Struggles to Legalize Abortion in Nepal and Challenges Ahead

Forum for Women, Law and Development (FWLD) & Planned Parenthood Global Partners
Struggles to Legalize Abortion in Nepal and Challenges Ahead

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Forum for Women, Law and Development (FWLD)

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<tr>
<td>A.D.</td>
<td>anno Domini</td>
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<tr>
<td>B.S.</td>
<td>Bikram Samvat (Nepali Calendar)</td>
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<tr>
<td>BPFA</td>
<td>Beijing Platform for Action</td>
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<td>CBS</td>
<td>Central Bureau of Statistics</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>CREHPA</td>
<td>Center for Research on Environment Health and Population Activities</td>
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<td>CRLP</td>
<td>Center for Reproductive Law and Policy</td>
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<td>CRR</td>
<td>Center for Reproductive Rights</td>
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<td>DHS</td>
<td>Department of Health Services</td>
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<td>FDH</td>
<td>Family Health Division</td>
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<td>FPAN</td>
<td>Family Planning Association of Nepal</td>
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<td>FPIA</td>
<td>Family Planning International Association</td>
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<td>FWLD</td>
<td>Forum for Women, Law and Development</td>
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<td>HMG</td>
<td>His Majesty's Government</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICPD</td>
<td>International Conference on Population and Development</td>
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<td>IDS</td>
<td>Integrated Development Systems</td>
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<td>INGOs</td>
<td>International Non-Governmental Organizations</td>
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<td>IWRAW-AP</td>
<td>International Women's Rights Action Watch - Asia Pacific</td>
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<td>MGEP</td>
<td>Mainstreaming Gender Equity Programme</td>
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<td>MPs</td>
<td>Member of Parliaments</td>
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<td>MWCSW</td>
<td>Ministry of Women, Children and Social Welfare</td>
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<td>NGOs</td>
<td>Non-Governmental Organizations</td>
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<td>NESOG</td>
<td>Nepal Society ofObstruction and Gynecologist</td>
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<td>NHEICC</td>
<td>National Health Education Information Communication Center</td>
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<td>NKP</td>
<td>Nepal Kanoon Patrika</td>
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<td>NSMP</td>
<td>Nepal Safer Motherhood Project</td>
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<td>TAF</td>
<td>The Asia Foundation</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<td>UNIFEM</td>
<td>United Nations Fund for Women</td>
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From the perspective of the women’s rights movement, the changes in the law on abortion in Nepal surely call for jubilation and celebration. However, it is but just one step—albeit an important one—towards actual realization of the right to abortion and several other human rights of the women in Nepal. This change would not have been possible without the concerted and continued support and hard work of a host of personalities and organizations who fought tirelessly for the cause. The same applies with the preparation of this study, as far as the hard work of the individuals involved is concerned.

I wish to record my sincere appreciation to all those who participated in this report preparation for their valued contribution. Without the support of these individuals and institutions, this undertaking would not have been accomplished.

First of all, my thanks go to all the key informants whose inputs not only shed light on the process of legalization of abortion in Nepal but also provided basis for much of our analyses. My thanks are also due to Ms. Valerie De Fillipo, Senior Director, Planned Parenthood Global Partners for her encouragement to take up the challenges of this study.

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Introduction

1.a. Background

The legalization of abortion in Nepal reflects both Nepal’s newfound dedication to social change as well as the many ethnic, cultural, and religious influences in Nepal’s legal system. The Constitution states that Nepal is a multiethnic and multilingual state, with more than sixty-four ethnic groups and a population of 24 million people. Nepal is the only Hindu Kingdom in the world. Approximately 85 percent of the population is Hindu, 12 percent Buddhist and the remaining 3 percent are either Muslim, Christian, Jain, or of some other belief. The modern legal system in Nepal owes its strong allegiance to the Hindu Dharmasatra, local customs, and traditions as well as to Nepal’s long isolation from the rest of the world. Nepal only opened itself to the world in 1951 after the success of the Popular Democratic People’s Movement of 1951. However, the subsequent modernization of Nepali society and its legal system continued to reflect traditional values even as it incorporated many features of Indian and English legal systems.
Hinduism strictly forbids abortion due to the high value it places on female fertility. Indeed, one source of a woman's status in traditional society is her ability to produce sons. The Rigveda and the Athruaveda consider abortion as unacceptable on all social, moral, and ethical grounds. A woman who intentionally aborts her pregnancy is threatened with punishment in hell. Other members of society are ordered to treat her as a social outcast. The Manu Smriti, the source of Hindu law, forbids funeral rights to a woman who terminates her pregnancy. Receiving food from a woman who terminates her pregnancy is also considered a sin. Husbands who are complicit in an act of abortion are considered to have committed a sin, but if they were not involved, then they are only required to leave their wives. Hinduism's condemnation of abortion extends to instances of spontaneous abortion as well. A woman, who experiences a spontaneous abortion (i.e., miscarriage) is considered to be unclean for a period of time equal to her gestation.

The Ayurvedic medical tradition also condemns abortion, but makes an exception for cases where the pregnancy poses an absolute danger to a mother's life. For such exceptional cases, the Ayurved specifies herbal medications, certain hot and sour foods, laxatives, and irritants to induce abortion. Normally, these items are forbidden to pregnant women.

The traditional prohibition on pregnancy termination is also due, in part, to the practicality of having a large family in a rural, agrarian-based society. In situations where there is a high infant mortality rate, a low population density, and a perpetual need for workers, a large number of offspring helps to fulfill the pressing labor demands of agricultural production. But this paradigm is inconsistent with contemporary times, where the infant mortality rate is relatively low, the population density is high, and the demand for labor, particularly in urban settings, is more

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5 For a more detailed explanation, see “Hospital Based Study on Abortion in Nepal,” conducted by Integrated Development Systems (IDS), November 1985.
than met by the existing number of workers. These inconsistencies have resulted in high unemployment rates, poverty, and crime.

Nepal suffers from one of the highest maternal mortality rates in the world, and the practice of unsafe abortion is responsible for more than 50 percent of those maternal deaths. The maternal mortality rate of Nepal is estimated at 539 per 100,000 live births. The World Health Organization defines unsafe abortion as: “a procedure for terminating unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards or both.” Up until September 2002, Abortion in Nepal was considered a criminal act provided for under the Homicide Chapter of the Country Code, 2020 (“Muluki Ain”). Abortion was illegal even in cases of rape or incest. But the illegality of abortion did not discourage demand for it; rather, the illegality drove abortion underground. An estimated one-third of rural women and one-fifth of urban women in Nepal, who reported experiencing unwanted pregnancies, helped fuel a clandestine market for abortion services.

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7 Muluki Ain, Chapter on Homicide, sec. 28, 1963. “Except when the termination of pregnancy results from an act of benevolent nature, any person who undertakes abortion, performs or assists in performing abortion shall be punishable for the offence of abortion.”

8 In addition, over one-fifth (21 percent) of the women in rural areas and one-seventh (14 percent) of women in urban areas reported experiencing unwanted pregnancy twice or more. 21 percent of rural women and 28 percent of urban women said that they sought abortions as a result of their unwanted pregnancies, with eight percent of rural women experiencing a failed attempt and six percent of urban women experiencing a failed attempt at abortion. Source: Anand Tamang, et. al., Contraception, Unwanted Pregnancies & Induced Abortion in Kathmandu Valley, CREHPA.
The often brutal methods employed by these service providers proved to have a deleterious effect on the health and freedom of women.\textsuperscript{9}

This grim outlook for the reproductive health and human rights of Nepali women catalyzed the efforts of activists and researchers to change the abortion laws in Nepal. These activists and researchers believed that legalizing abortion, thereby freeing women to seek abortion and other reproductive health services openly and without fear of criminal sanctions, would ultimately reduce the number of unsafe abortions being performed.

The House of Representatives passed the 11th Amendment of the Country Code (“the 11th Amendment”) on 14 March 2002. The 11th Amendment received the Royal Assent on September 26, 2002, thereby legalizing abortion in Nepal for the first time in the country’s history. The passage of this amendment culminates three decades of research and activism at local, national, and international levels for the protection of women’s reproductive health and the advancement of women’s rights. The 11th Amendment allows abortions during the first 12 weeks into a pregnancy provided the woman gives her voluntary consent.\textsuperscript{10} The 11th Amendment also permits abortions up to 18 weeks in cases of rape or incest and at any point during the pregnancy if the woman’s life is threatened by the pregnancy or if the pregnancy is likely to result in the birth of a disabled child.\textsuperscript{11} These exceptions require both the advice and consent of a physician, as well as the consent of the woman.\textsuperscript{12}

Because Nepal has passed the 11th Amendment, Nepal now has one of the most liberal abortion policies in Asia. Nepal joins China, Vietnam, Cambodia, and Singapore as countries that liberally permit abortion upon a woman’s request. By comparison, India’s abortion law - the oldest in the region - permits abortion only in certain medical and social

\textsuperscript{9} Abortion in Nepal: Women Imprisoned, study conducted by Forum for Women, Law and Development (FWLD) and Center for Reproductive Law and Policy (CRLP), 2001.
\textsuperscript{10} See Muluki Ain, Eleventh Amendment, 1997.
\textsuperscript{11} Ibid.
\textsuperscript{12} See Muluki Ain, supra note 3, Chapter on Homicide no. 28 (b), 1963; see also Muluki Ain, supra note 6, Eleventh Amendment, 1997.
circumstances but not upon a woman’s voluntary discretion. Other countries such as Thailand, Korea, Malaysia, and Pakistan condone legal abortion in limited circumstances, while Bhutan, Indonesia, Laos, Myanmar, the Philippines, and Sri Lanka continue to have very restrictive abortion policies.

Legal abortions, however, do not automatically translate into safe abortions. But now that the government has legalized abortion, it now bears the responsibility to see that the main objectives underlying the legalization, i.e., the protection of woman’s reproductive health and the promotion of women’s human rights, are fulfilled. The new law is only the first step towards providing greater protection of women’s reproductive health and more extensive human rights. The challenges ahead may be divided into three categories: legal, medical, and social. The government, the private sector, and non-governmental organizations (NGO) must develop a consensus on what precisely these challenges are and how they will be met. Only through their mutual cooperation can their resources and expertise, concerning women’s reproductive health and women’s issues in general, bring about real improvements for Nepali women.

1. Issues of Abortion in Nepal

The prohibition of abortion in Nepal posed serious risks to women’s health and disregarded their human rights. As a public health issue, the facts speak for themselves: Nepal has one of the highest maternal mortality rates in the world, an estimated 539 deaths per 100,000 births. It is estimated that more than half of these deaths are due to unsafe abortions. Studies have also shown that between 20 percent and 60 percent of all obstetric and gynecological admissions in major hospitals in Nepal are for abortion-related complications. Illegal abortions have also caused serious human rights transgressions. A 1997 nationwide prison study revealed that out of the total women in prison, 20 percent

14 Ibid.
15 Abortion in Nepal: Women Imprisoned, study conducted by FWLD and CRLP, 2001, pg. 11.
16 See CREHPA, Unwanted Pregnancy Abortion in Nepal: Some Facts and Figures, CREHPA.
were there on charges of abortion and infanticide. Similarly a study conducted by FWLD and CRLP in 2001 entitled Abortion in Nepal: Women Imprisoned revealed that 65 women were in prison on charges of abortion and abortion-related offences.

Abortion in Nepal is a public health issue, as Nepal suffers from one of the highest maternal mortality rates in the world and the practice of unsafe abortion is responsible for approximately half of these maternal deaths. The high mortality rates are due in large part to (1) the lack of training of abortion service providers, (2) the lack of adequate health care services available to most women in Nepal, and (3) the use of extremely dangerous and unsanitary traditional abortion methods by untrained providers. Methods often consist of either the application of vaginal medication, oral medication (e.g., the ingesting of herbs, mercury, etc.), or the insertion of a foreign body/catheter into the uterus (e.g., stick covered with cow’s dung).

A woman in the district of Nawalparasi, inserted an iron hanger into her uterus in an attempt to abort, as she had no access to safe and legal means of abortion. The result was she died of heavy bleeding and septic.

Abortion in Nepal is a woman’s rights issue, as until recently women faced criminal charges for having an abortion or being suspected of having an abortion, which often resulted in prison sentences of up to two and half years. And due to the denial of access to services, information or scientific investigation system, a majority of cases were and still are treated as cases of infanticide that carry a punishment of life imprisonment. A significant proportion of the women in prison for having had an abortion are illiterate. Moreover, their cases were

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17 Ibid.
18 See FWLD and CRLP, supra note 13.
19 See CREHPA, supra note 1.
21 Ibid.
22 See FWLD and CRLP, supra note 13, at 68.
not investigated properly nor were they provided with adequate legal counsel.\textsuperscript{23} Often they were never even officially informed of the court’s verdict and were just sent to prison.\textsuperscript{24} Furthermore, men were rarely, if ever, charged for illegal abortion even though husbands, brothers, brothers-in-law, and other men frequently played a major, sometimes dominant, role in a woman’s decision to have an abortion.\textsuperscript{25}

Women have no access to family planning and lack the negotiating power to negotiate the use of family planning measures with their husbands while at the same time have no right to negotiate an sexual intercourse. At the same, they are compelled to give birth no matter what the circumstances were at the time the pregnancy was conceived, but they have no right to confer citizenship to their children. The overall social environment for a woman in the absence of a right to abortion is, therefore, extremely repressive, resulting in a state of despair and helplessness, and in many instances, suicide.

Even the updated study of women in prison conducted in June 2003 by FWLD/CRR/IPAS has indicated that there are 11 detainees, 47 prisoners and 1 accused in bail in Nepal, all charged/convicted for abortion related crimes. The statistics reiterate that women are denied right to choose and options for abortion.

Abortion in Nepal is a class issue, as wealthy, urban women have always had access to safe abortion services without fear of criminal sanction.\textsuperscript{26} It is only the poor women who not only lack access to adequate reproductive health care services but also are the only ones prosecuted under the statute.\textsuperscript{27}

Abortion in Nepal is a religious and social issue, as the legal prohibition on abortion is the result of deeply held religious and social beliefs that place women in a social position inferior to that of men. Specifically, these same beliefs and institutions that forbid abortion are also the cause of the social stigma women bear as a result of their decisions to have abortions. Additionally, because of the inferior social role that

\begin{flushleft}
\textsuperscript{23} Ibid.
\textsuperscript{24} See Ibid at 65.
\textsuperscript{25} See Ibid at 63.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
\end{flushleft}
women hold, many women are forced to undergo abortion procedures which are extremely hazardous to their health, irrespective of their consent. The society tends to use control of women's sexuality as a means to keep women under the subordination.

Abortion in Nepal is an information issue, as until recently neither the law nor society distinguished between abortion and infanticide or between induced abortion and spontaneous abortion. With regard to the difference between abortion and infanticide, women who feared social stigma from an unwanted pregnancy, such as one resulting from an illicit affair, rape, or incest, attempted to terminate their pregnancies with whatever means available to them. Often these means did not include safe or sanitary abortion services. With regard to the difference between induced and spontaneous abortion, women who suffer miscarriages through no fault of their own are sometimes reported to the authorities for having an abortion by grudging in-laws, such as a jealous co-wife or angry sister-in-law. Not only have the courts failed to make necessary distinctions between the types of abortions, but law enforcement agencies and the population in general lack a sufficient understanding of the abortion issue to competently charge and/or denounce women who have had one of the various types of abortions.

Abortion in Nepal is a development issue, as large segments of the population lack access to basic health care services and that it is unrealistic to assume that legalizing abortion will result in an immediate decrease in the high maternal mortality rate. Nepal needs more doctors, more nurses, more equipment, and more healthcare facilities if it is to meet the basic healthcare demands of the general population. Needless to say, Nepal is even further away from being able to supply for the specific health care needs of women, such as abortion and other services central to a woman's reproductive health.

1. C Rationale of the Study

Although many different organizations and individuals have taken a number of initiatives to legalize abortion in Nepal, there has not yet been a documentation of their efforts as a whole or the culminating 11th Amendment. This study is a documentation of the process
for the legalization of abortion in Nepal and to acknowledge those persons who put forth great effort in helping to realize legalization of abortion. All along, while it is not the central justification, the utility of documentation like this hardly needs any exaggeration. Legalization of abortion is not the first, nor will it be the last, campaign in Nepal aimed at better protection of rights of women. The ups and downs of this campaign, and the way the government and the civil society reacted to and interacted with the participants of the movement can only be instructive to any future mass campaign aimed at realizing some other aspect of women’s rights. The research also has a component on judgment analysis, critiquing many of the important decisions of the Supreme Court related to abortion. The analysis is expected to be helpful at a later date in making comparisons of the judgments of the court pre and post legalization and how the changes in the law may have impacted upon the attitude of the judges. It may also be helpful in comparing the changes in the lives of women because of the changes in the law with their status before the reforms were initiated.

1.d Objectives of the Study

The objectives of this study are:

- to document the abortion issue in Nepal;
- to chronicle the research and activists’ efforts that resulted in the legalization of abortion; and
- to outline the challenges that Nepal faces now that abortion is legal and to comment on the recommendations which have been made for meeting those challenges.

1.e Methodology of the Study

The following methods are used in this study:

A. Primary Sources

Scheduled interview: Scheduled interviews were conducted with 10 key informants, who have been continuously involved in the movement to legalize abortion in Nepal. They comprise of women’s rights activists and doctors.
Judgment analysis: To see the judicial development in abortion laws, reported Supreme Court judgments have been analyzed, which help us to find out the trend and interpretation. Judgments published in Nepal Kanoon Patrika from 1979/80 to 2001/02 (2036 to 2058) before the legalization of abortion have been collected and analyzed for the purpose.

Consultation: A consultation was organized with different stakeholders on July 21, 2002 to take their feedbacks on draft report.

B. Secondary Sources

Information from both published and unpublished sources, such as books, reports and newspapers, are used to complement and supplement information generated from primary sources.

1. Scope and Limitation

The primary limitations of this study are that the documentation process is based on research and studies conducted by the various organizations who are working in the field of reproductive health rights, and the interviews of their key informants. The extent to which personal and group bias may have been a factor in their information and analyses of the developments so far is a factor that should be taken into consideration when scrutinizing this study’s data.

28 Dr. Aruna Upreti, Mr. Raju Sapkota, Mr. Nabin Shrestha, Mr. Himal Shrestha, Ms. Sou Gerseson, Ms. Sapana Pradhan Malla, Mr. Ratna Shrestha, Mr. Phanindra Gautam, Ms. Ami Galani, Ms. Bharati Silwal Giri, Mr. Scott Stone, Mr. Prem Shrestha, Mr. Bishnu Kanel, Mr. Basanta Basnet, Mr. Som Luintel, Mr. Rup Narayan Shrestha, Ms. Salina Joshi, Mr. Kumar Chudal, Mr. Sabin Shrestha, Ms. Meera Dhungana, Hon’ble Indira Rana, Ms. Binda Magar, Ms. Purna Shrestha, Mr. Bijaya Poudel, Dr. Prof. Shanta Thapaliya, Mr. Ram Kumar Kamat, Mr. Tanka Panta, Hon’ble Chitra Lekha Yadav, Mr. Kedar Poudel.
Struggles to Legalize Abortion in Nepal and Challenges Ahead

History of Abortion Law in Nepal

2.a Pre-codification Period

Prior to the enactment of the Country Code of 1854 (the old Code), homicide laws were primarily governed by unwritten and un-codified laws based on the Hindu Dharamashastras, local customs and traditions, and, occasionally, Royal Edicts. In the Licchavi Era (300 A.D. to 1200 A.D.), although no separate legal provision relating to abortion existed, the act of abortion was considered to be immoral and those convicted of abortion were punished accordingly.\(^1\) In the Malla Era (1200 A.D. to 1769 A.D.), the legal status of abortion was interpreted to provide for the best interests of the high caste families, whereby abortion was permitted in cases of pregnancies caused by sexual relationships between members of high and low castes.\(^2\) No precise provisions regarding abortion can be found before the Shah Era (1853 to present).\(^3\)

2.b Country Code 1854 A.D.

The Country Code of 1854 subdivided unlawful homicide into three categories: (1) Jyanmara (murder); (2) Jatakmara (infanticide) and; (3) Bhabitabya Hatya (accidental murder).\(^4\) Women who were accused of Jatakmara faced sentences of life imprisonment. The Country Code 1854 amended in 1935 eliminated the separate categorization of

\(^1\) See Sonali Regmi, Unsafe Abortion: Violation of Women’s Right to Reproductive and Sexual Health, a Study with Reference to Nepal, University of Toronto, 2001, p. 39.
\(^2\) Ibid.
\(^3\) Ibid.
\(^4\) See Muluki Ain 1911, 1854. There were also lawful homicides, i.e., killings that were considered culturally and socially appropriate and thus not covered by the criminal law.
Jatakmara, thereby including it under Jyanmara.\(^5\) Jatakmara continued to be included as Jyanmara in the Country Code of 1963, which is the legal code in use today.

Under the Country Code 1854, abortion is dealt with in Sections 56-71.\(^6\) According to these provisions, abortion is prohibited in any circumstance.

### 2.c Country Code, 1963 A.D.

Under the Country Code, 1963, abortion is listed under the chapter on homicide.\(^7\) Sections 28 to 33 of this Chapter specifically address abortion. Section 31 provides for punishment of those convicted of performing or receiving an abortion. It states that if any person performs an abortion on a pregnant woman with her consent and she miscarries, both the person performing the abortion and the woman will be sentenced to one to one and one-half years in prison.\(^8\) The duration of prison terms depended on whether the fetus was less than six months or more than six months old. For a person performing an abortion on a woman without her consent, the punishment ranged from two years (for a fetus less than six months) to three years (for a fetus more than six months).\(^9\)

Section 28 of the Chapter on Homicide of the Country Code, 1963 did have a provision that allowed abortions to be performed on women if it was done with a purely benevolent objective by the physician, but the provision was never seriously used because of the vague nature of the sentence and the risk involved in the process, since those seeking to abort could never be sure that the provision would come to their rescue in case of a criminal prosecution.

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5. See Muluki Ain, 1854 amended in 1935.
7. See Muluki Ain, supra note 3, Chapter on Homicide no. 28, no. 29, no. 31, and no. 32.
9. Ibid.
A very important issue to keep in mind while discussing the impact of abortion provisions on women is the provision dealing with infanticide, under which most abortion-related cases are prosecuted. Infanticide carries a much heavier punishment, and there is a tendency among prosecutors and investigators to take up any abortion-related case as a case of infanticide without even caring to investigate and determine the cause of the death of the foetus. One of the motivations behind such an approach is also the fact that investigation in still birth is fairly complicated, and hence they tend to take the easy route by treating every case as a case of infanticide.

2.d Nepal Medical Council Rule, 1967 A.D.

The medical profession has promulgated its own less restrictive provision for abortion in rule 22 (J) under the Medical Council Rule, 1967 which is as follows:

Except in those situations were a woman’s health is at risk, a physician shall not otherwise perform an abortion. Even if such grounds for a health exception do exist, a physician shall seek a second opinion from another physician and only if the latter concurs that the continued pregnancy represents a threat to the woman’s life or that there is the possibility of a physical deformity in the child or mental imbalance in the woman, may such pregnancy be terminated.

It is arguable that an abortion conducted under this provision by a medical practitioner too could be illegal since the language of the Country Code is fairly explicit as far as banning of abortion of any kind is concerned. The only exception that the Code provision on abortion had before the 11th Amendment was for “an act of benevolent nature,”
presumably meaning that only when an abortion happened as a result of a certain performance on a woman’s body aimed at saving her life, or something as serious, conducted by a medical practitioner would the abortion be able to go free of punishment. An expansive interpretation of the exception was clearly not intended at the time of drafting the provision in the Code, considering that abortions of almost all kinds were prosecuted and punished under the then provision. Based on that perspective, it is questionable if a more expansive provision under a delegated legislation-like the Medical Council Rules - could have come to the rescue of any medical doctor, although there is no way of ascertaining the same since there have been no cases in which the rule was raised as a defense.

Reaffirm the right to the enjoyment of the highest attainable standards of physical and mental health, protect and promote the attainment of this rights for women and girl and incorporate it in national legislation,... as well as policies where necessary to reflect a commitment to women’s health...

C.106, Main recommendations from Beijing Platform for Action
Judiciary of Nepal in Abortion Law

There have been a number of decisions of the various courts of Nepal which recognize the very difficult circumstances in which women resort to abortion, and tend to offer them the leniency in dealing they deserve. However, on the whole, the jurisprudence of abortion law in Nepal is rather jumbled up, with the same court coming up with diametrically opposite findings in seemingly similar cases. On the whole, while the courts have attempted to be concerned about the rights of the accused in abortion cases and to offer to her the benefit of doubt, it is disturbing to see that in a number of instances, as the analysis below shows, they have come up with exceptions to the generally accepted rules of criminal law even placing the burden on the accused to establish her innocence. This study attempts to analyze a number of relevant judgments specially to see the judicial trend in abortion-related cases. This analysis could be helpful to make a comparison with the court decisions in similar cases post-legalization.

3.a. Judicial Trend in Abortion Cases

Existing legal provisions concerning abortion and infanticide have a direct impact on the position and status of women. In this study, judgments related to abortion and infanticide have been analyzed to assess the judicial approach in those cases and also to see how the existing legal system treats women. While analyzing the judgments, both the qualitative and quantitative approaches have been applied. The judgments published in the Nepal Kanoon Patrika (NKP) from 1979/80 to 2001/02 (2036 to 2058 B. S.) have been collected and analyzed.
Pattern of Conviction and Acquittal

While analyzing the pattern of conviction and acquittal of women in abortion and infanticide, it is found that the percent of conviction is 68 whereas, the percent of acquittal is 32.

It is observed that the rate of conviction in abortion-related cases is very high compared to other criminal cases where women are victim. An interesting point to be added here is that all these cases were decided by male judges.

Upholding or Reversal of Lower Courts’ Decisions

The judgments have been analyzed also on the basis of upholding or reversal of the lower courts’ decisions by the Supreme Court. In 64 percent of cases, Supreme Court upheld the lower courts’ decisions that women were guilty. Similarly, in 16 percent of the cases, Supreme
Court upheld the lower courts’ decisions that women were innocent. However, in 16 percent cases, Supreme Court decided women innocent as against the guilty verdicts by lower courts. Similarly, in 4 percent cases, Supreme Court found the women guilty as against the lower courts’ decisions to acquit them.

Use of Discretionary Powers of Sentencing

Courts generally invoke No. 188 of the Chapter on Court Proceedings of the Country Code\(^1\) to exercise discretionary power to award punishment when court is of the view that the maximum punishment would be too severe relative to the degree of culpability. During the judgment analysis, the number of cases where Supreme Court has invoked their discretionary powers were also been looked into. Out of the total number of convictions, in 70.59 percent of cases, No 188 of Court Proceedings has been invoked whereas, in 29.41 percent cases, it has not been invoked.

It is observed that the Court is sympathetic in its approach and has prescribed a lenient punishment in large number of infanticide cases taking into consideration this legal provision. In HMG v Sumitra Rai

\(^{1}\) No. 188 of Chapter on Court Procedure of the Country Code states that even if one is convicted of the offences in which the capital punishment, life imprisonment with confiscation of entire property or life imprisonment is prescribed in accordance with this Act, if the judge delivering the judgement is under suspicion on his own conscience that the case may be a mere accident or while considering the circumstances of the offence committed, he deems that it would be excessive to award the punishment as prescribed in the Act and deems on his conscience that the convict be punished leniently, he shall forward his opinion in writing with reasons therefor having fixed the punishment in accordance with the Act in his reference judgement. The final court may, if it deems appropriate, award lesser punishment than prescribed in the Act.
(Gurung), for example, the Supreme Court upheld the decisions of the lower courts to prescribe a punishment of only five years’ imprisonment saying “imprisonment of a woman for life would be an excessive punishment since it appears that the defendant killed her new born to save herself from the social stigma.”

Similarly, in HMG v Bhimkala Balal, the Supreme Court took into consideration not only the desire of the defendant to avoid social stigmation but also her young age. Court disagreed with the idea of imprisoning her for life saying “it appears that she committed the crime to save herself from the social stigma after she was unable to have a timely abortion.” The court reduced her jail term to four years, against the decisions of the District and Appellate courts, punishing her with a seven-year imprisonment. It is important to note, however, that while the judges have a sympathetic attitude towards women in these cases, they have not yet recognized it as a gender and reproductive health right issue.

**Degree of Punishment Awarded**

While analyzing the cases, the degree of punishment awarded in the cases have been looked into. Out of the total convictions, only in 5.88 percent of cases, women have been imprisoned for a term of 2 years, in 11.76 percent, women have been imprisoned for a term of 3 years, in 5.88 percent, women have been imprisoned for a term of 4 years, in 35.29 percent, women have been imprisoned for a term of 5 years, in 23.53 percent, women have been imprisoned for a term of 10 years and in 11.76 percent, women have been given life imprisonment.

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2 Supreme Court decision on 2060/01/19, yet to be published.
3 Supreme Court decision on 2060/03/13, yet to be published.
We also comparatively analyzed the pattern of the Supreme Court’s upholding the term of imprisonment prescribed by lower courts or awarding the higher or lower terms of imprisonment than that of the lower court. In 58.82 percent of the cases, the Supreme Court upheld the same term of imprisonment as prescribed by the lower courts. However, in 29.41 percent of the cases, the Supreme Court awarded smaller terms of imprisonment than that of the lower courts whereas, in 11.77 percent of infanticide cases, the court awarded higher term of imprisonment than that of the lower courts.

Confession at Police and at Court

Out of the reported cases of the Supreme Court, in 76 percent of the infanticide cases, the accused persons have confessed in the police but only in 16 percent cases, they have confessed before the court.
Marital Status of Accused Women

The marital status of the women charged in these cases have also been looked into and it is found that 48 percent women were married, 32 percent women were unmarried and 20 percent women were widowed. In case of married women, most of their husbands were away from home for employment.

Duration of Time Taken to Declare the Verdicts

We analyzed the duration of time right from FIR to final decision of cases where we found that duration taken was different from case to case. In these cases, generally it takes 3-5 years to get final decision from Supreme Court. Out of 25 cases, 8 cases were decided in 3 years, 6 cases in 4 years, 5 cases in 5 years, 3 cases in 2 years and 1 case in one year, one case in 6 years and one case even in 8 years.

Legal Representation in Final Hearing

The right to be defended by the legal practitioner of one's choice\textsuperscript{4} is

\textsuperscript{4} Article 14(5) of the Constitution of the Kingdom of Nepal, 1990.
one of the constitutional safeguards and fundamental rights. However, looking into the legal representation in the aforementioned cases, the accused women did not get any legal representation for pleading in final hearing at Supreme Court in 36 percent of cases, whereas, public attorneys did not appear on behalf of government in 48 percent of cases.

3.b Judicial Precedents in Abortion Cases

While analyzing the decisions of the Supreme Court in the cases relating to abortion and infanticide, both positive and negative attitudes are found to have been reflected in those decisions. Therefore, in this study, those decisions have been analyzed dividing them into two broad categories as follows:

1. Positive Interpretation

1.1. Benefit of doubt goes to the accused

The Supreme Court is found to have accorded the benefit of doubt to the accused in the cases relating to abortion and infanticide. In most of these cases, the fact-in-issue seems to be whether it was a still-birth or the infant was killed after the birth. In such issue, the court has held that unless it is proved by facts and evidences that the infant was killed after the birth, the court presumes that it was a still-birth, and thus the court has accorded the benefit of doubt to the accused.5

5 HMG vs. Ishwari Pant: NKP 2042. Vol. 12 pp. 1101-3
The court has held that finding an infant, who is born from illicit relationship dead shall not ipso facto be presumed to be abortion. The court has also held that in such cases, illicit relationship alone should not be taken as the basis for conviction, rather there should be some direct evidence to prove abortion or infanticide. In another case, the Supreme Court has held that merely because a woman conceives an unwanted pregnancy because of illicit sexual relationship with others, she may not be convicted of the offence on the basis of presumption that she has committed illegal abortion or infanticide in order to protect herself from social disgrace and stigmatization.

1.2 Motherly affection towards child has to be taken into account

In one case, the full bench of the Supreme Court has held that prior to concluding that an infant was killed after birth, the judge must not forget the motherly affection and love towards the new born, which naturally flows from the mother's heart. Thus, the Supreme Court is of the view that a court generally presumes that the mother does not murder an infant she has given birth to and to prove it otherwise, there is a need of a direct evidence.

1.3 Difference between abandoned infant and infanticide

The Supreme Court has differently treated the offence of abandoning an infant born alive and the offence of infanticide. The court is of the view that abandoning and infant born alive and its subsequent death may not be treated as infanticide.

According to the Nepalese law, one is liable for life imprisonment with confiscation of entire property in case of infanticide and for an imprisonment of four years in case of abandoning a living infant.

As the court has treated the offence of abandoning an infant differently from infanticide there is leniency in punishment for women.

1.4 Non-confrontation not to be deemed as giving word for killing

The Supreme Court has differentiated the offence of giving words for killing from the act of non-confrontation. In one case involving this

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6 HMG vs. Setu alias Parbati Thakurani,: NKP 2038. Vo. 3 pp 12-14
7 HMG vs. Narudevi Bhandari: NKP 2045, pp. 1090-2
8 Kamala Bishwakarma vs. HMG : NKP 202, Vol. 2 pp. 176-180
10 No. 18 of the Chapter on Homicide, the Country Code
issue, the Supreme Court has ruled that where an infant is born from illicit sexual intercourse and the male goes ahead to murder the infant, the non-confrontation of it by the woman may not be deemed as having given words for the killing.\textsuperscript{11}

2. Negative Interpretation

2.1 Infanticide is deemed to have occurred if not found alive

The Supreme Court has in so many cases, laid down the principle that benefit of doubt goes to the accused of the abortion and infanticide. However, the court has, in its latest decision\textsuperscript{12}, laid down an opposite principle that unless otherwise proved, it would be presumed to be infanticide if an infant born from an illicit relationship is found dead. This principle has created an unfortunate situation that might lead to conviction of a woman for infanticide and be punished with life imprisonment along with confiscation of entire property even in cases of still-birth. In Nepal where there is no access to hospital services to a large number of people and there is lack of advanced forensic research system, there are several cases of still-birth or the child is dead after the birth. However, because of this principle, woman has to bear criminal liability in cases of still-birth or of natural death after birth of the child.

An interesting point to be noted here is that one of the justices who laid down this rule has, in one of the earlier cases where he was also involved, laid down the rule that unless proved otherwise, a child born a presumed to be dead.\textsuperscript{13} But here, the opposite principle is laid down. More interesting is the point that both of these judgments were delivered by the same justice of the Supreme Court. This shows that there is no consistent judicial position even in the Supreme Court in the cases relating to abortion and infanticide.

2.2 Guilt to be established on the basis of circumstantial evidences

In direct conflict with the precedents that benefits of doubt goes to the accused in the cases relating to abortion and infanticide, the Supreme Court has laid down various types of contradicting principles. One of the such principles is that in case of lack of direct evidences, the guilt

\textsuperscript{11} HMG vs. Sitadevi Thapa: NKP 2047, Vo. 1, pp 49-51
\textsuperscript{12} Manimaya Shris vs. HMG : NKP 2049, pp 361-5
\textsuperscript{13} See Goma Devi Pyakurel vs. HMG : NKP 2040, Vol. 2, pp. 67-70.
has to be established on the basis of circumstantial evidences. Here, the Supreme Court is of the view that if benefit of doubt is given to the accused, the whole concept of circumstantial evidences would come to an end. This decision has also done away with the universal principal of criminal law that the prosecutor has to prove his/her case beyond reasonable doubt, and even in absence of any direct evidence, an innocent woman may be punished because of the circumstances of bearing unwanted pregnancy.

2.3 Abortion to be presumed if not made public

The Supreme Court has, in order to ascertain whether it is an abortion or a miscarriage, even resorted to examine whether or not the instance was made public. Here, the court is of the view that only the offenders don’t make the incident public because of their criminal intention. This has created a situation of women’s victimization even in cases of natural miscarriages of the fetus and the women’s failure to get it registered on time. The women would be physically unable to report it on time because of her early maternity stage and the resulting weaknesses. The principle discussed above does not help such women rather it holds them responsible without their guilt.

2.4 Punishment for infanticide for the offence of abortion

In one case, the Supreme Court has punished a woman even without ascertaining whether it was an abortion or infanticide. In this case, the court has held that as there are no witnesses in this case, punishment has to be imposed only on the basis of statement of the accused recorded at the police. The court further held that as the accused confessed that she consumed the drugs for abortion in the second month of her pregnancy and the new-born did not weep at birth, it would be too severe to punish her for infanticide because the infant was at the verge of destruction, and because there were no evidences suggesting otherwise. Neither can it be ascertained, in the absence of evidences, that the mother had the intention to kill the infant born alive after the birth. The court further held that the mother can not be acquitted either because she had attempted to terminate it and thus, the court imposed the punishment of a term of five years invoking No. 188 of the Chapter on Court Proceedings in the Country Code. It is clear

15 Krishnalal Yadav vs. HMG : NKP 2044, Vol. 6, pp. 671-75
16 HMG vs. Deurupa alias Draupadi Chhetri: NKP 2040, Special Issue, Decision No. 67, pp. 284-87.
from the above that the Supreme Court has imposed the punishment on the woman not for the offence of infanticide but for the offence of attempting abortion. However, in this case, the punishment has been increased having invoked No. 188 of the Country Code. This shows the utter negligence and recklessness even in the most respected judicial authority like Supreme Court. Because of this judgment, the woman has to suffer an additional term of imprisonment.

2.5 Inconsistency in the use of judicial discretion

There is no consistency at the Supreme Court on the use of No. 188 of the chapter on Court Proceedings, the Country Code. In some cases, the court has punished with an imprisonment for five years and in some others for ten years. For example, in cases of infanticide by an unmarried girl or by a widow, the court has, having invoked No. 188, imposed a punishment of 10 years imprisonment because the offences were committed to save themselves from social stigma, whereas, in case of a married woman committing the same offence, the court has invoked No. 188 and imposed a punishment of five years imprisonment on the basis that the offence was committed to save themselves from the husband, other children and social stigma as well. Having regard to the circumstances, the widow and unmarried girls have to be punished less leniently, however, the court has its own view in this matter.

Having analyzed the decisions in which the court has mitigated punishment invoking No. 188 of the chapter on Court Proceedings, it appears that the pattern of use of this judicial discretion depends, on the facts of each case and individual perception and hunch of the judges. It is simply because in the identical offences of infanticide committed by unmarried girls to protect themselves from social stigma, a term of ten years imprisonment is imposed in one case and a term of five years imprisonment is imposed in the other. Similarly, in case of the murder of a new-born from an incestuous relationship by mother-in-law, the punishment of five years imprisonment was

17 Pursuant to No. 31 of the Chapter on Homicide, the Country Code, if the pregnancy is up to 6 months, the punishment is termination is of two years of imprisonment and if it is above 6 months, the punishment is three years of imprisonment.
18 Harkamaya Limbuni vs. HMG: NKP 2045, Vol. 10, pp 1018-21
19 HMG vs. Kalasi Tiruwa Kameni: NKP, 2045 Vol. 9, pp 872-76
20 Harkamaya Limbuni vs. HMG : NKP 2045, Vol. 10, pp 1018-21
21 HMG vs. Yam Kumari Pandey: Hastima Rokka Magarni v HMG : NKP 2048, Vol. 11, pp. 793-96
imposed whereas, in case of the murder of a new-born by the mother herself out of circumstantial compulsions, the punishment of ten years imprisonment was imposed. This shows that the Supreme Court has not invoked No. 188 of the Chapter on Country Code with uniformity in its application.

Conclusion

The above analysis shows that there is no consistent approach that the Supreme Court has developed in the cases relating to abortion and infanticide. From case to case, the justices seem to come up with different views. Conflicting principles have been laid down even by the benches comprising of the same justices. Although in most of the cases, the court offered sympathetic treatment to women holding that the women have committed abortion or infanticide to save themselves from social stigma, the approach of the court has not been to recognize the reproductive health rights of women. This protectionist approach of the court is unworkable because only women have been convicted unilaterally in those offences and there is no uniformity in the application of the judicial mind. The court seems to be making judgments influenced by the traditional patriarchal norms of controlling women's sexuality.

It is the duty of the states parties to “respect, protect and fulfill women’s rights to health care”, have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system, which ensures effective judicial action. Failure to do so will constitute the violation of article 12 of CEDAW.

Para 13 of General Recommendation No. 24 of CEDAW Convention

22 HMG vs. Man Kumari Gurung: NKP 2047, Vol. 6, pp. 474-77
23 Parbati Chhetri vs. HMG: NKP 2047, Vol. 4, pp 401-4
Process of Legalization of Abortion in Nepal

It is a bit tricky to pin-point the exact date when the process of legalization of abortion began in Nepal, for the simple reason that while there have been several attempts in the past it was only in the more recent past that the process really gained momentum. This momentum had to do with the new found vigor of the women’s rights activists and their dedication in the post-democracy era after 1990. Arguably, the process really seemed to be getting anywhere in the aftermath of the Supreme Court decision in Meera Dhungana, requiring the executive to present to the Parliament a new Bill to address discriminatory provisions in the Nepali laws. While Meera itself was a case demanding equal treatment of women with regards to parental property, during the process of national education and debate on women’s rights issues that ensued in the aftermath of the directive order, the women’s rights activists in Nepal began to address the wider issues of equality and non-discrimination and located abortion as one of the two main issues—along with equal rights over parental property—affecting women’s status in the Nepali society. That is not to overdo the impact of Meera or to belittle the many other attempts that have been made for decades to legalize abortion in Nepal. Of course, it is also important to note the very lasting influence that Nepal’s signing of various international human rights instruments especially those in the immediate aftermath of restoration of multiparty democracy in Nepal in 1990. One of those instruments was CEDAW, the Convention on the Elimination of all forms of Discriminations Against Women, 1979, which has very specific provisions on the government’s positive obligations to uplift the right to reproductive and sexual health of women. It is with this in the background that we provide below a chronology of events, mostly of the recent past, related to the passage of the Bill.

Apparently, long before the women’s rights movement gained momentum and began demanding that abortion be recognized as an element of a woman’s right to reproductive and sexual health, the drafters of the Draft Criminal Code of 1973 had come up with the proposal to regulate and recognize abortion. The exception under the provision on “causing miscarriage” (Section 130) provided for situations under which abortions would be acceptable, and it is poignant to note that they resemble substantially to the new exceptions which have been provided for in the Country Code (11th Amendment) Bill. It provided that termination of pregnancy, through abortion, would be allowed where:

a. the length of pregnancy has not exceeded three months and is terminated with the consent of the woman;
b. the medical practitioner is of the opinion that the continuance of pregnancy would involve risk to the life of the pregnant woman, or if there is a substantial risk that the new born would be deformed and handicapped;
c. the pregnancy is a result of rape or incest.


The Pregnancy Protection Bill¹, 2053 (1996) was introduced by MP Sunil Kumar Bhandari, the Chairperson of the Family Planning Association, during the 12th session of the Parliament on Srawan 16, 2054 B.S. (31 July 1997). The Bill clearly defined the roles of government hospitals, recognized health institutions and physicians with respect to legalizing abortion. It also described provisions relating to the protection of pregnancy, circumstances in which abortion may be permitted, the extent to which confidentiality must be maintained, special rights and duties of abortion providers, and specific details concerning the

1. For detail, see Annex 2.
government’s authority to conduct investigations into illegal abortions. This Bill, however, lapsed on Ashad 12, 2056 B.S. (26 June 1999) because Sunil Kumar Bhandari completed his tenure as a member of the National Assembly.


The Country Code (11th Amendment) Bill, 2054 B.S. (1997 A.D.) was registered in the Parliament on 7 July 1997. The 11th Amendment Bill incorporated various rights related to women including the legalization of conditional abortion. While the Bill was a definite step forward towards ensuring right to reproductive health to women, it still came with a number of lacunae and half-hearted measures, which while offering to women some leeway with regards to abortion, did not quite offer a comprehensive and holistic solution to the problems that women were facing-like measures to ensure safe and affordable abortion. It also subjected the woman’s decision to abort to a consent of her husband. The Bill provided for three different instances in which abortion would be allowed, namely, (1) freedom to abort within the first 12 week, with the permission of husband, if the woman is married, (2) freedom to abort up until 18th week of pregnancy if the pregnancy is a result of rape of incest and, (3) freedom to abort at any time if in the absence of it the woman’s life could be endangered, or harm her physical or mental health or if she is likely to give birth to a deformed baby.

4.d. Amendment Proposals by MPs

The number of amendments proposed by members of parliament after the Bill was presented for their consideration was unprecedented
to say the least. There were over 100 amendment proposals from parliamentarians belonging to all political parties and at one time it looked like an unmanageable state of affairs with virtually every parliamentarian carrying a very strong opinion about the whole issue. On hindsight, however, the active participation of the parliamentarians only added to the momentum for reforms and ensured a vigorous debate in parliament before it adopted the provisions for reform.

4.e. Lapses in the Bill

The 11th Amendment Bill was referred to the Foreign Affairs and Human Rights Committee on August 20, 1997. The Foreign Affairs and Human Rights Committee held many discussions, and also met with NGO representatives and human rights activists to gather necessary suggestions concerning the 11th Amendment Bill. Subsequently, the Bill was referred to the newly formed Law and Justice Committee of the House of Representatives. But the legal status of the Bill was lapsed on 15 January 1999 because the House of Representatives was dissolved.

4.f. Alternate Proposals by Civil Society

Collaboration committee of various NGOs/media/individuals made various proposals to the government to modify the Bill. Some of the recurring themes in all the proposals for change from the civil society can be enumerated as under:

| a) | to provide for a punishment to those who identify the sex of the unborn, and perform abortion based on the fact so determined. |
| b) | to make an act of abortion free to any woman and unencumbered by any consent. |
| c) | to provide for a stricter imprisonment to those who perform or cause abortion on a woman without her free consent or under coercion. |
A separate advocacy leaflet prepared by FWLD, which was subsequently presented to the government as its proposals for change in the Bill also contained the above points.²

4.g. Re-registration of Country Code (Eleventh Amendment) Bill, 1999

The Bill that was presented to the House of Representatives on 11/8/1997 had passed through several stages before it lapsed as a result of the dissolution of the House of Representatives on 15/1/1999 and declaration of general elections for May 1999. Before it lapsed, the Bill had seen amendment proposals by 109 members of parliament, and had been discussed in detail by the Foreign Affairs and Human Rights Committee and was under consideration of the Law, Justice and Parliamentary Affairs Committee. Thankfully, the government reintroduced the Bill to the House on 20/9/1999, within a few months of the General Elections, 1999.


Around the time that the Parliament and the civil society in Nepal were discussing the merits and lapses in the proposed amendments in the Country Code, Nepal was in the process of preparing-periodic or initial reports to a number of treaty bodies, including the Committee

The Committee expresses concern at the current law, which criminalizes abortion, including in cases of abortion through rape and incest. The Committee considers that the current law on abortion contributes to the high maternal mortality rate in Nepal.

CEDAW Committee, Concluding Comments on Nepal’s Initial Report to CEDAW, 1999

² Advocacy leaflet on Reproductive Health Right of Women, Publication no. 41, FWLD, 2001
on the Elimination of Discrimination Against Women, which oversees the status of implementation of CEDAW provisions. An important element of the Shadow Report on Government Report presented to the committee by the women’s rights NGO’s was with reference to rights regarding reproductive health of the Nepali women. The committee expressed grave concerns about the state of reproductive laws in Nepal, including the fact that under the laws then existing, abortion was criminalized, including those abortions which were results of rape or incest. The committee also called upon the government to revise existing legislation and to reconsider the proposed amendments so as to provide services for safe abortions. A study revealed that the Concluding comments contributed to influence the decision-makers on this regard.³

### Concluding Observations/Comments of the Committee on Economic, Social and Cultural Rights: Nepal

32. The Committee notes with deep concern the high rates of maternal mortality, especially in rural areas, owing mainly to unsafe and illegal abortions, and that female life expectancy in Nepal is lower than male life expectancy.

33. The Committee notes with alarm that abortion is absolutely illegal and is considered a criminal offence, punishable by severe sentences, and cannot be carried out even when pregnancy is life threatening or the result of incest or rape. The Committee also regrets the fact that the reproductive and sexual health programmes are not implemented because of lack of financial resources.

55. The Committee urges the State party to take remedial action to address the problems of clandestine abortions, unwanted pregnancies and the high rate of maternal mortality. In this regard, the Committee urges the State party to reinforce reproductive and sexual health programmes, in particular in rural areas, and to allow abortion when pregnancies are life threatening or a result of rape or incest.


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Struggles to Legalize Abortion in Nepal and Challenges Ahead

4.i Amendment Proposals by MPs

When the Bill was presented to the House the second time around, it saw yet another series of amendment proposals by parliamentarians. This time, there were 72 proposals for amendment from 51 members, still an exceptional level of participation on the part of the parliamentarians.

<table>
<thead>
<tr>
<th>Proposed Amendment Proposal to the Country Code (Eleventh Amendment) Bill</th>
<th>Proposed . No.</th>
<th>No. of Parliamentarians</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instead of the provision of the proposed No. 28, the provision “the sole right to be pregnant or to cause abortion shall be vested on pregnant women”</td>
<td>54</td>
<td>1</td>
</tr>
<tr>
<td>Instead of the provision of the proposed No.28, insert the provision that “the pregnant women should not be made to abort without her consent and should not identify or cause to be identified the sex of the foetus with an intention to cause abortion.”</td>
<td>55</td>
<td>21</td>
</tr>
<tr>
<td>Instead of the provision of the proposed No. 28 A, insert the provision that “the pregnant women shall without consent of anybody cause abortion of unwanted pregnancy up to 12 weeks.”</td>
<td>58</td>
<td>21</td>
</tr>
</tbody>
</table>
4.j. Advocacy

All through the amendment process, a group of women’s rights NGOs in Nepal persisted with their advocacy work, aimed at educating and influencing public opinion and through them the parliamentarians and the decision-makers. Various advocacy materials were prepared and disseminated widely. Various rallies and dharnas were organized to show agitation from civil society’s side. As the final results show, they were successful in more ways than one, although not all of their demands were incorporated in the final Bill that was adopted by the parliament.

4. k. Discussion on the Bill

On March 25-26, 2000 the Social Justice Committee of the National Assembly organized a workshop to discuss the existing discriminatory legal provisions in the Country Code (Eleventh Amendment) Bill and required areas of reform. In the two-day workshop, parliamentarians themselves identified the shortcomings in the Bill and prepared amendments.

4. l. Recommendation of Committee to Pass the Bill with Amendment

On October 5, 2001, Parliamentary Committee on Law, Justice and Parliamentary Affairs recommended the passage of the Bill with some amendments.

4. m. Dilemma of the Country Code (Eleventh Amendment) Bill

The House of Representatives had passed the Bill with recommendations suggested by the Committee on October 9, 2001, owing to political differences, the National Assembly, where the opposition parties were in the majority, rejected to even consider the Bill on October 13, 2001. They argued that it was still incomplete in regards to inheritance. This

4. Programme was jointly organized by the Social justice Committee, MWCSW, UNDP, and MGEP.
caused a sort of legal stalemate. It could go either way from there. If the House of representatives were to reject the Bill, it would have lapsed but if the Bill were to be passed again by a majority of the House of representatives, it would qualify to be presented to His Majesty for Royal Assent. Amidst this situation, women's groups had two different views. Few women's group echoed the stance of the National Assembly, which created confusion and hindrance for passage of Bill. At this stage FWLD took up a stand to pass the Bill as it did not only provide inheritance right but also decriminalized abortion, provided severe punishment on rape, criminalized paedophilia and also amended many discriminatory laws related to marriage and divorce. To bring all the stakeholders to a common consensus, FWLD conducted meetings with different groups specially showing the changes that the Bill sought to bring through a comparative presentation on existing law and proposed law and how the new law would benefit women.

4.n. National Conference and Rally

A very important event to garner public support, of course as part of a series of similar events conducted in smaller scales, was the national conference and rally organized by a host of prominent women's rights NGOs in Nepal. Participated by some 1500 people, the conference had representations from various ministries and members of parliament, the judiciary, foreign embassies, UN agencies, INGOs, donor organizations, local NGOs, media, National Human Rights Commission, civil societies and grassroots people's movements from all over the Kingdom. It was a conference that dealt with discriminatory laws in general and shared with the participants heart-rending stories from women suffering from the ill-effects of the

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5. National Conference was supported by IWRAW-AP, FPIA, UNIFEM, TAF, UNFPA, FWLD.

“Building a society based on equality is the need of the hour. For that, substantive equality, not formal equality, would be our priority.”

- Rt. Hon’ble Chief Justice Keshav Prasad Upadhyay
discriminatory laws. Not only was it a major media event which forced the decision-makers to take note, it clearly also was an event of great educative and lobbying value.

An extremely convincing statement about the impact of the Conference came from one of the parliamentarians, who seems to have changed his views on the issue—for the better—as a result of the Conference. While casting his vote in favor of the Bill in the House of Representatives, Member of Parliament Chitra Bahadur KC, a senior communist leader, acknowledged that the National Conference for Gender Equality was an eye opener for him and other members of his party.⁶

“None of the other Conference I have attended is as heart touching and effective than the present one...... My party has always shown solidarity with women activists in all issues of gender equality.”

- Hon’ble Madhav Kumar Nepal
Leader, Main Opposition Party

Victim’s Voice on Criminalization of Abortion

“I am a teacher and a father of 3 children. While I was out in a training, I got the information that my wife has been admitted in hospital and is in a serious condition. When I reached to the hospital I found my wife screaming due to high bleeding. Doctors were unable to save her life and she died during the treatment. Later, I came

to know that my wife had gone to health assistant for check up due to stomach pain. This health assistant was running a private clinic at our village. The health assistant diagnosed pregnancy as a reason for my wife’s pain and recommended her for abortion. He performed abortion after assuring safety. However, through the medical report it was found that while performing abortion, sharp equipment was used and that cut the uterus of my wife and caused continuous bleeding. Its not only my wife, who dies of unsafe abortion, I myself is aware of 6-7 innocent women who died because of unsafe abortion. I think my wife would not have died if our country had services for safe and legal abortion. Therefore, the only tribute for my wife will be the legalization of abortion in Nepal.’’

4.o. Passage and Royal Seal on Country Code (Eleventh Amendment) Bill

At least partly as a result of the national mood created by the National Conference, the Bill sailed through the House of Representatives quite easily on March 14, 2002. There were 147 votes in favor and 1 against. After the passage of the Bill by the House, it received the Royal Seal on September 26, 2002.

4.p. Formation of Abortion Task Force

The government formed Abortion Task Force\(^7\) to develop the terms and conditions of implementation of the abortion law, which has since been renamed as Technical Committee for the Implementation of Abortion Care (TCIC). FWLD has given its feedback from reproductive health right perspective on draft terms and conditions prepared by the government. Even almost a year after the passage of the Bill, the government has yet to finalize and adopt the terms and conditions,

7. The Abortion Task Force was formed by the Family Health Division (FDH), Department of Health Services (DHS) in February 2002. Members of Abortion Task Force are Family Health Division, National Health Education Information Communication Center (NHEICC), CREHPA, Nepal Safer Motherhood Project (NSMP)/DFID, Nepal Society of Obstruction and Gynecologist (NESOG) and GTZ-HSSP/RH.
thus keeping the issue still unresolved in the sense that those who are having abortions at this stage could still find themselves at the legal faultiness. At the same time, the whole process of drafting and finalizing the terms and conditions for safe abortion services needs to be followed up with a lot of caution. Since Regulations are not drafted to regulate procedural details of the provisions in the Country Code, it is through the provisions in the terms and conditions document that many of the substantive provisions in the Eleventh Amendment will get realized, and if due care and foresight is not employed in the process of finalization of the document, there is still a strong possibility that actual realization of abortion-related rights and services will remain elusive.


Draft Criminal Code, 2001 has been submitted to His Majesty’s Government by the Task Force headed by the Attorney General of Nepal. Draft Criminal Code has proposed legalization of abortion in following grounds:

- 12 weeks of pregnancy with the consent of the pregnant women however in addition in case of married woman consent of husband and for others consent of mother or father is required.
- 18 weeks of pregnancy in case of rape or incest with the consent of pregnant women
- Anytime in case of life of pregnant women is in danger or the physical or mental health may deteriorate or possibility of birth of disable child on an advise of an expert
- Anytime with the consent of pregnant women who is HIV positive

4.r. Study/Research

Hospital Based Study on Abortion in Nepal: In 1985, a Canadian organization called Integrated Development Systems (“IDS”) performed the first ever report on abortion in Nepal, a Hospital Based Study on Abortion in Nepal. In 1996, IDS followed up on its research with a Study
on Rural Based Abortion in Nepal. Neither of these reports, however, were widely distributed or published because of prevailing social attitudes about abortion.

Stepping Stone: In 1995, Nepal Obstetrics and Gynecological Society published a report that discussed the issue of legalizing abortion. Experts on the subject consider this report to be a “stepping stone” to the introduction of Sunil Bandari’s private Bill and the subsequent 11th Amendment Bill.

Discriminatory Laws in Nepal and Their Impact on Women: In 2000, FWLD conducted a study to reveal the existing discriminatory laws against women in various issues including reproductive health. Through a detailed analysis of the existing discriminatory provisions (including law relating to abortion) and their adverse impact on women, this study makes a forceful arguments for change in those laws.

Women in Prison in Nepal for Abortion: A Study on the Implications of Restrictive Abortion Law on Women’s Social Status and Health: CREHPA’s study entitled, Women in Prison in Nepal for Abortion: A Study on the Implications of Restrictive Abortion Law on Women’s Social Status and Health, stated that of the total of 406 female inmates serving prison terms during its study period, the number of women convicted for infanticide-abortion was 80. The study notes that many women who rely on unsafe, clandestine abortion services take great care to register themselves as having experienced a spontaneous miscarriage. The study states that it is only those women, who are careless, ignorant, poor, and unlucky, that get caught and imprisoned for abortion and infanticide. Women, who are charged with abortion and infanticide and sent to prison, are rarely represented by legal counsel, are often ignorant of the nature of the charges against them, and are
generally not provided with voluntary access to a medical examination to clear their names.

Abortion in Nepal: Women Imprisoned: Another report, also concerning women sent to prison for having abortions, was published jointly by the Centre for Reproductive Law and Policy (CRLP) and the Forum for Women, Law and Development (FWLD). Entitled “Abortion in Nepal: Women Imprisoned,” the conclusions of this report were similar to those of CREHPA’s report.

Research-based advocacy helped to raise the voices for law reform effectively.

4.5 Barriers in the Process of Legalization

The attitude of the Nepali civil society and the media, not to mention the government officials, was not that positive in earlier days of the movement to legalize abortion. Activists arguing for the legalization had to face a lot of social pressure and were subjected to a number of negative comments. They were also accused of trying to destroy the social fabric of Nepali society by introducing “western” ideas of women’s independence and sexuality. A opinion poll survey conducted by Media Services International (MSI) in cooperation with Westminster Foundation for Democracy in September 1999 showed that 73% of the respondents were against the idea of granting women the right to abort. However, another public poll conducted CREPHA in 1999 showed otherwise. Of the 800 respondents in nine districts of eastern districts, 72% were in favor of liberalizing abortion laws in the country.

Towards the final years and months, however, the level of sensitization and acceptability of the idea of legalization of abortion had gathered quite a height. From the days of constant taunting and harrassment of activists in the early years, towards the later years there came a time when people only spoke favorably about the whole issue, never daring to
be politically incorrect in a public forum. Most of the diehard opponents of the idea began to keep their opinions to themselves.

After the process of legalization of abortion had gained momentum, a policy pronouncement of the US government came as a concern to the NGOs working for cause. One of the concerns was the possibility that His Majesty’s Government and parliamentarians would change its mind about the Bill in light of the changed US policy.

The Eleventh Amendment of the Country Code did not only have abortion as an area of change but also had women’s right to parental property as a central, and arguably more contentious, issue. In fact, the consolidation of the two issues in one Bill made things easier from the perspective of abortion rights because most of the opposition to the Bill was focussed more on the issue of parental rights and not so much on the issue of abortion. The House Committee on Law and Justice conducted a public poll on the issue of property right of women, something unparalleled in the history of Nepali parliamentary exercise, but the question of abortion was not subjected to that kind of scrutiny or public opinion poll.

All Governmental and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women’s health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family planning services.

Para 8.25 of ICPD
Draft Criminal Code, 1973 propose legalization of abortion in certain conditions

Registration of Country Code (Eleventh Amendment) Bill 1997 in House of Representatives which also include legalization of abortion in certain conditions on 13 January 1997

Bill lapsed due change in Government on 12 March 1997

MP Sunil Kumar Bhandari introduce Protection of Pregnancy Bill, 1996 in National Assembly on 31 July 1997


Country Code (Eleventh Amendment) Bill presented in the House of Representatives on 11 August 1997

Discussion on the Country Code (Eleventh Amendment) Bill and forward to the committee on 20 August 1997

Amendment proposals by MPs

Discussion in Foreign Affairs and HRs Committee

The Bill transmitted to Law, Justice and Parliamentary Affairs Committee on 1 September 1998

Country Code (Eleventh Amendment) Bill lapsed due to the dissolution of the House of Representative on 15 January 1999

Committee recommended to pass the Bill with some Amendments on 5 October 2001

Amendment proposals by MPs

Presented in Law, Justice and Parliamentary Affairs Committee on 18 August 2000

Amendment proposals by MPs

Bill presented in the House of Representative on 28 June 2000

Registration of Country Code (Eleventh Amendment) Bill, 1999 in the Parliament on 29 September 1999

Protection of Pregnancy Bill 1996 lapsed due to the completion of the tenure of member presenting the Bill on 26 June 1999

Bill pass by the House of Representatives on 9 October 2001

Amendment proposals by MPs

The Bill pass by the House of Representative pass the Bill once again on 14 March 2002

National Assembly rejected to consider the bill on 13 October 2001

His Majesty’s the King gave Royal Assent on the Bill on 26 September 2002

Abortion is legalized in certain conditions
Personal Initiatives to Legalize Abortion in Nepal

The enactment of the 11th Amendment required the concerted efforts of many private individuals and NGOs spanning over decades. Without their dedication, the 11th Amendment would never have been passed and Nepali women would still be without the right to have an abortion. Provided below are brief notes on some of the individuals and the organizations they represent which played pivotal roles in many respects to realize the women’s right to abortion. It is important to note that the list is by no means exhaustive and there were numerous other individuals and institutions who made their own contribution to realize the right.

5. a Dr. Bhola Rizal

During the 1970s, abortion issue was first raised by a gynecologist, Dr. Bhola Rizal. At that time, there was little discussion regarding public health issues, especially abortion. Rizal started to publish several articles proposing the legalization of abortion as a way to protect women’s reproductive health. Much of the response to this article was from religious and socially conservative opponents of the legalization of abortion.

In contrast to Dr. Rizal’s opinions, there were also many doctors who were against the legalization of abortion in Nepal. They did not consider abortion to be a public health issue. Then in the late 1980’s and 1990’s details of the health risks concerning abortion issues were published.
and promoted, and the issue of abortion was once again raised by doctors and women’s rights activists.

5.6 Mr. Sunil K. Bhandari

Sunil K. Bhandari was appointed as a president of ad-hoc executive committee of FPAN, when FPAN was in crisis and had stopped all the activities because of financial problems. He worked with FPAN as its president for a decade (1991-2001). After joining FPAN, he saw the critical situation of reproductive health right in Nepal, especially in rural areas. He saw the big gap between haves and have-nots. He realized that criminalization of abortion only stigmatized poor, rural and uneducated women.

Another turning point for him was his participation in International Conference on Population and Development in 1994. This conference allowed him to understand population and development issues. These two incidents motivated him to work on legalization of abortion.

Bhandari was a member of National Assembly from 1993 to 1999. Being an MP, he lobbied with the government to submit the Bill to legalize abortion. After seeing a lukewarm response of government, he registered a private member’s Bill on Protection of Pregnancy at the National Assembly, despite being a member of the ruling party. For this, he experienced a lot of pressure from within the party and he felt that a few leaders of the party are still biased against him because of the same. He was forced to give oral explanation to his parliamentary party. When this Bill was initially tabled, it was rejected by majority. However, he did not give up. He re-registered the same Bill during the next session and did comprehensive campaign in favor of the Bill. This time around, the National Assembly accepted the Bill. But the Bill lapsed while it was in a House of Representatives sub-committee due to completion of Bhandari’s tenure as MP. In his opinion, the Bill lapsed not only due to technical procedural problem but that lack of strong political commitment was equally responsible for it. However, it goes without saying that all his efforts contributed towards including abortion issue in the government Bill i.e. Country Code 11th Amend-
He says that conditional legalization of abortion is not the end of the movement but just half the way. He is concerned about proper and effective implementation of new abortion law, and is committed to continue work on the issue.

5.c Dr. Aruna Upreti

In 1986, Dr. Upreti began working in a hospital and saw first-hand the high rate of maternal mortality and other complications caused by unsafe abortions. As a result, she published several articles proposing the legalization of abortion as a way to protect women's reproductive health. Much of the response to her articles was from religious and socially conservative opponents of abortion. They objected on religious grounds and characterized abortion issue as a “Western” issue not suitable for a Hindu Nation.

From 1998-99, at the request of the United Nations Development Programme, Dr. Upreti wrote a report to present to the Parliament the status of women's rights in general. In the report she featured reproductive health issues, including abortion. Dr. Upreti stated in an interview that at her presentation to Parliament, the leftist parties “had done their homework” and understood a lot of the issues and facts involved in their arguments supporting the legalization of abortion. In contrast, she stated that the Congress Party parliamentarians were largely ignorant of the issues and merely reiterated the old religious-based arguments against it, specifically, that the legalization of abortion would promote promiscuity. Dr. Upreti also believes that the Maoist
insurgency influenced the passage of the abortion Bill because the Maoist platform included strong advocacy of women's health rights. This, she said, put the government on notice that they needed to address these issues.

With regard to the medical community, Dr. Upreti feels that there were many doctors who did not consider abortion to be a public health issue until details of the health risks became known. Dr. Upreti attributed much of the doctors' lack of awareness concerning the abortion issue on the doctors being extremely sheltered. Many of them were so ignorant of the situation because they are part of the upper class and are accordingly shielded from some of the harsher realities of poverty. However, Dr. Upreti said that if the medical community had become involved from the beginning, the abortion issue would have been resolved and legalized at a much faster rate.

Dr. Upreti believes that the legalization of abortion could play a prominent symbolic role in the advancement of women’s rights. For example, the 11th Amendment puts doctors on notice that they cannot refuse a woman an abortion even when the woman has not obtained her husband's consent. Prior to the legalization of abortion, a woman would be left with few options if she had an unwanted pregnancy. Now that abortion is legal, doctors do not have as much discretion concerning when they can and cannot perform an abortion. Moreover, Dr. Upreti characterized the new law as being quite progressive: it addresses many of the health concerns that were raised during the Parliamentary debates and it is not as diluted or complicated as the abortion laws in India.
Advocate Sapana Pradhan Malla

Sapana Pradhan Malla, a leading lawyer of Nepal, has been working as an activist in the area of women’s human rights in general since 1991. In the course of activism as well as her work as a litigator, she used to visit jail frequently. She saw lots of women prisoners in jail. When she inquired about them she came to know that most of women prisoner were there in the charges of abortion and infanticide. When she inquired about male prisoners, she was shocked that none of male prisoners were there for the same charges. At that time, she realized abortion issue was one of prominent gender issues in Nepal. She thought of this as a class issue as well. This motivated her to work on legalization of abortion which is in fact reproductive health right of women.

At the time she began advocating for legalization of abortion, even women activists were afraid to speak on that issue. General assumption of people was it would encourage “immoral sexual behavior”. Initially she was questioned in social gathering for raising such an issue, which, they said, could destroy the indigenous social values and norms.

As in initial stage, according to the mood of people she raised the issue strategically. She linked the issue with impact of banning abortion, as a result of which people could realize the seriousness of the issue. Ms Malla is acutely aware that the issue of abortion entails conflicting claims of child rights and the right of the unborn. However, the question has to be considered holistically by giving due consideration to the question of commitment that a young, generally unmarried, would-be mother of very little social and economic means is in a position to make to ensure to the unborn the basic amenities and facilities which are a must to be able to lead a life of dignity. It is not reasonable to impose on a young woman the obligation to give birth and to take care of the newly born, if at the very early stages

At the time when advocate Malla began advocating for legalization of abortion, even women activists were afraid to speak on that issue.
of her (unplanned) pregnancy she decides that she is not mentally prepared or socially independent to undertake the responsibilities. Up to a point that the unborn is not presumed to have acquired the standing that warrants its treatment as a deemed individual, it is only reasonable to allow women to make a choice about what they want to do with their bodies and whether they want to be committed for life to provide for, protect and respect the rights and needs of the unborn.

In addition, to Malla, abortion in Nepal is also a question of easily avoidable victimization of women. About 50% of maternal mortality is caused by unsafe abortions, conducted by untrained hands, which could easily be avoided if abortions were allowed in regulated circumstances. The fact that abortion was declared a criminal act, punishable by imprisonment, was not enough of a deterrence for the women who had unplanned pregnancies and wanted to get rid of the pregnancy even at great risk to one's life. From this perspective, for a country that had abolished death penalty the reluctance of the state to legalize and regulate abortion could in fact be treated as something tantamount to tolerating death penalties to women.

Among her personal initiatives were representation in the courts in various abortion related cases, organizing various workshops and training to various stake-holders on the issue of abortion and how and why it should be allowed in a regulated way. She was at the forefront of lobbying initiatives with the parliamentarians as the Bill was being debated over in the Parliament. The original Bill that was presented had undergone substantial changes by the time it was adopted by the Parliament, thanks to the undeterred and persistent efforts of Malla and very helpful and positive roles played by parliamentarians like Prem Bahadur Singh and Mahendra Madhukar who were very receptive about accepting positive changes in the Bill. Her other initiative which arguably proved to be the final stroke that led to the adoption of the Bill by the parliament was the coordination of the
national conference in 2002, which brought together people from different walks of life to hear heart-rending experiences of victims or survivors of the criminalisation of abortion. Organized at a time when the Parliament seemed to have reached a stalemate over the issue, the even really drew the attention of the population in general and that of the parliamentarians to the kinds of problems that women were facing because of the absence of a regulated abortion procedure.

5.e Mr. Anand Tamang

From 1989-1990, Anand Tamang conducted a two year study on spontaneous abortions on a grant from the World Health Organization. The study was allowed to be published by the Nepali government because it focused exclusively on spontaneous abortions. The study’s findings included descriptions of the often brutal methods used to perform abortions. Furthermore, Tamang recommended that abortion be legalized in Nepal. According to Tamang, this recommendation “opened a Pandora’s Box on discussion of abortion” in the country.

In 1996, CREHPA, the NGO Tamang is associated with, published an opinion poll that showed the majority of the public favored legalizing abortion. Tamang said that one of the main reasons that the abortion issue had so much support for legalization was because of the good coverage of the issue by the media, particularly in regards to the brutal and horrific methods of abortion that were being performed by traditional providers. CREHPA continued its push for legalizing abortion in 1997 when it published a study of women who were put in prison on charges of infanticide and abortion.

Tamang is now a member of a Task Force, whose objective is to design and develop protocols and policies for the government to ensure the safety of women who receive abortions. The Task Force made the monitoring of sex-selective abortions one of its main priorities. Its policy guidelines included a provision barring tests to determine the sex of an unborn child. Furthermore, the Task Force has made recommendations on how to raise the profile and status of women in society so that families will not prefer sons over daughters for socio-economic reasons.
5.f. Prof. Dr. Shanta Thapaliya

Prof. Thapaliya saw several single mothers in the villages in Nepal as she travelled to those places with legal aid programmes during the late 1980s and early 1990s. She was deeply touched by their status in the society and the way the women their children were treated by their family members. She realised the fact that due to the lack of right to have an abortion, women were compelled to give birth even when it was unaccepted or unwanted pregnancy. Initially, when she raised the voice for reforms in the law, she was charged with allegations of trying to encourage prostitution and make Nepal a “sex free” society.

Her major contribution was on giving advices on the Bill prepared by the Family Planning Association supporting their initiative and even when the government bill was in the parliament, raising the voices to make the bill comprehensive.

She feels even though we have now a progressive abortion law, Nepal is a society where access to abortions services is likely to be very difficult, because of the terrain and the lack of health care facilities in the rural areas. Even after legalization, the government has not been able to provide services and the Ministry of Health is making excuses by saying that it was not in a position to provide abortion services because the government was yet to finalize and adopt the abortion procedures.

She feels the eleventh amendment of the Country Code clearly provides access to abortion to any woman until 12 weeks of pregnancy, hence the government does not need to wait till the abortion procedures to be adopted as now it is a right of every woman to get the abortion services.

A major challenge now for abortion rights activists and the government, according to Thapaliya, is to focus on the services delivery to one and all who wants to abort, and it is more by the access to the services than the changes in the law that the success of the whole abortion rights movement in Nepal will be judged.
Achievements and Challenges ahead

Abortion, under any circumstance, was criminalized in Nepal. The Eleventh Amendment is one of the landmark law reform attempts in regards to women empowerment and women’s rights. The 11th Amendment recognized abortion as a women’s reproductive health right for the first time in Nepal.

Major reforms introduced by the 11th Amendment in the area of abortion are as follows:

- Abortion is legal up to 12 weeks of pregnancy
- Abortion is legal up to 18 weeks of pregnancy in case the pregnancy is due to rape or incest
- Abortion is legal anytime in case the pregnancy poses danger to the life of pregnant women or to her physical or mental health or it might lead to the birth of a disabled child
- Abortion is criminalized if performed on the basis of the identification of sex of the unborn

Abortions performed without the free consent of the women is illegal and punishable by imprisonment

The legalization of abortion in Nepal is but the first step if the objectives of the 11th Amendment, i.e., the protection of women’s reproductive health and the assertion of women’s right to choose whether or not to have an abortion, are to be fulfilled and enjoyed by the entire population. The legalization of abortion has also brought many challenges before us. The obvious challenges ahead may be divided into four categories: legal, social, medical and other challenges.
A. Legal Challenges

1. Women on charges of abortion and related offences still in prison

The most pressing legal challenge is the as of yet unresolved fate of women in prison convicted of abortion and infanticide. With the legalization of abortion, the most immediate consequence is that women who have an abortion during the statutorily prescribed timeframe will not be subject to arrest and imprisonment. While this does nothing to address the fate of women currently in prison for having an illegal abortion, at least it prevents future cases. Even after the legalization of abortion seven cases are reported under the abortion related cases. For the first time, this study indicated that there was one man as a detainee, three as prisoners and four on bail for abortion related cases. However, it still shows higher percentage of males being able to be released on bail (4), compared to women (1).

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1 Prison visit finding of FWLD, CRR/IPAS June 2003, there are still 59 women in which 58 are in prison and 1 is in bail. According to the latest update October 30, 2003, there were still 41 women in prison and 1 in bail, among 41, 7 are detainee.
2 According to the findings of the district prison visit by FWLD, CRR and IPAS in June 2003.
2. Terms and conditions yet to be adopted

It has been more than a year since abortion was legalized but unfortunately the guidelines for the safe and accessible abortion services has not yet been adopted. Changes in law do not atomically grant the right to women until and unless they are able to exercise safe abortion services.

3. No clear legal definition of abortion, miscarriage, still birth and infanticide

The law has not yet defined the differences between abortion, miscarriage, still birth and infanticide. As long as these definitions are not distinguished, the police, the courts and the population in general will be able to subjectively prosecute and admonish women who have abortions, regardless of the legality of the action. These women cannot afford to sit in limbo while waiting for interpretations of these definitions by the courts.

4. Abortion still dealt with under Homicide Chapter

Abortion is still dealt in Homicide Chapter of the Country Code, treating abortion as a crime at par with homicide. This is a clear indication that there is no recognition of abortion as right which reinforces the lack of conceptual clarity about abortion and its distinction from infanticide.

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3 Country Code (Eleventh Amendment) Bill was passed on March 14, 2002 and got the Royal Seal on September 26, 2002.

4. Advocate Sapana Pradhan Malla, on behalf of FWLD, filed writ petition on 31st October, 2003, at the Supreme Court for issuing an order to the government to formulate procedures needed to ensure safe abortion services.
5. International reproductive health right commitments yet to be reflected in domestic standard

Nepal has recognized women's right to reproductive health, including the right to abort, in a host of international human rights instruments including CEDAW Convention, ICPD, Beijing Platform for Action and others. However, as far as municipal laws of Nepal are concerned, there is yet to be a real translation of those international instruments. Despite all the positive attributes of the eleventh amendment, the fact remains that recognition of the woman's right to abort is merely an exception within the overall scheme of the Chapter on Homicide which otherwise still treats abortions as illegal.

6. Investigation and prosecution system can still treat abortion as homicide

Most investigations in abortion-related cases start after a family member or a close neighbor reports the incident to the police. The investigation of abortion-related cases have generally been very shallow, because of lack of proper examination of physical proofs as well as because it starts with the assumption that the women under investigation is in fact guilty. On the other hand it lacks scientific investigation system. The investigation of the case starts with the badly decomposed dead body of the fetus from which very few inference can be drawn. In many cases, doctors give their opinions based on the decomposed body which lead to the life imprisonment of women and many times with the confiscation of property.

7. Discriminatory law

Whoever does anything out of malice or anger to pregnant women and thereby causes a miscarriage of up to six months is punished with three to six months' imprisonment, whereas, if a women performs abortion with her own consent she is punished with one to one and half year's imprisonment. This legal provision is discriminatory towards the women.

5. No 32, Chapter on Homicide, Muliki Ain (Country Code)
6. No 31, Chapter on Homicide, Muliki Ain (Country Code)
8. Judiciary yet to acknowledge abortion as reproductive health right of women

In dealing with abortion and infanticide related cases, the judiciary is sympathetic in its approach and has prescribed a lenient punishment in large number of cases but some of the reasons they have given, even after the legalization of abortion, are:

a. “imprisonment of a woman for life would be an excessive punishment since it appears that the defendant killed her newborn to save herself from the social stigma” or

b. “it appears that she committed the crime to save herself from the social stigma after she was unable to have a timely abortion.”

Not in a single case has the court recognized it as a gender and reproductive health right issue. This type of approach towards the women shows that judiciary has yet not acknowledged abortion as reproductive health right of women.

9. Determination of rape and incest is complicated

Abortion is legalized in certain conditions which includes voluntary abortion up-to 12 weeks and up-to 18 weeks in case of rape and pregnancy which is the result of incest, but given the time that judicial determination of rape or incest takes, 18 weeks limitation is meaningless. Perhaps a better mechanism should be put in place if exceptions of rape and incest were to be implemented in reality. The question that this provision raises is as to whether every instance of rape has to come to the notice of the authorities for legal action, and if a certain instance of rape or incest does not come to the notice of the authorities would that result in the woman being denied the right of abortion.

10. Extent of disability is not defined

One of the provisions under which women can perform abortion at any time is “if there is possibility of being a disabled child” but on the other hand the law does not define the extent of the disability.

7. HMG vs. Sumitra Rai (Gurung), Supreme Court decision on 2060/01/19, yet to be published.
8. HMG vs. Bhimkala Balal, Supreme Court decision on 2060/03/13, yet to be published.
11. Consequences of denial of abortion services

Once the abortion is legalized it is the liability of the service providers to provide the services to the women who are in need of abortion services. But if the service providers deny the services what will the consequences be of denial of such abortion services? It is not mentioned anywhere in the law. Once the right is given to the women, it is the liability of the service provider to provide services and it is the right of the women to be able to exercise the abortion services.

B. Social Challenges

1. Lack of public awareness on new abortion law

Most of the public is unaware of the new abortion law and there is more than one type of abortion. Furthermore, the law does not explain that the illegality of abortion is determined by when within a gestation period the abortion takes place. There are many specifics within the law that may be difficult for the general public to comprehend. For instance, whether or not the abortion is spontaneous or induced? Or are there other circumstances, such as the fetus is malformed, which may give a woman a legal exception for abortion. The lack of knowledge about the new law might increase the back street abortion as these unaware women might not know where to seek safe abortion, leading to grave complications.

2. Social acceptance of law

An immediate impact that the legalization of abortion will have on society is the message that the new law sends to the public: the government has recognized a woman’s right to choose and that abortion is neither a sinful nor a criminal activity. Given the strongly held traditional and social views on abortion, the new law is symbolic of the great progress being made for the broader recognition of women’s rights. However, the government’s mere legal support is not enough. Women who have abortions may still receive severe chastisement from their own communities. Fear of this type of admonishment may act as an even greater obstacle to women than fear of government punishment ever could.
3. Sex-identification and gender based abortion practices

Although the sex-identification of the foetus and gender based abortion is strictly prohibited in the law, the dilemma is who is going to monitor that such practices should not take place in the society like ours where son is a priority. There is no mechanism to monitor such practices.

4. Subordinate position of women in society

There is a strong tradition in Nepal of women being considered inferior to men. This is due in large part to the Hindu religion and its guiding texts, such as the Manusmriti, which subjugate women to a lesser status than that of men. These traditional norms have been slow to change and the valuing of women as being inferior still exists in most of Nepal. While women continue to hold a lower status in society, is difficult for them to exercise not only the rights that the government has bestowed upon them (e.g., abortion), but also the natural and basic human rights that should be inherently possessed by all people. It is the responsibility of the government to ensure that women are able to exercise their human rights (including abortion). Furthermore, the government must also ensure that women are not subjected to discrimination of any type which may hinder their ability to enjoy these rights. If the government fails to provide for its women in this manner, it will be in violation of several international agreements to which Nepal is a party.

5. Social stigma and harassment

In the Nepali society, abortion is taken more as an issue of morality than the issue of reproductive health right of women. It is only seen as the
way to get rid of unwanted pregnancies or the pregnancies which is the result of rape or of illicit relationship. Women who perform abortion are likely to be socially stigmatized and the same could be the reason for the people to harass the women which effect their self confidence to live with dignity in the society.

6. Voluntary consent can be created through family pressure

Nepal is a patriarchal society where all the decisions are taken by the male members of the family. Women are not even given the right to decide about their reproductive health rights like whether to continue the pregnancy or not, when to have the children, how many etc. Men firmly believe that it is their prerogative/right to decide whether or not the unwanted pregnancy should be terminated. Apart from the husband, often in-laws and close friends are involved in this process. In this circumstance, there is possibility that women may give consent for abortion because of the pressure of the family members.

7. Class and caste issue

Studies have shown that an overwhelming number of women in prisons for abortion-related offences come from the ethnic communities and from the so called dalits. For example, a report by FWLD indicated that 15% of the women inmates were brahmin, 20% were chhetris and 65% were ethnic groups that includes Rais, Magars, Tamangs and the dalits. A majority of them are either illiterate or are educated at the very elementary levels. Forty three percent of the women are in the 15-25 year age group.  

C. Medical challenges

The primary medical challenges concerning abortion are:

1. Services are not available

Guidelines for the safe abortion is yet to be adopted even after the passage of the Bill on March 14, 2002 and getting Royal Seal on September 26, 2002. The Comprehensive Abortion Care Service (CAC), which is being conceived of as a Centre to provide abortion facilities to women at the Maternity Hospital, has not been able to take off, among

other things, because of the lack of clarity on the application and administration in the law, and the delay in the implementation of the terms and conditions. The Maternity Hospital has recently completed a three-weeks master trainers’ training to four senior doctors, in course of which they performed 32 abortions.\textsuperscript{11} Due to lack of guidelines for safe abortion services, they have stopped providing services to abortion-seekers. They are, however, making preparations to keep themselves ready to offer services if the terms and conditions were to be introduced by the government.

2. \textbf{How will abortion be made safe?}

Arguably the biggest medical challenge is to provide safe abortion services to all the women who are in need. The question of who should provide abortion services should be determined by what is good for women’s health? In particular, if something were to go wrong, who would be able to handle post-abortion complications? Another issue concerns the licensing of physicians and other health professionals to perform

\begin{quote}
\textbf{In order for women in rural areas to be able to take advantage of safe abortion services, the safe abortion services must first be financially affordable.}
\end{quote}

\begin{quote}
A woman died of excessive bleeding after an unsuccessful attempt to abort with assistance from a former peon at a healthpost in Inaruwa in eastern Nepal. A report published in the September 17, 2003 issue of Nepal Samacharpatra said the mother of three who was six months pregnant had paid the peon Rs 2000 for the service. The peon was reportedly absconding. The report quoted locals as saying that several young women working in the mills area in Sonapur go to the peon for abortion services.
\end{quote}

\textsuperscript{11} Interview with Dr. Bimala Lakhe, Director, Maternity Hospital, Sept. 2003.
abortions: how should the government enforce its abortion laws against persons, even physicians, who perform abortions without complying with the legal provisions. Unless the government can establish a system to ensure that only safe and legal abortions are performed, a substantial portion of the 11th Amendment’s purpose will be moot. Women in rural areas will continue to seek midwives for abortions if midwives are the most affordable option and women are referred to mid-wives by people whom the women trust.

3. How will abortion be made accessible?

Accessibility of safe abortion services is also one of the medical challenges. The wide dispersion of Nepal’s rural communities also makes it difficult for the government to provide abortion services to women in remote locations. Nepal has neither the human nor the capital resources necessary to resolve this problem of distribution. Nepal will most likely require significant assistance from external sources in order to provide Nepali women with safe abortions.

4. How will abortion services be made affordable?

Another accessibility issue is how to ensure that legal abortions are affordable to all women. Abortions that were considered to be safe (i.e., abortions performed by physicians at private clinics) have been much more expensive compared to the more archaic and dangerous
practices (e.g., insertion of cow dung on a stick into a uterus). In order for women in rural areas to be able to take advantage of safe abortion services, the safe abortion services must first be financially affordable. A lack of financial resources can be an even bigger obstacle than what the government says is legal or illegal.

5. Abortion can be used as a method of family planning

Abortion should not be used as a method of family planning but it should be used as the last resort for the termination of the unwanted pregnancy. However, there is a possibility that women may be forced to abort her pregnancy without their consent due to the family pressure and may use it as a means of family planning.

6. Confusion in determining the period of gestation

There are two methods to calculate the period of gestation i.e. from the first day of the last menstrual period and the other ways is calculation from the day of conception i.e. approximately 15 days from the date of last menstrual period. However, law does not specifically clarify which method should be applied. It creates confusion in determining the period of gestation.

7. Lack of scientific investigation system to determine the gestation period

Lack of scientific investigation system to determine the gestation period of women especially in the rural areas can be one of the reasons leading to women being denied abortion services by the service providers. In many instances women don’t know how to calculate the gestation period and due to the lack of scientific investigation system there is possibility that women may lose the right to abortion and end up being prosecuted and punished for performing illegal abortion.

D. Other Challenges

1. The Global Gag Rule

Unfortunately, as of June 2001, the United States essentially ceased financial support to all NGOs outside of the United States that either

perform abortion related activities or advocate for pro-abortion changes in national laws.\textsuperscript{13} This policy has come to be known as the “global gag rule.” Although the gag rule has not affected direct country to country aid from the United States, this policy has crippled many NGOs, which developing countries depend upon for assistance and aid. For instance, the FPAN has had to sacrifice many of its programs, some of which had been operating for more than 20 years. Fortunately, the international community has attempted to mitigate the damage caused by the gag rule. The FPAN has been able to acquire some additional funding from other sources, like the International Planned Parenthood Foundation.\textsuperscript{14} However, overall, the United State’s gag rule has had, and is likely to continue to have, a deleterious effect on the progress of abortion rights in developing countries, including in Nepal, whereas same policy does not affect to their country.

2. Institutional stands on abortion

Institutional stands are among the challenges, which hinder women from exercising abortion rights. For e.g. organizations like the United Mission to Nepal (UMN) are strictly advised not to provide abortion services in their clinics as, according to them, children are God’s gift and they can not go against it. Other organizations like UNICEF which works in the area of child rights, also feels that abortion right conflicts with the child’s right to life. This type of institutional stand may hinder the needy women’s exercise of their right to abortion.

\textbf{Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion.}

Para 8.25 of ICPD

\textsuperscript{13} Supra note 62.
\textsuperscript{14} Ibid.
The recommendations made in this section will address a wide range of issues concerning several different groups. However, each of the recommendations will relate to improving the status of women in Nepal and the accessibility of safe and legal abortions.

While the recommendations contained in this section deal more with the various modes of providing safe and easy access to abortion services, it should be kept in mind that a great deal of effort should be made to prevent the very necessity to have abortion through well-targeted sex education and making available the family planning measures.

The first and the foremost step that the government must take should be to adopt the abortion procedures so that the right guaranteed under the law can be exercised in reality.

To the Government:

(1) Define the period of gestation

The two prevalent ways of calculating gestational age are: the duration of pregnancy is calculated from the first day of the last menstrual period and the other way is calculation from the day of conception i.e. approximately 15 days from the date of last menstrual period. However, as there is no uniformity in the calculation of gestational age, many times women are denied access to abortion due to the difference in period of calculation. Furthermore, the time at which pregnancy is deemed to

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2 Global Review of Laws on Induced Abortion, supra note 317.
begin is generally calculated either from the day of conception or the
day of implantation. The laws in several countries, such as Germany,
New Zealand, Netherlands, United States, etc., explicitly state that
pregnancy does not commence until the fertilized egg implants in the
uterine wall. The South African law defines the period of gestation
thereby putting an end to the speculation around the calculation of
gestation period. The statute itself must clarify the way of
 calculating the period of gestation, so that the uncertainty and arbitrary
decision making of the medical practitioners may be avoided.

The newly liberalized law relating to abortion in Nepal does not
specifically state the calculation of the period of gestation, thereby
creating ambiguity in law. Therefore, the Safe Abortion Policy in Nepal
should define the calculation of the period of gestation and the time at
which pregnancy is deemed to begin, and do away with the ambiguity
in law.

(2) Explicitly define abortion in regards to the law

The definitions of abortion and infanticide must be made completely
unambiguous, so those women who have abortions can no longer be
tried and convicted under infanticide laws.

Since abortion and incest can be valid grounds for abortion, it should
be insured that abortion services are made available to any woman on
the basis of her statement to that effect, and legal protection should be
provided to medical practitioners who perform abortions on the basis
of such a statement.

(3) Revise the Country Code so that abortions can no longer be prosecuted
under “Homicide”

Women who have had abortions should not be prosecuted under the
Homicide Chapter of the Country Code. Under the Homicide Chapter,
Women in Nepal have received sentences as severe as life imprisonment

4 Ibid
for having had an abortion. To prosecute women for having an abortion is a travesty of the justice system, and to prosecute them for a crime categorized as homicide is outrageous and baffling.

(4) Initiate public awareness campaigns that inform women of their abortion rights

Women in all parts of Nepal need to know that they can legally have abortions. Women need to know that they now have safe and legal options when confronted by an unwanted pregnancy. The government has a duty to its citizens to ensure that they know what they are allowed to do.

(5) Initiate public awareness campaigns, which elevate the social status of women

The tradition of treating women as second class citizens runs deep in Nepal. In order for the government to elevate women’s standing, despite the considerable resources and time that will need to be allocated, the government has an obligation to its people. Concept of son priority needs to be changed, women’s right to sexuality needs to be recognized.

(6) Include abortion as part of the basic health care package available to everyone

As long as poor women are unable to have safe abortions because they lack money, there will be inequity in the distribution of medical resources, an important human right. This situation could also be characterized as not only discrimination on the basis of wealth and social standing, but also a situation of neglect to Nepal’s rural population. This would be a clear violation of international agreements to which Nepal is a party. Article 14 of CEDAW requires states to “take into account the particular problems faced by rural women” and to “take all appropriate measures to ensure the application of the provisions of CEDAW to women in rural areas.” (One of the provisions of CEDAW is for states to ensure that women receive the medical treatment they need, e.g., abortion.)

6. See FWLD and CRLP, supra note 13
7. See CEDAW, supra note 80, at art. 14
8. See CEDAw, supra note 80
(7) Establish abortion training programs

For the most part, the providing of safe abortions will be a relatively new field in Nepal. The government must provide training to future abortion providers in order to meet the inevitable new demand for safe and legal abortion. If this demand is not met, women will probably continue to seek out the alternative (i.e., unsafe) abortion providers in order to fulfill their needs.

(8) Train members of government to address abortion issues

There is a serious need to educate police, public attorneys, judges, and even private lawyers on abortion, abortion laws, and the implementation of those laws. People in positions of authority must be able to apply these laws for the best interest of women. If the government does not apply these laws in an appropriate manner, then travesties of justice, like women going to prison for having abortions, will continue to occur.

(9) Establish a formal entity, which monitors the quality of abortions services (especially in rural areas)

As past research has made quite obvious, if the conditions and procedures used in performing abortions are not of high quality, the consequences to a woman receiving an abortion could be dire. The government must ensure that there are no lapses in the quality of abortions, especially in rural areas where the potential for such lapses is great. All along, the government should also make sure that the entity develops monitoring indicators to assure a constant monitoring of the effectiveness of the enforcement of law. This entity should also be equipped with the capacity to monitor gender-based abortion, so that, if necessary, the government could include a suitable provision in the terms and conditions to prevent such abortions.

(10) Increase awareness concerning family planning methods

Family planning methods (FP) would free women from having to resort to abortions. The government should encourage women to use FP if they do not wish to have children. Sex education and family planning as a preventive measures so that such situation does not arises.
Release women who are currently in prison for having had an abortion

Over fifty women are imprisoned currently in prison on charges of abortion, and abortion related offences. In most of the cases it is registered as infanticide and the women are punished for life imprisoned even though there is lack of proper investigation, lack of post mortem report of the dead body of the foetus etc. Their incarcerations are a travesty of justice. The government needs to re-evaluate these women’s situations, especially in light of the 11th Amendment and the government’s seemingly new commitment to improving women’s rights.

To Civil Society

1. Continue to conduct studies and research that raise public awareness concerning the plights of Nepali women

The studies and research performed by NGOs is a significant reason why the 11th Amendment was adopted and women are gaining more rights in Nepal. However, there are still significant areas where progress must be made. Only through the continued dedication of the NGOs can such progress ever have a chance of occurring.

2. Continue pressure on the government to make abortions more accessible to women in Nepal

Just because certain types of abortions are legal in Nepal does not mean that the abortions will be available and affordable to all women. The government has yet to finalize the specific implementation conditions of the abortion laws. NGOs need to pressure the government to make abortions cheap (or free), safe with no excessive preconditions, and to make it widely available to all members of the population.

3. Help provide the government with the human and capital resources necessary to provide women with safe abortions

The government needs significant help if it is to make abortions readily available to all women, who wish to have them. Safe and legal abortion is relatively new to Nepal and the government and the country, in

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9. According to the findings of the district prison visit in June 2003 by FWLD, CRR and IPAS, 58 women are imprisoned in charge of abortion and abortion related offences and 1 woman is in bail.
general, lack both the expertise and financial resources necessary to realize an adequate system for providing safe abortions.

(4) **Disseminate information to the public concerning the rights of women (including the right to have an abortion)**

Women have a right to know what they can and cannot do. The system for disseminating information that is pertinent to women is severely lacking in Nepal. Most women are illiterate and lack opportunities to learn and understand their legal rights. In order for these laws to give effect to rights, which women can take advantage of and enjoy, rather than just words on paper, schemes must be developed, which ensure that women understand what opportunities are available to them.

(5) **Hold the government to its international obligations, especially with reference to CEDAW, ICCPR and ICESCR**

The government is still in clear violation of many of its international obligations. Women still do not have an equal status to men and many laws still discriminate against women. Therefore it is important to hold the government to its international obligation.

(6) **Pressure the United States government to end its global gag rule**

The United States is single-handedly crippling the world's efforts to improve women's rights. Without the financial support of the world's richest government, NGOs are likely to be unable to provide services to many of the individuals, who are most in need. The United States government and its citizens must be made to recognize the dreadful consequences that its stand against abortion is having. These consequences are not just hurting pro-abortion efforts, but they are also devastating many other types of human rights efforts as well.

**To Health Care Providers**

(1) **Cease providing abortions that are not approved of by the government**

Traditional abortion procedures are not safe and put women who use them in grave harm. Midwives and other providers, who are not sanctioned by the state or formally trained, must recognize the danger that they place women in.
(2) Refer abortion seekers to government approved abortion providers

As all traditional abortion methods are either unsafe or ineffective, healthcare providers (both traditional and non-traditional) can best serve women by referring them to formally trained abortion providers, who are sanctioned by the state.

Many of the doctors have been found to be declining medical services to people who come to them, especially the patient needs abortion-related services. In case of abortion-seekers, an addition should be made in the medical practitioners’ code of ethics to make it obligaroty on them to at least refer the patient to a competent doctor if they do not want to attend to the medical requirements of the patient.

(3) Provide post-abortion care to all women arriving at healthcare facilities suffering from complications of unsafe abortions

Despite the illegal nature of unsanctioned abortion, the priority for all healthcare facilities should always be to provide care for the wellbeing of a person. Healthcare facilities should always provide post-abortion care to women, regardless of the legality or nature of the abortion.

Conclusion

The enactment of the 11th Amendment was a significant triumph for women’s rights in Nepal. However, the road to providing women with all of the rights to extreme they are entitled to as human beings is a long and difficult one. NGO’s, the government, and the population in general must rally behind its women. Women’s rights must be substantially improved if Nepali women are ever going to be on an equal footing with the men of Nepal. The issue of women’s rights is not just a women’s issue, it is an issue of the society at large. Everyone and everything suffers when women are not given their just opportunities. Politics, the economy, and business are without a significant portion of their best minds and greatest resources. The legalization of abortion will aid in rectifying this problem, as women will be able to decide when they want to work and when they want to have a family. But the legalization of abortion is just the beginning of what needs to be done on the issue. Legal abortions do not directly translate into safe abortions or accessible abortions. The public and private sectors must work together so that
all abortions are both safe and accessible. As a result, women will not only have total control over their body’s integrity but also on their lives in general.

Women’s enjoyment and exercise of reproductive rights and fundamental freedom will become a universal fact when women everywhere are allowed to make their own decisions about their fertility and sexuality.

Human Rights of Women
National and International Perspectives
References

7. Conception, Unwanted Pregnancies and Induced Abortion in Kathmandu Valley, CREHPA.
10. Directory of Organizations Working for Protection of Women's Sexual and Reproductive Health and Rights, Women Section, FPAN.
20. Pregnancy Protection Bill, registered by Hon’ble Sunil K. Bhandari, President FPAN.
Annex I

List of Key Informants

1. Mr. Anand Tamang, President, CREHPA
2. Dr. Aruna Upreti, CEDAW Monitoring Committee
3. Mr. Bhoj Raj Pokhrel, Former Secretary of HMG/N (Ministry of Health, Ministry of Supply, Ministry of Information and Communications, Ministry of Home Affairs)
4. Dr. Bhola Rijal, Gynecologist, Om Nursing Hospital and Research Center
5. Mr. Nirmal Kumar Bista, Director General, Family Planning Association of Nepal
6. Dr. Rajit Bhakta Pradhananga, Reader, Nepal Law Campus
7. Advocate Sapana Pradhan Malla, President, Forum for Women Law and Development (FWLD)
8. Mr. Laxman Prasad Aryal, Former Justice, Supreme Court, Nepal
9. Prof. Dr. Shanta Thapaliya, President, LACC
10. Hon’ble Indira Rana, Member, National Human Rights Commission
Pregnancy Protection Bill
A Bill Framed to Provide for Protection of Pregnancy

Preamble

Whereas it is expedient to make timely and effective provisions relating to the protection of pregnancy by amending and improving current Nepal law relating to abortion so as to maintain public welfare and morality and protect the right of pregnant women to decide whether or not to end their pregnancy at an early stage with due respect for matters of public interest relating to abortion and social beliefs regarding the protection of pregnancy.

Now therefore, the parliament has enacted this law in the 26th year of the reign of His Majesty King Birendra Bir Bikram Shah Dev.

1. Short title and commencement
a. This law shall be known as the Pregnancy Protection Act, 1996
b. It shall come into force on such date as may be prescribed by His Majesty’s Government by notification in the Nepal Rajpatra. (Nepal Gazette)
2. Definitions

Unless otherwise meant with reference to the subject or context, in this act,

a. Government Hospital means a hospital, maternity home, nursing home, clinic or any other similar health facility owned or controlled by His Majesty’s Government.

b. Recognized Health Institution means a health institution recognized by His Majesty’s Government under Section 5 for performing functions relating to abortion.

c. Physician means a physician possessing the qualifications as mentioned in Section 6.

d. Prescribed or as prescribed means prescribed or in the manner prescribed in the rules framed under this act.

3. Pregnancy to be Protected

It shall be the duty of each pregnant woman, as well as of each citizen, to protect the embryo/foetus of any period contained in the womb.

4. Medical Checkup of Pregnant Woman

While conducting a medical check up of or treating any pregnant woman, a physician or any other person who is authorized under current law to do so shall do so in such a manner that it does not adversely affect her pregnancy.

5. Approval to be Obtained

a. Hospitals, maternity homes, nursing homes, clinics or similar other health facilities, other than government hospitals, must obtain the approval of His Majesty’s Government to perform functions relating to abortion under this act.

b. An application must be submitted to His Majesty’s Government in the prescribed format in order to obtain approval under sub-section (1).

c. On receipt of an application under sub-section (2), His Majesty’s Government shall, if it so deems appropriate following necessary investigations into the matter, grant approval in the prescribed format for performing functions relating to abortion.

6. Physician’s Qualifications

A physician who performs functions relating to abortion under this act must have acquired the prescribed educational qualifications relating to medicine, worked in a government hospital or a recognized medical institution for the
prescribed period, and gained experience or expertise in functions relating to abortion.

7. Ordinary Abortion
The qualifications or experience mentioned in Section 6 shall not be compulsory in the case of a physician who effects abortion in a government hospital of a pregnant woman whose abortion can be effected without surgery and through the use of ordinary medicines only and whose health is not likely to be adversely affected by the abortion.

8. Provisions Relating to Protection of Pregnancy
a. No person other than a physician may effect or arrange for effecting abortions.

b. While performing functions relating to abortion, a physician must carry out all medical activities related thereto at a government hospital or a recognized health institution.

c. Before performing functions relating to abortion, a physician must formally provide counselling services to a woman desirous of undergoing an abortion.

d. While providing counselling services under sub-section (3), the physician must also provide appropriate information about the medical procedure of effecting an abortion, the medical consequences thereof, the facilities provided in that connection by government hospitals or recognized health institutions, and the alternatives of an abortion.

9. Circumstances in Which Abortion May be Permitted
a. Pregnancies of the following types may be terminated on the written requests of pregnant woman:

   i. Pregnancy of not more than 12 weeks, with the consent of the husband in the case of a married pregnant woman, and with the consent of the guardian in the case of an unmarried pregnant woman.

   ii. Pregnancy of not more than 18 weeks which has resulted from rape or incest.

   iii. Pregnancy which, if not aborted, is likely to endanger the life or adversely affect the physical or mental health of the pregnant woman, or result in the birth of a physically handicapped baby or a baby which cannot survive.
b. For the purpose of sub-section (1), the period of pregnancy shall be calculated from the first day of the last normal menstruation period of the pregnant woman.

Provided that this sub-section shall not be deemed to have prejudiced the fixation of the period of pregnancy through clinical examination.

c. In case the pregnant woman requesting for an abortion under sub-section (1) is a non-Nepali national, she must also submit a recommendation of the Nepal-based embassy of the country of which she is a citizen and evidence of her stay in Nepal for the past four months in minimum.

10. Request for Abortion

Any pregnant woman desirous of having her pregnancy aborted must request the physician of a government hospital or a recognized health institution for the same in the prescribed format.

11. Records to be Maintained

Before initiating the process of effecting an abortion of a pregnant woman, a physician must determine that the woman has not made the request for abortion under Section 10 by succumbing to any pressure, threat or a allurement, that she has done so independently and voluntarily, and that the abortion will not adversely affect her health, and keep a record there of in the prescribed format.

12. Prohibition to Force Abortion

No pregnant woman shall be compelled to abort her pregnancy against her will through the use of any pressure, threat or allurement, or by misguiding her.

13. Amniocentesis Test

No sex identification service, including the amniocentesis test of an embryo or foetus in the womb shall be provided.

14. Abortion Service Charges

a. A government hospital shall not collect a service charge of any kind while providing abortion services under this act.

Provided that an appropriate service charge may be collected from a pregnant woman who is financially strong or who is capable of bearing the expenses.

b. Notwithstanding anything contained in sub-section (1), a pregnant woman must bear the burden of the additional expenses of the hospital excluding
the service charge relating to the abortion facility.

c. The service charge relating to the abortion facility under sub-section (1), or the additional expenses of the hospital under sub-section (2), shall be as prescribed.

15. Confidentiality to be Maintained

a. The employees of a government hospital or a recognized health institution, or the physicians, nurses and other assistants involved in abortion activities, must keep all particulars, information, documents, statistics, etc. concerning such activities confidential.

b. Notwithstanding anything contained in sub-section (1), in case the concerned pregnant woman gives her consent in writing, there shall be no restriction relating to such confidentiality in her respect.

16. Prohibition to Publicize Abortion as a Means of Population Control

a. His Majesty’s Government or any central or local agency or any other organization, association or corporation functioning under the budget, management or control of His Majesty’s Government shall not publicize abortion as a means of population control.

b. Notwithstanding anything contained in sub-section (1), this shall not be deemed to have prejudiced the right to carry out publicity and extension activities on such subjects as the health of pregnant women, birth-spacing, family planning, and maternity and child welfare.

17. Other Conditions and Facilities

The conditions to be fulfilled and facilities to be provided by government hospitals or recognized health institutions and physicians while performing functions relating to abortion, in addition to those mentioned in this act, shall be as prescribed.

18. Special Rights and Duties

a. It shall not be compulsory for anyone to take part in the abortion of a pregnancy which is authorized under this act but not approved by his/her conscience.

b. Notwithstanding anything contained in sub-section (1), it shall be the duty of every physician to participate in the act of effecting the abortion of a pregnancy in case the life of the pregnant woman is likely to be endangered or her physical or mental health is likely to suffer a serious and permanent damage if the abortion is not effected immediately.
19. Power to Conduct Investigations

a. His Majesty’s Government may conduct investigations, or make arrangements for doing so, at any time to see whether or not the provisions contained in this act or in the rules framed under this act, have been complied with by government hospitals, recognized health institutions or physicians while performing functions relating to abortion.

b. His Majesty’s Government may depute any civil employee for the purpose of sub-section (1).

c. It shall be the duty of all concerned, incesty’s Government shall publish a national report containing the number of legal or illegal cases of abortion carried out during the past year, their types and nature, the available statistics relating to their impact, and other prescribed particulars, every year.

20. Civil or Criminal Liability

No physician who performs functions relating to abortion in accordance with this act without any negligence on the written request of a pregnant woman shall have any civil or criminal liability.


His Majesty’s Government hospitals, recognized health institutions and physicians, to furnish replies to the questions asked and documents relating to abortion demanded by the civil employee deputed under sub-section (2) in the course of his investigations.

22. Penalties

a. Anyone who effects an abortion in contravention of this act, or takes any action with the intention of causing an abortion, or with full knowledge or reasons to believe that such action could lead to an abortion, and thus actually causes an abortion shall be punished as follows:

i. If the period of pregnancy is not more than three months, with imprisonment for a term not exceeding one year.

ii. If the period of pregnancy is not more than six months, with imprisonment for a term no exceeding three years.

iii. If the period of pregnancy exceeds six months, with imprisonment for a term not exceeding five years.

b. In addition to the provisions contained in sub-section (1), any person who takes any action which is prohibited under this act and the rules framed
hereunder or does not take any action which must be taken under this act and the rules framed hereunder shall be punished with imprisonment for a term not exceeding one year.

23. Government to be the Plaintiff

His Majesty’s Government shall be the plaintiff in all cases under this act, and such cases shall be deemed to have been included in Schedule 1 of the 1992 State Cases Act.

24. Power to Frame Rules

a. His Majesty’s Government may frame necessary rules in order to implement this act.

b. Without prejudice to the generality of the powers conferred by Sub-Section (1), His Majesty’s Government may frame rules in respect to the following matters in particular:

i. Matters concerning the records, forms, documents and statistics concerning abortion to be maintained by hospitals or recognized health institutions.

ii. Matters concerning the preservation of statistics mentioned in Clause (a), and the procedure and opportunities of their use for study and research purposes.

iii. Matters concerning the medical qualifications or work experience of physicians.

iv. Format of applications to be filed for obtaining permission to perform functions relating to abortion, as well as of permission to do so.

v. Format of a request for abortion to be made by a pregnant woman.

vi. Matters concerning service charges relating to abortion facilities, and additional expenses of hospitals.

vii. Conditions to be fulfilled and facilities to be provided while performing functions relating to abortion.

viii. Particulars to be mentioned in the national report.

25. Repeal

Sections 28, 29, 30, 31, 32 and 33 of the law on Homicide contained in the legal code (Muluki Ain) have been repealed.
Annex III

List of Organizations Working for Protection of Women’s Sexual and Reproductive Health Rights*

1. Agroforestry, Basic Health & Cooperatives (ABC) Nepal
2. Ama Milan Kendra
3. ADRA
4. Beyond Beijing Committee
5. Child Workers in Nepal Concerned Centre (CWIN)
6. CARE, Nepal
7. CRS Company Pvt.Ltd.
8. Central Women Legal Assistance Committee
10. Centre for Development and Population Activities (CEDPA)
11. Didibahini
12. Dalit Pidit Mahila Kalyan Samaj, Surkhet
13. Family Planning Association of Nepal (FPAN)
14. Family Health International
15. Forum for Women, Law and Development (FWLD)
16. General Welfare Pratisthan
17. Institute for Social and Gender Equity (SAMANTA)
18. Knowledge Social Service, Community Development, Human Rights, Drug abuse Prevention Environment Saving Centre
19. Legal Aid and Consultancy Centre (LACC)
20. Mrigendra Samjhana Chikitsak Guthi
21. Maiti Nepal
22. Marie Stopes International (MSI)
23. Nepal Red Cross Society
24. National Network Against Girls Trafficking (NNAGT)
25. New Era Limited
27. Nepal Fertility Care Centre (FNCC)
28. PLAN International
29. PATRON, Dhankuta

30. REDD BARNA
31. Sunaulo Parivar, Nepal
32. Sancharika Samuha
33. Saathi
34. Shtri Shakti
35. SOLVE-Nepal, Dhankuta
36. Srijanshil Community Development Assistance Group, Morang
37. The Asia Foundation/Nepal
38. Tewa
39. United Mission to Nepal
40. United Nation Population Funds (UNFPA)
41. USAID/Nepal
42. Vijaya Development Resource Centre, Bhojpur
43. World Education
44. Women Rehabilitation Centre (WOREC)
45. Women Awareness Centre Nepal (WACN)
46. World Neighbours
47. Association for Rural Women Upliftment, Sarlahi
48. Association for the Promotion of Women Employment and Protection of the Child and Environment, Saptari
49. Banke Self-Reliance Women’s Organization, Banke
50. CHETANA, Sarlahi
51. Community Based Organizational Development for Empowerment (CODE), Achham
52. Community Reproductive Health and Counseling Centre
53. Gramin Mahila Utthan Kendra, Dang
54. Janajati Bikas Kendra, Doti
55. Jana Jagaran Mahila Sangh, Bardiya
56. Janakpur Women’s Development Centre (JWDC), Dhanusha
57. Lions Club/Butwal, Rupandehi
58. Mahila Chandeshori Bahumukhi Sahakari Sastha, Palpa
59. Mahila Jagaran Samaj, Saptari
60. MCH Products Pvt. Ltd.
61. Nepal National Association for Social Welfare of Deprived Community, Banke
62. Nari Kalyan Samiti, Bardiya
63. Namasaling Community Development Center, Ilam
64. Nari Bikas Sangh, Ilam
65. Nari Utthan Kendra, Kanchanpur
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67. Nepal Community Development Centre, Jhapa
68. Nari Bikas Sangh, Jhapa
69. PRERANA, Sarlahi
70. Panch Nagar Women Welfare Centre, Nawalparasi
71. Rural Women Development Organization, Dang
72. Rotary Club/Butwal, Rupandehi
73. Saptari Mahila Jagaran Sangh, Saptari
74. Samuhik Abhiyan, Bhojpur
75. Safebagar Samaj Sewa, Accham
76. Team Organizing Local Institute (TOLI), Kaski
77. Tharu Mahila Utthan Kendra, Bardiya
78. Training and Counseling Service Center, ABC Nepal, Morang
79. Utpidit Janjati Mahila Sachetan Kendra, Accham
80. Uttam Women Development Main Committee, Nawalparasi
81. Women Skill Creation Centre (WOSCC), Makwanpur
82. Women Development Branch, Baglung
83. Women Development Branch, Dailekh
84. Women Network, Dailekh
85. Women Cultural Upliftment Centre, Mahottari
86. Women Development Branch, Kaski
87. Women Empowerment Campaign, Doti
88. Women Development Branch, Kailali
89. Women Empowerment Campaign, Dhangadhi
90. Women Empowerment Support Group, Dhankuta
91. Women Development Branch, Palpa
92. Women Welfare Association, Palpa
93. Women Development Branch, Kanchanpur
94. Women Development Branch, Bhojpur
95. Women Ableness Recess (WAR), Surkhet
96. Women Development Service Center (WDSC), Dhanusha
97. Women Development Branch, Rupandehi
The conditional legalization of abortion in Nepal can be interpreted as a manifestation of the society’s commitment to women’s rights as well as the gradual success of its rights activists and the civil society at large to prod the government towards accepting the legitimate demands by women for right of control over one’s body.

While documenting the entire process of realization of abortion rights in Nepal, which is its principal objective, this study cautions all concerned about the many regulatory, institutional and even legal problems that are still bound to be daunting to an average abortion-seeker. Despite the change in the law, it is imperative that the government makes arrangements for proper institutional supervision and control of the conduct of abortion, and makes financial and institutional commitment to make abortion cheap and accessible to all.

This study argues that some of the legal dilemmas that continue to nag the abortion right community could be put to rest by declaring a general amnesty to all women facing jail terms for abortion and related offences committed before legalization of abortion. The next step should be to promptly bring into operation the terms and conditions for the conduct of abortion, including the procedure for making a decision to have an abortion. After putting all legal confusions to rest, a stage will be set to arrange for the institutional and health care services to make abortion safe and accessible to all. That will take time, but with the new found vigor and commitment for the right to abortion on the part of the state and the civil society, there is no doubt that it can be achieved over time.