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Review article

Legal status on sexual assaults—Is Nepal lagging way behind compared to International law?

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ABSTRACT

Existing legal framework for sexual offences in Nepal is outdated. There is a lack of provisions for the adequate protection of the victims. Victims are often reluctant to report the cases of sexual assault owing to social stigma and lack of legal assistance. An elaboration on definition of rape and sexual assaults in law and reframing of legal procedures for effective handling of these cases is the need of the time. This article provides an in depth analysis of the existing Nepalese law on sexual assaults and the areas requiring reformation and amendment.

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1. Introduction

Violence against women dates back to centuries and is still persistent in the present society in epidemic proportions. Violence against women and violation of their rights is not confined to a specific culture, religion, region or a country. Sexual abuse is a severe form of exploitation of woman's right and rape is the extreme form of sexual abuse which injures the physical and mental health of the women. The traumatizing effects are serious and persist even after the recovery from bodily pain or suffering. While women's day and women's rights are celebrated nationwide, the irony is that her real concerns and honor is least bothered about. The plight of women in Nepal is evident by the fact that this censure crime is on the rise as depicted in Table 1 [1].

2. Nepalese law

2.1. What constitutes rape?

Article 1 in Chapter 14 on Rape of the General Code of Nepal (Muluki Ain) states [2]:

"if a person enters into sexual intercourse with a woman without her consent or enters into sexual intercourse with a girl below the

age of 16 years with or without her consent shall be deemed to be an offence of rape."

The above statement clearly states that rape is an offence commenced upon a female by a male. For the purpose of this article minor penetration of penis into vagina shall be considered sexual intercourse. Sexual intercourse within kinship (incest) is also considered rape as per article 2 of the same chapter. Chapter 15 further elaborates the prohibited degree of consanguinity and punishment for Incest.

2.2. Rape and consent

If a person enters into sexual intercourse with a female aged sixteen years or less, he is said to have committed an offence of statutory rape where question of consent or non-consent does not arise. Consent obtained by use of fear, force, coercion, undue influence or misrepresentation of facts is not valid for the purpose of this article and neither is kidnapping or hostage taking (abduction) in this regard. Consent obtained from a woman who is not in compos mentis is deemed invalid too.

2.3. Unnatural intercourse and rape

Article 9A in the chapter on Rape states, any kind of unnatural sexual intercourse with a minor is also rape.

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2.4. Time limit to file a rape case

Article 11 of the same chapter limits the filing of suit on rape charge within thirty five days of commencement of crime beyond which the suite cannot be filed.

2.5. Pregnancy from rape

As per the provision made in the Article 28B in chapter on Homicide, a victim can consent to lawfully terminate pregnancy resulting from rape/incest within eighteen weeks of gestation.

3. Discussion

3.1. Definition

Muluki Ain of Nepal is adopted from English common Law to which ingredients from Hinduism are sprinkled [2]. The three basic elements in the rape definition include: intercourse, force and lack of consent [3]. Rape is conceded as a serious crime and universally criminalized even though definition of rape in legal regime varies. In 2002, World Health Organization stated rape as a public health problem and defined it as “Physically forced or otherwise coerced penetration – even if slight- of the vulva or anus, using a penis, other body parts or an object” [4].

3.1.1. Intercourse

Nepalese law accepts minor penetration of penis into the vagina to be an offence of rape. However, touch or attempt to touch female organs is considered sexual harassment but not rape with a maximum imprisonment not exceeding one year as per chapter 13 on intention of sex in Nepalese laws. Mere touching of the labia by male organ is not considered rape as per the current law and the assailants of this crime are trialed for sexual harassment if the defense lawyer is clever enough. Rape statue in the neighboring country India after its recent amendment in 2013 made a provision to book a person for sexual assault even if he tries to manipulate any body part of the victim for sexual intent or touches/inserts any of his body part or an object into any natural orifice against will and without consent [5,6]. Similar amendments in the Nepalese laws are required or at least the word minor penetration should include any touch/penetration and the word vagina be replaced by perineum.

3.1.2. Force

It is not the sexual desire that drives an assailant to commit sexual assault/rape. Rape is unwanted and brutal exertion of power

and also a gender based violation upon the female who the assailant often knows [7]. Studies have shown that rapes by strangers merely constitute less than 20 percent of the total rape cases [8]. Holding a female and/or putting off her inner clothes for sexual intercourse is considered as sexual harassment as per the prevailing law until and unless intercourse is attempted. We are of the opinion that disrobing a female by force should be included in the section of rape itself. In this regard, Istanbul Protocol states that “Sexual torture begins with forced nudity . . . An individual is never as vulnerable as when naked and helpless. Nudity enhances the psychological terror of every aspect of torture, as there is always the background of potential abuse, rape or sodomy” [9].

3.1.3. Consent

While considering the age for consent, the prevailing law prohibits consensual sexual intercourse if a girl is below sixteen years. The legal age to marry in Nepal with consent from parents/guardians is eighteen years and twenty years if their consent is not sought [2]. This contradiction in the law regarding the age of consent needs to be looked into. The present statute allows the youths above sixteen years for consensual fornication which is not only cultural or social stigma but brings complications like habituation, teenage pregnancy, transmission of infection to mention a few. We suggest increasing the consenting age for sexual intercourse to eighteen years as a way out to the existing scenario as done in India through recent amendments [5,6].

3.2. Unnatural intercourse

As per article 9A, carnal intercourse against the laws of nature is rape if commenced upon a person less than sixteen years of age. Definition of rape includes only vaginal penetration and article 9A mentions unnatural intercourse only upon those less than sixteen years of age. As per the existing laws, forceful unnatural acts like sodomy or buccal coitus upon any person above sixteen cannot be included as an offence of rape. For the existing contradictions, authors incite for amendment in the article that any forceful intercourse, natural or unnatural, should be punishable offence and considered as rape.

3.3. Complications of rape

Rape is a legal diagnosis. Social cost of victimization as per United States Justice Department is calculated in terms of time lost from work which includes time spent on medical treatment, attending court, psychological sessions and also avoiding contact with assailant [10]. Physical injuries inflicted upon the victim in many instances are too silent. Initial psychological impacts upon

Table 1

Data related to crime against women in Nepal [1].

Year	Population of Nepal	Total female population	Rape	Attempt to Rape
2000–01	23,151,423	11,587,502	186	33
2001–02			122	35
2002–03			129	21
2003–04			157	18
2004–05			154	19
2005–06			188	25
2006–07			195	38
2007–08			317	70
2008–09			309	73
2009–10			391	75
2010–11	26,494,504	13,645,463	376	101
2011–12			481	151
2012–13			555	156
2013–14			677	245

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