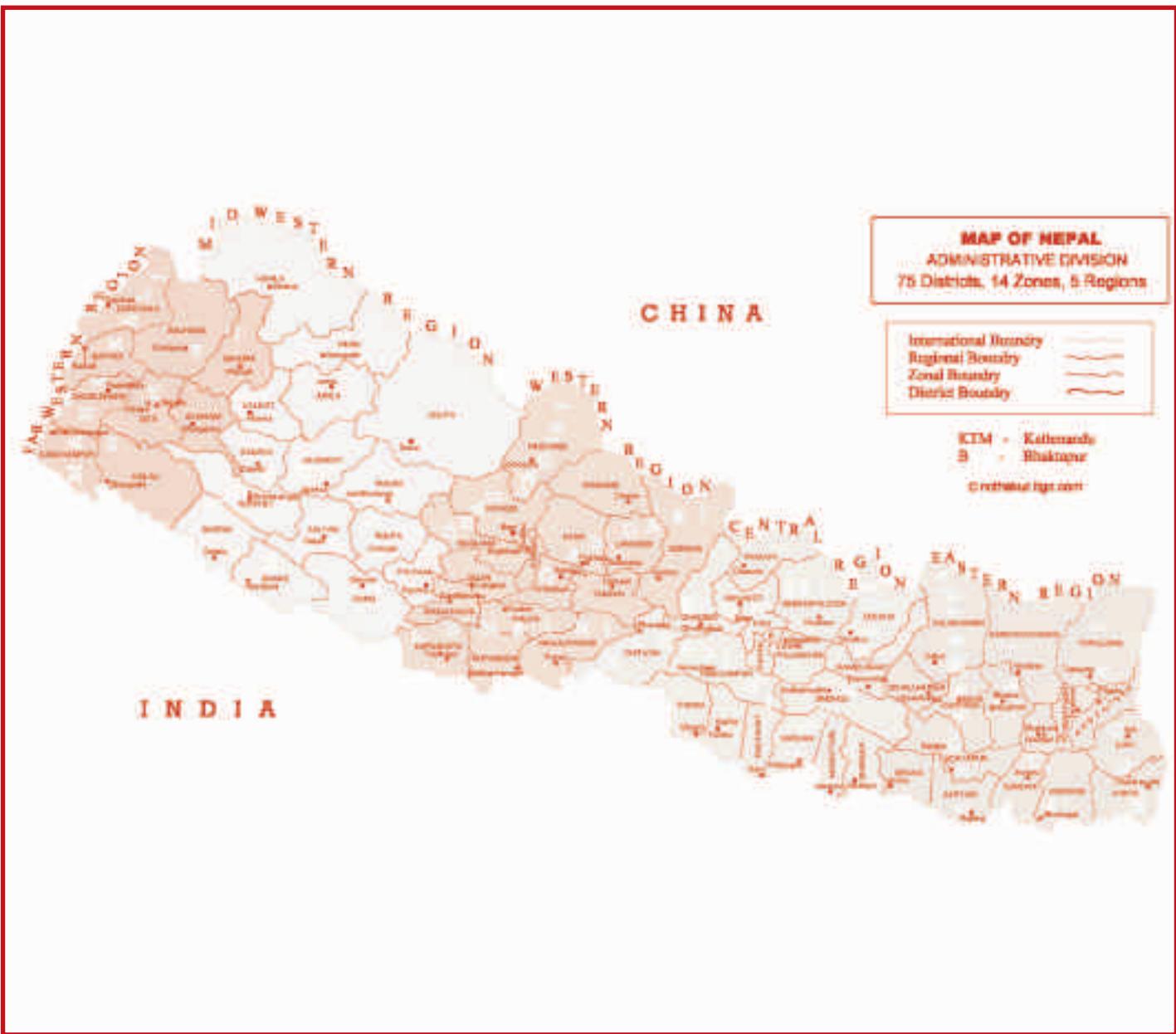


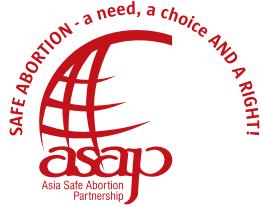
# A Study of Knowledge, Attitudes and Understanding of Legal Professionals about Safe Abortion as a Women's Right



## IN NEPAL







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**Background:** Sexual and Reproductive rights and health for the women of Asia sometimes appears to be a distant vision. The ICPD, the Millennium Development Goals and the Beijing Declaration notwithstanding, maternal mortality continues to be high in many parts of Asia and patriarchal society structures reinforce women's lack of autonomy and decision making capacities thus putting their lives at risk on a daily basis through deprivation, physical and sexual violence, rape, unsafe abortions, and others. Unsafe abortions still contribute to 13-50 % of the maternal mortality in some of these countries.

The Asia Safe Abortion Partnership (ASAP) [www.asap-asia.org](http://www.asap-asia.org) was formed in March 2008 as the regional network supported by the International Consortium for Medical Abortion (ICMA) [www.medicalabortionconsortium.org](http://www.medicalabortionconsortium.org). The objectives of ASAP are to promote new technologies for safe abortion, serve as a forum for information and experience sharing, strategic thinking and planning for a collective vision aimed towards regional/ international advocacy and support members to advance the partnership goal in their country contexts through law and policy advocacy, capacity building, research and documentation and service delivery.

The ultimate goal of ASAP is : "To promote, protect and advance women's sexual and reproductive rights and health in Asia by reducing unsafe abortion and its complications; and where it is legal, by promoting access to comprehensive safe abortion services."

A number of studies, particularly in the recent past have looked at the issue of safe abortion services, their reach and the perspective of both users and service providers. Therefore, ASAP planned a multi-country study that went

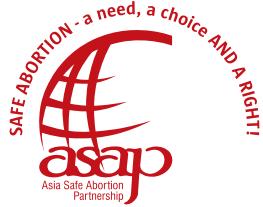
beyond the community- provider interface and explored the views of gatekeepers such as lawmakers and implementers who are outside the service provision field. A survey of legal professionals and law enforcement officials was planned with a view to assess their level of understanding and support for safe abortion as a women's right and public health issue in countries where abortion laws are restrictive and where it is legal.

The aim of the study was to obtain an understanding of the differences in knowledge, attitudes and understanding among legal professionals and law enforcement officials towards women's rights to safe and legal abortion in countries where abortion is severely restricted and where it is legal, in order to inform the strategies for advocacy to liberalize abortion in those countries.

In order to make significant changes in improving access to safe abortion reforming national laws and policies (especially in restrictive environment); setting forth more effective principles and guidelines for public information and service delivery (in countries with more liberal policies); and other changes may be critical. When it comes to examining the law as it is and the law as it should be, it is therefore important and necessary to look at the role of the legal profession as agents of change.

The legal profession, in its first sense, means not only the private practitioners, but also the judges, magistrates, law students, and law professors (academe). Lawyers after all, make use of the law to defend or prosecute women or abortion service providers who are held to account under the law; the academe's opinions are consulted by the judges and magistrates who in turn, interpret the provisions of the law and decide the fate of the woman/service provider accordingly. Legal experts (whether private practitioners, members of the judiciary or the academe) are always at

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the forefront in legislative advocacy - drafting of bills, as well as providing legal expertise and support for the sponsors of proposed legislative measures, to ensure that the proposed measure measures up to the agreed-upon standards, i.e., the Constitution and in many cases, the state's international commitments.

The court is a powerful arena to effect changes in society. Through the avenue of the courts, restrictive laws may be stricken down as invalid; failure to implement the law by state agents, may hold these state agents liable, in their official as well as personal capacity; refusal to heed the requirements of the law, may also compel the courts to enforce compliance by these state agents. Needless to say, the role of the lawyer in advocating for these reliefs, and of the judges / magistrates in deciding to grant and ordering the reliefs sought, are important in society purporting to be under the rule of law, where society evolves and changes are effected, in part, through the courts and justice system.

Legal profession, when used in this study, however, does not simply refer to those who have had formal schooling in law and are bestowed the titles as such. This study adopts an expanded definition of the legal profession and includes also legislators, high ranking police personnel, jailers, medical practitioners, head of hospitals, and other persons who are tasked with the implementation of the law, as well as those whose opinion and experience may be given weight in legal and policy advocacy.

While the members of the legal profession are important agents of change in society, they cannot effect lasting change on their own. We recognize that these changes in the field of law and policy need to be propelled and informed by the experiences and wisdom of those at the ground level in the implementation of the law.

The study findings are expected to help in a greater understanding of the perspectives of this group and will inform future capacity building, attitude reconstruction

efforts and the development of advocacy tools for action.

### Research Questions:

The main research questions asked were:

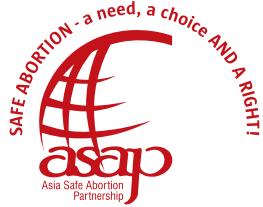
- Are legal and law enforcement personnel aware of the abortion related law in their country?
- What is their attitude towards access to safe abortion being seen as a women's right?
- What is their understanding of safe abortion (or lack of it) as a social justice and public health issue?
- What impact do they perceive this has on access to safe abortion by the women in their country?
- What influences their position vis a vis women in the community ion the context of the right to safe abortion services?
- What interventions can be recommended to ensure a more supportive role for these persons in enhancing women's right to safe abortion?
- What can be recommended to improve the situation for women in these countries to improve their access to safe abortion services?

### Methodology:

Semi structured questionnaires were administered to 13 members of the legal profession<sup>5</sup>. The sample was representative and largely self selected.

The researchers did make a concerted attempt to identify those members who are involved in handling abortion related cases, or are in a position to influence policy debate, decision making process of the judiciary. However, in

5. Legal profession to include law students, practicing lawyers, magistrates, judges.



absence of persons from amongst the law professionals who had handled abortion cases, the interviews were conducted with representatives from the profession who were willing to discuss the issue.

Strict confidentiality was maintained of the identity and coding was used. The location and names of the respondents was coded using unique numeric codes. The master list of names and codes was available only with the principal investigator of the study and till the completion of data collection (to ease repeat access in case of incomplete interview). No other person associated with the study had access either to the name or the exact location of the respondents. This ensured that the confidentiality of the respondents was maintained.

### **Analysis focus**

Interviews were transcribed. They were coded and analysed using Atlas Ti. Analysis was also done manually as and when necessary. Secondary data analysis was carried out to describe the legal context of the communities under study.

Analysis was done to describe and demonstrate patterns, emerging themes, and specific characteristics linked to

1. Abortion laws, rationale, law enforcement mechanisms
2. Knowledge, attitudes, and perceptions amongst law professionals, enforcement officials and gatekeepers regarding unwanted pregnancies and abortion (safe / unsafe)
3. Differences in knowledge, attitudes, and perceptions amongst law professionals and enforcement officials regarding abortion laws, rationale, law enforcement mechanisms

**Sample:** The team interviewed 13 lawyers. Six of these are lawyers were women. Almost all of them had dealt with abortion related cases. But only two of them clearly mentioned that they had one or two cases every month.

One of them specifically handled cases dealing with gender based violence and rights based issues. Other dealt with all types of cases. The legal experience of these lawyers ranged from 10 to 33 years. Two lawyers also mentioned being involved in training programmes.

### **Findings**

The findings from the interviews of the legal professionals are presented against the overview of the abortion statistics and the legal context of abortion in the country.

### **Knowledge of respondents**

#### Abortion trends

No respondent had any idea about how many abortions take place annually. One respondent just said that the number was high there more cases in winter than in summer. The responses ranged from 1 lakh to 2.19 lakh and most of these were illegal. But most of the respondents agreed that number of abortions is increasing.

A young, fresh graduate lawyer said, "*I am not sure about the actual number, but I think it is a large number because we see cases in private clinics, hospitals and even in villages we hear of women using different herbs for abortion. I believe that unsafe abortions are practiced more widely than safe abortions*".

The common reasons listed for seeking abortion were unwanted pregnancy, illegitimate pregnancies out of pre and extra marital relationships, unawareness about contraceptives & so spacing/ small family, woman's health, prostitution, rape, incest, war/conflicts, migration etc. The women who sought abortions were mostly poor, illiterate, rural, lower class women, wives of migrant workers and sex workers. Two respondents were of the opinion that even educated women sought abortions and one said that high profile girls and teenagers also sought such services. One also mentioned that since it was previously illegal in the country, women went to India-Nepal border towns to get it done.

The young lawyers continued with the reasons for increasing abortion trend - in his view, “**Basically, women who are unaware about the contraceptives, women from the remote areas, women those who are unaware of such things, and women poor women living in the remote site are the victims**”.

An advocate with 20 year practice in Criminal and Civil law said, “*In my area monthly 15 to 20 abortions are done. Basically, this sort of abortion flow is high in winter than in the summer. This occurs due to the birth spacing, the concept of small family, pregnancy among the unmarried women, extra marital affair, sometimes due to rape and incest, and also after sex selection which is illegal in Nepal. Most women are poor and from the lower caste. Women who live in the remote areas practice unsafe abortion but those from the urban areas have safe abortion*”.

#### Abortion laws

Four of the respondents talked about “Muluki Ain” (Civil code) that included abortion in the chapter on Homicide and criminalized it. All the 13 respondents were aware of the new Abortion law in their country but only two could recall the year of its enactment. Some said that earlier laws were restrictive. To acknowledge women's right and in response to the commitment to improve women's health the new law was made.

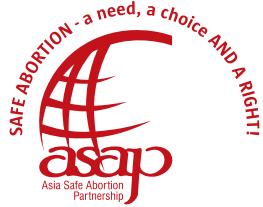
A male advocate with a decades practice in Criminal and Civil law and dealing with human and women's right issues said, “**According to the Muluki ain (Civil code) in Nepal abortion was a crime. As the code of ethic, if the life of the patient was at risk, only then abortion was allowed. We had a study among the people living in prisons, 65 women were in jail during that time, we did not find any male in the prison; and what we also found was the women who were there in the jail were all from the lower caste, women with low income and education. Sunil Bhandari bought a private bill "garva samandhak bidhayak" (Pregnancy Protection Bill). There were people who said that this would also bring in violence with it, and from that time till the date we are struggling**”.

The female advocate explained, “**In the beginning there was no law in the country before the amendment of Muluki Ain (Civil code 11). Due to which women had to keep her pregnancy even in case of rape and incest. There was no legal condition under which women could abort the pregnancy except if they had health problems. Women from urban areas countered this and went ahead and abortions whereas other women who were raped, were further victimized and went to the prison as per the law, if they had abortion. After the amendment of Muluki Ain the law has become more liberal, there is now a legal system for abortion**”.

Another female advocate elaborated on the new amended law, “**Nepal legalized abortion and abortion is now permitted up to 12 weeks of gestation on the request of the pregnant woman. Regarding, abortion service only authorized medical personnel's (health service providers) approved by the government are supposed to provide abortion services. Similarly law legalizes abortion up to 18 weeks in case of rape or incest with the woman's own consent, and a woman can abort at any gestation if the pregnancy is harmful to her, if the fetus is suffering from severely debilitating fetal deformity or disease, but this has to be certified by an expert and listed physician**”.

Majority (11/15) said that abortions were permitted up to around 12 weeks of pregnancy. Six of them also mentioned 18 weeks but only if the pregnancy had resulted due to rape or incest. Two respondents said that if there was a foetal deformity or if the women's health was an issue, it could be done anytime. Only one respondent categorically said that it wasn't allowed for sex selection.

Their awareness about laws in other countries and international agreements was virtually non-existent. Respondents justified their lack of awareness on the basis of non-inclusion of these agreements in their training curriculum. However, all of them were of the opinion that it should be included in the syllabus. Most of, them mentioned that gazette was their sources of updating information related to laws. One or two mentioned audio-visual media, 'Court' discussions, legal literacy programmes and training programmes by NGOs as source of updated information.



### Implementation and enforcement mechanism

With regard to implementing bodies a variety of agencies were thought of as implementing bodies. The list included Ministries: Health, Woman & Child, and Home, Municipality, Hospitals/Doctors, Judiciary such as District courts and lawyers, Police, District and Village Development committees, Civil Society and NGOs.

Despite the long list of implementing bodies, role of each one in implementation was not explicitly mentioned by most of the respondents.

*"The Village Development Committee, Municipality, District Development Committee, the Courts, Civil society and NGOS are the implementing bodies. Their basic role is in advocacy. Police have an important role. Their role is to investigate and convict. Police have the main role because abortion cases are State cases and the police have the primary role to investigate such cases", said a female advocate.*

Only one respondent felt that the implementation had improved over time. The one who said it was better than before, also said that people from border area go to India or to traditional healers in the village to get an abortion done.

### Legal outcome and trends

While trying to understand what trend the cases followed, what the outcome was, or about going to a higher court and who is charged for breaking the law, what was commonly said was that not many cases go to the court and certainly not to the higher court. One respondent also mentioned that such cases more often are settled internally. Except one respondent, all were of the opinion that lawyers did not avoid abortion related cases. One respondent clarified that acceptance or avoidance depended on the case.

A young female advocate who worked for a law firm said, *"I don't know much about the case flow, because in our organization we don't get such cases. Everyone (doctors, women, and husband) should be charged for breaking the law; especially the women and the person who has forced her for*

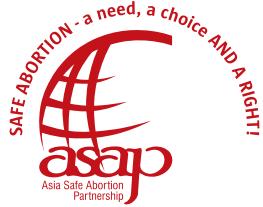
*sex should be charged but mostly such cases are handled internally".*

All were of the opinion that women are charged and there was a tendency amongst the judiciary to look only at medical reports to pass the judgment. While talking about legal outcomes, the responses were, "it is a judge's discretion", "women are blamed", and "norms, values, culture, society and tradition guide the decision".

A female advocate dealing with gender based domestic violence and women's rights said, *"Nepal being guided by Patriarchy, before the amendment of this law, women would get charged for doing an abortion. The norms, values, culture, society and tradition were the factors that influenced the decision making and outcome".*

A female advocate said, *"The punishment is specific to each country. Talking about Nepal, when there was no abortion law, the punishment for abortion was equivalent to that for killing people. Women were imprisoned for 20 years in case of abortion or if they threw a live baby. If a woman threw the baby alive, and someone found it and gave it back to her and if the baby died in a few days (2-3) then she was given less punishment".*

The female advocate dealing with gender based domestic violence and women's rights continued, *"I don't know if I am suppose to say this or not, but economy really plays a role in the case procedure, rich people withdraw case due to the reputation in the society. Yes there's a difference in married and unmarried and the economy does plays a role here. Those who are rich or have a supportive family, keep their own lawyer and those who can spend money will definitely go to the high court. Now with the help of free legal aid women can go to the higher court. There are some changes in the lower and higher court. For example, if the lower court has charged 10 years imprisonment for the abortion case, the higher court can and has been reducing the charge considering its criteria's. But in the end it is obviously the women who are charged for breaking the law".*



Some respondents also said that previously, because of stigma, women were punished but with the new law it is being looked at as women's right. Two respondents mentioned that husband and wife both are charged and one respondent said that if the doctor is not qualified he is also charged. According to some men bribed and escaped and women suffered. But now law is more in favour in women.

A few of them cited examples. One mentioned that a woman was convicted in the lower court but the Supreme Court 'cleared her of her charges'. Another respondent simply said that there was a case against a woman but she won. Yet another one said that "*the woman was cleared of the charges by the court but she was thrown out of the house by family members*".

## Attitudes

### Relevance of the Act

Four respondents categorically said that the laws were not relevant, particularly in a Hindu country according to one. These laws according to a few made the women "*wild*". The one, who said that the law wasn't relevant in the Hindu country, felt that it needed to be changed/amended because the law has adversely affected health and morality of women.

A senior advocate with three decades of legal practice in Criminal and Civil law was categorical in his criticism of abortion law, "*No, it is not relevant in the Hindu country like ours. It has made women wild. The moral aspect of women has decreased. It has a negative impact on the health and the morality of our women*".

One respondent felt that no change necessary if accessibility and affordability were improved. Rest all felt that a change/amendment was necessary to permit sex selective abortions, to remove the condition of 12 weeks gestation, to focus on either right to live or right to abort, or because even today abortion is looked at as crime.

When asked who should play a key role in this matter, several agencies were mentioned by the respondents. Policy makers, social organization (NGOs, INGOs), local bodies, civil society, activists and health educators were mentioned in the list. Their role was perceived as "should point out the gaps/lacking, advocacy, guide the law, etc. All felt that international agreements had a role to play and therefore had to be a part of law curriculum.

### Need for Amendments

All respondents knew that the law was amended but none could recall when it was amended. Two said that it was the 11th amendment. Giving the rationale one of them said, "*it was for challenging discriminatory punishment*".

Only two respondents were indirectly or directly linked with the process of changing the law. One of them expressed his disappointment, "*The law at present is not complete. It should have made access easy for women but the government has not taken any action*". The other one said that law and health ministries and FWLD, the NGO are the key movers in the process and they have drafted a new law based on data from 500 lawyers, and sent it to the Supreme Court to change the discriminatory provisions against women. Four respondents felt that a separate policy was necessary but for that country should be ready. For policy change these four saw a major role of NGOs, elected representatives, activities and civil society. One lawyer however felt that amendment was enough and no further modification of any kind was required.

### Abortion as Women's Right

All female respondents were of the opinion that abortion laws were to be viewed as an achievement in terms of women's rights. Similarly all of them agreed that the woman had a right to her own body. Three respondents said that the foetus too had rights

A male advocate said, "*Sexual and reproductive rights are right of the woman to decide on pregnancy and number of children. 'Aachano ko pir khukuri lai thaha hudai na'. Sexual and reproductive rights and abortion are a woman's right*.



*Rise in the population will affect the nation but then abortion is the personal and an absolute right of women on her body”.*

*“The fetus which has not been born, not seen the world but the woman is an individual who exists. The rights of that woman should be prioritized as the fetus depends upon that woman. If the woman doesn't want to keep the fetus, it is her right. Rights of the woman are a priority. Other are secondary rights”, said a female advocate.*

Five respondents said that this was a social justice, public health & women's right issue. The remaining merely talked of women's rights. While elaborating on why they thought so, the respondents explained that it is a rights issue because it deals with right to life of the fetus, gender, sex ratio, women's reproductive health, and increase in population.

It appears that the questions related to rights and autonomy weren't clearly understood and therefore the answers are rather vague & difficult to analyze.

#### Expanding access

All respondents felt that there was a need to expand access. Respondents talked about increasing demand and the need to meet it. One said that concept of free sex is developing one so we should improve access.

They suggested various means to do so. These included allowing or establishing more institutions, increasing awareness thro mass media using students & teachers as well as health workers for advocacy and by promoting medical abortion. Almost all respondents saw the role of NGOs, professional bodies and religion in positively promoting safe abortion services thro creating awareness and preventing misuse.

When asked whether abortion services should be made easily available and free of cost through government facilities, one respondent said that it should be free for the poor while there should be charges for the better offs.

Another felt that it should be free in the public sector. This was supported by the remaining. A few felt that licensing should be simplified.

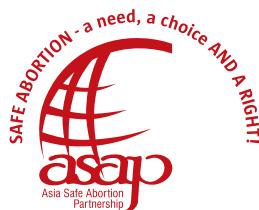
Two respondents had heard about abortion pill but nobody talked about its dangers or benefits or even about de-medicalisation of services for abortion. While talking about practically of shifting the boundaries of services provision one respondent felt that it was practical after raising awareness among women while the other said that it wasn't safe. Challenges faced included geography (terrain) and social norms lack of trained manpower, less facilities recognized by the govt. financial resources, lack of awareness, poverty, patriarchy, women's secondary status and even women's own attitudes.

A male advocate said, *“Financial and human resources are the challenges. How can we talk about such a reproductive facility in a country where we don't have sufficient health facility? Also, it is difficult to regulate medical abortion than surgical. But looking at the geography where there are not many doctors, medical abortion is fine. So, let's say okay, but we should have hospital as a back up. It will make it a little easy for women. But then if medical abortion is done without counseling there could be reproductive impact. Since it's easy people might do it by themselves”.*

Two respondents felt that only after increasing the level of awareness, access should be expanded. One of him said that even before increasing awareness, staff should be recruited. According to some the present man-power was less skilled and tainted and they didn't stay at the place of their posting which restricted access.

#### **Discussion**

The earlier prohibition of abortion in Nepal that criminalized abortion violated women's right to equality and non-discrimination and contradicted the commitment articulated in CEDAW. The evidence through various



studies also showed disproportionate conviction and penalization of women from low-income and rural families thereby again highlighting the discriminatory practices under the previous law.

Further, the law mentioned that pregnancy could be terminated for the purpose of "welfare." This condition was ambiguous and open to interpretation at every stage. Law enforcement officials could interpret the law differently. In many cases law enforcement officials treated these as cases of infanticide. The implications were severe. While a woman charged with abortion was officially punishable up to three years in prison, infanticide warranted a penalty up to 20 years.

The Nepali Constitution does not explicitly guarantee the right to life. However, according to the Supreme Court, it is the government's obligation to "refrain from acts or omissions that directly endanger life" and requires the government "to take reasonable steps in order to prevent deprivations of life by individuals.". This can be interpreted both as supportive or against the right to abortion. While protections of the right to life could be seen as a guiding factor that requires the government of Nepal to ensure women's access to legal and safe abortion services and the denial of this right as putting the lives of women at risk, thereby violating women's right to, it can also be seen as the foetal right to life and therefore safe abortion as violation of the foetal right. Further, there is no constitutional protection of the right to health in Nepal. However, the National Health Policy recognizes access to health services is "a basic human right".

The legalization of abortion with more explicit terms and conditions was a welcome step and well in line with the stated policy statements and commitments to international agreements. However, the awareness about specifics of the law amongst the law enforcement officials is a cause of concern. The judgmental attitude is an even more serious worry.

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