



# SEXUAL VIOLENCE IN SOUTH ASIA: LEGAL AND OTHER BARRIERS TO JUSTICE FOR SURVIVORS

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Founded in 2018, Dignity Alliance International (DAI) is a UK-based charity that invests in those that seek to ensure access to justice and inclusion for excluded communities and works towards achieving a more just and equitable society. We are committed towards supporting the development of local as well as South Asian community-based institutions and networks in their commitment to document the lived experiences and knowledge of survivors and community leaders. We work in collaboration with South Asian partners in building strategies and providing solutions to protect the most vulnerable and socially excluded communities.

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# CONTENTS

## **4 EXECUTIVE SUMMARY**

6 Key Findings

## **7 INTERSECTIONALITY FRAMEWORK & METHODOLOGY**

8 Focus on Socially Excluded Communities

9 Methodology

10 Terminology

## **11 PATTERNS OF SEXUAL VIOLENCE**

12 Prevalence of Sexual Violence Against Women and Children

14 Marital Rape

14 Patterns of Sexual Violence Against Women and Girls from Socially Excluded Communities

16 The COVID-19 Pandemic and Sexual Violence in South Asia

## **17 PROTECTION GAPS IN LAWS RELATING TO SEXUAL VIOLENCE**

18 Applicable International Human Rights Standards

19 Protection Gaps in Sexual Violence Laws in South Asia

## **31 Prabha - Bangladesh - Survivor Story**

## **33 BARRIERS TO ACCESSING JUSTICE WITHIN THE CRIMINAL JUSTICE SYSTEM**

34 I. Stigma and Victim Blaming

## **35 Rita - Nepal - Survivor Story**

36 II. Procedural Loopholes/Barriers/Lapses within the Criminal Justice System

45 III. Bribery and Corruption

46 IV. Extra-Legal Settlements/Compromises

## **48 Ambika - Nepal - Survivor Story**

## **50 Bhavna - India - Survivor Story**

51 V. Lack of Support Services for Survivors

54 VI. Intersectional Discrimination against Women and Girls from Socially Excluded Communities

55 VII. Impact on the Life of the Survivor

## **56 Dhriti - India - Survivor Story**

## **57 SURVIVORS' IDEA OF JUSTICE**

## **60 Yeshey - Bhutan - Survivor Story**

## **61 RECOMMENDATIONS**

## **67 ANNEX - DETAILED METHODOLOGY**



# EXECUTIVE SUMMARY

Sex inequality is a fundamental challenge to development in South Asia, which is home to 860 million women, i.e., 22.6% of the global female population. The Global Gender Gap Report 2020 projects that it will take about 72 years for South Asia to close the current gender gap of 33.9%.<sup>1</sup> Further, it is estimated that one in every two women in the region experience violence in their day-to-day lives.<sup>2</sup> Quite shockingly, UNICEF has estimated that 64% of the world's children who experienced severe violence are in South Asia.<sup>3</sup> In particular, countries across South Asia report high rates of sexual violence against women and girls.

High levels of stigma attached to rape often lead to non-reporting or withdrawal of cases. Pressure to withdraw the case, fear of repercussions such as violence, threat to life or social ostracisation are some of the other factors that hinder the process of reporting. Governments must make prevention of sexual violence an integrated part of their strategies on gender-based violence and ensure that education programmes shift the focus of blame to the perpetrator rather than the victim. This should encourage more women to come forward to seek justice and would go some way to addressing the social impunity for perpetrators of rape.

*The criminal justice systems across the region are characterised by implementation failures that lead directly to major shortcomings in providing timely support to survivors.*

<sup>1</sup> Global Gender Gap Index measures the extent of gender-based gaps among four key dimensions (Economic Participation and Opportunity, Educational Attainment, Health and Survival, and Political Empowerment). See World Economic Forum, Global Gender Gap Report 2020, [http://www3.weforum.org/docs/WEF\\_GGGR\\_2020.pdf](http://www3.weforum.org/docs/WEF_GGGR_2020.pdf).

<sup>2</sup> Duncan Green, The "We Can" Campaign in South Asia, 2015, [https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file\\_attachments/cs-we-can-south-asia-160115-en.pdf](https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/cs-we-can-south-asia-160115-en.pdf)

<sup>3</sup> United Nations Children's Fund South Asia, Child Protection, <https://sha.es/aoe9sp>



This report focuses on the problems that women and girls face while accessing the criminal justice system. They are met with apathy and neglect at all levels, often resulting in withdrawal of the case or long delays in adjudication. Despite the pervasiveness of sexual violence across the region, the laws in all the South Asian countries contain certain protection gaps which leave women and girls vulnerable to sexual violence. In addition to these protection gaps, even where laws and policies exist, they are not effectively implemented on the ground. The criminal justice systems across the region are characterised by implementation failures that lead directly to major shortcomings in providing timely support to survivors.

This report analyses the gaps in the laws and policies on sexual violence and assesses the role and response of the criminal justice system in addressing the issue of sexual violence against women and girls in South Asia. In particular, it focuses on six countries – Bangladesh, Bhutan, Nepal, Maldives, India and Sri Lanka. The report utilises a survivor-centric approach to provide insights on the shortcomings of the criminal justice system and in providing recommendations to ensure improved access to justice for survivors.

## KEY FINDINGS

Most South Asian countries report high rates of sexual violence against women and girls. However, the data on reported cases is still not indicative of its high rate of prevalence, due to several reasons such as underreporting, in addition to disparities in computing, documenting rape cases etc.

**Despite the prevalence of sexual violence, rape laws across the six South Asian countries studied effectively deny justice to survivors of sexual violence due to protection gaps in the laws particularly:**

- **Limited definitions of sexual violence**, which do not cover all forms of sexual penetration and fail to recognise a broad range of coercive circumstances where consent cannot be voluntary, including situations where the victim is incapable of giving consent.
- **Failure to criminalise marital rape in all circumstances** in four of the six countries studied. Even in the two countries (Bhutan and Nepal) which criminalise marital rape in all circumstances, the penalty for marital rape is far lower than the penalty for other forms of rape.
- **Discriminatory or overly burdensome evidence requirements** in rape cases affect access to justice for survivors. The laws in five out of the six countries (apart from India) permit the introduction of evidence on the past sexual history of the rape victim.

In addition, there are severe barriers to accessing justice and implementation gaps within the criminal justice system, including:

- **Long Delays:**

One of the major barriers to accessing justice identified by survivors is long delays in police investigation, medical examination, prosecution and trial of rape cases, with the perpetrator often out on bail during the pendency of the trial.
- **Intrusive Medical Examinations:**

In some countries, including India, Nepal and Sri Lanka, there is evidence that the two-finger test, a traumatising and unscientific vaginal examination, continues to be conducted as part of the medical examination of rape survivors.
- **Extra-legal Settlements/Compromises:**

Across all six countries, one of the major barriers to successful prosecution of rape cases is the pressure put on the survivor or her family to enter into an extralegal settlement or compromise with the perpetrator. This problem is particularly acute in Bangladesh, India and Nepal where over 60% of the survivors interviewed reported facing pressure to settle/compromise the case.
- **Low Conviction Rates:**

Bhutan has the highest conviction rate (64%) in rape cases of the six countries (although from an extremely low reporting base), with Sri Lanka (3.8%) and Bangladesh (3%) reporting abysmally low conviction rates. Conviction rates in India (27.12%) and Nepal (34.8%) are also fairly low, resulting in impunity for perpetrators of rape across the region.
- **Bribery and Corruption:**

Survivors and stakeholders across four countries (Bangladesh, India, Nepal and Sri Lanka) highlighted that the susceptibility of justice system officials, including police, medical officers and public prosecutors, to bribery and corruption was a severe challenge to accessing justice in rape cases.
- **Lack of Support Services for Survivors:**

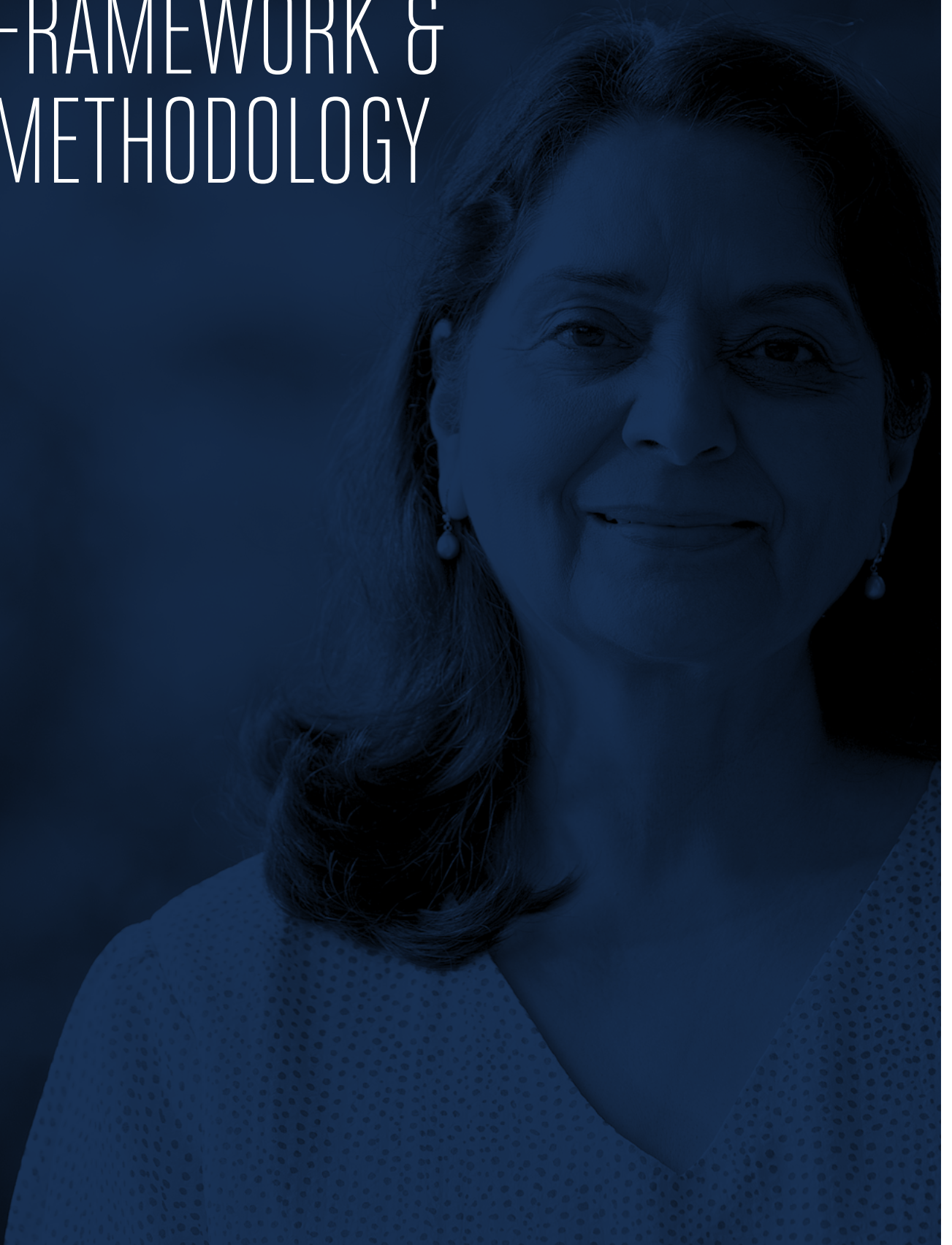
In all countries, the victim/witness protection schemes were poorly implemented or there are insufficient shelters/safe houses, jeopardising the safety of rape survivors and leaving them vulnerable to violence and threats from perpetrators and/or their families. In addition, psychosocial care is rarely provided to survivors by the government. Only two countries (India and Sri Lanka) have schemes for payment of compensation by the government to rape survivors including eligibility for interim compensation immediately after filing the police complaint. Even where provisions for payment of compensation exist, practical barriers often make compensation inaccessible for survivors.
- **Intersectional Discrimination Against the Most Marginalised:**

Survivors of sexual violence from socially excluded communities face specific barriers to accessing justice based on their caste, tribal, ethnic or religious identities in addition to gender discrimination.

## KEY RECOMMENDATIONS

- 1**  
**Address Protection Gaps in the Law**
- 2**  
**Improve Police Responses to Cases of Sexual Violence**
- 3**  
**Ensure Survivor-Friendly Medical Examinations in Rape Cases**
- 4**  
**Improve Prosecution Procedures and Trials of Sexual Offences**
- 5**  
**Design and Fund Holistic Interventions to Improve Access to Justice for Survivors**

# INTERSECTIONALITY FRAMEWORK & METHODOLOGY



# FOCUS ON SOCIALLY EXCLUDED COMMUNITIES

This report uses an intersectionality framework to understand sexual violence against women and girls. This lens involves a consideration of the intersections of sex with other systemic inequalities/oppressions such as sexuality, ethnicity, indigeneity and disability, to name a few, to produce unique experiences of violence.<sup>4</sup> Each deserves special attention. In this report, the focus will be placed on communities who are excluded on the basis of caste, ethnicity or religion.

The South Asian region is inhabited by a diverse population of multiple religious, linguistic, ethnic and caste groups. Accompanying this diversity is a history of marginalisation and discrimination of certain groups that has inevitably led to their exclusion, which is further exacerbated by the apathy of the State and non-State actors through policies and practices. Caste discrimination,<sup>5</sup> in its various manifestations, is practised widely in almost all of these South Asian countries, barring Bhutan and the Maldives – although both these countries have their own deep-seated forms of other identity-based discrimination. South Asia has approximately 120 million Dalit women.<sup>6</sup> Apart from the systemic discrimination that Dalit women face, including for example in terms of lower wages and landlessness, they also face high levels of gender-based violence.<sup>7</sup>

While caste discrimination has long been acknowledged as a serious violation of human rights and has served as a major obstacle in terms of achieving equality and dignity for all, the progress towards its annihilation has been slow. Among the most serious impediments to addressing caste discrimination is a lack of anti-discrimination law or a de facto denial of equality before the law, resulting in a lack of protection of caste-affected people against violent attacks and other crimes and impunity for the perpetrators of such crimes.<sup>8</sup> Dalit women and girls are at higher risk of gender-based violence including trafficking, sexual exploitation, sexual and physical violence, rape and murder.<sup>9</sup>

In addition to caste, discrimination based on ethnicity is prevalent in many of the South Asian countries studied. Adivasis in India, Terai/Madhesi communities in Nepal, indigenous tribes based in the Chittagong Hill Tracts in Bangladesh and persons from the Tamil community in Sri Lanka are all socially excluded based on their ethnicity. Women and girls from minority religious communities within a particular country also face discrimination based on their religion.

Women and girls from socially excluded communities are often at higher risk of being subjected to sexual violence as compared to other communities, due to the use of rape as a weapon of suppression, accompanied by a general culture of impunity for sexual violence and particular impunity for those from dominant classes, castes or religions, which often leads to a denial of justice.<sup>10</sup> Further, lack of social, political and economic clout often hinders reporting of cases by these communities or increases their vulnerability to threats and pressure from perpetrators. Survivors are further subjected to discrimination when dealing with the criminal justice system. Survivors of sexual violence from socially excluded communities thus face severe obstacles to accessing justice.

4 See UN Women, The value of intersectionality in understanding Violence against Women and Girls, July 2019, <https://eca.unwomen.org/en/digital-library/publications/2019/10/the-value-of-intersectionality-in-understanding-violence-against-women-and-girls>.

5 The caste system is a form of social and economic governance whereby people are divided into social groups (castes) fixed by birth, descent and work. These castes are assigned at birth and are rigid and hereditary. The caste system is based on ritual purity and is inherently unequal. Dalits, who fall outside the caste system, are considered as "untouchables" and face social exclusion, ostracisation and discrimination from other caste groups.

6 UN Women, Dalit Rights Activists break new ground in South Asia, 24 July 2018, <https://www.unwomen.org/en/news/stories/2018/7/feature-dalit-rights>.

7 Asia Dalit Rights Forum et. al., Dalit Women in South Asia: Access to Economic Rights, <http://asiadalitrightsforum.org/images/imageevent/674350670South%20Asia%20report-single%20page%20format.pdf>

8 The South Asia Collective, South Asia: State of Minorities Report 2018, [http://sac.defindia.org/wp-content/uploads/2019/10/SASM-Report-2018\\_e-Book-revised.pdf](http://sac.defindia.org/wp-content/uploads/2019/10/SASM-Report-2018_e-Book-revised.pdf)

9 Asia Dalit Rights Forum, supra note 7.

10 Bangladesh Dalit and Excluded Rights Movement & Nagorik Uddyog, Benchmarking the Draft UN Principles and Guidelines on the Elimination of (Caste) Discrimination based on Work and Descent, <http://www.ncdhr.org.in/wp-content/uploads/2018/12/Benchmark-Study-Bangladesh-Report.pdf>





## METHODOLOGY

This report is a qualitative study and incorporates both primary and secondary research methods. It provides a general overview of and analyses the protection gaps in the laws related to rape (against both women and children) in the six selected South Asian countries. It also analyses how these laws have been put into practice and identifies the gaps in implementation and the barriers to accessing justice within the criminal justice system faced by rape survivors, particularly those from socially excluded communities.

The methodology consisted of in-depth desk research on applicable laws, as well as existing reports and studies published by international and national human rights agencies, academic journals, non-governmental organisations and community-based organisations. Primary data collection was also undertaken across the six countries, through in-depth interviews and focus group discussions with 28 survivors of sexual violence from four countries (Bangladesh, Bhutan, Nepal and India) and interviews with 20 stakeholders across all six countries. Thematic analysis was undertaken to analyse qualitative data using Dedoose, a web-based application for qualitative and mixed-method data analysis.

Due to difficulties in identifying survivors of sexual violence who were willing to speak out about their experiences, no survivor interviews were conducted for the Maldives and Sri Lanka. For support with the secondary research and to carry out interviews with survivors and stakeholders, assistance was obtained from research consultants who were experts on sexual violence within the particular country.

A detailed explanation of the methodology employed is provided in the Annex to this report.

Although men and boys can experience sexual violence during their lifetime, it disproportionately affects women and girls and this report is written from that perspective. It must be acknowledged, however, that sexual violence against men and boys is largely unreported and unexplored, which, together with prevailing patriarchal attitudes on male rape, often undermine their right to an effective remedy. The definitions of rape in three of the six South Asian countries (India, Bangladesh and Nepal) are gender-specific and do not provide sufficient protection for transgender and adult male rape survivors. While it is key to call for the amendment of these provisions to ensure rape laws protect people regardless of sex or gender identity, it is also important that criminal justice systems reflect and address the gendered nature of the rape offence.

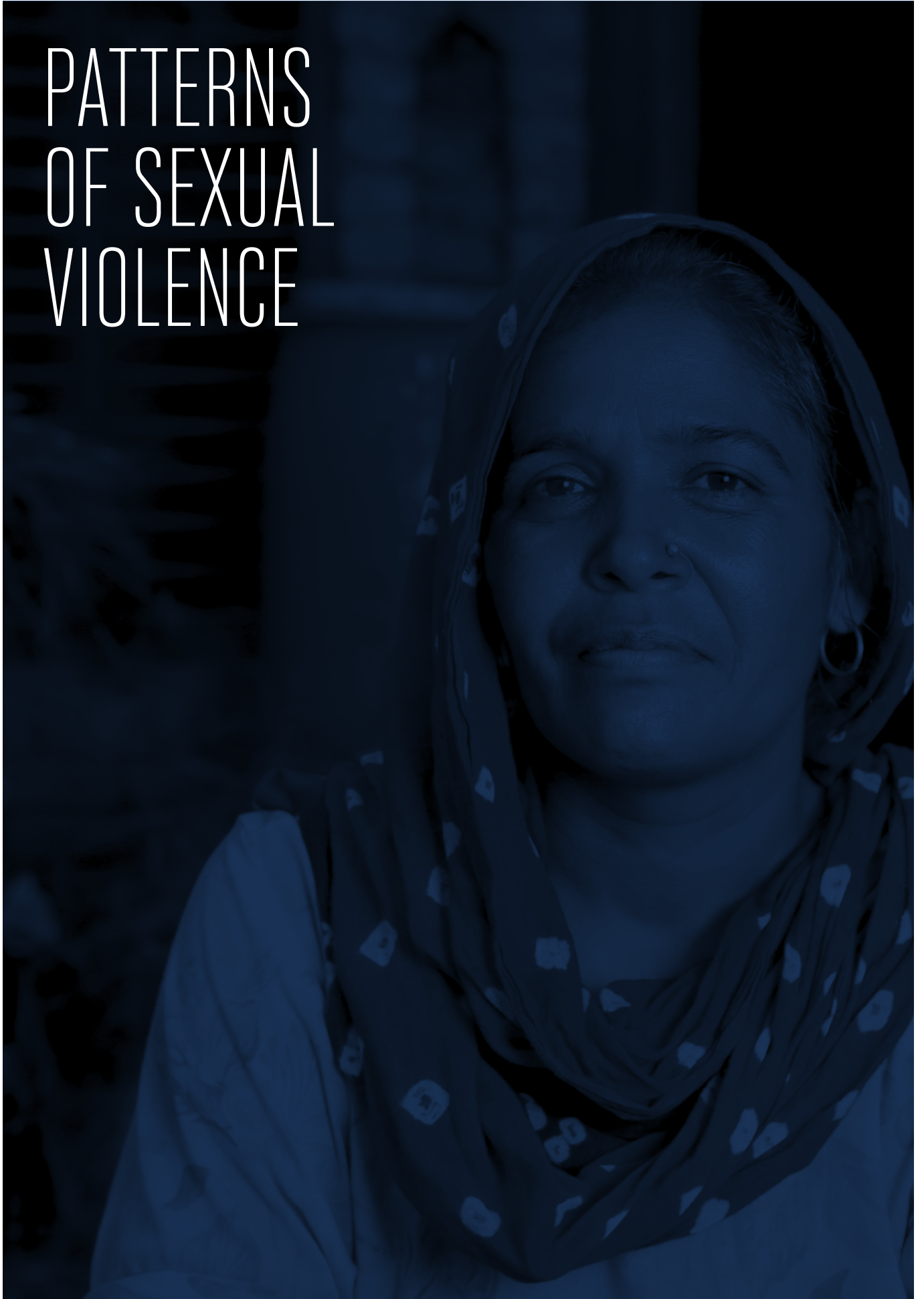
# TERMINOLOGY

The terms “**survivor**” and “**victim**” have been used in this report to refer to any person who alleges or has been subjected to sexual violence whether or not they engage with the criminal justice process, with the term “**victim**” being used particularly in reference to legal standards. We understand that women and girls who suffer sexual violence may identify themselves as a “**victim**”, “**survivor**” or otherwise, and the terminology used in this report is not intended to negate other terms which may be preferred by women and girls who have suffered violence.

The term “**stakeholders**” as used in this report refers to lawyers, representatives of non-governmental organisations and other professionals who provide services to survivors of sexual violence or advocate for their rights.



# PATTERNS OF SEXUAL VIOLENCE



# PREVALENCE OF SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN

With criminal justice systems across the region failing women and girls, South Asia has recently witnessed a sudden public outcry against the years of neglect and structural discrimination faced by rape survivors.

In India, anti-caste and gender rights activists, students and the public took to the streets to protest against the police and government who attempted to deny the gang rape of a 19-year-old Dalit woman in September 2020 and forcibly cremated her body.<sup>11</sup> Similarly, in Nepal where there has been an exponential increase in the number of rape cases since 2017 and in Bangladesh where a video of a brutal gang rape went viral across social media, the public have demonstrated their dissatisfaction with the criminal justice system for the ways in which rape survivors have been mistreated.<sup>12</sup> In Bhutan and the Maldives where the number of reported rape cases per year is extremely low, recent high-profile cases that garnered widespread media attention have forced a public reckoning on the issue of sexual violence.<sup>13</sup>

Evidence suggests that violence against women and girls tends to increase during emergency events and epidemics.<sup>14</sup> In the context of COVID-19, the real essence

of sexual violence perpetrated against women and girls may not be adequately captured through official data for several reasons such as restricted mobility, lack of adequate support systems, stigma, presence of perpetrator in close proximity – all leading to non-disclosure and non-reporting.

The data on reported rape cases in the six South Asian countries demonstrates the magnitude of the problem of sexual violence, which is prevalent across the region. However, it is important to note that identifying comparable data on rape across these countries is not possible due to the evident difference in the scale of reporting across these countries, as data suggests. Therefore, this chapter seeks to merely provide a general statistical overview of the region. The numbers presented here are not necessarily indicative of the prevalence of such cases in any of these countries, for it is a known and established fact that sexual violence is grossly underreported.

The figures presented in Tables 1 and 2 below are based on the number of reported cases only.

**Table 1: Number of Reported Cases in the Six Countries of South Asia**

Reported Rape Cases <sup>15</sup>	2019	2018	Source
<b>Bangladesh</b>	6321	5123	Bangladesh Police as reported by the Daily Star
<b>Bhutan</b>	54	49	National Statistics Bureau (NSB)
<b>India<sup>16</sup></b>	32,033	33,356	National Crime Records Bureau (NCRB)
<b>Maldives</b>	10	9	Maldives Police Service <sup>17</sup>
<b>Nepal</b>	2144 [July 2019- June 2020]	2230 [July 2018 – June 2019]	Nepal Police
<b>Sri Lanka</b>	1779	1792	Sri Lanka Police

11 BBC News, Hathras case: A woman repeatedly reported rape. Why are police denying it?, 10 October 2020, <https://www.bbc.com/news/world-asia-india-54444939>

12 Human Rights Watch, South Asia: Justice, Services can curb Sexual Violence, 17 December 2020, <https://www.hrw.org/news/2020/12/17/south-asia-justice-services-can-curb-sexual-violence>

13 See The Bhutanese, Bhutan Outraged: 8-year-old raped and murdered in Paro, 5-year-old rape in Dagana and 4-year-old molested in Thimpu, 23 September 2019, <https://thebhutanese.bt/?p=22296>; Sun Online, Safari rape case: Release of suspects sparks widespread outrage, 28 June 2020, <https://en.sun.mv/61362>.

14 Erika Fraser, Impact of COVID-19 Pandemic on Violence against Women and Girls, 16 March 2020, UKAid, <https://www.sddirect.org.uk/media/1881/vawg-helpdesk-284-covid-19-and-vawg.pdf>

15 The rape cases referred to in this table for Bangladesh, India, Maldives, Nepal and Sri Lanka include rape cases against women and girls only. For Bhutan, since the law is gender-neutral, the reported cases could potentially include rape of men and boys as well, though no de-segregated data is available.

16 The reported rape cases for India in this table include rape cases registered under the Indian Penal Code, 1860 only (against both women and girls). The data on rape cases against children registered under the Protection of Children from Sexual Offences Act, 2012 is provided in the next table.

17 The data is not publicly available, but was provided by the Maldives Police upon request by the researchers for the purpose of this report. Please note that the data received from the Maldives Police Service contradicts data received from the Ministry of Gender, Family and Social Services on child rape cases which is included in Table 2 below.

In most countries, the data demonstrates that the number of reported rape cases have been steadily rising in recent years, which may indicate improved reporting as well as rising crimes. In some countries such as the Maldives, recent improvements in legislation on sexual violence could also account for the rise in reporting.

**Table 2: Number of Cases of Rape of Children Across Six Countries of South Asia**

The data also shows that across South Asia, despite strong legislation being in place to address the issue of child sexual abuse, it continues to be a rampant phenomenon across these countries.<sup>18</sup> In some countries, such as Nepal, Bhutan and the Maldives, a majority of rape cases reported are cases of rape of children.

Country	Number of Cases of Rape of Children	Year	Source
Bangladesh	1005	2019	Bangladesh Shishu Adhikar Forum
Bhutan	48	2019	NSB
India	26,192 <sup>19</sup>	2019	NCRB
Maldives	16	January - October 2019	Ministry of Gender, Family and Social Services <sup>20</sup>
Nepal	1420	2018-2019	National Child Rights Council
Sri Lanka	1490 (girls below the age of 16)	2019	Sri Lanka Police

**Table 3: Prevalence Data on Lifetime Experience of Sexual Violence**

Prevalence surveys conducted in these countries show that the number of women and girls who have experienced sexual violence is much higher.

Country	Lifetime Experience of Sexual Violence (both partner and non-partner violence)	Age Group Studied	Source
Bangladesh	25.2 % (partner) and 3% (non-partner)	Above 15	<a href="#">Bangladesh Bureau of Statistics, 2015</a>
Bhutan	8.7%	15-64	<a href="#">National Commission for Women and Children, 2017</a>
India	5.8%	15-49	<a href="#">National Family Health Survey-4, 2016</a>
Maldives	11%	15-49	<a href="#">Maldives Demographic and Health Survey, 2017</a>
Nepal	7%	15-49	<a href="#">Nepal Demographic and Health Survey, 2016</a>
Sri Lanka	9.7%	Above 15	<a href="#">Women's Wellbeing Survey, 2019</a>

18 See Human Rights Watch, South Asia failing to address its Child Rape problem, February 2020 <https://www.hrw.org/news/2020/02/11/south-asia-failing-address-its-child-rape-problem>

19 These 26, 192 cases were registered under the Protection of Children from Sexual Offences Act, 2012. There were also 4940 cases of rape of rape against girls under the age of 18 registered under the rape offence in the Indian Penal Code, 1860.

20 There are inconsistencies in official statistics on rape from various sources. In contrast to this data received from the Ministry of Gender, Family and Social Services. The Maldives police only records 3 cases of child rape in 2019.

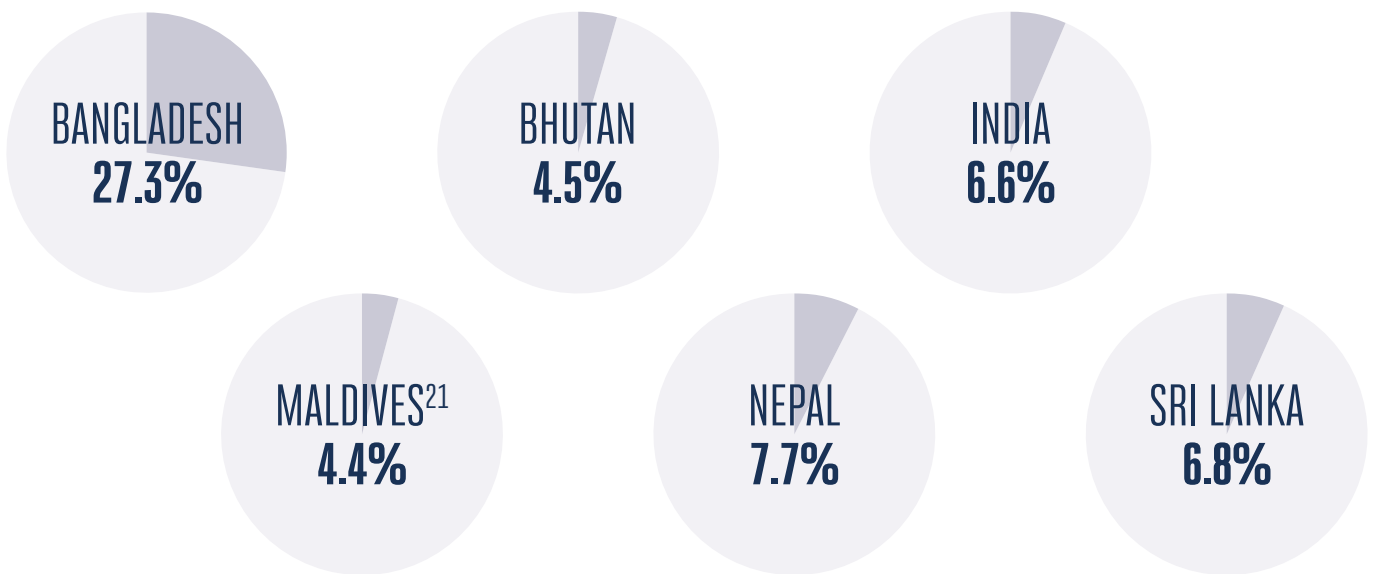
# MARITAL RAPE

While marital rape is considered a criminal offence in over 104 countries across the world, in the South Asian region, only Bhutan and Nepal recognise it as a criminal offence in all circumstances despite its alarming prevalence.

Data presented in the figure below indicates the rate of marital rape/intimate partner violence across the six countries over different years, hence data is not comparable between the countries. Except for Bangladesh,

all the countries have recorded fewer than 10% of rapes in marital relationships. However, even these figures need to be viewed in light of the prevailing attitude and perceptions of men and women towards marriage, stigma, gender roles and the acceptance by both men and women of a woman's perceived subordinate role in marriage. This is further exacerbated by the lack of legal recognition of rape within marriages.

## Rate of Lifetime Intimate Partner/Spousal Sexual Violence



Source: Please refer to Table 3 above for the data sources and age group studied for each country.

# PATTERNS OF SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS FROM SOCIALLY EXCLUDED COMMUNITIES

In relation to official statistics on rape cases against socially excluded communities, India is the only country that officially captures this, based on caste and tribes. According to official crime data, there were 3,486 reported cases of rape against Dalit (Scheduled Caste) women and girls in 2019, and 1,110 reported rape cases against Adivasi women and girls (Scheduled Tribes).<sup>22</sup> On average, 10 rape cases of Dalit women and girls were reported daily last year in the country. In fact, findings from NFHS 4 indicate that rates

of sexual violence are highest among Dalit and Adivasi women [7.8% and 7.3% respectively], as compared to lower rates of sexual violence against Others, i.e. groups not marginalised based on caste or ethnicity (4.5%).<sup>23</sup>

In **India** and **Nepal** women from Dalit subgroups, such as the Madhesi Dalits in Nepal and various other groups in India face discrimination from other Dalit communities who are perceived to be higher up the social ladder. In

<sup>21</sup> The Women's Health and Life Experiences Survey (2007) records a 6.7% lifetime prevalence of sexual violence by intimate partners. <https://maldivesindependent.com/files/2015/03/Maldives-Study-on-Womens-Health-and-Life-Experiences-2007.pdf>

<sup>22</sup> National Crime Records Bureau, Crime in India, 2019, <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%202.pdf>

<sup>23</sup> National Family Health Survey - 4, 2015-16, <http://rchiips.org/nfhs/NFHS-4Reports/India.pdf>.

**Bangladesh**, Hindu Dalit women face discrimination based on their religion, as well as their ethnicity. In the context of **Sri Lanka**, while caste-based discrimination may not be as visible in the public domain as India, Nepal or Bangladesh, sexual violence against ethnic minorities is rampant.

Independent surveys and studies carried out across Nepal, Sri Lanka and Bangladesh provide an understanding of sexual violence against women and girls from socially excluded communities.

In **Nepal**, according to a 2019 study conducted by Feminist Dalit Organization (FEDO), out of the total incidents of rape, 21% of the victims were from the Dalit community. Only 15% of those Dalit victims were able to get justice. Shockingly, in 80% of the cases, the Dalit victim had been killed.<sup>24</sup> It is argued that even in the absence of efforts to maintain caste-disaggregated data of rape, the scale of violence against Dalit women and girls remains significantly high in the nation.<sup>25</sup>

In **Bangladesh** between 2012 and 2019, at least 86 incidents of rape were reported against victims belonging to an ethnic minority according to Odhikar, an NGO working on human rights.<sup>26</sup> These communities would primarily include indigenous women who are mainly based in the Chittagong Hill Tracts (CHT). The Kapaaeng Foundation reported an increase in rape of indigenous women and girls from 12 in 2017 to 19 in 2018, whereby most of the victims were minor girls.<sup>27</sup> It further acknowledged rape as “the most severe violation of human rights against indigenous women and girls in 2018”.<sup>28</sup> However, with respect to Dalit women in Bangladesh, experts opine that it is difficult to determine the exact number of rape cases perpetrated on them. A study from 2014 revealed that 39% of the respondents faced violence

due their caste and livelihood identity (e.g. manual scavengers, street sweepers), yet they rarely register it with the police or judicial sector.<sup>29</sup>

In **Sri Lanka**, numerous cases of sexual violence have been reported against Tamil women, particularly during the conflict. While there is no official estimate of the number of such rape cases, Human Rights Watch has found that sexual violence perpetrated against Tamil women by security forces has continued even after the end of the conflict.<sup>30</sup> The report provides detailed accounts of 75 cases of alleged rape and sexual abuse between 2006-2012 in both official and secret detention centres across Sri Lanka, where army, police and pro-government Tamil paramilitary groups frequently participated in rapes.

While **Bhutan** does not have caste-based social exclusion, a 2016 assessment supported by UNDP identified 14 groups in the country as vulnerable - people who beg, children in conflict with the law, female workers working at Drayang<sup>31</sup>, persons practising risky sexual behaviour, to name a few. Drayang workers are predominantly women between the ages of 18 to 34 years, with minimum to no educational qualifications, and those who move from rural to urban areas seeking economic prospects. Many forms of abuse take place within these establishments, including the violation of labour laws by the owners to maximise profits, illegal transactional sex between the workers and their customers as well as sexual harassment against the female workers.<sup>32</sup>

This sets a broad context on the nature of sexual violence in South Asia. The following chapter will explore international human rights standards as well as national laws on sexual violence against women and children, in addition to analysing the gaps and strengths of the same.

24 Feminist Dalit Organization, Increasing Violence against Dalit Women and Girls and their Access to Justice, 2019, <http://fedonepal.org/wp-content/uploads/2019/04/Issue-38.pdf>

25 The Record, Killing in the Name of Caste, 26 May 2020, <https://www.recordnepal.com/wire/news-the-wire/killing-in-the-name-of-caste/>

26 Odhikar, Annual Human Rights Report, 2019.

27 Kapaaeng Foundation, Human Rights Report 2018 on Indigenous Peoples in Bangladesh, p. 68.

28 Ibid.

29 BDERM & Nagorik Uggyog, Situation of Dalits in Bangladesh, 2018, [https://idsn.org/wp-content/uploads/2018/03/NGO-report-\\_UPR\\_Dalit-rights-in-Bangladesh-2017.pdf](https://idsn.org/wp-content/uploads/2018/03/NGO-report-_UPR_Dalit-rights-in-Bangladesh-2017.pdf)

30 Human Rights Watch, Sri Lanka: Rape of Tamil Detainees, 2013, <https://www.hrw.org/news/2013/02/26/sri-lanka-rape-tamil-detainees>

31 Drayang is a female-dominated sector of entertainment in Bhutan where women engage in dance, music for their customers, mostly a male clientele.

32 Gross National Happiness Commission Secretariat, Bhutan Vulnerability Baseline Assessment - 2016, <https://www.gnhc.gov.bt/en/wp-content/uploads/2017/11/UNDP-Book-for-Website.pdf>

# THE COVID-19 PANDEMIC AND SEXUAL VIOLENCE IN SOUTH ASIA

The COVID-19 pandemic has exacerbated the crisis of sexual violence across the globe. In South Asia, there is an absence of official data which adequately captures the actual number of sexual violence incidents which take place. However, qualitative reports suggest that survivors of sexual violence have faced numerous problems in accessing justice, including not having their cases recorded by the police, prosecuted or successfully adjudicated. Over the course of 2020, women experienced increased vulnerability<sup>33</sup> due to several factors such as lack of access to police stations (particularly during lockdowns), attitudes of police officers (some of whom turned away survivors who sought to report), reduced working of courts which led to delays in trial proceedings, pressure to compromise cases and generally impeding access to justice for survivors of sexual violence.

The additional impact of lockdown and other consequences of the COVID-19 pandemic on reported rape cases includes specifically:

## Bangladesh

According to statistics compiled from media reports by ASK, a human rights organisation in Bangladesh, 975 rape incidents were reported to have taken place between January to September, of which 64.8% cases were reported between April and August alone. The crisis of rape has led to several protests across the country in 2020 due to the lower levels of conviction and the failure of those in power to take effective action to address sexual violence.<sup>34</sup>

## Bhutan

Official statistics are not available on the number of rape cases reported during the pandemic. However, UNFPA, which runs the One-Stop Crisis Centre in Bhutan, has reported a surge in gender-based violence, including increased cases of rape/sexual assault against children.<sup>35</sup>

## Nepal

In Nepal, the number of rape cases against women and children has exponentially increased during the pandemic.<sup>36</sup> Activists from the country opine that in most rape cases perpetrators are from upper-caste communities who target women and girls from socially excluded communities. Despite the rise in number of reported rape cases in the country, the perpetrators largely remain free due to the culture of impunity enabled by the police, community leaders and the judiciary.<sup>37</sup>

## Maldives

Owing to the lockdown earlier last year, in the Maldives most essential health and public services for women and children were disrupted. During the first three months of the lockdown, 46 cases of sexual assault were reported in the country. Delays in courts, prosecutions and proceedings could have further exacerbated the vulnerability of women and girls in accessing justice.<sup>38</sup>

## India

India witnessed a significant drop in the number of reported rape cases during the pandemic. As per police statistics, there was a total of 23 rape cases reported in the state of Delhi between March and April, compared to 139 during the same period in 2019. However, experts suggest that this is barely a true representation of the reality, rather the number of cases may have actually increased but women are unable to report because of the presence of perpetrators at home during the lockdown.<sup>39</sup>

## Sri Lanka

A rapid survey revealed that during the curfew period in Sri Lanka, 5.6% of respondents had experienced sexual violence.<sup>40</sup> There was also a reported surge in the number of complaints of sexual and gender-based violence received by the Women's Helpline.<sup>41</sup>

33 Eurozine, Pandemic Rape in India, 2020, <https://www.eurozine.com/pandemic-rape-in-india/>

34 ABC News, Bangladesh faces a silent rape crisis despite recent government approval of death penalty for sex crimes, 24 October 2020, <https://www.abc.net.au/news/2020-10-24/bangladesh-faces-rape-crisis-despite-death-penalty-law/12769782>

35 UNFPA, Pandemic and Rising Tide of Violence increase demand for mental health, psychosocial care, 8 October 2020, <https://shares/aoeQDm>

36 WOREC, The Status of Violence against Women and Girls during Lockdown of COVID-19, 23 April 2020, <https://worecnepal.org/content/123/2020-04-23>

37 DW, Surge in Nepal Rape Cases triggers death penalty discussion, 12 October 2020, <https://www.dw.com/en/nepal-women-protest-surge-in-rape-cases/a-55248955>

38 United Nations in Maldives, COVID-19 Socio-economic Response and Recovery Framework, 2020, [https://unsdg.un.org/sites/default/files/2020-08/MDV\\_Socioeconomic-Response-Plan\\_2020.pdf](https://unsdg.un.org/sites/default/files/2020-08/MDV_Socioeconomic-Response-Plan_2020.pdf)

39 Cheena Kapoor, Drop in India's rape cases no cause for celebration, 21 August 2020, <https://www.aa.com.tr/en/asia-pacific/drop-in-indias-rape-cases-no-cause-for-celebration/1948513>

40 IPS News Service, Report shows Sri Lanka has escalation of Violence during COVID-19 Lockdown, 19 August 2020, <http://www.ipsnews.net/2020/08/report-shows-sri-lanka-escalation-violence-covid-19-lockdown/>

41 UNDP Sri Lanka, When home isn't safe anymore, 24 July 2020, [https://www.lk.undp.org/content/srilanka/en/home/presscenter/articles/2020/COVID19\\_Gender\\_Impacts.html](https://www.lk.undp.org/content/srilanka/en/home/presscenter/articles/2020/COVID19_Gender_Impacts.html)





# PROTECTION GAPS IN LAWS RELATING TO SEXUAL VIOLENCE

# APPLICABLE INTERNATIONAL HUMAN RIGHTS STANDARDS

International legal human rights frameworks guarantee the right of all women and girls to live a life free from violence, including sexual violence. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which is a binding international commitment that has been ratified by all six South Asian countries studied, together with General Recommendations 19<sup>42</sup> and 35<sup>43</sup> of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) requires all States to “repeal all national penal provisions which constitute discrimination against women.”<sup>44</sup> This principle also applies to repealing any discriminatory definitions of rape and other forms of sexual violence, as well as to the laws based on which sexual violence is prosecuted and punished. Being able to live a life free from sexual violence is also necessary to meet the obligations set out in the United Nations 2030 Agenda for Sustainable Development (the SDGs), particularly Goal 5: Achieving Gender Equality and Goal 16: Peace, Justice and Strong Institutions.<sup>45</sup>

With regard to the definition of sexual violence, General Recommendation 35 as well as jurisprudence of the CEDAW Committee provides that the definition of sexual crimes, including rape should be based on lack of freely given consent and take account of coercive circumstances.<sup>46</sup> The United Nations has also provided

informative guidance on the issue of gender violence legislation, including guidance on drafting effective legislation on sexual violence issued by the UN Women Virtual Knowledge Centre to End Violence Against Women and Girls (UN Women Guidelines).<sup>47</sup> It is clear from these treaties and commitments that the goal of legislation on violence against women and girls should be “... to prevent violence against women, to ensure investigation, prosecution and punishment of perpetrators and to provide protection and support for survivors of violence.”<sup>48</sup>

In addition to having comprehensive and non-discriminatory legislation on sexual violence, States are required to “[e]nsure effective access of victims to courts and tribunals; ensure authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and as appropriate ex officio prosecution to bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties.”<sup>49</sup> In this regard, the CEDAW Committee has stated that six components — justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems — are necessary to ensure access to justice.<sup>50</sup>

42 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against women, 1992.

43 Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 2017.

44 Article 2, Convention on the Elimination of all forms of Discrimination against Women.

45 See in particular, Targets 5.1 “End all forms of discrimination against all women and girls everywhere”; 5.2 “Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation;” and 5.C “Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels”; and Targets 16.1 “Significantly reduce all forms of violence and related death rates everywhere;” 16.2 “End abuse, exploitation, trafficking and all forms of violence against and torture of children;” 16.3 “Promote the rule of law at the national and international levels and ensure equal access to justice for all”

46 CEDAW General Recommendation No. 35, supra note 45, para 5; Karen Tayag Vertido v. The Philippines, CEDAW, Communication No.18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010).

47 United Nations Women, Handbook for Legislation on Violence against Women, 2012, <https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>

48 UN Women Virtual Knowledge Centre to end Violence Against Women and Girls, Ensure that the Goal of the Legislation is Well-defined, 2010, <https://www.endvawnow.org/en/articles/3-ensure-that-the-goal-of-the-legislation-is-well-defined.html>

49 CEDAW General Recommendation No. 35, supra note 45, para 44.

50 Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 on Women's Access to Justice, 2015, CEDAW/C/GC/33

# PROTECTION GAPS IN SEXUAL VIOLENCE LAWS IN SOUTH ASIA

This chapter surveys the provisions in the rape laws across the six selected countries which discriminate against women and girls, as well as the gaps in legal frameworks which impede access to justice for rape victims. It discusses the extent or otherwise to which sexual violence legislation and criminal justice systems in South Asia comply with the international human rights obligations referred to above and the UN Women Guidelines. Issues relating to the implementation of the law and the functioning of the criminal justice system are dealt with in subsequent chapters.

## Limited Definitions of Sexual Violence

### Are all forms of sexual penetration included within the definition of rape?

Laws on sexual violence should punish all acts of sexual penetration equally and provide equal access to justice to all survivors regardless of their sex, sexual orientation, gender identity and means of penetration. Integration of all forms of sexual penetration within the definition of rape essentially contributes to viewing rape as a violation of bodily integrity and sexual autonomy.

According to the UN Women Guidelines, legislation should include a definition of sexual assault which is not framed as a crime of honour or morality. Laws that focus on breach of honour rather than coercion result in denial of justice to the victim. They create a hierarchy of more or less “worthy” survivors, perpetuate the notion of women as bearers of the “morality” of a society and foster an environment where women’s bodies and lives are controlled and the blame for sexual violence is transferred onto the victim.<sup>51</sup> For instance, penal laws in both India and Bangladesh still include colonial-era offences of “outraging” or “insulting” the “modesty of a woman”. Retaining such archaic notions in the law which associate the bodily integrity of a woman to patriarchal concepts such as “modesty” and “honour” encourages jurisprudence which focuses on the “immorality” of victims.

Similarly, limiting the definition of rape to peno-vaginal penetration views rape as an offence against the chastity and honour of the woman, also placing undue importance on procreative sexual acts.

**All forms of sexual penetration are not considered as rape or other equivalent offence in 2 out of the 6 countries.**

Country	Are all forms of sexual penetration considered as rape or other equivalent offence?	Details of the Applicable Legal Provisions
Bangladesh		The rape offence is narrowly applied to include peno-vaginal penetration only. Other forms of sexual penetration are covered under “unnatural offences” or sexual oppression/assault, which carry significantly lower penalties.
Bhutan	✓	The law has a wide definition of rape which includes “any act of sexual intercourse whatever its nature”.
India	✓	The law has a wide definition of rape which includes all acts of sexual penetration, as well as acts of oral sex (without a requirement for penetration).
Maldives	✓	The rape definition under the Sexual Offences Act has been partially expanded beyond peno-vaginal penetration, but does not include all acts of sexual penetration. Rape is understood to include only penile penetration of the vagina and other bodily orifices such as the mouth and anus. However, penetration by fingers or objects is not included within this definition. The definition of rape under the Penal Code however includes all forms of sexual penetration <sup>52</sup> , while the law applicable to sexual abuse of children prohibits all forms of sexual touching.
Nepal		The rape definition has been partially expanded beyond peno-vaginal penetration, but does not include all acts of sexual penetration. Penile penetration of the vagina, mouth and anus are included within the definition of rape. However, when the means of penetration are fingers or other objects, only penetration of the vagina is included within the definition of rape and not penetration of other bodily orifices.
Sri Lanka	✓	While the rape offence is narrowly applied to include peno-vaginal penetration only, other forms of sexual penetration are covered under the crime of “grave sexual abuse” which carries the same penalties as rape.

51 See Equality Now, *The World’s Shame: The Global Rape Epidemic, How Laws Around the World are Failing to protect Women and Girls from Sexual Violence*, 2017, [https://www.equalitynow.org/the\\_world\\_s\\_shame\\_the\\_global\\_rape\\_epidemic\\_how\\_laws\\_around\\_the\\_world\\_are\\_failing\\_to\\_protect\\_women\\_and\\_girls\\_from\\_sexual\\_violence](https://www.equalitynow.org/the_world_s_shame_the_global_rape_epidemic_how_laws_around_the_world_are_failing_to_protect_women_and_girls_from_sexual_violence)

52 There is a lack of clarity on whether the Penal Code or Sexual Offences Act will apply in rape cases especially where the provisions in these two laws contradict each other. However, it is pertinent to note that the Maldives government has stated that that the Sexual Offences Act “will be prioritised over the Penal Code in application, concerning cases of sexual offences.” See Replies of Maldives to the list of issues and questions in relation to its sixth periodic report, CEDAW/C/MDV/RQ/6, 20 August 2020, para 99.

## Is incest defined as a specific offence under the law?

In principle, incest is covered within the definition of general sexual offences such as rape and child rape/sexual assault. However, in the South Asian context, the taboo surrounding the issue coupled with attitudes of police, prosecutors and judges who often believe that incest is not possible or that no family member would commit such crimes, make it extremely difficult for victims to come forward and get their cases registered with the police. As

such, a specific provision on incest provides clarity for law enforcement professionals and the general public and encourages reporting of such crimes.

**Only Bangladesh does not have a specific provision on incest.**

**There is no specific provision on incest in 1 out of the 6 countries.**

### Requirement for Genuine and Voluntary Consent to Sexual Acts

The CEDAW Committee in the case of *Karen Tayag Vertido v. The Philippines*, recommended that the state should remove the criterion of violence from the definition of rape and should enact a definition of rape, which:

- a. requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the survivor was consenting; or
- b. requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.<sup>53</sup>

All six countries have a consent-based definition of rape, whereby it is not necessary to show the use of additional force, violence, threats or use of helplessness of the victim in order to prove rape.



### Definition of Rape in Local Languages

How the law is formulated also steers its implementation and it is therefore important to ensure that the terminology used for rape in all the official languages in which the law is published is based on lack of consent and violation of bodily autonomy. For instance, under Nepali law, though lack of consent to sexual intercourse is sufficient to prove rape (in both

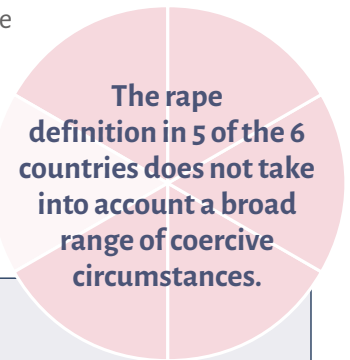
the English and Nepali versions), the heading of the rape offence in the Nepali version of the law is titled “Jabarjasti Karani Ko Mahal” which does not translate as “rape” but rather as “forcible sexual intercourse”. The use of this term to describe rape perpetuates the notion that rape can only take place through additional force or violence, even though evidence of use of force or violence is not required by the law.

<sup>53</sup> Karen Tayag Vertido v. The Philippines, CEDAW, Communication No.18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii).

## Does the law recognise a broad range of coercive circumstances in which consent is immaterial?

The UN Women Guidelines state that laws should provide a broad range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority (for example, in a correctional facility or in a school setting) or by individuals in certain professional relationships to the victim such as an ongoing psychotherapist-patient relationship; and provide for a broad range of coercive circumstances around consent such as intimidation or fraud.

The laws across all six South Asian countries provide that consent obtained through putting the victim in fear of death or hurt is not valid consent for the purposes of the rape definition. Some of the laws also recognise other forms of coercive circumstances such as fraud, duress, deception/misrepresentation as to the relationship of the perpetrator with the victim, though they often fail to take into account sexual violence from persons in positions of authority or professional relationship as coercive circumstances for the purposes of rape.



Country	Does the definition of rape take into account a broad range of coercive circumstances?	Details of the Applicable Legal Provisions
Bangladesh		Bangladeshi law does not provide for any circumstances involving persons in positions of authority wherein consent is immaterial.
Bhutan		Bhutanese law provides for the offence of custodial rape, wherein consent to the sexual intercourse by a person in “custody” is immaterial, and the punishment provided is the same as the punishment for rape. However, it does not explicitly recognise any other circumstances of rape by an individual in a position of authority.
India	✓	Indian law presumes the absence of consent on the part of the victim in a broad range of circumstances such as rape by an individual in a position of authority, custodial rape, rape by a relative, guardian, teacher, person in a position of trust, or person in a position of control or dominance over a woman. However, this is only a presumption and may be disproved by the defence if there is sufficient evidence to show unequivocal, voluntary consent to the sexual act.
Maldives		Maldivian law does not provide for any circumstances involving persons in positions of authority wherein consent is immaterial.
Nepal		Nepali law prohibits sexual intercourse (irrespective of consent) in certain circumstances, including by a government employee with a detainee, with a person in one’s protection and within professional settings. However, these are classified as separate offences (not rape) and carry far lighter penalties than those prescribed for rape.
Sri Lanka		Sri Lankan law provides that consent is immaterial in cases of sexual violence with a person in detention. Other forms of coercive circumstances where the victim is raped by a person in a position of authority such as the management of a remand home, hospital, custodial home and the like are considered as aggravating factors, though lack of consent still needs to be proved in such cases.

## Definition of Consent

CEDAW jurisprudence has established and the UN Women Guidelines recommend that the definition of sexual assault should be based on whether or not there was consent to the act in question. That would require the existence of “unequivocal and voluntary agreement” and steps taken by the accused to ascertain whether the victim was willingly engaging in the sexual act. In partial compliance with this recommendation, Indian law, for example, includes a specific definition of consent within the rape provision as follows:

*“Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.”*

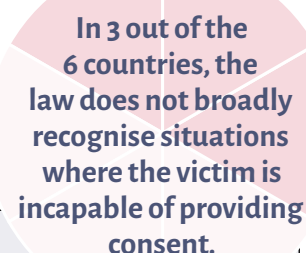
Apart from India and the Maldives, none of the other countries studied have definitions of consent which are specifically applicable to rape/sexual offences. Introducing similar definitions of consent within the rape provision clarifies and improves the law and assists in minimising the secondary victimisation of survivors in rape proceedings, by shifting focus from the behaviour of the victim prior to the rape, to interrogating the behaviour and actions (or lack thereof) of the accused during the alleged rape, such as genuine efforts taken by the accused to establish consent prior to engaging in the sexual act.



## Does the law broadly recognise situations where the victim is incapable of providing consent?

Laws relating to sexual violence should recognise common situations in which the victim is incapable of providing consent to sex,<sup>54</sup> as such situations could either be considered as ‘coercive circumstances’ or instances where genuine consent is impossible as required by CEDAW jurisprudence.<sup>55</sup> Including a comprehensive list of such circumstances under the law where there is incapacity

to consent is important to ensure justice. For instance, the law should identify situations where the victim is intoxicated by drugs or alcohol, is unconscious or is asleep, as circumstances where the victim is not capable of consenting.



In 3 out of the 6 countries, the law does not broadly recognise situations where the victim is incapable of providing consent.

Country	Does the law broadly recognise situations where the victim is incapable of providing consent?	Details of the Applicable Legal Provisions
Bangladesh		Bangladeshi law does not deal with the issue of incapacity to provide consent at all, in the case of adult victims.
Bhutan		The law in Bhutan only recognises situations where the victim was intoxicated by the perpetrator without her consent or where the perpetrator rendered the victim unconscious. It does not explicitly recognise all situations where the victim is incapable of providing consent where the perpetrator did not cause such incapacity.
India	✓	The law recognises that consent is immaterial in situations where the victim is incapable of giving consent including unsoundness of mind, intoxication or unconsciousness, if the victim is “unable to understand the nature and consequences of that to which she gives consent”.
Maldives	✓	The law in the Maldives recognises a number of situations in which the victim is incapable of giving consent to sex, including in cases of mental disability (where the victim is incapable of giving consent to the act or understanding the nature of the act), intoxication or where the victim has no power to physically defend herself.
Nepal		The law in Nepal provides that “unsoundness of mind” vitiates consent, but does not provide for other situations such as intoxication and unconsciousness.
Sri Lanka	✓	Sri Lankan law recognises that consent is immaterial in situations where the victim is incapable of giving consent, such as unsoundness of mind and intoxication.

As shown in the table above, the laws in many countries also recognise incapacity to consent in cases of mental disability or “unsoundness of mind”. While it is good that the law makes note of this, it should not be taken to mean either that a person with a mental disability will always

be incapable of consenting to sex or that a person with a mental disability cannot ever act as a competent witness in their own case. Each aspect should be properly investigated at the time, with appropriate support as necessary, and based on the person’s individual capacities at the time.

## Does the law explicitly state the proof of physical resistance is not required?

None of the six countries surveyed legally require proof of physical resistance for rape convictions. Maldivian law includes “evidence of physical injuries” as one of the seven types of evidence which can be adduced in cases of sexual violence, which could encourage judges to look for such evidence in rape cases even though it is not strictly required. Even in countries where the laws on sexual violence make no mention of proof of physical resistance,

it is seen that in practice judges often look for evidence of physical injuries on the body of the victim when deciding whether the sexual intercourse was consensual or not. To put an end to this practice, laws in Sri Lanka and India have been specifically amended to state explicitly that evidence of physical resistance is not required to prove lack of consent to sexual intercourse.

<sup>54</sup> The Hague Principles on Sexual Violence, Civil Society Declaration on Sexual Violence, Part I, Section 2(b), <https://4genderjustice.org/wp-content/uploads/2019/11/The-Hague-Principles-on-Sexual-Violence.pdf>

<sup>55</sup> Karen Tayag Vertido v. The Philippines, CEDAW, Communication No.18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii).

## Marital Rape

The laws reviewed in all six countries do not treat marital rape on a par with rape outside marriage. Laws which explicitly allow marital rape under the law treat women as the property of their husbands and render them vulnerable to sexual violence and abuse within marriage. The laws which permit marital rape usually do so by excluding marital rape from the scope of the rape provision (i.e. it is not criminalised), or by stating that consent to sex is presumed if the parties are married. A presumption of ongoing consent in a marital relationship violates a woman's right to her autonomy, security and bodily

integrity, particularly where domestic violence has been established.

Such laws also send the broader signal that women are subordinate to their husbands and set the scene for general legal and societal discrimination, positioning women at best as second-class citizens without individual authority. The UN Special Rapporteur on violence against women recommends that criminal laws should be revised or new criminal provisions should be adopted to prohibit marital rape,<sup>56</sup> as do the UN Women Guidelines.

United Nations' treaty bodies (the CEDAW Committee and the Human Rights Committee in certain cases) have made the following recommendations in relation marital rape:

- For **Bangladesh** (CEDAW Committee, 2016)<sup>57</sup>, **India** (CEDAW Committee, 2014)<sup>58</sup> and **Sri Lanka** (CEDAW Committee, 2017<sup>59</sup> & Human Rights Committee, 2014<sup>60</sup>), the concluding observations issued recommended that marital rape be recognised as a criminal offence.
- For **Maldives**, in 2015, the CEDAW Committee recommended that the Maldives adopts specific legislation, within a clear time frame, to criminalise marital rape, without any exemptions.<sup>61</sup>
- For **Nepal**, in 2014, the Human Rights Committee expressed concern at the “disproportionately low penalties for marital rape”.<sup>62</sup>

*Laws which explicitly allow marital rape under the law treat women as the property of their husbands and render them vulnerable to sexual violence and abuse within marriage.*

56 See Report of Dubravka Šimonović - Special Rapporteur on violence against women, its causes and consequences, on her mission to the Bahamas, 25 May 2018, A/HRC/38/47/Add.2, para. 73.h.

57 CEDAW/C/BGD/CO/8, 25 November 2016.

58 CEDAW/C/IND/CO/4-5, 24 July 2014.

59 CEDAW/C/LKA/CO/8, 3 March 2017.

60 CCPR/C/LKA/CO/5, 21 November 2014.

61 CEDAW/C/MDV/CO/4-5, 11 March 2015.

62 CCPR/C/NPL/CO/2, 15 April 2014.





In 4 out of the 6 countries, laws explicitly permit marital rape of spouses over 18

## Does the law criminalise marital rape in all circumstances?

Country	Does the law criminalise marital rape in all circumstances?	Details of Applicable Legal Provisions
Bangladesh		Bangladeshi law explicitly permits marital rape of adult women in all circumstances, with no exception even for when the parties are separated.
Bhutan	✓	Marital rape is explicitly criminalised in all circumstances. However, it is only considered as a petty misdemeanour with far lower penalties than rape.
India		The law explicitly permits marital rape <i>unless</i> the parties are separated.
Maldives		The law explicitly permits marital rape <i>unless</i> the parties are separated or in the process of dissolving the marriage, or if the husband has a dangerous sexually transmitted disease which he knowingly transfers to the wife.
Nepal	✓	Marital Rape is criminalised in all circumstances, though the law provides for a lower penalty than for rape.
Sri Lanka		The law explicitly permits marital rape <i>unless</i> the parties are judicially separated.

### The Fight to Criminalise Marital Rape in South Asia

Governments across South Asia have been reluctant to amend laws to criminalise marital rape, often taking the argument that prohibiting marital rape would destabilise or destroy the institution of marriage. Despite the lack of response from governments, women's rights activists across South Asia have for decades been advocating for amendments to archaic criminal laws which permit marital rape.

In this fight, courts have often led the way in upholding the human rights of married women to bodily autonomy and freedom of choice. The earliest victory came in Nepal, when the Supreme Court of Nepal in 2000 struck down the earlier penal provision as unconstitutional which did not criminalise marital rape.<sup>63</sup>

In other countries, however, there has been no progress despite attempts to use public interest litigation to declare such provisions unconstitutional. For instance,

in India, the Supreme Court struck down the provision of the Penal Code which permitted marital rape of children between the ages of 15-18, while leaving in place the marital rape exception which applied to adult women.<sup>64</sup> There is currently a petition before the Delhi High Court seeking a declaration that the failure to criminalise marital rape is unconstitutional, though this case has been pending since 2015.<sup>65</sup> Similarly, in Bangladesh, a petition pending before the High Court challenges the penal provision permitting marital rape and the court recently sought an explanation from the Bangladeshi government on why marital rape should not be made illegal.<sup>66</sup>

It is hoped that the recent legal challenges will bear fruit and that other South Asian countries will follow the lead of Nepal and Bhutan to declare marital rape a criminal offence.

63 Ms. Meera Dhungana v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs and Others [Nepal Supreme Court, 2000].

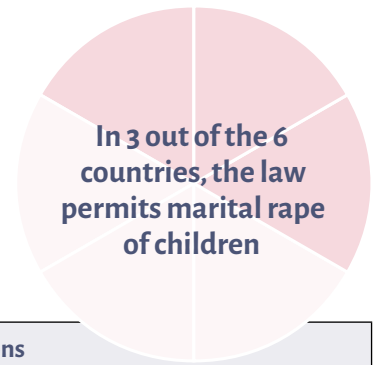
64 Independent Thought v. Union of India [2017] 10 SCC 800.

65 RIT Foundation v. Union of India W.P (C) 284/2015.

66 BLAST, BRAC, Naripokkho & Manusher Jonno Foundation, High Court calls for Explanation on discriminatory laws on marital rape, 3 November 2020, <https://blast.org.bd/content/pressrelease/04-11-2020-Press-Release-marital-rape-ENG.pdf>

## Does the law criminalise marital rape of children?

In some countries, the law not only explicitly permits marital rape, but such marital rape is legal even when the “wife” being raped is a child and even if the child does not otherwise meet the minimum age of consent for sex.



Country	Does the law criminalise marital rape of children?	Details of Applicable Legal Provisions
Bangladesh		The law explicitly permits marital rape of children over the age of 13. There is a mismatched punishment clause which provides only for punishment of two years' imprisonment in cases of marital rape of a child under 12 years of age, with no punishment designated for marital rape of children between the ages of 12 and 13. This law also conflicts with Bangladesh's Child Marriage Restraint Act which only permits marriage of girls above the age of 18 and boys above the age of 21 (though courts may allow for exceptions in special circumstances).
Bhutan	✓	Marital rape of children is criminalised.
India	✓	Indian law earlier permitted the marital rape of children between the ages of 15 of 18, though this exception was struck down by the Indian Supreme Court in 2017. <sup>67</sup> Indian law now does not permit marital rape of children.
Maldives		Maldives' law on child sexual abuse (2009) contains an “exemption arising out of marriage” which states that sex offences under the law would not be considered as an offence if the person is married to the child. This provision is now in conflict with the Maldives' Child Rights Protection Act (2019), which sets the minimum age of marriage at 18, without exception.
Nepal	✓	Marital rape of children is criminalised.
Sri Lanka		The law explicitly permits marital rape of children over the age of 12. This is in conflict with Sri Lanka's family law which sets the minimum age of marriage at 18, though personal laws such as the Muslim Marriage and Divorce Act have no minimum legal age of marriage. Thus, this issue specifically affects girls from the Muslim community in Sri Lanka.

<sup>67</sup> Independent Thought v. Union of India [2017] 10 SCC 800.

## Laws Requiring/Permitting Discriminatory or Overly Burdensome Evidence

### Does the law prohibit introduction of evidence relating to the past sexual history of the victim?

The UN Women Guidelines provide that states should prohibit introduction of a survivor’s sexual history as evidence in sexual violence proceedings. Laws which allow the introduction of a victim’s sexual history are based on patriarchal assumptions that only “chaste” and “moral” women can be raped, contribute to the impunity of perpetrators and lead to re-victimisation of survivors who are subjected to traumatic and degrading cross-examinations in court.<sup>68</sup> Since consent can only be evaluated according to the circumstances prevailing at the time under charge, evidence of past sexual history should be irrelevant in a rape trial.

In 5 out of the 6 countries, the law allows the introduction of character evidence relating to the past sexual history of the victim.

Country	Does the law prohibit introduction of character evidence relating to the past sexual history of the victim?	Details of Applicable Legal Provisions
Bangladesh		The law on evidence specifically allows introduction of evidence in rape cases which shows that “the prosecutrix was of generally immoral character”.
Bhutan		While Bhutanese law states that evidence of past sexual behaviour is not generally relevant in sexual violence cases, the exceptions are so broad as to defeat the purpose of the main provision.
India	✓	The law specifically provides that the previous sexual experience of the victim is not relevant in sexual violence cases. Indian law also has a specific provision prohibiting the defence from adducing evidence or asking questions in cross-examination relating to the general immoral character, or previous sexual experience, of the victim while proving consent or the quality of such consent.
Maldives		Maldivian law is silent on the issue generally, though there is an express provision allowing introduction of evidence relating to the “dignity and discipline of the victim” if there is a possibility of false testimony being supplied by the victim. Further the law permits the court to opine that it was improbable the offence took place having regard to “the relationship between the parties and the transactions between them prior to the offence”. <sup>69</sup> In addition to being discriminatory and based on negative gender stereotypes, these provisions could in practice also encourage introduction of evidence relating to the sexual history of the victim.
Nepal		The law is silent on the issue, which, in practice, allows introduction of character evidence relating to the victim in rape cases.
Sri Lanka		The evidence law specifically allows introduction of evidence in rape cases which shows that “the prosecutrix was of generally immoral character”.

68 BLAST, Between Virtue and Immorality: Why Character Evidence must be prohibited in Rape Cases, November 2019.

69 Maldivian lawmakers have proposed removal of some of these provisions, particularly sub-sections (c), (d) and (e) of section 53 of the Sexual Offences Act; See The Edition, MP Meekail proposes to scrap parts of Sexual Offences Act, 29 June 2020, <https://edition.mv/news/17537>.

## Does the law have overly burdensome evidence requirements?

The UN Women Guidelines recommend that a *requirement* of corroboration of the statement of a sexual violence survivor be prohibited by states. It also states that it is important that legislation allows for the prosecution and conviction of an offender based solely on the testimony of the survivor.

The law in the **Maldives** stands out amongst the six countries for burdensome evidence requirements imposed for proving offences of rape. The Sexual Offences Act states that when at least 5 types of the specified evidence are available, they are “sufficient” to prove the case beyond a reasonable doubt. The types of evidence specified include results of a scientific test; evidence of eye witnesses; forensic results; statements given by third parties “as related to them by the victim within a short period of time from occurrence of the incident, where there are no probabilities of the victim fabricating the story”; victim’s statement; evidence of physical injuries and material evidence. Many of the types of evidence listed in this section are discriminatory and based on negative gender stereotypes/rape myths, for example evidence of physical injuries and requiring there be “no probabilities

of the victim fabricating the story”. Further, setting a legal standard which could potentially be interpreted to mean that at least five types of evidence are needed is an extremely burdensome requirement which significantly reduces the possibility of successful convictions. The general interpretation of this provision by the courts remains unclear given the lack of published verdicts under the Sexual Offences Act. The CEDAW Committee has also expressed concern about the “stringent evidentiary provisions required for sexual violence offences” in the Maldives.<sup>70</sup> This burden is, however, reduced in cases of child sexual abuse, as the law specifies a greater variety of evidences which can be introduced, including the child’s narration of the incident itself in addition to corroborating statements by different parties.

In contrast to the Maldivian approach, courts in a number of South Asian countries (including India, Bangladesh, Nepal and Sri Lanka) have held that convictions in rape cases can be based on the sole testimony of the victim. In practice, it is found that courts often look for corroboration through medical evidence or other testimonies as discussed in later chapters.



*“In a sex offence case there is no legal bar in believing the sole testimony of the prosecutrix, nay, she must prima facie be believed, except in a rarest of rare cases where she is found unreliable, the necessity of corroborative evidence will arise and that the legal custom of insisting on corroboration in every case or alternatively of stating the reason for waiving such corroboration is not applicable in our country.” - Bangladesh High Court in Jahangir Hossain v. The State (1996) BLD (HCD) 238*

70 Committee on the Elimination of Discrimination against Women, Concluding Observations on the combined fourth and fifth periodic reports of Maldives, 11 March 2015, CEDAW/C/MDV/CO/4-5.

## Other Discriminatory/Problematic Legal Provisions

In addition to the specific issues highlighted above, the laws in some South Asian countries, have a few provisions which are either discriminatory towards women and girls, or otherwise impede access to justice in cases of rape. These provisions are highlighted below:

### Limitation Periods - Nepal

Short limitation periods during which rape cases may be brought forward for trial impede access to justice for survivors, particularly in relation to child victims who may find it difficult to raise a complaint before they reach the age of majority. In relation to both adults and children, given the various factors which contribute to delays in reporting, laws should not impose any limitation period within which the rape complaint needs to be filed.<sup>71</sup>

**However, Nepali law requires complaints in rape cases to be filed within one year of the date of incident.**<sup>72</sup>

Though the time limit for filing rape complaints was recently increased from 35 days to one year, this statute of limitations for rape cases in Nepal is still the lowest out of the six countries studied. Stigma, shame, intimidation, trauma and even lack of recognition of the abuse keep victims from coming forward and even with the increased statute of limitation, it places an overwhelming burden on victims and allows perpetrators to evade punishment.

The CEDAW Committee has noted that this statute of limitations “fails to take into account the stigma that women and girls face when reporting cases of sexual and gender-based crimes and, therefore, fosters impunity for such crimes” and recommended that Nepal “repeal the statute of limitations provision on the registration of cases of sexual violence in all contexts to ensure effective access for women to justice for the crime of rape and other sexual offences”.<sup>73</sup>

### Adverse Inference Based on Delay in Reporting - Maldives

The Sexual Offences Act in the Maldives contains certain provisions which enable gender stereotyping and secondary victimisation of survivors during legal proceedings. In particular, section 53 provides that a long delay between the occurrence of the incident and date of reporting, if the incident was not narrated to other persons in the meantime, can be relied on by the defence to deny the accusations of sexual violence. This provision is discriminatory and is not in compliance with the UN Women Guidelines, which specifically provides that sexual violence legislation should not allow for adverse inferences for delays in reporting. As the UN Women Guidelines note, such delays may be caused by numerous legitimate concerns including trauma, fear of stigmatisation or retaliation, financial or emotional dependence on the perpetrator, lack of access to responsible or supportive institutions, lack of resources and the like, even lack of faith in the criminal justice system itself. As such the delays should not be interpreted to demonstrate that the evidence of the rape victim is unreliable, as Maldivian law currently permits.

### Gao - Bhutan

Bhutanese law provides for payment of compensation (“gao”) to the husband in cases where a married woman is raped (in addition to payment of compensation to the survivor).<sup>74</sup> This discriminatory provision treats the wife as the property of her husband and is based on archaic and patriarchal notions of chastity, the “lack” of which offends the honour of her husband and therefore warrants some payment to off-set her fall in value. It fails to centre the woman as the real victim, to understand and treat the crime from her perspective and to deliver full justice.

71 See UN Special Rapporteur on violence against women, its causes and consequences & Equality Now, Rape as a Grave and Systematic Human Rights Violation and Gender-based Violence against Women: Expert Group Meeting Report 2020, [https://www.equalitynow.org/rape\\_human\\_rights\\_violation\\_gbv\\_sr\\_egm\\_2020](https://www.equalitynow.org/rape_human_rights_violation_gbv_sr_egm_2020).

72 Section 229, National Penal Code, 2017.

73 Committee on the Elimination of Discrimination of Women, Concluding Observations of the sixth periodic report of Nepal, 12 November 2018, CEDAW/C/NPL/CO/6, paras 10-11.

74 Sections 179 & 180, Bhutan Penal Code.

## Offence of 'False Accusation' - Bangladesh

The Prevention of Oppression against Women and Children Act, 2000 in Bangladesh includes a specific provision which provides for punishment for filing a "false case or complaint" with the purpose of causing injury to the person against whom such offence is filed. As noted by the UN Women Guidelines, provisions of this kind in particular with respect to sexual violence crimes, "may dissuade survivors from filing cases due to fear

of not being believed, and there is a high risk that such provisions may be applied incorrectly and used by the defendant/offender for purposes of retaliation." In the other 5 countries studied, provision of false testimony is dealt with under general criminal offences applicable to all crimes, without specifically including a provision on false cases in sexual violence legislation.

## Special Provisions for the Protection of Socially Excluded Communities

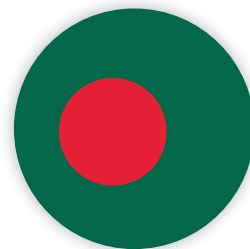
When sexual violence is committed against women and girls from socially excluded communities, they often face multiple forms of discrimination (based on their gender, caste, religion or ethnicity among others) while accessing the criminal justice system, often finding it even more difficult to get a case lodged and sent to trial. To address this, some of the South Asian countries studied have passed specific laws aimed at preventing and redressing discrimination against certain socially excluded communities. For example, in India, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act criminalises atrocities against Scheduled Castes and Scheduled Tribes. Sexual harassment and assault against an SC or ST woman or girl committed with the knowledge of her caste or tribal identity are considered as caste-based atrocities under the law, which provides for special measures to improve access to justice in such cases. In Nepal, the Caste-Based Discrimination and Untouchability

(Offence and Punishment) Act, 2011 prohibits caste-based discrimination, but does not contain provisions similar to those under Indian law to specifically address instances of caste-based sexual violence or rape. Sri Lanka and Bangladesh do not have specific laws or provisions which address the added vulnerabilities of socially excluded communities in relation to crimes of rape/sexual assault. A draft anti-discrimination law which has been prepared by the National Human Rights Commission in Bangladesh could potentially provide some protection in such cases, though it is yet to be passed. Governments across South Asia should review their laws to ensure that the special needs of all marginalised communities are met, including for example, women with disabilities. Further, the laws need to be properly implemented to make a difference - in India, for instance, the implementation of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is notoriously poor.



# PRABHA\* - BANGLADESH

## Survivor Story



“When the doctor finally came to examine my injuries, it was 1:30am and I had been waiting for her in the hospital since afternoon. Earlier that day, a gang of men attacked me in the rice fields and took turns to thrash and rape me. I had passed out and they left me for dead.

After a local hospital refused to treat me — shocked at the nature of my injuries and fearing police involvement — my husband took me to the police station and begged them to find medical help, so the police brought me to a bigger hospital. The doctor spent just a few minutes checking me and declared I had not been raped.

To my shock, she lashed out at me and said that I was trying to get an upper hand in a land dispute by framing the accused. “You’re a woman, tell me why I would lie? Just look at my body!” I shouted. But she was unrelenting. I was in the hospital for a month.

At that moment, I realised my gang rape was political. The accused, who had strong connections with a powerful local politician, had bribed their way across the system to shut me up. Who knows, the doctor may have been one of the people who had been paid a hefty price for her silence?

It’s never easy for a woman to fight a case of sexual assault in this country. And when the survivor is a poor, Adivasi woman and the accused from the majority community with powerful political connections, it is even more difficult to obtain justice. In a system designed to take our land, our livelihoods and keep us at the bottom of social hierarchies so that we keep serving the powerful in silence, what hope do I have?

The public prosecutor who was assigned to my case barely ever spoke to me. Though he is paid by the government to represent me, I paid him 1500 taka (approx. \$18 USD) every month from my meagre savings just to tell me the dates of the hearings, which is his duty to tell me. Even then he would be unreachable for days. Then I had to start paying his clerk to get to know about court appearances and even then I’d be informed the evening before appearing before the court.

In the court, the defence lawyer, another man from the majority community, continuously shamed me. “Which husband of yours is this, you have many?” he said. And he asked my daughter, “Do you number your fathers?” My lawyer did not raise a single objection.

While all the accused were arrested, most of them got bail soon after and they are roaming free. Some of them live in the same lane as I do. We receive death threats almost every day, like a well-oiled routine. They have filed dozens of lawsuits against me and I risk losing the land I farm and which feeds us.

The little money I earn selling our harvest goes in legal fees. I received no government aid at first because the doctor had written off my accusations as false. Then desperate, one day I made a trip to the Prime Minister’s office and cried and begged till they let me in. Since then, I have received 80,000 taka (approx. \$945 USD) in aid, which has gone on fighting the many lawsuits.

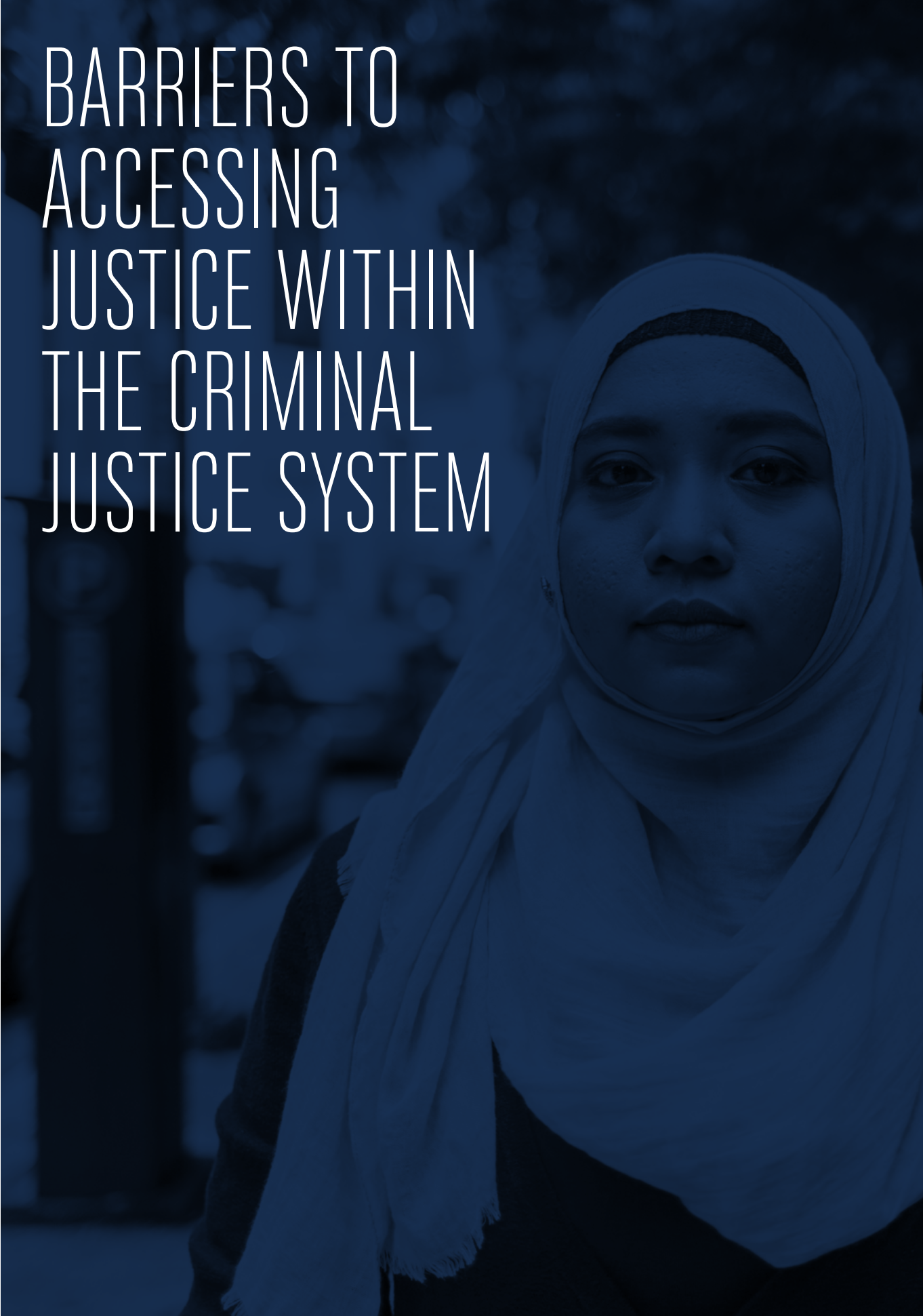
The police filed a charge sheet a year after the rape, which happened in August 2014. I was shocked when I looked at it - they made my case look so weak that the accused would walk free. But I wasn’t giving up, I visited senior police officials and complained till they agreed to do a better job. My case is still ongoing.

**I often wonder if my life would be different if I was a Bangali woman, not a marginalised Adivasi woman. I see young people from my community being rejected from jobs just because of their identity, our women and girls are raped every day and the culprits walk around with impunity. I may look alive, but inside I have been shattered into hundreds of pieces. Only my courage has kept me together.”**

*\* This story is anonymous and the name Prabha is a pseudonym*

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# BARRIERS TO ACCESSING JUSTICE WITHIN THE CRIMINAL JUSTICE SYSTEM

**The primary and secondary research revealed the following barriers to accessing justice faced by survivors of sexual violence across the six South Asian countries:**

## **I. Stigma and Victim Blaming**

Disbelief in the testimonies of survivors, blaming survivors for having “provoked” the rape, and discriminatory attitudes (based on deep-seated gender biases and rape myths) towards survivors of sexual violence were reported by survivors and/or stakeholders in all the six countries studied. Further, survivors are subjected to such attitudes from their own family, from the community, from the police, health care professionals, judges and defence lawyers. Survivors reported being blamed by family or community members either for the rape itself or for reporting the case and purportedly bringing shame on themselves or their family. The stigma faced by survivors, lack of support from family, as well as fear of being blamed are some of the major factors contributing to either delayed disclosure/reporting of cases by survivors, non-reporting of rape cases to the police or survivors deciding to drop the criminal case after it has been filed.

*“After that incident I didn’t say anything about what happened to me... one day I gathered the courage to tell my mother...and told her that I wanted to report the matter to police but she told me that people might not believe me and that people might look down on me. She thought that it was very embarrassing for me to report the matter to the police. She was like let’s never talk about it, think about it as a bad dream and that with time I would be okay... I was devastated that my own mother would not support me...”*

*- Rape Survivor from Bhutan*

The tendency by law enforcement officials to blame survivors for the rape and the refusal to believe their testimonies based on gender biases and rape myths are important factors contributing to the large number of

cases dropping out of the system and the low conviction rates. It also turns the criminal justice process into a traumatic ordeal for survivors. This problem is particularly acute for survivors from socially excluded communities, as law enforcement officials have a greater tendency to not believe women and girls from minority communities due to caste, class, tribal or religious biases intersecting with gender biases.

*“[O]ne of my friends reported the matter to the police and the police didn’t believe her because she was very young during that time, instead they made her believe that it was her fault and she asked for it; because it happened after the night club in Thimphu.... She was horrified that she would be the one who would get arrested.” - Rape Survivor from Bhutan*

Such gender biases also impact the impartiality and fairness of the investigation in rape cases. For instance, police officers who engage in victim-blaming also often refuse to register the complaint, or do not take the criminal investigation seriously.<sup>75</sup> There were even reports of physical violence and abuse against survivors by police officers while accusing them of lying.

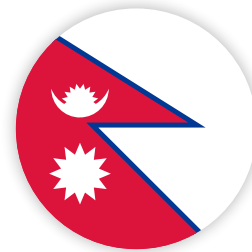
*“I was slapped twice by the SP [Superintendent of Police] on my cheek, blaming me that it was my fault and I was lying.” - Rape Survivor from India*

The lack of sensitivity and the patriarchal mind-set of criminal justice system officials contribute to the problem of negative gender stereotyping. This issue is compounded by the shortage of female police officers, healthcare professionals, prosecutors and judges throughout the region. However, some stakeholders have stressed that even the abysmally low number of female law enforcement officials are often not trained or sensitised enough to deal with cases of sexual violence, often resulting in apathy and victim-blaming attitudes towards survivors.<sup>76</sup>

<sup>75</sup> Focus Group Discussion with Rape Survivors, Madhya Pradesh, India, March 2020.

<sup>76</sup> Stakeholder Interview with NGO Representative, Bangladesh, September 2020; Stakeholder Interview with independent lawyer, Madhya Pradesh High Court, India, October 2020; Stakeholder Interview with NGO representative, Haryana, India, March 2020.

## RITA\* - NEPAL Survivor Story



“A few days after I was raped by a man from the neighbourhood where I lived, my husband deserted me because he believed I was to blame. Overnight, the community turned against me and, unable to bear the taunts and the boycott, I came to live with my parents. I had to leave my young children behind with my in-laws because with my earnings I can barely meet my own expenses, let alone care for them.

I was assaulted in 2018, and though I wanted to complain, the fear that crossed my mind was the shame I would bring to my husband and in-laws. I almost decided against lodging a formal complaint with the police because I feared the taboo and ostracisation would make life miserable for my children, who I want to have a good future. My brother, however, convinced me to go to the police, and with help from Women for Human Rights, a women’s organisation that works in my home town, I reported the assault.

The next day the police arrested the culprit—a married daily wage earner from the same Dalit community as me—and I was provided a government lawyer. Although the police registered my complaint and took me to the hospital for medical tests, throughout my conversations with them I constantly felt they were placing blame for the assault on me. It felt familiar - my husband, in-laws and neighbours had also blamed me. I knew it was not my fault but people around me made me feel like it was.

The community elders tried to force me into some sort of a settlement with the accused—this is not unusual; I’ve known several women who’ve had to reach a financial agreement with their rapists under pressure from the community. I rejected the suggestions because I wanted to follow the law and register a police complaint.

My lawyer did not insult me, but, instead of fighting my case, made my parents change their statement and brokered a deal with the accused’s family, who apparently promised to pay us Rs 25,000 in exchange for dropping the complaint. I was made to agree, the case was closed, and I never saw a single rupee of the money I was promised.

I work very hard as a masonry labourer. It gives me some sense of freedom, but doesn’t pay me enough to bear my expenses. Deciding to raise my voice against the sexual violence I faced cost me my relationships and I have been ridiculed.

**I wish people did not blame victimised women, that they were more accepting and understood the trauma. If this was done then I would not have been left to fend on my own. My husband left me and I have been separated from my young children because I don’t earn enough to support them. If the justice system wasn’t corrupt and so inaccessible to a poor woman from an underprivileged Dalit community like me, I would be with my children and my perpetrator wouldn’t be a free man.”**

*\* This story is anonymous and the name Rita is a pseudonym*

*“A few days after I was raped by a man from the neighbourhood where I lived, my husband deserted me because he believed I was to blame.”*

## II. Procedural Loopholes/Barriers/Lapses within the Criminal Justice System

### Failure of the Police to promptly File/Register Rape cases

In **Bangladesh, India, Nepal** and **Sri Lanka**, the failure of the police to register or file rape cases even after receiving complaints from survivors is a major obstacle to accessing justice. For instance in India, with a majority of survivors who were interviewed indicating that the police were either reluctant to file the First Information Report (FIR)<sup>77</sup> or delayed doing so. The widespread nature of this issue prompted the Indian government to amend the law in 2013 to specifically include a criminal penalty for police officers who fail to file an FIR in rape cases.<sup>78</sup> However, stakeholders interviewed noted that this provision is hardly enforced and in their experience, there are no known cases of successful prosecutions against police officers for such failure.<sup>79</sup> Further, even after the introduction of these provisions, survivors continue to face issues with reporting.<sup>80</sup> Police officers also commonly fail to register the rape cases under the correct legal provision applicable to the case.

One of the four survivors interviewed from **Bangladesh** also reported that the police initially refused to file the case and only did so after public protests forced them into registering it (with a delay of around a week). There are numerous such instances of refusals or delays in registering rape cases by the police recorded in Bangladesh.<sup>81</sup> This worsening situation led to the Bangladesh High Court issuing detailed directives to the police in 2016 to ensure mandatory and immediate registrations of FIRs in rape cases.<sup>82</sup> However, stakeholders from Bangladesh have noted that these directives are often not followed in practice.<sup>83</sup> For instance, police officers still send survivors from one police station to another claiming lack of jurisdiction, despite High Court directives to the contrary.

*“Every information relating to commission of cognizable offence including rape... shall be immediately reduced to writing by the officer-in-charge of a police station irrespective of the place of occurrence without any discrimination whatsoever, and without causing any delay.” - Bangladesh High Court in Naripokkho & Others v. Bangladesh, 2016*

In **Nepal**, all the six survivors interviewed for this study reported fairly good experiences with the police and did not face any issues in getting their cases registered. However, it is important to note that all six survivors had obtained the support of a non-governmental organisation before approaching the police, which may have impacted their experience. Stakeholders interviewed for this study, as well as other Nepali activists, have noted that in other instances, police officers have often failed to register rape cases, particularly when the rape survivor is from a socially excluded community.<sup>84</sup>

In **Sri Lanka** and the **Maldives**, stakeholders highlighted the failure of police to file rape complaints in some cases, particularly if the alleged perpetrator is from a powerful family/community. They also reported instances of police officers misreporting information provided by the survivor in the official police complaint in a manner often detrimental to the survivor's interests.<sup>85</sup>

### Delays in Investigation, Prosecution and Adjudication

In all the six South Asian countries studied, lengthy criminal justice processes and delays in investigation, prosecution and adjudication were identified as major challenges to accessing justice. Delays in collecting evidence and conducting the medical examination could have a severe impact on the quality of evidence and, consequently, the probability of successful prosecution.

77 A First Information Report (FIR) is the official document filed by the police when they receive information about a cognizable offence (a serious criminal offence). The information is usually received through a complaint from the victim or someone on her behalf.

78 Section 166-A, Indian Penal Code, as introduced by the Criminal Law (Amendment) Act, 2013.

79 Stakeholder Interview with independent lawyer, Madhya Pradesh High Court, India, October 2020.

80 See Partners in Law and Development, Towards Victim Friendly Responses and Procedures for Prosecuting Rape, 2017, <https://doj.gov.in/sites/default/files/PLD%20report.pdf>.

81 See for example, UNB News, Victim stays in thana for 3 days as police delay in recording rape case, 10 June 2019, <https://unb.com.bd/category/Bangladesh/victim-stays-in-thana-for-3-days-as-police-delay-in-recording-rape-case/19865>; Fatama Suvra, Contested Dissent: Social Crisis Related to the Collection and Use of Medical Evidence in Rape Trials, 2013, [https://www.academia.edu/3500111/Contested\\_Dissent\\_Social\\_Crisis\\_Related\\_to\\_the\\_Collection\\_and\\_Use\\_of\\_Medical\\_Evidence\\_in\\_Rape\\_Trials](https://www.academia.edu/3500111/Contested_Dissent_Social_Crisis_Related_to_the_Collection_and_Use_of_Medical_Evidence_in_Rape_Trials)

82 Naripokkho & Others v. Bangladesh, Bangladesh High Court, judgment dated 18 February 2016, WP No. 5541/2015

83 Stakeholder Interview with NGO representative, Bangladesh, September, 2020.

84 Stakeholder Interview with NGO Representative, Nepal, September 2020. See Also FEDO, supra note 24.

85 Stakeholder Interview with lawyer & NGO Representative, Sri Lanka, August 2020.

Delays in conducting the police investigation and trial can increase the likelihood of survivors being pressured into extra-legal settlements, result in increased contradictions between the statement given to the police and testimony given in court (due to passage of time) and, above all, cause more trauma and emotional stress to the survivor.

*“These delays make me feel like I am being denied justice.” - Rape Survivor from Bangladesh*

#### Delays in Police Investigation:

A number of countries report long delays in the investigation process. For example, two out of the four survivors in **Bangladesh** reported delays in the police investigation process - in one case, the charge sheet was filed by the police over a year after the rape incident took place. However, in **Nepal**, survivors largely reported that the police investigation was completed in a timely manner with the speedy arrest of the accused persons. **Indian** law imposes a time limit of 60 days for the filing of the charge sheet in sexual violence cases and some stakeholders have indicated that the amendment in the law has helped speed up police investigations, though the time limit is not adhered to in all cases.<sup>86</sup>

#### Delays in Conducting the Medical Examination:

Delays in conducting medical examinations (even for a few days) can have a major impact on the quality of medical evidence. Survivors in a few countries reported that delays of 3-4 days in medical examinations often resulted in medical reports concluding that no evidence of rape was found. For example, though **Indian** law mandates that the medical examination be conducted within 24 hours of receiving the complaint, one survivor noted that the medical examination was not conducted until 4 days after the police report was filed, resulting in scant medical evidence to support her testimony that she was raped.

Both survivors and stakeholders from **Bangladesh** noted that often, when survivors approach local or sub-district hospitals after being raped, they are sent to a district hospital due to lack of facilities, causing delays in the examination process. Similarly, in the **Maldives**, lack of facilities, particularly in rural areas or the outer atolls, can

result in delays in medical examinations which need to be referred to bigger hospitals.<sup>87</sup>

*“The Forensic Department of the Medical College Hospitals closes at 2 PM. So does a rapist always rape before 2 PM? Of course not.”  
- Activist and NGO Representative, Bangladesh*

These delays have also been corroborated by independent research studies. For instance, a 2020 study from **Bangladesh** analysed the medical evidence in 140 rape cases filed in various police stations in Dhaka. It found that for 95% of the victims, the medical examination was done after a week or more than one month after the rape incident.<sup>88</sup>

In some countries, particularly in the **Maldives**, **Bhutan** and **Sri Lanka**, there are also reported delays in obtaining results of forensic examinations and DNA testing due to lack of availability of technical expertise and facilities within the country. For instance, activists working in the Northern and Eastern provinces of Sri Lanka report that processing of DNA test results can sometimes take up to 1.5 years.<sup>89</sup> Stakeholders from **India** have also complained about delays in obtaining DNA test results due to the limited number of DNA testing centres within the country.<sup>90</sup>

#### Delays in Rape Trials:

With the exception of Bhutan (for which sufficient data is not available), all other countries experience delays in the conduct of rape trials, with the longest delays reported from **Bangladesh** and **Sri Lanka**. Only the laws of Bangladesh and India impose time limits for conduct of trials in rape cases.

- **Bangladesh:** Bangladeshi law imposes a time limit of 180 days for conduct of the trial by special tribunals set up under the Prevention of Women and Child Repression Act, 2000. However, this time limit is almost never adhered to (see box in p. 39 below). Three of the four survivors interviewed from Bangladesh reported long delays in the trial process (with the fourth being a recent case where the trial is yet to

86 Stakeholder Interview with independent lawyer, Madhya Pradesh High Court, India, October 2020.

87 Stakeholder Interview with NGO representative, Maldives, October 2020.

88 Ferdous, N. F., & Jabin, N., Distribution and Determinants of Rape Victims: A Retrospective Analysis 11(1) Anwer Khan Modern Medical College Journal, 41-45 (2020), <https://www.banglajol.info/index.php/AKMMMCJ/article/view/45666>.

89 Women's Action Network, Women's Access to Justice in the North and East of Sri Lanka, CEDAW Shadow Report, 2016, [https://www.ecoi.net/en/file/local/1402157/1930\\_1497432878\\_int-cedaw-ngo-lka-25964-e.pdf](https://www.ecoi.net/en/file/local/1402157/1930_1497432878_int-cedaw-ngo-lka-25964-e.pdf)

90 Stakeholder Interview with NGO Representatives, India, March 2020.

begin). In two of the cases, the trials are yet to be completed even though they have been pending for over 5-6 years.

- **Bhutan:** There is insufficient data for Bhutan regarding the average length of rape trials, though one stakeholder indicated that in her experience, trials in sexual violence cases are normally completed within one year.<sup>91</sup>
- **India:** Indian law has the strictest time limit (60 days) for conducting rape trials.<sup>92</sup> However, the stakeholders interviewed were united in their agreement that this prescribed time limit is almost never followed. For instance, a study conducted on rape trials in Delhi in 2017 found that, on average, merely recording the statement of the survivor took 8.5 months.<sup>93</sup> In fact, official crime statistics show that the pendency percentage in rape cases in 2019 (i.e. the number of cases still pending at the end of the year out of the total rape cases for trial during the year) was 89.5%.<sup>94</sup>
- **Nepal:** Three out of six survivors interviewed from Nepal reported that their trials were completed within 60-90 days. One case was dropped during the trial

and the remaining two cases have been pending for over a year, with delays caused due to the COVID-19 pandemic. However, activists from Nepal indicate that delay in trials in rape cases is very common in Nepal, with some cases remaining pending for over two years.<sup>95</sup>

- **Maldives:** Though there are no research studies or data available on the time taken for rape trials in the Maldives, anecdotal information from stakeholder interviews indicates that there can be long delays, sometimes lasting up to ten years.<sup>96</sup>
- **Sri Lanka:** In Sri Lanka, a 2020 study of 14 rape cases before the Negombo High Court found that the process for indictment by the State (filing of charges) took between 3 to 11 years in the cases studied, while the trial process before the High Court took anywhere between 6 months to 14 years. Overall, the minimum time between the date of the rape incident and judgment was 5 years, with the longest case taking 19 years merely for completion of the trial.<sup>97</sup>



91 Stakeholder Interview with NGO Representative, Bhutan, October 2020.

92 Section 309(2), Code of Criminal Procedure, 1974.

93 Partners in Law and Development, supra note 82.

94 National Crimes Records Bureau, Crime in India, 2019, <https://ncrb.gov.in/en/crime-india-2019-0>.

95 Forum for Women Law and Development & IWRAP-AP, Court Watch Monitoring on Sexual and Gender Based Violence Cases in Trial in Selected District Courts, December 2018, <http://fwld.org/wp-content/uploads/2019/01/Case-monitoring-final.pdf>

96 Stakeholder interview with Lawyer and NGO Representative, Maldives, October 2020.

97 Muthukuda Niriella, Inadequacy of Legal Protection for Rape Victims: Analysis of High Court Cases in Negombo Division of Sri Lanka, May 2020, [https://www.researchgate.net/publication/342623471\\_Inadequacy\\_of\\_Legal\\_Protection\\_for\\_Rape\\_Victims\\_Analysis\\_of\\_High\\_Court\\_Cases\\_in\\_Negombo\\_Division\\_of\\_Sri\\_Lanka](https://www.researchgate.net/publication/342623471_Inadequacy_of_Legal_Protection_for_Rape_Victims_Analysis_of_High_Court_Cases_in_Negombo_Division_of_Sri_Lanka)

## Fast-Track/Special Courts for Rape Trials

To address the problems of delays in rape cases, India and Bangladesh have set up fast-track courts or special tribunals aimed at ensuring speedy disposal of cases of violence against women. Stakeholders from other countries such as Nepal and Sri Lanka have in fact recommended setting up similar fast track courts in their own countries to ensure speedy justice.

## Have these measures worked and should other countries follow suit?

The evidence from **India** indicates that the efficacy of fast-track courts varies widely from state to state. Many states have chosen not to set up fast-track courts at all.<sup>98</sup> Official crime statistics from 2019 demonstrate that in states which have established fast-track courts, over 80% of trials before fast-track courts took over a year to complete, with 46% of cases taking over 3 years to complete the trial.<sup>99</sup> One study of fast track courts in Delhi also found that, on average, there was very little difference between the time taken by a fast track court

and a regular court in completing the trial (around ten days).<sup>100</sup>

Similarly, in **Bangladesh**, the Nari O Shishu Nirjatan Daman Tribunals set up to deal with cases of violence against women and children have struggled with major backlogs and delays. A Supreme Court study found that over 38,000 cases of violence against women and children before these tribunals have been pending for over 5 years.<sup>101</sup> This can be contrasted with the average time taken for trial of criminal cases in regular courts, which is reported to be 3.7 years.<sup>102</sup>

Fast track courts/special tribunals set up in **India** and **Bangladesh** follow the same legal process for trial as the normal court and deal with a huge number of cases (usually not limited to rape cases only, but also other forms of violence against women). With judges being overburdened and without sufficient investment from the government in appointing additional judges and improving infrastructure, there is no reason to expect fast-track courts/special tribunals to deliver speedier justice.

## Failure to keep the Survivor Informed

Another major issue affecting access to justice is the failure to keep survivors informed of the progress of the case. In many instances, the police officers do not provide pertinent information or documents to survivors such as what has been written down in the official police complaint, copies of the complaint or updates about the progress of investigation. Survivors have also noted that public prosecutors assigned to prosecute their case in court often fail to inform survivors about the legal process or the status of their case, leaving survivors in the dark about the processes during the trial.

This lack of information often disincentivises survivors from continuing with the criminal justice process and can also cause emotional distress for survivors who may not know whether the perpetrator is behind bars or how the trial is progressing. It also increases the possibility of survivors being coerced into accepting extra-legal settlements/compromises.

*“Currently I have not heard anything from the lawyer. I am assuming this is because of the lockdown caused by the pandemic. My financial condition is really weak. This is another reason that I have not been able to contact the lawyer to follow up on my case.”*  
- Rape Survivor, Nepal

98 The Leaflet, Why Have fast track courts failed in India?, 31 October 2020, <https://www.theleaflet.in/why-have-fast-track-courts-failed-in-india/#>

99 National Crimes Records Bureau, Crime in India, 2019, <https://ncrb.gov.in/en/crime-india-2019-0>.

100 DAKSH, Zero Pendency Courts Project: Final Report on the Pilot Project by High Court of Delhi, [http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice\\_3MRRIN3QTHN.PDF](http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_3MRRIN3QTHN.PDF)

101 The Daily Star, Special Laws: Goal of fast-track trial still unmet, 4 August 2019, <https://www.thedailystar.net/backpage/news/special-laws-goal-fast-track-trial-still-unmet-1781383>

102 Supreme Court of Bangladesh, Strategic Plan (2017-2022), p. 16, [rhttp://www.supremecourt.gov.bd/resources/contents/Strategic\\_Plan.pdf](http://www.supremecourt.gov.bd/resources/contents/Strategic_Plan.pdf)

## Failure to Follow Prescribed Protocols During the Medical Examination

The guidelines issued by national governments addressing the care, treatment and medico-legal examination of survivors are not being effectively implemented in most South Asian countries.<sup>103</sup> For instance, many states in **India** have not yet adopted the national guidelines for medico-legal care of survivors of sexual violence<sup>104</sup> and evidence from the **Maldives** indicates that most health practitioners are unaware of guidelines for health sector response to gender-based violence.<sup>105</sup> Across the South Asian region, healthcare providers, particularly those from rural areas, are either unaware of the guidelines or do not strictly follow the protocols while conducting the medical/forensic examination of rape survivors. There are many instances where informed consent is not taken from the survivors before conducting the medical examination.<sup>106</sup>

One of the survivors from **India** reported that she was denied medical treatment when she was taken for her medical examination. Three survivors also noted that despite signs of physical injuries on various parts of their bodies (including strangulation marks in one case), no remarks on these injuries were made in the medical report. Some survivors from India highlighted that the doctors were only interested in completing the forensic examination, but did not provide medical care to treat the injuries or pain suffered by the survivor. In contrast, survivors interviewed from **Nepal** were generally happy with the attitude and care they received from healthcare providers during the medical examination and did not have any specific complaints with the process. However, activists from Nepal have noted that the medical examination in Nepal is rife with procedural problems, which cause discrepancies in the medical report thereby affecting chances of success in court. For example, the

format of the report only allows for Yes/No answers rather than having qualitative questions which allow for more elaboration.<sup>107</sup>

*I had lot of injuries, especially on my back... Earlier I had no idea about medical, but now... I am aware that in the report all the injuries need to be mentioned. But now that I realise, none of my injuries were reported in the medical test report. - Rape Survivor, India*

Another issue is the refusal to conduct the medical examination in some countries (such as **Bhutan** and **India**) unless the case has first been reported to the police. This affects the ability of rape survivors to access medical care, particularly in cases where they do not wish to report the rape to the police.

In a few countries, particularly **Bhutan** and the **Maldives**, there have also been failures to maintain confidentiality by healthcare professionals.<sup>108</sup> Given the small populations in these countries and close community links, the leaking of information about patients by healthcare providers has affected the trustworthiness of healthcare providers in the eyes of survivors.<sup>109</sup>

Medical professionals from **Bhutan** have also complained about the lack of necessary equipment, resources and training to effectively carry out the forensic examination of rape survivors.<sup>110</sup> The lack of trained medical professionals available to conduct the medical examinations is also a problem in a few other countries, including the **Maldives** and **Sri Lanka**.<sup>111</sup>

103 Stakeholder Interview with NGO Representatives, India, March 2020; Stakeholder interview with NGO Representative, Maldives, October 2020. Muthukuda Niriella, Medico-Legal Evidence in Rape Cases: Analysis with Special Reference to Sri Lanka, (2018) European Journal of Social Sciences 23-32; The Daily Star, Medical Exam of Rape Victims: Police Not Following HC Directives, <https://www.thedailystar.net/backpage/news/medical-exam-rape-victims-police-not-following-hc-directives-1693084>

104 Centre for Enquiry into Health and Allied Themes, Understanding Dynamics of Sexual Violence : Study of case records, 2018.

105 Uthema, Comprehensive Shadow Report responding to the 6th State Report to the CEDAW Committee of April 2019, April 2020, para. 30

106 Ferdous, supra note 90; Human Rights Watch, Everyone Blames Me: Barriers to Justice and Support Services for Sexual Assault Survivors in India, 2017, <https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors>

107 WOREC Nepal and Isis-WICCE, Unveiling Justice: Rape Survivors Speak out A Research Report on Access to Justice for Rape Survivors in Nepal 2007-2010, 2011, <https://worecnepal.org/uploads/publication/document/205613797Unveiling%20Justice-Rape%20Survivors%20Speak.pdf>

108 RENEW, Report of the National Symposium, The Bhutanese Pledge: A Shared Commitment Towards Eliminating Violence against Women, 2016, <https://renew.org.bt/wp-content/uploads/2017/08/RENEW-National-Symposium-%E2%80%99CThe-Bhutanese-Pledge-A-Shared-Commitment-Towards-Eliminating-Violence-against-Women%E2%80%9D-2016-2017.pdf>; Stakeholder interview with NGO Representatives, Bhutan, October 2020.

109 Submission from Human Rights Commission of the Maldives for the combined Fourth and Fifth Periodic Report of the Republic of Maldives to the United Nations Convention on Elimination of All Forms of Discrimination against Women Committee, January 2015, p.26.; Lilia Ormonbekova, Study on the Access to Health Services by Domestic Violence Victims in Maldives, Hope for Women, June 2017. <http://hopeforwomen.org.mv/wp-content/uploads/2018/05/Study-on-the-Access-to-Health-Services-by-DV-victims-2017.pdf>

110 RENEW, supra note 110.

111 Stakeholder Interview with NGO Representatives - Maldives, October 2020; Muthukuda Niriella, supra note 99.



## Continued Use of the “Two-Finger Test”

The unscientific and traumatising two-finger test is still being used as part of the medical examination in a number of South Asian countries. This test involves a medical practitioner inserting two fingers into the vagina of a rape survivor in an attempt to determine if the hymen is broken, as well as to test laxity of the vagina. The test is often used to declare rape survivors as “habituated to sex”. Medical evidence of past intercourse is used to cast doubt on the rape allegation, either to suggest a survivor lied about the rape, to imply that the rape wasn’t harmful or to suggest the moral impropriety of the survivor and therefore her lack of entitlement to justice. If the hymen is still intact, the test is used to declare that rape could not have taken place, though it is scientifically proven that rape can take place without breaking the hymen.

From a human rights perspective, conducting a test on rape victims that has no probative value is a violation of the personal integrity of the women and girls and could cause further trauma to these rape survivors.

Country	Legal Status of Two-Finger Test	Extent of Use within the Country
<b>Bangladesh</b>	The Bangladesh High Court banned the use of the two-finger test in 2018. <sup>112</sup> In compliance with this ruling, the Ministry of Health issued a circular to all hospitals in the country, reiterating the prohibition on using the two-finger test on rape survivors and also forbidding the use of the term “habituated to sexual intercourse” in the medical reports. <sup>113</sup>	There is insufficient evidence on whether the two-finger test is still being used after the High Court ban and the government circular issued in 2019.  However, a 2012 study found that the two-finger test had been prevalent and had been conducted in 19 out of 28 rape cases (68%) studied. In 12 of these cases, the two-finger test was conducted on minor victims. In one case, it was conducted on a pregnant survivor. <sup>114</sup>
<b>Bhutan</b>	Information is not available.	
<b>Nepal</b>	The Nepali Supreme Court has ruled that the use of virginity testing to prove marriage violated the right to privacy of women. However, there is no specific judgment or policy dealing with the use of virginity/two-finger tests in rape cases. <sup>115</sup>	Stakeholders interviewed from Nepal reported that virginity testing/two-finger test is still being conducted on rape survivors. However, none of the six survivors interviewed for this study reported having had the two-finger test conducted on them.
<b>Maldives</b>	Interviews with stakeholders as well as secondary research did not provide any evidence that the two-finger test is taking place in the Maldives.	
<b>India</b>	The Supreme Court of India banned the use of the two-finger test in 2013. <sup>116</sup> The guidelines issued by the Ministry of Health also ban the use of this test during the medical examination of survivors of sexual violence. <sup>117</sup>	Numerous survivors from India interviewed for this study confirmed they have undergone the two-finger test. A study in 2018 found that the two-finger test was still being used and referred to in medico-legal examination reports in 4 states. <sup>118</sup> Further, a study of fast-track court judgments in the state of Karnataka found that 25% of the judgments made explicit reference to the two-finger test and to the victim being habituated to sexual intercourse. <sup>119</sup>
<b>Sri Lanka</b>	There is no specific ban on the two-finger test in Sri Lanka, though the national guidelines for medico-legal examination of rape survivors does not prescribe the conduct of the two-finger test. <sup>120</sup>	Stakeholder interviews and other commentaries <sup>121</sup> have confirmed that the two-finger test is being conducted in Sri Lanka and that courts do rely on the “findings” of the two-finger test when deciding rape cases.

112 BLAST v. Bangladesh, High Court of Bangladesh, 12 April 2018, WP No 10663/2013, <https://www.blast.org.bd/content/pressrelease/18-04-2018-Press-Release-tft-eng.pdf>

113 Ministry of Health and Family Welfare, Government of the People’s Republic of Bangladesh, Circular dated 21 July 2019, Circular No. 45.05.0000.010.36.002.19.288.

114 Asmita Basu, Use of Medical Evidence in Rape Cases in Bangladesh, March 2012, [https://www.academia.edu/9384955/Use\\_of\\_medical\\_evidence\\_in\\_rape\\_cases\\_in\\_Bangladesh?email\\_work\\_card=title](https://www.academia.edu/9384955/Use_of_medical_evidence_in_rape_cases_in_Bangladesh?email_work_card=title)

115 Annapurna Rana v. Kathmandu District Court and Others, Nepal Supreme Court, writ no. 2187 of 2053.

116 Lillu v. State of Haryana (2013)14 SCC 643.

117 Ministry of Health and Family Welfare, Government of India, Guidelines and Protocols, Medico-legal care for survivors/victims of sexual violence, March 19, 2014, <http://mohfw.nic.in/sites/default/files/953522324.pdf>

118 <https://feminisminindia.com/2018/08/10/two-finger-test-still-used/>

119 Jayna Kothari, Sexual Offences Court on Trial: Neither Fast nor Just, 2015, <http://clpr.org.in/sexual-offences-court-on-trial-neither-fast-nor-just-2/>.

120 The College of Forensic Pathologists of Sri Lanka, National Guidelines on Examination, Reporting and Management of Sexually Abused Survivors for Medico-legal purposes, 2014, <http://medical.sjp.ac.lk/downloads/forensic-medicine/Medico%20Legal%20Purposes.pdf>

121 Priya Thangaraja, Rape and Evidentiary Process in Sri Lanka in The Search for Justice - the Sri Lanka Papers, 2017.

## Secondary Victimization During the Trial

As highlighted in the laws chapter, only **Indian** law prohibits the introduction of evidence in relation to the past sexual history of the survivor. In the remaining five countries, the laws are either silent or expressly permit the introduction of such evidence.

In practice, it is reported across almost all the countries that the defence lawyers ask derogatory questions about the past sexual history of the survivor, her past relationship with the perpetrator or similar questions which are used to evaluate whether the survivor is “worthy” or of “good character”. If the survivor is found to be of “immoral character”, it can sometimes lead to acquittal of the perpetrator, even if there is evidence that the sexual intercourse was non-consensual. Cases should be decided on the evidence alone and not on whether the court deems the victim worthy or otherwise. In addition to such direct discrimination, excessive interrogation and introduction of character evidence can provoke further harm and lack of access to justice, being humiliating and traumatic for survivors, with survivors even deciding in some cases that they would rather abandon the trial than continue with it.<sup>122</sup>

*“The defence lawyer is extremely disrespectful. He raises questions about my character all the time. When I am on the witness stand, he asks me about my husband, ‘what number husband is this of yours?’... Every time he utters these outrageous questions, I am losing my dignity, my honour, time after time in front of an open court.... Does the judge not see it, when the tears roll down my face, when these insulting questions are asked?” - Rape Survivor from Bangladesh*

Such secondary victimisation of survivors during the court trial is a particularly acute problem in **Bangladesh** and **Sri Lanka**. All three adult survivors interviewed from Bangladesh reported facing derogatory questions from defence lawyers, with the judge intervening to halt the questioning only in one case. A study also found that trial judges and defence lawyers in Bangladesh habitually use the legal provisions allowing introduction of evidence of the “immoral character” of the victim in rape cases to undermine the credibility of the victim’s statement.<sup>123</sup>

In **Sri Lanka**, the stakeholders interviewed opined based on their experience that it is fairly common for courts to rely on evidence on the past sexual history of the victim. They cited examples of cases where courts have drawn adverse inferences based on the finding that the victim was “habituated to sex”.<sup>124</sup> In **Nepal** as well, defence lawyers intentionally raise questions relating to the sexual history or “character” of the victim and judges often fail to intervene to stop such questions.<sup>125</sup>

*“Every time we take a woman to a courtroom, the judge always asks ‘what did you wear?’” - Lawyer and Activist, Sri Lanka*

In **India**, despite the existence of a law prohibiting questioning on the past sexual experience of the survivor, in practice it is found that defence lawyers often find creative ways to skirt the law and ask humiliating and derogatory questions to the survivors, many of which are aimed at implying that the survivor consented to the rape.<sup>126</sup>

122 Fatama Sultana Suvra, Shotirai Kebol Dhorshon Hoie (Only the Chaste Are Raped), 2016, Bangladesh Legal Aid and Services Trust (BLAST).

123 Ibid.

124 Stakeholder Interview with lawyer & NGO Representative, Sri Lanka, August 2020; Stakeholder Interview with lawyer and academic, Sri Lanka, August 2020. See Also Inoka Gallage v. Kamal Addararachchi and Another 1 SLR 307

125 Forum for Women Law and Development, IWRAW-AP, Court Watch Monitoring on Sexual and Gender Based Violence Cases in Trial in Selected District Courts, December 2018, <http://fwld.org/wp-content/uploads/2019/01/Case-monitoring-final.pdf>

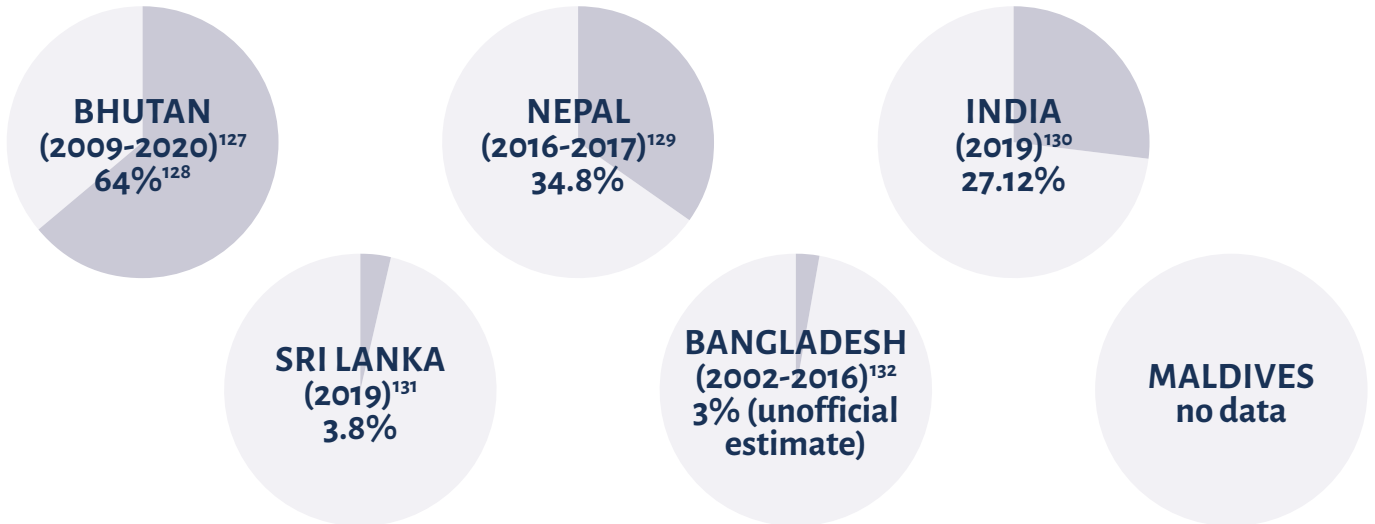
126 Stakeholder Interview with independent lawyer, Madhya Pradesh High Court, India, October 2020. See Also The Print, Laws Repealed, but Rape victims continue to face humiliating questions, 29 August 2017, <https://theprint.in/theprint-analysis/laws-repealed-rape-victims-continue-face-humiliating-questions/8416/>

## Impunity for Perpetrators

Across the region, there are extremely low rates of conviction in rape cases, resulting in impunity for perpetrators of rape. For the purpose of this report, the

conviction rate is taken as the number of cases in which conviction was obtained out of the total number of rape cases disposed of by courts.

### Conviction Rates in Rape Cases



There are numerous reasons for low conviction rates in rape cases, many of which are common across the countries studied. As explained further in the section on “Pressure to Settle/Compromise” below, threats and settlements often lead survivors to turn “hostile” or fail to cooperate in the legal process, which jeopardise the chances to obtain a conviction.

In addition, the types of evidence routinely sought by courts can lower chances for a conviction. Courts often place undue importance on the results of medical examinations when deciding on rape cases.<sup>133</sup> Survivors and stakeholders across the region noted that medical reports which include findings of “no evidence of rape found” can have a severe impact on the success of criminal case. Often, such reports are given because there is a delay in conducting the medical examination, as a result of which the vaginal swab would not indicate physical evidence of the penetration having taken place.

*“The starting presumption [of courts] is that if it was rape, she ought to have resisted and if she resisted, then there should be physical evidence to that effect to present itself in the form of bodily evidence to violence. In the act of interpreting physical and medical evidence you find that patriarchal norms are what judges resort to.”*

*- Lawyer and Activist, Sri Lanka*

<sup>127</sup> As per data released by the National Commission on Women and Children, out of 530 cases filed between 2009 and 2020, there were convictions in 64% of cases. <https://www.ncwc.gov.bt/notifications/429>

<sup>128</sup> Based on a very low number of prosecutions

<sup>129</sup> As per data filed by the Nepal government with the United Nations Special Rapporteur on Violence against Women. Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, Visit to Nepal, A/HRC/41/42/Add.2, 19 June 2019.

<sup>130</sup> National Crime Records Bureau, Crime in India, 2019, <https://ncrb.gov.in/en/crime-india-2019-0>

<sup>131</sup> Sri Lanka Police, Grave Crimes Abstract, 2019, <https://www.police.lk/index.php/item/138-crime-statistics>.

<sup>132</sup> There is no official data available. A recent study found that out of the 4,277 violence against women cases (the vast majority of which were rape cases) disposed in Nari-O-Shishu Nirjaton Domon Tribunals (the Special Tribunals on Violence against Women) in Dhaka district between 2002 and 2016, the accused was sentenced to punishment in less than 3% of the cases. Quratul Ain Tahmina and Probon Bhowmik, ‘Shaja Matro Tin Shotangsho: Dhaka Nari O Shishu Nirjaton Domon Tribunal’ (Punishment in Only 3% of Cases: Suppression of Violence against Women and Children Tribunal, Dhaka), 2018, Prothoma, <https://www.prothoma.com/tahmina-pranab/saja-matro-3-sotangso>.

<sup>133</sup> Lyal S. Sunga and Kawser Ahmed, A critical appraisal of laws relating to sexual offences in Bangladesh: A Study commissioned by the National Human Rights Commission, 2015, UNDP and IDLO, 32; <https://www.idlo.int/publications/critical-appraisal-laws-relating-sexual-offences-bangladesh>

Courts also often look for evidence of injuries on the body of the survivor as proof that the survivor had physically resisted the rape, even though the law only requires lack of consent.

*“In this rape case, victim did not sustain any injury on her face, cheeks or breasts at the time of commission of the alleged rape and the Medical Board also did not detect any trace of sexual violence on her face, cheeks or breasts and also did not detect any trace of sexual violence on the person of the victim. Thus, we find no corroboration with the statement of [the] prosecutrix.” - Bangladesh High Court in Khairul v State<sup>134</sup>*

Further, as highlighted above, the results of the two-finger test, based on which doctors note that the survivor is “habituated to sex”, or introduction of evidence on the past sexual history of the survivor, often contribute to the decision of courts to acquit the accused.



### Ever-Increasing Penalties for Rape Are Not the Solution

Recent public protests and outrage against the escalating rape epidemic in the South Asian region have prompted governments to respond by increasing the applicable penalty for rape. In October 2020, Bangladesh introduced the death penalty for rape cases, while in 2018, India introduced the death penalty for rape of children under the age of twelve. However, as women’s rights activists across the region have repeatedly argued, simply increasing the penalty will not have the desired deterrent effect on rapists. Given the extremely low conviction rates in rape cases, what is important is the certainty of punishment, not the brutality of it. In fact, experts have opined that severe mandatory minimum punishments/sentences can contribute to lower conviction rates, since in some cases judges prefer to acquit rather than impose a life sentence or the death penalty.

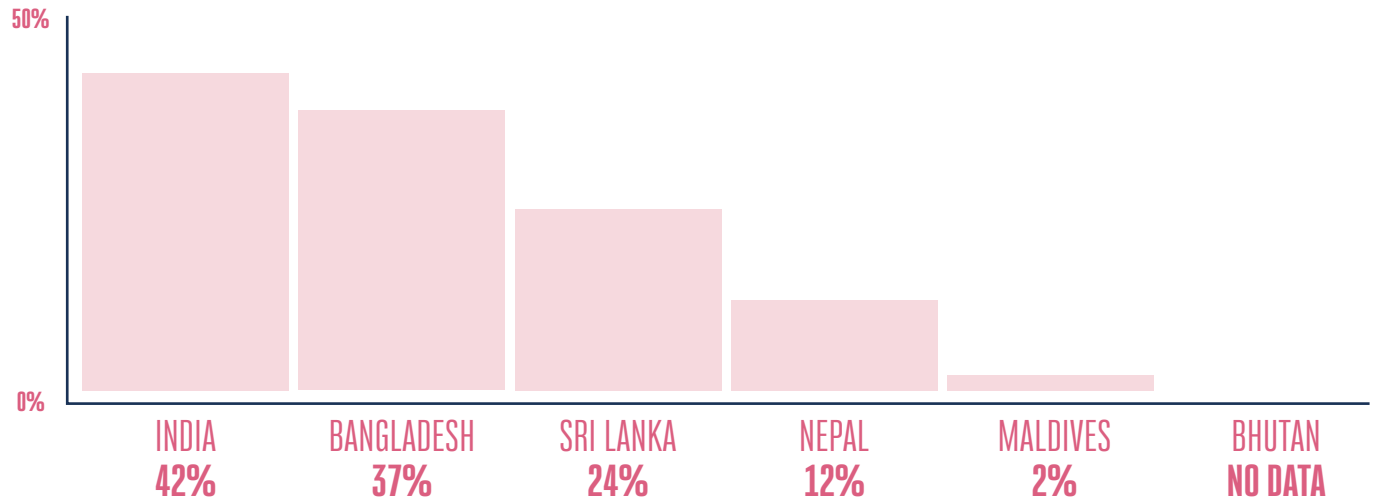
Increasing the penalty for rape may be an easy step for governments to take to appease public outrage. Punishments reflective of the severity of the crime are important. However, it is more important to invest in bringing about long-term structural changes in the criminal justice system to ensure that more cases are successfully reported, investigated, tried and convicted.

134 12 MLR 409 (HCD) (2007), para 24.

### III. Bribery and Corruption

South Asia experiences high rates of corruption within the police and other public systems, including healthcare providers, public prosecutors and judges.

Percentage of people who have had contact with the police in the last 12 months and paid a bribe:<sup>135</sup>



The issue of corruption appears to be most acute in **India** and **Bangladesh**. Multiple rape survivors from **India** reported that they were forced to pay a bribe to the police in order to get their case registered or for investigation to take place. Stakeholders from these countries also confirmed that they were aware of numerous instances of police demanding such bribes from survivors.<sup>136</sup> Survivors from both India and Bangladesh also suspected the perpetrator in their case to have bribed the police in exchange for delaying the investigation or refraining from arrest. They also reported that police officers even filed false counter-cases or criminal allegations against the survivor after receiving bribes or pressure from the perpetrator or his community. Survivors and stakeholders from these countries also raised the problem of healthcare providers taking bribes from perpetrators and compromising or falsifying the results of the medical examination.

In **Sri Lanka**, stakeholders particularly highlighted the issue of police officers and healthcare professionals being susceptible to political pressure or compromising investigation results due to fear of reprisals from the perpetrator (especially if he was from a powerful community).<sup>137</sup>

Public prosecutors are also susceptible to bribery. For example, one survivor from **Nepal** reported that she was made to pay money to the public prosecutor to ensure that he took her case seriously (though his services were meant to be free). Another survivor from Nepal noted that the public prosecutor received money from the accused persons in exchange for pushing the survivor to settle the case outside the court, though no money from the promised settlement was actually paid to the survivor. Stakeholders and research studies from Nepal have also highlighted the issue of corruption among public prosecutors and healthcare providers, which impedes access to justice in sexual violence cases.<sup>138</sup>

<sup>135</sup> Transparency International, Global Corruption Barometer - Asia, 2020, <https://www.transparency.org/en/gcb/asia/asia-2020>

<sup>136</sup> Stakeholder interview with lawyer, Supreme Court, Bangladesh, October 2020; Stakeholder interview with NGO representative - Bangladesh, September 2020; Stakeholder Interview with independent lawyer, Madhya Pradesh High Court, India, October 2020; Stakeholder Interview with NGO representative, Haryana, India, March 2020.

<sup>137</sup> Stakeholder Interview with lawyer & NGO Representative, Sri Lanka, August 2020.

<sup>138</sup> WOREC Nepal, supra note 109.

#### IV. Extra-Legal Settlements/Compromises

Across all six South Asian countries studied, one of the major barriers to successful prosecution of rape cases is the pressure on the survivor or her family to enter into an extra-legal settlement or compromise with the perpetrator, whereby the survivor agrees not to pursue the criminal case. In all the countries, such settlements are not permitted by the law in rape cases. However, they still remain extremely common and if such settlements are entered into, the survivor or other witnesses stop appearing in court or give contradictory evidence, which makes it close to impossible to obtain a conviction.

In particular, the pressure to enter into extra-legal settlements/compromises is extremely high in **Bangladesh, India** and **Nepal**. Of the 22 survivors interviewed across these three countries, over 60% stated that they had been pressured by the perpetrator, his family or other community members either to refrain from filing the police report or to drop the case. Many of the survivors were offered money in exchange for such settlement, or were subject to threats or physical violence. In other instances, societal or community pressure (including banishing or threatening to banish the family from the village) or political influence were used as means to force survivors to settle/compromise the case.

*“When I was raped, and when I went to the police station.. I was pressured and scared.. The Sarpanch [village head] had gone, on behalf of the accused, to the police station and had already had a word with the police, stating that the girl (I) was wrong, and not to write the report... The Sarpanch also came and pressured me (forcing me to take back the case and sign an agreement/compromise) saying that ‘it is very insulting that you need to come to the police station every day.’” - Rape Survivor, India*

While none of the survivors from **Bhutan** interviewed for this study reported being pressured into such settlements, activists from Bhutan have noted that sexual violence survivors (particularly in cases of domestic violence) sometimes seek to mediate their case or settle the matter outside courts.<sup>139</sup> All the stakeholders interviewed from the **Maldives** highlighted the pressure which rape survivors often face to withdraw the case or not co-operate during the investigation or trial.<sup>140</sup> In **Sri Lanka**, stakeholders noted that perpetrators of rape sometimes attempt to avoid criminal punishment by entering into a compromise with the survivor’s family, wherein they agree to marry the victim.<sup>141</sup>

#### Example of Good Practice: Nepal

In December 2020, Nepal passed an ordinance which imposes a sentence of three years’ imprisonment and a fine of up to NPR 30,000 for those who force mediation or reconciliation between rape victims and perpetrators, or their families. Individuals holding public office or people’s representatives trying to mediate are liable to face more stringent penalties, including imprisonment of up to 3.5 years.

Introducing similar criminal provisions in other South Asian countries could be useful to address the problem of such mediations/compromises in rape cases. However, such provisions need to be effectively implemented and enforced, particularly against *panchayat* members, in order to have an impact on improving access to justice for rape survivors.

<sup>139</sup> RENEW, supra note 110.

<sup>140</sup> Stakeholder Interview with NGO representative, Maldives, October 2020. Stakeholder Interview with lawyer and NGO representative, Maldives, October 2020.

<sup>141</sup> Stakeholder Interview with lawyer and academic, Sri Lanka, August 2020.



## Role of Extra-judicial/Traditional Dispute Resolution Mechanisms

In a number of countries, traditional dispute resolution mechanisms, such as *khap/jati panchayats*<sup>142</sup> in **India** and **Nepal**, or *shalishes*<sup>143</sup> in **Bangladesh** also play a significant role in encouraging or coercing survivors into extra-legal settlements. Such settlements can also involve marriage of the perpetrator to the rape survivor.<sup>144</sup>

In **India**, *khap* or *jati panchayats*, usually composed of dominant caste community members, are known to frequently pressure rape survivors and their families to compromise rape cases, including using their social and political power to intimidate or bribe the police officers investigating the case, threats of economic and physical retaliation, social boycott, banishment from the village or other such means.<sup>145</sup>

In **Nepal**, a study which analysed 700 rape cases found that in 50% of the cases, such “mediation” was attempted or conducted without even consulting the rape survivor. The pressure for such mediation could come from the perpetrator or his family, the survivor’s own family, community members or political party leaders. Even though the pressure on victims to settle is enormous and

their consent unlikely to be obtained in a truly free way, in most cases, such “mediation” was carried out without ever ascertaining the wishes of the rape survivor or obtaining her consent to the settlement.<sup>146</sup> In **Bangladesh**, a study of 61 cases found that in 37% of cases studied, *shalish* was attempted before legal proceedings were initiated.<sup>147</sup> Other studies in Bangladesh have also found the prevalence of post-prosecution *shalish* to be rampant, even after the police complaint is filed.<sup>148</sup>

In **Bhutan**, traditional dispute resolution mechanisms are still resorted to in some cases of sexual and domestic violence. Survivors of violence have reported that these “mediators” are often biased and wish to resolve the dispute with a harmonious outcome, even if such outcome conflicts with the needs or the best interests of the survivor.<sup>149</sup> In **Sri Lanka**, where the survivor is from the Muslim community, *quazi* courts (which do not have legal authority to take on cases of sexual violence) sometimes intervene in rape cases and order payment of compensation by the perpetrator, without reporting the case to the police.<sup>150</sup>

It appears that such traditional dispute resolution mechanisms are not commonly known or used in the **Maldives**.

142 Khap/Jati panchayats are caste-based community groups, normally composed of dominant caste members which often act informally as quasi-judicial bodies in settling disputes.

143 Shalish is a traditional, informal method of dispute settlement in Bangladesh, usually headed by elderly male members of the community

144 WOREC Nepal, supra note 109; Sharin Shajahan Naomi, The Legal Challenges on the way to Judicial Remedy in Rape Cases: The Role of Human Rights and Legal Services Programme of BRAC, 2009, BRAC Research Report, [https://www.academia.edu/1014601/The\\_Legal\\_Challenges\\_on\\_the\\_way\\_to\\_Judicial\\_Remeddy\\_in\\_Rape\\_Cases\\_The\\_Role\\_of\\_Human\\_Rights\\_and\\_Legal\\_Services\\_Programme\\_of\\_BRAC](https://www.academia.edu/1014601/The_Legal_Challenges_on_the_way_to_Judicial_Remeddy_in_Rape_Cases_The_Role_of_Human_Rights_and_Legal_Services_Programme_of_BRAC).

145 Equality Now & Swabhiman Society, Justice Denied: Sexual Violence and Intersectional Discrimination - Barriers to Accessing Justice for Dalit women and girls in Haryana, India, 2020. <https://www.equalitynow.org/justicedenied>; Human Rights Watch, supra note 108.

146 WOREC Nepal, supra note 109.

147 Asmita Basu, supra note 116.

148 Sharin Shajahan Naomi, supra note 145, p. 28.

149 RENEW, supra note 110.

150 Hyshyama Hamin and Hasanah Cegu Isadeen, Unequal Citizens: Muslim women’s struggle for justice and equality in Sri Lanka, 2016, <https://www.oursplatform.org/resource/unequal-citizens-muslim-womens-struggle-justice-equality-sri-lanka/>

# AMBIKA\* - NEPAL

## Survivor Story



“After I reported the assault, things were tough and the behaviour of people around me changed. They labelled me as someone who has been raped, but they never talked about the perpetrator. He is from a Muslim community and is financially well established, while I am from a Dalit community and my economic condition is poor.

Some people blamed me, they acted as if I wanted it to happen. They talked behind my back and even to my face, which was very hurtful to me and my family. The stigma has prevented me from getting decent work and I cannot trust men around me.

The Panch (head of unofficial village council) of my area put pressure on me to settle out of court, but I thought this will only bring me more trouble by giving into the culprit. It would also have encouraged men in my community to do whatever they felt like. I wanted the perpetrator to get maximum punishment so that other men would not dare to do such activities.

I did not want to bow down to pressure and felt that through the formal justice system I could receive justice in a true sense. I received support from a few people in my community who encouraged me to fight and I have had good experiences with the police and medical officers involved in my case.

I filed a complaint a day after the incident and there was no delay in the process. The police referred me to support services and they caught the perpetrator in just four days.

Police and medical officers who handled my case were helpful and treated me well and a woman officer was always present. I had a free check-up at the hospital and several follow ups in the weeks after. Psychosocial counseling was provided to me by an NGO (Women for Human Rights).

I have been treated well by the government lawyer representing me, whose services are free of charge, although I have had to make some small payments which has been difficult for me. I was given transport money to go to court to give my statement, but it was still hard; I didn't feel like leaving the house, but I had to push myself to do so.

The perpetrator is currently behind bars, but he has not been sentenced. I haven't heard anything from my lawyer recently, I think because of lockdown for the pandemic. My financial situation is weak and this has meant I haven't been able to contact the lawyer to follow up about my case.

**I think the state should be more accountable towards survivors and ensure they are updated on their cases regularly. But I have come a long way with the help of my family, human rights activists, police and medical officers. Although I am still awaiting justice, I have high hopes.”**

*\* This story is anonymous and the name Ambika is a pseudonym*

*“After I reported the assault, things were tough and the behaviour of people around me changed.”*



## Complicity of Criminal Justice System Officials in Encouraging Settlements

Though such settlements are not permitted by law, police officers, prosecutors and judges from across the region are often complicit in such settlements, either by turning a blind eye or actively encouraging them to take place. Survivors and stakeholders have highlighted numerous instances where the police allow such informal mediations/settlement processes to take place within the police station premises itself, delay filing the FIR to allow time for such settlement or even persuade the survivor to accept the settlement.<sup>151</sup> Some survivors also reported being approached for such settlements while they were in the hospital receiving medical treatment after the rape. Public prosecutors in many cases also encourage settlements or even facilitate them.<sup>152</sup>

Alarming, in some countries, there are also reports of judges permitting or encouraging such settlements, despite the law clearly prohibiting them in rape cases.

- In **Bangladesh**, courts have allowed parties to seek adjournments in rape cases on the grounds of pursuing such settlements.<sup>153</sup> In other instances, when the *shalish* process has taken place before the police report was filed, this fact is often noted in the FIR. Some judges, rather than stressing the illegality of such processes, have questioned why *shalish* members were not examined as witnesses in the criminal proceedings, thereby granting legitimacy to an illegal parallel justice process.<sup>154</sup>
- In **India**, a court order was made in 2015 granting bail to a person accused of rape to allow him time to mediate. Reassuringly, the case received severe backlash.<sup>155</sup>
- Stakeholders interviewed from **Sri Lanka** have noted that courts sometimes reduce or suspend sentences in rape cases on the grounds that the perpetrator has married the victim, particularly in cases of statutory rape of children.<sup>156</sup>



151 Stakeholder Interview with NGO representative, Haryana, India, March 2020; Stakeholder Interview with NGO Representative - Maldives, October 2020; Stakeholder interview with NGO Representative - Nepal, September 2020. Office of the High Commissioner for Human Rights in Nepal, Opening the Door to Equality: Access to Justice for Dalits in Nepal, December 2011, [https://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2011\\_12\\_07\\_Opening\\_the\\_Door\\_to\\_Equality\\_E.pdf](https://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2011_12_07_Opening_the_Door_to_Equality_E.pdf)

152 See Sharin Shajahan Naomi, *supra* note 145.

153 BLAST, Conference Report: Rape Law Reform in Bangladesh, 2019, <https://www.blast.org.bd/content/publications/BLAST-RLR-Conference-Report.pdf>

154 See for example Abdul Majid (Md.) vs. State 13 BLC (2008) 52 [64]: "Non-examination of witnesses, Chairman Shamsur Rahman who held the shalish and the persons who were present in the shalish and also the witness like Lokman, Bodiuzzaman and Liton, who alleged to have caught hold of accused Majid, were very much fatal for the prosecution which casts a doubt on prosecution case."

155 Pratiksha Baxi, It is not the job of the Courts to arrange 'compromise marriages of Rape Survivors, *The Wire*, 26 June 2015, <https://thewire.in/gender/it-is-not-the-job-of-the-courts-to-arrange-compromise-marriages-of-rape-survivors>

156 Stakeholder Interview with lawyer and academic, Sri Lanka, August 2020.



## BHAVNA\* - INDIA Survivor Story

“I used to work with caterers cooking food for marriages and parties. A contractor promised me a job so I went with them and they sold me to a group who were part of a trafficking network. I was kept in a farmhouse and people would come to rape me.

I couldn't escape because I was never left alone. Then one day we were in the village and I happened to meet the village head. I pleaded to him to let me go because what they were doing to me was not right and I had children. He listened and felt concerned and with his help I was able to get out.

I was away for almost six months and when I returned home, my husband beat me and left. Instead of supporting me, he told the Jati Panchayat that I had eloped with someone else. But why would a woman leave her children?

I went to the police and they were initially unwilling to file a report, saying that I was a bad woman with loose morals. It was with the help of an NGO that I was able to take my case forward.

We are already fighting society. The law should not suppress us when we raise our voice. The police should give support and at least write down reports in a timely manner.

I decided to file a case against my husband for domestic violence. The Jati Panchayat did not care about me being raped and did not like me speaking publicly about my husband being violent. He was from the same caste as them and they thought he should not have to go to jail. The Panchayat said that if I had some self-respect then I wouldn't take this legal course and make things into a big issue.

As punishment, the Jati Panchayat ordered that my parents would have to pay a fine of one lakh (approx. \$1370 USD) if they allowed me to return to their home. My father told me they could not afford the money and so they cut ties with me.

My rape case was filed in 2016 and is still ongoing. The accused's statement is being recorded and the perpetrators are out on bail.

**The authorities said that I would get compensation of five lakhs (approx. \$6866 USD) but I have not received this. And when I went to court, my lawyer informed me that I would get a conveyance fee (money paid to compensate a witness for travel and food expenses when attending court) but when I went to take the money, the court officials asked “conveyance fee for what?”**

*\*This story is anonymous and the name Bhavna is a pseudonym*

*“I went to the police and they were initially unwilling to file a report, saying that I was a bad woman with loose morals.”*

## V. Lack of Support Services for Survivors

A number of survivors highlighted the fact that they did not receive any support from family members or the community. In many cases, survivors felt they could go on with their case only because of the support from non-governmental organisations providing services to survivors. However, they also flagged the responsibility of governments to provide support services in such cases and criticised their failure to do so.

*“So I would also like to suggest that if we are not supported by anyone, then I feel that the legal system should support us, because if our families, community etc. ostracise us, then where do we go?” - Rape Survivor, India*

### Lack of Adequate Victim/Witness Protection Mechanisms & Failure to Ensure Safety of Survivors

Numerous survivors have reported facing threats of physical violence and intimidation by perpetrators either to stop them from reporting the case to the police, or to scare survivors into withdrawing/settling the case. In many cases, victims turn “hostile” or stop cooperating with the criminal process as a result of threats received from the perpetrator. Many countries also do not have adequate laws for protection of victims and witness in rape cases. Even when such laws are in force, inadequate implementation can leave survivors or other witnesses vulnerable to such threats or compromise their safety.

*“He had threatened my daughter saying ‘If you dare tell anyone I will cut you up in pieces and throw you away in a bag.’” - Mother of minor rape survivor, Bangladesh*

In all six countries, even if there is a comprehensive law or scheme for victim/witness protection, it has been noted by stakeholders that these provisions are not effectively implemented in practice. Difficulties in obtaining police protection, combined with lack of sufficient shelter homes to house survivors, result in survivors often being left vulnerable to threats and violence.

- **Bangladesh:** Bangladesh does not have a comprehensive law or scheme for protection of victims and witnesses (a draft bill proposed in 2006 is yet to pass<sup>157</sup>). The Prevention of Oppression against Women and Children Act, 2000 has provisions for the tribunal to order safe/protective custody when necessary. However, there is a shortage of safe shelters<sup>158</sup> and stakeholders have reported that safe custody homes are not respectful of women or their autonomy.<sup>159</sup>
- **Bhutan:** Bhutan does not have a comprehensive law or scheme for protection of victims and witnesses. There are few available shelter homes in the country, which are insufficient to provide safe shelter to all victims who require it.<sup>160</sup>
- **India:** The national Witness Protection Scheme 2018 has been endorsed by the Supreme Court,<sup>161</sup> but there is no law dealing with the issue. The scheme has yet to be effectively implemented by most state governments and there is a lack of awareness of the scheme at the ground level. Stakeholders noted that it still remains difficult (or practically impossible in some states) to obtain police protection for survivors and witnesses and even when such protection is provided, it is inadequate or given only for short periods of time.<sup>162</sup>
- **Nepal:** The Crime Victim Protection Act, 2075 (2018) has provisions to ensure safety of victims. However, the rules under this law are yet to be framed by the government. Stakeholders have also recommended that interim protection orders be allowed in rape cases, to ensure victims are able to obtain protection in a speedy manner.

157 Law Commission - Bangladesh, Final Report on a proposed law relating to protection of victims and witnesses of crimes involving grave offences, 2006, <http://www.lawcommissionbangladesh.org/reports/74.pdf>

158 Human Rights Watch, “I Sleep in my own deathbed”, Violence against Women and Girls in Bangladesh: Barriers to Legal Recourse and Support, 2020, <https://www.hrw.org/report/2020/10/29/i-sleep-my-own-deathbed/violence-against-women-and-girls-bangladesh-barriers>

159 Stakeholder Interview with Lawyer, Supreme Court, Bangladesh, October 2020.

160 RENEW, supra note 110.

161 Mahender Chawla & Ors. v Union of India & Ors. [Writ Petition (Criminal) No. 156 of 2016].

162 Stakeholder Interview with independent lawyer, Madhya Pradesh High Court, India, October 2020; Stakeholder Interview with NGO representative, Haryana, India, March 2020.

- **Maldives:** The Sexual Offences Act, 2014 provides for a scheme of protection orders. A Witness & Victim Support Service Unit has been established at the Prosecutor General's Office to support survivors during the formal processes pending trial and the Maldives Police Service also has a Victim Support Unit. However, these services are under-resourced and information about the status of its functionality and services is not publicly available. Stakeholders have noted that lack of protection of survivors from threats and violence is still one of the major gaps in the criminal justice system in the Maldives. In particular, they highlighted the lack of available shelter homes to house survivors, as most shelter homes are not functional in practice. The staff members and budget for operating these homes are also inadequate.<sup>163</sup>
- **Sri Lanka:** A specific law to protect victims and witnesses of crime was passed in 2015.<sup>164</sup> However, stakeholders have noted that the law is not implemented properly and has not had the expected impact of ensuring that victims and witnesses are kept safe.<sup>165</sup>

## Failure to Provide Psychosocial Care

Stakeholders across the region have identified the lack of government-provided quality psychosocial support and counselling to rape survivors. In many countries, governments simply do not provide or fund such services to survivors. Even in countries where such services are provided by the government, there is often a lack of trained personnel and many survivors are unable to access psychosocial support.

Survivors from **Nepal** and stakeholders from **Sri Lanka** and the **Maldives** also highlighted the issue of the government failing to provide for holistic care, including psychosocial support to survivors of sexual violence.<sup>166</sup>

*“I have no complaints with the justice system, but I wish there were facilities of rehabilitation to the victims... to ease the healing process of the victims, regular follow ups, counseling services must be provided. I was lucky to have received support from a few people, without which I would have been lost.” - Rape Survivor, Nepal*

In **India**, though one-stop centres are meant to provide counselling, there is often a shortage of trained counsellors to provide psychosocial care at these centres.<sup>167</sup> Further, even when one-stop centres are functioning in a particular district, the police often do not refer survivors to the centre to access services. There are even some reports of staff from these centres engaging in victim-blaming or persuading survivors to settle the case.<sup>168</sup>

## Denial of Compensation

Only the laws of **India**<sup>169</sup> and **Sri Lanka**<sup>170</sup> have provisions requiring the state to pay compensation to victims of rape, including interim compensation which is payable even before completion of the criminal process. In **Sri Lanka**, though the law provides for the setting up of a Victims of Crime and Witnesses Assistance and Protection Fund, the law is not being effectively implemented, rendering such compensation inaccessible.<sup>171</sup> In **India**, survivors can apply for a portion of the compensation immediately after filing the police complaint and the money is paid out by the government from the Victim's Compensation Fund. However, procedural and administrative difficulties and the complicated application process can make accessing this compensation difficult for survivors of sexual violence.<sup>172</sup> Some survivors interviewed for this study from India noted that they did not receive compensation.

163 Stakeholder Interview with NGO Representative - Maldives, October 2020; Stakeholder Interview with lawyer and NGO Representative, Maldives, October 2020.

164 Assistance to and Protection of Victims and Witnesses of Crimes Act, No. 4 of 2015.

165 Stakeholder Interview with lawyer and academic, Sri Lanka, August 2020

166 Interview with NGO Representative, Maldives, November 2020. Interview with NGO Representatives, Maldives, October 2020.

167 Stakeholder Interview with NGO Representatives, India, March 2020.

168 Jagriti Chandra, Is 'compromise' the route that one stop centres should choose?, The Hindu, January 2019, <https://www.thehindu.com/news/national/other-states/is-compromise-the-route-that-one-stop-centres-should-choose/article25986995.ece>

169 Sections 357 and 357-A, Code of Criminal Procedure, 1973.

170 Sections 29 and 30, Assistance to and Protection of Victims of Crime and Witnesses Act, 2015

171 Muthukuda Niriella, supra note 99.

172 Partners in Law and Development, supra note 82; Equality Now & Swabhimani Society, supra note 147.

## Example of Good Practice: India and Sri Lanka

Laws imposing responsibility on the State to pay compensation (as opposed to the perpetrator) and ensuring at least a portion of the compensation is payable immediately upon filing the criminal complaint are a good practice from India and Sri Lanka. The availability of immediate compensation can support survivors through the legal process and allow them to cover the expenses of continuing the case, but accessibility to such compensation in practice needs to be improved.

In the **Maldives**, victims have the right to recover both financial and non-financial damages through an application to the Court.<sup>173</sup> In **Bangladesh, Bhutan, Nepal** and **Sri Lanka**, compensation may be awarded by the court on application after conviction of the perpetrator with the compensation being payable by the perpetrator. This creates some issues because survivors often require financial support during the criminal justice process (to pay for medical or psycho-social care, to compensate for loss of earnings from going to court for hearings etc.). Further, given the low conviction rates, when payment of compensation is dependent on the conviction of the perpetrator, this results in a majority of rape survivors not being able to access compensation at all. Granting a portion of the compensation at the beginning of the process will allow the victim to be able to afford to continue with the case, such as to compensate for loss of earnings when attending court and meet other similar expenses associated with the criminal justice process.

Even in cases where there is a conviction, in practice survivors are often not awarded compensation or the amount of compensation is inadequate. In **Nepal**, none of the four survivors interviewed who had obtained convictions in their cases were awarded compensation. In **Bhutan**, activists have criticised the decision of courts to deny compensation to rape survivors in some cases (on the grounds that conviction was sufficient to achieve justice and compensation was unnecessary), despite a request for such compensation being made.<sup>174</sup>



<sup>173</sup> Articles 54-57, Sexual Offences Act, 2014.

<sup>174</sup> Kuensel, No Compensation for Rape Victims, <https://kuenselonline.com/no-compensation-for-rape-victims/>

## VI. Intersectional Discrimination against Women and Girls from Socially Excluded Communities

Women and girls from socially excluded communities face intersectional forms of discrimination while accessing the criminal justice system, based on their sex as well their caste, ethnic, tribal or religious identity. It is widely acknowledged that the rates of non-reporting in sexual violence cases is high amongst women and girls from socially excluded communities, especially when the perpetrator is from a dominant caste/class.<sup>175</sup> Women from these communities are often dependent on dominant caste/class communities for their livelihood and this economic dependency often forces survivors from these communities to stay silent about the rape, in fear of threats, retaliation and backlash.<sup>176</sup> Ethnic and caste minorities are also more likely to live in remote areas, particularly in countries such as **Nepal** and **Bangladesh**. The sheer physical distance to the nearest police station or court can result in non-reporting of cases due to lack of access.<sup>177</sup>

Some of the survivors interviewed expressed their belief that the criminal justice process might have proceeded more smoothly if they had not belonged to a marginalised community. Experts have opined that police officers and justice system officials are more prone to not believing rape survivors from socially excluded communities<sup>178</sup> and that ingrained caste discrimination leads to police officers refusing to register rape complaints by Dalit women and girls.<sup>179</sup> Rape survivors from socially excluded communities are subject to threats and intimidation and are more vulnerable to being forced into compromises or extra-legal settlements.<sup>180</sup>

*“If the law operates objectively, without favouring one of us over the other, then I am confident I will receive justice. However, in the five years that I have been seeking justice, I found no reason to believe or proof that the law is functioning as it should.” - Rape Survivor, Teagarden community, Bangladesh*

Stakeholders from **Bangladesh, Nepal** and **Sri Lanka** also noted that women and girls from ethnic/linguistic minorities face issues accessing justice because of lack of knowledge of Bangla, Nepali and Sinhala respectively. There are few justice system officials in these countries who speak the language of minority communities, translation services are poor and officials do not display a sympathetic attitude towards survivors who speak different languages. As such, survivors from linguistic minorities face additional barriers in accessing justice and are often unable to understand or effectively contribute to ongoing legal proceedings.

Overall, the social, economic and political power wielded by dominant caste/class/ethnic/linguistic communities results in widespread impunity for perpetrators of sexual violence particularly when they rape women and girls from socially excluded communities.<sup>181</sup> Some survivors also noted that though they had not faced any outright discrimination based on their caste or ethnic identity, they believe that class-based social exclusion operates powerfully to favour perpetrators when they are from more privileged communities.

*“I have encountered some incidents where police would be there only for those who are of high rank and positions whereas for people like us and from middle class families, they would turn a deaf ear.” - Rape Survivor, Bhutan*

175 Bangladesh Dalit and Excluded Rights Movement & Nagorik Uddyog, Dalit Women in Bangladesh: Multiple Exclusions, 2011, <http://www.indianet.nl/pdf/Dalit-WomenInBangladesh.pdf>

176 United Nations Resident and Humanitarian Co-ordinator's Office, Violence against Madheshi Dalit Women in Dhanusa & Mahottari districts, Issue 39, April 2012, [https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report\\_706.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_706.pdf)

177 Hidden Truth: Rape, Violence and Brutality in the CHT by Bangladesh Military, Global Defense Corp, 2020, <<https://www.globaldefensecorp.com/2020/02/29/hidden-truth-rape-violence-and-brutality-in-the-chittagong-hill-tracts-by-bangladesh-military/>>; Office of the High Commissioner for Human Rights in Nepal, supra note 153.

178 All India Dalit Mahila Adhikar Manch (AIDMAM), Voices Against Caste Impunity; Narratives of Dalit Women in India (2018).

179 Sisters for Change, Karnataka Dalit Mahila Vedike, Breaking Down Barriers to Justice: Making the Indian Criminal Justice System work for Dalit Women victims of Violence (2016), <https://www.sistersforchange.org.uk/2016/06/11/breaking-down-barriers-to-justice/>

180 FEDO, supra note 24.

181 National Campaign on Dalit Human Rights, Dalit Women Speak Out: Violence Against Dalit Women in India, 2006, [https://idsn.org/uploads/media/Violence\\_against\\_Dalit\\_Woment.pdf](https://idsn.org/uploads/media/Violence_against_Dalit_Woment.pdf)

## VII. Impact on the Life of the Survivor

Across the South Asian region, crimes of sexual violence can have a life-long impact on survivors and their families. Survivors reported feelings of shame which, combined with stigma and backlash from family and community members, had a deep impact on their emotional and mental health.

Many survivors faced ostracisation from their community or their family after the rape incident. A few survivors reported that their husbands had left them, blaming them for the rape.

In many cases, survivors were forced to leave the village entirely or relocate due to the continued stigmatisation and hostility which they faced from the community. Unofficial village councils (such as panchayats and shalishes) also routinely play a role in forcing survivors out of their homes or neighbourhoods, often in retaliation for the survivor deciding to pursue the criminal complaint. In a few instances, the survivors were forced to move because they feared for their safety, particularly when the perpetrator was not in prison.

The education of survivors, their children or other family members was interrupted in some cases due to fear for their safety or of further attacks from the perpetrator(s).

*“I kept thinking my body is no longer mine because not only was I sexually abused but I was also physically abused. I kept thinking I’d not live anymore and that I’d only live for a few years.” - Rape Survivor, Bhutan*

*“Where most people were supportive, many did not know how to react to my situation so they avoided me. This was painful for me initially, but I grew a thick skin over time and carried on with my life.” - Rape Survivor, Nepal*

*“When others/outsideers speak it can still be tolerated. But when your own people and relatives - uncles and aunts also talked this way, I used to feel very bad. But then what can we do? It is not in our hands...I have had a time when, if I wished to cry, tears would not come out of my eyes.” - Rape Survivor, India*

*“I just felt like dying. I always felt like doing something to myself. Moreover, I used to be ill for days.” - Rape Survivor, India*

Survivors also noted the impact that the rape had on their livelihood. In some cases, particularly for survivors engaged in daily wage jobs, they suffered loss of income for undertaking regular visits to police stations and courts, which often dragged on for years. Some survivors even lost their jobs or had difficulty finding work due to the stigma attached to the rape.

In a few cases, the fear and trauma caused by the rape incident resulted in survivors feeling unsafe in public spaces or around other men, which has impacted their day-to-day lives, as well as their ability to continue in their jobs.

As such, the impact of sexual violence on the mental, physical, emotional and economic well-being of survivors can last for life and can impact every aspect of survivors' lives in ways that go far beyond the scope of the criminal justice process. Government responses to sexual violence thus need to be correspondingly holistic and multi-sectoral in nature and should also focus on prevention of sexual violence as opposed to concentrating only on addressing the impact of sexual violence after it has taken place.

# DHRITI\* - INDIA

## Survivor Story



"I used to work alongside my husband as a wage labourer and our employer asked us to steal from someone else's farm but we weren't willing to do this. We were told we'd have to pay a high price for saying no and when my husband went to collect our wages, they refused to pay him.

When my husband was out, our employer came to our place when my little daughter and I were sleeping. He had a knife and stick and threatened to kill us. He also threatened me not to tell anyone including my husband and said he would kidnap or kill everyone in our family if I did. He did things to me against my consent and he hurt me with the knife.

My husband was also hurt by some goons who pushed him in the gutter. When he returned home, I mustered the courage to tell him everything. He was very annoyed and blamed me. He said, "You have shamed us in front of the village. How will we face people? What will we do now? You must go to your parent's house."

My parents are far away so I went to my in-laws. My father-in-law fought with me, saying, "We have a very bad daughter-in-law who has shamed us in front of the whole village". But he also said we should file a police complaint.

The accused told me that if I tried to report to the police, he would not let us reach the station and would kill all of us. We had no vehicle so my father-in-law and I managed to reach there by bus. But the perpetrator and his supporters were at the station already. People had gathered in large numbers and tried to prevent us going inside.

A police officer said a report could not be taken as the person I had to file it with was out. They made me wait a long time and I sat there until 5pm. Finally, I told them to write down my report or else I would take the matter further. He asked me, "Where would you go?", and I replied, "Wherever we would be heard and wherever we get justice". He said, "How would you go? You were raped before and you will be raped further."

I still urged him, saying, "If I have been raped once, and if it is to happen again, then I will anyway have to die. But what has happened to me should not happen to any other women." After that, he wrote the report. He asked how and where I was held and how I was raped. He also told me to swear on god. I was not educated so I couldn't even read the report to see whether it was correctly written.

I was taken to hospital for a medical check-up and had the two-finger test conducted on me. The nurse was not cooperative. She rudely said I was talking too much and that I had conned the accused for money.

When we were leaving the hospital, there were many people there from the side of the accused. My husband asked the police to arrange a vehicle to take us home but the police said, "If they try to kill you, then you will have to die," so we had to get the bus.

We went to another police station where my statement was recorded in a proper manner. The accused had reached there too and I was so angry when I saw him.

When I went to court, there were two lawyers there but I don't know who they were representing. They told me to say I had taken 40,000 rupees (approx. \$550 USD) from the accused, but I refused because I hadn't taken the money. The police dragged me in front of the judge and I begged him to give me justice. But the verdict given was that rape had not been proven in the report and the perpetrators were released.

**Now my case is being appealed in the High Court. The judge is there to give justice. If we get justice, then such incidents will not have to be repeated with other women."**

*\*This story is anonymous and the name Dhriti is a pseudonym*



# SURVIVORS' IDEA OF JUSTICE



## Why is it important to understand justice from the perspective of survivors?

It is key to note that justice is ever-evolving and carries different interpretations and meanings to different survivors. This section seeks to locate justice within the lived experiences of survivors to understand the differential nature of the same and to lend an active voice to the survivor in defining justice.

### Speedy Trials as Justice

Survivors across countries including Bangladesh, India and Nepal highlighted speedy trials as vital in dispensing justice. It is also key to note that the essence of this expectation is not necessarily limited to successful convictions, but it is linked to reclaiming their dignity and honour within a society where a “raped woman” is looked down upon and further victimised by different actors. Lengthy trials undoubtedly contribute to the frustration and hopelessness that survivors face, often leading to them dropping the cases.

*“I feel like the State could have made the trial process speedy and ensured that I got justice on time. The rapists should have got punishment by now. Then I could have lived with some honour. Those who are violated, we are dishonoured – year after year, we live on being identified as the raped woman.” - Rape survivor from Bangladesh*

## Sensitivity and Accountability from the System as Justice

The discrimination and lack of action faced at the hands of police, medical officers, lawyers and judges has had a significant bearing on the lives of the survivors. Many survivors across Bangladesh, India and Nepal stated that a more sensitive approach by the officials within the system would have been a great boost to their morale and led them to trust the process better. Additionally, the survivors believed that even in the absence of support from their family and community, the system should be held accountable for dispensing justice and protecting the survivors.

*“I think there have to be changes in sensitivity from the system and accountability from the same. Only then we will be able to trust the system and go to them to seek help in any case. Within my household there have not been many changes... [regarding] the people in the neighbourhood and community; I cannot change the way they view me. I have always done good to all of them, they should not judge me on the basis of what happened to me.” - Rape survivor from Nepal*

## Timely Procedures as Justice

Delays in registering cases and conducting investigations is one of the primary loopholes of the criminal justice system, especially in the context of addressing rape cases as evidenced in the above chapter. Survivors, particularly from India, stated that following procedures on time is of extreme importance given that such delay may result in loss of evidence, increased chances of being threatened by the perpetrator, physical violence and threat to life, increased chances of being pressured for a financial settlement and, most importantly, the ability of the survivor to recall the details of the rape incident.

*“The law also should not suppress us when we raise our voice. We are already fighting the society. When we want legal support, whether it is a male or a female police officer, irrespective of that, they should support us... They should at least write down the report on time, because if they do things in a timely manner, then maybe we will get support or help.” - Rape survivor from India*

## Conviction as Justice

Closely linked to the lengthy duration of trials is the uncertainty of the case status. Survivors, particularly from Bangladesh suggested that conviction of the perpetrator could provide respite to their ordeals as rape survivors in society. This perception of justice is intrinsically linked to their ideas of safety, honour, shifting the blame from themselves and a legal sentencing in recognition of the violence they were subjected to by the perpetrator.

*“My demand is quite simple. I demand that my daughter’s rapist gets hard justice – he should be in prison for the rest of his life.... What else can I want from the state other than certainty of punishment, and also ensuring he never is able to set foot outside that jail again. I want speedy justice and I want the state to ensure that my daughter’s rapist gets the punishment he deserves.” - Mother of a minor rape survivor, Bangladesh*

## Change in Attitudes of Society and Community as Justice

Victim blaming attitudes of society are deep-seated across the region, often discouraging rape survivors from coming forward with their accounts. The negative societal attitudes towards survivors operate at multiple layers and often lead to their ostracisation on numerous fronts. Survivors across Bhutan, Bangladesh, India and Nepal state that a change in the way society thinks about rape survivors is essential in shifting the onus from survivors to the perpetrators and to view rape as a weapon of power and not sexual intercourse.

*“People who blame the victims need to know that they are escalating the problem by choosing to focus on the victim the way that they do. I have seen society blame the victim and the victim blaming culture. People need to understand that sexual violence is not about sex but it’s about power and control. There’s a time where I was blamed... that I asked for it. [They say] That she was going out with him and wearing this, they don’t understand that sexual violence has nothing to do with it. From personal experience people tend to blame the victim easily but if they went through a similar experience, only then would they understand how the victims feel.” - Rape survivor from Bhutan*

# YESHEY\* - BHUTAN

## Survivor Story



“When I finished third grade, I went home for vacation. I was then about thirteen years old. I was worried whenever my relative came home drunk at night and wondered whether I would get beaten up or should kill myself. He sexually assaulted me and said he would kill me if I told anyone. So that’s why I never said anything, not even to my close friends or family.

He took me to a hospital and afterwards he’d give me a pill every day after my meal. A few days later, I started bleeding, heavy bleeding. I thought it was menstruation at first but now I realise it wasn’t.

I kept thinking my body is no longer mine because not only was I sexually abused but I was also physically abused. I wasn’t healthy like I am now. I didn’t get enough food to eat and I had to run away from him to avoid getting beaten. I kept thinking that I’d only live for a few years because my body was in pain.

Someone reported what was happening to the police but I don’t know who. They came and took the perpetrator and me in for questioning together. I was scared because he was there, but I told the police everything because they said they were planning to send me somewhere safe and I got some confidence when I heard that. That night, they thought I’d kill myself so they kept someone with me.

They put me in a small police cell but I was happy because it was still a safer place than home. At least I was not being beaten. The thought of being taken to a shelter even stopped my suicidal thoughts.

A dasho (government representative) came and found me in the cell. She scolded the person who put me there and took me to the shelter. Most of the children are there due to their own experiences but we didn’t ask each other and respected one another not to tell.

When I was taken for a hospital check-up, I was afraid I would have some diseases like HIV/AIDS. The medical staff were very softly spoken, explained everything and supported me, they told me not to be afraid when they examined me and did tests to check if I was pregnant.

But I did not see the medical report and I still don’t know the results. Even now, I don’t like hospitals and try to avoid them. I’m worried that if I go to hospital, I might find out I have some diseases from my experience and I don’t want to be unhappy because of that.

**My case was not taken to court and I wonder what happened because they did not tell me anything. I didn’t ask because we were related. He was my own brother.”**

*\* This story is anonymous and the name Yeshey is a pseudonym. Though Yeshey was a minor when the incident took place; she is now 26 years old.*

*“I kept thinking my body is no longer mine because not only was I sexually abused but I was also physically abused.”*

# RECOMMENDATIONS



# GOVERNMENTS SHOULD:

1

## Address Protection Gaps in the Law

- **Ensure that all forms of sexual penetration are covered within the definition of rape**, including oral, anal and vaginal penetration by any organs or objects, especially in Bangladesh and Nepal.
- **Ensure that the definitions of sexual violence** cover all forms of sexual acts committed without the victim's voluntary, genuine and willing consent and in a broad range of coercive circumstances, including by recognising situations where the victim is incapable of giving consent especially in Bangladesh, Bhutan, Sri Lanka, Nepal and the Maldives.
- **Remove discriminatory or burdensome evidence requirements applicable in law**, including by explicitly prohibiting introduction of evidence relating to the past sexual history of the survivor (in all countries except India) and amending laws which require a number of different types of evidence (e.g. in the Maldives).
- **Explicitly criminalise marital rape, including marital rape of children**, in all circumstances in Bangladesh, India, the Maldives and Sri Lanka. Ensure that the penalties for marital rape are commensurate with applicable penalties for other forms of rape, particularly in Bhutan and Nepal.
- **Enact comprehensive special laws for the protection of victims from socially excluded communities**. For instance, in India, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act criminalises atrocities against Scheduled Castes and Scheduled Tribes. Under this act, any form of sexual violence against women and girls from SC or ST communities with the knowledge of her caste or tribal identity is recognised and criminalised as a caste-based atrocity and incurs special measures to improve access to justice in such cases.
- **Address gaps in existing sexual violence prevention legislations to recognise the increased vulnerabilities of marginalised communities/groups**. For example, in Nepal, the Caste-Based Discrimination and Untouchability (Offence and Punishment) Act prohibits caste-based discrimination, but does not contain similar provisions to those under Indian law to specifically address instances of caste-based sexual violence or rape.



## 2

### Improve Police Responses to Cases of Sexual Violence

- **Hold accountable police officers** who refuse to register complaints, tamper with evidence, pressure survivors or their families to compromise or in any way obstruct justice in sexual violence cases. In India, an amendment was introduced in the law in 2013 to include criminal penalty for police officers who refuse to file an FIR in rape cases.
- **Increase training and capacity building for gender sensitisation of police officials** to prevent secondary victimisation of survivors:
  - Increase in diversity of workforce in terms of ethnicity, language and caste.
  - Set standards in training by partnering with more women's rights agencies.
  - Promote specialisation within police units, for example provide training to police officers to specifically deal with gender-based violence against women and children.
  - Establish women's and children's desks in all police stations.

For example, in the Philippines, the Magna Carta of Women requires that all government personnel involved in the protection and defence of women against gender-based violence receive mandatory training in human rights and gender sensitivity.<sup>182</sup>

- **Improve effective implementation of existing laws and policies on victim and witness protection** to ensure that rape survivors are safe while pursuing the criminal justice process.

## 3

### Ensure Survivor-Friendly Medical Examinations in Rape Cases

- **Implement and enforce nationwide bans against the two-finger test** and issue directives to all hospitals and healthcare providers to raise awareness on bans which may already be in place.
- **Conduct appropriate post-rape forensic medical examination in a timely and sensitive way** and provide medical care and counselling services to survivors through hospitals without insisting on prior registration of a police complaint.
- **Allocate sustained resources for forensic evidence collection and testing:**
  - Increase the number of labs and DNA-testing centres.
  - Improve infrastructure of labs and similar spaces for conducting tests within hospitals to make it more survivor-friendly.
  - Recruit and increase number of technicians/practitioners.
- **Train medical professionals on the appropriate protocols for conduct of medical examinations in rape cases:**
  - ensure they are aware of any national guidelines applicable for such examinations.
  - impart training and skills to practitioners to specialise in gender-based violence.

Some countries such as the United States and Canada have introduced forensic nurses who are trained to handle sexual violence cases sensitively. This has proven to have several benefits including improved evidence gathering.

<sup>182</sup> <https://pcw.gov.ph/republic-act-9710-magna-carta-of-women/>

## 4

### Improve Prosecution Procedures and Trials of Sexual Offences

- **Ensure that all forms of sexual violence offences are investigated and prosecuted as a priority, including sexual violence offences committed during conflict.**
- **Institute better mechanisms to monitor the diligence and performance of public prosecutors:**
  - Efforts must be directed towards designing and carrying out regular assessments in compliance with UN Rule of Law indicators to evaluate the performance of public prosecutors.<sup>183</sup>
- **Institute better mechanisms to compel attendance of witnesses** such as investigation officers, medical officers for eg. issuing non-bailable warrants<sup>184</sup> in the event of failing to appear before the court.
- **Ensure that survivors of sexual violence are sufficiently supported throughout the legal proceedings:**
  - provision of free legal aid.
  - ensure that survivors are informed about the criminal justice process and their rights under the law and are updated regularly on progress throughout the proceedings.
- **Proactively address delays in the trial process and ensure that trials are completed speedily in rape cases.**

## 5

### Design and Fund Holistic Interventions to Improve Access to Justice for Survivors

- **Increase allocation of resources towards sexual violence prevention and response programmes:**
  - Promote gender-responsive planning and budgeting in national plans and policies that adequately meet the needs of women and girls.
  - Emphasise active participation of civil society and specialist gender advocates in policy planning and budgetary processes as a means of learning about the needs of women and girls and aim to include them in the designing of laws, policies and budgets to positively impact their lives.
- **Create Victims' Compensation Funds for payment of compensation by the State to rape victims** and allow victims to apply for interim compensation without having to wait for a conviction. Currently, laws imposing responsibility on the State to pay compensation (as opposed to the perpetrator) and ensuring at least a portion of the compensation is payable immediately upon filing the criminal complaint are only enacted in India and Sri Lanka.
- **Ensure that stringent action is taken against any persons, including perpetrators of rape, community members or members of informal dispute resolution bodies** such as caste *panchayats* and *shalishes* who threaten, pressure or force rape survivors or their families into extra-legal settlements in rape cases specifically in Bangladesh, Nepal and India. For example, in Nepal, an ordinance passed in December 2020 makes it a criminal offence to force mediation or reconciliation between rape victims and perpetrators or their families. This is a welcome measure and an official recognition by the government of the widespread nature

<sup>183</sup> [https://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](https://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf)


<sup>184</sup> A non-bailable warrant refers to a warrant for a person's arrest in which no bail amount is set. The arrested person would then be able to obtain bail only by appearing before court and obtaining a bail order from a judge.



of such mediation practices in rape cases. However, the implementation of the provisions of the Ordinance needs to be monitored to determine its effectiveness, as strict enforcement is required in order to end such mediations in rape cases.

- **Ensure efficient multi-sectoral response to provide holistic support services to survivors:**
  - Promote broad consultation with all relevant sectors/agencies addressing violence against women and girls, led by the Gender Ministry/Ministry of Women.
  - Promote survivor-centred principles and human rights standards of safety and offender accountability within all stakeholders including law enforcement, healthcare, judiciary and other government officials to ensure effective response to individual cases as well as policy making.
  - Promote provisions for long-term trauma-informed mental health care.
- **Conduct timely evaluation on the enforcement of laws** as an attempt to investigate low rates of conviction in rape cases:
  - Ensure that the results of evaluation are available publicly.
  - Foster mechanisms based on outcome of the evaluation to provide recommendations for law and policy reforms.
- **Improve data collection on rates of reporting, prosecution and convictions in sexual violence cases** (particularly in the Maldives):
  - Set standards for timely gender-responsive data collection, monitoring and evaluation (M&E).
  - Ensure that data is broadly available and disaggregated based on the sex, age and caste, tribe, ethnicity and religion of the survivor. Currently, except India, none of the six countries included in the study maintains caste/ethnicity disaggregated data.
- **Increase collaboration with survivors through survivor advocates:**
  - Survivor advocates must be employed by the law enforcement agencies to serve as a consistent link between the system and survivor, particularly to ensure the well-being of the survivor while the case is ongoing, passing on important information and details about the case. In India, the State Legal Services Authority has a scheme for Para-Legal Volunteers which aims at imparting legal training for volunteers from the community who act as intermediaries between lay people and legal service institutions.<sup>185</sup>
- **Expand focus of justice beyond legal justice - efforts must be made to streamline justice based on a survivor-centric approach:**
  - Acknowledge the widespread impact of trauma on survivors and strengthen their capacity to recover through information, resources and support services.
  - Expand the focus to acknowledge the trauma in families of survivors as well as persons who provide direct service to survivors, such as counsellors.

<sup>185</sup> <https://nalsa.gov.in/acts-rules/preventive-strategic-legal-services-schemes/scheme-for-para-legal-volunteers>

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- Empower the public, particularly women and girls, to understand their rights, improve awareness of laws related to sexual violence, available remedies and methods to preserve evidence prior to reporting.
  - Ensure that child survivors of rape are provided appropriate long-term support to re-integrate them into social settings such as schools.
  - Integrate compulsory sex and relationship education in the school curriculum in an early, age-appropriate way.
  - Implement education and awareness raising programmes, which also target men and boys, regarding human and women's rights, as well as programmes aimed to modify discriminatory social and cultural patterns of behaviour, including through targeting stereotyped gender roles and promoting non-violent masculinities.
  - Integrate knowledge about trauma into policies, procedures and practice.

# ANNEX - DETAILED METHODOLOGY

This is a qualitative study which incorporates both primary and secondary research methods.

**Secondary Research:** In-depth desk research was undertaken on existing reports and studies published by international and national human rights agencies, academic journals, non-governmental organisations and community-based organisations. The secondary research also included an analysis of the gaps in the law allowing for potential impunity for perpetrators of sexual violence.

**Primary Research:** The sampling method employed is a non-probability method where the sample was recruited using the Convenience Sampling Technique, based on accessibility and availability of the respondents. The primary data collection was conducted across six countries in South Asia - India, Nepal, Sri Lanka, Bhutan, Maldives and Bangladesh.

Focus-group discussions and in-depth interviews were conducted with various stakeholders - survivors, human rights activists, lawyers, NGO leads and case workers actively engaging with survivors of sexual violence. Types of interviews were both direct interviews and indirect interviews - via telephone.

28 survivors were interviewed as part of this study - 16 in-depth interviews with survivors in Bangladesh, Bhutan and Nepal and 1 focus group discussion with 12 survivors in India. Due to difficulties in identifying survivors of sexual violence who were willing to speak out about their experiences, no survivor interviews were conducted for the Maldives and Sri Lanka. In-depth interviews were also conducted with 20 stakeholders across all the six countries selected for the study.

**Data Analysis:** Thematic analysis was undertaken for primary data analysis of survivor and stakeholder interviews using Dedoose, a web-based application for qualitative and mixed-method data analysis.

Country	List of Interviewees
<b>India</b>	<ul style="list-style-type: none"> <li>Survivors – 12 (Focus group discussion)</li> <li>Lawyers, NGO leaders</li> <li>Activist, NGO representative from Haryana</li> </ul>
<b>Maldives</b>	<ul style="list-style-type: none"> <li>Lawyer- NGO representative</li> <li>NGO representative from an organisation working on women's issues</li> <li>NGO representatives from an organisation working on health and social concerns</li> </ul>
<b>Sri Lanka</b>	<ul style="list-style-type: none"> <li>Independent Lawyer-Academic</li> <li>Representative from Family Rehabilitation Centre</li> <li>Lawyer-NGO representative</li> <li>Activist</li> </ul>
<b>Bhutan</b>	<ul style="list-style-type: none"> <li>Survivors – 6</li> <li>Director of Community Outreach from an NGO working with survivors of domestic and gender-based violence</li> <li>NGO representative</li> <li>Journalist</li> </ul>
<b>Bangladesh</b>	<ul style="list-style-type: none"> <li>Survivors – 4</li> <li>Lawyer, Supreme Court</li> <li>NGO representatives from a legal aid organisation</li> <li>NGO Representative from an organisation working with minority communities</li> </ul>
<b>Nepal</b>	<ul style="list-style-type: none"> <li>Survivors – 6</li> <li>Advocate Bishnu Bashyal, Independent Lawyer</li> <li>Renu Sijapati, NGO Representative from Feminist Dalit Organisation (FEDO)</li> </ul>

## Research Ethics:

Owing to pandemic-induced norms such as social distancing, curfews and lockdown across these six countries, efforts were made to restructure the methodology to fit the circumstances without stalling the data collection process. While face-to-face interviews with survivors were the planned and preferred method of primary research initially, a shift to telephonic interviews with survivors in some cases was necessary. Face-to-face interviews were held whenever possible. However, given the sensitive nature of the cases being dealt with, the following parameters were undertaken to ensure research ethics were maintained throughout. Details of the survivor such as the date of the incident and age of the survivor at the time of the incident were taken into consideration before deciding whether to interview the survivor across countries. Telephone interviews were only conducted under the following conditions:

- If the survivors were survivor leaders
- If the Consultant/Third party person/NGO had engagement with the survivor in the past
- If the Consultant/Third party person/NGO was able to provide counselling services to the survivor, if required

All efforts were made to ensure that no survivor was subjected to re-traumatisation, where careful consideration was made to recruit only survivor leaders or those with whom the NGOs or consultants have worked with in the past. In countries where this was not possible, such as Sri Lanka and Maldives, survivor interviews were not conducted.

Direct interviews were not conducted with survivors who are minor girls (under the age of 18), instead a parent/guardian of the survivor was interviewed.

Records of oral consent via telephone interviews have been maintained, in addition to maintaining the signed Informed Consent Forms, wherever applicable. Identities of the survivors have been anonymised in the report.

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