



CEDAW Secretariat
OHCHR - Palais Wilson
52, rue des Pâquis
CH-1201 Geneva 10
Switzerland

January 29, 2018

Re: Supplementary information on Nepal, scheduled for review by the Committee on the Elimination of Discrimination against Women during its Pre-Sessional Working Group

Dear Committee Members:

The Center for Reproductive Rights (the Center), an international non-governmental organization with offices in Nepal, Colombia, Kenya, Switzerland, and the United States, the Forum for Women, Law and Development (FWLD), the Justice and Rights Institute – Nepal (JuRI Nepal), and the Justice for All (J4A) have prepared this letter to respectfully assist the Committee on the Elimination of Discrimination against Women (the Committee) in its review of Nepal’s sixth periodic report (State Party Report) on compliance with the Convention on the Elimination of All Forms of Discrimination against Women (the Convention) and formulation of the list of issues during the Pre-sessional Working Group for the 71st session.

This letter focuses on two issues concerning violations of women’s and girls’ reproductive health rights. First, the letter highlights on the gaps in the current and forthcoming laws on abortion leading to imprisonment of women undertaking abortion. Second, the letter deals with gaps and inconsistencies in the existing and forthcoming laws related to child marriage, and ineffectiveness in the implementation of laws and policies resulting in the continuation of child marriage. The letter highlights the need to review the general criminal ban on abortion that has led to the prosecution of women and enact a comprehensive reproductive health rights law integrating access to safe abortion services. It also underscores the importance of promoting legal accountability for ending child marriage in Nepal.

I. Committee’s Concluding Observations and the State Party’s Responses

During Nepal’s 2011 review, the Committee made several important concluding observations on women’s reproductive rights and child marriage. The Committee specifically expressed its concern on “the high rate of unsafe abortion, in particular by women in situation of poverty, women from rural villages and from marginalized communities within urban areas”¹ and recommended the government to “improve access to abortion services throughout the country.”²

Responding to the concluding observations, the State Party Report highlights that the maternal and reproductive health of women has been improved by implementing various guidelines including on safe abortion.³ It states that the government has launched awareness raising campaign on safe abortion practices particularly targeting the adolescents and youth,⁴ and that women are receiving Comprehensive Abortion Care (CAC) and Post Abortion Care (PAC) services from listed sites.⁵

On child marriage, the Committee repeatedly raised concerns “at the persistence of harmful traditional practices... such as child marriage”⁶ despite legal provisions banning it⁷ and recommended to “enforce legal minimum age of marriage” and “undertake awareness-raising measures throughout the country on the negative effects of early marriage on women’s enjoyment of their human rights, especially their rights to health and education.”⁸ It also specifically recommended to “adopt concrete measures, including effective enforcement of provisions banning early marriage, to prevent drop out of girls from school.”⁹ Previously, in 2004, the Committee had urged the government to “enforce its marriage law, particularly as they relate to the prohibition of child marriage.”¹⁰

In response, the State Party Report highlights the constitutional prohibition of child marriage, setting of 20 years as minimum legal age of marriage and the endorsing the National Strategy to End Child Marriage, 2016 that aims to end child marriage in Nepal by 2030.¹¹ It highlights various initiatives undertaken by the government, including nationwide launch of collaborative awareness campaigns against child marriage with civil society organizations and national and sub-national level state agencies such as National Women Commission and Women and Children Offices,¹² formation of more than 1000 local level committees to support girls and families vulnerable to child marriage along with referral mechanism,¹³ creating 75 new positions of child protection officials,¹⁴ and hosting the First National Girl Summit to galvanize wider support to end child marriage.¹⁵ The Report also claims the gradual decrease in child marriage in Nepal “due to legal, policy and programmatic interventions” against harmful traditional practices against girl child, including child marriage.¹⁶ It also reports that the government is in the process of drafting a consolidated legislation against all forms of harmful traditional practices, and the new draft Bill on children prohibits all forms of harmful practices affecting children.¹⁷

II. Relevant Constitutional and Legal Developments in Nepal

The Constitution of Nepal 2015 (the Constitution) guarantees every woman the right to safe motherhood and reproductive health as fundamental rights.¹⁸ The Constitution for the first time explicitly prohibits child marriage¹⁹ and upholds children’s right to compensation in cases where their rights are violated.²⁰ Furthermore, the Constitution also clearly requires the State to adopt legal provisions to implement the fundamental rights within three years of its commencement (i.e. by September 20, 2018).²¹

In 2017, the Government of Nepal (the government) after years of review, replaced the *Muluki Ain* (the Country Code of Nepal - that encompasses provisions related to both Penal and Civil matters) with separate civil and criminal codes—the *Muluki Penal (Code) Act, 2017* (the Penal Code Act) and the *Muluki Civil (Code) Act, 2017* (the Civil Code Act)²² – which will be effective only from August 17, 2018.

III. Issue Summary

A. Women imprisoned for undertaking abortion

In 2002, the eleventh amendment to the Country Code introduced legal exceptions to the general ban on abortion.²³ Prior to introducing legal exceptions, unsafe abortion accounted for 50% of maternal deaths in major hospitals.²⁴ Approximately 20 percent of total women prisoners of Nepal were imprisoned for undertaking illegal abortions.²⁵ While access to safe abortion services has contributed significantly to reducing maternal mortality ratio in Nepal,²⁶ women continue to be prosecuted and imprisoned given the general ban on abortion.

The Supreme Court of Nepal in *Lakshmi v. Government of Nepal* in 2009 issued a ground-breaking decision recognizing abortion as a woman's fundamental right.²⁷ It issued an order to the government to remove disparities to ensure the uniformity in service fee, and to enact separate and comprehensive law on abortion from right based approach. In line with the Supreme Court's decision, in 2014 the government initiated a process of drafting a separate Bill on Safe Abortion Services. In 2015, the government announced free abortion services in government health facilities, and in 2016 the Procedural Guidelines on Safe Abortion Services Program were revised to incorporate the provisions related to the implementation of free abortion services. The government allocated, total budget of \$ 27,000 in last fiscal year (2016/17) and \$ 800,000 in current fiscal year (2017/18) for providing these services, however, its implementation remains to be monitored.

In light of the constitutional development that guarantees reproductive health as fundamental rights, in 2016, the government initiated a process of drafting a comprehensive umbrella legislation on Reproductive Health (RH Bill) that focuses on five major RH components—namely family planning, safe abortion, safe motherhood, treatment of reproductive morbidity, and access of adolescents and persons with disability as a cross-cutting issue in all the components. The RH Bill received “in principle consent” from the Cabinet in 2017, but the process has been stalled for several reasons including the 2017 elections in Nepal. Regardless of these developments, the recently enacted Penal Code Act criminalizes abortion as a general rule,²⁸ and only includes provisions on legal exceptions to abortion.²⁹ It fails to not only take on board the Supreme Court decision in the case of *Lakshmi*, but also undermines the development related to comprehensive RH Bill which integrates provisions related to abortion from a right based approach.

As noted earlier, as a general rule, abortion is still a criminal offence in Nepal and the provisions related to abortion are in the Chapter on Homicide of the Country Code. According to 2016 National Health Demographic Survey (NDHS 2016), 59% of girls and women between the ages of 15-49 are still unaware about the legal exceptions under which abortion is permitted;³⁰ especially those belong to rural areas, are without education, and poor.³¹ Women continue to face significant barriers in accessing safe abortion services, which includes “lack of awareness of the availability and location of services, lack of transport to approved facilities, and gender norms that hinder women's decision-making ability.”³²

Due to criminalization³³ and stigma surrounding abortion, women often resort to abortion beyond legal exceptions generally from untrained providers in illegal settings.³⁴ According to an ongoing fact-finding study conducted by FWLD and the Center in 15 districts of Nepal,³⁵ 54 abortion-

related cases were registered between 2011 to 2016 in the district and high courts, out of which 13 cases were against women for terminating their pregnancies.³⁶ Among these 13 cases, 5 women were convicted, of which four imprisoned. It must be noted that, in cases where women were convicted, they were not only unaware of legal exceptions to the general ban on abortion but also lack information about the place where CAC services were available forcing them to seek illegal abortion from untrained providers, thus exposing them to the risks of life, health and prosecution. In one case, the Court has even convicted a 15-year-old victim of rape, who terminated pregnancy at around 20 weeks by consuming medical pills brought by her father from a local drug seller.³⁷ The girl's father and the drug seller were released on ground of lack of evidence. While many facts of the case remain unclear, there is no investigation on the issue of rape. The case demonstrates the suffering caused due to criminalization of abortion and thus the need for doing away with the general ban on abortion.

B. Gaps, inconsistencies, and poor implementation of laws addressing child marriage

Child marriage triggers a continuum of reproductive and sexual harms and violations for girls,³⁸ including exposure to forced and unprotected sex. Lack of access to reproductive health information and services further deteriorates the married young girls' lives leading to unplanned and frequent pregnancies. According to NDHS 2016, among married girls between age 15-19, only 14.5 percent used contraceptive methods.³⁹ The unmet need for family planning in this group is approximately 35 percent which is considerably higher than the overall unmet need for women between age 15 - 49 (approximately 24 percent).⁴⁰ It also notes that approximately 40 percent of married girls aged 15-19 have already given birth to at least one child.⁴¹ Women and girls married young are also denied of educational and employment opportunities,⁴² and suffer domestic violence⁴³ mostly from their spouses.⁴⁴

Child marriage i.e. marriage below the age of 20 years is a criminal offence in Nepal,⁴⁵ and is penalized with fines and imprisonment for those involved in arranging such marriages.⁴⁶ The government adopted the National Strategy to End Child Marriage in 2016⁴⁷ and is currently finalizing the costed implementation plan. Despite these ongoing legal developments and initiatives, UNICEF's the State of the World's Children 2017 listed Nepal as one of 20 countries worldwide with the highest prevalence of child marriage and as having the third highest incidence of child marriage in South Asia.⁴⁸ According to the 2011 national census, approximately 75% of married women surveyed were married before age 20 and over 100,000 girls were married before the age of 10.⁴⁹ According to NDHS 2016, among women age 25-49, 71% women were married by age 20 and 52% of women were married by age 18.⁵⁰ These statistics clearly emphasize on the need of stricter enforcement of legal age of marriage.

Child marriage is an offence against the State.⁵¹ However, according to Women and Children Service Directorate of Nepal Police, in the last 18 years (i.e. 1996-2014) only 93 cases of child marriage have been reported to the police.⁵² The State Party Report noted that in 2014/15, the District Attorney's Office prosecuted 45 cases, and the Appellate Government Attorney's Offices and the Attorney General's Office prosecuted 25 and one cases respectively.⁵³ While these figures show gradual increase in prosecution of cases related to child marriage, these are still too low given the persistent prevalence of child marriage in Nepal.

Reiterating the lack of adequate steps to implement laws related to child marriage, the Supreme Court of Nepal has issued numerous directive orders to the government to address child marriage through the effective implementation of laws.⁵⁴ The lack of effective implementation of laws can be attributed to both substantive gaps and poor implementation of law. Gaps in the current laws prohibiting child marriage include the condition to declare the marriage void i.e. the couple does not have any children from the marriage at age of 20,⁵⁵ three months statute of limitation,⁵⁶ and inadequate punishment and fines.⁵⁷ Furthermore, the existing legal provisions are silent on support mechanisms and social protection systems such as legal aid, sexual and reproductive health services, psycho-social counselling, life skills programs, educational and employment opportunities, and shelters for girls and women who opt to leave such marriages.⁵⁸

Moreover, the lack of harmonization between the laws prohibiting child marriage and other laws that disempower girls and women further act as barriers in accessing legal remedies for women and girls married young.⁵⁹ In addition, some of the major procedural challenges include limited knowledge among law enforcement agencies about their roles, lack of legal accountability for not taking required actions, difficulties faced by women and girls in proving their actual age and age at marriage due to the weak birth registration system, poor or incorrect information about the law and low level of marriage registration.⁶⁰

The recently enacted Penal Code Act and Civil Code Act have taken inconsistent approaches to addressing child marriage. While the Penal Code Act criminalizes marriage below 20 years⁶¹ and declares it *void ab initio* i.e. the marriage does not have any legal effect,⁶² according to the Civil Code Act such marriages shall be legally valid, though voidable.⁶³ Though the Penal Code Act increases the maximum fine for child marriage,⁶⁴ the punishment remains minimal. Additionally, the Penal Code Act also punishes minor for marrying below the minimum legal age⁶⁵ thus leading to double victimization. This clearly reflects the lack of recognition of the continuum of harms resulting from child marriage leading to violation of fundamental and human rights.⁶⁶

Similarly, though the Civil Code Act recognizes 20 years as legal age of marriage,⁶⁷ it has some problematic provisions. It recognizes marriages solemnized in accordance with custom and traditions,⁶⁸ and except in cases of rape or incest, if a woman has given birth to child resulting from sexual contact, the man and woman are considered to be married.⁶⁹ These provisions may be interpreted to justify child marriage.

Therefore, effective enforcement of laws and policies and addressing gaps and inconsistencies in laws is crucial in ensuring legal accountability and providing robust support mechanism for girls married young.

IV. Suggested Questions for the Government of Nepal

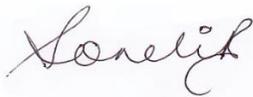
In light of the above, the Center, FWLD, JuRI Nepal and J4A respectfully request the Committee to raise the above-mentioned issues for review with the government and to ask the following questions:

1. What measures are being taken by the government to ensure that women are not prosecuted and imprisoned under any circumstances for undertaking abortion?

2. What has been done to remove provision related to abortion from criminal law, and to enact comprehensive legislation on reproductive health with provisions related to women's access to safe abortion from right based approach?
3. What specific steps are being taken by the government to address the gaps and weaknesses in laws and policies on child marriage, including by reviewing and amending contradictory provisions in the Penal Code Act and the Civil Code Act, to ensure that child marriages are void *ab initio*?
4. What specific steps are being taken by the government to effectively enforce legal provisions prohibiting child marriage as well as to ensure access to effective legal remedies and support mechanisms for girls married young?

The Center, FWLD, JuRI Nepal, and J4A hope that the information provided in this letter will be useful to the Committee in drafting the list of issues to be raised with the government during its sixth periodic review. Please do not hesitate to contact us should you have any questions.

Sincerely,



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- ¹ CEDAW Committee, *Concluding Observations: Nepal*, para. 31, U.N. Doc CEDAW/C/NPL/CO/4-5 (2011).
- ² *Id.*, at 32.
- ³ Government of Nepal, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Sixth periodic reports of States parties due in 2015: Nepal, para. 87, U.N. Doc. CEDAW/C/NPL/6 (May. 15, 2017) [hereinafter Nepal Report before CEDAW].
- ⁴ *Id.*, at para 88.
- ⁵ *Id.*, at para 200.
- ⁶ CEDAW Committee, *Concluding Observations: Nepal*, para 17, U.N. Doc CEDAW/C/NPL/CO/4-5 (2011).
- ⁷ *Id.*, at para 43.
- ⁸ *Id.*, at para 44 (a).
- ⁹ *Id.*, at para 28(b).
- ¹⁰ CEDAW Committee, *Concluding Observations: Nepal*, para 209, U.N. Doc A/59/38 (2004).
- ¹¹ Nepal Report before CEDAW, *supra* note 3, para 25.
- ¹² *Id.*, at para 23, 27, 134.
- ¹³ *Id.*, at para 24.
- ¹⁴ *Id.*, at para 24.
- ¹⁵ *Id.*, at para 25.
- ¹⁶ *Id.*, at para 24.
- ¹⁷ *Id.*, at para 26.
- ¹⁸ THE CONSTITUTION OF NEPAL, 2072 (2015), art. 38(2) (Nepal).
- ¹⁹ *Id.*, art. 39(5).
- ²⁰ *Id.*, art. 39(10).
- ²¹ *Id.*, art. 47.
- ²² The *Muluki Penal (Code) Act, 2074* and *Muluki Civil (Code) Act, 2074* were enacted on October 16, 2017.
- ²³ The *Muluki Ain [Country Code]*, part 4, ch. 10, no. 28(b), 28, 28(a), 29 (1963) (Nepal) [hereinafter *Muluki Ain (Nepal)*]. The legal exceptions to abortion are up to 12 weeks of pregnancy on demand; in case the pregnancy is a result of rape and incest up to 18 weeks of pregnancy; and at any gestational period if the pregnancy poses a danger to the woman's life or her physical or mental health or if there is a risk of fetal deformity. Abortion performed beyond the prescribed gestational period, forced abortion by third party i.e. abortion without the consent of pregnant women, and any outrageous act of a third party that causes abortion is a punishable offence.
- ²⁴ THAPA PJ, THAPA S, SHRESTHA N, A HOSPITAL-BASED STUDY OF ABORTION IN NEPAL, *STUDIES IN FAMILY PLANNING* (1992).
- ²⁵ CREHPA, *WOMEN IN PRISON IN NEPAL FOR ABORTION* (2000).
- ²⁶ The maternal mortality ratio is 239 deaths per 100,000 live births during the 7 preceding years. GOVERNMENT OF NEPAL, MINISTRY OF HEALTH AND POPULATION, POPULATION DIVISION, NEPAL DEMOGRAPHIC AND HEALTH SURVEY 2016 259 (2016) [hereinafter NDHS 2016].
- ²⁷ *Lakshmi & Others v. Government of Nepal*, Decision No. 8464, N.K.P. 2067, (Vol. 9) at 1551 (2009).
- ²⁸ The *Muluki Penal (Code) Act, 2074*, part 1.2, ch. 13, sec.188 (2017) (Nepal).
- ²⁹ *Id.*, sec. 189.
- ³⁰ NDHS 2016, *supra* note 26, at 161.
- ³¹ *Id.*
- ³² Guttmacher Institute, *Abortion Incidence and Unintended Pregnancy in Nepal*, 42 *International Perspectives on Sexual and Reproductive Health* 197-209 (2016).
- ³³ *Muluki Ain*, *supra* note 23, part 4, ch. 10, no. 28 (a).
- ³⁴ CREHPA ET AL., *EFFECTS OF BEING DENIED LEGAL ABORTION IN NEPAL* (2015).
- ³⁵ CENTER FOR REPRODUCTIVE RIGHTS, FORUM FOR WOMEN, LAW AND DEVELOPMENT, *IMPLEMENTATION STATUS AND CHALLENGES OF ABORTION LAW IN NEPAL (Unpublished report)*. The Study is based on the abortion cases registered between fiscal year 2011/12 to 2015/16 from 15 districts of Nepal.
- ³⁶ Out of the 54 cases, 13 cases were against women terminating pregnancies, 7 were related to infanticide, 5 were related to forced abortion, and 29 were abortion caused as a result of third party actions, including by beating.
- ³⁷ *Government of Nepal v. Ta*, decision no. 128, decision date (17 December 2015) (Ilam District Court) (in the files with Forum for Women, Law and Development).
- ³⁸ CENTER FOR REPRODUCTIVE RIGHTS ET AL., *ENDING IMPUNITY FOR CHILD MARRIAGE IN NEPAL* 8 (2016).
- ³⁹ NDHS 2016, *supra* note 26, at 125.
- ⁴⁰ *Id.*, at 132.

⁴¹ *Id.*, at 96.

⁴² GOVT. OF NEPAL, MINISTRY OF HEALTH AND POPULATION, POPULATION DIVISION, NEPAL ADOLESCENT AND YOUTH SURVEY 42 (2012). 26.64% of girls ages between 15-19 drop-out of schools due to marriage in Nepal

⁴³ NDHS 2016, *supra* note 26, at 339, 349. 11% of women among age 15-19 experienced physical violence in Nepal. and approximately 10% experienced violence during pregnancy.

⁴⁴ *Id.*, at 350. Among approximately 84% of women age 15-49 who experience physical violence since age 15, reported their current husband committed the violence.

⁴⁵ The Muluki Ain, part 4, ch. 17, no. 2 (1963) (Nepal). The eleventh amendment to the Country Code raised the minimum legal age of marriage to 20 years, for both women and men, and legally permitted marriages above the age of 18 years with parental consent - which was repealed in 2015.

⁴⁶ Muluki Ain, *supra* note 23, part 4, ch. 17, no. 2(1-8).

⁴⁷ Press Release, UNICEF, Nepal Hosts Its First Girl Summit to End Child, Early And Forced Marriage (Mar. 23, 2016), <http://unicef.org.np/media-centre/press-releases/2016/03/23/nepal-hosts-its-first-girl-summit-to-end-child-early-and-forced-marriage>.

⁴⁸ UNICEF, THE STATE OF THE WORLD'S CHILDREN 2017 (2017), *available at*: <https://data.unicef.org/resources/resource-topic/child-protection/>.

⁴⁹ GOVT. OF NEPAL, NATIONAL PLANNING COMMISSION SECRETARIAT, NATIONAL POPULATION AND HOUSING CENSUS 2011 (National Report) 131 (2012), *available at* cbs.gov.np/wpcontent/uploads/2012/11/National%20Report.pdf.

⁵⁰ NDHS 2016, *supra* note 26, at 77.

⁵¹ The State Cases Act, 2049 (1992) at Annex (Nepal).

⁵² NEPAL POLICE, CRIME INVESTIGATION DEPARTMENT, WOMEN AND CHILDREN SERVICE DIRECTORATE, *available at*: <https://cid.nepalpolice.gov.np/index.php/cid-wings/women-children-service-directorate>.

⁵³ Nepal Report before CEDAW, *supra* note 3, Annex XVIII tbl. 18.

⁵⁴ *See* Sapana Pradhan & Others v. Prime Minister & Council of Ministers & Others, decision no. 7659, N.K.P. 2063, Vol. 3 at 289 (2006); *see* Rama Panta Kharel & Others v. Government of Nepal, Writ no. WS-128/2063 B.S. (2007); Kavita Pandey v. Prime Minister & Council of Ministers & Others, decision no. 8901, N.K.P. 2069, Vol. 10 at 1534 (2012).

⁵⁵ Muluki Ain, *supra* note 23, part 4, ch. 17, no. 2(9).

⁵⁶ *Id.*, at no. 11. The statute of limitation for filing a complaint, by any person, is three months from the date that the person learns of child marriage.

⁵⁷ *Id.*, at no. 2(1-8).

⁵⁸ CENTER FOR REPRODUCTIVE RIGHTS ET AL., ENDING IMPUNITY FOR CHILD MARRIAGE IN NEPAL 21 (2016).

⁵⁹ *Id.*, at 14-15.

⁶⁰ *Id.*, at 20-21.

⁶¹ The Muluki Penal (Code) Act, 2074, part 1.2, ch. 13, sec. 173 (1) (2017) (Nepal).

⁶² *Id.*, at sec. 173 (2).

⁶³ The Muluki Civil (Code) Act, 2074, part 3, ch. 1, sec. 73 (1) (a) (2017) (Nepal).

⁶⁴ The Muluki Penal (Code) Act, 2074, part 1.2, ch. 13, sec. 173 (3) (2017) (Nepal).

⁶⁵ *Id.*

⁶⁶ CENTER FOR REPRODUCTIVE RIGHTS, CHILD MARRIAGE IN SOUTH ASIA (2013).

⁶⁷ The Muluki Civil (Code) Act, 2074, part 3, ch. 1, sec. 70 (1) (d) (2017) (Nepal).

⁶⁸ *Id.*, at sec. 67.

⁶⁹ *Id.*, at sec. 74.