

Analyzing SC's decision on marital rape

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#OPINION

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Failing to recognize marital rape as a heinous crime will dissuade victims from seeking justice.

The Supreme Court of Nepal recently set a concerning precedent regarding the recognition of marital rape. The court emphasized that marital rape should not be equated with rape, distinguishing between the two. This decision can downplay the seriousness of sexual violence within marriage. It undermines efforts to protect individuals from abuse and contradicts the global trend towards recognizing and penalizing marital rape as a form of sexual violence.

In a judgment recently published on the Supreme Court's website, the Court dismissed the decision given by the Appeal Court, Illam, which had imposed imprisonment of eight years and a compensation of Rs 50,000, reducing the sentence to merely two months' imprisonment and Rs 25,000 in compensation.

The case involved a child marriage between a 16-year-old boy and a 14-year-old girl, where shortly after the marriage, the girl's father accused the boy of rape. The judgment confirming their marriage stressed that once a marital relationship is established, treating marital rape as equivalent to non-marital rape is unjust. The SC ruling clarified that consensual physical relations between married couples are not criminal offenses but are integral to social values, essential for social development, and a basic human need. The court pointed out that comparing marital rape to a serious crime like rape is unfair since both husband and wife consented to live together after marriage.

The Court also established their marriage in this case and did not declare it void, relying on the non-retrospective application of the law principle. This principle states that legal provisions cannot be applied to events or actions that took place before those provisions were enacted or came into force. In essence, individuals cannot be held accountable for conduct that was not prohibited by law at the time it occurred. The marriage happened when the Muluki Ain 2020, was in force, under which child marriage is voidable and not ipso facto void. The Court explained that while the age limit for marriage is determined by law, due to food, technology, and various such external factors, sexual desires can occur early. The Court further explained that for children who have entered puberty, the psychological aspects of sexual desire caused by natural and physical needs, as well as the sensitivity to the context and environment that influences such desire, should also be considered. The Court, however, failed to address the liability of the boy's parents. According to the facts of the case, although the girl and boy married with their own consent, the marriage took place in the presence of the boy's parents, with their involvement. Under the then laws, the parents would have been punished with six months' imprisonment and a fine of Rs 10,000, which has now been increased to three years' imprisonment and a fine of Rs 30,000. While the Court has looked at various factors and considered them mitigating factors, it should have addressed the liability of the parents. If a child develops early due to various factors and commits a crime, and if the child is not given full liability for the same, then the guardians should be the ones to take responsibility.

While delivering the judgment in regards to rape, the Court acknowledged that the girl had not consented to the sexual act. However, it explicitly stated that because the individuals were married at the time, the act could not be classified as rape. This decision was based on the provisions of the then Muluki Ain, 2020, Chapter on Rape, No. 3 Sub-Point 6, which stipulated a punishment of 3 to 6 months imprisonment and a fine of up to Rs 25,000 for such cases. Consequently, the Court sentenced the perpetrator to 3 months' imprisonment and ordered him to pay Rs 25,000 in compensation.

The Court, guided by the Some Acts of Nepal Amendment Act, 2074, which stipulates that individuals aged 16-18 should be penalized according to the Penal Code, 2074, and Criminal Procedure Code, 2074, even for offenses committed before the enactment of these codes, ruled that the 16-year-old boy involved should receive a reduced sentence. As per the Penal

Code, 2074, Section 39, he was sentenced to 2/3rds of the standard punishment, amounting to 2 months' imprisonment. This case raises a critical question: why did the Court apply the Amendment Act, 2074, to reduce the sentence rather than determine it, especially considering that under Section 219(4) of the Penal Code, 2074, the maximum penalty for such an offense is 5 years? The key issue here is the absence of a minimum sentence for marital rape, allowing the court to impose a relatively short jail term.

In 2002, in the judgment of HMG vs Meera Dhungana, the Supreme Court recognized marital rape. Subsequently, in 2006, An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2063 (2006) declared marital rape a punishable crime with a jail term of 3-6 months. The Act to Amend Laws to End Gender Violence and Ensure Gender Equality, which came into effect in 2015, increased the minimum jail term for marital rape to 3 years, with a maximum extending up to five years. However, the National Penal Code Act of 2017 introduced further changes, leaving the minimum sentence for marital rape convicts undefined. The punishment for marital rape in the existing law is not enough and should be aggravated. Even though the punishment for marital rape was increased gradually, the punishment has to be increased, and the minimum punishment is to be fixed.

The disparity in punishment for rape based on the victim's marital status is a pressing issue. While the penalty for raping a woman outside of marriage can range from seven to twenty years, within marriage, the maximum sentence is capped at five years. This inconsistency not only violates the principle of equality enshrined in the Constitution of Nepal but also contravenes international obligations, such as those outlined in the Convention on the Elimination of All Forms of Discrimination Against Women, which prohibits discrimination based on marital status.

Such a distinction implies that marriage implies consent, perpetuating outdated notions of male dominance within marital relationships. This view diminishes the severity of marital rape, suggesting that ongoing sexual relations between spouses mitigate the offence. Addressing this disparity is crucial to ensuring that all victims of rape, regardless of their marital status, receive equal protection under the law.

Marital rape and rape should not be distinguished because both involve sexual intercourse without consent. Regardless of the relationship between the perpetrator and the victim, any sexual activity without consent violates human rights and constitutes a criminal offense.

Treating marital rape differently suggests that marriage allows one spouse to control the other's body, undermining the victim's autonomy and dignity. This perpetuates harmful societal norms that prioritize marital harmony over individual rights and reinforces unequal power dynamics within relationships.

Failing to recognize marital rape as a heinous crime will dissuade victims from seeking justice which perpetuates a culture where perpetrators can act with very little sanction. All forms of sexual violence should be treated seriously and addressed through legal systems that prioritize the rights and safety of all individuals, irrespective of marital status.

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