

**Advocate Achyut Prasad Kharel v. Office of Prime-minister and
Council of Ministers, Kathmandu and Ors.**

Supreme Court of Nepal

4 August 2008

Writ No. 3352 of the year 2061 BS(2004 AD)

Judges: Hon'ble Justice Bala Ram K.C., Hon'ble Justice Tapa
Bahadur Magar

Order

Bala Ram K.C. J: The summary of facts and issues of the above mentioned writ petition filed before this Court under Articles 23 and 88(2) of the Constitution of the Kingdom of Nepal, 2047 (1990 AD) are as follows:-

1. The writ petition states that the National Code (Muluki Ain), 2020 (1963 AD) by its eleventh amendment made in 2058 BS (2001 AD) has made provision by amending the clause (1) of No. 28B of the Chapter on Life, that after fulfilling the procedures as prescribed by His Majesty's Government, a health worker attaining the qualification as prescribed, may, with the consent of the concerned pregnant women, remove her fetus within 12 weeks of conception. According to the said legal provision, only with the consent of pregnant women may a fetus be removed within 12 weeks of the conception. For this purpose, the consent of her husband is not required. Nature has not given men the capacity to conceive. In this context, during a period of conjugal life concerns regarding the bearing of children, determination of offspring, gap of birth of offspring, are to be determined mutually by the spouse. But the aforesaid amended provision has ignored the rights of a husband and granted a monopolistic discretionary power only to women to remove the fetus within 12 weeks which in principle is against the theory of gender justice. Article 16(1)(e) of the Convention on the Elimination of all forms of Discrimination Against Women, 1979,(CEDAW), provides that the State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women which shall include the same rights to decide freely and

responsibly on the number and spacing of their children and to have access to information, education and the means to enable them to exercise these rights. It guarantees equal rights between females and males. The provision contained in the aforesaid No. 28B of the Chapter on Life in the National Code (Muluki Ain) has ignored the husband's right to determine the removal of fetus within 12 weeks of conception and has vested unilateral power to take decision regarding such removal only in the wife. The said amended provision, therefore, contradicts with Article 16(1)(e) of CEDAW to which Nepal is a party. Section 9(1) of the Treaty Act, 2047 (1991 A.D.) states that treaties and agreements, to which Nepal is a party shall be enforced as if it is the law of Nepal, and in case of divergence, the provision of treaties or agreement shall prevail over the provision of the national law to the extent of inconsistency. Therefore, the writ petitioner prays that, as the provision made in Clause (1) of No. 28B of the "Chapter on Life" in the National Code (Muluki Ain) is inconsistent with Article 16(1)(e) of CEDAW, the said No. 28B, pursuant to Section 9(1) of the Treaty Act, 2047 be nullified by issuance of a directive order.

2. This Court had passed an order on 2061/09/23 BS (2005/01/07 AD) directing the Respondents to submit their affidavits within 15 days excluding the time required for journey from the date of receiving of the said notices, as to why an order should not be issued as sought by the writ Petitioner. The Court also directed that the case file be presented before the Bench after receiving the affidavits in case the affidavits are submitted within the prescribed time limit or after the expiry of the said time limit set for submitting the affidavits. The Office of the Prime Minister and Council of Ministers of His Majesty's Government, the Respondents, in its affidavit submitted before this Court, have stated that the enactment and amendment of laws is the subject matter falling under the jurisdiction of Parliament. Therefore, the writ petition should be declared as dismissed on the ground that the writ Petitioner has made this Office an irrelevant body in the present case as a Respondent on the matter relating to an Act enacted by the Parliament.
3. The Ministry of Law, Justice and Parliamentary Affairs of His Majesty's Government, a Respondent, in its affidavit submitted before this Court, has stated that No. 28B of the Chapter on Life in the National Code (Muluki Ain) has not checked the spouses' right to take decision by mutual consent on the matter related to removal of fetus. Therefore, the

pleas made by the writ Petitioner alleging that this provision has infringed the rights of the male and has created obstacles in married life is not logical. Hence the writ petition should be quashed.

4. The Secretary Mr. Mohan Bahadur Karki, Ministry of Health of His Majesty's Government, a Respondent, in the affidavit submitted before this Court, has stated that none of the acts of his Ministry have infringed the writ Petitioner's right and therefore, the writ petition should be quashed.
5. The Ministry of Women, Children and Social Welfare of His Majesty's Government, a Respondent, in its affidavit submitted before this Court, has stated that CEDAW in Article 4 has provided that adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination and these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. After the achievement of the practical objective of equality such steps are to be terminated. In the direction of getting substantial and practical equality, the proviso to Article 11(3) of Constitution is centered to have a relative view of such a provision. Hence the provision made in 28B of the Chapter on Life in the National Code (Muluki Ain) is not contrary to the provision of the said Convention of CEDAW. The Bench perused the entire case file that was being enlisted in the daily docket in compliance with the rules and presented before this Bench.
6. The writ Petitioner, the learned Advocate Mr. Achyut Prasad Kharel, putting his arguments before the Bench said that the decision on removing the fetus, if granted absolutely to females only, will not achieve the objective of equality. The fact that the male cannot conceive and bear a child should not be ignored, and therefore, spousal consent should be made compulsory in matters of taking decisions on removal of a fetus. The provision contained in Article 16(1) (e) of CEDAW is founded on the principle of equality, but the provision inserted by an amendment to No.28B (1) of the Chapter on Life in the National Code (Muluki Ain) is contradictory to the principle adopted by the said Convention. Therefore, the order as sought by the writ Petitioner should be issued. The counsel of the Respondents, the Learned Acting Deputy Attorney General Mr. Tika Bahadur

Hamal, stated that the provision of a Nepal Law cannot be declared as annulled under Article 88(2) of the Constitution by reason of being inconsistent with the provision of the Convention as sought by the writ Petitioner. If a male is permitted to take a decision on the matter regarding removal of fetus borne by his wife, it will be inconsistent with the norms of CEDAW. Therefore, the provision contained in No. 28B (1) of the Chapter on Life in the National Code (Muluki Ain) is consistent with the provision of the said Convention. Similarly, the Learned Advocates Ms. Meera Dhungana, Mr. Sabin Shrestha and Mr. Lok Hari Basyal by obtaining permission granted under Rule 42(2) of the Supreme Court Rules, 2049 to represent Women Law and Development Forum argued that in case spousal consent for removal of a fetus is made compulsory it would be contrary to the principle of right to equality and a female's right to self-determination. Therefore, the writ petition is liable to be dismissed.

7. Taking into account the arguments put forward by the Learned counsels representing both sides the Bench has to give its verdict on the matter as to whether the order as sought by the writ Petitioner is to be issued or not. The main plea of the writ Petitioner is the annulment of No. 28B (1) of the Chapter on Life in the National Code (Muluki Ain) under Section 9(1) of the Treaty Act, 2047(1990 A.D.) on the ground that the said provision No. 28B (1) is inconsistent with the Article 16(1)(e) of CEDAW. In this context, it is seen that section 9(1) of the Treaty Act, 2047, has provided that in the event of any provision of any prevalent law being inconsistent with the provision of any treaty to which Nepal or the Government of Nepal is a party, for the purpose of such treaty the inconsistent provision of such law shall be deemed as inoperative to the extent of such inconsistency. Such matter shall be governed by the said treaty as if it is the provision of a Nepal law.
8. It is seen that the writ petition is filed under Article 88(2) of the Constitution of the Kingdom of Nepal, 2047(1990 A.D.). The said Article 88 had provided two types of extra-ordinary jurisdictions to this Court. Accordingly, Article 88(1) is seen to have given the power to declare any provision of the Nepal law as ultra vires in cases where the said provision imposes unreasonable restriction on the enjoyment of the fundamental rights conferred by the Constitution or is inconsistent with the provision of the Constitution, to the extent of inconsistency. Similarly, the provision in 88(2) confers extraordinary power on this Court

under which it can issue necessary and appropriate orders for the resolution of any constitutional and legal question in disputes involving public interest, or for the enforcement of any legal right where no alternative remedy is available. Under this, the Court may issue appropriate orders for the resolution of constitutional or legal issues in disputes involving public interest for the enforcement of legal rights which have been illegally violated.

9. There is no doubt that Nepal is a Party to CEDAW by ratifying the same. Thus, in the context of Nepal being a party to the said Convention, pursuant to Section 9(1) of the Treaty Act, 2047, where any provision of the national law of Nepal is inconsistent with the provision of the said Convention, the provision of Nepal law to the extent of such inconsistency is deemed as ipso facto inoperative and the provision of the Convention is operative as if it is Nepali law. For the purpose of doing complete justice under the extraordinary power conferred by Article 88(2) of the Constitution, this Court can issue any appropriate order that is seen necessary for the enforcement of fundamental rights. However, in this context, Article 1 of the Constitution should be taken into consideration. Article 1 provides that the Constitution is the fundamental law of the country and all laws inconsistent with it shall, to the extent of such inconsistency, be void. As the said provision has institutionalized the principle of constitutional supremacy, Article 1 may be broadly treated as the clause for the supremacy of the Constitution. As Article 1 has accepted the Constitution as fundamental law, the supremacy clause connotes that every law of the state should be intra vires the provisions of the Constitution. Thus, Article 88(1), which offers extra-ordinary power on this Court to declare any law inconsistent with the Constitution as void, is directly related to the provision of Article 1 of the Constitution. In other words, the power under the said Article 88(1) is a power that becomes relevant only when any provision of national law becomes inconsistent with the Constitution.

10. As claimed by the writ Petitioner, this court does not seem to have power under Articles 1 and 88(1) of the Constitution and section 9(1) of the Treaty Act, 2047, to declare ultra vires, a provision of any Nepal law which is found to be inconsistent with any treaty or convention. This Court may examine whether any provision of national law is repugnant to the provision of an international treaty or not. Section 9(1) of the Treaty Act, 2047, provides that “in the event of any provision of any prevalent law being inconsistent with the provision of any such treaty

to which Nepal or the Government of Nepal is a party, for the purpose of such treaty the inconsistent provision of such law shall be deemed as inoperative to the extent of such inconsistency”. Therefore, in case any provision of a law is found to be contradictory to the provision of a treaty, in such condition it would be sufficient for this Court to issue a declaratory judgment under its extraordinary jurisdiction.

11. Now let us observe, whether or not the provision of Article 16(1)(e) of CEDAW and No. 28B(1) of the Chapter on Life in the National Code (Muluki Ain) contradict each other as claimed by the writ Petitioner. No. 28B(1) of the Chapter on Life in the National Code (Muluki Ain) reads as follows:

“No. 28B: Notwithstanding anything contained in foregoing No. 28, it shall not be deemed as abortion committed under this Chapter on Life on the following condition in case the fetus is removed by a licensed health-worker having attained the required qualification by adopting the procedure as prescribed by the Government of Nepal, Removing the fetus of less than 12 weeks maturity subject to obtaining the consent of the concerned pregnant women.”

Similarly Article 16(1)(e) of CEDAW reads as follows:

Article 16

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- a. The same right to enter into marriage;
- b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- c. The same rights and responsibilities during marriage and at its dissolution;
- d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- e. The same rights to decide freely and responsibly on the number and spacing of

their children and to have access to the information, education and means to enable them to exercise these rights;

- f. The same rights and responsibilities with regard to guardianship, ward-ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The aforesaid Article of 16(1)(e) of CEDAW, ensures the right to decide freely and responsibility on the number and spacing of children for both males and females equally. The writ Petitioner has stated in his writ petition that No. 28B(1) of the Chapter on Life in the National Code (Muluki Ain) has conferred a right on women to decide on the matter regarding removal of fetus of less than twelve weeks maturity. Therefore, the said provision is not based on the principle of equality as provided by Article 16(1) (e) of CEDAW. As the Petitioner claims, in the matter of abortion while there should be an equal right to the concerned male and female, the provision contained in aforesaid No. 28B of the Chapter on Life in the National Code (Muluki Ain) has ignored the husband's right to determine the removal of fetus within 12 weeks of conception and vested unilateral power to decide such removal only on the wife. The writ Petitioner also claims that such discriminatory law may create a gulf in happy conjugal and family life.

12. In this context, while examining the preamble of CEDAW, the said Convention was adopted, taking note of the fact that despite various resolutions, declarations and recommendations being adopted to eliminate discrimination between men and women, expected success was not achieved with regard to enjoyment of basic human rights by men and women on the basis of equality. There are numerous forms of discriminations against women existing in the world. Therefore, CEDAW was adopted with an objective of institutionalizing equality. The Preamble of the said Convention states: "...discrimination against women violates the

principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries that hampers the growth of the prosperity of society and the family and makes more difficult for the full development of the potentialities of women in the service of their countries and of humanity”. Thus, any type of discrimination against women would be against human dignity which may create an obstacle to the entire family and impede social development. Therefore CEDAW seems to have been adopted with a view to creating an environment, whereby women would enjoy rights without any discrimination and would fully realize their competence and capabilities.

13. For the purpose of attaining the aforementioned objectives, the state parties, pursuant to Art 16(1)(e) of CEDAW, bear the responsibility of taking appropriate steps for the elimination of any and all discriminations against women , especially ensuring that both males and females freely enjoy equal rights with regard to determining the number and spacing of the birth of children. By quoting this provision of the Convention, the Petitioner claims that the unilateral right given to women by No. 28 B (1) of the Chapter on Life to abort the fetus of up to 12 weeks is inconsistent with Art 16(1)(e) of CEDAW. There is no doubt that the matter regarding taking decisions on the number and spacing of the children and/or conceiving and retaining of the fetus are matters that are covered under Article 16(1)(e) of CEDAW under the subject “marriage and family matters”. But, the question in this regard is whether the provision contained in No. 28B of the Chapter on Life in the National Code (Muluki Ain) has violated the principle of equality of men and women contained in Article 16(1) (e) of CEDAW. It is seen that No. 28B of the Chapter on Life in the National Code (Muluki Ain) provides for the abortion of fetus of maximum twelve weeks’ maturity with the consent of women. But it has not prevented the couple from deciding the said matter by evolving consensus following mutual consultation. The conjugal relationship between a husband and a wife is based on intercourse with spousal consent. If such mutual trust and understanding is lacking between the husband and wife, conjugal life instead of continuing, moves towards divorce. Therefore, there are fundamental differences between the maintenance of conjugal relationship and divorce. In other words, the continuance or non-continuance of conjugal relation brings about substantial differences with regard to enjoyment of the rights and performance of duties of a man

and woman. The significance of a conjugal relation also lies in the maintenance of such mutual understanding. Where a misunderstanding erupts between the married couple in any matter, such a conflict leads to the breach of conjugal relation rather than its maintenance. Therefore, in case any law provides either of the spouses an absolute right during conjugal life, it is expected that the exercise of such right shall be made with mutual consent and understanding. If there is misunderstanding in conjugal life, it will lead towards divorce. Therefore, where there is a conjugal relationship existing between a woman and a man, it is generally understood by people that there exists mutual understanding and mutual trust between them in conjugal affairs. This is a simple rule and applies to most conjugal relationships.

14. In order to clearly decipher the question raised by the writ petitioner, the provision contained in Article 23 of the International Covenant on Civil and Political Rights, 1966 and Article 10(1) of the International Covenant on Economic Social and Cultural Rights, 1966 and Art 16(1)(e) of CEDAW should be read together and harmoniously interpreted. Article 23 of International Covenant on Civil and Political Rights, 1966 is as follows:

“Article 23

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. State Parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and in its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

Similarly, Article 10(1) of International Covenant on Economic, Social and Cultural Rights, 1966 is as follows:

“Article 10

The States parties to the present Covenant recognize that:-

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it

is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.”

From the observation of the foregoing provisions of the Covenants, family has been accepted as a natural and fundamental unit of society. It also accepts that marriage shall be entered into with free and full consent of the intending spouses. It provides that no marriage shall be entered into without the independent and full consent of the female and male. In other words, marriage can take place only with free and full consent of intending spouses. It is certain that marriage solemnized without the consent of the spouse, such as unequal marriage, marriage by misrepresentation, forced marriage and marriage done under coercion or undue influence, cannot last for long. Such marriages can break. Marriage is an agreement entered into by spouses accepting the relationship, an agreement based on mutual trust entered knowingly, voluntarily, willingly, consciously and without any outside pressure, illusion or any consideration. The foundation of conjugal relation is mutual trust. Following the solemnization of marriage with mutual consent, understanding and trust, matters such as determination of number of children to be procreated and their spacing are also matters to be decided with mutual understanding and mutual trust of the spouses. In the absence of mutual consultation and consensus a situation of mutual distrust emerges. Such a marital relationship may not continue any further. Therefore, contentions that a woman takes decisions on abortion without the consent of her husband or that a pregnant woman comes to the authorized health institution for abortion without the consent of her husband seem to be hypothetical. It cannot be ruled out that in rarest of the rare cases such consent might be lacking but the same cannot be generalized. On the basis of such suspicion, the provision contained in No. 28B of the Chapter on Life in the National Code (Muluki Ain) cannot be declared as ultra vires.

15. It is argued in the petition that the provision contained in No. 28B of the Chapter on Life in the National Code (Muluki Ain) is inconsistent with Article 16(1)(e) of CEDAW. It has been clarified above that in case any Nepali law contradicts with any Treaty signed by Nepal, in such a situation this court does not declare the law as void and ultra vires, instead it issues a declaratory judgment highlighting the fact of such repugnancy. It is not the contention of the writ petitioner that the provision contained in No. 28B of the Chapter on

Life in the National Code (Muluki Ain) contradicts with the Constitution of the Kingdom of Nepal, 2047 and hence pursuant to Art 88(1) of the Constitution, should be annulled. No. 28B of the Chapter on Life in the National Code (Muluki Ain) confers the right upon a woman to take decisions on removing her fetus of maximum twelve weeks maturity. There are few reasons behind allowing pregnant woman to have such a right on her own without the consent of the husband. There are a few legislative intentions behind this. Nepali society still lacks in education and awareness. Superstitions, traditional customs and usages still prevail in society. There is no substantial change in the male dominated family structure. Society is yet to transform in away that women can enjoy their rights independently and without impediments, as men can. The traditional belief that sons and not daughters are required for continuity of the family lineage still exists. This is despite the fact that chromosomes determine whether a son or daughter is to be born, and it is said that the chromosome donated by the male plays an important role for the birth of the son. Superstitions and traditional and conservative beliefs do not change overnight. In such a social and family backdrop, women, who's physical and health status is vulnerable, should be necessarily vested with some rights. Women should have equal rights to say that she needs no more children. If the man is given the sole power to decide such matters, and if the wife does not have the right to say any thing, we cannot say that there is equality between men and women. Moreover, reproductive health is an important right of women, a component of her right to life. No one has the right to forcefully deprive woman of the right to health. If any conditions are imposed whereby the woman is required to take the consent of her family especially her husband, women's empowerment and social progress would not be possible.

16. Thus, in the context of the foregoing discussion, it is found that the provisions contained in No. 28B of the Chapter on Life in the National Code (Muluki Ain) and the provision contained in Article 16(1)(e) of CEDAW cannot be considered absolutely. On the face of it, the provisions contained in No. 28B of the Chapter on Life in the National Code (Muluki Ain) that give women the right to decide the removal of the fetus, seem to be depriving man of the right to equality. However, in practice, in most cases, this happens with spousal consent. Taking any exceptional situation as mentioned above, the provision cannot be said to be inconsistent with the provision contained in Article 16(1)(e) of the CEDAW. Here, what cannot be forgotten is that CEDAW is an instrument for the

protection of the interests of women. It is the aim of CEDAW to promote and protect women's rights, based on the principle of equality, and empower them in the public sector as being equal to men. For this reason too, the absolute interpretation of Article 16(1)(e) of CEDAW cannot be construed in absolute terms, as sought by the Petitioner. Therefore, the Bench holds that it is not necessary to issue any order as sought by the writ Petitioner. Hence writ petition has been declared as dismissed. Let the case file be delivered as per rules.

s/d Bala Ram K.C. Justice

I concur with the above opinion.

s/d (Tapa Bahadur Magar) Justice Bench Officer: Matrika
Prasad Acharya

Computer Setting: Amir Ratna Maharjan

Date: Monday the 20th day of the month of Shrawan of the year 2065 BS (corresponding to 4th August 2008 AD).