Confidentiality and the Legal Process:

*Leveraging Legislation and Policy to Protect Nepal’s Most Vulnerable Victims*

Margot Dankner
Teresa Taylor
Monica Youssef

*The Community Justice Project*
*Georgetown University Law Center*
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# Table of Contents

Executive Summary ............................................................................................................. 3

Key Terms .............................................................................................................................. 7

I. Introduction .......................................................................................................................... 8

II. Specialized Police Unit for Sexual Violence Cases ............................................................ 14

III. Evidentiary Privileges: Protecting the Communications Between Service Providers and Victims From Being Introduced in Court .......................................................... 19

IV. Testifying in Camera: Protecting Witness and Victim Identity in Court ......................... 27

V. Court Proceedings: Legal Protections of the Victim as a Witness .................................. 32

VI. Publication Bans: Preventions Against Public Disclosure in the Media ....................... 37

VII. Advocacy Plan .................................................................................................................. 42

Acknowledgements .............................................................................................................. 50

About the Authors ................................................................................................................. 50

Bibliography .......................................................................................................................... 51
EXECUTIVE SUMMARY

Nepal is in the midst of an exciting phase of its history. After years of civil war and political infighting, a peace accord has been signed between the country’s major political parties, allowing efforts to reform Nepal’s Constitution and Criminal Code may resume in earnest.¹ Nepalese leaders can seize this moment to ensure that new laws protect the rights of all people and solidify Nepal’s place in the world as a humanitarian, democratic state.

Sexual assault victims are too often ignored or not taken seriously by actors in law enforcement, the judicial system, and media. Many (perhaps even most) incidents of sexual assault are not reported. The reported numbers of sexual assault in Nepal are small. This does not mean, however, that sexual assault is not happening in Nepal. Instead, many victims and witnesses of sexual assault may be reluctant to come forward because legal protections for them are so weak.

Consider this: In a survey of victims in the United States, all victims surveyed said that it was “important” or “very important” that what they said or shared with a sexual assault crisis advocate be kept confidential.² Although similar data does not exist for Nepalese sexual assault victims, a crucial lesson can be taken from the U.S. study: if a country and its legal system want to combat sexual assault, they must ensure that victims do not believe that they will face additional harm by reporting an incident of sexual assault and participating in the legal proceedings that result. Without such protections, sexual assault victims are likely to remain silent, and the problem will continue to infect society as the victims are forced to endure silently the crimes committed against them.

Nepal’s current laws do not protect the confidentiality of sexual assault victims in police investigations, legal proceedings, and the greater public discourse. Breaches of confidentiality in any of these stages can have serious consequences for these victims. The mere mention of a name in a court docket or in a newspaper article could cause serious social, emotional, or, in the worst cases, physical harm. Many victims in Nepal are shunned socially or even cast out of their families. Crimes against sexual assault victims leave deep physical and emotional scars. These wounds should not be exacerbated by the indiscretion of police officers, judges, service providers, NGO workers, journalists, or other third parties who often play a role in the investigation, prosecution, or reporting of a sexual assault case. To protect those who come forward, help them heal, and encourage others to do the same, the law should provide strong, clear protections of victims’ confidentiality. This paper gives concrete recommendations on how this can be done.

This report starts with the premise that confidentiality of sexual assault victims and witnesses of crimes can be breached at several points – during the investigation, prosecution, or aftermath. To respond to the wide scope of the problem, it offers recommendations to protect confidentiality in every stage of the process:


• Protections of confidentiality during investigations:
  o Nepal can expand and enhance the authority and effectiveness of its Women’s Police Cells so that victims and witnesses can trust that well-trained, mostly female police officers will be able and ready to hear and respond to complaints of sexual assault.
  o The current legal system does not recognize any privileges for communications between victims and service providers (e.g. psychological counselors, medical staff, and NGO workers). These communications involve highly sensitive information and the victim should have the final decision on all disclosures of this information to third parties.  

• Protections of confidentiality during trials or other legal proceedings:
  o Testifying in court in front of one’s perpetrator can be a traumatizing experience in a public proceeding. To allow victims and witnesses to present their testimony in a more comfortable and less public setting, judges should be allowed to order in camera witness testimony (testimony given privately in a judge’s chambers) in hearings or other court proceedings.
  o Victims and witnesses may face threats to their lives or well-being after testifying in a sexual assault case. The law should provide certain protections to prevent harm from coming to victims during and after the trial ends.

• Protection of confidentiality against public access through the media:
  o Media coverage of a sexual assault investigation or trial can cause a victim to face intense public scrutiny. The Constituent Assembly could pass a simple law that prevents media outlets from using victims' and witnesses’ names in news reports. For especially sensitive cases, judges provide additional protections by ordering a publication ban on the case.

• Promoting understanding of and respect for these protections, an advocacy plan examines considerations for educating police officers, judges, service providers, members of the media, and the general public about the importance of confidentiality in sexual assault cases.

Each of these recommendations is bolstered by comparative research from a wide variety of other countries. We made an effort to include a broad range of examples from countries that share some characteristics with Nepal, including legal systems, development levels, and commitment to human rights and the rule of law.

As Nepal’s decision-makers weigh the recommendations presented in this paper, they should consider the following statistics that underscore the problem of sexual violence in Nepal.

• The United Nations estimates that, worldwide, one in five women will become a victim of rape or attempted rape in her lifetime. Women aged 15-44 are more at risk from rape and domestic violence than from cancer, motor accidents, war, and malaria. In contrast, according to the Nepali Women’s Police Cell (a special unit within Nepal’s police force that handles crimes against women) 376 cases of rape and 101 cases of attempted rape

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3 In cases involving children, however, the service provider may need to break privilege in order to protect the child. The report offers specific examples on how the law may allow for this.


5 Id.
were filed in the court in fiscal year 2009-10. This number entails less than .004% of Nepal’s female population. Comparing this number to worldwide statistics strongly suggests that underreporting of sexual assault cases in Nepal is prevalent.

- Children in Nepal – especially girls – are especially vulnerable to sexual assault. Among sexual assault cases that are reported, the majority of victims are girls under the age of eighteen; at least sixteen cases involved children under ten years old. A UNICEF study on sexual violence and Nepali children outside the Kathmandu Valley found that 22% experienced exhibitionism from adults (e.g. adult showing genitals), nearly 18% experienced some kind of physical contact of sexual abuse (e.g. fondling over or under clothes or kissing), and 9% experienced invasive sexual abuse.

- Sexual violence victims are more likely to be vulnerable to human trafficking or HIV infection, and those who experience trafficking or live with HIV/AIDS are more likely to experience sexual violence. Human trafficking increases vulnerability to sexual violence and HIV infection. Significant numbers of Nepali women and children are trafficked domestically and abroad. An estimated 10,000 to 15,000 Nepali women and girls are trafficked to India annually, while 7,500 children are trafficked domestically for commercial sexual exploitation every year. One report found that that 40% of Nepali women trafficked into India to work as sex workers returned to Nepal HIV positive – and the study showed the infection rate among girls fourteen and younger was 60%.

- Police enforcement is weak: officers frequently fail to investigate sexual assault cases and, when they do, they often push cases into informal mediation.

Sexual assault is a pervasive, insidious social problem. This paper focuses on how to protect victims’ identities after the act of sexual assault occurs so that they do not suffer again by an unauthorized release of their identities and personal information. These protections, in time, may have preventative effect as well: with strong confidentiality protections in place and consistently

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9 UNITED NATIONS CHILDREN’S FUND (UNICEF), VIOLENCE AGAINST CHILDREN IN NEPAL vii (2005).


12 “In its recent report to the UN Human Rights Council, OHCHR reported that in cases of sexual assault, ‘instances of the police taking proactive steps to register a case ex officio are rare,’ and even when a survivor reports a crime to the police, ‘police frequently delay the registration process, including by insisting upon a medical report.’ The report further described that ‘it is usually the police or local authority figures who encourage victims to seek a settlement [mediation] with the alleged perpetrator often under pressure from local political parties, particularly if a party affiliate is involved.’ Nepal: No Justice for Gang-Rape Victim, Human Rights Watch (March 15, 2011), http://www.hrw.org/news/2011/03/15/nepal-no-justice-gang-rape-victim.
enforced, more victims and witnesses may be more likely to come forward and, in time, fewer crimes may occur.

*Note:* Every legal protection needs some assurance of enforcement to be effective. Monetary penalties, criminal sanctions, and injunctions are three traditional forms of enforcement that are used by legal systems throughout the world. This paper does not discuss enforcement thoroughly because we believe that our Nepali partners understand the contours of the cultural, societal, and political factors that shape these kinds of policy decisions in a way we cannot. A viable option for enforcement in Nepal may something that we, as American law students, cannot fathom. We encourage the Forum for Women and Development and its partners to consider what enforcement mechanisms may be appropriate to accompany the legal protections of confidentiality presented in this report.
KEY TERMS

Child: Any person under the legally-established age of adulthood (usually younger than 18 years of age). This report focuses on children who experience sexual assault or other traumatic event.

Confidentiality: Keeping any sensitive personal information, including identifying details, personal history, police reports, medical records, and privileged statements, from disclosure by a third party without authorization from the person implicated.

Human trafficking: The moving, selling, or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.\(^\text{13}\)

Privilege: A form of legal protection that often allows the holder of the privilege to withhold certain evidence from being entered into court.

Service providers: Different types of individuals who may provide counseling or immediate assistance to sexual assault victims or domestic violence victims after an attack. May include social workers, physicians, psychiatrists, psychotherapists, psychologists, volunteers, advocates, or other workers employed at a rape crisis center or a battered women’s shelter.

Sexual assault: Sexual assault takes many forms including attacks such as rape or attempted rape, as well as any unwanted sexual contact or threats. Usually a sexual assault occurs when someone touches any part of another person's body in a sexual way, even through clothes, without the other person's consent.\(^\text{14}\)

Victim / Survivor: Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of criminal laws operative within member states, including those laws prescribing criminal abuse of power. This report uses the term “victim” and “survivor” interchangeably.

Witness protection program: Formally established covert program subject to strict admission criteria that provides for the relocation and change of identity of victims or witnesses whose lives are threatened because of their cooperation with law enforcement authorities.\(^\text{15}\)

\(^\text{13}\) SAARC CONVENTION ON PREVENTING AND COMBATING TRAFFICKING IN WOMEN AND CHILDREN FOR PROSTITUTION, art. I, ¶ 3 (2002).


\(^\text{15}\) Adapted from UNITED NATIONS OFFICE ON DRUGS AND CRIME, GOOD PRACTICES FOR THE PROTECTION OF WITNESSES IN CRIMINAL PROCEEDINGS INVOLVING ORGANIZED CRIME 5 (2008).
I. INTRODUCTION
Sexual violence against women is prevalent worldwide. In the last two decades, there has been a global effort to end violence against women by establishing national laws that “increasingly criminalize such violence, ensure the prosecution and punishment of perpetrators, empower and support victims, and strengthen prevention.” Enacting comprehensive legislation that punishes the perpetrator while protecting the victim, especially from being re-victimized during the legal process, is a necessary step each country has to undertake in order to end sexual violence against women. The international community has attempted to protect women through several conventions and treaties, all of which Nepal has adopted, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). With recent political developments and opportunities to reform its legal system, Nepal is especially poised during its current transitional period to enact legislation that protects victims of sexual violence.

Nepal is a country with a rich history, geography, culture and political system. Kathmandu Valley is the capital of Nepal and “is the most important urban concentration in Nepal...in comparison to the rest of Nepal, [it] possesses basic amenities like water supplies, electricity, gas, telecommunications, roads, sanitation, education, security, and transportation.” Kathmandu Valley also has access to services and technologies that are generally not available in the rural villages of Nepal. The difference in infrastructure and resources between Kathmandu Valley and rural areas of Nepal can influence what laws people are aware of and how laws are enforced in each region.

Nepal was a monarchy from the mid-18th century until 2008 when a newly elected Constitutional Assembly (CA) abolished the monarchy and established a federal democratic republic. Currently, an Interim Constitution governs the law in Nepal and mandates that the CA draft Nepal’s permanent constitution. The Interim Constitution “respect[s] the people’s mandate in favor of democracy, peace and security with full commitment of democratic value and norms” and has established the “right to life [and] liberty, right against torture, right against preventive detention and right relating to justice.” Although the CA initially had a deadline of two years

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17 Id.


19 Id.


21 Id.


to complete the draft of a new constitution, that deadline has been extended three times thus far and the CA is still continuing to draft a permanent constitution.\textsuperscript{24}

In addition to a permanent constitution, Nepal is also in the process of reforming its entire justice system. Currently, Nepal is governed by the Muluki Ain of 2020, a legal code which replaced the 1910 Muluki Ain that was promulgated in 1854 and was Nepal’s first and oldest codified law.\textsuperscript{25} The Muluki Ain covers a range of legal topics (civil, criminal, family, marriage, etc.) but “despite over a dozen amendments — [the Muluki Ain] has several weaknesses.”\textsuperscript{26} Consequently, the Nepali government is preparing to replace the entire Muluki Ain to modernize Nepal’s justice system.\textsuperscript{27} Three bills have been introduced to the CA: Criminal Code Bill, 2011; Criminal Procedural Code Bill, 2011; and Criminal Offences (Assessment and Execution of Punishment) Bill, 2011.\textsuperscript{28} Nepal’s current status of drafting a new constitution and reforming its criminal justice system makes this the opportune time for Nepal to prioritize protecting victims in its new legal system.

This report provides research, analysis, and recommendations for lawmakers in Nepal to consider in enacting legislation to better protect victims of sexual violence. Specifically, the report focuses on one major issue that these victims face — the protection of their confidentiality during police investigations, legal proceedings and in the general public. Confidentiality protections extend to the individual’s name, address, family members, medical records, and privileged communications with a service provider.\textsuperscript{29} Protecting confidentiality can be the key to supporting victims and bringing perpetrators to justice. For example, in a survey of victims in the United States, all victims surveyed said that it was “important” or “very important” that what they said or shared with a sexual assault crisis advocate be kept confidential.\textsuperscript{30} As the U.S. Department of Justice has explained:

Confidentiality plays a vital role in the recovery process because it helps establish an environment in which victims feel more comfortable seeking assistance, making connections, and exercising their power within their right to choose what information to share, with whom, when, and how. Thus, confidentiality is a fundamental component of the relationship between a victim service center, a sexual assault victim advocate, and a victim.\textsuperscript{31}


\textsuperscript{27} Id.

\textsuperscript{28} Subedi & Pokharel, supra note 22.

\textsuperscript{29} Service providers include counselors, medical staff, and legal representatives. Privileges are discussed fully in Section III.

\textsuperscript{30} Zannoni, supra note 2.

\textsuperscript{31} Id.
As in countries all over the world, sexual assault is a serious problem in Nepal. Though the government pledged to “end violence against women in 2010,” there is still much progress to be made. From 2009 - 2010, 376 cases of rape and 101 cases of attempted rape were filed in court but most incidents went unreported. In addition, in the first half of 2011, over 300 domestic violence cases were reported to police in the Kathmandu Valley alone; many more likely went unreported. Legislative weakness and inadequate policing compound the problem. Recently, there have been some sensational examples of police indifference and abuse. For example, in September 2009 police publically interrogated a 14-year-old rape victim outside the Sunsari Police Station in Dharan in front of a large crowd. One of the alleged rapists was a police officer who offered the family 30,000 rupees to withdraw the case against him. According to district police, the case was dismissed. In March 2010, a police sub-inspector allegedly raped an 18-year-old Indian woman in the railway police station in Janakpur, Dhanusha District and then was cleared of the charges when the victim did not show up to testify in court. These stories and others support the need for legislation to ensure a more effective police investigation process.

Legislation that protects the confidentiality of sexual assault victims is important to those victims because of the social stigmas and difficulties they face once their assault is revealed. Victims of rape most often do not report the crime because of “the taboos surrounding sexual violence,” which in turn make it difficult to gather data on the issue. Even in rare cases where a victim reports the crime and presses charges, she still faces “an uphill battle”, which may include threats against her and her family to withdraw the accusations or rallying from the community to physically stop her from testifying in court against the accused. Hence, by enacting legislation that protects their confidentiality, sexual assault victims would not have to face the stigma and consequences that often prevents them from reporting the crime or testifying against their perpetrators.

Some complicating factors — domestic or international human trafficking, living with HIV/AIDS, and being a child victim — can make the victim’s experience of participating in an

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37 Id.

38 Pietropaoli, supra note 8, at 1, 3.

39 Id.

40 Id. at 5.

41 Amnesty Int’l Annual Report 2011 – Nepal, supra note 33. The Forum is more knowledgeable in this area than the authors, especially in regards to specific examples of issues facing women in Nepal. We suggest adding a few of those examples to this section to further illustrate the point.
investigation or court proceeding even more perilous. The unique vulnerabilities, such as social stigma, that these groups face within society make them especially prone to re-victimization during the legal process. Being some of the most marginalized people and the people most vulnerable to the impact of social stigma, breaches of confidentiality are more likely to have a devastating impact on these victims’ lives. Hence, if provided with a guarantee that their privacy would be protected when they report a crime, aid the police during investigations, or seek help from service providers, then it may be more likely that these victims would seek those recourses.

Nepal has the highest number of human trafficking victims in South Asia. In fact, as of 2009, approximately 10,000 to 15,000 Nepali women and girls were trafficked to India annually and 7,500 children are trafficked domestically for commercial sexual exploitation. Even though, “Nepal [has] made limited efforts to protect victims of trafficking,” the majority of victims of human trafficking in Nepal still do not report or testify against their traffickers because there are no comprehensive legal protections to ensure their confidentiality or their personal safety from retaliation by their traffickers. For example, many victims who are material witnesses in court cases do not testify because they are often pressured by their communities not to pursue a case. Consequently, victims of human trafficking would benefit greatly from comprehensive legislation that protects their confidentiality, which would better enable them to pursue cases against their traffickers.

Children are particularly affected by sexual violence and human trafficking in Nepal. The majority of sexual violence reported cases involve victims who are girls under the age of eighteen and there have been at least sixteen reported cases of rape against children under ten years old. In addition, as of 2000, at least 20% of girls trafficked to India were under the age of sixteen. Because children are particularly vulnerable and more easily intimidated than adults, it is important that they are accorded special protections during the investigation and trial stages so that they, or their families, are threatened against pursuing the case.

People who are living with HIV/AIDS are especially in need of legislation to protect their confidentiality because of their marginalized status in society. These persons are stigmatized both for having HIV/AIDS and because of the correlation between having HIV/AIDS and being a sex worker. A 2007 report found that 40% of Nepali women trafficked into India to work as

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45 Id.
46 Note that this is for reported cases only. Violence against adult victims is less likely to be reported. See Pietropaoli, supra note 8, at 2.
47 Id.
48 Poudel & Carreyer, supra note 11, at 8.
sex workers returned to Nepal HIV positive.49 The cultural stigma against persons with HIV/AIDS in Nepal is so great that it even extends to health professionals, who “appear suspicious, even unaware, of contemporary biomedical knowledge as it relates to HIV” and who often breach the confidentiality of these persons by revealing their HIV/AIDS status to others.50 Thus, persons with HIV/AIDS should also receive protection of their confidentiality because their illness greatly marginalizes them in Nepalese society.

This report will recommend key elements that are necessary for comprehensive legislation to protect these vulnerable victims’ identities during investigations, court proceedings, and in the public sphere. These recommendations will strengthen Nepal’s legal and political system by providing the victims with an improved access to justice through legal mechanisms and protections. The report analyzes and expands upon the recommendations provided in the proposed bills to reform Nepal’s criminal justice. Each section of the report offers top-line recommendations, the key issue present for Nepal, a comparative study of other country’s laws and policies, and a brief conclusion. The report provides examples from thirteen different countries so as to provide diverse options. In determining which countries to include in the report, we considered the following factors in comparison with Nepal: the level of development and infrastructure, regional counterparts, similar historical development of women’s issues; availability of resources; and comprehensiveness of law or policy.

Though the recommendations are aimed primarily at protecting the confidentiality of adults who are victimized by sexual assault, they may be applied more broadly in Nepal’s criminal justice system. Special attention should be given on ensuring that victims who were trafficked, are living with HIV/AIDS, or were victimized as children enjoy the protections recommended in the paper.

The report follows a chronological order of events — from a victim first reporting a crime to the police until a trial has concluded. Section II recommends that Nepal expand its Women’s Police Cells to more police units; Section III discusses the evidentiary privileges that victims should have with service-providers; Section IV analyzes how victim’s identities can be protected in court; Section V explores how a victim can be protected when they are also a witness in a trial; Section VI offers solutions for preventing confidential information from being disclosed to the public; and Section VII recommends an advocacy plan to educate the public about the new legislative measures. The graphic below shows how the paper’s recommendations fit into the process.

49 Prasai, supra note 42.

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<td>Specialized police units or police officers assigned to handle sexual assault cases.</td>
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<td>Absolute privilege for any communication, written or oral, between a sexual assault victim and a service provider/</td>
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<td>Training for police officers and service providers on protections of confidentiality.</td>
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<td>Witness protection for sexual assault victims</td>
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<td>Training for judges on how to decide and enact new legal protections (e.g. in camera testimony or publication ban).</td>
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<td>Training for members of the media on importance of confidentiality.</td>
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<td>Public outreach to help all Nepalese people understand the importance of confidentiality.</td>
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II. SPECIALIZED POLICE UNIT FOR SEXUAL VIOLENCE CASES

The first step in the investigation process is the victim reporting the crime to the police. For a victim of sexual assault, this can often be a terrifying and shameful ordeal. Specialized police units that are professionally trained to interact with victims of sexual violence and to investigate the cases with sensitivity to the victims’ confidentiality could help to assuage the fear and shame, thus encouraging reporting.

Recommendations
- Nepal should consider expanding the number of Women’s Police Cells to more police units in Nepal, including police units in rural areas.
- The Women’s Police Cells within each police unit may be more effective if they had a majority of women officers so that women can feel more comfortable reporting a crime and to minimize the possible discrimination against women from male officers.
- To be most effective, all the officers in the Women’s Police Cells should be appropriately trained to respond to sexual violence cases, especially how to maintain a victim’s confidentiality throughout the investigation process.

The Issue
Generally, the nature of sexual violence cases makes them more complex and sensitive than most other crimes that a police force deals with on a daily basis. The nature of the crime is so personal that victims are less likely to report it due to shame and fear that their identities will be revealed in the community. In Nepal especially, the social stigmas surrounding raped victims often hinders women from admitting that they have been raped. Rape victims in Nepal are also frequently pressured by police to settle their case for meager sums of money outside of court rather than pressing charges against perpetrators. Hence, social stigma hinders a rape victim from identifying herself as such and reporting the crime and, even in the rare cases that she does report, inadequate policing (and disproportional penalties) can belittle the seriousness of the crime and can pressure the victim to drop the charges.

Moreover, medical professionals, who are not provided with any training in how to sensitively interact with sexual assault victims, often refuse medical exams or treatment to victims who come without a police report. On the other hand, police often refuse to file a First Information Report without a medical report that corroborates that sexual violence occurred. This disregard for the seriousness of sexual offenses and the shuffling of responsibility between the police and health professionals can leave victims feeling helpless, and may discourage them from reporting

52 Id. at 6.
53 Id. at 5.
54 Id.
incidents to the authorities. These feelings are often exacerbated when there is no unified system in place for reporting sexual violence crimes — victims do not know where to go, what to do, or who they can comfortably and confidentially talk to when they have been sexually assaulted.

Currently, Nepal has Women’s Police Cells, which are police units that include women who are specially trained to handle women’s cases, in only five cities (including Kathmandu). Even in these cities, the Women’s Police Cells do not seem to have been established as the initial responders to sexual violence claims. Furthermore, it is unclear how many women are officers in the Women’s Police Cells (or how feasible it is for a woman to be an officer), what kind of training officers receive or what resources and funding is available to the Women’s Police Cells. Victims may be more willing to report sexual violence if there was a well-established first responder location with a confidential system for reporting where victims felt respected, understood and dealt with professionally. In fact:

[T]here is evidence that specialized units are more responsive and effective in dealing with violence against women. Experience has shown that the establishment of such units may facilitate the development of expertise in this area and may result in an increase in the number of cases investigated and a better quality and more efficient process for the complainant/survivor.56

It may be effective for Nepal to clearly institute Women’s Police Cells as the initial responders to sexual assault crimes and to conduct public outreach to educate the public about this resource. This way, victims will know where to go and the responsibility will not be resisted or passed on. For it to be most effective, however, Nepal should also consider expanding its current Women’s Police Cells to more cities and to rural villages so that there is a unified system throughout Nepal that is easily accessible to most women. Furthermore, the Women’s Police Cells should be adequately funded with a majority of women officers who are properly trained on confidentiality issues because women victims are more likely to feel comfortable speaking to women officers about sexual violence than they would be to male officers, especially because of the social stigma in Nepalese society. Implementing these changes — expanding the number of Women Police Cells, having a majority women officers, and providing adequate training on confidentiality — will help encourage victims to report sexual assault because it will lessen the fear of their privacy being revealed during the investigation process.

Comparative Case Studies
The following comparative case studies demonstrate the success of some of these factors in different countries. Brazil and other Latin American Countries show the expansion of Women’s Police Stations to more than 400 cities, specific functions the stations play that makes them an effective part of the investigation process, and the legislative history that occurred which aided in their development. Zambia illustrates the importance of having a coordinated first response system for sexual assault victims and the benefit of having a women majority in the police units. Rwanda demonstrates the success, through its Gender Desks, of grassroots efforts to bring community awareness of the problem of sexual violence and the availability of this specialized


police unit. India shows the beginning steps of creating all-women’s police stations to handle sexual violence cases.

**Brazil and other Latin American Countries**

Countries in the Latin American region have taken active and multi-pronged steps to end sexual violence and to protect victims. In addition to reforms in national law and policy, and involvement in regional and international conventions, many of these countries have also created Women’s Police Stations (WPS), which are “specialized police (or judicial) institutions whose purpose is to improve access to justice.”

The Women’s Police Stations program began in Sao Paulo, Brazil in 1985 but has now expanded to more than 400 WPS just in Brazil and then further expanded to more than thirteen Latin American countries. Although the WPS models are different in each country, they “continue to be one of the most important policies and are the main entry point for accessing justice, and some countries have adopted polices to continue increasing the amount of WPS.”

Some common practices across WPS in different Latin American countries that help them to function effectively include the authority to prevent and investigate violence, receive complaints, and make arrests. Additionally, in Ecuador, the WPS “have the authority to punish violence, issue protection measures, and order reparations. In Brazil…[they] have the authority to remit cases to the corresponding court to issue protection measures. Similarly, the WPS in Brazil, Nicaragua, and Peru have the authority to enforce protection measures issued by the courts.”

Some WPS also offer integrated services, such as legal, social and psychological services for victims, which allows for a comprehensive and multidisciplinary approach to helping individuals recover. All these characteristics contribute to the effectiveness of WPS in Latin America, which makes them worthwhile examples for other countries to follow.

Specifically in Brazil’s case, some factors that helped the development of WPS are:

- The implementation of a National Policy to Prevent, Combat, and Eradicate Violence against Women (2003) by the Special Secretariat on Policies for Women (SPM).
- This was proposed at the federal level and implemented at the state and municipal levels through the National Pact to Combat Violence against Women (2007).
- Both of these governmental actions led to governmental discussions about the scope of action for Specialized Women’s Police Stations.
- Passage of Law 11.340 (2006), known as the Maria de Penha Law, which is specialized legislation that deals with domestic and family violence against women.

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58 *Id.* at 9.

59 *Id.* at 30.

60 *Id.*

Locally, some municipalities have taken their own proactive steps as well. For example, the municipality of Belo Horizonte organized the Network to Combat Violence against Women of Minas Gerais.

Zambia
Zambia is a good model for comprehensive victim support units that help victims with many of their post-crime needs. Zambia’s Police Act of 1999, as amended, established Victim Support Units at all police stations that focus solely on sexual violence issues, such as rape, domestic violence, sexual abuse, and trafficking.62 The majority of the support officers in these units are women (320 are women out of 430 officers).63 Amongst its services, a Victim Support Unit has a coordinated response center where victims of sexual violence can go to receive medical, psychological and police assistance in one place. Unit officers are trained to administer to victims, including providing them with emergency contraception in cases of rape.64

Rwanda
Rwanda provides a good model for a designated police unit that also builds community awareness. Rwanda established Gender Desks at police stations, which are units that are mostly staffed by women who are trained to help victims of sexual violence.65 These units “investigate cases and ensure that evidence is available for court proceedings.”66 As a result, in 2006 the Rwandan police referred 1,777 rape cases to prosecutors, resulting in 803 convictions.67 A unique aspect of the Rwandan Gender Desk is that since it’s establishment in 2008, it has conducted significant national public outreach to build awareness about its existence and educate the public on gender equality and human rights.68 This has built grassroots efforts to fight gender and sexual-based violence.

India
As a neighbor to Nepal, India offers a practical example for establishing all-women police stations that are specifically established to handle sexual violence cases. As recently as September of 2011, the government of India created sixty-five all-women police stations with an initial 550 personnel, which will handle violence against women crimes.69 According to one commentator, the establishment of all-women police stations was due to “Police stations in India [being] notoriously hostile environments, leaving some victims feeling less secure than before their visit. In particular, victims of rape, sexual harassment and trafficking [had] reported

63 Id.
64 Id.
66 Id.
67 Id.
68 Id.
revictimisation by the very police officers tasked with helping them.”

The all-women police stations were seemingly established to address these concerns, which are similar to Nepal’s and to encourage women to go to police stations and report their case.

Conclusion

Thus, Nepal’s Women’s Police Cells in five cities are a step in the right direction. Primarily, it is suggested that Nepal expand these cells throughout Nepal and officially make them the initial responders to sexual assault crimes so that there is a unified system throughout Nepal. In addition, a majority of women officers in these police cells who are well-trained and equipped to respond to sexual assault cases and to maintain confidentiality throughout the process will help encourage victims to report sexual assault. It may also be helpful to conduct public outreach that educates both rural and urban areas of the availability of the Women Police Cells and generally, to galvanize support for ending sexual violence against women.

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71 Id.
III. EVIDENTIARY PRIVILEGES: PROTECTING THE COMMUNICATIONS BETWEEN SERVICE PROVIDERS AND VICTIMS FROM BEING INTRODUCED IN COURT

Evidentiary privileges that protect the communications between sexual assault victims and NGO service providers, counselors, and medical professionals are another way to protect the confidentiality of victims during the investigation and trial process. This legal framework protects service providers, counselors, and medical professionals from feeling as if they are unable to keep complete records for fear that they could be introduced at trial, while also ensuring that victims feel safe in confiding all necessary and pertinent information.

Recommendations

- An absolute privilege that would protect any communication, written or oral, between victims of sexual assault or trafficking and any medical or mental health professional, counselor, or NGO service provider from being introduced at trial, appears to be the most effective way to increase victim reporting and protect confidentiality.
- Including with this privilege a provision permitting the victim, and only the victim, to waive that privilege, further empowers the victim and provides her with the opportunity to admit the evidence if she so chooses.

The Issue

An evidentiary privilege is a form of legal protection that often allows the holder of the privilege to withhold certain evidence from being entered into court, even if that evidence would otherwise be relevant and admissible. It can also provide the holder of the privilege with the ability to prevent others from admitting evidence covered by the privilege into court. The privilege can cover written information, oral communication, or both.

While Nepal has evidentiary privileges that protect the communications between husband and wife, attorney and client, and police officer and informant, no privilege exists for the communication between rape victims and service providers. Evidentiary privileges that shield the communication between victims and their social workers, medical professionals, therapists, clergy members, or counselors from disclosure can increase victims’ willingness to report crime and receive treatment. Without such a guarantee of confidentiality, “sexual assault victims may not be willing to disclose personal information for fear that their innermost thoughts and feelings will later be scrutinized by defense counsel and used against them during a trial.” In addition, such protections provide a safe environment in which victims can receive assistance, while also shielding victims from further stigmatization by the community.

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72 Jessica Mindlin and Liani Jean Heh Reeves, CONFIDENTIALITY AND SEXUAL VIOLENCE: A TOOLKIT FOR STATE COALITIONS 13 (The National Crime Victim Law Institute at Lewis & Clark School of Law, 2005).
74 Evidence Act 2031, 8 §§ 41, 44A, 45, 46 (1977) (Nepal).
75 RAPE, ABUSE & INCEST NATIONAL NETWORK, supra note 73.
Evidentiary privilege laws fall into three categories: absolute, absolute diluted, and qualified. An absolute privilege places the power to waive the privilege entirely in the hands of the victim, an absolute diluted privilege legally places the power with the victim but enables the court to make determinations on a case by case basis, and a qualified privilege is one in which the law is promulgated with an explicit grant of power to the court to waive the privilege.

<table>
<thead>
<tr>
<th>Type of Privilege</th>
<th>Waive-able by a Judge?</th>
<th>How to Waive?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Absolute</td>
<td>No</td>
<td>The victim may waive the privilege by introducing the evidence into court, by discussing the privileged information with third parties not covered by the privilege, or by signing a waiver permitting the release of the information.</td>
</tr>
<tr>
<td>Absolute Diluted</td>
<td>Yes</td>
<td>While the victim is legally granted with the sole power to waive the privilege, judges are not prohibited from waiving.</td>
</tr>
<tr>
<td>Qualified</td>
<td>Yes</td>
<td>Judge is statutorily granted the ability to make case-by-case determinations on whether to waive the privilege. Often, this requires an in camera review of the evidence in which the judge weighs the totality of the circumstances in making the decision of whether or not to allow it in court.</td>
</tr>
</tbody>
</table>

**Comparative Case Studies**

**Absolute Privilege**

An absolute privilege “protects any communication or record of communication between a victim and a qualifying service provider made in furtherance of psychological and emotional healing from examination by defendant or the court.” Within this paradigm, only the victim

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76 Mindlin and Reeves, supra note 72.

77 *Id.*

78 A “qualifying service provider” would include anyone who is a social worker, an NGO staff-member who works with victims of sexual assault, medical professionals, therapists, and counselors. In Nepal, this would primarily include NGO workers who provide outreach and support services to women victims of sexual violence and trafficking, medical professionals, psychologists and sociologists (see Domestic Violence (Offence and Punishment) Act, 2066 §4(9) (2009) (Nepal)).

79 Mindlin and Reeves, supra note 72.
may waive the privilege; the court does not have the ability to waive it under any circumstances. While there are variances from jurisdiction to jurisdiction, in most legal systems where this privilege exists, the victim may exercise the waiver by introducing the evidence into court herself, discussing the privileged information with third parties not covered by the privilege, or signing a waiver permitting the release of the information.\textsuperscript{80}

The benefit to an absolute privilege is that there is a bright line rule protecting the victim’s confidentiality in all circumstances; since judges are unable to waive the privilege, there is less opportunity for corruption to influence the outcome of the case. Furthermore, it is empowering to the victim as it provides her, and only her, with the ability to choose whether that information is introduced at trial. Because sexual violence and human trafficking are crimes that involve dominance and an extreme power imbalance, returning that power to the victim can be restorative.

However, an absolute privilege may present tension with the right of the defendant to a fair trial as it prevents potentially relevant information from entering into evidence.\textsuperscript{81} The interim constitution in Nepal does not explicitly include the right to confront all witnesses and evidence entered against the accused, but Nepal is a signatory and ratifying body of the International Covenant on Civil and Political Rights (“ICCPR”), which requires that defendants be given the opportunity to cross-examine adverse witnesses at trial.\textsuperscript{82}

Privileging communication between rape victims and service providers does not necessarily infringe on the right to confront witnesses, as the right does not automatically confer the “power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”\textsuperscript{83} Rather, as jurisdictions that have enacted and upheld an absolute privilege protecting the communication between victims and service providers have found, the ability to cross examine the victim in court is sufficient to preserve the right of confrontation.\textsuperscript{84} Moreover, these jurisdictions have found that the policy reasons of protecting victim confidentiality and providing a safe space in which victims feel comfortable reporting crime outweigh any added benefit the accused might enjoy from having access to such communication.

While the enforcement of an absolute privilege has been possible without levying serious penalties on offenders in many of the jurisdictions mentioned below, Germany has enacted legislation that criminalizes the disclosure of any privileged information with fines and imprisonment of up to one year. This has assisted with enforcement of the privilege by highlighting the importance of respecting confidentiality and punishing those who do not comply.

\textsuperscript{80} Id.
\textsuperscript{81} RAPE, ABUSE & INCEST NATIONAL NETWORK, supra note 73.
\textsuperscript{84} In the United States, the confrontation clause has been interpreted as permitting the protection of communications with service providers to get help without requiring them to assist in the prosecution.
**Australia**
The state of Tasmania in Australia confers an absolute privilege to the communication of rape victims with sexual assault counselors. The privilege there is promulgated to prevent the disclosure of sexual assault counseling communications without the explicit consent of the counseled person, and “courts do not have the power to order disclosure without that consent.”

This guarantees that the privilege remains in the hands of the victim and prevents judges from overriding it.

**United States**
Similarly, within the U.S., fourteen states and the District of Columbia have enacted laws granting absolute privileges for the communication between rape counselor and rape victim. These states have chosen to adopt an absolute privilege because:

[due to] the fear and stigma that often results from those crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes.

An absolute privilege ensures that these policy considerations are taken seriously by providing the victim with the sole authority to waive the privilege. While these laws have been challenged in Illinois, Colorado, and Pennsylvania for violating the confrontation and due process rights of the defendant, courts have upheld the laws in all three states and found no constitutional due process or confrontation clause violation.

**Germany**
Germany offers an example of how the importance of protecting private communication can be further accentuated by the adoption of criminal penalties for disclosure of such information. Additionally, Germany’s laws cover the disclosure of all personal secrets, regardless of whether or not that individual is a victim, and they apply to communication between nearly any individual consulted under their professional capacity. While the German law is extremely

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(1) Whosoever unlawfully discloses a secret of another, in particular, a secret which belongs to the sphere of personal privacy or a business or trade secret, which was confided to or otherwise made known to him in his capacity as a

1. physician, dentist, veterinarian, pharmacist or member of another healthcare profession which requires state-regulated education for engaging in the profession or to use the professional title;

2. professional psychologist with a final scientific examination recognised by the State;
broad, in granting such extensive privilege to private communication, the message is clear that confidentiality is valued and respected. The addition of a criminal penalty to the prohibition on revealing private information further solidifies the importance of the privilege and provides an additional level of deterrence to those who may wish to violate the confidentiality.

**Absolute Diluted Privilege**

In an absolute diluted privilege system, the privilege is promulgated as absolute, but exceptions may exist allowing the judge to review the communication in camera (privately within the judge’s chambers).90 Typically in this scenario, the judge may decide to review the communication in order to determine whether it is material and relevant. If she finds that it is, then she may order disclosure of the communication in trial.

**Australia**

Many Australian states have an absolute diluted privilege system where the court “can decide to order disclosure even if the complainant does not agree to it.”91 In many of these jurisdictions, however, courts are required to consider the “nature, extent and likelihood of harm to the complainant” if evidence is admitted. In some Australian states, judges face additional requirements in making the determination of whether or not to waive the privilege. These include weighing admission of the communication against the public interest of ensuring that counselors and victims feel at liberty to freely communicate, that counselors do not feel obligated not to made adequate counseling records, and that the application for the disclosure of the information is not being made “on the basis of discriminatory beliefs or bias.”92

**United States**

The American states that have an absolute diluted privilege demonstrate how some courts have balanced the privacy interests of the victim with the rights of the accused. Michigan and Connecticut have privilege statutes that are facially absolute, but there are mechanisms by which judges can inspect the evidence and make a determination of whether or not to waive the privilege. In Michigan, a trial judge will “conduct an in camera review of privileged rape crisis records if the defendant can demonstrate that there is a reasonable probability that the records

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3. attorney, patent attorney, notary, defense counsel in statutorily regulated proceedings, certified public accountant, sworn auditor, tax consultant, tax agent, or organ or member of an organ of a law, patent law, accounting, auditing or tax consulting firm in the form of a company;

4. marriage, family, education or youth counsellor as well as addiction counsellor at a counselling agency which is recognised by a public authority or body, institution or foundation under public law;

4a. member or agent of a counselling agency recognised under section 3 and section 8 of the Act on Pregnancies in Conflict Situations;

5. a state-recognised social worker or state-recognised social education worker; or

6. member of a private health, accident or life insurance company or a private medical, tax consultant or attorney invoicing service,

shall be liable to imprisonment of not more than one year or a fine.

90 Mindlin and Reeves, *supra* note 72, at 14.

91 Heath, *supra* note 85.

92 Id.
contain material information necessary to the defense. “93 Thus a defendant may override the statutory privilege by making a showing that his constitutional rights may be compromised by excluding the evidence. Likewise in Connecticut, if the defendant shows that there is a serious risk to his right to confrontation, then a trial judge may “inspect the confidential records in camera.”94 Massachusetts has gone even further with a recent court decision that permits defense counsel to review confidential records in camera to determine whether or not it contains material evidence.95 While this approach goes further to protect the rights of the accused, advocates have criticized this decision as disregarding the privacy interest of victims.96

**Qualified Privilege**
Qualified privilege laws have an express provision granting courts the authority to make a case-by-case determination on whether or not to keep the communication privileged and confidential. In this scenario, the power to waive the privilege remains with the court and not with the victim.97 In these settings, often the defendant may request an in camera inspection of the privileged material upon a threshold showing that such evidence may be material to the defendant’s case.98 This paradigm does more to ensure that potentially relevant information is not withheld from trial, and in so doing, provides additional safeguards against any possible due process or confrontation right violations.

While qualified privilege laws provide more protections for defendants since courts are explicitly granted the ability to waive the privilege in favor of the defendant, they also leave room for overuse of judicial discretion. Additionally, advocates argue that even “permitting a trial judge to inspect rape crisis center records in camera intrudes on a sexual assault victim’s expectation of privacy and goes against the policy reasons for privileging victim counseling records in the first place.”99 This paradigm is particularly worrisome in countries where the possibility for corruption and bribery of judges is high.100

**United States**
While procedures vary, in the U.S. jurisdictions that have qualified privileges, judges often make a determination based on the totality of the circumstances. In this test, they will take into account policy considerations and potential harm to the victim that releasing the information may cause against any of its probative or exculpatory value.101

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93 RAPE, ABUSE & INCEST NATIONAL NETWORK, *supra* note 73.
94 In Re Robert H., 509 A.2d 475, 484 (Conn. 1986).
96 RAPE, ABUSE & INCEST NATIONAL NETWORK, *supra* note 73.
97 *Id.*
98 *Id.*
99 *Id.*
101 RAPE, ABUSE & INCEST NATIONAL NETWORK, *supra* note 73.
**Bolivia**

Bolivia has also promulgated a qualified privilege that protects the communication between victim and psychologist with an explicit grant of authority to courts to waive that privilege.\(^{102}\) While this has allowed for the possibility that privacy is protected, leaving the privilege in the hands of the judge has in effect rendered this law null.\(^{103}\)

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**Special Considerations for Cases Involving Children**

Children should enjoy the same privilege rights as adults, but children's rights may be applied differently because children usually lack the capacity to act on their own behalf in serious legal or health-related situations. For example, though parents are usually involved in all decisions affecting their children, what if the parents themselves are the problem? In cases of child abuse, neglect, or trafficking, parents may be the instigator. To serve the best interests of the child in those cases, service providers, police investigators, and court officials may need to violate confidentiality so that proper action can be taken.

In Western Australia (an Australian province), doctors, nurses, midwives, teachers, and police officers have a legal obligation to report all reasonable beliefs of child sexual abuse to the Department for Child Protection.\(^{104}\) When a report is made, the Department for Child Protection sends a copy of the report to the local police. To encourage reports to be made, the law offers protection for the reporter (the person who makes the mandatory report) and the informant (the person who provides the information in the report). Those reporters and informants who act in good faith are guaranteed protection from civil and criminal liability, breaches of any duty of confidentiality, breaches of professional ethics or standards of conduct. Generally, reporters’ and informants’ identities must not be disclosed.\(^{105}\) If such identities are disclosed, penalties of up to...

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\(^{102}\) Supreme Decree No. 25087 Art. 2, § 5 (1999) (Bol.).


\(^{105}\) A few exceptions to this bar on revealing a reporter’s or informant’s identifying information exist:

- The Department of Child Protection’s report that is shared with the police includes the reporter’s identifying details. This means that the police officers who come into contact with the report must be vigilant not to reveal this information.

- A Department for Child Protection officer finds it necessary to do so during child protection, family law or adoption proceedings relating to the child.

- If a person makes a misleading report, that person may be prosecuted for an offense relating to mandatory reporting and information about their report may be shared with the court.

- The reporter consents in writing to the identifying information being revealed.
two years in prison and a $24,000 fine may be imposed. Penalties may be imposed even if the disclosing information does not name the reporter or informant directly, but others may still be able to determine his or her identity from the clues given.

**Conclusion**

An absolute privilege protecting all communication between the victim and any NGO service provider or medical professional that she seeks assistance from in the course of reporting sexual violence or human trafficking may be an effective model for Nepal. If all of the power of the privilege is in the hands of the victim, the potential for judicial misconduct or corruption is minimized, confidentiality is more likely to be protected, and victims may be more inclined to come forward to report crimes.

If such a privilege is enforced in Nepal, it will be important to ensure that the right to a fair trial is balanced with the exercise of the privilege. This may be achieved by providing the accused with the ability to cross-examine all adverse witnesses in trial. The addition of a criminal penalty for anyone who discloses such confidential information as Germany has done may also be effective in the Nepali context. Criminal penalties can serve to legitimize and further highlight the importance of the privilege while also increasing the potential for enforcement.

A court must give permission for identifying information to be revealed and can only do if: (1) the court is satisfied that it is necessary to safeguard and promote the wellbeing of the child; (2) revealing identifying details is critically important in the proceedings and there is compelling reason in the public interest to make the disclosure; or (3) the person has consented to the disclosure. But even if disclosure of identifying information is allowed, a Department of Child Protection officer can object where they believe that the disclosure endangers, or is likely to endanger, a person’s safety or psychological health. *Id.*
**IV. TESTIFYING IN CAMERA: PROTECTING WITNESS AND VICTIM IDENTITY IN COURT**

During the course of the trial itself, legal provisions that allow victims to choose to testify privately *in camera*, with the possibility for physical separation from the accused in the form of a screen, a witness box, or the ability to testify via closed circuit television, protect victims both from having their identities leaked as they would be in a public trial, but also from the re-traumatization that can come from having to directly confront their abuser.

**Recommendations**

- We recommend the adoption of legislation that grants rape and human trafficking victims the right to testify confidentially *in camera* or via closed-circuit video.\(^{106}\)
- Our research indicates that additional protections applied *in camera*, such as the right to request a screen shielding the witness from the accused, the ability to take frequent breaks if needed, and the opportunity to see a copy of all cross examination questions prior to the trial, can further minimize the probability of additional trauma befalling the victim.
- These protections are more likely to be utilized by victims if police and court officials inform victims of these rights prior to trial so that they know to invoke them.
- In order to preserve the right to a fair trial, these provisions must also be accompanied by a law expressly granting the accused with the right to be present and ask questions during any testimony given any *in camera* or via videoconference.

**The Issue**

Victims of sexual assault and trafficking face the possibility of enduring additional trauma, as well as community stigmatization and retaliation, from publicly testifying in front of their abusers.\(^{107}\) Providing victims with the opportunity to testify in camera, or privately within the judge’s chambers, allows victims to contribute to the prosecution of defendants while protecting them from further trauma or harm. In Nepal, this privacy is of particular importance due to the general stigmatization and shame that sexual assault and human trafficking victims endure.\(^{108}\)

The privacy of victims must be weighed, however, against the Nepali constitutional right of the accused to a fair trial,\(^{109}\) which under the ICCPR includes the right to a public hearing and the right to cross-examine witnesses.\(^{110}\) In balancing these competing interests, several countries have adopted laws which provide for exceptions to the general rule in cases of rape or when children are involved. The ICCPR has also recognized that in certain scenarios, particularly in

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\(^{106}\) The recently drafted Nepal Draft Criminal Procedure Code Bill 2011, Chapter 3, Sections 109 and 129 proviso includes these provisions, and we recommend the adoption of this legislation.


\(^{110}\) ICCPR *supra* note 82, at art. 14(1), (3)(e).
cases involving sexual crimes, the right to a public hearing may be waived in favor of a private proceeding that protects the confidentiality of the individuals involved.\textsuperscript{111}

Recognizing the importance of protecting victim privacy in the courtroom, the CA has drafted a provision within the recently proposed Criminal Procedure Code Bill that includes the right of victims of sexual offences to testify \textit{in camera} or to testify via videoconference.\textsuperscript{112} While we recommend the adoption of these provisions into Nepali law, they must be accompanied by the right of the accused to be present \textit{in camera} or at the videoconference and provided with the ability to confront and cross-examine all witnesses testifying against them. Without such an explicit guarantee written into the law, the draft legislation runs the risk of violating Article 14(3)(e) of the ICCPR, which guarantees the right of the accused to confront witnesses introduced against him.\textsuperscript{113}

\textbf{Comparative Case Studies}

India and South Africa have both adopted laws that may be particularly applicable to the Nepal context. Both countries have stigmas against victims of sexual assault and trafficking, both are common law countries like Nepal, and both have relatively comparable economic resources. While South Africa has faced some enforcement issues, these can be addressed through measures that require courts and police officers to inform victims of their right to a trial in camera if they wish to protect their privacy.

\textbf{India}

India’s Criminal Procedure Code (CPC) expressly grants rape victims the right to a trial in camera.\textsuperscript{114} Although defendants in India are guaranteed the right to cross-examine witnesses in open court, these laws create an exception to that right in rape and child sexual abuse cases.\textsuperscript{115} The Indian government has found that the importance of ensuring confidentiality in such contexts supersedes the right of the accused to a trial in open court.\textsuperscript{116} Further ensuring the protection of vulnerable victims, the CPC grants police officers the power to make a determination that “any part of the statement recorded [under the provision granting in camera testifying privileges] of a person the prosecution proposes to examine as its witness need not be disclosed to the accused if it is not essential in the interests of justice or is inexpedient in the public interest.”\textsuperscript{117}

\begin{flushright}
\footnotesize
\textsuperscript{113}ICCPR, \textit{supra} note 82, at art. 14(3)(e).
\textsuperscript{115}\textit{Id.}
\textsuperscript{116}\textit{Id.}
\textsuperscript{117}\textit{Id.}
\end{flushright}
Indian courts have also recognized the importance of protecting victims of sexual assault, and case law provides for additional measures that can be taken to further shield the privacy of the victim. In *Sakshi vs. Union of India*, the court held that the following protections should be made available to child sex abuse victims in adjudicative proceedings:

In holding trial of child sex abuse or rape:
(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.118

The *Sakshi* decision gives clear instructions on how to balance the vulnerability of the victim/witness with the rights of the accused. These additional safeguards can further protect both adult and child victims of sexual violence from possible re-traumatization that can take place even if the hearing is held in camera.

**South Africa**

The South African model provides insight into the need to ensure public awareness of the law so that victims are able to invoke their right to *in camera* protections. South African Criminal Procedure Code §153 gives courts the ability to make case-by-case determinations on whether to permit criminal proceedings to take place in camera in order to protect witness identity.119 However, there has been a disconnect in South Africa between the law as it was intended to be carried out and its enforcement on the ground. A recent report by the Gender Law Unit of South African firm Sonnenberg, Hoffman & Galombik found that “[t]he effectiveness of existing protective legislative measures has been severely hampered by the lack of knowledge on the part of witnesses of their rights and the failure of presiding officers to interpret the law in a manner congruent with providing adequate protection to witnesses in sexual offence proceedings.”120 The report recommends changes in South African law that would require prosecutors to inform victims of their right to a trial *in camera* so that they are aware of their rights.121 In particular, it recommends that the law expressly provide that prosecutors inform the victim or, in case the

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118 Sakshi v. Union of India, 2004 (6) SCALE 15.
121 The language of the recommended law is as follows: “The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is below the age of eighteen years, such witness, his or her parent, guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 13 and of the protective measures listed in paragraphs (a) to (g) of section 13(4) prior to such witness commencing with his or her testimony at any stage of the proceedings.”
victim is under the age of 18, the victim’s parent or guardian, that he or she may be declared a “vulnerable witness” under the law and may invoke protective measures such as the ability to testify privately in camera if he or she so chooses. The proposed legislation also specifies that the victim be informed prior to testifying.\textsuperscript{122}

**Special Considerations for Cases Involving Children**

Nepali statutes and court practice could allow for protections for child witnesses so that they do not have to confront the accused during the trial. At minimum, judges should allow child witnesses to be screened from the accused’s view during the trial. Additional measures that require more advanced technology, such as testifying remotely through an internet-based video link or through closed-circuit television, also may be adopted if resources are available.

In the United Kingdom, courts have the statutory responsibility to consider special measures to protect vulnerable and intimidated young witnesses.\textsuperscript{123} One method of presenting evidence involves the use of a live telecast for witnesses who are children.\textsuperscript{124} In at least one case, the judge allowed the child witness to be screened from the accused during trial.\textsuperscript{125}

As part of the testimony accompanying a report to the Law Commission of India in its review of rape laws, women and children’s advocacy groups made several suggestions that mirrored current practice in western countries. These included:

- Testimony of a minor in a case of sexual assault should be recorded as early as possible in the presence of a judge and a children’s services representative;
- The minor’s testimony should be video-taped or presented through closed-circuit television to prevent the minor having to confront the accused in court;
- The judge should carry out the cross examination of the child, using questions submitted by the defense; and
- A screen should be used during the child’s in-court testimony so that s/he does not see the accused during the trial.\textsuperscript{126}

The Commission only adopted the final suggestion as an official recommendation, noting that the others would be “impractical.”\textsuperscript{127} Nepal may also find it difficult to procure and distribute the video-recording or close-circuit television equipment to carry out these procedures now, although Nepalese legislators and advocates may consider all of these proposals. Using technology can be a real asset as courts try to balance the needs of the victim with the rights of the accused. Grant opportunities or development programs might be able to sponsor pilot programs in a few Nepali courts as a first step.

\textsuperscript{122} Id.


\textsuperscript{124} Id. § 24.


\textsuperscript{126} 172nd Report of the Law Comm’n, supra note 114.

\textsuperscript{127} Id.
Though well-intentioned, special protections for children may cause due process violations for criminal defendants. The U.S. Constitution, for example, guarantees the right of the accused to face and examine the witnesses against him or her, a right known as the "confrontation clause."\textsuperscript{128} The Supreme Court in the U.S. state of \textit{Texas} recently invalidated a state law that allowed the admission into a trial of a recording of the oral testimony of a child was younger than thirteen years of age if the court determined that the child would be unavailable to testify in the presence of the defendant about certain particularly serious crimes (including sexual assault).\textsuperscript{129} Although Nepal's interim constitution does not include a confrontation clause, Nepal is a signatory of the International Covenant on Civil and Political Rights, an international treaty that does include such a clause.\textsuperscript{130} As Nepal's decision-makers develop protections for children in trials, they should be sure to balance concerns for the child with the internationally-recognized rights of criminal defendants.

\textbf{Conclusion}

Nepali trials are currently all public and held in open court. Though this is effective for ensuring a fair trial to the accused, it does not protect the confidentiality of victims.\textsuperscript{131} Granting the right to testify confidentially in camera as India and South Africa have would provide a level of protection to Nepali victims of sexual assault and trafficking that is not presently available.

The inclusion of additional protections for witnesses testifying \textit{in camera} would further minimize the probability of additional trauma befalling the victim. Direct confrontation with the accused can be a deeply upsetting experience for victims, and providing witnesses with protections such as a screen or separated witness box, separate waiting areas for witnesses and defendants, a copy of questions prior to trial, and breaks during testimony as needed, can further protect victims.

It will also be important for Nepalese authorities to ensure that these options remain available to victims, and that the laws are actively utilized. As the situation in South Africa demonstrates, just having the law is not enough. Outreach must be done to ensure that victims are aware of their rights and know to invoke them in court. To prevent a similar disconnect between legal ideals and on the ground enforcement, Nepali police, court officials, and prosecutors should be instructed to inform victims of these rights prior to trial so that they know to invoke them.

Finally, it will be crucial that the right of the accused to a fair trial is balanced with the need to protect the privacy of victims who testify in court. To do this, it defendants must be given the right to cross examine the witness, whether it be through questions given to the judge, via video conference, or directly during the \textit{in camera} testimony.


\textsuperscript{130} ICCPR, \textit{supra} note 82, at art. 14(c).

\textsuperscript{131} Subedi and Pokharel, \textit{supra} note 112.
V. COURT PROCEEDINGS: LEGAL PROTECTIONS OF THE VICTIM AS A WITNESS

Victims are often the most important witnesses in court proceedings because they have first-hand knowledge of the crime and the perpetrator. This makes them prime targets for threats and other forms of intimidation tactics by the perpetrator that are meant to scare them from testifying in court. Government-sponsored witness protection programs are especially designed to provide witnesses with protection from harm, if necessary, during the entire court process. Often, these protections include stringent requirements for guarding the victim’s confidentiality and help to alleviate victims’ fear of testifying against their perpetrators.

Recommendations
- Nepal should consider establishing a witness protection program that is independent of the government to ensure fairness. It should also explore opportunities for recommendations from international tribunals or organizations.
- If there are resource obstacles, Nepal can consider establishing a tiered witness protection system to minimize costs and increase efficiency.
- To ensure enforcement, Nepal should consider establishing penalties for any disclosures about a witness in the program.
- Nepal can establish an expansive outreach program to educate people about the law and witness’ rights.

The Issue
Sexually assaulted women in Nepal are not testifying in court against their perpetrators because there is no protection of their confidentiality. Because the victims are not testifying, and sometimes not even reporting the crimes, the perpetrators are going free and committing sexual crimes again and again without repercussions. Women may be more willing to report crimes and testify in court if there are legal protections of the victim as a witness.

Victims who are also witnesses and who can testify with first-hand knowledge of the crime, need to be assured that they will be protected if they come forward, report the crime, and otherwise assist law enforcement and the justice system in catching the perpetrator and prosecuting him in court. Victims are often the most effective sources of information and evidence but because of this, perpetrators often threaten or intimidate witnesses from going to the police. For example, with human trafficking:

The continuous aspect of the crime — i.e. trafficking victims stay in the ‘hands’ of the offender for a long period who has plenty of opportunities for intimidation — provokes in the victims fear of reprisals and for the safety of their families in case of reporting the crime to the police. In addition, the possibility to be sent back to the same environment from which they decided to leave, and without money, decreases the likelihood of trafficking victims to talk to the police.132

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Victims need protection during all parts of the process — during pre-trial investigations, during trial, and post-trial. These protections can include witness anonymity protections during pre-trial investigations, police escorts during trial, and relocation assistance after trial. Nepal can consider following the examples of the below countries by enacting legislation and adopting comprehensive policies that protect witnesses whose assistance to the police or testimony in court would expose them to harm. As Keriako Tobiko, the Kenyan Director of Public Prosecutions, has stated, “security to witness is a basic human right; the Government is committed to ensure safe and secured criminal justice.”

**Comparative Case Studies**

Nepal should consider the following lessons from several different countries to create a unique and sustainable approach to witness protection. South Africa has found that sexual assault victims can and should qualify for witness protection efforts. New Zealand has clear procedures for providing for witness anonymity prior to, during, and after any legal proceedings. Kenya’s experience shows the desirability of an independent body to make witness protection determinations. Colombia is a useful example of how different types of cases and witnesses can merit different levels of protection. And, finally, the development of programs in the United States show how far witness protection programs can go — and provides an example for Nepali leaders to consider for particularly dire cases.

**South Africa**

Currently, South Africa’s witness protection program can be applied for victims or witnesses in a variety of criminal cases, including rape. The Witness Protection Act 112 of 1998, which amended the Criminal Procedure Act of 1977, governs the witness protection program. The Act established the Witness Protection Office within the Department of Justice but under the guidance of a Director that is appointed by the Minister of Justice. According to the Act, “any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or not, by reason of his or her being a witness, may report such belief… and apply in the prescribed manner that he or she or any related person be placed under protection.” The Director also has the power to provide witness protection for crimes that are not on the list if he or she believes it necessary for the safety of a witness.

**New Zealand**

New Zealand allows for the protection of witnesses before the trial even starts. Both the prosecutor and the defendant may ask the presiding judge for an order that excuses that side from disclosing any identifying information about its witness and excuses the witness from providing

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135 *Id.* at § 7(1).

136 *Id.* at § 7(4).
that information during the trial.\textsuperscript{137} To issue the order, the judge must hold a hearing in chambers and weigh interests of the safety of the witness and his or her property against the interests of justice, including the general right of an accused to know the identity of witnesses, the gravity of the offense, the importance of the witness’s testimony, whether other means to protect the witness are available, and whether other evidence may be used in place of the witness’s testimony.\textsuperscript{138} The judge should issue the order only in exceptional circumstances.\textsuperscript{139} If the order is granted, the witness’s anonymity is protected during all legal proceedings and is barred from publication in the media.\textsuperscript{140} A similar order may be requested to protect the anonymity of a witness during the trial as well.\textsuperscript{141} A judge may appoint an independent counsel to assist in making determinations on witness anonymity.\textsuperscript{142} Breaking a protected witness’s anonymity can result in up to seven years’ imprisonment and fines of $2,000 for individuals or $8,000 for organizations.\textsuperscript{143}

\textbf{Kenya}

Kenya’s experience shows the importance of revising witness protection programs in their early years and the potential that external international actors have to help in this development. In 2006, Kenya passed the Witness Protection Act, which protects “The life or safety of the person [who] may be endangered as a result of his being a witness.” The Act gave the Attorney General the responsibility of determining whether a witness can be included in the witness protection program.\textsuperscript{144} Amongst other factors, the Attorney General had to consider “the seriousness of the offence…the nature and importance of any relevant evidence or statement…and the nature of the perceived danger to the witness.”\textsuperscript{145} In 2010, Luis Moreno-Ocampo, the chief prosecutor at the International Criminal Court (“ICC”) expressed concern to the Kenyan government over the protection of witnesses involved in the investigation of the post-election violence that occurred in 2007.\textsuperscript{146} A team from the ICC went to Kenya to help the Kenyan government establish an even stronger witness protection program.\textsuperscript{147} The result was that Kenya amended the Witness Protection Act,\textsuperscript{148} and established an independent Witness Protection Agency (“WPA”). A key improvement in the law through the amendment is that witness protection program is no longer tied to the State Law Office (a.k.a. the office of the Attorney General) but will now be

\begin{itemize}
\item \textsuperscript{137} Evidence Act 1908 § 13B(2) (N.Z.).
\item \textsuperscript{138} Id. at §§ 13B(4)-(5).
\item \textsuperscript{139} Id. at § 13B(5)(b).
\item \textsuperscript{140} Id. at § 13B(6).
\item \textsuperscript{141} Id. at § 13C.
\item \textsuperscript{142} Id. at § 13E.
\item \textsuperscript{143} Id. at § 13J.
\item \textsuperscript{144} The Witness Protection Act, (2006) Cap. 149 § 16(b) (Kenya).
\item \textsuperscript{145} Id. at § 6.
\item \textsuperscript{147} Id.
\end{itemize}
independent and will operate in secrecy to further protect witnesses. 149 Thus, with the help of the ICC, the Kenyan government now has a stronger law and an independent witness protection agency.

**Colombia**

Colombia’s Law No. 418 of 1997 established a three-tiered system for witness protection, which is administered by the Office of the Attorney General. 150 The first program gives witnesses information and recommendations for their own safety, the second gives witnesses limited protections, and the third provides the witness with a change of identity, relocation, and full protection. 151 By allowing for different levels of protection for different types of witnesses, the Colombian model recognizes that not all witnesses and not all crimes are created equal. The justice system, therefore, should provide an array of remedies to give witnesses the level of protection they need.

**United States** 152

The United States Federal Witness Protection Program, also known as the Witness Security Program (“WITSEC”), is administered by the U.S. Department of Justice and operated by the U.S. Marshall Service. 153 Congress established WITSEC through the Organized Crime Control Act of 1970 and amended it with the Comprehensive Crime Control Act of 1984. 154 WITSEC provides witnesses, whose lives are in danger due to their testimonies, with protection throughout the entire legal process — before, during, and after trial. When witnesses are exposed to the most danger, such as during trial testimonies or other court appearances, the program provides them with 24-hour protection. 155 If need be after trial, witnesses and their families can receive new identities with proper documentation and are relocated — essentially beginning completely new lives. 156

It is not easy for a witness, even if it is a victim, to be included in WITSEC. The Comprehensive Crime Control Act sets out strict admission criteria, which includes assessing the significance of the case, whether the witness’s testimony is crucial to the success of the prosecution, and if there

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151 Id.

152 Id.

153 Id.

154 Id.

155 Id.

156 Id.
are any alternative means to secure the witness’s safety.\textsuperscript{157} For example, WITSEC usually provides protection for witnesses who provide testimony against drug traffickers, terrorists, organized crime members and other major criminals.\textsuperscript{158} Therefore, it is rare that victims of sexual violence are eligible for WITSEC unless the gravity of the crime is well established and there is no alternative means to protect the victim. Trafficking, however, which is a particular problem for Nepal, is an organized crime and would most likely be covered under WITSEC. To supplement the federal protections, states such as California\textsuperscript{159} and Connecticut\textsuperscript{160} have implemented their own witness protection programs, which sometimes cover crimes that are not covered by the federal program, including crimes of sexual violence. Hence, under U.S. law, a victim of sexual violence would be admitted in WITSEC on a case-by-case basis and may have a better chance with state witness protection programs.

**Conclusion**

Nepal should combine the approaches of these countries to establish its own witness protection program that protects victims of sexual assault violence who are afraid of providing the police with evidence or testifying in court.


\textsuperscript{158} Fact Sheet Witness Security, supra note 153.


VI. PUBLICATION BANS: PREVENTIONS AGAINST PUBLIC DISCLOSURE IN THE MEDIA

An additional reason that promoting strong confidentiality measures both during legal proceedings and after proceedings are closed is that records of proceedings may provide media and public access to victims' personal lives. Sexual assault cases can garner significant media attention that may cause victims to be subjected to intense public scrutiny. In the most egregious cases, a victim is tried in the court of public opinion as reporters uncover salacious details about the event or the victim and present them to the public. Victims can suffer intense emotional pain and may face physical threats.

Recommendations

• Legislators could provide a simple, effective remedy for many sexual assault victims by passing a law that bans publishing the victim's name in news reports of the crime.

• Nepal should consider enacting a statutory provision that allows judges to place a publication ban on all court proceedings in especially sensitive cases. The publication ban would not be automatic, but would require the judge to weigh carefully several factors, including (1) the right of the accused to a fair hearing (as guaranteed by the Nepali interim constitution); (2) whether there is a real and substantial risk that the victim or witness would suffer significant harm if his or her identity were disclosed; (3) the availability of effective alternatives to the ban that would protect the identity of the victim or witness; and (4) the impact of the proposed order on the freedom of expression of those affected by it. Each publication ban will involve a unique set of facts, so the exact parameters of individual bans are likely to vary.

The Issue

Disclosures through the media can present particularly difficult situations for victims. If information is released via the media or another public forum, private information regarding an individual’s status as a victim of sexual assault (and complicating factors such as history with human trafficking or a diagnosis of HIV/AIDS) can become public knowledge. This, in turn, can lead to unnecessary embarrassment, harassment, and shame for person who already has endured a difficult ordeal.

Since the return to democracy in 2006, Nepal has made strides towards an open, free press and a robust media culture. Several legal provisions guarantee the freedom of the press and offer protections for journalists. But as Nepal’s government works to ensure the freedom and protection of the press, it should encourage and, in certain sensitive cases, require members of the media to protect victims’ rights to privacy and confidentiality. This extends both to traditional sources of media that continue to serve most of Nepal – newspapers, radio, and


162 This section of the paper discusses publication bans during legal proceedings; the following section discusses means to educate the media.
television – and to the new media sources that have an increasing presence in the Kathmandu Valley and are likely to spread throughout the country in time.

**Comparative Case Studies**

This section discusses methods that Canada and the United States have used to balance the needs of victims with the importance of a free and open press. Both countries are more developed than Nepal, but the solutions their courts and legislatures have presented to the problem are well worth the considerations of Nepalese policy- and lawmakers. Particularly valuable is the concept that prohibitions against media disclosures should be available but only applied in the most delicate of situations, when media coverage of the trial would be likely to create significant harm for the victim or witness but not significantly violate the rights of the accused and/or of the press.

**Canada**

Canada provides an excellent example of a strong legal provision for banning all publication about a delicate trial in media outlets. Because courts have adopted clear and systematic procedures for getting such a ban, they serve as a useful example for Nepal. The Canadian Criminal Code requires judges to order a publication ban to protect the identity of all victims of sexual offenses and witnesses of sexual offenses who are younger than eighteen. During court proceedings, the judge informs the victim, witness, or prosecutor that he or she may make a request for a publication ban. If the request is made, the judge must order it. Judges may order a similar order in other cases if the judge is satisfied that the publication ban is “necessary for the proper administration of justice.”

The publication ban applies to the victim or witness’s behavior as well. After the publication ban is in place, the victim or witness must ask the court for an order ending the ban if he or she no longer wants the publication ban to apply. The victim or witness may need to explain to the judge why the ban is no longer needed.

Steps for getting a publication ban in Canadian courts:

1. The victim or witness makes an application to request the publication ban in writing. In the application, the victim or witness must explain why this protection is necessary.
2. The victim or witness gives the application to the judge hearing the case. If no judge has been assigned to the case, any superior court judge in the jurisdiction may accept the application.
3. The prosecutor, the accused, or any other person who may be affected by the publication ban is notified about the application. The judge decides whether to notify local newspapers or other media about the pending order.
4. The judge may hold a hearing to consider the request for the publication ban. The hearing is more informal than a trial and may be held in private. During the hearing, the victim or witness may speak in person or have a lawyer speak on his or her behalf.
5. The judge decides whether to make the ban and/or whether to attach certain conditions to the ban (e.g. a time limit). The judge must consider: (1) the right of the accused to a fair and public hearing; (2) whether there is a real and substantial risk that the victim or witness would suffer significant harm if his or her identity were to be disclosed; (3) the

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164 Id.
availability of effective alternatives to protect the identity of the victim or witness; and (4) the impact of the proposed order on the freedom of expression of those affected by it.

Though the Canadian ban has its critics, its proponents assert that its benefits outweigh its harms. The protections offered by the publication bans seem to have a particularly strong effect on victims. The Canadian National Women's Study found half of rape victims would be "a lot more likely to report" to police if there was a law prohibiting the news media from disclosing their name and address and 86% felt victims would be "less likely" to report rapes if they felt their names would be disclosed by the news media.166

United States

The United States, like Nepal, has a free, open, and robust media culture. The American Constitution guarantees freedom of the press.167 Moreover, the media is allowed to publish any information obtained from official court records that are open to the public.168 In cases of sexual assault, newspapers or other media outlets are allowed to publish victims’ names if the information had been obtained lawfully from a publicly released police report.169

The right of the media to access information, however, can be limited when a compelling state interest is involved. In Nixon v. Warner Communications, the U.S. Supreme Court ruled that (1) the court should exercise “informed discretion” about the release of certain evidence; (2) the common-law right of access to judicial records did not extend to all evidence presented; and (3) release of the tapes in question was not required by the constitutional guarantees of freedom of the press or of public trial.170 In a subsequent case, the Court ruled that a state’s mandatory rule to keep cases involving minors who had been sexually violated closed to the press was unconstitutional.171 Instead, the Court ruled that the state interest in protecting those victims could be satisfied if judges determined on a case-by-case basis whether keeping the case away from the press was justified.172

U.S. states have the power to decide whether to give certain victims additional protections. Most states also restrict coverage of cases involving certain classes of victims or witnesses, including juveniles and victims of sexual crimes. For example, Florida’s Crime Victims Protection Act provides protective anonymity for rape victims when five requirements are demonstrated by

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165 A publication ban has been placed on some very high-profile cases in Canada. The public and media outlets complained that since knowledge of the crime(s) was already publicly-accessible, knowledge of the legal proceedings as a result of those crime(s) is a public right that does no further harm to victims.


167 U.S. const., amend. I.


172 Id.

173 These characteristics were developed by the courts and include:
If protective anonymity is granted, all court records that reveal the victim's name, address, or photograph immediately become confidential and exempt from Florida's constitutional public disclosure provisions. Furthermore, no publication or broadcast may include “an identifying photograph, an identifiable voice, or the name or address of the victim.” To allow this, the state may substitute a false name for the victim in any court records. If the protective anonymity order is broken, the court may use its full powers to find contempt of court. These restrictions are waivable if the victim personally files with the court a written consent to cancel the Act's protective anonymity.

**Conclusion**
Giving judges the option to issue a publication ban in sensitive cases can provide a significant measure of protection for victims and witnesses. Nepal should consider the experiences of Canada and the United States as it formulates its own laws and procedures. Publication bans are not automatic. First, the prosecution must request that the judge consider a publication ban. The judge then holds a hearing so that both sides may present arguments that allow the judge to consider fully the interests and rights at stake in his or her decision. If ordered, the publication ban can extend as far as the judge sees fit; some may ban all reporting on a case, while others may only ban the use of the victim or witness’s name or identifying information. The flexible nature of the publication ban will allow judges and litigators to adapt it to meet the unique needs and characteristics of each case. Finally, even if a publication ban is ordered, the party that initially requested it should be able to ask that it be removed. Each of these elements ensures that a victim or witness has a proactive role in the way that the media may report on her case.

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A Note on Enforcement
While all of the recommendations presented in this report protect victim confidentiality in theory, they are not effective in practice unless they carry some power of enforcement. Though this report does not discuss enforcement thoroughly, it does encourage the Forum and its partners to consider what enforcement mechanisms may be more appropriate and effective for the legal protections presented here.

The penalties that are levied by different jurisdictions in order to enforce statutory protections of confidentiality range from civil penalties, such as injunctions and tort damages, to criminal penalties, such as fines and incarceration.¹⁷⁵ In making a decision as to which type of enforcement mechanism might work best, several factors may be considered:

- Whether it involves an affirmative disability or restraint;
- Whether it has historically been regarded as a punishment;
- Whether its operation will promote the traditional aims of punishment — retribution and deterrence;
- Whether the behavior to which it applies is already a crime;
- Whether an alternative purpose to which it may rationally be connected is assignable for it; and
- Whether it appears excessive in relation to the alternative purpose assigned.¹⁷⁶

Additionally, within the context of Nepal, considerations such as differences in urban and rural environments, cultural variance, capacity on the ground, and societal norms and standards will all be important to consider in determining how to best enforce confidentiality protections.

Civil penalties may be more effective in situations where the individual who disclosed the information is part of a government agency because a civil action can be brought against the agency itself, whereas a criminal penalty cannot.¹⁷⁷ Additionally, since there are more procedural requirements with criminal law, a civil action may be easier to pursue.¹⁷⁸ But in jurisdictions where civil actions are less likely to be enforced than criminal penalties, criminal penalties may be more effective to ensure deterrence and enforcement of the law.

Both the legal protections of confidentiality and the penalties designed to enforce them are meaningless, however, unless they are accompanied by community outreach and education campaigns so that citizens are aware of their existence. Additionally, training government personnel on the importance of enforcing this legislation will be crucial to the successful realization of these protections.

¹⁷⁷ Murdock, supra note 175.
¹⁷⁸ Id.
VII. ADVOCACY PLAN

Legal protections will only ensure confidentiality of sexual assault victims if people are aware of the protections, understand their importance, and will act to uphold them. Education and outreach campaigns have the potential to make sure that any new laws are known, respected, and enforced. As one researcher of Nepal’s development observed, “[My work] shows that institutions change when there is a demand among strategic players for change.”

The Forum for Women, Law and Development (FWLD) regularly conducts outreach and training events, and so would be well placed to lead these initiatives.

Recommendations

• To increase awareness and acceptance of the importance of confidentiality for sexual assault victims, outreach efforts should target several key stakeholders. Education and outreach campaigns could target multiple stakeholders, thus providing an opportunity for actors at different stages of a sexual assault case to learn from each other and develop new ways to work together.

• Police officers must understand how new legal protections of victims’ and witnesses’ confidentiality will affect their investigations, record keeping, and reports in court and to the public and media.

• Judges will be responsible for deciding to enforce several of the provisions recommended here, including in camera testimony, witness protections, and publication bans. Judges must be trained in these procedures after they are passed by the legislature.

• Our recommendations suggest the adoption of a privilege for communications between victims and service providers. If this privilege is enacted by the legislature, service providers must be apprised of their new responsibilities. Some service providers and NGOs may want to reconsider their current practices of reporting victims’ names and identifying information to align with legal expectations.

• Members of the media may be subject to new legal requirements and, if educated about the issue, may decide to adopt their own standards for publishing details about sexual assault cases.

• The general public must be aware of the importance of protecting the confidentiality of sexual assault victims. Social expectations must align with the motivation behind legal changes if new protections are to have any effect.

The Issue

A victim’s confidentiality can be breached in many different stages and by many different actors. A police officer may disclose her identifying information while interviewing another witness. A counselor or NGO worker may use a victim’s name to raise awareness without considering how that disclosure could affect the victim personally. A judge may not seal court proceedings, thereby opening up the record to anyone who wishes to view it. A reporter may use a victim’s name or personal information in an article or blog post. And the victim’s acquaintances may

spread the story through the gossip grapevine. Preventing all of these breaches of confidentiality may well involve changing norms of behavior at many levels, from interpersonal relations to professional duties to societal expectations. As legal changes take place, they must be accompanied by outreach efforts to each of these groups to increase awareness of and respect for victims’ and witnesses’ confidentiality.

Police Officers
Often the first government officials to encounter a complaint of sexual assault, police officers have a significant responsibility to ensure that the details collected during their investigations can be kept confidential. Nepal already has some special Women's Police Cells, discussed in Section II, that may offer a natural vehicle for ensuring that sexual assault victims’ confidentiality is protected. Officers in the women’s police cells, however, must be trained in any new procedures that the Constituent Assembly passes.

Judges
This paper proposes many changes to Nepal’s legal system to protect the confidentiality of sexual assault victims. Though it is encouraging that the Supreme Court of Nepal already directed the Constituent Assembly to pass legislation that protects the confidentiality of sexual assault victims, the Supreme Court will not decide every request to uphold evidentiary privileges, to enforce a publication ban, or to allow in camera testimony. Judges throughout the Nepalese court hierarchy must be apprised of new confidentiality protections. This can occur through short-term education programs for judges and through the special litigation procedures in Nepal that allow any interested party to bring a case.

Service Providers
Section III of this paper discusses at length how evidentiary privileges for communications between victims and their legal representatives, medical care providers, and counselors and suggests that only the victim should be able to waive any such privileged communications. This recommendation, along with many others in this report, is based on the assumption that revealing a victim’s story to the public will have negative effects on the victims. But several organizations and service providers use such details to humanize the issue, hoping to trigger empathy and action. To increase exposure of especially troubling cases, major human rights organizations and victim service providers routinely reveal victims’ identifying details on their websites, sometimes to encourage action and occasionally to offer success stories.180

Although releasing personal information about victims seems commonplace among advocates for women in Nepal, Nepalese officials and NGOs may need to re-consider how victims’ stories are presented to the public. Have victims agreed to release this information? If so, do they understand how it will be used? Even if many Nepalese people do not have access to the internet and so a victim’s community may not find out about her or the crime committed against her through a web posting, people all around the world can easily access and read about her story.

Victims’ advocates and service providers may choose to reconsider these practices and choose an alternate means of telling a victim’s story. For example, an advocacy story could describe the details of a case, but use a pseudonym for the victim. Even small changes can offer strong protections for victims.

Members of the Media
Media can be a negative force in sexual assault cases when victims are re-traumatized by undue attention, but media can also be highly effective in raising public awareness, promoting action, and changing community attitudes. Additionally, members of the media may see it as a civic duty to report as fully and truthfully as possible. In a country with an open and active press, it seems inconsistent to encourage members not to report certain information. Sexual assault cases, however, are not like all other stories. Details are highly sensitive and personal, and having them reported can cause a victim to feel ashamed and even violated all over again. Members of the media should be more aware of the effects that reporting can have in these special cases and examine ways to adapt reporting methods to these realities.

Nepal's Constituent Assembly could legislate on additional media protections, e.g. ban the publication of victims' names in news accounts and authorize judges to issue publication bans. To complement new legal protections, the Forum and its partners to encourage Nepali newspapers, radio stations, internet sites, and other media outlets to commit voluntarily to upholding these basic protections. Encouraging members of the media to take ownership of their own responsibility not to create additional problems for victims may result in more tangible benefits for victims and witnesses involved in sexual assault, human trafficking, or HIV/AIDS cases. NGOs like the Forum could engage with media partners in Nepal to educate journalists about their responsibilities and duties to protect confidentiality.

To complement or enhance legal requirements, members of the media may adopt their own policies to protect sensitive personal information for victims of crime and patients with HIV/AIDS. For example, a newspaper may set an internal set of standards for how to report on sexual assault cases in a sensitive, victim-friendly manner. For inspiration, Nepalese media actors may consider the list that was developed by an American NGO to define victims' rights during their interactions with the media. Victims have the right:
- To say "no" to an interview;
- To select the spokesperson or advocate of the victim's choice;
- To select the time and location for media interviews;
- To request a specific reporter;
- To refuse an interview with a specific reporter even though he or she has granted interviews to other reporters;
- To say "no" to an interview even though the victim has previously granted interviews;
- To release a written statement through a spokesperson in lieu of an interview;
- To exclude children from interviews;
- To refrain from answering any questions with which the victim is uncomfortable or that the victim feels are inappropriate;
- To avoid a press conference atmosphere and speak to only one reporter at a time;
- To demand a correction when inaccurate information is reported;
- To ask that offensive photographs or visuals be omitted from airing or publication;
• To conduct a television interview using a silhouette or a newspaper interview without having their picture taken;
• To give the victim's side of the story;
• To refrain from answering reporters questions during a trial;
• To file a formal complaint against a reporter;
• To grieve in private; and
• To suggest training about media and victims for print and electronic media in their community.\textsuperscript{181}

The General Public

Reaching the various actors in a sexual assault case about the need for confidentiality for sexual assault victims is the natural first step in an advocacy campaign. After all, the judges, lawyers, doctors, reporters, counselors, and victims’ advocates must know how they must alter their work and professional practices to fit new legal requirements. But the work must not stop there. The general public in Nepal also should learn to understand why protecting sexual assault victims’ personal information is important. Many victims may not be the subject of a media inquiry, but most victims are vulnerable to gossip by their friends, family, and acquaintances. In Nepal, gossip can be extremely harmful to a victim’s reputation and well-being. Though the legal protections described in this report may not stop neighbors from talking, they will increase the visibility of confidentiality in the public eye. As more Nepalese people see their police officers, service providers, judges, and reporters taking confidentiality seriously, they are likely to think about how they may protect confidentiality with their own efforts.

Special attention will probably need to be paid to indigenous groups in Nepal. Fifty-nine indigenous communities with unique linguistic, religious, cultural, and territorial characteristics are legally recognized in Nepal.\textsuperscript{182} Victims in these groups who experience sexual assault are likely not to seek assistance from the traditional legal system.\textsuperscript{183} Instead, these victims often use customary-law-based solutions that involve the village elders considering the complaint publicly and then deciding a resolution for the victim and the accused. Sometimes, the accused is required to marry the victim; other times, the victim may receive some remuneration from the accused. This report focused on protections within the formal Nepalese legal system, but the authors encourage the Forum and its partners to consider strategies for involving these indigenous groups in discussions and community efforts. Though the systems in which sexual assault cases are handled are different, the experiences of sexual assault victims are often similar. Some of the


\textsuperscript{183} This paragraph is culled from an-in-person interview with Dilli Chaudhary, a leader in the fight against bonded and child labor in Nepal. Dilli is the founder and president of Backward Society Education (BASE), and a partner of The Advocacy Project (AP). The interview took place on Oct. 18, 2011. See also Gopal Dahit, Social Inclusion/Exclusion in relation to Tharu Indigenous Knowledge and Practices, Social Inclusion Research Fund Brief RF/2006/02 (2008).
solutions deemed acceptable under customary law – particularly public discussion of the event and forced marriage – do not align with international human rights principals and should be changed.

Comparative Case Studies
Because advocacy efforts must align with the unique character of the country in which they take place, we have chosen to include comparative examples from Nepal in this section. We encourage the Forum and its partners to expand and add to these examples to develop a new advocacy plan for protecting confidentiality in Nepal.

Nepal
FWLD routinely conducts trainings with district and appellate judges, legal practitioners, and NGO staff members about the importance of human rights and the implications of international treaties like CEDAW. It could offer similar sessions on confidentiality, and could invite many different stakeholders from a particular region to collaborate during these sessions. These sessions also may present an opportunity to involve indigenous groups in constructive, educational discussions.

Nepal has a unique judicial mechanism through which any interested party may file a complaint in Nepalese courts as a “Public Interest Litigations” (PILs). FWLD has filed many PILs, including appeals to criminalize marital rape, to give daughters inheritance rights by forbidding “aputali,” to decriminalize abortion, and to prohibit child marriage. The great success FWLD has had with many of these cases suggests that a similar case may be brought to help promote victims’ rights to confidentiality.

FWLD joined other groups in Nepal on a nationwide advocacy plan to promote equal inheritance rights. By working with many stakeholders and building public awareness, the campaign was successful in amending the Nepalese legal code and women gained the right to property -- a substantial change with significant results for women. Property ownership is now on the rise among Nepalese women. Women in urban areas have benefitted especially: they own at least a third of homes and lands in Kathmandu Metropolitan area. This kind of comprehensive,

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187 The law, passed in 2002, allowed women to qualify for a share of the husband’s property immediately after marriage (earlier laws required women to be married for at least 15 years and be at least 35 years old to qualify for a share of the husband’s property). Additionally, a widow without sons need not wait until she is 30 years old to claim a share of property from her in-laws. If she remarries, she need not return the share of property she had received from her in-laws. The amendment continues to honor women’s absolute rights over the properties they acquire in the form of gifts, bequests, will or purchased using personal earnings. Pandey, supra note 179, at 283.

188 Id. at 290.

189 Id. at 287.
nation-wide campaign may not be necessary to promote confidentiality protections alone, but lessons about the importance of confidentiality could play an important, central role in a future campaign against sexual assault.

**Conclusion**

Passing strong legal protections to confidentiality in client-counselor relationships, police investigations, and court proceedings is a necessary but not sufficient step towards supporting survivors and discouraging future crime. All of these efforts, however, seek to help those individuals who have already become victims. To prevent others from suffering similar fate, something more will be needed. A broad coalition of stakeholders – from government actors to civil society organizations to members of the media – must be included in efforts to increase awareness of and change societal attitudes about sexual violence, human trafficking, and HIV/AIDS. An inclusive and ambitious national and local initiative is a complementary step that can raise the issue above something that happens behind closed doors in courthouses and police stations. Though campaigns should avoid the use of individual victims unless those victims affirmatively decide to participate, the campaigns can bring together the many soldiers in the fight against these crimes to wage a coordinated effort that can lead to long-term, systemic improvements. Such initiatives are not out of the reach of a small country like Nepal -- in fact, the strong respect for human rights and the rule of law among Nepali people will serve as a solid foundation for continued efforts to encourage survivors and end future crimes.
VIII. CONCLUSION

Victims of sexual assault face myriad issues within Nepali society. If it is revealed that a woman has been raped, she can be automatically divorced from her husband under the law, face incredible stigma and shame, be ostracized from her community, and face community pressure not to press charges against the perpetrator. These issues can be compounded when that individual is also a survivor of human trafficking, has been diagnosed with HIV/AIDS, or is a child. As a result of the vulnerabilities that these groups face, there is an increased need for laws, policies, community education, and advocacy campaigns that highlight the need for, and importance of, protecting the confidentiality of sexual assault survivors who come forward to report crimes.

In the investigation stage of a trial, having specialized police units or police officers trained to handle sexual assault cases and to protect the identity of victims can increase the likelihood that victims will come forward to report crimes. In particular, increasing the number of Women’s Cells to make these services more accessible to victims of sexual assault throughout Nepal could help to ensure that the investigation process is mindful of the needs of these individuals and that confidentiality is protected in both rural and urban areas.

Evidentiary privileges that protect the communications between sexual assault victims and NGO service providers, counselors, and medical professionals are another way to protect the confidentiality of victims during the investigation and trial process. An absolute privilege that places the power to waive the privilege entirely in the hands of the victim has been particularly effective in jurisdictions that face high levels of judicial corruption, as it does not provide the judge with the power to waive the privilege. In addition, this legal framework protects service providers, counselors and medical professionals from feeling as if they are unable to keep complete records for fear that they could be introduced at trial, while also ensuring that victims feel safe in confiding all necessary and pertinent information. An exception to this privilege may need to be carved out for service providers who work with children. Young victims and witnesses are unlikely to know about their rights and privileges so may need adults to act on their behalf. Service providers for children, for example, may need to break privilege and report an act of abuse or sexual assault to help the child get out of a dangerous or abusive situation.

During the course of the trial itself, legal provisions that allow victims to choose to testify privately in camera, with the possibility for physical separation from the accused in the form of a screen, a witness box, or the ability to testify via closed circuit television, protect victims both from having their identities leaked as they would be in a public trial, but also from the re-traumatization that can come from having to directly confront their abuser. Child victims and witnesses are likely to benefit significantly from these protections as they are more likely to be pressured or intimidated by their abusers.

Witness protection programs further shield the confidentiality of victims during the trial process by providing them with government-backed support and security. This protection can make victims more willing to participate in the trial process as they may be less fearful of the repercussions that can result from the accused knowing how to find them.
The protection of victim identity from public access is also a crucial component of shielding the identity of rape victims and preventing adverse consequences from befalling them. Providing judges with the ability to withhold identifying information in sensitive cases can play a crucial role in ensuring that victims of sexual violence do not face unwanted repercussions.

Finally, an advocacy plan for ensuring that protections of confidentiality are known and respected is essential in establishing that the need for confidentiality is important and should be respected. A broad coalition of stakeholders – from government actors to civil society organizations to members of the media – can make a significant impact on societal perceptions about sexual violence, human trafficking, and HIV/AIDS and raise awareness about the need for confidentiality to protect victims.

Nepal is at an exciting and dynamic moment in its history, and there is much opportunity for both legal and societal change. The country has already come a long way with much of the new criminal legislation that has been drafted, and continuing to improve confidentiality for victims of sexual assault will remain a crucial step in promoting the rights of women and girls in Nepal.
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ABOUT THE AUTHORS

Margot Dankner graduated from Washington University in St. Louis with a B.A. in International Studies. Margot then worked to advance the rights of women and children as a Coro Fellow in Public Affairs in St. Louis, MO, and then as a Project Coordinator at Children at Risk in Houston, TX. During law school, she has continued this work by helping represent women and girl victims of gender-based violence in asylum claims and other forms of immigration relief through her work with Kids in Need of Defense and the Tahirih Justice Center. Margot’s legal interests include international human rights, refugee and asylum law, and youth advocacy.

Teresa Taylor graduated from University of Virginia with a B.A. in Religious Studies and American Studies. After graduation, she served as a Peace Corps Volunteer in the Kyrgyz Republic and worked on homelessness policy in Virginia. During law school, she co-authored a report on remedies for domestic violence victims in China. Her legal interests include education and international investment and development.

Monica Youssef graduated from the University of Southern California with a B.A. in International Relations and a minor in Business Administration. During law school, she worked on human trafficking issues with the Protection Project at the Johns Hopkins School of Advanced International Studies. She spent a summer in Egypt working at Alexandria University’s Legal Clinic, which services victims of domestic violence. Her legal interests include international human rights, investment and development.
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