



Technical Guidance: Decriminalisation of Abortion

The most recent available estimates show that around 45% of all abortions globally were unsafe. Over half of all estimated unsafe abortions globally were in Asia, mostly in South and Central Asia. Similarly, 3 out of 4 abortions that occurred in Africa and Latin America were unsafe. Legal and policy barriers have been recognised as amongst the leading barriers to safe abortion, contributing to and compounding other obstacles such as high cost, lack of skilled providers, stigma, and discriminatory gender norms.¹

Laws and policies play a critical role in determining an individual's access to safe abortion services. United Nations experts have recognised that the rate of unsafe abortion in any country is directly correlated to the extent that its abortion laws are restrictive or penal.² The public health and social justice impacts of abortion criminalisation with exceptions have been clearly articulated by human rights bodies and experts: rather than making abortion safer, improving health or lives, or reducing the incidence of abortion, such laws actually lead to less safe abortions, worse health outcomes,³ and harm to women's status in society by perpetuating gender stereotypes and abortion stigma.⁴ For marginalised groups of pregnant persons, the likelihood of ill-health and legal risk from criminal laws is greatly heightened.

Despite evidence of the harmful impact of this approach, criminalisation of abortion remains prevalent in Global South countries and beyond, at

least on certain grounds or gestational stages. In many countries, the criminalisation of abortion is a colonial legacy, enshrined in penal codes and provisions adopted nearly wholesale from European countries. Positively, many countries in the Global South have significantly liberalised their abortion laws in recent years, with some even recognising abortion as a fundamental right. Yet, law reform typically takes the form of criminal law liberalisation that leaves intact the underlying framing of abortion as a crime to which there may only be limited exceptions.

As advocates, there is a pressing need to highlight the failings of criminal legal approaches to abortion—including exceptions-based approaches where abortion is de-penalised on certain grounds—and call into question why abortion is the sole medical procedure regulated through criminal laws. Recent developments, including COVID-19 and use of medication abortion outside of the formal health sector, have further revealed the urgency of decriminalisation of abortion in a context where millions of pregnant people could potentially be considered criminals for self-managing an abortion despite the limited availability of care in the formal health sector.

This factsheet aims to provide a tool for advocates seeking to challenge criminalisation of abortion, including understanding how and why full

decriminalisation can increase access to safe and legal abortion.

History of Criminalisation of Abortion

Abortion remains, at least, partially criminalised in most countries (see Part V for a discussion of comparative laws). Globally, 41% of women live under restrictive laws and in 26 countries, abortion is not permitted under any circumstances at all.⁵ In 158 jurisdictions, pregnant people who participate in an unlawful abortion also face criminal penalties.⁶ State criminalisation of induced abortion labels abortion as “inherently wrong” and “harmful to society.”⁷ This stands in contrast to where states frame abortion as a health issue legally, which shows that abortion is part of the preservation and promotion of health.⁸

In much of the Global South, abortion criminalisation is a legacy of colonial-era penal codes. For example, in India, Pakistan, and Bangladesh,⁹ the penal code of 1860 introduced by the British colonial government criminalises abortion with stringent punitive measures.

Laws criminalising abortion often have the stated rationale of promoting state interest in protecting prenatal life and/or reducing maternal mortality resulting from unsafe abortion. However, restrictive abortion laws do not meet the alleged purpose of protecting prenatal life because they do not reduce the incidence of abortion. Further, evidence shows that restrictive laws increase the risks of unsafe abortion, which leads to maternal mortality and morbidity. Criminalisation of abortion leads to significant harm, including the denial of abortion by providers because of the fear of prosecution and harassment, and refusal of care to women facing obstetric emergencies due to suspicion of abortion.

Courts have also recognised that another rationale for abortion criminalisation is legal entrenchment of moral or religious perspectives, codification of gender stereotypes regarding maternity, or pursuance of demographic or other political goals.¹⁰ Criminal abortion laws frame abortion as a crime against society, often reflecting the view of women who undergo abortions as failing to fulfil their “societal duty” to reproduce. The stigma resulting from

abortion not only has a chilling effect on access to services, but also contributes to individuals’ internalisation of stigma and harms perceptions of self-worth.

The Path to Abortion Decriminalisation: From Partial to Full

Reform of criminal provisions on abortion may take many forms, including partial and full decriminalisation. *See text box: Defining Decriminalisation*

Defining Decriminalisation

“**Partial decriminalisation**” of abortion refers to the liberalisation of restrictive abortion laws where abortion remains punishable under the law in certain circumstances. Partial decriminalisation typically includes reform to recognise exceptions where abortion is legal, such as within certain gestational limits and/or on certain grounds.

“**Full decriminalisation**” of abortion means ensuring that no one – including pregnant persons, health-care providers, or others – is subjected to criminal or punitive sanctions for:

- seeking or having (or being presumed to have sought or had) an abortion,
- performed an abortion, or
- assisted others to obtain or perform an abortion.

Abortion criminalisation impedes access to abortion by perpetuating stigma and creating a “chilling effect” on pregnant persons’ access to healthcare and resulting negative health outcomes. Under partial decriminalisation, these barriers persist. When an overarching criminalised approach to abortion is retained with only exceptions, the entire procedure remains stigmatised. Abortion criminalisation with exceptions creates a regime where individuals seeking abortion services must “prove” they should be exempted from punishment. Stigma along with the possibility of prosecution leads to a “chilling effect” regarding access to abortion.

While restrictive abortion laws can render safe abortion inaccessible, the World Health Organization (WHO) has confirmed that such laws do not reduce the incidence of abortion.¹¹ Rather, individuals with unwanted pregnancies continue to need and seek abortions even when illegal. As a result, they are exposed to an increased risk of clandestine and unsafe abortion, and avoidable maternal injury or death.¹²

Providers and pregnant individuals often remain fearful of heightened scrutiny and prosecution due to lack of clarity on the scope of legal exceptions and real risks of prosecution.¹³ Providers may also report individuals suffering from pregnancy complications to authorities out of fear for being accused of “aiding and abetting” an illegal abortion.¹⁴ For pregnant individuals, this chilling effect leads to delays and denials of safe and legal abortion, fear of seeking care for pregnancy-related complications due to concerns about arrest or abuse, and imprisonment and prosecution (including miscarriages).

Examples from around the world show that exceptions-based approaches that only partially decriminalise abortion are insufficient to address the significant stigma and chilling effects caused by criminalisation.¹⁵ Partial decriminalisation continues to leave pregnant individuals vulnerable to immense physical and mental suffering from forced continuation of pregnancy, clandestine or unsafe abortion, abuse in post-abortion care, and trauma from interactions with the criminal justice system.

- ➔ An example of **partial decriminalisation** is India. In India, the Medical Termination of Pregnancy Act of 1971 removes penalties for registered medical providers for induced abortion on several grounds within certain gestational limits. Abortion outside of these grounds remains a crime. The Indian Penal Code does not exempt pregnant women from prosecution. However, millions of women have abortions outside of the formal health system in India, meaning these women may be considered criminals under the law. In recent years, providers have sent hundreds of pregnant individuals to court to seek approval for an abortion due to fear of prosecution, even where such abortions

would fall within the scope of a plain-reading of the recognised exceptions.¹⁶ Courts in India have recognised that this has led to trauma, including risks of suicide.¹⁷ In its List of Issues for India’s review under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee called for the state to clarify measures to remove legal and practical barriers to safe and legal abortion, including criminalisation and provider refusals to perform abortions due to fears of prosecution.¹⁸

Full decriminalisation is the removal of abortion from the penal code. It also requires looking beyond the penal code — States must modify or remove any other laws and policies and end any practices that directly or indirectly create punishments for abortion.

It is important to understand that full decriminalisation does not mean coercion, force, or violence is legal in the context of abortion. Rather, States must still ensure accountability where individuals’ sexual and reproductive rights are violated, third parties included. Accountability for violation of professional and ethical codes of conduct and medical standards can also still be pursued through general laws and administrative policies or procedures.

- ➔ An example of **full decriminalisation** is the removal of abortion from the penal code, as being sought by activists in the Philippines. Activists seek to remove the penal code provisions on abortion so that no pregnant person, provider, or accompanying person is charged with a crime for inducing an abortion or denied post-abortion care. All convicted persons under these provisions shall be released and pending trials stopped. The draft bill states that coercion and violence will remain criminalised under other provisions of the penal code and the law on violence against women. Also, the draft bill states that providers who fail to meet appropriate standards of care outlined in health-related laws will remain subject to administrative, civil, and criminal liability under existing laws and policies.¹⁹

There has been a growing call for full decriminalisation of abortion across the world. From the Philippines to Colombia, civil society coalitions are taking to the streets, the web, the courts, and the legislature to demand full decriminalisation of abortion. This call reflects the reality that maintaining any criminalisation of abortion—even with exceptions on certain grounds—continues to lead to significant access barriers.

- ➔ In Colombia, the Causa Justa coalition recently filed a petition before the Constitutional Court seeking the full decriminalisation of abortion and regulations to ensure access in practice. Colombia currently has partially decriminalised abortion by recognising broad exceptions to criminal provisions on abortion in certain circumstances. However, the law continues to criminalise abortion in all other circumstances. Evidence shows that partial decriminalisation has been insufficient to address the “chilling effect” on abortion access caused by fear of prosecution and stigma. The law continues to perpetuate harmful gender stereotypes about women by making motherhood the “default” outcome of pregnancy by penalising interruption of pregnancy.²⁰

Full Decriminalisation Must Be Accompanied by Positive Guarantees of Rights

It is important to note that decriminalisation of abortion needs to be accompanied by positive guarantees of access to abortion. Abortion access should be protected within the continuum of sexual and reproductive healthcare. The WHO recommends that: “[a]bortion services should be integrated into the health system ... to acknowledge their status as legitimate health services and to protect against stigmatisation and discrimination of women and health-care providers.”²¹

Positive measures ensure other mechanisms of state control are not used to impede its free and legal exercise, such as restrictive measures established through other legal regimes but not

part of the criminal code (time limits or legal grounds) or administrative means (third party consent requirements). As part of treating abortion like other health care services, abortion access should be guaranteed through broader legislative and policy commitments to ensure the accessibility, availability, acceptability, and quality of healthcare. Positive legislative and policy guarantees could include recognising abortion as essential and abortion medications as essential drugs, addressing abortion-related stigma and harmful gender stereotypes concerning women’s roles vis-à-vis child-bearing, and ensuring universal access to sexual and reproductive health services.

- ➔ An example of how States can adopt positive guarantees of rights is Nepal’s Safe Motherhood and Reproductive Health Act (SRMRHA). This law situates abortion within a broader commitment to reproductive health services. The SRMRHA outlines affirmative responsibilities of the State to provide reproductive health care in practice, not just on paper. These duties include mandating allocation of government funds for reproductive health services and affordable access in private facilities; guaranteeing confidentiality; and outlining measures to ensure the reproductive health of marginalised subgroups without discrimination, such as adolescents and persons with disabilities. The SRMRHA also prohibits coercion or force in the context of abortion decision-making.²²

Human Rights Obligations to Decriminalise Abortion

U.N. human rights bodies and experts clearly recognise States’ obligations to decriminalise abortion. Access to abortion, including under the law, is essential to realisation of the full range of human rights. U.N. treaty-monitoring bodies and experts have repeatedly recognised the harm resulting from criminal abortion laws, including deterring women to take steps to protect their health to avoid liability or stigma, causing preventable maternal mortality and morbidity, and also driving negative mental health outcomes due to the risk of arrest.²³ The Special

Rapporteur on the right to the highest attainable standard of health also cautions that “[w]here abortion is illegal, women may face imprisonment for seeking an abortion and emergency services for pregnancy-related complications, including those due to miscarriages. Fear of criminal punishment for ‘aiding or abetting’ abortions can lead health-care providers to report people suffering from pregnancy complications to authorities.”²⁴

U.N. and regional human rights experts affirm that “criminali[s]ation of or other failure to provide services that only women require, such as abortion and emergency contraception, constitute discrimination based on sex.”²⁵ The UN Working Group on the issue of discrimination against women and girls in law and in practice notes that criminalisation of abortion “is one of the most damaging ways of instrumentalising and politicising women’s bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies.”²⁶ Human rights law also recognises that the discriminatory impact of criminalisation is felt most acutely by marginalised groups that face intersecting forms of discrimination.²⁷

Human rights bodies and experts recognise that criminalising women and providers is linked to human rights violations.²⁸ Under human rights law, States must repeal discriminatory criminal laws, including laws that criminalise abortion,²⁹ and ensure that women and other pregnant persons are able to access safe abortion services both in law and in practice. For example, since 2015, the Committee on the Rights of the Child has consistently recommended that States “decriminalise abortions in all circumstances and review its legislation” as a means to ensure access to safe abortion and post-abortion services.³⁰ By 2020, the call to decriminalise abortion in all circumstances has also come from the Committee on the Rights of Persons with Disabilities, the Committee on the Elimination of Discrimination against Women, the Working Group on Discrimination against Women and Girls, the Special Rapporteur on the right to the highest attainable standard of physical and mental health, the Special Rapporteur on extrajudicial, summary, or arbitrary executions, and the Special Rapporteur on violence against women.³¹ Human rights bodies and experts also state that post-

abortion care must be provided immediately, confidentially, and unconditionally, regardless of the legal status of abortions.³² Mandatory reporting of abortion and coercion or delays in care to extract confessions violate human rights law.³³

Further, human right requires that States remove other barriers to legal access to abortion, including cost, unregulated or improperly regulated refusals of care by health providers, and medically unnecessary mandatory waiting periods or counselling. Human rights law also requires positive legal and policy measures that guard against arbitrary denials of abortion where legal and ensure access to services on legal grounds.³⁴

Growing Recognition of the Need for Abortion Decriminalisation in the Global South

Across the world, advocates, courts, and legislators are recognizing the illegitimacy of criminal legal approaches to abortion. In many countries, including in Asia and Latin America, this has resulted in support for campaigns to partially decriminalise abortion or expand existing exceptions.³⁵ Notably, however, there has also been growing recognition of the need to fully decriminalise abortion, including in the Global South. For example, the Supreme Court of Nepal recognised in 2009 that abortion criminalisation discriminates against women. The Court noted that such discrimination is especially experienced by illiterate and low income women from rural areas, and called for the government to use health regulations and law to ensure access to safe abortion care through a comprehensive legal framework that “defines the related rights, duties, and processes and is implemented through appropriate programs.”³⁶ Civil society has built on this decision to pass a comprehensive reproductive health law that outlines positive obligations to ensure abortion access and continues to advocate for the decriminalisation of abortion.

Similarly, in 2016, building on the recognition of the right to safe abortion in certain circumstances in the Maputo Protocol, the African Commission on Human and Peoples Rights launched a continental campaign

to decriminalise abortion in Africa. In launching the campaign, the Special Rapporteur on the Rights of Women in Africa stated:

“One may want to ask this question: if we have all these laws and frameworks, why are our women and girls still dying due to unsafe abortion? The answer is mainly that most African states have maintained colonial and punitive domestic laws that criminali[s]e the right to safe abortion.... Laws that criminali[s]e abortion ...mean[] the state has punitive power over women’s reproductive autonomy. When these laws are enforced, women’s rights are denied.”³⁷

The campaign recognised that criminal abortion laws not only harm public health, but also harm social justice. The Special Rapporteur on the Rights of Women in Africa noted that such laws are discriminatorily enforced and unfairly impact the most vulnerable women and girls.

Conclusion

The call for abortion decriminalisation is arising from across international, regional, and national human rights movements. Their advocacy reveals the stark truth revealed both by data on the impact of criminal abortion laws as well as scientific progress on medication abortion—that there is an urgent need to treat abortion as the essential health service it is. As a result of such criminal laws on abortion, every day, pregnant individuals around the world face arrests, prosecution, and incarceration for preventable obstetric emergencies or suffer the cruelty and harm of being forced to continue unwanted pregnancies. These harms are most acutely experienced by marginalised populations, who often experience intersectional discrimination based on gender together with race, caste, economic status, sexual orientation, or other status. Recent developments have only underscored the need to reform colonial-era penal codes and adopt legal frameworks that

truly advance bodily autonomy, health, and gender equality.

Endnotes

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- ²⁴ See CEDAW, *Inquiry Concerning the United Kingdom*.
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ABOUT THE PUBLICATION

This technical guidance paper aims to provide a tool for advocates seeking to challenge criminalisation of abortion, including understanding how and why full decriminalisation can increase access to safe and legal abortion. Laws and policies play a critical role in determining an individual’s access to safe abortion services. The public health and social justice impact of abortion criminalisation with exceptions have been clearly articulated by human rights bodies and experts: rather than making abortion safer, improving health or lives, or reducing the incidence of abortion, such laws actually lead to less safe abortions, worse health outcomes, and harm to women’s status in society by perpetuating gender stereotypes and abortion stigma.

ABOUT SAIGE

The Safe Abortion Advocacy Initiative- A Global South Engagement (SAIGE) is a platform for Global South advocates, activists, academics and services providers committed towards realizing safe abortion as a human right.