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Information on the List of Issues Prior to Reporting for Nepal for Consideration by the Human Rights Committee at its 131st Session (1 March - 26 March 2021)

Introduction

1. We present the following submission in advance of the 131st session of the Human Rights Committee ('the Committee'), taking place between 1 March - 26 March 2021, for consideration of the List of Issues Prior to Reporting for Nepal. Equality Now and Women for Human Rights (WHR) are writing to express our concern about sexual violence laws and procedures in Nepal that deny justice to survivors, as well as discriminatory nationality laws which constitute a violation of the obligations under the International Covenant on Civil and Political Rights (ICCPR). We are recommending questions to be asked to Nepal by the Committee and offering suggestions on the legal and procedural changes required to make sure that perpetrators of sexual violence are brought to justice, that survivors access justice, and that gender discriminatory provisions in Nepal's laws are abolished.

Information about the authors of the submission

2. Equality Now is an international human rights NGO with the mission to achieve legal and systemic change that addresses violence and discrimination against women and girls around the world. Founded in 1992, Equality Now has offices in London, New York, Nairobi and Beirut, as well as consultants based in various parts of the world. Ending sexual violence, ending sex trafficking, ending harmful practices and achieving legal equality are the main areas of Equality Now's work.

3. Women for Human Rights, single women group (WHR) based in Nepal with its liaison office in USA, is a leading national NGO specializing in advocacy and empowerment of single women groups in Nepal and South Asia. WHR is also one of the founding members and the secretariat office for SANWED (South Asian Network of Widows Empowerment in Development). Established as an NGO in 1995 A.D., it advocates and works for women rights with a core focus on Single women's rights and empowerment in Nepal and South Asia. WHR holds extensive and in-depth expertise in the areas of the socio-cultural, economic and political rights of widows. WHR has organized over 200,000 widows, reaching out to 77 districts throughout Nepal.
4. The legal provisions and practices detailed in this submission highlight the failure of the State to comply with its obligations under Article 2 (non-discrimination), Article 3 (equality for men and women), Article 24 (right to nationality) and Article 26 (equality before the law) of the ICCPR.
5. We reiterate the Concluding Observations on the second periodic report of Nepal¹ and underline, in particular, the recommendations urging the government of Nepal to:
 - ensure that all forms and manifestations of violence against women are defined and prohibited under domestic law with sanctions commensurate with the gravity of the offence, in accordance with international standards.
 - establish a comprehensive national data collection system on cases of different types of violence against women.
 - conduct awareness-raising campaigns on the negative effects of violence against women, inform women of their rights and existing mechanisms of protection, and facilitate complaints from victims.
 - ensure that cases of violence against women are thoroughly investigated, perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that victims have access to effective remedies and means of protection.
 - ensure that citizenship provisions of the new Constitution guarantee the equal right of women to acquire, transfer and retain citizenship.

Legal Provisions enabling impunity for perpetrators of sexual violence

6. Nepal's laws on sexual violence have undergone a sea change since 2015. Commendably, Nepal's new Constitution specifically includes the right of women to not be subjected to violence, including sexual violence, as a fundamental right.² The new National Penal Code introduced in 2017 expanded the definition of rape, increased the limitation period and together with changes in procedural laws, improved the overall legislative framework applicable to sexual violence cases.

¹https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fNPL%2fCO%2f2&Lang=en

² 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."

7. Despite these changes, however, there still remains some gaps in the law which enable impunity for perpetrators of sexual violence, including the narrow definition of rape. The definition of rape under the National Penal Code includes penile penetration of the vagina, mouth and anus. 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. Thus, non-consensual sexual acts such as insertion of objects or fingers into the anus or mouth are not included within the definition of rape.³
8. Another provision of the law which impedes access to justice for survivors of sexual violence is the short limitation period which is applicable in such cases. Nepali law requires complaints in rape cases to be filed within one year of the date of the incident.⁴ 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 incredibly short. The Committee has also recognized that “even this new statute of limitation is not commensurate with the gravity of such crimes”.⁵ Short limitation periods for rape cases 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. The stigma, shame, intimidation and trauma associated with rape keeps 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 also 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”.⁶
9. In addition, Nepali law does not contain any specific provisions prohibiting the introduction of evidence as to the past sexual history of victim during the trial process in rape cases. In practice, this has left victims vulnerable to the defense raising questions or accusations affecting the dignity of the victim during the rape trial, and judges often do not intervene to prohibit such questions.⁷ This facilitates the secondary victimisation of survivors during the legal proceedings, as well as enabling impunity for the perpetrator since it looks to judge the general character of the victim rather than focus on the evidence in the case and the actions of the alleged perpetrator.
10. The offence of rape under Nepali law is based on the absence of consent, and there is no legal requirement for the use of force or additional violence to prove the offence of rape. However, the heading of the rape offence in the Nepali version of the Penal Code is titled

³ Section 219, National Penal Code, 2017.

⁴ Section 229, National Penal Code, 2017.

⁵ *Fulmati Nyaya v. Nepal* CCPR/C/125/D/2556/2015, Views adopted by the Human Rights Committee dated 22 May 2019.

⁶ 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.

⁷ 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>

“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 force or violence, even though evidence of use of force or violence is not required by the law. The use of such terms in the Nepali version of the law (as opposed to “Balatkaar” which literally means rape) affects the dignity of rape survivors and promotes rape myths and gender stereotypes.

Marital Rape

11. International human rights standards highlight the obligation of States to pay specific attention when it comes to crimes committed in a domestic setting, including marital rape. Marital rape was criminalised under Nepali law after a landmark Supreme Court decision declared that the earlier penal provision which did not criminalize marital rape was unconstitutional.⁸ After the Committee had expressed concern over the disproportionately low penalties for marital rape during Nepal’s second periodic review in 2014,⁹ the National Penal Code of 2017 increased the applicable penalty for marital rape to imprisonment with a maximum term of five years.¹⁰ Despite this however, the penalty for marital rape still remains lower than the penalty applicable in other cases of rape (imprisonment of 7-10 years in cases of rape of adult women over the age of 18, with the penalty increasing in cases of child rape depending of the age of the child). This disproportionately low penalty for marital rape promotes the impression that sexual violence in intimate partner settings is not as serious a crime as so-called “stranger rape”.
12. The Nepal Demographic and Health Survey (2016) indicates that the most common perpetrator of sexual violence amongst ever-married women is the current husband (in 80% of cases).¹¹ However, reporting levels for cases of marital rape remain very low, due to a combination of lack of awareness of the law and fear of reprisals.¹² Further, as noted by the United Nations Special Rapporteur on Violence against Women in her report on her visit to Nepal, even when marital rape or other forms of intimate partner sexual violence are reported, “it is often less likely to result in prosecutions and convictions than assault by a stranger”.¹³

Access to Justice for survivors of sexual violence

13. As per data issued by the Nepal Police Crime Investigation Department, there were 2230 rape cases recorded in the fiscal year 2018-19, and 2144 cases of rape recorded in the fiscal

⁸ Ms. Meera Dhungana v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs and Others [Nepal Supreme Court, 2000].

⁹ CCPR/C/NPL/CO/2, para 13.

¹⁰ Section 219(4), National Penal Code, 2017.

¹¹ Nepal Demographic and Health Survey, 2016, <https://dhsprogram.com/publications/publication-sr243-summary-reports-key-findings.cfm>

¹² Human Rights Watch, *Our Time to Sing and Play: Child Marriage in Nepal*, 2016, https://www.hrw.org/sites/default/files/report_pdf/nepal0816_web.pdf

¹³ 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, para 36.

year 2019-20, which is a sharp increase as compared to previous years.¹⁴ Even these figures are likely to be lower than the true number. Despite this increased reporting, laws against sexual violence in Nepal are poorly implemented.

14. A report by the National Human Rights Commission of Nepal in 2019 highlighted the shortcomings of the Nepal police in relation to evidence collection and investigation, as well as its failure to protect rape victims.¹⁵ Lack of accountability of police officers, even when they are found to be complicit in illegal acts such as destroying evidence,¹⁶ and difficulties in accessing police stations also create obstacles to justice.¹⁷
15. Another major obstacle to justice is community intervention resulting in mediation or “compromises” amongst perpetrators and the victim, whereby the victim is coerced into agreeing not to cooperate during the criminal process.¹⁸ Though such mediation is not permitted under law for rape cases, the police is also often complicit in facilitating mediation between perpetrators and victims.¹⁹ These mediation processes are subject to political interference and reflect existing, unequal power structures. As such women and girls from marginalised communities (including those who are marginalised on the basis of caste or ethnicity such as Dalit, Madhesi and Terai communities) are even more vulnerable to being coerced into such mediation processes, the outcomes of which are likely to reflect existing discriminatory attitudes against women and stigma associated with sexual violence.²⁰ Such mediation is often carried out by the family without even consulting the victim, and can sometimes result in forced marriage between the perpetrator and the victim, resulting in further trauma.²¹ With the recommendation of the Cabinet of Ministers, the President of Nepal recently authenticated an “Ordinance made to amend few sections on Sexual Violence”, 2077 (BS) (2020 AD) which imposes a three-year jail term and a fine of up to NPR. 30,000 for those who force mediation or reconciliation between rape victims and perpetrators of their families. Individuals holding public office or people’s representatives trying to mediate are liable to face more stringent laws, with their jail term

¹⁴ <https://cid.nepalpolice.gov.np/index.php/cid-wings/women-children-service-directorate>

¹⁵ https://www.nhrcnepal.org/nhrc_new/doc/newsletter/GPV_Report.pdf

¹⁶ 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>

¹⁷ 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>

¹⁸ CREHPA, UCL, Tracking Cases of Gender-Based Violence in Nepal: Individual, institutional, legal and policy analyses, 2013, <https://nepal.unfpa.org/sites/default/files/pub-pdf/TrackingCasesofGBV.pdf>

¹⁹ https://www.nhrcnepal.org/nhrc_new/doc/newsletter/GPV_Report.pdf

²⁰ Office of the High Commissioner for Human Right 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

²¹ 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>

increased by six months if found guilty.²² This is a welcome measure and an official recognition by the government of the widespread nature of such mediation practices in rape cases. However, the provisions of the Ordinance need to be strictly enforced and implemented by the Nepali government in order to end such mediations in rape cases.

16. The UN Special Rapporteur on Violence against Women has also highlighted the “dire shortage of adequate shelters across the country offering a safe house for women and girls who have been victims of violence, within indigenous communities in particular and in rural and remote areas”. Her report also noted that the shelters which were in place were not provided with sufficient support, and that there was a lack of coordinated, gender-friendly and comprehensive essential services for survivors of sexual violence.²³
17. Low levels of female participation amongst police, government attorneys and judges and lack of gender sensitivity amongst justice officials impedes access to justice. In addition, delays in court proceedings and execution of judgments, non-payment of victim’s compensation despite legal entitlements, failure to maintain privacy of the victim in all cases and lack of support systems for victims of sexual violence are all procedural hurdles within the justice process.²⁴
18. Over 13,000 people were killed during Nepal’s decade-long civil war between government forces and the Communist Party of Nepal (Maoist) (CPN-M). The signing of the Comprehensive Peace Accord (CPA) put a formal end to the conflict in 2006. However, both parties have failed to deliver on their promise to seek justice for the victims of human rights violations including sexual violence, and to end impunity.²⁵ Women, children and senior citizens have suffered physical, verbal and sexual violence from both National security forces and Maoist combatants. However, the Government of Nepal has failed to deliver justice and end impunity for victims of human rights violations, including victims of torture and sexual violence. Nepal has developed its National Action Plan (NAP) for the implementation of United Nations Security Council Resolutions 1325 and 1820 and the NAP was contextualized within a broader set of government policies and initiatives that seek to mainstream gender and implement those United Nations Security Council Resolutions, focusing on women, peace, and security. However, the second phase of NAP was not endorsed by the Government. As such, women and children subjected to sexual violence during the conflict are still unable to access justice for the crimes committed against them.

²² “Mediators in rape cases will also face jail term, as per a new ordinance”, *The Kathmandu Post, Kathmandu*, (22 November 2020) available at <https://kathmandupost.com/national/2020/11/22/prison-sentences-for-rapists-increased-as-per-new-ordinance-cabinet-endorses> accessed on 16th December 2020.

²³ 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, para 72.

²⁴ 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>

²⁵ “Silenced and Forgotten: Survivors of Nepal’s Conflict-Era Sexual Violence” (September 23, 2014) available at <https://www.hrw.org/report/2014/09/23/silenced-and-forgotten/survivors-nepals-conflict-era-sexual-violence>, accessed on 17th of December 2020.

Discriminatory Nationality Law

19. The Committee’s past recommendations to the State Party expressed concern “that women are denied equal rights as men with respect to acquiring and conferring nationality” and recommended that Nepal’s new Constitution should “guarantee the equal right of women to acquire, transfer and retain citizenship.” However, the provisions of Nepal’s 2015 Constitution still discriminate on the basis of sex, as in a number of circumstances, Nepali women are unable to pass on their nationality to their children on the same basis as men. Further, Nepali law also discriminates on the basis of sex in relation to the right of women to transfer nationality to foreign spouses.
20. Article 11(2) of Nepal’s Constitution grants citizenship by descent to persons whose mother or father was a citizen of Nepal at birth.²⁶ However, this provision is later contradicted by other provisions including Articles 11(5) and 11(7). According to Article 11(5), a Nepali woman only retains the right to pass nationality by descent if her child is born and resides in Nepal and “whose father is not traced,” with the condition that the citizenship of the child be converted into “naturalized” if the father is proven to be a foreigner. Article 11(7) states that the child of a Nepali woman married to a foreign man may only acquire naturalized citizenship if the child has permanently resided in Nepal and has not acquired another citizenship. Similarly, where the father is a foreigner, sections 3(2) and 5(2) of the Citizenship Act allow Nepali women to pass on their citizenship to their children only under certain circumstances.²⁷ These provisions discriminate against women on the basis of sex in violation of the ICCPR as well as the right to equality enshrined in Nepal’s own Constitution.
21. In addition, Nepal’s laws also discriminate against women in relation to the right of Nepali women to transfer their nationality to foreign spouses. The Citizenship Act does not recognise the ability of Nepali women to confer nationality on a non-national spouse, though foreign women married to Nepali men may acquire citizenship by naturalization after following the process laid down in the Citizenship Act.²⁸
22. The Citizenship (Amendment) Bill, 2018 was approved by the State Affairs Committee of the Nepal Parliament in June 2020, though it is yet to be passed by Nepal’s Parliament. The Bill in its current form would address some of the sex discriminatory provisions in Nepal’s citizenship law. For instance, the Amendment Bill provides that: (a) A child born to a Nepali citizen mother who is residing in Nepal can obtain citizenship by descent. (b) A child whose parents cannot be identified can also acquire citizenship by descent. (c) A child born to a Nepali citizen mother and foreign father can acquire naturalised citizenship even if not born on the territory. (d) A foreign woman married to a Nepali man can now apply for naturalised citizenship after 7 years, with certain conditions.²⁹

²⁶ Article 11(2), Constitution of Nepal, 2015.

²⁷ Sections 3(1)-(2) and 5(2), The Nepal Citizenship Act 2063 (2006).

²⁸ Sections 5(1), The Nepal Citizenship Act 2063 (2006).

²⁹ Citizenship Affected People’s Network, Community Action Center Nepal, Dignity Initiative, Nepal Institute of Peace, Statelessness Network Asia Pacific, Global Campaign for Equal Nationality Rights, Institute on Statelessness and Inclusion, *Joint Submission to the Human Rights Council*, Universal Periodic Review: Nepal, 37th Session, July 2020.

23. However, some sex discriminatory provisions would still remain even if the Amendment Bill were passed, including the lack of ability of Nepali women to pass their citizenship to foreign spouses. Further, in order to ensure consistency with the provisions of the Constitution, further constitutional reform is required to remove the contradictions within the various provisions of the Constitution relating to citizenship and to legally eradicate gender discrimination in matter of citizenship entirely.

Suggested Questions for State Party's List of Issues Prior to Reporting

24. We respectfully urge the Committee to raise the following questions with the Nepali government:

- a) What measures has Nepal undertaken to amend its criminal law provisions (such as amending the terminology for rape in the Nepali version of the law) and to abolish the statute of limitation period in cases of rape?
- b) What measures has the Nepali government undertaken to expand the definition of rape and also ensure that evidence relating to the sexual history of the rape survivor is not allowed to be introduced during the trial?
- c) What is the Government doing to ensure that marital rape is treated as seriously as other forms of rape, to encourage survivors of marital rape to report cases to the police and to address the social stigma associated with intimate partner sexual violence?
- d) What measures has the Government undertaken to collect data on reports of sexual violence registered with the police, rate of prosecutions and convictions, and to ensure that such data is disaggregated based on caste, ethnicity, and age of the victim?
- e) What is the Government doing to improve access to justice for survivors of sexual violence and to ensure that sexual violence investigations and trials are conducted in accordance with human rights standards?
- f) What measures has the Government undertaken to discourage “mediations” or “compromises” in cases of sexual violence, including by raising awareness of the recent Ordinance criminalising forced reconciliation in rape cases and effectively enforcing these provisions? What steps is the Nepali government taking to protect survivors of sexual violence from the community pressure to enter into such “mediations”?
- g) What steps is the Nepali Government taking and within what timeframe to amend the nationality laws to ensure that all female citizens have the same rights as male citizens to confer nationality on their children and non-national spouses, and to acquire and retain their nationality?

- h) What steps is the Nepali government taking to ensure access to justice for survivors of conflict-related sexual violence during Nepal's civil war?