

Unintended Consequences: A Critical Analysis of Nepal's Rape Law Reform and Its Impact on Juvenile Justice

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ABSTRACT

The increase of the age of consent to 18, with the Muluki Penal Code that came into effect in 2017, created an unintended burden on the juvenile justice system in Nepal. The amendment, drafted to protect minors from sexual exploitation by adults, resulted in the criminalisation of consensual relationships between adolescents. The surge of inmates aged 16 to 18 years is leading Nepal into a crisis in its juvenile correction centres, with overcrowded facilities, decrepit conditions, and increased violence. This crisis was underlined by three deaths in juvenile correction centres at Bhaktapur, Parsa, and Banke up to September 2023. This article explores the legal, social, and ethical dilemmas generated by Nepal's reforms of rape law and advocates for a more nuanced approach in safeguarding vulnerable populations without moralising normal adolescent sexual conduct. This approach is based on the consideration of pending challenges for the juvenile justice system and the development of strategies to reconcile child protection goals with the realities of adolescents' relationships.

Keywords: Informed consent; juvenile delinquency; Nepal; rape.

With the amendment of the Criminal Code in 2017, the juvenile justice system of Nepal has affected countless young people. This legislative reform, which aimed to strengthen the protection of minors, has inadvertently created a complex web of legal, social, and ethical challenges. By examining these impacts, we can gain some appreciation of the difficult path that must be navigated in crafting laws to protect a particularly vulnerable population, while taking into account adolescent development and relationships.

As Nepal stands at this critical juncture, the path we choose will have profound implications for justice, public health, and the lives of countless young people. In the context of Nepal, Section 219 (2) of the Muluki Criminal Code clearly specifies that any form of sexual intercourse, either with or without consent below the age of 18 years, constitutes rape.¹ Consensual sexual intercourse refers to sexual intercourse with consent between two individuals above 18 years of age, when the consent is provided wilfully in a sound state of mind in the absence of coercion, undue influence,

intimidation, threat, impersonation, or kidnapping or taking of hostage.¹ Any deviation or sexual act from this, associated with penetration of the penis into the anus or mouth; penetration of the penis, to any extent, into the anus, mouth or vagina; or insertion of any object other than the penis into the vagina, is also referred to as rape.¹

The punishment for rape varies depending upon the age of the survivor as well as the age of the perpetrator. The punishments for the perpetrator will be 16-20 years, 14-16 years, 12-14 years, 10-12 years and 7-10 years if the survivor is <10 years, 10-<14 years, 14-<16 years and 16-<18 years, respectively.¹ For a child less than 10 years of age, any offense committed by them will not lead to a legal action, as they are considered legally immune.¹ The law has specified punishment for any child between 10 and <14 years, a maximum of 6 months of imprisonment or reform home for a maximum of one year in lieu of such imprisonment, 14-<16 years half the punishment and 16-<18 years two-thirds of the punishment imposable to a person who has attained majority.¹

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With a variation across age groups from 10-18 years, there are further discrepancies with respect to age across different scenarios. The age of a minor in Nepal is specified as less than 16 years.² However, regarding medical treatment, the minimum age of consent is set at 16 years per the code of ethics put forth by the Nepal Medical Council.³ Additionally, voting rights can be exercised after the age of 18 years.⁴ For abortion, the right to safe motherhood and reproductive health act 2075 defines teenagers as those aged 10-19 years but does not define adult women on the basis of the age category.⁵ They have also specified that every teenager and woman has the right to obtain education, information, counselling and services related to sexual and reproductive health.⁵ However, it also states that every woman (not mentioned as a teenager) should have the right to have her examined or checked whether she is pregnant after arriving at a health institution.⁵ This variation and lack of clarity regarding the age group further jeopardises the services that can be imparted by a health professional with a legal question mark hanging over their heads. Furthermore, the definition of rape clearly specifies an age of 18 years and that any sexual act prior to that age group constitutes rape. In addition, the age for marriage in Nepal has been specified as 20 years, and any form of legalisation of marriage prior to 20 years of age of both parties cannot be accomplished.⁶ This 2-year gap between the age of consent for sexual intercourse and the legal age for marriage has led to a plethora of cases. These typically involve an individual over 18 years but less than 20 years who initially provides consent for sexual intercourse. However, when society becomes aware of their sexual relationship, and as they cannot legally marry, an accusation of rape is often put forward against the male by the female owing to societal pressure.

For years, our legal system has grappled with a rigid definition of rape that fails to differentiate between forced sexual acts and consensual relationships involving individuals under 18 years. This oversimplification has led to thousands of young people languishing in juvenile detention centres and prisons. These juvenile centres, a total of eight throughout the country, include individuals 18 years or less for an act that would be charged as a crime punishable by law in the case of an adult or individuals currently residing in juvenile centres but who have crossed 18 years prior to the completion of their jail terms.⁷ These centres are situated in Morang, Parsa, Makawanpur, Bhaktapur, Kaski, Rupandehi, Banke and Doti across all the provinces of Nepal, except Karnali.⁸ These individuals, also referred to as juvenile delinquents, are sent to juvenile homes to provide

them with accommodations and food, education, and psychosocial support to overcome the grief of their acts and to provide basic skills to survive once they are released.⁸

However, in the context of Nepal, most of these centres have issues surrounding all the basic entities, including accommodations and food. They have been accommodating almost double the population of delinquents than their capacity, ultimately hindering the provision of food and having serious consequences with respect to health.⁹ There have been multiple reported cases of delinquents escaping juvenile centres as well as cases of vandalism and protests across these centres throughout the country due to inadequate and poor facilities.^{8,10} In addition, in September 2023, three deaths were reported across juvenile centres in Bhaktapur, Parsa and Banke, suggesting that these centres are not taking adequate measures for the betterment of these youths.¹¹

The Public Defender Society of Nepal published a study across all the juvenile centres of Nepal with a total of 917 delinquents, and of this number, the majority were 16-18 years of age.¹² In addition, more than half of the total number of delinquents were charged with rape.¹³ Considering this age group and the number of delinquents charged with rape, there is a burdening issue of whether our current legal framework often ignores the crucial distinctions in cases of rape from consensual sexual intercourse. From a forensic standpoint, the physical and biological evidence in cases of violent rape differs significantly from that of consensual sexual activity. However, because of the current jurisdiction surrounding rape, we are not only failing to serve justice but also potentially traumatising young individuals who may have engaged in consensual relationships.

Another major issue surrounding the current law, and the discrepancies associated with it is legal marriage and the dilemma during the provision of health services, especially family planning and reproductive health, by medical personnel. Since the legal limit is set at 20 years of age, most cases in a peripheral setting presenting for obstetric examination belong to a teenage population. This was clearly justified by the annual health report of 2024, when the adolescent birth rate was 71%, which targeted 43% in 2026 and 30% in 2031.¹⁴ During their practice in a tertiary hospital in a rural setting, one of the authors has experienced most of the cases seeking obstetric services under the age of 18 years and always being asked by the specialist with a legal dilemma on whether to continue with the services or not, as mostly

the pregnant female is less than 18 years, arriving with her husband, and as per the legal definition of rape, irrespective of the consensual nature of the act, it is rape.

Recent media reports indicate that these legal changes represent significant progress in classifying various sexual offenses. However, these classifications need to be based on forensic evidence and scientific understanding. This means investing in better forensic facilities, training more experts, and educating law enforcement and the judiciary about interpreting forensic evidence.

In addition, are we going to do anything about false accusations? The problem arises when, after coming to society, the couple faces family or social pressure in some cases. The protocols of the medico-legal system must be strengthened to differentiate fake allegations from genuine cases of assault. It does not just save the lives of those falsely accused; it is equally critical to ensure that real victims see justice served.

Moreover, the harm wrought by our laws has been psychological. Incarcerating young individuals for consensual acts can lead to long-term mental health issues and social maladjustment. As a society, we must question whether this approach truly serves our collective interest.

However, we need to be careful as well as push for reform. Making the age of consent younger or loosening rape laws could conceivably open new opportunities for real predators. All changes have to be very calibrated: protect minors from exploitation but also recognise how teenage relationships play out.

Recent indications show that these issues are finally being acknowledged at the government level. The Minister for Law, Justice and Parliamentary Affairs in August 2024 said that the government will amend laws on rape to introduce a stricter policy.¹⁵ This followed based on the fact-finding conducted by a parliamentary committee team after visiting juvenile correction centres and prisons where the statistics showed that many of those held were either consensually having sexual relationships, or clearly explainable as rape.¹⁵ Finally, this paper's recommendations are consistent with this legal development that indicates a potential return to balance.

CONCLUSIONS

In conclusion, the next time we embark upon new legislation in this area, a panel of experts from various disciplines, such as juvenile justice, adolescent psychology and forensic medicine, ought to be consulted in its drafting. Together, our shared knowledge can support a fairer and evidence-based law on the books. In addition, of course, we need legal penalties that protect the innocent and chastise those who are not, as well as an acknowledgement in our laws to recognise the complexities of human relationships and sexuality.

The journey is challenging, but it must be traversed. The reconciliation of our laws with forensic reality and societal necessity is the only process that can provide all Nepali people with access to a just system. The yawning disparity between our legal scaffolding in this department and the ground realities of today is quite striking.

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