

# INCLUSION OF WOMEN'S HUMAN RIGHTS AND POLITICS OF EXCLUSION

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The women's right movement in Nepal has a fascinating—albeit relatively short—history. While voices about discrimination between the sexes have been raised since much earlier in different forms, the issue—and the horrible impact it had on women—began to come to the fore arguably as a result of the decision of the Supreme Court in *Meera Dhungana*<sup>1</sup> in 1995 in the case of inheritance right of a daughter. It's been more than seven years since the decision and some achievements have been made ever since.

With the eleventh amendment of Country Code, equal right to parental property and legalization of abortion at its core, the women's rights movement has been a successful movement even though it is not comprehensive, despite all the social hurdles that are present in any undertaking of this kind. At the formal level, there have been few positive changes in the law. However, the story does not end—but merely begins—there. This article has attempted to analyze some of the positive steps, gaps in the initiatives, remaining discrimination against women after the publication of "women's right at the cutting edge of international human rights."<sup>2</sup>

## INCLUSION OF WOMEN'S RIGHT

The Supreme Court has recognized treaty jurisprudence interpreting international human rights instruments as a national law in Reena Bajracharya's case<sup>3</sup> and also declared existing discriminatory policy of Royal Nepal Airlines Corporation ultra-vires. This significant step taken by the Supreme Court was encouraged by the concerns raised in the Concluding Comments of the CEDAW Committee<sup>4</sup> on the views expressed by Supreme Court while interpreting discriminatory laws against women, which stated that any laws that do not confirm with culture and tradition of the society shall be disrupted. Important power and responsibility lies in the hands of the judiciary for the inclusion of women's human right.<sup>5</sup>

### **Rape is Rape, No Matter Whoever Commits it, Marital Rape Cannot be Excluded from Rape**

In *Meera Dhungana for FWLD vs. HMG/N*<sup>6</sup>, a writ petition was filed challenging the Constitutional validity of No. 1 of Chapter on Rape in the Country Code 1963 that has defined rape as the act of having sexual intercourse with a girl, widow or other's wife not attaining the age of sixteen years with or without her consent in whatsoever manner or attaining the age of sixteen years without her consent in whatsoever manner either exerting

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<sup>1</sup> Meera Dhungana vs. Ministry of Law and Justice, NKP, 2052, Vol 6, p.462.

<sup>2</sup> Annual Survey of Nepalese Law 2001, Nepal Bar Council, pp 260-265

<sup>3</sup> Reena Bajracharya vs. RNAC, NKP, 2057, Vol. 5, p376.

<sup>4</sup> On the Initial Report to CEDAW about the interpretation of discriminatory laws by the Supreme Court.

<sup>5</sup> Supreme Court of Nepal has interpreted that six months probation time mentioned for women health employees cannot be assumed different from the special probation period of Women Civil Servant<sup>5</sup>.

<sup>6</sup> Publication of decisions relating to human rights, 2059, Special Issues, Supreme Court, p.129.

threat, pressure or coercion or with undue influence. This definition of rape did not include the act of sexual intercourse with one's own wife without her consent and excluded such act as a crime.

In this case the Supreme Court said rape is one of the major offences amongst the criminal offences of grave nature. Rape is an inhuman act that violates women's human rights and directly causes serious impact on individual liberty and right to self-determination. It also causes adverse impact on physical, mental, family and spiritual life of a victim woman. Unlike consensual sexual intercourse in which both persons willingly participate in the intercourse, rape involves use of force and threat by the rapist. Therefore, in a civilized society, rape is taken as a heinous criminal offence without exception. Rape being a heinous criminal offence and since it has not been categorically immune by law, interpretation of No. 1 of the Chapter on Rape has to be reformed reflecting the international law including international treaties, instruments, and principles of law.

The Court also said if a woman is human; they are also entitled to all rights that a human being is entitled. A marriage does not mean that a woman needs to be a slave. To say that a husband can have intercourse with his wife without the wife's consent is to deny independent existence, right to live with self-respect and right to self-determination. Any act which results in non-existence of women, adversely affects on self-respect of women, infringes upon right of women to independent decision making or which makes women slaves or an object or property.

The Court further said it can not be said that any man who commits heinous and inhuman crime of raping a woman may be immune from criminal law simply because he is her husband. Such husband has to be liable to the punishment for the offence he has committed. It has also mentioned in it's decision that as a punishable offence, there is a situation of gap of legal provisions following the rape of one's own wife – such as providing immediate relief by allowing to live separately or to divorce the rapist husband; prescribing the degree of offence in rape committed in the circumstance of child marriage. Hence a directive order has been issued by the Supreme Court to the Ministry of Law, Justice and Parliamentary Affairs, to introduce a Bill for bringing necessary amendments with regard to the said gaps and for making complete legal provisions for justifiable and appropriate solution in an integrated manner with regard to marital rape taking into account the special situation of marital relationship and position of a husband.

### **Lower Punishment in Raping a Prostitute is Discrimination based on Profession**

A writ petition filed by Sapana Pradhan-Malla for FWLD vs. HMG/N<sup>7</sup>, challenged the Constitutional validity of No. 7 of Chapter on Rape in the Country Code 1963 that stated' in case, any person commits rape in any manner to a prostitute without her consent and through the use of force he shall be punished with a fine not exceeding Rs. 500 or, with imprisonment not exceeding one year, and whereas, No. 3 of the Chapter has provided that if any person rapes a woman depending on the age of the girls, he shall be imprisoned for three to ten years. Thus, the law itself has provided punishment differently to the culprit as per the status of women, where as culprit should not be punished differently on the basis of victim's personal, professional, social or legal status.

In this case Supreme Court said the provision, which provides less punishment for rape to a prostitute, has discriminated against them without any reasonable grounds, construing them

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<sup>7</sup> Ibid, p.144.

as lower class. The existence of such laws, which are discriminatory and unequal among citizens, does not comply with the spirit of the Constitution. It is not reasonable to think that the punishment for the crime should be different only on the basis of any profession or any individual's character. If we keep in force such discriminatory legal provisions, it further encourages the rape of prostitutes. It is, therefore, not reasonable to keep in force such legal provisions that encourage grave crimes.

The main components for rape are threat, intimidation and use of force. *Mens rea* and *actus reus* of the criminals exists in a same manner in a rape no matter if it is against any woman. And the legal provision which punishes less and more for the same type of crime only on the basis of a victim's character and profession becomes discriminatory according to the spirit of the Constitution and various International Conventions on Women and Human Rights and the recognized principles of the Justice as well.

These initiatives form judiciary is seen as an adoption of International human rights framework to provide women *de facto* rights. As a result of judicial interventions in many test cases<sup>8</sup> filed on equality issues, the government submitted Country Code (11<sup>th</sup> amendment Bill) in the parliament in 1997 and after seven years of social and political battle the bill was passed by the House of Representatives in March 14, 2002.<sup>9</sup> Initiatives to bring comprehensive and effective laws were made by registering the Bills on Domestic Violence and Trafficking in Persons in the Parliament. However, the Bills lapsed as the parliament dissolved in May 23, 2002.<sup>10</sup>

### **Daughter is Recognized as an Heir of the Family**

Daughters are accepted as heir to inherit paternal property, widows are provided full right to inheritance, Right of wife is created in husband's property before attaining the age of 35 and complete 15 years of marriage, duties for upbringing of the daughter is provided and one share of husband is given to a wife at the time of divorce. It has also created effectiveness in judgment execution in the cases relating to share of property.<sup>11</sup>

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<sup>8</sup> Chanda Bajracharya vs. Parliament Secretariat et. al. NKP 2053, Vol. 7, p.537. Sapana Pradhan Malla for FWLD vs. Ministry of Law and Justice, writ No. 2824, Decided on 2053.4.3 B.S. (July 18, 1996).

<sup>9</sup> However, Bill got royal seal only on 26<sup>th</sup> September 2002 and under the law until bill gets royal seal it cannot be enforced. Hence Bill became effective only from 26<sup>th</sup> September 2002.

<sup>10</sup> Jestha 9, 2059 B. S

<sup>11</sup> Eleventh Amendment to the Country Code.

### **Some Discriminatory Laws on Adoption has been Amended**

The new amendment has changed the provision that women whose husbands are still living or who have living sons of their own or of co-wives are precluded from adopting a child. Now the law provides a wife who has separated from her husband after taking her share of property to adopt a child, if she does not have her own son. The new law has also restricted for adoption if it is only daughter, before this amendment adoption was restricted if it was only a son.<sup>12</sup>

### **Mental Torture Ground for Divorce**

The law has provided new grounds for divorce, one is mental torture, and another is if the spouse has sexual intercourse with any other person. Before, only husbands had right to divorce on the ground of infidelity of their wives.<sup>13</sup>

### **Abortion is Legalized in Certain Situations**

The new law provides right to abortion up to 12 weeks of pregnancy for any woman and 18 weeks in case the pregnancy is due to rape or incest. The law provides for the right to perform abortion with the advice of medical practitioner at anytime, in case any pregnancy poses danger to the life of the pregnant woman or to her physical or mental health or it leads to the birth of a disabled child. Sex based abortion is prohibited and a mother's consent is important before performing abortion.<sup>14</sup>

### **Increased Punishment in Rape Cases**

The amended law has increased the punishment in rape. The law regards pedophilia as rape and provides for an additional punishment in pedophilia,<sup>15</sup> gang rape and rape of disabled and pregnant woman.<sup>16</sup> The law also provides equal punishment of imprisonment of up to 1 year or fine up to five thousand for both men and women who commit bestiality.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Country Code 1963 ( 11<sup>th</sup> amendment), Chapter on rape, No.9A.-If any person commits, or causes to be committed, any kind of unnatural sexual intercourse with any minor, such person shall be deemed to have committed rape and shall be punished with imprisonment of up to additional one year, in addition to the punishment referred to in number 3 of this Chapter, and the court has to get reasonable compensation provided by the offender to such minor, taking into account, *inter alia*, of the age and grievance caused to that minor."

<sup>16</sup> Country Code 1963 ( 11<sup>th</sup> amendment), Chapter on rape, "No.3A- Those who commit rape of a woman in group, or one who commits rape of a pregnant, disabled or incapacitated woman, shall be punished with imprisonment of additional five years, in addition to the punishment referred to in this Chapter."

## Increased the Age of Marriage

Discriminatory punishment on misrepresenting marriage has been amended. The law has also increased the age of marriage for 18 years both for a girl and a boy with consent of marriage. Without the consent of parents, the age for marriage has been increased for 20.<sup>17</sup> It has increased punishment for child marriage. It has also decriminalized unmatched marriage.

## POLITICS OF EXCLUSION

### Eleventh Amendment has not been able to Eliminate all the Discriminatory Laws against Women

Despite being a party to 16 international human rights instruments,<sup>18</sup> including the CEDAW, and constitutional guarantee to right to equality and non-discrimination, Nepal still has discriminatory legal provisions against women.<sup>19</sup> Eleventh amendment to the Country

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<sup>17</sup> Country Code 1963 ( 11<sup>th</sup> amendment), Chapter on marriage, No.2.- No marriage shall be contracted or got contracted if the man and woman are not of 18 years of age where the consent of guardian is available and not of 20 years of age where such consent is not available. If the marriage is contracted contrary to this provision, the principal offenders having attained majority, out of those committing the offense, shall be liable to the following punishment:-

Where the marriage of a girl below 10 years of age is contracted/procured, punishment of imprisonment for a term from six months to three years and a fine of one thousand to ten thousand rupees-----1

Where the marriage of a girl over 10 years and below fourteen years of age is contracted/procured, punishment of imprisonment for a term from three months to one year and a fine of up to five thousand rupees-----2

Where the marriage of a woman over fourteen years and below eighteen years of age is contracted/procured, punishment of imprisonment for a term not exceeding six months or a fine of up to ten thousand rupees or both-----3

Where the marriage of a woman or man below twenty years of age is contracted/procured, punishment of imprisonment for a term not exceeding six months or a fine of up to ten thousand rupees or both-----4

One who contracts or arranges marriage without knowledge that marriage is arranged or contracted lying that it is within the limitation of law is not liable to punishment-----5

Out of the priest, matchmaker and other abettors who knowingly performs the acts of marriage prohibited under the above-mentioned provisions, one having attained majority shall be punished with imprisonment for a term of up to one month and a fine of up to one thousand rupees-----6

Notwithstanding anything contained in the above-mentioned clauses of this number, in cases where marriage has not yet been contracted but it has already been set after performing the rites and rituals, the principal who has arranged it shall be punished with a fine of up to five hundred rupees and the set matter shall be invalidated-----7

The fines imposed under clauses 1, 2, 3 and 4 above shall be collected, if they are paid, and be given to that girl, woman or man. If the fine is not paid, the partition property of that person subject to punishment shall be confiscated, and the figure of punishment recovered there from shall be provided to that girl, woman or man. If the fine cannot be recovered from the confiscation of property, the offender shall be punished with imprisonment for up to three months for the fine not recovered-----8

Where the marriage has been contracted before the man or woman has attained the age of eighteen years and no offspring is born to them, the man or woman who has so got married before his or her age of eighteen years may, if he or she does not accept the marriage after he or she has attained the age of eighteen years, void such marriage-----9

<sup>18</sup> Though, the Parliament had passed a resolution to ratify the Convention on the Suppression of Immoral Trafficking and Exploitation of Prostitution of Others, 1949, it is yet to be deposited with the UN Secretary General.

<sup>19</sup> Discriminatory Laws in Nepal and Their Impact on Women: A Review of the Current Situation and Proposals for Changes, FWLD, August 2000.

Code<sup>20</sup> has created rights of women on the basis of their marital status. The discriminatory laws against women pose a major hurdle in the road to achieving gender equality. Although eleventh amendment of the country code has recognized daughter as heir equally as the son, it provides that daughters should return her share in case she gets married after taking her share. Similarly, a provision in the Code that daughter should return intestate property after her marriage is more discriminatory than the previous law where a daughter was not required to return intestate property once she received. The Code established that men are entitled to divorce if it is proven by the Medical Board recognized by HMG that he has no children within 10 years of their married life. Women are not entitled to divorce on the same ground. The recent amendment has not been able to change many discriminatory provisions in the Country Code.

### **Insufficient Special Measures**

Recognizing the special needs of women, efforts have been made to uplift them by enacting special laws and by initiating few specific programs in their favor. However, the existing special measures are insufficient in quantity and inadequate in quality.<sup>21</sup>

### **Lack of Awareness on Women's Rights**

Women themselves, for whom the rights are created and demanded, are not aware of their rights. Patriarchy and gender stereotypes are some of the major hurdles to women's empowerment and equality. As existing laws are scattered, it is difficult for the average person to be aware of the rights without wider dissemination of information. In a country like Nepal, where limited resource is allocated for women's development, this poses a major challenge. Though much effort has been made to increase sensitization/awareness of gender issues at various levels, there is still a long way to go. The patriarchal norms and values still reflect in the laws, judicial interpretation, policies and programs. The lack of gender sensitization has led to biases against women, which generally result in violation of women's basic human rights and fundamental freedoms.

### **Lack of Conceptual Clarity on the Principle of Equality**

Lack of conceptual understanding among the legislators, interpreters and enforcers on principle of equality has created confusion reinforcing protectionist approach, which further limits women's fundamental rights and freedom. Negative arguments against special measures obstruct the achievement of substantive gender equality as they hamper the implementation of special measures in favor of disadvantaged group.

Some positive initiatives reflected in the judicial decision cannot be said to be sufficient to reflect the protection and promotion of human rights of women in the national context, as even today Court has been excluding women from the Constitution as an independent citizen to confer citizenship to their children or spouse.

There are existing discriminatory citizenship laws,<sup>22</sup> and which was challenged in Chadrakant Gyawali's case<sup>23</sup> the court quashed the writ petition arguing court lack jurisdiction for judicial

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<sup>20</sup> The Country Code (Eleventh Amendment) Bill has been passed by the Parliament on March 14, 2002 and it has received the Royal Seal on September 26, 2002.

<sup>21</sup> Special Measures and their impact on women, FWLD 2003.

<sup>22</sup> The law provides citizenship right to those children whose father is citizen of Nepal at the birth of the child by descent (Article 9(1) of the Constitution of Kingdom of Nepal 1990) that excludes mother from lineal descent. A child found in Nepal is deemed to be citizen until father is traced (Article 9(2) of the Constitution of Kingdom of Nepal 1990) that denies existence of mother. A provision where a foreign woman married to Nepali citizen providing right to acquire citizenship (Article 9(5) of the Constitution of Kingdom of Nepal 1990) that denies similar right to Nepali women marrying a foreign citizen is denied.

review of constitutionality of the constitutional provision. Going beyond the interpretation made in Benjamin Piters<sup>24</sup> where Court argued “Article 11 of the Constitution is a general provision and the provision in the part two of the Constitution, relating to citizenship, is a specific one, the Court claimed that the special provision will prevail in case of contradiction with the general provision”, whereas in this case court said that “if there is a contradiction between two articles of the constitutions harmonious construction can not be applied as each article have its own objectives and they are independent from each other”. This decision reflects how patriarchal values are deeply rooted in the mind of law makers and law interpreters denying same treatment to women in the name of women being subject to go away, subject to give away. Policy makers and even politicians bringing arguments that nationality issue is very sensitive and also matter of national security, even raising the concern about open border with India. But my simple argument is, can in the name of open border, you can discriminate only women and deny right as an equal citizen. Why State donot want to recognize a woman, as a mother, as an independent identity and as a citizen?

I would also like to bring another example, where Foreign Employment Act, 1986 was amended inserting a new<sup>25</sup> provision, which requires foreign employment agencies to take approval of guardians of women and the HMG/Nepal before sending women for foreign employment. Men need no such requirement.

A ministerial level decision has also been taken restricting women's employment in the Gulf countries in the Middle East. However, this has not deterred women from seeking foreign employments, and many are leaving the country illegally and are therefore more vulnerable to exploitation. Sabin Shrestha for FWLD filed a writ petition<sup>26</sup> against the violation of fundamental right to equality guaranteed by the Constitution arguing that the women should enjoy the same employment opportunities as men. Unfortunately, the judges of the Supreme Court were unable to distinguish between substantive equality and discriminatory laws. Though this provision is based on protectionist approach, which restricts various rights of women in the name of protection, the Supreme Court has validated the provision on the basis of the constitutional provision, which allows for special laws for the advancement and protection of women.

Similarly in another writ petition filed by Prakash Mani Sharma for Pro-Public vs. HMG/N challenging the provision that requires a woman below 35 years of age to take approval from her guardian to get a passport, according to Passport Rules, 2027 B.S. The Supreme Court quashed the petition without even issuing the show cause to the government. This is a clear example reflecting the ignorance of the law interpreters at the highest level about the concept of substantive model of equality. As a result of this, the international commitment shown regarding the women by Nepalese Government is confined in the commitments only. In this situation the challenge seems to be to recognize the need for an accountable state - a state that is made responsible for its actions nationally and internationally in the clear-cut understanding of human rights frame work and concept of equality.

In recent years, gender equality movement has made some progress in various fields, especially on elimination of discrimination against women. The wide disparities between men and women cannot be narrowed down only through inclusion of formal law. It requires bridging the gender gap, which is a result of long history of women's social and

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<sup>23</sup> Chandraknat Gyawali Vs HMG Nepal, Supreme Court bulletin 2059, Vol 9 p 1.

<sup>24</sup> Benjamin Piters Vs Department of immigration, NKP 2048, vol 11, p 479

<sup>25</sup> Section 11 of Foreign Employment (Second Amendment Act, 2054).

<sup>26</sup> Supreme Court Bulletin, 2058, Vol. 19 p1

cultural exclusion, through the inclusion of substantive equality in the laws, policies and programs to bring equality in result.

At least all the organs of the Government, Political Parties have recognized denial of women's rights not only as violation of women's rights but as gross violation of human rights and realized their legal responsibility for such wrongs but also their accountability for inclusion of women. However the challenge is to reconceptualize human rights to include the human rights of women and to extend beyond the dictates for equality to cover concerns particular to women as a women.<sup>27</sup> We have to remind our government and political parties today that in spite of the apparent consensus on inclusion of women, the politics of exclusion of women has been questioned and will continue to be questioned.

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<sup>27</sup> International Human Rights law and Practice: Implications for Women, Florence Butegwa, From Basic Needs to Basic Rights, Edited by Margaret A. Schuler, page 38.