

## LEGALIZING STATE PATRIARCHY IN NEPAL

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The debates concerning women's property have given rise to such anxieties as the "Nepali family" in crisis and the concomitant erosion of the "social fabric of Nepal."<sup>1</sup> While much has been said about the pivotal role of the state in these political conflicts, the extent to which the state has been conceptualized as playing a central role in the shaping of "the Nepali family" and "Nepali culture" via the law in this, and past, historical legal and political junctures, has not been investigated.

By focusing on changes in family law in the country's civil code, the *Muluki Ain* (MA), during the Panchayat era of Nepal's history (1961-1990), in this article I trace the historical evolution of the role of the state vis a vis "the family" in Nepal. I argue that in contradiction to dominant historical readings of legal changes for women as constituting a linear progression of laws from conservative Hindu laws of old to modern legislation entailing greater and more freedom for women,<sup>2</sup> the legal changes made to the MA entail much more complicated and contradictory consequences for women in Nepal. More specifically, legal amendments made during Panchayat rule has resulted in the increased power of the Nepali state to intervene directly into family relations, appropriating authority to re-define the relations between family members. This has further led to the encouragement of the development of separate gendered spheres of the feminine domestic realm of the private and the masculine of the public. I argue that the Panchayat era was an important time in the history of gender in Nepal and that the state and the law played central roles in the structuring of a particular form of patriarchy – a shift from "family patriarchy" to "state patriarchy."<sup>3</sup>

For purposes of clarification, in this article I have taken the state to be a distinct set of centralized institutions which monopolize the use of

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1 For a summary of such arguments and responses to them see K. Sangraula 1997.

2 This is not to say that such accounts have argued that the rights women gained so far are have been sufficient.

3 As will be evident, much of this piece is indebted to the work of Boris and Bardaglio (1983) and it is from them that I borrow the idea of the transition from "family" to "state" patriarchy.

legitimate force over a given territory. Patriarchy is defined as the struggle between women and men to control women's labor power (Boris and Bardaglio 1983: 7). Gender is used to emphasize the "socially produced structures, meanings and relations that depend on, deepen and transform, but are not fully explained by, or reducible to, biological sex differences"(Nair 1996: 11). Furthermore, the arguments posed in this article make no assumption concerning the actual impact of these laws on the populace. Nor is it assumed that the transformation of families takes a unilinear form, especially given the multiplicity of family forms in existence in Nepal. Indeed as Gilbert (1993) has shown, the manner in which communities interpret or resist (legally or extra-legally) the legal code is embedded in local, ethnic, political and various other vectors of identities which make it impossible, without detailed ethnographic research, to argue either the creation of a "Hindu" social pattern or some sort of hybrid "Nepalization" process. My focus solely on state-initiated legal reforms is instead premised on the argument that without an understanding of the manner in which state-society relations have been historically structured, the potential for, and the effectiveness of, democratic changes cannot be ascertained.

I begin with a brief outline of the evolution of the legal structure of Nepal. I then trace the dominant narratives of women and law in Nepal and the inter-linking between Panchayat, development - *bikas*, and current state and non-governmental legal initiatives. I then embed these legal initiatives in the larger political background of Nepal and then finally embark on an in-depth analysis of the actual legal amendments and the implications they hold for women and the structuring of gender roles in modern Nepal.

### **The Legal Framework**

It was not until 1854 that a civil code, the Muluki Ain (MA), was established by the Hindu Rana elite who ruled Nepal following the appropriation of power from the royal family. As no codification of law had taken place before this time, the creation of the MA as a national legal system is of extreme importance in terms of the structuring of one of the chief agents of state intervention.

The MA was a comprehensive legal code which divided and ranked the entire population into a caste hierarchy with Bahun and Chettri<sup>4</sup> castes at

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4 Otherwise known as Brahman and Ksatriya, these groups are of Indic origin and usually referred to in Nepali as being Bahun and Chettri.

the top, Tibeto-Burman “tribes”<sup>5</sup> in the middle and untouchable castes as the bottom (Höfer 1979). In contrast to caste systems in India, the MA placed non-Hindu populations into the middle-ranking over and above the low castes. In the creation of a national caste system where caste-ranked Hindus, Tibeto-Burman and ethnically Tibetan people were placed in a single caste hierarchy, thereby defining the manner by which all groups related to others as well as to the state, the cultural dominance of Hindu norms was reinforced. While it may appear to make sense of the MA as more of an ethnicized caste hierarchy, the intent of the makers was to rank the population according to caste. Indeed, as Levine points out in her article on the nature of caste and ethnic boundaries in Nepal, by disadvantaging those groups that conformed least to Hindu norms, non-Hindu groups “came to deal with the state as the state defined them, in the guise of castes” (Levine 1987: 72). In Höfer’s terms, the MA represented a significant advance towards integration and “to becoming a nation of castes” (Höfer 1979: 202).

The MA provided laws that covered details that ranged from appropriate relations between land-holder and tenant, to punishment for improper defecation as well as state regulation of inter-caste sexual, marital and commensal relations (Höfer 1979). Encompassing civil, criminal and procedural law, the MA for the first time provided Nepal “with a uniform system of administration, particularly in relation to revenue and judicial concerns” (Adhikari 1976: 106). State officials legislated local behavior by regulating caste boundaries and behavior with laws and punishments for crimes varying according to caste and sex.

In early 1951, a monarchy-catalyzed revolution ousted the Rana oligarchy and restored the king to power, paving the way for the Panchayat years (1961<sup>6</sup> to 1990) of “guided democracy” - a system of ostensibly village-based democracy “suited to the Nepali soil,” but which functioned in reality as a repressive political system that banned political parties and concentrated power in the monarchy. An amended MA was promulgated in April 1963 in which the language of caste distinctions and hierarchies disappeared and laws applied to all uniformly regardless of sex

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5 Included in this category are such groups as Gurung, Tamang, Limbu, Rai, Sherpa and others. For some of the debates surrounding the complex distinctions between caste and tribe see Sharma 1978, Gellner 1991 and Holmberg 1989.

6 The decade of the 1950s was a period of democratic experimentation which was cut short by the abrupt seizure of power by King Mahendra in 1960.

or “caste”. Since its promulgation, this MA was amended a total of eight times during the Panchayat period. Following the 1990 democratic revolution, the MA has been amended once and a new Constitution as well as various legislation have been implemented to guarantee basic democratic rights.

Within this larger framework of changes, discussions of the law and women are embedded in descriptions of the establishment of uniform laws, the banning of excessive punishments, the erasure of caste differences and the equalization of punishments for both sexes. By concentrating on the period of Panchayat rule during which time the most amendments overall and specifically pertaining to women were made, the following section maps out, via analyses of newspaper articles, official speeches and various state and non-governmental publications, the manner in which women and the legal rights they have gained over time, have been portrayed as an unproblematic linear progression.

### **Constructing the Gendered Legal Agenda**

Discussions concerning the law and women form part and parcel of what historian Onta has termed *Rāṣṭriya Itihās* - a national chronicle of progress as part and parcel of a very specific form of Nepali national history disseminated during the Panchayat era, in which the dark era of Rana rule is contrasted with the enlightened, progressive and modern period of Panchayat rule (Onta 1996). Nepal has been said to have undergone three unifications (*ekikarāns*)– the first territorial, when Prithvīnarayan Shah unified the country in 1768 by conquering petty principalities, the second emotional, with Bhaunbkhata Acharya’s translation of the Ramayana into simple, non-Sanskritic Nepali, and a third unification with *bikās* – development – as a “tale of progress” that starts around 1950 and restores to Nepal its former glory by unifying Nepal with the world of nations and propelling it into the modern age (Des Chene 1996). As in the gendered nationalist independence discourse of India (Chatterjee 1989, Sarkar 1987), women have played a key role in Nepal’s coalescing, nationalist struggle to develop out of the dark ages.

According to gendered *Rāṣṭriya Itihās*, women in Nepal were part of a unique and special history (Nepal Country Paper 1977). Nepal’s glorious past had an unrivaled tradition of valuing women in society (Adhikari 1984, Raj 2010 v.s., Gorkhapatra 2016 v.s.).<sup>7</sup> Vague references to the

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7 Contradictions in such depictions were not unusual. Having claimed this progressive and unique perspective on women as inherent in Nepal, one

ancient scriptures and religious traditions solidify claims to the fact that women enjoyed a high status in society (Pokhrel 2030 v.s., Gorkhapatra 2018 v.s.). A constant theme that is touched upon but never elaborated in Panchayat era material, such statements are usually accompanied with equally ambiguous and unexplained comments that “unfortunately, in later centuries, the adoption of conventional concepts and the introduction of reformatory policy expanded by medieval literary aristocrats seem to have been responsible for the decline in the status of women” (Nepal Country Paper 1977). For the most part, somewhere starting in the “middle ages” (undefined) there appears to have been a downfall in the status of women in Nepal (Nepali 2037 v.s.: 1). Women of Nepal are daughters of Sita who have had their minds ruined by old beliefs and superstitions.<sup>8</sup> While the sources and the “old-ness” of these beliefs and superstitions is never fully explored, the intervening years of decline in the status of women in Nepal, if specified, are explained by the effect of Muslim rule in India filtering into Nepal (Verma 2026 v.s.: 3, Gautum 2037 v.s.: 3) or the prohibitions laid by the Rana rulers which kept women bound in their roles as housewives (Bista 2025 v.s.: 3). Indeed, if the gloriously high position of Nepali women remains amorphously defined, the backwardness of women immediately prior to the Panchayat period – ie during Rana rule - is always made explicit. This is a period in which women were utterly oppressed and treated like slaves (Acharya 1988: 67). According to Thapa, “prior to the political change of 1951, the social, political, legal, economic and religious factors had made Nepalese women weaker, more exploited and devoid of any sort of freedom” with such “social evils” as polygamy and child marriage (Thapa 1985: 18) For the darkness of the Rana ages of repression, exploitation and injustice could only be highlighted with the natural propensity that Nepal and Nepalis had to just the opposite virtues of freedom, equality and justice for all, as well as the leading role taken by the Panchayat rule to re-establish those standards of old.

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author preceded to then describe women in various domestic roles along with various literal meanings of *Swasni Manchhe* (“women”) such as “an integral part of husband,” “one who knows how to sit gracefully,” and “one who smells like perfume.” See Shyam Prasad Adhikari.

8 According to one author, it is only because of superstition and common beliefs that women’s minds have been ruined. Again, exactly how and from where these “age-old” beliefs came from given the glorious heritage of Sita, Brikuti etc, is not mentioned. See Kusum 1980: 52.

It is in this context that the predominant legal narrative, consisting of the movement from years of grim, repressive laws to one of increasingly modern and enlightened legislation, needs to be situated. The idea of social evils which used to plague the country serves as a useful foil with which to compare progressive Panchayat rule and the modern campaigns against social evils launched by King Mahendra.<sup>9</sup> The 1963 MA implemented by Mahendra is stated as being “a revolutionary step which as far as possible has tried to make pure blind, religious customs and bad practices” (Acharya 1984: 3). The progressiveness of this legal structure is embodied in the statement that “[t]his new *Muluki Ain* has put emphasis on two main points, which are (a) equality before the law and (b) special privileges for women” (Vaidya and Manandhar 1985: 290-91).

Indeed, this MA is said to be Nepali women’s “Magna Carta,” allowing them the opportunity to walk on the same line as women from developed countries and giving women as citizens opportunities in political, economic, social and cultural areas not only legally but also constitutionally (Nepali 2037: 3). Reinforcing this idea is one of the most cited quotes in the literature on women during the Panchayat period - taken from Queen Aishwarya’s speech at the Inaugural Function of International Women’s Year, 1975 in which she states that “so far as the question of equality is concerned, Nepalese women, since the advent of democracy, specially under the partyless Panchayat System, have been enjoying almost all the rights. Nor, like their counterparts in the western world, did they have to wage a protracted struggle for it” (International Women’s Year Committee 1975: 2-3).

While downplaying the benevolent and paternal bestowal of rights by the monarch evident in explicitly propagandist, governmentally sponsored material, the move from dark ages to a modern era is also mapped out in other texts. For example, in 1967 the National Women’s Organization<sup>10</sup>

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9 As part of the moral development of society, social evils such as ostentatious expenditures on rituals, marriage and the sacred thread ceremony as well as drug addiction, child abuse, “woman abuse” and every form of sexual and social discrimination was to be collectively targeted. See SSNCC (n.d.: 14).

10 Following Mahendra’s takeover, all political parties were banned. The 1976 Class Organization Act implemented by the Panchayat state resulted in the constitutional recognition of six class organizations: Nepal Farmers, Nepal Youth, Nepal Women, Nepal Adults, Nepal Laborers and Nepal Ex-Army. The Nepal Women’s Organization was one of the legally recognized “class organizations”.

published a booklet aimed at explaining women's basic rights in a very simplified format. Written by renowned female lawyer Sushil Singh 'Silu,' the publication was rationalized by the fact that after the 2007 revolution and the consequent establishment of [panchayat] democracy, men and women were awarded equality by the constitution. The implicit message was that the need of the day was for women of Nepal to know and to appropriate these new and modern rights - hence the booklet (Singh 2024 v.s.). Concluding remarks of "still a lot to do" and the outlining of potential avenues for further change (Singh 2024 v.s.: 14), imply that what has been achieved, while insufficient, has unproblematically been a gain for women in Nepal.

Notions of a straightforward progress in women's legal rights is as evident in post-Panchayat material. Paudel in his introduction to the MA, states how the bad practices and customs of the past - such as child marriages - have been removed by the current MA and how women who have been victims of oppression since the ages, have been liberated from this tyranny (Paudel n.d.: 14-15).<sup>11</sup> A booklet briefly outlining women's rights according to Nepal's 2047 constitution published by the non-governmental organization (NGO) Service for Underprivileged Section of Society (SUSS) - is illustrative of the non-governmental publications which follow similar formats - highlighting the progressive accumulation of rights by women with each new and "modern" legal provision (Nembang 2048 v.s.).

The sequential acquisition of women's rights needs to be further situated in a context in which according to Panchayat writers, although Nepali society is a traditional society, it is heading towards the modern and a modern, progressive society is in the making (*Rāṣṭriya Utanmā* 2028: 4). The need to regain the glory of old is combined with the necessity to face the challenge of the new. In the creation of "the new Nepali", it was said that women had a special role to play (Bista 2025 v.s.: 3). In tandem with Nepal's march to the "modern", the illiterate and "conscious-less" women of Nepal had to be "awakened" from their pitiful, superstition-ridden lives and moved forward to help develop the nation (Aryal 2031 v.s., Gurung 2028 v.s., Rastriya Sambad Samiti 2025 v.s.).

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<sup>11</sup> As with the example above, Paudel concludes his section on "the safeguarding of women's rights" with comments on the fact that this MA still has errors (n.d.: 21) - with the understanding that rights accumulated thus far remain unproblematic.

It was in this context that amendments in the legal stature of women were repeatedly said to be changes that were “appropriate for the time” *samayānukul samśodhanharu* (Paudel n.d.: 14) and importantly, impacted by current political, economic and social beliefs, with the 1975 United Nation’s International Women Year referred to as key (Shrestha 2055 v.s.: 3). Indeed, what has been recognized as one of the first and most comprehensive analyses of the law as it applies to women in Nepal, *Tradition and Change in the Legal Status of Nepalese Women* by American anthropologist Lynn Bennett begins with the statement that in recent years “great improvements have been made in the formal legal status of women,” (Bennett 1980: xi), and is framed in what has become almost the stock formulation for any study concerning the status of Nepali women,

Marked changes took place after the institution of the panchayat political system by His Majesty King Mahendra in 1961 when women were constitutionally recognized as a special interest group. More recently under the reign of King Birendra, and especially during the International Women’s Year in 1975, further improvements were made in the constitutional provisions governing women’s rights (Bennett 1980: xi).

With the new equaling modern, these changes are all depicted as being positive especially linked as they are to the global realm and the international discourse of rights for women. In this context, “Nepali traditions” of old are portrayed as hindrances to the march towards equality and the development of women in general. As is evident from a fairly recent NGO report, such portrayals continue to dominate: “Religion, ethnicity, culture, law, tradition, history, and social attitudes place severe limits on women’s participation in public life, and also condition their private life. These factors have both shaped the culture’s world view and governed individual self-image, subsequently affecting the understanding and practice of development” (Shtri Shakti 1995: 142).

Framed in the modernization terminology of the transition from the traditional to the modern, the only notion of power evident in these legal accounts is that of patriarchy framed in its ahistorical and unchanging form, stripped of all its caste and ethnic implications. The next section re-inserts the specifically *political* and changing nature of state and society relations missing in these legal accounts.



### **Gendering National Politics**

In recent years, political discussions on state-society relations in Nepal have turned to the realm of the politics of nationalism and ethnicity. Central to these conversations has been the fact that Hinduism, the Nepali language and the monarchy (and as Onta 1996 has pointed out, *Rāṣṭriya Itihās*) has formed the core of national culture as promulgated by the Panchayat regime (Sharma 1992, Burghart 1994, Whelpton 1997). However, most of these political analyses have failed to situate these ideological endeavors in the context of a changing state structure and the gendered consequences of such politics.

Following the end of Rana rule and the supposed “opening up” of the “hermit kingdom”,<sup>12</sup> King Tribhuvan, but especially his son King Mahendra, initiated widespread administrative and development programs - the national project of *bikās*, development - with the aid of foreign donors. Mass institutional and infrastructural expansion was accompanied by the ideological project of national unification with, among other things: the propagating of new legal codes; a national education system; the disseminating of Nepali as the national language; the adoption of national symbols, including the flag; emphasis on the traditional role of the monarchy as a symbol of national unity and as the center of loyalty for various ethnic groups and the unificatory goal of developing the nation (Burghart 1994). In the fortuitous juncture of post World War 2 global imperatives of the project of development, and the Panchayat elite’s own need to legitimate its rule, the massive injections of aid enabled the expansion of infrastructure and state institutions which in turn facilitated the dissemination of Panchayat ideology. Thus political analysts of Nepal have so far missed what scholars from different fields such as anthropology and history have amply demonstrated in their work - that the politics of culture, identity and nation is inextricably tied to the notions of progress and modernization embedded in *bikās* (Pigg 1992, 1993, Onta 1996, Des Chene 1996). Similarly overlooked has been the fact that the Panchayat state was not only a quantitatively, but a *qualitatively* different form of state which sought, ideologically and institutionally, to bring under the purview of state governance realms of social life which had hitherto remained outside its control.

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12 For critiques of this depiction - inextricably linked to the politics of *Rāṣṭriya Itihās* - see Onta 1997.

It is in this context that an understanding of the changing nature of the state as it relates to women, the family and law is important. Höfer noted that when it came to civil law in the MA of 1854,

various groups of the population were openly or tacitly granted a certain degree of autonomy. Local traditions regulating marriage, inheritance, and the like were often tolerated as a kind of customary law, and jurisdiction was the concern of ad-hoc councils composed of village notables (Höfer 1979: 40).

Indeed local groups petitioned state authority in order to obtain official recognition of their own customs and traditions and to modify the law for their own advantage. This led to the law being more a product of mutual accommodation (Hofer 1979: 175). Furthermore, for disputes within communities, state authorities deferred to local community leaders and the family life of these different peoples remained governed only by their own customs and laws.<sup>13</sup> Consequently, while inter-caste relations were strictly regimented, relations within different “caste” and ethnic communities remained largely unregulated.<sup>14</sup> “[I]n effect, the system permitted each group to maintain its own pattern of family life, including its own customs relating to marriage, kinship, sexuality, residence, and inheritance (Gilbert 1992: 736) such that “there was no typical ‘Nepalese family’ but rather a host of ethnically distinct family forms, some bounded by caste practice, some differentiated regionally” (Gilbert 1993: 29).

However, the legal code promulgated by King Mahendra introduced “the concept of a single system of family law, and by implication, a single family form, for the whole country” (Gilbert 1992: 737). This standard family form, takes the Brahman-Chettri as the model and makes that the template for dealings with the family such as marriage, joint-family property management, property transmission (Gilbert 1993: 67). An hegemonic family form based on a “Hindu template”<sup>15</sup> has important

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13 This is not to say that state legislation did not affect non-familial customary practices within these groups. See Burghart 1984 and Michaels 1997.

14 That there were some regulations within certain communities is evident in the MA’s attempt to regulate Newar marriages and make divorce less easy (Gellner 1991: 112).

15 As Gilbert makes clear, both the 1854 MA and later amended versions, deviated from the strict enforcement of orthodox Hindu laws and regulations (Gilbert 1993: 175-248).

ramifications for the structuring of “the Nepali family” currently said to be under threat.

While it is beyond the scope of this article, this “Hindu template” clearly has ramifications for women in communities with gendered familial norms different to that of upper caste, orthodox Hindus as Gilbert has pointed out in her work (Gilbert 1992, 1993). The consequences of this imposition of these laws, however “modern”, on communities in which women have historically had less dichotomously defined gendered roles and public and private spheres of the feminine and masculine, remains to be more thoroughly investigated through further ethnographic research. It may well be that what Hofer saw as the “conspicuous indifference” (Hofer 1979: 209) towards most ethnic groups in the 1854 Muluki Ain relative to their demographic weight and cultural diversity, stemming from ignorance and unchallenged political dominance of the higher Hindu castes, in fact *protected* certain women in Nepal from the patriarchal structures of the laws embedded in Hindu norms. This is not to say that patriarchy does not exist in non-Hindu communities. It is to point out that in some communities in Nepal, women’s roles have not been restricted to childbearing and rearing within the private home as a norm with men primarily defined as participating in the political and economic spheres of the public,<sup>16</sup> in contradiction to this “Hindu template.”

However, of more immediate relevance for the purposes of this paper, and an angle that Gilbert does not pursue, is how this family form based on a “Hindu template” came into being and the specific form it takes in terms of the structuring of relations within the family and relative to the state. A wider and more in-depth examination reveals that the complex structure of relations that restricts women in all their social roles from being able to take full advantage of existing law, is embedded in larger changes affecting individual, family and state relations. It is not only that, as Gilbert states,

the state has stepped out of some familial relations, for instance no longer forbidding inter-caste marriages, or discriminating against the property rights of previously married women; and it has stepped in to others, by strictly ordering the number and type of heirs to a joint family property, adding to the rights of women as wives and mothers, and making divorce easier for women and harder for men (Gilbert 1993: 175).

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16 See for example Watkins 1996.

It is an overall re-structuring of state-family, husband-wife, parent-children relations which intensified individualistic norms and solidified legal identities vis-a-vis the state.

By mapping out the various amendments made to the MA over the years, in the following section I trace the manner in which the rights charted out in the dominant legal narratives have not only led to women's increasing legal individuality vis-à-vis their husbands and families, but have at the same time also resulted in women becoming re-inscribed with gendered identities and roles and more directly falling under the jurisdiction of state power.

### Legislating State Patriarchy<sup>17</sup>

While no explicit category of family law exists in Nepal, the following sections of the MA are generally taken to be constitutive of that category: On Marriage (*Bibāha Bāre Ko*); On Husbands and Wives (*Logne Svāsnī Ko*); On Ancestral Property Divisions (*Amśa Baṇḍā Ko*); On Women's Wealth and Personal Property (*Strī Amśa Dhan Ko*); On Adoption (*Dharmaputra Ko*); On Heirship (*Aputāli Ko*) and On the Payment of Fines for Adultery (*Jāri Ko*). These laws stipulate the conditions by which individuals enter and leave families and their concomitant rights and duties. More specifically, they regulate who can marry under what conditions and with what consequences—legal and economic. Gilbert writes that the notion of “a family” and “a family law” is hard to historically recount in so far as they developed late and that state interventions which affected local family matters were not necessarily aimed at the family or at family law (Gilbert 1993: 32). Furthermore, legal textbooks note that the definitions of what constitutes a family varies according to different tax law and other regulations (Shrestha 2049 v.s.: 2-3, Thapaliya 2045 v.s.: 2-4). Neither does the present MA actively provide a definition of marriage. Instead, the following negative injunctures limit the conditions under which marriage may take place: the age of the couple (MA 2050 v.s. 4[17: 2.1 to 2.5]); their consent (MA 2050 v.s. 3[17]); their physical and mental health (MA 2050 v.s.

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17 I have followed Gilbert's organizational structure in quoting from the MA (Gilbert 1992: 730). The MA is divided into *bhāg* (sections), which are further subdivided into *mahal* which cover topics such as marriage and theft. The *mahal* are divided into *nambar* (numbers) which themselves contain further divisions called *ḍaphā*. The citation of MA 2033 v.s. 3[13:1.3] thus corresponds to the MA of 2033 v.s., *bhāg* 3, *mahal* 13, *nambar* 1, *ḍaphā* 3. All translations are mine unless otherwise noted.

4[17:4,5,9]) and their blood relation (MA 2050 v.s. 4[17:1]). However, the general family created by the code encompasses the man, his wife (or wives), sons and unmarried daughters (Gilbert 1993: 32).

As Gilbert makes clear in her dissertation, issues of family, property, kinship and ownership are not only intertwined, but form the core of relations from a person's birth to death. The MA constructs the legal category of a "joint" family—the *aṁśiyār* who are co-parceners to the *aṁśa* or *sagol* to joint property<sup>18</sup> until the time in which a formal property division takes places (*aṁśa baṇḍā*). Men are entitled to family property by birth. Women acquire rights through marriage to their husband's property. The co-parceners to *aṁśa* property consist of a man, his wife or wives, his sons and their wives or widows and unmarried daughters above a certain age.<sup>19</sup> While it is true that women are not recognized as full rights-bearing persons by law and have tenuous claims to family property only as daughters and wives (Y. Sangraula 1997), an analysis of the forms of amendments to laws relating to the family, especially property, reveals changing conceptions of women as individuals.<sup>20</sup>

Prior to 2020 v.s., only widowed women over the age of 40 were allowed to dispose of all their movable property and one half of their

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18 There are five forms of property ownership within the family stipulated by the Muluki Ain. These are: *aṁśa* or ancestral property; *swa-ārjan* which is property that is self-earned via one's own skill, a legal gift or inherited from another person (MA 2050 v.s. 3[13:18]); *dāijo* which is the dowry property of women usually in moveable in form and given to a girl at the time of her marriage by her parent's side or mother's parent's side or by friends (MA 2050 v.s. 3[14:5]); *pewā* which translates as "women's own property" is that property which is given to wife by the husband with the permission of the co-parceners or that which she has earned through her own labor or from the property already in her possession; and *jiuni* or a "life share" of an ancestral property is given in lieu of a formal *aṁśa* share and consists of a life-time share of the property that is not more than five percent more or less than an ordinary share (MA 2050 v.s. 3[13:15]). That which cannot be proved as belonging to another of the latter four categories, is automatically assumed to be *aṁśa* which makes essential the full documentation of all *aṁśa* and *pewa* in order to ensure that a woman's property remains securely her own.

19 Muluki Ain 2050 v.s. 3[13: 1 and 16].

20 It is not the intent of this paper to highlight the inadequacies of the rights gained by women such as the gaining of rights to parental property by daughters over the age of 35. Such arguments are widespread and will not be rehearsed here.

immovable property (Service for Underprivileged Section of Society [SUSS] 2040/41 v.s.). Furthermore, the woman who had taken *aungsa* from her husband and was living apart from him,<sup>21</sup> or the virgin daughter who had taken *aungsa* from her father's property, was only permitted to do as she wanted with the movable property. All other women had to get permission from the heirs - *hakwallahs* - of up to three generations (SUSS 2040/41 v.s.). With the 2020 v.s. MA, married women were able to dispose all movable and up to half of the immovable property without anyone's permission. The growing economic independence and changing idea of women as individuals with property rights that needed to be secured by the state was furthered with the sixth amendment to the MA in 2033 v.s., when it no longer became necessary for a woman living apart from her husband to need his permission to dispose of her immovable property; she now only needs the permission of her sons who are of age (SUSS 2040/41 v.s.) Furthermore, a completely new clause was added at that time to the Ancestral Property Division *mahal* to state that a woman married for at least 15 years and at least 35 years of age was entitled to get *amśa* from her husband and to live separately (MA 2033 v.s. 3[13:10a]).

Changes in property rights applied to women as daughters as well as to women as wives. With the sixth amendment of the MA made in conjunction with the United Nations International Women's Year (IWY), daughters were given a full share of parental property provided she remain unmarried (SUSS 2040/41 v.s.). The right of daughters to inherit parental property was also modified in their favor at this time so that they became fourth in line (MA 2033 v.s. 3[16:2]).

That women were beginning to attain a legal identity different to that of the household of their husbands, or if not married, that of their fathers, is further shown by the fact that starting from 2020 v.s., a separate category for women's property was created in the legal texts - On Women's Wealth and Personal Property (SUSS 2040/41 v.s.). This is not to say that the concept of women's property did not exist before in legal texts (Bennett 1980: 19). However, the creation of a separate category reveals a concern to make secure women's rights to property and its disposal (SUSS 2040/41 v.s.). Given the import of family, property, kinship and ownership to a person's core relation in Nepal, the rights to

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21 A wife may separate from her husband without divorcing him if he takes another wife or if she is mistreated by him or the in-laws. At that time she is may take her share of her husband's *amśa* property.

property gained by women, though admittedly limited, are indicative of a re-defining of the women vis-à-vis their husbands, family and kin.

The restructuring of family relations and the growing recognition of the woman as a legal person in her own right is further reinforced through the legislation on marriage and divorce. For the first time in the history of Nepal, the 2020 v.s. MA included legal stipulations for grounds for divorce. Prior to this, the legal books only recognized divorce as practiced by custom among various peoples (SUSS 2040/41 v.s.).<sup>22</sup> As authors have pointed out, the state's legal granting of a divorce does not automatically ensure that a woman's best interests will be served—women divorced for infidelity (MA 2050 v.s. 3[14:6]) and elopement are not eligible to make any financial claims on their husbands and alimony given lasts for only five years or until the woman remarries, whichever comes first (MA 2033 v.s. 3[12:4a]). Furthermore in so far as Kuba and Thapaliya point out that the law of divorce specified under the *mahal*, “On Husbands and Wives” has the objective of not only delineating the grounds for divorce but also “to abolish the various existing customary divorce practices and to bring all citizens of the country under one unified code equally” (Kuba and Thapaliya 1985: 107), this has the same effect of discriminating against women from communities with much different and less stringent divorce norms. However, given that increasing flexibility and choice is given *within the context of Hindu laws*, these laws can also be read as granting women more legal recognition and as establishing the legal identity of the wife as separate from that of her husband.

The solidification of the identity of the wife/woman/daughter as individuals in their legal stature vis à vis their husbands and fathers is clear. However such changes, while decreasing “family patriarchy,” has also increased the power of the state to not only “protect” the rights of women but also to determine the internal dynamics of the family. This is

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22 The conditions under which a woman can obtain a divorce include: if the husband brings home another woman to be his wife (see MA 2050 v.s. 3 [17:10]); or has a second wife somewhere else; or has thrown the wife out of the house; or has not given her food and clothing; or has lived for more than three years apart from her without inquiring or looking after her; or he has tried to kill her, break her bones or inflict serious physical harm to her; or if he cheats or tricks her or if he becomes impotent (MA 2050 v.s. 3 [12: 1, 2]). A man can divorce a woman on the same grounds (MA 2050 v.s. 3 [12:1.2]) or if it is legally established that his wife has had sex or eloped with another or merely publically stated that she has done so (MA 2050 v.s. 3 [12:2]).

especially evident in the legislation governing marriages and relations between husband and wife.

In 1971 the Marriage Registration Act was put into effect. Bennett sees this Act as continuing the state's theme of tolerating the very heterogeneous forms of marriage existing in the various ethnic communities of Nepal, validating as it does the legality of all types of marriage performed according to any religious, communal or family tradition that themselves do not contravene existing laws (Bennett 1980: 47). Those who are registered need only meet the following requirements in order to be compliant with the law—to not have living spouses, be of a certain minimum age and be in good mental health (Marriage Registration Act 1971, Chapter 2, Section 4). However, the legislation does not only reflect the changing emphasis on the contractual nature of marriages and the state's willingness to provide a certain amount of freedom within the sphere of marital unions. The very fact that the Marriage Registration Act came up in 1971 also speaks of a general concern of the state in regulating precisely that sphere. As Shrestha explicitly states, Nepali marriages are not just important for the family, but also a subject of concern outside of the home too (Shrestha 2049 v.s.: 28). For what clearly needs to be understood is that while a notion of state tolerance of diverse Nepali ethnic practices does underlie these marriage laws, the fact remains that “the code now stands as the ultimate authority and its provisions prevail over tradition in any court of law” (Bennett 1980: 47).<sup>23</sup> As Gilbert notes, “with few exceptions a marriage may not

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23 The uneasy relationship between the nationally approved regulations and divergent customary marriage and divorce practices is illustrated by “marriage by capture” and polyandrous marriages. In the case of the former, and in cases where the “capture” is but a ritual display stemming from pre-planned arrangements, regulatory problems do not exist. Where, however, the “capture” is indeed forced and the girl/woman does not consent, under *nambar* seven of *mahal* 17 in the Muluki Ain, such a marriage is void. Whether rape charges are then applicable is not clear. Polyandrous marriages practiced by certain Tibetan-speaking peoples in the northern parts of Nepal more clearly illustrate the tension behind state and customary regulations covering marital life. While the MA does permit a man to have more than one spouse, the same is not true for women. However, in so far as the polyandrous wife is often married to all her husbands simultaneously, determining who is the husband and who are the lovers remains ambiguous. The fact that the husband must be the person to put forward a *jāri* case has meant that the issue has so far been circumvented. See Bennett 1980: 48.



be annulled by other than the original parties or the state, and once a marriage has been concluded all other state defined rights in property flow from it, unaltered by family disapproval” (Gilbert 1993: 178). The specific grounds for valid marriage under the matrimonial law in Nepal is decided by the courts “on the Doctrine of Factum Valet, presumptions, equity and good conscience” (Kuba and Thapilia 1985: 107).

A closer examination of the chapter “On Husbands and Wives” (Logne Svasni Ko), reveals just how much more explicit a role the state assumed in the policing of marriages with the sixth amendment made in the spirit and aftermath of IWY. *Nambar 1* of this chapter begins with an enlarged array of numbers which refer to the chapter “On Marriage” for circumstances in which one can obtain a divorce. While in the fifth amendment (2031 v.s.), only numbers four and five of “On Marriage” are referred to, the sixth amendment adds numbers seven and eight to the above. A glance at the numbers referred to reveals that while numbers four and five in “On Marriage” remain unchanged, both numbers seven and eight have been amended by the sixth amendment. Number seven was rewritten so as stipulate that neither a woman *nor a man* can be forced to marry and the fine for doing so is up to two years of imprisonment (as opposed to the unequivocal two years stated up the fifth amendment) (MA 2031 v.s. 4[17:7]). Number eight was amended so as to read that if a married or widowed woman was married off as a virgin, she herself could only be prosecuted if she was over the age of sixteen (as opposed to the age of fourteen stipulated in earlier MA), and if she knowingly takes part in the deception.

Interesting here for our purposes is the fact that the following two extra sentences are added here by the sixth amendment—if the woman is married, the marriage becomes void and if she was a widow, without the agreement of the man, the marriage becomes void (MA 2033 v.s. 4[17:8]). The need to explicitly state that one cannot marry a married woman (previously unstated although clauses existed for imprisonment and fines) and the active inclusion of a clause which puts the authority to dissolve or keep the marriage to a widow in the hands of the man, is indicative of the role of the state in not only regulating women’s sexuality but also maintaining and reproducing gender hierarchy. For at the same time the state seeks to appropriate traditional patriarchy, it also adopts and perpetuates male power.

Furthermore, what is not usually noted when talking about divorce in Nepal is the manner in which *nambar 1(a)* of the chapter “On Husbands and Wives”: *explicitly added during the sixth amendment* (as opposed to

being merely amended) states the requirement that if all the stipulations concerning the circumstances under which a married couple can divorce are met, then a request must be filed at the village or town level government office, whereupon it is the duty of the latter to also do all it can to reconcile the couple. If attempts at reconciliation fail and everyone is in agreement that it is better to divorce rather than keep the marriage intact, then within the year, that office has to send its recommendation along with the filed request to the relevant district level office (MA 2033 v.s. 3[12:1a]). The increased power of the state to directly intervene and indeed, decide the “properness” or “viability” of marriages is clear. As Gilbert states succinctly, “Divorce...has ceased to be an informal affair, and has become a matter for government action” (1992: 751).

The increasing intervention of the court and thus the state into the establishment and regulation of marital unions is made clearer when looking at the regulations for *jāri*. The latter is a customary practice in which a man who commits adultery with another man’s wife is allowed to keep the wife if he pays the cuckolded husband a cash compensation which was taken to be a “marriage expense” or “divorce expense” (Höfer 1979: 79). This chapter was amended with the sixth amendment so that the provisions on adultery were radically changed. In keeping with the general equalization of punishment of crimes, regardless of the caste status of all involved, punishment and fines were to be equal for both sexes.<sup>24</sup> More importantly for this paper is the manner in which cases of adultery are made more explicitly into a matter of state intervention. The former provisions by which the adulterer was to compensate the husband directly (MA 2031 v.s. 4[18:2]) was abolished. According to new stipulations, rather than payment being made to the husband (SUSS 2040/41 v.s.), a fine of up to Rs. 2000 is to be paid to the court (MA 2033 v.s. 4[18:2]). That fines now have to be made to the state implies that the “wronged” is no longer the husband but the state. While payments were made to the

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24 In MA 1910 v.s., a lower caste man committing adultery with a higher caste woman would have been jailed for up to fourteen years, while had the two adulterers been of the same caste, he would have received a much lighter sentence. See Bennett 1980: 48. The sixth amendment included the provision that both the man and woman involved were culpable and to be fined and jailed according to the same conditions. This recognition of women as legal beings in their own right is also evidenced by the fact that the same amendment made women who knowingly became the second wife of a bigamist as culpable as the bigamist.

state authorities in the past,<sup>25</sup> the fact that payments are now to be solely paid to the state points to a changing notion of who in fact “owns” women’s bodies and thus is “wronged.” Patriarchal responsibility has shifted to the state. It further makes clear that while formerly the payment of *jāri* to the husband whose wife one has eloped with was synonymous with divorce, the government from this amendment on, takes the position that there can be no de facto divorce (Gilbert 1992: 751).

The continued inclusion of *jāri* in the MA and thus the continued relegation of women to the status of the personal property of the husband (Bennett 1980: 48) indicates that the changes that have taken place overall in increasing the rights of women in Nepal were not implemented solely for the purposes of gender equality. These changes were a means with which to legitimize state intervention and state control over hitherto strictly defined realms of the private. In this light, what is usually read as being a move towards greater equity between men and women - that the husband who is himself polygamous is not allowed to press for *jāri* punishment on his wife and his lover (Bennett 1980: 50) - needs to be read more cautiously. Shrestha in his commentary on this particular *nambar* (3) of the *Jāri Ko Mahal* states that the latter clause along with the others restricting when a *jāri* claim can or cannot be made, makes clear that the Muluki Ain grants men the permission to only marry one woman (Shrestha 2055 v.s.: 611). The implicit state regulation of what constitutes a legitimate “married couple” as well as, if not more than a move to equality for women, can be seen as a central driving factor behind the changing laws.

At the same time that women’s rights are increased and the state takes on more of a role of her protector vis-à-vis the husband, it is also clear that the role of the husband is also being regulated. It is important to remember that the restructuring of laws by the state holds gendered repercussions for both men and women. Men are also shaped according to the requirements of the state. The increasingly stringent laws on bigamy speak to official Nepali state concerns with the re-structuring of the appropriate and “proper” role of the husband. Prior to 2020 v.s., bigamy was permitted and no fines or punishments were inflicted on the

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25 Höfer notes that in the 1854 Muluki Ain, two types of payment were made. One was the divorce payment that the seducer paid to the husband based on only the woman’s caste. The other was a fine that was paid to the authorities according to the status disparity between her and her seducer (Höfer 1979: 79).

bigamist.<sup>26</sup> In the 2020 v.s. MA, aside from certain specific circumstance, bigamy was not permitted. However, punishment took the form of up to seven days of imprisonment or up to fifty rupees in fine. In the 2021 v.s. MA, the term of imprisonment was increased to up to one month of jail time or up to one thousand rupees fine. At the same time, the woman who knowingly became the second wife was also held responsible - with seven days of imprisonment or a fifty rupees fine. Under current laws implemented by the 6<sup>th</sup> amendment, only under certain conditions may a man take another woman. The fact that women are not permitted to take another husband at any time aside, this amendment is seen to be an improvement over the previous regulations in that if a man marries another woman for any reasons other than legally stipulated, he is liable to one to two months imprisonment and a fine of from one to two thousand rupees. The woman who knowingly becomes a second wife is also accordingly punishable under the same laws (SUSS 2040/41 v.s.).

That since 1976 in the case of bigamy occurring outside legally defined bounds, the wife herself no longer needs to file a case as anyone is able to do so,<sup>27</sup> highlights the fact that the “equality” that is brought about by such amendments stem from a paternalistic attitude towards women. Consequently, the notion of equality is undermined at the same time that it is strengthened (Boris and Bardaglio 1983: 76). Indeed, Kuba and Thapaliya bring to the fore this basic reality when they state that the lack of the provision of rules and essentials of ceremonies, rites, marriage licence or the requirement to register marriages in order to establish their validity, stem from an intent to protect the child (presumably to avoid questions of its legitimacy) and the woman from sexual exploitation - in so far as “even a mere sexual intercourse outside wed-lock between a man and woman establishes their marital status when the question arises about the legitimacy of a child” (Kuba and Thapiliya 1985: 106). Evidenced here is the assumption that the state *should* intervene on behalf of women and children as well as the increasing power and willingness of the state to intrude into the matrimonial arena hitherto left alone.

### **Regulating Children and Motherhood**

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<sup>26</sup> The following section is taken from SUSS.

<sup>27</sup> The time period within which such cases have to be filed has also been increased from within 35 days to within 3 months. See SUSS 2040/41 v.s.

The increasing role of the state in structuring newly founded notions of “legitimate” marital unions cannot of course exclude attention to the offspring of these unions - the children. Evident from the changing amendments is the increasing individualization of children. For example, not usually remarked upon is the fact that in the 6<sup>th</sup> amendment, *nambar* 6 of the *Aṁśa Baṣṭā* was totally removed (MA 2033 v.s. 3[13:6]). Erased here was the clause that stipulated that a woman who has had four or more husbands, and her children, would only get half the *aṁśa* that a full *aṁśa* inheriting wife would get; and that children born of incestuous relations would only receive a quarter of the *aṁśa* that children born of a fully inheriting *aṁśa* would receive (MA 2031 v.s. 3[13:6]). While such issues as a woman’s purity are obviously at stake here, of more interest is not so much the implicit validation of such unions, but the recognition of and concern for the welfare of the children. The removal of this clause indicates, at least in the legal texts, the conferring of family membership and property rights on what had formerly been seen as “illegitimate” children - who now were the bearers of rights and duties of their own.

Along with the provision of family membership and property rights on illegitimate children, that the rights of children are also increasingly being kept in mind during this time is made clearer by changes in laws on adoption. Prior to the fourth amendment, adoption was restricted to agnatic relatives within seven generations (MA 2025 v.s. 3[15:1]). However *ḍaphā* 4(a) was added by the fourth amendment to state that any child below the age of sixteen, without a father and with the consent of the mother or whoever else has brought him up (including the state if the child was in an orphanage) can be adopted (MA 2027 v.s. 3[15:4a]). The sixth amendment added *nambar* 9a to d and enabled girls to be adopted (MA 2033 v.s. 3[15:9a-9d]).<sup>28</sup>

The addition of formal legal adoptions reveals changing concern over child welfare and notions of the feasibility of parent-child relations based on volition and consent as well as on biology. Furthermore, it is clear that the control over the child now emanates from the state rather than it being a function of natural rights of the parents, as illustrated by the fact that from the sixth amendment, foreigners were able to adopt Nepali children if their economic status and *character* (my emphasis) are deemed

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28 These *ḍaphās* were added to regulate the very specific conditions under which girls could be adopted - such as the need to make sure that a minimal of twenty five year age difference existed between the adopter and the child to be adopted.

acceptable by the state (MA 2033 v.s. 3[15:12a]). As Grossberg states in the nineteenth century American context, “judicially inspired custody and guardianship changes shifted the child placement authority to the courts more than they changed the subordinate legal status of married women”(1985: 244.)

In terms of the state’s increasing ability to intervene between parent and child relations to decide the “best interests” of the child, the need to specifically target the child can also be seen in the changes in terminology with these texts. In the fifth amended MA of 2031 v.s., in the *mahal* dealing with custodial right of parents, the offspring are referred to as *santān* throughout (MA 2031 v.s. [12:3]). After the sixth amendment, the very same *ḍaphā* was not only greatly expanded, but *santhan* was used only twice to convey progeny - both times in reference to the child born within 272 days following divorce. In all other references to the offspring regardless of the age category, the word *nawabālak* - child - is used. This also applies to the clauses amended in the sixth amendmend referring to children in the poor/penniless *mahal*. Shrestha points out that the word *santān* means different things in different parts of the MA. For example in the *mahal* On Inheritance (*Aputāli Ko*), the word *santān* refers to sons. In *nambar* 3 of the *mahal* On Husbands and Wives, *santān* connotes both sons and daughters (Shrestha 2049: 65-66). However, what is important to note here is that while *santān* can also mean family and even heir (especially as used in the *mahal* “On Inheritance”), the introduction of *nawabālak*, hitherto unused, and which is more specific and unambiguous in its reference to children, is indicative of state perceptions of individuating children as separate from families, and thus more specifically targetable for state action. That *nambar* one and two of the Poor Penniless chapter was removed so that they could be included in the Children’s Law of 1991(Shrestha 2055 v.s.: 261) suggests state efforts to more directly control and shape the lives of children according to state needs. These changes need to be situated within the context of greater changes in state policies and increasing value placed on children as sources of future skilled labor force for developing Nepal.

The transformation of women and children as individuals in their own rights is not total. They occur within circumscribed roles and jural statuses which heighten the importance and dimensions of sexuality and reproduction central to the construction and cultural encoding of women within the consolidation of the Hindu state structure.

*Ḍaphā* three of the *mahal* “On Husband and Wives,” was greatly expanded in the sixth amendment. In the amended version, the stipulation

remains unchanged that any child born within 272 days after the divorce is to be considered the child of the husband unless otherwise proven. However, the appropriate guardian of this child and any other under the age of five (increased from the age of three stipulated in the previous MAs) is changed from being the father to the mother. In a reversal of prior legislation (MA 2031 v.s. 3[12:3]), it is the mother who receives the first option to look after children up to the age of five (MA 2033 v.s. 3[12:3]). This changing conception of who is more suited to look after the welfare of such young children maps out a different role for the wife than that of being “the implement of reproduction for the kin group” (Höfer 1979: 86) central to the Hindu concept of woman.<sup>29</sup> The maternal preference reveals a growing link between notions of womanhood and motherhood as well as evolving ideas of both what needs to be done for the welfare of children and what constitutes a “good mother.”

The new faith in women’s innate proclivities for child rearing and in developmental notions of childhood is made all the more apparent in the next sentence in the *daphā* which states that for children aged five and above, the woman retains the first option to look after the children<sup>30</sup> *unless* she has taken up with another man - whereupon the father must taken charge of the child/children (MA 2033 v.s. 3[12:3.2]). It is obvious that *such* women do not fit the state ideal of requisite “good mothers,” although presumed fit to look after children under the age of five. Maternal capabilities of the Nepali women had to fit the state standards of a “proper mother.” However, such is the importance of inherent maternal instincts that the Nepali state does see the necessity of granting them access to the children and thus explicitly states at the end of the *daphā*, that visitation rights *also* be extended to women who have eloped. To reiterate, this is only included by the sixth amendment. Up until then, no such differentiation was made between the “mothering” ability of married and divorced women. In fact, after stating that upon the agreement of both

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29 In referring to the same passages, Shusila Singh ‘Shilu’, a renowned female lawyer with whom Bennett wrote *Tradition and Change*, states that the Hindu concept of woman as *jāyā* is such that she simply bears children for her husband and that she herself has no rights to the child (Bennett 1980: 64). Singh misses here the important ideological ramifications of these changes for notions of “motherhood” and the welfare of the child.

30 In the MA amended for the fifth time, it was responsibility for children of this age group for which mothers were given first priority

mother and father, *santān*<sup>31</sup> over the age of eight were to be looked after by the mother or else the father, the sentence in the fifth amended MA stipulated that the divorced mother would have the responsibilities stated in that *nambar* and that if the woman had another husband, that husband would also be included in the above (MA 2031 v.s. 3[12:3]).

Consequently, while in the past the mothering abilities of divorced women appears unquestioned, stricter notions of what a “good mother” entails structures the manner in which the welfare of the child is thought to be best protected from the sixth amendment onwards. The active intervention and power of the court to decide not only the structuring of the family but to judge the morality of those women’s and other individuals’ standing in the courts is further revealed by the fact that according to Shrestha, in so far as there is no hard or fast rule as to how much alimony is to be given to divorced women, in establishing the amount to be paid, the court takes into account “the husband’s economic circumstances or capabilities, his family situation, the family he has to support, the economic situation of the woman to be divorced, [and] *her character*” (Shrestha 2049 v.s.: 63; emphasis mine). The economic fate of the divorced woman is therefore measured and calculated according a standard of behavior constructed by the paternalistic state apparatus.

Such is the dilemma posed by those women not conforming to emerging ideas of a good “Nepali mother/wife”—that with the sixth amendment (ostensibly for the rights of women)—certain other changes were made in various parts of the MA to ensure that the duties and responsibilities of these women were more strictly regulated. In the *mahal* on the Poor/Penniless, several amendments were made that sought to more strictly structure the roles of those errant women. *Daphā* three of this *mahal* stipulates the rights of child/children should the mother elope and should the father die, be missing or be abroad. The version amended in the sixth amendment reads so that not only does the mother have to look after the children should there be no property-owner or *hakwālā* of age, but that even if the latter do exist, it is the responsibility of the mother to look after all children under the age of eight. Over the age of eight but under the age of sixteen, the mother gets rights to the children only if the *hakwālā* is not of age or does not want to raise the children (MA 2033 v.s. 3[5:3.3]). Shrestha reasons these changes as stemming from the need to ensure that the child/children under the age of eight will continue to

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31 *Santān* can have several meanings, including children, babies, family and kin.



receive the love and care of motherhood (*mātrivoko prem ra snare pāi rahana sakos*). However, those children over the age of eight are no longer thought of as “unknowing” or without the power of wisdom, so that it would be more appropriate to have the child/children under the guardianship of the *hakwālā* of age rather than the eloped mother (Shrestha 2055 v.s.: 261).

It is obvious that as nurture-based definitions of child welfare became more important, they were enacted at the expense of paternal custody rights and older custody laws based on purely legal rights to property - “property-based standards of parental fitness” (Grossberg 1985: 235). What is also clear is that “mothers gained these rights not because they possessed greater power than the father but because the courts viewed as better able to meet the obligations of childrearing that the state wanted fulfilled” (Boris and Bardaglio 1983: 77). Furthermore while new custody rights based on concern with child nurture and acceptance of women as more legally distinct individuals—with a special capacity for moral leadership and child rearing—undermined paternal custody rights and thus played a central role in undermining family patriarchy, these changes, ostensibly for women and in the spirit of International Women’s Year, did nothing to challenge gendered roles. What they served to do was undermine the legal authority of husbands and fathers while strengthening state control over the lives of women to ensure they met state dictated child-rearing obligations. In all, notions of children’s welfare needs, parental fitness and codes of parental duties furthermore, reduced the legal autonomy of the home (Grossberg 1985: 283).

### **Conclusion**

It is clear that the legal changes that have occurred over the years cannot be read as the unproblematic accumulation of rights for women in Nepal. Despite women’s formal equality in some spheres, the active restructuring of family relations seen from a broader angle reveals that women became more closely associated with their bodies as familial ideology constituted as “natural” the role of women as wives and mothers. The legal amendments made during the Panchayat period can be read as part and parcel of a process by which differences became increasingly more fixed and rigid at the same time they became naturalized.

The legal gendering along more dichotomously defined spheres of the private - feminine and public - masculine brings to the fore the fact that Gilbert’s “uniform Nepalese citizen” who emerges from the legal structures (Gilbert 1993: 465) is in fact not so uniform—the citizen in

Nepal is gendered. As I have argued elsewhere (Tamang 2000) the gendering of the public and private spheres and the emergence of gendered citizenship is inextricably linked to the manner in which Nepal became incorporated into the global relations of production—via the international project of development—and the emergence of the non-feminist public and private distinction between state and society and politics and economy. It is the emergence of the latter public/private spheres that has led to the active re-structuring of gendered roles to fit more dichotomously defined notions of masculinity and femininity in Nepal—gendered as in all state-building projects (Joseph 1997), but gendered in historically and culturally specific ways. In Nepal, gendered citizenship must be understood in the context of the central role of international development actors in the maintenance of masculinized Hindu rule; the attempted homogenization of Nepal's diverse population and the creation of “the Nepali woman” (legally and otherwise) as a chief instrument for achieving all of the above.

Contextualized thus, I end with a return to the issue of the state, law, women, and “the family” as it relates to the “property rights” debate. Hitherto not considered in the latter is the fact that “the family” is not just a neutral or purely descriptive term. As Barrett and McIntosh have argued,

it should be remembered that the currently dominant model of the family is not timeless and culture free...This hegemonic family form is a powerful ideological force that mirrors in an idealised way the characteristics attributed to contemporary family life. It has only a tenuous relation to co-residence and the organisation of household economic units (Barrett and McIntosh 1982: 33-34).

If arguments concerning the “destruction of Nepali culture and values” should daughters get equal property rights obscure the changing and in fact the very “modern” nature of existing “traditional” statutes on property and indeed “Nepali culture”, both sides of the property rights debates appear to have missed the manner in which the power of the idea of “the family” enables the “glossing over of varied, changing experiences and possibilities of families” (Risseuw and Palriwala 1996: 28). It may well be that deployments of “culture” as a justification of gender inequalities can be challenged with positive “cultural” examples from the various communities in Nepal (without obscuring the patriarchal structures existant in the latter) which may not fit “the Nepali family” model as legally and commonly understood.

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