Ensuring Reproductive Rights of Women in Nepal: Law and Praxis

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Abstract

Reproductive rights are fundamental rights and freedoms relating to reproduction and reproductive health that vary amongst countries around the world, but have a commonality about the protection, preservation and promotion of a woman's reproductive health rights. Reproductive rights include the right to autonomy and self-determination , the right of everyone to make free and informed decisions and have full control over their body, sexuality, health, relationships, and if, when and with whom to partner, marry and have children , without any form of discrimination, stigma, coercion or violence. The access and availability of reproductive health services are limited due to geography and other issues, non-availability and refusal of reproductive health services may lead to serious consequences. The State need to ensure accessibility, availability, safe and quality reproductive health services and address the lifecycle needs of women and girls and provide access of every young women and girls to comprehensive sexuality education based on their evolving capacity as their human rights, through its inclusion and proper implementation in school curriculum, community-based awareness program and youth led mass media. It is necessary for strengthening compliance, in a time-bound manner, with international human rights standards that Nepal has ratified that protect, promote, and fulfill the basic human rights and reproductive health rights in Nepal and also need to review standards and conventions that Nepal has had reservations about or those that have been poorly implemented in the country.

Keywords: reproductive rights, right to health, right to autonomy and self-determination, maternal mortality

Introduction

Reproductive rights are fundamental human rights. They embrace human rights that are already recognized in international, regional and national legal frameworks, standards and agreements.[1] Reproductive rights are legal rights and freedoms relating to reproduction and reproductive health that vary amongst countries around the world, but have a commonality about the protection, preservation and promotion of a woman's reproductive health. Reproductive rights include the right to autonomy and self-determination – the right of

[1]High-Level Task Force for the ICPD (2013) Policy Recommendations for the ICPD Beyond 2014: Sexual and Reproductive Health & Rights for All. http://www.icpdtaskforce.org/pdf/Beyond-2014/policy-recommendations-for-the-ICPD-beyond-2014.pdf

everyone to make free and informed decisions and have full control over their body, sexuality, health, relationships, and if, when and with whom to partner, marry and have children – without any form of discrimination, stigma, coercion or violence. This includes the right of every person to enjoy and express their sexuality, to be free from interference in making personal decisions about sexuality and reproductive matters, and to access sexual and reproductive health information, education, services and support. The regime of reproductive rights further includes the right to be free from torture and cruel, inhumane or degrading treatment or punishment; and to be free from violence, abuse, exploitation and neglect.

Reproductive health right is an essential component of the universal right to the highest attainable standard of physical and mental health, enshrined in the Universal Declaration of Human Rights 1948 (UDHR) and in other international human rights conventions, declarations, and consensus agreements. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, timing and spacing of their children and to have the information and means to do so, and the right to attain the highest standards of sexual and reproductive health.[2]

Thus, reproductive rights are the legal rights related to reproduction and reproductive health that vary amongst countries all around the world.[3]It includes the right to make decisions concerning reproduction free from discrimination, coercion and violence in compliance with national and international human rights instruments.[4]

A. Human Rights interlinked with reproductive rights

Reproductive rights are key to promote development. Reproductive right is interlinked with various other rights like right to equality, right against torture, right against non-discrimination, right to life, right to health and so on.[5] In absence of one of these rights, the purpose or the target of reproductive right cannot be achieved.

Following human rights are interlinked with reproductive right and play key role for attainment of the purpose of reproductive rights.

1. The Right to Life

Right to Life is the central for enjoyment of all other human rights. One cannot enjoy their right to life to the fullest unless they are provided with basic reproductive health facilities which are also the subject of reproductive right.

The right to life is further secured in Article 3 of UDHR, Article 6(1) of International Covenant on Civil and Political Rights 1966 (ICCPR), Convention on the Rights of the Child 1989, and Article 10 of the Convention on the Rights of Persons with Disabilities.

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[2]ICPD Programme of Action, para 7.3.
[3]*Cook, Rebecca J.; Fathalla, Mahmoud F. (1996). "Advancing Reproductive Rights Beyond Cairo and Beijing". International Family Planning Perspectives.* ***22*** *(3): 115–21.*
[4]G.A. Res. 2200A (XXI).
[5]CRR and FWLD '*mahilakoprajananswasthaadhikarsambandijankaripatra*' published in 2076.

2. The Right to Liberty and Security of Person

Reproductive right also concerns liberty and security of a person. It includes the liberty to make free decision and give voluntary consent on matter of reproduction to the individuals and couples.[6] Women have free right to have control over and decide freely and responsibly on matters relating to their sexuality, including sexual and reproductive health, free from coercion, discrimination and violence.[7]

This right is also secured in Article 3 of UDHR, Article 9(1) of ICCPR and Article 14 of Disability Rights Convention.

3. The Right to Health including Sexual and Reproductive Health

Right to health means the enjoyment of highest level of physical, mental and social well-being.[8] If sexual and reproductive health of an individual is not given more importance then physical, mental and social well-being is also threatened. Hence, this endangers the purpose of reproductive right.

This right has also been recognized in UDHR (Article 25(1)), ICESCR (Articles 10 (2), 12 (1) and 12 (2)), Convention against Racial Discrimination (Article 5), CEDAW (Articles 12(1), 12 (2) and 14(2)), Convention on the Right of the Child (Articles 24(1) and 24 (2)), Disability Rights Convention (Article 25).

4. The Right to decide number and spacing of Children

Proper decision concerning number of children and space between their births is of great essence. Wrongful decision on such matter may often result in dangerous consequences regarding reproductive health, for instance, uterine prolepses, mortality, and so on. This obviously is against the set target of reproductive right. Hence, right to decide number and spacing between the children is also the key to reproductive health right. This right has also been recognized in Article 16(1) of Convention on Elimination of All Forms of Discrimination Against Women 1979(CEDAW) and Article 23(1) of the Disability Rights Convention.

5. The Right to consent in marriage and Equality in marriage

Family is the basic unit in society and one of the important purposes of marriage is the formation of family. Both men and women must enjoy the equal rights and must be regarded as equal partners in marriage.[9] The concept of marriage is also concerned with reproductive right because in general the issues of reproduction arise only after when couple enters into the conjugal relation. This right has been secured in UDHR Article 16, ICCPR Article 23(2),(3),(4), ICESCR Article 10(1), CEDAW Article 16(1),(2) and Disability Rights Convention Article 23(1).

[6]ICPD Program of Action, Para 7.3.
[7] Beijing Platform for Action
[8]Protocol of San Salvador Article 10(1).
[9] African Women's Protocol Article 6.

6. Right to Privacy

The issues of reproductive rights are often gender sensitive, which may require privacy and confidentiality. Reproductive and sexual health services must safeguard the rights of adolescents to privacy, confidentiality, respect and informed consent.[10] This right has further been guaranteed in Article 17 (1)(2) of ICCPR, Article 16(1)(2) of Children's Right Convention and Article 22(1) of Disability Rights Convention.

In the leading judgment in *Annapurna Rana case*[11]the Supreme Court of Nepal annulled the decision of lower courts that required virginity test of a woman on the ground of right to privacy of the woman.

7. Right to Equality and non-discrimination

Women are the ones who mostly suffer and get victimized by the reproductive health issues. This is mostly due to the prevalence of gender based and other forms of discrimination in the society. Therefore, we must ensure the right to equality and non -discrimination for purpose of education, basic health facilities, care after marriage, decision making authority and so on. This right has also been recognized in Article 2 of UDHR, Article 2(1) of ICCPR, Article 2(2) of ICESCR, Article 1, 3, 11(2) of CEDAW, Article 2(1)(2) of Children's Right Convention and Article 6(1) of Disability Right Convention.

8. Right to be free from practices that harm Women and Girls

There are various mal practices in society that directly or indirectly harm female and their reproductive health such as '*Chaupadipratha'.* We must eradicate any conflict which may arise between the right of women and the harmful effects of certain traditional and customary practices, cultural prejudice and religious extremism.[12] This right has also been guaranteed by Article 2(f), 5(a) of CEDAW and Article 24.3 of Children's Rights Convention.

9. Right against torture or other cruel, inhuman and degrading treatment or Punishment

Torture, cruel and inhuman treatment is one of the basic factors that has been infringing reproductive right of a person. For instance, mental torture given to pregnant women after knowing the fetus is a girl, forcing continuous birth of child without proper spacing, not taking a person to get proper medical treatment even after knowing he/she is in need of it etc. This right has further been protected by Article 5 of UDHR, Article 7 of ICCPR, Article 37(a) of Convention against Torture, Children's Rights Convention and Article 15(1),(2) of Disability Rights Convention.

10. Right against sexual and gender based violence

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity is considered as crime against

[10]ICPD Program of Action para 7.45.
[11]*Annapurna Rana vs. G. Sumsher J.B.R.* N.K.P 2055, Dec. no. 6588.
[12]Vienna Program of Action, para 38.

humanity.[13] Domestic and sexual violence are common form of violence which often remains unnoticed and unreported. This leads to the infringement of reproductive rights too,for instance, subjecting person for forced prostitution, pornography or any other form of illegal sexual activity. This right has also been protected by Article 5(a),6 of CEDAW, Article 19(1), 34 of Children's Rights Convention and Article 16(1) of Disability Rights Convention.

11. Right to Access Sexual and Reproductive Health Education and Family Planning Information

Sexual and reproductive health education, concept of family planning, contraceptives, information and services are the basic requisite of attainment of goals of reproductive right. Therefore, these rights must be protected for strengthening reproductive rights of every human. This right has been guaranteed in Article 10 of CEDAW, Article 23(1) of Disability Rights Convention.

12. Right to Enjoy Benefits of Scientific Progress

There are many discovery and invention of new methods and technologies in the present days, for instance, the concept of surrogacy, test tube baby to the women who are unable to conceive a child. Everyone must have equal right to enjoy its benefit and technologies progress without any discrimination. This right has been protected under Article 27(1) of UDHR, Article 7 of ICCPR and Article 15(1) of ICESCR.

All the above mentioned rights must be ensured, protected and implemented for the attainment and enjoyment of the reproductive right to the fullest.

B. Historical Development of Reproductive Rights: International & Nepalese Perspective

1. International Commitments – A historical overview

Before 1990s, issues related to reproductive health focused on controlling women's fertility in order to diminish population growth and not much more than that. Health was the key entry point and rather than reproductive wellbeing more broadly. This is no longer the case. Several consensus documents explaining the relationship between human rights and sexual and reproductive health have been developed. Some examples are as follows:

The first document to formally embed reproductive rights within human rights was the 1968 Final Act of the Tehran Conference on Human Rights, which states in section 16 "Parents have a basic human right to decide freely and responsibly on the number and spacing of children and a right to adequate education and information in this respect". The General Assembly endorsed the Final Act in December 1968.[14]

The 1975 Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace confirms the principle of equal rights within the family and the principle of inviolability of the human body as per Principle 12, "[e]very couple and every individual has the right to decide freely and responsibly whether or not to have children as well

[13] Rome Statute of ICC, Art 7(1)(g).
[14]UNGA Resolution 2442 (XXIII).

as to determine their number and spacing, and to have the information, education and means to do so.[15]

In 1993, the World Conference on Human Rights adopted the Vienna Declaration and Program of Action, another document signaling a worldwide consensus on the right to sexual and reproductive health. Section 3 of the Program of Action[16] deals with women's rights and their right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels, including sexuality education.

In 1995, the Fourth World Conference on Women took place in Beijing.[17] The Beijing Declaration and Platform for Action, adopted at the Conference, among other things highlights the right to equal access to and equal treatment of women and men in education and health care and the enhancement of women's sexual and reproductive health as well as education. Both the ICPD Program of Action and the Beijing Declaration and Platform for Action show that alongside health and health care, education is a crucial tool in promoting and protecting reproductive rights.

The World Summit in 2005 was a follow up to the Millennium Summit in 2000. The 2005 World Summit Outcome [18] confirms the commitment to the Millennium Declaration and reiterates the "determination to ensure the timely and full realization of the ... Millennium Development Goals". In addition, the World Summit Outcome contains new commitments, four of which became part of the revised MDGs during 2006-2007. One is the achievement of universal access to reproductive health by 2015 (that became an addition to MDG 5); another is universal access to HIV/AIDS treatment by 2010 (that became an addition to MDG 6).

2. International Guidelines that guarantee reproductive rights:

a. Convention on the Elimination of All Kinds of Discrimination against Women (CEDAW)

CEDAW was adopted on 18, 1979, which came to enforcement on September 3, 1981. The convention states that the discrimination against women, violates the principles of equality of rights and human dignity, and is an obstacle in the participation of women, on equal terms with men, in social, economic, political and cultural life of the nation.

b. International Conference on Population and Development (ICPD)

In 1994, the International Conference on Population and Development (ICPD) stressed the importance of adolescence to sexual and reproductive health throughout the life cycle. It also—for the first time in an international agreement—recognized that adolescents have particular health needs that differ in important ways from those of adults, and stressed that

[15] UN Doc. E/CONF. 66/34.
[16]UNGA Resolution A/RES/48/121.
[17]United Nations General Assembly Resolution A/RES/50/203.
[18]UNGA Resolution A/RES/60/1.

gender equity is an essential component of efforts to meet those needs.

The ICPD Program of Action urges governments and health systems to establish, expand or adjust program to meet adolescents' reproductive and sexual health needs, to respect rights to privacy and confidentiality, and to ensure that attitudes of health care providers do not restrict adolescents' access to information and services. It further urges governments to remove any barriers (laws, regulations or social customs) between adolescents and reproductive health information, education, and services.

The 1999 Special Session of the General Assembly, ICPD+5, recognized the right of adolescents to the highest attainable standards of health, and provision of appropriate, specific, user-friendly and accessible services to address effectively their reproductive and sexual health needs including reproductive health education, information, counseling and health promotion strategies.

C. Reproductive Rights in India: The Current Situation

The women's health movement began in India in the early 1980s, with small groups of women discussing various aspects of being female, from experiencing menstruation, problems of contraception, awareness of bodies, and early discrimination which results in malnutrition. Cultural and religious taboos about menstruation, pregnancy and childbirth were thrown to the winds and issues brought out into the open. And the roots of women's oppression were analyzed in the context of personal own lives, and the slogan 'personal is political' took on new meaning. Slowly, the discussions spread into colleges, among working women, into *basti*s and middle-class colonies. Charts, posters, *phad*s (traditional pictorial representations on cloth), plays and songs became the medium to spread awareness about women's health issues. Simultaneously, what evolved was a scathing critique of the medical establishment, its dual role with respect to women, depending upon their class: its utter neglect of poorer women who had no access to medical care during pregnancy and its 'over-medicalization' of pregnancy and childbirth for higher classes of women, manifested by unnecessary caesarean sections, for instance.

Over the last decade, Indian courts have issued several notable decisions recognizing women's reproductive rights as part of the "inalienable survival rights" implicitly protected under the fundamental right to life. In certain ground-breaking judgments, the courts have even for the first time recognized reproductive rights as essential for women's equality and have called for respect for women's rights to autonomy and decision-making concerning pregnancy. In cases spanning maternal health, contraception, abortion, and child marriage, Indian courts have adopted robust definitions of "reproductive rights" that reflect human rights standards.[19] While court decisions are not uniform, several trailblazing rulings have boldly affirmed women's rights to remedies for violations of reproductive rights—including the first case

[19]DevikaBiswas v. Union of India, W.P. (C) 81/2012; Centre for Reproductive Rights, *Reproductive Rights in Indian Courts*, https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf.

globally to recognize maternal health as a right—and laid the foundation for Indian courts to continue to play a strong role in preventing and addressing ongoing violations of these rights.[20]

The Constitution of India recognizes many of these same rights as fundamental rights that the government has an obligation to uphold, including the right to equality and non-discrimination (Articles 14 and 15) and the right to life (Article 21) which is understood through jurisprudence to include the rights to health, dignity, freedom from torture and ill treatment, and privacy.[21]

India is also a signatory to numerous international conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of the Child (CRC), all of which recognize reproductive rights. Article 51(c) of the Indian Constitution and the judiciary have established that the government has a constitutional obligation to respect international law and treaty obligations.

The government of India also bears a constitutional obligation to ensure legal remedies for violations of fundamental rights and human rights. Article 39(a) requires the government to promote equal access to justice and free legal aid as a means to ensure that "opportunities for justice are not denied to any citizen by reason of economic or other disabilities."[22]

Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception, women and girls continue to experience significant barriers to full enjoyment of their reproductive rights, including poor quality of health services and denials of women's and girls' decision-making authority. Historically, reproductive health-related laws and policies in India have failed to take a women's rights-based approach, instead focusing on demographic targets, such as population control, while also implicitly or explicitly undermining women's reproductive autonomy through discriminatory provisions such as spousal consent requirements for access to reproductive health services. Despite a national law penalizing marriages of girls below 18 years of age and policies and schemes guaranteeing women maternal healthcare, in practice India continues to account for the highest number of child marriages and 20% of all maternal

[20] Centre for Reproductive Rights, *Reproductive Rights in Indian Courts*, https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf

[21] *ParmanandKatara v. Union of India*, (1989) 3 S.C.R.997; *PaschimBangaKhetMazdoorSamity v. State of West Bengal*, A.I.R 1996 S.C.C. 2426; *Chameli Singh v. State of U.P.*, (1996) 2 S.C.C. 549; *Consumer Education and Research Centre v. Union of India* (1995) 3 S.C.C. 42; *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, A.I.R. 1981 S.C. 746; *Kharak Singh v.The State of U.P. & Others*, A.I.R. (1963) 1 S.C.C. 332.

[22] TanviMathur, Reproductive Rights for Women in India, http://www.legalserviceindia.com/legal/article-3372-reproductive-rights-for-women-in-india.html.

deaths globally.[23] Although India's National Population Policy guarantees women voluntary access to the full range of contraceptive methods, in practice state governments continue to introduce schemes promoting female sterilization, including through targets, leading to coercion, risky substandard sterilization procedures, and denial of access to non-permanent methods.[24] In addition, although abortion is legal on multiple grounds until 20 weeks of gestation and throughout pregnancy where necessary to save the life of the pregnant woman under the Medical Termination of Pregnancy Act (MTP Act), 56% of the 6.4 million abortions estimated to occur in India annually are unsafe and result in 9% of all maternal deaths. [25]

1. Judicial Precedents in India

In 2011, the Delhi High Court issued a landmark joint decision in the cases of *LaxmiMandal v. DeenDayalHarinagar Hospital &Ors.*and*Jaitun v. Maternity Home, MCD, Jangpura & Ors.,* concerning denials of maternal health care to two women living below the poverty line. The Court stated that "these petitions focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the reproductive rights of the mother." Citing CEDAW and ICESCR, the decision held that "no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background. This is where the inalienable right to health which is so inherent in the right to life gets enforced."[26]

In 2012, the High Court of Madhya Pradesh echoed the Delhi High Court's judgment in *SandeshBansal v. Union of India*, a public interest litigation seeking accountability for maternal deaths, recognizing that "the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India" and that "it is the primary duty of the government to ensure that every woman survives pregnancy and child birth."[27]

Importantly, the *Bansal decision* specifically rejected financial constraints as a

[23]World Health organization (WHO), Child Marriages: 39,000 every day, U.N. Press Release(2013); see also Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt— Addendum—Mission to India, para. 94, U.N. Doc. A/HRC/14/20/Add.2 (April 15, 2010).

[24]*DevikaBiswas v. Union of India & Others*, W.P. (C) 81/2012.

[25]Frost, JenniFer;KalyanWala;Shveta, Moore;Ann, Singh, Susheela;StillMan, Melissa, abortioninIndia: ALiteratureReview, GuttmacherInstitute (2014) referencing the Report on Medical Certification of Cause of Death, 2010, New Delhi: Registrar General of India, 2014; See also, Duggal, R.;Ramachandran, V., The abortion assessment project - India: key findings and recommendations, Reproductive Health Matters 12, 122-129 (2004).

[26]Consolidated Decision, *LaxmiMandal v. DeenDayalHarinagar Hospital & Others*, W.P. (C) No. 8853/2008; *Jaitun v. Maternal Home MCD, Jangpura& Others*, W.P. (C) 8853/2008 & 10700/2009, Delhi High Court (2010)

[27]*SandeshBansal v. Union of India* W.P. (C) 9061/2008.

justification for reproductive rights violations, and established that government obligations under Article 21 require immediate implementation of maternal health guarantees in the National Rural Health Mission, including basic infrastructure, such as access to blood, water, and electricity, in health facilities; timely maternal health services and skilled personnel; and effective referral and grievance readdressing mechanisms where maternal health care is denied.

D. Reproductive Rights in Nepal: The Current Situation

For much of Nepal's history, abortion was strictly illegal. Women were routinely imprisoned for having abortions, while countless women died of complications from unsafe, illegal abortions.

In the 1990s, women's rights activists launched a campaign to reform the *MulukiAin*, Nepal's Country Code, to eliminate discriminatory provisions. This campaign included advocating for the decriminalization of abortion. In 2001, the Center for Reproductive Rights (CRR) and the Forum for Women, Law and Development (FWLD) documented the harmful impact of Nepal's criminal abortion ban. The findings were released in 2002 in the report Abortion in Nepal: Women Imprisoned. On September 26, 2002, an amendment to the *MulukiAin* was signed into law making abortion legal on broad grounds. This amendment, which granted women greater autonomy over their reproductive lives, has been hailed as a milestone and is reinforced by Article 20(2)'s robust recognition of women's reproductive rights.

In a land mark decision of *Lakshmi Dhikta& Others v. Government of Nepal,*[28]the Supreme Court of Nepal held accountable to the Government of Nepal for the failure to guarantee broad access to safe and legal abortion services and to ensure their affordability. Discussing Article 20(2), the Court noted the following: "Reproductive health and reproductive rights stand in relation to one another. It is only when one's reproductive health is in a good state that one can appropriately enjoy their reproductive rights; similarly, it is only when one has reproductive rights that their reproductive health can be fully protected."The Court further stated that unless reproductive rights are understood as women's rights, "women would not be able to live freely with self-respect and equality; they would not be able to participate fairly as competent, educated, and active members of society, and exercise their right to life; and the rights guaranteed to women under international treaties, the constitution and other laws would become unachievable."

Prakash Mani Sharma & Others v. Government of Nepal[29]: This case seeks accountability for the government's failure to address the widespread incidence of uterine prolapse, a severe form of maternal morbidity. In 2008, the Supreme Court ruled that the government had violated Article 20(2) by failing to develop and implement policies and programs to effectively prevent, detect, and treat uterine prolapse. Discussing the significance of Article 20(2), the Court stated the following: "Women's reproductive rights have been

[28]*Lakshmi Dhikta& Others v. Government of Nepal*, Writ No. 0757, Jestha, 2066, at 22 (2011).
[29]*Prakash Mani Sharma & Others v. Government of Nepal*, Writ No. 064, at 13(2008) (Supreme Court of Nepal)

recognized as fundamental rights by Article 20(2) of the Interim Constitution. Without the recognition of these rights, women would not be able to fully exercise their other fundamental human rights. It is the constitutional obligation of the state to ensure the basic preconditions necessary for the practical implementation of this right."

Importantly, in both cases, the Supreme Court recognized reproductive rights under Article 20(2) as encompassing a broad range of government obligations, including guarantee of the right to decide whether and when to have children, addressing forced marriage and sexual violence, providing information about and access to methods of family planning, and protecting women's autonomy to make decisions relating to reproduction without interference and with respect for their confidentiality.

Under ICESCR, Nepal has an immediate obligation to guarantee women's right to health and to ensure special protection of pregnant women in the pre- and post-natal period.[30]Additionally, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has expressed concern over these issues in Nepal, including specifically the "challenges in accessing delivery services, especially emergency obstetric care [and] poor nutrition, which is strongly correlated with higher risks of maternal mortality and morbidity."[31]

1. Progress Achieved

Historically, Nepal has had one of the highest rates of maternal morbidity and mortality in South Asia. The maternal mortality ratio (MMR) in Nepal decreased from 539 maternal deaths per 100,000 live births to 239 maternal deaths per 100,000 live births between 1996 and 2016.[32] The significant decline in maternal mortality can be attributed to various legal, policy and programmatic milestones achieved in Reproductive health in Nepal since Beijing 1995.

During 2000, 20% of all pregnancy deaths were due to unsafe abortion. Prior to 2002, abortion was criminalized in all circumstances.[33]

The Ministry of Health (MoH) introduced '*Operational Guidelines for Gender Equality and Social Inclusion Mainstreaming in the Health Sector'* in 2013 and institutionalized the GESI unit for mainstreaming gender issues in the health sector, along with efforts to harmonize gender into policy, law, strategies and programs.

The MoH has been implementing 'National Female Community Health Volunteer (FCHV) Program' with support from international partners to improve access to quality health services. The program implementation is based on mobilization of a network of local women

[30]ICESCR, supra note 1, arts. 10, 12; ESCR Committee, Gen. Comment No. 14; ESCR Committee, Concluding Observations: Nepal, para. 25, U.N. Doc. E/C.12/NPL/CO/2 (2008).
[31]CEDAW Committee, Concluding Observations: Nepal, para. 31, U.N. Doc. CEDAW/C/NPL/CO/4-5 (2011).
[32]https://www.mhtf.org/2017/12/29/the-current-state-of-maternal-health-in-nepal/
[33]Abortion in Nepal : Women Imprisoned, study conducted by Forum for Women, Law and Development (FWLD) and Center for Reproductive Law and Policy (CRLP), 2001; the study show that 65 women were in prison on charges of abortion and abortion-related offences.

volunteers.[34]

The MulukiCriminal Code 2017 which was passed by the Parliament on 17th August 2018, criminalizes *Chaupadi* and discrimination and exclusion based on menstruation period.[35] There has been huge civil society support and engagement in this process and in awareness raising activities. Furthermore, unhygienic conditions during menstruation of adolescent girls are addressed through enforcing Guidelines on *Chhaupadi*and launching awareness raising activities. Training and awareness on Menstrual Health Management (MHM) are provided in some district. Components on population and reproductive health have been incorporated in school curriculum to raise awareness about the need of care and hygiene during menstruation.

The Public Health Service Act, 2018 ensures that every citizen shall have the right to obtain quality health service in an easy and convenient manner.[36] Section 3(3) guarantees that no citizen shall be deprived of health services and the section 3(4) ensures that every citizen shall have the right to obtain free basic health services.

E. Legal Provisions ensuring Reproductive Rights in Nepal

Reproductive rights concern the power to make decisions about one's own fertility, child bearing, child rearing, gynecological health and sexual activities. Though the concept of reproductive right has been emerged lately in context of Nepal, our country has made several efforts in protection of reproductive rights in Nepal. There are both national and international laws governing such protection.

1. International Instruments

Nepal has been party and has ratified various international treaties and conventions which have guaranteed reproductive health and reproductive rights in various ways, for instance; UDHR 1948,ICCPR 1966, ICESCR 1966,CEDAW 1979,CAT 1984,CRC 1989andthe Convention of Rights of Persons with Disabilities 2006. These conventions have protected Reproductive Rights explicitly or implicitly. Disability Convention is the first comprehensive international human rights instrument to specifically identify the right to reproductive and sexual health as a human right.[37]

CEDAW has provided State obligation on providing access to specific educational information to help insure the health and well-being of families including information, advice[38] and access to family planning.[39]State parties shall further take the measures to ensure equality in working place by also safeguarding their function of reproduction.[40] State parties to the CEDAW must also ensure to women the appropriate services in connection with pregnancy, confinement and

[34]https://www.mohp.gov.np/en/program/reproductive-maternal-health/female-community- health-program
[35]The Country Criminal Code 2017, Section no. 168 (3)
[36]Section 3(1), the Public Health Service Act, 2018
[37]Rights of Person with Disabilities, 2006, G.A. Res. 61/106.
[38] Article 10(h) CEDAW
[39]Article 14(b), CEDAW.
[40] Article 11(f) CEDAW

the post-natal period, granting free services with necessary, as well as adequate nutrition during pregnancy and lactation.[41]

The CEDAW Committee's General Recommendation 24 recommends that States priorities the "prevention of unwanted pregnancy through family planning and sex education." The CESCR General Comment 14 has explained that the provision of maternal health services is comparable to a core obligation which cannot be derogated from under any circumstances, and the States have immediate obligation to take deliberate, concrete, and targeted steps towards fulfilling the right to health in the context of pregnancy and childbirth. Sexual and reproductive health needs are the rights that people are entitled to demand.[42] It is therefore the state responsibility to ensure and protect it.

Reproductive Rights have also recently been incorporated in international development agenda i.e. UN MDGs in 2000. In the World Summit Document of 2005, the leaders from all around the world made an explicit commitment to achieve universal access to reproductive health by 2015.[43] In Nepal, the NHRS was revised in 1996 to facilitate the implementation of Cairo Action Program within the existing health care system. The concept of Reproductive Health as a central theme in women's health was further endorsed during the fourth World Congress on Women held in Beijing in 1995.[44]

2. Constitutional history relating to Right to Reproductive Health in Nepal

Government of Nepal Act, 2004 was the first constitution of Nepal and guaranteed right to equality as a fundamental right. However, the Constitution did not contain any provision regarding reproductive right in particular. This constitution though not implemented had formed the base for the development of constitutional history in Nepal. The Interim Government of Nepal Act, 2007 had the provision regarding maternity help in Article 7. Article 14(2) had made the provision that the State shall adopt special provision for protection of women and children on the basis of positive discrimination. The Constitution of the Kingdom of Nepal, 2015, he Constitution of Nepal, 2019 and the Constitution of Kingdom of Nepal, 2047 had similar provision.

In the Constitutional history of Nepal, the Interim Constitution of Nepal, 2063for the first time adopted right to reproductive health as fundamental right in Article 20(2). It states, every woman has right to reproductive health and right related to reproduction.[45]

In the recent constitution i.e. the Constitution of Nepal, 2072 has recognized various rights that protects and strengthen reproductive rights of individuals. Article 38(2) states every woman shall have the right to safe motherhood and reproductive health. Further other rights that are

[41] Article 12(2) CEDAW
[42] Sexual and Reproductive Human Rights; Aposition Paper published by Department for International Development, 2004.
[43] UNGA, 2005 World Summit Outcome, U.N Doc A/Res/60/1 (2005).
[44] Unheeded agonies
[45] Interim Constitution of Nepal,2063 Article 20(2).

associated to reproductive rights has also been protected. Right to live with dignity,[46]right to equality,[47]right to privacy,[48] right against exploitation,[49]right relating to health,[50] and right to women.[51] It created a 'space' for women to demand and assert their health rights and control over their own body and reproductive lives. It provides for a full range of reproductive rights including but not limited to access to health services, access to information/ education, freedom from abuse and other coercive actions. It further includes everything women need concerning control over their body to live a life of dignity free from violence including State violence.

3. Legislative Provision

The Right to Safe Motherhood and Reproductive Health Act, 2075 (2018) has been introduced to safeguard reproductive rights of women in Nepal. This Act has made necessary provisions on making motherhood and reproductive health service safe, qualitative, easily available and accessible, in order to respect, protect and fulfill the right to safe motherhood and reproductive health of the women conferred by the Constitution of Nepal.

a. This Act guarantees certain rights to women in regard to the Right to Reproductive Health. This provision ensures that every woman and teenager shall have the right to obtain education, information, counseling and service relating to sexual and reproductive health. Every person shall have the right to obtain service, counseling and information relating to reproductive health, right to get information regarding contraceptives and use them. It ensures the right to get reproductive health service needed during different situation of his/her lifecycle, in easily available, acceptable and safe manner.

b. This Act guarantees women the right to safe motherhood, reproductive health, right to determine the gap between births or the number of children, right to obtain abortion service pursuant to this Act, right to get necessary counseling, obstetric care, and postpartum contraceptive service and right to nutritious, balanced diet and physical rest during the condition of pregnancy and child birth and morbidity.

c. Right to get obstetric service:

Every woman shall have the right to get her examined or checked whether she is pregnant or not, upon going to a health institution. The health institution concerned shall have to provide the pregnant woman, the following services:

(a) To check health at least four times during the pregnancy in normal condition,

(b) To check health as per the advice of a physician or competent health worker during the prescribed condition except that referred to in clause (a),

(c) To receive appropriate counseling relating to health care, and

[46]The Constitution of Nepal, Article16.
[47]The Constitution of Nepal, Article 18.
[48]The Constitution of Nepal, Article 28.
[49]The Constitution of Nepal, Article 29.
[50]The Constitution of Nepal, Article 35.
[51]The Constitution of Nepal, Article 38.

(d) To obtain safety measures and minimum care to be adopted during pregnancy.

Similarly, a governmental and community health institution providing obstetric care shall have to arrange competent health worker to provide obstetric care, or midwife or other trained health worker if such a competent health worker is not available. The non-governmental and private health institution fulfilling the standard prescribed by the Government of Nepal shall have to provide obstetric care in a respectful manner.

d. Right to obstetric leave:

Any woman working in a governmental, non- governmental or private organization or institution shall have the right to get obstetric leave with pay, for a minimum of ninety-eight days before or after the delivery. If it is not sufficient to any pregnant woman, such a woman shall have the right to get leave without pay, for a maximum of one year upon the recommendation of the expert doctor.

The Act also further requires governmental, non-governmental or private organization or institution to make necessary arrangement for woman working in its office for breast feeding during the office hours up to two years from the birth of the infant.

If complicated surgery is to be conducted as per the opinion of the specialist doctor due to morbidity, the governmental, non- governmental or private organization or institution shall have to provide the woman working in its office with an additional leave with pay for a maximum of thirty days before or after conducting such surgery.

e. To perform safe abortion:

A pregnant woman shall have the right to get safe abortion performed in any of the following circumstances:

- Fetus (gestation) up to twelve weeks, with the consent of the pregnant woman,
- Fetus (gestation) up to twenty-eight weeks, as per the consent of such woman, after the opinion of the licensed doctor that there may be danger upon the life of the pregnant woman or her physical or mental health may deteriorate or disabled infant may be born in case the abortion is not performed,
- Fetus (gestation) remained due to rape or incest, fetus (gestation) up to twenty-eight weeks with the consent of the pregnant woman,
- Fetus (gestation) up to twenty-eight weeks with the consent of the woman who is suffering from H.I.V. or other incurable disease of such nature,
- Fetus (gestation) up to twenty eight weeks with the consent of the woman, as per the opinion of the health worker involved in the treatment that damage may occur in the womb due to defects occurred in the fetus (gestation), or that there is such defect in the fetus of the womb that it cannot live even after the birth, that there is condition of disability in the fetus (gestation) due to genetic defect or any other cause.

f. Not to get abortion conducted forcefully:

No one shall get the abortion conducted by coercing a pregnant woman, threatening, enticing or tempting her.

g. Safe abortion service:

The licensed health worker who has fulfilled the prescribed standards and qualification shall have to provide the pregnant woman with safe abortion service. Appropriate technology and process of the service should be provided. The pregnant woman who wants to obtain the safe abortion service shall have to give consent in the prescribed format to the health institution which has obtained a license, or to the health worker who has obtained a license. In case of a woman who is in unsound mental condition, who is not in a condition to give consent instantly or who has not completed the age of eighteen years, her guardian or curator shall have to give consent. And in the case of a woman who is below the age of eighteen years, safe abortion service shall have to be provided by considering her best interests.

Similarly, the licensed health institution or licensed health worker shall have to keep confidential all records, information, documents related to reproductive health of the pregnant woman and counseling and service provided to her. However, the records relating to such information, document and counseling service may be made available if such information is demanded by the investigation authority or court in course of investigation and hearing of any lawsuit, if it is required to quote without revealing identity of the related woman for the purpose of study, research or monitoring relating to safe abortion or if the woman concerned demands herself the records thereof.

h. Right to obtain morbidity care:

Every woman shall have the right to get her examined, obtain counseling and receive treatment relating to morbidity by or in the health institution. It shall be the duty of the concerned health institution or health worker to provide information of the matters relating to the care to be followed on the condition of morbidity and in the condition following the surgery, and the hazards likely to be caused by it while providing service in a manner that such information is understandable.

4. Nepalese Judicial Decisions:

a. Lakshmi Dhikta Case:

In 2009, the Supreme Court of Nepal ruled that the right to reproductive autonomy is violated where a woman is unable to access a safe, legal abortion. Lakshmi, an extremely poor woman from the far-western region of Nepal, was denied an abortion because could not afford the NPR 1,130 fee for the procedure and was forced to continue her pregnancy. Citing Article 20(2) as well as CEDAW and ICCPR, the Court ruled that a right to abortion exists in Nepal and ordered the government to address barriers to safe abortion, including cost.[52]The Court

[52]Decision, Lakshmi Dhikta& Others v. Government of Nepal, Writ No. 0757, Jestha, 2066, (2011)

emphasized that the right to self- determination guarantees women the right to make independent decisions about reproduction without any external inference, and the right to "determine birth and the gap between births. "Affirming the right to self-determination, the Court stated that "a compulsory pregnancy is a serious conspiracy against the freedom of women. The Supreme Court reasoned that the right to create one's family vests in women as the owners of their own bodies, and implies the right to access to contraceptive and information services and the right to decide whether and when to bear children, without the express consent of one's husband.

Lawyers in Nepal have brought cases concerning the right to reproductive health recognized in Article 20(2) of the then-in-force Interim Constitution of Nepal 2006 as well as internationally recognized reproductive health standards. In 2008, the Supreme Court held in Prakash Mani Sharma v. Nepal that reproductive health is recognized as a matter of right, and thus that the government's failure to prevent, detect, and treat uterine prolapsed, a severe and treatable form of maternal morbidity violated women's rights to reproductive health.[53]Importantly, the Court's decision here illustrates how national recognition of the right to reproductive health can lay the foundation for comprehensive protection of women's health. The Court stated, "[s]ince reproductive health is recognized as a matter of right, the following falls within the ambit of the right: decision regarding reproduction, voluntary marriage, decision as to conceive or not, decision as to abort a child pursuant to law, determination of number of children, reproductive education, and freedom from sexual violence which have also been prescribed in various treaties and declarations."

b. Sapana Pradhan Malla vs. Office of the Prime Minister and Council of Ministers et al. (2061)

In this case, the Supreme Court held that for the indistinguishable offence of abortion, distinguished punishments for a pregnant woman and for other persons who compel abortion is not reasonable. Section No. 28 is the proviso for penalizing a pregnant woman and Nos. 28a and 32 are applicable to all, whether man or woman, so the provision cannot be regarded as discriminatory from a gender perspective, yet setting a greater penalty for a pregnant woman and a lesser penalty for those encouraging men or women to commit the offence of abortion is discriminatory. Based on the gravity of the offence, the penalty set for offenders other than a pregnant woman is minimal. Penalty for the offence should be rational and based on wisdom so as to make the same penalty for others as for a pregnant woman. The Court found the penal provision of Section No. 28 to be relatively appropriate. Therefore, the Court issued a directive order in the name of the respondent Council of Ministers and Office of the Prime Minister to carry out the necessary amendments to the penalty provisions of Nos. 28a and 32 or to enact appropriate penalty provisions for offences relating to abortion in harmonization with that provision.

[53]Prakash Mani Sharma & Others v. Government of Nepal, Writ No. 064, 2064 (2008)

c. Dil Bahadur B.K. v. Government of Nepal, 2062

Restricting *'Chaupadi'*

The directive orders were issued in name of Prime Minister Office and Ministerial Office to announce '*chaupadi* 'as *'Kuriti.' w*ithin 1 month. Also the directive orders were issued to conduct various awareness program against '*chaupadi'* in various parts of country and to conduct research and prepare a report on status of '*chaupadi*' in Nepal and the necessary steps that need to be taken for eliminating this tradition.

d. BimalaKhadkaet. al v. Government of Nepal, 2067[54]

Protection of Reproductive Rights of Differently abled Women.

Applicant filed a writ petition of Mandamus in name of GON to issue directive order for the protection of Reproductive Health Right of differently abled women. The directive orders were issued in name of GON to make proper arrangements of hospitals, public vehicles and easy facilities in all the public places to differently abled people and also make effective implementation of Constitutions and International Conventions.

e. Prakashmani Sharma vs. Office of Prime Minister and Council of Ministers et al.[55]

Protection and care of pregnant and breastfeeding women in prison

Applicant filed a writ petition, stating the condition of improper and insufficient management regarding care and protection of pregnant and the breastfeeding women in prison.

Court issued directive orders in name of respondent to make arrangement for providing proper health care, facilities and protection of pregnant and breastfeeding women and their children in prison.

f. Junga Bdr. Singh vs. Office of the Prime Minister and Council of Ministers et. al[56]

Since reproductive right is fundamental rights of every people, in order to ensure it, court issued the directive orders in name of respondent to arrange necessary facilities for providing opportunity to meet families for the prisoners incase if the wife is pregnant. i.e. pregnant women should be given opportunity for timely visiting her acquitted husband. Also the Court held that a pregnant prisoner woman should be provided an opportunity to meet her husband from time to time.

5. Other efforts made to ensure and protect Reproductive Rights

a. Government Efforts

Government is the main authority responsible to ensure and protect reproductive rights in the country. Nepal is signatory party to many international conventions and treaties. Further, our government has also ratified many of human right protection instrument. Government has

[54]*BimalaKhadkaet.al v. GON*, N.K.P. 2067, Dec no. 8384.
[55]*Prakashmani Sharma vs. Office of Prime Minister etal.*Writ no. 2063-WS-0028.
[56]*JungaBdr. Singh vs. Office of PM et. al.*N.K.P 2068, DEC NO. 8631.

enacted several laws, plans and policies for ensuring and protecting reproductive rights. Also, our government has been encouraging many NGOs and INGOs to carry out research and other related works for the protection of such rights. Our government has been working in collaboration with many other institutions for upgrading the condition of reproductive health in Nepal.

Some of the major works done for the government side to ensure and protect reproductive right are enlisted below:

- Making favorable laws to further ensure and strengthen the reproductive health rights of women;
- Attempt on providing cheap and affordable health care during maternity;
- Establishment of Reproductive Health Rights Working Group (RHRWG) under the chairmanship of National Women Commission has been made in collaboration with other actively working NGO and INGO to enforce court decision in this regard.
- Awareness Program concerning family planning and the guaranteed reproductive rights.

b. Institutional Efforts

There are many national and international institutions working actively in the matter regarding reproductive rights. They have been advocating, providing various services, conducting free camps, initiating several projects for the effective protection of reproductive rights in Nepal. Some of the institutions providing services relating to reproductive rights are as follows:

- INF is the first institution recording any involvement and still provides surgical and advisory services to women across the country.
- GTZ Health Sector Support Program has supported surgery on reproductive matters and conducted the clinic based study.
- PHECT- Nepal and RHEST have been conducting hysterectomy camps and mass awareness program in different parts of our country.
- Safe Motherhood Network Federation has been working on issue of uterus prolapses.

Moreover, the institutions like CAED, WOREC, FWLD, CRR have been continuously participating in program relating to reproductive health.

Key Recommendations:

- Delay in making regulations has created confusion regarding standards. In the absence of regulations, women cannot get maternity allowance, and maternity leaves. There are possibilities of problems if complications occur or some unfortunate incident takes place during abortion. The Regulation regarding safe motherhood and reproductive rights should be introduced at the earliest.
- Reaffirm the right of every women and girls, without distinction of any kind, to the enjoyment of the highest attainable standard of reproductive health as outlined in the Constitution of Nepal and other human rights instruments to which Nepal is a State party.
- Prioritize and adopt the life- cycle approach to health design and delivery while addressing the health needs of the most marginalized women and girls taking an intersectional approach to leaving no one behind (including youth, race, ethnicity, caste and class, disability, LGBTI, older women and any other marginalized identity according to social context).
- Ensure accessibility, availability, safe and quality reproductive health services addressing the lifecycle needs of women and girls and access of every young women and girls to comprehensive sexuality education based on their evolving capacity as their human rights, through its inclusion and proper implementation in school curriculum; community-based awareness program; youth led mass media.
- Decriminalize safe abortion and increase awareness program on safe abortion. In addition, all type of safe abortion services up to second trimester services should be included in Basic Health Care package.
- Recognize health as holistic concept and not mere as physical health in health program planning and implementation. Ensure availability of gender sensitive trained health care force that can address the interlinkages of different dimensions of health, also are well trained to recognize the interlinkages of women's health with emerging issues such as climate change.
- Recognize and address the negative health consequences of harmful traditional practices including child marriages. Ensure proper referral mechanism and promote empowerment programs that address gender inequality.
- Generate evidence-based policy for health on the premise of gender- disaggregated data finding inter-linkages between Reproductive Health.
- Adopt a gender transformative approach to national health workforce planning,

making gender analysis integral to labor market analysis as agreed in the UN international agreements (ILO/WHO) in order to include women in equal numbers to men in health decision making at all levels from provincial to National Level.

- Adequate steps should be taken by the government to ensure universal access to quality reproductive health information and services, including contraceptive information and services, maternal health care, and safe abortion services, especially for adolescents girls and socio-economically marginalized women and girls in rural and remote areas.
- Effective steps should be taken by the government to protect women and girls from sexual and other forms of physical and emotional violence, both within and outside marriage, and to provide access to emergency contraception in addition to other services including counseling and legal redress.
- Take concrete steps to prevent and address the high prevalence of uterine prolapse by effectively implementing the recently adopted procedural guidelines on prevention and treatment of uterine prolapse.
- The provision of Minimal Initial Service Package (MISP) at all the health facilities for the continuation of sexual and reproductive health services is very important.

Conclusion

Reproductive health has been defined as "a state in which people have the ability to reproduce and regulate their fertility; women are able to go through pregnancy and childbirth safely; the outcome of pregnancy is successful in terms of maternal and infant survival and well-being; and couples are able to have sexual relations free of the fear of pregnancy and of contracting disease." But in a world where a woman's rights are so severely curtailed; where her sexuality is not hers; where she does not have access to equal opportunity or health care; where the state is determined to interfere in it, when and how many children she has; where privatization, social sector cuts, shrinking work opportunities and wages and dwindling food security systems are hitting women hardest, it is clear that her reproductive rights cannot be discussed in isolation.

At the family and community level, the only way to tackle reproductive health issues is to locate them within the broader spectrum of needs as perceived by women. Similarly, at the policy level, this debate can only be meaningful if it recognizes the interdependence of reproductive health, general health, and socio-economic conditions. The reproductive health concept, as advanced by both state and aid agencies, focuses on regulating women's fertility. In doing so, they have been merely 'women-centered', and not, it must be emphasized, 'pro-women'. They have failed to grasp the full complexity of the term 'reproductive health' and to

put it in a public health perspective. Instead, they have repeatedly resorted to techno-centric strategies of moving from one hazardous contraceptive to the other, one population control program to the next, rather than opting for considered social and structural alternatives that have a development-led perspective. In the process, they have systematically damaged women's health, and consequently, the health of the entire population.

For the women's movement, which for decades has been articulating the links between women's reproductive rights and their cultural status and socio-economic rights, the term 'reproductive rights' has come to be an ideal to work towards. A symbol as it was, of a society free from the ills of prejudice and malpractice, of coercion and compulsion. A vision of a world is where the good health of all is as much a state of mind as a state of physical well-being, and consequently, the key to a healthier future for all.

In countries like Nepal where the access and availability of reproductive health services are already limited due to geography and other issues, non-availability and refusal of reproductive health services may lead to serious consequences. Reproductive morbidities remain grossly neglected within government plans and policies. Similarly, access to safe, quality abortion services, including information, counseling and post abortion care are also significantly lacking. An analysis of the concerned laws, policies, programs, however, consistently reflects the lack of implementation of a rights frame work, discrimination and exclusion of a range of persons that poses sustained barriers to access and quality of care and exacerbates the marginalization of reproductive health and rights in Nepal. Finally, it is necessary for Strengthening compliance, in a time-bound manner, with international human rights standards that Nepal has ratified that protect, promote, and fulfill the basic human rights and reproductive health rights in Nepal and also need to review standards and conventions that Nepal has had reservations about or those that have been poorly implemented in the country.