

Supreme Court, Division Bench
Hon'ble Justice Min Bahadur Rayamajhee
Hon'ble Justice Kalyan Shrestha

Order
Writ No.064.....WO.....0230

Sub: Mandamus

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| Advocate Prakash Mani Sharma, resident of Kathmandu District, Kathmandu Metropolis, Ward No. 14, Kuleshore, self and on behalf of Pro-Public.....1 | |
| Advocate Rama Pant Kharel, resident of Kathmandu District, Kathmandu Metropolis Ward No. 33, Gyaneshor.....1 | Petitioners |
| Advocate Sharmila Shrestha, resident of Kathmandu District, Sakhu Pukulachi VDC Ward No. 8.....1 | |
| Advocate Kabita Pandey, resident of Kathmandu District, Kathmandu Metropolis Ward No. 34, Baneshor.....1 | |
| Advocate Basanta Prasad Adhikari, resident of Kathmandu District, Kathmandu Metropolis Ward No. 34, Baneshor.....1 | |

Vs.

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| Government of Nepal, Prime Minister and Office of the Council of Ministers, Singhadurbar1 | |
| GoN, Ministry of Population and Health.....1 | |
| GoN, Ministry of Women, Children and Social Welfare.....1 | Respondents |
| Nepal National Women's Commission, Singhadurbar1 | |
| Nepal National Human Rights Commission, Harihar Bhavan.....1 | |

Kalyan Shrestha J: The content and order of the writ petition submitted before this Bench pursuant to Articles 32, and 107 (2) of the Interim Constitution, 2063 is as follows:-

Protection and promotion of women's reproductive health is a matter of interest for everyone since this right is directly related to the development of women's economic, educational, social, political and cultural rights. The problem of uterus prolapse which is prevalent in women not only has a negative impact on their reproductive health but also causes encumbrances to their social, family, and marital life and the child born through such women face many problems. In order to provide access to the right to reproductive health and in order to eliminate the problems related to reproductive health, Article 20 (2) of the Interim Constitution, 2063, has prescribed that every woman shall have the right to reproductive

health and other reproductive rights wherein reproductive health has been guaranteed as a fundamental rights in the Interim Constitution. Without the guarantee of this right, the women shall not be able to exercise other fundamental human rights enshrined in the Constitution. Therefore, it is the constitutional obligation of the State to provide basic minimum infrastructure for the practical execution of this right. Unfortunately, no effective programs have been initiated by the State for the prevention and redressal of the problem relating to uterus prolapse of women, wherein majority of the women in Nepal face premature death and some of the women and the children born through them face sickness and illness. A study report claims that approximately six hundred thousand women are a victim of this problem and from among these women; approximately two hundred women need immediate treatment. In 2005, Safe Motherhood Network Federation, Nepal had conducted a study on Uterus Prolapse: “A Key Maternal Morbidity Factor Amongst Nepali Women” in ten districts namely Dhankuta, Siraha, Bara, Nuwakot, Kapilvastu, Baglung, Banke, Surkhet, Kanchanpur and Baitadi. The study report underlines that 4,518 women had come to the health camps and from among these women, 415 suffered from the problem of uterus prolapse. A women’s health camp was organized in Doti and Acham districts by Nepal Family Planning Association in 2056 wherein 3,000 women had come to the health camps and out of the 3,000 women, 2,000 women suffered from reproductive problems, and out of the 2,000 women suffering from reproductive problems 25% suffered from the problem of uterus prolapse. The report also underlines that 30% of such problems were faced in Terai and 70% in the hilly districts. The study report further underlines that the principal reason for uterus prolapse is lack of nutritious food at the time of pregnancy, lack of care and health services for lactating mothers, social and family discrimination against women, lack of awareness on reproductive health, lack of access to health camps or concerned units, lack of proper equipments and medical practitioners, unsafe abortion, poverty, and practice of social customs against women. The petitioner further contend that where women are vested with the constitutional rights to exercise their rights relating to health services and facilities and where the fundamental human rights guaranteed by international human rights treaties and conventions entitles women to receive free consultation, treatment, health services and facilities, the petitioners have sought the Court to provide directive orders against the Ministry of Population and Health, Ministry of Women, Children and Social Welfare and against the Prime Minister and Council of Ministers, directing them to provide services or cause to provide services through the health centers, sub-centers and from health workers and subsequently provide an updated report in this regard to the Supreme Court and the petitioners furthermore have sought the Supreme Court to issue an order of certiorari against the respondents to draft a Bill on women reproductive health and table the same before the Parliament. Likewise, the petitioners have also sought for the constitution of a special committee under the coordination of the Ministry of Women, Children and Social Welfare, comprising of representative from the petitioner’s organization as well as representatives from other organizations involved in women’s health and have sought this Court to issue appropriate orders to implement informative programs through national media and to implement people oriented programs for the resolution of the problem relating to uterus prolapse.

An order had been set aside by this Court on September 30, 2007, wherein the said order had directed to provide a copy of the writ petition to respondents 1, 2, and 3 through the Office of the Attorney General seeking the respondents as to why the order sought by the petitioners need not be issued and had directed the respondents to submit their rejoinder within 15 days from the date of receipt of the order excluding the period of travel and likewise the order had directed to provide a copy of the writ petition to respondents 4 and 5 through the concerned District Court seeking the respondents as to why the order sought by the petitioners need not be issued and had directed the respondents to submit their rejoinder in person or through their representative within 15 days from the date of receipt of the order excluding the period of travel. Furthermore, the order had directed the prioritization of the case and had subsequently directed for the submission of the case for hearing upon receipt of the rejoinder or upon the expiry of the limitation for submission of the rejoinder.

The rejoinder submitted by the Ministry of Population and Health states as such: That the petitioners have failed to state as to what rights have been violated by actions undertaken by the Ministry and that since, the rights of the petitioners have not been violated by the act of the Ministry, the writ petition should be quashed.

Likewise, the rejoinder submitted by the National Human Rights Commission states as: That extensive programs needs to be initiated to create public awareness on the protection of women's reproductive health and reproductive rights by the concerned units and organizations of the Government of Nepal and by various national and international organizations involved in reproductive health sectors. That National Human Rights Commission is involved in the protection and promotion of human rights. That the Commission has not received a single petition alleging violation of the rights relating to reproductive health and reproduction and failure to receive medical treatment in relation to uterus prolapse. That the Commission has taken notice of the subject matters raised in the petition and that the Commission shall entertain this issue in the days to come wherein the Commission has requested the court to quash the writ petition.

The rejoinder submitted by the National Women's Commission states as such: That the Commission had been established in 2058 for the protection of the rights and interest of women. That the officers appointed therein have completed their tenure of two years, and in the absence of officers, the Commission, has failed to function pursuant to its objectives. That the Commission is active in formulating and implementing programs pursuant to the rights and acts guaranteed by the Act and that the Commission is serious in relation to women's reproductive right and to the women's right guaranteed by the international treaties and agreements to which Nepal has been a Party and where the Commission need not have been made a respondent, the writ petition should be quashed.

The content of the rejoinder submitted by the Prime Minister and Office of the Council of Ministers is as such: That in order to provide continuity to the allowance provided to lactating mothers, women health volunteers fund and motherhood and new born child fund shall be

established, that health programs relating to motherhood and new born child shall be transmitted in the local language, that in order to encourage female volunteers under the family planning and safe motherhood program, a fund shall be established in each Village Development Committee wherein programs related thereto shall be implemented, that 25 free mobile health camps shall be operated to resolve the problem relating to uterus prolapse and that governmental and non-governmental organizations shall be mobilized to operate such health camps. That the Government of Nepal through its budget for the fiscal year 2064/65 has earmarked some budget for this purpose and that the Government of Nepal through its various units has to the extent of its capacity and means extending acts deemed necessary. That the Government of Nepal is active towards determining and managing the reproductive health of women and providing them security. That pursuant to the principle of separation of power as prescribed in the Interim Constitution, 2063, the Legislative-Parliament is the sovereign body in formulating laws and as such no other body can directly or indirectly direct this body to frame laws. That the writ petition is not based on reality and that this office has been made a respondent on irrelevant matters. That Section 9 of the Nepal Treaty Act, 2047, prescribes the status of international treaties to which Nepal is a Party. That the subject matter of the treaty cannot be exercised by a person as a matter of right and that locus standi does not arise on the basis of the treaty and that the writ petition in relation to international treaty is irrelevant and as such the writ petition should be quashed.

The rejoinder submitted by the Ministry of Women, Children and Social Welfares states as such: That the Ministry is active with regards to the execution of policies in relation to empowerment of women. That program to be initiated by various women development offices in relation to reproductive health of young girls and budget for this purpose has been earmarked. That no budget and programs have been proposed or approved for this fiscal year in relation to the problem of uterus prolapse raised by the writ petitioners. That although the subject matter of health does not fall within the ambit of this Ministry, the Ministry would like to notify that the Ministry is serious in formulating policies and programs with regards to the empowerment of women.

Where the case pursuant to the rules had been submitted before this Bench, the Bench upon perusal of the case files had entertained and heard the submissions presented on behalf of the petitioners and respondent.

The learned advocates, Ms. Kabita Pandey, Prakash Mani Sharma and Rama Panta made their submission as such: That the reproductive health of a woman not only includes the birth of a child but also includes matters relating to healthy living. That the Interim Constitution 2063, prescribes matters relating to reproductive health as a matter of fundamental right. That various reports have underlined, that provided, woman during pregnancy and within 45 days of pregnancy are involved in heavy chores fall victim to the problem of uterus prolapse. That provided, the mother is healthy, the child also remains healthy. That investment made towards the health of woman is not a personal investment but is an investment for the future of the nation. That the State should show special interest in the reproductive health of woman and subsequently conduct and transmit public awareness and informative

programs. That where the problem of uterus prolapses is on the increase, ipso facto signifies the State failure in fulfilling its responsibility. That the women have failed to enjoy the reproductive rights although such rights have been guaranteed by the Constitution, that the economic and social tradition of Nepal has had an effect on women's reproductive health. That provided, public awareness programs and diverse health programs are operated, it is deemed to bring some reform and as such an order of certiorari should be issued.

Likewise, Acting Deputy Attorney General, Kumar Chudal on behalf of Prime Minister and Council of Ministers made his submission as such: That the problem of uterus prolapse is a grave and sensitive subject matter and for the resolution of the problem sufficient resources are deemed necessary and resolution of such problems would consume a considerable amount of time. That the underlying principle issue herein is the issue of sensitizing and orienting the general public on this matter. That the problem will be resolved slowly and hence it is not possible to eradicate the problem immediately. That where the Council of Ministers through a decision have decided to operate 25 camps and have also decided to raise public awareness in this regard and have for the year 2064/065 earmarked budget for this purpose clearly indicates the nation's commitment towards eradicating this problem and hence order as sought by the petitioners' need not be issued.

Upon hearing the submissions and plea presented therein, it is for this Court to decide as to whether or not the order as sought by the petitioners need be issued. The principal plea made by the petitioners in this regard is as such: That no effective programs have been initiated by the State to redress the problem of uterus prolapse wherein majority of the women face premature death and many women and children born from such women are sick and suffer from different ailments. That special provision should be made wherein women should be entitled to free consultation, treatment, health services from the medical centers, sub-centers and from health workers. That an order should be issued by the Court, directing the State to draft a Bill on women's reproductive health and submit the same before the Parliament and that various public awareness programs should be initiated through the national media for the resolution of the problem of uterus prolapse.

From the perusal of the writ petition, it can be deemed that the writ petition has been submitted as a public interest and that the organization has registered the writ petition with the purpose of obtaining judicial remedy. The said organization for some decade has been involved and has been active in the area of public interest wherein the issue of uterus prolapse has been raised by the petitioners and have sought this Court to address the responsibility of the State and as such the writ petition submitted by the petitioners organization is deemed to be an issue of public interest and that the subject matter does not involve the personal interest of the petitioners organization but rather it deals with the problems related to uterus prolapse faced by the women and hence the subject matter is deemed to be an issue of public interest. The respondents have not objected to the subject matter and neither have they raised the issue of uterus prolapse to be a personal matter. Right of women and reproductive rights is a matter of human rights which has been incorporated as one of the fundamental rights in the Interim Constitution. Provided, where

this writ petition has been submitted for the purpose of implementing those rights, if it cannot be deemed to be matter of public interest, then it would be difficult to define as to what matters would fall within the ambit of public interest. Therefore, pursuant to Article 107 of the Interim Constitution, 2063, the said matter is deemed appropriate to be entertained by this Bench.

Prior to entering into the claim sought by the petitioners, the Bench deems that it would be appropriate to make a general analysis of the matters raised by the petitioners with regards to the nature of the right to reproductive health and its execution.

Within the extensive periphery of human rights, human rights of women hold an important place. The concept of human rights envisages the diverse status and experience of human and prescribes conditions deemed necessary for living a life with respect or creates conditions thereof and encourages for the protection and preservation of such rights. **Although, human rights is applicable to humans only, there cannot be one single standard for execution of human rights since execution of rights depends upon a person's physical, economic and social status.** Although it is a common aim to be identified as a human being, due to the diversity in relation with regards to experience and the diversity in addressing the subsequent problems, there cannot be a common standard of human rights applicable for all. For example, **where a common standard of human rights were made applicable for oppressed class and an oppressor or where a common physical standard were to be prescribed for a person with disability and an able person, the result in terms of equality would not be as envisaged by the human rights philosophy.**

Therefore, the nature of human rights in relation to women should be specially considered. The writ petition raises the issue of exercising the right to reproductive health of women and resolution of the problem relating to health. In a wider context, reproductive health is not a subject matter that is confined and related to a women's issue but rather is an issue of all human beings and as such is also an issue of the males. But experience shows that this problem is faced by the women and that the State has not been able to address this problem as desired.

Reproductive health has a direct relation to the physical attribute of a woman and this should have been a social human cause with regards to the resolution of this problem but unfortunately it has been deemed otherwise. Women's health is different than the males due to their reproductive health. The health of a woman varies from the time of birth till their death. During the process of the development of the health of a male and female, various changes occur accordingly to their age and problems also develop differently. Provided, proper health facilities cannot be managed to address the physical attributes of a woman, the medical facilities designed for a male will fail to address the problems faced by the women. Female, male, minor, aged, handicapped, torture victim, and people who are economically, socially and culturally discriminated fall within the ambit of humanity. Therefore, it is necessary to address these experiences and recognition of such issues assists in the

protection of human rights, and hence it is deemed necessary to look into and understand this problem as a part and parcel of human rights of woman.

Reproductive health is an integral part of the health of a woman and is considered as a matter of human rights of a woman. Although, reproductive health initially was considered as a part and parcel of health facilities this is now considered as right to health. The right to health recognized by the Universal Declaration of Human Rights has also been recognized by Article 12 of the International Covenant on Economic, Social and Cultural Rights wherein the said Article recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The said Article also prescribes and emphasizes that the State Parties should take steps towards the reduction of still birth-rate and of infant mortality and for the healthy development of the child. Article 10 on The Convention on the Elimination of All Forms of Discrimination against Women prescribes the right to access to information on health whereas Article 12 prescribes that no discrimination shall be made against women in the field of health care and also guarantees and ensures women appropriate services in connection with pregnancy and post-natal period, free services where necessary as well as adequate nutrition during pregnancy and lactation.

Reproductive health pursuant to the definition made by International Conference on Population and Development (ICPD) is a state of complete physical, mental and social well-being in the absence of any sickness or infirmity. It implies that the provision of medical treatment for any particular illness or problem will not ipso facto address the necessity of the reproductive health in toto. In order to reflect reproductive health in its true form, freedom to decide on matters relating to the health of a woman, freedom to decide the number, spacing and timing of their children, access of information regarding family planning, right to access to health care services and privacy of information are deemed important. While considering the facilities on reproductive health, provisions relating to consultation on family planning, information, education, communication, education on pre-natal pregnancy, safe maternity services, post-natal services, breastfeeding, care of mother and child and safe and valid abortion are included.

Where there is any problem in any other points raised hereinabove, it creates an impact on reproductive health and subsequently on the health of the woman.

Due to deficiency in nutritious food, access to family planning, provision of leisure and facilities of health treatment can create complex problems relating to reproductive health. From among those problems is the problem of uterus prolapse raised by the petitioner. Although, the problem of uterus prolapse can be deemed as a part of the problem related to reproductive health, this problem in toto represents the problem of reproductive health as well as the health of woman and therefore, it is necessary to entertain this subject as a matter of constitutional and legal right and also the responsibility of the State and the strategy taken by the State should also be taken into consideration.

It is now for the Court to decide as to whether or not the question of uterus prolapse raised by the petitioner is based on the fundamental and legal rights and as to whether or not the said subject matter is justifiable.

As discussed hereinabove, **the problem of uterus prolapse is a matter concerning the health of woman. Right relating to health of woman is a part of right to life. Except as provided for by law no person shall be deprived of his personal liberty. Likewise, the right to live a dignified life is also a basic right to life. Provided, the State does not provide the basic facilities or protection for the health of a human being, then proper protection of the right to life cannot be achieved. Therefore, it is necessary to link life with right to health.**

Although, right to reproductive health has been termed as a matter of health, this has to be linked with the right to life, right to freedom, right to equality, right against torture, right to privacy and right to social justice and right of woman. Where, the right to reproductive capacity is not recognized, this would not only exploit the right of women but will also create numerous encumbrances against the right of women. Therefore, the right over one's body is an important right and on this basis, other elements on reproductive health must be evaluated. For example, the right as to whether or not to conceive, right to give birth and the number of children, use of family planning methods are all supplementary to those rights. Where women are compelled to give birth to children, that would be a matter of torture and this being a personal event and if right to information on these matters are not protected, it would be an intervention against her right to privacy. Where proper management as deemed necessary regarding information, facilities and treatment on reproductive health is ignored and where investment is only made towards the health of the male or in other areas of health, which would create negative impact on the reproductive health then that would be deemed to be a case of inequality. Likewise, where women are prevented to exercise their legal rights voluntarily, and are subjected to external pressure resulting in adverse conditions to their health, then such instances can be deemed to be a violation to their right to freedom. Therefore, rather than limiting the reproductive health to a particular right, it would be appropriate to relate them with other rights. Where, the rights are interpreted with the objective of displacing one another, this would create a conflict between the rights, which would result in the defeat of one's own right. Jurisprudence on rights does not allow for such kind of interpretation. Provided, where one's own right is to be refuted or where the appropriateness of such rights is deemed to be terminated, then placement of rights within the legal framework would have no essence. Therefore, it is necessary to take into consideration the interrelation of various rights and is also necessary to resolve through this case as to how these rights could be practically translated.

Women's right to reproductive health has been recognized by the UN Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on

the Elimination of All Forms of Discrimination against Women. During the execution of these Conventions, various events such as the Iran Conference, Egypt Conference, World Women Conference in Beijing had been convened under the convenorship of the United Nations. These conferences not only emphasized on the recognition of these rights but also provided guidelines towards the extension and effective execution of these rights. The World Health Organization had conducted a special study on the nature of reproductive health and its limitations, and the report points out that reproductive health of women includes, physical, mental and social well being of a woman.

Nepal is a Party to the above human rights documents and by participating in various international assemblies; Nepal has formally expressed its commitment toward those instruments. Article 35 (21) of our Constitution expresses its allegiance towards the Charter of the United Nations. The Covenants and other legal documents made pursuant to the recognition and philosophy of the United Nations, and the responsibilities created by these treaties and the access to these benefits by the general public is a question that has been raised by the petitioners, and as such these questions needs to be addressed and can be addressed. Participation in the international Conventions related to human rights or ratification of these Conventions is deemed to be the acceptance of the responsibilities towards the execution of human right laws proposed by the international community. Although, recognition of human rights is universal and its subsequent execution is local, the Member State should exercise its capacity to the maximum and should prepare an infrastructure for the universal protection of human rights. Pursuant to the expectation of the global community and for the satisfaction of our own population, it is necessary that these treaties should be satisfactorily executed. Where such treaties are executed on a national level, we would not only be exercising our international responsibilities, but on the other hand we, pursuant to the direction provided by the international law relating to human rights, would be protecting the human rights of the people. Therefore, it is evident that adherence to the contemporary international laws is not only obligatory but also fruitful.

Likewise, Section 9 of the Treaty Act, 2047, has opened various avenues for the application of international treaties that has been ratified by Nepal and past decisions rendered by this Court have honored the provisions prescribed in the international treaties and taking cognizance of these treaties the court has interpreted national laws, and in many instances, the Court has issued directive orders to formulate laws pursuant to those treaties. Pursuant to the jurisprudence related to the treaties, our courts have without any bias accepted and recognized the contribution made by the international laws and tried to maintain coordination between the international and national law. This is in itself positive.

Matters relating to reproductive health is not only a right relating to health and a right recognized by the international treaties but is also recognized as a human right under Article 20 (2) of the Interim Constitution. The said Article prescribes that every woman shall have the right to reproductive health and other reproductive rights. The said Article prescribes this right as a fundamental right and prescribes no conditions to this right and therefore, meaningful and effective execution of this right is expected from the State.

Under the proviso prescribed under the Directive Policies and Principles of the State or under the proviso prescribed under the Right to Equality, the said proviso prescribes for special programs for the advancement of women and other class of people, whereas the said **Constitution has prescribed reproductive health under the fundamental rights of the Constitution which clearly expresses the State's priority. This right which has been prescribed as self-executionary nevertheless awaits sufficient legal provisions for its effective execution. Truly speaking, this right has been provided due respect and therefore, recognizing the fundamental right it is necessary to seek alternatives for the effective execution of this right. In other words, the right to reproductive health, recognized as a fundamental right, needs to be protected whereby the problem of uterus prolapse as stated by the petitioners would be effectively addressed and in order to protect and implement these rights, it is necessary to formulate laws as deemed necessary.** The right established as fundamental right should be made consumable by the State through the formulation of necessary laws and programs. In the absence of any mechanism, provided these self-executory right becomes ineffective, would constitute a breach of the obligations vested upon the State. Provided, such conditions arise, the court may issue necessary order or directive to fulfill those responsibilities.

Under the Interim Constitution, the right to reproductive health has been prescribed as a non-derogable and non-restrictive fundamental right. Prescription of the right to reproductive health in the Constitution is not in itself sufficient but rather it is equally important that this right is effectively enforced. Unfortunately, no laws till date in relation to reproductive health has been enacted and implemented and neither has it been defined in any law and nor any prescribed procedure has been prescribed for the enjoyment of this right. **Reproductive health is a right, mere recognition of which in the Constitution is not sufficient, rather physical facilities should also be made available for the enjoyment of this right. In the absence of any legal, institutional, procedural and result oriented infrastructure, this right would be limited to formalities.** Therefore, in order for people to realize this right, efforts should be made towards the formulation of policies (including formulation of laws), drafting of plans, its subsequent implementation, extension and evaluation.

This class of right is deemed as social, economic and cultural right. This right is different than the civil and political rights and mere declaration or recognition of this right is not sufficient for its execution, but rather there should be positive infrastructures for the execution of this right. In such rights it is not necessary to prove as to what rights the State violated, but rather it is necessary to see as to how active the State was or what positive programs did the State launch for the enjoyment of this right and is necessary to prove as to whether or not practical benefits were provided for this class of individual. Therefore, remedial jurisprudence of social, economic and cultural rights is different than the remedial jurisprudence of civil and political rights and therefore, the State pertaining to the nature and necessity of remedy should take into consideration appropriate remedial methods.

It is not possible to identify a breach committed by the State in the exercise of the right relating to reproductive health. Nevertheless, the Constitution has provided special recognition to this right and in the absence of any infrastructure provided; the targeted group cannot enjoy such right, declaration of such right has no particular importance and subsequently, the State should be held responsible for such situation.

Right to reproductive health and other rights are deemed to be important in the eyes of economic and social justice, and this right has been provisioned in the current Constitution. Therefore, the State should develop necessary approaches and create satisfactory and conducive environment for the exercise of such rights. In short, the petitioners have sought for the promulgation of laws for regulating matters relating to reproductive health and for provision of basic facilities relating to reproductive health and this matters are incorporated under Article 20 of the Interim Constitution and the demand sought by the petitioners is also based on the international covenants relating to human rights that has been ratified by Nepal and this being a matter of legal right, the Court deems it justifiable to entertain the said issue.

As to whether or not the matter falls within the ambit of public interest, it is necessary to identify the problems lying therein.

Delivering social justice is the principal need for cases that are of social and economic nature. In such kind of issues, rather than evaluating the problem of an unidentified class it is appropriate to evaluate the problems of such class along with the problem of other classes and collectively address the prevailing problem. Otherwise, each party would enter the jurisdiction of the Court with their personal problems and if the Courts were to deliver remedy on this basis, social justice would not prevail. Social justice can be maintained through public interest cases where injustice experienced by many can be addressed collectively.

In the said case, the petitioners have not entered the Court due to personal problems or injustices experienced by them, but rather submitted the said case relating to the problem of uterus prolapse, which is based on various research reports.

However, question may arise as to how appropriate it would be to seek constitutional remedy on the basis of study report made by non-governmental organizations or on the basis of reports that have been submitted [by those] outside the judiciary. Such question may arise because in a judicial process every single evidence is thoroughly examined and upon such examination it is decided as to whether or not such evidence should be accepted by the court. But it is not possible to follow such legal process in relation to the study or reports made by private or non-governmental organizations, and there could be a risk in determining any conclusion on the basis of such reports. Nevertheless, the said case is not a case instituted at the private level between the plaintiffs and respondent, but rather it is an issue of public interest and as such collection and examination of evidence pursuant to the evidence law need not be made.

In order to depict the gravity of the problem, the petitioners have submitted various data and various study reports made by non-governmental organizations have been submitted in order to substantiate the data.

Rather than accepting the said report as evidence regarding the problem of uterus prolapse, it should be considered a report highlighting the nature and trend of the problem. And therefore, the factual data presented in the report need not be challenged. The study has been limited to 10 districts, and many of the questionnaires presented therein relate to the quantity and quality of the participants and therefore, it is not possible to conclude as to whether or not such report is dependable and scientific and as such the report cannot be accepted as the final indicator.

The respondents have not objected or questioned the information and the problems depicted through the report submitted by the petitioners, neither have they rejected or termed the conclusion of the report unnatural. Likewise, neither have the respondents denied the prevalence of the problem nor have they denied that legal or practical remedy should not be made available to redress it. Rather, from among the respondents, the Prime Minister and the Office of the Council of Ministers have given due recognition to the problem and expressed their commitment to redress the problem. With regards to the petitioners plea for promulgation of law in relation to reproductive privileges, the respondents have stated that since the matter falls within the ambit and jurisdiction of the Legislature and pursuant to the principle of separation of powers, the court in this regard cannot issue orders for promulgation of laws, and it as such cannot be a subject to be entertained by the court. With regards to the plea made by the respondent, it cannot be disputed that formulation and promulgation of law falls within the ambit and jurisdiction of the Legislature, whereas the petitioners by citing lack of adequate laws for enjoyment of rights relating to reproductive health have sought for the issuance of an order for the enforcement and enjoyment of those rights. The respondents have neither denied the existence of the problem nor have they stated that services related to reproductive health have been determined through the management and provision of law and privileges. **The plea that the right to frame laws is vested upon them is not sufficient in itself for the protection of the fundamental rights of the people. In a true sense, the Legislature is vested with the authority to frame laws but where the Legislature does not perform well pursuant to the provision of the Constitution, or fails to execute its responsibility with regards to the protection of the fundamental rights of the people, the court in this regard can call for attention for the execution of the States responsibility.**

The court in many instances has notified the Legislature and the Executive and has issued various orders or directives for the formulation of necessary laws and subsequently laws have been formulated or amended. Objective of the constitutional system is to protect the rights of the people and to provide dynamic governance. Although coordinate Branches established pursuant to the Constitution are separate according to the division of their work, the ultimate objective is to assist in the governance of the country. Therefore, the constitutional

bodies or wings should not consider themselves to be different from each other but rather they should consider themselves to be supplementary to each other.

Our Constitution envisages the principle of rule of law and recognizes the Constitution, laws and recognized principles of justice as the source of law and therefore, the plea taken by the petitioners pursuant to the Articles of the Constitution, laws relating to human rights and the concept of justice cannot be overlooked. Therefore, taking into consideration the necessity of laws, issuance of directives for proper management cannot be deemed to be otherwise.

Truly speaking, it would have been more appropriate had the Executive rather than recognizing the gravity of the subject matter and the appropriateness of its remedy provided a work plan regarding the avenues of remedy to be undertaken. The rejoinder submitted by the Prime Minister and the Office of the Council of Ministers underlines that the budget for the fiscal year 2064/65 prescribes for conducting mobile health camps for resolving the problem relating to uterus prolapse and that budget has been earmarked for various purpose but the execution is yet to be seen. The proposal envisaged by the State for resolving this problem is not important but rather what has been achieved is more important. In other words, it would have been more appropriate had the State stated its target and implemented the same.

The rejoinder submitted by the Ministry of Health and Population and Ministry of Women, Child and Social Welfare is deemed insensitive. The rejoinder submitted by the Ministry of Health and Population requests for the rejection of the writ petition by citing that the petitioners had failed to substantiate as to what rights had been violated by the act of the Ministry. A positive response was expected from the Ministry and it was envisaged that the Ministry through its rejoinder would underline its policies or programs to be implemented for the class represented by the petitioners and would also provide a timeline for the control of the problem. The petitioners had not submitted the petition in relation to their personal rights and therefore, it is not relevant for the petitioners to state the effect caused to them by the act of the Ministry. The Ministry of Health is vested with the responsibility of conducting a survey of the health condition of the population of the country and is also vested with the responsibility of evaluating the problems relating to health of people of various ages, gender and formulate short-term and long-term plans and proposal for resolving such problems and should implement the same but unfortunately the rejoinder submitted by the Ministry of Health has ignored all such responsibilities and the contents of the rejoinder indicates that the Ministry is not positive towards the problems submitted by the petitioner.

The court expected that the Ministry through its rejoinder would express its commitment in resolving the problems relating to health of the various classes through a judicious disbursement of the budget. It was also expected that the Ministry through its plan and legislative Act would have expressed its effort towards executing its responsibilities and would have also stated as to the extent of execution of the directive principles and policies of the State. Women centric remedy cannot be provided without a deep knowledge of the

health of women and their lives and their right to equality and right to reproductive health. Where problems relating to women's health is to be resolved on the basis and standard of the health of a male, then such an act would not bring about the desired result. Therefore, the Ministry of Health should seek to give priority to matters relating to women's health in all the programs to be initiated by public and private sectors and should play a lead role in mainstreaming matters relating to health. It is expected that the Ministry of Health should earmark the budget for health related services and from among the budget earmarked, should also prioritize the budget to be consumed in relation to women's health. Having so many expectations, the Ministry has been indifferent towards the principle issue raised by the petitioners and as such very little expectations can be expected from the Ministry with regards to the resolution of the problem.

Although, the Ministry of Women, Children and Social Welfare through its rejoinder has stated that training programs on reproductive health for teenage girls have been initiated, the Ministry states that programs and budget for the problem regarding uterus prolapse raised by the petitioners have not been proposed and they further take the plea that although matters relating to health does not fall within their Ministry, they state that the Ministry is serious towards the issue of women empowerment. From the rejoinder submitted by the Ministry, it can be deemed that pursuant to the division of labor there is a tendency between the Ministry of Health and Ministry of Women, Children and Social Welfare of alienating themselves from their responsibility. Pursuant to the current infrastructure, it is natural that the Ministry of Health being a Ministry related to health should be health centric and Ministry of Women, Children and Social Welfare should be women centric, but nevertheless there should be cooperation and coordination between the two Ministries on matters relating to health services of women. Unfortunately, neither has the Ministry of Health made reproductive health as its focal point nor has the Ministry of Women, Children and Social Welfare made any effort towards addressing the matter relating to the health of a woman. Although, the Ministry through its rejoinder expresses its commitment towards the empowerment of the concerned class, the statement in the absence of any particular policy, plan and program has no substance.

From among the respondents, the National Human Rights Commission has taken the plea that petition relating to reproductive health has not been submitted before the Commission and likewise the Women Commission expresses that the Commission has not been able to act in this sector. Human rights and women rights are interrelated and although this matter relates to both the Commission, it is unfortunate that both the Commission have failed to state their contribution towards addressing this issue. The Commissions' insensitivity towards this matter is clear and it is also evident that the general public is less sensitive or inactive towards obtaining the service of the Commissions. It is important that Commissions should identify themselves not by its mandate but by its contribution. Where issues relating to women and human rights are not effectively executed by the concerned Commissions, it is a matter of concern.

It is now for the court to decide as to whether or not the order as sought by the petitioners should be issued.

As stated hereinabove, the status of reproductive health of women in Nepal is in a serious state, and it is also clear that no plan has been made to address this problem. In the present context, there are approximately six hundred thousand women suffering from the problem of uterus prolapse and it is also evident that no preventive or remedial programs focusing on problems relating to reproductive health and uterus prolapse have been initiated. This is due to lack of nutritious food, leisure, lack of access to family planning, lack of awareness regarding rights relating to reproductive health and violence against women. In addition, lack of health centers or facilities required for women's physical and mental well being and its subsequent decentralization, availability of medicine, lack of public awareness regarding care during pre and post-natal pregnancy are some of the issues that pose a problem in resolving the problem.

Uterus is an important part of a women's body wherein an embryo during pregnancy develops and within a certain period the embryo develops into a child. Uterus provides nutritious elements from the body of the mother for the development of the embryo and as such uterus is considered as a preliminary stage of human life and recognized as a reproductive part of a woman. Where this part of the body is safe and healthy, the embryo within the uterus develops into a healthy human being and therefore, protection of the uterus of a woman is also the protection of the existence of human beings. Various medical write-ups state that during the period of pregnancy, the embryo develops within the uterus, causing the uterus to stretch wherein the muscles holding the uterus becomes weak and feeble. Where the muscles and the nerves holding the uterus becomes weak and feeble and where pressure is created on the uterus, this would result in uterus prolapse. Reasons for uterus prolapse have been cited in many articles, research, reports and books related to health. Some of the reasons cited are as such: long period of gestation or difficulty in the birth of a child, giving birth to many children, and pressure on the uterus, lifting of heavy articles during pre and post natal period, hard labor and formation of flesh in the pelvis region. Nevertheless, research on uterus prolapse cannot be denied or deemed to be otherwise.

Report made with regards to social conditions and conclusions made therein depicts a grave picture of the prevailing problem and the concerned sector has not been able to provide due attention towards this problem. Although, matters included in the social research report do not have direct relation with the case, the conclusion made therein can be deemed and considered to be an additional material for formulation of standard and policies in this regard. No objection has been made by the government against the information and subject matter raised by the petitioner and neither have they expressed the need for conducting an additional research by the court. The government is always capable to conduct additional research to open avenues for resolution of the problem for any particular place or class or people and to some extent this is expected from the government. The nature and extent of this problem should be a matter of priority for the State but the rejoinder submitted by the

respondents deems it to be otherwise. Article 20 (2) of the Interim Constitution, 2063 prescribes reproductive health as a fundamental right and in the absence of proper protection of reproductive health, the problem of uterus prolapse has been far reaching and as such the said right can be deemed to have been violated. **Since reproductive health is recognized as a matter of right, the following falls within the ambit of the right: decision regarding reproduction, voluntary marriage, decision as to conceive or not, decision to abort a child pursuant to law, period and determination of number of children, reproductive education, and freedom from sexual violence which have also been prescribed in various treaties and declarations.**

Although, this matter has been constitutionally recognized, there has not been any law, policy and programs to provide tangible results.

Where reproductive health has been included and provisioned in the Constitution, it can be deemed that women's health and rights have received philosophical recognition and in order to guarantee the rights laws should be formulated and facilities approved by the law should be provided wherein services and facilities should be decentralized and information in this regard should be disseminated thereby creating awareness among the people. Maternity services is a social and human service and any adverse effect would have an impact on the society and therefore, the State should accept its legal responsibilities and prioritize this matters which has been constitutionally recognized and determine the availability of services in this regard.

Although, right relating to reproductive health has been enshrined under Article 20 (2) of the Interim Constitution, the right other than being prescribed under the Constitution has not been defined and no laws have been formulated to define the right and neither has any institutional mechanism been developed for the execution of this right. As a result, this right although been constitutionally recognized, has not been enjoyed by the people. Therefore, a directive order is hereby issued in the name of the Prime Minister and the Office of the Council of Ministers to hold consultation deemed necessary with health related experts and representatives of the society and to draft a Bill and submit it before the Legislature-Parliament as soon as possible. Likewise, an order of mandamus is hereby issued in the name of the Ministry of Women, Children and Social Welfare and Ministry of Population and Health to prepare special work plans and to provide free consultation, treatment, health services and facilities to the aggrieved women and to set up various health centers and to

initiate effective programs with the aim of raising public awareness on problems relating to reproductive health of women and the problem of uterus prolapse. It is hereby ordered to provide the information to the respondents.

s/d
Kalyan Shrestha
Justice

Consenting on the above opinion.

s/d
Min Bahadur Rayamajhee
Justice

Bench Officer: Deepak Kumar Dahal

Dated 22 Day of the month of Jestha of the Year 2056 (June 5, 1999).....