

## Decriminalization of Abortion in Nepal: Imperative to Uphold Women's Rights

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## Nepal's Commitment to Women's Reproductive Rights

Guaranteeing safe motherhood and reproductive health rights as women's fundamental rights,<sup>1</sup> the Constitution of Nepal (2015) (the Constitution) reiterated Nepal's earlier commitment to women's reproductive rights.<sup>2</sup> Working towards implementing these fundamental guarantees, on September 18, 2018, Nepal took the monumental step of enacting an umbrella legislation, the Safe Motherhood and Reproductive Health Rights Act (SMRHR Act), and on October 12, 2020, adopted the Safe Motherhood and Reproductive Health Rights Regulation (SMRHR Regulation).

The SMRHR Act aims to respect, protect and fulfill woman's safe motherhood and reproductive health rights<sup>3</sup> and to provide safe, quality, affordable, and accessible maternal and reproductive health services.<sup>4</sup> The SMRHR Act comprehensively covers matters related to safe motherhood,<sup>5</sup> family planning,<sup>6</sup> safe abortion,<sup>7</sup> and reproductive-health-related morbidity.<sup>8</sup> It specifically provides a broad definition of reproductive health rights that includes the right to obtain reproductive health services, counseling, and information, and the right to determine the number and spacing of children.<sup>9</sup> It prohibits discrimination in the availability of reproductive health care services,<sup>10</sup> and requires that such services be confidential,<sup>11</sup> and adolescent- and disabled-friendly.<sup>12</sup> Additionally, it makes all reproductive health care services free of cost at all government health facilities,<sup>13</sup> requires all levels of government, including the federal, provincial, and local levels, to allocate a specific budget for reproductive health services;<sup>14</sup> and provides for a reasonable amount of compensation to the victim of an offence committed under the Act.<sup>15</sup>

The SMRHR Act is comparatively progressive as it specifically recognizes women's right to access abortion as a right to reproductive health.<sup>16</sup> The previous law on abortion under the Country Code and the National Penal (Code) Act (2017) (the Penal Code), did not recognize abortion as a right and allowed the procedure only under certain circumstances as an exception to "abortion" as a crime.<sup>17</sup> The SMRHR Act allows abortion with the consent of the pregnant woman up to 12 weeks of gestation.<sup>18</sup> It also conditionally permits abortion up to 28 weeks of gestation for pregnancies resulting from rape or incest, in situations where the woman suffers from HIV or a similar incurable disease,<sup>19</sup> or when failure to undertake an abortion may pose a threat to the life of a pregnant woman, adversely affect her mental or physical health, or cause a fetal impairment.<sup>20</sup> The SMRHR Act specifically prohibits forced abortion—when the procedure is performed without the consent of the pregnant woman or when force, violence, or intimidation is used against her.<sup>21</sup>



Although the Safe Motherhood and Reproductive Health Right Act aims to respect, protect, and fulfill women's reproductive rights, its provisions in relation to abortion have failed to fully achieve this.

## Nepal's Restrictive Provisions on Abortion

Although the preamble of the SMRHR Act aims to respect, protect, and fulfill women's reproductive rights, its provisions in relation to abortion have failed to fully achieve this. Under the SMRHR Act, following restrictions remain:

- i) ***Abortion remains under the purview of criminal law:*** The SMRHR Act fails to remove abortion-related provisions from the purview of criminal law. In matters pertaining to the punishment for abortion undertaken beyond legal conditions, the SMRHR Act refers to the provisions of the Penal Code and specifically states that abortion-related punishment provisions will be dealt with in accordance with the Penal Code.<sup>22</sup> Accordingly, the Penal Code provides for imprisonment for a term up to one year and maximum fine of Rs 10,000 for abortion of pregnancy up to 12 weeks of gestation; imprisonment for a term up to three years and maximum fine of Rs 30,000 for abortion of pregnancy after 12 weeks and up to 25 weeks of gestation; and imprisonment for a term up to five years and maximum fine of Rs 50,000 for abortion after 25 weeks of pregnancy.<sup>23</sup>
- ii) ***Ending pregnancy after 28 weeks of gestation is denied even to save a woman's life:*** The SMRHR Act introduces regressive provisions, prohibiting abortion after 28 weeks of pregnancy. Unlike the provisions of the Country Code and the Penal Code, which allowed abortion at any time of gestation if the pregnancy posed a danger to the pregnant woman's life or physical or mental health, or if there was a risk of fetal impairment, the SMRHR Act permits abortion only up to 28 weeks of gestation in these circumstances.<sup>24</sup>
- iii) ***Women continue to be penalized for undertaking abortion beyond legal conditions:*** The SMRHR Act fails to fully decriminalize abortion. It prohibits abortion when it is outside of the legal conditions<sup>25</sup> and when it is performed by an entity other than approved health institutions or service providers.<sup>26</sup> The SMRHR Regulation covers matters related to listing of health service providers<sup>27</sup> and health institutions<sup>28</sup> to provide legal abortion services; appropriate technologies and processes for providing abortion service;<sup>29</sup> and procedural matters for seeking a woman's consent for abortion.<sup>30</sup> By specifically prohibiting women from seeking abortion beyond the prescribed legal conditions,<sup>31</sup> the SMRHR Act continues to penalize women who seek abortion after the prescribed gestational limit, or from unlisted service providers or health institutions.
- iv) ***Definition of abortion also includes miscarriage:*** The definition of abortion provided by the SMRHR Act includes "spontaneous ... termination of fetus from uterus before it becomes capable of natural birth."<sup>32</sup> As a result, even miscarriage caused accidentally or without any outside intervention would fall under the purview of "abortion." This misleading definition could lead to prosecuting a "natural miscarriage" as an illegal abortion.



The fact finding study conducted by CRR and FWLD revealed that the criminalization of women for undertaking abortion beyond the legal conditions is aggravated by the lack of clarity in the law, biased mindset of law enforcement agencies against abortion as a crime, stigma of women obtaining abortion, and lack of family support and legal representation, resulting in prosecution of women.

## Nepal's Restrictive Abortion Law Leads to Prosecution of Women and Girls

Historically, Nepali women have borne the burden of criminalization of abortion in Nepal. In 2001, prior to the introduction of legal exceptions on the general ban on abortion at the time, a study was conducted by the Center for Reproductive Rights (CRR) and the Forum for Women, Law and Development (FWLD). The resulting report, *Abortion in Nepal: Women Imprisoned*,<sup>33</sup> revealed that 57 women had been sent to 26 prisons across the country after being prosecuted for abortion and infanticide offenses. The testimonies of 19 of these women revealed “a fact-pattern suggesting abortion, i.e., termination of pregnancy within nine months.” Similarly, in 2017 CRR and FWLD conducted a fact-finding study in 16 districts of Nepal for *Reforms Required in Laws Related to Abortion and Its Enforcement: Facts Revealed from the Review of Case Files*.<sup>34</sup> It revealed that between 2011 and 2016, 53 abortion-related cases were registered in the district and high courts. Of these cases, 13 were against women for ending their pregnancies; five of those women were convicted, and four of the five were imprisoned. In the cases of the five women who were found guilty, they were unaware of the legal exceptions to the penal provisions on abortion and lacked information about facilities where safe abortion services were available. The lack of knowledge forced them to seek an abortion from an unlisted provider, which was illegal.<sup>35</sup> The 2017 study revealed that the criminalization of women for undertaking abortion beyond the legal conditions is aggravated by the lack of clarity in the law, biased mindset of law enforcement agencies against abortion as a crime, stigma of women obtaining abortion, and lack of family support and legal representation,<sup>36</sup> resulting in prosecution of women. The study revealed cases where penal provisions were used to prosecute women on the suspicion of illegal abortion without a proper investigation, and even in cases of lawful abortion. The cases of Asha and Sarita illustrate these examples:

### ASHA<sup>37</sup> PROSECUTED ON SUSPICION OF ILLEGAL ABORTION, WITHOUT PROPER INVESTIGATION

Asha, along with her partner and an abortion service provider from Siraha District, was prosecuted after being suspected of getting an illegal abortion. The appellate court in Rajbiraj dismissed the case on the grounds that people cannot be sentenced merely based on a suspicion.

In its decision, the appellate court held that:

*The denial statement of the defendants is further corroborated by the testimony of the witnesses. Medical report has also affirmed the denial statement of the defendants. In a serious and sensitive case such as illegal abortion, the plaintiff has failed to prove the accusation and claims by factual proofs and evidence. The accused persons could not be held liable for a criminal offence and be sentenced for it merely based on suspicion that they might have committed the alleged offence.*<sup>38</sup>



### **SARITA<sup>39</sup> PROSECUTED FOR LAWFUL ABORTION**

Declaring a lawsuit filed against Sarita as a case of lawful abortion, the Baitadi District Court held that:

*[Records] show that the woman was admitted to a hospital after experiencing bleeding. The pregnancy of a gestation somewhere between six to ten weeks was terminated with the woman's consent by a medical practitioner licensed to perform abortion pursuant to No. 28B of the Chapter on Homicide of the Country Code. ... Therefore, it is hereby decided to acquit her of all charges and prosecution claims.<sup>40</sup>*

Moreover, because law enforcement agencies lack clarity on the definitions of abortion, miscarriage, infanticide, and stillbirth, there have been cases where a woman was prosecuted for intentional homicide even when the cause of a newborn's death was undetermined, or for illegal abortion for experiencing a miscarriage. The cases of Puja and Kalpana illustrate these examples:

### **PUJA<sup>41</sup> WAS PROSECUTED ON CHARGE OF INTENTIONAL HOMICIDE AFTER NEWBORN DIED OF UNDETERMINED CAUSES**

Puja was prosecuted on the charge of intentional homicide. The appellate court of Biratnagar acquitted her, validating the verdict of the Morang District Court, which had acquitted the defendant of the charge and claims of a criminal offence of murder of a newborn baby after a live birth.

In its decision, the appellate court observed that:

*[Prosecutor] did not confirm that defendant had actually killed a newborn baby rather they only stated their mere belief to be so, the fact that there was no eye-witness available who had seen her killing the child after giving birth, the fact that the prosecution has failed to present any material or objective evidence to prove the alleged offence, and the fact that the cause of death is reported to be "undetermined" in the autopsy report. ...<sup>42</sup>*

### **KALPANA<sup>43</sup> SUFFERED A MISCARRIAGE, THEN WAS PROSECUTED ON CHARGE OF ILLEGAL ABORTION**

The Siraha District Court acquitted Kalpana, who had a miscarriage but was accused of illegal abortion by the prosecution.



In its judgment, the Court noted that:

*The situation examination report and the autopsy report of the fetus neither proved nor confirmed that the said defendant performed or caused to perform an abortion of the fetus. Whereas, neither the documents and pieces of evidence collected and enclosed within the case file confirm the allegation that the accused had committed an offence of illegal abortion nor has the plaintiff been able to prove the said allegation irrefutably and beyond any reasonable doubt. ...<sup>44</sup>*

In all the above-mentioned cases, though women have been finally acquitted by the court, they had to suffer unnecessary pain and emotional distress by being subjected to legal actions against them based on suspicions of having obtained an illegal abortion. The 2017 study also noted instances where the criminal provision against women for undertaking illegal abortion led to the punishment of a minor girl, in a case for ending a pregnancy resulting from rape. The case of Sita illustrates this example:

#### **SITA,<sup>45</sup> A MINOR GIRL, WAS CONVICTED AFTER TAKING ABORTIFACIENTS**

*Fifteen-year-old Sita, who got pregnant as a result of rape, ended her pregnancy at around 20 weeks by consuming medical pills her father obtained from a local pharmacist. Sita's district court statement notes that she sought an abortion to safeguard the reputation of herself and her family. The court convicted Sita of an illegal abortion and sentenced her based on her admission. However, the court acquitted both the father and the pharmacist, because the father had asked her not to take the medical pills despite purchasing them for her, and the pharmacist's involvement was not proved.<sup>46</sup>*

Aforementioned stringent provisions of the SMRHR Act still link abortion-related provisions with criminal law, restrict ending pregnancy after 28 weeks of gestation even to save a woman's life, criminalize women for undertaking abortion beyond legal conditions, and has a misleading definition of abortion that also includes miscarriage. In the backdrop of past trends of abortion law implementation as reflected by the 2017 study, the current law poses continued risk of legal prosecution against women on a charge of "illegal abortion" in any circumstances.



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To enable Nepali women to realize their fundamental human rights and to ensure access to safe abortion services, Nepal must take immediate steps to amend the SMRHR Act to broaden the scope of legal abortion by decriminalizing abortion in all cases, including for ending pregnancy after 28 weeks of gestation when necessary to save the life or health of the woman or girl, or in cases of pregnancies involving fetal impairment.

*To fully decriminalize abortion, Nepal must take concrete steps to eliminate punitive measures for women who undergo abortions and for health care providers who provide abortion services, including by repealing the penal provisions on abortion under the Penal Code.*

## Nepal Must Fully Decriminalize Abortion

Criminalizing women for undertaking abortion beyond legal conditions cannot be justified as a means to save them from unsafe abortion. Despite criminalization, in circumstances where legal abortion is not available or accessible, women resort to seeking services from illegal providers under illegal settings. According to a study, less than half (42%) of all abortions were provided legally in government-approved facilities in Nepal, and the remainder (58%) were clandestine procedures provided by untrained or unlisted providers or induced by the pregnant woman herself.<sup>47</sup> Such situations become more compelling during humanitarian crises, including earthquakes, and pandemics such as COVID-19. During those times, the availability and accessibility of essential reproductive health care services, including contraceptives and legal and safe abortion services, are negatively affected due to restrictions in mobility, the strain in health facilities and systems, economic challenges, and existing gender and social inequalities.<sup>48</sup> Under such conditions, women are further compelled to seek illegal and unsafe abortion, even in cases where it is within legal gestational limits, and are thereby exposed to possible criminal penalties.

Furthermore, the criminalization of abortion violates the enjoyment of the constitutionally guaranteed fundamental rights of Nepali women, including their rights to dignified life,<sup>49</sup> to freedom,<sup>50</sup> to equality,<sup>51</sup> to free basic health services and equal access to health services,<sup>52</sup> and to safe motherhood and reproductive health.<sup>53</sup> Criminalization also denies women the right to self-determination in the reproductive decision-making protected under the SMRHR Act.<sup>54</sup> This also disregards legal obligations under the Public Health Service Act (2018) that prescribed abortion as basic health service to be provided free from the State to every citizen.<sup>55</sup> In addition, Nepal's National Health Policy (2019) also focuses on making safe abortion services qualitative and effective.<sup>56</sup> Recognizing women's right to abortion as a constitutional right and interpreting it as a right to reproductive health, the Supreme Court of Nepal, in its groundbreaking *Lakshmi v. Government of Nepal*<sup>57</sup> decision, opined that it is "conflicting and unsuitable" to keep the provisions related to the right of abortion within a "harsh and rigid criminal law framework."<sup>58</sup> In its decision, the Court issued a specific directive order to the Government of Nepal "to take necessary and appropriate initiatives to enact a separate and comprehensive law on abortion incorporating ... reproductive health related provisions of the international human rights laws."<sup>59</sup>

Full decriminalization of abortion will also be in accordance with the recommendations received by Nepal from human rights bodies. In 2018, raising its concerns on the criminalization of abortion in Nepal,<sup>60</sup> the Committee on the Elimination of Discrimination against Women (CEDAW) specifically urged Nepal to amend the SMRHR Act to "fully decriminalize abortion in all cases, to legalize it at least in case of risk to health of the mother, in addition to the cases for which it is already legalized, including in cases of rape, incest, severe fetal impairment and risk to the life of the mother, and allocate sufficient resources to raise awareness of safe abortion clinics and services."<sup>61</sup> In 2021, during the 37<sup>th</sup> session of the Universal Periodic Review, Nepal was specifically urged to "decriminalize abortion and concretely protect the rights and sexual and reproductive health of women and girls."<sup>62</sup>

Thus, to enable Nepali women to realize their fundamental human rights and to ensure access to safe abortion services, Nepal must take immediate steps to amend the SMRHR Act to broaden the scope of legal abortion by decriminalizing abortion in all cases, including for ending pregnancy after 28 weeks of gestation when necessary to save the life or health of the woman or girl, or in cases of pregnancies involving fetal impairment. To fully decriminalize abortion, it must take concrete steps to eliminate punitive measures for women who undergo abortions and for health care providers who provide abortion services, including by repealing the penal provisions on abortion under the Penal Code.



## Endnotes

- 1 THE CONSTITUTION OF NEPAL, 2072 (2015), art. 38(2) (Nepal) [hereinafter the Constitution].
- 2 INTERIM CONSTITUTION OF NEPAL, 2063 (2007), guaranteed right to reproductive health and right relating to reproduction as fundamental rights. Interim Constitution of Nepal, 2063 (2007), art. 20(2) [now repealed].
- 3 Safe Motherhood and Reproductive Health Rights Act, 2075 (2018), Preamble (Nepal) [hereinafter SMRHR Act].
- 4 *Id.*
- 5 *Id.*, at part 3.
- 6 *Id.*, at part 3, secs. 10, 11, and 12.
- 7 *Id.*, at part 4.
- 8 *Id.*, at part 5.
- 9 *Id.*, at part 2, sec. 3.
- 10 *Id.*, at part 8, sec. 29.
- 11 *Id.*, at part 2, sec. 4.
- 12 *Id.*, at part 8, sec. 28.
- 13 *Id.*, at part 8, sec. 32 (1).
- 14 *Id.*, at part 6, secs. 22 and 23.
- 15 *Id.*, at part 7, sec. 27.
- 16 *Id.*, at part 2, sec. 3(5).
- 17 In 2002, the eleventh amendment to the *Muluki Ain* (Country Code of Nepal) introduced legal exceptions to the general ban on abortion. In 2017, the Country Code of Nepal was replaced by separate civil and penal codes—the National Penal (Code) Act, 2017 and the National Civil (Code) Act, 2017, and the abortion related provisions were kept under the chapter called “Offence against Protection of the Pregnancy” in the Penal Code. The *Muluki Ain* [Country Code], part 4, ch. 10, no. 28(b), 28, 28(a), 29 (1963) (Nepal) [now repealed]; National Penal (Code) Act 2074, part 1.2, ch. 13, sec. 188 (2017) (Nepal) [hereinafter Penal Code].
- 18 SMRHR Act, *supra* note 3, at part 4, sec. 15(a).
- 19 *Id.*, at part 4, sec. 15(c) and (d).
- 20 *Id.*, at part 4, sec. 15(b) and (e).
- 21 *Id.*, at part 4, sec. 16.
- 22 *Id.*, at part 7, sec. 26(c).
- 23 National Penal (Code) Act 2074, part 1.2, ch. 13, sec. 188(3).
- 24 SMRHR Act, *supra* note 3, at part 4, sec. 15(b) and (d).
- 25 *Id.*, at part 4, sec. 16 (1).
- 26 *Id.*, at part 4, sec. 18; and Safe Motherhood and Reproductive Health Rights Regulation, 2077 (2020), part 3, rule 13 (Nepal) [hereinafter SMRHR Regulation] Available at <https://reproductiverights.org/sites/default/files/documents/Safe-Motherhood-and-RHR-Regulation-2077.pdf>.
- 27 SMRHR Regulation, *supra* note 26, at part 3, rules 12, 14 and 15.
- 28 *Id.*, at part 3, rules 11, 14, and 15.
- 29 *Id.*, at part 3, rule 17.
- 30 *Id.*, at part 3, rule 18.
- 31 SMRHR Act, *supra* note 3, at part 4, sec. 16(1), and at part 7, sec. 25(g).
- 32 *Id.*, at part 1, sec. 2(d).
- 33 Center for Reproductive Law and Policy, Forum for Women, Law and Development, *Abortion in Nepal: Women Imprisoned 25* (2002). Available at [https://reproductiverights.org/sites/default/files/nepal\\_2002.pdf](https://reproductiverights.org/sites/default/files/nepal_2002.pdf). Note: Center for Reproductive Law and Policy has since been renamed Center for Reproductive Rights.



- 34 Center for Reproductive Rights, Forum for Women, Law and Development, *Reforms Required in Laws related to Abortion and Its Enforcement: Facts Revealed from the Review of Case Files* (2017) (in Nepali) [hereinafter 2017 fact-finding study]. The study was based on the abortion cases registered between fiscal year 2011/12 to 2015/16 in 16 districts of Nepal where the fact-finding was conducted; out of the 53 cases, 13 cases were against women ending pregnancies, seven were related to infanticide, five were related to forced abortion, and 28 were abortion caused as a result of third-party actions, including by beating.
- 35 *Id.*
- 36 The researchers of the 2017 fact-finding study defended the accused women in the cases where no legal representation was available. They were successful in obtaining acquittals in two cases, from Biratnagar Appellate Court and Jhapa District Court, and in a case at Morang District Court, they were successful in reducing the woman's sentence by subtracting the time spent in custody during an investigation. Cited by 2017 fact-finding study, *supra* note 34.
- 37 Pseudonym used to protect the privacy of the woman.
- 38 Judgment of Appellate Court Rajbiraj dated Jan. 10, 2015, cited by 2017 fact-finding study, *supra* note 34.
- 39 Pseudonym used to protect the privacy of the woman.
- 40 Judgment of Baitadi District Court, dated Aug. 14, 2016, cited by 2017 fact-finding study, *supra* note 34.
- 41 Pseudonym used to protect the privacy of the woman.
- 42 Judgment of Appellate Court, Biratnagar dated March 7, 2014, cited by 2017 fact-finding study, *supra* note 34.
- 43 Pseudonym used to protect the privacy of the woman.
- 44 Judgment of Siraha District Court, dated July 13, 2016, cited by 2017 fact-finding study, *supra* note 34.
- 45 Pseudonym used to protect the privacy of the woman.
- 46 Case file from Ilam District Court of a lawsuit decided on Dec. 17, 2015, cited by 2017 fact-finding study, *supra* note 34.
- 47 Mahesh Puri et. al., *Abortion Incidence and Unintended Pregnancy in Nepal, International Perspectives on Sexual and Reproductive Health*, Vol. 42, No. 4 (December 2016), pp. 197-209.
- 48 World Health Organization (WHO), *Addressing Human Rights as Key to the COVID-19 Response* (21 April 2020). Available at <https://www.who.int/publications-detail/addressing-human-rights-as-key-to-the-covid-19-response>.
- 49 The Constitution, *supra* note 1, art. 16.
- 50 *Id.*, art. 17.
- 51 *Id.*, art. 18.
- 52 *Id.*, art. 35(1) and (3).
- 53 *Id.*, art. 38(2).
- 54 SMRHR Act, *supra* note 3, at part 2, sec. 3(3).
- 55 Public Health Service Act, 2075 (2018), chapter 2, sec. 3(4)(b) (Nepal).
- 56 National Health Policy, 2076 (2019), strategy no. 6.20.5 (Nepal).
- 57 Lakshmi & Others v. Government of Nepal, Decision No. 8464, N.K.P. 2067, (Vol. 9) at 1551 (2009).
- 58 *Id.*, at para. 90 (2009).
- 59 *Id.*, at para. 101 (2009).
- 60 Committee on the Elimination of Discrimination against Women, *Concluding Observations on the sixth periodic report of Nepal*, para. 38, U.N. Doc./CEDAW/C/NPL/CO/6 (2018).
- 61 *Id.*, at para. 39(b), p. 14/18.
- 62 Draft report of the Working Group on the Universal Periodic Review Nepal, rec. 6.135, U.N. Doc. A/HRC/WG.6/37/L.7 (2021). Available at <https://uprmeetings.ohchr.org/Sessions/37session/Nepal/Documents/Nepal%20-%20Chronological%20List%20of%20Recommendations.docx>