Court of Human Rights has also articulated the similar kind of jurisprudential concept. The court, while developing the jurisprudence on privacy and sexual orientation has proscribed discrimination on the ground of gender identity. In the case of *Van Kuck vs. Germany*, which was filed against the discriminatory insurance provision that did not take the responsibility of the surgical operation for sex change, the court has interpreted that “...*the applicant’s freedom to define herself as a female person, one of the most basic essentials of selfdetermination the very essence of the European Convention of Human Right being respect for human dignity and human freedom. Protection is given to the right of transsexual personal development and physical and moral security.*”

Similarly, the court in two cases namely, *Goodwin vs. United Kingdom* and *I vs. United Kingdom* in 2002 explicitly recognized the rights of the third gender individuals. In this case the UK government had declined to prepare the legal identity papers of individuals corresponding to the present sex following the change through surgical operation. The court held that *changes in their identity papers holding their right, to respect for their private lives and also their right to marry had been violated.*

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

### **Article 13. Right to Equality:**

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
- (2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.
- (3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

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

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

According to the data published by the Center Bureau of Statistics/Government of Nepal in 2005, there are different religious groups in Nepal such as Hindu, Buddhist, Muslim, Kirat, Jain, Christian, Sikh, Bahai and others. The state cannot discriminate these religious groups. According to the data of the Government of Nepal, there are 102 identified races and castes in Nepal. The state cannot discriminate anyone on the ground of religion, race and caste. Similarly, it cannot discriminate on the basis of sex also. Non-discrimination on the basis of sex is a fundamental right of every citizen. The male and female have been clearly mentioned under the category of 'sex' in the data published by the Center Bureau of Statistics whereas the identity of third gender has not been accepted there. Only male and female are mentioned in all reports. The third gender has not been mentioned even under the 'others' category.

It is a simple belief is that a child generally is born normal at birth. However, sometimes abnormal children such as having more than five fingers in a hand or blind or Siamese twins or handicapped are also born. Similarly, on the basis of genitals, intersex children, other than the male and female, having both genitals may also born. Sometimes, a child born with genitals of one sex, due to the biological and natural process can develop sexual characteristics other than the one acquired at birth. It is not appropriate to think that they are not human beings or the citizens only because of such changes. It is an uncontroversial fact that only two sexes- male and female- are being recognized on the basis of sex in traditional society. The expressions such as human beings, sex or gender are fundamentally different. **The fundamental rights comprised under Part III of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the state.** For this reason, the fundamental rights stipulated in Part III **are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizen of this country as well.**

Except in Article 13 [4] which refers to equal remuneration, the terms 'citizen' or 'sex' are used instead of 'men' and 'women' everywhere in the Interim Constitution. But it can be possible to classify the natural person under various categories not only the above mentioned categories. For example child, aged, adult and old on the basis of age or tall and short on the basis of height or black and white on the basis of complexion. Similarly, a natural person can be classified as male or female or third gender on the basis of gender. Thus, **the people other than 'men' and 'women' including the people of 'third gender' cannot be discriminated on the ground of sexual orientation. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution.**

Taking note of Art 26 of the ICCPR, in the constitutions of several countries, the term 'sex' has been used instead of 'men' and 'women'. This is for the purpose of eliminating possible discrimination on the ground of sexual orientation. No citizen is allowed to be discriminated on the ground of sexual orientation. South Africa may be said to be the first country which has incorporated the provision of non-discrimination on the ground of sexual orientation in the 'Bill of Rights' of its Constitution. Under the provision of right to equality, the Sub Article {3} of Article 9 of the Constitution which was adopted on 8 May 1996, amended on 11 October 1996 and came into effect from 7 February 1997 reads as follows:

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

Thus, it is clearly mentioned in this Constitution that no person can be discriminated on the ground of sexual orientation.

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

The decision made by the Constitutional Court of South Africa can be considered an important document with regard to the right and interest of the people of the third gender.

Likewise, Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has called for the modification of all types of prejudiced and customary social practices that make people inferior or superior on sexual ground. The Article states that

*"... States parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority or either of the sexes or on stereotyped roles for men and women."*

As can be seen from the numerous initiatives mentioned above, the jurisprudential concept that the rights of sexual minorities need to be protected is getting stronger. The sensitivity and awareness regarding sexual feeling and natural behavior of a human being is also developing. The social principle that accepts natural tendencies in human behavior is slowly evolving. Here, it will be pertinent to quote a portion written by Paul Hunt in an UN Report on Rights and Health. It reads *"Esexual rights include the right of all persons to express their sexual orientation with due regard for the well being and rights of others, without fear of persecution, denial of liberty or social interference."*

Various opinions and views are expressed in regard to the rights of homosexuals and the people of third gender. Several countries especially the Muslim countries seem to stand against recognition of homosexuality as a right because of their religious and cultural beliefs and values. However, it seems to us that it is not just an issue of mere debate now. It has acquired wider concern and interest at the national and international level. The following was the view of Ms Luis Arbour, the UN High Commissioner for Human Rights in the International Conference of Homosexuals and Transsexuals in Montreal on 26 July 2006:

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

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

Even today various opinions are expressed against the abovementioned norms and values developed in regard to the recognition of the sexual orientation and gender identity, to the effect that sexual activities among the homosexual and transsexual are not natural; that they are not capable of reproduction and that it engenders social pollution. Stating it to be an unnatural relation, strong views are, thus, expressed against its legalization. However, such views are influenced by traditional approach of gender identity that recognizes only male and female. **The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural. When an individual identifies her/his gender identity according to the self-feelings, other individuals, society, the state or law are not the appropriate ones to decide as to what type of genital s/he should have, what kind of sexual partner s/he needs to choose and with whom s/he should have marital relationship. Rather, it is a matter falling entirely within the ambit of the right to self-determination of such an individual.**

In consideration of the backgrounds as mentioned hereinabove in various paragraphs, it seems to us that efforts have not been made to protect and promote the interest and rights of the homosexuals and the people of third gender under the Nepali laws. Although, there is no distinct law that declares the relation between homosexuals as crime (it is kept within the definition of unnatural coition), there is a claim that the state mechanism has implicitly contributed to the discrimination created due to negative attitude of the society towards these people which cannot be ignored. As the concept of trans-sexuality has not been legally accepted, one cannot also dismiss the claim that the transsexual and homosexual peoples are not living their lives easily by keeping their own identity. These people have been compelled to appear in the public life with the identity as determined according to their genitals instead of their own characteristics, and, it is very important to reconsider the prevalent values in the context of human rights and fundamental rights.

**We should also gradually internalize international practices in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. If we continue to ignore the rights of such people only on the ground that it**

**might cause social pollution, our commitment towards respecting human rights will be questioned internationally.** It cannot be said that only because of their behavior, activities and conduct guided by their self-feeling as well as their cross dress other than one imposed by the society according to their gender identity, will pollute the society. This is so, as an individual does not change his own natural identity merely to imitate other people. **The medical science has already proved that this is a natural behavior rather than a psychiatric problem. Now, therefore, it is not desirable to cling to the old belief by ignoring the conclusion drawn by science and medicine. Any provision that hurts the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights' point of view. The fundamental rights of an individual should not be restricted on any grounds such as religion, culture, customs, values and the like.**

**The legal provisions in our prevailing laws** such as the chapters 'Of bestiality', 'Of Marriage', 'Of Husband and Wife' of the Country Code [*Muluki Ain*], 2020 [1963 AD] **as well as provisions incorporated in other statutes and rules with regard to the citizenship, passport, voter list, security check etc and similar legal practices have not only refused to accept the identity of the people of third gender but also declined to acknowledge their existence. Similarly, it seems necessary to analyze the situation in which due to administrative thinking and social environment the people of third gender are not finding it conducive to lead the life springing from their behavior and character and dictated by their nature.** For example, an individual who is born with a male genitals may show feminine character when he becomes an adult and dress up like a woman. Yet he holds the identity card of a man as provided by the state and the society. Similarly person born with female genital may show masculine character but may carry with him/her the identity certificate of a woman as provided by the state or society. It is obvious that such persons face the problem of identity.

Coming to the fourth question i.e. whether or not an order prayed for by the petitioners should be issued, the writ petition seems to have been filed on behalf of the minority people on the basis of sexual orientation and gender identity. The major contentions of the petitioners can be classified as follows:

- Legal provisions should be made to provide for gender identity to the people of transgender or third gender, under which female third gender, male third gender and intersexual are grouped, as per the concerned person's self-feeling. Such people should not be discriminated on the basis of sex.
- The fundamental human right of the lesbians, gays, bisexuals and transgender people should be protected by the state and society according social recognition on the basis of their sexual orientation and by making appropriate legal provisions that ensures them the life with freedom as other heterosexual people.

In consideration of the first contention, the petitioners seem to argue that the people of third gender, for not being 'men' or 'women', are deprived of the identity papers including the citizenship certificate from the government offices that mentions their own sex; that they are deprived of the benefits from the educational institutions as well as other public offices as citizens; and that they are also being dishonored and disrespected by concerned public office bearers. Therefore, they claim that discriminatory laws which make 'male' or 'female' as the base should be repealed and their fundamental rights and human rights, which recognize their gender identity based on self-feeling, should be protected.

The people under the category of LGBTI, except those whose sex has been changed through sex change operation either from male to female or from female to male, grow up with the

natural process. Similarly, among the people other than LGBTI, some are born healthy, agile and have good height; some others are disabled and handicapped; yet some others are blind, dwarf and deaf-mute. They are considered either man or woman simply because of their genitals. These people who have been clearly identified as men and women do not face any difficulty in the enjoyment of fundamental rights. However, persons other than those clearly identified as men or women face difficulty in the realization of fundamental rights. It is not appropriate to have such discriminatory constitutional and legal provisions that restrict the people having third gender identity enjoying fundamental rights. The LGBTI people who, otherwise have normal characteristics, should not be deprived of the enjoyment of their fundamental rights only because of their sexuality or because of their indifference towards the people of opposite sex in contrast to other heterosexual persons, or because of their varied cross dresses. The state should make necessary arrangement for the people of third gender besides male or female. While the people with the identity of either a 'male' or a 'female' despite having abnormal physical conditions - either handicapped or dwarf or deaf-mute etc. - can enjoy such rights with their own identity, it would not be reasonable to say that the people, with different gender identity and sexual interest, who otherwise are normal, cannot enjoy their fundamental rights and human rights guaranteed by the constitution and other international instruments relating to the human rights. If any legal provisions exist that restrict the people of third gender from enjoying fundamental rights and other human rights provided by Part III of the Constitution and international conventions relating to the human rights which Nepal has already ratified and applied as national laws, with their own identity, such provisions shall be considered as arbitrary, unreasonable and discriminatory. Similarly, the action of the state that enforces such laws shall also be considered as arbitrary, unreasonable and discriminatory.

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

### **ICESCR - Article 10:**

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

### **ICCPR - Article 2:**

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

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

3. Each State Party to the present Covenant undertakes:

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

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

## Article 16

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

## Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

## Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

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

All fundamental rights provided in Part 3 of the Interim Constitution of Nepal, 2063 [2007 AD] from Article 12 to 32 have been guaranteed to every Nepali citizens and persons. Though the petitioners are in minority the enjoyment of these rights with their own identity is the fundamental rights of the petitioners as well. The Part IV of the Constitution provides for Directive Principles and Policies of the State. It is the right of the petitioner to benefit from these policies with their own identity. It cannot be construed that the legal rights and fundamental rights as well as human rights provided to the individuals by the Constitution and other human rights related international instruments to which Nepal is a party, may be enjoyed only by men and women merely because the term 'sex' - [meaning male and female] is mentioned in the Constitution. **As the people with third type of gender identity other than the male and female and different sexual**

**orientation are also Nepali citizens and natural person they should be allowed to enjoy the rights with their own identity as provided by the national laws, the Constitution and international human rights instruments. It is the responsibility of the state to create appropriate environment and make legal provisions accordingly for the enjoyment of such rights. It cannot be construed that only 'men' and 'women' can enjoy such right and other people cannot enjoy it only because they have a different gender identity and sexual orientation.**

Similarly, Article 12 of the Constitution has guaranteed the right to freedom. Article 12 (1) provides that every person shall have the right to live with dignity and Article 12 (2) provides that except as provided by law no person shall be deprived of his/her personal liberty. The said Article 12 should be considered as relating to the right to life. The terms 'men' and 'women' are not mentioned in this article. The freedom guaranteed in Article 12 is for every person. The word 'person' implies every natural person. Being the natural person LGBTI should be entitled to live in the society enjoying all the freedoms with dignity. The Article 12 (2) has guaranteed minimum freedoms to human beings. The freedoms guaranteed by this Article can be enjoyed with one's own identity irrespective of sex. The freedoms guaranteed in sub-clauses (a) to (f) of Article 12 (3) can only be restricted by laws. And such laws should not be arbitrary, discriminatory and unreasonable. Reasonable restriction on such freedoms can be imposed if an act undermines the sovereignty and integrity of Nepal, or jeopardizes harmonious relations subsisting among the peoples of various castes, tribes, religion or communities. There are two significant expressions - 'with dignity' mentioned in the article 12 (1) and 'except for the provision in law' mentioned in the article 12 (2). The interpretation of these two expressions should be made in such way that they do not frustrate but contribute to the furtherance of fundamental rights or human right of all people including women, men and LGBTI.

Similarly, Article 13 of the Constitution has guaranteed the right to equality. According to sub Article (1) all citizens are equal before the law and no person is denied equal protection of the laws. And pursuant to sub article (2), there can be no discrimination against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of them. Similarly, sub-article (3) reads that the State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. However, there is a proviso in this sub-article which provides that nothing shall be deemed to prevent the enactment of special provisions by law for the protection, empowerment or advancement women, Dalits, indigenous ethnic tribes, Madhesi or peasants, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated. The sub-article (4) provides that there shall be no discrimination with regard to remuneration and social security between men and women for the same work.

The said constitutional provisions relating to equality have guaranteed equality before the law, equal protection of law, non-discrimination on the application of law, non-discrimination by the state on any ground and non-discrimination on matters of social security as well.

In Article 12 (2) of our Constitution provides that except when provided by law no person shall be deprived of his/her personal liberty. By analyzing this provision it seems that such liberty can be restricted by making law in the public interest. The right provided by Article 12 is the right to life which is a crucially important right for the human beings. In brief, every citizen and every person shall obtain such rights on equal basis such as the right to have one's own identity. Such freedoms cannot be restricted by making discriminatory or arbitrary law. The existing property

laws, other personal identity including citizenship related laws, the law of marriage as well as some other laws seem male and female sex specific. Such laws do not seem to accept even the existence of the people other than the 'male' and 'female'.

It has now been accepted that the gender identity of an individual is determined not only by the physical sex but also by her/his behavior, character and perception. Generally, a person may physically be either a male or a female at birth but during the process of physical development s/he may, as per her/his identity, acquire either masculine or feminine character. However, all people may not be viewed with the same approach. Some people may acquire different traits and behavior contrary to their physical sex at birth. As is already observed, it happens naturally. However, there does not seem any provision in our existing law that allows these people to practice any profession as well as to maintain conjugal relationship with their changed sexual identity. The law which does not allow the people to enjoy their fundamental rights and freedoms retaining their own identity, may be considered as discriminatory. While making harmonious interpretation of the provisions of Articles 2, 16 and 17 of the ICCPR, it seems that the state has to recognize every individual with their own identity or every person has the right to have one's own identity. Article 10 of the ICESCR and the Article 23 of the ICCPR, to which Nepal has already ratified and applied as national laws have provided the right to marry only to the men and women. The Article 17 of the ICESCR provides the right to privacy of the family life to an individual as well as the right not to be subjected to unlawful attacks on her/his honour and reputation. As provided by section 9 of the Nepal Treaty Act, 2047 (1991 AD), the ICCPR and the ICESCR should also be considered as the national laws of Nepal, it seems to us that the LGBTI should be allowed to enjoy the rights guaranteed by the Nepalese law without discrimination and with their own identity like other individuals. Therefore, this directive order is hereby issued to the Government of Nepal to make necessary arrangements towards making appropriate law or amending existing law for ensuring the legal provisions which allow the people of different gender identity and sexual orientation in enjoying their rights as other people without any discrimination following the completion of necessary study in this regard.

Likewise, according to the provisions of the Fundamental Rights given in Part III and Directive Principles and Policies of the State given in Part IV of our Constitution, the state seems to have the responsibility to make special legal provisions for the upliftment of the oppressed and disadvantaged people such as women, children, the aged, incapacitated, indigenous, dalits etc. We all should take note that the terms 'men' and 'women' are mentioned here instead of the term 'sex', whereas in the Constitution instead of the terms 'men' and 'women', the term 'sex' is mentioned which may be construed to include the people of third gender as well besides 'men' and 'women'. As the term 'sex' refers not only to men and women but also the people of third gender, **this judicial comment is hereby made as it looks necessary to keep a clear provision in the new Constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa.**

Another claim of the petitioners pertains to the protection of the fundamental right of the lesbians, gays and bisexual people by the state though appropriate legal provisions which, by granting them legal and social recognition from the state and society on the basis of their sexual orientation, ensures a life of freedom as other heterosexual people have. In reality, this claim is specific in regard to the issue of same sex marriage or co-habitation of such couple. Looking at the issue of same sex marriage, **we hold that it is an inherent right of an adult to have marital**

**relation with another adult with her/his free consent and according to her/his will. The same sex marriage should be viewed from the view point of interest and rights of the concerned people as well as that of the society, family and all others.** It seems appropriate to reach a conclusion after studying the legal provisions and practices of other countries regarding gay and lesbian marriage. It has already been recognized in some countries whereas in some others it yet to be recognized. Therefore, it is essential to carry out a thorough study and analysis of international instruments relating to the human rights, the values recently developed in the world in this regard, the experience of the countries where same sex marriage has been recognized, and its impact on the society as well. **The Government of Nepal has hereby been directed to form a committee as mentioned below in order to undertake the study on over all issues in this regard.**

Formation of the Committee

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

The committee is directed to undertake the study on the issues of same sex marriage and marital status of overall LGBTI persons as well as the legal provisions of other countries amongst the issues raised by the petitioners and **the Government of Nepal is directed to make the legal provisions after considering recommendation made by the said committee.** It does not seem appropriate to set the terms of reference for the committee by this court because it may be appropriate to provide this task to the government due to the gravity and seriousness of the subject matter. The directive order is also hereby issued to the respondent Government of Nepal to submit a copy of the report to this court that is submitted by the said committee.

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

I concur with the aforesaid verdict.

.....  
[Justice Balram K.C.]

.....  
[Justice Pawan Kumar Ojha]

Bench Officers:  
Shyam Kumar Bhattarai  
Yadav Raj Pokharel

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