

# SOUTH ASIA STRATEGIC LITIGATION LAB OUTCOME REPORT

16-18 May, 2024  
Kathmandu, Nepal

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## South Asia Strategic Litigation Lab Outcome Report

This is an outcome report of the South Asia Strategic Litigation Lab (SL LAB) organized by Purak Asia from May 16-18, 2024 in Kathmandu, Nepal. The findings and outcomes of the report are based on the conversation and discussion shared by the participants and the resource persons of the workshop.

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# Table of Content

<b>A. Introduction .....</b>	<b>5</b>
<b>B. Terminology .....</b>	<b>7</b>
<b>C. Cross-regional experiences .....</b>	<b>8</b>
1. Country updates .....	8
2. Strategic litigation movement in South Asia.....	13
2.1. Strengths: Enablers of success .....	14
2.2. Weaknesses: Blocking impact.....	14
2.3. Opportunities: Openings for strategic litigation.....	15
2.4. Threat: Risks and challenges .....	16
<b>D. Thematic modules.....</b>	<b>18</b>
1. Lawfare against civic actors .....	18
1.1. Common legal tools used to silence critical voices .....	19
1.2. Successful litigation strategies .....	21
2. Co-opted judiciary.....	22
2.1. Common methods of interference .....	23
2.2. Successful litigation strategies .....	24
3. Treatment of minorities.....	26
3.1. Targeting of minority groups .....	26
3.2. Successful litigation strategies .....	26
4. Misinformation/hate speech on social media .....	29
4.1. Role of social media companies.....	30
4.2. Actions taken by States/Governments .....	31
4.3. Ensuring freedom of expression .....	32
4.4. Successful Litigation Strategies.....	32
<b>E. Cross-country collaboration .....</b>	<b>35</b>
<b>ANNEX A: Country up-dates .....</b>	<b>36</b>
<b>ANNEX B: Treatment of minorities .....</b>	<b>37</b>



## A. Introduction

Over the years strategic litigation has become an important tool to safeguard or remedy human rights violations in South Asia. In the context of increasing populism and political intolerance in the region, the essence of strategic litigation lies in that it can challenge power through the use of law, dissenting voices, and independent scrutiny in the court. It obliges the government to respond to public interest matters, human rights violations, and people's rights through the principle of legal accountability. Strategic litigation has a bigger goal of achieving a lasting impact on a larger population and the society as a whole. It is a part of a social movement and the involvement and contribution of various actors are important to maximize the goals of strategic litigation.

In South Asia, civil society organizations and human rights defenders, such as activists, journalists, legal professions, have been proactively using strategic litigation to protect the rights of people, including victims of human rights violations. In many instances, strategic litigation has made a positive impact in realizing the rights of marginalized communities. However, the implementation of court orders in successful cases is challenging in the context of South Asia because of the deteriorating rule of law, increasing impunity, corruption, and declining democratic practices. Lack of awareness amongst policymakers and communities also sometimes create hurdles in the effective implementation of strategic litigation wins.

From 16 to 18 May 2024, Purak Asia organized the Strategic Litigation Lab (SL Lab) in Kathmandu, Nepal. The three-day workshop brought together legal professionals, activists, and human rights defenders from Bangladesh, India, Nepal, Pakistan and Sri Lanka with diverse backgrounds, expertise and experiences in a collective manner to reflect on the practical challenges and solutions of strategic litigation in this particular sub-region. Countries in

South Asia share similar legal systems as well as legal legacies, and cross-reference jurisprudence from neighbouring states. The convening intended to explore how these close ties can be used to the advantage of strategic litigation.

The main objectives of the SL Lab II were:

- Sharing successful/emblematic cases and progressive jurisprudence in South Asia and discussing how they can be used in other countries;
- Exploring collaboration across countries in South Asia to use strategic litigation to address common issues or strengthen each other;
- Building a network of practitioners in South Asia to continue exchange and collaboration in the future; and
- Empowering young lawyers pursuing strategic litigation in South Asia.

This outcome report summarizes the essence of the key insights, strategies, and cross-country collaboration ideas discussed during the collective exploration by the participants. Through interactive sessions, case studies, and peer-learning participants gained valuable insights on multifaceted issues of strategic litigation within the sub-region.

We would like to express our gratitude to all participants of the workshop, as well as, Massum Adhikari, Neetu Pokharel, Som Niroula, and the Open Society Justice Initiative.

## B. Terminology

Participants commonly defined the term “strategic litigation” as the planned and intended use of legal action to achieve a broader set of social, political, or policy objectives beyond those named in the case. It entails the careful and deliberate selection and pursuit of legal cases to establish positive precedents, influence public opinion, or bring about systematic change.

However, litigation alone might not always be the best strategy especially when power dynamics come into play. The participants agreed that for litigation to be an effective tool, it must be employed strategically, i.e. it should be embedded in advocacy efforts, policy lobbying, community mobilization and engagement, and use of international instruments and mechanisms, such as UN treaty bodies and mandate holders. In some cases, there is a risk of litigation backfiring where courts may establish regressive precedents or jurisprudence. Thus, the participants agreed that litigation is not always the only or best solution to solve issues, but should be part of a broader strategy.

The terms “emblematic” or “landmark case” refer to legal cases that serve as pivotal examples marking a broader social, legal, or political change. Decisions which create or define a new right, establish a new set of precedent or jurisprudence, overturn previous judgments in favour of a more progressive interpretation or develop fundamental rights are often considered to be landmark.

In strategic litigation, emblematic cases hold immense importance in shaping legal systems, influencing social change, and advancing human rights advocacy. One of the primary objectives of strategic litigation is establishing new precedents, thus emblematic cases have a broader significance within the realm of strategic litigation. Furthermore, established emblematic cases also provide valuable insights and can be employed as strategy itself for further litigation and advocacy efforts in upholding fundamental rights and values.

## C. Cross-regional experiences

The SL Lab started out with an overview of cross-regional experiences and issues before inviting participants to discuss specific thematic topics.

### 1. Country updates

The participants identified the most pressing human rights issues faced by countries in the South Asian region, while also addressing the biggest challenges to strategic litigation unique to each country in order to identify commonalities amongst them. Additionally, the participants also emphasized the success or the biggest wins of strategic litigation of each country in recent times, offering valuable insights for refining litigation strategies based on those successes. The table in [Annex A](#) reflects the responses for each country.

The human rights issues faced across the South Asian region show similarities as well as differences at some level. The most common and pressing human rights issue across the region identified through the discussion includes the **rights of minorities and vulnerable groups** ranging from caste-based discrimination, labour rights, gender and LGBTQ+ rights. Amid various issues discussed during the session, one issue that garnered utmost concern from all the participants was the **shrinking of the civic spaces**, curtailing of critical voices and stifling of dissent. Threats encountered by human rights defenders (HRDs) and litigators are not only hindering strategic litigation but also limiting the possibility of advocacy.

The participants unanimously agreed that **declining democratic values and practices** in the region has led to increasing politicization which has become the biggest challenge to strategic litigation. Likewise, the discussion also brought out the **declining independence of the judiciary, weakening of democratic institutions and lack of implementations** of laws, policies and judgment as additional key obstacles to strategic litigation.

Despite the various issues and challenges to strategic litigation, the

participants notably identified successful cases in the past five years. The various cases highlighted by the participants showcased the importance of strategic litigation in their respective country. The discussion aimed at identifying the various strategies used in these emblematic cases that made them a success.

## Bangladesh:

### • Ship-Breaking Case

South Asia became one of the preferred and world largest sites for dismantling old ships for scraps (ship-breaking) where the vast majority of ships are scrapped in non-facilitated beaches as labour is readily available at low cost and enforcement of laws is weak.<sup>1</sup> Particularly in Bangladesh, many European shipping companies send their end-of-life ships to dangerous and polluting yards where the safety and health of the labourer involved in the dismantlement were put at risk, even causing the death of several workers. In the case of *Hamida Begum v. Maran (UK) Limited*,<sup>2</sup> the claimant Hamida Begum, widow of a deceased worker, claimed that Maran (UK) Ltd owed to workers, such as her husband, a duty of care to ensure that the dismantling of ships are done in an ethical way. Given the well-known dangers of ship-breaking, it is the duty of the shipowner to comply with utmost occupational health and safety standards to eliminate any foreseeable risk of death and injury.<sup>3</sup> The emblematic judgment reiterated the obligation of shipowners to meet international standards for ship-recycling, and ensure their ships are dismantled at ethical yards. It also called for investment in South Asia to improve work practices, health and safety, and the impact on the environment.

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1 S. Rizwana Hasan, "Corporate Crime & State Responsibility: The case of Ship Breaking," UN TNC, Geneva, October 2016, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanellIIISubtheme2/RizwanaHassan.pdf>.

2 [2022] 1 All ER (Comm) 940, [2021] EWCA Civ 326, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html>.

3 Oliver Holland and Rachel Bonner, "Shipbreaking judgment: The shipping industry and the law of negligence," Leigh Day, March 10, 2021 available at: <https://www.leighday.co.uk/news/blog/2021-blogs/shipbreaking-judgment-the-shipping-industry-and-the-law-of-negligence/>.

## India:

### • Electoral Bond Case

In India, the constitutionality of the electoral bond scheme was challenged in the Supreme Court. The electoral bond scheme was first introduced in the Finance Bill in 2017 and allowed party donations through the purchase of electoral bonds. The scheme was challenged by Association for Democratic Reforms (ADR) as the lead petitioner on 14 September 2017.<sup>4</sup> The petitioners argued that the electoral bond scheme allowed “non-transparency in political funding” and legitimized electoral corruption at a “huge scale.”<sup>5</sup> The Court observed that the electoral bond scheme violated the fundamental right to information of voters, infringed the principle of free and fair elections as a result of unlimited corporate donations and complete anonymity of donors, and posed backdoor lobbying risks between corporations and political parties. The Supreme Court unanimously ruled the scheme unconstitutional shortly before the most recent elections in 2024.

## Nepal:

### • Forced Eviction Case

The Constitution of Nepal (2015) guarantees the right to housing and land under the fundamental rights chapter. However, people residing in riverbanks especially in the city face constant harassment from the police through measures such as bulldozing settlements, forceful evictions, issuing unwarranted notices against squatter communities without ensuring relocation and resettlement while leaving them homeless and landless. Recently, in the case of Januka Pokhrel v. Kathmandu Metropolitan City, the Patan High Court issued an interim order against the

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<sup>4</sup> Association for Democratic Reform and Anr. v Union of India & Ors., Writ Petition (C) No. 880 of 2017, No. 59 of 2018, No. 975 of 2022, No. 1132 of 2022, available at <https://www.scobserver.in/wp-content/uploads/2021/10/Electoral-Bonds-judgement.pdf>.

<sup>5</sup> Ibid.

Kathmandu Metropolitan City’s notice to evict squatters from various settlements along the riverbanks in Kathmandu.<sup>6</sup> This is an example of how lower courts can be activated in protecting vulnerable communities.

### • Right to Education Cases

The right to education is guaranteed under the Constitution of Nepal (2015). The recent trend in Nepal shows that High Courts are much more active in giving progressive rulings and orders to ensure the right of education of children. For instance, the Surkhet High Court issued an interim order that exempted students from paying any admission fees while enrolling in community school.<sup>7</sup> Similarly, in regards to juveniles’ right to education, the Nepalgunj High Court issued an order to the Jayendu Child Reform Home to provide an update about the status of education in the facility.<sup>8</sup>

### • Fast-Track Juvenile Justice Case

The Constitution of Nepal (2015) guarantees the right to juvenile-friendly justice as a fundamental right.<sup>9</sup> However, in practice it is often found that children are taken in custody without proper information on what charges they are being detained. Furthermore, the regular courts often fail to properly handle the cases, and the rehabilitation of children is often affected due to non-availability of a juvenile bench. The Supreme Court of Nepal has time and again directed District Courts to adjudicate juvenile delinquency cases within 120 days through continuous hearings as mandated by Section 37 of the Act relating to Children (2018).<sup>10</sup> However, due to the reluctance of the

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6 Anup Ojha, “Court denies interim order against KMC’s eviction notice to squatters,” The Kathmandu Post, Tuesday, July 9, 2024 available at: <https://kathmandupost.com/kathmandu/2023/04/28/court-denies-interim-order-against-kmc-s-eviction-notice-to-squatters>.

7 RSS, “Community school ordered not to take any fees,” Nepal News, June 7, 2022, available at: <https://www.nepalnews.com/s/nation/community-schools-ordered-not-to-take-any-fees>.

8 Advocacy Forum Nepal, “Nepalgunj High Court Issues Order to Provide Update about Education in Jayendu CCH,” February 21, 2024, available at: <https://www.advocacyforum.org/news/2024/02/nepalgunj-high-court-issues-order-to-provide-update-about-education-in-jayendu-cch.php>.

9 The Constitution of Nepal, 2015 Art. 39(8), “Every child shall have the right to child friendly- justice.”

10 Aastha Pokhrel, “Juvenile Justice in nepal:Legal challenges and solutions,” The Annapurna Express, June 25, 2024, available at: <https://theannapurnaexpress.com/story/49444/->

government to implement the order, the juvenile justice system is still struggling. Some district courts have over 500 juvenile cases, and it is impossible to clear them within the stipulated time without dedicated courts in place.<sup>11</sup> Thus, recently the Supreme Court has given the executive until mid-July to establish juvenile courts.<sup>12</sup>

## Pakistan:

### • Military Courts Case

The military courts in Pakistan under the Army Act tried about 103 civilians for their alleged involvement in violence on 9 May 2023, which included attacks on military installations.<sup>13</sup> The Supreme Court with a 4-1 majority decision suspended the order of the military courts and declared it unconstitutional. It stated that the Constitution guarantees the right to a fair trial of citizens which military trials of civilians do not comply with.

### • Presidential Complaint Case

In May 2019, then President Arif Alvi filed a complaint, known as “reference”, against the incoming Chief Justice Qazi Faez Isa alleging ownership of unexplained assets in the UK which was viewed as an attempt by the government to interfere with the judiciary by blocking him from taking office.<sup>14</sup> The Supreme Court struck down the presidential reference terming it “invalid”.<sup>15</sup>

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11 Binod Ghimire, “Court gives executive four months to set up juvenile courts,” The Kathmandu Post, July 9, 2024, available at: <https://kathmandupost.com/national/2024/03/17/supreme-court-gives-government-four-months-to-set-up-juvenile-courts>.

12 Ibid.

13 Aamir Latif, “Pakistan’s top court strikes down civilian trials in military courts,” AA, October 23, 2023, available at: <https://www.aa.com.tr/en/asia-pacific/pakistans-top-court-strikes-down-civilian-trials-in-military-courts/3029970#>.

14 Haseeb Bhatti, “SC throws out presidential reference against Justice Qazi Faez Isa, terms it ‘invalid’ Dawn, E-Paper, July, 2024, available at: <https://www.dawn.com/news/1564513>.

15 Ibid.

## Sri Lanka:

### • Presidential Pardon Case

In Sri Lanka, judicial review was strategically invoked to tackle an unwarranted presidential pardon. The Supreme Court revoked the presidential pardon granted to a former parliamentarian convicted for murdering a political rival.<sup>16</sup> The Court deemed the decision “arbitrary and irrational,” and gave an interim order to take the accused back in prison custody for the duration of the case. This was the first time that a presidential pardon was successfully challenged.

## 2. Strategic litigation movement in South Asia

The session showcased the current status of the strategic litigation movements in the South Asian region through an assessment of its strengths, weaknesses, opportunities, and threats (SWOT). The SWOT analysis revealed that there are more weaknesses and threats to strategic litigation compared to the strengths which is adversely affecting the desirable impact of litigation.

However, it is equally important to take stock of the possible opportunities within the fractured system which can help mitigate the threats and pave the way for successful strategic litigation in the South Asian region. Even though it might appear that potential threats outweigh the benefits, the participants expressed optimism and determination as they believed that despite the unprecedented threats effective mitigation is still achievable.

The participants agreed that the current situation in the South Asian region poses disadvantages but also were of the view that openings for litigations can be found. In this regard, the participants shared their own experience and case studies, discussing how opportunities could be created, and how to help mitigate risks and challenges of litigation processes.

<sup>16</sup> Meera Srinivasan, “Sri Lanka SC quashes presidential pardon of ex-MP convicted for murder,” The Hindu, January 17, 2024, available at: <https://www.thehindu.com/news/international/sri-lanka-sc-quashes-presidential-pardon-of-ex-mp-convicted-for-murder/article67748922.ece>.

## 2.1. Strengths: Enablers of success

The participants identified the following points in the region that enable successful strategic litigation:

- Institutional capacity: Courts are open and progressive in some countries.
- Legal Communities are keen and open and experienced on strategic litigation.
- Civil society organization movements are strong.
- Ratification of international treaties, declarations, and conventions provides a basis for litigators in certain countries.
- Judicial discretion provides a lot of space for judges to make progressive rulings. However, judges are more willing and open to make progressive judgments in non-political cases and less in politically sensitive cases.
- Regional sharing between certain countries is a strength which should extend to collaboration among judges.

## 2.2. Weaknesses: Blocking impact

The discussion revealed the following factors that hinder impact of strategic litigation:

- Lack of organizational support and networking forcing lawyers to work in silo.
- Lack of organized community of litigators.
- Tendency of headline grabbing title (“Publicity Interest Litigation”) rather than taking strategic cases.
- Long duration of cases both in terms of getting verdict as well as enforcement.
- Legal harassment of activists: The legal procedures alone

sometimes serve as never ending punishment.

- Judiciary being co-opted: Some courts are severely compromised.
- Independence of the judiciary is dependent on the political landscape of the country.
- Progressive judgments and decisions which are not being implemented.
- Transitional justice cases such as enforced disappearance, torture, mass arrests, etc. are more challenging to litigate.
- Lack of democratic accountability.
- Lack of regional human rights courts due to lack of political will.

### **2.3. Opportunities: Openings for strategic litigation**

The participants saw opportunities for strategic litigation as follows:

- Use of international mechanisms such as invoking UN Special Procedures as reports of international bodies can be used in cases as evidence. International recommendations can be useful.
- Identifying international fora for litigation at international level which can contribute value by influencing the decisions of domestic courts, raising awareness about specific issues, or even demonstrating the feasibility of accountability measures.
- Lawyers and litigators must be proactive and create opportunity initially by taking up cases which have not been addressed, for instance climate litigation, equality/inclusion, disability rights, workers' rights, and criminalisation of poverty are areas where strategic litigation might have an impact.
- Extensive research and documentation, and evidence

collection can be used to build opportunities for strategic litigation.

- Litigation at High Courts can have more opportunities than at the Supreme Court.
- Accessing other bodies outside courts, e.g. Human Rights Commissions, administrative statutory bodies, and using Right to Information requests can be a strategy.
- Seeking specific remedy, e.g. compensation, can provide an opportunity for future strategic litigation that builds on the initial case.
- Organizing judicial dialogue, coordinating with judges, engaging with judges to make them aware about issues, and organizing sensitization workshops for judges on topics, such as transitional justice mechanism, before taking up the case could open up opportunities for strategic litigation.
- Publicly communicating about the issues through modern technology and making people/community aware about their rights can garner public support.
- Engaging with the media and finding the right opportune moment to garner media attention to the issues for adequate coverage is helpful.
- Employing UN vetting of peace-keepers as a strategy to exclude human rights abuses can help advance accountability.
- Employing universal jurisdiction for a certain nature of crime that can be tried around the world.

#### **2.4. Threat: Risks and challenges**

Strategic litigation in South Asia comes with a risk and actors in this space face a variety of challenges:

- Reprisals against lawyers/litigators who engage with

international fora is common.

- Arbitrary arrest and detention of lawyers, human rights activists when pursuing critical cases.
- In India, the Foreign Contribution Regulation Act is being used to shut down civil society organizations.
- International sanctions were used as an excuse to limit funding for civil society organizations in Bangladesh.
- Social media is used to portray negativity.
- Political influence on decisions related to issues that are politically sensitive/crucial.
- Populism/populist government poses a serious threat in the current situation.
- Oftentimes, unwillingness and hesitancy of governments to uphold the commitments made at international level pose a serious challenge.

Despite the numerous risks and challenges, participants still agreed it is worth pursuing strategic litigation, and proposed the following measures to mitigate some of the threats:

- Careful documentation and evidence gathering can mitigate the attempt to undermine cases.
- Construct cases from grassroots level to ensure legitimacy.
- Use of international precedents can help mitigate risks.
- Step-by-step approach is helpful to mitigate risks, e.g. asking for compensation or relief first before filing a subsequent petition asking for an independent fact-finding committee.
- Risk mapping before filing a case is important.
- Including various other actors (organizations, partners,

lawyers) as joint petitioners can prevent targeting of one particular petitioner.

- Seeking out underutilized progressive legislation, administrative mechanism and using them strategically for one's advantage in the litigation process.
- Seeking relief from the High Court with jurisdiction and not completely relying on the Supreme Court alone.
- Strengthening regional collaboration through conferences, workshops and seeking opportunities within such conferences.

## D. Thematic modules

During the thematic modules at the SL Lab, participants were invited to discuss particular human rights concerns that resonate across the region with the aim to identify useful strategies and cases to address them.

### 1. Lawfare against civic actors

In recent times, the term “lawfare” has gained much traction in discussions surrounding human rights advocacy. Lawfare, as first defined by Charles J. Dunlap, Jr. is “the use of law as a weapon of war, a method of warfare where law is used as a means of military objective.”<sup>17</sup> However, he refines the definition in today's time as “the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.”<sup>18</sup> In this regard, lawfare surrounding human rights issues and advocacy refers to the manipulation of the legal system to suppress, intimidate, harass and silence critical voices of civic actors, lawyers, litigator, and other human rights defenders.

In South Asia, there have been unprecedented amounts of efforts to curtail the voices of civic actors and cleverly shrink civil society

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<sup>17</sup> Charles J. Dunlap, Jr., “Lawfare: A decisive Element of 21st- Century Conflict,” 54 Joint Force Quarterly, 2009, available at [http://scholarship.law.duke.edu/faculty\\_scholarship/3347](http://scholarship.law.duke.edu/faculty_scholarship/3347).

space, e.g. politically motivated actors using legal forums, institutions, and processes in attempts to discredit, delegitimize and defund organizations.<sup>19</sup> The participants agreed that there has been a rise of lawfare against civic actors in the region undermining human rights advocacy and efforts. Anyone who advocates for human rights or critical issues, human rights defenders, litigants, journalists and even some judges are targets of lawfare. This can also extend to anyone having contradicting or opposing views from those in power, including farmer protesters, youtubers, opposition leaders, Members of Parliament, and National Human Rights Institutions. This type of targeting is not limited to the individuals but also extends to their families.

The participants identified common tools, trends, and patterns of lawfare to understand how legal tools/mechanisms are used to silence critical voices in order to develop possible strategies to navigate around those efforts. This was followed by a discussion on successful strategies to counter attempts of suppressing critical voices.

## **1.1. Common legal tools used to silence critical voices**

### **Legal harassments**

Civic actors, lawyers, litigators and human rights defenders are subjected to systematic harassment oftentimes in order to silence them and shut down their work. They are constantly being harassed through repetitive legal procedures, including prosecution, arrest, and arbitrary detention. For instance, in Pakistan Section 54 of the Code of Criminal Procedure legitimizes arrest without probable cause. Similarly, contempt of court is being used as one of the common tools against lawyers to silence them. Likewise, there is the trend of filing non-bailable charges to disrupt and delegitimize their work.

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<sup>19</sup> Kay Guinane, "The Alarming Rise of Lawfare to Suppress Civil Society: The case of Palestine and Israel", The Charity & Security Network, September, 2021, pg. 1-5, available at <https://charityandsecurity.org/wp-content/uploads/2021/09/The-Alarming-Rise-of-Lawfare-to-Suppress-Civil-Society.pdf>.

## **Criminalization of speech**

One of the tactics employed by authorities to shrink civic spaces and systematically suppress dissent is through criminalization of free speech. Governments enact restrictive legislation to curtail freedom of expression by labelling expressions, opinions, or activities of civic actors as illegal or punishable offenses. For example, “anti-national”, “promoting criminal amenity”, “threatening public safety and security”, and “foreign agents” are among such labels which governments/authorities use to justify prosecutions and imprisonments.

## **Misuse of laws and policies**

Oftentimes laws and policies, even if they are in themselves pursuing a legitimate objective, are not being utilized for the intended purpose but are used as a tool to target civic actors and delegitimize their work and cause obstruction. For example, in Sri Lanka the Prevention of Terrorism Act is often used to prosecute lawyers and civil society activists on non-bailable charges. Similarly in India, defamation cases are filed against civic actors under Section 499 of the Indian Penal Code, in addition to the Unlawful Activities Prevention Act and National Security Act. Likewise, blasphemy laws in Pakistan and anti-trafficking laws in Nepal (in cases supporting migrant workers) are used as a tool to silence voices and suppress them.

## **Frivolous lawsuits**

Filing of baseless lawsuits against targeted lawyers and activists by powerful entities is one of the common tools used to disrupt their work, stifle civic space and drain their resources. The trend of filing cases with no evidentiary basis and the rampant lodging of criminal complaints are of growing concern. Furthermore, the participants argued that even though there might not be convictions, once the lawsuit is lodged often the long-lasting process in itself is draining and serves as a punishment which is extremely demotivating and demoralizing.

## Financial blockage

Various NGOs are dependent on donor agencies or government funding in order to continue their work. However, in recent times, they have been targeted by the governments through freezing of their accounts or cutting of fundings to make them financially vulnerable and weak to impede their work. For instance, in India funding for civil society organizations are severely restricted by the Foreign Contribution Regulation Act. Likewise, tax offenses and money laundering offenses are often employed against many civic actors causing huge impact on organizations. Furthermore, civic actors are often targeted by obstructing the renewal of licenses to continue working or by revoking work permits of foreign journalists.

## Intimidation and surveillance

Civic actors are often subjected to intimidation both online and offline. On one hand, in this technological era, online slandering, online harassment, and ongoing online hate campaigns against civic actors are increasing and often remain unchecked. On the other hand, censorship is employed by authorities as a tool to stifle dissent. Civic actors are under continuous surveillance online as well as offline, and the threat extends to their families. The intimidation and surveillance is used against civic actors to instil fear and discourage their advocacy efforts.

### 1.2. Successful litigation strategies

#### Employing writ of *habeas corpus*

In Nepal, the advocate of a strategic litigation case was subjected to arbitrary arrest stating peace and security concerns. A writ of *habeas corpus* was employed against the arbitrary arrest asking for the release of the lawyer and the court stated that lawyers cannot be arrested on the basis of fake cases.

## Using jurisdiction of High Courts

In India, the Delhi High Court held that when civil society organizations are investigated under the Foreign Contribution Regulation Act, their funds could be used even during suspension. Similarly, in Pakistan the Lahore High Court struck down the offense of sedition under Section 124-A of the Pakistan Penal Code for being in violation of fundamental rights.

## Stay on law

In India, the sedition law is being challenged. The Indian Supreme Court has ordered a stay on the application of the sedition law wherein the law cannot be used in any manner while the proceedings are on-going. Thus, activists cannot be prosecuted on the basis of the law.

## 2. Co-opted judiciary

Among the three organs of the government, the judiciary stands paramount in the delivery of justice. Especially in a democratic country, the independence of the judiciary has been deemed the bedrock of democracy. Independence in this context means the condition of the judicial power to be free from any control, interference and subjugation. Decisions of the judiciary should be impartial and not subject to influence from other organs of government or from private or political interests.

However, with declining democratic principles and deteriorating rule of law the independence of the judiciary is in danger in many places. In recent years, the judiciary in South Asian countries is becoming severely compromised and is highly influenced by external forces. The co-optation of the judiciary poses a grave threat to accessing justice as it undermines the rule of law, leading to impunity. Strategic litigation has the intention of setting important precedents. Thus, in situations where the judiciary is compromised, it faces real challenges.

The participants discussed the various methods through which states have been interfering with the independence and impartiality of the judiciary, and attempt to identify strategies to overcome those barriers through case studies.

## **2.1. Common methods of interference**

### **Appointment and removal**

In Nepal, the Judicial Council, the body responsible for appointment of judges, has a tendency of appointing judges on a *quid pro quo* basis. Likewise, in Pakistan, the Judicial Commission has government members and judges are kept in check, sometimes deterring them from ruling against the government. Especially when there is a vacancy in the Supreme Court to be filled, no judge wants to make progressive rulings against the government to retain the possibility for a seat on the highest court. Furthermore, the appointment and removal process within the judiciary is not transparent which makes it difficult to challenge the decision.

### **Politicization of appointment process**

In the South Asian region, the governments through the recruitment/appointment process of judges can influence and manipulate verdict delivery. Interference starts from the moment of the appointment process itself. For instance, in Nepal, the Judicial Council is responsible for the appointment of judges but three people out of five members within the body are politically inclined, thus this leads to influence on the appointment process. In Bangladesh, High Court judges are appointed by the President on advice of the Chief Justice, and unless the judges are not of a party they are not appointed.

### **Threats and intimidation**

Oftentimes, state actors resort to harassment, intimidation or even physical violence and threats to their lives against judges who

challenge the government or challenge politically sensitive cases/issues. For example, a recent trend in India is to intimidate judges via phone calls. Once the phone call is made it means a redline for the judiciary which is usually set by a political authority. In one case an Indian judge was found dead in suspicious circumstances after refusing to follow the instructions given to him via a phone call. Similarly, in Pakistan judges get phone calls from security agencies.

### **Budgetary control**

States have the power to allocate budget for the fiscal year wherein the financial dependence on the state compromises the independence of the judiciary. States at times through budgetary control manipulate or withhold funds as a means of exerting pressure on the judiciary. Furthermore, budgetary control over the judiciary has often led to low or reduced salary post-retirement which severely affects the morale of the judges.

### **Legislative interference**

Legislative interference poses a great risk of encroachment on the independence of judiciary by restricting the jurisdiction of courts and limiting judicial powers through the enactment of new laws amending existing legislations. For instance, in Pakistan a bill to curtail the power of *suo motu* motions by the Supreme Court was introduced. Even though critics argued the bill to be unconstitutional, the Supreme Court itself upheld the law. Similarly, in Sri Lanka, for certain procedures the legislation ousted judicial discretion.

## **2.2. Successful litigation strategies**

### **Implementation of progressive legislation**

Nepal has enacted the Judicial Fund Act to provide fiscal autonomy to the judiciary. However, the fund is not implemented and every year the fund is utilized for different purposes. Even with a progressive legislation the law has remained inactive for three decades. A petition for mandamus order to operationalise the fund was filed

at the Supreme Court. At present, the case is under adjudication and once resolved, the ruling might contain useful findings on the independence of the judiciary.

### **Asserting judicial powers**

In Nepal, a writ of mandamus was filed in relation to the safety of prisoners after an earthquake affected prisons, wherein the State argued that the management of prison fell under executive and could not be filed as public interest litigation in court. However, the Supreme Court passed directive orders stating where the life of a large group of people is at stake, the court has jurisdiction to ensure the right to life of individuals.

### **Media mobilization**

The courts in Pakistan have a selective approach in entertaining *suo moto* cases. One strategy employed was to file an application to the court and at the same time share it with the media. In one case, the newspapers published a head-line story which compelled the court to take *suo moto* notice immediately. This led to a landmark occupational health and safety decision awarding compensation. Thus, media mobilization helped facilitate the flow of information as judges take notice of what newspapers publish.

Similarly, in another case an internal hate letter against a judge was leaked to the media which put the court in the spotlight and compelled the court to take action on such a serious matter. As a result, there was much wider support, and this helped stop the unwarranted dismissal of the judge.

### **Challenging legislative interference**

In Bangladesh, the Supreme Judicial Council is in charge of the removal of judges but parliament decided to assume that power. This was challenged in the court arguing that it would interfere with judicial independence. Two out of three High Court judges

of the bench ruled that the amendment of the constitution was *ultra vires*. The Supreme Court confirmed the ruling. However, the government has filed a review and the decision is pending.

### **3. Treatment of minorities**

#### **3.1. Targeting of minority groups**

Within the South Asian region there are specific minority groups who are targeted by the state as well as non-state actors which makes it crucial to address this mistreatment in order to ensure their basic rights. Across the countries, participants identified a range of minority groups that have been historically or structurally disadvantaged and discriminated. These include religious minorities, ethnic minorities, caste-based minorities, indigenous people, refugees / asylum seekers, drug users, LGBTQ+, persons with disabilities, and women, among others.

The treatment of these groups discussed by the participants show similarities across all the countries in the region. Minorities have been subjected to discrimination, persecution, physical violence or threats of violence, lynchings, categorisation as “anti-national” or “terrorists”, land theft and eviction based on their membership in a particular group. In addition to being directly or indirectly targeted, they are also often excluded from political discussions, economic opportunities and education. The table in [Annex B](#) provides a break-down by country.

#### **3.2. Successful litigation strategies**

Amongst various measures, strategic litigation is one of the tools for addressing minority rights issues, providing a platform for marginalized communities to seek justice and equality. During the SL Lab, participants presented various successful litigation cases for addressing minority rights issues, drawing insights from emblematic cases and legal principles.

## **National Human Rights of Dalit v. Union of India**

In India, the Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act 1989 and Rules 1995 were adopted to protect caste-based minorities from discrimination and other forms of mistreatment. The Act mandates exclusive special courts for trial of offenses against Dalits in each district but not all are initiated. However, in the years since its adoption, the authorities in India have failed to implement it. Following a public interest litigation case filed by a Dalit-led NGO, the Supreme Court of India issued directive orders to oblige the government to implement the Act and Rules. The case was strategically filed at the High Court in Rajasthan which led to the establishment of five exclusive special courts. In this case, the documentation preceding of the filing was essential. Evidence was collected on offenses against Dalits that were not investigated by the police and where compensation was not paid.

## **BNWLA v. Government of Bangladesh<sup>20</sup>**

This case addressed sexual harassment issues at work and public places. Prior to this case, there were no specific legislative provisions for addressing sexual harassment of women and girl children. The Supreme Court of Bangladesh issued a series of rules to serve as guidelines which included definition of sexual harassment and measures to be adopted including public awareness, complaints procedures and punishments. This case was successful in increasing prevention of sexual harassment in Bangladesh. The use of international law and foreign case law as interpretation guides for domestic law proved to be useful in this case.

## **Decriminalization of homosexual relations in Sri Lanka<sup>21</sup>**

The Supreme Court of Sri Lanka held that a proposed amendment

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<sup>20</sup> Supreme Court of Bangladesh, *BNWLA v. Government of Bangladesh*, 14 May 2009, Petition No. 5916 of 2008, available at <https://compendium.itcilo.org/en/compendium-decisions/supreme-court-of-bangladesh-bnwla-vs-government-of-bangladesh-14-may-2009-petition-no-5916-of-2008#2>.

<sup>21</sup> iProbono, *LGBT+ Equality: Demystifying Decriminalisation in Sri Lanka*, May 2023, available at <https://i-probono.com/case-study/lgbt-equality-demystifying-decriminalisation-in-sri-lanka/>.

bill seeking to repeal provisions of the Penal Code which resulted in discrimination against LGBTQ+ community in Sri Lanka was not in violation of any provisions of the Constitution. As a result, the parliament had the power to decriminalize homosexuality. The case's success was aided by campaigns tackling misinformation relating to the amendment bill and making the contents of the bill clear to the public. Bringing in key stakeholders (LGBTQ+ activists, lawyers, CSOs) together for broader public discourse on the rights of LGBTQ+ community in Sri Lanka proved to be useful strategy. In addition, lawyers working on the case received specialized training to support victims of discrimination.

### **Rights of Sri Lanka's Adivasis<sup>22</sup>**

The Eastern indigenous Adivasi community of Sri Lanka faces unwarranted challenges and discrimination from the state. This self-sufficient community who entirely rely on traditional livelihood, hunting, collecting wild honey, engaging in chena cultivation and fishing are losing their unique lifestyle due to development policies adopted by the governments of Sri Lanka.<sup>23</sup> With policies such as a ban on entering the forests because of forest encroachment, their traditional forest-integrated life has been lost, their way of life shattered, and today these communities are at the risk of losing their identity encroaching their right to dignified life. In this regard, Adivasis need legislation to validate their rights. In a strategic case, the plaintiffs documented the history of international initiatives contributing to the international consensus on indigenous people's rights and cited case studies and best practices around the globe. The case presented documentation of real stories, struggle, and discrimination faced by the community. Outside of the court, advocacy efforts were pushing for the adoption of the UN Declaration on the Rights of Indigenous People within the domestic legal/policy framework. Currently, the case is pending.

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<sup>22</sup> Center for Policy Alternatives, OUR LAND, YOUR LAWS: Protecting the Rights of Sri Lanka's Adivasis, January 2023, available at <https://citizenslanka.org/wp-content/uploads/2023/02/Issue-03-English-Final-2.pdf>.

<sup>23</sup> Ibid, p.6.

### **Khaki v. Rawalpindi (Pakistan)<sup>24</sup>**

This case recognized the rights of transgender persons by directing the National Database and Registration Authority of Pakistan to recognize a “Third Gender” in identification documents so that their respective fundamental rights are protected and guaranteed. Press mobilization and publishing information regarding the treatment of LGBTQ+ community who are constantly harassed by police and other agencies proved to be a useful strategy.

### **Class action lawsuit for migrant workers in Nepal**

The issue of voting rights of migrant workers in Nepal was contested. In 2018, responding to a public interest litigation case, the Supreme Court issued a directive ordering the government to ensure voting rights of migrant workers. However, the order was not implemented. Thus, a new strategy was adopted where the petitioners strategically decided to file a class action lawsuit rather than another public interest litigation to provide remedies for the migrant workers denied voting rights.

## **4. Misinformation/hate speech on social media**

In this era of digital/technological advancement, social media platforms have garnered attention for both positive as well as negative aspects. With the increase of social media platforms and use they have become the most preferred and readily available source of information facilitating unprecedented levels of connectivity and information dissemination. While these social media platforms offer opportunities for information dissemination which otherwise would not have been available, they also present significant challenges, including the spread of misinformation and hate speech.

In recent years, these social media platforms have been used to target civic actors, lawyers, activists and human rights defenders through memes, trolling, or hate-labels. Likewise, they are particularly

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<sup>24</sup> Supreme Court of Pakistan, Dr. Muhammad Aslam Khaki & another v. S.S.P. (Operation), Rawalpindi & others, Constit. Petition No. 43/2009, 4 November 2009, available at <https://www.icj.org/wp-content/uploads/2012/07/Khaki-v.-Rawalpindi-Supreme-Court-of-Pakistan.pdf>.

vulnerable to targeted campaigns of misinformation which has an adverse impact on their profession as it undermines their work and advocacy efforts. Furthermore, the misinformation and hate speech on social media sometimes put their life at risk, endangering their safety and well-being.

However, at the same time, in South Asia, governments restrict freedom of speech and press freedom on social media platforms to suppress critical voices. This poses a challenge to strategic litigation seeking to limit misinformation and hate speech online.

#### **4.1. Role of social media companies**

Even though there is no successful litigation so far in South Asia with regards to accountability of social media companies, the participants agreed that it would be important to take up litigation strategically demanding a balance of power because the power solely lies with the companies. The participants recognized the need to strike a balance of power with three actors, i.e. companies, government and people. Social media companies are currently making decisions on misinformation/hate speech online without sufficient dialogue and collaboration with multiple stakeholders on the ground. In Bangladesh, mob lynchings are often incited by online content which are spread via social media platform algorithms but content moderators used to be abroad and did not understand the situation on the ground.

Since some of the social media are not physically present in most of the South Asian region, it is challenging to hold them accountable and take up any litigation against such companies. In light of this, the possibility of transnational litigation in the home country of the companies could be contemplated as one of the strategies to make companies more responsible and accountable towards its users. Likewise, possible partnerships with foreign law firms where these social media companies have headquarters could be explored.

## 4.2. Actions taken by States/Governments

The participants pointed out that governments in the region are not taking any action against misinformation/hate speech online targeting civic actors. Most legal as well as administrative measures by the government are mostly geared towards their own advantage. The government actively monitors the content if it is against the government no matter the subject of the speech.

For instance, the Online Safety Act in Sri Lanka is controversial and strategically employed by the government to silence people's voices against the government. The courts and lawyers critique this particular Act to be of low standard and deem it to be a restrictive law. The government has a tendency to take action against religious offenses rather than other forms of hate speech. In 2022, Emergency Regulations were employed to tackle anti-government sentiments around the country. One unique feature was the provision to prosecute for rumours but these are being challenged in court currently.

Likewise, in Bangladesh, the laws are not used in favour of public citizens but only to the benefit of the government. A case study was presented showing how a female Chief Executive of a media house was falsely accused and was subjected to derogatory words in the public court.

In Nepal, the government enacted a couple of laws: the Cyber Crime Act and the Electronic Transaction Act to regulate misinformation and hate speech online, but the action is only taken against the activities that challenge the government (e.g. censorship of satirical cartoon), even though the objective of the Act seems to be to control hate speech. Thus, the enactment of new law poses more disadvantages to the public while empowering the government. The imposition of an administrative ban on TikTok in Nepal was justified due to concerns of geopolitical interest. In hindsight, there was an increase in people's movements during the election period which opposed the present members of parliament and political

parties demanding new generations of leaders. As these movements became powerful through TikTok, this platform was banned.

Thus, there is a selective approach by the State when employing policies and laws against misinformation and hate speech which is mostly catered towards shielding government rather than protecting civic actors. Most participants were of the view that at this moment it is better not to advocate for new laws or regulations as any new legal provisions, even if well intended, are at the risk of being misused.

### **4.3. Ensuring freedom of expression**

The participants recognized that there is a need to strike a balance between prohibiting misinformation/hate speech and guaranteeing freedom of speech and expression. There was agreement that it is crucial to analyse content based on context and on a case-by-case basis. As hate speech in itself is a very complex matter there needs to be guidelines or parameters to know what constitutes hate speech, by for instance analysing the speech/statement itself, the status of the speaker, the context of the speech, if it is instigating violence or immediate damage.

However, there was a debate whether all forms of hate speech can be brought into a single paradigm because some speech may not necessarily fall within the guideline, or may not incite any violence or immediate damage. Thus, even the guidelines themselves need to be context specific and hate speech cannot be looked at through a blanket approach. This poses the question how feasible this in practice would be and if courts actually are in the position to address this.

### **4.4. Successful Litigation Strategies**

The participants identified a number of important cases on this topic.

### **Ramzy Razeek case**

Ramzy Razeek, a social media commentator and member of Sri Lanka's Muslim minority, was arrested under the International Covenant on Civil and Political Rights Act (ICCPR Act) and the Computer Crimes Act due to his Facebook comment on "ideological jihad against the hate community." The Supreme Court declared the arrest unlawful and a violation of his fundamental rights. The Supreme Court also came up with its own guidelines as to what constitutes hate speech.

### **Bombay High Court case on Fact Checking Unit**

In India, an amendment to existing laws on information technology intended to set up a government Fact Checking Unit that could demand social media platforms to take down misinformation concerning business of the central government. Through a filing at the Bombay High Court, petitioners challenged this amendment because they feared such a unit would have a chilling effect on freedom of speech and expression. The final decision of the court is still pending.

### **Investigation of hate speech**

In India, hate speech is a criminal offense but rarely investigated. The Supreme Court of India Court directed that when any hate speech is made states and national authorities shall take *suo moto* action (on their own initiative) to register criminal cases regardless if complaints are filed. This was a recent ruling and it remains to be seen how it will be implemented.

### **Delhi High Court case**

In India, a case was filed against the government for failure to direct Facebook to better address misinformation and hate speech in the lead up to national elections. The Delhi High Court directed the petitioners to first seek administrative remedies before the relevant regulatory body which has the mandate to deal with such online

content. If that fails, petitioners would still have the option to continue litigation. Interestingly, the Delhi High Court obiter stated that a company has a legal obligation to make sure that no hate speech or misinformation is posted.

## E. Cross-country collaboration

The SL Lab concluded with discussion on how to leverage newly formed partnerships to explore cross-country collaboration for strategic litigation in order to address complex legal issues that transcend national boundaries. The following are some of the possible cross-country collaboration ideas explored by the participants:

- Sharing of legal expertise across countries
- Inquiring about common human rights issues
- Review of similar legal frameworks in different the countries
- Strategic case filing in domestic as well as other jurisdictions simultaneously or in a coordinated manner
- Coalitions and regional networks to share cases, strategies, gaps in litigation
- Plan and organize learning visits
- Translation of emblematic cases and judgements in English and ensuring accessibility, in particular cases from Nepal which are not available in English
- Sharing of best practices beyond one's jurisdiction
- Internships for law students in other countries
- Good laws can be used as a model to draft bills in other countries
- Replicating legal challenges to legislation in other countries that was successfully challenged in one country
- Submitting *amicus curiae* in other countries with good case law from domestic country

## ANNEX A: Country up-dates

Countries	Two most pressing human rights issues	Two biggest challenges to strategic litigation	Two biggest wins of strategic litigation in the past 5 years
Bangladesh	<ul style="list-style-type: none"> <li>• Freedom of Speech</li> <li>• Freedom of safe environment</li> </ul>	<ul style="list-style-type: none"> <li>• Political Bureaucratic Scenarios</li> <li>• Reluctance of Judiciary</li> </ul>	<ul style="list-style-type: none"> <li>• Ship-Breakings Case</li> <li>• Privacy Case</li> </ul>
India	<ul style="list-style-type: none"> <li>• Minority Rights</li> <li>• Shrinking of society space</li> </ul>	<ul style="list-style-type: none"> <li>• Weakening of Democratic Institutions,</li> <li>• Reprisals on taking of strategic litigation</li> </ul>	<ul style="list-style-type: none"> <li>• Electoral Bond Case</li> <li>• Prevention of Atrocities Act Case</li> </ul>
Nepal	<ul style="list-style-type: none"> <li>• Transitional Justice (conflict-related sexual violence)</li> <li>• Discrimination (caste, gender, poverty, LGBTIQ+)</li> </ul>	<ul style="list-style-type: none"> <li>• Populist approaches</li> <li>• Implementation</li> </ul>	<ul style="list-style-type: none"> <li>• Forced Eviction</li> <li>• Right to education</li> <li>• Fast-Track Juvenile Justice</li> </ul>
Pakistan	<ul style="list-style-type: none"> <li>• Independence of Judiciary</li> <li>• Labor Rights</li> </ul>	<ul style="list-style-type: none"> <li>• Independence of Judiciary,</li> <li>• Lack of organized Community of litigators</li> </ul>	<ul style="list-style-type: none"> <li>• Trials of civilians by military courts</li> <li>• Presidential reference/complaint against Chief Justice</li> </ul>
SriLanka	<ul style="list-style-type: none"> <li>• Repressive laws/ misuse of law</li> <li>• Stifling of dissent</li> </ul>	<ul style="list-style-type: none"> <li>• Threat to HRDs/ Litigators</li> <li>• Judiciary (competences, attitudes)</li> </ul>	<ul style="list-style-type: none"> <li>• “Polluter Pay” principle</li> <li>• Ramzy Razeek Case</li> <li>• Presidential Pardon Case</li> </ul>

## ANNEX B: Treatment of minorities

Countries	Targeted Minority Groups	Treatment of Minority Groups
Bangladesh	<ul style="list-style-type: none"> <li>• Religious minority</li> <li>• Ethnic minority</li> <li>• Indigenous minority</li> <li>• LGBTQ+</li> <li>• Women</li> </ul>	<ul style="list-style-type: none"> <li>• Persecution</li> <li>• Land theft</li> <li>• Prejudice, historical discrimination</li> <li>• Torture</li> <li>• Suppressed</li> </ul>
India	<ul style="list-style-type: none"> <li>• Dalit, Adivasi, Tribals</li> <li>• Religious minorities (Christians, Muslims)</li> <li>• National and ethnic minorities</li> <li>• LGBTQ+, disabilities</li> <li>• Refugees and asylum seekers</li> <li>• HIV, drug users</li> </ul>	<ul style="list-style-type: none"> <li>• Caste-based discrimination</li> <li>• Persecution</li> <li>• Categorisation as terrorist, 'secessionist', 'anti-nationals', 'habitual offenders'</li> <li>• Exclusion from political discussion</li> <li>• No access to justice</li> <li>• Struggle to access education, economic opportunity</li> <li>• Threat of violence</li> <li>• Mob lynching of Dalits</li> </ul>
Nepal	<ul style="list-style-type: none"> <li>• Indigenous group (Chepang, Madhesi)</li> <li>• Caste-based minorities primarily Dalit</li> <li>• LGBTQ+</li> <li>• People with disabilities</li> </ul>	<ul style="list-style-type: none"> <li>• Denied from economic opportunity</li> <li>• Untouchability practices</li> <li>• Deprived from resources</li> </ul>
Pakistan	<ul style="list-style-type: none"> <li>• Religious minority (Shia, Ahamadi)</li> <li>• Ethnic groups like Hazara</li> <li>• Women</li> <li>• Transgender</li> <li>• Person with disability</li> </ul>	<ul style="list-style-type: none"> <li>• Discrimination;</li> <li>• Formal (Legal)- No laws to address discrimination</li> <li>• Informal (Practical)- humiliated, threatened</li> <li>• Persecution on the basis of religion</li> </ul>

SriLanka	<ul style="list-style-type: none"><li>• Religions minorities</li><li>• Indigenous minorities</li><li>• LGBTQ+ community</li><li>• Gender based discrimination</li><li>• Estate workers/poverty</li><li>• Farming community/ Fishermen</li></ul>	<ul style="list-style-type: none"><li>• Land eviction/land grabbing</li><li>• Arbitrary use of criminal laws against minorities</li><li>• Discriminatory laws/retention of discriminatory laws</li><li>• Microfinance Bill</li></ul>
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