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# Landmark Decision of ● Supreme Court of Nepal on Abortion Rights

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REPRODUCTIVE  
RIGHTS



Working for non-discrimination and equality



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**LAKSHMI V. GOVERNMENT OF NEPAL**

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**Supreme Court, Division Bench**

**Hon'ble Justice Kalyan Shrestha  
Hon'ble Justice Rajendra Prasad Koirala**

**Order**

**Writ No. WO-0757 of year 2063 B.S. (2006 A.D.)  
Date of Decision: 2066/2/6/4 B.S. (May 20, 2009 A.D.)**

**Subject – Mandamus**

Lakshmidivi Dhikta, a resident of Dadeldhura district, Ajaimeru VDC, Ward - No. 8 ..... 1

Advocate and Chairperson Sapana Pradhan Malla, on behalf of Forum for Women, Law and Development (FWLD) situated at Kathmandu Metropolis Ward No. 11 and on her own behalf ...1

Advocate Meera Dhungana, on behalf of Forum for Women, Law and-Development (FWLD) situated at Kathmandu Metropolis Ward No. 11 and on her own behalf ..... 1

Melissa Upreti, a resident of Kathmandu district, Kathmandu Metropolis, Ward No.33, Gyaneshwar .....1

Advocate Sharmila Parajuli, working in Women Legal Aid Clinic of Kathmandu School of Law situated at Bhaktapur district, Dadhikot VDC, Ward No. 5 .....1

Advocate Om Aryal, a resident of Bhaktapur district, Madhyapur Thimi Municipality, Ward No. 16 Lokanthali ..... 1

Advocate Rama Pant Kharel, on behalf of Pro-Public and her own behalf ..... 1

Advocate Lokhari Basyal, on behalf of Forum for Women, Law and Development (FWLD) situated at Kathmandu Metropolis, Ward No. 11 and on his own behalf .....1

Advocate Purna Shrestha, a resident of Kathmandu Metropolis, Ward No. 15 .....1

Petitioners

**vs.**

Government of Nepal, Office of the Prime Minister and the Council of Ministers, Singha Durbar .....	1
Government of Nepal, Ministry of Health, Population and Environment, Ramshah Path .....	1
Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs, Singhdurbar .....	1
Government of Nepal, Ministry of Women, Children and Social Welfare .....	1
Government of Nepal, Ministry of Local Development, Pulchowk .....	1
Government of Nepal, Law Reform Commission, Kathmandu .....	1
Interim Legislature Parliament, Singh Durbar, Kathmandu...	1
Government of Nepal, Department of Health Services, Teku, Kathmandu .....	1
Government of Nepal, Family Health Division, Teku, Kathmandu .....	1
Government of Nepal, National AIDS and Sexual Disease Control Centre, Teku, Kathmandu .....	1

Respondents

- **Fetus does not have an independent existence and its existence is confined only inside the mother’s womb. Therefore, even if a fetus is deemed to have any interest, it cannot exist against the interest of the mother.**

[Para 15]

- **Claims regarding husbands’ rights to become father are made from time to time, however, if so, due consideration needs to be given to wife’s rights to become a mother too. If it is accepted that in order to fulfill a husband’s desire to become a father, a woman must act against her wishes and assume the physical dangers and potential adverse outcomes of pregnancy, then she loses all control over her own body and as a result she is explicitly or implicitly forced to accept a continuous position of subordination. As a wife cannot force an unwilling husband to become a father and thus engage for physical relation, similarly, a man cannot force a woman.**

[Para 26]

- In a broad sense, reproductive health and reproductive rights encompass the decision to bear children and not to bear children and within that the right of a pregnant woman to terminate an unwanted pregnancy she does not wish to continue is also, ipso facto incorporated.
- Reproductive rights cannot be only understood as creating an obligation to reproduce, it includes within the scope the right not to reproduce. Reproductive rights must be envisioned in the same way just as a right to undertake a certain act inherently includes the freedom not to engage in such an act.

[Para 40]

- The legitimacy of the abortion service or the relevance of its availability will be meaningful only if it becomes accessible and affordable to those in need of it.

[Para 62]

- The rights given by the law are also the issues relating to the interests of the people. If law creates any benefits or interests, their equal distribution i.e., their enjoyment on equal basis, is also necessary. The right to equal protection of the law also implies equal accessibility and affordability of all to the benefits of the law, thus judicious obligations on such aspect cannot be denied.

[Para 73]

- As abortion is a health concern and that the right to health has been guaranteed as fundamental right, and it should be regarded as the right to life. Furthermore, our country's Constitution has also recognized the right to social justice, and the Directive Principles and State Policy establish the special protection to women's right as an important responsibility of the State. Therefore, the right to abortion or pregnancy related concerns cannot be regarded as a personal problem and isolated from the public duties of the State.

[Para 75]

- It is not justified to include abortion related provisions in the chapter on Homicide, as the Constitution and other existing laws have not recognized right to life of a fetus before birth.

[Para 87]

- It is conflicting and extremely unsuitable to continue keeping the provisions on abortion within homicide chapter, which is integral part of stringent criminal laws, whereas abortion rights are emergingly recognized rights. Taking into consideration the spirit of abortion

related provisions introduced through the amendment, it is necessary to regulate abortion as a separate and specific issue by introducing a separate legislation.

[ Para 90]

- The issue of abortion must not be confined to the question of whether or not to give birth to the fetus, and whether or not abortion can be undertaken, rather, it is an issue that has broader implications for overall women's health. Accordingly, it is necessary to have a proper legal system for remedies to address multi-dimensional problems that may arise as a result of the violations of the right to abortion, or refusal to provide such services, or poor quality of services. In terms of legal remedies, there must be appropriate provisions for punishment to the guilty, compensation for the victim and other facilities including the victim's health.
- Rights to abortion creates certain expected obligations form the state and the service providers, and thus it cannot be considered only as a matter of State's discretion or a voluntary will.

[Para 96]

**On behalf of petitioners:** Learned Advocates Purna Man Shakya, Narendra Prasad Pathak, Meera Dhungana, Prakashmani Sharma, Kavita Pandey, Sabin Shrestha, Lokhari Bashyal

**On behalf of respondents:** Learned Deputy Public Attorney Kumar Chundal

### Relevant Laws

- Articles 13, 13 (1), (3), 16(2), 20, 20(2), 107 (2) of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.)
- No. 28 A and B of the Chapter on Homicide of the Country Code
- Section 14 (1) of the Safe Abortion Service Procedure, 2060 B.S. (2003 A.D.)

### ORDER

**Justice Kalyan Shrestha:** The synopsis of the present writ petition submitted before this court pursuant to Articles 32 and 107(2) of the Interim Constitution of Nepal, 2007 and the order made thereupon are as follows:

We, the petitioners are individuals, actively engaged in protection and promotion of women's rights, filing public interest litigations against



discriminatory laws against women, and for protection of public interests and individual rights including gender justice. Similarly, I, Lakshmidevi Dhikta one of the petitioners, am from a very poor family in Dadeldhura district backward area when it comes to social awareness. Due to lack of education and awareness, and in absence of the knowledge that giving birth to unnecessary number of children is related to women's reproductive rights, I gave birth to five children. When I became pregnant again, I sought for an abortion and while doing so, I got the information that the government hospital legally provides abortion services. I went to Dadeldhura hospital with my husband to seek abortion service where I was asked to pay a service fee of NPR 1,130.00. Since I did not have the said amount, I was denied to avail legally provided service creating a situation where I have to continue with unwanted pregnancy and give birth to a child. Therefore, I am presenting myself before the court to report the injustice resulting from the violation of fundamental and legal rights including reproductive health, ensured by the prevalent laws.

Article 13 of the Interim Constitution of Nepal, 2007 guarantees each individual's right to life with dignity whereas Section 12 of the Civil Rights Act, 1955 provides that no person shall be deprived of his/her life or personal liberty, except otherwise provided under the prevailing law. In the same context, in the case of *Surya Prasad Dhungel vs. Godavari Marbles*, the esteemed Supreme Court has guaranteed a person's right to life. Due to the lack of information on the right to abortion in Nepali society, abortion service is not affordable and accessible thus resulting in the continuation of unwanted pregnancy which at times has resulted in death [of women]. Reports of arbitrary fees being charged in abortion cases and by the abortion related service providers, and of deaths due to unsafe abortion have not gone unreported. We [petitioners] requested the concerned agencies for the expansion of the abortion services to make them affordable and accessible in the context that unsafe abortions have been seriously violating the right of the women to live with dignity, and that though some reforms in the abortion related provisions have been introduced by the eleventh amendment of the Country Code, they have not been fully implemented. Women's rights to live with dignity and right to self-determination have been violated due to the unaffordability and inaccessibility of the right to abortion.

Article 13(1) of the Interim Constitution of Nepal, 2007 provides for right to equality and ensures that all citizens are equal before the law, and that no one shall be denied equal protection of the laws. In addition, Article 13(3) of the Interim Constitution states that there shall be no discrimination against any citizen on the grounds of religion, race, , caste, tribe, gender, origin, language or ideological conviction or any of these, and ensures that no citizen shall be deprived of the enjoyment of constitutionally and legally guaranteed rights

on any grounds or reasons as it provides for special provisions of law for the protection, empowerment, or advancement of women, Dalits, indigenous, madhesi or farmers, laborers or those belonging to economically or socially backward class, and children, the elderly, disabled or those who are physically and mentally incapacitated. Denial of realization of the constitutionally and legally guaranteed right to abortion, due to poverty, is against the principle of equality. Majority of Nepali women are unable to seek abortion [services] due to lack of awareness of their legal rights to abortion, inability to pay service fee for abortion, or unavailability of abortion services in the concerned district, and are thus subjected to continue unwanted pregnancy. This amounts to the suppression of women's right to live with dignity, freedom, and the right to self-determination.

Article 1 of the International Covenant on Economic, Social and Cultural Rights, 1966 guarantees everyone the right to self-determination; and, the International Covenant on Civil and Political Rights, 1966 also ensures the right to self-determination. The right to abortion falls within women's right to self-determination. Though abortion is women's right to self-determination, the eleventh amendment of the Country Code recognizes it as woman's reproductive rights. Nonetheless, the prevalent Nepali laws have not been able to ensure woman's reproductive right by adopting the standards laid down by the international human rights conventions or treaties to which Nepal is a party.

As stated in the fundamental rights of the Interim Constitution of Nepal, the right to privacy states that the privacy in relation to a person's life, residence, property, documents, correspondence, or information is inviolable, unless otherwise specified by the law. However, women seeking abortion services in the government hospitals have to fill up the forms for an appointment, these forms have to be filled in open spaces and hospital determine the daily quota for abortion services and does not provide the service if the daily quota has exceeded. Such practices not only violate women's privacy but also creates situations in which women are unable to enjoy their right to abortion within the legal limits.

Abortion was legalized in Nepal, following a study conducted in Nepal revealed that unsafe abortion as the reason for approximately 50% of maternal deaths. However, the prevailing abortion services in Nepal are inadequate due to the geographic adversity of the country. In such situation, despite being not prohibited by the law, the ban on medical abortion by the Safe Abortion Service Procedure, 2003 is against the legal norms and values. Of the districts of Nepal where safe abortion services are available, these services are located only in urban areas. Lack of legal and procedural clarity does not ensure the

abortion right of women living in rural areas. Therefore, the right to abortion correlated with reproductive health of women in general has not been ensured.

Thus, in this context, poor women are either compelled to give continuity to unwanted pregnancy or become victims of unsafe abortion. On the other hand, due to lack of information about the legality of abortion, the right to information guaranteed by the Constitution is also being violated. Therefore, writ petition has been filed in this court requesting for the issuance of an order of Mandamus in the name of the Ministry of Law and Justice to enact a separate, clear and specific law related to safe abortion to ensure right to safe and accessible abortion, until the enactment of such law, for the issuance of order in the name of the Ministry of Health directing through Mandamus to conduct special programs to inform general public and service providers about the prevailing legal provisions on abortion, and to set up a required central level fund to avail affordable and accessible abortion services ensuring right to abortion of the poor and disadvantaged women. In addition, an order of mandamus be directed in the name of relevant respondent agencies to maintain the confidentiality of the women who seek abortion services. Similarly, an order of mandamus be issued in the name of defendants to avail accessible abortion services to all the citizens; to ascertain the maximum amount of the service fee for abortion; to avail free abortion service to women who are unable to pay the service fee; and to plan and conduct awareness raising programmes for the general public. In addition, an appropriate order be issued in the name of the respondents to provide required compensation to Lakshmidivi Dhikta, one of the petitioners, in consideration of physical, mental and economic damage inflicted upon her due to the violation of her constitutional and legal rights.

This court issued an order to the respondents to send their response in writing within 15 days excluding time for traveling, and submit in accordance with the rules explaining what is the issues of this case, and why an order shouldn't be issued as demanded by the petitioner?

The written response submitted by the Office of the Prime Minister and Council of Ministers states that, the writ petition should be quashed as it is filed without any basis and reason to hold this office as the respondent and, does not even cite a clear argument on how the work and actions of this office have violated rights of the petitioner. The eleventh amendment of the Country Code has made provisions to manage, dignify and guarantee the right to abortion as a woman's right. Necessary procedures have been adopted to implement those provisions, and accordingly, Nepali women have been availing the services. In the context that the concerned body of Nepal Government is actively engaged in implementing the legal provisions, there is no need for the

esteemed court to issue any order. Though, the relation between the prevalent law and international conventions ratified by Nepal is described in Section 9 of the Treaty Act, 1990, as the subject of the Convention itself cannot be exercised directly as rights by individuals, the plea in the petition filed with reference to the International Convention is not in accordance with the law. As it is the sole jurisdiction of the legislature to decide on the law/s that need to be enacted or amended, and as this office is not in a position to regulate such issues; there is no reason or basis to hold this office as a respondent.

The written response submitted by the Ministry of Health and Population states that as the writ petition does not clearly state how this Ministry's work and actions have violated rights of the petitioner. In such context, as none of the rights of the petitioner have been violated by the work and actions of the respondent, therefore, the baseless writ be quashed.

The written response submitted by the Legislature Parliament states that there is no reason to make the Legislature Parliament as one of the respondents, thus the writ is unreasonable and should be quashed *prima-facie*. Article 16(2) of the Interim Constitution of Nepal, 2007 states that every citizen shall have the right to free basic health services as provided by the law. In accordance with this provision, it is mandatory to formulate the law that makes basic health services available to the general population. The Legislature Parliament is a constitutional body that engages itself for the adoption of Bills formally registered by the Government of Nepal or one of its members by applying due process of legislative law and does not take initiatives on its own for the formulation/enactment of law. Thus, in relation to specifying the basic health services and to make State provide them available free of cost, a government Bill that has taken into consideration the financial status of the government is required to be presented. Disregarding this fact, the writ petition has unnecessarily held Legislature Parliament as a respondent and therefore needs to be quashed.

The written response submitted by the Department of Health Services, Family Health Division, and National Centre for AIDS and STD Control states that Section 28 B of the Chapter on Homicide (Murder) as amended by the eleventh amendment of the Country Code provides for a legal provision that allows a qualified health worker, who has obtained a license upon fulfillment of ascribed procedures, to perform abortion with the consent of the concerned woman. The procedure for such abortion service has been outlined in the Safe Abortion Service Procedure, 2003. Section 14(1) of the said Procedure states that "in lieu of providing safe abortion services, health institutions, doctor or health worker may charge service fee from the service seeker." The reason behind permitting qualified and registered health workers and the health institutions to provide

such services as prescribed by the Procedure is to make the services available to the general population. Thereby, for providing such services, including by the government health centers, it is necessary to ascertain the amount for service fee; and while ascertaining the service fee not exceeding NPR 1,000 that includes the cost of medicines, the cost that may be levied based on the geographical region has also been taken into consideration. For those unable to pay the fee due to economical reason, free services have been made available, as well as an initiative will be taken to make such services more effective. To increase the coverage of the services, until Chaitra 19, 2063 B.S. (April 2, 2007 A.D.), 359 doctors have been trained and registered for providing the service. Till date, these services have already been made available in 70 districts, except for Rukum, Rolpa, Salyan, Terathum, and Kalikot [districts]. Similarly, to raise public awareness, messages have been disseminated 10 times in a year via different means of mass media. Moreover, in relation to supporting the incapacitated, this Division holds positive intention on the establishment of a separate fund to avail these services to the poor women Arrangements to maintain the confidentiality of service recipient woman already exists, and thus the presented writ be quashed.

The written response submitted by of the Ministry of Local Development mentions that local bodies have been fulfilling their health-related responsibilities to the best of available means and resources as directed by the Local Self Governance Act, 1998. Therefore, there is no reason to hold the Ministry as one of the Respondents, and the writ petition that makes an agency as a defendant that in reality does need not be a defendant, is subjected to be quashed *ipso facto*. Similarly, the written response submitted by the Ministry of Women, Children and Social Welfare states that any part of the petition doesn't indicate the action or inaction on part of the Ministry that has led to the violation of fundamental, or constitutional or legal rights of the petitioner. The petition is imaginative and the Ministry therefore, requests for quashing the writ petition.

The written response submitted by the Ministry of Law, Justice and Parliamentary Affairs states that the eleventh amendment of the Country Code has added abortion related provision in No. 28 B in the Chapter on Homicide, and this has already been implemented. This provision affirms respect towards women's reproductive rights by the State. Furthermore, Article 20 of the Interim Constitution of Nepal, 2007, guarantees women's rights as fundamental rights. The part IV of the Constitution also outlines Responsibilities, Directive Principles and Policies of the State to provide for the protection of special rights and welfare of women. In the context that various legal provisions addressing the issues raised by the petitioner already exist, the present writ does not have a legal standing and thereby subject to annulment.

The case has been scheduled and presented before the Bench as per the Rules, and learned advocates including Purna Man Shakya, Narendra Prasad Pathak, Meera Dhungana, Prakash Mani Sharma, Kabita Pandey, Sabin Shrestha and Lokhari Basyal, appearing on behalf of the petitioners, stated that as reproductive rights is a fundamental right it is the obligation of the State to put in place the required infrastructures and facilities for the enforcement of this right. Similarly, although the amendment in the Chapter on Homicide in the Country Code has slightly relaxed the provisions relating to abortion, it has failed to provide for comprehensive legislation on abortion and, therefore a necessary order be issued to enact a separate law. In addition, an order be directed in the name of the respondents to ensure abortion services for the targeted group by allocation of required resources, proper assignment of human resources as well as conducting awareness raising programs. By including the provision of abortion in the Chapter on Homicide, it is considered as a subject of criminal law which is not in line with the modern approach. In present context, instead of considering abortion as a traditional legal subject, it should be regarded from rights-based perspective. Right to safe abortion, not being a civil or political right but a social and economic right in nature, holds more significance in a country like Nepal. If anyone, on account of their inability to pay the service fee, is deprived of the enjoyment of their right guaranteed as a fundamental right, it amounts to denial of enforcement of the fundamental right. Similarly, rural women have been deprived of their right to safe abortion in the absence of effective implementation of public awareness program. The pleaders argued for an order including compensation for Lakshmidevi Dhikta, the petitioner of the present writ, for the mental and physical damage she underwent for not being able to seek abortion services due to financial constraints. Learned Deputy Attorney General Kumar Chundal, defense lawyer for the Government of Nepal stated that the right to safe abortion is an important right of a woman. The Government of Nepal has been working on this issue to the best of State's ability and resources. He argued that Safe Abortion Service Procedure, 2003 have been formulated and implemented to provide effective safe abortion services. Therefore, the situation requiring the issuance of orders/directives as demanded by the petitioners does not exist and therefore the writ should be quashed.

After hearing to the arguments presented by the counsels representing both the parties, and taking into consideration the contents of the petition and written responses, following questions are considered to be addressed in the present case:

1. Whether or not the Petitioners have the *locus standi* to file this petition?
2. Whether or not abortion is a right of a woman?

3. What kind of relation does abortion have with women's human rights and legal rights?
  4. Whether or not the Petitioner has a right to accessible and affordable abortion?
  5. Whether or not, as demanded, there is a need to issue an order for the enactment of a separate law related to abortion?
  6. Whether or not one of the petitioners, Lakshmidevi Dhikta, should receive compensation?
  7. Whether or not, as demanded, the orders/directives should be issued?
- 2) Firstly, while considering the question of Petitioners' *locus standi* to file the petition, the present writ petition has been jointly filed as a public interest litigation pursuant to Article 107(2) of the Interim Constitution of Nepal, 2007 by various organizations working in various fields of public interest, their officials, legal practitioners and an affected person who is deprived of access to abortion services. The present writ petition that includes various demands to address women's reproductive issues especially the problems related to abortion, has been filed by Chairperson of the Forum for Women, Law and Development Sapana Pradhan Malla and its officials and advocates, Pro-Public and advocates, together with Lakshmidevi Dhikta, a person who herself is affected by the pregnancy related problem. The petitioning advocates represent organizations that are actively engaged in the field of women's legal rights and gender justice, and their possible capabilities to represent the issues of public interest specifically those relating to women's rights have been noted and amongst those petitioners, especially Lakshmidevi Dhikta, who herself is affected has raised the issues of her individual rights and welfare and is demanding a remedy. In addition to the specific problem of the affected persons, it is found that the present petition is filed demanding that abortion related problems of women be comprehensively addressed. On several occasions, by issuing required order and directives, this court has provided remedies on different petitions filed by the petitioners raising public interest concerns on the existing problems related to various issues of women rights, human rights, and gender justice. The problem related to abortion raised in the present petition is not only a personal problem faced by a specific woman, rather it is an issue of common and public concern for all women, and therefore, there is no basis to question the competency and status of the petitioners on their *locus standi* and to represent the issues of public interest.

- 3) In relation to one of the Petitioners, Lakshmidevi Dhikta, who has demanded compensation for the consequences resulting from her inability to pay abortion service fees, at the time of pronouncement on her petition, it is not clear whether or not she has given birth to the child. If she has already given birth to the child, there is no rationale to issue an order to provide abortion service to her, and thereby a question arises whether her demand has lost its meaning.
- 4) Firstly, it is appropriate to consider this issue. The demand for making abortion service effective, reliable, lawful, easy, less expensive and accessible in the present petition leaves no special relevance for petitioner Lakshmidevi Dhikta to report on the status of her pregnancy till the time the decision is made. Even if the petitioner Lakshmidevi Dhikta has already given the birth, it will not create obstacles to consider her demand. The nature of the case related to abortion is such that once it gets filed in the court, there is a possibility that the pregnant woman gives birth during the course of average time required for the court trial. The pregnancy matures quite speedily while the case trials moves slowly, and if judicial remedy is denied on the basis that pregnancy is no more prevailing by the time decision takes place, it may lead to large number of situations where pregnant women facing the problems are unable to receive remedy. Therefore, if the raised question in the writ petition is not addressed in totality considering the context when the case was filed and the situation arisen at the time of granting legal remedy and its impact, then, it amounts to complete denial of abortion services or legal remedies to pregnant women, which is not appropriate.
- 5) Let's discuss on the second question, whether or not abortion is a right of a woman. Abortion means the process of terminating fetus from women's womb before its natural birth including by artificial medical or surgical intervention, or external intervention into the women's womb. The English edition of *Cambridge Advanced Dictionary* defines abortion<sup>1</sup> as "the intentional ending of a pregnancy, usually by a medical operation". It is a natural process that sexual intercourse leads to conception and after conception with gradual development of various organs, it passes through different growth stages of being embryo or fetus, finally resulting in the birth of a child after maturity of the pregnancy. In various instances, prior to the birth, the fetus dies or fails to develop, whereas, in some circumstances a pregnant woman does not want to give birth to the fetus, or the life of the pregnant mother becomes endangered due to the fetus. In case where the fetus does not develop and dies, using a medical procedure to remove it is natural and there is no legal problem. However, when there is an unwanted pregnancy or a mother wants to



terminate her pregnancy, whether or not one can do so while the fetus is still in a growing stage remains a topic of debate. In case there is no possibility of the survival of the fetus after birth, or if there is an imminent danger to the physical or mental health of the pregnant woman due to the fetus, almost all judicial systems provide space for terminating the fetus through medical intervention as an essential prerequisite. Besides these conditions, can a pregnant woman voluntarily terminate the pregnancy or not? While doing so, it is necessary to consider what relevance does the time factor have, and to refer to provisions Nos. 28 A and 28 B of the Chapter on Homicide to understand related existing legal provisions.

**No. 28 A:** *No person shall cause termination of pregnancy by coercing, threatening, or alluring a pregnant woman. The person causing termination of pregnancy through such action/s shall be liable to the punishment as follows:–*

- One year of imprisonment in case of the pregnancy up to twelve weeks ..... 1*
- Three years of imprisonment in case of the pregnancy up to twenty-five weeks ..... 1*
- Five years of imprisonment in case of the pregnancy above twenty-five weeks ..... 1*

**No. 28 B:** *Notwithstanding anything contained in number 28 of this Chapter, where a qualified, licensed health care worker accomplishes abortion under the following circumstances in accordance to the procedure specified by Nepal Government, it shall not be deemed as committing abortion as prohibited in this Chapter.*

- Where the pregnancy of up to twelve weeks has been aborted with the consent of the pregnant woman ..... 1*
- Where the pregnancy of up to eighteen weeks conceived as a result of rape or incest has been aborted with the consent of the pregnant woman ..... 2*
- Where abortion has been accomplished with the consent of the pregnant woman, upon the opinion of a doctor having possessed the qualification pursuant to the prevailing law that if abortion is not accomplished, the life of that woman can be at risk or her physical or mental health can be affected or a disabled child may be born..... 3*

6) Pregnancy is viewed as the cause for creation of human race and process that continues existence of the human race. In this view, pregnancy complements motherhood. It is important to protect fetus as embryo or fetus is the first form of every human being. Considering this very significance of fetus, one point of view regards fetus as life; the protection of fetus is tantamount to the protection of life and the destruction

of fetus is destruction of life itself. The other point of view states that though fetus is a natural link for human life, it exists inside the woman's body, without mother there is no identity of a fetus and as mother faces several health and life related vulnerabilities caused due to pregnancy, the fetus cannot override over the protection of mother's physical and mental health. A fetus owes its existence to a mother, and if the right of a fetus is considered against the health or interest of the mother, there will be conflict of interest between mother and fetus. Furthermore, it will establish the primacy of the fetus, and such situation would go against the mother. Fetus cannot be protected by endangering mother therefore; it is argued that the termination of a fetus is acceptable up to desired limit in accordance with the law based on will or health or other interests of the mother.

Individuals arguing for the protection of the fetus and arguing against abortion are categorized as Pro-life, whereas those individuals who argue for abortion are categorized as Pro-choice.

In this manner, the society's views all over the world on this issue have been found to be conflicting on religious, philosophical, medical approach and different legal grounds.

- 7) Pro-life groups perceive that the legalization of abortion will promote sexual promiscuities. They argue that abortion may become a means of family planning; endanger the existence of human race; devoid the State of its duty to protect life as well as create potential health risks for pregnant woman resulting from the advancements in medical science. On the other hand, the pro-choice groups mainly argue that criminalization of abortion has not controlled sexual promiscuities, and instead of endangering the existence and future of human race abortion rather helps in protecting the physical and mental health of a pregnant mother. Moreover, it is the duty of the State to protect the life of a mother as other people. Similarly, in the present context, due to the advancement in medical science abortion can be performed safely and thus cannot be viewed as risk to health.
- 8) It is natural for everyone to have their own views for or against the abortion. Basically, the question– when does a life begin– helps to develop a rigid or flexible view on abortion. Pro-life groups argue that life begins at the point of conception after sexual intercourse. The others perceive that the life starts only when the fetus displays the ability to survive after its birth. As there is no universally accepted principle/standard stating when the fetus becomes alive or when life cycle begins, it is not correct to state

that a fetus should be regarded “life” right from the beginning, i.e., from conception.

- 9) In reality, it is difficult to say for sure when the life begins. Following conception, life takes shape in parallel with the growth of a fetus. However, to regard every such situation of fetus’s growth as life, in addition to the scientific facts, it should also be recognized by the law accordingly. In fact, neither science nor law seems to have accepted the existence of life in an unborn person. Our Constitution has not dealt with any right of an unborn child including his/her constitutional, religious, property or other rights

Regarding this issue, in 1973 the American Supreme Court, in its verdict in *Roe v. Wade*,<sup>2</sup> has extensively dealt with this matter and held the opinion that a fetus could not be treated as life.

- 10) In the same context, while disposing a petition challenging the constitutionality of the Choice on Termination of Pregnancy Act of 1966, on the ground that the right to abortion granted by that Act contravened Article 11 of the African Constitution which stated that 'every person shall have the right to life', the Supreme Court of South Africa, in the case of *Christian Lawyers Association of South Africa and Others vs. Minister of Health and Others*, observed that the impugned Act was not unconstitutional. The court stated that since a fetus cannot be treated as an independent person, the provision allowing unrestricted abortion within the first three months and conducting abortion only in some limited circumstances after that period, did not contravene Article 11 of the Constitution which states, "Every person shall have the right to life". The court, however, also observed that the pregnant woman reserves the right to give or not to give birth to such a child taking into consideration the health of the mother and the child, as well as the future of the child.
- 11) The Constitutional Court of Austria, in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (1974), which challenged the constitutionality of legal provision that removed restrictions to carry out an abortion within the first three months alleging it as an violation of the right to life recognized in the European Convention on Human Rights and the national constitutional law, held that, the impugned provision could not be ruled as unconstitutional, as an unborn person could not be recognized as an individual and therefore the right of a fetus did not fall under the right to life.
- 12) A fetus means the state of growth within the womb prior to its birth as a human being. The fetus assumes the status of a child or an infant only

when born alive after the completion of the natural time and condition inside the womb. We do not consider a full term but still-born infant, as a life. The state of being born alive as a child from the mother's womb means life and any state other is considered a fetus. It is necessary to understand in practical terms the difference that even a fetus which is capable of being alive after birth, if still born cannot be considered as life.

- 13) There is no legal basis to regard a fetus as life as our Constitution and the laws do not mention anywhere as to when life begins in a fetus, and do not have any provisions that recognize any rights of the fetus or for their protection. If a fetus is to be considered a life in itself and identity of a fetus and that of the mother who carries the fetus through conception is to be considered separate, the existence of fetus's life cannot be endangered even when the physical or mental health of a mother is under threat, and in such a situation, the independence of the fetus shall have to be recognized until the last stage of mother's life. Thus, even if the existence of the mother is endangered, she will have to endure until the last minute for the protection of fetus's life or last measures for the protection of the life of the pregnant mother shall be taken only after ensuring the protection of the independent life of the fetus. In reality, such an argument is not practical.
- 14) A fetus is dependent on the mother. A fetus cannot be recognized as a separate personality from that of the mother as it owes its existence to the mother. Those who argue that a mother cannot abort the fetus at her will for the reason that the fetus is also life are required to give a satisfactory answer of when the fetus assumes the state of life – a matter which has not been settled with certainty so far. Without any specific ground provided under the prevalent law and the Constitution, it is not feasible for the court to take new decision about such a complex, scientific, philosophical and policy related issue i.e. when does life begin? Therefore, it seems to be the need of time to rightfully understand the existing difference between the fetus and the life.
- 15) It is well understood that a fetus does not have an independent existence and its existence is confined only inside the mother's womb. Therefore, even if a fetus is deemed to have any interest, it cannot exist against the interest of the mother. Protection of the fetus has its own importance; a fetus has significance for a pregnant mother too; however, the interests of the mother and that of the fetus are not separate. Instead, it is appropriate to view it in an integrated manner that the interest of the fetus is the part of mother's interest. A serious question raised in this discourse is the State's duty to protect its citizens, and since population

is a key component of statehood, the protection of pregnancy becomes important. Such importance also needs to be taken into consideration.

- 16) The main question is – in the pretext of protecting pregnancy or the fetus, whether or not a mother can be forced to become pregnant and to give birth to a child at maturity by curtailing the interest, health, or happiness of the mother? Or whether or not a mother at her own will can or should be allowed to abort the fetus irrespective of its stage? This is an important question. Different social and legal systems have tried to respond to this issue from diverse perspectives. Several countries or legal systems allow termination of pregnancy, even if as an exception, including in the cases where the life of the mother is endangered, or that the child in womb will be born disabled with no possibility of leading an independent life, or when the pregnancy is conceived as a result of rape, or conceiving pregnancy while being HIV positive. In addition, many countries and legal systems allow pregnant women to safely terminate their pregnancies of up-to three months or twelve weeks with the consent of the pregnant women.
- 17) Different legal systems have diverse legal provisions related to procedure to be adopted for voluntary abortion of pregnancy of up-to three months or twelve weeks, the persons or institutions providing the abortion service and the terms and conditions to be complied in the course of abortion. Since Section 28 B of the Chapter on Homicide in the Country Code allows a pregnant woman to undertake safe abortion up-to twelve weeks of pregnancy following the specified procedure, the right to abortion of a woman to that limit has to be recognized in Nepal too. A society which recognizes the right to abortion has helped women to be free from unwanted pregnancy, and thereby to live life as per their wishes, to develop professionally, to be relieved from the compulsion of carrying inappropriate burden, and to exercise the right to self-determination. On the other hand, with the completion of first three months or twelve weeks of pregnancy, the fetus keeps growing and the possibility of its ability to survive independently outside the mother's womb also increases; simultaneously the procedure for abortion and its technical aspect becomes more complicated, and the risks to the woman's health increases. There is less complication and risk, if the interested person terminates the pregnancy at the early stage, and as the complication increases in the later stages of pregnancy, except in some specific circumstances, it cannot be used but as a last resort to save life. Therefore, the State has lately regulated abortion as a means of creating balance between voluntary will and compulsion of women as well as for protecting the pregnancy. Particularly, if the fetus has reached a point of

development whereby it has the capacity to survive outside the womb, it is appropriate to protect the fetus. Thus, in such situation, even those countries which do not criminalize abortion, deny right to an abortion on mother's request. In fact, this is considered to be in the interest of both the mother and the fetus.

In reality, whether or not such a provision may or may not be treated as a right of women shall have to be reviewed from the relevance of this right.

Women, in entirety, like other individuals or men have human rights, and therefore, like others they are free to enjoy the rights to equality, liberty, to pursue happiness and to live with dignity.

- 18) Prior to the eleventh amendment of the Country Code, abortion was fully restricted and criminalized in our country. As a result of the legal provision prescribing punishment for abortion, many women who became pregnant as a result of rape were also forced to continue their pregnancies; many suffered legal consequences and were forced to suffer in jail for undertaking abortion as they tried to hide their pregnancies due to social embarrassment or when they resorted to abortion as a result of not being able to continue their pregnancies for social reasons. Such situation appeared both strange and unfair from the view of compliance with international norms. While becoming pregnant is not a consequence of women's act alone; after conception, only women bore the direct burden of the prosecution for abortion and the men responsible for causing the pregnancy generally did not fall within the purview of the law. Rural, illiterate, and poor women mostly bore the allegations of abortion. Due to the feminization of poverty and the criminalization of abortion, although unsafe, desperate women were forced to clandestinely resort to abortion procedures as a last resort. As a result, unsafe abortion became a leading cause of maternal mortality in Nepal.
- 19) Nepal is known as a country with a high incidence of maternal mortality due to abortion. This is a serious problem in countries where abortion is criminalized, and even in the countries where conditional abortion is permitted but services have not been provided adequately, unsafe abortion has become a leading women's health concern worldwide. Whether due to the criminalization of abortion or the lack of reliable system for providing safe abortion services, various aspects of women's lives and human rights are affected. Therefore, for women rights, it is important to decriminalize abortion to a certain extent, to protect pregnancy except when they are unwanted and to create safer environment for those seeking abortion services.

- 20) As noted above, prior to the eleventh amendment of the Country Code, abortion was criminalized under all circumstances and women were being deprived of their basic human rights, including the right to life. Thus, the above-mentioned eleventh amendment has proven to be a significant milestone.
- 21) Though abortion was given the status of a fundamental right following the United States Supreme Court's decision in *Roe v. Wade, 1973*, that involved a legal challenge to the criminalization of abortion in America, there was a criticism that the decision was a result of legislative or political activism. In our context, abortion has been recognized on conditional grounds through the eleventh amendment of the Country Code which was enacted through a political process involving legislators. Thus, whether or not a woman has a right to abortion is no longer a legal question but rather is undisputedly a right recognized by the law. Therefore, there is no need to justify its relevance in the political process; rather, the main question is how to undertake effective measures for the proper enjoyment of this right.
- 22) Following the eleventh amendment of the Country Code, Article 20 of the Interim Constitution of Nepal, 2007 incorporated a separate provision for women's rights which includes the right to reproductive health. As a result, this right has been further reinforced in Nepal.

The provisions contained in Article 20 of the Constitution are as follows:

**Article 20, Women's Rights:**

- (1) A woman must not be discriminated against in any way on the ground that she is a woman.
  - (2) Every woman shall have the right to reproductive health and right relating to reproduction.
  - (3) No woman shall be subjected to physical, mental or any other forms of violence, and such an act shall be punishable by law.
  - (4) Sons and daughters shall have equal rights to ancestral property.
- 23) Reproduction is a unique aspect of women's health. One way or the other, women are impacted by their reproductive health throughout their lives such as menstruation, pregnancy, delivery, post-delivery health complications, problems related to reproductive organs, menopause and related physical and mental health issues, which are all issues related to reproductive health. Right to reproductive health is considered as an integral part of woman's human rights, and right to abortion holds an important place in that.

From a rights perspective, reproductive health is an important human right subject for women.

- 24) The right to freedom including the right to live with dignity and personal liberty are important subjects/issues of women's human rights. The related issues include the right to health, the right to reproductive health and family planning, the right to marry freely or form a family, the right to have or not to have children, the right to decide the number and spacing between children, that includes the right to abortion in accordance with the law, the right to privacy, the right to non-discrimination, the right against torture, cruel, inhuman or degrading treatment or punishment, the right to freedom from sexual violence, the right to benefit from scientific progress or to participate in research.
- 25) Among these, the right to self-determination holds a special importance in relation to the right to the reproductive health. This comprises the right to plan one's family, which includes the right to information about and access to family planning methods, and the right to use such contraceptive; as well as women are considered to have the right to independently make decisions relating to reproduction free from any external interference. This means that a woman is the master of her own body and whether or not to have sexual relation, whether or not to give birth to a child, and how to use her body are matters wherein a woman has the final say. Though traditionally in a marriage it is normal for a woman to make various decisions with the consent of her husband or based on mutual understanding, it is very important that a woman has the final say about how her body will be used to bear or not bear children.
- 26) Even though the law in some countries still regards abortion as a social issue, thus requiring husband's consent for a woman to undergo abortion, guardian's consent in case of a minor girl, or the mutual consent of both husband and wife. This means, men are free to use their bodies in their accord but women are not be able to do the same. Claims regarding husbands' rights to become father are made from time to time, however, in such cases, due consideration needs to be given to wife's rights to become a mother. If it is accepted that in order to fulfill a husband's desire to become a father, a woman must act against her wishes and assume the physical dangers and potential adverse outcomes of pregnancy, then she loses all control over her own body and as a result she is explicitly or implicitly forced to accept a continuous position of subordination. As a wife cannot force an unwilling husband to become a father and to engage for physical relation, similarly, a man cannot force a woman.



- 27) If these standards are not accepted, women will have to surrender to various wanted or unwanted situations, including toleration of sexual or physical violence; termination or continuation of pregnancy upon determination of sex of the conceived child; be prepared to be impregnated against their wishes or to terminate a wanted pregnancy; undergo genital mutilation for sexual satisfaction, use of contraceptives etc. Therefore, a woman's right to self-determination in relation to abortion is an important and integral part of the right to reproductive self-determination.
- 28) This right has been continuously strengthened as a dynamic theme of human rights jurisprudence. Importance has been given continuously to women's reproductive health, especially the sexual relationship based on sexuality and equality be it at the Human Rights Conference held in Tehran in 1968, or the Women's Conference held at Mexico in 1984, or the International Conference on Population and Development held at Cairo in 1994, or the Beijing Platform for Action formulated in 1995.
- 29) Various international human rights declarations, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child, have in one way or the other addressed the rights to reproductive health and abortion within women's human rights.

Article 3 of the Universal Declaration of Human Rights, Articles 6.1<sup>3</sup> and 9.1<sup>4</sup> of the International Covenant on Civil and Political Rights and Articles 6.1<sup>5</sup> and 6.2<sup>6</sup> of the Convention on the Rights of the Child address the issues of life, liberty and security of women.

Likewise, Article 5 of the Universal Declaration and Article 7 of the International Covenant on Civil and Political Rights address the right against torture.

Articles 10.2<sup>7</sup>, 12.1<sup>8</sup> and 12.2<sup>9</sup> of the International Covenant on Economic, Social and Cultural Rights and Articles 10<sup>10</sup>, 11.2<sup>11</sup>, 11.3<sup>12</sup>, 12.1<sup>13</sup> and 14.2<sup>14</sup> of the Convention on the Elimination of All Forms of Discrimination against Women specifically address the issues of the rights relating to women's health, reproductive health and family planning. Further, Article 16.1<sup>15</sup> of CEDAW Convention has specially dealt with the right to continue the pregnancy and give birth to a child or discontinue it.

- 30) The right to privacy is significantly connected to the right to abortion. The prevalent social psychology is not favorable towards abortion, no matter

how important the act of abortion is for the realization of women's right to self-determination. Becoming pregnant or not is purely a personal matter of an individual who has the right to privacy that is protected by Article 17.1<sup>16</sup> of the International Covenant on Civil and Political Rights.

- 31) Likewise, having ratified or acceded to the International human rights Conventions and Declarations that recognize reproductive health and abortion as integral part of women's rights, in addition, the Interim Constitution of Nepal guarantees the right to reproductive health and the Country Code clearly recognizes abortion, there seems no reason to question the recognition of this right.
- 32) Pregnancy falls within the integral subject of reproductive health. The ability to become pregnant is a unique aspect of women's health. The crux lies in the perspective through which the law and justice upholds this uniqueness with regard to reproductive health. Woman and her capacity to conceive may seem synonymous with each other, as only a woman can conceive a pregnancy, however, from the women's rights perspective, it is appropriate to view this uniqueness as a combination of women's right, necessity and their contribution. Pregnancy is a unique capacity possessed by women and a woman's issue, hence for this reason it is also a woman's right. The fact that a woman has the natural capacity to become pregnant does not mean that she has to become pregnant. Woman's uniqueness in itself is her right, and not a compulsion. The enjoyment of such rights will be affected, if women are not provided with appropriate rights to protect this uniqueness, and required services, facilities and protection advancing these rights. As the existence and evolution of the human race are inherently related to the reproduction by women, it is a matter of supreme human interest and, therefore, also a matter of common public interest.
- 33) Women may be forced to become pregnant and to continue pregnancies if their reproductive health rights are not protected in a correct manner, and instead of being respected as rights holders they will be transformed into mere instruments bearing compulsive responsibility of producing human. Although becoming pregnant is a noble human act, no other situation that can be more burdensome and condemnable when the pregnancy is forced. Once the bearer is denied of its right to either carry the pregnancy or not, the outcome cannot be considered to constitute the fulfillment of one's highest duty, and instead of right it becomes a form of slavery. Thus, except in situation when a woman voluntarily seeks counseling or consent, the fact that a woman is a master of her own body has to be recognized; she has the right to make and implement final

decision on matters relating to conceive or not to conceive a pregnancy, to continue or not to continue a pregnancy, and space pregnancies. In order to ensure the birth and development of free human beings, from a human rights perspective, it is important for a mother to be free. It is important to take into consideration, that a mother's servitude cannot be a source of freedom for her children.

- 34) A child born out of an unwanted pregnancy may be a lifelong burden for the woman which will not only affect the best interest of both the mother and child, but it also may have some societal consequences. Therefore, the first priority of the human being is to ensure that the pregnancies are wanted and legal and other measures for ensuring highest level of protection of such wanted pregnancies are adopted.
- 35) While considering the third question, relationship between abortion and women's human rights and legal rights - the request made by the petitioner Lakshmidevi sheds light on the relationship between the right to reproductive health especially the right to abortion with the other human rights of women, and how the absence of one right affect the enjoyment of other existing rights.
- 36) Woman's right to physical or sexual freedom cannot be ascertained unless reproductive health is recognized as women's right, as it transforms the right to become pregnant into a responsibility. Women will be denied of abortion even in compelling situations that require abortion on physical or other grounds, and to they have to suffer the conditions of criminalization in silence. Such dehumanization of women's health may lead to fatal consequences, due to which women may not be able to exercise their right to life including the right to live with dignity, freedom, equality, or participate fairly as competent, educated, and active members of society. Thus, rights guaranteed to women under international treaties, the Constitution and the prevalent laws are pushed to a point where they become unachievable. If to become pregnant willingly is the noblest form of human service, a forced pregnancy is a serious conspiracy against a woman's freedom.
- 37) A woman who was forced to have an unwanted pregnancy experiences physical and mental torture and may have to endure physical and mental health related issues during each pregnancy and post-natal periods; her life may be at risk; and she may have to bear expenses for protecting her health as well as the pregnancy. During that period, she may lose opportunity of employment or income generation, which in turn may affect her professional development; child rearing becomes the biggest responsibility for a woman, and she may have to consecrate all her

interests, rights, and happiness. As a result, it affects the enjoyment of women's various rights including the right to freedom (Article 12), the right to equality (Article 13), the right relating to health (Article 16), the right to employment and social security (Article 18), the right to education and culture (Article 17) and the right to property (Article 19). The gravity of its impact on all these rights is more serious in case the pregnancy is uncertain, and it further creates challenging situation in the exercise of some other rights, including the right to privacy (Article 28), the right against torture (Article 26), the right against exploitation (Article 29) and the right relating to justice (Article 24). All the above-mentioned rights must be comprehended in the context of women's rights as per Article 20.

- 38) Aforementioned Article prohibits any form of discrimination against women on the ground that she is a woman, provides for the right to reproductive health and right relating to reproduction to every woman, and prohibits physical, mental or any other forms of violence against women. While pregnancy is a noble act, when forced, it may become a cause of violence against women, and based on men's rights and women's responsibilities may also become a cause of inequality. Therefore, in order to keep women free from discrimination resulting from the practice of categorizing women based on whether or not they have been pregnant, it is necessary to recognize the right of women to have the final say regarding their pregnancy.
- 39) As Article 20(2) states that every woman has the right to reproductive health and right relating to reproduction, it is also necessary to understand the two different concepts of right to reproductive health and the reproductive right. Reproductive health is associated with the physical, mental health and societal happiness relating to the reproductive capacity of women. The Programme of Action of the International Conference on Population and Development (ICPD) describes "reproductive health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity in all matters relating to the reproductive system, and to its function and processes." It therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Reproductive health and reproductive rights stand in relation to one another. It is only when one's reproductive health is in good state that one can fully enjoy their reproductive rights; similarly, it is only when one has reproductive rights that their reproductive health can be fully protected. This relationship has been recognized wisely by Article 20 of the Constitution.

- 40) Reproductive rights may appear as the right that protect reproductive health and the right to make decision enabling its exercise. The essence/ spirit of this right lies in the attainment of the highest possible sexual and reproductive health and the right to freely take decision about reproduction without any external pressure. In a broad sense, reproductive health and reproductive rights encompass the decision to bear children and not bear children and within that the right of a pregnant woman to terminate an unwanted pregnancy she does not wish to continue is also, *ipso facto* incorporated. Otherwise, the right to freely decide about reproduction, which falls within the scope of reproductive rights, is restricted and it makes reproductive rights meaningless. Reproductive rights cannot be only understood as creating an obligation to reproduce, it includes within their scope the right not to reproduce. Reproductive rights must be envisioned in the same way just as a right to undertake a certain act inherently includes the freedom not to engage in such an act.
- 41) Another significant aspect of reproductive health and reproductive rights is protection of violence against women. The acts of forcing to conceive unwanted pregnancy or to terminate a pregnancy both constitute violence against women. The right to abortion as a part of reproductive right not only includes the right to terminate a pregnancy but also includes the right to protect pregnancy. The right to abortion is the right to be exercised only when there is an unwanted pregnancy or in difficult situation; it is not the right to oppose pregnancy at all times, therefore, it is necessary to consider the right to abortion within an appropriate limit.
- 42) On several occasions women are subjected to different forms of discrimination including discrimination, disqualification, exclusion, social stigma, etc. due to their pregnancy. A sense of violence is rooted in any incongruous discrimination. This is expressed in the extreme forms of violence against women including rape, forced impregnation, forced contraception, or forced abortion. Therefore, the protection of reproductive health and reproductive rights in reality is necessary to ensure women's freedom from physical, mental or any other forms of violence.
- 43) Significance of reproductive health and reproductive right is not only an issue relevant to adult women, rather also rights of children or elderly women. Taking into consideration the life-long impact of pregnancy on a minor's health and other rights, the State has a duty to provide adequate protection of her reproductive health and other related rights.

- 44) As reproductive health relates to a woman's personal life, her control over the information relating to any event pertaining to reproductive health has special importance. Article 28 of our Constitution has a separate provision on right to privacy. It has provided that except in circumstances provided by law, privacy in relation to any person, and their residence, property, documents, records, statistics correspondence, and reputation are inviolable.
- 45) As woman's reproductive health status, including whether or not a woman has had an abortion or whether or not she is pregnant, is treated as a personal matter, it should be protected and kept confidential except in the circumstances as specified by the law, such as, record keeping for administrative purpose, providing information for the knowledge or the record of a doctor, or on the request of the concerned person, or for the purpose of approved audit or research. As the aforementioned Article guarantees privacy of a person, it appears to make inviolable the state of reproductive health of a woman, or pregnancy, or abortion. If such information is not kept confidential, it may create hurdles for women to live with dignity or they may encounter discrimination or suffer violence. Thus, the provisions relating to the right to reproductive health and reproduction in Article 20, and the right to privacy in Article 28 of the Constitution are correlated and are complementary to each other.

Therefore, it is clear that, right to abortion as a reproductive right is closely related with various fundamental and human rights.

- 46) Now, let us consider the fourth question as to whether or not the petitioner has a right to accessible and affordable abortion. The petitioner Lakshmidevi Dhikta has contended that though the eleventh amendment of the Country Code has legalized abortion to some extent, she was asked to pay a service fee of NPR 1130/- by the government hospital at Dadeldhura to avail the service. Her inability to pay the service fee caused continuation of her pregnancy and birth of sixth child.

Taking into account the aforementioned problem, the petitioners have made special request for making abortion services accessible and affordable.

- 47) The rejoinder submitted by the respondents in response to the above-mentioned demand of the petitioners, state that there is no reason to make them defendants and that they have done nothing that adversely affects the rights and interests of the petitioners, so the writ be quashed. On the other hand, the rejoinder submitted on behalf of the Department of Health Services, Family Health Division, and National Centre for AIDS

and STD Control states that the Safe Abortion Service Procedure, 2003 has been issued to implement the legal provision relating to abortion contained in No. 28 B of the Chapter on Homicide as amended by the eleventh amendment of the Country Code.

- 48) Section 14(1) of the said Service Procedure states that in lieu of providing safe abortion services, health institutions, doctor or health workers may charge service fees from the service seeker. The reason behind permitting qualified and registered health workers and the health institutions to provide such services as prescribed by the Procedure is to make the services available to the general population. Requesting to quash the writ petition, the respondents contended that it was necessary to prescribe certain amount of service fee and while ascertaining the service fee not exceeding NPR 1,000 that includes the cost of medicines, the cost that may be levied based on the geographical region has also been taken into consideration. They further contended that an initiative will be taken to make free services more effective for those who are unable to pay the fee due to economical reason, till date, these services have been made available in 70 districts, and that there is positive intention on the establishment of a separate fund to avail these services to the poor women, and also that a system to maintain the confidentiality of women seeking this service already exist.
- 49) Prior to the eleventh amendment when the Country Code categorized abortion as a criminal offence punishable under the law, many women were forced to continue unsafe pregnancy. Women even succumbed to death as they could not undertake abortion in critical conditions. Moreover, it was found that, while opting for illegal abortion due to lack of safety measures they either succumbed to death or if survived faced life-long reproductive health complications and were forced to bear the immense burden in case they gave birth to a child born with physical deformities. In a context where neither the State nor the family prioritizes investing in women's health, it is found that (women) are forced to bear the burden of increasing health related expenses, and the child born out of unwanted pregnancy have to face problems in family and society. Due to the criminalization of abortion, those who could afford sought abortion services abroad, whereas, a greater impact of criminalization was found on those who cannot afford such options. The related sector stated that the criminalization of the abortion led to several consequences, i.e. abortion service becoming a lucrative profession for the abortion service providers in the country.

- 50) In this situation, though the criminalization of abortion has specifically or adversely impacted the economically weak, illiterate and rural women, in general, it has an overall impact on all women.
- 51) At present, No. 28 B of the Chapter on Homicide added through the eleventh amendment of the Country Code has legalized abortion to certain extent, and the provision contained in Article 20 of the Interim Constitution have opened doors for addressing one of the prime factors responsible for violence against women. However, the main question is the extent to which the concerned group has been able to practically benefit from the legal provision.
- 52) The right to health is considered as a human right. In addition to abortion being a right to health, it is also considered a woman's right. Though right to health is regarded as human right, the State has not been found providing free medical services for treating health related problems. In fact, most of the medical expenses are borne personally. The more developed the countries and their economy is, greater is the State's investment on medical facility and wider is the distribution of the benefits. If the investment made on public health worldwide is surveyed, nearly 90% of that is of the highly developed western countries. Very low investment is found to have been made in the developing countries, especially the poor countries. The percentage of the gross domestic product that should be invested in the health sector is serious human rights policy question for the State. The State has an indivisible interest and responsibility towards protecting and treating health of its general population; however, it is affected by the State's capacity and its development stage. Hence, every State is required to implement it in a progressive manner on the basis of its international obligation, domestic legislations, and social realities. This responsibility needs to be especially viewed in the context of the International Covenant on Economic, Social and Cultural Rights.
- 53) Though the question of safe abortion and accessibility of the abortion service is a matter related to health, administration and economy, it cannot be isolated only as a social and economic issues as the ground for claiming this right is based on Article 20, which is related to women's rights and other fundamental and legal rights of women.
- 54) General application and observance of the laws is the essence of the rule of law. To ensure rule of law, rights, interest or benefits created by law should be equally accessible to the common people and should not be confined to a particular class or certain people. Equality and justice



are the main foundations of the rule of law. There cannot be equality without justice and there cannot be justice without equality. These are mutually complementary concepts. Within the right to equality, various constitutions in the past have protected the right to be equal before the law, and equal protection of the law, yet, in a divided society of different class and groups, equality in reality has not been achieved. Article 13 of the Interim Constitution provides for undertaking special measures for the advancement of the disadvantaged class, women, senior citizens or children; yet, equality has not been achieved.

- 55) Thus, a fact to be duly regarded is that the purpose of guaranteeing the fundamental rights like equality, freedom, and justice in the Constitution and legislation is not merely declaratory and people must be able to benefit from them in practice. However, the inclusion of such provisions in the Constitution and legislation does not automatically guarantee them. For the same, it is necessary on the part of the State to disseminate information about the law, build necessary infrastructures for the implementation of the law, establish necessary institutions, build the capacity of institutions or the human resources working in the institutions, and continue programs to ensure the distribution of services and facilities according to people's needs. On the other hand, the State should also support to build the capacity of the concerned individuals or community to enjoy relevant services or benefits of such legal rights, processes, institutions and programs. The primary function of the State is to enable individuals to exercise their rights according to their needs. Rule of law, democracy and good governance will remain as a myth so long as *status quo* remains in the situation of those who are unable to take care of their interests, realize or exercise their rights guaranteed by law, and fully represent themselves. Illiterate people and prosper democracy; weak people and strong democracy; and despondent people and active democracy can never happen. Similarly, the rule of law cannot achieve its ideals where the people do not even have little information about their rights, knowledge about how to exercise their rights and the financial and other means to do so. The bitter truth is that, no matter how modern, intellectual or scientific the law or decisions are, unless the benefits accruing from them effectively and extensively reach to the grassroots level, they cannot make meaningful contribution to the implementation of the rule of law. Therefore, it is necessary to understand that the nature of our rule of law is not determined by the type of laws or institutes established in the State rather is determined by the effective implementation of the law and the situation and number of population benefitting from it.

- 56) Though reform of abortion law and the provisions enshrined in the Interim Constitution relating to women's right to reproductive health and the right to reproduction open positive avenues, how progressive and practical they are stands in its own place. The more important issue here is the implementation status of the legislation and extent to which the individuals or the people seeking abortion service have been able to benefit from them.
- 57) Following the abortion law reform and the adoption of provision relating to reproductive rights, some positive initiatives include training of the abortion service providing health workers and doctors, increasing the number of institutions providing services or service centers, the adoption of the Safe Abortion Service Procedure, 2003, have taken place, and the targeted class have been able to benefit from them to some extent.
- 58) The rejoinder submitted by the respondents mentioned that the reason behind Section 14(1) of the Safe Abortion Service Procedure, 2003 that entitles health institutions, doctors or health workers to charge service fee from the service seeker, is to allow the registered health workers and the health institutions to provide such services and to make the services accessible to all the general population. It has also been contended in the written response that it was necessary to prescribe service fees for providing the services including at the government health centers not exceeding NPR 1,000 including related medical expenses.
- 59) The aforesaid contention shows that the main functions of the government sector are to authorize the health institutions or health workers including government and non-government sectors to provide such service and to curb the tendency of charging arbitrary amounts as service fee by ascertaining the maximum limit.
- 60) In order to make abortion services accessible, it is necessary to increase the number of registered health workers or doctors and to ensure their distribution across the country. Instead of being concentrated in one place, it is also necessary to decentralize and distribute health institutions providing services so that maximum population can benefit from them. Likewise, it is also necessary that the service fees charged by both the government and non-governmental health institutions are reasonable and commensurate with the service seeker's ability to pay. However, the written response has not addressed this issue appropriately. How many health institutions have been registered till date? How many health workers and doctors have been listed? Have they been or not been provided with quality training? How many of such health institutions

providing services exist and in which parts of the country? Which health institutions have provided what type of services and where? What is the ratio of fees charged? What is the quality of abortion service and complications following abortion? What are the additional arrangements besides health-related facilities to address those complications? What are the policy related decisions on all these matters and what is the monitoring mechanism? Many such related questions will emerge in this regard. But these issues have not been addressed even to a limited extent in any of the written responses.

- 61) To ensure that the needy women for whom, in reality, such services have been created may not be deprived of them only because of geographic remoteness or procedural hassles or their inability to pay the fees in spite of their strong willingness and urgency to avail the abortion service. It is necessary to pay attention to various matters such as the distribution of health institutions providing services and their services across the country; strengthening of the capacity of necessary human resources of these institutions and deputing them to work at various places; making their services standardized and reliable; ensuring that service fee is compatible with the standards of the provided services and that it commensurate with service seeker's ability to pay and that the service seeking procedure is prescribed in advance and is not unnecessarily time-consuming or troublesome.
- 62) The legitimacy of the abortion service or the relevance of its availability will be meaningful only if it becomes accessible and affordable to those in need of it.
- 63) The awareness on abortion is only confined to the urban and comparatively educated communities till date. Due to this reason, though flow of unsafe abortion is high in rural areas, the demand for such services and the service providers is mostly confined to the urban areas. Thus, unless these services are easily and widely extended beyond the urban areas to the rural areas, concerned rural population will remain out of this service network.
- 64) As far as the question of the service fees to be charged by the service providers raised in the writ petition is concerned, it appears from the written responses that a maximum limit of NPR 1,000- that includes the medical expenses, has been prescribed. It has been argued that, since both the governmental and the non-governmental organizations provide such services, service fee in the governmental organizations is relatively cheaper than the private sector whose charges are relatively

more expensive. In fact, comments can be made on the justification of the fees charged by them only after considering the quality of service provided by the concerned health organizations.

- 65) As services can be provided by both the public or private sector health institutions and the concerned service providers can themselves determine the service fees, they tend to do so as per their convenience. To assess whether or not the service charge are within the scope of the person's ability to pay, it is necessary to integrate the fees prescribed by any health institution with its quality of service, and the paying capacity of service seeker. It is also found that such determination of fees cannot be similar for all health institutions. The most important thing however is that if a woman who needs an abortion is unable to obtain the service simply because of the unaffordability of the service and there is a provision of service fee beyond her paying capacity, it is not only unjust but also an irony. If a woman who needs abortion is unable to do so because of procedural complexities and exorbitant service fees or is forced to continue the pregnancy and give birth, then it must be recognized that the benefit created by law has not been enjoyed by its intended beneficiaries.
- 66) The written responses have not mentioned who is legally responsible for monitoring whether the fees prescribed currently by the different service providers are exorbitant or not.
- 67) In this case, one of the petitioners Lakshmidēvi Dhikta is seeking remedy for her inability to pay the prescribed service fee of NPR 1,130.00 demanded by the health institution for providing services. The Department of Health Services claims that the services to indigents are provided for free. Though important, there is no clear provision in the law as to when and on what conditions the abortion services shall be provided free of cost. Unless such basic matters are specified, a situation will arise where those in need of the service do not approach the services or are unable to do so. Unless the conditions, procedure and locations for providing free services do not reach the needy people, the abortion services cannot be deemed as affordable and accessible to those groups.
- 68) Government institutions such as the Ministry of Health or the Department of Health Services, who are entrusted with the regulatory role should assess the quality of services and the appropriateness of service fees and prescribe reasonable service fees accordingly.
- 69) Lakshmidēvi Dhikta, one of the petitioners has pleaded her inability to pay the service fees. Although half of the world's population comprises

of women, instead of establishing required hospitals and health service centers that focus on women's health and reproductive rights, and allocating adequate budget, there are very limited number of women centric health facilities. Most of the hospitals or health centers are geared towards responding to men's health needs and women are forced to seek services in such facilities.

- 70) As far as the legal basis for ensuring the accessibility and affordability of such services is concerned, it is the primary obligation of the State to prioritize the implementation of these rights once they have been recognized as fundamental rights.
- 71) To ensure the enjoyment of legally recognized rights or facilities, in accordance with the principle of equality before the law and equal protection of the law pursuant to Article 13 of the Interim Constitution, the State must create a conducive environment allowing people from different places or areas to have access to abortion services on equal basis. It has been contended in the written response that till Chaitra 19, 2063 B.S. (April 2, 2007 A.D.), 359 doctors have been trained and registered and the service had been extended in 70 districts except in Rukum, Rolpa, Salyan, Terhathum and Kalikot districts. Compared to the past, this development can be considered encouraging. However, it is also important to consider the situation from the point of view of distribution and consumption of services and examine how many registered doctors or health workers are actually present in the districts and in how many health facilities or centers such services are actually available. The abortion service also needs to be extended immediately to those remaining districts where it is yet not extended.
- 72) An analysis of the data relating to how many service seekers have been able to obtain abortion services per district will be helpful to determine whether service extension is fairly distributed.
- 73) In fact, all these works are concerned with the executive body that develops the policy, implements, and monitors the services to make them affordable and accessible. It is not feasible for the court to be concerned with the daily routine of such policy related issues and their implementation. The concern of the court is focused on whether or not the rights granted by the Constitution and the law have been protected and promoted. In the backdrop of increased awareness of the people on democratic norms, fundamental rights and human rights including their increased expectations from the judiciary in relation to the enjoyment and protection of their rights, the court due to its social and legal responsibility towards practical realization of the legally granted rights,

it cannot merely declare about the rights but should attempt to ensure its actual observance and implementation. The rights given by the law are also the issues relating to the interests of the people. If law creates any benefits or interests, their equal distribution i.e., their enjoyment on equal basis, is also necessary. The responsibility of the judiciary cannot be denied in respect of the right to equal protection of the law that also implies equal accessibility and affordability of all to the benefits of the law.

- 74) The present writ petition has been filed highlighting the problem faced by Lakshmidevi Dhikta, one of the petitioners, who in addition of being a rural, poor and scheduled class woman, was forced to continue the pregnancy since she could not afford to pay even the minimum abortion service fee charged by the government hospital. The respondents have neither refuted that charge nor have they expressed any commitment to resolve her personal problem. She and the other petitioners represent themselves and many other women having similar background. Through the written response received from the Department of Health Services, it cannot be considered that the above-mentioned class has an easy access to the service and that it is affordable, taking into account the amount of service fee. The main relevant issues [in this context] include the law on abortion; establishment of places and centers for providing abortion services; its information dissemination; awareness raising programs on suitability or unsuitability of abortion; arrangements of counseling centers and providing counseling to service seekers; norms for prescribing reasonable fees and its monitoring; arrangement of assistance by the State for providing free service to the needy ones who are unable to afford the fee; and making service accessible and affordable. The written responses of the respondents fail to demonstrate that the abortion service has been made accessible by developing the necessary infrastructure required for exercising the right provided by the law.
- 75) To the extent that abortion is a service required only by certain individuals, the question is as to whether or not the State should provide it for free. As abortion is a health concern and that the right to health has been guaranteed as fundamental right, it should be regarded as the right to life. Furthermore, our country's Constitution has recognized the right to social justice, and the Directive Principles of State Policy establish the special protection to women's right as an important responsibility of the State. Therefore, the right to abortion or pregnancy related concerns cannot be regarded as a personal problem and isolated from the public duties of the State.

- 76) Now, let us consider the fifth question – the petitioners have demanded for a separate abortion law. Indicating poverty, illiteracy and absence of adequate legal provisions related to abortion as the reasons, to ensure safe and accessible right to abortion, the petitioners have requested for the issuance of a directive order in the name of the Ministry of Law to enact a separate and clear law on abortion.
- 77) The petitioners themselves have mentioned that the eleventh amendment of the Country Code has provided right to abortion as a reproductive health right. That makes it clear that in the present context there is no legal gap in respect of the right to abortion as such. Nonetheless, questioning the adequacy of the existing law, the petitioners have demanded for the enactment of a separate and specific law on right to safe and affordable abortion. This indicates the inadequacy of existing provisions related to abortion, and therefore petitioners have demanded for a law which includes right to safe abortion and practical provisions to ensure its affordability.
- 78) Generally, nobody can approach the judicial bodies for demanding the State or its organs to enact any specific law or any specific type of law. Such a demand should be put before the authorized Legislature. As the law emanates from a political process and the representatives of the people are required to lawfully express it, the court cannot interfere for the enactment of a particular type of law. However, in present case, the petitioners have not asked for a law in the form of a pure political demand, rather they have made this demand against the backdrop of fundamental rights stated in various Articles of the Interim Constitution. Especially, they have taken recourse to Article 13(1) and the proviso clause of Article 13(3) of the Interim Constitution. Sub-article (3) has provided as follows: “Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment and advancement of women, Dalits, indigenous ethnic tribes (*Adivasi Janajati*), Madhesi or farmers, labourers or those who belong to a class which is economically or socially backward, or children, the elderly, disabled or those who are physically or mentally incapacitated.” Though, Article 16(2) provides every citizen with the right to free basic health services as provided by the law, and Article 20 incorporates right to reproductive health as women's right, it has been argued against this backdrop that there is no separate law for the implementation of these fundamental rights.
- 79) In this manner, as the Constitution itself has declared that law can make provisions to protect the rights and interests of women, in the absence of necessary law the basic infrastructure development for the exercise of

women's rights, or equality, and health is not possible, thus, the demand of the petitioners cannot be termed as of a political nature. As the Interim Constitution itself has recognized various rights of women and has assured to provide them by formulating necessary laws, it becomes an obligation of the State to enact necessary laws.

A review of the rejoinder presents diverse views in regard to the claims made by the petitioners for the enactment of law.

- 80) In its written response, one of the respondents, the Interim Legislature Parliament, has stressed on the need of enacting a law in line with Article 16 of the Interim Constitution that provides for the right to free basic health services as provided by the law. However, it has also argued that the Legislature Parliament does not take initiatives on its own for the formulation of law, as it is a body that engages itself for the adoption of Bills formally registered by the Government of Nepal or one of its members by applying due process and therefore, contended for registration of a government Bill regarding free health services. This is something of worth consideration.
- 81) Generally, in order to implement its policies and programs, the government is required to propose the Legislature Parliament to enact necessary laws. Likewise, in the capacity of people's representative, any member may also propose the enactment of necessary law. Whether any Bill is registered through a governmental or non-governmental procedure, it falls under a legislative function. The Legislature cannot categorize its formal and essential work on the basis of the process through which the Bill is presented or who has presented the Bill. Even if a procedural argument is put forward contending that a government Bill needs to be introduced as providing free health service has a financial aspect, that is only a procedural matter; the Legislature on any ground whatsoever cannot brush aside its obligation as the enactment of law is a matter of its fundamental obligation. If the Constitution makes it mandatory to introduce legislation for the implementation of a particular fundamental right, then the only way it can be put into practice is through the speedy enactment and implementation of the legislation. Once the constitution makers declare a fundamental right in favor of people, to exercise it and to obtain a remedy becomes person's inherent right. Thus, in its capacity of being the State's organ it also becomes the responsibility of the Legislature, besides other organs of the State, to establish necessary preconditions for the enjoyment of such right. Neither the government nor the legislature entrusted with the responsibility to enact the law can either impede or impassive the enjoyment of a fundamental right by



failing to introduce relevant law or delaying the process. Therefore, the Legislature Parliament cannot argue for being free from its obligation of enacting law.

- 82) Amongst the respondents, the written response submitted by the Office of the Prime Minister and the Council of Ministers has contended, that the court does not need to issue an order as the eleventh amendment of the Country Code has made provisions to manage, dignify and guarantee the right to abortion as a woman's right and that the procedure have been adopted to implement those provisions. Moreover, the enactment or amendment of law is the sole jurisdiction of the Legislature Parliament and the Office of the Prime Minister and the Council of Ministers cannot regulate such matter. Therefore, this office should not be included as respondent and request to quash the writ.
- 83) The Legislature Parliament has argued in its written response that since it cannot take the lead in law-making, a government Bill ought to be brought forward. On the other hand, the Office of the Prime Minister and the Council of Ministers has pleaded that it cannot regulate the enactment of law since this is the sole jurisdiction of the Legislature Parliament. These conflicting statements have, in fact, created confusion as to who is responsible for making the law. There is no dispute that the State mechanism should function in line with a constitutional approach. According to that approach, under the doctrine of Separation of Powers between the State organs and the principle of check and balance, normally, the Legislature enacts the law, and the Executive implements the law. Other organs [of the State] are also required to assist in the execution of this sectorial work. The government by tabling the Bill or the Legislature by adopting the policy and program presented by the government assists each other in its work or ought to support each other. In this manner the complete State mechanism is created. In the present case, both the Legislature and the Executive have submitted their written responses brushing aside their obligations regarding lawmaking, which gives an indication of the sensitivity these institutions display towards the fundamental rights of the people. In reality, it is both a joint as well as an individual responsibility of both the organs to take necessary actions for the enactment of laws i.e., the submission of necessary Bill including allocation of budget by the Executive in accordance with constitutional requirement and by enabling the Executive to submit necessary Bill or resolution for making them accountable towards the rights of the people or by regulating the submitted Bill in line with the legislative procedure. Therefore, the court disagrees with the arguments raised by both the respondents in their written responses.

- 84) So far as the written response submitted by the Ministry of Law and Justice regarding the enactment of law as per the demand of the petitioners is concerned, the Ministry argues that no order be issued as requested by the petitioners on the ground that the eleventh amendment of the Country Code already recognizes the right to abortion and various other legal provisions related to the women's right already exist in Article 20, and under the Responsibilities, Directive Principles and Policies of the State of the Interim Constitution.
- 85) The written response submitted by the Ministry though argues that safe and affordable abortion services are guaranteed by the prevalent law, it does not mention any reason why there should be no separate law on abortion as demanded by the petitioners.

Therefore, it is expedient to consider this case in totality of the demands raised by the petitioners.

- 86) Due to the prevalence of extremely traditional views on abortion, prior to the eleventh amendment of the Country Code, abortion was strictly criminalized. As a result, mostly women were prosecuted and punished for this crime. It is found that, in a way, woman's unique reproductive capacity was used against her in a conspiratorial way.
- 87) Till date, abortion is a part of the Chapter on Homicide in the Country Code. This gives the impression that by criminalizing abortion, the fetus within the womb has been recognized as life. It is not justified to include abortion related provisions in the chapter on Homicide, as the Constitution and other existing laws have not recognized right to life of a fetus before birth.
- 88) The Chapter on Homicide does not define life. Following the eleventh amendment, with the incorporation of new provisions on abortion in No. 28 B of the Chapter on Homicide that provides for safe abortion on request till the first 12 weeks of pregnancy, it is clear that the fetus is not recognized as life/living. It is inappropriate to incorporate a matter not included in the definition of human life into the Chapter on Homicide.

In this changing context, with the recognition of reproductive health and abortion as a woman's right, it is necessary to adopt a new and different way of thinking that is suitable for the establishment of these rights.

In fact, being a very old statute the Country Code deals with issues related to traditional crimes, and that attempts have been made in the recent days for the modernization of the criminal law. It can be expected that

these issues will be resolved through the enactment and enforcement of the specialized Civil Code or Criminal Code.

- 89) Since abortion is a new and sensitive issue evolved through greater public consciousness and it is important to convey the correct message to the public, it is no longer appropriate to treat it as an issue of Criminal Law and retain it especially in the Chapter on Homicide. Even though abortion has been decriminalized under specific circumstances, so long as it is retained as a part of the Chapter on Homicide, abortion will carry the impression of criminality.
- 90) Besides that, No. 28 B of the Chapter on Homicide only prescribes minimal conditions, i.e., circumstances in which abortions may be performed and sanctions for any unlawful interference with the pregnancy. Abortion entails many considerations, minimum of which are not currently dealt by the law. These include women's rights, health, safety; techniques and procedures for abortion; the competencies and duties of abortion providers; registration and legitimacy of abortion facilities; the management of record keeping of abortion related information and confidentiality; provisions related to service fee for abortion; public awareness on abortion; provisions for counseling on abortion; regulatory bodies and complaint hearing mechanisms; and right to remedy etc. The current provisions of Nos. 28 A and 28 B added to the Chapter on Homicide through the eleventh amendment of the Country Code simply have minimum provisions related to offence and punishment, and thereby cannot be accorded separate and independent recognition as a law on abortion. As the current legal framework is inadequate, the government has had to "make do" with the issuance of the Safe Abortion Service Procedure, 2003, to regulate the safe abortion services. In fact, the legality of the Procedure is not even clear. If such situation continues, it is not known, how many more executive orders the government will have to issue from time to time to tackle it. This issue cannot be resolved in a comprehensive and sustainable manner by the application of an inadequate legal framework and with an *ad hoc* approach. As reproductive health and abortion are the issues related to legal rights, the availability of legal and safe abortion can be fully realized only if diverse programs for public are implemented upon determining a definite legal framework, rights and duties, as well as processes. It is conflicting and extremely unsuitable to keep the provisions on abortion – this newly recognized right – within a harsh and rigid criminal law framework as currently done in the Chapter on Homicide. Taking into consideration the spirit of abortion related provisions introduced through the amendment,

it is necessary to regulate abortion as a separate and specific issue by introducing a separate legislation.

- 91) Addressing the sixth question as to whether or not the petitioner Lakshmidevi Dhikta is entitled to compensation, it was observed that due to lack of education and awareness and in the absence of knowledge that giving birth to unnecessary number of children is a subject of women's reproductive right, she went to Dadeldhura hospital for seeking abortion service after becoming pregnant even after giving birth to five children, where she was asked to pay NPR 1,130 as the service fee. As she did not have the said amount, she was denied from availing the legally provided services which created a situation wherein she had to continue with the unwanted pregnancy and give birth to a child, and therefore suffered physical, mental and economic loss resulting from the violation of her constitutional and legal rights and demands the issuance of an order to provide her with necessary compensation.
- 92) In the context where a woman is prevented from exercising her right to abortion or is denied the related services and thereby forced to continue the pregnancy, it is clear that this right as part of reproductive rights guaranteed by the Constitution and other laws, has been violated. In a situation where a pregnancy is continued and child is born, it is not possible to reinstate the violated right. In such situations, only remedial measures can be availed to the affected person whose rights have been infringed.

Compensation is one of the several remedies that can be provided for the impact on woman for having to raise a child and been forced to continue a pregnancy to a term.

- 93) If health providers and facilities do not become sensitive towards this right and if steps are not taken to ensure that they are ready and equipped to provide abortion services, there is a strong possibility of widespread violations, and women requiring services may be continuously denied the ability to exercise their legal right. Moreover, issues relating to pregnancy should not be viewed as being limited to the fetus but that they may relate more broadly to women's physical and mental health. Pregnancy may cause problems in various organs of a woman's body.
- 94) In *Tysiac vs. Poland*,<sup>17</sup> a case filed by a Polish citizen Tysiac in the European Court of Human Rights, accusing the government hospital of Warsaw for denial of providing abortion services that lead to the injury of retina creating a possibility of blindness, the court held that Poland had infringed the right guaranteed under the European Convention on

Human Rights and had failed to fulfill its positive obligation towards a woman seeking service. In addition, taking into consideration the importance of time factors in cases of abortion, the court stressed the need for making necessary reforms in the service procedures for timely judicial resolution. Besides this, the court directed that the woman be paid 25,000 Euros as compensation in order to provide some relief for her suffering and damages and also to reimburse 14,000 Euros spent by the woman in the course of seeking judicial remedy.

- 95) In Mexico, a thirteen-year-old girl,<sup>18</sup> who became pregnant due to rape when sought abortion services, was denied services by the employees of a government hospital on the pretext of religious and personal beliefs, and, as a result, she was forced to give birth to a child. In a case lodged before the Inter American Commission of Human Rights by two Mexican human rights activists and the Center for Reproductive Rights on behalf of the girl, the dispute was resolved amicably after the Mexican government accepted its obligation arising out of its refusal to provide abortion services and agreed to provide the victim girl reparation for the damages caused, bear the educational expenses of the child as well as issue a manual on providing abortion service to the victims of rape.
- 96) Therefore, the issue of abortion must not be confined to the question of whether or not to give birth to the fetus, and whether or not abortion can be undertaken, rather, it is an issue that has broader implications for overall women's health. Accordingly, it is necessary to have a proper legal system for remedies to address multi-dimensional problems that may arise as a result of the violations of the right to abortion, or refusal to provide such services, or due to poor quality of services. In terms of legal remedies, there must be appropriate provisions for punishment to the guilty, compensation for the victim and other facilities for the victim's health. Since there are expectations from the State or service providers for the fulfillment of the right to abortion it cannot be considered only as a matter of State's discretion or a voluntary will.
- 97) Various legal systems that recognize the right to abortion are found being particularly sensitive towards this issue. The European Court of Human Rights, the Inter American Commission of Human Rights and the domestic courts of some European countries have given judgments to provide compensation in cash and in other forms, after assessing the damage suffered by women resulting from the failure of the institution or organ responsible to provide abortion services.
- 98) In the context of the present case, in the absence of a separate comprehensive law on abortion, no efforts seem to have been even

made to address these questions. Questions in relation to providing compensation remain unanswered in the absence of clear law and procedures. Therefore, these issues need to be specifically addressed while making adequate provisions relating to abortion. It is the duty of the State to provide remedies including compensation on its behalf or on behalf of the service providers taking into consideration, the suffering caused to the victim as a result of the failure to provide required and quality services. It also needs to be addressed through enactment of law or through judicial remedies, in appropriate occasions.

- 99) Addressing the last question as to whether or not the order as requested by the petitioners should be issued, it has already been analyzed in the context of the questions raised above. While considering in totality, though reproductive rights have been recognized as fundamental rights in the Constitution, it is found that no law has been enacted taking into consideration various problems related to abortion, a critical part of this right. Notwithstanding limited provisions on abortion that exist in the Country Code, rather than recognizing abortion as a right of the needy and desirous women, it has been established as criminal law. Also, there is lack of adequate provisions for safe, reliable, accessible, and quality service to the service seeking women that complement the fundamental right. No amendments have been made in relation to integrating all abortion related provisions, and to maintaining confidentiality of women while receiving service or approaching judicial services. In the present legal framework, there is a lack of clarity on the qualifications, competence and liability of the service providers resulting in the lack of expansion of required services for all needy women of the country; there is no provision to address a situation in which women are not deprived of services even due to their inability to pay the service fee; lack of a standardized regulatory mechanism to regulate the practice of charging arbitrary service fees; as well as lack of resources required to make such arrangements etc. Women in need of seeking abortion services confront adverse situations as a result of the conventional thoughts that contribute to creating various myths around abortion services as well as due to the lack of precise information regarding the nature of abortion services, its procedure and impacts, and about the organizations or persons providing such services. Therefore, in order to also safeguard individuals against such situations, it is necessary for the State to introduce special public awareness programs on abortion and various aspects relating to it.

- 100) Abortion services have not been expanded and decentralized to cater to the requirement of all the needy and desirous people throughout Nepal. In addition, no initiatives have also been taken to standardize the service fees for curbing the variations and practice of charging arbitrary fees, and to provide free services in the public health facilities to the needy people who are deprived of services only because of their inability to pay the service fees. Therefore, an order of Mandamus is issued in the name of the respondents including the Office of the Prime Minister and the Council of Ministers to take necessary and appropriate measures to maintain confidentiality of the records having information of women who receive abortion services from the health facilities as well as of personal identity of these women in the process of seeking judicial services; to ensure the uniformity in service fee by removing variations; and, through specific programs to carry out extensive dissemination for raising awareness and providing correct information about various aspects of abortion for removing traditional negative notions about abortion and for informing service seekers on the proper and responsible use of available services.
- 101) Additionally, a directive order is issued in the name of the respondents including the Office of the Prime Minister and the Council of Ministers, the Ministry of Health and Population, and the Ministry of Law and Justice to take necessary and appropriate initiatives to enact a separate and comprehensive law on abortion incorporating all the above-mentioned various aspects as well as reproductive health related provisions of the international human rights laws.
- 102) In relation to the compensation claimed by the petitioner Lakshmidevi Dhikta on the ground that she had gone to the nearest hospital to seek abortion service but was forced to continue the unwanted pregnancy due to her inability to afford the fee, the public officials should provide the requested services required for the enforcement of constitutionally recognized right in an affordable manner, and due to the violation of such right, if a situation of infringement continued due to continuance of unintended pregnancy, [the Court] deems that it will be appropriate to compensate such person including through judicial remedy after taking into account the damage suffered by that person. In this case, even though the petitioner has not submitted any physical evidence regarding denial of service to her, it is worth considering that through this writ petition she has broadened the remedial measures by representing not only herself but also many other women confronting problems like her. However, it is not possible to compensate her as per the demand as it fails to specify

certain figure of compensation on the basis of assessment of the damage. Let this order be circulated to the respondents and handover the case file as per the rules after crossing off from the registration list.

I concur with the aforesaid opinion

(Rajendra Prasad Koirala)

Judge

Done on Jyestha 6, 2066 B.S. (May 20, 2009), Wednesday

Bench Officers: Ramesh Prasad Gyawali and Bimal Poudel



## ENDNOTES

1. [http://dictionary.cambridge.org/dictionary/british/abortion\\_1](http://dictionary.cambridge.org/dictionary/british/abortion_1)
2. Roe v. Wade, 410, U.S. 113 (1973)
3. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
4. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
5. States Parties recognize that every child has the inherent right to life.
6. States Parties shall ensure to the maximum extent possible the survival and development of the child.
7. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
8. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
9. The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
10. State Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:
  - (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
  - (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
  - (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programs and the adaptation of teaching methods;
  - (d) The same opportunities to benefit from scholarships and other study grants;
  - (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programs, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
  - (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
  - (g) The same opportunities to participate actively in sports and physical education;
  - (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.
11. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:
  - (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
  - (b) To introduce maternity leave with pay or with comparable social benefits without loss of

- former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
  - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
12. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.
  13. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
  14. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
    - (a) To participate in the elaboration and implementation of development planning at all levels.
    - (b) To have access to adequate health care facilities, including information, counseling and services in family planning;
    - (c) To benefit directly from social security programmes;
    - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
    - (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
    - (f) To participate in all community activities;
    - (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
    - (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
  15. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
    - (a) The same right to enter into marriage;
    - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
    - (c) The same rights and responsibilities during marriage and at its dissolution;
    - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
    - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
    - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
    - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
    - (h) The same rights for both spouses in respect to the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
  16. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
  17. *Tysiac v. Poland*, App No. 5410/03 (2007), European Court of Human Rights.
  18. *Paulina del Carmen Ramirez Jacinto v. Mexico*, case 161.02, Report No. 21/07, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007).



CENTER *for*  
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