

ABORTION AND RAPE IN NEPAL - A LEGAL ASSESSMENT

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Introduction

Human rights, and particularly women's human rights, have been a burning issue in this decade. The protection of women's human rights has been discussed in various conferences from the past up to the preparatory meetings of the Beijing Summit of 1995.

The recently held Cairo meeting on population has taken a further step towards securing these rights, since population issues are directly related to this sector. The Cairo meeting faces the challenge of controlling population growth-rate through three negotiations. First, the reduction in infant, child and maternal mortality, and universal access to family planning information and services; second, estimates of financial resources, i.e. the breakdown, levels and sources that will be required to provide reproductive health services, including family planning; and third, the issue of the definition of terms like "reproductive health", "safe motherhood", "fertility regulation" and "family planning".¹

It can be observed that all negotiations of the current meeting are oriented towards family planning. Family planning not only decreases population, but must also be regarded as a branch of human rights. Women, who are the main sufferers, must be given

¹ *The Rising Nepal*, September 4, 1994.

rights over their own bodies as well as rights to take decisions with regard to family planning. Hence, abortion emerges as a leading issue in the present day situation. Rape is yet another issue which severely affects women. The number of gang rapes and child rapes has been increasing rapidly in recent years. Women who become pregnant as a consequence of rape are also not allowed to undergo abortions. These women, who are actually the victims of such criminal offences, face stark social and legal injustice.

It is high time for concerned groups and the government to take action against these offences and to uphold the rights of the women's sector. This paper attempts to assess the laws governing abortion and rape, and discusses the proposed bills for amendments of the existing laws. This paper is an analytical presentation against rape and towards securing reproductive rights for women - that is, towards legalising abortion. To this extent it is partially or wholly devoted to the protection of women's human rights.

The substance

The most sensitive issue on moral rights of humans is the right to live, and the right to freedom provides the backbone of this fundamental right. The two rights are interrelated, as no one can live without freedom and the notion of freedom is irrelevant without life. Yet very few understand the eminence of these interwoven laws. Abortion is also directly related to these rights, since by abortion - i.e. snatching the right to live - we misuse the right to freedom. Abortion is deeply related to social conscience, and the existence and emotions of a woman. But at times abortion takes a more serious

stand with respect to the emotions and conscience of humans. This the main reason why this issue still exists in a problematic condition, and no one has been able to decide whether this is an optimistic or pessimistic step for women.

Abortion in Nepal has existed from traditional times, something proved by sloka 317 of chapter 8 of the Manusmṛti, where it is stated that for the crime of abortion the punishment is extended even to those responsible for the crime. There have been various definitions of abortion. Black's *Law Dictionary* defines it as the "unlawful destruction of the human foetus before the natural time of birth", whereas the *Encyclopaedia Britannica* defines it as "the termination of pregnancy before independent viability of the foetus has been attained". According to Modi's *Medical Jurisprudence*, abortion is "the termination of a pregnancy before twenty-eight weeks of pregnancy". Thus jurisprudence allows only the termination of a pregnancy of four months i.e. within the first trimester, as abortion. In legal terminology "abortion" denotes an intentional interruption of pregnancy by removal of the embryo from the womb (Weinberg, 1979).

Various definitions of abortion conclude that abortion in real terms is the termination of pregnancy with or without the consent of the woman, before the right time of the child's delivery. Countries which are bounded by traditions, strict social norms and religious constraints regard abortion pessimistically and consider it a criminal offence. On the other hand, more developed countries have practical views on abortion and think positively. Mixed views on the subject can also be observed in the Western and European nations.

Nevertheless, their laws are flexible. Groups fighting for women's rights to control their bodies champion the right of abortion, whereas conservative human rights groups fight against it, as they consider it a deprivation of the right to live.

Existing laws governing abortion

Under Nepalese legal provision, abortion is permitted only when it is performed to save the mother's life. The existing legal provisions governing the act of abortion are as follows.

Section 28 of the chapter on homicide states that, whoever causes a woman with a foetus to miscarry shall, if such miscarriage be caused not in good faith for the purpose of saving the life of the mother, be punished for the offence of abortion.

Section 29 of the chapter on homicide states that whoever, without intention of aborting, causes miscarriage of a foetus in the event of anger, shall also be counted guilty of the offence of abortion.

Section 31 of the same chapter states that if miscarriage is caused without the woman's consent, whoever commits the offence should be punished with imprisonment of two years for a pregnancy of up to six months and imprisonment of three years for pregnancy of above six months.

If miscarriage is caused with the woman's consent, then such a woman and whoever commits the offence shall be punished with a year's imprisonment if the pregnancy is up to six months, and one year's imprisonment for a pregnancy above six months.

If the foetus takes the form of a child in both cases, in spite of attempts to induce miscarriage, then the punishments are halved.

Section 32 of the chapter on homicide states that under section 29 of this chapter, if, in the event of anger the offender is conscious of the pregnancy, then for up to six months' pregnancy a three-month term of imprisonment and for a pregnancy of above six months a six-month term of imprisonment are specified. Further, if in the event of anger the offender is unaware of the pregnancy, then fines of Rs. 25 and Rs. 50 are imposed for pregnancy of up to six months and above six months respectively.

These legal provisions in Nepal seem inadequate. They do not take into consideration the health status of women. The World Health Organisation defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". These legal clauses just consider physical well-being when they refer to "good faith" in section 28. Further, the limit of what constitutes "good faith" is nowhere defined. No mention is made of whether abortion for women carrying children as a result of rape or gang rape constitutes good faith. This does not guarantee the social well-being of women. The clause where abortion is allowed with the woman's consent does follow the line of women's rights, but it is backed up by punishments. Therefore, it is felt that abortion in rape cases, gang rape cases, failure of family planning devices and to uplift women's status must be legalised. This requires extensive amendments to the existing clauses.

The Bill proposed for discussion and subjected to amendments in the sixth session of the House of Parliament concerning abortion is as follows:

1. Instead of the previous section 28, the following amended version is to be considered. Section 28 of the existing law runs as follows: whoever causes a woman to miscarry a foetus, knowingly, with intention or in action with confident rational or reasoning, be punished with an imprisonment of from two months to two year for up to six months pregnancy and with an imprisonment of from six months to five years for above six months pregnancy, for an offence of abortion.

2. Clause 28 a) is to be added after the amended section 28, which is to be stated accordingly. In the existing section 28 of the code abortion is considered illegal under other conditions than "in good faith". But, in this amended version if such an act is performed by a competent obstetrician in an accredited hospital where satisfactory hospital procedures are observed, abortion is not considered illegal. But certain conditions are stated which run as follows.

The abortion of a foetus within three months, if carried out with the consent of the husband, under the condition that he is living, is not considered illegal.

The abortion of a foetus carried by a woman who is a victim of rape or incest, if performed with six months of pregnancy and with the woman's consent, is not considered illegal.

If pregnancy threatens the mother's life or harms the physical and mental states of the mother; or if there is a possibility of foetal

impairment, then with the consent of the woman, if a competent obstetrician performs the act, abortion is not considered illegal. These amendments, if passed by the House and implemented properly, will help to secure women's human rights.

Legal assessment of abortion

Various international personnel and organisations have been deeply involved in the issue of abortion - whether to legalise it or not. Legalising abortion would mean securing women's human rights, and the rights of women over their bodies. This would further ensure population control, especially in cases that are the outcome of the failure of family planning devices. But, as a result of the severe legal restrictions obtaining in all jurisdictions, most women are driven to what are at least technically illegal abortions. A study conducted by IIDS on 1,241 cases in Nepal showed that 7.5 per cent were induced abortions performed by untrained personnel.² However, in reality this figure must be higher, as this was a limited study.

In 1966, for the first time, twelve heads of state proclaimed that family planning must be given the authority of human rights. It was also declared that the greatest possible number of couples should be made aware of the existence and use of family planning devices, and they must be given the right to use them. In 1967, eighteen more nations, including Nepal, supported this campaign. In 1968, the UN held a conference on human rights. A proclamation was passed

² *The Kathmandu Post*, Sunday, August 14, 1994.

to the effect that the full responsibility for decisions concerning childbearing belonged to parents, and that they held full rights in taking these decisions. This was the UN Convention on Human Rights. In the same year support for women's human rights and a campaign for forwarding family planning were established, along with other issues related to women. The UN announced 1974 as the year of world population. A world population conference was held in Romania, which supported the population control campaign and vested the right of bearing a child upon the mother, thereby securing women's human rights. 1975 was International Women's Year, and the Mexico summit held in this year devoted its activities to the amendment of legal clauses that directly or indirectly supported women. Nepal also conducted activities supporting women. Various amendments were made in the family law clauses, and the Government itself initiated activities on family planning. However, laws and regulations concerning fertility have not yet been passed.

In this way, since 1966, various international level organisations have been working hard to support the family planning campaign, vesting the sole rights upon women to control over their bodies and emotions. And, since those days, efforts have been made to recognise family planning as an integral part of women's human rights. Moreover, after the UN Convention on Human Rights, each member nation is bound by the promise to amend reproductive rights in its existing codes.

Thus the recognition of family planning as a component of women's human rights, and support for the move to give women rights over their bodies and emotions, have long received

international affirmation. This ensures abortion as one of the options for family planning. Yet, many controversies have been posed, especially from the Muslim countries who hold abortion as being against their national policies. For this purpose even the recently-held UN Cairo meeting on population is facing problems, with many Muslim countries boycotting the gathering and many Muslims and Roman Catholics raising voices against it as well as accusing the UN of promoting abortion. The Vatican is not ready to compromise its religious position. As a result of this broad opposition, the Cairo meeting concluded on a negative note to the extent that it refused to accept abortion as one of the family planning options and even to encourage the use of contraceptives for this purpose. Though the summit ended on this negative note, I would like to express my view and further advocate that "abortion under certain conditions", as mentioned above, be used as an option for family planning and as an alternative means of protecting victims of rape and incest. This will work towards protecting woman's rights. If not, the conclusions are alarming.

Many experts hold the view that abortion should not be legal and that the use of contraceptives must be encouraged, arguing that abortion encourages the development of an illicit character among unmarried women. But, according to the *Kathmandu Post* sources, in a study of 1,241 cases, only eighteen cases were registered for abortion among unmarried women and widows. This number is negligible and can be improved with other modes. Yet, when family planning devices fail or for some reason cause side effects and cannot be used, abortion is the only measure for family planning.

Therefore, abortion "under certain conditions" must be legalised and the existing laws must be amended as proposed earlier. Not legalising this would take the women to unskilled hands and they would suffer maternity deaths. This is the case in Nepal, where 50 per cent of maternity deaths occur for such reasons.

Since under existing laws abortion is a criminal offence directly related to women's rights, rape is yet another criminal offence that is strictly and directly related to women's human rights. The victims of rape have to suffer social humiliation and legal injustice, not infrequently culminating in a life of prostitution or even in suicide, since the women who are so victimised and bear children as a consequence are not allowed to abort legally. Furthermore, the social and legal security of such children are not even secured under the existing laws.

Hence, in order to observe the situation of women's human rights in the country, it becomes very important to assess the clauses on rape under Nepalese law. First, however, let us note various definitions of rape. As defined by Black's *Law Dictionary* rape denotes "the unlawful carnal knowledge of a woman by a man forcibly and against her will". Rape is an ancient crime, dating from at least the time of the Anglo-Saxons in England, when it was punishable by death. From the seventeenth to the nineteenth centuries consent was the main issue in rape. Women had to show by resistance that they did not consent. The requirement that women show their non-consent by resistance is peculiar to the law of rape. Therefore, the case of rape is one of the toughest to be proved. Due to inherent social stigmas and the likelihood of social recriminations,

the filing of such cases is very rare. Nevertheless, police records show that numerous cases are recorded every year, and that this number is increasing annually. Hence, to secure the victims' rights, Nepal's legal code also has legal clauses, however inadequate these may be.

Laws governing rape

No. 1 of the chapter on rape in the Nepalese Code defines rape as the act of coercing any unmarried girl, widow or married woman to illicit sexual intercourse, with or without the woman's consent if she is under sixteen years of age, and without consent if she over sixteen years of age. Further, if such an act is performed with consent, terrifying the girl on any basis, or even through undue influence, it is also considered as rape.

The punishments for rape are as follows:

According to No.3 of the same chapter, the accused is punished with imprisonment from six to ten years if the victim is below fourteen years of age and from three to five years if she is above fourteen years of age.

No.8 of the same chapter excuse the rape victim from punishment if she kills the accused within an hour of the rape or attempted rape in the course of defending herself. However, if an hour has passed, she will be either fined Rs. 5,000 or sentenced to a term of ten years' imprisonment.

No.10 of this chapter makes the victim of rape liable to receive half the share of the property of the offender without losing her rights over her former husband's property.

Further, there are provisions for punishment for people involved in helping the rapist and people involved in gang rape, and moreover for people otherwise involved in this business and for people who order others to perform such an act. A legal clause of fining Rs. 500 for the rape of a prostitute also exists in the chapter on rape in the civil code.

These clauses on rape are not adequate to discourage the crime. It is little wonder that, even with the existing legal clauses, the number of cases filed against rape is increasing as a geometric progression. For example, no. 8 of the chapter on rape allows an hour for the victim to take revenge, something that is neither adequate nor practical: few women would be likely to be in a position to exact revenge within an hour of brutal treatment. Furthermore, the specified punishment is also inadequate to discourage men from committing the crime. Even men holding relations with prostitutes must be punished to discourage this profession. Therefore, it was realised that various amendments were required, and appropriate changes were proposed by the Government.

The bill proposed for the amendment of existing laws on rape in the sixth session of the House of Parliament deserves our attention. In the proposed bill for amendment of the chapter on rape, instead of the existing no. 3 of the chapter, the following no. 3, dealing with the punishment of offenders, was proposed:

If the victim is below 12 years, imprisonment of 10 to 20 years

If the victim is above 12 but below 16 years of age, imprisonment of 7 to 14 years.

If the victim is above 16 years of age, imprisonment of 3 to 10 years.

Instead of no.4 of the existing law wherein a year of imprisonment is specified for those knowingly involved in rape, the term has been increased to between one and three years. The period of imprisonment is doubled if the victim is below sixteen years of age.

Instead of no.10 of the existing laws which includes words like "former husband" and "life-long possession", such words have been eliminated from the clause and other clauses are added. For example, the proposed 10 (a) makes the following specification: for the investigation of crimes under this chapter, while taking the statement of the victim, a policewoman is to be appointed, and in the absence of a policewoman the statement is to be taken by a policeman in the presence of a woman social worker. And according to the proposed 10 (b), during the court procedure of crimes under this chapter, only the concerned legal personnel or the advocate, the accused, the victim, the guardian of the victim, the police personnel investigating the suit and the authorities of the court shall be present on the bench.

It can be observed that the proposed bill for amendments in the existing laws is really a step towards protecting women from this inhuman act.

The provision of equal punishment for the rape of girls below sixteen years of age, however young the victim may be, is unsatisfactory. There are records of child rape in which the victims are below four years of age. Moreover, these cases are also heard in open courts, further humiliating the victims. Therefore, the present proposed bill, which links the term of imprisonment to the age of the victim - i.e. the younger the victim the severer the punishment - is a very welcome clause. The term of imprisonment ranges from a minimum of ten years to a maximum of twenty years. This reform is very appropriate. Further, the proposed bill of amendment allows the hearing of such cases in privacy, by women police officers or in the presence of a woman social worker, and protects women from being raped - mentally - for a second time: the open court amounts to the mental rape of victims who have already suffered physical rape. It can be said that even raping a prostitute constitutes a crime.

Eliminating the term "former husband" from the existing no. 10 would entitle the woman to remain the wife of her husband even after rape. Previously, stating "former husband" would imply that he ceased to be her husband after the rape, which is actually not fair, since no woman would consent to being raped, and such injustice towards a man's wife cannot be construed as adultery.

This proposed bill, which was actually prepared by the Women Security Pressure Group and later realised by the Government in proposing it in the Sixth Session, represents a considerable step. I welcome this bill and hope it will help in protecting the women's sector from the inhuman act of rape and from general oppression.

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