

Court Watch
Monitoring on
**Sexual and
Gender Based
Violence Cases in
Trial in Selected
District Courts**



FWLD

Working for non-discrimination and equality

COURT WATCH MONITORING ON
**SEXUAL AND GENDER BASED
VIOLENCE CASES IN TRIAL IN
SELECTED DISTRICT COURTS**

Study Team

Advocat Sabin Shrestha

Advocate Roshana Pradhan

Ms Anisha Thapa

District Researchers

Advocate Sunil Shrestha, Banke

Advocate Meena Giri, Morang

Advocate Lalita Thike Shrestha, Makwanpur

Advocate Ramesh Chaudhary, Nawalparasi

Mr Binod Chandra Devkota, Lalitpur

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FOREWORD



In Nepal, women are still in unbalanced power relation and facing sexual and gendered based violence. Constitution of Nepal prohibits all forms of discrimination including discrimination based on sex, marital status, health condition and on the basis of pregnancy. It recognizes discrimination not only based on culture, custom, tradition but also on religion as an exploitation. Any forms of violence is prohibited and made punishable by the Constitution. New Rape provision in Country Criminal (Code) Act, 2017 has broadened the definition of rape. Human Trafficking and Transportation (Control) Act 2007 has also expanded the definition of trafficking and ensured many rights to victim in the process of accessing justice. Domestic Violence (Offense and Punishment) Act 2009 and Regulations are in place. Interim protection measures are provided under the Domestic Violence (Offense and Punishment) Act 2009. Supreme Court of Nepal in *Gurasdebi's* case recognized battered women syndrome as an defense. However, many are unaware of the law, procedures and protection measures provided on the process to accessing justice. Social cultural and economic context is yet to change. Long court process, lack of socio economic support system, stigmatization and hostility are some of the obstacles in access to justice. As a result, even now very few cases are reported. And success ratio although increasing but yet to be enough. However with the Court's verdict in Public Interest Litigation, many laws are changed, procedures and systems are put in place.

Nepal being a state party to Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) has an obligation to adopt and ensure legislative, executive, judicial, administrative and

all other necessary measures to prevent and prosecute SGBV cases. Similarly, General Recommendations (GR) 33 calls state parties to ensure justiciability, availability, accessibility, good-quality, provision of remedies and accountability of justice systems. It also calls state parties to amend the discriminatory laws, procedures and practices. It recommends for addressing stereotyping and gender bias in the justice system and recognizes importance of capacity building, Education and awareness-raising. It calls state parties to have effective Legal aid and public defense mechanism and adequate resources to ensure access to justice. Similarly, GR 35 of CEDAW creates responsibility on state actor and non state actor not only to prevent, protect and prosecute on threat or act of violence but also on omission. Recommends State Parties to ensure all necessary support system and due diligence in the process.

However this study observes weak and inadequate legal aid, lack of socio psychological counselling, easy intimidation, lack of privacy in domestic violence cases, lack of order for safety of victims, no interim order for the victim of domestic violence, lack of continuous hearing, inadequate or no compensation are impeding factors on women's access to justice. The study makes a focus on the implementation gaps in lined with the national and international obligations of the state.

I sincerely believe that the study would facilitate in improving legal and procedural gaps and bring necessary focus on implementation of law and procedures in access to justice in SGBV cases. I would like to congratulate FWLD and study team for their daunting tasks in bringing out this study report.



Sapana Pradhan Malla
Justice, Supreme Court

ACKNOWLEDGEMENT



Nepal being a state party to CEDAW is obligated to adopt necessary measures to translate CEDAW into domestic laws and policies as the Section 9 of the Nepal Treaty Act 1991 states that the international provisions shall be enforceable as national law once Nepal ratifies the instrument. General Recommendation 33 of CEDAW on women's access to justice states about the obligations of States parties to ensure that women have access to justice and General Recommendation 35 of CEDAW on gender-based violence against women states for the acts and omissions by the state organs and agents that constitutes gender-based violence against women. These include the acts or omissions of officials in its executive, legislative and judicial branches.

In this regard, Court watch monitoring on Sexual and Gender based violence (SGBV) cases in trial in selected District Courts is carried out to monitor the SGBV cases, the role of courts and courts officials to ensure international obligations and identify implementation gaps of legal framework against SGBV that impedes women's access to justice. This study makes an observation of implementation of the laws and policies with regard to CEDAW and its General Recommendations 33 and 35 in SGBV cases in trials at district court level. It also makes recommendations that should be addressed in the context of sexual and gender based violence cases.

FWLD is grateful to Honorable Sapana Pradhan Malla, Justice, Supreme Court of Nepal, for providing foreword for this study. FWLD would like to express sincere gratitude to International Women's Right Actions Watch Asia Pacific (IWRRAW-AP) for the financial and technical support to carry out the study.

FWLD would like to express deepest thanks to Ms.Ishita Dutta, Programme Officer of International Women's Right Actions Watch Asia Pacific for providing her guidance, comments and suggestions throughout the study.

FWLD would like to thank study team and district researchers for their valuable contributions to carry out the court watch monitoring and observe the sexual and gender based violence cases. FWLD would also like to thank the court officials of relevant courts for their support to provide information on cases.



Sabin Shrestha
Executive Director
FWLD

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INTRODUCTION OF THE STUDY

1.1 Background

In Nepal, there is a greater prevalence of patriarchal beliefs concerning masculinities even today. People believed that men were by nature polygamous and strong. The sexual and gender-based violence occurs as a result of the normative role expectations associated with each gender, along with the unequal power relationships between genders, within the context of a specific society due to which the cases of sexual and gender based violence is in a rise.

According to the Nepal Demographic Health Survey 2016, nearly one third of all married women in Nepal have experienced violence perpetrated by their partners, the most common violence being physical and emotional. Thirty four percent of such women have sustained injuries due to the violence. The survivors often face social stigma and familial pressures.¹ In the year 2017/018, 1480 rape cases are reported in Nepal.² Similarly, in 2017, 149 people were killed as a result of GBV in Nepal. Of these victims, 140 were female, 75 of whom were killed because of domestic violence.³

A selection of relevant incidents reported by the Women and Children Services Directorate (WCSD) of the Nepal Police are shown in the given statistics (Table 1):

1. <https://reliefweb.int/report/nepal/helpline-gbv-survivors-nepal-transmits-hope-and-support>
2. <https://myrepublica.nagariknetwork.com/news/1-480-rape-cases-last-year-4-every-day/>
3. Addressing gender based violence in Nepal, <http://blogs.worldbank.org/endpovertyinsouthasia/addressing-gender-based-violence-nepal>

Table 1

Fiscal Year	Rape	Attempt to rape	Trafficking	Abortion	Polygamy	Child marriage	Domestic Violence	Witch Craft
1996/1997	112	34	117	74	101	5	337	-
1997/1998	181	34	130	101	135	3	228	-
1998/1999	141	18	110	81	96	1	432	-
1999/2000	186	33	120	89	96	5	711	-
2000/2001	122	35	92	55	75	1	449	-
2001/2002	129	21	40	14	51	-	410	-
2002/2003	157	18	55	15	69	2	569	-
2003/2004	154	19	56	8	44	3	922	-
2004/2005	188	25	72	11	66	1	730	-
2005/2006	195	38	97	14	65	1	939	-

Fiscal Year	Rape	Attempt to rape	Trafficking	Abortion	Polygamy	Child marriage	Domestic Violence	Witch Craft
2006/2007	317	70	112	3	94	7	1100	-
2007/2008	309	73	123	13	122	4	881	-
2008/2009	391	75	139	12	170	2	968	-
2009/2010	376	101	161	8	146	7	983	4
2010/2011	481	151	183	12	197	2	1355	39
2011/2012	555	156	118	13	249	12	2250	35
2012/2013	677	245	144	28	350	19	1800	28
2013/2014	912	414	185	18	421	15	6835	39
2014/2015	981	562	181	17	518	23	8268	43
2015/2016	1089	452	212	22	463	20	9398	28
2016/2017	1131	536	227	22	464	26	11629	24

Source: <https://cid.nepalpolice.gov.np/index.php/cid-wings/women-children-service-directorate>

Though the various statistics shows that the sexual and gender based violence cases are in rise, they are hardly reported. The data of Nepal Demographic Health Survey 2016 shows that 61.3% of women who had experienced violence had not shared or discussed it with anyone. It is because the culture of silence is highly ingrained as women do not file or report the cases due to the patriarchal mindsets and women fear that they will be re-victimized.

The Constitution of Nepal acknowledges the right not to be subjected to Sexual and Gender Based Violence (SGBV), as one of its fundamental rights of women.⁴ The Government of Nepal has made substantive strides in GBV policies and legal frameworks including the adoption of specific legislations such as Domestic Violence (Offense and Punishment) Act 2009; the Human Trafficking and Transportation (Control) Act 2007; The Sexual Harassment at the Workplace (Elimination) Act, 2015; the Witchcraft Allegation (Offense and Punishment) Act 2016. While a strong legal framework exists surrounding criminalization of sexual and gender based violence incidents, the patriarchal social structure and the justice system often causes challenges in victims opting for legal recourse.

Similarly, Nepal being state party to Convention on Elimination of All forms of Discrimination against Women (CEDAW) is under obligation to ensure the appropriate measures to address SGBV cases. The right of access to justice for women is essential to the realization of all the rights protected under the CEDAW.⁵ On the other hand, General Recommendation 33 states about access to justice for women and General Recommendation 35

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4. Constitution of Nepal, 2015. Article 38 (3) "No woman shall be subjected to physical, mental, sexual, psychological or other form of violence or exploitation on grounds of religion, social, cultural tradition, practice or on any other grounds. Such act shall be punishable by law, and the victim shall have the right to obtain compensation in accordance with law.
 5. General Recommendation 33, CEDAW.

urges states parties to strengthen the implementation of their obligations in relation to gender-based violence against women and recommends about the various legislative, executive and judicial actions to ensure justice for SGBV victims.

The legal framework relating to SGBV is progressive. However, there remains some gaps and also some challenges in implementation. In this regard, the court watch case monitoring was carried out by FWLD in coordination and support from IWRAP Asia Pacific in order to review the implementation gaps of legal framework against SGBV. For the court watch monitoring, the enumerators made their observations using court watch monitoring framework that assessed court facilities, conditions within individual courtrooms, judges' management of individual cases, and the availability of services. The study continued its focus on the cases of sexual and gender violence and its procedures and its shortcomings.

1.2 Objectives of the Study

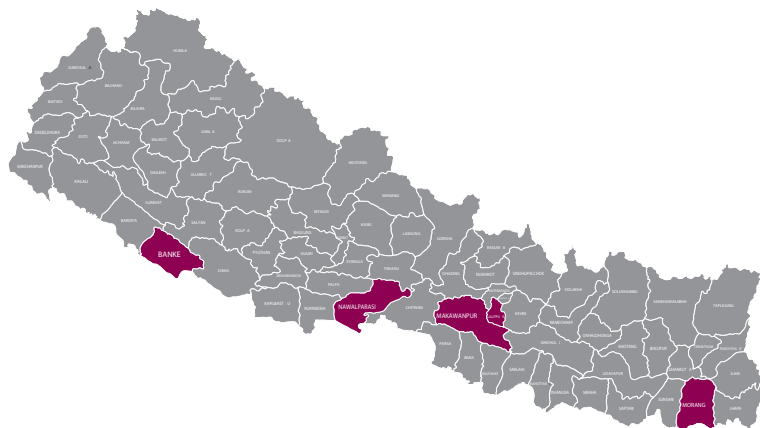
Sexual and gender based violence cases are increasing day by day and it has been an issue of concern. Due to patriarchal mindsets and attitudes, women do not file complaints because of fear of being re-victimized. The legal framework of SGBV is comprehensive in context of Nepal. However, there have been implementation challenges.

The major objectives of the study are:

- To find out the present scenario of the cases of sexual and gender based violence, its proceedings in the court and implementation of the decision.
- To monitor the cases of sexual and gender violence in trial in 5 selected district courts of Nepal and to review the implementation gaps of legal framework against SGBV that impede women's access to justice.
- To analyze the behavior of court towards the victim as well as the perpetrators and develop recommendations to enhance victim-centric approaches in courts.

1.3 Research Area of the Study

The 5 selected districts: Morang, Makwanpur, Lalitpur, Banke, Nawalparasi are taken as research area of the study.



1.4 Methodology of the Study

The court watch monitoring was conducted to identify the procedural aspects of the cases of sexual and gender based violence, to identify the types of cases, attitude of the court and to know whether the court proceedings establish access to justice⁶ or not and procedural gaps in the SGBV cases. In this regard, CEDAW, General recommendation 33 and 35 were taken into reference throughout the study. The following activities were conducted for completion of the study:

-
6. General Recommendation 33, para 18 (f) Access to justice guarantees the possibility of taking measures in order to protect the victims' privacy and image by the prohibition of image capturing and broadcasting, in cases where this may violate the dignity, emotional condition and security of girls and women, protection of women complainants, witnesses, defendants and prisoners against threats, harassment and other harm before, during and after legal proceedings and provide the budgets, resources, guidelines and monitoring and legislative frameworks necessary to ensure that protective measures function effectively.

Preparation of the Court Watch Monitoring Framework

The court watch monitoring framework was prepared for the purpose of monitoring. The framework tried to capture the trials proceedings in the court regarding SGBV cases to find out the gaps and difficulties faced by the victims.

Training to the District Researchers

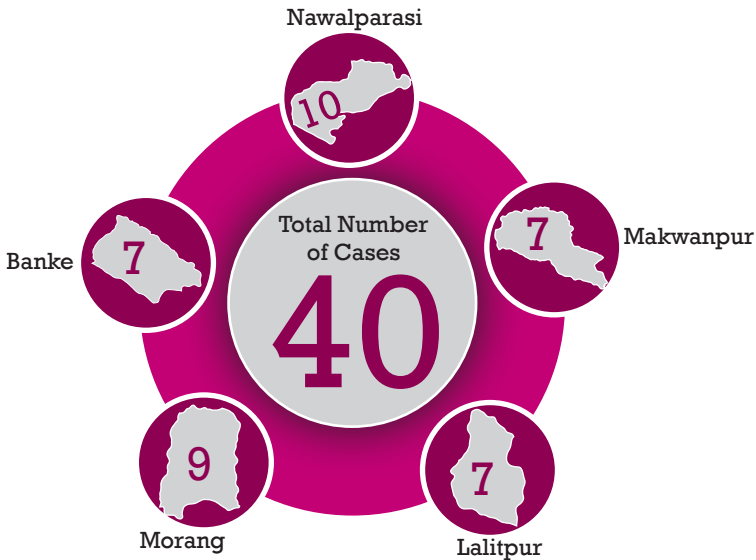
The researchers were first briefed about the objectives of the study along with the court watch monitoring framework and the procedures to carry out the study. The international obligations in CEDAW and its general recommendations were also briefed during the trainings.

Approval from the court

The approval from the relevant courts was taken in order to carry out the court watch monitoring process.

Identification of SGBV cases

The total number of 40 SGBV cases that are in trial in selected district courts were taken from following districts:



Duration of Court Watch Monitoring Framework

The duration of court watch monitoring was 6 months from February to July, 2018. During the time period, the researchers observed 40 cases from selected districts and the following components were analyzed:

- Implementation of procedural law in SGBV cases.
- Obstacles and challenges faced by the victims of SGBV.
- Decision in cases of SGBV

1.5 Limitation of the Study

The Court Watch Monitoring only covers 40 SGBV cases that are in trial in 5 selected District Courts i.e. Morang, Nawalparasi, Banke, Makwanpur and Lalitpur. The study is an indicative report to analyze the implementation gaps in the court procedures of SGBV cases.

CEDAW AND ITS APPLICATION IN NEPAL

2.1 International Framework and SGBV

Over the past 30 years, Violence against Women (VAW) has progressed from a relatively unaddressed issue at the international level to an issue that is recognized as a key women's human rights concern. International human rights law has in turn established a body of law and jurisprudence that recognizes and addresses VAW.

The UN Declaration on the Elimination of Violence against Women was adopted by the United Nations General Assembly in 1993 in its resolution 48/104 of 20 December 1993. The 1993 Declaration on the Elimination of Violence against Women became the first international instrument explicitly addressing violence against women, providing a framework for national and international action. It defines violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

The United Nations Commission on Human Rights in resolution 1994/45, adopted on 4 March 1994, decided to appoint a Special Rapporteur on violence against women, including its causes and consequences. The special rapporteur is mandated to seek and receive information on violence against women, recommend

ways to eliminate violence against women at national, regional and intersectionality levels, and work collaboratively with the other United Nations human rights mechanisms.

A central development in the recognition of VAW in international human rights law has been the interpretation and application of specific rights to cases involving VAW. Through a significant conceptual shift, general human rights treaties are now regarded as applicable to VAW. For example, sexual violence of sufficient severity may constitute torture, as found in *Mejía v Perú* (IACtHR, 1996), while forms of GBVAW may amount to violation of respect for one's private life, as found in *X and Y v Netherlands* (ECtHR, 1985).

The expansion of the application of human rights guarantees beyond negative rights to positive obligations has also served to combat VAW. The shift from the requirement of mere abstention to the obligation for States to adopt systemic measures to address structural issues has ensured more effective and fair prosecutions, investigations, court procedures and evidentiary rules.

Further, the development of due diligence obligations in their application to GBVAW committed by non-State actors has expanded the protection of women's human rights. For example, the Committee against Torture in General Comment No 2 found private bodies accountable for VAW through torture.

2.2 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

CEDAW is also known as international bill of women's right. Nepal ratified CEDW on 22 April 1991 without any reservation. Although the text of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) does not expressly mention VAW except in its Article 6 "Trafficking and Exploitation of Prostitution" which states that state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. However, since

its adoption the CEDAW Committee has firmly entrenched the recognition of GBVAW as discrimination and the prohibition on VAW as a norm of customary international law. Through its authoritative General Recommendations (GR), CEDAW frames VAW in terms of substantive equality and non-discrimination.

The CEDAW Committee adopted General Recommendation 12 on Violence against women in eighth session, 1989 and General Recommendation 19 on Violence against women in 11th session, 1992 which first addressed the issue of VAW and affirmed States' obligations to enact legislation, institutional mechanisms and data collection on VAW. Crucially, General Recommendation 19 defines VAW as a form of discrimination under the Convention. VAW has also been addressed through communication and inquiry procedures of the Optional Protocol to CEDAW.

Further CEDAW Committee adopted GR 33 on access to justice in 2015 which aims to address women's right to access justice holistically. It identifies major obstacles such as discriminatory laws and gender bias within the justice system. For instance, paragraph 51 deals with women and the criminal justice system addressing inter alia statutory limitations, secondary victimization, rules of evidence and their implementation, issues that are all significant in the context of sexual violence. Similarly, paragraph 19 deals with the provision of remedies, specifically referring to measures for reparations.

The CEDAW Committee adopted GR 35 on gender-based violence against women, updating General Recommendation No. 19 in 2017 that sums up past developments and carries them forward as it affirms that the prohibition of violence is a norm of customary international law and offers a detailed, structural analysis of the contexts in which VAW occurs. It affirms that violation of sexual and reproductive health and rights of women may be a form of VAW and amount to torture in some cases, while also dealing with contemporary forms of violence such as those occurring online. GR 35 further recommends the sexual assault be characterized as a crime against the right to personal security and physical, sexual

and psychological integrity and that sexual crimes be based on the lack of freely given consent.

2.3 Concluding Observations on Sixth Periodic Report of CEDAW Committee⁷

The CEDAW Committee considered the sixth periodic report of Nepal at its 1631 and 1632 meetings held on 23 October 2018. The CEDAW Committee then issued the Concluding Observations on sixth periodic Report whereby the Committee noted with appreciation for the efforts of the State to review and revise sexual and gender based violence provisions including Act to Amend Some Nepal Acts for Maintaining Gender Equality and Ending Gender Based Violence, in 2015; The Witchcraft-related Accusation (Crime and Punishment Act), in 2015 and The Sexual Harassment at the Workplace (Elimination) Act, in 2015, however the Committee is concerned about statute of limitation and difficulties in registration of sexual and gender based violence cases.

The principle areas of concern showed by the Committee are:

- a) The statute of limitation which provides for a period of one year to file cases of rape and other forms of sexual violence, fails to take into account the stigma that women and girls face when reporting on sexual and gender-based crimes and, therefore, fosters impunity for such crimes;
- b) The fact that judicial and law enforcement officers, especially at the local level, prevent the registration of sexual and gender based violence, and do not comply with rulings of higher courts and fail to execute such judgements.

7. Concluding Observation on Sixth Periodic Report of CEDAW Committee, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/NPL/CO/6&Lang=En.

The Committee recommends that the State party, in line with its General Recommendation No. 33 (2015) on women's access to justice:

- a) Reinforce targeted outreach activities to disseminate information on the legal framework, available mechanisms to access justice and legal aid schemes, and promote a culture and a social environment in which justice-seeking by women is viewed as both legitimate and acceptable rather than as a cause for additional discrimination or stigmatization;
- b) Provide targeted financial support and legal aid in commonly spoken languages for women facing intersecting and multiple forms of discrimination, such as Dalit women, indigenous women, including Madhesi and Tharu, women from religious minorities, women with disabilities, women living in remote areas, LGBTI women, displaced and migrant women;
- c) Repeal the statute of limitation provision on the registration of sexual violence cases in all contexts to ensure women's effective access to courts for the crime of rape and other sexual offences;
- d) Provide mandatory training through the National Judicial Academy to all members of the judiciary, including members of Judicial Committees, and law enforcement officers on women's rights, as well as on gender-sensitive investigation and interrogation procedures in cases of gender-based violence against women, in line with commitments made at the second cycle of the Universal Periodic Review (A/HRC/31/9, para. 122.46).

Further, the Committee recommends that the State party, in line with its General Recommendation No. 35 (2017) on gender-based violence against women, updating General Recommendation No. 19:

- a) Develop targeted awareness raising for communities that are particularly affected by gender-based violence against women, including indigenous communities and communities living in temporary shelters, provide special opportunities for

their access to the Gender-Based Violence Elimination Fund and promote the participation of indigenous women in the police service;

- b) Adopt the National Strategy and Action Plan on Gender Empowerment and Ending Gender Based Violence before the end of 2018, as indicated during the dialogue, and allocate adequate resources for its implementation, including for the Gender-based Violence Elimination Fund;
- c) Amend provisions of the Penal Code to recognize sexual violence, including rape and forced abortion, as a form of torture and bring the definition of rape in line with the Rome Statute, in line with commitments made at the second cycle of the Universal Periodic Review (A/HRC/31/9, paras. 121.8-9 and 122.13).

2.4 Application of CEDAW by Judiciary in Nepal

As per Section 9 of Nepal Treaty Act 1991, it states that the international provisions shall be enforceable as national law once Nepal ratifies the instrument and the Government of Nepal is therefore obligated to adopt legislative, executive and judiciary mechanisms in regard to CEDAW. The brief discussion about how judiciary has taken CEDAW into consideration while making decisions in various cases of sexual and gender based violence cases has been made.

- In the case of *Jyoti Poudel vs. Government of Nepal*, the Supreme Court has issued a directive order to amend the Domestic Violence (Offence and Punishment) Act 2066 (2009) in order to incorporate the serious crimes in Schedule 1 of the Prosecution Act 2049 (1992) and to establish a fast-track court for trying these cases by taking consideration into various articles of CEDAW such as Articles 2 (b) (f), 3 and 5.⁸

8. *Jyoti Poudel and others v. Nepal Government and others*, NKP 2066, Writ no.: WO-0424, Decision no. 8282.

- In the case of *Sapana Pradhan Malla vs. the Government of Nepal*, the Supreme Court of Nepal has issued directives order for the privacy and protection of the victim in certain cases, including SGBV.⁹
- In the case of *Sharmila Parajuli vs. Government of Nepal*, the Supreme Court of Nepal has ordered to make appropriate laws by making a study on sexual harassment by taking a special reference to Article 2 of CEDAW which states that state has the obligation to adopt measures in order to prevent sexual harassment and any kind of discrimination against women.¹⁰
- In the case of *Jyoti Poudel vs. the Government of Nepal*, the Supreme Court of Nepal has issued a directive order to establish an investigation within three years and to specifically assign jobs for investigation. The directive also called to issue an investigation manual for serious crimes, including those against women. In this case, it is stated that Nepal being a party of CEDAW is obliged to adopt measures for fast track justice system to the victims of domestic violence.¹¹
- In the case of *Suntali Dharmi vs. the Government of Nepal*, the Supreme Court of Nepal delivered the verdict that the extraordinary jurisdiction of the Supreme Court under Article 107 of the Interim Constitution cannot be obstructed or limited by the provision of Article 135, which provides professional immunity and discretionary power to the Attorney General for prosecuting or not prosecuting in the court of justice by making a special reference to the CEDAW and one of the essential right that is access to justice This is a new dimension of jurisprudence in the Nepali criminal justice system. The

9. Advocate Sapana Pradhan Malla v. Nepal Government, Prime Minister, Council of Ministers and others, NKP2063, Writ No.: 3561

10. Advocate Sharmila Parajuli v. HMG Ministry of Law, NKP 2060, Writ No.: 3434, Decision No.: 7449

11. Jyoti (Lamsal) Poudel and others v. Nepal Governmet and others, NKP 2067, Writ No.: 0663, Decision No.: 8507

Supreme Court can now review any cases on the basis of malafide and arbitrary exercise of this power where either some of the perpetrators have not been prosecuted or the case itself has been dropped due to subjective reasons. Thus, the Supreme Court of Nepal can review the decision of the Attorney General or its subordinates on the aforementioned grounds.¹²

- In the case of *Laxmi Dhikta Vs Office of Prime Minister, Singha Durbar*, a directive order has been issued in the name of the Office of the Prime Minister and Cabinet of the Government of Nepal, Ministry of Health and Population and the Ministry of Law and Justice to initiate the process on making a separate and comprehensive law on the abortion-related matters by incorporating various aspects of the abortion-related matters that are discussed hereinbefore in the foregoing paragraphs incorporating the provisions made by the international instruments on human rights relating to the reproductive rights of women such as Article 16.1 of the CEDAW which has specially addressed the issue relating to women's right on decision of birthing and other articles which have especially addressed the issues relating to women's right to health, reproductive health and family planning.¹³

Several Mandamus orders and directive orders have been issued by the Supreme Court in line with the Articles of CEDAW and have been making special reference to CEDAW while making decisions.

12. Suntali Dhami (Shah) v. Office of the Prime Minister and Council of Ministers, et.al, NKP 2068, Writ No.: 0584, Decision No.: 8541

13. Laxmi Dhikta Vs Office of Prime Minister, NKP 2067, Decision. No. 8464, Edition 9, Pg. 1551.

LEGAL FRAMEWORK AGAINST SGBV

The Constitution of Nepal guarantees the right not to be subjected to SGBV, as one of its fundamental rights of women.¹⁴

The recently repealed Country Code of Nepal defines gender-based violence as an act committed on the basis of gender that may inflict physical, sexual or psychological harm to the victim. The Country Criminal (Code) Act, 2017 that came into force from August, 2018 has no definition on GBV in Nepalese legal framework.

Nepal has also made a determined effort to combat SGBV by passing specific legislation on different aspects of SGBV, including: the Domestic Violence (Offense and Punishment) Act 2009; the Human Trafficking and Transportation (Control) Act 2007; The Sexual Harassment at the Workplace (Elimination) Act, 2015; the Witchcraft Allegation (Offense and Punishment) Act 2016; the GBV Relief Fund Regulation; and the different chapters of the Country Criminal (Code) Act 2017 that set out the laws on rape, Sexual Abuses, Marriage, Menstrual Violence, Discrimination, Acid Attack, Dowry and Cyber-crime.

14. Constitution of Nepal 2015, Article 38(3), "No woman shall be subjected to physical, mental, sexual, psychological or other form of violence or exploitation on grounds of religion, social, cultural tradition, practice or on any other grounds. Such act shall be punishable by law, and the victim shall have the right to obtain compensation in accordance with law."

3.1 Law against Rape



The Chapter on Rape in Country Criminal (Code) Act, 2017¹⁵ defines the crime of rape as non-consensual intercourse with an adult woman or any intercourse with a girl under 18 (thereby defining rape as committed by men against women and girls. The chapter stipulates the punishment for the offender, ranging from 10 to 20 years imprisonment¹⁶ Section 220 states about the rape not be committed within incest. Similarly, it prohibits sexual abuse against child.¹⁷ Section 228 mentions about the appropriate compensation to the victim. The limitation to file the case is 1 year from the date of occurrence of offence except in the incest rape.¹⁸

3.2 Law against Domestic Violence



“Domestic Violence” is defined as any form of physical, mental, sexual or economic harm perpetrated by one person to a person with whom he/she has a domestic relationship and includes any acts of reprimand or emotional harm.¹⁹ The Domestic Violence (Offense and Punishment) Act 2009 bestows the right to file claims with the Police Office, National Women's Commission or local bodies (such as municipalities and village executive), by any person who has reason to believe that an act of domestic violence has been, is being, or is likely to be, committed.²⁰ A person who commits an act of domestic violence shall be punished with a fine of three thousand rupees up to twenty five thousand rupees or

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15. Country Criminal (Code) Act 2017, Chapter on Offence relating to Rape, Section 219.
 16. Id, Section 219 (3).
 17. Id, Section 225.
 18. Id, Section 229.
 19. Domestic Violence (Offense and Punishment) Act 2009, Section 2 (a).
 20. Id, Section 4

six months of imprisonment, or both.²¹ The Act provides that the proceedings of such cases shall be in-camera.²² It also provides for compensation to be granted to the victim of domestic violence, depending on the nature of the act of domestic violence and degree of pain suffered by the victim.²³ The offense of domestic violence must be reported within 90 days of the commission of the crime.²⁴

3.3 Law against Human Trafficking



The Human Trafficking and Transportation (Control) Act 2007 (HTTCA) defines activities that are deemed to be human trafficking and human transportation.²⁵ The reporting of cases related to human trafficking are made to the nearest police office.²⁶ The Act states that any person who commits an offence of buying or selling a human being, shall be punished with twenty years imprisonment and fined two hundred thousand rupees.²⁷ The Act also provides for a translator and interpreter, if the working language used by the concerned court is not understandable by the victim.²⁸ According to the Act, the compensation to the victims of trafficking shall not be less than half of the fine levied as punishment to the offender.²⁹ The Act also decrees the maintenance of confidentiality of the name and address of the informant.³⁰ The Government of Nepal is the plaintiff in all cases filed under this Act³¹ and the proceeding of the cases are captured in camera.³²

21. Domestic Violence (Offense and Punishment) Act 2009, Section 13 (1)

22. Id, Section 7

23. Id, Section 10

24. Id, Section 14

25. Human Trafficking and Transportation (Control) Act 2007, Sec. 4 (1) and (2).

26. Id Section 5.

27. Id Section 15.

28. Id Section 11.

29. Id Section 17 (1).

30. Id Section 20.

31. Id Section 28.

32. Id Section 27.

3.4 Laws against Sexual Harassment



Sexual Harassment at the Workplace (Elimination) Act, 2015 defines sexual harassment at the workplace as physical touch with sexual intent, demonstrating sexual objects, audio-visual objects or other seductive materials at the workplace. Country Criminal (Code) Act, 2017 prohibits sexual harassment at any places.³³

3.5 Law against Accusation and Torture as a Witch



The Witchcraft Allegation (Offense and Punishment) Act 2016 defines an offence of making a witchcraft allegation as the act of alleging any person practices witchcraft. It provides for victim protection and compensation.³⁴ Similarly, Country Criminal (Code) Act, 2017 prohibits inhumane treatment to any person.³⁵

3.6 Law against Marital Rape



Sexual intercourse by a husband with his wife without her consent is defined as marital rape, as per the Country Criminal (Code) Act, 2017, Chapter on Sexual Violence.³⁶ According to this clause, any husband who commits marital rape shall be punished with imprisonment up to

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33. Country Criminal (Code) Act 2017, Section 224 Prohibition of sexual harassment: (1) No person shall commit, or caused to be committed, sexual harassment to another person.
 34. Witchcraft Allegation (Offense and Punishment) Act 2016, Sec 6, Sec. 7, Sec. 12, and Sec. 17
 35. Country Criminal (Code) Act 2017, Chapter on Offence relating to Discrimination and other degrading treatment, Section 168 (1) (a) (b).
 36. Country Criminal (Code) Act 2017, Chapter on Offence relating to Rape, Section 219 (4)

5 years.³⁷ The Country Civil (Code) Act, 2017 also provides that marital rape can be one of the grounds for divorce.³⁸

The Country Criminal (Code) Act, 2017 further provides that, a wife who has filed a claim of marital rape shall be provided with special security until the case is decided by the court. While doing so, the court could render the below mentioned orders:³⁹

1. To treat the wife humanely, providing her with all her maintenance and basic needs.
2. To provide her with necessary cost of health services.
3. If the situation persists, where the husband and wife could not stay together, to manage the place to live separately where the husband shall bear all the unnecessary costs of the wife.
4. To fulfill all the necessary duties and responsibilities towards the wife regarding her security.

3.7 Law against Dowry



Country Criminal (Code) Act, 2017, prohibits bridegroom and his family to transact expensive gifts and property from a bride's family.⁴⁰ The Act prohibits the Bridegroom's side or vice versa from compelling the bride's side or the groom's side to give cash, goods, *Daijo*, donation, gift, or farewell gift for the bride or bride groom, and also prohibits any agreement between the families to do this as a condition for the husband to accept the wife

37. Country Criminal (Code) Act 2017, Chapter on Offence relating to Rape, Section 219 (4)

38. Country Civil (Code) Act 2017, Chapter on Divorce, Section 95 (f).

39. Country Criminal (Code) Act 2017, Chapter on Offence relating to Rape, Section 219 (5).

40. Country Criminal (Code) Act 2017, Chapter on Offence relating to Marriage, Section 174 (1).

or for the wife to accept the husband.⁴¹ The punishment stipulated for such crime of asking dowry during the marriage ceremony is up to 3 years of imprisonment or fine up to Rs. 30,000 or both and the taken property must be returned.⁴²

In the previous Country Code, the punishment was imposed only on the act of asking dowry during the marriage ceremony, but, in the current Country Criminal (Code) Act, 2017, the act of asking dowry even after the marriage ceremony is also taken as a crime.⁴³ The punishment imposed on such act is up to 5 years of imprisonment or fine up to Rs. 50,000 or both.⁴⁴

3.8 Law against Menstrual Violence



The Country Criminal (Code) Act, 2017 states that any act of discrimination, untouchability or inhumane act towards women by keeping her in "Chhaupadi" in her menstrual period or lactating period is prohibited.⁴⁵

The punishment imposed on such act is up to 3 months of imprisonment or fine up to Rs. 3,000 or both.⁴⁶ If any public service officer commits such violence, the offender is liable to additional 3 months of imprisonment.⁴⁷

The time limitation for the complaint is 6 months from the date of the offense.⁴⁸

41. Country Criminal (Code) Act 2017, Chapter on Offence relating to Marriage, Section 174 (1).

42. Id, Section 174 (2).

43. Id, Section 174 (3).

44. Id, Section 174 (4).

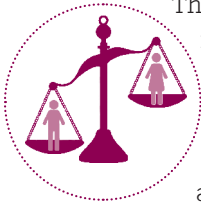
45. Country Criminal (Code) Act 2017, Chapter on Offence relating to Discrimination and other degrading treatment,, Section 168 (3).

46. Id, Section 168 (4).

47. Id, Section 168 (5).

48. Id, Section 170 (2).

3.9 Law against Discrimination against Women



The Country Criminal (Code) Act, 2017 states that no person shall act discriminatory knowingly upon any citizen on the basis of sex, marital status and pregnancy.⁴⁹

If acted so, the punishment imposed on such act is stipulated up to 3 years of imprisonment or fine up to Rs. 30,000 or both.⁵⁰

3.10 Law against Child Marriage



The Country Criminal (Code) Act, 2017, Chapter on Marriage provides that both parties must be 20 years of age for solemnizing a marriage.⁵¹

It states that early marriage, marriage before attaining the age of 20 years, is a punishable offense. The jurisdiction to hear such cases lies

with the District Court. Any person involved in solemnizing a child marriage shall be punished up to 3 years of imprisonment and fine up to Rs. 30,000.⁵² The limitation period to file a claim related to child marriage is only 3 months from the date of knowledge of the incident, which is a very short period, especially if a child forced to marry is very young, is uneducated, or in a remote area. They may not know at the time of the marriage that it was unlawful, and may not have access to legal support. The child marriage will ipso facto be void.

49. Country Criminal (Code) Act 2017, Chapter on Offence relating to Discrimination and other degrading treatment., Section, Section 160 (1).

50. Id, Section 160 (2).

51. Country Criminal (Code) Act 2017, Chapter on Offence relating to Marriage, Section 173(1).

52. Id, Section 173(3).

3.11 Law against Cyber- crime

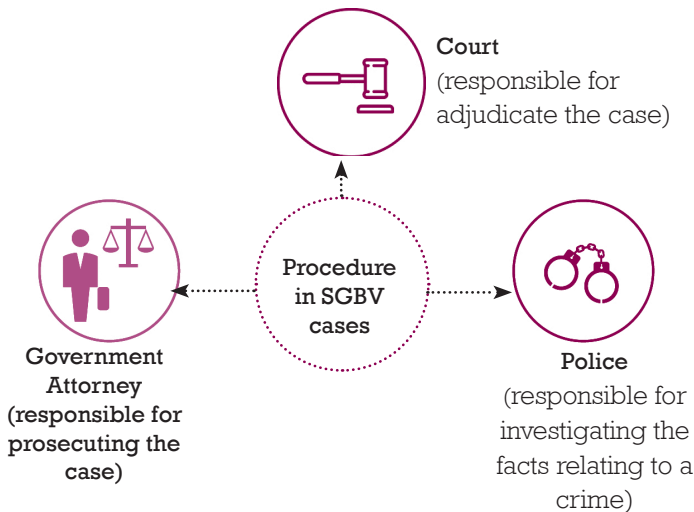
The Country Criminal (Code) Act, 2017, Chapter on Offence relating to Defamation provides that no person shall commit libel. The Act prohibits any person by words in writing, by conduct or by signs or by visible representation or by publicity or by other means to damage the character of another person.⁵³ Any person involved in libel shall be punished up to 2 years of imprisonment or fine up to Rs. 20,000 or both and if the libel is committed or caused to be committed by electronic means or other means of mass communication, such person shall be imposed additional sentence upto 1 year imprisonment or a fine upto Rs. 10,000.⁵⁴ The limitation period to file a claim related to libel is 3 months from the date of knowledge of the commission of the offence.

53. Country Criminal (Code) Act 2017, Chapter on Offence relating to Defamation, Section 306 (2) (a).

54. Id, Section 307 (1).

ADJUDICATIVE MECHANISM IN NEPAL

In SGBV cases, the police are responsible for investigating the facts relating to a crime, Government Attorneys for prosecuting the case, and the Court to adjudicate the case.

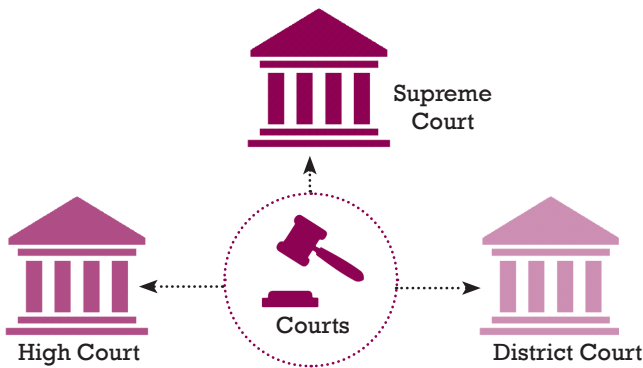


4.1 Courts

Constitution of Nepal 2015 states about the establishment of three tiers of courts⁵⁵ to provide justice to conserve the fundamental

55. Constitution of Nepal 2015, Part 11, Article 127 (1).

rights provided by the constitution, promoting the full assurance of human rights and rule of law and also giving punishment to the criminals and provide justice to the victims in Nepal. As per Article 124 sub article (1) of the Constitution, there will be Supreme Court, High Courts, District Courts and other judicial bodies, Special Court, Administrative Court, Labor Court, Loan Recovery Tribunal, Revenue Tribunal and Foreign Employment Tribunal.



(a) Supreme Court

According to the Constitution, Supreme Court as the record keeping court holds the right of final interpretation of constitution and law. Supreme Court also holds the right to give necessary direction to other courts and judicial bodies after examining and supervising the administrative justice and management. Everyone must follow the legal principle interpreted or propounded by the Supreme Court.

(b) High Court

Except other provisions in the prevailing law, High Court was established to hear the appeal on the first or last decision on cases given by District, Provincial or any other body or by official who are within its jurisdiction. This Court hears appeal on the decision made by the first instance court with the rights to reverse

or upheld decisions, also have right to initiate and finalize some special cases. The initial proceedings and finalizing of cases which are not stated by law, cases ordered by the Supreme Court and cases of contempt of courts falls under the jurisdiction of High Court.

(c) District Court

Except other provisions made by the Federal Law, District Court is provided with the rights to initiate and finalize all the cases within its jurisdiction, oversee the writs including habeas corpus injunction, hear the appeal over the decision made by the quasi-judicial body, hear appeal over the decision given by the local level judicial bodies established according to the provincial law, right to sentence punishment by initiating the case of contempt if anyone hinder the work of judicial bodies under its jurisdiction or if disobeys orders or decisions.

4.2 Office of the Attorney General

Attorney General is the main advisor of Government of Nepal responsible to give advises to the Government and other officers determined by the Nepal Government on constitutional and legal topics. The Constitution has given rights to the Attorney General to decide whether to proceed or not in cases where there is an interest or concerns of Nepal government. Attorney General or government lawyer who are under the authority of Attorney General represent Government of Nepal. Without the advice of Attorney General, the cases filed by the Government of Nepal cannot be withdrawn. High level government attorney office, special government attorney office and district government attorney office are under the authority of Attorney General.

4.3 Nepal Police

Crime investigation department, women and children service directorate, central investigation bureau and metropolitan crime

control division are the important organs within the internal organized structure of Nepal Police. The crime investigation department works on developing policies relating to crime investigation, directs the offices under its authority, monitor as well as manage other works relating to crime control and investigation. Along with crime control, maintaining peace and security is also one of its main responsibilities. Nepal Police is stated as the body to investigate the criminal cases. Within the central crime investigation department, Nepal police has established children service directorate and 210 police offices around whole Nepal and has made provisions to file cases in those offices.

4.4 Some Challenges in Implementation Process

In terms of the legal framework, the SGBV protection laws show that they are relatively comprehensive in addressing SGBV issues. Procedurally these laws also include clauses regarding compensation and in-camera hearing of the cases relating to women and children. There is also the procedure of continuous hearing to ensure the speedy justice in these types of cases.

However, there remains some gaps, and also some challenges in implementation.

One of the challenges, in terms of access to justice is that, the statutory limitation periods set by the law in various SGBV cases are insufficient.

Another challenge in implementation concerns women's knowledge on the laws. A Study on Gender-Based Violence conducted in Selected Rural Districts of Nepal in 2012 by Office of the Prime Minister indicated that a majority of women (61.3%) were unaware of any laws that address GBV. And only 13% were aware of the specific law against domestic violence. Only about one quarter of women (24.8%) were aware of services available to the survivors of GBV. A very small percentage (5.6%) of women knew of shelter homes (women's refuges) at the district level, and the same percentage of women (6.1%) knew of the desk at

the District Development Committee dedicated to handling GBV cases. Five percent were aware of the women's and children's center at the district police office. Only seven women were aware that there is a GBV-focused District Resource Group led by the Chief District Officer (CDO). The importance of continued public education on this issue, including the legal protection mechanisms, cannot be over-emphasized.

However, there lies a lack of coordination between Government Attorney, police and court. Women representation on such offices is very low in number. There are 2 women judges out of 19 in Supreme Court, 10 women judges out of 147 in High Court and 3 women judges out of 234 in District Court⁵⁶ and there also lacks gender sensitivity in the offices. The criminal procedure in Nepal is still apparently adversarial/ accusatorial in nature. The court proceeding starts with 'record of the deposition' of the suspect necessarily. The suspect is free to confirm or reject the statement he/she made in the police office. The proceedings of the case all depends on the evidences presented by the victims and collected by the investigating officers. In context of Nepal, the role of the investigating officer has been criticized in various contexts. When we make a reference to a recent case of 13 years old Nirmala Panta, where she was raped and murdered and her dead body was found later. When her mother filed FIR, there was no immediate response from the police. Videos were found in social media where the police officials were trying to destroy the evidences related to this case.⁵⁷ It was found that there was lack of accountability from the police for the protection of the evidences. However, no accountability mechanisms were found to be enforced. The police officers involved in the destruction of evidences have now been dismissed. However, the weak investigation system and lack of accountability has led to delay in justice to the victim. In rape cases, since the onus of proof lies on

56. Shadow Report on 6th periodic report of Nepal on CEDAW, Page 17.

57. <http://epaper.ekantipur.com/epaper/the-kathmandu-post/2018-09-27/2018-09-27.pdf>

the prosecutors, the accused is considered innocent and should get the benefit of the doubt until and unless proven guilty. Against humanistic jurisprudential norms, victims are implicitly subjected to burden of proving the absence of consent.

The complexity of the legal proceedings can be a barrier for women who do not have high levels of education, and/or who do not have access to legal aid. There also is a lack of support mechanism resulting in less reporting about the SGBV cases.

Long delays in court proceedings mean it is a time-consuming and long-term commitment for a woman to pursue a claim, which can impinge on livelihood and/or family commitments and responsibilities, and could be deciding factors for survivors' willingness to proceed.

The complaint process is complex, which makes it difficult for the victims to receive compensations in practice even though there is a provision of compensation written in law.

The problems associated with the adjudication system are largely procedural in nature. Poor investigation and hurried prosecutions result in a lack of evidence and significant problems for effective prosecutions. Trial delay has also become common place in the Nepalese judicial practice despite court rules, and timely execution of judgments is another challenge in SGBV cases.

OBSERVATION AND FINDINGS OF THE STUDY

The court watch monitoring study was carried out to find out the implementation gaps of legal framework in the SGBV cases. The following number of cases was observed from 5 selected district courts.

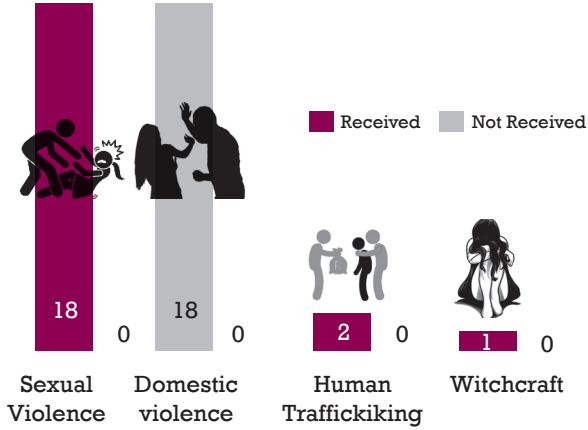
Number of Cases



5.1 Findings of the Study

The legal aid is provided in 21 cases (18 cases of sexual violence, 2 cases of human trafficking and 1 case of witchcraft). The legal aid is provided in the criminal cases where government is plaintiff.

Figure 1: Legal Aid to the victims of SGBV



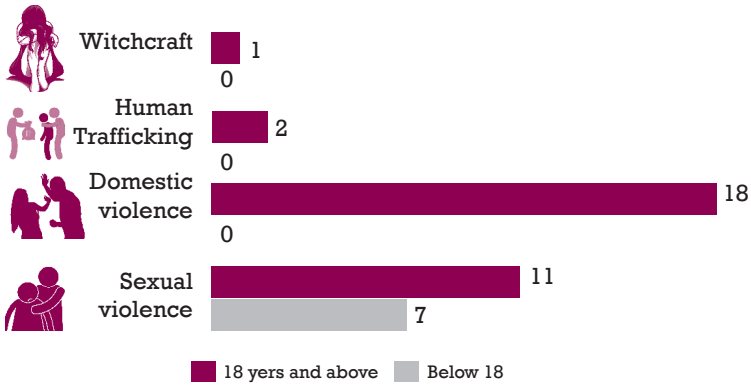
However, the victims can seek legal aid from NGO's or they can keep their own lawyers.

Legal Aid Act, 1997 in Section 3 states that a person having less than the specified annual income shall only be entitled to Legal Aid under this Act. Rule 6 of Legal Aid Rules 1998 states that the committee shall not entitle any person who has the Annual income more the Forty Thousand, for legal aid.

Here, it is seen that victims of 18 cases of domestic violence have not received legal aid. Though law states about provision of legal aid to the economically vulnerable people, it does not include socially vulnerable groups. Section 11 (4) of Domestic Violence Act states that The Service Centre shall provide, as per necessity, legal aid, psycho-consultation service, psychological Service and economic aid to the Victim. However, it is seen that the victims are not provided with such aid.⁵⁸

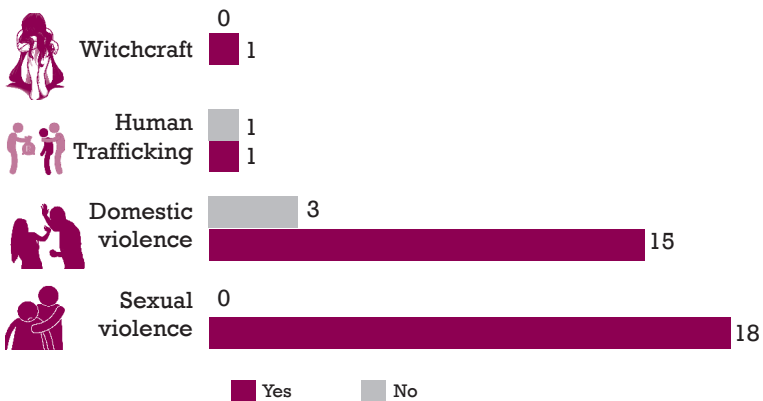
58. Ensuring fees or court charges are not imposed on victims/survivors. (General Recommendation 35, para 44)

Figure 2: Age of the victims of sexual violence



The figure shows that out of 18 cases of sexual violence including rape, incest, and sexual abuse; significant number of victims is below 18 years. The vulnerable group has been the victims of rape because of their innocence, inability to defense and protect them. They were easily lured by the perpetrators by giving nominal amount of money, some food and were victimized when the victims were alone in the homes or in the jungles when they were carrying out their daily works.

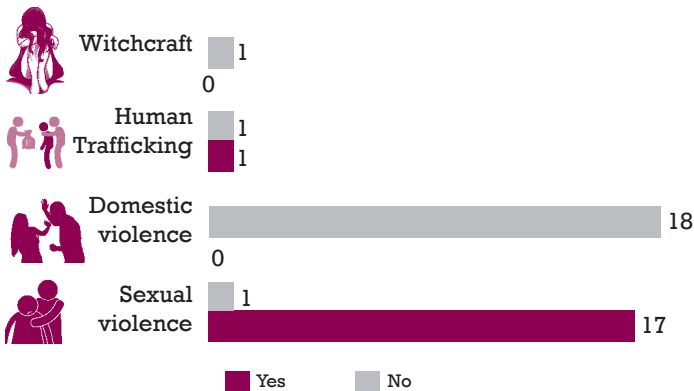
Figure 3: In camera hearing



The Country Criminal Procedure (Code) Act, 2017 ensures in camera hearing proceedings in cases of human trafficking, violence against women, rape and cases relating to husband and wife.⁵⁹ Similarly, Human Trafficking and Transportation (Control) Act, 2064 provides for in camera hearings in offences under this Act.⁶⁰ Domestic Violence (Offence and Punishment) Act, 2009 also states about the proceedings to be held in camera if it is so requested by the Victim.⁶¹

The in camera hearing has been ensured in the sexual violence, human trafficking and witchcraft cases in accordance with law. However, the in camera hearing proceedings have not been ensured in 3 cases of domestic violence cases.

Figure 4: Protection of Privacy



Country Criminal Code Procedure Regulation, 2018 states that the protection of privacy is to be ensured in the cases proceeded within in camera hearing.⁶² The personal identification of victims is to be maintained confidential throughout the case hearing.⁶³

59. Country Criminal Procedure (Code) Act 2017, Section 129 (2).

60. Human Trafficking and Transportation (Control) Act, 2064, Section 27.

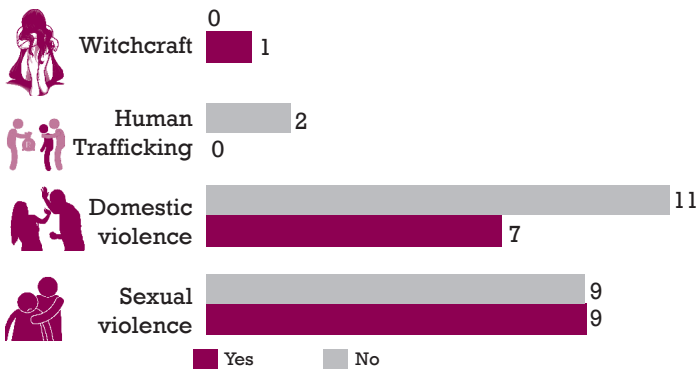
61. Domestic Violence (Offence and Punishment) Act, 2009, Section 7.

62. Country Criminal Code Procedure Regulation, 2018, Rule 63.

63. Country Criminal Code Procedure Regulation, 2018, Rule 64.

Privacy has been maintained by keeping the pseudo names in the 17 cases of sexual violence but it is seen that in one of the case of Nawalparasi, during FIR and examination of witness, the name has been changed but the address of the victim has not been kept confidential and in another case of Makwanpur, privacy is not maintained during FIR and statement of witness. Likewise, privacy has not been maintained in 18 cases of domestic violence.

Figure 5: Order for protection of victim



The order for the protection of the victim is not found to have given in the significant cases of sexual violence during the examination of witness during the monitoring. The state is liable to prevent re-victimization of the victims through ensuring safety of the victim and witness as there is possibility of victims being threatened and thus can become hostile during the proceedings of the case.

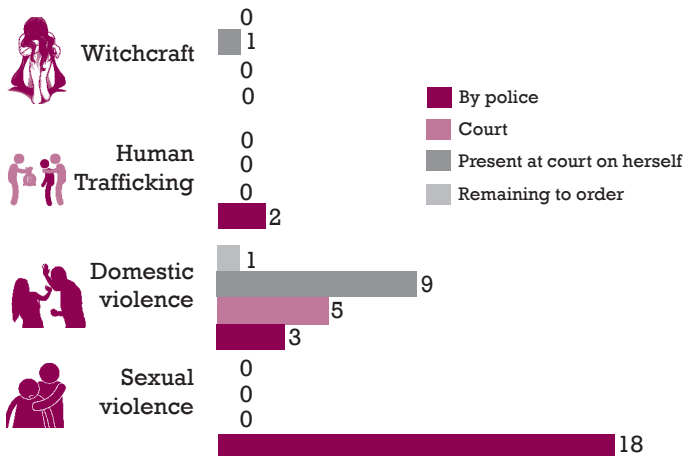
Section 5 of Domestic Violence (Offence and Punishment) Act clearly states that Interim protection order may be granted, however it is seen that the no any interim protection order is granted in 11 cases of domestic violence. In one of the case of Lalitpur, even after the application for protection was filed it was not ensured.

Human Trafficking and Transportation (Control) Act, 2007 provides that if a person provides reasonable ground and requests the nearest police office for security against any type of retaliation for reporting to the police under Section 5 or providing statement on

court or remaining as a witness, that police officer should provide any or all of the following protection measures to him/her: provide security during traveling in course of attending case proceeding in court, make arrangement to keep under police protection for certain period keep at rehabilitation center.⁶⁴

Despite the legal framework of order for protection of victims, it has not been ensured as per the police due to the lack of financial and human resources to ensure such protection of the victims.

Figure 6: Information issued for examination of evidence and witness hearing

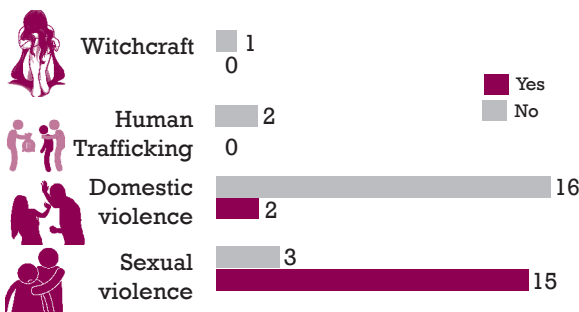


The information for examination of evidence and witness hearing has been issued by the police in most of the sexual violence cases and human trafficking cases. In the cases of domestic violence, the court has issued such information in few cases and in the remaining cases, the victim themselves has been present in the court.

64. Human Trafficking and Transportation (Control) Act, 2007 Section 26.

According to Human Trafficking and Transportation (Control) Act, 2007, if in the course of proceeding of the case, a person involved in reporting the offence under Section 5 of this Act gives contrary statement to that of the statement giver earlier or if he/she does not appear before the court on its notice or does not assist to the court, shall be liable for three months to one year of imprisonment.⁶⁵ The current provision punishes the victims that create a situation of re-victimization of victims.

Figure 7: Order for continuous hearing



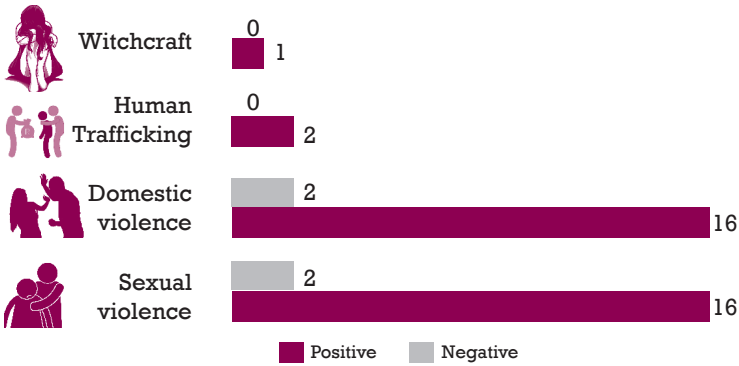
District Court Regulation, 2016 states that the continuous hearing is to be done in the criminal cases mentioned in Schedule 4 (b) whereby Government of Nepal is plaintiff.⁶⁶ There is role of the law enforcement agencies such as District Government Attorney office, Office of Attorney General, Police officials and Courts to maintain continuous hearing of such cases.

In significant number of sexual violence cases, the court has ordered for continuous hearing of the case, but it has not been implemented due to lack of coordination and support between the law enforcement agencies.

65. Human Trafficking and Transportation (Control) Act, 2007, Section 15 (6).

66. District Court Regulation, 2016, Rule 23 (c).

Figure 8: Behavior towards the victim by defense lawyers



The Code of Conduct for Legal Practitioners, 1994 provides that the defense lawyers shall not make false accusation, expression of hatred or angers or enmity against the victims.⁶⁷ The lawyers are to be admonished if they commit such acts.⁶⁸

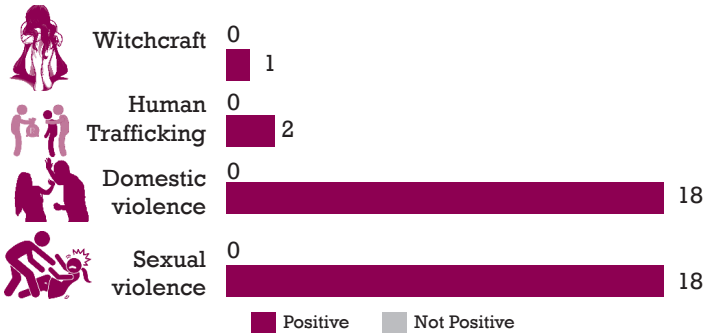
The defense lawyers' behavior towards the victim is positive in most of the cases. However in some of the cases, they have been raising questions regarding the dignity of woman and have pointed out past incidents to assassinate their character. They have been raising issues that are non-relevant to the cases such as women walking at night, their past relationships. They are also seen talking about the victims outside the bench after the hearing.

Though the code of conduct for legal practitioners states about demonizing lawyers for such acts, it is seen that bar council has not been taking actions against such lawyers.

67. Code of Conduct for Legal Practitioners, 1994, Rule 3 (j).

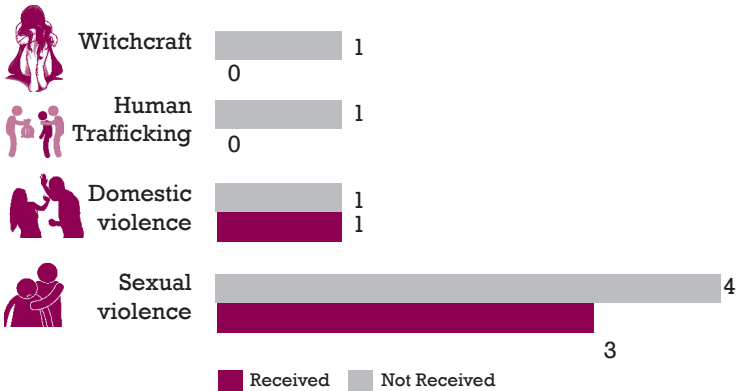
68. Code of Conduct for Legal Practitioners, 1994, Rule 7 (1).

Figure 9: Behavior of the judges towards the victims



The behavior of the judges seems to be positive and they have been giving decisions in the favor of the victim. However, it is seen in most of the cases that they have not been prohibiting irrelevant questions from the opponent lawyers that creates unnecessary trauma to the victims.

Figure 10: Compensation for the victim



The Country Criminal (Code) Act, 2017 ensures appropriate compensation to the victims of sexual violence.⁶⁹ Similarly,

⁶⁹ Country Criminal (Code) Act, 2017, Chapter on Offence relating to rape, Section 228.

Human Trafficking and Transportation (Control) Act, 2007 ensures compensation not less than 50% imposed on the defendant.⁷⁰ Domestic Violence (Offence and Punishment) Act, 2009 provides that the Court may, depending on the nature of the act of domestic violence and degree, the pain suffered by the Victim and also taking into account the economic and social status of the perpetrator and Victim, order the perpetrator to pay appropriate compensation to the Victim. Out of the 7 decided cases of sexual violence, it is seen that the compensation is received by the victims in 3 cases according to the law and out of 2 decided cases of domestic violence, 1 has received the compensation. However, the cases of human trafficking and witchcraft have not received compensation.

The implementation of decision was found challenging as the compensation has not been provided in 4 of those cases despite significant time of the decision of those cases has already been lapsed.

Quantum of Compensation in Sexual violence cases

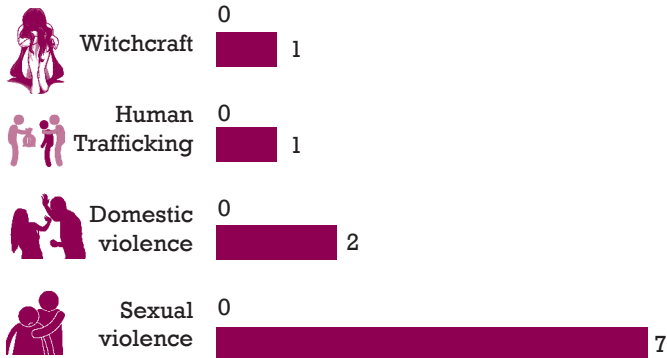
Case	Compensation Provided
Rape (below 16)	1,00,000
Rape (9 years)	50,000
Rape (8 years)	50,000
Rape (below 16 years)	45,000
Rape (above 16 years)	36,000
Rape (14 years)	25,000
Sexual abuse	25,000

It is seen that the quantum of compensation in sexual violence is from twenty-five thousand to one lakh. (Nrs.25000- 1,00,000). The compensation is provided from the certain percentage of fine imposed on the defendant. It is at court's discretion to order for appropriate amount of compensation as the upper

⁷⁰ Human Trafficking and Transportation (Control) Act, 2007, Section 17.

limit of compensation is not determined by law. However, the compensation provided on the basis of fine imposed on the defendant may not be adequate to the victims.

Figure 11: Status of punishment

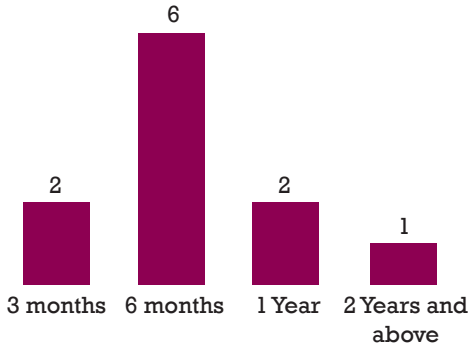


The court has ordered for punishment in the respective decided cases of sexual violence, domestic violence, human trafficking and witchcraft.

Quantum of punishment in sexual violence cases

Case	Punishment
Rape (below 16)	5 years
Rape (9 years)	11 years
Rape (8 years)	15 years
Rape (below 16 years)	5 years
Rape (above 16 years)	5 months 15 days
Rape (14 years)	5 years
Rape (7 years)	10 years and 1 month

The punishment in sexual violence cases is determined in accordance with the law. However, it is seen that the minimum punishment determined by law is provided to the perpetrator in most of the cases.

Figure 12: Duration of the Cases

Out of 2 cases decided within 2 months, 1 case is of human trafficking and 1 case is of domestic violence. Out of the 6 cases decided within 6 months, 3 cases are of sexual violence, 2 cases of domestic violence and 1 case of witchcraft. Out of 2 cases decided within 1 year, 1 case is of sexual violence and 1 case is of domestic violence. 1 case ongoing from 2 years is of sexual violence.

It is seen that the time taken for final decision of the case in average is 6 months- 1 year. But few of the cases are ongoing from 2 years. The immediate justice and fast track process in such cases seems lacking.

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

There have been several changes in the laws related to sexual and gender violence in Nepal. The Country Criminal (Code) Act, 2017 has increased the punishment in regard to the rape. Criminal Offense (Punishment Determination and Implementation) Act, 2017 states about the procedures to provide compensation to the victims.. The Domestic Violence (Offense and Punishment) Act, 2009 is introduced to prevent and control violence occurring within the family and for matters connected therewith and incidental thereto making such violence punishable, and for providing protection to the victims of violence. The immediate results of those changes in the laws are seen in the court cases as the court has been deciding consistently in different parts of the country in the favor of victim. However, despite the positive improvements of the law, from the above observations and findings we can conclude that there are still procedural gaps in its implementation. There are a few areas that require significant changes in the court procedures.

- According to Article 47 of Constitution of Nepal 2015, the state is obliged to adopt legal provisions within 3 years for the enforcement of fundamental rights. However, no specific legislation has been adopted yet for the enforcement of Article 38 (3).

- The victim's privacy is not maintained. Though the law specifically mentions about the protection of privacy and dignity in all phases of trial, in some of the cases address of the victims of sexual violence has not been kept confidential.
- The victims of domestic violence are not provided with legal aid. Consequently, the provision of legal aid in such cases must be effectively ensured, a systemic change seems necessary.
- Another common element in the cases is the instances where the defendants intentionally raised issues about the dignity of a woman and the judges are not seen intervening to prohibit such question.
- The most troubling finding is the failure of the implementation of the decisions. Despite positive decisions, the ineffective implementation stifles victims to compensation and limits the law only to paper. Without the actual exercise of those rights, the policy measures introduced fail to bring about the desired result.
- The reconciliation of cases of domestic violence and other forms of torture is also a major concern. The reconciliation may result in the re-victimization of the victims as they have to return to the same family.
- The complexity of the legal proceedings can be a barrier for women who do not have high levels of education, and/or who do not have access to legal aid; and the delays in the court proceedings and execution of judgments result in delay of access to justice and complainants tend to give up.

6.2 Recommendations

- Enact legislation for enforcement of Article 38(3) which guarantee the protection of rights of women against physical, mental, sexual or psychological or any kind of violence.

- The judges must be provided with ex officio powers to make an order for interim relief and appropriate interim protection of victims whenever deemed necessary.
- The court procedures along with the pre hearing procedures must be gender friendly and victim oriented so that victims of sexual and gender based violence can easily file complaints and get access to justice.
- Provide mandatory training through the National Judicial Academy to all members of the judiciary, including members of Judicial Committees, and law enforcement officers on women's rights, as well as on gender-sensitive investigation and interrogation procedures in cases of gender-based violence against women, in line with commitments made at the second cycle of the Universal Periodic Review (A/HRC/31/9, para. 122.46).⁷¹
- The victims must be informed about their rights in each trial through police, lawyers and judges.
- Ensure legal aid to all the victims of sexual and gender violence.
- The privacy must be maintained throughout the proceedings of the case.
- Repeal the statute of limitation provision on the registration of sexual violence cases in all contexts to ensure women's effective access to courts for the crime of rape and other sexual offences.
- The lawyers must be trained with legal procedures to maintain access to justice for victim in regard to claim for protection of privacy.
- Law enforcement officials must be trained on trends of crimes, its impact and preventive and curative measures.

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- Government attorneys to be reoriented to bring consistency in prosecution as to making claims of compensation, freezing of assets of defendants and so on.
- Interim relief must be provided immediately after commission of the crime, no matter defendants are arrested or not, and compensation must be provided once the trial court decides the matter and it must not linger too long.
- Provision of effective reparation to women victims/survivors of gender-based violence must be ensured. Reparation should include different measures, such as monetary compensation and the provision of legal, social and health services including sexual, reproductive and mental health for a complete recovery, and satisfaction and guarantees of non-repetition in line with general recommendations No. 28, 30 and 33.
- The current law that links payment of compensation to victim only to fine imposed on defendant needs to be reviewed in the light of the new constitutional guarantee of the right to compensation to victims of crimes. There are severe SGBV crimes that do not carry punishment with fines.
- Compensation must be based on the actual physical and psychological harms suffered.
- As payment of compensation to victim is a civil liability, there must be separate mechanism and procedures for paying compensation to the victims.
- Taking effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities and considering establishing specialized gender units within law enforcement, penal and prosecution systems in line with General Recommendation 33, para 51 (c).
- Being a heinous crime against the person of a human being, there must be some standards developed by judiciary for developing uniformity in application of law on matters of discretion in determining punishment.

- There must be provision of remedies such as psychological counseling, medical, shelter, non-formal education, family reintegration, mental health for victims with the collaboration of judicial institutions and non-governmental institutions.
- The issues of sexual and gender violence should be seriously taken into account when determining all the proceedings.
- A fast track process to hear the sexual and gender based violence cases must be adopted and effectively executed to implement decisions promptly.

BIBLIOGRAPHY

Conventions and Reports

- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- General Recommendation 19 of CEDAW.
- General Recommendation 33 of CEDAW.
- General Recommendation 35 of CEDAW.
- Concluding Observations on the Sixth Periodic Report of Nepal

Statutes

- Country Criminal (Code) Act, 2017.
- Country Civil (Code) Act, 2017.
- Domestic Violence (Offense and Punishment) Act 2009
- Human Trafficking and Transportation (Control) Act 2007
- The Witchcraft Allegation (Offense and Punishment) Act 2016
- Sexual Harassment at the Workplace (Elimination) Act, 2015
- Legal Aid Act, 1997
- Country Criminal Code Procedure Regulation, 2018
- District Court Regulation, 2016
- Criminal Offence (Punishment and Implementation) Act, 2017
- Code of Conduct for Legal Practitioners, 1994

Law Reports

- Nepal Kannon Patrika





Forum for Women, Law and Development (FWLD)

72 Adarsh Marg
P.O. Box 26538
Thapathali, Kathmandu, Nepal
Phone: +977-1-4233524/4233525
Fax: +977-1- 4240627
Email: fwld2013@gmail.com
URL: www.fwld.org



International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific)

10-2, Jalan Bangsar Utama 9, Bangsar
Utama, 59000 Kuala Lumpur, Wilayah
Persekutuan Kuala Lumpur, Malaysia
Phone: +60 3-2282 2255