

Supreme Court, Division Bench
Honorable Justice Tanka Bahadur Moktan
Honorable Justice Hari Prasad Phyal

Order

079-WO-0198

Sub: Certiorari, Mandamus

Petitioner: Adhip Pokharel, son of Bhojraj Pokharel, resident of Kathmandu District, Kathmandu Metropolitan City Ward No. 11

Vs.

Respondent: Ministry of Home, Department of Immigration, Kalikasthan, Dilli Bazaar and others

- In the contemporary context where numerous terms relating to gender identity have evolved and individuals are openly identifying and asserting their identities, the term “third gender” is incapable of representing all such identities. The use of this term therefore carries the risk of narrowing and constricting the identities of persons belonging to the broader gender and sexual minority communities. Even the terminology “LGBTIQA+” is considered insufficient to encompass the entire non-binary spectrum, and there is a growing consensus that the more inclusive terminology “SOGIESC” should be employed. In such circumstances, the use of the term “third gender” to address the entire non-binary group runs contrary to the very principle of inclusivity.

(Para No. 17)

- Since the proviso clause of Article 18 (3) of the Constitution of Nepal and the terminology “gender and sexual minorities” used in Article 42 (1) are capable of encompassing all persons of gender identities and sexual orientations other than “women” and “men,” it appears appropriate to employ the constitutionally recognized term “gender and sexual minorities” instead of the term “third gender.”

(Para No. 18)

- Binary terms such as “son” and “daughter” inherently embody a hierarchy. Although such terms ordinarily carry emotional connotations in common usage, their legal use may marginalize individuals who do not fall within those linguistic categories, and may enable those situated within such power relations to suppress or control other individuals who are different. In this context, laws employing such terminology become open to question and are to be regarded as amenable to reform.

(Para No. 25)

- The failure to adopt gender-neutral and inclusive language in ordinary legal usage may impede the unhindered exercise of the right to identity of gender and sexual minority communities, and may further render ineffective the exercise of rights conferred by subject-specific legislation. Where the objective of a law is not to exclude any group from the enjoyment of rights, that objective must also be reflected in the language employed in the statute. In determining the legislative intent of a law, the court is required, in the first instance, to apply the literal rule of interpretation, namely to

ascertain the ordinary meaning of the words used in the statute; accordingly, the language of the law must clearly indicate whether or not a particular group is included within its scope.

(Para No. 28)

- Where same-sex spouses of diplomats and various foreign officials are able to obtain visas without obstruction and reside in Nepal on an equal footing with their spouses, the contention that the foreign same-sex spouse of a Nepali citizen cannot obtain a non-tourist spouse visa appears to deny the facilities provided under the Immigration Act, the Rules, and other relevant laws, and reflects a prejudicial and discriminatory act based on the petitioner's sexual orientation and gender identity.

(Para No. 31)

- For the purpose of obtaining a marital visa, a marriage certificate or other official documentary proof evidencing the marriage, together with the citizenship certificate of the Nepali national spouse, are treated as the principal documents on the basis of which a non-tourist visa is issued. For the grant of such a visa, both spouses are required to be present before the Department for identification. Accordingly, where the citizenship certificate of the Nepali spouse, valid documentary proof of marriage, and the identification of both spouses are duly produced, the Department cannot lawfully refuse to grant a non-tourist visa pursuant to Section 8 (1) (h) of the Immigration Regulation, 2051, and the Immigration Act, 2049.

(Para No. 31)

On Behalf of the Petitioner: Advocate Mr. Roop Narayan Shrestha

On Behalf of the Respondent: Joint Government Attorney Mr. Sanjeev Raj Regmi

Precedents Cited:

- Nepal Law Reporter 2065, Unit 4, Decision No. 7958
- Nepal Law Reporter 2070, Unit 1, Decision No. 8945
- Nepal Law Reporter 2070, Unit 8, Decision No. 9048
- Nepal Law Reporter 2074, Unit 9, Decision No. 9875
- Nepal Law Reporter 2068, Unit 1, Decision No. 8536
- Nepal Law Reporter 2074, Decision No. 9921
- Nepal Law Reporter 2065, Unit 4, Decision No. 7958
- Nepal Law Reporter 2074, Unit 12, Decision No. 9921

Relevant Laws:

- Immigration Act, 2049
- Immigration Regulation, 2051
- National Identity and Civil Registration Act, 2076
- Constitution of Nepal
- Interim Constitution of Nepal, 2063
- National Civil Code, 2074
- National Penal Code, 2974
- Nepal Legal Interpretation Act, 2010
- Civil Service Act, 2049
- Working Journalist Act, 2051
- Human Organ Body Transplant (Regulation and Prohibition) Act, 2055

- Child Labor (Prohibition and Regulation) Act, 2056
- Income Tax Act, 2058
- Nepal Citizenship Act, 2063
- Electronic Transaction Act, 2063
- Company Act, 2063
- Federal Parliament Secretariat Act, 2064
- Banking Offence and Punishment Determination Act, 2064
- Non-resident Nepali Act, 2064
- Domestic Violent (Offence and Punishment) Act, 2066
- Children Act, 2075
- Bank and Financial Institution Act, 2073
- Cooperative Act, 2074
- Safe Motherhood and Reproductive Health Right Act, 2075
- Prison Act, 2070
- Insurance Act, 2079

Order

Honorable Justice Hari Prasad Phyuul: The summary of the facts and the order of the writ petition submitted before the jurisdiction of this court pursuant to Article 133 (2) of the Constitution of Nepal are as follows:

Fact Section

Joint writ petition submitted by petitioner duo Adhip Pokharel and Tobias Volz is as follows:

I, Adhip Pokharel, one of the petitioners, am a Nepali citizen. I am entitled to fully enjoy the rights conferred by the Constitution and laws of Nepal. I have been working abroad and have now returned to reside in Nepal. I am a homosexual male and, on the basis of my gender and sexual orientation, I belong to the gender and sexual minority community. I met Tobias Volz, another petitioner, here in Nepal. He is also a homosexual male, and after developing a close relationship we got married. Similarly, I, Tobias Volz, one of the petitioners, am a German citizen holding German passport No. C4JCLNF5L issued by the Government of Germany. I have been residing in Nepal for several years in connection with my work, having served at international organizations including the United Nations Office in Nepal, the German International Organization (GTZ), and UNAIDS. It was during this period I met Adhip Pokharel, another petitioner. As we are both homosexual and developed mutual affection, we were married under German law on 2075/07/02 (corresponding to 19 October, 2018). Our marriage was registered at the Marriage Registration Office in Malsch, Kreis Karlsruhe, Germany, under registration No. E37/2018, and we have obtained the marriage certificate. After the marriage, the married partner (spouse), Tobias Volz, one of the petitioners, approached the Department of Immigration and, in accordance with Nepalese immigration law, applied for a non-tourist visa for the first time on 2079/04/03 (corresponding to 19 July, 2022); they did not take any legal action. Subsequently, I, Adhip Pokharel, requested a marriage registration certificate in Nepal and went to the Ward Office of the local level where I reside, namely Ward Kathmandu District Kathmandu Metropolitan City Ward No. 11 to register the marriage accordingly. However, we were informed that since there was no provision for the registration of same-sex marriages, and our marriage could not be registered. Thereafter, having learned that a directive had already been issued by the Honorable Supreme Court to the respondent Department of Immigration regarding the non-tourist visa, we submitted our application for the

visa on 2079/05/03 (corresponding to 19 August, 2022), attaching the said order—including the copy of the order dated 2074/07/06 (corresponding to 23 October, 2017) (Writ petition of certiorari including mandamus filed by Suman Pant v. Ministry of Home Affairs, Department of Immigration). Despite this, I, Tobias Volz, was once again denied the issuance of the visa under the same category, and only verbal information regarding the refusal was provided.

The Constitution of Nepal recognizes the rights of homosexual and gender and sexual minority persons, ensuring that neither citizens nor individuals are subjected to discrimination and that equal protection under the law is provided. Pursuant to Section 7 of the Immigration Act, 2049 (1992), the Director General of the Department of Immigration is empowered to issue visas as prescribed by law and to extend the validity of such visas. Further, Rule 8 of the Immigration Regulation, 2051, provides that a foreign national who has established a marital relationship with a Nepali citizen and presents a certificate of marriage registration is legally entitled to be issued a non-tourist visa. Accordingly, where a foreign national has established a marital relationship with a Nepali citizen and presents a marriage registration certificate, the Director General of the Department of Immigration pursuant to Rule 8 bears the obligation to issue a non-tourist visa. Similarly, under private international law, various treaties exist governing matters of marriage and family relations, and Nepal has incorporated the provisions of these treaties into its domestic law. Sections 692 to 721 of the Civil Code contain provisions relating to private international law, covering issues such as marriage, divorce, property, inheritance, contractual agreements, and the enforcement of judicial decisions. As elaborated in the preceding paragraphs, in light of the Constitution of Nepal, the various internationally ratified human rights instruments endorsed by Nepal, and the directives and orders issued by the Honorable Supreme Court, in addition to the precedents established in the matter of petitioner Suman Pant vs. the respondent Department of Immigration through the order of certiorari including mandamus, any refusal by the respondents to grant a non-tourist visa to Tobias Volz is contrary to these established principles and infringes upon the rights of the petitioners. Accordingly, it is requested that any decisions, correspondence, or related actions of the respondents that may have been taken in this regard be set aside through the order of certiorari and that an order of mandamus or any other appropriate order be issued against the respondents directing the immediate issuance of a non-tourist visa to petitioner Tobias Volz.

An order had been set aside by the court on 2079/5/19/1 (corresponding to 3 September, 2022) which reads as follows: what has transpired in this matter? Why should the order as sought by the petitioner not be issued? Provided, there are any reasons and grounds for not issuing the order, the respondents are hereby directed to submit their rejoinder through the Office of the Attorney General within 15 days excluding the period of travel. It is hereby directed to provide a copy of the writ petition and this order and execute a summon informing the Office of the Attorney General and to submit the case file upon receipt of the rejoinder or upon the expiry of the limitation period. Where the petitioner has also sought for an interim order, the court deems it appropriate to decide on the interim order upon discussing with both the parties and the court hereby orders the parties to be present on 2079/5/26 (corresponding to 11 September, 2022) for discussion.

According to the records of the Department of Immigration, visa applications have been online for several years. As per these records, the petitioner held a tourist visa until 29th September 2022, and the Nepalese portal shows no record of any other visa application submitted by the petitioner. Under the legal provisions of Section 7(c) of the Immigration Act, 2049 (1992), Rule 8(1)(g)(j) of the Immigration Rules, 2051 (1994), Clause 4.4(5)(a) of Chapter 4 of the Immigration Procedures, 2065 (2008), Sections 67 and 76 of the Muluki Civil Code, 2074

(2017), Section 18 of the National Identity Card and Civil Registration Act, 2076 (2019), and Rule 16 of the National Identity Card and Civil Registration Rules, 2077 (2020), any person submitting the requisite documents through the Department's online portal shall have their submitted documents examined and the necessary decision rendered in accordance with these legal provisions.

Order

Having listed in the cause-list, the present writ petition was submitted before the Bench and the documents attached with the case file were examined. On behalf of the petitioners, learned advocate Mr. Rupnarayan Shrestha argued that both petitioners, Tobias Volz and Adhip Pokharel, are homosexual and were married under German law on 19th October 2018. Their marriage was registered at the Marriage Registration Office in Germany under registration No. E37/2018, and they have obtained the corresponding marriage certificate. Under the Nepalese immigration law, a foreign national who has established a marital relationship with a Nepali citizen and presents a certificate of marriage registration is legally entitled to be issued a non-tourist visa. In the writ petition Suman Pant vs. Department of Immigration, Dillibazar, this Honorable Court, after providing a detailed exposition on the rights of gender and sexual minorities, issued an order directing the issuance of a non-tourist visa to the petitioner's married partner (spouse). Where the petitioners have submitted the marriage certificate and other documents prescribed by law, refusal to grant a non-tourist visa on the grounds of their sexual orientation and gender identity cannot deprive them of the rights conferred under prevailing laws to reside together as a married couple. Accordingly, in view of the Constitution of Nepal, the applicable laws, various international treaties ratified by Nepal, and the principles articulated by this Court in the writ petition Suman Pant v. Department of Immigration, the learned advocate prayed that an appropriate order or directive be issued directing the issuance of a non-tourist visa to petitioner Tobias Volz.

On behalf of the respondent Department of Immigration, learned Joint-Government Attorney Mr. Sanjeev Raj Regmi submitted that Tobias Volz is a German national and, according to the records of the Department of Immigration, held a tourist visa until 29th September 2022, and has not submitted any other visa application, as reflected in the rejoinder submitted by the Department. Under the Immigration Act, 2049 and the Immigration Rules, 2051, a foreign national who has established a marital relationship with a Nepali citizen and presents a marriage registration certificate is legally entitled to be issued a non-tourist visa. Point No. 4.4 (5) (a) under Chapter 4 of the Immigration Procedures, 2065, specifies the requisite documents to be submitted for obtaining a non-tourist visa on the basis of marriage. Where the petitioners submit the application along with the necessary documents as prescribed by law, and their marriage does not contravene the prevailing laws of Nepal, the competent authority shall decide at the time of application whether the requested visa can be granted and therefore, the writ petition should be dismissed.

The principal contention of the writ petition is that from among the petitioners, Nepali citizen Adhip Pokharel and German citizen Tobias Volz were married under German law on 2018/10/19.

(corresponding to 19 October, 2018), and their marriage was registered at the Marriage Registration Office in Malsch, Kreis Karlsruhe, Germany, under registration No. E37/2018, with a marriage certificate duly issued. The German citizen petitioner, Tobias Volz, applied for a non-tourist visa at the Department of Immigration on 2079/4/3 (corresponding to 19 July, 2022), but they did not agree to initiate any action on the application. Subsequently, when the Department requested a marriage registration certificate issued in Nepal, the petitioners accordingly approached the Ward Office located at Kathmandu District Kathmandu Metropolitan City Ward No. 11 to register the marriage; however, they were informed that since there was no provision for the registration of same-sex marriages in Nepal, the marriage could not be registered. The petitioner stated that having submitted a copy of the order dated 2074/07/06 (23 October, 2017) regarding the writ petition of Suman Pant v. Ministry of Home Affairs, Department of Immigration, which directed the issuance of a non-tourist visa based on a same-sex marriage, the petitioner again applied for a visa on 2079/5/3 (corresponding 19 August, 2022), but the issuance of the visa was denied and only verbal information regarding the refusal was provided. In this manner, the petitioners' rights under Articles 16, 17, and 18 of the Constitution of Nepal, the provisions relating to private international law under Part 6 of the National Civil Code, 2074, Section 7 of the Immigration Act, 2049, Rule 8 (1) (h) of the Immigration Rules, 2051, and the requirement under Point No. 11 of Schedule – 2 a of the Immigration Regulation, 2051, to mention one's spouse, are being infringed. Therefore, the petitioners requests that an order of mandamus or any other appropriate order be issued against the respondents to address this matter.

In the rejoinder submitted on behalf of the respondents, it is stated that although the petitioner Tobias Volz reportedly applied for a non-tourist visa, no such application is reflected in the Nepalese portal software. According to the Immigration Procedures, 2065, a copy of the marriage registration certificate or, in the case of a marriage conducted abroad, an official letter from the relevant embassy certifying the marriage must be submitted along with the documents required for obtaining a non-tourist visa. In this regard, Sections 67 and 76 (1) or (2) of the National Civil Code, 2074, provide for the registration of marriages, and Section 18 (2) of the National Identity Card and Civil Registration Act, 2076, provides for notifying the marriage. Therefore, where the applicant submits the necessary documents in accordance with these legal provisions through the Department's online portal, the submitted documents will be examined and the appropriate decision shall be rendered and therefore, the respondent requests the writ petition to be dismissed.

Upon reviewing the above factual background, the arguments of both the parties, and the documents submitted with the case file, the Bench deems it necessary to address the following questions:

- (a) What provisions does the Constitution of Nepal make regarding the rights of the gender and sexual minority community and matters relating to marriage?
- (b) What has been this court's approach so far regarding the rights of the gender and sexual minority community and matters relating to marriage? In particular, what has been the court's position regarding the issuance of a non-tourist visa to the foreign partner (spouse) of a Nepali same-sex individual?
- (c) What provisions exist under federal law regarding the rights of the gender and sexual minority community and matters relating to marriage?

(d) Whether an order as requested by the petitioner should be issued?

2. **First Question** – Considering the provisions of the Constitution of Nepal regarding the rights of the gender and sexual minority community and matters of marriage, it is noted that during the drafting of Nepal’s Constitution, the gender and sexual minority community faced discrimination in law, administration, and society based on sexual orientation and gender identity. To eliminate such discrimination and ensure equal enjoyment of human rights, this court, in the writ petition filed by Sunil Babu Pant, has observed that the term “gender” *includes not only women and men but also the third gender. Accordingly, while drafting the Constitution of Nepal by the Constituent Assembly, and while conferring rights under the Constitution, there should be a clear provision, akin to the Bill of Rights in the Constitution of South Africa, prohibiting discrimination on the basis of gender identity and sexual orientation in addition to male and female¹*. Against this judicial backdrop, during the drafting of the Constitution, the Constituent Assembly’s committee tasked with studying fundamental rights and the directive principles prepared a concept paper on citizenship. In this paper, it was recommended that citizenship certificates be issued to every Nepali citizen aged 16 years or above without any discrimination on the basis of gender, and that the certificates explicitly recognize the third gender alongside male and female². In line with this recommendation, Article 12 of the Constitution of Nepal provides for the acquisition of Nepali citizenship, inclusive of gender identity. Similarly, the proviso clause in Sub-Article (3) provides that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment, or development of “gender and sexual minorities,” thereby affording additional safeguards to members of this community. Sub-Article (4) stipulates that there shall be no discrimination on the ground of gender³ with regard to remuneration and social security for the same work, and Sub-Article (5) provides that all offspring⁴ shall have the equal rights to ancestral property without discrimination on the ground of gender. These provisions demonstrate that the Constitution of Nepal does not permit any discrimination on the basis of gender in the enjoyment or exercise of rights by citizens belonging to the gender and sexual minority community. Regarding the fundamental principles and recognition of gender equality guaranteed under Article 18 of the Constitution of Nepal, it is observed that “the subject of gender equality must extend not only between women and men but also to gender and sexual minorities⁵... this aims toward achieving substantive equality rather than mere formal equality⁶... Gender inclusivity entails the inclusion of gender and sexual minorities as well, ensuring equal treatment in the enjoyment, distribution, and exercise of rights⁷... Groups such as intersex and other gender-diverse persons are included, where, in general terms, biological sex is categorized as male, female, or intersex at birth, while social gender reflects an individual’s internal perception as female,

¹ Sunil Babu Pant and others vs. Nepal Government et.al., Nepal Law Reporter 2065, Unit 4, Decision No. 7958, pg. 524

² Report of the Constituent Assembly, Committee on Fundamental Rights and Directive Principles, Thematic Concept Paper and Preliminary Draft, 2066, p. 145.

³ The phrase “on the basis of gender” in Article 18 (4) of the Constitution of Nepal has replaced the words “women and men” used in Article 13 (4) of the Interim Constitution of Nepal, 2063.

⁴ The phrase “all children” in Article 18 (5) of the Constitution of Nepal has replaced the words “son or daughter” used in Article 20 (4) of the Interim Constitution of Nepal, 2063.

⁵ Report of the Constituent Assembly, Committee on Fundamental Rights and Directive Principles, Thematic Concept Paper and Preliminary Draft, 2066, p. 184

⁶ Ibid pg. 184

⁷ Ibid pg. 332

male, or third gender. The concept paper prepared by the Constituent Assembly's Committee on Fundamental Rights and Directive Principles states that "sexual orientation refers to the direction of an individual's sexual or emotional attraction, which may be toward persons of the opposite sex, the same sex, or all sexes⁸." This indicates that the rights guaranteed under Article 18 are intended by the framers of the Constitution to be enjoyed and exercised equally and with dignity by citizens of the gender and sexual minority community, inclusive of their identity. "The report of the Committee on Fundamental Rights and Directive Principles recommended that the Constitution should constitutionally guarantee the human rights of the gender and sexual minority community, provide for appropriate redress in case of violations of their human rights, and employ gender-neutral language. Furthermore, where the terms "women" and "men" are used, the report suggested that the term "third gender"⁹ should also be included".

3. The Preamble of the Constitution states that it is committed to "...eliminating all forms of discrimination based on class, caste, region, language, religion, gender and all forms of class based untouchability and ensuring economic equality, prosperity, and social justice, with the objective of building an egalitarian society based on the principles of proportionality, inclusiveness, and participation¹⁰." This indicates that the constitutional vision of an egalitarian society is predicated on the prior elimination of all forms of discrimination present in society.
4. In Nepali society, the use of derogatory terms such as "*Chakka*," "*Hijra*," "*Napunsak*," "*Meti*," "*Gandi*," "*Maugi*," "*Kothi*," "*Maugmehar*," "*Maugiyaaha*," and "*Maibabu*" to demean members of the gender and sexual minority community is still prevalent. Given that the Preamble of the Constitution of Nepal emphasizes the elimination of gender-based discrimination and the construction of an egalitarian society, it is evident that, within the framework of the concept proposed by the Committee on Fundamental Rights and Directive Principles, the framers of the Constitution envisioned various provisions to address such issues in the Constitution. Therefore, the terminology "gender identity and sexual orientation" entered Nepali legal language and literature only after the Sunil Babu Pant case, in which this Court observed that no discrimination should be made on the basis of gender identity and sexual orientation. While the Constitution of Nepal, under the provisions relating to the right to equality and social justice, includes the term "gender and sexual minorities" to ensure the protection, empowerment, development, and social strengthening of this community, it is to be understood that, in a broader sense, this term encompasses the entire LGBTIQ+¹¹ and SOGIESC¹² spectrum, providing expansive meaning and coverage.
5. In the preliminary draft on fundamental rights presented by the Committee on Fundamental Rights and Directive Principles, provisions regarding family-related rights were proposed. Under these provisions, every individual would have the freedom to marry and to seek divorce under the law; no one could be forced into marriage without full and free consent or against their will. Spouses would have equal rights in property and family matters; both

⁸ *Supra* note 5 at p. 359.

⁹ Report of the Constituent Assembly, Committee on Fundamental Rights and Directive Principles, Thematic Concept Paper and Preliminary Draft, 2066, p. 184.

¹⁰ Preamble of the Constitution of Nepal

¹¹ The term LGBTIQ+ denotes lesbian, gay, bisexual, transgender, intersex, queer and asexual and "+" term denotes other gender and sexual minority communities not represented in the LGBTIQUA

¹² SOGIESC, which stands for Sexual Orientation, Gender Identity, Gender Expression, and Sex Characteristics, refers to individuals whose sexual orientation, gender identity, gender expression, or sex characteristics fall outside traditional or normative categories.

parents would have equal rights and responsibilities for the upbringing, care, and holistic development of their children; and every child would have rights and duties to respect and be cared for by their guardians. Furthermore, the practice of having more than one husband or wife, or entering into a marriage without full and free consent or against the individual's will, would be punishable under the law¹³. In the draft, it is noteworthy that marriage is not restricted to a relationship between a man and a woman; instead, gender-neutral terms such as “individual” and “citizen” are used. By recognizing marriage as a relationship between persons, the draft ensures that the marriage and family-related rights of gender and sexual minorities are also protected.

6. Although the proposed family-related rights did not appear in their original form when the Constitution of Nepal was promulgated, Article 38 (6), under the provisions on Rights of Women, ensures that the spouse shall have equal rights¹⁴ to property and family affairs, thereby safeguarding family-related rights. Furthermore, under Article 18, the principle of non-discrimination through the right to equality includes the recognition of the identity of gender and sexual minorities, prohibiting discrimination on the basis of gender and sexual orientation. Consequently, the provision in Article 38 (6) guaranteeing equal rights in property and family matters is to be interpreted as extending to the gender and sexual minority community, thereby establishing a constitutional basis for their marriage and family-related rights. While Sub-Articles (1), (2), (3), (4) and (5) of Article 38 explicitly specify rights exercisable by women, Sub-Article (6) uses the gender-neutral term “spouses.” This terminology can be understood to encompass same-sex spouses as well.
7. Article 16 of the Constitution guarantees the right to live with dignity, Article 17 the right to freedom and Article 18 the right to equality. In this context, this court has, from time to time, interpreted these provisions to establish that members of the gender and sexual minority community are entitled to recognition of their identity, a sense of belonging, a dignified life, and family life. Applying a harmonious interpretation consistent with these interpretations, the gender-neutral term “spouses” in Article 38 (6) is understood to include same-sex spouses, thereby entitling them to the property and family-related rights arising from marriage. Similarly, Article 50 (1) of the Constitution of Nepal envisions, as a directive principle, *to establish a public welfare system of governance, by establishing a just system in all aspects of the national life through the rule of law, values and norms of fundamental rights and human rights, gender equality, proportional inclusion, participation and social justice*. In line with this, Article 51 (c) (5) provides that it is the policy of the state to *end all forms of discrimination, inequality, exploitation and injustice in the name of religion, custom, usage, practice and tradition existing in the society*. Viewed in this light, and recognizing that marriage and family have traditionally been perceived as existing only between individuals of different sexes, a narrative long held in society, the Constitution, during its framing and promulgation, has adopted an inclusive perspective, extending protection to those previously excluded or unrecognized by societal norms. Accordingly, a harmonious interpretation of the fundamental rights under Part 3 of the Constitution requires that the enjoyment and exercise of rights related to marriage and family also be accessible to persons of the gender and sexual minority community, placing this obligation squarely within the duties of the State.

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

¹⁴ These terms were used in place of the words “husband and wife” or “*Shreeman Shreemati*” that appeared in laws prior to the promulgation of the Constitution of Nepal. For example, in the Muluki Ain, 2020, the term “*lognay swasni*” was used to refer to husband and wife.

8. Against the backdrop of the judicial observation in the *Sunil Babu Pant* case, which emphasized that the Constituent Assembly must advance the Constitution-drafting process without discriminating against the gender and sexual minority community, the Committee on Fundamental Rights and Directive Principles prepared a concept paper recommending that, when the terms “women” and “men” are used in the Constitution, “third gender” should also be included. In the preliminary draft of the Constitution, under “family-related rights,” it was proposed that every individual, regardless of gender, shall have the freedom to marry. With the inclusion of this provision in Article 38 (6), which guarantees equal rights of spouses in property and family matters, it is evident that, during the drafting of the Constitution, Article 38 (6) was designed to uphold and protect the rights and interests of persons belonging to the gender and sexual minority community. Article 38 (6) of the Constitution of Nepal challenges the binary (male–female) assumptions embedded in traditional Nepali social values, such as the concepts of husband/wife or mother/father, by deconstructing these norms. It recognizes existences that differ from such hierarchically structured personal and familial power relations, which have historically marginalized and exploited certain groups. In doing so, it abandons historical, social, and legal practices that isolate or exclude other identities, and instead embraces a broad, inclusive, and pluralistic understanding of family and marital relationships. Therefore, it must be recognized that, during the very process of drafting the Constitution, the identity of the gender and sexual minority community was consciously acknowledged, emphasizing the nondiscriminatory enjoyment, exercise, and implementation of their human rights. Within this framework, same-sex marriage is a matter envisioned under the Constitution, consistent with the decisions of this court, the reports of committees formed in accordance with court directives, and the human rights treaties ratified by Nepal.
9. Regarding the second question as to what has been this court’s approach so far regarding the rights of the gender and sexual minority community and matters relating to marriage? In particular, what has been the court’s position regarding the issuance of a non-tourist visa to the foreign partner (spouse) of a Nepali same-sex individual? Based on the writ petitions that have come before this court over time, it is evident that this court has articulated judicial precedents affirming the identity of the gender and sexual minority community, their right to live with dignity, and the protection of their marriage and related rights. In the *Sunil Babu Pant* case, the court observed that the existing society, laws, and state had denied the existence and identity of the gender and sexual minority community, socially and domestically marginalized them, and that prevailing laws failed to provide adequate protection. Consequently, members of this community were unable to enjoy the fundamental rights guaranteed under the Constitution or rights conferred by international human rights instruments. The court held that the State must immediately provide legal measures to protect and ensure these rights, grant citizenship according to gender identity, repeal other discriminatory laws, and enact laws on the basis of equality. The court further interpreted that the State must recognize the existence of third-gender individuals beyond male and female, ensure they are not deprived of constitutional fundamental rights, and protect the right to sexual privacy. Any legal framework that prevents gender and sexual minority individuals from exercising their constitutional and internationally guaranteed human rights according to their own identity is arbitrary, baseless, and discriminatory. In that judgment, the court noted that the term “gender” includes the third gender in addition to women and men. Accordingly, during the Constitution-drafting process, the Constitution of Nepal must ensure that no discrimination occurs on the basis of gender identity or sexual orientation, in addition to male and female. The court further observed that, since the Constitution uses the term “gender” rather than specifically “male” or “female,” persons with diverse gender identities and sexual orientations must be able to enjoy their rights equally and without

discrimination. Consequently, the court issued a directive order to the Government of Nepal to enact appropriate laws or amend existing laws to ensure such rights are protected and accessible.

10. Similarly, the Supreme Court observed that since any adult individual has a natural right to enter into a marital relationship with another adult of their choice, same-sex marriage must be considered from the perspective of the rights of the individuals involved as well as social and family considerations¹⁵. The Court further noted the need to study and analyze international practices and legal frameworks regarding same-sex marriage, and accordingly directed the formation of a committee to conduct such a study. Pursuant to this order, the committee constituted by the Government of Nepal submitted a study report on same-sex marriage in 2071, recommending that the Government of Nepal undertake legal reforms to recognize same-sex marriage. The report suggested *“either providing legal provisions for same-sex relationships within the National Criminal Code or National Civil Code, or extending the concept of marriage, traditionally between a woman and a man, to recognize marriage as a relationship between persons’ regardless of gender, thereby granting equal recognition to same-sex unions”*¹⁶. The following recommendations were submitted by the Committee¹⁷:

- It is appropriate for the Government of Nepal to repeal the legal provisions that recognize marriage only between a woman and a man, and instead adopt the principle that marriage can occur between any two individuals, granting legal recognition based on the principle of equality
- Once the principle that marriage is a voluntary relationship between individuals is recognized, legal provisions affecting that principle must be amended. This includes: replacing the term “sons and daughters” with “children” in matters of property and cultural rights, granting rights to the respective couple instead of solely to a husband or wife, and treating crimes such as rape and sexual violence as offenses committed by an individual against another individual rather than specifically by a man against a woman. In this context, the Criminal and Civil Codes and their procedures must be amended, along with related laws concerning marriage registration, property, and other associated matters
 - Measures should be adopted to empower the sexual and gender minority community by facilitating their participation in education, economic activities, and professional work. Legal and social policies should be implemented to recognize and embrace societal diversity, integrating these communities into the mainstream. Steps should also be taken to protect their sexual and family life, raise public awareness, and engage them at political and administrative levels.
- Given the long-standing existence of various couples in same-sex relationships, such couples should be granted legal recognition. Following such legal recognition, it is also necessary to provide for legal provisions allowing these couples to adopt children after a specified period.

¹⁵ Sunil Babu Pant (Decision No. 7954) Paragraph 6

¹⁶ Pursuant to the Supreme Court’s directive, the Committee constituted by the Government of Nepal submitted a study report on same-sex marriage, page 55 (2014/2071).

¹⁷ Ibid pg. 56

11. In the aforementioned *Sunil Babu Pant* case, this court legally affirmed the right of sexual and gender minority individuals to enjoy their constitutional, fundamental, and human rights without discrimination, respecting their identity and enabling them to live with dignity. The judgment also directed the immediate repeal of existing discriminatory legal provisions against sexual and gender minorities and mandated that no future laws be drafted in a discriminatory manner. The judgment also conferred legal recognition to same-sex relationships. Although the Study Committee's report recommended granting legal recognition to same-sex marriage and amending the relevant laws accordingly, the government has yet to initiate the necessary legislative process for such amendments¹⁸. The *Sunil Babu Pant* case, along with the Study Committee report on same-sex marriage formed by the Government of Nepal and the Constitution of Nepal, has deconstructed traditional societal and familial norms, recognizing experiences and identities that society and law had previously failed to acknowledge. While these pronouncements establish legal recognition, principles, and provisions that bring such lived experiences within the ambit of law and society, their full implementation and the protection of the complete freedom of such individuals remains a duty of the State
13. Reviewing the judgments of this court, in the case of *Prem Kumari Nepali vs. the National Women Commission*¹⁹, the court addressed issues concerning same-sex relationships. In that case, the petitioner, a lesbian woman Rajani Shahi, had previously been married to a man before she could express her natural sexual orientation and desires. When she sought divorce to express her same-sex orientation, her husband allegedly restricted her freedom. The court held that an individual's sexual orientation, even if different from their biological sex, cannot be prohibited, and that all persons whether female, male, third gender, or same-sex are entitled to enjoy their constitutional rights equally under the Constitution and prevailing laws.
13. Furthermore, in the same case, regarding the legality of same-sex relationships, the court observed that if any woman or man wishes to live with or spend their life with another person of the same sex, the law cannot legally prevent such a relationship. The court noted that it is not sufficient merely that the State does not intervene; rather, such relationships should be formally recognized and addressed comprehensively²⁰ within the framework of law and policy. It is further observed that whether or not a marriage is solemnized, individuals have the right to live either separately or together with a person of the same sex as partners. Since existing laws and traditions only recognize opposite-sex marriages, the legal framework concerning same-sex relationships remains inadequate. The court noted that decisions regarding with whom to share one's life are personal choices, and therefore same-sex relationships should be legally recognized and accorded validity.
14. Similarly, in the case of *Dilu Buduja vs. Government of Nepal*²¹, the female applicant, Dilu Buduja, was denied a passport by the Passport Department on the basis of being third gender. The court observed that the Passport Act, 2024, and the Passport Regulations, 2067, does not discriminate against third-gender persons. Accordingly, the court directed the authorities to make necessary modifications in the machine-readable passport software and

¹⁸ National Human Rights Commission, Study Report on the Human Rights Situation of Sexual and Gender Minorities, p. 68 (2077).

¹⁹ Prem Kumari Nepali vs. National Women Commission, Nepal Law Reporter 2070, Unit 1, Decision No. 8945

²⁰ Prem Kumari Nepali (Decision No. 8945) Paragraph No. 8

²¹ Dilu Buduja vs. Nepal Government et.al., Nepal Law Reporter 2070, Unit 8, Decision No. 9048

to amend Schedule 2 of the Passport Regulations, 2067, to ensure that passports reflecting third-gender identity are issued without delay. Following the directive of the court, the Passport Regulations were amended and the technical issues in the machine-readable passport system were addressed. As a result, individuals from the sexual and gender minority community can now legally obtain machine-readable passports that reflect their self-identified gender, marked as “Other/O”, ensuring their gender identity is formally recognized in official travel documents²².

15. Similarly, in the case of Yam Bahadur Rana Aanik vs. Government of Nepal²³, the petition highlighted that minors obtaining citizenship at the age of 16 may not yet have a fully formed understanding of their sexual and gender identity. Consequently, if a citizenship certificate is issued indicating “Male” or “Female,” the petitioner through the writ petition, sought the right to amend the gender designation to “Other” in the citizenship certificate and other personal documents in accordance with their self-identified gender. In this context, the court held that any individual’s right to obtain a gender identity in accordance with their self-perception is a matter of personal autonomy. No other person, society, state, or law can determine one’s biological sex in a way that undermines personal freedom, dignity, or self-respect as such actions would violate human rights. Given that the Constitution and citizenship laws recognize the existence of a third gender and commit to protecting the rights of such communities, it is appropriate that a citizenship certificate issued based on biological sex, when the individual has not yet determined their sexual or gender identity be amended to indicate “Other”, thereby reflecting the individual’s self-identified gender. Furthermore, the court has also issued directive orders in the name of the Government of Nepal to ensure that individuals belonging to the sexual and gender minority communities are not subjected to discrimination or humiliation in any form or from any source, thereby mandating the creation of a safe and respectful environment for them.
16. Similarly, in the writ petition of Pushparaj Pandey vs. Government of Nepal, Prime Minister and Council of Ministers, although the order directed that surrogacy services should not be provided to same-sex couples, it explicitly recognized “Nepali same-sex couples”, thereby conferring legal acknowledgment to same-sex marriages²⁴. Similarly, in writ petitions filed concerning the implementation and enjoyment of women’s rights, while interpreting the right to equality of sexual and gender minorities in a holistic manner, this court, in Jyoti Lamsal Paudel’s writ petition²⁵, observed that for a marriage to attain legal validity, whether between two persons of the same sex or between a woman and a man, the full and free consent²⁶ of both parties is mandatory. Likewise, in Jyoti Lamsal Paudel’s case²⁷, this court interpreted international human rights instruments by holding that the Universal Declaration of Human Rights, 1948 recognizes all human beings, women, men, and persons of the (third gender) as equal before the law and equally entitled to its protection. Further, the International Covenant on Economic, Social and Cultural Rights, 1966 acknowledges that society is composed of men, women, and persons of the (third gender) alike; and accordingly, the State is obliged to address all three groups and must not discriminate among women, men, and third-gender persons in the enjoyment of rights. While interpreting the right to equality of persons belonging to sexual and gender minority

²² Currently, under Schedule-2 of the Passport Regulations, 2077, the application forms for passports and travel permits provide a legal framework for gender identity as follows: In the ‘Passport Application Form’ under Format “A”, Item 6 “Sex”, the option “O for Others” is available and in format “B” under Item 6 “Sex” with regards to ‘ePassport Application Form’ the option “X for Others” is available which ensures gender identity.

²³ Yam Bahadur Rana Aanik vs. Government of Nepal

²⁴ Ibid Paragraph 33

²⁵ Jyoti Paudel et.al., vs. Nepal Government, Prime Minister and Office of the Council of Ministers, Decision No. 8282

²⁶ Ibid, Paragraph 16

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

communities, in *Prakashmani Sharma et al. vs. Office of the Prime Minister and Council of Ministers*²⁸, this court held that Article 13 of the Interim Constitution of Nepal, 2063, guarantees equality of all persons before the law. In a country governed by a written Constitution that protects fundamental rights, the State cannot discriminate on the ground of sex merely because a person is male, female, or of the third gender. Any law that discriminates on the basis of sex lacks legal validity and cannot withstand constitutional scrutiny. The court further interpreted that sons, daughters, and persons of the third gender enjoy equal rights in ancestral property. While interpreting the right to equality guaranteed under Article 13 of the Interim Constitution of Nepal, 2063, in *Jyoti Lamsal Paudel's* case²⁹, this court held that the said provision requires the adoption of constitutional and legal measures to eliminate discrimination against third-gender and LGBTI persons on the basis of sexual orientation. Similarly, in the case of *Saroj Nath Pyakurel*³⁰ case, this court held that women, including third-gender persons, are entitled to obtain Nepali citizenship in accordance with their own will, and accordingly issued an order directing the competent authorities to make appropriate arrangements for issuing Nepali citizenship certificates to all eligible persons and for the preparation of the voters' list.

17. Measured against the aforesaid orders and judgments, it is evident that this court has remained sensitive to the rights, interests, identity, and dignity of sexual and gender minority communities. While interpreting the right to equality guaranteed under the Interim Constitution of Nepal, 2063, and the Constitution of Nepal, this court has issued judicial comments and various directive orders to ensure appropriate amendments to legal frameworks relating to citizenship, passports, and similar matters; to safeguard the right to identity and self-determination of persons belonging to sexual and gender minority communities; and to accord legal recognition to same-sex marriages and relationships. In this sense, this court appears to have undertaken to a considerable extent an interpretative exercise in gender justice and jurisprudence with a view to translating the principle of equality into practical reality. By recognizing the rights of persons belonging to sexual and gender minority communities as an integral component of a progressive society, this court has consistently endeavored to hold State institutions accountable and responsive to the realization and enforcement of those rights. From a review of the above-mentioned decisions rendered by this court to date, it is evident that the constitutional rights of persons belonging to sexual and gender minority communities, including the rights to identity, dignified life, marriage, and the enjoyment and exercise of other constitutionally guaranteed rights have already been interpreted as being subject to equality. In that context, this court does not find it appropriate to depart from such established interpretation. However, while this court has generally referred to persons belonging to sexual and gender minority communities under the umbrella term "third gender", the usage of this terminology warrants reconsideration. Ordinarily, the term "third gender" has been employed to denote communities other than women and men. In certain documents, however, the same term has also been used specifically to refer to the "transgender" community³¹. **In the contemporary context where numerous terms relating to gender identity have evolved and individuals are openly identifying and asserting their identities, the term "third gender" is incapable of representing all such identities. The use of this term therefore carries the risk of narrowing and constricting the identities of persons belonging to the**

²⁸ *Prakashmani Sharma et.al., vs. Prime Minister and Office of the Council of Minister*, Decision No. 8456

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

³⁰ *Saroj Nath Pyakurel et.al., vs. Nepal Government*, Nepal Law Reporter 2068, Unit 1, Decision No. 8536

³¹ In the National Human Rights Commission's Study Report on the Human Rights Situation of Sexual and Gender Minorities, 2077, the Nepali translation of the term "transgender" has been used as "third gender". Similarly, in the case of *Suman Pant*, the term has been expressly employed as "transgender".

broader gender and sexual minority communities. Even the terminology “LGBTIQA+” is considered insufficient to encompass the entire non-binary spectrum, and there is a growing consensus that the more inclusive terminology “SOGIESC” should be employed. In such circumstances, the use of the term “third gender” to address the entire non-binary group runs contrary to the very principle of inclusivity.

18. Since the proviso clause of Article 18 (3) of the Constitution of Nepal and the terminology “gender and sexual minorities” used in Article 42 (1) are capable of encompassing all persons of gender identities and sexual orientations other than “women” and “men,” it appears appropriate to employ the constitutionally recognized term “gender and sexual minorities” instead of the term “third gender. In the context of the rights of sexual and gender minority communities, although this court, even prior to the promulgation of the Constitution of Nepal, has used the term “third gender” in its interpretative judgments, it now appears more appropriate to employ the term “sexual and gender minorities.” It is acknowledged that, in cases such as Sunil Babu Pant and others, the term “third gender” was used on the basis that it was more dignified and respectful than derogatory expressions such as “*hijra*” or “*chhakka*,” which were prevalent at the time. However, the term “third gender” does not comprehensively encompass all groups within the community. By contrast, the expression “sexual and gender minorities” more inclusively and accurately reflects the full diversity of identities within this community. In practice, the term “third gender” should be understood as a respectful expression used primarily in colloquial language. On the other hand, sexual and gender minority individuals are currently legally required to use “Other” as their gender marker. However, transgender women and men should be allowed to select “female” or “male” according to their self-identified gender. Similarly, other sexual and gender minority persons should be able to indicate a third-gender or non-binary gender identity on their personal documents. These issues must be approached with the highest degree of human sensitivity and respect for individual identity. A person’s outward appearance and existence need not be singular, and in fact, an individual’s visible face and identity are often seen as one. That is one truth. Yet, the unseen aspects of that person, their inner identity and experiences may differ. Recognizing and understanding those experiences is another truth. Therefore, truth can be multiple and should not be viewed from a single perspective. Just as there is natural diversity, so too do humans possess diverse and plural identities and beliefs. Viewing this truth thoughtfully and from a humane perspective, and recognizing that the identities and rights of sexual and gender minority individuals are increasingly acknowledged, this court must exercise heightened awareness and take into account global standards of gender justice and jurisprudential recognition.
19. With regard to the provision of non-tourist visas to foreign spouses of Nepali same-sex individuals, this court’s stance can be observed from the present petition. In the case before this court, Tobias Volz, a foreign same-sex individual in a marital relationship with the Nepali same-sex petitioner Adhip Pokharel, was denied a non-tourist visa by the Department of Immigration. This factual scenario closely parallels the matter in the case of Suman Pant versus the Ministry of Home Affairs, Department of Immigration. In that case, this court issued a mandamus directing the provision of a non-tourist visa to a foreign same-sex spouse of a Nepali same-sex citizen, thereby establishing a judicial precedent. It is pertinent to further examine the judicial basis of the Suman Pant case. In that case, the petitioner, a same-sex woman, Suman Pant, had lawfully entered into a court marriage with Leslie Lewis on 18 December 2015 in Sacramento County, Sacramento, California, United States. Upon arriving in Nepal, Leslie Lewis applied to the Department of Immigration for a non-tourist visa. The respondent Department of Immigration verbally refused to issue the

non-tourist visa. Although Section 7 of the Immigration Act, 2049, mandates that the Director General grant a visa in such cases, no decision was made regarding this application. The petitioner argued that such refusal was contrary to the Constitution of Nepal, which recognizes the rights of sexual and gender minority communities, and violated Section 7 of the Immigration Act, 2049, as well as Rule 8 (h) of the Immigration Regulations, 2049, which provide that foreigners married to Nepali citizens and submitting a certificate of marriage registration are entitled to a non-tourist visa in Nepal. Further, the petitioner contended that the refusal infringed her rights guaranteed under Articles 17, 18, 18 (2), 18 (3), 38 (1), and 133 of the Constitution of Nepal. Accordingly, the petitioner prayed the court to issue an order of mandamus directing the respondents to grant non-tourist visas to sexual and gender minority individual who enter into same-sex marriages and arrive in Nepal, and to urgently enact and implement laws facilitating such visas.

20. While issuing an order of mandamus in the said petition, regarding the issuance of non-tourist visa to Leslie Lewis married spouse of petitioner Suman Pant, the court observed that *“Part 3 of the Constitution of Nepal guarantees fundamental rights, including the right to live with dignity, the right to liberty, the right against torture, and rights related to justice, to every individual. Similarly, rights such as equality, property rights, and the right to information are guaranteed to all citizens. The terms “person” and “citizen” as used in the Constitution are gender-neutral; they do not refer exclusively to men or women but encompass every individual, without discrimination on the basis of gender or sexual identity”*. Accordingly, the court observed that the fundamental rights guaranteed by the Constitution are not to be construed as rights conferred exclusively upon men or women; nor can it be held that individuals who do not belong to, or do not wish to identify with these traditional gender categories are excluded from such rights. To deny these individuals the protections guaranteed under the Constitution, or to deprive them of the enjoyment of such rights is impermissible³². In this context, since the rights guaranteed by the Constitution are gender-neutral, sexual and gender minority individuals cannot be excluded from the equal protection afforded by the Constitution, nor can any circumstance be created that deprives them of the enjoyment of their rights. In this matter, while interpreting the right to live with dignity guaranteed under Article 16 of the Constitution of Nepal, it has been observed that *“the right to live with dignity guaranteed by the Constitution encompasses an individual’s right to personal identity. Respect cannot be claimed unless a person’s physical existence and identity are acknowledged. Similarly, the recognition of dignity cannot be said to exist unless the autonomy that completes an individual’s life is respected. From this perspective, any law, policy, or practice inconsistent with the rights guaranteed by the Constitution cannot be recognized or upheld.”*³³ Previously, this court had interpreted that the right to live with dignity guaranteed under Article 12 (1) of the Interim Constitution of Nepal, 2063, inherently included the right to personal identity. Building upon that interpretation, the decision in the Suman Pant case further elaborated and established the principle that an individual’s dignity cannot be recognized unless their personal identity is acknowledged, thereby reinforcing and extending the earlier judicial interpretation.
21. In discussing discrimination that may arise from the State, it has been interpreted that, *“in light of the broad framework of human rights law and the constitutional provisions on fundamental rights, any form of discrimination against sexual and gender minority*

³² Suman Pant vs. Department of Immigration et.al., Case: Certiorari/Mandamus Nepal Law Reporter 2074, Decision No. 9921, Unit 12 Paragraph 6 (Date of Decision 274/7/06)

³³ *ibid*

communities, whether through an act or through omission is unlawful. Discrimination on the basis of sex, physical condition, marital status, or social and cultural marginalization, which adversely affects the existence, identity, or dignity of sexual and gender minorities, or which renders the enjoyment or exercise of their rights ineffective or meaningless through denial, avoidance, or prohibition, is impermissible in any form³⁴. It has been further emphasized that discrimination can arise not only from positive actions or enactments by the State but also from omissions. Therefore, if any act or omission by the State results in adverse effects on the dignity of sexual and gender minority communities, or obstructs the enjoyment or exercise of their rights, such act or omission is unlawful, and the State is prohibited from creating or allowing such circumstances.

22. Similarly, the Constitution of Nepal does not deprive individuals of the sexual and gender minority communities of their constitutionally guaranteed rights, including the right to live with dignity and the right to equality. Under Section 8(1) (h) of the Immigration Regulations, 2051, foreigners who are in a marital relationship with a Nepali citizen and upon submission of a certificate of marriage registration are entitled to a non-tourist visa. With regards to the decision of the Department of Immigration denying a non-tourist visa to the petitioner's spouse, Leslie Lewis Melnik, the court has observed that *"Provided, a foreign national claiming to be in a marital relationship with a Nepali citizen submits a certificate of marriage registration, and the Nepali citizen confirms in the visa application that this is the person he is married to, then the Department of Immigration cannot refuse to issue a non-tourist visa to such foreign national. In matters concerning any individual's rights, unless explicitly prohibited by law, the presumption must be in favor of the individual's entitlement. The Constitution is not merely a document of rights but also a document of justice. The Constitution recognizes the distinct identity of sexual and gender minority individuals and guarantees that no discrimination shall be made on the basis of gender. If the Immigration Act or its regulations do not reject such identities, then interpreting terms such as "husband" or "wife" in the visa application form in a manner that negates constitutionally guaranteed rights would be unjust. Accordingly, any omission by the respondents resulting in the non-issuance of a non-tourist visa contrary to the Constitution cannot be considered acceptable"* In this matter, while interpreting the right to self-determination of sexual and gender minority individuals, it has been observed that *"the manner in which a person conducts their private life, their gender identity, and the calling of their inner self are matters of personal autonomy; any interference in these matters would contravene the Constitution, human rights law, and the Immigration Regulations³⁵*." Accordingly, it has been held that authorities *"cannot refuse to issue a non-tourist visa to a person with whom a sexual or gender minority individual has entered into a marital relationship³⁶"*.
23. Since the grant of a non-tourist visa to a foreign national who is in a marital relationship with a Nepali citizen belonging to the gender and sexual minority community is directly connected with the identity and dignity of persons of that community, permitting the grant of a non-tourist visa to a foreign spouse of a traditional male or female Nepali citizen, while denying the same facility to the foreign spouse of a person belonging to the gender and sexual minority community, is contrary to human rights law, the Constitution of Nepal, the Immigration Act, and the Immigration Regulation. Therefore, the inaction in granting a non-tourist visa cannot be considered lawful. Accordingly, in the case of Suman Pant, an order of mandamus was issued in the name of the Department of Immigration directing it to issue a

³⁴ Suman Pant (Decision No. 9921) Paragraph 13

³⁵ Ibid paragraph 18

³⁶ Suman Pant (Decision No. 9921) paragraph 19

non-tourist visa to Leslie Lewis Melnick, the same-sex spouse of the petitioner Suman Pant. As the legal issues and claims involved in the present writ petition are identical to those in the said case, and the facts are also substantially similar, the appropriate grounds and reasons for granting a non-tourist visa to Tobias Volz, the married spouse of the present writ petitioner Adip Pokharel can be derived from the decision in *Suman Pant's case* in accordance with the principle of stare decisis. Therefore, the action taken by the Department of Immigration cannot be considered acceptable. Therefore, in accordance with the grounds for decision adopted and the interpretation and principles enunciated by this court in the writ petition of Suman Pant, the omission on the part of the respondent Department in refusing to grant a non-tourist visa to the petitioner Tobias Volz is found to be contrary to the Constitution and the law.

24. Third Question - Considering what provisions exist under federal law regarding the rights of the gender and sexual minority community and matters relating to marriage? It necessary to examine how the civil, criminal, and other subject-specific laws have addressed matters relating to their identity, dignity, marriage, property, family, and related issues. It is observed that various provisions of the National Civil Code, 2074, generally employ gender-neutral terms such as “person” and “citizen.” Under the provisions relating to citizens’ rights in Part I, Chapter 3 of the National Civil Code, 2074, Section 17 provides that every person shall be equal before the law; Section 18 stipulates that no discrimination shall be made in the application of general laws on the grounds including gender; and Section 19 states that any special provisions made by law for the protection, empowerment or development of citizens, including those belonging to gender and sexual minority communities shall not be considered to be a discrimination. Similarly, Section 20 provides that no person shall be deprived of personal liberty. Further, Section 30 stipulates that every person shall, immediately after birth, be recognized as a person be entitled to exercise rights under law until he or she survives.in accordance with law for as long as he or she remains alive. Likewise, Section 36 provides that any person may, subject to law, undergo change of organs. Thus, it is evident that persons belonging to the gender and sexual minority community are, in the eyes of the law, equal to persons of other genders, are not to be subjected to discrimination in the application of general law, and are entitled to enjoy rights as provided by law. However, under the provisions of Family Law in Part III, Section 67, while defining marriage, provides that “if a man and a woman accept each other as husband and wife through any occasion, ceremony, formal or other act, a marriage shall be deemed to have been concluded.” It is observed that the committee formed pursuant to the order of this Court to study same-sex marriage has already recommended that this provision be amended so as to expand the concept of marriage from a relationship between a man and a woman to a relationship between persons³⁷. Although Section 69 of the National Civil Code, 2074, provides that every person shall have the freedom to conclude a marriage and that such person’s family life shall be inviolable, the marriage-related provisions of the said Code, in addressing marital rights and the obligations arising therefrom, refer to “man,” “woman,” or “husband” and “wife.” Consequently, these provisions have failed to encompass persons belonging to gender and sexual minority communities. As such, these provisions, not being

³⁷ Committee formed by the Government of Nepal pursuant to the order of the Supreme Court, *Study Report on Same-Sex Marriage*, p. 56 (2071).

informed by this court's past orders³⁸ and various provisions of the Constitution, appear to warrant consideration in light of the principles of equality and non-discrimination.

25. Likewise, Section 76 of the National Civil Code, 2074, provides that “both husband and wife shall get their marriage registered by filing an application in the authority appointed as per law.” On the basis of this provision, it is observed that local levels have refused to register the marriages of same-sex couples, taking the position that Nepali law does not recognize the registration of same-sex marriages. Further, under Part III of the Code, which contains provisions relating to family law—covering matters such as divorce; relations between mother, father, and son or daughter; maternal and paternal authority; guardianship; next of kin; adoption; inter-country adoption; partition of property; and intestate succession—the law employs gender-specific and relational terms such as man, woman, grandfather, grandmother, mother, father, son, daughter, daughter-in-law, elder brother, elder sister, younger brother, and younger sister. Despite the fact that the Constitution and the decisions of this court have already affirmed the right of persons belonging to gender and sexual minority communities to live family lives without obstruction, it does not appear that these provisions or administrative practices have been informed by such constitutional mandates or judicial pronouncements. **Binary terms such as “son” and “daughter” inherently embody a hierarchy. Although such terms ordinarily carry emotional connotations in common usage, their legal use may marginalize individuals who do not fall within those linguistic categories, and may enable those situated within such power relations to suppress or control other individuals who are different. In this context, laws employing such terminology become open to question and are to be regarded as amenable to reform.** Similarly, under Part IV of the National Civil Code, 2074, which contains provisions relating to property, Section 257 employs gender-specific terms such as husband, wife, father, mother, son, and daughter to determine the entitlement to the joint property. Further, under Part VI of the Code, which contains provisions relating to private international law, the provisions concerning marriage³⁹ employ the gender-neutral term “citizen,” whereas other provisions relating to adoption⁴⁰ and maternal and paternal authority⁴¹ employ gender-specific terms such as father, mother, son, and daughter. These terms are precisely the kind of terminology that, in accordance with the Constitution and the decisions of this court, ought to be amended or revised to ensure inclusivity.
26. Under Part II, Chapter 11 of the National Penal Code, 2074, relating to offenses concerning marriage, Sections 171, 172, 173, 174, and 175 employ the gender-neutral term “person.” However, Section 175, which prohibits polygamy, explicitly specifies “man” and “woman.” Similarly, in Section 189, which provides for the lawful performance of abortion, the term “woman” is explicitly indicated. Under Section 192 (2) (k), it is provided that “cutting of woman’s breast.” Similarly, under Part II, Chapter 19 of the Code, relating to sexual offenses, Section 219 defines rape as follows: “Where a man has sexual intercourse with a woman without her consent or with a girl child below eighteen years of age even with her consent, the man shall be considered to commit rape on such woman or girl child.” It is thus observed that the law recognizes only women as potential victims of rape. Similarly, Section 220 also employs gender-specific terms. In Section 224, which deals with sexual misconduct, the reference to “husband” or “wife” likewise renders the provision gender-

³⁸ Sunil Babu Pant and others vs. Nepal Government et.al., Nepal Law Reporter 2065, Unit 4, Decision No. 7958, pg. 524

³⁹ Section 699, Section 70 and Section 701 of the National Civil Code, 2074, prescribes provisions relating to recognition of marriage

⁴⁰ Ibid Section 703

⁴¹ ⁴¹ *Supra* note ४३ को दफा ७०२।

specific. Further, Section 226 of the National Penal Code, 2074, provides that committing or causing to commit unnatural sexual intercourse with another person without his or her consent shall be deemed to be an offence. Although the provision criminalizes only unnatural intercourse carried out without consent, the term “unnatural intercourse” has historically been used in British colonial law⁴² to refer to same-sex sexual relations. The historical adoption and use of this term in the Nepali legal tradition conveys the implication that same-sex sexual relations are acts against nature. Consequently, such terminology appears derogatory and disrespectful with regard to the rights of persons belonging to the gender and sexual minority community. Similarly, Subsection (3) of Section 233, provides that no person shall carry out physical examination with the intent to breach the privacy of a “woman” Further, the National Penal Code, 2074, provides that whenever a woman is to be arrested or detained, a female police officer shall be assigned as far as practicable.

27. Although efforts have been made to ensure gender equality and eliminate gender-based violence by the Act⁴³ made to amend some Nepal Acts by removing gender-specific terminology from various subject-specific laws, it is observed that some laws still do not employ gender-neutral language. Gender-specific terms such as “mother,” “father,” “son,” “daughter,” “adoptive son,” “adoptive daughter,” “man,” “woman”, and the like continue to be used, thereby excluding or failing to encompass persons belonging to the gender and sexual minority community. Examples of such laws are as follows:

- In the Nepal Law Interpretation Act, 2010, gender-specific terms such as “father,” “son,” “daughter,” “adoptive son,” and “adoptive daughter” are used. Although Section 12 (1) states that “words importing the masculine gender shall be taken to include the feminine gender,” the Act cannot be considered fully gender-inclusive.
- Under Section 39 (2) (d1) and (d2) of the Police Act, 2012, provisions exist for creating separate accommodation facilities for male and female personnel through rules and orders.
- In the Land Act, 2021, Sections 2(c) and 52(c) define family using gender-specific terms such as husband, wife, son, and daughter.
- Under Section 2(c) of the Civil Service Act, 2049, the term “family” is defined to include relationships such as husband, wife, son, daughter, adoptive son, adoptive daughter, father, mother, grandfather, and grandmother.
- In Section 2(h) of the Working Journalist Act, 2051, the definition of family employs gender-specific terminology such as husband, wife, son, daughter, adoptive son, adoptive daughter, man, woman.
- Under the Human Organ Transplantation (Regulation and Prohibition) Act, 2055, Section 2(j) defines “family member”, and Section 2 (l) defines “close relative”, both employing gender-specific terms such as husband, wife, son, daughter, adoptive son, adoptive daughter, elder brother, younger brother, elder sister, younger sister, grandson, and granddaughter.
- In the Child Labor (Prohibition and Regulation) Act, 2056, the term “children” is used.

⁴² While British law historically criminalized homosexuality, in its colonies, the same conduct was criminalized under the label of “unnatural intercourse.” For example, this is reflected in Section 377 of the Indian Penal Code, 1860, and Section 377 of the Bangladesh Penal Code, 1860. See also *Navtej Singh Johar & Ors. v. Union of India & Ors.*, AIR 2018 SC 4321.

⁴³ Act No. 8 of the year 2072 B.S.

- Under Section 2 (b) of the Income Tax Act, 2058, in defining relatives, gender-specific terms such as husband, wife, son, and daughter are employed.
- In the Nepal Citizenship Act, 2066, Sections 3, 5, 8, and 17 contain various provisions concerning foreign and Nepali citizen women. Similarly, Section 5 (2) uses the gender-specific term “sons and daughters”.
- Under Section 47 of the Electronic Transactions Act, 2063, acts such as teasing, harassing, or insulting women are made unlawful; however, the provisions do not encompass persons belonging to the gender and sexual minority community as potential victims.
- Under Section 2(z9) of the Company Act, 2063, in defining “close relative”, gender-specific terms such as husband, wife, son, daughter, and daughter-in-law are used.
- In Section 2(q) of the Federal Parliament Secretariat Act, 2064, in defining “family”, gender-specific terms such as husband, wife, son, daughter, adoptive son, and adoptive daughter are employed.
- Under Section 2(j) of the Banking Offense and Penalty Determination Act, 2064, in defining “family member”, gender-specific terms such as husband, wife, son, and daughter are used.
- In Section 2(f) of the Non-Resident Nepali Act, 2064, in defining “family”, terms such as husband, wife, and son or daughter are employed.
- Under Section 2(b) of the Domestic Violence (Offense and Punishment) Act, 2066, in defining domestic relations, the terms adoptive son or adoptive daughter are used.
- In the Children-related Act, 2018 (2075), the term “children” is employed.
- Under Section 2(w) of the Banking and Financial Institution Act, 2073, in defining “family”, gender-specific terms such as husband, wife, son, daughter, and daughter-in-law are employed.
- In Section 2(d) of the Cooperative Act, 2074, the definition of “family” similarly uses gender-specific terms such as husband, wife, son, and daughter.
- The Safe Motherhood and Reproductive Health Rights Act, 2075 provides for maternal and reproductive health rights of women but does not encompass persons belonging to the gender and sexual minority community.
- Under Section 15 of the Prison Act, 2079, prescribes for separate buildings and toilets for male and female inmates.
- In Section 2(e) of the Insurance Act, 2079, in defining a “single-household family”, gender-specific terms such as husband, wife, son, daughter-in-law, daughter, adoptive son, and adoptive daughter are used.

28. Thus, even in certain federal laws, gender-neutral and inclusive terminology that could encompass citizens belonging to the gender and sexual minority community is still not employed. **The failure to adopt gender-neutral and inclusive language in ordinary legal usage may impede the unhindered exercise of the right to identity of gender and sexual minority communities, and may further render ineffective the exercise of rights conferred by subject-specific legislation. Where the objective of a law is not to exclude any group from the enjoyment of rights, that objective must also be reflected in the language employed in the statute. In determining the legislative intent of a law, the court is required, in the first instance, to apply the literal rule of interpretation, namely to ascertain the ordinary meaning of the words used in the statute;**

accordingly, the language of the law must clearly indicate whether or not a particular group is included within its scope. Although Section 12 (1) of the Nepal Law Interpretation Act, 2010 provides that “words importing the masculine gender shall be taken to include the feminine gender,” this provision appears insufficient for persons belonging to the gender and sexual minority community. As it is already clear from Article 18 of the Constitution, which guarantees the right to equality, that persons of the gender and sexual minority community are entitled to enjoy rights equally, and from the precedents established by this court, the language used in the law must also be made gender-inclusive to encompass persons belonging to the gender and sexual minority community. However, in federal laws, particularly in defining “marriage” and “family,” terms such as husband, wife, son, daughter, adoptive son, adoptive daughter, daughter-in-law, and other words denoting “man” or “woman” are used to identify family members. Defining marital and family relationships in the law solely in terms of “man” and “woman” creates a situation in which persons belonging to the gender and sexual minority community are excluded from the rights associated with marriage and family relationships. Therefore, given that the use of gender-specific terms in these laws excludes persons belonging to the gender and sexual minority community, it is noteworthy that the government should initiate legislative efforts to use gender-inclusive terminology in these laws, so as to recognize and encompass the identity and rights of persons belonging to the gender and sexual minority community and to further promote inclusion.

29. With regard to how the rights of persons belonging to the gender and sexual minority community can be incorporated into the law, the article “They, Them, and Theirs” published in the *Harvard Law Review* states: *“The law can recognize non-binary gender using familiar civil rights tools and concepts. Non-binary gender rights might take the form of recognition of a third gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of non-binary people into rules or spaces that require binary categories”*⁴⁴. This implies that, to legally address the rights of persons belonging to the gender and sexual minority community, it is necessary to recognize a third gender category, eliminate unnecessary legal sex classifications, and, where gender classification as “male” or “female” is required, thoughtfully integrate persons of the gender and sexual minority community into such classifications. In certain matters, it appears necessary to adopt gender neutrality and discourage unnecessary gender classifications. In other matters, where gender classification is required, it is essential to determine thoughtfully and intelligently how persons belonging to the gender and sexual minority community can be included within such classifications. For example, using the term “offspring” instead of “son and daughter” can help avoid unnecessary gender classification, as recognized under Article 18 (5) of the Constitution of Nepal. However, the same approach may not be feasible in the context of “parents.” It is therefore necessary to determine appropriately and thoughtfully how persons belonging to the gender and sexual minority community can be included within the definition of “parents.” Similarly, according to the order of this court in the case of Sunil Babu Pant, the report of the committee formed to study same-sex marriage, as well as the recommendations of the National Human Rights Commission⁴⁵, have been positive in favor of granting legal

⁴⁴ Jessica A. Clarke, *They, Them and Theirs*, 132 Harv. Law Rev. 894, 901 (2019).

⁴⁵ National Human Rights Commission, Study Report on the Human Rights Situation of Sexual and Gender Minority Persons, pp. 78–81 (2077)

recognition to same-sex marriage. The recommendations and suggestions⁴⁶ include: providing legal recognition to same-sex marriages; incorporating related legal provisions on divorce, inheritance, and adoption; and allowing couples, whether married or not to legally adopt an adoptive son, adoptive daughter, or other adopted child upon reaching a specified age.

30. **Fourth Question** – Whether an order as requested by the petition should be issued? It is noted that the German national Tobias Volz, one of the writ petitioners, applied to the respondent department for a non-tourist visa. He was requested to submit a marriage registration certificate of the marriage registered in Nepal. When attempting to register the marriage at Kathmandu District Kathmandu Metropolitan City Ward No. 11, he was refused on the ground that there was no provision to register same-sex marriages. Upon reapplying, he was only provided with verbal information of the refusal, without any written communication regarding whether a decision had been made. Accordingly, the petitioners sought issuance of a non-tourist visa. The respondent, in its rejoinder stated that a certificate showing the marriage registration under the provisions relating to marriage in the National Civil Code, 2074 and notification of the marriage under the National Registration Act, 2075 must be submitted. It is evident from the petition itself that the writ petitioners did not submit any application to examine the validity or recognition of their marriage. Moreover, a marriage registration certificate was submitted showing that the marriage was conducted under German law 2075/7/2 (corresponding 19 October, 2018) and registered at the Marriage Registration Office in Malsch, Kreis Karlsruhe, under registration no. E37.2018. The certificate was also authenticated by the German Embassy and attached to the writ petition. In these circumstances, the respondent Immigration Department’s insistence on submitting documents under the National Civil Code, 2074 and the National Registration Act, 2075 appears unreasonable.
31. Pursuant to Section 7 of the Immigration Act, 2049, the Director General of the Department of Immigration is empowered to grant non-tourist visas. Rule 8 (1), prescribes that the following foreign nationals and their family members shall be granted a non-tourist visa and in Part (h) of the Regulation it prescribes that “non-tourist visas must be granted to foreigners who are married to Nepali citizens and who submit a marriage registration certificate”. In this context, it is noted that Paragraph 5.3 of the Protocol and Consular Handbook⁴⁷, issued by the Ministry of Foreign Affairs, provides that diplomats and their dependent family members holding diplomatic visas are eligible for diplomatic visas. Further, Point No. 2 specifies: “*Same-sex partner of a diplomatic agent holding a diplomatic passport issued by the sending state (reciprocity condition applies).*” Similarly, Paragraph 5.4 of the same Protocol provides that official visas are issued to certain officials and their dependents. This includes family members holding official/service passports, holders of United Nations Laissez-Passer (UNLP), and persons with regular passports upon formal request from a foreign mission. Point No. 3 of this paragraph specifically states: “*Same-sex partner of an official of a diplomatic mission holding official/service passport (reciprocity condition applies).*” Accordingly, under the aforementioned provisions, it is evident that the same-sex spouse of a foreign diplomat is entitled to receive a non-tourist visa. **Where same-sex spouses of diplomats and various foreign officials are able to**

⁴⁶ Committee formed by the Government of Nepal pursuant to the order of the Supreme Court, Study Report on Same-Sex Marriage, p. 56 (2014/2071 B.S.).

⁴⁷ Ministry of Foreign Affairs Protocol Division, Protocol and Consular Hand Book (May 2018).

obtain visas without obstruction and reside in Nepal on an equal footing with their spouses, the contention that the foreign same-sex spouse of a Nepali citizen cannot obtain a non-tourist spouse visa appears to deny the facilities provided under the Immigration Act, the Rules, and other relevant laws, and reflects a prejudicial and discriminatory act based on the petitioner's sexual orientation and gender identity. In today's context of globalization, marriages and divorces can occur not only between Nepali citizens but also between Nepali and foreign nationals. The National Civil Code, 2074 contains provisions on private international law. Specifically, Sections 692, 699, and 701 provide legal recognition of marriages conducted abroad. Similarly, in the case of *Kanika Goyal v. Karan Goyal*, the court held that matters relating to marriage, divorce, and child custody should be considered under private international law. This approach is grounded in the relevant legal provisions and judicial practice. In light of this, and in the present writ petition, there is no basis to treat a marriage conducted abroad otherwise. **For the purpose of obtaining a marital visa, a marriage certificate or other official documentary proof evidencing the marriage, together with the citizenship certificate of the Nepali national spouse, are treated as the principal documents on the basis of which a non-tourist visa is issued. For the grant of such a visa, both spouses are required to be present before the Department for identification. Accordingly, where the citizenship certificate of the Nepali spouse, valid documentary proof of marriage, and the identification of both spouses are duly produced, the Department cannot lawfully refuse to grant a non-tourist visa pursuant to Section 8 (1) (h) of the Immigration Regulation, 2051, and the Immigration Act, 2049.** The provisions of the Immigration Act, 2049 and the Immigration Regulations, 2051 do not reject the distinct identity of persons belonging to the gender and sexual minority community. Therefore, the use of the terms "husband" or "wife" in the application form cannot be construed to nullify constitutionally guaranteed rights. Accordingly, the omission of the respondent in issuing a non-tourist visa is unjust and inconsistent with the Constitution and cannot be deemed acceptable. Similarly, it is clear that the rights and freedoms guaranteed under the Constitution of Nepal are to be equally enjoyed by persons belonging to the gender and sexual minority community. The right to live a life with dignity includes the right to identity and the right to conduct one's family life freely, has been consistently recognized by the longstanding examples laid down by this court. During the drafting of the Constitution of Nepal, under the heading "Right to Family", the draft provided that "couples shall have equal rights in property and family matters." When the Constitution was promulgated, this provision was reproduced verbatim under Article 38 (6). Unlike the other five sub-articles under the rights of women, Sub-article (6) uses the gender-neutral term "couple", which implies that couples belonging to the gender and sexual minority community also enjoy equal rights in property and family matters. Accordingly, there is no ground to challenge this interpretation. Thus, in light of human rights law, the Constitution of Nepal, the wisdom of the Constituent Assembly during the drafting of the Constitution, the report of the Committee formed by the Government of Nepal to study same-sex marriage as per the order of this court, the principles established by this court, and the provisions of the Immigration Act and Immigration Regulation, the refusal of the respondent department to grant a non-tourist visa to the petitioner cannot be regarded as lawful.

32. The concept of human rights has evolved based on the inherent dignity and worth of every individual. The universal principle of human rights dictates that no person shall be deprived of any right on the basis of their identity and this principle equally applies to the rights of

persons belonging to the gender and sexual minority community⁴⁸. Furthermore, based on the principle of equality as endorsed by the Universal Declaration of Human Rights, 1948, any social or legal discrimination against persons belonging to the gender and sexual minority community is contrary to the concept of human rights and human rights law⁴⁹. Similarly, under the International Covenant on Civil and Political Rights, 1966, the rights to life, equality, dignity, and privacy are guaranteed; the Convention Against Torture, 1984 provides protection against torture; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, along with the Yogyakarta Principles⁵⁰, Yogyakarta Principles Plus 10⁵¹, and reports of the United Nations High Commissioner for Human Rights⁵², affirm that it is the State's duty to protect the rights of persons belonging to the gender and sexual minority community, including their right to self-respect. This duty extends to ensuring rights related to marriage. Consequently, replacing the traditional notion that marriage can occur only between a man and a woman, various countries have begun to recognize same-sex relationships in order to uphold the rights of the gender and sexual minority community. Legal recognition of same-sex relationships has been accepted in various forms, including registered partnership, civil partnership, civil union, same-sex marriage, domestic partnership, *pacte civil de solidarité*, and unregistered cohabitation, thereby acknowledging non-binary marital relationships alongside traditional binary unions. As early as 1811, the Netherlands decriminalized same-sex relationships, allowing same-sex couples to formalize their relationships through cohabitation, joint residence agreements, or registered partnerships. Subsequently, in 2000, the Civil Code was amended to grant same-sex couples the right to marry⁵³.

33. Similarly, in 2003, several provinces in Canada enacted laws recognizing same-sex marriage. Subsequently, at the federal level, a Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes was introduced to legalize same-sex marriage. To determine the constitutionality of this proposal, the federal Parliament referred the matter to the Supreme Court of Canada in the case of *Re: Same-Sex Marriage*⁵⁴. The court, adopting a progressive interpretation of the Constitution, upheld the validity of same-sex marriage. Following this, in 2005, the Civil Marriage Act was enacted, defining marriage as a legal union between two persons. Despite persistent opposition from the Roman Catholic Church, in 1998, local governments in Spain began enacting laws recognizing same-sex marriage. Subsequently, in 2005, the Central Parliament amended the Civil Code to provide nationwide legal recognition of same-sex marriage. The constitutionality of this law was challenged before the Constitutional Court of Spain, which upheld its validity in 2012⁵⁵. Similarly, in the case of *Minister of Home Affairs and Anr v. Fourie and Anr*⁵⁶ in 2005, the Constitutional Court of South Africa held that the provision of the Marriage Act, 1961 which denied legal recognition to same-sex couples was unconstitutional. Following this judgment, the Civil Union Act, 2006 was enacted,

⁴⁸ United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948, Art. 1; All human beings are born free and equal in dignity and human rights.

⁴⁹ *Id.* at Art. 2; Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁵⁰ The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006.

⁵¹ The additional Yogyakarta Principles (YP+10): Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017.

⁵² Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, November 2011.

⁵³ Acts of 21 December 2000, Stb. 2001, nos. 9 and 10 (allowing registration that grants similar legal effects as marriage in the Netherlands).

⁵⁵ Constitutional Court Judgment No. 198/2012 of November 6, SCT 198/2012.

⁵⁶ *Minister of Home Affairs and anr. v. Fourie and anr.*, Case CCT 60/04, [2005] ZACC 19.

providing legal recognition to same-sex marriages. Similarly, prior to 2009, same-sex marriages were already being legalized in Buenos Aires, Rio Negro, Villa Carlos Paz, and Rio Cuarto in Argentina. At the national level, a law legalizing same-sex marriage was enacted in 2010. Subsequently, in 2015, the Civil and Commercial Code replaced the previous Civil Code, ensuring additional rights related to marriage and granting full legal recognition to same-sex marriages.

34. In the United Kingdom, the Civil Partnership Act, 2004 was enacted to regulate and provide legal recognition for the relationships of two persons with the same-sex orientation. Subsequently, with the enactment of the Marriage (Same Sex Couples) Act, 2013, same-sex marriages were also legally recognized in the UK. In the United States, while reviewing the constitutionality of laws prohibiting same-sex marriage, the Supreme Court of the United States in *Obergefell v. Hodges*⁵⁷ in 2015 interpreted that under the due process clause and the equal protection clause of the Fourteenth Amendment, same-sex couples are entitled to the right to marry. As a result of the *Toonen v. Australia*⁵⁸, a case submitted in 1994 to the United Nations Human Rights Committee, Australia repealed its sodomy laws. Subsequently, the Marriage Act 1961 was amended through the Marriage Amendment (Definition and Religious Freedoms) Act, 2017 to recognize same-sex marriages solemnized abroad.
35. Examining the legal and judicial developments concerning the gender and sexual minority community in South Asia, in 2009, the Supreme Court of Pakistan in the case of *Dr. Muhammad Aslam Khaki & Anr v. S.S.P. (Operation), Rawalpindi & Others*⁵⁹ issued various interim orders ensuring the rights of the gender and sexual minority community, including rights to property, voting, education, and security. Subsequently, in 2018, the Transgender Persons (Protection of Rights) Act, 2018 was enacted to provide legal protection for equality and other rights of the community. In India, in the case of *National Legal Services Authority v. Union of India and Others*⁶⁰ in 2014, the court recognized that every individual has the right to make decisions regarding their own gender identity. Similarly, in *Navtej Singh Johar & Ors. v. Union of India & Ors*⁶¹ in 2018, the court held that Section 377 of the Indian Penal Code, which criminalized consensual same-sex sexual conduct as "unnatural intercourse," was unconstitutional to the extent of such criminalization. In that case, reference was also made to Nepal's *Sunil Babu Pant* case, noting that: *"The constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection"*⁶². Accordingly, it was concluded that same-sex relationships must not be subjected to discrimination, and legal provisions must be enacted to ensure equal protection.
36. Similarly, the Constitutional Court of Taiwan, in Interpretation No. 748, held that the provisions of the Civil Code that did not recognize same-sex marriage were unconstitutional⁶³. In Bhutan, in December 2020, the Penal Code (Amendment) Act of Bhutan, 2021 was enacted, decriminalizing consensual sexual relations between adults of the same sex under the category of "unnatural sex." Considering the *Sunil Babu Pant* case,

⁵⁷ *Obergefell v. Hodges*, 576 US 644

⁵⁸ *Toonen v. Australia*, 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁵⁹ *Dr. Muhammad Aslam Khaki & anr. v. S.S.P. (Operation), Rawalpindi & ors.*, [2009] Const. Pet. No. 43, SC (Pak.).

⁶⁰ *National Legal Services Authority v. Union of India and others*, AIR 2014 SC 1863.

⁶¹ *Navtej Singh Johar & Ors. v. Union of India & ors.*, AIR 2018 SC 4321.

⁶² *Navtej Singh Johar* at para. 124.

⁶³ J.Y. Interpretation No. 748 (2017/05/24).

the report of the Committee constituted by this court on same-sex marriage, the principles laid down by the Supreme Courts of India and other South Asian countries, as well as the legislative developments concerning same-sex marriage in European countries, it is evident that the legal recognition of same-sex marriage has been progressively evolving. From a South Asian perspective, the Sunil Babu Pant case has served as a pioneering guide on the rights of the gender and sexual minority community. On behalf of the Blue Diamond Society, the case recognized that same-sex marriage can exist in the same manner as marriage between a man and a woman. Pursuant to the court's order, the Committee constituted to study same-sex marriage also recommended, as an appropriate modality, the concept of equal marriage to provide legal recognition to same-sex relationships. The Committee's report has been submitted to the Government of Nepal and is under consideration. However, under Schedule 2 (a) of the Immigration Regulation, 2051, and in the non-tourist visa application forms, specifically Point No. 11, applicants are required to select either "husband" or "wife." This provision effectively prevents gender and sexual minority individuals from obtaining a non-tourist spouse visa, which cannot be justified. In the application submitted by the writ petitioner Tobias Volz, provided, the other petitioner Aadhip Pokharel identifies and certifies that he is the person with whom a marital relationship exists, and provided, the writ petitioner Aadhip Pokharel submits his citizenship certificate, the marriage registration certificate, and other necessary documents required in the application form, an order of mandamus is hereby issued in the name of the respondent Department directing them to issue a non-tourist pursuant to Rule 8 (1) of the Immigration Regulation, 2051, to the writ petitioner Tobias Volz.

37. Furthermore, regarding the matter that applicants are being deprived of rights due to the requirement under Item No. 11 of Schedule-2A of the Immigration Regulation, 2051, to specify the "husband/wife" in the application form, this court notes that in the Sunil Babu Pant case, a directive order was issued to the Government of Nepal, instructing that "persons with different gender identities and sexual orientations must be able to enjoy their rights without discrimination, on par with others, and that appropriate laws should be enacted or existing laws amended to ensure such rights"⁶⁴. The learned Joint-Government Attorney in Suman Pant's case informed the Bench that a study⁶⁵ is currently being undertaken by the Government of Nepal to implement the directives. Considering that the country is in the process of implementing the Constitution, it was noted that no specific directive order has yet been issued⁶⁶, with the expectation that the Federal Legislature will take positive measures and the directive will be implemented as soon as possible. However, as nearly six years have passed since the issuance of that order without any amendment, the rights of other members of the gender and sexual minority community have been adversely affected, which has prompted the filing of the present writ petition. Similar to the Suman Pant case, the present writ petition also raises the issue that the requirement under Item No. 11 of Schedule-2A of the Immigration Regulation, 2051, to specify "husband/wife" in the application form, adversely affects the rights and interests of persons from the gender and sexual minority community. While no directive order was issued in the Suman Pant case, it is now deemed necessary to amend this provision to ensure the protection of the rights and interests of same-sex couples. It is held that the requirement under Item No. 11 of Schedule-2A of the Immigration Regulation, 2051, obliging applicants to specify "husband/wife" in order to obtain a non-tourist visa, constitutes an undue impediment for foreign nationals who maintain a marital relationship with Nepali citizens belonging to the gender and sexual minority community. Such a requirement directly undermines the rights of these individuals

⁶⁴ Sunil Babu Pant et.al., vs. Nepal Government et.al., Nepal Law Reporter 2065, Unit 4, Decision No. 7958, pg. 6

⁶⁵ Suman Pant vs. Ministry of Home, Department of Immigration, Nepal Law Reporter 2074, Unit 12, Decision 9921, pg. 21

⁶⁶ *ibid*

to identity, dignity, marriage, and the free exercise of family life, guaranteed under the Constitution and relevant human rights instruments. Accordingly, a directive order is hereby issued in the name of the respondent to amend Item No. 11 to ensure that foreign nationals in marital relationships with Nepali citizens from the gender and sexual minority community may obtain a non-tourist visa.

38. Given the prevailing use of hierarchical terminology in existing laws, and the potential of gendered terms such as “husband/wife” to reflect or reinforce power imbalances within family relationships (for instance, portraying the husband as the dominant party), it is necessary to draw attention to these implications. Accordingly, a copy of this order shall be forwarded to the Office of the Attorney General for the information of the Ministry of Law, Justice, and Parliamentary Affairs and other relevant stakeholders involved in law-making and amendment processes. For the implementation of the observations and directives contained in this order, it is hereby ordered that a copy of this order pursuant to Rule 127 (4) of the Supreme Court Regulation, 2074 be provided to the Judgment Execution Directorate. It is hereby ordered to remove the case from the case registry and to enter the order in the electronic system and accordingly submit the case file to the Record Section.

Consenting with the above Opinion

Honorable Justice Tanka Bahadur Moktan

Bench Officer (Under-Secretary): Manoj Baral

Research Assistant: Laxmi Rana (Section Officer), Rakesh Bam (Intern), Ravi Nayak (Intern)

Dated: Year 2079 of the Month of Paush Date 4 Day 2

(Corresponding to Year 2022 of the Month of December Date 19 Day 4)