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PREVENTING SEXUAL VIOLENCE IN NEPAL

THROUGH HARMONIZING RELEVANT LAWS WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

SUMMARY REPORT DECEMBER 2015

KSL Policy and Legal Research Center
Kathmandu School of Law
Bhaktapur, Nepal

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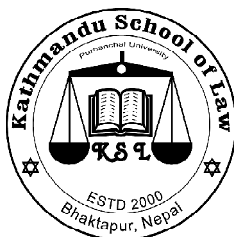

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TABLE OF CONTENT

1. OVERVIEW 1

2. INTERNATIONAL STANDARDS PROHIBITING SEXUAL VIOLENCE 2

3. JURISPRUDENTIAL OVERVIEW OF RAPE LAW.................................... 3

4. REVIEW OF EXISTING LEGISLATION ON THE CRIME OF RAPE IN NEPAL... 5

5. JURISPRUDENCE ON RAPE ESTABLISHED BY THE PRINCIPLES OF THE SUPREME COURT OF NEPAL... 7

6. OBSERVATION OF THE PROVISIONS OF THE DRAFT CRIME CODE, THE CRIMINAL PROCEDURE CODE AND THE SENTENCING ACT......11

7. ANALYSIS OF STAKEHOLDERS' OPINION... 13

8. CONCLUSION AND RECOMMENDATION.. 17

   8.1 Conclusion... 17

   8.2 Recommendations.. 21

KSL Policy and Legal Research Center, in the context of rising sexual assault and rape crimes in Nepal, conducted a study in early 2015 under the project entitled "Preventing Sexual Violence in Nepal through Harmonizing Relevant Laws with International Human Rights Standards". The study included review of existing laws along with the Supreme Court's judgements on rape and sexual violence in Nepal in order to reflect on gaps in matters of procedures, evidence collection and use of reasoning in cases relating to the rape and sexual violence. The assessment of the provisions of the draft Crime Code, including procedures of investigation, prosecution and trial schemed by the draft Criminal Procedure Code and the new system of punishment under Sentencing Act, was carried out in the light of findings established by the review of the existing laws; including assessment of court's judgements. Additionally, a comparative analysis of the rape law jurisprudence was carried out in order to discern the current trends of thoughts on rape law and approaches adopted by the courts in order to protect the human dignity, gender equality and sexual autonomy of women in the modern world. The study, with the financial and technical support of the Political and Public Affairs Office of the British Embassy in Kathmandu, came out of a comprehensive report recommending the stakeholders to revisit our legislations and 'system of law and justice' to stop sexual violence and rape. This report provides key summary of the study to disseminate the research report to wide range of stakeholders and impart the knowledge on the modern, progressive humanistic jurisprudence of rape laws to bring desired reform in alignment with the recommendations made therein.

1. OVERVIEW

This research has been undertaken to review the existing legislations on rape and other form of sexual violence in light of the international human rights standards; identify lapses, gaps and weaknesses focusing on the procedural gaps in investigation, prosecution and adjudication; review the courts judgments; explore the principles established by the Supreme Court of Nepal; and access the principles, provisions and procedures and mechanisms incorporated into the Draft Penal Code, the Criminal Procedure Code and the Sentencing Act. The main objective of this study is to enlist and review the Nepalese legal provisions dealing with rape and other forms of sexual violence and suggest amendments to harmonize them with the international standards and recognized principles of justice.

Accordingly, the study has presented a comprehensive analysis of the situations and put forward a set of recommendations as reflected in the extensive review of the existing legislation, the principles laid down by the Supreme Court and the careful scrutiny of the draft Crime Code, the Criminal Procedure Code and the Sentencing Act in the light of the prevailing international human rights standards. In addition, the study has been completed by engaging groups of multiple stakeholders in the form of comprehensive focus group discussions, with a particular emphasis towards understanding the barriers and opportunities for improving the district and national level institutional responses to crime of rape and justice to victims.

As a basic thrust, the study is emphatically concerned with the need of 'respecting women's sexual autonomy and equality' within the laws on rape in Nepal. Driven by this thrust, the study has meticulously taken an orientation to explore the current problems of the rape law and has aims to mitigate them by contributing towards improvisation of the proposed legislations. As a matter of fact, the study comprises of extensive discourse on international human rights standards on issue of sexual violence and rape as well as modern pro-women rape law jurisprudence. This study is expected to make a contribution towards addressing the lapses, gaps and weakness in the proposed bills through analysis of challenges in the existing laws and making recommendations to address them.

2. INTERNATIONAL STANDARDS PROHIBITING SEXUAL VIOLENCE

The study gives an overview of international standards that prohibit sexual violence, including rape. It examines the international human rights law as regards what rights are violated by an act of sexual violence and what State responsibilities ensue so as to take appropriate measures to protect the rights of women. It discusses about rape and other sexual violence as torture and delves into the jurisprudence developed by international courts and committees on the interpretation of matters like consent, marital rape, evidence, rights of the victims and compensation.

The elaborate discussion on international law, international guidelines and statistics about the crime of rape and sexual violence present some spectacular development in relation to the prohibition, prevention and humanistic treatment to the victims of sexual violence, encapsulated in the points below:

a. International human rights law and international criminal law complement each other in development of a comprehensive prohibition of all forms of sexual violence against women.

b. International law has been developed to 'recognize and affirm' gender-equality principles while addressing the problem of sexual violence. An elaborate rights and State responsibility framework exists in this regard.

c. International law recognizes rape and other sexual violence as an instrument of torture.

d. International law unequivocally recognizes that rape and other forms of sexual violence has a deeper affliction in the dignity of the victim apart from physical harms and thus is not merely a sexual aggression.

e. There is a universal acceptance that the principles of 'sexual autonomy of woman' and 'right to physical and mental integrity' are the foundations of the prohibition on sexual violence.

f. Proof of sexual violence requires the prosecution to establish either forcible sexual conduct in absence of voluntary consent or presence of a coercive environment in which genuine consent is not possible.

g. Silence or lack of resistance cannot be construed as consent.

h. The definition of rape under international law is expansive and pragmatic. It could serve as a model definition for States like Nepal seeking to amend their laws on rape.

i. International law has clearly developed standards concerning the treatment of victims during investigation of crimes, prosecution and the trial. It requires States to develop a practice of trial of such cases in a closed camera-court, and utmost preservation of the privacy of victims. It also seeks to minimize procedural burden on victim.

j. Despite the development of international law in consistence with modern humanistic jurisprudence based on dignity and equality of women, there are persistent barriers to elimination of sexual violence in national jurisdictions due to a deeply entrenched social construct based on gender stereotypes.

k. The statistics from highly recognized sources reveal that sexual violence is a global phenomenon of almost equal scale and severity.

l. The statistics also reveal that sexual violence is more pervasive and recurrent than generally estimated, which ascertains that action plans regarding elimination of sexual violence need to be enhanced in terms of identification of their causes and consequences and more efficacious plans should be developed on their premise.

3. JURISPRUDENTIAL OVERVIEW OF RAPE LAW

The study deals with 'jurisprudential overview of the elements, principles and laws of the crime of sexual violence'. It projects the substantial shift in the concept of rape from the traditional common law definition, that placed an onus to establish presence of resistance and attached stigma on woman, and did not provide appropriate protection to the victims, to a modern humanistic jurisprudence which does not unreasonably encumber the victim and clearly defines the elements of crimes of rape and other forms of sexual violence. The discourse also adequately reflects on the issues of 'women's autonomy in matter of sex as well as the principle of gender equality'.

The study shows that the 'history of reforms in rape law and jurisprudence' have taken a long course, and that the traditional common law rape jurisprudence, which required the victim's resistance as an imperative element of rape, is rapidly vanishing. The obsession of rape myths and gender stereotyped concepts of men and women's sexual relation, however, still continues. The new jurisprudence of rape law, which emphatically recognizes the significance of gender equality and human dignity of women, on the other hand, consists of the following principles:

a. The rape myths and stereotypes that the 'crime of rape' is an outcome of women's provocative sexual attitude are now discarded. They are attributes of a patriarchal culture, which not only discards autonomy of women concerning their sexuality but instigates control of men over women's sexuality. The definition of rape thus cannot be rested on elements such as 'resistance of victims'.

b. The crime of rape violates women's human dignity and sexual equality. The emphasis on the idea of rape as a violation of the social peace necessarily leads to a belief that 'resistance and force are imperative requirements to transform the sexual intercourse into rape'. Such belief eventually subordinates women to sexual urges of men, thus requiring women to shoulder the burden of proving no-consent.

c. 'Consent' is a subjective willingness and objective action to sexual intercourse, which legitimizes the sexual conduct between two people. Hence, the concept of consent must be taken as a mental willingness of woman who intends to voluntarily participate in the sexual intercourse. This principle, in turn, leads to the following normative understandings:

   - Resistance is not necessary 'to express the absence of the consent'. A *'No'* to the unwanted sex is enough to express no-consent. Sexual advancement from the perpetrator in disregard 'No' is enough to transform sex into a crime of rape.

   - Consensual sex is an outcome of the 'affirmative permission for sexual intercourse' from a woman. The affirmative permission implies a 'positive answer of woman to the request of the other party for sexual intercourse'. This '*yes*' includes both the subjective preparedness of women for sexual intercourse and the objective participation in the performance of sexual intercourse. Consent for sexual intercourse in this sense is not a defense of the perpetrator.

   - Any party can withdraw consent from sexual intercourse at any moment. Hence, consent is not enduring expression of choice. If partner continues sexual penetration once the *'no'* is expressed, the on-going intercourse becomes unwanted, thus giving rise to the element of unlawful sex and eventually the crime of rape.

   - The past moral character of woman is immaterial, and cannot constitute a defense to rape. In the offence of sexual assault, the victim should be shield from discovery of past moral characters and its use as a defense by the offender.

- 'Penetration' and 'completion of intercourse' cannot be made the requirements of rape. The harm to the dignity of the victim is greater than the physical harm. The crime of rape thus should not be viewed the dimension of penetration. It must be seen from the point of view of harm it has caused to the inherent human dignity and sexual autonomy of the victim. From this perspective, the Nepalese legal system on rape seems underdeveloped, archaic and not pro-gender equality; it needs to perceive rape from the humanistic perspective.
- It is not the consent of victim but the *mens rea* of the offender that should be considered strictly. If the offender tends to coerce or engages in pursuing sexual contact against the will of the victim, it must be understood as *mens rea* for rape.

4. REVIEW OF EXISTING LEGISLATION ON THE CRIME OF RAPE IN NEPAL

The study presents review of existing legislation on the crime of rape in Nepal. It includes an analysis of the existing 'definition of rape' and reflects on the concept of consent in the line of international human rights instruments. The study analyses the problematic prevalence of discrepancies in matter of determination of punishment, understating of the self-defense right of victims, lapses in right to receive compensation and time limitation for investigation and prosecution of the rape crime. Analytical reflections are also made on procedural requirements concerning reporting of the crimes of rape and sexual violence, the processes of investigation and the prosecution and the trial and judgment execution procedures.

The comprehensive review of the law on rape shows, in general, that the situation of 'access to justice' to the victim is severely impaired. The review has revealed the following specific findings, which call for prompt and effective responses from the Government of Nepal and the legislative body:

a. The existing rape law of Nepal is found overwhelmingly influenced by the notion of protecting 'virginity and chastity' of women. The notion is reflective in all aspects of law, most acutely in the system of punishment. The underlying emphasis on protection of 'virginity and chastity' has caused the judiciary to be obsessively concerned with 'looking into elements such as penetration, use of force and completion of sexual intercourse by ejaculation' as the primary grounds for conviction of the

accused. In absence of such elements, the tendency of courts to shift the 'charge of rape' into 'attempt to rape' is found a commonplace practice. A large number of victims are thus deprived of proper justice. The definition of rape and system of punishment under the prevailing law on rape must be reformed urgently.

b. The term '*jabarajsati karani*' is not only derogatory in itself but also narrows the scope of definition of rape. This term etymologically limits the act of rape into 'sexual penetration'. The crime of rape is not, however, limited to 'forcible penetration' alone. Numbers of unwanted sexual wrongdoings are covered by the term 'rape' under pro-women jurisprudence of rape. For instance, sexual acts such as anal coitus, oral sex, insertion of foreign objects into vaginal canal, touching of private parts for sexual gratification and so on are wrongful sexual activities also fall within the scope of rape. The definition of rape must encompass the elements that are essential to protect the human dignity of women, their sexual autonomy and equality. Hence, all those sexual acts that violate the sexual autonomy of women must be covered by the definition of rape.

c. The system of punishment based on the age group of victims must be ended. Rape must be defined as a crime against women's human dignity, and the system of punishment must focus on the harm caused to women's human dignity and their sexual autonomy. In this premise, the present paradigm of punishment which is strictly guided by the age of the victim is unjust and irrational.

d. The criminal liability for marital rape is insufficient. The present law treats marital law leniently. The sexual stereotypes that a husband has unlimited privilege of sex with wife has influenced the provision of the marital rape.

e. The concept of compensation provided by the existing law is extremely unrealistic, derogatory and insufficient. Although eliminated in expression, the existing law still relates the issue of victims' compensation with men's *aungsa* rights (the right to receive parental property) *in factum*. To associate compensation for rape with offenders' *aungsa* right is a flagrant violation of the victim's dignity. The present system of compensation is thus unworthy.

f. The existing law has been unable to devise a special procedure for the investigation of the rape crime, its prosecution and adjudication.

In an overall analysis, the existing rape law of Nepal is archaic and ridden by patriarchal values and gender stereotypes. Although gradually shifting towards a progressive mentality, the existing law has largely failed to show human

sensitivity towards women; it continues to perceive women as 'objects needing sexual purity'. The women's subjective willingness is negated as a factor determining her consent. The passive or silent participation of women in sexual intercourse, due to fear or threat of harm, is regarded as tantamount to consent. The rape law of Nepal implicitly compels victims to resist for denial of consent. The practice of probing for 'active or some kind of violent refusal' as a worthy evidence of no-consent has resulted in gross injustice towards many victims.

5. JURISPRUDENCE ON RAPE ESTABLISHED BY THE PRINCIPLES OF THE SUPREME COURT OF NEPAL

The study attempts to clarify the various aspects of legislations dealing on crime of rape as a sexual violence in the light of the principles laid down by the Court. It comprehensively and critically analyzes the jurisprudence on several issues such as definition of crime, the concept of consent, time limitation for filing report for legal proceeding, determination and amount of compensation and other associated issues. It presents several inconsistencies in the principles established by the Supreme Court of Nepal as well as the positive trends adopted by the Court in linking the crime of rape with principles of women's sexual autonomy and equality.

The thematic and analytical review of the Court's judgements has produced the following findings:

a. The Supreme Court has regarded 'consent' of the victim as a conclusive factor for distinguishing rape from a lawful sexual intercourse. The critical observation of several principles established by the Court in regard with the definition of the consent guides us to conclude the following:

    - Traditional notion of rape law that requires resistance of victims to express no-consent is still influencing the mindset of judges in Nepal. As a matter of fact, the Supreme Court has ruled in number of judgement in favour of the accused stating that the victim had no signs of struggle.

    - This notion of jurisprudence does not reflect on the need of respecting the human dignity of the rape victims, and only attempts to see the sexual intercourse from the perspective of the offender. The belief on underlying gender stereotypes encourages the judges to overlook the aspect of psychological harms sustained by the victim. The definition

of the consent is then taken as a state of 'non-resistance' to the sexual intercourse.

- Moreover, this notion of jurisprudence of rape law refuses to seek subjective willingness on the victim to participate in the sexual intercourse. The review of several judgements shows that 'the concept of recognizing consent as a privilege of women to indulge in sexual intercourse' is fully absent in Nepal. The judges of Nepal seem unaware of this new jurisprudence.
- The protection of the virginity and chastity is a primary thrust of the existing rape law of Nepal. The archaic law on rape does not recognize the principle of gender equality. The review of the judgements show that the courts of Nepal are still not inclined to depart from this traditional jurisprudence of rape law to the new one which intends to 'recognize the sexual autonomy of women on the basis of equality of persons'.

b. Supreme Court of Nepal has obsessively indulged in perceiving 'penetration and completion of sexual intercourse' as the imperative elements to constitute the crime of rape. It has concluded in several cases that the sexual contact between man and woman does not constitute the crime of rape without 'penetration and completion of sexual intercourse'. As a matter of fact, the Supreme Court, where it did not find the penetration and completion of sexual intercourse taken place, has tended to decline the conviction of offenders in the crime of rape; rather it has adopted a practice to define the crime where there is no penetration and completion of sexual intercourse as a crime of 'attempt to rape'. While some judgements have departed from this wrong notion, the inconsistencies and contradictions among judgements are phenomenal.

c. Nevertheless, the Supreme Court is found, in the recent times, to somehow be inclined to give up its traditional standing of 'defining a crime of rape' based on 'penetration and completion of sexual intercourse'. Some judgements have held that even the partial penetration is enough to constitute rape'. In *Jiwan Rijal v.Nepal Government,* it has made more reformative departure from the earlier trend wherein it was held that 'the evidence of rape must be evaluated keeping the natural conditions and human sensitivity into consideration'. The Court, however, failed to elaborate what the human sensitivity and the natural conditions are meant by. We are thus compelled to conclude that no explicit reformative guidelines have been developed by the Court with regard to the constituent elements of rape.

d. The system of punishment adopted by the existing law of rape is guided by the age of the victim. In this type of punishment system, the age of the victim is the conclusive element for shouldering criminal liability on the offender. This type of punishment system does not look into or consider about the intensity, consequence, and the graveness of the criminal acts, it merely focuses on the 'age of the victim'. It is a corollary of the past system of punishment in which the 'offender's caste was the vital matter for determination of the 'penal liability' to be imposed upon. The Supreme Court is silent with regard to this defective punishment system. The underlying reason behind this notion of punishment is protection of virginity and chastity of women. Unfortunately, none of the principles of the Supreme Court are conscious about this fact.

e. Analysis of the judgements regarding the punishment of the juvenile offenders, on the pecuniary liability in particular, show that the Supreme Court has been suffering from inconsistencies in its several rulings; they contradict with each other. In one case, it favours the principle that suggests imposition of the pecuniary liability on the juvenile offender, and in another it rejects the same principle and suggests that such principle would be inconsistent to the juvenile justice.

f. The stand of the Supreme Court with regard to marital rape seems comparatively progressive. The Court has emphatically declined to differentiate between rape in non-marital and marital circumstances. The debate on punishment to be provided pursuant to the status of the actor would then be deemed to be inconsistent with the right to equality as envisaged by the Constitution and the international standards that call for zero tolerance on all forms of sexual violence upon victims of all walks of life.

g. It is an undisputed right of the victim to obtain compensation from the offender as well as the State. The existing provision of law regarding the victim's compensation is not only meagre, but also non-pragmatic, conservative and non-purposive. Unfortunately, no victim-friendly interpretation on the right to compensation of the victim of rape is available from the Supreme Court. This is because the Court has till date established the offender's property as only source for compensation. But the tendency of the court requiring the victim to identify and locate the offender's property is unjust and anti-victim. No judgment of the Supreme Court is available, suggesting the government to set up an interim relief fund and prompt financial assistance of medical treatment and rehabilitation.

h. The Supreme Court seems uncertain if the given present time limitation (35 days) for reporting a crime of rape is adequate or not, scientific or unscientific. In the case of *Shuntali Dhami*, the Supreme Court issued a ruling requiring the prosecutor to prosecute three unprosecuted accused, despite the response of the Attorney General that the time limitation had elapsed. But in few days that followed, the Supreme Court, acting upon the writ petition of the alleged offender against the ruling that required the prosecutor to prosecute them, issued a stay order against the prosecutor. These kinds of discrepancies plague all the issues in rape cases. The situation discerned from the review compels to conclude that application of principle of *stare decisis* and the culture of respecting its own past precedents is meagre in the Supreme Court of Nepal, at least in the cases of rape.

i. The principle laid down by the Court that the act of rape cannot be exempted only on the ground of delay in FIR is a positive intervention in given context of the awareness among the victims and geography of the country.

j. With regard to the medical report, the Supreme Court has established some important principles, such as- medical report is good evidence showing the impact of the rape on the victim, but not a conclusive one. The court has emphatically argued that, only on the negative findings of the medical report the court cannot overlook other evidence that confirm the conviction of the offender.

k. Circumstances might lead the witnesses to change their testimony in the Court, thus engendering a state of hostile witness. However, an offender of rape cannot be relieved of criminal liability only on the ground of hostile testimony of the victim.

l. Providing exemption to the rape offender on the ground of hostile testimony might not only create an injustice to the victim but also will promote social disorder.

m. The privacy must be made a right of the victim right from the time of registration of the case in the police office or in a law court, or in other bodies, till the time of disposal of the case, and even following the disposal of that case, if necessary.

n. Testimony of the victim, as per the provision of the Evidence Act, should be deemed as direct as well as conclusive evidence. Only the plea of innocence by the perpetrators at the Court room is not sufficient to exempt him from the offence.

o. The use of discretionary power by judge of Appellate court to reduce the punishment of accused is found to be arbitrary as it is often not based on valid reason.

6. OBSERVATION OF THE PROVISIONS OF THE DRAFT CRIME CODE, THE CRIMINAL PROCEDURE CODE AND THE SENTENCING ACT

The study includes an intensive study of the draft Crime Code, draft Criminal Procedure Code and the Sentencing Act in line with the provisions of *Muluki Ain*, 2020. There are some positive changes in the draft Crime Code, such as the inclusion of oral and anal penetration within the definition of rape and increment of the victim's age threshold for statutory rape to 'below 18 years'. These provisions do reflect the international standards. However, there is a huge scope for modification in the *Chapter on Rape* in terms of both its contents and language. The definition of rape still excludes penetration by insertion of foreign object or other organs as a form of rape. No justification is provided for relying on classification of the age of the victim alone for determining the punishment. Although marital rape has been defined and its severity has been better recognized than the existing law by increasing the punishment, it is still, unreasonably, not considered as punishable as rape committed on an unmarried woman. The provision prohibiting sexual assault, misbehavior, harassment excludes application to 'other than one's wife', a phrase that is misleading and unreasonable. Also, the punishment prescribed in this provision is insufficient and not sensitive towards the sexual dignity of children and adolescents. Likewise, the provision prohibiting sexual abuse of child only protects girl child below the age of 10 years and thus fails to cover a wide segment of vulnerable children who are boys. The punishment is also not in par with the precedent set by the Supreme Court of Nepal that defines certain acts of sexual abuse of a girl child as an act of rape. Similarly, although compensation has been affirmed for the victims of rape and other sexual violence, its mechanism has not been precisely set out.

With regard to the procedural aspect such as the stages of proceedings, the Draft Criminal Code and Draft Crime Procedure Code have taken a step forward than the existing laws. An exemplary provision is that regarding imprisonment as last resort, which inculcates the reformative approach for reintegrating or re-establishing the offender in the society. However, some amendments are still necessary, such as allocating the responsibility on the police personnel

themselves to initiate the investigation of crime if necessary and making it mandatory for them to avail the services of medical doctors to provide immediate treatment to the victim wherever she resides or is located. Further, the provision on legal representation should confer a privilege on the victim to appoint her own counsel to defend her interest and also to assist the prosecutor.

The review of the concerned provisions of these legislations reveals, *inter alia*, the following major findings:

a. The definition of rape has been widened, and improved in several counts. The rise of the punishment in the crime of marital rape has been important for the purpose of addressing the phenomenal problems of domestic sexual violence. However, the provision concerning marital law has presented this crime differently than the crime of rape *per se*. The reason behind 'making such a difference in matter of punishment between the crime of marital rape and rape *per se*' is unknown or has no justification at all.

b. The inclusion of many forms of sexual violence within the scope of rape is a positive development in the draft legislation. However, the confusions and complications have widely infested the legislations. A serious review about these inconsistencies is, therefore, advisable.

c. The system of punishment adopted by the draft legislation, especially with regard to the crime of rape *per se*, is unjustified, and is marked by the absence of any particular jurisprudential scheme. The type of punishment the offender is to undergo is determined by the age of the victim, but not by the gravity of his wrongful act. The punishment system is explicably tainted by the deeply rooted patriarchal notion of women's sexual subordination. The culturally underlying notion of protecting the virginity and chastity of women is implicitly pervasive in the proposed system of punishment. This has been a great setback of the draft legislation.

d. The provision of the draft Criminal Procedure Code to conduct trial of rape case in closed camera court is a positive development, which protects the privacy rights of the victims, and as such materializes the standards set forth by the international human rights standards concerning protection of sexual violence victims' rights to privacy.

e. The reformative approach to punishment within the draft *Sentencing Act* should be widened in its scope so that the perpetrators of sexual violence also receive a fair opportunity to transform. This may, in fact, contribute in

alleviating the crimes of sexual violence in the society by helping recidivists change their attitude.

f. The provision of the draft *Sentencing Act* concerning compensation to the rape victim is a positive development. However, the Act is still conservative regarding the responsibility of the state to rehabilitate the victims. Hence, review is necessary in this regard.

7. ANALYSIS OF STAKEHOLDERS' OPINION

Key stakeholders at national and district levels were selected on the basis of a stakeholder mapping exercise, through which respondents were assessed on their apparent level of power and interest and commitment to address the problem of rape and other forms of sexual violence. The range of stakeholders included police, prosecutors, investigating officers, judges, defense lawyers, criminal law academicians, women lawyers and the member of the Statutory Committee of the Legislative Parliament. The consolidated findings of the six focused group discussions thematically are encapsulated as follows:

a. Defining 'rape'

- Defining rape on the basis of 'penetration and bruises and wounds in genital organs' are anti-victim approach.
- The definition of rape in the existing law totally avoids 'oral sex', 'anal sex' and other forms of violence such as use of foreign objects, touching and playing with the genitals using hands where a person does not actually penetrate but takes full satisfaction of sex including ejaculation; such acts should also be included in the definition of rape.
- The terms such as 'undue influence', 'false assurance' 'rape to minor', 'unnatural sex' too should be incorporated and properly explained in the definition of the crime of rape.
- The Nepali term '*jabarjasti karani*' (forcible sexual intercourse) used in the law limits the scope of rape to the sexual intercourse with complete penetration, and, hence, does not incorporate the crime as an act against the physical integrity and dignity of the victim. This traditional definition of rape based on notion of "*karani"* does not embrace the new development of rape law jurisprudence; or rather it rejects such new developments.

b. Marital Rape

- The absence of definition of 'marital rape' in the existing Nepalese law is a matter of grave concern which is not only contributing to the subordination of wife to the husband but also a serious cause of psycho-social trauma of women in Nepal, particularly in a case of battered woman.

- The prescription of punishment of imprisonment for a term ranging from three months to six months is not only inadequate but itself a cause of increasing violence of marital rape.

- There was a clear distinction in the opinions provided by the male and female participants. The male participants stated that 'marriage is a license to sex' and hence marital rape should be tried under domestic violence and a separate categorization under the *Section of Rape* is not required while the female participants unanimously opined that martial rape should be dealt as a crime of rape and punished accordingly.

c. Determination of Punishment on the basis of age of victim

- The age of the victim is an important element of consideration while fixing the term of imprisonment, but all participants, unanimously, focused on the need of having a new law which must be based on principle of 'gravity of seriousness and the intensity of the harm sustained by the victims'. They also recommended for increasing definition of child age as 18 years.

- Many people in the rural areas do not register the birth and there are very few documents to provide the real age of the person, thus this makes the determination of age a daunting task. Even the medical reports provide the age of the person in range which can be of least help while dealing with the case. This also justifies the system of punishment is not based on the age of the victim but on the gravity of the crime.

- The nature of the crime and the harms it causes on dignity of women must be the fundamental basis of the punishment.

d. Limitation

- The limitation of 35 days set by the existing Nepalese law is inadequate and cannot address the interest of justice in rape cases

as the time frame is not sufficient to collect and analyze the evidences and prosecute the case.

- A midway balance can be adopted by maintaining different limitation for different purposes. The limitation should be made flexible in the situations where 35 days seems to be insufficient. The victim's physical and mental state should be considered while initiating a rape case.
- The limitation can be set in two tiers. One for the lodging of First Infromation Report and second the registering the case in the Court. At least one year period of limitation for investigation and filing the charge should be made by the draft Criminal Procedure Code.

e. Evidence

- Investigation should be speedy for maintaining the chain of custody of the evidences with emphasis on the following:
  - DNA samples should be collected and tested and taken as primary evidence.
  - The timely recording of medical condition of the victim should be prioritized which will form a science-based evidence in order to decide a case.
  - Circumstantial evidences must be taken into consideration.
  - The victims and the witnesses of the rape should be protected by the law so that they would not turn to hostile in the court. To maintain this, the testimony by both victim and accused should be video recorded in the closed camera court.

f. Consent

- Fraudulently acquired consent is no consent.
- Resistance does not only mean physical opposition or fight, even a simple 'No' should be regarded as no-consent.
- An expressive or verbal 'Yes' should be regarded as the full expression of consent.
- The burden of proof to establish consent should be on the accused. Absence of the verbal consent or silence should not be inferred as

consent. Rather the *mens rea* of the accused should be effectively analyzed and used against him.

g. Attempt to Rape

- Nepalese legal provisions have failed to define 'attempt' in the crime of rape. This failure has resulted in the ambiguousness in differentiating between 'attempt' and 'sexual harassment' or indecent assault.

- Attempt to the crime like rape, is a violation of physical integrity and dignity of a person. Thus it should be defined in close proximity with the rape itself rather than sexual harassment or indecent assault.

h. Privilege of Self- defence and Retaliation

- The right to 'self-defence' provided by the existing *New Muluki Ain* places victim in awkward position by requiring necessarily acquiescing if not resist. Failing to resist a victim may resort to killing of perpetrator immediately, thus putting herself into a serious danger.

- The right to defence should be provided to the people defending the victim of crime of rape especially in the case of a rape of a child, minor, differently able and mentally retarded victims.

- The conditions on the use of force during such defence should be defined clearly to avoid the situations of misusing the 'defence' to pour out revenge or other personal issues of the crime.

i. Compensation

- The crime of rape is result of act of the offender and failure of the State to protect the victim. Hence, it is the duty of the State to provide safety to the victim after the crime of rape. The State must fulfil its responsibility of assisting the victim with the compensation and other assistance as soon as it is proved that she is a victim of rape and not wait for conviction. The provision of interim relief and reparation is the primary responsibility of the State.

- The victims should be given proper medical treatment according to their physical condition. They should be physically well-treated, psychologically counseled and emotionally helped.

j. Role of government attorney

- Government attorneys must work along with the investigating officer to better prepare the charge sheet and prosecute in the court in the crime of rape. The prosecutor must take responsibility of protecting victim and remain in constant consultation with the victim in order to finalize the demand for punishment and the type of compensation.

8. CONCLUSION AND RECOMMENDATION

8.1 Conclusion

The crime of rape is as old as the history of human civilization. Traditionally, the crime of rape is largely influenced and governed by the 'given perception of sex in each society'. This perception in turn is influenced by the religion, morality and culture of relationship between men and women in that given society. In traditional societies, ranging from ancient Hebrew to Hindu societies, the 'virginity and chastity' of women are emphatically and jealously protected, and the crime of rape was often defined as 'theft of men's privilege of sex with wives'. Hence, when a girl became a victim of rape it was unequivocally considered a crime of unlawful encroachment against the pride of the father, and if a married woman was raped it was taken as an unlawful intrusion against the exclusive sexual privilege of the husband. The rape laws in those societies were strict. A raped victim was considered 'wrongdoer' like the perpetrator. But she could skip the wrath of the society by 'engaging herself to resist'—the resistance was thus taken as a evidence to her defense and the absence of resistance was inferred to mean the presence of her consent.

The common law defined rape as a 'man obtaining sexual intercourse with a woman by force and sans her consent'. It required woman 'to resist the rapist to utmost of her physical capacity'. The 'use of force by the perpetrator and absence of consent on the part of the victim' are considered two major constituent elements of the 'common law definition of rape'. These two requirements transformed a sexual intercourse between man and woman into a crime of rape. The Nepalese law gave 'a right to woman for her self-defense, including retaliation'. A raped woman is exempted from the criminal liability to the homicide of the perpetrator, if he dies by her actions of anger. Like the traditional common law rape jurisprudence, the Nepalese rape law required women to be 'a noble woman and fight for protecting her chastity'.

The new jurisprudence of rape, which emphatically recognises the sexual autonomy of women and their human dignity, refutes to define women's subordination in sexual intimacy, and unequivocally recognises centrality of 'reciprocity' in sexual intimacy and requires mutuality, integration and responsibility in all affairs of sexual performance. New humanistic jurisprudence of rape law presents 'consent' as a privilege of victim, thus fully protecting victim's integrity and sexual autonomy. What is undeniable fact is that 'it is important for all societies to accept, recognize and practice a culture of sexual relationship which is based on a principle of mutual respect and understanding of men and women in matters of sexual relation'. It is thus illustrated in three theories of consent. Firstly, *'No means 'No' model,* which affirms that 'when a woman says "*No*" to a man's sexual advances, she does not consent, and courts should recognize that sexual penetration after that point is rape. This theory demands woman to verbally express her refusal. Secondly, '*Yes Model*' states that a man must obtain 'affirmative permission from his partner before having sex'. Under this theory, a woman's silence cannot be inferred as "*consent*". Thirdly, the *negotiation model* urges for 'centrality' of negotiation, in which a person intending to obtain sexual intercourse with other must consult with his partner before sexual penetration occurs. This theory promotes and advocates for 'maximization of autonomy and equality of women' in matters of sexual relation between men and women.

The aforementioned models have been derived from the comparative study of rape laws from Canada, UK, and USA. The Canadian Courts adopted the model of '*No means No model*', the English courts adopted the model of '*Yes model*' and the US Courts, however, are found to be lingering in between these two theories. US courts are still prone to require women to resist and refuse to convict the rape offenders if women have not used 'reasonable force'.

Meanwhile, the study of rape laws in India and Nepal show a different picture from the modern humanistic jurisprudence. In both of these countries patriarchal values have largely guided the laws. The right of sex is considered largely as a privilege of men where women are victims of men's subordination. The Indian law does not recognise 'marital rape' and in Nepal though it is recognized, the meagre punishment clearly depicts that 'marital rape' is not considered a grave offense. Thus, both laws have overlooked to recognise physical integrity of a wife.

Further, both laws consider 'penetration as a pre-requisite element to establish the crime of rape'. However, the Supreme Court of Nepal in the case of *Arjun Pandey v Nepal Government* has moved from the traditional approach to

modern humanistic jurisprudence of rape, the inconsistencies and controversies among various judgements of the Supreme Court have given to victims of rape only a very limited space for justice—while 'penetration' is described not mandatory for confirming the crime of rape, the element still exists as an element of rape. The Supreme Court of Nepal uses 'the completion of sexual intercourse marked by ejaculation of semen' equally important requirement of rape, thus looking for traces of semen in and around vagina of the victim as evidence to convict the offender.

The review of draft legislations in Nepal shows that the new law, the draft Crime Code, has adopted a comparatively broader definition of rape, which includes 'oral and anal sex' as instances of rape. Nonetheless, the definition still fails to incorporate the progressive concepts such as 'even the touching of the private part of the victim' constitutes the crime of rape. The tendency of 'defining such act as an attempt to rape' is general in the judiciary of Nepal.

Few progressive changes in the draft legislation can be traced out. The new law has defined 'consent', 'marital rape', 'incestuous rape', 'sexual harassment or indecent assault', 'sexual abuse of minor' specifically. However, the definition still is ambiguous. Further, the punishment and the time limitation for the crime of rape have been extended. Thus, draft legislations require extensive improvements as suggested by new rape law jurisprudence. The Supreme Court of Nepal must adopt gender sensitive attitude to consider rape cases, and the crime investigators and the prosecutors must be using humanistic women dignity-based approach in their functions.

The major findings of the study can be encapsulated as follows:

a. The existing laws on rape in Nepal (the section on Rape within the *Muluki Ain* as well as the judgements of the Supreme Court of Nepal on rape crimes) are parochial in terms of gender equality, and obsessively conservative in terms of 'sexual autonomy of women'. The protection of virginity and chastity of women is their main thrust, thus ignoring the obligation to respect the human dignity of rape victims.

b. The system of punishment in force utterly reflects the 'notion' described above. The object of punishment, that is, to adequately penalize the wrongful sexual act of the offender, is weaker and insufficient. The stereotypical gender biasness being injected into the existing law causes the system of punishment to be influenced by the 'concept of chastity' rather than by the corresponding harms

sustained by the victim. As a matter of fact, rape of an adult woman or married woman results in lesser sentence than rape of a girl child. These laws have seemingly failed to take into notice that the lower age of the victim is only an 'aggravating factor' but not the element of crime as such. However, owing to the definitional misconception itself, rape of an adult woman is considered less injurious and less severe a crime. Thus, the laws on rape have failed to protect the 'the sexual dignity of the Nepalese woman and girl child'.

c. The laws on rape are ostensibly based on a notion that 'the silence of victim' constitutes consent, and as such, provides a good defense to the perpetrator. It is unfortunate that the laws put the burden of proving non-consent on the victim in this matter, in sheer ignorance of the modern jurisprudence on sexual violence that requires that 'the consent requires subjective willingness on women to participate in the sexual contact'.

d. The misconceptions that 'penetration and completion of sexual act' are fundamental elements of the crime of rape still loom large in the legal provisions as well as the jurisprudence in Nepal. 'Looking into state of penetration and completion of sexual intercourse' for convicting the offender is a common attitude and practice in the judiciary as of now. These misconceptions emanate from the term '*jabarjasti karani*', the English equivalent terms for which is '*forcible sexual intercourse'*. The major problem in the laws on rape has thus sprouted out of the erroneous terminologies themselves.

e. Under the prevailing laws and procedures, there is little scope for the victims to be benefitted from compensation. The prosecutors and trial courts are obsessively indulged in requiring victims to 'identify and locate the property or resources' of the offenders to obtain compensation, which is one of the reasons why the confidence of rape victims on actors of criminal justice system is bleak and why increasing number of victims are turning hostile in their testimony during the trial.

f. The proposed Crime Code, the Criminal Procedure Code and the Sentencing Act under consideration of the Legislative Parliament have brought about some substantial improvements in comparison to the Chapter of Rape in the *New Muluki Ain*. The definition of rape has been expanded to cover various circumstances and progressively criminalized acts such as 'touching of genital organs of a child' for

sexual pleasure as an offense in par with definition of rape. Yet, many developments in modern jurisprudence are left unaddressed due to which the bills still suffer from many lapses and gaps.

8.2 Recommendations

In the light of the findings established by the study, as discussed in the foregone chapters, the following recommendations are put forward:

a. The proposed new law, the Crime Code, the Criminal Procedures Code, and the *Sentencing Act*, must not be in any sense influenced by 'traditional common law principles which focuses on use of resistance and force'. In this sense, victims should not be burdened with the *onus of proof* of no-consent. The requirement of 'no' or 'affirmative permission' should be the sole constituent of 'consent', and otherwise should be taken as no-consent. It is the right time for Nepal to depart from the traditional common law jurisprudence and stereotypical patriarchal values based on definition of rape followed by Nepalese law, and to adopt humanistic and pro-woman sexual autonomy-based jurisprudence of rape law.

b. The provisions on rape law under draft legislations must be reviewed thoroughly against the aforementioned principles. So, the Statutory Committee of the Legislative Parliament before enacting these legislations must conduct intensive or comprehensive public hearing by inviting experts of criminal law practitioners, criminal law academicians and sociologists and so on. The following suggestions are thus recommended:

    - As suggested by the majority of participants in the FGDs, the new legislation must be adopted as soon as possible, so that the existing rape law based on 'resistance and penetration requirements' of the *New Muluki Ain*, 2020 can be removed. Meanwhile, Nepal is party to various international treaties on gender based violence and sexual abuse of women. So, the new law must be made in harmonization with those international laws and principles.

    - The draft legislations in the definition of rape must include 'oral and anal sex', 'insertion of foreign objects' with the specific mention of pro-human dignity definitional elements. Also, the definition of the victim of rape should be gender neutral and

should be interpreted through the sociological and anthropological dimension also.

- The women's consent for consensual sex must be precisely defined in the draft legislations specially making '*NO*' requirement as enough ground for non-consent.

- The draft legislations must extend the time limitation of the filing rape case, from six months to 1 year.

- As provided for in the both existing law and the draft legislation, age of the victim is an imperative element to determine the type of punishment the accused has to undergo. The system of punishment based on 'age of the victim' is based on the notion of protecting the 'virginity and chastity' of women and as such misleading. This exceptionalism in the legal system must be removed.

- However, informing the police regarding the incident of the rape should be made within 24 hours not as a legal obligation to file the case but with the objective of promptly facilitating the medical examination. The legislation must also ensure visit of the victim by medical doctor promptly in her house or where she is located.

- The concept of self- defence should not be defined in terms of retaliation rather it should be taken as a means of defending the physical integrity by the victim. In such case, if the perpetrator dies, the victim shall not be placed into a criminal liability so that her arrest and detention should be specifically exempted unless the act of defence was motivated by a criminal conspiracy of killing. The draft legislation should extend the scope of self-defence to the guardian or other adults in case of the rape of minor, differently able or mentally retarded.

- The compensation should be made victim-oriented in accordance with international conventions to which Nepal is a State party. The draft legislation must provide for the establishment of as "Interim Relief Fund" and must make the arrangement for the 'prompt assistance in the form of interim relief to the victim by the State'. The pecuniary penalty levied on the offender should be obtained by the State in the form of penalty. The current practice of rendering the victim to 'identify and locate' the property for the sake of awarding the compensation to her must be removed

by the courts. The State must make a system of providing the compensation from the 'Compensation Fund'.

- The victim should be entitled to receive minimum threshold amount from the State right at the time of prosecution of the case.
- District court judge should be empowered to decide and execute such minimum threshold amount from the State.

c. The investigating officer and prosecutor should co-ordinate from the time of FIR is lodged to the presentation of evidence at the court. The practice by the prosecutor to consult with victims must be made a legal provision in the draft legislation.

d. The intensive study of precedent established by the Supreme Court of Nepal,from 2059 BS to 2070 BS, illustrates that in the past, the court has adopted an approach of defining rape on the basis of use of force or resistance and has made actual penetration a pre-condition for transforming sex into the crime of the rape. Nevertheless, some reforms in the attitude of the court seen. Thus, it is recommended to establish an 'expert committee' for reviewing all past judgments and declare all those judgments redundant which are based on the requirements of 'penetration and completion of intercourse'. While doing so, the Supreme Court has to adopt a principle of protecting integrity and human dignity of victims, and must recognize the principle of sexual autonomy and equality of women. Hence, the following principles are suggestions are put forward:

- Victim must not be required to prove her non-consent situation.
- The moral characters of victim must not constitute adverse evidence to establish no-consent situation.
- The act of rape should not be overlooked only on the ground of having absence of physical injuries, bruises, and traces of semen, blood stains in and around the genital organ of the victim.
- Rape must not be taken only as harm caused by the physical sexual assault, but also be taken as attack on human dignity of woman, her emotion and integrity.
- The legal proceedings should strictly maintain the privacy of the victim on the crime of rape from filing of FIR to the sentencing of the offender, and even after that if necessary.

e. The compensation to the victim should not only be considered as a means of support in the aftermath of the crime of rape. This rather should be taken as reparation to the violation of the human integrity of women.

f. State should maintain strong and effective laws and mechanisms on psycho-social, physical counselling and economic reparation to the victim of crime of rape.

g. The police, prosecutors and the courts shall be sensitive towards the victim in cases of rape. The training on the rights of the victims of the sexual abuse and the role of prosecutor, investigator and judges should be provided on developing the motivation and morale of the officers of these institutions for optimum use of such authority and capacity.

h. Nationwide dissemination of new legislation and its jurisprudence to police, prosecutors and judges should be done.

i. Awareness building program for niche NGOs on scientific and rational approach to be taken for medical examination of victim as well as the medical examination of the suspect but developed and conducted.

j. Publication of the commentary of draft legislations should be done.

k. Review of the university law course on criminal law on rape should be done to rationalize the university level law education.

l. Legal awareness training to media people on new jurisprudence of rape law and the proposed law is vital.

PREVENTING SEXUAL VIOLENCE IN NEPAL THROUGH HARMONIZING RELEVANT LAWS WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

SUMMARY REPORT

DECEMBER 2015

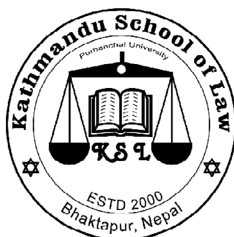

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TABLE OF CONTENT

1. OVERVIEW 1

2. INTERNATIONAL STANDARDS PROHIBITING SEXUAL VIOLENCE 2

3. JURISPRUDENTIAL OVERVIEW OF RAPE LAW.................................... 3

4. REVIEW OF EXISTING LEGISLATION ON THE CRIME OF RAPE IN NEPAL.. 5

5. JURISPRUDENCE ON RAPE ESTABLISHED BY THE PRINCIPLES OF THE SUPREME COURT OF NEPAL.. 7

6. OBSERVATION OF THE PROVISIONS OF THE DRAFT CRIME CODE, THE CRIMINAL PROCEDURE CODE AND THE SENTENCING ACT......11

7. ANALYSIS OF STAKEHOLDERS' OPINION.. 13

8. CONCLUSION AND RECOMMENDATION.. 17

   8.1 Conclusion.. 17

   8.2 Recommendations.. 21

KSL Policy and Legal Research Center, in the context of rising sexual assault and rape crimes in Nepal, conducted a study in early 2015 under the project entitled "Preventing Sexual Violence in Nepal through Harmonizing Relevant Laws with International Human Rights Standards". The study included review of existing laws along with the Supreme Court's judgements on rape and sexual violence in Nepal in order to reflect on gaps in matters of procedures, evidence collection and use of reasoning in cases relating to the rape and sexual violence. The assessment of the provisions of the draft Crime Code, including procedures of investigation, prosecution and trial schemed by the draft Criminal Procedure Code and the new system of punishment under Sentencing Act, was carried out in the light of findings established by the review of the existing laws; including assessment of court's judgements. Additionally, a comparative analysis of the rape law jurisprudence was carried out in order to discern the current trends of thoughts on rape law and approaches adopted by the courts in order to protect the human dignity, gender equality and sexual autonomy of women in the modern world. The study, with the financial and technical support of the Political and Public Affairs Office of the British Embassy in Kathmandu, came out of a comprehensive report recommending the stakeholders to revisit our legislations and 'system of law and justice' to stop sexual violence and rape. This report provides key summary of the study to disseminate the research report to wide range of stakeholders and impart the knowledge on the modern, progressive humanistic jurisprudence of rape laws to bring desired reform in alignment with the recommendations made therein.