Supreme Court, Special Bench
Rt. Hon'ble Chief Justice Kedar Prasad Giri
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Bala Ram K.C.

Order
Writ No. 064-0035 of the Year 2063

Sub: Mandamus

Jit *Kumari* Pangeni (Neupane), resident of Nawalparasi district, Makar VDC Ward No. 4…….....1
Advocate Sapana Pradhan Malla, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11 …….....1
Advocate Meera Dhungana, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11 …….....……1
Advocate Bhupendra Khanal, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11 …….....1
Advocate Sushma Gautam, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11 …….....….1
Advocate Lok Hari Basyal, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11 …….....…….1
Dhan Maya Giri, resident of Nawalparasi District, Makar VDC Ward No. 4….....…1

Petitioners

Vs.

Prime Minister and Office of the Council of Ministers, Singhadurbar …… .....……1
GoNepal, Ministry of Law, Justice and Parliamentary Affairs …… .....…..1
GoN, Ministry of Women, Children and Social Welfare…….....….1
Interim Legislative Parliament, Singhadurbar, Kathmandu… ……1
GoN, Law Reform Commission, Singhadurbar…… ...…….1

Respondents

Bala Ram K.C. J: The content and order of the writ petition submitted before this Bench pursuant to Article 1, 107 (1) and 107 (2) of the Interim Constitution, 2063 is as follows:-

From among the petitioners Jit *Kumari* Pangeni (Neupane) contends that a marriage had been consumed between her and Bed Parasd Pangeni, resident of Nawalparasi district, Makar VDC Ward No. 4 in the year 2050, wherein three sons were born to her through their marriage. The petitioner contends that the relationship between her and her husband were very cordial till the year 2058 and thereafter, the petitioner's husband had resorted to fear, coercion, battery and had begun to indulge in forceful sexual relationship wherein the petitioner's husband had resorted the petitioner to perform fellatio and when disagreeing to such acts, the petitioner's husband had resorted to battery and perpetrating sexual violence against the petitioner. The petitioner further contends that on March 31, 2007, the husband tried to establish sexual relationship without the consent of the petitioner and upon refusal to comply with the husband's demand, the petitioner was subjected to violence wherein the petitioner was beaten on her eyes, face, breasts and was subsequently raped by the husband and having no other recourse, the petitioner had filed a first information report at the District Police Office in Nawalparasi on April 6, 2007. With the conclusion of the investigation and where a charge sheet had been submitted against the husband, the District Court on April 17, 2006 had directed the husband to furnish Rs. 4,500 as bail and since the bail amount could not be furnished, the petitioner contends that her husband is behind bars and the petitioner fears that she may be subjected to further violence, torture and insecurity upon release of her husband. The petitioner further contends that the prevailing laws are insufficient to punish the perpetrators and this not only has an impact on the victim but also has a negative impact on the children and friends.

The petitioner further states that owing to the prevailing legal provisions, her right to equality, right against exploitation, right against torture, right to be free from violence and her sexual rights had been exploited, wherein the petitioner pursuant to Article 32 of the Constitution has sought for constitutional remedy. Likewise, the other writ petitioners' state that they have been associated with Forum of Women, Law and Development and have been working as legal practitioners and have been advocating for the protection and preservation of women's right. They further contend that women pursuant to Article 32 and 107 of the Constitution are vested with the right to seek remedy against the violation of women's right.

The petitioners contend that Section 1 on the Chapter of Rape under the *Muluki Ain* defines rape as "Provided, intercourse is established with any women without her consent or where intercourse is established with a girl below 16 years of age with or without her consent shall be deemed to be rape." Furthermore, the petitioners state that Section 3 of the said Chapter prescribes for imprisonment on the basis of the age, wherein a perpetrator is sentenced from five years to fifteen years imprisonment whereas, provided, a spouse is raped by her husband, the perpetrator is sentenced for a period of three months to six months which according to the petitioners is insufficient and discriminatory. They contend that where punishment is prescribed on the basis of relationship and social relation, the said provision is contrary and inconsistent with the recognized principles of criminal justice and equality.

They further contend that the said inconsistent provision has further aggravated the problem, wherein a husband is instigated to commit an offence of rape against his spouse.

The writ petitioners further contend that consent has to be derived from both the parties during any sexual relationship, and absence of consent from one party would generate violence. Such violence has been defined as a crime under the criminal law and provision for punishment has been prescribed therein. The petitioners' further state that the prevailing laws denies women of her sexual rights and where the law prescribes for lesser punishment; there is the possibility of the accused being released on bail wherein the victim may be further victimized. The petitioners state that such a provision provides the husband the right to sexually exploit his spouse.

Likewise, the petitioners through their petition contend that a directive order had been issued by the honorable Supreme Court on May 2, 2002 in relation to marital rape case and in the course of implementing the directive order, Gender Equality Act, 2063 had been enacted and the provision prescribed therein are discriminatory. The provision prescribed in the Act, discriminates the offence of rape in relation to the person perpetrating rape against a married woman, which is inconsistent with Article 13 of the Interim Constitution, 2063. Proviso under Sub-article (3) of Article 13 of the Interim Constitution prescribes that the State shall make special provision by law for the protection, empowerment or advancement of women, whereas Article 20 prescribes that women shall not be discriminated against in any way on the basis of gender and as such the legal provision prescribing lesser punishment against a husband committing rape against his spouse is deemed to be discriminatory.

The petitioners contend that the said legal provisions are inconsistent with Article 1, 2, 3, 4, 6 and 15 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, Article 1, 2, 3, 5, and 17 of International Covenant on Civil and Political Rights, 1966, Article 1, 2, 3, and 5 of the International Covenant on Economic, Social and Cultural Rights, Article 1, and 12 of the Universal Declaration of Human Rights, 1948, Article 2 of the UN Declaration on the Elimination of Violence against Women to which Nepal has been a Party. Section 9 (1) of the Nepal Treaty Act, 1990, prescribes that where a treaty to which Nepal has become a Party following its ratification is inconsistent with the provision of prevailing laws, shall be deemed void to the extent of such inconsistency and that the provisions of the treaty shall be applicable as laws of Nepal. Likewise, Article 26 and 27 on the Vienna Convention on the Law of Treaties, 1969, to which Nepal has been a Party prescribes that every treaty shall be binding upon the parties and that the Parties shall not escape from its obligation. The petitioners citing Section 3 (6) on the Chapter of Rape under the *Muluki Ain* to being inconsistent with the constitutional rights, right to equality, right to procreation, sexual rights, right against violence against women, right against exploitation, right to privacy, right against torture, right to self-determination, right to freedom, right against gender discrimination have sought for an order of certiorari and have sought the court to issue any other appropriate order for formulation of equal laws.

An order had been set aside by this court on March 28, 2007 asking the respondents as to why the order sought by the petitioners need not be issued. Similarly, the order prioritizing the case, had directed the court to present the case before the bench upon submission of the rejoinders from the respondents within 15 days from the date of receipt of the order excluding the period of travel.

The rejoinder submitted by the Secretariat of the Legislative-Parliament states as such: that the laws have recognized any kind of rape as a grave criminal offence which is punishable by law. That the modern criminal jurisprudence does not envisage punishment for the sake of punishment but also envisages reformations thereto. That behind any criminal offence, backgrounds, reasons, status and circumstances of perpetrators is not the same and varies a lot and therefore, it would not be justifiable to render a uniform punishment for all kinds of offence. That, the fundamental elements vis-à-vis the status of the people involved in the offence, the circumstance therein that is prevalent during an offence determines the quantum of punishment and therefore, the principle of providing different punishment for an offence of similar nature has developed. That there is a difference between marital rape and other rape. That the effect of marital rape is limited within the family of the victim rather than with the society and is associated with the future life of the person in question and therefore, even where the result is the same, there is a huge difference between other rape and marital rape in terms of its impact, wherein the Legislature has provisioned for a lesser obligation in relation to marital rape. That it is the discretionary power of the Legislature to determine and prescribe the quantum of punishment for various offences and as such issues with regards to the concept of equality cannot be raised in a court. That where there is a basis for differentiating people and where there is a specific objective for prescribing different provisions and provided that objective is in itself justifiable, then laws can be formulated for different conducts. That where the issues, in relation to the legal provisions raised by the petitioners are not justifiable, the writ petition should be quashed.

Likewise, the rejoinder submitted by the Government of Nepal, Prime Minister and the Council of Ministers states as such: that where the writ petitioners have based their petition with the international treaties to which Nepal has been party, the treaty as a matter of right cannot be exercised by a person. That the human rights have been guaranteed by the Interim Constitution, 2063. That it is the recognized principle of criminal jurisprudence, that quantum of punishment for any criminal offence should be prescribed pursuant to the gravity of the offence and therefore, it is justifiable to prescribe different punishment pursuant to the age and conditions of the perpetrator during the perpetration of the offence. That the formulation or amendment of Act falls within the jurisdiction and ambit of the Legislature and as such is not a subject matter to be regularized by the court and therefore, the writ petition prima facie should be quashed.

The rejoinder submitted by the Ministry of Law, Justice and Parliamentary Affairs states as such: that Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (Civil Code) has defined marital rape and punishment thereto has been provisioned. That marriage in a Nepali society has been accepted as a prestigious social conduct and therefore, when laws

are been formulated, social values, recognized principles and traditions are taken into considerations and subsequently punishments are provided thereto. That it is a policy matter of the State to determine the quantum of punishment in any offence and quantum of punishment and result is determined pursuant to the status of the person involved in the offence, nature and gravity of the offence. That the prevailing legal provisions, in relation to marital rape are not contrary and inconsistent with the Interim Constitution, 2063, and international treaties and conventions. That pursuant to a writ petition filed by writ petitioner Meera Dhungana against this Ministry re: Writ Petition No. 55 of the Year 2058, the honorable Supreme Court had propounded a principle wherein the Supreme Court had interpreted that the result of rape committed by an ordinary person and rape committed by a husband cannot be similar and therefore, pursuant to the principle propounded by the Supreme Court, the quantum of punishment in marital rape and in other kinds of rape should be different and justifiable and therefore the writ petition should be quashed.

The content of the rejoinder submitted by the Ministry of Women, Children and Social Welfare is as such: that the writ petitioners have not been able to state as to what acts which needed to be performed has not been performed by the Ministry or as to what act has been performed which should not have been performed whereby their fundamental or constitutional or legal rights have been violated, that as the contents of the writ petition are self explanatory, the writ petition should be quashed.

Where the case pursuant to the rules had been submitted before this Bench, the learned advocates, Ms. Sapana Pradhan Malla, Ms. Meera Dhungana, Mr. Lok Hari Basyal, Dr. Rajit Bhakta Pradhananga and learned advocate Mr. Sagun Shrestha made their presentation as such: that the offence of rape is a grave criminal offence and that there is no intelligible basis to prescribe lesser punishment for a rape committed by a husband against his spouse in relation to other rape committed by other person. That where an accused may be released on bail or guarantee for an offence having a sentence less than three years, the conduct of the accused shall remain the same, wherein violence against women may further be perpetrated and where Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (Civil Code) is inconsistent and contrary to the provisions relating to the Interim Constitution and Convention on Elimination of all Forms of Discrimination Against Women, the writ petitioners have sought the court to declare the said provision void..

Deputy Attorney General Mr. Narendra Prasad Pathak on behalf of the Government of Nepal stated as such: that the Legislature has recognized rape as a grave criminal offence and as far as the issue of punishment is concerned, the quantum of punishment may be different pursuant to the status of the person involved in the offence and the circumstances therein. That, even where a criminal offence, may be perpetrated by persons under different conditions, the result would be of a similar nature but elements such as the status of the person involved in the offence, conditions and circumstances of the offence determines the quantum of punishment. That where the result is the same, there is a difference between other rape and marital rape and as such quantum of punishment in other rape and marital rape is different. That prescription of the quantum of punishment vests solely within the

jurisdiction of the Legislature and the writ petition should be quashed. A written memorial had been submitted by the petitioners.

Today being the date set aside for rendering a verdict, the Bench upon perusal of the writ petition, rejoinders and the submissions made therein by the learned advocates and the memorials submitted by the learned advocates, the Bench deems that decision should be made on the following issues:-

(1) As to whether or not the current legal provision in relation to the punishment prescribed under marital rape is discriminatory? Provided, it is deemed discriminatory, as to whether or not such law can be deemed void by this court?

(2) As to whether or not an order sought in the petition should be issued?

With regards to the first issue, amendment to Section 3 on the Chapter of Rape had been made so as to maintain gender equality by the Act Relating to Amendment of Some Nepal Act, 2063, wherein the following provision in relation to punishment had been prescribed in the said amendment. Section (6): "Notwithstanding anything contained elsewhere, provided a husband commits rape against his spouse, the person shall be subjected to imprisonment for a period of three months to six months." The petitioners contend the provision to be discriminatory thereby encouraging violence against women and where the provision is contrary and inconsistent with Article 13 of the Interim Constitution, 2063, and Article 2, 3, 6, and 15 of the Convention on Elimination of All Forms of Discrimination Against Women, 1967, to which Nepal is a Party, an order of certiorari should be issued in the name of the respondents directing them to frame or cause to frame legal provisions prescribing for equal punishment. Likewise, the rejoinders submitted by the respondent claim that prescription of the quantum of punishment is a policy matter of the State and the quantum of punishment and result is determined by the status of the person involved in the offence, nature and gravity of the offence and therefore, it would not be justifiable to look into the provision with the concept of equality. That where there is a definite and justifiable objective in providing different punishment in relation to marital rape and other rape, the writ petition should be quashed.

It cannot be disputed that the offence of rape is a grave criminal offence. Such an offence not only creates a negative impact on the physical, mental and family life of the victim but also has an impact on the society and therefore, many countries prescribe for life-term imprisonment for offences relating to rape. In our context, this offence has been recognized as a deplorable and grave criminal offence and provision for punishment has been prescribed therein. Pursuant to a writ petition filed by petitioner *Meera Dhungana v Ministry of Law, Justice and Parliamentary Affairs*, re: Writ Petition No. 55 of the Year 2058, the petitioner had sought the court to declare void the said provision due to it being inconsistent with the Constitution. Section 1 on the Chapter of Rape prescribes that where an unmarried girl, widow or any married woman below 16 years of age is subjected to intercourse with or without her consent and those above 16 years of age is subjected to intercourse without her

consent by force or fear or through undue influence shall be deemed to be rape. The court had deemed that the said provision did not allow any immunity with regards to marital rape (see order dated May 2, 2002). Thereafter, amendment to Section 1 on the Chapter of Rape had been made wherein amendment to Section 3 on the said Chapter was made wherein the following provisions had been prescribed:

Section 3. Following punishment shall be levied for offence of rape:

(1) Ten to fifteen years for commission of rape against a girl below 10 years.
(2) Eight years to twelve years for commission of rape against a girl above 10 years and below 14 years.
(3) Six years to ten years for commission of rape against a girl above 14 years and below 16 years.
(4) Five years to eight years for commission of rape against a woman above 16 years and below 20 years.
(5) Five years to seven years for commission of rape against a woman who is 20 years or above.

From the amended provision, a perpetrator pursuant to the age and condition (husband and wife) of the woman is subjected to imprisonment for a period of three months to fifteen years. The issue is not related to the difference in punishment on the basis of the age of the victim but is related to the difference in punishment owing to the relationship with the victim and as such the constitutionality of the said provision has been raised.

Quantum of punishment in criminal cases has been prescribed pursuant to the gravity of the offence. Provided, anyone with intention commits to take the life of another person is subjected to life imprisonment whereas, for accidental homicide the ratio of punishment is comparatively less. Pertaining to the nature of the offence, gravity and circumstances during the perpetration of the offence, there may be diversity or difference in punishment. Rape against a minor is recognized as a grave offence under Section 3 on the Chapter of Rape, and harsher punishment has been prescribed therein. Nevertheless, rebate of punishment in criminal cases on the basis of relationship with the victim has not been prescribed elsewhere in the laws. **Where, rape has been recognized as a grave criminal offence under the Chapter of Rape and where the result of such offence is the same, there is no rationality in differentiating between marital and non-marital rape. Offence is committed in lieu of any criminal act and provided, rebate on punishment is to be provided pursuant to the status of the actor, it would deem to be inconsistent with the right to equality as envisaged in the Constitution.** It is an assumption that love and good feelings reside between a husband and wife and conditions of rape does not exist but the circumstance may not always remain the same. **Where a spouse is considered as means of recreation and exploitation and contrary to the desires of the spouse, her health and needs, is raped by the closest person, then such a person committing such an offensive act, cannot be entitled to rebate in punishment merely because of his relationship with his spouse and there is no jurisprudential basis with regards to such rebate in punishment.** Legal provision

prescribed under Section 7 on the Chapter of Rape has been declared void by this court since the said provision prescribed rebate in punishment based on the character and profession of the victim and as such was deemed to be unequal among women. (Refer to: *Sapana Pradhan Malla vs. Ministry of Law, Justice and Parliamentary Affairs, et.al*. Writ No. 56 of the Year 2058, Date of order May 2, 2002). Therefore, based on his relationship, profession and character of the victim where rebate in punishment is provided to a person in any criminal offence is deemed to be discriminatory between women. Our criminal justice system prescribes for the release of the accused on bail or on guarantee for an offence having less than three years of imprisonment and also prescribes that the bail or guarantee may be accepted or rejected for an offence having three years or more punishment. Where the law for marital rape prescribes for punishment that is less than three years and in the absence of any judicial separation during the course of litigation, and where the accused may not stand trial in detention, the possibility of the victim being re-victimized and tortured cannot be denied.

Based on the nature of the offence, health of the victim and the age, the quantum of punishment in any offence may be increased and added to the principal sentence. In case of repeated theft, additional punishment is made for repetition of the same offence. Where a group of persons commit homicide, additional sentence is made in lieu of the involvement of the group for committing such homicide but jurisprudential principle underlines and recognizes that the additional sentence cannot exceed the principle sentence. Section 3 on the Chapter of Rape, prescribes punishment for each individual involved in the offence of rape. Likewise, Section 3 (a) on the Chapter of Rape prescribes additional five years imprisonment on the principle punishment for committing gang rape against a woman or for committing rape against a pregnant woman, or rape against an incapacitated or handicapped woman. Similarly, Section 3 of the said Chapter prescribes additional one year imprisonment for a person who being H.I.V. positive knowingly commits an offence of rape against a woman. Section 4 of the said Chapter prescribes for three years imprisonment for each abettor who knowingly assists in the commission of the offence and where such offence is committed against a woman below 16 years of age, the quantum of punishment is double fold. From the above-mentioned provision where a woman is gang-raped or where a pregnant woman is raped or an incapacitated or handicapped woman is raped or where a person who is H.I.V. positive, knowingly commits an offence of rape against a woman is subjected to a minimum of one year additional sentence on the principle sentence and the abettors are also subjected to three years imprisonment, whereas Section 3 (6) on the Chapter of Rape prescribes for lesser punishment and as such the said provision cannot be deemed to be proper. From the construction of the said provision, provided a husband commits an offence of rape against his spouse, he is subjected to imprisonment for a period of three months to six months and where an offence of rape is committed against his pregnant spouse, or offence of rape is committed against his incapacitated or handicapped spouse he is subjected to an additional sentence of one year. Likewise, where a husband is infected with H.I.V. and knowingly commits an offence of rape against his spouse he is subjected to an additional sentence of one year wherein the principle sentence is deemed to be less than the additional sentence which in itself is unnatural and unfit. Principally, the principle sentence cannot be

less than the additional sentence rather additional sentence may be levied on the principle sentence depending upon the gravity of the offence. Therefore, **where the principle sentence is less than the additional sentence, Section 3 (6) on the Chapter of Rape cannot be deemed to be proper and consistent with the principle of equality.**

Nevertheless, determination of quantum of punishment in relation to any offence is a matter of legislative wisdom and legislative wisdom as such cannot be intervened by the court. Where the Legislature has defined any act as an offence and has prescribed punishment thereto and provided such sentence is deemed unequal, the said provisions cannot be altered or repealed by this court and the same cannot be done pursuant to the principle of separation of power. Declaring any act as an offence and prescribing punishment thereto is purely a legislative act. Provision of punishment is made subject to the condition that an act has been declared to be an offense. Provided, the provision of punishment is deemed to be illegal, the same cannot be deemed to be void as long as the law declaring the act to be an offense exists. Provided, this is to be done, an act shall be deemed to be an offence whereas punishment thereto shall fail to exist thereby creating an atmosphere of impunity which is contrary and inconsistent to the concept of criminal law and justice. Therefore, **where pursuant to the principle of equality, the provision relating to punishment is deemed contrary, the said provision cannot be deemed otherwise or declared void by this court. Nevertheless, in cases where such provision is contrary to the constitutional principle and violates the fundamental right or is inconsistent with the principles of criminology and tends to encourage an individual to commit an offence and causes encumbrance in the development of the criminal law and the justice system, the court cannot escape from its obligation on the pretext that sentencing policy is purely a legislative matter.** As an interpreter of the Constitution and protector of the civil rights, the court in order to fulfill its obligations vested by the Constitution can provide directions deemed necessary or motion the government to frame provisions that are just, proper and unbiased.

Therefore, as discussed hereinabove, where rape has been declared as a grave offence, discrimination on punishment between marital and non-marital rape cannot be made and there is no justifiable reason in providing lesser punishment on the basis of relationship with regards to marital rape and where the principle sentence is less than the additional sentence in marital rape, the provision prescribed under Section 3 (6) on the Chapter of Rape cannot be deemed to be just. Therefore, pursuant to the principle of equality, the court hereby issues a directive order in the name of the Ministry of Law, Justice and Parliamentary Affairs to make provisions so as to bring coordination between the discriminatory sentencing policies between marital and non-marital rape and to make proper provisions where the principle sentence may not be less than the additional sentence. It is hereby

ordered to provide a copy of this order to the Ministry through the Office of the Attorney General and to maintain the case file accordingly.

s/d
Anup Raj Sharma
Justice

Consenting on the opinion

s/d
Kedar Prasad Giri
Chief Justice

Opinion of Hon'ble Justice Bal Ram K.C.

The principal contention of the writ petitioners is that where Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (Civil Code) prescribes for imprisonment for a period of three months to six months for offence relating to marital rape, the said provision being inconsistent with the provision of the Constitution have sought to declare the said provision void. Where the petitioners have sought to declare Section 3 (6) on the Chapter of Rape void, they contend that Section 3 prescribes for harsher punishment for other kind of rape but where rape is committed by a husband against his spouse the said provision prescribes for imprisonment for a period of three months to six months and contend that the said provision provides discrimination between women who have been a victim of rape. Principle propounded in Writ Petition No. 55 of the Year 2058 re: *Meera Dhungana vs. Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs*, Article 1, 2, 3, 4, 6, and 15 of CEDAW, Article 1, 2, 3, 5 and 17 of ICCPR, 1966, Article 1, 2, 35 of ICESCR, 1966, Article 2 on the Declaration on the Elimination of Violence Against Women, 1993 and decisions made by foreign courts in relation to marital rape have also been submitted along with writ petition and the memorials.

The proviso under Article 13 (3) of the Interim Constitution of Nepal, 2063, prescribes that special provisions by law shall be made for the protection, empowerment or advancement of women. Article 18 (2) prescribes for right to social security as provided for in the law whereas Article 20 prescribes the right to reproductive health and other reproductive rights. The Constitution also prescribes that no physical or mental or other form of violence shall be inflicted on any women and provided any such act has been committed shall be punishable by law. Article 21 prescribes the right to participate in state structures on the basis of principles of proportional inclusion. The above rights have been prescribed as fundamental rights and Part 4 of the Constitution prescribes that it shall be the policy of the State to make special provision for the development and advancement of the women.

Nepal has ratified CEDAW, 1979 in 22 April 1991, ICCPR, 1966 in 14 May 1991 and ICESCR 1966, in 14 May 1991. With the enactment of Nepal Treaty Act, 1990, Section 9 of the said Act prescribes that in case of the provisions of a treaty to which Nepal has become a Party conflicts with the provision of current laws of Nepal shall be held invalid to the extent of such conflict.

In order to end discrimination against women and for the protection of the interest of the women and for the protection of the rights and interests guaranteed by the Constitution and various Conventions, this court through various writ petitions has repeatedly issued various directive orders in the name of the government. This court is the guardian of the fundamental rights of the citizens and also the guardian of the rights and interest of the women and as such this court should be aware and alert towards the various rights and interests guaranteed by CEDAW, ICCPR, ICESCR and the Interim Constitution.

Notwithstanding anything contained in the petition and the international Conventions such as CEDAW, ICCPR, ICESCR which have been submitted along with the writ petition, the petitioners have not entered the court to exercise the rights guaranteed by these Conventions to which Nepal is a Party and the rights guaranteed by the Constitution and the laws of Nepal but rather they have invoked the extra-ordinary jurisdiction of this court and have sought for the increase in the quantum of punishment by citing that the provision of three to six months of imprisonment of a husband committing an offence of rape against his cohabiting spouse is less. Where the petitioners pursuant to Article 107 (2) of the Interim Constitution have entered this court challenging the legislative domain, it is for this court to measure as to whether the claim sought by the petitioners falls within the extra-ordinary jurisdiction of this court pursuant to Article 107 (1) and (2) and as to how relevant, logical and as to whether or not the claim sought by the petitioner is in line with the Constitution.

Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (National Code) prescribes imprisonment for a period of three to six months provided a husband commits an offence of rape against his spouse whereas amendment to the definition of rape has not been made.

The sentencing provision prescribed under Section 3 on the Chapter of Rape has been amended pursuant to the directive order issued by the Special Bench of this court in connection to Writ Petition No. 55 of the Year 2058.

The legal interpretation made by this court is termed as precedent and precedents cannot be further interpreted. Precedents are used in disputes having the same subject matter. The above directive order made by court clearly differentiates a rape committed against a woman by any other person and an offence of rape committed by a husband against his spouse during their marital state and pursuant to this interpretation, a directive order had been issued for the purpose of framing legal provision. Pursuant to Writ No. 55, an order had not been issued to provide equal sentencing in the name of equality against a husband committing an offence of rape against his wife and such an order cannot be issued by the court. How can an order to lessen or increase the quantum of punishment be issued through

an extra-ordinary jurisdiction? Therefore, where reference to Writ No. 55 of the Year 2058 have been made by the petitioners and have interpreted marital rape and on the basis of the interpretation have sought for increase in the quantum of punishment, the same has not been interpreted in the said writ petition. Pursuant to the said writ petition, the court has interpreted that there is a difference in other rape and marital rape and as such this cannot be disputed.

The petitioners principal plea is that pursuant to a valid marriage and in the absence of any judicial separation provided, a husband commits an offence of rape against his cohabiting spouse, the quantum of punishment should be increased and should be in par to other rape committed against any other women. In this regard, various matters should be taken into consideration. Rape is a grave criminal offence and our laws have recognized this as a grave criminal offence. Section 8 on the Chapter of Rape, the right to self defense for a woman wherein a woman is vested with the right to take the life of the person committed rape and such an act is not deemed to be any offence and where the life of such person is taken within one hour of commission of the offence of rape, the woman is exonerated from such offence.

The body of a woman is inviolable. This right of self-defense is deemed necessary for the protection of the chastity of a woman. It is necessary to vest women with such rights to protect themselves against any attacks to their physical personality and chastity. Section 8 on the Chapter of Rape, is deemed to be a good law made by the legislative wisdom which cannot be disputed. **Rape leaves a devastating effect on a woman's mental, intellectual, physical, and family, social, economic life and her profession. Rape is considered as a grave offence where the gravity of the offence is greater than an offence of homicide. Rape is considered as an offence against the society and humanity and this fact is indisputable.** Taking into consideration the seriousness of such an offence, our Legislature has prescribed for immunity wherein a woman who in the process of protecting her chastity takes the life of the perpetrator her action is not deemed to be an offence. The necessity of Section 8 cannot be disputed.

Our laws has recognized rape has a grave criminal offence, wherein the State itself conducts the investigation, submits charge sheet and represents the case from the inception till the final disposal of the case. The offence of rape is included in the Schedule of the State Cases Act, 2049, wherein the plaintiff in such cases is the State. Where a decision to the Writ Petition No. 55 of the Year 2058 had been rendered, the definition of rape committed against any woman by any other person and rape committed by a husband against his cohabiting spouse is the same in the Act. Pursuant to the prevailing legal provision, Section 1 on the Chapter of Rape defines rape as an act that is committed without the consent of the woman through force, or fear or through undue influence. A third person cannot be a witness against a rape committed by a husband against his cohabiting spouse. Pursuant to our evidence law, provided, a victim who has been victimized by any act, event or circumstances expresses such event immediately or later, then such matters expressed

falls within the ambit of evidence. A spouse, pursuant to Section 10 (1) (b) of the Evidence Act, 2031, can be a witness to the offence of rape committed by her husband.

Provided, any one commits an offence of rape, the evidence that is obtained upon the examination of the clothes of the female and male, examination of their sexual organs and physical examination and examination of the scene of the crime is deemed to be irrefutable evidence. In the absence of any judicial separation, provided, sexual intercourse has been consumed between a husband and his cohabiting spouse with or without her consent, and provided any evidence thereto during the process of investigation is to be collected, the pubic hair, semen and fiber transfer of clothes can be obtained through laboratory examination wherein all evidence relating to rape can be obtained. In an offence of rape committed by a person against any woman, the evidence obtained through the physical examination of the perpetrator and the victim and the evidence obtained from the crime scene would be similar to the offence of rape committed by a husband against his spouse. Forensic science may not be able to segregate between rape and consensual intercourse. Where evidence from the bed shared by the husband and wife and from the physical examination of the spouse is obtained, what would be the basis for segregating as to whether the act was rape or a consensual intercourse between them? In the absence of judicial separation, where the marriage between a husband and wife is valid and are cohabiting and sharing the same bed and are not living separately or pending any divorce, and provided sexual intercourse consumed between a husband and wife is deemed to rape, the life and liberty of the husband would be at risk because the husband would not be able to prove that the act was a consensual sexual intercourse. It cannot be deemed that all women possess good character. Some women may also possess bad character. Provided, where such a woman pursuant to Section 8 on the Chapter of Rape takes the life of the husband within hour of the commission of sexual intercourse and takes the plea of self-defense, the life and liberty of the husband would be at risk. Therefore, clear provision of living apart and judicial separation should be made and clear definition of marital rape should be provided therein and therefore, marital rape should be defined under the present definition made in the Chapter of Rape.

In the absence of living apart or judicial separation, it is necessary to understand as to whether the definition of rape provided under the Chapter of Rape is applicable to a valid marriage where a husband and wife are cohabiting and sharing the same bed. At the time of prescribing the definition of rape under Section 1 on the Chapter of Rape, the concept of marital rape was not prevalent in Nepal and neither was it prevalent in other countries. The concept of marital rape was not prevalent to the draftsmen prescribing the definition of rape and the draft legislation that was submitted for enactment. Section 1 defines rape as act of sexual intercourse committed against any other woman other than his wife without the consent of such woman. At the time of drafting the definition, the offence of rape was defined as an act committed against any other woman other than his wife. At the time of drafting the definition of rape, the definition was made under the concept, principle, social structure and legal regime that marriage was “an implicit general consent to sexual intercourse by a wife on marriage to her husband.”

Section 1 on the Chapter of Rape does not recognize the sexual intercourse consumed between a husband and spouse as rape. Therefore, in order to increase the quantum of punishment for an offence of rape committed by a husband against his cohabiting wife, it is deemed necessary that the concept of living apart and judicial separation should be included in the Chapter of Rape and a separate definition of marital rape should be made therein. Definition of offence cannot be made by the extra-ordinary jurisdiction of this court, which would be contrary to the principle of devolution of power and recognized principles of interpretation of laws.

Rape has been recognized as a crime for centuries. The Hindu society as well as the Christian, Muslim or any other religion or society considers rape against a woman as a grave offence and stringent punishment has been provided therein. If we are to look into the historical development in relation to the punishment of rape, rape is considered as an act of sexual intercourse consumed against any other woman other than his wife without the consent of such woman. Historical Background of Rape prescribed under Part Two of the book entitled "The Consequences of Rape", penned by Professor Charles W. Dean and Researcher Mary De Bruyn Kop of Hartford University mentions that rape was considered as a crime even before the birth of Christ whereas, there was no legal provision in relation to a rape committed by a husband against his spouse. The book underlines that "records show that rapist were subjected to punishment as far back as thousands of years before Christ. The Code of Hammurabi which was carved in Babylon around 1900 B.C. on an abelisk of Blackstone decreed that men should be punished if they raped. The early Hebrews considered rape a crime as did Assyrians. All these early civilization meted out punishment according to their own systems of justice. Justice however was a double edged sword then, as provisions were made for the punishment of not only the criminal but also to the victim.

Under the code of Hammurabi the Babylonians considered a married woman, who was raped to be guilty of adultery, bond her to the rapist and threw both of them in the river. Both the assailant and the victim could be saved from death, however the husband if he wished could pull his wife from the water in which case the King would pardon the adulterer. The Hebrews also considered some women to be responsible for their own rape. A married woman who was raped was stoned to death along with her assailant at the gates of the city. The same punishment was dealt to a virgin who was raped within the city walls, the reasoning being that she could have cried out and been heard and rescued if she had wanted.

The Assyrians went one step further. They also punished the wife of the rapist. If a man raped a virgin, her father was entitled to take the wife of the rapist. Rape was a crime for sure, not only against the woman rather against the women's father and husband as well, since it was their property that had been defiled.

In the thirteenth century, England stated rape as a crime against society rather than woman but did not deem sexual intercourse consumed by a husband against his spouse to be rape. It is necessary to define that an offence of rape under a valid marriage can be committed

by a husband against his cohabiting spouse. The court can provide legal definition of the term offence but the court cannot provide criminal definition to the sexual intercourse consumed between a husband and spouse. Definition of criminal acts falls within the ambit and legislative domain of the legislature.

The definition of rape prescribed under Section 1 of the Chapter of Rape and provision of punishment prescribed under Section 3 (6) of the said Chapter are penal law. Pursuant to the principles of legal interpretation, where interpretation of the definition of a crime and the punishment prescribed by the legislation is to be made by the court, the general meaning that is derived from the use of the word should be made and interpreted. In other words, while interpreting the penal law, the expression derived by the use of the term expressed by the legislation should be considered and conclusion should be reached therein. It cannot be presumed that the intention of the legislation was otherwise and on this basis interpretation should not be made for the purpose of increasing or decreasing the quantum of punishment.

In relation to marital rape, it is necessary to make a perusal of the Medical Jurisprudence written by Modi. Marital rape has been defined under Section 376 A of the Penal Code of India which is as follows:

(a) Who is living separately from him under a decree of separation or,
(b) Under any custom or usage

Without her consent is punishable with imprisonment which may extend to two years.

Pursuant to the Penal Code of India, marital rape is deemed to be an offence provided, there is a judicial separation or the husband and wife are living apart and the sexual intercourse must have been consumed without the consent of the spouse and in terms of punishment, the Code also prescribes for an imprisonment for a period of two years.

Perusal of the laws and decisions of external countries in relation to marital rape submitted by the petitioners also underlines that an offence of rape is committed by a husband provided such sexual intercourse is consumed without the consent of his spouse and where they are living separately or by a decree of the court are judicially separated. In *People vs. Liberta*, a case referred by the petitioners, the order of the family court underlined that where a husband and wife are living apart and where sexual intercourse is consumed by the husband against the desires of his spouse, such an act is deemed to be an offence of rape. Likewise, the petitioners through the submission of their deliberation note and submission of Regina vs. Appellate, a decision rendered by the Court of Appeal Criminal Division dated 23 October 1991, take the plea that sexual intercourse consumed by the husband without the consent of his spouse has been recognized as an offence of rape and harsher punishment has been provided for such act.

In the case of Regina vs. Appellate submitted by the petitioners, the case of History of the Pleas of the Crown, Vol. 1736, R. vs. Clearance 1888 of Sir Mathew Hale, the case of S. vs. H. M. Advocate, 1989, H.M. Advocate vs. Duffy, 1983, H. M. Advocate vs. Paxton,

1985, Reg vs. Clearance, 1888, Reg vs. Miller, 1954, Reg vs. Jackson, 1981, Reg vs. Robert, 1986, Reg vs. Kowalski, 1987, Reg vs. H. 1990, Reg vs. J, 1991, Reg vs. Chopman, 1959, Reg vs. US, 1991, Reg vs. Sharples, 1990, Regina vs. O. Brien, 1979, Regina vs. Steal, 1986 and Reg vs. Clark, 1949, deals with the issue as to whether or not sexual intercourse consumed by the husband without the consent of his spouse constitutes the offence of rape. Upon perusal of the above-mentioned cases, where a marital relationship is established between a husband and a spouse, it is deemed that consent for sexual intercourse has been provided by the spouse and provided, the spouse desires to live separately and where through a decree of the court is living apart or is judicially separated, the consent for sexual intercourse provided by the spouse is ipso facto deemed to be revoked by the spouse and where sexual intercourse is consumed against a spouse living apart and without her consent, then such an act is deemed to be an offence of rape.

The plea taken by the petitioners is that where a husband consumes sexual intercourse with his spouse without her consent, the act should be recognized as an offence of rape and also take the plea that the punishment prescribed under Section 3 (6) on the Chapter of Rape is insufficient and that punishment should be equivalent to the punishment prescribed for other offences of rape otherwise, it would be contrary and inconsistent with the right to equality.

In relation to the plea taken by the petitioners, it is necessary to discuss as to whether or not right to equality, equal protection of law, Section 3 (6) on the Chapter of Rape, CEDAW, ICCPR, ICESCR are applicable. Firstly, it is necessary to see as to whether or not the current provision prescribed in Section 3 (6) on the Chapter of Rape, alienates the married women from the right to equality. Article 13 in relation to right to equality under the Constitution is as such:

13. **Right to Equality**: (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

(2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, gender, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, gender, origin, language or ideological conviction or any of these.

Provided, that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, *Dalit*s, indigenous ethnic tribes, Madhesi or farmers, laborers or those who belong to a class which is economically, socially or culturally backward or children, the aged, disabled or those who are physically or mentally incapacitated.

Article 13, prescribes that no discrimination shall be made on the basis of gender, religion, caste, class and language and that discrimination shall not be made between a male and female, provided reasonable classification can be made by making laws. Section 3 (6) on the Chapter of Marriage has classified a spouse cohabiting under a valid marriage under one classification and where any person commits an offence of rape against any other woman other than his spouse, then such a woman is classified under another classification. Therefore, it is necessary to understand that pursuant to reasonable classification a spouse cohabiting under a valid marriage is classified under one classification and any other woman other than a spouse is classified under another classification. Where under a valid marriage, provided, an offence of rape is committed by the husband against his cohabiting spouse and where such offence is proved, the punishment against such offence is less owing to their relationship and cohabitation, whereas provided an offence of rape is committed against any other woman, the quantum of punishment is higher. On the basis of classification of legal provision, this is deemed to be reasonable classification. Where a spouse, cohabiting with her husband becomes a victim of rape by her husband and where any other woman who becomes a victim of rape by any other person fall under different classification. This is the recognized principle of classification. It is a constitutional provision and recognized principles that reasonable classification can be made by law for obtaining certain objective which the petitioners have failed to take into consideration. Therefore, the plea that Section 3 (6) is contrary and inconsistent with the right of equality cannot be held.

Definition of a crime and prescription of quantum of punishment solely falls within the ambit and jurisdiction of the national legislation. Under a valid marriage, where the husband and spouse are not living separately or where there is no judicial separation and are cohabiting together, the consent for sexual intercourse from the spouse and sexual intercourse against any woman by any person without her consent cannot be looked upon from the same lenses. To deem sexual intercourse as an offence between a husband and a spouse sharing the same bed and cohabiting together and sexual intercourse with a spouse without her consent by the husband who is not divorced but is living apart through a judicial decree or under judicial separation, it is necessary for the legislation to frame laws in this regard. In the absence of legal provision regarding judicial separation and living apart provided, an offence of rape is to be recognized on the basis of the spouse's claim that sexual intercourse was consumed by her husband without her consent and in the absence of the definition of marital rape provided, the quantum of punishment as sought by the petitioners is to be increased by an order of this court, there would be a miscarriage of justice.

The criminal justice system is not a fool-proof against the crime anywhere in the world. In our system, in order to recognize any act to be grave criminal offence and to increase the quantum of punishment, careful consideration needs to be made by the legislature. Taking this matter into consideration, pursuant to Writ Petition No. 55 of the Year 2058, an order was issued by the court to amend the law in order to provide completeness to the issue of marital rape taking into consideration the special circumstances of marital relationship and the status of husband.

The articles of CEDAW, ICCPR, ICESCR and other international treaties cited by the petitioners are irrelevant. The petitioners' do not state that the rights guaranteed by the conventions have been infringed due to lack of sufficient laws or due to the negligence of the executive but rather have sought for the increase in the quantum of punishment for the offence of rape committed by the husband against his spouse. The articles of CEDAW, ICCPR, ICESCR cited by the petitioners are for the empowerment of women. Women in a country like ours that is infested with poverty, illiteracy, traditional customs, religion, culture have been deprived from all the opportunities receivable from the State. With the peoples' uprising in 2047, a new Constitution was promulgated and Article 11 (3) of the said Constitution prescribed that special provision by law shall be made for the advancement of women. The Interim Constitution has given continuity to the said provision. In the international level, after the Second World War, and in particular after the establishment of the United Nation, CEDAW and other human rights conventions had been enacted for the advancement of the women's intellectual, educational, economic, cultural and health rights and these instruments were enacted for the empowerment of the women. Nevertheless, these conventions do not provide any definition with regards to the offence of rape that would provide risk to the life and independency of the male class and neither does it arbitrarily provide for imprisonment.

The above conventions provide special provision and reservation for the women for their development and advancement particularly in the field of education, health, skills, profession wherein they need not compete with their male counterparts and the conventions provide more advantage to the women in all sectors. Where such provision has been prescribed, the males cannot object citing that the provisions discriminate between male and female. Nevertheless, in the name of empowering the women, criminal law cannot be constructed that would deem to create risk to the life and independency of the husband. The standard of criminal justice is equal for both men and women. On the basis of the first information report given by the spouse, the quantum of punishment cannot be increased which would risk the life and independency of the husband and this is not the objective and intention of the international conventions.

Therefore, consenting on the opinion of the majority in other matters, the plea for increasing the quantum of punishment as prescribed under Section 3 (6) on the Chapter of Rape, a directive order is hereby issued in the name of government to provide legal definition with regards to sexual intercourse consumed pursuant to a valid marriage and sexual intercourse between a husband and spouse who although are not divorced are living apart/judicial separation through the decree of the court and where sexual intercourse is consumed against a spouse living apart/judicial separation without her

consent then such an act should be deemed to be an offence of rape and under such circumstances the quantum of punishment should be reconsidered.

s/d
Bala Ram K.C.
Justice

Dated 26 of the Month of Ashadh of the Year 2065 of Day 5 (July 10, 2008)…....