

## Marital Rape Court Decision

### Supreme Court Special Bench

Hon'ble Justice Mr. Laxman Prasad Aryal  
Hon'ble Justice Mr. Kedarnath Upadhyaya  
Hon'ble Justice Mr. Krishna Kumar Barma

### Order

Writ No. 55 of the year 2058 BS (2001-2002)

**Subject: Law inconsistent to the Constitution be declared invalid and ultra vires pursuant to Article 88(1) of the Constitution of the Kingdom of Nepal, 2047 (1990).**

On behalf of the Forum for Women, Law and Development, Thapathali, ward No. 11 of Kathmandu Municipal Corporation and on her own, Advocate Meera Dhungana, 33, a resident of the same .....Writ Petitioner.

Versus

His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs,  
Singhdurbar ..... 1  
His Majesty's Government, Cabinet Secretariat, Singhdurbar..... 1  
The House of Representatives, Singhdarbar, Kathmandu.....1  
The National Assembly.....1  
.....Respondents

Facts in brief of and the order made in the writ petition filed at this court pursuant to Article 88(1) of the Constitution of the Kingdom of Nepal, 1990 are as follows:

Whereas, a writ petition has been filed challenging the Constitutional validity of No. 1 of Chapter on Rape in the Country Code stating that Part 3, Article 11 of the Constitution of the Kingdom of Nepal, 2047 has guaranteed the right to equality and aforesaid equal protection of law to all the citizens of Nepal. The preamble to the Constitution has expressed the commitment for the protection of the human rights and rule of law. Right to equality is one of the basic premises of any democratic country and backbone of rule of law. If any legal provision creates advantage to one and disadvantage to other between the same sex on the basis of social status or any other reason and if such legal provision creates inferiority feelings then such legal provision is nothing but unequal. Not only the Constitution of the Kingdom of Nepal, but also the international instruments like the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural

Rights, 1966; the UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 provide that all human beings are equal and every one possesses the inherent right to equal protection, that no person shall be unreasonably discriminated that the legal provisions depriving, discriminating, excluding and restricting economic, social, cultural, civil rights and human rights and fundamental freedoms of women to be eliminated through the medium of Constitutional and legal measures and that no laws shall be enacted causing or intending the cause discrimination, and Nepal has ratified or acceded to those international treaties and conventions without any reservation and has accepted the responsibilities arising out of those basic instruments of human rights. Section 9(1) of the Nepal Treaty Act, 1991 has categorically provided that in case a provision of a treaty to which Nepal is a party is inconsistent with any provision of a law in force, the provision of the law in force shall, to the extent of such inconsistency, be invalid for the purpose of the treaty and the provision of such treaty shall prevail as a municipal law of Nepal;

Whereas, the petitioner also states that the Constitution of the Kingdom of Nepal, 1990 is the fundamental law of the land. No other laws may be enacted or enforced in contravention to principles, values and spirit of the fundamental law. In addition to this, Nepal has become a party to the aforementioned instruments;

Whereas, the petitioner further states that despite of these above mentioned provisions, No. 1 of the Chapter on Rape in the Country Code 1963 has defined rape as the act of having sexual intercourse with a girl, widow or other's wife not attaining the age of sixteen years with or without her consent in whatsoever manner or attaining the age of sixteen years without her consent in whatsoever manner either exerting threat, pressure or coercion or with undue influence. However, the act of having sexual intercourse with one's own wife by the husband without her consent has not been included in the definition of rape;

Whereas, the petitioner further states that Article 11 of the Constitution of Kingdom of Nepal, 1990 has guaranteed all citizens, equal protection of law and equality before law and Article 12(1) has guaranteed right to individual liberty. Similarly, Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has defined the term 'discrimination'. The definition not only included direct discrimination but also included the law or practice that has the purpose or effect of causing discrimination or depriving from equal treatment. This Convention has not only hold the state responsible for violence or violation of women's right by public institution or in public sphere, but also in case of such acts committed in private spheres. In the course of the Beijing Plus Five Review Process held to review the progress made after the Beijing Conference (on women), marital rape has been taken as one of the forms of violence against women and a commitment has been made to ban it;

Whereas, the petitioner continues in the petition that rape is a physical relationship against the will. Consent is fundamental basis for sexual intercourse or contact, however, provision contained in No. 1 of the Chapter on Rape has violated the women's right to equality and right to take decision which have been secured under various international

instruments like International Covenant on Civil and Political Rights, 1966 and the Convention on Elimination of All Forms of Discrimination against Women. Whereas, the petitioner has also stated that the reason that criminal law should not be attracted on family relations and that it ruins a married life are baseless ones. It is simply because in a married life when violence is present in sexual relationship, then there is no meaning and value of such relations. Thus, the petitioner has requested that as No. 1 of the Chapter on Rape is inconsistent with the right to equality guaranteed under the Constitution of the Kingdom of Nepal, 1990 and also with the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments, the impugned provision is void pursuant to Article 1(1) of the Constitution of the Kingdom of Nepal, 1990, therefore, the impugned provision be declared ultra vires under Article 88(1) of the Constitution;

Whereas, an order was issued by a single Bench of this court on 2058-4-17 (Aug 1, 2001) requiring the respondents to submit written as to why not and order to be issued as requested by the petitioner;

Whereas, separate written replies with the same content of response have been received from the House of Representatives and the National Assembly that the petitioner could not have shown and established as to why the House of Representatives and the National Assembly have been made respondents and the relevancy of making them respondents, thus, the petition is liable to be quashed as the subject-matter would be cleared from the written replies of other respondents;

Whereas, the Ministry of Law, Justice and Parliamentary Affairs stated, in its written reply, that the said provision of the current law has been enacted because it is not in conformity with the Hindu religion, traditions and values that a husband rapes his own wife exercising threats, fear, pressures and duress, unlike what has been contended by the writ-petitioner. With the change of time, state parties to various international instruments have been expressed positive commitment with regard to equal rights to women and in course of changing laws in accordance with provisions of international instruments, new laws have been enacted or being enacted in Nepal. Thus, the process of timely change of laws is in progress. As the said provision is, from the viewpoint of equality, equally effective even in the present context, there is no need of repeal or amendment. On the basis of the above, No. 1 of the Chapter on Rape, the Country Code, is not inconsistent with the Constitution of the Kingdom of Nepal, 1990, the Convention on the Elimination of All Forms of Discrimination against Women and other international instruments relating to women's human rights, therefore, the writ petition is liable to be quashed;

Whereas, the Cabinet Secretariat has, in its written reply, contended that No. 1 of the Chapter on Rape, the Country Code, has criminalized the act of having sexual intercourse with force with any women and has afforded protection to women by punishing any third person who commits the offence of rape as defined or deemed by law with any woman other than his wife. Since it is against the Hindu religion, traditions and values that a husband rapes his wife by exercising threat, fear, pressure and force, unlike what has been contended by the petitioner, the current law contains that provision. Moreover, the

petitioner has not been able to establish what action or proceeding of the Secretariat has violated the right of the petitioner, and the Secretariat has been made respondent without any basis, the writ petition is liable to be quashed;

Whereas, in respect with the rule the writ petition has been referred to this bench. Advocates Sapana Pradhan Malla and Raju Chapagain pleaded on behalf of the writ petitioner stating that No. 1 of the Chapter on Rape has not criminalized rape of a wife committed by her husband using force, threat, fear and duress provided immunity to the offenders. Various international human rights instruments have recognized that marital rape is not only a form of violence against women but it is also a serious violation of women's human rights. Being a party to those international instruments, Nepal is under a duty to abide by the obligations arising through those instruments. The classification of the law that an act committed against an unmarried girl to become an offence and the same act committed against a married woman not to become an offence is not a reasonable classification. The said provision in the Chapter on Rape is against the right to equality guaranteed under Article 11 and the right to privacy guaranteed under Article 22 of the Constitution of the Kingdom of Nepal, 1990 and in contravention to the right to equality guaranteed under various international Rape treaties and conventions. Therefore, the impugned provision of No. 1 Chapter on Rape is inconsistent with Article 1 of the Constitution; it should be declared invalid and ultra vires pursuant to Article 88 of the Constitution;

Whereas, on behalf of the respondent His Majesty's Government, The learned Deputy Attorney General Narendra Kumar Shrestha and the learned Joint Attorney General Narendra Prasad Pathak pleaded that the Constitution has guaranteed right to equality only amongst equals, however, married and unmarried women cannot be treated alike. The social position and family responsibilities of married women are far more different and separate than the unmarried ones. The said legal provision has been made with the recognition that marriage is a permanent consent expressed for having sexual relations. Thus, the provision of the said No. 1 of the Chapter on Rape cannot be applicable equally with respect to the women having nuptial relationship and the women having no such relationship. Writ jurisdiction may not be entertained on the basis of a hunch or hypothesis as no victim has filed case. In case any man causes pain or suffering to his wife against her will, such action may be the basis for divorce and a separate provision of remedy-the offence of battery and punishment-has been included under the Chapter on Battery. It is a matter to be determined by legislative that what sorts of acts committed by person or a group of persons in a society have to be criminalized and what sorts of punishment has to be imposed. It is not in conformity with Hindu religion and traditions to say that consent is required to have sexual relations with one's own wife. While changing a legal provision prevailing since time immemorial, the repercussions it causes on the society and its execution have to be taken into consideration. The legislature enacts and reviews laws as per the need of the time and societal opinions. But a court does not make law in the same manner as legislature does. Unlike what has been claimed by the petitioner, No. 1 of the Chapter on Rape does not contain gender discriminatory provision, rather it merely defines the offences of rape. Thus, as the said provision is not inconsistent with the Constitution, the writ petition is liable to be quashed;

Whereas, upon the study of the documents collected in the case-files and having listened to the points raised during the pleadings by the legal practitioners appearing on both sides, the main contention of the petitioner is that as No. 1 of the Chapter on Rape, of the Country Code, contains "others wife having her husband alive", the provision has excluded and immuned the rape of one's own wife from the definition of rape. The said provision is in contravention of the right to equality guaranteed under Article 11 of the Constitution of the Kingdom of Nepal, 1990 and various international human rights instruments to which Nepal is a party. So No. 1 of the Chapter on Rape be declared invalid and ultra vires pursuant to Articles 1 and 88(1) of the Constitution of the Kingdom of Nepal, 1990. The respondents have, in their written replies, contended that provision of No. 1 of Chapter on Rape has been enacted as it is against Hindu traditions and values to presume that a husband commits rape of his own wife, so the said provision is not contrary to the right to equality guaranteed under the Constitution and the international instruments relating to women's human rights to which Nepal is a party. Upon evaluating and analyzing the points raised in the writ petition and written replies, decisions have to be rendered with respect to the following questions:-

- (a) Whether or not the petitioner has locus standi to file the writ petition?
- (b) Whether the issues raised by the petitioner needs a concrete case filed by aggrieved wife or a question whether or not marital rape constitutes the offence of rape may be decided under public interest litigation?
- (c) Whether or not marital rape to be committed to a wife is an offence of the nature of getting immunity under No. 1 of the Chapter on Rape of the Country Code?
- (d) Whether or not other appropriate order needs to be issued?

With regard to the first question whether or not the petitioner has locus standi to file the petition, the writ petitioner has contended that as No. 1 of the Chapter on Rape, the Country Code contains, "others wife having her husband alive", and these words have allowed a husband to commit rape to his wife, the said provision is inconsistent to right to equality guaranteed under Article 11 of the Constitution of the Kingdom of Nepal, 1990. The writ petition has been filed under Article 88(1) of the Constitution and under Article 88 of the Constitution, two types of issues public interest or concern may be filed at this court through the writ jurisdiction- issue of any law being inconsistent with the Constitution or an undue restriction has been made on fundamental rights under Article 88(1) and issue of interpretation or settling of any legal question of public interest or concern under Article 88(2) of the Constitution.

Review of Article 88(1) of the Constitution clearly shows that under Article 88(1) of the Constitution, any Nepali citizen may file a petition at the Supreme Court requesting the court to nullify the law or a part thereof be declared invalid, which is inconsistent with the Constitution. In this connection, this court has, in *Bharatmani Jangam vs Parliament Secretariat* (writ No. 4195 of 2056, Date of order 2057-7-16 corresponding to ....) interpreted that even though Article 88(1) is related to the subject of public interest, it is

not aimed against an executive act, rather it is aimed to the test of Constitutionality of a legislative act. In the observance of Constitutional duty, any Nepali citizen is entitled to file a petition at the Supreme Court invoking Article 88(1), thus, unlike Article 88(2), there needs no meaningful relation of the petitioner to file a petition for the issue of public interest. Similarly, Article 88(2) has provided extraordinary jurisdiction to this court to issue necessary and appropriate order for settling disputes arising out of any Constitutional or legal question. This provision is related to the right to seek Constitutional remedy on the issues of public interest or concern against decisions and proceeding carried out by the executive. A principle has been laid down in *Radheshyam Adhikari V. Cabinet Secretariat* (NKP 2048 p. 810) that in getting such a remedy, there shall be meaningful relation and substantial interest of the petitioner with the concerned subject matter of public interest. Similarly, this principle under Article 88(2) has been followed later in so many cases, and the extent of public interest has been further widened and extended. It has been held in *Chudanath Bhattarai v. Public Service Commission* (NKP 2054, p. 360) that the person seeking remedy under Article 88(2) must have the issue related to the interest or concern of a community or people in general rather than his/her personal interest or concern. A similar type of order has been issued by a full bench of this court in *Bharatmani Gautam v. Ministry of Finance and others* (Ri.Pu.E.No.138, dated 2057-12-21 corresponding to .....). These legal principles have been laid down by the Supreme Court in such cases, which are related to public interest, or concern in whatsoever manner.

Whereas, the origin of the concept of public interest or concern is found to be developed as liberalization of the rigid concept of locus standi. If the traditional concept and judicial practice that only the person who is entitled to can file a case is applied even on the matters of public interest or concern, the petition easily gets quashed and consequently it becomes easy in converting public property into private property and ultimately it will encourage those who are in the advantage of abusing judicial process. Therefore, in the matters of public interest or concern, the principle that only the person who is entitled to can file a case can not be applied as in the matters of private affairs. Thus, primarily, it has to be examined that whether or not the issue raised by the petitioner is a matter of public interest or concern? Or whether the petitioner has filed this writ petition merely for the purpose of attainment of personal interest in the name of public interest or concern?

Whereas, this writ petition has been filed under Article 88(1) raising human rights, interests and concern of entire women who are under the category of wives. There is no doubt that the petitioner is Nepali citizen. It can not be said that the petitioner has no locus standi to file this writ petition as there is Constitutional provision in Article 88(1) and interpretations thereon that any Nepali citizen may file a writ petition to settle any legal and Constitutional question;

Whereas, while considering on the next question whether the issues raised herein needs to be raised only in a concrete case or it can be settled through this petition under the subject-matter or public interest or concern, some analyses need to be made on the nature and characteristics of an issues of public interest. An issue of public interest or concern is not of adversary nature and interest or concern of one person is not adverse to the interest

or concern of another person as it necessarily happens in the matters of private interest or concern, rather issue of public interest or concern involves such interest or concern protection or promotion, which is a common duty of both - the petitioner and the respondent. Even judges needs to be committed more on protecting and promoting public interest than to be fully impartial in the cases involving private parties. Upholding public interest or concern by judges is delivering appropriate justice in the cases of such nature. In a case involving public interest or concern, the petitioner, respondent and judges all have the same objective to meet and serve and the spirit of mutual cooperation than that of adversary nature and of mutual co-action than that of competition between parties. In such cases, no party is winner or loser, as all win. Whether the writ is issued or quashed, in both situations, public interest is protected. It is the basic characteristic of a dispute involving public interest or concern. Absence of other procedural complications and speedy setting of disputes are other characteristics of such a dispute;

Whereas, public interest for which remedy are available under Article 88(1) and (2) of the Constitution is different from the public interest that may be established under legal remedy of ordinary nature as referred to in No. 10 of the Chapter on Court Proceedings of the Country Code. The former is related to the extraordinary jurisdiction for the test of Constitutional validity of a law or any part thereof. It is not appropriate to think that such issue can be settle only through ordinary remedy as District Court and Appellate Court do not have jurisdiction under Article 88 of the Constitution. Thus, it can not be said that the case for the remedy sought by the petitioner has to be brought in ordinary course of treatment, and the issue raised by the petitioner is the one that can be settled under the extraordinary jurisdiction of the Supreme Court as referred to in Article 88(1) of the Constitution;

Whereas, while going through the main issue of the petition that whether or not No. 1 of the Chapter on Rape allows a husband to rape his wife, it is relevant to discuss in brief on the definition and nature of rape before settling the questions;

Whereas, rape is one of the major offences amongst the criminal offences of grave nature. Rape is an inhuman act to be committed violating women's human rights and the act directly causing serious impact on individual liberty and right to self-determination of victim woman. Not only it causes adverse impact on physical, mental, family and spiritual life of victim women, it also adversely affects on self-respect and existence of women. This offence is not only against victim women, but also against the society as a whole. Murder destroys physical being of a person but the offence of rape destroys physical, mental and spiritual position of victim women. Thus, it is a heinous crime. Law of every country has treated rape as one of the grave criminal offences and has provided for punishment accordingly. In Nepal as well, the Country Code, 2020 (1963) has treated rape as one of the grave criminal offences. Rape is most serious offence. It is evident from the provision made in No. 8 of the Chapter on Rape, which provides right to self-defense of chastity that there would be no offence committed if the culprit of rape is killed within one hour from the time of commission of the rape. It is one of the heinous forms of all offences. It violates all rights of a woman, which are related to living with

dignity. Rape also adversely affects on self-respect and personality of the victimized women;

Whereas, the main element of rape is use of force, threat and duress. It is called rape because force is used while it is committed. Forcible sexual intercourse by exercising force is inhuman, uncivilized and animal-like act. From the conceptual viewpoint of rape, it is the worst forms of criminal offence under the category of domestic violence against women. For the commission of a criminal offence, there needs guilty mind (*mens rea*) and such actions (*actus reus*), which may actually commit the offence. In rape, the act is forcibly and intentionally committed at the will of one person but against the will of other person irrespective of unwillingness or denial of other person. Unlike consensual sexual intercourse in which both persons have willingness for the intercourse, rape involves use of force, threat duress, fear by the rapist. Therefore, in each of civilized, human and well-cultured society, rape is taken as a heinous criminal offence without exception;

Whereas, rape being a heinous criminal offence and since it has not been categorically immune by law, interpretation of No. 1 of the Chapter on Rape has to be made in context of international law including international treaties, instruments, and principles of law;

Whereas, women are also human beings. As long as women remain as human being, they are also entitled to all rights that a human being is entitled for being a human. Article 1 of the Universal Declaration of Human Rights, 1948 has declared the right of every human person to live with self-respect. Similarly, all members of human family are entitled to be equal before law and equal protection of law without discrimination. Article 4 provides that no selfdom or servitude shall be accepted. The International Covenant on Civil and Political Rights, 1966, under its Article 1, provides that all people shall have right to self-determination and Article 8(1) has provided that no one shall be subjected to slavery and serfdom. These rights of self respect, self-determination and independent existence are inseparably and inalienably available to a human person, thus, women are also entitled to these rights. There seems no distinction in exercise of such rights before and after the marriage of women;

Whereas, a marriage does not mean women to turn in to slaves. Thus, women do not lose human rights because of marriage. So long as a person lives as a human being he/she is entitled to exercise those in-born and natural human rights. To say that the husband can rape his wife after the marriage is to deny independent existence, right to live with self-respect and right to self-determination. Any act which results in non-existence of women, adversely affects on self-respect of women, infringes upon right of women to independent decision making or which makes women slaves or an object or property is not compatible in the context of modern world, rather it is a stone-age thought;

Whereas, to forcibly compel women to use an organ of her body against her will is serious violation of her right to live with dignity, right to self-determination and it is an abuse of her human rights. The Constitution has guaranteed the right to privacy. Therefore, in the light of those international instruments on human rights, it cannot be said that marital rape is permissible. Article 1 of the Convention on Elimination of All

Forms of Discrimination against Women (CEDAW), defines the term 'discrimination against women' as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, culture, civil or any other field." Similarly, Article 6 of CEDAW has provided the right against trafficking of women and exploitation of the prostitution of women. Article 2 of the United Nations Declaration on Elimination of Violence against Women, 1993 (General Assembly Resolution No. 48/104) has inter alia, included marital rape as a form of violence against women. Similarly, the Fourth World Women Conference held in Beijing in 1995 has also included marital rape as a form of violence against women and stated that marital rape is violation of women's human rights. Section 103C of the Beijing Platform for Action has included marital rape under domestic violence against women and has urged to make necessary laws on it;

Whereas, section 9 of the Nepal Treaty Act, 1991 has categorically provided for that the aforesaid treaties and international instruments to which Nepal is a party have to be accepted as law of Nepal. In case provisions of such treaties and instruments to which Nepal is a party are inconsistent with provisions of Law of Nepal, the former provisions prevails. Thus, the position of such treaties and instruments are higher. Such treaties and instruments relating to human rights are important documents of modern age. National laws have to be framed according to those instruments and such laws have to be interpreted accordingly. In this background, while defining the offence of rape, the Constitutional norms and provisions of international instruments have to be taken into account;

Whereas, in this context, it is relevant to cite some of the judgments. In *Regina v. R.* (1992), the House of Lords in England has held that marriage is not an implied consent for rape, and has convicted the husband. In *Peoples v. Liberta* (1984), the court of Appeal of New York has held that there is no justification of the distinction between rape and marital rape and that marriage is not a license to rape wife by husband and the court has declared a New York law unconstitutional that exempted marital rape from being an offence. Interpretations given in those cases are related to and significant in the context of the present case;

Whereas, a discussion on the history of our family law and criminal law and reforms brought from time to time is relevant in this context. Preamble of the Country Code, 1963, which has been enacted to settle family disputes and convicting and punishing criminal offences, provides that as peoples behaviors could not be regulated only by religions, literatures, the code has been enacted to punish all, either belonging to higher or lower classes, on an equal basis. This shows that the aim of the law is to punish all culprits instead of traditional practice of discrimination. Religious beliefs and traditions did not restrict polygamy, but now the law has made it punishable. There has been a sea-change in the classical thought that a marriage once entered into continues for ever and law has provided that the relationship may be divorced subject to the provisions of law. Law has provided for seeking alimony from the husband to live separate from him. The

law has eliminated practices of untouchables and other forms of social discrimination and exclusion. Law has regulated marriage - child marriage is prohibited and no marriage is recognized without consent. The law has not allowed more than one wife to a man and eliminated provision for partition of partial property. In matters of crimes as well, the Constitution has envisaged right to equality and other laws including the Country Code have been amended accordingly. Many discriminatory provisions contained in the Chapter on Rape have been amended. The age of women referred to in No. 1 of the said Chapter has been changed from time to time. However, the terms "other's wife whose husband is living" stated in No. 1 of the said Chapter inserted by an amendment of 1992 BS (1935 AD) have been still continuing. There has been a sea-change in social, economical and cultural background during the Rana regime of the said time. It is quite natural to bring about timely changes in laws with the changes in social, economical and cultural background;

Whereas, bringing timely changes in laws is to proceed towards globalization with the concept of universal values and traditions. The main basis of globalization is reciprocal international relations and the values and traditions determined by treaties and conventions. It is in this context that laws are being made in the national level according to the provisions of international treaties and instruments to which Nepal is a party. A Bill has been introduced in order to bring changes in the Prevention of Trafficking in Human Beings Act, 1986 in harmony with recently adopted SAARC Convention on Prevention of Trafficking in women and Girls. The Country Code (Eleventh Amendment) Bill has been passed to enforce the principle of substantive equality under the CEDAW and the Bill against domestic violence has also been adopted. In this way, the terms "other's wife whose husband is living" referred to in No. 1 of the Chapter on Rape have to be interpreted in the context of recognition of the said principles in national and international level;

Whereas, murder or attempt to murder, battery, defamation or verbal abuse of one's own wife are criminal offences made punishable, it cannot be said or taken that though No. 1 of the Chapter on Rape that criminalize rape as a heinous criminal offence, has immune any person committing such an offence from punishment. If an act is an offence by its very nature, it is unreasonable to say that it is not the offence merely because of difference in person committing the act. It will yield discriminatory result, if we interpret that an act committed to any other woman is an offence and is not an offence, if the same act is committed to one's own wife. There is no justification in differentiating between the women who are wives and other women. Such discriminatory practice is against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and letters and spirit of Articles 11(1), (2) and (3) of the Constitution of the Kingdom of Nepal. No law can be interpreted against provisions of the Constitution and treaties and international instruments to which Nepal is a party. Therefore, to exempt an offence of rape committed to one's wife by the husband is against recognized principles of justice. An offence is deemed to be committed because it is committed and not because there is difference in the status or position of the person committing that offence. There may be difference in the degree of punishment but there would be no immunity from punishment. The law itself has regarded consent as a basis of marital relationship and

marriage cannot be solemnized in absence of the consent. In similar ways, mutual consent is compulsorily required to have sexual intercourse between husband and wife after the marriage. Sexual intercourse with use of force and without consent is regarded as the offence of rape;

Whereas, it has been contended in the written replies that it is beyond imagination that a husband commits rape to his wife, and it is sure that so long as there is love and good faith between husband and wife, there is no situation of rape. It is normal state of affairs, however, sometimes reality of life becomes different and strange than the normal state. Where a wife is treated as an object or property or a means of entertainment and exploitation, her personal health and her needs are ignored in an irrational and inhuman manner and in that situation, an unnatural and brutal act of rape of wife is committed. Such situation may be rarest of rare. Therefore, it is imperative in a married life to discourage the brutal act of rape. If marital rape is punishable, a pure, healthy and clean atmosphere will be created in society in places of disorder and imbalance. In our country, law has prohibited child marriage very long ago but this social evil is still in practice. If marital rape is made punishable, it would help eliminate this social evil as well;

Whereas, the learned government advocate appearing on behalf of the respondents pleaded that it is not in conformity with Hindu religion and tradition to say that consent is required to have sexual intercourse with one's own wife. Hindu religion and its literature stress on purity, cleanliness and behavior of good faith in conjugal life, it can not be said that Hindu religion and traditions exempts the heinous act of rape to wife. Sexual intercourse in conjugal life is a normal course of behavior, which must be based on consent. No religion may ever take it as lawful because the aim of a good religion is not to hate or cause loss to any one. Thus, the pleading of the learned government attorney appearing on behalf of the respondent can not be accepted;

Whereas, from the viewpoint of literal interpretation theory of legal interpretation as well, No. 1 of the Chapter on Rape, the Country Code, does not categorically excluded marital rape from the definition of rape. A proviso clause of a law must be clear, categorical and doubtless. A law cannot be said to have proviso from a definition based on presumption against the basic tenet and elements of rape. If an odd sense comes out from an interpretation of a law, its meaning should be found from constructive interpretation. Even the literal interpretation of the words "other's wife whose husband is living" which is appearing in No. 1 of the Chapter on Rape does not mean that no rape shall be committed to one's own wife. In those words, the word "others" come before "no man whose husband is living". The word has not been used as an exception but as an adjective to the words woman whose husband is living and the word gives a symbolic meaning. Such use of word can not be taken as a proviso. Having analyzed the content of No. 1 of the Chapter on Rape, it seems to have criminalized rape and it does not seem to have classified having excluded one's wife by way of a proviso. Therefore, the structure of the said law and the causes explained above there seems no justification and reasonable cause for treating marital rape as an exception;

In the light of the discussions made in the foregoing pages and spirit of the right to equality guaranteed in the Constitution, various international human rights instruments ratified by Nepal and changing norms and values in criminal law with the pace of time, it is appropriate reasonable and contextual to define marital rape too as a criminal offence. It can not be said that any man who commits heinous and inhuman crime of rape to a woman may be immune from criminal law simply because he is her husband. Such husband has to be liable to the punishment for the offence he has committed;

Now, therefore, as marital rape found to have been immune by No. 1 of the Chapter on Rape, it can not be regarded, as contended by the writ petitioner, that the impugned definition of rape is inconsistent to the Constitution. Thus, the writ petition is hereby quashed. It is also hereby decided that as a punishable offence, there is a difference in the consequences of the rape committed by a third person and by a husband and No. 8 of the Chapter on Rape has kept in mind only the consequences of rape committed by a third person, there is a situation of gap of legal provisions following the rape of one's own wife - such as providing immediate relief by allowing to live separate from or to divorce the relationship with the rapist husband; prescribing the degree of offence in rape committed in the circumstance of child marriage; therefore, a directive order has been issued in the name of one of the respondents, the Ministry of Law, Justice and Parliamentary Affairs, to introduce a Bill for bringing necessary amendments with regard to the said gaps and for making complete legal provisions for justifiable and appropriate solution in an integrated manner with regard to marital rape taking into account the special situation of marital relationship and position of the husband. Do pass the information of this order to the respondents through the Attorney General and handover the case-file as per Rules.

Sd  
Justice

We concur with the above opinion.

Sd. Sd.  
Justice Justice

Done on this Thursday, the 19th of Baisakh of the year 2059.