

Nepal_Legal_Explainer

Introduction

Following the 2007 democracy movement in Nepal, an Interim Constitution was promulgated in 2007, which provided for a Constituent Assembly charged with drafting Nepal's permanent constitution. The Constitution of Nepal, 2015, after many disagreements, delays and problems, came into existence replacing the Interim Constitution of 2007. Article 4(1) of the Constitution states that Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state. The laws discussed below refer to the federal protection offered against gender based violence in Nepal.

1. The Constitution of Nepal

Article 29 of the Constitution of Nepal, 2015, makes an express provision for the right against exploitation, especially exploitation on the grounds of religion, custom, tradition, usage, practice or other such grounds. Article 29(3) specifically provides that no person shall either be subjected to trafficking or be held in slavery or servitude.

Article 38 of the Constitution of Nepal, 2015, lays down the rights of women in the country. Article 38(3) specifically states that no woman shall be subjected to physical, mental, sexual, psychological or other form of violence or exploitation on grounds of religion, social, cultural tradition, practice or on any other grounds. Such act shall be punishable by law, and the victim shall have the right to obtain compensation in accordance with law.

Article 39 of the Constitution of Nepal, 2015, enumerates the rights of children in the country. Article 39(5) provides that no child shall be subjected to child marriage, transported illegally, abducted/kidnapped or taken in hostage. Article 39(6) provides that children cannot be recruited or used in an army, police or armed group, or be subjected to abuse, exclusion or physical, mental, sexual

or other form of exploitation based on cultural and religious traditions. Article 39(7) ensures that no child can be subjected to physical, mental or any other form of torture in home, school or other place and situation whatsoever.

2. Domestic Violence (Offense and Punishment) Act, 2009

The Domestic Violence (Offense and Punishment) Act, 2009 is the penal law in Nepal which makes provisions ensuring the right of every person to live a secure and dignified life, to prevent and control violence occurring within the family and including penalties for domestic violence and offering protection to the victims of violence.

The overall purposes of this act are to assure a dignified life for women within the household by ending domestic violence; and to provide justice to victims of domestic violence by making domestic violence criminally punishable.

What is domestic violence?

"Domestic Violence", as defined in the Act, means any form of physical, mental, sexual and economic abuse perpetrated by any person to the other person with whom he has a family relationship. The definition also covers acts of reprimand or emotional abuse.

"Physical abuse" as defined in the Act, means any act or conduct which is of such nature as to cause bodily harm or injury except the losing and breaking of limbs; holding the person captive, inflicting physical pain or any other act connected therewith and incidental thereto.

"Mental Abuse" as defined in the Act, means any act of threatening the aggrieved person of physical torture, showing terror, reprimanding him, accusing him of false deeds, forcefully evicting him from the house or otherwise causing injury or harm to the aggrieved person emotionally and this phrase also denotes discrimination carried out on the basis of thought, religion or culture and customs and traditions.

"Sexual Abuse" as defined in the Act, means any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of any person; or any other act that hampers safe sexual relations.

What are the fundamentals of the Act?

This law is applicable only in cases of domestic violence against women, all over Nepal. There is no specific *locus standi* that is required under the Act- the victim herself or any person who knows about the violence can denounce the violence to the Police, the Local Government, the National Women's Commission or the Court.

An in-camera trial can also be asked for, to ensure proceedings remain confidential.

Any complaint under this Act however, must be filed within 90 days of the commission of the crime.

What is the punishment prescribed by the Act?

The Act provides that whoever commits the act of domestic violence shall be punished with a fine of three thousand rupees which may extend up to twenty-five thousand rupees; or six months of imprisonment; or both. Individuals who aid or abet in committing domestic violence are liable to half the punishment of the perpetrator, while individuals who have already been punished once for domestic violence, will be liable to double the punishment of the perpetrator.

3. Gender Equality Act, 2006

The Gender Equality Act, 2006, amended or repealed a number of civil and criminal laws on matters including rape and sexual harassment. The Act made several amendments to the Country Code, *Muluki Ain*, of Nepal. *Muluki Ain* is

the criminal code of the country and prescribes punishments for criminal offences under the Act.

What is female foeticide?

Female foeticide is the abortion of the female fetus, outside of legal methods. The Gender Equality Act, 2006, criminalised female foeticide through the amendment of Section 28A, of the Country Code and the addition of fresh Sections 28C and 28D.

What are the provisions prescribed by the Act regarding female foeticide?

Section 28A provides that No person shall cause termination of pregnancy by coercing, threatening, alluring the pregnant woman and prescribes punishment for the same.

Section 28C provides that no act to identify the sex of the fetus with the intention of terminating pregnancy shall be committed or cause to be committed. The person committing or causing to be committed so shall be liable to a punishment of imprisonment from three months to six months.

Section 28D provides that whoever carries out or causes to be carried out pregnancy termination having detected the sex shall be liable to a punishment of imprisonment from six months to two years.

What does the Act say about the Intention to have Sexual Intercourse?

The Gender Equality Act, 2006, provides that whoever, without the consent of a woman, touches or tries to touch her sensitive organ, removes or tries to remove her under garment, takes her to any solitary place in an unnatural manner, causes her to touch or catch his/her sexual organ or uses any sexually motivated word or symbol to her or shows to her such photographs or drawing, teases or harasses her with sexual motive or behaves with her in the like manner in an unnatural way or catches her with the motive to have sexual

intercourse, it amounts to be sexual harassment and the person committing such an offence shall be liable to a punishment of imprisonment up to one year and a fine up to ten thousand rupees. The person victimized of such an act shall also cause to be paid reasonable amount of compensation from the offender.

What is rape?

Rape is a form of sexual assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person without that person's consent. The Gender Equality Act, 2006, provides that, Whoever does have sexual intercourse with any woman without her consent, or with a girl child below the age of sixteen years with or without her consent, it amounts that the person has committed rape of such woman or girl child.

The Act specifies that consent acquired through fear, threat, duress or coercion or by subjecting a woman or a girl child to an undue influence, fraud or by use of force or kidnapping her or making her a hostage shall not be deemed to be the consent. Neither shall consent acquired in the state of unconsciousness be deemed to be valid consent.

What punishment is prescribed for rape by the Act?

The Act, in No. 3 of the Section illustrates the term of punishment that rapists are liable to, in accordance with the age of the victim.

So for instance, in case of the rape of a girl child of or below the age of ten years, the perpetrator would be liable for imprisonment for ten years to fifteen years.

In case of the rape of a girl child of or above the age of ten years but less than the age of fourteen years, the perpetrator would be liable for imprisonment for eight to twelve years.

In case of the rape a girl child of or above the age of fourteen years but less than the age of sixteen years, the perpetrator would be liable for imprisonment for six to ten years.

In case of the rape of a girl child of or above the age of sixteen years but below the age of twenty years, the perpetrator would be liable for imprisonment for five to eight years.

In case of the rape of a woman of twenty years or more, the perpetrator would be liable for imprisonment for five to seven years.

Moreover, in case a husband rapes his wife, he would be liable for imprisonment from three months to six months.

No. 10 of the section provides that in a case of rape, the court shall, having considered the physical or mental damage caused to such woman, cause the perpetrator to pay such woman a reasonable amount as compensation as it decides. Such amount shall be determined having regard to the seriousness of the offence and in case the victim is dead because of the commission of the offence, the torture caused to her dependent children, if any.

Section 14 of the Act substitutes No. 5 of the Miscellaneous Provision of the Act with a penalty for imprisonment from one to three years, in case a government employee has sexual intercourse with a woman in prison or custody. This also applies to doctors or health practitioners, and office bearers or employees of a rehabilitation centre.

4. Human Trafficking Control Act, 2007

This Act, aims to protect people, especially women and children from human trafficking and transportation. Under Section 2(e), 'exploitation' has been defined as an act of keeping human being as a slave and bonded and this word also includes to remove human organ except otherwise provided by prevailing law.

What is human trafficking and human transportation?

Section 4 specifies that human trafficking includes the following-

- To sell or purchase a person for any purpose,
- To using someone into prostitution, with or without any benefit,
- To extract human organ except otherwise determined by law,
- To go for in prostitution.

Section 4 also states that human transportation includes

- To take a person out of the country for the purpose of buying and selling,
- To take anyone from his /her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurements, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

What punishment is prescribed for human trafficking and human transportation by the Act?

Section 15 of the Act deals with punishment of individuals who commit offences under Section 3 of the Act. It prescribes

- Twenty years imprisonment and a fine of Two Hundred Thousand Rupees for selling or buying a human being,
- Ten years to Five years imprisonment and a fine of Fifty Thousand Rupees to One Hundred Thousand Rupees for forcing into prostitution, with or without financial benefit,
- Ten years imprisonment and a fine of Rs Two Hundred Thousand to Five Hundred Thousand Rupees for extracting human organ except otherwise determined by law,
- One month to three months imprisonment and a fine of Two Thousand Rupees to Five Thousand Rupees for a person engaged in prostitution.

For a person who is involved in transportation of human being for the purpose of buying, selling and engaging someone in prostitution-

- Ten years to Fifteen years imprisonment and a fine of Fifty Thousand Rupees to One Hundred Thousand Rupees for taking a person out of the country.
- Fifteen years to Twenty years imprisonment and a fine of One Hundred Thousand Rupees to Two Hundred Thousand Rupees for taking a child out of the country.
- Ten years of prison and a fine of Fifty Thousand Rupees to One Hundred Thousand Rupees for taking a person from one place to another place within the country.
- Ten years to Twelve years imprisonment and a fine of One Hundred Thousand Rupees for taking a child from one place to another place within the country.
- One years to two years of imprisonment for taking a person from one place to another place within the country, and two years to five years of prison for taking out of the country for the purpose of exploitation under Clause (b) of Sub-section (2) of Section 4.
- Except otherwise written in clause (e) and (f), seven years to ten years of prison for a person committing an offence under clause (b) of Subsection (2) of Section 4.
- The person engaged in provocation, conspiracy and attempt of an offence of human trafficking or transportation or an abettor of that offence shall get half out of full punishment envisioned for that offence.

Under Section 17 of the Act, the Court can also direct the payment of compensation to the victim which shall not be less than half of the fine levied upon the offender as punishment.

5. Sexual Harassment at Workplace Prevention Act, 2015

What is sexual harassment according to the Act?

Pursuant to Section 4 of the Sexual Harassment Prevention Act, any of the following unsolicited acts committed by or caused to be committed by any person in abuse of his/her position, power or by imposition of any type of coercion, undue influence, or enticement would constitute sexual harassment:

1. Physical contact and advances
2. Showing or displaying of pornographic material
3. Expressing sexual motives by way of written, verbal or non-verbal means
4. Demand or proposal for sexual favors and
5. Flirting or harassing with sexual motive.

The said Section clarifies that in the event any of the above acts are done for educational purpose or in the course of treatment or providing protection to employees, then such acts should not be regarded as sexual harassment. Therefore, as an example, if any pictures are displayed in the course of raising awareness of reproductive health, the mere display of such pictures should not constitute sexual harassment for the purpose of the Act.

What does redressal mechanisms and punishments does the Act prescribe?

The Sexual Harassment Act envisions two types of complaint mechanisms: the Internal Complaint Mechanism and the External Complaint Mechanism. Internal Complaint Mechanism is the mechanism where you can complain to the authority having the power to decide, e.g Manager. External Complaint Mechanism is the mechanism where you can go to the related CDO for complaint.

The Act provides for a fine upto Rs 50,000 and imprisonment up to six months for committing an offence under the Act. If the act is repeated by the same person, the punishment is doubled. If the authority fails to comply with the duties and responsibilities, there is a fine up to Rs 25,000. If any person is caught alleging false claims, the person may be fined up to Rs 10,000.

