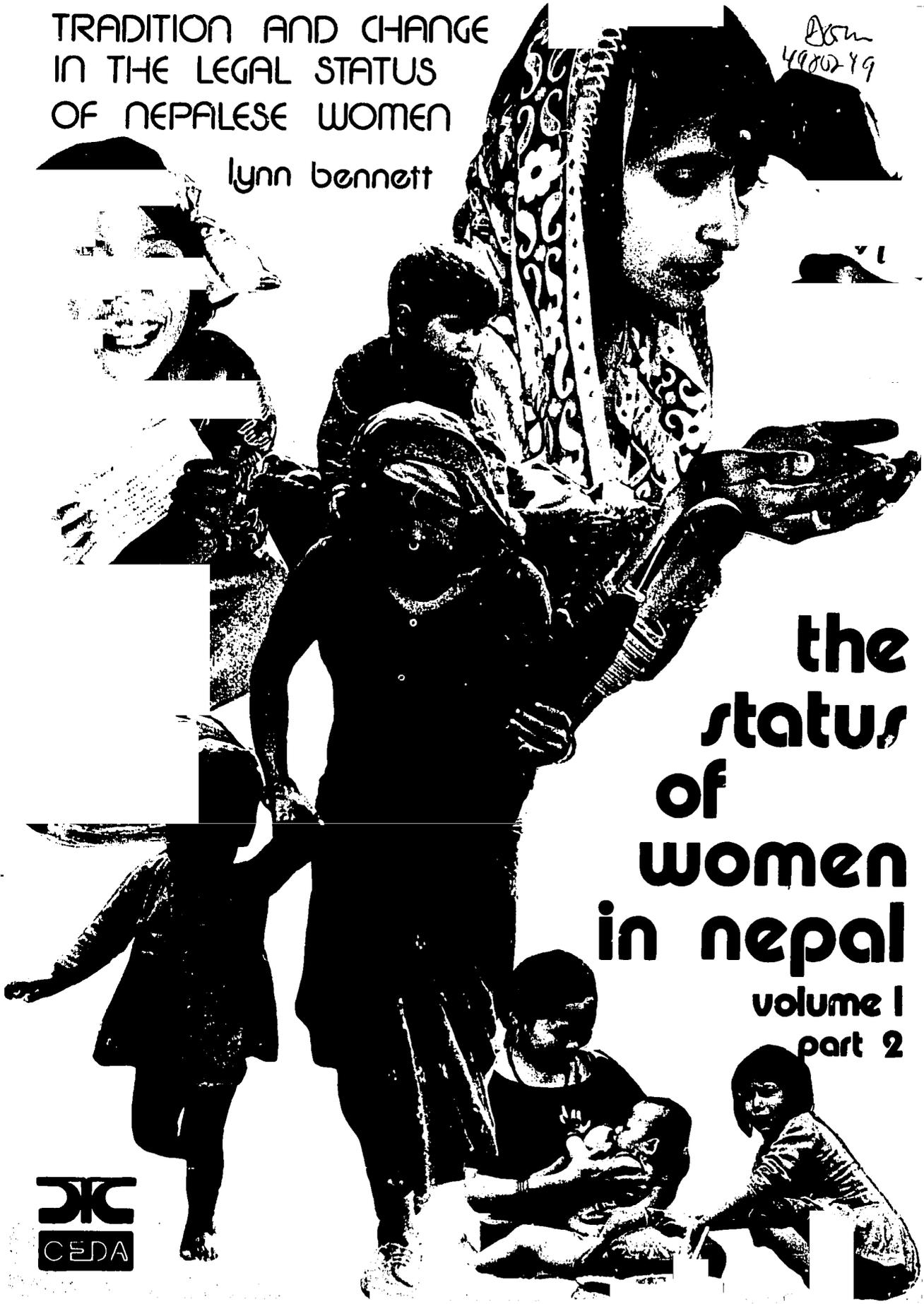


TRADITION AND CHANGE
IN THE LEGAL STATUS
OF NEPALESE WOMEN

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**the
status
of
women
in nepal**
volume 1
part 2



140-117-020
140-45780

TRADITION AND CHANGE IN THE LEGAL STATUS OF NEPALESE WOMEN



The Status of Women in Nepal
Volume 1: Background Report
Part 2

TRADITION AND CHANGE
IN THE LEGAL STATUS
OF NEPALESE WOMEN

by Lynn Bennett
with assistance from
Shilu Singh



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FOREWORD

Empirical investigations about the Status of Women in Nepal have still remained rather scarce. However, the consciousness about the role of women in national development and the need for improving their status for effecting equality have definitely increased over the past few years.

It was almost two years ago that this Centre initiated pioneer research on the Status of Women in Nepal. The preliminary outcome of our effort was the publication of Volume I. The main objective of this publication was to provide adequate background readings for the forthcoming Volume II consisting of about eight case studies on Nepalese women belonging to various ethnic groups and the aggregate analysis of the research endeavours.

The interest shown in our publications both at home and abroad led to the early sellout of the first printing of Volume I. The demand for the various parts of that Volume, however, is still high. It is with pleasure that we are bringing out the second reprint of all the parts of Volume I.

We are grateful to USAID/Nepal for providing financial assistance in the publication of the second reprint of this Volume. Similarly, thanks are due to Tribhuvan University Press for doing the printing job at a short notice.

We hope to bring out the second Volume on Status of Women in Nepal soon.

Dr. Govind Ram Agrawal
Executive Director

SEPTEMBER 1980

FOREWORD

An Introduction to the CEDA Status of Women Project: Its Scope and Purpose

This monograph is part of a series of studies comprising Volume I (Background Report on the Status of Women in Nepal), which itself is part of a broader research endeavour undertaken by the CEDA Status of Women Project. As stated in the formal language of the project agreement between H.M.G. & USAID the overall purpose of the project is "to collect and generate information on the status and roles of a representative range of Nepalese women in order to support planning to facilitate the increased integration of women into the national development process." Towards achieving this broad goal three major consecutive phases of the project were envisioned. The present Volume I containing five separate studies or monographs represents the product of the first phase of the project which was devoted to the collection and analysis of available secondary data on Nepalese women in a number of specific areas.

The second phase of the project, which is still underway as Volume I goes to press, is intended "to develop methodologies and implement pilot socio-economic case studies of women . . . in traditional rural communities." At present the five members of the project research team together with three co-operating anthropologists have just returned from extended field-work in eight different villages in various parts of Nepal. They have used both in-depth anthropological methods and quantitative survey techniques to gather comparative data on women's economic roles and their status, both within the family unit and in the wider social group. In addition to the combined use of anthropological and survey methods, each researcher has conducted an extensive observational Time Allocation Study of the daily activities of all household members within each village sample. The researchers now face the challenging task of analyzing and writing up both their quantitative survey data and their qualitative observational data into studies on the status and role of women in the eight communities where they worked. These village studies together with a comparative analysis and summary of the major development-related findings will comprise Volume II, the product of the project's second phase.

The third and final phase of the project will be to channel the findings of Volume I and II (along with information from the many other documents relevant to planning for women in Nepal) into a concrete and practical draft for a National Plan of Action for Women. Such a draft of course would need input from many other concerned bodies and agencies both at the center and throughout the kingdom before reaching its final form. The CEDA draft will merely be the starting point for discussion and conceptualization by the concerned agencies prior to final endorsement of the National Plan of Action. In many ways the third phase will be the most important part of the project for it marks the crucial and often neglected transition point between research and action. From a more personal perspective for the project team it also represents the means through which we will at least begin to be able to return something to the generous yet practical village women and their families who made time in their busy workdays to patiently answer so many questions and to open us to the often hard economic and social realities of their lives. It is our hope that the Draft National Plan of Action when it is completed will serve as a stimulus for the formulation of a coherent national policy on women and provide a basis for the eventual development of specific action - programs for rural Nepalese women such as those with whom we worked.

Volume I: An Overview

As mentioned above, the present Volume I is the product of the first phase of the project which was concerned with the collection and analysis of secondary data on women in Nepal. The five specific functional objectives which govern the nature and scope of this volume each appear as separate monographs. According to the project agreement, **Objective A** was "to prepare a national statistical profile of women in Nepal." This task was undertaken by Ms. Meena Acharya and appears as Volume I, Part 1, the first monograph in the series. **Objective B** which was "to prepare a summary of women's legal rights as set forth in the National Civil Code" was carried out by Dr. Lynn Bennett with assistance from Ms. Shilu Singh and appears as Volume I, Part 2. Mrs. Bina Pradhan undertook to carry out **Objective C** which was "to prepare an inventory of Nepalese institutions concerned with women." Her work appears as Volume I, Part 3, the third work in the series. **Objective D** was "to compile a list of information resources on women in Nepal" and for this Ms. Indira Shrestha

has prepared the annotated bibliography which appears as Volume I, Part 4. The final objective of the first phase was objective E, "to gather information on the extent to which women's participation in agriculture, industry, trade and science and technology is reflected in Nepal's national plans and programs." This task was undertaken by Dr. Puskar Raj Reoajal and appears as Volume I, Part 5.

Volume I, Part 2: "Tradition and Change in the Legal Status of Nepalese Women"

This monograph is a review of the official legal status of women with special emphasis on their rights to property ownership and inheritance, marriage, divorce and other family laws as well as laws affecting women's ability to enter into business contracts, obtain employment, etc.

The starting point of the study is that in recent years great improvements have been made in the formal legal status of Nepalese women. Significantly, marked changes took place after the initiation 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. In so far as fundamental constitutional rights are concerned there is no discrimination on the grounds of sex in Nepal.

The author however maintains that "full legal equality" may not be unambiguously available to women. For, while the constitution guarantees sexual equality in the application of law, the author notes that there is silence over the nature and content of the laws themselves and that certain legal provisions leave room for conflicting interpretations. One example mentioned is the constitutional provision regarding the right to religion which the author feels could be invoked in defense of certain traditional practices (such as child marriage, etc.) which would compromise the legal equality of women. In this connection the reader is referred to the alternative views on the issue presented by two members of the panel of commentators (Thapa and Sharma), who believe that despite the burden of tradition in Nepalese courts the right to religion is a qualified right.

In her discussion of certain clearly non-egalitarian aspects of Nepalese marriage and property laws the author points out that the law in many instances is not only an instrument of social change but also a bastion of conservatism and orthodoxy. A major portion of the study is devoted to setting out some of the salient social and religious values which resulted in women's markedly inferior status in the classical Hindu legal codes from which contemporary Nepalese law evolved. Yet, as the author does show, there has always been a strong tendency in Nepalese law towards upholding more universal, egalitarian and pragmatic norms rather than those which were unicultural, dogmatic and strictly Brahmanic. Even during the autocratic Rana regime, when efforts were made to apply laws which were more emphatically based on Hindu orthodoxy, the realities of Nepal's ethnic diversity, coupled with the geopolitical exigencies and the countervailing effects of Buddhism, forced the regime to accept local customs. Indeed much effort was given to codification of local customary practises. This is not to say that, as Nepal is a Hindu state, the Mulki Ain does not subscribe to Hindu values and norms. It does. What it does not do is to prescribe these norms at the cost of national integration and social justice. Hence the impression one obtains from Nepalese laws is that while the norms and values are distinctly Hindu the sacred books are less and less frequently invoked for guidance in the interpretation of the National Code. In this sense Nepalese law is dynamic and pragmatic. While saying this it should also be emphasized that women themselves have a vital role to play in the process of evolution towards full equality under the law. This relates to women's own self image. If women seek to be treated as equals then they must refrain from the temptation to secure judicial sympathy by pleading their cases as the "weaker sex."

Unlike the constitutions of many other developing countries, the Nepalese constitution fully guarantees equal political rights for men and women. Further, the Nepalese constitution recognizes the need for special access for women's political participation in the quest for a society that is 'just, dynamic and free from exploitation' (Directive Principles of the Constitution). Towards this end there is the institutionalization of the Nepal Women's Organization as a class organization. The question of how to assure people's participation in development is a major political issue of the day. In so far as women's participation is concerned, there is some considerable debate and

unclearly of direction as to the present role of the Nepal Women's Organization. Hence, although in 1975 provision was made whereby women's political participation at the village and district panchayat levels was guaranteed through cooption of at least one woman at the respective levels by the Back-to-the-Village National Campaign Committee, by the turn of 1977 seats were no longer reserved exclusively for women. Whether in the long-run the method of seat-reservation is in fact the best device for women's political emancipation is being debated even among women leaders. Whatever the merits of the case, however, it would appear that the issue of special provision for women was submerged by the national political debate over the larger issue pertaining to the appropriateness of political representation on the basis of election versus cooption. The political swing in favour of elections generally cost women their reserved seats since other class organizations could presumably demand the same rights and thereby dilute the electoral process based on adult franchise.

The author's summary of findings and recommendations itself lucidly provides the major thrust of her arguments for needed restructuring of the Nepalese judicial system to make it more responsive to women's needs. The hurried reader could profitably consult the same. Of particular interest among the recommendations made is one suggesting the establishment of Family Courts in Nepal. True, the institution of Family Courts will not by itself lead to changes in the ideology of male supremacy. After all the economic and demographic realities are such - slow rate of economic growth, land fragmentation, high infant mortality, lack of job opportunities, low level of literacy, etc. - that it will take a long period of time before the preponderant ideology which requires women to be chaste and modest in all their public and private behaviour and conduct can be socially-oriented towards the same set of virtues which apply to men. With a more dynamic economy women will undoubtedly begin to question their current self-image of dependency and grow into the additionally available roles and responsibilities.

Last, but by no means the least, the author is concerned about possible inconsistencies in the law that could arise in a nonsecular state where certain acts are permissible in the private domain (e.g., caste practice), although not in public. In so far as relationships between men and women are concerned it would seem that, in respect of

family laws at least, the concept of the private and public domains needs further scrutiny. Moreover it should perhaps be emphasized that if the law is to be an instrument of social change, then the state must as matter of public policy actively enforce certain deliberately selected laws rather than simply making them available for recourse to at private, individual levels. One of the essential preconditions for the formulation of such legal policy is a clear assertion on the part of Nepalese women as to the role that they would like to play in society. Such a position based on a national consensus does not now exist. It is believed that the enactment of a long-term National Plan of Action would contribute greatly not only to the resolution of the persisting tension between tradition and change in women's legal status as analysed in this study, but also to the enunciation of an active public policy at the level of the state to further enhance the status of women in Nepal.

Madhukar Shumshere J.B. Rana
Project Director

ACKNOWLEDGEMENTS

This research is a product of the untiring endeavours of many people from within and without CEDA -- some being more visible than others. We believe that this is a joint effort in which each person has contributed his or her best, whether professionally or administratively.

First, we owe a very special debt of gratitude to His Majesty's Government and to the United States Agency for International Development/Mission to Nepal as well as to the Asia Bureau and Women in Development office in AID/Washington for so confidently entrusting CEDA with the responsibility and also the material and moral support to execute this study. Particularly, we would like to thank Secretary, Dr. Devendra Raj Pandey and Joint Secretary, Mr. Hit Singh Shrestha of the Ministry of Finance; the Director of USAID/N, Mr. Samuel Butterfield and last, but by no means least, the Deputy Director, Mr. Julius Coles and the Chief of the Economic and Social Analysis Staff, Mr. John Babylon. These last two gentlemen without hesitation prodded us on our research timetable while always stressing the need for quality in our output. We sincerely hope that we have lived up to their expectations.

Many people from outside CEDA spared their valuable time to help us as commentators, advisors, and consultants. It is impossible to mention each and every one by name, but we sincerely thank Mr. Kul Shekhar Sharma, Governor of Nepal Rastra Bank and Dr. Parthiveswor Timilsina, Dean of the Institute of Humanities and Social Sciences for the secondment of staff to complete the research team.

We owe a special debt of gratitude to the distinguished members of the Advisory Board to this study, namely Hon'ble Mrs. Kamal Rana, Chairperson, Women's Services Coordination Committee and Hon'ble Dr. Ratna Shumshere Rana, Member, National Planning Commission. Also, the role played by Ms. Diane Stanley, Director, United States International Communication Agency should, we believe, not go unrecorded. Her co-sponsoring with CEDA the National Seminar-cum-Workshop entitled "Women of Nepal: Approaches to Change" served in many ways as a catalyst for this study by bringing the women-oriented institutions of Nepal and prominent Nepalese leaders to CEDA to provide us with their insights into the problems of Nepalese women.

We would also like to express our thanks to Mrs. Prabha Thakur and Ms. Barbara Lyon Tobin for their undertaking the thankless task of editing and re-editing our manuscripts and to Mr. Dibya Giri for undertaking the similarly thankless task of typing and retyping the innumerable drafts of our manuscripts.

Finally, we are deeply indebted to Dr. Lynn Bennett, Project Advisor for her particularly deep commitment and intellectual guidance in helping us to steer the study through all its ebbs and tides. And the same expression of gratefulness I personally owe to Mr. Jagat Mohan Adhikari, Vice Chancellor of Tribhuvan University who helped me all along the way with administrative problems faced by the project.

Madhukar Shumshere J.B. Rana
Project Director and
Executive Director of CEDA

January 1979

INTRODUCTION

The National Code and related documents governing the official legal status of Nepalese women reflect a mixture of both modern and traditional ideologies. Since these ideologies are motivated by different values and view women from different perspectives, the law is not always consistent in its intentions. In this sense Nepalese law is a reflection of Nepalese society itself. Anthropology has revealed that all societies contain certain contradictory principles and that a certain degree of ambiguity and inconsistency is everywhere a part of human social interaction.

The interstitial role of women in all societies (and especially in matrilineal ones) as the links between kin groups usually leads to their being the focus of many of these contradictory ideas. This is illustrated by high caste Hindu society in which women are simultaneously accorded high and low status. It is true that the dominant patrilineal ideology assigns subordinate status to women in their roles as wives and daughters-in-law. However, there is a strong opposing sentiment which makes women in their roles as daughters, sisters and mothers, the focus of both affection and deep veneration. Hence, though it is undeniable that Hindu culture views women as properly subordinate to men, the question of women's overall status in Hindu society is actually far more complex. Unless one is willing to accept the contradictions and ambiguity that surround women in Hindu culture; unless one attempts to understand how these conflicting views are related to the dynamic of Hindu culture as a whole, one will be left with but a superficial impression of the actual position of women in Hindu society.

The formal nature of law and the solemn scholarly paraphernalia that surrounds it might lead one to expect that the law escapes this kind of contradiction. But legal scholars have found that it does not. Like any other human institution, the law is necessarily caught up in the conflicting cross currents which impel the society it governs. Thurman Arnold (1969) has noted, in fact, that it is a crucial function of law to "give a place to all of the economic, and also the ethical notions of important competing groups within our society, no matter how far apart these notions may be." Referring to American law he writes that:

It contains both the contradictory philosophies of obedience and revolt. [...] The dissatisfied minority is cheered by the fact that the law is elastic and growing. The conservative is convinced that [law] is becoming more and more certain. It gives all people an equal chance for success, and at the same time it protects those who have been born in more favored positions of privilege and power. (Arnold 1969: 47-48).

Yet Arnold maintains that while law must reflect the pluralistic nature of society, it must at the same time serve a symbolic purpose by fostering an image of society as ultimately governed by a unified and rational set of principles. While in traditional cultures these principles were established by religion, in modern societies they are considered to be determined by 'science' or 'human reason'. "We may describe jurisprudence or the science of the law in our present day as the effort to construct a logical heaven ... wherein contradictory ideals are made to seem consistent. [...] Law is the shining but unfulfilled dream of a world governed by reason." (Arnold 1969: 50).

Like the law in all countries, Nepalese law is neither totally consistent nor totally rational.*¹ Instead, it reflects an attempt to encompass and reconcile the values and norms of a wide range of people from different social, economic, and educational backgrounds. The magnitude of the task is staggering, for Nepalese law must speak to isolated and uneducated people in remote mountains and valleys whose values and ways of living have changed little since the 17th century. And at the same time, it must answer the needs of educated people in the thriving urban centers who are attempting to blend traditional religious values and modern egalitarian values into a uniquely Nepalese synthesis.

¹Footnotes accompanied by asterisks (*) refer to comments by expert readers, to be found at the end of this study.

WOMEN IN THE NEPALESE CONSTITUTION

The official law of Nepal consists of the Constitution, the National Code (Mulki Ain) and the body of Acts and Rules issued from time to time by the legislature. Nepal's Constitution lays out the fundamental principles upon which the National Code and other subsidiary statutes ultimately rest. Though it continues to respect traditional views, the Constitution is a progressive and essentially egalitarian document in its regulation of the rights of women. Section 2 of Article 10 on the "Right to Equality" states that "no discrimination shall be made against any citizen in the application of general laws on the grounds of religion, race, sex, caste, or tribe." (H.M.G. 1976: 6). It further guarantees in Section 3 that "there shall be no discrimination against any citizen in respect of appointment to the government service or any other public service only on the grounds of religion, race, sex ..." (H.M.G. 1976: 6). Joshi (1975: 44) has concluded that these two provisions taken together guarantee that "men and women in public service get equal pay for equal work." Shushila Singh, however, notes that this interpretation is "not free from controversy and that the wording of the two subsections of Article 10 still leaves room for women to be paid less for the same work on some other pretext." Although discrimination on the grounds of sex is prohibited, there is no explicit mention of the principle of equal pay for equal work in the Constitution itself. Thus, according to Singh, "even among men there is no legal guarantee of equal wage for equal work," except among those whose wages are regulated by the rules set out in "Minimum Wages for Industrial Workers Ordinance."¹

The Constitution grants equal political rights to women. "Like males, each female after completing the age of twenty-one years is entitled to cast a vote" and "there is no restriction [on] a woman [becoming] a candidate [for] any post of any kind to be filled by an election." (Rana & Shrestha 1975: 5). In addition, the Constitution, recognizing women as a class of persons who need special access to political participation, provided in Article 67 A for the institution

¹See page 11.

of the Nepal Women's Organization.¹ During International Women's Year a further effort was made to increase women's involvement in all levels of the political structure. The various legislative Acts defining the membership and/or election procedures for village, town and district level Assemblies and Panchayats, as stipulated in the Constitution, (Article 30, 31 and 32 respectively) were amended. In each of these Acts a section was added directing the Back to the Village National Campaign to nominate a woman to each Village, Town and District Panchayat, if there was no woman among the elected members. Unfortunately, however, in December 1977, ordinances to amend the Town Panchayat Act, Village Panchayat Act and the District Panchayat Act were issued. These ordinances, by doing away with the provisions for nominating members, also removed the guarantee that every panchayat body would contain at least one woman.²

Despite the fundamental legal rights and provisions which it grants to women, the Constitution falls short of guaranteeing them full legal equality. A closer look at Section 2 of Article 10 reveals that sexual equality is guaranteed only in the application of the law. This is an important advance over the situation under the old National Code which, for many types of crimes, prescribed differential sanctions depending on the caste or sex of the offender. Joshi (1975), for example, notes that since "a woman was considered to be the weaker sex.... If a certain crime was committed by her she had to suffer only half the punishment prescribed for men." Article 10 clearly prohibits such unequal application of the law; however, it says nothing about the

¹See Volume I Part 3 for discussion of recent changes in the Structure of the Mahila Sangathan or Nepal Women's Organization and description of its present organization and functions.

²Section 10 of the ordinance to amend the Village Panchayat Act says "notwithstanding anything written in any of the foregoing sections, members nominated in the Village Panchayat by the Back to the Village National Campaign shall continue till the expiry of their terms of office. If however, the seat goes vacant, it shall not be filled by nomination." Section 8 of the ordinance to amend the Town Panchayat Act and Section 11 of the ordinance to amend the District Panchayat Act make similar provisions.

nature of the laws themselves which, as Nepalese legal scholars have pointed out, are not always based on equality of the sexes.¹

In addition, Article 14 on the "Right to Religion" introduces possible conflict between sexual equality and religious rights, leaving the legal position of women highly ambiguous. It states that "every person may profess his own religion as handed down from ancient times and may practice it having regard to the tradition." (H.M.G. 1975: 7). While protecting the fundamental right of religious freedom this Article may also inadvertently limit women's rights, since some of the ancient religious practices referred to have been interwoven with social patterns and cultural values that have served as constraints to equality for women. (Joshi 1975: 46 ff). The problem here is similar to the problem of caste discrimination which, though explicitly barred in the Constitution, could theoretically be claimed by some as a legitimate religious tradition.^{2,3}

Here we confront what is probably the major obstacle to full legal and social equity between men and women in Nepal; it is part of a fundamental question about development itself: How does a modernizing nation such as Nepal continue to respect the rich cultural and religious traditions of its citizens while at the same time, it attempts to rework these very traditions along more egalitarian lines? Our concern in the present study is with the role of law in this process of transformation or re-interpretation of traditional socio-cultural patterns--specifically as the law affects the status of Nepalese women.

Historical Transformations in the Role of Law in Nepalese Society

Both the Nepalese Constitution and the present National Code reflect an emerging concept of law as unified, secular and an active instrument of social change. On all fronts this modern ideal of the role of law represents a radical break with the past. In describing the judicial role of Nepal's central administration in the early 1800's, Stiller (1976) draws attention to the diversity of localized customary laws. The law of Gurkha was emphatically Hindu and many of these

¹See Joshi (1975) and also Bhandari's comment on Shilu Singh's "A Daughter's Right to Inherit Paternal Property" in Ghimire (1977: 43).

customary practices were either non-Hindu or at best, unorthodox Hindu. Nevertheless, the central administration tolerated these local practices. Indeed, Stiller goes on to mention that tolerance was in part,

dictated by the geographical and geo-political reality of Nepal. This geo-political situation in the Kingdom re-enforced the Hindu concept of law and imposed on the king and his administration concern for local customs and traditions, acceptance of them, and even sanction of customs that were at variance with the religious ideals that motivated the state. (Stiller 1976: 130).

The role of the judiciary at that time was thus one of passive sanction or validation of the traditional status quo in the various communities under its authority. Clearly the judiciary did not actively encourage social change, even in the direction of Hindu orthodoxy. As Stiller puts it, ordinances issued from Kathmandu "invariably tried to define and classify rather than to impose new structures on society." (1976: 130).

Sharma (1977) in his insightful study of the social implications of the first Mulki Ain or National Code indicates that even after the enactment of this document in 1854, the same tendency towards acceptance of divergent customary practice described by Stiller, continued. "In spite of the fact that the Code of Nepal established the supremacy of Hindu values, still its adopted policy was one of non-interference with traditional customs and usages of the ethnic groups if they did not directly contradict basic Hindu values." (Sharma 1977: 293).¹

¹Sharma (1977: 285) mentions the following "high Hindu value symbols" which under the old Mulki Ain had to be honored by all Nepalese citizens: "the inviolability of the high position of the Upadhyaya Brahmans (this deference to them is reflected in the Code everywhere), sacredness of the cow which could not be killed (Code 66: pp. 296-298), incest (Code 113-120), levirate, copulation with the women of untouchable-caste (Code 156: pp. 670-73) and violation of commensal rules by caste members (Code 90: pp. 407-12)."

In contrast to traditional Gurkha law and the first Mulki Ain, modern Nepalese law clearly intends that in the interest of both national unity and social equity, a single code should govern all Nepalese citizens regardless of their ethnic background or religious affiliation. The new Mulki Ain (National Code) of 1963 is thus supposed to supercede the plethora of localized customary laws that used to prevail throughout Nepal. Customary law may still be practiced, but not where it contravenes the principles of the Constitution or the National Code.*⁴

Another important change is that Nepalese law is no longer validated by reference to Hindu scripture. While it remains distinctly Hindu in character, the present National Code is clearly understood as a product of modern legislative processes, rather than as a product of sacred inspiration. In other words, the Hindu scriptures influence Nepalese law only indirectly to the extent that they shape the general social and ethical values of those who make the law, rather the way the Bible could be said to have influenced English law. Even the old Mulki Ain never depended solely on scriptural authority. The preamble to the revised (1932) version of the old code notes that,

because of changing times all social behaviors can not be conducted solely on the basis of scriptures... [we have therefore] ordered the successive prime ministers to make necessary amendments to the Code in conformity with the scriptures, the country, the times, customs and situations... (H.M.G. 1935).

According to Singh, the trend in Nepalese law has always been "simply to collect, define and classify laws--both laws from the scriptures and customary law--with minimum deviation only when such deviation has become urgent due to the changing times."¹

One of the fundamental questions about the law in every society is: What should be the relationship between the law and public attitudes and behavior? Is the role of law simply to express and maintain existing social norms and traditional moral values? Or should the law itself be an instrument or vehicle for social change? Dror has pointed

¹Shilu Singh, personal communication.

out "the apparent contradiction and real tension between the ideology of the rule of law--which regards law as the stable foundation of social order--and the instrumental orientation towards law associated with the utilization of law as a means of social action." (Dror 1969: 92).

Law cannot entirely abandon its role as the embodiment of social consensus; it cannot go too far beyond existing social patterns and values without losing its effectiveness. Nevertheless, in modern societies there has been increasing emphasis on the instrumental role of the law. Examination of contemporary Nepalese law reveals the same trend towards greater active involvement on the part of the judiciary in the process of social change. Perhaps the most significant impact on the legal status of women has come from Nepal's acceptance of law as a mechanism for social change, rather than simply as means of passively sanctioning diverse ethnic traditions or preserving orthodox Hindu practice.

These changes in the concept of law, together with the modern egalitarian values on which they rest, have substantially improved the legal status of Nepalese women. These modern egalitarian values, however, are far from being universally shared throughout Nepal. Even among the educated urban elite there are those who feel that social change--especially in the direction of sexual equality--is a threat to their deepest cultural and religious values. For this group the role of law should be to preserve tradition which they interpret to mean that women's proper role is to be subordinate to men. This conservative view is reflected in parts of Nepal's Constitution and National Code, creating the mixture of tradition and change or, one might say, the inconsistency and ambiguity of purpose that characterize both of these documents.

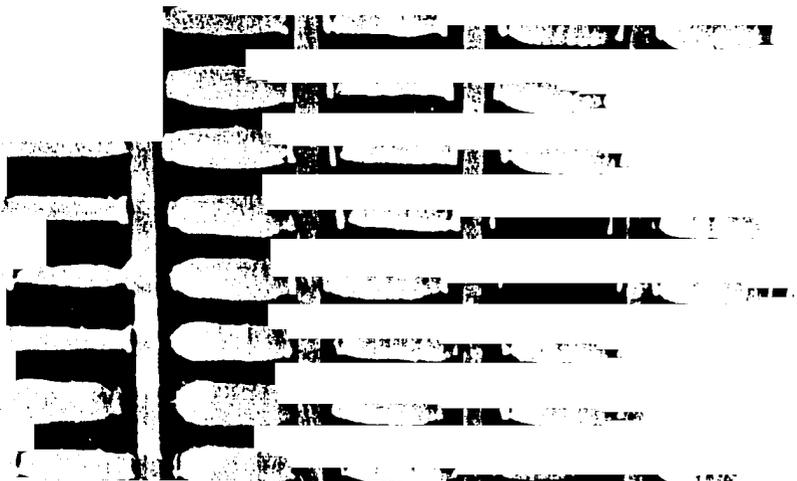
It is the interface between tradition and change in the legal status of women which interests us here, the ambiguities and conflicts that arise and the solutions that have been or could be tried. We have already noted briefly two areas (Article 10, Section 2 and Article 14) where the Constitution potentially opens the way for sexual discrimination. Another area of uncertainty is Section 2 of Article 17 which allows "restrictions on the exercise of fundamental rights for protection of the interest of minors or women." As Joshi (1975: 44)

has pointed out, there are ways in which this clause has actually improved the status of Nepalese women as it was no doubt intended to do. The examples she gives are the laws banning bigamy, child marriage, and marriage between partners with more than 20 years age difference between them, as well as the law requiring the woman's consent to marriage. Since the first three practices are permitted in orthodox Hindu tradition, they could presumably be allowed under Article 14, the "Right to Religion."

Article 17 (2) could in fact be invoked in defence of progressive laws that forbid these traditional practices as harmful to women. Unfortunately, however, this article is very ambiguous and according to Joshi (1975: 44) it "has been misused for creating much inequality between men and women under the law of the realm [i.e. the National Code]."⁵

What we see in the Constitution then, is a document of ambiguous intentions regarding the legal status of women. In the hands of progressive law-makers supported by an active judiciary, the Constitution could provide a stronger basis for substantial improvement in women's legal status than it has so far. Its very ambiguity, especially regarding Article 17 (2), however, leaves room for legislation that could actually limit women's rights in overzealous attempts to protect them.

*Photo on following page:
A woman employed in the textile production
industry in Kirtipur. Photo by Ane Haaland*



WOMEN'S STATUS IN THE NATIONAL CODE

The Public Sector

Let us turn now to the present National Code and the body of legislative Acts and Ordinances where the principles of the Constitution are given concrete expression in the form of law. Generally, legislation in the public sector which governs commercial transactions and the nation's emerging industrial development have been the most successful in incorporating modern egalitarian views. Since the law's involvement in this sector is relatively recent, it has not been constrained by traditional social patterns and has been able to take much bolder measures to improve women's status than has been possible in the field of family law.

This phenomenon is not unique in Nepal. Findings from India (Committee on the Status of Women in India 1974: 102; Sarkar 1977: 95; Pappy 1975: 115), Israel (Lahav 1977: 197), and Turkey (Dror 1969: 96-98) indicate that when developing countries attempt pervasive modernization of their legal systems, areas governed by family law tend to be much less receptive to change than the public sector. Dror's hypothesis is "that changes in the law have more impact on emotionally neutral and instrumental areas of activity than on expressive and evaluative areas of activity. Basic institutions rooted in traditions and values, such as the family, seem to be extremely resistant to changes imposed by law." (1969: 96).

The legislation governing the industrial sector reveals a clear intention to take active measures to improve women's status. For example the legislation on "Minimum Wages for Industrial Workers"¹ explicitly states in note 2 that, "male and female workers shall be paid equal wages for equal work." (On Wages 1976: 2). The "Nepal Factories and Factory Workers Act" of 1959 contains numerous provisions aimed at improving conditions for female factory workers. Section 14 calls for "separate and enclosed latrines and urinals for male and female workers." Section 27 specifies that, "no woman shall be employed

¹Passed on November 12, 1973 and amended on January 5, 1975.

in any factory except between 6 a.m. and 6 p.m."¹ Other provisions such as Section 30 regarding maternity benefits,² and Section 34 requiring the establishment of child care centers, are aimed specifically at improving the conditions of working mothers. The 1965 "Nepal Factories and Factory Workers Rules" in Chapter 6, Section 29 "Arrangements for Children" sets out in detail how these child care centers should be run:

1. The management of the factory shall make arrangements for keeping the children of workers at open and uncrowded places situated near the area wherein female workers are employed. A bed shall be arranged for each child in the rooms. There shall be arrangements of toys for the entertainment of the children. The management shall also make provisions for milk and tiffin to every child.
2. A trained nurse shall be posted in every such room to look after the children. The management shall provide plain dress to the nurse to be worn while on duty. Arrangement shall be made to give half an hour's leave every four hours to every mother who has to suckle her baby. (On Wages 1976: 36-37).

The problem with these laws is that they are difficult to implement. According to Shilu Singh, the factory workers' legislation regarding women has yet to be adequately instituted. It is, in fact, one of the proposed projects of the Women's Services Coordination Committee to press for better enforcement of these laws. The danger here as with other protective legislation is that it may inadvertently harm those it seeks to protect. The factory workers' laws may make

¹Section 52.A.4 of the same Act sets forth a fine up to Rs.100/- to be levied on "the person who derives direct benefit from the wages earned by such a woman" (i.e., a woman working under conditions in contravention to Section 27).

²Section 30 states "the director of the factory shall make arrangements for maternity benefits of the factory in the prescribed manner." Recent legislation has set the maternity leave period at one and a half months. Such leave will not be granted on more than two occasions.

conditions of female employment so expensive that factory managers refuse to employ women. Similarly the protective restrictions on hours during which women may work, the weight they may lift,¹ and even an insistence on equal wages for women, may also unintentionally limit employment opportunities for women. In order to actually benefit women, such protective legislation must not only be actively enforced; it must be accompanied by a strong H.M.G. policy of equal opportunity for employment with, for example, tax or foreign exchange incentives for companies that hire women despite the extra costs involved.

Even if such a policy can be realistically worked out in the context of Nepal's nascent industrial development, it still leaves untouched the vast majority of Nepalese women in the labor force--those who work in the unorganized sector (often at wages well below those of men) as agricultural laborers.*⁶

Family Law

Women's Status in Classical Hindu Property and Inheritance Law

The laws which most deeply affect the lives and opportunities of Nepalese women are those governing marriage and divorce, property rights, and inheritance. Generally, this is an area known as family law or in English jurisprudence, 'the law of persons.'² The Nepalese National Code of 1963, and more recently, the 6th amendment passed during the 1975 International Women's Year, have greatly improved women's position in matters of family law.

¹The "Nepal Factories and Factory Workers' Rules," Chapter 7, Section 46 on "Lifting of Heavy Loads by Workers" specifies that: "The following workers shall not be allowed to lift or carry heavy loads in excess of the following weights: 1) Adults - 2 Maunds, 2) Women - 1½ Maunds, 3) Children - 1 Maund."

²In India these same matters fall under "Personal Laws" which are different for different localities and religious communities.

Women's Traditional Legal Status: The Cultural Context

Despite these recent changes, however, the National Code still preserves certain features of the traditional Hindu patrilineal ideology. This ideology views women as dependent on the one hand, and dangerous on the other. Accordingly, women must be both protected and controlled by their male kin. In the familiar words of Manu, the ancient Hindu law-maker: "Her father protects her in childhood, her husband in youth and her sons protect her in old age, a woman is never fit for independence."

The logic behind this view of women is extremely complex, involving Hindu ideas about purity and pollution as well as the related cultural ambivalence toward sexuality and fertility with which women are so strongly associated in Hinduism as in virtually all cultures in the world (Ortner 1974). In the Brahman-Chetri culture of rural Nepal one can see this ambivalence ritually expressed in the fact that, despite the profound respect for motherhood, child birth itself and other signs of female sexuality, such as menstruation, are considered polluting.¹

At this point it is important to emphasize that in speaking of "Hinduism" we are referring to an ancient cultural religious complex which has existed for more than two thousand years and which today is practiced in many forms throughout the Indian sub-continent and beyond. The basic metaphysical principles and spiritual values of the Hindu world view have thus been expressed in a great variety of social and ritual configurations in many different Hindu communities past and present. Even within Nepal, Hinduism has been interpreted differently by the Newari and Parbatiya communities and by the many indigenous hill peoples who have adopted Hinduism to varying degrees. In addition, the various socio-economic and educational strata within each respective group have also developed their own particular interpretations of Hinduism. The social reality of Nepalese Hinduism thus ranges from strict Brahmanical orthodoxy on the one hand to liberal reform interpretations on the other, with countless variations in between. Then too, in Nepal there is the countervailing effect of Buddhism--both Newari Buddhism and Buddhism as it is still practiced by many Tibeto-Burman speaking groups from the hill and mountain regions of the country.

¹For fuller discussion of this issue see Bennett (1976)

Nevertheless, it is appropriate to speak of Nepal as a "Hindu Kingdom"; and it is helpful to try to understand the legal status of women in Nepal in the context of traditional Hindu values, however much these values may be undergoing change and re-interpretation. In the same way one can make the broad statement that Hinduism or the Hindu world view contains within itself conflicting views of women, as long as one is always aware that the way in which this underlying ambivalence is expressed will be different in any given Hindu community, philosophical school or religious sect one chooses to consider in depth. Some may seem to emphasize the negative side of the contradiction and the subordinate position of women; others focus on the positive aspect and the high status of the female. For example, within the range of Hindu views of women, one finds documented the severe restrictions placed on women of the Nambudri Brahman community of South India (Gough 1955 and Yalman 1963) on the one hand, and the fervent worship of the power of female energy found in the medieval and contemporary Shakta cults on the other (Bharati 1965).

Acknowledging then, the limitations of generalizations about Hindu women or even Nepalese Hindu women, we will briefly examine the position of women as it is reflected in the specific social organization and ritual practices of the rural Brahman-Chetri community of the middle hills of Nepal. Although this group does represent the largest single population group in the kingdom, it must be emphasized once again that their beliefs and practices which are discussed here do not in any sense hold universally for Nepal. There are two reasons for dealing in some detail with Brahman-Chetri social structure: first, the basic outlines of their world view and the world view embodied in classical Hindu law are essentially congruent. Hence an understanding of contemporary Brahman-Chetri social structure and values provides an important key to the logic and social implications of Hindu law and the Nepalese National Code which emerged from it. The second reason stems from the acute awareness that there exists in Nepal a large gap between the law as it is codified and the law as it is practiced in traditional rural communities throughout the kingdom. Even a superficial familiarity with the lives of women in the hills and rural areas indicates that they do not yet fully benefit from recent improvements in their official legal status. In many instances--particularly in the area of family law--their legal status is still effectively determined by customary law. Since customary law varies between communities, documentation of the actual legal situation of rural women in Nepal's many ethnic groups

would require extensive field-work which is clearly beyond the scope of the present study.¹ Nevertheless, some grounding in the social reality of one group may help us to at least be aware that the law as it is codified may be quite different from law as it is practiced at the village level. In fact the gap between official and customary law may be much greater in other communities which, unlike the Brahman-Chettri community, do not share the basic Hindu world-view reflected in the National Code.

As we mentioned at the outset of this monograph, the women of the Brahman-Chettri group have a highly ambiguous social and ritual status. Consanguineal women (i.e. daughters and sisters) are worshipped as symbols of innocence and purity while for affinal women (i.e., wives and daughters-in-law) the situation is reversed. These latter women are expected to show great deference to all their husband's family members and to behave in a very modest and restrained way that contrasts sharply with the relaxed behavior allowed them in their parents' home. It is only when an affinal woman achieves motherhood, thereby justifying her sexuality and proving her vital worth to her husband's family, that her status begins to improve.

Perhaps the most important reasons behind the subordinate status of Hindu women in their affinal roles lie in the structure and ideology of traditional Hindu kinship itself. In the simplest terms, Hindu kinship is organized around multi-generational groups of patrilineally related males. These groups of men are largely stationary by virtue of their economic dependence on the land they jointly own and cultivate. Individual women must move from one of these groups to another in patrilocal marriage. Socially, ritually, and economically, the patrilineal extended family is the core of the Hindu way of life. The ideal of agnatic solidarity is strong. There is the conviction that brothers should stick together and there is pride in belonging to a large extended family that can take care of its dependents including aged parents, young children, widowed sisters-in-law, unmarried daughters and even unemployed younger brothers. The extended family thus provides security

¹The Status of Women Project will however attempt at least preliminary documentation of the actual legal status of women in eight different rural communities throughout Nepal during the second field work phase of the project.

to its members and ideally fulfills many of the functions of a comprehensive social welfare program--functions which the government of a developing country like Nepal would find difficult to duplicate.

Ritually, the agnatic group is linked by their obligation to perform funeral ceremonies for fellow members and subsequent annual worship for deceased patrilineal ancestors. These essential ceremonies that insure the spiritual peace of the departed should be performed by male lineage members and preferably by one's own son. The spiritual bond between male members of the patrilineage is further expressed by their corporate worship of a common lineage god or kul devta as well as by their joint worship of the warrior goddess Durga at the great autumn festival of Dasai. Just as women may not perform certain essential funeral rituals, so they are also barred from direct participation in the worship of Durga or the lineage gods. This exclusion from certain key patrilineal rituals is an expression of the well known fact that women in Hindu society are always peripheral members of the patrilineal group.¹ In both their natal and affinal families their status and their loyalties are always ambiguous.² As daughters they are honored transients who must be sent away from their natal patriline at marriage. As wives they enter their husband's patriline as low-status outsiders sometimes suspected of having the intent to destroy the cherished agnatic solidarity and dissolve the extended family group for their own selfish purposes.

¹For discussion of this phenomenon in other Hindu groups, see Madan (1960); Roy (1975); Marriott (1955); Karve (1953); Mandelbaum (1970). The peripheral status of women and their exclusion from certain key patrilineal rituals occurs in patrilineal societies in many parts of the world. For excellent descriptions of this phenomenon among patrilineal groups from Africa, South America and New Guinea respectively see: Max Gluckman, "Kinship and Marriage Among the Lozi of Northern Rhodesia and the Zulu of Natal," in African Systems of Kinship and Marriage edited by A.R. Radcliffe Brown and Daryll Forde, (Oxford: Oxford University Press, 1965), pp. 166-206; Yolanda Murphy and Robert Murphy, Women of the Forest, (New York: University Press, 1974), Marilyn Strathern, Women in Between, (London: Seminar Press, 1972).

²For fuller exploration of this complex issue see Bennett (in press).

Most important among the patrilineal rituals are the long and arduous funeral ceremonies (kirya) and subsequent annual worship (sraddha) which must be performed for deceased patrilineal relatives. Among rural Brahmins and Chetris there is a strong belief that people who die without a patrilineal survivor (preferably their own son) to perform these ceremonies are destined to haunt their communities in the guise of prets or hungry ghosts. A similar belief is found in ancient Sanskrit literary texts where the son is described as "he who rescues his parents from hell."

From the point of view of women's legal status, the significant aspect of the kirya/sraddha rituals is the fact that they have traditionally been connected with the right to inherit patrimonial property. To quote Manu (IX: 142) once again, "Pinda / the ceremonial rice ball offered to the ancestors during sraddha / follows family name and estate." The exclusion of women from the patriline's spiritual function is an expression of the fact that they were also kept on the periphery of the patriline's important economic role as a property owning group. This becomes clear when we examine the concept of the Hindu co-parcenary. As Tambiah (1973: 75) and others (Sivaramayya 1973: 38) have pointed out, the sociological conception of the Hindu joint (or extended) family is not congruent with the legal definition of the joint family as a group of co-parceners in a single estate. The former includes up to four generations of co-resident patrilineally related males, their wives, unmarried daughters and widowed sisters-in-law, while the traditional Hindu co-parcenary normally included only the males. According to Mayne:

When we speak of a Hindu joint family as constituting a co-parcenary we refer not to the entire number of persons who can trace from a common ancestor, and among whom no partition has ever taken place; we include only those persons who by virtue of relationship have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce its partition. Outside this body there is a fringe of persons who possess inferior rights such as that of maintenance, or who may under certain contingencies hope to enter the co-parcenary. (1883: 230).

It is women--the wives, daughters and widows--who have traditionally constituted the "fringe" of this co-parcenary. They have been members of the joint family as a productive unit without being full members of the joint family as a legal, property-owning unit.

Classical Antecedents of the Nepalese Co-parcenary

Although opportunities for women to inherit ancestral property have been greatly expanded by Nepal's present National Code, the assumptions of classical Hindu inheritance law remain, i.e., that immovable property must be kept within the agnatic group and that women therefore have inferior claims to such property. It may be helpful then, to know something about the traditional antecedents of the present National Code in order to better understand the current definition of the co-parcenary and rights of succession and inheritance in contemporary Nepalese law.

Traditional Hindu law falls into two major schools, the Mitakshara which governed most of India, and the Dayabagha which governed Bengal and parts of Assam. From its first codification in the Mulki Ain of 1854, Nepalese law has never fit neatly into either school. The present code of 1963 combines elements from each along with some tenets not found in either school. In the Mitakshara school the co-parcenary group is exclusively male. According to Tambiah:

Ideally the Mitakshara envisages a four generation agnatic male exclusive corporation of coparceners in a joint estate; while they remain as coparceners the property devolves on the other males by survivorship and reversion and females, both widows and daughters are rigorously excluded. (1973: 78).

Under Mitakshara law, males become coparceners at birth (technically at conception) and all the coparceners are considered to be joint tenants in a common property. This means that none of them can dispose of his share without the consent of others. In fact, because property within the undivided coparcenary devolves by survivorship rather than succession, a coparcener cannot claim any fixed share in the estate as definitely accruing to him since the size of his share can increase at any time upon the death of a fellow coparcener or decrease upon the birth of a son to any member of the undivided coparcenary. However, under Mitakshara married sons are allowed to demand partition of the joint estate at any time.

By contrast, under Dayabhaga law, sons may not demand partition during the father's lifetime without his consent. While the father lives he is absolute owner and "possesses in principle the same powers of alienation over the ancestral estate as he has over his personal assets." (Lingat 1973: 173). If the father has separated from his brothers and is head of his own household, he does not need the consent of other coparceners to dispose of ancestral property as he would under the Mitakshara law. In that sense then, Dayabhaga law reflects the ideal of a patriarchal family under the sole authority of the father, while the Mitakshara envisions collective ownership of property and a more equal distribution of authority among the agnates. Nevertheless, as Sivaramayya (1973: 38) points out, "despite the seemingly wide gulf between the Mitakshara and Dayabhaga laws, functionally and sociologically the joint families are alike in both systems."

This essential similarity of the social reality behind the divergent schools also holds with respect to women's membership in the coparcenary. Under the Dayabhaga law the widow of a coparcener was allowed to succeed to her deceased husband's share in the absence of a near male heir; but she was allowed only rights of alienation.¹ Hence her position was essentially no different from that of the widow under Mitakshara law who was entitled only to maintenance out of her deceased husband's share.² In both schools the widow had only a life interest in the ancestral property she inherited from her affinal family. Her estate was a "limited" or "restricted" estate which she essentially held in trust for her husband's patrilineal heirs.

¹ Jimutavahana, the author of the Dayabhaga says: "But the wife must only enjoy her husband's estate after his death. She is not entitled to make a gift, mortgage or sale of it." (Chaudhary 1961: 10).

² Sivaramayya (1973: 36) writes, "According to Mitakshara law prior to 1937 [when the Women's Right to Property Act was passed in India], if an undivided coparcener died leaving a widow and no male issue his widow was entitled to a right to maintenance only and his interest developed on the other coparceners by survivorship."

The Classical Concept of Stridhanam or Women's Exclusive Property

Before turning to modern Nepalese law regarding property and inheritance, it is perhaps useful to note that there were several major types of property in classical Hindu law, each with its own rules of succession and inheritance. Ancestral or coparcenary property with which we have thus far been concerned, was the most important category--especially in traditional agrarian communities. However, in addition to what a man might inherit from his patrilineal ancestors, there was also what he was able to earn on his own or what he received as a gift from someone outside his lineage. Both of these categories constituted his self-earned property and generally there were no limitations on its disposal nor on rights of testament.¹ A third, and for us extremely significant, category mentioned in all the old texts is stridhanam which means women's exclusive property or literally, "women's wealth." All property owned by a woman however, was not her stridhanam. Traditionally, stridhanam consisted only of what a woman received at marriage from her parental family together with what she was given by her husband at marriage and later "out of affection."² Women had absolute rights over their stridhanam property and upon their death it passed to their daughters or to relatives from their family of birth.³ Most texts

¹Sivaramayya (1973: 28) points out that until the "ascendancy of individualism" under anglo-Mitakshara law which saw 1) a gradual expansion of the concept of self-acquired property, 2) increasing recognition of the right to testamentary disposition, and finally 3) the passage of the Hindu Gains of Learning Act in 1930, the category of self-earned property had not been very prominent in traditional Hindu Law.

²According to Manu, stridhanam consisted of: "what (was) given before the nuptial fire; what (was given) in the bridal procession, what was given as a token of love and what was received from a brother, a mother or a father are considered as the sixfold separate property of a married woman." (Manu IX. 194) "(Such property) as well as a gift subsequent and what was given (to her) by her affectionate husband, shall go to her offspring (even) if she dies in the lifetime of her husband." (Manu IX. 195).

³For detailed discussion of the sub-categories of stridhanam property in the classical texts and of the devolution of each different category see Tambiah (1973: 86-91).

exclude a woman's "self-earned property" from the stridhanam category and hence such property, like the widow's life share in her husband's ancestral property, passed to her husband's patrilineal heirs by the normal rules of succession.

Tambiah (1973: 86) characterizes the Hindu institution of dowry or marriage portion as a "sort of pre-mortum inheritance" or a "substitute for the right of inheritance." Since stridhanam traditionally consisted only of movables such as jewelry, clothes, household utensils, furnishings and perhaps livestock, it was, he maintains, logically consistent with the patrilocal marriage pattern prevalent throughout most of India. Because the wife moved to her husband's family (which was almost always located in another village at some distance from her parental home), it would obviously be neither convenient nor economically viable for her to inherit immovable property. Tambiah sees stridhanam and dowry as an institution meant to balance the all-male coparcenary with its exclusively patrilineal transmission of landed property. "Most students concentrate on the rules of male coparcenership in the Hindu joint family and the transmission of this property through agnates without bringing to our attention the complementary, though perhaps less stressed, conceptions of female succession to property and of female property as a distinct category." (Tambiah 1973: 73).

Stridhanam or Women's Exclusive Property in Contemporary Nepalese Law

There is a striking similarity between the classical concept of stridhanam and the Nepalese equivalent, daijo-pewa, as defined in the laws relating to "Women's Estate and Women's Absolute Property" (striamsadhan). According to Sections 4 and 5 of Chapter 14, Part 3 of the National Code:

- 4) Movable or immovable assets gifted to women by their friends and relatives on the father's or maternal grand-father's side and any increment made or occurring thereto is considered daijo. Movable assets gifted in writing by the husband or by relatives on the husband's side with the consent of all coparceners, or by other friends and relatives on the husband's side, and any increment made or occurring thereto, is considered pewa.

- 5) A woman may use her daijo and pewa assets as she likes and after her death, in case she has willed (such assets) to any person, the provisions of the will shall be complied with. In case there is no such will, the assets shall accrue to sons living jointly with her, if any; or sons who have separated from her; or else to the husband;¹ or else to the sons of her sons; or else to her daughter's sons; or else to the nearest relative [on husband's side]. (Adoption and Inheritance 1976: 14).

Two contrasts with the classical pattern of stridhanam as described earlier are immediately evident. Firstly, the Nepali daijo and pewa may explicitly include immovable assets. Secondly, these assets are not transmitted in the female line. Not only do the son and husband inherit before the daughter, but the heirs of the woman's husband, rather than relatives from her natal lineage, are brought into the order of succession.

A further variation from the classical pattern, and one that is favorable to women, is the fact that in Nepalese law a woman has the same absolute rights over her self-earned property as she does over her daijo-pewa. She may dispose of all these types of property as she likes and will them to whomever she pleases.

Nevertheless, there are provisions in the 1974 Evidence Act which limit women's actual control and ownership of their daijo, pewa and self-earned property. According to Section 6 a. of the Evidence Act, in the absence of contrary proof, the law courts must presume that any property registered in an individual's name or bank account is co-parcenary or family property rather than the exclusive property of that individual.² Unless a woman either has documents proving that property registered in her name was given as daijo or pewa or she can prove that she earned it (through employment or through investment of daijo or pewa monies), such property will be regarded as joint family property in which

¹The order of succession was amended in 1975 to give greater priority to the daughter. An unmarried daughter is now fourth in line after the husband and the married daughter is fifth before the son's son.

²Shilu Singh, personal communication.

all coparceners have an equal claim. Thus, if she is living in a large undivided joint family, not only herself and her husband, but even her husband's coparceners (his father, mother and brothers) may all take a share in her property. We find, then, that a wife has rights in only her husband's share of the joint estate but all her husband's coparceners have claim over property registered in her name.

No doubt these provisions were designed to strengthen the joint family institution by preventing coparceners from secretly transferring individual earnings to their wives' names and thus beyond the reach of their fellow coparceners. The requirement that pewa be gifted in writing with the consent of all coparceners apparently still leaves a loophole for women to claim as daijo (or a gift from her parent's side) property which had in fact been given to her by her husband as a kind of "secret" pewa. However well meaning the intention to strengthen the joint family system with these provisions, it seems clear that the documentation required by the Evidence Act has the unintended effect of limiting women's property rights. This is particularly true since in Nepal so few women are literate (and even fewer are familiar with the complexities of the legal system) and few women are employed in the organized sector where they can secure proof of their own earnings. In addition, there has been no tradition of legal documentation of daijo gifts. No doubt many women throughout Nepal mistakenly assume that they are financially secure merely because they have property registered in their name. The recent of Kamala Devi vs. Hiranya Bahadur Basnyet¹ illustrates what can happen to women's "property" under the present law. Here, the divorced woman applied to the law court to evict her ex-husband's family members from a house registered in her name and which she claimed was purchased from her daijo property. The Supreme Court (Division Bench) ruled in favour of the ex-husband's family. They held that even property registered in the name of a divorced woman would be regarded as the property of her ex-husband's family if the property had existed in the wife's name before the divorce and if she could not prove conclusively that the property had been purchased from her stridhanam. From this ruling, it would follow that even an ex-husband's creditors could have claim in the "exclusive" property of the divorced wife in payment of debts incurred by her ex-husband, if she cannot prove that it was her stridhanam.

¹Ibid.

Even so, the greatest restriction on a woman's use and control of her stridhanam property appears not to come from the provisions in the Evidence Act which we have been discussing. Evidence from field work among rural Brahman-Chetris shows that in that group at least, even though a woman's exclusive control over her stridhanam property is accepted as an ideal, all too often the daijo and pewa of an incoming wife are treated as the property of her husband's joint family. Unfortunately, sometimes even her personal effects such as saris and jewelry may be taken over by her mother-in-law or younger sister-in-law. Although the new bride is welcomed in her husband's family as someone who will labor and produce offspring, she can also, as mentioned earlier, be resented as someone who may well some day cause the joint family to separate. To offset these suspicions and to fulfill the Hindu ideal of proper wifely behavior, the daughter-in-law must be submissive and self-effacing. Thus, in cases where stridhanam is wrongly appropriated, if a daughter-in-law should make any complaints about her in-laws disposition of her daijo, she should be considered shameless, ill-bred and ungrateful.*⁷

In the classical Hindu pattern presented earlier, stridhanam, and specifically dowry, were institutions that completed and, at least to some extent, balanced the dominant system of patrilineal inheritance. Tambiah (1973: 62) describes dowry as "property given to a daughter to take with her into marriage. Technically it is her property and in her control though the husband usually has rights of management." He further states that "in societies where dowry prevails the wife takes away with her on the dissolution of marriage the dowry property (or that portion which remains) which has always remained legally and formally in her possession." (Tambiah 1973: 64).

Clearly this picture of dowry as a woman's "substitute" for inheritance in her natal family, and as her security in times of crisis, does not always hold true for all families in Nepal. It is true that the bride gains prestige from a generous dowry, but she does not necessarily gain personal security from it. If the marriage breaks up, some women are able to take only those personal items of clothing and jewelry which have remained in their possession.

The Committee on the Status of Women in India noted the same situation in that country:



often even [a woman's] jewellery is not in her control and it does not help her in times of crisis. The household goods given at marriage may not belong to her. In north India they may be disposed of by the in-laws and even when they are in use in what she calls her home, in the event of separation, nothing appears to belong finally to the woman. (1974: 73).

It would appear then, that the social reality of some contemporary Hindu families is much harsher than the classical Hindu legal texts on the matter of women's actual stridhanam rights.

That women have no guarantees of real control over their marriage portion may not hold true, however, for the urban elite or for Nepal's autochthonous ethnic groups. Research has yet to be carried out on the actual property situation among urban elite women in Nepal, but recent anthropological studies on the Limbus (Jones 1976), Kham Magars (Molnar 1977), Rais,¹ and the Tibetan-speaking people of Baragaon (Schuler 1977), indicate that women in these groups enjoy a much higher degree of economic independence and have more control over their marriage portion than women in neighboring Hindu groups. It is hoped that ongoing research in the communities mentioned above will not only indicate more precisely the extent of women's actual control over their marriage portion in the different groups, but also uncover some of the social-structural and ideological factors responsible for women's overall greater economic independence in these groups.

Whatever the results of research on women in the non-Hindu groups, one thing seems clear: at present women in rural Hindu communities are disadvantaged on two fronts. Not only are they largely excluded from the patrilineal transmission of immovable property, but they often have no effective control over the movable stridhanam property which goes with

*Photo on opposite page:
A hill woman displays her daijo pawa. But how
secure is her actual control over this "absolute
property" in the context of customary law?
Photo by Lynn Bennett.*

¹Charlotte Hardman, personal communication.

them in marriage.¹ For the vast majority of rural women, their daijo-pewa amounts to very little anyway--certainly nothing approaching the value of the land which their brothers will inherit. Nevertheless, reaffirming women's traditional legal, and moral rights to such property may be an important first step in recognizing the fact that women are actually equal contributors to the economic unit of the Hindu joint family. Even some small measure of economic independence would support the image of women as full partners in their family of marriage rather than perpetual dependents and "outsiders."

The Committee on the Status of Women in India found the twin institutions of bride-price and dowry degrading to women. "Whether they are transferable assets as in the case of brideprice, or liabilities whose value has to be enhanced so that they become acceptable, women are demeaned." (1974: 77). Ultimately we must agree. But in the present context of patrilineal succession, it may be more helpful to think of ways of transforming this institution so that it can actually benefit women as it was originally intended to do. As an interim measure, the Committee on the Status of Women recommended that records be kept "of things given to the daughter so that they remain her possessions and are not appropriated by the in-laws." (1974: 76). This suggestion seems especially appropriate to Nepal in light of the documentation of daijo and pewa gifts which is currently required by the Evidence Act. Practical and feasible mechanisms would need to be developed since legal service is least accessible in the remote rural areas where women are often most in need of such protection. One possibility is that parents and in-laws could be encouraged to register their respective daijo and pewa gifts in detail with local panchayat officials.*⁸

¹Section 5 of Chapter 12 "On Husband and Wife" seems to absolve the coparcenary from responsibility for maintaining the personal property of an affinal woman intact and under her control. "If the dowry of personal property of a wife is spent, it may be compensated from the joint property of all coparceners living in a joint family without sub-division of property according to the law on Monetary Transactions only if consent in writing has been obtained from all coparceners who are above the age of sixteen years, if any. In case such property is utilized without fulfilling this condition, the liability shall not be borne by the co-parceners, not compensated from the joint property in case they are not willing."

Women's Rights to Ancestral Property in the National Code

In Nepalese law, women's rights of inheritance and succession regarding joint family property are considerably more secure than they were in either Mitakshara or the Dayabhaga systems. Unlike the traditional Hindu schools, Nepalese law automatically recognizes the wife as coparcener in her husband's ancestral property.*⁹ Section 1 of the law on partition (Chapter 13, Part 3) reads: "In ascertaining shares in the division of joint property of the father, mother and sons, each surviving person gets one share." Not only does the wife get a share equal to that of a son, but she now has the right, under certain circumstances, to force a partition during her husband's lifetime, which a son may not do unless the father denies him maintenance.¹ This has come about through new provisions in the 6th amendment to the National Code, passed during 1975, which allow a wife to take her share and live separately if she "has completed at least fifteen years of marriage or has attained the age of at least thirty-five years."² Like the son, the wife has always been able to get her share of the property if she "is denied maintenance by her parents-in-law and/or her husband and is expelled from the house, or is frequently beaten up or harassed, or [if her] husband has brought or taken another woman as wife."³

The potential problem with these laws is that they specifically cover only those situations where the husband himself has separated and is head of his own coparcenary. It is not clear whether a woman whose husband is still in a state of jointness with his father and/or brothers can claim her full share under Section 4 of the law on conjugal relations mentioned above, or whether she is allowed only "maintenance". The wording of the text⁴ suggests that the latter might be the case. The

¹"No person shall deny food and clothing to his sons or wife. He shall provide them with food and clothing according to his status and income or else give them their due share in the [ancestral] property," Sect. 10 under the law on partition "Adoption and Inheritance." (1976: 16).

²Section 4 under the Law "On Husband and Wife" (Chapter 12, Part 3) "Marriage and Conjugal Relations." (1976).

³Section 10.A of the law on "Partition" (Chapter 13, Part 3).

⁴"In case she has been expelled only by her parents-in-law, she shall be provided with maintenance according to income and status." (Adoption and Inheritance 1976: 28).

situation becomes even worse for a sonless woman whose husband has died before partition. Apparently such a woman may not become a full coparcener in her husband's ancestral property until she reaches the age of 30. As a young widow without male issue she must be content with "maintenance" similar to what she would have received under the old Mitakshara laws. Thus,

a sonless widow, whose share has not been allotted and who is living in a joint family with her coparceners shall not be entitled to take up her share and be separate as long as the latter provide her with food and clothing and expenses for religious observances and charity according to their own standard so long as she has not attained the age of 30.¹

Although there is a provision for her to take her share and live separately if she is not so maintained, obtaining proof of neglect might be very difficult for a woman in such a position. This law also seems inconsistent with Section 5 of the same chapter which allows that "in case the husband or father dies before the property is sub-divided his share shall accrue to his wives and children according to law."² Perhaps the crucial difference is that Section 5 presumes the widow in question either had male issue or had not been widowed at an early age.

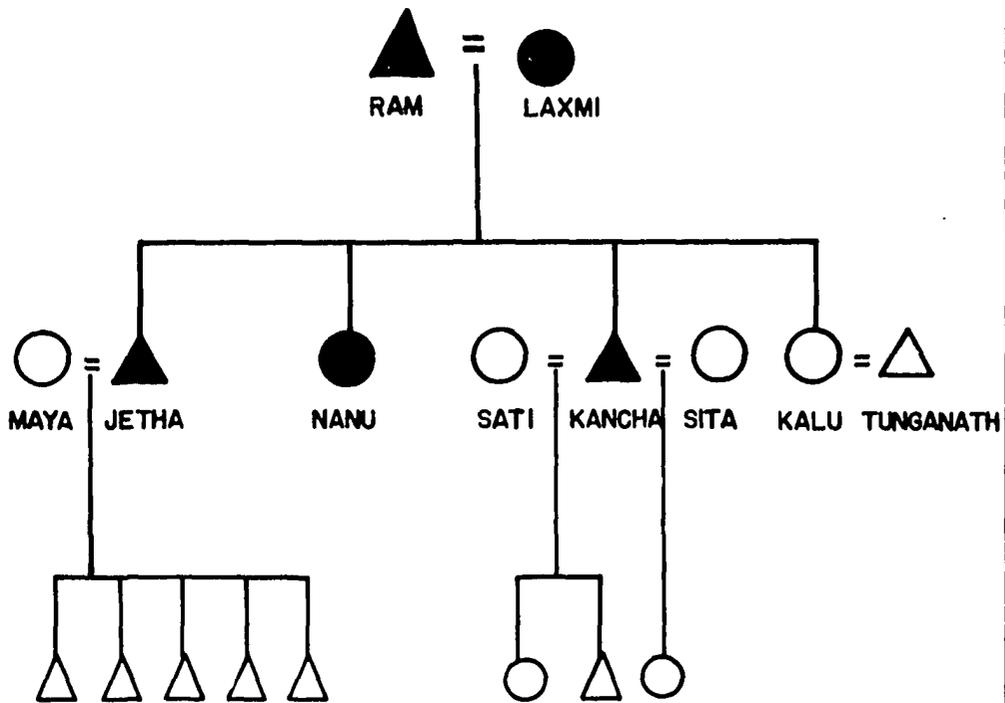
Partition and Succession

In order to more fully understand the woman's rights within the Nepalese concept of the coparcenary, it may be helpful to look at a hypothetical family and see how ancestral property would devolve over several generations. Let us take a husband and wife, Ram and Laxmi, who have two sons and two daughters. After thirty years of married life, their family tree in anthropological notation looks something like diagram 1 on page 31. Ram and Laxmi, their sons, sons' wives and children and their unmarried daughter Nanu, have been living together in a single joint family. But now Jetha and Kancha would like to divide the ancestral estate (angsa badnu) and live separately (bhinna basnu). Since Nepalese law follows the Dayabhaga school in holding that the son cannot

¹Section 12 of the law on "Partition" (Chapter 13, Part 3), Shilu Singh, Trans.

²Ibid., p. 15.

Diagram I



KEY

Female ○

Male △

Member of same coparcenary group ● ▲

Marriage =

Descent |

Siblingship ┌─┴─┐

force a partition during the father's lifetime,¹ we know that Ram must give his consent to such a separation. Let us assume that he does so.

At the time of separation, Ram's original angsa (the share of ancestral property which Ram had received when he separated from his father some 30 years ago) must be divided among those who are coparceners with Ram in his original angsa. Members of this coparcenary group are colored in black in diagram - 1.

Normally Nanu, the eldest daughter of Ram and Laxmi, would not be a coparcener in her father's estate. Note that her younger sister Kalu is not. Kalu followed the normal pattern and married out of her natal patriline. Her "share" in her parental estate consists of her marriage expenses, a small daijo and the informal right to visit her natal home from time to time and receive small gifts from them. Nanu, however, was born deaf so she has never married. According to the 6th amendment, passed in 1975,² she will be entitled to a share equal to that of her brothers if she remains unmarried after she has reached the age of 35.³ Previous to this new law, Nanu would have received only half the share her brothers received. Through a curious oversight, however, the National Code has left the unmarried daughter below the age of thirty-five without claim even to maintenance in her parental family. Of course Hindu religious and cultural beliefs about the sacred status of daughters and sisters, coupled with natural family affection, would probably assure that Nanu's father and after him her brothers, would in fact support her. Yet the law explicitly mentions only the father's obligation to provide

¹National Code, Section 10, of Chapter on "Partition".

²National Code, Section 16, of Chapter on "Partition".

³Civil Code Section 16, of Chapter on "Partition". This amendment seems inconsistent with Section 2 of the Chapter on "Inheritance" which says that in the absence of a spouse or male heir the unmarried daughter inherits only 2/3 of the property. A son in this situation would have inherited the entire ancestral estate. Hence it seems that the unmarried daughter does not in all circumstances receive a share equal to that of son.

maintenance to a son and is silent about his obligation to a daughter.¹

This anomalous situation has been corrected by a recent Supreme Court decision cited by Shilu Singh:

In a case (Jagat Maya Katal Shrestha and Krishna Maya Katal Shrestha vs Sanu Kaji Katal Shrestha) the Division Bench of the Supreme Court has ruled in support of the decision of Kabre Palanchok District Court that on the matter of a father's liability to maintenance; the word "son" includes both male and female issue. Basing [their decision] on section 12(1) of the Nepal Law Administration Act which says that unless otherwise understood from the context, the words denoting masculine gender shall include both men and women, the District Court decided that a father has an obligation to maintain his daughter. [This decision] was reversed by the Zonal Court, but was again upheld by the Supreme Court. It has thus from adjudication [become] law that a father must provide maintenance to his daughter. However the brother's obligation to maintain a sister has not yet been ruled.²

To return then to the partition of property in Ram and Laxmi's family, there are two ways in which the shares could be allocated. One is for there to be a formal division of the property with each of the figures shaded in black in the diagram (i.e., Ram, Laxmi, Nanu, Jetha and Kancha) receiving an angsa or share of exactly 1/5 of the coparcenary estate. Since strictly equal division of property can easily lead to awkward situations like the partitioning of a small family dwelling or the division of fields which are already too small to be efficiently

¹ Angur Baba Joshi (1975: 45) has cogently argued that "as the parents do normally look after their children whether boy or a girl, to the best of their ability it may sound too demanding or even ridiculous to ask for legal provision for such things. But the main point in this connection is that if such provision is considered necessary for the son, why not for the daughter?"

² Shilu Singh, personal communication.

farmed, families often agree to a more informal division of property. In such an informal division the coparceners may all agree that certain members, in consideration of the particular family obligations they must bear, should receive a portion which is larger or smaller than their exact angsa portion would be. For example, if at the time of partition Ram and Laxmi had not yet arranged a marriage for their daughter Kalu, they might ask that an extra portion be added to their share to help meet wedding expenses. If, however, Ram and Laxmi have fulfilled all such familial obligations, they may well accept a smaller portion which is just enough to assure that their own needs are met.

The problem with this second type of informal division is that it depends on the continuing good will of the coparceners. If at a later date there is a family disagreement and one member decides that he or she has been unfairly treated, that individual can go to court and sue for a formal re-division of the property into exactly equal shares. To avoid this possibility many families thus have their "informal" property divisions "passed" by the local court. However, Section 15 of the Chapter "On Partition" in the National Code stipulates that,

Acceptance or conferment of a larger or smaller share in the property is called jiuni. The conferment of jiuni (maintenance) is valid if not more than five percent is given over the share due to anybody. (Adoption and Inheritance 1976: 18).

In other words, the court will uphold such informally agreed upon unequal division as long as no one's share exceeds his or her normal share by more than five percent.

However, the concept of jiuni or jiuni bhagh, as it is often called in the village, is more complex than the passage above would indicate. In addition to the narrow technical legal usage given above, there is a popular sense of the term which is current in many rural areas of Nepal. This customary usage of the term is fairly well captured by Turner's dictionary definition of jiuni as "that which is retained for his own support when an old man divides his property among his children." According to this usage jiuni refers not just to the portion up to five percent above the normal angsa as mentioned in the Code, but to the entire share (whatever its size) taken on an informal basis by anyone--man or woman, young or old--who will probably not form any new marital

relations or produce any further offspring to become coparceners in the said share. This sense of the term is also re-enforced by its derivation from the Nepali verb jiunu which means "to live" or "to exist." Jiuni or jiuni bhagh is thus used loosely to mean the portion of coparcenary property a person takes merely to sustain himself or "to exist" for the remainder of his life. While the technical legal usage of jiuni refers to the proportion of the actual share taken in relation to the exact share due, the main import of the customary usage is to convey information about the social position of the individual taking such a share, i.e., that the person has no dependents and no further coparceners.

When an individual takes a jiuni bhagh at the time of property division, the informal assumption is that upon that individual's death, his or her share will revert to the original coparceners to be divided equally among them. Jiuni is thus understood as "a limited right, a guarantee of support, but not amounting the right or disposal over the property."¹ However, an examination of the provisions regarding jiuni in the Code indicates that the individual does in fact have certain important rights over the disposal of his or her jiuni share.

The main purpose of the jiuni share (in its broader customary sense) seems to be to guarantee that the person who holds it receives adequate care in old age or infirmity. Hence, the rules governing its devolution are somewhat looser than those governing other types of ancestral property including jiuni in the narrow technical sense. The law allows for the jiuni share to pass to whichever relative supported and cared for the deceased during old age. So if at the time of partition Ram and Laxmi had gone to live with their eldest son, Jetha, Ram's jiuni would first go to Laxmi (and vice versa)² upon his death. Then when Laxmi died both jiuni shares would pass to Jetha who had looked after them.³ If neither Jetha or Kancha had been willing to care for the old couple and their married daughter Kalu and her husband had done so, then they would have inherited both jiuni shares.⁴ Similarly, if Ram

¹Shilu Singh, personal communication.

²National Code, Section 10, of Chapter 16, Part 3.

³Ibid., Section 6.

⁴Ibid., Section 3.

had gone to live with a sister, then the sister would inherit his jiuni share when he died.¹ The law even provides for an individual to change his mind and take up residence with (and thus pass his jiuni share to) another relative if he is not treated well in the household where he first decided to settle.²

Stone's characterization of the jiuni share as a "wedge of power" seems extremely apt (1978: 11). In addition, the jiuni institution, if it is in fact actually practiced as set forth in the Code,³ seems to give a viable alternative to strict patrilineal succession. It allows the individual a chance to acknowledge bonds of affection rather than agnatic ties and presents a greater opportunity for women to inherit ancestral property from their parental side.

An important aspect of the Nepalese coparcenary which distinguished it from the Mitakshara system is the fact that "sons of brothers living in a joint family [e.g., who have not partitioned the coparcenary estate] shall be entitled to shares from the shares of their fathers only."⁴ This means that unless their fathers have already obtained partition, sons are not born coparceners of the joint family property, as they are in the Mitakshara. In other words, the principle of survivorship operates only one generation at a time. In terms of our hypothetical family, this means that Jetha's sons and Kancha's sons do not share equally in the coparcenary property belonging to all the figures outlined in black. That means that when Jetha dies, his wife and each of his five sons will get one sixth of his property, only half as much as Kancha's one son and two wives will each inherit.

This same principle applies to the wives of sons. Each wife is a coparcener only in her own husband's potential share and not in the

¹Ibid., Section 7. This is a recent amendment. Previously such a sister would have been entitled to only half of Ram's immovable property. The rest would have gone to the coparceners who had abandoned him.

²Ibid., Section 9.

³Stone's work and my own field observations among Brahman-Chetri groups would tend to indicate that such latitude in the disposal of jiuni bhagh is not customary practice. But this question needs further investigation in the field.

⁴National Code, Section 3, Chapter 13, Part 3.

coparcenary containing her husband's father, mother and brothers which is usually intact when she marries into the family. Nepalese law also provides that if there are co-wives, both women and their sons shall each be entitled to an equal share in their husband's ancestral property.¹ This means that Sati and her son and Sita together with Kancha each get an equal $\frac{1}{3}$ of Kancha's share when their ancestral property is divided. The law goes even further to insure that co-wives receive equal treatment. Clauses 2 and 3 of Section 19 of law on partition are designed to prevent favouritism even in the disposal of self-earned property (swa-arjan). They provide that "a person who has more than one wife surviving or one wife and sons from a another wife, can dispose of his self-earned property as he wills, provided that he does not give it as a gift or bequest to one particular wife or son."² However, the law still upholds the man's right to dispose of his jiuni share as he likes. According to Clause 4 of Section 19 above,³ Kancha is entitled to live with Sita after partition and pass his jiuni share on to her.

Dolaji

Earlier in our discussion of the jiuni bhagh we saw how strict patrilineal succession has been softened in Nepalese law to provide for increased security in old age and for some expression of individual bonds of affection. We find a similar trend in the institution of the dolaji daughter. In the oldest classical Hindu law, a man with a daughter and no sons had to either adopt a son or pass his ancestral property to his residual heirs (hakdar in Nepali), i.e., his brothers and their sons. This ensured that the property stayed in the same patrilineage.

¹Ibid., Section 4. "In case any person has a number of wives, all of them shall be entitled to subdivide and utilize their husband's share according to the law." ("Adoption and Inheritance" 1976: 15).

²Shilu Singh, Trans.

³National Code, Section 19(4), Chapter 13, Part 3, "Even in cases where property cannot be utilized at one's discretion as provided for in the foregoing sections, one's own (jiuni) may be so utilized." ("Adoption and Inheritance" 1976: 20).

According to modern Nepalese law however, this sonless man could instead institute his unmarried daughter as a dolaji and pass his ancestral property to her, rather than to his brothers.¹

The law specifies that the future husband of such a dolaji daughter has no claim on the property she inherits from her father. The property goes instead to the dolaji's son or daughter. Only if the dolaji daughter is without issue and is over 45 can she make a deed handing the property over to her husband. If she fails to do this and dies intestate, the property reverts to the residual heirs who would, under rules of strict patrilineal succession, have inherited before her.

The dolaji provisions thus apparently allow for a modification of Section 2 of the law on Inheritance (Chapter 16, Part 3) which states that the daughters of a man with no son, grandson or widow would inherit only 2/3 (if unmarried) or 1/3 (if married) of her father's ancestral property. The wording of Section 2 suggests that the remaining 1/3 or 2/3's of the ancestral property of the deceased would go to his hakdars or residual heirs defined as "the nearest agnate relative within seven generations." By using the dolaji provisions, however, such a sonless man can assure that his entire estate will pass to his daughter.

Among the changes introduced in the succession laws by the 6th amendment to the National Code, passed in 1975, were provisions which 1) inserted the daughter before patrilineal hakdars in the line of succession to ancestral property,² 2) allowed for a daughter to inherit the entire jiuni portion of her parents,³ 3) and allowed for a sister to inherit the entire jiuni portion of her brother.⁴ In these provisions the trend away from strict patrilineal succession which began with the old dolaji provisions⁵ is strengthened. Besides giving increased attention to the bonds of affection, Nepalese law has begun to acknowledge the importance of lineal over collateral ties--even when the only lineal descendent is female.

¹Ibid., Section 5, 6, 7 and 8 of Chapter 15, Part 3.

²Ibid., Section 2, Chapter 16, Part 3.

³Ibid., Section 3.

⁴Ibid., Section 7.

⁵Ibid., Section 5, 6, 7 and 8 of Chapter 15, Part 3.

Comparison of the Restrictions Placed on Men and Women in the Use of Ancestral Property

We now have some sense of how the Nepalese coparcenary works and under what circumstances a woman may be included in the line of succession to ancestral property. Before leaving the subject of women and property, however, let us briefly examine the kinds of restrictions placed on women's use of ancestral property. Some of these restrictions operate only before the coparcenary has been divided and others continue even after when a woman has received her share. In brief, many of these restrictions place greater limitations on women's ability to obtain credit, open bank accounts, enter into contracts or alienate ancestral property than are placed on men in similar circumstances.

At first glance, the National Code in Section 8, Chapter 17 on Monetary Transactions gives the impression that women are as eligible as men to make financial transactions and enter into contracts on behalf of the joint family. The law states that:

A man or woman of adult age and knowledge, who functions as head of the family, or, when the family is an undivided one, who owns houses and is engaged in trade or agriculture or other work in different places, is regarded as the head in the place where he or she lives and works. Only such transactions as are concluded by such head (of the family), or bear his (or her) signature or written commitment, even when concluded by other members of the undivided family who have attained majority, shall be charged upon the joint assets (of the undivided family.) (Selections from the 1963 Legal Code 1973: 15).

However, throughout the rest of the National Code, it is presumed that the household head is male. Neither the chapter on women's property rights (Chapter 14) nor the chapter on inheritance and partition (Chapter 15 and 13) allow for cases where a woman is the head of a coparcenary group. In fact, women are never legally deemed competent to even handle their own share after sub-division, let alone oversee the shares of others. Unlike a man who has complete control over his entire share of ancestral property¹ after his coparceners have taken their share, a woman in the same situation is still under male control. According to Sections

¹i.e., that which we previously distinguished as the jiuni share.

2 and 3 of the chapter on women's property rights (Striamsadhan, Chapter 14):

- 2) A girl, married woman, or widow who is living separately may dispose of as she likes, even without the consent of anybody, all movable property that she has inherited, and not more than half of the immovable property. She may dispose of the entire immovable property also with the consent of her father if she is a girl and if her father is alive, or with the consent of sons who have attained majority, if there are any, in case she is a married woman or a widow.

- 3) Unsecured loans contracted by such a woman shall not be realized from immovable assets which cannot be used as they like in accordance with the provisions of Section 2 of this law. ("Adoption and Inheritance 1976: 13-14).

This aspect of Nepalese law echoes the ancient dictum of Manu that "a woman is never fit for independence." Far from being considered as the head of a household, even a mature woman who is widowed or separated must submit to the authority of her sons.

The restraints on a woman who is still a member of her husband's undivided coparcenary are even greater. Section 9 of Part 3, Chapter 17 specifies that, except when she acts as head of the family, she cannot conclude any financial transaction or enter into any contract on her own. This is because a creditor could not on the strength of such a transaction make any claims on the woman's husband's ancestral property. The legal consequence of this provision is that a woman can obtain credit or make a binding financial transaction only if she has some exclusive property (documented daijo, pewa or self-earned wealth) or if she has succeeded to a share in her husband's property through separation or widowhood.

To understand the discriminatory effect of this law let us return to our hypothetical family and consider the case of Jetha, his wife and their five sons after they have separated from Jetha's father, Ram. This new coparcenary is composed of seven members each with an equal share. Yet if Jetha makes a financial transaction, obtains credit or enters into a contract, it is binding on the whole family. On the other hand if Maya enters into any such transaction, the creditor cannot

advance any claim over the family property. He must wait until she succeeds to her share through widowhood or separation, and thus is unlikely to enter into any significant transaction with her. In effect then, the husband is not legally responsible for his wife's financial commitments (i.e., nothing she does can reduce his share of the coparcenary). But the wife is affected by her husband's debts and his financial transactions may considerably reduce her eventual share.

This is not to say of course that men, even when they are the head of the household, are not also restricted in their use and control over coparcenary property. Section 9(1) of the chapter on partition stipulates that a household head (presumed to be male) who has wives, sons or widowed daughters-in-law as coparceners may alienate all movable and up to half of the immovable property of the joint estate without the consent of the other coparceners. To alienate the remaining half of the immovable property he must have their consent. Superficially this restriction sounds very much like the restriction on women previously quoted (Section 2, Chapter 14). But there is a crucial difference. Women are restricted even in the use of their own share while a male household head has restrictions only over his use of more than half of the entire immovable coparcenary estate. In a large undivided family, such a household head may have effective control over much more than his own share in the estate.

For example, if Jetha's family owned thirty-five ropanis of land, the eventual share of each of the seven coparceners including Maya would be five ropanis. But the difference between Jetha's and Maya's rights of disposal over the estate is striking. Jetha may sell, mortgage or even give away up to $17\frac{1}{2}$ ropanis or one half of the undivided family estate without taking the consent of either his wife or his sons, while Maya cannot sell a single ropani on her own as long as the joint coparcenary estate is intact. Of course this restriction applies to the

five sons as well, but only until the partition of the estate.¹ At that point the sons are free to dispose of their five ropanis as they like. But Maya is still at a disadvantage since she can dispose of only half or $2\frac{1}{2}$ ropanis of her share without the consent of her sons.

One final restriction on women's use of ancestral property should be mentioned briefly here, though the cultural ideology and legal ramifications of it will be dealt with only in the next section on Marriage and Divorce. Section 6 of Chapter 14 "On Women's Estate and Women's Absolute Property" states that:

In case conjugal relations are broken in accordance with the provisions of the law on conjugal relations or in case a widow fails to remain chaste to her (deceased) husband, the share obtained by her from the husband's side, and any increment made or occurring thereto, shall not accrue to her but to the nearest relative [] on the husband's side. [] (Marriage and Conjugal Relations 1976: 12).

Not only does this law make divorce much more of a security risk for women than for men, but sets standards of female behavior that in no way apply to men in similar circumstances. The law does, however, make some attempt to protect the widow from false accusations of illicit sexual activity made by those who would stand to inherit her property. Section 19 of the law on inheritance (Chapter 16, Part 3) stipulates that:

¹The last sentence of section 35 of the law on partition (Chapter 13, Part 3), which was added in on December 19, 1975 with the 6th amendment, seems to conflict with the concept of the head of the household as the sole individual capable of making binding financial transactions with coparcenary property. The new clause states that: In case a deed has been executed keeping the entire property in joint ownership, each (coparcener) may dispose of his share of such joint property in the manner he likes." (Ibid., p. 27). Does this mean that the wife and son living in an undivided coparcenary do have the right to sell or mortgage their "potential" share of the ancestral estate?

*Photo on following page:
dyapu men and women work side by side in their vegetable gardens but because of Nepal's patrilineal inheritance laws women are much less likely than men to own the land they work.*



In case any person falsely makes or instigates a statement to the effect that any woman has been guilty of illicit sexual intercourse with any person, with the motive of appropriating her property or commits, or instigates any fabrication to this effect, the person guilty of such false statement or fabrication shall not be allowed subsequently to inherit the property of such woman.

Other provisions in Section 9 and 10 of the law on rape (Jabarjasti karani ko) protects widows from losing their rights to their former husbands' property after becoming rape victims. The rapist loses all potential claims he may have had to such a woman's property (in a case where he was a hakdar of the deceased husband) and in addition, he forfeits half his existing property to the victim.¹ Even with such protection, however, the principle of Section 6, Chapter 14 clearly does not treat women and men equally.

Concepts of Marriage and Divorce in Contemporary Nepalese Law: A Blend of Diverse Customary Practices, Orthodox Hindu Ideals, and Modernizing Influences

Customary Practice

In our earlier discussion of the historical background of the contemporary Nepalese Civil Code, we mentioned the characteristic flexibility of Classical Hindu law in response to the structure of caste society. Although the ideal standards of orthodox Brahmanical Hinduism were rigid and the rules for maintaining these standards restrictive, the system also tolerated those whose practices deviated from the rules. Such individuals or groups were simply accorded a lower place in the caste hierarchy. There was the concept that different rules applied to

¹"In case any person commits or instigates rape with any woman with the intention of appropriating her inheritance, he shall not be entitled to such inheritance (Sec. 9). In case any person commits rape with any woman half of his property shall be confiscated and given to the woman. The (court) fee of ten per cent (of the value of the property) shall not be charged in such cases. Such (a) woman shall be entitled to her lawful share in her former husband's property as long as she lives (sec. 10)." ("Selections from the 1963 Legal Code, Part III" 1973: 15).

different people; at each level of society a different dharma was appropriate.

While this tolerance marks Hindu law in general, it has been particularly evident throughout the development of Nepalese Hindu law. As mentioned earlier, the law of Gorkha governed diverse ethnic groups, many of whom were non-Hindus and all of whom were isolated from each other and from the center by the mountainous terrain of the kingdom. As Stiller (1976: 174) has pointed out, nowhere was this tolerance more apparent than in the matter of marriage and divorce:

In many ethnic groups in the hills the marriage bond was not considered as binding as we commonly consider it today. Divorce was [a] very informal thing. If a man wanted a woman who happened to be already married and she was so inclined, she went with him. If she stayed with him various fees were paid and that was the end of it. To the Hindu ideal this was the clash of clashes. A woman was married to a man once for all time, until death do them part and beyond. There was no re-marriage, and there was certainly not a casual breaking of the marriage bond.

Stiller goes on to give an example of the kind of "dialogue" between outlying, presumably non-Hindu, communities and the center over this issue:

It began when a bharadar on the local level forbade such practices. The local people then appealed to the center with the claim that such practices were considered permissible in their community. The center, after further clarification then permitted the practice to continue but added a fine... for those involved.... Local custom was thus tolerated even in cases such as these... [where,] the practice in question was in direct contravention of the Hindu ideal. (1976: 174).

This tradition of flexibility in marriage and divorce is still apparent in many aspects of the present National Code. For example, Nepalese law does not insist on any kind of solemnization of the marriage relationship either through performance of a religious ceremony or through court registration. The 1963 National Code did away with the old distinction

between marriage as initiated by a religious ritual (biaite marriage) and a marriage in which a man simply "brought" a wife into his home or kept her as a mistress without performing any ceremony (liaite marriage).¹

The National Code gives no definition of "marriage", nor does it anywhere enumerate the forms of customary marriage which it recognizes as valid. However, Sections 11 and 12 of the Marriage Registration Act of 1971 do explicitly recognize the validity of all marriage (whether or not they are registered) which are "performed according to any religious, communal or family traditions as long as they are not in contravention of the existing laws."² In effect, under the present Code, the performance of any form of wedding ceremony or simply evidence of sexual relations (even as a single event), can amount to marriage.

¹Usually among high caste Hindus a liaite wife was either of lower caste status than her husband or was a widow or divorcee. In both cases an orthodox Hindu marriage ceremony would not be permissible. Offspring of such a union belong to their father's caste and clan (unless the mother is of untouchable status in which case the husband and the offspring all fall to her status) but have slightly lower status within the caste. In the case of the remarriage of a high caste woman, she also falls slightly in caste status after such a marriage. Such liaite wives (and their children) used to face legal discrimination. Now such a woman is treated as a full status wife under the law, unless she is "kept outside clandestinely" in which case she and "sons begotten of her shall not be entitled to claim any share in the property of the husband or father after his death." (Chapter 13, Section 8). This latter provision implies that social recognition is a crucial element in establishing a legally valid marriage relation and that, since the marriage of member of an undivided joint family has important effects on other members of the coparcenary, they must be made aware of it. In support of this point, Shilu Singh has noted that "among the Newars, both Hindus and Buddhists, a formal marriage ritual is not a compulsory condition for recognition. But the bride whether 'Biaite' or 'Liaite' must be formally and ritually introduced to all her husband's coparceners and other near relatives. The bride must ceremonially present betel nuts to these relatives. Only then do they recognize her as their relative; otherwise they do not even mourn her death." (Shilu Singh, personal communication.)

²Shilu Singh, Trans.

In order for a marriage to be eligible for registration, however, certain conditions must be met. Neither partner may have a living spouse, both must be sane and both must meet certain minimum age requirements (Marriage Registration Act, Chapter 2, Section 4). In addition, there must be mutual consent and there may be no close cognate relationship between the couple (National Code, Chapter 14, Section 1).

However, there is no requirement that marriages be registered in order to be legal; and marriages performed in contravention to the minimum age requirements or the laws prohibiting bigamy, though punishable, are still recognized as valid. Only in cases of close cognatic relationship, lack of mutual consent or lack of sound physical and mental health of one partner (discovered only after the wedding ceremony has been performed), can marriage be declared null and void.

Thus the tradition of flexibility in Nepalese law with regard to the acceptance of divergent marriage and divorce practices continues in the present National Code. However, the Code now stands as the ultimate authority and its provisions prevail over tradition in any court of law. To understand something of the relationship between customary practice and the National Code, let us examine the current official legal status of some examples of traditional practice regarding marriage and divorce.

"Marriage by capture" is one decidedly non-Brahmanical custom¹ practiced to some extent among certain Tibeto-Burman speaking communities of Nepal's middle hill and mountain regions. Usually such marriages are actually arranged beforehand either by the parents of the couple or by the couple themselves. If this is the case and the "capture" is merely a ritual display, then this form of marriage is recognized as valid under Nepalese law. But if, as is sometimes the case, the girl is actually captured against her will and cannot be persuaded to consent to the marriage, then, under Section 7 of Chapter 17 in the National Code, such a marriage is considered to be void. What is not mentioned in the Code is whether or not sexual relations forced on a woman during the course of such a marriage by capture would be considered rape.²

¹Although Manu considers "marriage by capture" as one legitimate form of marriage, it is not approved for the higher castes.

²Shilu Singh, personal communication.

Polyandrous marriage, which is occasionally practiced by certain Tibetan-speaking groups in the northern mountain regions is not recognized as valid under Nepalese law. Though the Code does recognize grounds for a man to take secondary wives while he is currently married, it does not recognize grounds for a woman to take a second husband while she is married to the first. (See chart on "Grounds for Legal Bigamy", p. 63). Hence the law would consider the polyandrous wife as the legal wife of one husband only. Her relations with the other husband(s) would be considered as adultery. However, the problem here is that in polyandry, the woman often marries all her husbands together at a single ceremony. She thus begins conjugal relations with them all simultaneously and the law cannot ascertain which should be considered her husband and which should be considered as her lover. Even if this problem could be solved, neither the woman nor any of her husbands can be punished because adultery is punishable only on the complaint of the husband. Polyandry provides an example of a form of customary marriage which, though not sanctioned by Nepalese law, is nonetheless tolerated in practice.

In another customary practice, a man who has committed adultery with another's wife pays a cash compensation called jari kal to the injured husband and is then allowed to keep the wife. According to Shilu Singh, the whole concept of jari is unique to Nepalese law. Jari, or eloping with another man's wife, is punishable, but the principles underlying punishment have always been controversial and the law regarding jari has been often amended. Until 1963, when the new National Code was instituted, the amount of compensation which the injured husband could claim varied with his caste status and that of the adulterer. A lower caste man who eloped or committed adultery with a high caste woman would be punished with a term of imprisonment up to 14 years, while an adulterer of caste status equal to the woman would be given a much lighter sentence. The Code of 1963 removed all caste discriminations from the jari laws and provided equal compensation for all castes. However, Shilu Singh reports that:

This was severely criticized by supporters of the feminist movement on the grounds that provision for payment of compensation for eloping with or committing adultery with someone else's wife (or technically committing the offence of 'jari') would mean that the wife is considered the personal property of the husband. Some

*Photo on opposite page:
In the Jumla region of far-western Nepal jari
marriage is accepted even by the high caste
Hindu community to which this woman belongs.
Photo Gabriel Campbell.*

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even demanded the removal of the chapter "on jari" from the Mulki Code.¹

While the sixth amendment to the Code did not remove the chapter, it radically changed the nature of the provisions on adultery. The amended Code did away with the previous penalty of "compensation" (up to Rs. 1000/-) that the adulterer paid to the injured husband. In its place a fine of up to Rs. 2000/- was instituted which is to be paid by the adulterous couple to the court rather than to the wronged husband. In addition, under the new laws, both the man and the woman who have committed adultery are equally liable to a term of up to two months in prison (Chapter 18, Section 2). For jari punishment to be inflicted, however, the woman's husband must file suit.² After such a suit the former marriage is dissolved and the woman becomes the wife of the adulterer. The National Code thus recognizes jari marriage as valid.*¹⁰

The Hindu Ideal of Female Behavior as it Affects Contemporary Nepalese Law

Despite this legal tolerance towards divergent forms of marriage and divorce, it would be a mistake to conclude that Nepalese law has not been deeply influenced by Brahmanical concepts of legitimate marriage and orthodox Hindu standards of female sexual purity. As with so many cultures throughout the world--both modern and traditional, western and non-western--Hindu culture has always demanded higher standards of sexual restraint from women than from men. This fact is still partially reflected in the provisions regarding bigamy, divorce, and adultery in the Nepalese National Code.

According to the ideals of traditional Hinduism, a woman may marry and have legitimate sexual relations with only one man in her life. This is symbolized by the fact that the only legitimate and honorable form of marriage for orthodox high caste Hindus is kanyadan or "gift of virgin." Once a woman has been given in marriage by her natal family, she may never enter into a second proper union even if she is widowed or abandoned

¹Shilu Singh, personal communication.

²In a move towards greater equity, the new law states that a husband who is himself polygamous loses the right to inflict jari punishment on his wife and her lover.

at a young age.¹¹ If she should later take up with another man, her ritual and spiritual purity will diminish and she and any offspring she has by such a second union may be given somewhat inferior caste status. Men, on the other hand, have traditionally been able to have several wives--even several at the same time, though this was not the general practice--without endangering their ritual purity or caste standing. (Dumont).¹ A vestige of this concept is still evident in Section 7 of Chapter 14 on marriage which allows a man to dissolve a marital union contracted with a woman whom he later discovers is actually a widow. Apparently, having been previously married to a spouse who died makes a woman automatically unacceptable as a marriage partner but does not affect a man who is a widower. Here, encoded in contemporary Nepalese law, is the traditional Brahmanical attitude against widow remarriage.

Similarly, though adultery has always been considered a serious religious crime for both men and women, its social and legal repercussions, especially in orthodox high caste communities, are much more severe for women. (See "Grounds for Annullment" on page 61). One of the reasons for this, as for the ban on remarriage, is the traditional belief that women are far more vulnerable than men to permanent and irrevocable pollution through sexual contact. Stevenson (1953) has related the greater vulnerability of women to the physiology of the sexual act itself and the idea of external and internal pollution. Semen once released is a source of impurity like most bodily emissions. Men however merely emit it and are polluted externally, while women absorb it and are therefore polluted internally. For men the pollution of sexual intercourse is similar to that which accompanies defecation; both are temporary and can be removed by bathing. For a woman, however, sexual intercourse can be permanently polluting--rather the way eating boiled rice can cause an irrevocable fall in caste status unless the "right" person (i.e., someone

¹The one exception here is of course if a high caste man takes up with an untouchable woman. As mentioned earlier, in such a case both the man and any children he has by such a woman fall to the woman's caste status.

of sufficiently high ritual purity) cooks and serves the rice.¹ For a woman in an orthodox high caste community, the man to whom she was given as a kanyadan is the only man with whom sexual intercourse will not cause a permanent loss of ritual purity. This is one of the meanings of the traditional belief that the husband is "like a god" to his wife. To her his ritual status is so high and his purity is so great that she cannot be polluted by him. Even eating his jutho food does not pollute her but is merely a sign of her high respect for him and their special sacred relationship as husband and wife.

This difference in the way men and women are affected by sexual pollution is one of the reasons why the consequences of adultery are so different for men and women. A man who has committed adultery can restore his former purity and thus retain his original caste and marital status through a simple ritual bath. An adulterous woman, on the other hand, permanently loses her ritual purity and former caste status. Consequently, her husband traditionally had the right--and in some very strict communities even the duty--to repudiate her and dissolve their marriage.

Yalman (1963) has related the intense Hindu concern over female sexual purity to the structure of caste society itself. In the context of endogamous groups whose position in the caste hierarchy depends heavily upon each group's relative purity of descent, women, as those who bear the children, are ultimately responsible for the caste standing of the next generation of their husband's lineage. Thus, in order to assure its own purity of descent and thereby its own rightful place in the caste hierarchy, each lineage group must protect the purity of its women and assure that only the "right men" are allowed sexual access to these women. Field work among the Brahmans and Chetris of Nepal indicates that the lineage's concern over (and regulation of) sexual purity is greatest for the category of affinal women (wives and daughters-in-law) who will bear its next generation. Consanguineal women (daughters

¹The distinction between internal and external pollution is operative in Nepalese Hindu society. For example, despite the general injunction against inter-caste marriage, a high caste man may take a middle ranking matwali woman as concubine or wife. He does not lose his own ritual purity and caste standing as long as he refrains from taking rice cooked by such a woman. Thus sexual relations with a matwali woman do not pollute a man internally while eating rice which she had cooked would do so.

and sisters) who will be sent away to bear children for another lineage are treated with much greater leniency. (Bennett: in press).

Allen (1977), in his analysis of the Newari ihi ceremony in which prepubescent girls undergo a symbolic marriage to Lord Vishnu, further suggests that the higher the group is placed in the caste hierarchy, the greater their concern with maintaining the rules of ritual purity in general and control of female sexuality in particular. This explains why, as we noted earlier, punishments were much harsher in the old pre-1963 Code for adultery with a high caste woman than for adultery with a middle or lower caste woman.

Bigamy, Adultery and Divorce in Contemporary Nepalese Law

Such rules concerning caste and ritual purity are no longer accepted in contemporary Nepalese law. The National Code of 1963 completely abolished all caste based legislation. Current laws on bigamy, divorce and adultery are aimed solely at protecting the institution of marriage, not the institution of caste. Nevertheless, it would appear that many of the traditional assumptions of orthodox Hinduism which stress the importance of female sexual purity and woman's role as child bearer for her husband's lineage still underlie certain of the Code's provisions. For example, let us look at the laws concerning bigamy. Section 9 of Chapter 17 of the Code declares that bigamy is illegal. Bigamy is punishable,¹ though not void. However, as the chart on page indicates, the law does permit bigamous marriage for a man under certain circumstances. It would appear that these provisions indirectly reflect the previously mentioned Hindu belief that a virtuous woman may have marital relations with only one man during her life while under certain circumstances (most notably the need to beget offspring to continue the lineage) a man may have marital relations with more than one woman and

¹Section 10 of Chapter 17 sets the punishment for bigamy at a term of imprisonment ranging from one to two months plus a fine ranging from Rs. 1000/- to Rs. 2000/- for the man who takes a second wife. It is an important step towards equity that the same provision places some of the responsibility for the crime of bigamy on the woman who knowingly comes as a second wife. Such a woman is liable to be imprisoned for up to seven days and fined up to Rs. 50/-.

remain unpunished. Otherwise why do these conditions apply only to men whose wives have become in some way deficient? We do not wish to recommend, merely for the sake of equity, that women also be allowed to practice bigamy. But at least the conditions listed on page 63 as grounds for legal bigamy on the husband's part could be applied to the husband as grounds for divorce or separation requested by the wife.

In defense of the present bigamy laws, one might argue that the allowance for a man to add a second wife under the circumstances given above may actually be less harsh on the first wife than the alternative of her being abandoned or divorced. This is particularly true given the traditional social context and the present economic status of most rural women in Nepal. At least as the law now stands the elder wife retains her right to maintenance and/or a share in her husband's property.

Clearly, a piecemeal approach to modification of a social phenomenon as complex as the institution of marriage could have many unforeseen harmful effects on those it seeks to help. The laws on bigamy are closely connected to those on divorce and adultery and these in turn are related to the laws regarding property. Let us attempt to trace out some of these relationships.

At present, a woman loses her rights to any of her husband's property upon divorce. The 6th amendment provides for alimony in the form of maintenance for up to five years or until a woman enters another union. However, not only is claiming such alimony extremely difficult for the divorced woman, but it amounts to much less than the share she would have received had she continued to endure her former union. Thus, even though a woman is considered to be a potential coparcener in her husband's share, this potential becomes a reality only if she remains married. There is no belief that a woman has earned a permanent share of the family holdings through her contribution to household production. It is the husband who is seen as the permanent owner of the family property, or the share in the joint-family property, as the case may be.

It is true that the 6th amendment did make provisions for the wife to get a legal separation which under the circumstances enumerated in the chart on page 62 allows her to take her share in her husband's coparcenary property (National Code, Chapter 14, Section 10, A). But here again, embodied in the National Code, we encounter the notion that

female sexuality must be controlled. For in contrast to men, neither the legally separated woman nor the widow retains her rights to such property should she enter another union or indulge in any sexual activity. Thus, except in unusual cases where she controls extensive daijo or self-earned property, a married woman's security is firmly tied to her chastity. If she is married and commits adultery, her marriage is automatically dissolved along with her rights to coparcenary property. (National Code, Chapter 12, Section 2). If she is separated or widowed, she must retain her chastity or lose her share. (National Code, Chapter 13, Section 5). If she is divorced she has already forfeited her share. A man in similar circumstances (i.e., where he has committed adultery, gotten a divorce or taken a second wife after a separation, divorce or even during his first marriage) forfeits none of his rights to coparcenary property.

The argument here is not that Nepalese law should refrain from supporting the traditional Hindu values of marital stability and individual sexual restraint. Rather, we wish to focus on the fact that (as can be seen from Charts I-IV) the current laws are enforcing higher standards and meting out harsher punishments for women than for men. In the context of patrilineal succession, as it is encoded in the current laws, the traditional Hindu ideal of absolute female purity is being re-enforced by economic sanctions that do not apply to men. Men inherit landed property as sons while women, in the overwhelming majority of cases, inherit landed property only in their capacity as wives. Descent relationships (i.e., parent-child) are much stronger and less easily broken off than are affinal relationships created by marriage (i.e., husband-wife). Since men have rights to property by virtue of the biological fact of birth, their economic security is not so closely connected with their sexual morality. Women's rights to property however depend almost entirely upon the social fact of marriage which in Nepalese culture has everything to do with their sexual morality. It is important to remember that working out equitable laws on bigamy, adultery, and divorce depends on more clearly perceiving and confronting the issue as to how differential behavioral standards for men and women are currently reinforced by existing inheritance laws.

In recent years the issue of equal inheritance rights for daughters has been much discussed in Nepal.¹ One issue which is invariably raised in such discussions is that bilateral inheritance would create reverse discrimination against men. The query goes: "But wouldn't women inherit twice--once as daughters and again as wives after their husband's death?" The answer is yes. But it should also be noted at the same time that men would also inherit twice--as sons and then as husbands after their wife's death. Men would receive along with their sisters a share of their parent's ancestral property. Upon their wife's death they would inherit what she had been given by her parents. Upon the death of the last surviving spouse the couple's pooled property could be divided among their sons and daughters.

Needless to say, in fairness to men, daughters would have to forego their claims to daijo if they were granted equal rights to angsa from their parent's side. They would be entitled only to the same marriage expenses allowed to their brothers. In addition, daughters would of course be expected to take an equal share of the responsibility of caring for their parents in old age--a responsibility which many women would welcome were it socially acceptable and legally sanctioned.

There are other more serious problems of a practical nature that would arise if daughters were given equal inheritance rights in a predominantly patrilocal society like Nepal's where the wife is expected to reside with her husband's parents. Tambiah (1973) has noted that the

¹In fact it was one of the recommendations passed by the workshop on the Legal Status of Women at the recent (May 17-18, 1978) seminar on "Women of Nepal: Approaches to Change." The following is the text of the recommendation: " 'The daughter and the son should have equal right to ancestral property; however the daughter shall not dispose of her share until she attains the age of thirty-five.' During the final plenary session two suggestions were made for the modifications of this recommendation. One suggestion was to allow parents to make testamentary disposition of ancestral property according to their own preference. Another suggestion was that the clause restraining the daughter from disposing of her property until she attains the age of thirty-five be removed since it was felt to discriminate between daughters and sons." (USICA and CEDA, 1978: 52). For earlier discussions of the issue see Shushila Shrestha (Shilu Singh) (1977 a), Angur Baba Joshi (1975) and Ghimire (1977).

pattern of bilateral inheritance in the family of birth where both the sons and daughters inherit lands property occurs in Hindu South Asia only in communities where residence is neolocal (i.e., a couple may set up a new household unit on their own) or ambilocal (i.e., a couple may settle with either set of parents). In Nepal, where residence is generally patrilocal, a woman who inherited land from her parents would either have to sell it and try to buy land in her husband's village or rent out the land to tenants in her natal village. Neither of these solutions would be without problems in the context of rural Nepal where landholdings are already over-fragmented and often too small to be economically viable and where, in addition, many villagers are unfamiliar with (and wary of) the legal complexities involved in buying and selling land. As pre-conditions for successful implementation of bilateral inheritance, it would be essential to a) streamline and simplify existing land sales procedures and b) develop alternative schemes for income generation in rural areas to reduce the already acute pressure and dependency on existing land resources.¹ Despite the problems associated

¹In fact, if such income generating schemes could be given high priority and targeted especially towards rural women, this might be a more workable alternative to the immediate equalization of land inheritance law as a means for achieving the long range goal of economic and social equality for women. Such an approach would have the multiple benefits of 1) increasing the overall income of the rural family unit 2) reducing their dependency on finite land resources and 3) hopefully increasing a woman's status in the family and community through her greater earning power. (Since rural women in most areas of the country are already fully occupied with their many domestic and agricultural chores, an important part of this kind of approach would obviously have to be the development of labor-saving technologies to make women more efficient in the work they are already doing and give them time to take up new types of employment.)

This kind of attempt to elevate women's economic status independently of the fundamental issue of land ownership and inheritance would of course only be an interim measure. Ultimately as pointed out by Piepmeyer (n.d.), "inheritance laws in some countries which favor males decrease the absolute worth and the potential independence of women and must be reformed before absolute equality can become a reality."

with the implementation of equal inheritance rights for sons and daughters, it is nevertheless a fruitful exercise to try to imagine the implications of such a system--to think of how different a Nepalese woman's life options might be if, like a man, her economic security were not so heavily dependent upon her relationship to her husband.

The most obvious implication is that, freed of economic dependency on their husbands, more ordinary rural women could actually take advantage of existing divorce laws to end marriages in which the man has failed to fulfil his moral and legal obligations (see Chart I). However, the full implications of equal inheritance laws go much deeper. What is really at issue is not only economic equality for women, but the idea of women as formally equal partners in marriage and the family enterprise. Those who have lived and travelled in the rural areas--and especially in the hills--know that Nepalese women do in fact often participate informally as full partners in the day to day affairs of farm and family management. Nevertheless the ideology of male control remains and what is more, it is reinforced by the patrilineal inheritance system which assures that the bulk of landed property remains in the hands of men. In a largely subsistence rural economy, control over land is still the basis of formal power. Therefore, no matter how highly valued women may be as laborers and even managers in the rural family unit, their position in that unit--and in society at large--is still necessarily contingent on their relationships to the males who are by and large the legal owners of the means of production.

In this context, it is interesting to note that the marriage portion (daijo) which women receive from their parents, besides being smaller, is usually in the form of movable property. Hence it does not provide the same kind of economic security as the immovable property which men inherit as angsa from their parents. In terms of its ability to sustain, the daijo or marriage portion could be compared to jeri (a delicious syrup-filled sweet) while the angsa is like dal bhat (lentils and rice), the daily staple food. As important as daijo is, as an expression of parents' affection and concern for their daughter's welfare, it still cannot usually provide an alternative source of security in the case where a woman's marriage fails; nor can it provide a firm basis for the establishment of women's formal equality in the family and community.

Clearly a change in the inheritance system would entail certain changes in the family and in the relationship between husband and wife. While more liberal thinkers believe such changes would be positive, others fear they may weaken the fabric of Nepalese society. In fact, the most frequently expressed objection to equal inheritance for sons and daughters is that it would somehow lead to the break-up of the family. Perhaps no one has replied to this argument more forcefully than Joshi (1975: 46):

It is often argued... that [the patrilineal inheritance] system is necessary for encouraging close ties within the family. If the daughter were to get a share of the property of her parents instead of her husband, it might lead to disunity and consequently unhappiness in the family.

Yes, the family is an important unit of society. No doubt that there should be unity among its members, and more so between husband and wife. Otherwise it may not be able to fulfil its very significant role in the social structure. It is not however necessary that this unity be protected only at the cost of women by putting her under permanent tutelage of her husband and his family.

There are many complex factors that bind the family and the husband and wife together. To say that the economic dependency of the woman is the crucial one is to display a deep cynicism about the very nature of marriage.

Chart I

GROUNDS FOR DIVORCE, ANNULMENT, SEPARATION
 AND BIGAMY UNDER THE NEPALESE NATIONAL CODE

M E N	W O M E N
<u>Grounds for Legal Divorce</u>	
I. (Woman loses her share in husband's property, but may claim maintenance for five years or until she remarries)	
1. Wife lives separately for 3 years or more continuously without husband's consent.	1.(a) Husband leaves wife and lives separately without seeking any news of her and without taking care of her continuously for a period of three years or more;
	(b) husband drives her out of his house; or
	(c) does not provide her with food and clothes.
2. Wife performs any action or indulges in any intrigue or conspiracy designed to put an end to husband's life or lead to his physical disability, or result in any severe physical suffering to him.	2. Husband performs any action or indulges in any intrigue or conspiracy designed to put an end to wife's life or lead to her physical disability, or result in any severe physical suffering to her.
3. Mutual consent.	3. Mutual consent.
	4. Husband becomes impotent.
	5. Husband takes a second wife.

Chart II

M E N	W O M E N
<u>Grounds of Annulment or Automatic Dissolution of Marriage</u>	
II. (Woman loses her share in husband's property and may not claim maintenance)	
1. In case marriage is contracted with a girl who is dumb, leprous, crippled, lame, blind of both eyes, devoid of the genital organ, handicapped with her hand or leg broken, mad or epileptic, on the pretense that she is normal and in case the boy does not accept her, the marriage shall be cancelled.	1. In case marriage is contracted with a boy who is dumb, leprous, crippled, lame, blind of both eyes, devoid of the genital organ, handicapped with his hand or leg broken, mad or epileptic, on the pretense that he is normal and in case the girl does not accept him, the marriage shall be cancelled.
2. Marriage arranged without consent of the groom.	2. Marriage arranged without consent of the bride.
3. In case the man and the woman have been married before either has attained the age of sixteen years, such marriage shall be terminated if both of them do not consent to it after attaining that age.*	3. In case the man and the woman have been married before either has attained the age of sixteen years, such marriage shall be terminated if both of them do not consent to it after attaining that age.*
4. Wife confesses or is proven to have committed adultery.	
5. Wife is currently married to another man or is a widow.	
6. Wife elopes with another man.	

*The law does not specify what happens if only one partner does not agree to the marriage.

Chart III

M E N	W O M E N
<u>Grounds and Conditions of Separation</u>	
III. (Woman takes her share in her husband's property)	
	<ol style="list-style-type: none"> <li data-bbox="676 595 1129 674">1. The woman has completed 15 years of marriage or has attained the age of 35. <li data-bbox="676 707 1129 786">2. The woman is denied maintenance or expelled from her husband's house.* <li data-bbox="676 819 1180 875">3. The woman is frequently beaten up or harrassed.* <li data-bbox="676 909 1110 965">4. Husband brings in another wife. <li data-bbox="676 999 1129 1055">5. Woman remains unmarried and chaste after separation.

*She may not claim her share and live separately if her husband is still in a state of jointness with his parents; in such cases she gets only maintenance. A sonless widow below 30 may not take her share and live separately unless she is denied "food and clothing and expenses for religious observances and charity according to their own standard."

Chart IV

M E N	W O M E N
IV. <u>Grounds for Legal Bigamy</u>	
<ol style="list-style-type: none"> 1. Wife has leprosy. 2. Wife has incurable contagious venereal disease. 3. Wife becomes incurably insane. 4. No child is born or remains alive after 10 years of married life. 5. Wife becomes lame and unable to walk. 6. Wife becomes blind in both eyes. 7. Wife lives separately after obtaining her share in the property under Section 10 or 10-a of the Law on Partition of Property. 	

Child Custody and Maintenance

Another issue related to the problem of divorce and separation is that of child custody and maintenance. The National Code contains no explicit statement on the matter, but according to Shilu Singh:

Nepalese law considers the right of child custody as well as the duty to maintenance of the child as the right and liability of the father. A mother has no right upon the issue she has given birth to. The law is based on the Hindu concept of woman as jaya or one who bears children for her husband. The mother simply gives birth to children for her husband.¹

Although this concept of the ultimate supremacy of the father's rights over his offspring is still the foundation of contemporary custody and guardianship law, the 6th amendment to the National Code gave the mother important new custody rights. There is no separate chapter on the subject but new provisions which deal with custody in situations where the parents are divorced are found in the chapter on "Husband and Wife." It is not clear whether these provisions apply in cases where the mother has merely taken her share and lives separately but has not sought a formal divorce. However, since the wording of the provisions refer simply to "the child's mother" and "the child's father" it would seem that they are equally applicable in cases where the wife is merely living separately after partition.

The new provisions in Section 3 of Chapter 12 on "Husband and Wife" are as follows:

- 1) Regarding custody of children below 5 years of age, the mother will have the option to take custody. She can choose to do so, but if she does not wish to, the father is obliged to do so.

¹Shilu Singh, personal communication.

*Photo on opposite page:
A woman deserted by her husband seeks legal
counsel about how to get child support.
Photo by Lynn Bennett.*



- 2) If the child is above five, but is a minor (i.e., below sixteen), the mother has the option to take the child into her custody, provided she has not remarried after getting a divorce from the child's father.¹ If she does not choose to do so (take the child in her custody) or if she has remarried, the father is under obligation to take care of the child.
- 3) Notwithstanding the provisions made by the above two subsections, the father and the mother of the child can mutually agree to keep the child in the custody of either of them or arrange to keep the child by turns.
- 4) Either of the parents has a right to meet the child occasionally if the child is in the custody of the other. This right shall be enjoyed even by a mother who has remarried.
- 5) When the child is under the custody of the mother, the father is under obligation to pay for the expenses of child's maintenance (i.e., the expenses of food, clothing, education and medical care.)²

Ideally of course the whole issue of child custody should not be a matter of parental "rights"--whether those of the father or the mother--but of the child's welfare. If this were the case, the mother's right to custody of her children over age five would not be lost automatically if she remarried, since in most cases, it is considered healthier for a child to grow up in a two-parent home.

¹In Marriage and Conjugal Relations (1976: 27), this passage appears to have been mistranslated leading to the impression that a mother's rights to custody automatically terminated when her child reached five. "The mother may maintain a child who is below the age of five years if she desires to do so, and if she has not taken up another man as her husband." The actual import of the passage is that the mother's rights continue until the child reaches legal majority as long as the mother does not remarry.*12

²Shilu Singh, Trans.

There is one final aspect of Nepalese law which, though not directly related to the subject of marriage and divorce, is relevant to the discussion of traditional Hindu ideals of female behavior. This is the whole issue of women's control over their own reproductive capacity. Recently the United Nations Fund for Population Activities (UNFPA) has sponsored a project on "Population and the Law" to study the implications of current Nepalese laws for the nation's population policies. A high level committee of legal experts and social and economic planners has been formed to locate and analyze those laws that are directly or indirectly affecting the nation's rate of population growth. Since this committee will undoubtedly be investigating the current law on abortion and its policy implications, this present study has not attempted to deal in any depth with this complex issue.¹³ It may be helpful, however, as a starting point for further discussion, to simply present the existing legislation on the subject. The following provisions appear in Chapter 10, Part 4, "On Homicide":

(Section 28) Any person, doing an act which results in abortion, except an act done for the protection of an expecting mother; or anyone who gets abortion accomplished; or anyone assisting in the act of abortion is liable to punishment.¹⁴

(Section 29) Any act, done to a pregnant woman out of ill-will, which resulted in abortion, is punishable even if it was not with the intention of bringing about abortion.

(Section 31) Anyone who causes an abortion on a woman without her consent shall be punished with an imprisonment of two years, if the embryo is of six months or less, and with an imprisonment of three years, if the embryo is of more than six months. If the abortion is done with the consent of the woman on whom the abortion is done, both the woman and the person causing abortion shall be punished with an imprisonment of one year each, if the embryo is of six months or less and with an imprisonment of one and a half years, if the embryo is of more than six months. An attempted abortion causing the birth of a live child is punished with half of the above sentences.

(Section 32) The offence mentioned in Section 29 above committed with the knowledge that the woman is pregnant is punishable by a sentence of three months term, if the embryo is of six months or less, and by a sentence of six months, if the embryo is of more than six months. If the offence is committed without knowledge that the woman is pregnant, the punishment is a fine of 25 rupees, if the embryo is of six months or less and a fine of 50 rupees, if the embryo is of more than six months.

(Section 33) Proceedings against the offence can be carried only if the complaint is made within three months from the date of the offence. If the offender himself reports, there is no time limit for the proceeding.¹

Like traditional cultures in almost all parts of the world, traditional Hindu culture in Nepal encouraged high fertility. A woman's greatest source of recognition and status in the family and community was to be the mother of a large, thriving family. In a setting where infant mortality was high and where a large family provided the necessary agricultural labor, this was highly adaptive. It is not surprising that abortion in this context would be considered a crime. One of the fundamental issues which the Committee on Law and Population must face is whether the traditional belief in the value of high fertility is any longer beneficial to Nepalese society as a whole and to what extent these beliefs should continue to be supported through the provisions of the law. Their findings and recommendations on this and other issues related to the nation's population policy will have a profound effect not only on the legal status of Nepalese women, but ultimately on the general educational, economic, health and nutrition status of the Nepalese people as a whole.

Modernization of the Nepalese Marriage Laws: The Limits of Law as an Instrument of Social Change

As we have seen, Nepalese property and succession laws, as well as the laws governing marriage, divorce, adultery and child custody, have undergone major changes that have greatly improved the legal status of women. In the area of marriage, for example, increasingly stringent

¹Shilu Singh, Trans.

legislation has been passed to restrain practices such as child marriage, exorbitant wedding payments and bigamy, all of which were often directly or indirectly harmful to women. Yet in the rural areas of the country and often even among the more educated urban dwellers, these practices persist. It is clear that we need to better understand both the role and the limits of the law in bringing about social change. We might begin by looking more closely at the provisions governing the legal age of marriage and the ceiling on wedding payments. As with the laws prohibiting bigamy, the gap that exists between law and social reality is large and leads us to question how much of the task of social transformation the law can realistically be expected to shoulder on its own.

Minimum Age of Marriage. The National Code of 1963 came out against the custom of child marriage by stipulating that no girl could be married before the age of fourteen and no boy before the age of eighteen, even with the consent of their guardians. The sixth amendment, enacted during International Women's Year, raised the minimum age of marriage for a girl to 16 with her guardian's consent. The minimum age for marriage without the guardian's consent is now 18 for a girl and 21 for a boy.

Punishment for disobeying these provisions varies according to the age of the girl involved. Anyone responsible for arranging the marriage of a girl under 10 years of age is liable to imprisonment for a period ranging from 3 months to 3 years plus a fine of between Rs. 500/- and Rs. 5000/- (National Code, Chapter 17, Section 2, Subsection 1). Similarly, when the girl in question is above 10 but below 14 years of age, those responsible for her marriage may be imprisoned up to a year and fine up to Rs. 2000/- (National Code, Chapter 17, Part 4, Section 2, Subsection 2). If the girl is between the ages of 14 and 16, the punishment may not exceed three months imprisonment and a fine of Rs. 1000/- (Chapter 17, Part 4, Section 2, Subsection 3). According to Subsection 9 of the same law, any fines levied in connection with underage marriage are to be turned over to the girl in question.

In addition to restraining the practice of child marriage, this section of the "Law on Marriage" also attempts to prevent another practice which, although less common, was equally detrimental to women-- that is the marriage of a young girl to a man many years her senior. This practice frequently led to early widowhood for women in a social context where widow remarriage was forbidden for some groups and the

situation of the widow quite unenviable. The present law bars marriage between individuals if there is more than 20 years difference in their ages (Chapter 17, Part 4, Section 2).

As we noted earlier, marriages in contravention of the regulations mentioned above are punishable, but not automatically void. Though invalidation of such marriages would strengthen the law, it would not be appropriate in the present Nepalese context and might well do more to harm than help. In traditional communities, the family of a girl who had been given in orthodox Hindu marriage, no matter what her age at the time, might have a difficult time finding a second bride-groom for her when she had reached the legal age of marriage.

Under the present law, underage marriage becomes null and void only if the couple does not consent to it after they have both attained the age of sixteen (National Code, Chapter 17, Part 4, Subsection 10). This is consistent with the general provision in Section 1 of the same law, that valid marriage requires mutual consent. This important provision was greatly strengthened by the 6th amendment with the addition of Section 7 which states that: "No marriage shall be contracted or arranged without the consent of both the man and the woman. In case marriage is contracted or arranged by force, it shall be nullified." (Marriage and Conjugal Relations 1976: 4).

There are two difficulties in the wording of the minimum age of marriage laws which should be mentioned.¹ Firstly, Subsection 4 uses the term "guardian's consent" rather than "parent's consent" and the word "guardian" is not defined in Nepalese law. In customary practice the father is considered to be his daughter's guardian. The mother would assume this role only in the event of his death and even then, in certain communities, the girl's paternal uncle would, in the matter of her marriage, command more authority over her than would her mother. If the word "parents" could be inserted along with guardian in this clause (or better yet, a section defining "guardian" to include the mother), the mother would be assured of her rightful say in decisions concerning the daughter's marriage.

¹Shilu Singh, personal communication.

The second problem with the minimum age of marriage regulations is actually a matter of "reverse discrimination." The provisions for punishment are based solely on the age of the girl. If the boy in question is below age and the girl is not, punishments are much lighter, as specified by Subsection 5 of Section 2 which says that "all acts prohibited in the foregoing Section shall be liable to punishment (in case there is no specific provision for punishment) of a term of imprisonment not exceeding three months or a penalty of Rs. 500/- or both."¹

These issues aside, the major problem with the marriage regulations has been the difficulty of enforcement. Occasional reports of police arrests in cases of under-age marriage do appear in the newspapers. However, according to Women's Organization Senior Advocate, Shilu Singh, the Bagmati Zonal Court records do not contain a single case successfully prosecuted under these provisions. Apparently, although the police do check into such marriages when they are reported, they either fail to forward such cases to the law courts or fail to follow correct prosecution procedures, so that offenders are easily able to escape punishment. If enforcement is so ineffective in the Kathmandu Valley where public opinion is growing against the practice of child marriage, it must be even more problematic in remote rural areas where much of the population still considers this practice a religiously sanctioned ideal.

The difficulty of enforcement, however, cannot be entirely blamed on the law or on the police. In instances like this, where law penetrates deeply into the private life and religious values of individuals and families, it cannot really be effective until public opinion changes. Realistically, all the law can do is lead the way in bringing about such change. People must be educated to follow on their own.

Regulations on Marriage Payments and Wedding Expenditure. One area where this is particularly true is marriage payments. Attempts have been made to restrain the practice of elaborate marriage payments through various provisions in the National Code. Bride price (i.e., the custom of giving money to the bride's family in exchange for their daughter's hand in marriage) has always been held in low esteem by Hindus for whom the only fully legitimate and honorable form of marriage is the kanyadan

¹Ibid., Trans.

or "gift of a virgin." According to this tradition, for parents to receive any payment for their daughter's marriage would be a source of shame. It would also cancel out the great spiritual merit which they gain by making a religious gift or dan of their beloved daughter.

It is not, therefore, surprising that the provisions contained in the 1963 Code were aimed solely at preventing the socially disapproved practice of bride price and remained silent about the reverse custom of tilak. This latter custom prevails in some ethnic groups in the Nepal Terai where the bride's father must present a large amount of money to the groom as an inducement of marriage.

Section 6 of Chapter 17 on marriage in the 1963 Code prohibits the bride's family from accepting any payment from the bride-groom, "except that sanctioned by family tradition." This governing clause, however, makes the entire provision ineffective, since it was "tradition" that was the source of the problem in the first place. Worded this way, the provision has become in essence an unenforceable legal tautology.¹

Much stricter laws aimed at curbing marriage payments from both sides were promulgated in October of 1976 in the "Social Ceremonies (Reform) Act." Section 3 of the Act prohibits the payment or acceptance of tilak or "groom price" in any form. Anyone who accepts such a payment is liable to be punished with a fine of between Rs. 12,000/- and Rs. 25,000/- or an imprisonment not exceeding 30 days or both. The individual who offers such payment to the groom is liable to half of this punishment.

Section 4 of the Act prohibits the bride's family from accepting any payment from the groom in return for giving their daughter in marriage. Punishment for violation of this provision is a fine of between Rs. 12,000/- and Rs. 25,000/- and/or imprisonment up to one year for the individual accepting payment and half the above for the one who offers the payment.²

¹The punishments involved were also not much of a deterrent, being only confiscation of the payment plus a fine of an equal amount.

²It is to be noted that the term of imprisonment for accepting bride price is greater than that for accepting groom price.

The Social Ceremonies (Reform) Act has also put a ceiling on the amount of daijo or bridewealth that may be given to the bride by her family.¹ At Rs. 10,000/- plus one set of gold ornaments (Section 5, Subsection 2) the amount allowed is generous and far exceeds what the vast majority of the rural population could afford to give in any case. Hence this ceiling does not in any real sense affect our earlier recommendation that, as an interim measure until more equitable systems of property inheritance can be established, women's rights over their daijo property be protected to the full extent of the law. In fact, the suggestion made earlier that daijo gifts be registered with appropriate local officials could serve a double purpose: It would prevent women from losing control over such property and it would prevent exorbitant dowries.¹⁵ In order to more effectively restrain the latter practice, however, the wording of the act might have to be considerably tightened. At present, the Section which limits the amount of dowry refers only to daijo presented "during the wedding." This renders the whole provision ambiguous because it cannot constrain parents from presenting daijo within the allowed amount during the wedding and then offering more a few days later.²

The Social Ceremonies (Reform) Act specifically prohibits negotiation between the two families over the amount of daijo to be given and expressly bans the use of pressure by the groom's side to increase the amount.³ This

¹In Subsection 3 of Section 5 the punishment for exceeding the daijo ceiling is set at confiscation of the amount in excess, and a fine not exceeding Rs. 10,000/- or a term of imprisonment not exceeding fifteen days or both.

²Shilu Singh, personal communication.

³Section 5, "Restriction Dowry", Subsection 1: "The bride-groom's side shall not compel the bride's side to offer any specified amount in cash or in kind as dowry, donation or gift or farewell gift in any form to the bride-groom nor shall the two sides settle in advance the amount to be gifted. The bride-groom's side shall not cause any harassment or refuse to solemnize the marriage, or if the marriage has already been solemnized refuse to take away the bride formally, or in the case of persons among whom it is customary to take away the bride formally only after some time, refuse to have the farewell rituals solemnized and take away the bride on the grounds that no dowry has been paid." ("Social Ceremonies (Reform) Act" 1976: 470).

is certainly supportive of the concept of daijo as the bride's exclusive property, the amount of which should be of real interest only to the bride and her parents.

Following the promulgation of the Act, the Social Ceremonies (Reform) Rules were issued in December of 1976. These provisions are an excellent example of legal attempts to remove wasteful and socially harmful elements of cultural traditions. Limits are specified as to the number of relatives who may be invited and the quantity of gifts which may be presented for various ceremonies. Since weddings are the most elaborate--and often also the most ostentatious and costly--of all social ceremonies practiced in Nepal, the rules regulating them are presented in the greatest detail. The most important provisions are those which limit the number of relatives invited to 100 (Section 3, Subsection, 2), allow the bride's people to feed the bridegroom's party on no more than two occasions (Section 7, Subsection 3), and restrict the cost and quantity of gifts exchanged in various separate ceremonies (Section 4, 5, 6, 8, 9, 10, 11 and 12).

Offences under Social Ceremonies (Reform) Act (like those under the minimum age of marriage provisions) have been made cognizable. This means that the police are empowered and charged with the duty to investigate such offences and file a case against the offender. In this matter Nepalese law seems to be far advanced over the Indian "Dowry Prohibition Act" of 1961 which did not make such infringements cognizable. In the opinion of the Committee on the Status of Women in India (1974: 115):

the policy of making the offence non-cognizable completely nullifies the purpose of the Act as it is unrealistic to think that the father of a girl who had paid the dowry (and who alone is in a position to adduce evidence of the fact that dowry was stipulated and given) would prepare a complaint against the interests of his daughter after her marriage.

Nevertheless, even though the Nepalese police have been given a mandate to enforce the provisions of the Social Ceremonies (Reform) Act, not a single case has been prosecuted to date.¹ To quote a recent editorial from the Rising Nepal:

¹Shilu Singh, personal communication.

It is common knowledge that the implementation of the provisions of the Social Reforms Act aimed at cutting down wasteful expenditures at different social occasions and ceremonies have not been too successful. In the absence of strict enforcement by concerned authorities the provisions of the Act have gone largely ignored. (February 20, 1978).

The editorial reports that in the Bagmati Zone mobile "watchdog" teams made up of representatives from the local administration, police and panchayats have been constituted in an attempt to "dissuade people from violating the spirit and the letter of the Social Reforms Act." These mobile teams are charged with:

keeping a strict watch on the exchange of dowries not only during the marriage ceremonies but also on what are exchanged before and after, as well as to keep an eye on the number of invitees to social parties and receptions to ensure that people do not indulge in inviting a great number of guests through various practices such as inviting them in small groups on different days. (Rising Nepal, February 20, 1978).

The editorial clearly supports Dror's contention mentioned earlier that law alone, even supported by the police, cannot be expected to bring about change in the areas of family life and cultural values. (Dror, 1969: 96). In the absence of a totalitarian police controlled state (certainly an unattractive alternative), there are always ways to circumvent laws meant to govern these intimate personal and family matters. Even the "watchdog" teams mentioned in the editorial are unlikely to be successful if they view their job purely in terms of "enforcement." What is needed is a change in public opinion, a reinterpretation of traditional Nepalese religious and cultural values to allow new definitions of marriage and of the relationship between husbands, wives and in-laws. Only in the context of these new cultural definitions will wasteful ostentatious weddings and exorbitant marriage payments become obsolete and cease to exist. Perhaps if these mobile teams interpret their task to be as much one of education as of enforcement, they will be able to help their communities to follow where the law has attempted to lead them.

MAKING THE JUDICIARY STRUCTURE MORE RESPONSIVE TO WOMEN'S NEEDS

In his discussion of the relation between law and social change, Dror (1969: 93) has noted the distinction between the direct and indirect aspects of the role of law. Law influences social change directly when it alters the statutes which actually define and regulate certain basic types of social interaction and patterns of behavior. The Nepalese laws restraining bigamy and child marriage, as well as the important new provisions affecting women's inheritance rights, etc., which were contained in the 6th amendment to the National Code, are good examples of efforts to bring about social change directly through the law.

The law plays an indirect role in the process of social change when it creates or alters various social institutions which in turn have a direct impact on society. An example of this kind of indirect change is the recent directive issued by Her Majesty on International Women's Day which provides for free textbooks for female students up to class three. This law represents an effort to improve women's status indirectly by increasing their access to education.

In this study we have thus far been concerned with the more direct aspect of the role of the law. Always keeping in mind the particular cultural and historical context from which it emerged, we have examined the Constitution, the National Civil Code and the body of laws and rules which govern Nepalese citizens, seeking an overview of how these documents define the official legal status of Nepalese women. We have noted areas where the law has taken a direct role in encouraging social change beneficial to women and suggested certain other areas where further change in the provisions of the Code may be desirable. The exact nature of such direct changes, however, and the form they should take, must be left to those who are trained in the legal profession and experienced in the complexities of Nepalese jurisprudence.

There are, in addition, many ways in which the law could be used indirectly to improve the overall status of Nepalese women and increase their ability to participate more fully in the process of national development. The structure of the agricultural extension services could be changed to incorporate local village women as agents and to train them for the special task of improving the agriculture skills and knowledge

of their women neighbours. Special credit incentives could be extended to groups of women such as the group of Tamang women in Rasuwa district. These women, assisted by the Agricultural Development Bank, have banded together to purchase and operate larger more efficient looms to weave their traditional cloth. In these examples we are really talking about law as an arm of policy in various sectors of the economy. We are talking about how the law could be used to create or shape institutions which will in turn affect the rate and the direction of social change and economic growth. Once again it seems clear that legislation in support of specific policies aimed at integrating women in development is more appropriately the concern of the policy study contained in this volume (Part 5) or of the planners in charge of various sectors.

There is, however, one aspect of the indirect role of the law which might be appropriate to consider in concluding this chapter; that is, the issue of how the structure and process of the judiciary could be changed or expanded to make it more accessible to women and more responsive to their needs. Here the concern is not with changes in the written body of the law but with changes in the way the law functions as a social institution.

There are many dimensions to the problem of creating greater access to the law. Most basic is the large scale legal illiteracy in the outlying regions of the nation. Enlightened laws do not benefit women if they remain in law books and courtrooms, unknown to the rural majority. A participant in the Bi-National Seminar on Women and Development held in Ahmedabad, India wrote of that country:

It could very well be argued that in a country where about 80% are illiterate, legal knowledge is not impartable. But there is no question of sequence here. Literacy has to be there before, along with and after every other programme. Besides, since an illiterate woman is more vulnerable to exploitation by those who 'know', she needs legal knowledge much more than a literate person." (Bi-National Seminar on Women in Development 1977).

This of course is not a problem confined to the female sex. Illiterate men in remote areas without the financial resources, confidence and sophistication necessary to take their grievances to court are no less disadvantaged than women in similar circumstances. Hence,

though the focus here is specifically on the needs of women, there is need of concern for all the less advantaged sections of society.

There have been several efforts to increase the general public's awareness of women's legal rights. In 1967, the Nepal Women's Organization published an illustrated booklet in simple Nepali which set out the basic legal rights of women in question and answer form (Singh: 1967). 20,000 copies were printed and distributed throughout the country to local level women's organizations.¹

Much more of this kind of basic education needs to be done, perhaps using the techniques for communicating with pictures pioneered by UNICEF and N.D.S.² This means that not only do new and even simpler pamphlets need to be developed, but also that a core of female community workers needs to be taught how to use these materials. Even the most expressive and well designed visual materials cannot communicate to illiterate rural audiences unless they are accompanied by clear verbal explanations and discussions.

One of the objectives of the Women's Affairs Training Center is to teach its Women Worker Trainees about the fundamental legal rights and obligations of women. When they return to their home areas, the Women Workers in turn are supposed to teach these basic legal facts to groups of village women. To date, the impact of this aspect of the WATC's programme has not been assessed. Such an evaluation would help those concerned with the problem of legal literacy to determine what kind of training, materials, and follow-up support are needed to make this kind of approach most effective.

Other possible channels for getting basic legal information out to rural women might be the Mother's Clubs that are now in the planning and pilot stages or the Non-Formal Education scheme currently being designed by the Centre for Educational Innovation and Development of the National Education Committee. Since women are one of the major target groups of the Non-Formal Education project, incorporation of simple and relevant

¹During International Women's Year an updated version of this booklet was compiled by Indira Rana and Shushila Brestha (Shilu Singh) and published by the Committee of the International Women's Year. An English version entitled The Legal Status of Women was also published.

²See Fussell and Haaland (1976).

legal material as subject matter for functional literacy would have a large impact. Another possibility might be to involve NDS students by incorporating information on basic legal rights and obligations into the curriculum of their adult literacy classes. It would seem especially appropriate for law students to be entrusted with this kind of work. At present law students are not required to participate in the National Development Service although the Institute of Law is experimenting with using law students to give free legal counsel to the underprivileged sectors of society. (Dhungel 1978). Through the Institute's "Legal Clinic", law students will receive training in the practical aspects of the law while at the same time, they render an important and much needed social service. If this new program could be expanded to the law campuses in all four development regions, it could play a central role both by providing free legal counsel and by bringing basic legal literacy to men and women of the lower economic strata throughout the country.*¹⁶

Perhaps one of the most hopeful prospects for improving the general level of legal awareness among the rural population and at the same time providing access to legal redress for women, is the suggestion for an expansion of the Legal Aid Service Project run by the Nepal Women's Organization's Central Office. The service was begun in 1964 to provide legal counsel to women who, because they could not afford to hire lawyers, were unable to go to court to realize their official legal rights under the new National Code. Despite the fact that the staff has consisted of a single advocate and one office assistant, the project to date has filed law suits on behalf of 3,024 women of which only 729 suits are still pending. In addition, the project has given informal counsel to many other women. Although the project's Senior Advocate is able to provide legal service on an occasional basis to outlying regions of the country during her periodic tours, the Legal Aid Service at present has its only office in the capital. Hence it is able to provide regular advocacy only at the Supreme Court and in the local courts of the Kathmandu area.

A plan¹ has been put forward to expand the reach of the service by opening two new legal aid centers--one in Nepalgunj or some other town

¹The Dutch government requested the plan after having expressed interest in funding an expanded legal aid service for women in Nepal.

in the Far Western Region and another at Dhankuta or Dharan in the Eastern Region.¹

As the expanded program is presently envisioned, the advocates assigned to two new centers would conduct tours of different areas within their regions during at least three months every year. They would not only assist individual women with their cases in local courts, but would attempt to impart knowledge of basic legal rights to as many village men and women as possible during the course of their tours. In addition, all three centers would be responsible for organizing yearly training seminars for groups or "cadres" of village women from various districts within their regions. During the two month training period these village women would:

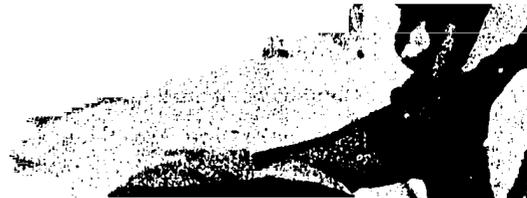
be acquainted with the basic principles of the Nepalese legal and judicial system, the essence of laws relating to women's rights so that they can on their own, provide preliminary legal service to necessitous women of their localities and recommend them to the advocates of the centres at the stage they approach the law courts. (Shrestha: 1977).

To be effective these "barefoot lawyers" would have to be integrated with and supported by some other local level organization. Village or District level Women's Organizations, where they exist, the network of Women Workers trained by the WATC, or the proposed Mother's Clubs could perhaps provide the necessary institutional support and reinforcement, but this aspect of the proposed project has yet to be worked out.

At the risk of overburdening them, a further responsibility might be suggested for the advocates in charge of the proposed regional Legal Aid Service Centers. In addition to making the provisions of the National Code better known to villagers, perhaps these legal experts could try to become familiar with customary law as it is actually practiced in areas they serve. Those who have worked or travelled in village Nepal know that there are discrepancies between official law and

¹Perhaps for budgetary or administrative reasons the proposed expansion plan has omitted the Western Region. It would seem, however, that a comprehensive national program for legal aid service would need to include all four development regions.

*Photo on opposite page:
Women wait to see the lawyer at the Legal
Aid Service Center.*



customary practice. The National Code itself is cognizant of the rich variety of local practices and allows customary usages as long as the latter do not violate the provisions of the Code which is ultimately the supreme law of the land.

Although the existence of a gap between official law and actual practice is thus recognized, no research has yet been carried out to determine the nature and extent of the variation in different regions of the country. From the point of view of women's status, it would be important to know whether localized practices such as polyandry or informal divorce customs are actually interfering with women's legal rights under the Code. While some customary laws almost certainly limit women's ability to realize these rights, others may well permit women even greater latitude for remarriage and financial independence, etc., than they enjoy at present under the provisions of the Code. Two things are needed which the Legal Aid Service advocates may be able to help provide: first, an effort to assure that no customary law is in force which deprives any man or woman from fully enjoying his or her basic legal rights under the Code; second, an attempt to clarify where necessary the relationship between customary law and the National Code. An example of a situation where such clarification might be necessary was reported by a colleague studying the Tibetan-speaking people of the Baragaon-Muktinath area. The case involved a woman who had been married to two brothers according to locally accepted custom of polyandry. When she later sought an official divorce, which would have entitled her to alimony and child support which she badly needed, the local district courts apparently refused to grant her a divorce on the grounds that her previous, polyandrous marriage had been invalid according to provisions of the National Code.¹

A similar problem with the interface between customary practice and national law was mentioned by the report of the Committee on the Status of Women in India (1974: 118) and a similar type of solution was recommended:

Retention of customary forms of divorce under the Hindu Marriage Act is advantageous because this process of dissolving the marriage saves time and money in litigations. The only difficulty that may

¹Sidney Schuler, personal communication.

arise is if the divorce according to customary law is brought at some stage to the notice of the court and the latter decrees that particular form of divorce to be against public policy or morality. If one or both parties have remarried, such a marriage will be void and the status of the children will be affected. To minimize this, it has been suggested that the Ministry of Law should prepare an exhaustive record of customs relating to divorce found in different States and set up a panel of socio-legal experts to determine if any of these customs are invalid. Copies of the record should be made freely and easily available to the people and the panchayats.

If such a socio-legal panel or committee were to be formed in Nepal, it could be charged with not only assessing the validity of various customary practices as recommended in the passage above, but also with determining whether such practices interfered with the intentions of the Nepalese National Code, particularly regarding women's rights. The advocates in charge of the proposed regional Legal Aid Centers could play a valuable role as members of such a committee by reporting what they had observed and recorded during their tours.

We have considered a variety of ways in which the law could be made more responsive to the needs of women and indeed, to needs of the rural population in general. We have noted the need to increase general legal literacy to expand the accessibility of free legal council and to strengthen the contact between law at the center (i.e., the National Code and Judiciary system) and law at the periphery (i.e., customary law as it functions in the village setting). The final recommendation to be considered here is one suggested by Shilu Singh, supported by Ms. Kusum Shukha and others in the legal profession.¹⁷ It involves a major structural change or expansion in the institutional framework of the law; namely, the establishment of family courts to handle problems concerning marriage, divorce, child custody maintenance, etc., which are presently handled by civil and criminal courts. One of the major difference between family courts on the one hand, and civil courts on the other, is that the latter are based on the 'fault principle' (Committee on the Status of Women in India 1978: 141). In other words, civil courts are based on formal adversary procedure where the parties involved confront each other through their respective lawyers--one claiming that wrong has been done and the other seeking to refute these claims. In family courts, procedure is informal and the major effort is towards

conciliation and compromise rather than towards the establishment of fault or guilt. The judge, assisted by social workers and perhaps specially trained family court lawyers, decides the case on the basis of the welfare of the parties involved. Cases can be handled in the privacy of the judge's chambers rather than in a courtroom open to public. In civil court procedure, on the other hand,

strong advocacy is often the determining factor. This is particularly unfortunate in the field of custody and guardianship where the welfare of the child is often relegated to the background and the decision arrived at, is based on the well argued points of the lawyer. The judge has no option but to give his decision on the points raised and argued. If the judge were to base his decisions on social needs or in the interest of one of the parties, it may be considered as biased and hence reversed in the appellate court. (Committee on the Status of Women in India 1974: 141).

Nepalese law has recognized the need for a conciliatory approach to family law. For example Section 1, A in Chapter 12 "On Husband and Wife", specifies that the town or village panchayat to which a couple seeking divorce submits their application must "make all possible efforts to persuade them to effect a reconciliation." ("Marriage and Conjugal Relations" 1976: 27). This provision is probably very effective in close-knit village communities where the members of the panchayat know the couple involved and probably the entire background of their marital dispute. In fact this kind of mediation by respected members of the community is an integral part of village life--it is, in effect, a kind of "customary court system" that has always gone hand in hand with customary law. Ishwaran (1968: 243), describing how customary law handles family disputes in village India writes:

The settlement of private disputes is a long process involving a number of caste elders and variety of trial procedures. In the event of a conflict the matter is referred to one who enjoys the confidence and regard of the family, and also one known for his sympathy and ability in handling delicate affairs of the individual and family. If the man consulted finds the situation difficult to handle, he suggests the names of one or two other persons who also possess the confidence of the litigants. The arbitrators or

conciliators resort to various methods, ranging from timely advice to admonition.

It is only in large urban centers or areas where traditional communities are undergoing rapid change or dislocation that such informal community mediation becomes inadequate and the assistance of outside mediators such as social workers and family courts becomes necessary. At present the Nepalese police, in the course of their prescribed duties in conjunction with the civil court system, are routinely involved in certain types of cases which could be much more effectively handled by social workers attached to family courts. One example reported by Shilu Singh is the procedure which must be followed by a woman seeking legal redress in a case where her husband has violated the bigamy laws and taken a second wife. First, the woman must report her husband's second marriage to the local police. It is then up to the police to determine the truth of the allegation and report the case to the public prosecutor who then files a complaint against the husband. Ms. Singh explains that Nepalese women, who are raised to behave in a modest and retiring way in public, often find it very difficult to go to the police. Not only are they ashamed to report on private family matters, but they are also often uneasy about approaching unfamiliar male officials. Apparently in many cases even after a woman did report her situation, the police were "unable" to complete their investigation within the former 35-day time limit for filing a complaint. With the passage of the 6th amendment, this time limit has been extended to three months. Nevertheless, the basic problem of inappropriate and intimidating procedure remains and police continue to be women's only channel for seeking legal redress in this situation.

For Nepal, faced by the many urgent priorities of national development, the institution of family courts supported by a corps of professional social workers must perhaps remain a task for the future. It is, nonetheless, important to realize that this kind of restructuring of the judicial system may be a crucial step in the process of transforming women's legal status, as it is embodied in the National Code, into a social reality.

SUMMARY AND CONCLUSIONS

In this study we have examined the interface between tradition and change in the legal status of Nepalese women, the ambiguities and conflicts that arise, and the solutions that have been or could be tried. The National Code and related documents governing the official legal status of Nepalese women reflect a mixture of both modern and traditional ideologies. Since these ideologies are motivated by different values and view women from different perspectives, the law is not always consistent in its intentions. In this sense Nepalese law is a reflection of Nepalese society itself which is engaged in the difficult process of synthesizing modern egalitarian social values with its own traditional religious and cultural patterns.

Recent laws--most notably the 6th amendment to the National Code passed during International Women's Year--have greatly improved the legal status of women. Among the positive legal changes discussed in this study were the following:

- The daughter has been granted equal share with the son in the ancestral property of her parents if she remains unmarried after the age of 35.
- In addition, the married daughter's place in the line of succession to intestate ancestral property from her parents side has been improved. (She has been placed before patrilineal uncles and male cousins.)
- There are now fewer restrictions on a woman's right to dispose of her ancestral property. (She may now dispose of all movable and half of her immovable ancestral property without consent of her father or adult sons.)
- Divorce laws have been made more liberal and a provision has been made for a divorced woman to claim up to 5 years of maintenance from her former husband.
- The minimum age of marriage for females has been raised to 16.

- A divorced or separated woman's rights to custody of her children (at least until they reach the age of 5) has been strengthened.

In these new provisions we noted not only the strong influence of modern egalitarian values, but an emerging concept of the law as an instrument of social change.

This study surveyed the legal position of women in two broad areas: public sector laws and family laws. In the public sector, the most important efforts to improve women's status were found in the factory workers' legislation. These laws have attempted to insure safe and favorable working conditions for women, guarantee maternity leave and child care facilities, and insure that women receive equal pay for equal work. It was suggested, however, that the problem with this kind of protective laws may be that they are too idealistic. If they were enforced (and at present they are not), they could unintentionally limit employment opportunities for women by making the conditions of female employment so expensive that factory managers refuse to hire them. In order to actually benefit women, such protective legislation must not only be actively enforced; it must also be accompanied by a strong government policy of equal opportunity employment with, for example, tax or foreign exchange incentives for companies that employ women despite the extra costs involved.

Far more important than public sector legislation to the majority of women in Nepal, however, are the family laws governing property, inheritance, marriage, divorce and child custody. These laws were found to be complex and closely bound to traditional social patterns such as the joint family ideal, patrilineal transmission of landed property, and cultural ideas about women's roles. In general, it was clear that while significant efforts have been made to improve the legal rights of women in line with modern egalitarian views, the force of traditional social patterns is such that many areas remain in which women and men are not treated equally under the law.

These issues are far too complex to be presented in such a brief summary. However, the following inequities illustrate the situation:

- Different sets of restrictions are placed on men and women in their use of ancestral property. Unlike a man who has complete control of his entire share of ancestral property after his coparceners have taken their share, a woman in the same situation is still under male control. To dispose of more than half of her immovable property she must have the consent of her father if she is unmarried and he is alive or if she is a married woman with sons, she must obtain the consent of her adult sons. The restraints on a woman who is still a member of her husband's undivided coparcenary are even greater. Section 9 of Part 3, Chapter 17 of the National Code effectively limits the wife from entering into any financial transactions regarding her eventual share in her husband's ancestral property until she has actually succeeded to that share through separation or widowhood. The husband, however, as household head, may alienate up to half of the immovable property of the entire coparcenary estate without even consulting the other coparceners. In effect then, the husband is not legally responsible for his wife's commitments (i.e., nothing she does can reduce his share of the coparcenary). But the wife is affected by her husband's debts and his financial transactions may considerably reduce her eventual share.

- Current laws allow polygamy for men under certain conditions while the opposite tradition of polyandry, which is customary practice in certain northern regions of country, is not recognized as valid under Nepalese law.

- Throughout the law concerning marriage, divorce, adultery and bigamy, different behavioral standards have been legislated for women and men. Furthermore, in the context of patrilineal succession as it is encoded in the law, these standards are currently being enforced by economic sanctions that do not apply to men. Men inherit landed property as sons while women almost always inherit such property only in their role as wives. Descent relationships between parents and children are much stronger and less easily broken off than are affinal relationships (i.e., husband-wife) created by marriage. Since men have rights to property by virtue of the biological fact of birth their economic security is not dependent on their marital

behavior or their sexual morality. Women's rights to property, however, depend almost entirely upon the social fact of marriage (i.e., on their role as a wife); therefore, women's economic security is entirely dependent on their adherence to strict social norms of proper marital behavior. At present these norms continue to restrict women even after the death of their spouse. Thus for a widow to retain her share of ancestral property, she must remain chaste and unmarried while a widowed man may freely remarry without forfeiting his ancestral property.

Beyond the central subject of this study, which was women's rights in the official Nepalese National Code, a tangential but no less important issue continually reasserted itself. This was the problem of the gap between the official legal documents under analysis and what could be called the legal reality experienced by the vast majority of illiterate rural women. Conclusive evidence as to the nature and extent of this gap must await the results of field studies to be carried out in the second phase of this project. However, available field data as well as personal observations in several rural areas of Nepal suggest that village women are often unaware of the rights granted them in the National Code. Furthermore, even when they do know of the new laws which could benefit them, many women are wary of becoming entangled in the unfamiliar and intimidating judiciary processes required to enforce them.

Two other closely related aspects of the "gap" problem were also explored in this study. One was the issue of how to reconcile Nepal's genuinely "participatory" judicial tradition of tolerance for local customary practice with the country's equally admirable (but admittedly "top down") attempt to legislate national standards for women's rights. The other issue considered was the limits of law as an instrument of social change. This was examined in the context of recent--largely unsuccessful--attempts to enforce minimum age of marriage laws and to set limits on lavish wedding expenditures and marriage gifts. The conclusion reached from this discussion was that the law, while crucial to instigate and legitimize social change, cannot bring about change on its own. It is not a substitute for other types of government action. Ultimately, if the goal of equality between the sexes is to be achieved, the social changes promoted by the legal code will have to be re-enforced in a variety of other institutional and non-institutional ways.

The final section of this study moved to a consideration of the way Nepalese law functions as a social institution. As possible means of narrowing the previously mentioned gap between women's official legal rights and their actual legal options, several suggestions were offered for making the judiciary structure more accessible to women and more responsive to their needs. These included:

- An intensified campaign to increase legal literacy in the outlying regions of the country so that rural women benefit from the recent advances in the National Code
- Expansion of the Legal Aid Service Project run by the Nepal Women's Organization
- Creation of a panel of socio-legal experts to study the interface between the National Code and customary practice
- The establishment of Family Courts

In sum, three major conclusions emerged from this examination of the legal status of Nepalese women:

- 1) While major advances towards legal equality between the sexes have been made in recent years, important inequities remain in the areas of property and inheritance, marriage, divorce and child custody--or in other words, in areas influenced by traditional cultural norms.
- 2) The extent to which Nepal's varied traditional cultural patterns conflict with each other as well as with modern egalitarian values must be seriously addressed as lawmakers continue to refine the legal code and clarify the legal status of the nation's female citizens.
- 3) The large discrepancy between women's official legal rights and customary practice in rural Nepal (which will be further investigated in Phase II of this project) indicates that existing judiciary structures should be re-oriented and supporting institutions created if the majority of women are to actually benefit from the rights granted to them in the National Code.

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COMMENTARY BY EXPERT READERS ¹

GENERAL COMMENTS

The case of a gradual enhancement of the legal status of women in Nepal is part of the problem of the Nepalese modernization. For a country steeped in tradition for centuries and with such disparate cultures, modernization will be naturally a slow and difficult process. The law is the most powerful and direct instrument for introducing social change anywhere. But it will be effective only to the extent that the society is receptive to the idea of change. Inconsistencies and flaws in the recent laws regarding the status of women of Nepal may reflect the ambivalence of the old society that is passing through transition.

Nonetheless, on the issue of women, Nepalese law is progressive and is one step ahead of the society. In the last twenty-five years, during which time Nepal has been endeavouring to bring about social change and economic development in the country, women of Nepal have made no small gains in increasing their legal status vis-a-vis men.

A more urgent task at this juncture in the women's movement for equality would be, perhaps, not just to press for more demands for legislation but to consolidate the achievements that have been made in this field so far. The pace of social progress in traditional society cannot be hastened by overloading it with 'paper reforms', because such an act will pose more problems than it will solve. Either the law will be honored in the breach if the society has not risen to the level of grasping the benefit of change, or it may even have a more disastrous effect on destroying the existing social fabric without offering another in its place. The

¹Draft copies of this study were sent to the following expert readers for review: Mr. Dhurba Bar Singh Thapa, Dean, Institute of Law, T.U.; Ms. Kusam Shrestha Shakha, Lecturer, Institute of Law, T.U.; Dr. Prayag Raj Sharma, Research Center for Nepalese & Asian Studies, T.U.; the Hon'ble Mrs. Angur Baba Joshi, Chairperson of Community Services Co-ordination Committee; Mr. Madhu Prasad Sharma, Advocate. Written responses were received from the first three and selected comments have been appended here. In addition Ms. Shilu Singh reviewed both the first and second drafts of this study. Many of her valuable comments and suggestions have been included in the body of the text itself.

conclusions of this report seem to underscore this basic idea and its wisdom must be praised. The report outlines the various possible steps to be taken as part of an extensive social work programme to make the rural women of Nepal more conscious of their rights. It suggests the setting up of 'family courts' to deal with the cases of women concerning their marriage, inheritance and divorce problems. This appears a most sensible and balanced view to make in the context of Nepal, although the more radical of the women's rights groups may not agree.

In spite of the progress made in the laws regarding the legal status of women, Nepal's social outlook continues to be influenced by tradition. Three main ideas still dominate the outlook of the society towards Nepalese women which the Nepalese law seems to support. They are:

1. The predominance of the idea of the patrilineage and male superiority in all family and social matters. This can be clearly seen from their clan/gotra organization, the idea of descent and ancestry, the universal desire to beget a son, the male's initiative and authority in family decisions, etc.
2. The high virtue attributed to chastity of women. This is reflected in a host of norms laid down for women regarding their modesty, gentle behaviour and sexuality. The regulations on sexuality forbid pre-marital sex, award women more severe sanctions for committing adultery than men, and dictate sexual abstinence for widows.
3. The injunction of Manu which maintains that at no time will a woman ever deserve to live independently. She must be sheltered in childhood by her father, in youth by her husband, and in old age by her son. As a result of this belief, it is rare even now to see a woman set up a household and live alone either as a young girl, spinster, divorcee or widow. Although the law regarding inheritance by women makes this possible now, such a woman is sure to invite disparaging comments from her society.

Despite the above, Nepalese society has been, on the whole, accommodative to the idea of gradual change for women. Whatever gains were made in this field have been achieved by making inroads into the strongholds of tradition. Some inconsistencies between the various provisions are indicative, however, of the ambivalence of a society in transition. The report itself has pointed out these flaws. One such inconsistency is the provision to ask to annul marriage on the grounds that the wife is the widow of a former husband if this fact was not known to her new husband at the time of marriage. The second is the law on bigamy which punishes a second marriage but does not declare it void. The third relates to the rights of a woman to enjoy alimony or her share of the angsa acquired from her husband or his family. A separated woman, divorcee, or a widow must have no sexual relationship with another man or she forfeits her rights to the above property. These ideas are still recognized in the law books concurrently with the new liberal values embodied in the legislation regarding divorce, widow marriage, inheritance rights to daughters etc. It would be prudent to do away with some of the glaring inconsistencies.

Strangely, women of Nepal did not have to put up with any struggle to secure political rights, such as the right to vote, or to run for a political office. All this came in the package of a democratic and popular rule in 1951. Socially, however, women who sought to make a distinguished career outside their household were not favourably judged because it undermined the idea of the role of a woman primarily as a housewife. This outlook still dominates even the urban and neolocal families. Women in Kathmandu and other urban centers have been taking jobs in the University, administration, and professions in increasing numbers, but their professionalism has not been growing proportionately: They can never completely get away from their traditional self-image as housewife. In fact the earning wife in Nepal is often regarded only as a means to relieve the family from the stress of low income.

- Dr. Prayag Raj Sharma
Research Center for Nepalese
and Asian Studies
Tribhuvan University

SELECTED COMMENTS ON SPECIFIC PASSAGES

* 1. The law is and has to be at times inconsistent. However,
page 2 the rationale for such inconsistent law in Nepal is the diversity of the society itself. The Hindu way of life is very diverse and dynamic in comparison to other principle cultures of the world. Hinduism is technically not a religion; it is simply an aggregate of the ways of life existing in a definite setting. It is not the religion but the tradition that has legal sanctity. So in order to respond to the needs of divergent cultural groups in Nepal, the law must be promulgated; it retains its authority only as long as the society accepts its validity.

- Dhurba Bar Singh Thapa
Dean
Institute of Law
Tribhuvan University

* 2. The caste system is the deep core of the Hindu system, religiously,
page 5 socially and even economically. The Constitution, which is the fundamental law of the land, prohibits discriminatory practices in all public affairs. However the constitution does not outlaw the caste system nor does it prohibit anybody from practicing his faith in his private domain. The right to religion and right to personal liberty are qualified, not absolute, rights. A person cannot claim his right to religious freedom as a sanction to practice any illegal action. His personal liberty is subject to the provisions of law. It is the duty of the legislation as the representative of society to determine how much restraint and control should be placed upon him and how much of his personal liberty should be taken away. Thus the assertion of the author that discrimination against women can be practiced "as legitimate religious tradition" is not a real issue.

- Dhurba Bar Singh Thapa
Dean
Institute of Law
Tribhuvan University

* 3. The fear of the author that some of the legal status accorded to
page 5 women in the new National Code could be contested by invoking the 'right to religion' looks somewhat hypothetical. I do not think that the legal courts in Nepal, in spite of their burden of tradition, will let new legislation be frustrated on grounds of

religion. When the law against immolation of women on the funeral pyre of their dead husband (the sati system) was passed in Nepal in the pre-1951 days, no one appears to have challenged it on grounds of religious freedom. I do not think it likely that a divorce petition by a woman in a legal court of Nepal could be challenged by her husband on the religious grounds that a ritualised marriage according to the Hindu custom becomes indissoluble. Opposition to a new law on women is more likely to be subverted through ignorance or open defiance since every one knows that the law enforcing agency in Nepal is hopelessly weak.

- Dr. Prayag Raj Sharma
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* 4. The Mulki Ain of 1963 is not actually supposed to entirely supercede the localized customary laws. This was the case when the first Mulki Ain was enacted during 1853. However, since it could not encompass all the traditions, it gradually gave way in order to keep the legal process going. Hence customary law is still practiced even if it contravenes, in some aspects, the constitution and the Mulki Ain. [Please refer to the] Chapter on Quadrupeds Sec. 7, the Chapter on Medical Practices, Sec. I and the Chapter on Incest Secs. 4 and 10.

- Dhurba Bar Singh Thapa
Dean
Institute of Law
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* 5. In my view Article 17 (2) is not as ambiguous as it could have been. The Article in its clause (f) specifically authorises the legislation to make laws "for the protection of the interest of women" even though such laws may discriminate on the grounds of sex. Similarly, grounds like "good conduct, health, comfort, economic interest, decency and morality of people in general" are so broad and all encompassing that discrimination may occur, but only according to the procedures of law, and such practices can occur from either end (i.e., be either beneficial or harmful.)

- Dhurba Bar Singh Thapa
Dean
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Tribhuvan University

* 6 The practice of unequal pay for women has probably its roots in
page 13 the old perception of women being physically weaker than men.
But this is being eliminated in the laws relating to employment.
The government, corporations and industries have accepted not
only the principle of equal pay for women but added to it
maternity privileges. Still, prejudice against employing women
lingers on from a belief that women get an equal pay for 'unequal'
work. In private sectors, such as agriculture and construction,
wage discrimination among laborers is still maintained, but it is
based on the conviction that the nature of work assigned to women
is less regorous than that assigned to men.

- Dr. Prayag Raj Sharma
Research Centre and Nepalese
and Asian Studies
Tribhuvan University

* 7. Evidence from field work among rural Brahmin-Chetris is cited
page 25 here to prove that greater restriction on women's control of
stridhanam comes from social custom than from the Evidence Act.
A social custom of that particular community is mentioned wherein
a mother-in-law or a younger sister-in-law might use the bride's
daijo, but it is only an illustration of a custom prevalent among
a section of Nepalese society, not a general feature of Nepalese
society. If in that community any complaint by a daughter-in-law
is considered shamelessness, among some communities (like the
Newars), the use of any personal effect or asset of a bride's
daijo by her in-laws is considered utter shame. Even when her
husband sells some of her daijo articles in utter need, he is
under obligation to repay it.

- Shilu Singh
Senior Advocate
Nepal Women's Organization

* 8. An important aspect of the women's property rights is her daijo-
page 28 pewa. The report observes that a woman's property rights, even
under the existing laws, are not as securely provided as they
should have been. The author also expresses her fear in regard
to daijo. The woman who brings it either surrenders it to the
family of her husband or is lured into parting with it. Despite
this situation, the inviolability of the daijo remains strong in

the people's outlook and the law has provided for its unassailability.

There are various kinds of gifts made by the bride's father at the time of his daughter's marriage. Some of these gifts include daksina (gift) of asarfi, jhari, khadkula, gagri made to the groom. These are invariably claimed by the parents. Another category of marriage gifts consists of the bed, quilt, room furniture, etc. This goes to embellish the room of the groom and the bride. The personal outfit given to the groom belongs to him. Then personal gifts are separately made to the daughter consisting of ornaments, cash, clothes and sometimes immovable property such as land. Although the entire marriage gift passes as daijo in a rather loose sense, the real daijo is only what a bride receives from her father or brother as a personal gift.

It is true that proper safeguards are not always made for protecting the woman's daijo. The difficulty arises because a woman's position in her husband's house is a subordinate one and the level of her awareness precludes her changes of protecting this property from her in-laws. Also, the patrilocal character of the Nepalese family renders the utilisation of the daijo land of a woman for deriving income rather difficult since such a land is usually located in her natal village. This would require selling off the land, but in such an event it might not take long for the cash obtained to fall into the hands of the husband or the in-laws.

The author's expression of fear at the vulnerability of daijo appears, on the whole, valid. However, her citing of a case in which a woman's claim to ownership of the house of her divorced husband where he was living because it was registered under her name and the Supreme Court disallowing her claim is not necessarily an instance of the weakness of the law on daijo. There is no disagreement with the opinion expressing the need to adopt better

safeguards to preserve the sanctity of the daijo property. But such safeguards are actually taken where the daijo gift is substantial. Where a case of a daijo can be clearly established, law is bound to uphold it and so it does.

It must be borne in mind that daijo operates differently in the rural and the urban situation. In the urban families daijo is often used as a ploy to concentrate property away from the joint-family and to make it legally unassailable from the claims of members of a coparcenary. It is, therefore, not unusual for a male belonging to an undivided family to accumulate property in his wife's name, although it is of his own earning. The decision of the Supreme Court against the claims of the woman cited in the report was probably based on this evaluation of the situation. The inviolability of the daijo is not challenged from a long case.

I would like to refer to a practice that is widely observed in Kathmandu. In an urban family where many married brothers are living together with their parents, all the coparceners are required to surrender their visible income to the chief householder. However, if one of the brothers has an earning wife, her income becomes inviolate and she is entitled to keep it entirely under her own control. Even her own husband may not legally claim it. But there should be an adequate provision in law to register a woman's earning and her daijo so that in the event of rupture in conjugal relationship, a wife may put up her legitimate claim. A woman, legally speaking, not only has no responsibility for sharing her income with the husband's family, she has no obligation to pay off the family debt through her personal property.

- Dr. Prayag Raj Sharma
Research Centre for Nepalese
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* 9. Section 1 of 'Law of Partition' does not automatically recognize the wife as coparcener in her husband's ancestral property. But it is true that she can claim for coparcenary property as equal with other male coparceners under two conditions. First, if her husband has already separated and taken his share of property from his father and the partition is going to take place between her

husband and sons (i.e., between two generations); secondly, if the partition is only between husband and wife. In both cases she is entitled to get a share equal to that of her husband and son.

In spite of all this, women cannot be said to have the same right in the coparcenary property as men. A woman acquires her right in the coparcenary property only after marriage. If she remains unmarried, she acquires such right only after attaining the age of 35. Moreover, in the event of a divorce, her rights to coparcenary property are forfeited in both her parent's side and her husband's side. A man's right to coparcenary property, however, remains unchanged in all circumstances, since he acquires such rights from birth.

So we should not be confused about this. Although Section 1 of 'Law on Partition' provides women the right to claim equal share in coparcenary property along with other male coparceners, women are still not treated as men as coparceners in the true sense.

- Ms. Kusum Shrestha Shakha
Lecturer
Institute of Law
Tribhuvan University

*10. There is need to explain the system of jari in some more detail
page 50 than has been done in the report. Jari signifies not merely adultery, but it is also an accepted form of marriage very widely practised in Nepal. Jari money is paid for reaching settlement with the former husband over the rights to keep his wife and such payment is supposed to make good the expenses that the former husband may have incurred in his marriage. But one should not forget the fact that the wronged husband had a right to chase and kill the seducer of his wife if he asked a court of law for this right within a specified time. Punishment of adultery meted out to men was quite severe, at least at the time when the Mulki Ain was first compiled. Certain high castes, however, refrained from killing the seducer of their wives which is made quite clear by the old Mulki Ain.

- Dr. Prayag Raj Sharma
Research Centre for Nepalese
and Asian Studies
Tribhuvan University

*11. The rigidity of the notion of sexual purity is considerably
 page 51 reduced among non-Brahman castes, although the wealthier and the
 elitist non-Brahman families try to follow high Brahmanical rules
 of purity. But in the rural areas of Nepal, changing husbands
 after marriage is not only permissible, but also widely practised.
 This does not compromise the caste status of the woman in the
 least nor that of children she begets from her new husband. But
 the change of husband has to occur always within the same caste.

- Dr. Prayag Raj Sharma
 Research Centre for Nepalese
 and Asian Studies
 Tribhuvan University

*12. Regarding custody of children above 5 years of age, the author's
 page 65 observation (footnote 1) is correct. The mother's right to have
 custody does not cease until she remarries.

- Dhurba Bar Singh Thapa
 Dean
 Institute of Law
 Tribhuvan University

*13. The project on Law and Population will definitely endeavour to
 page 66 consider the matters relating to limiting the size of family and
 to welfare of women and children. The project will also highly
 benefit from the outcome of this study. There can be valuable
 coordination between these tasks.

- Dhurba Bar Singh Thapa
 Dean
 Institute of Law
 Tribhuvan University

*14. In my opinion the approximate translation of sections 28 of the
 page 66 Chapter on Homicide should be as follows:

"Whoever, aborts, or causes to abort or helps or abets
 to abort any pregnancy, excepting cases whereby abortion
 is caused while performing any act of benevolence, shall
 be deemed to have committed an offence."

Similarly Section 29 may read as follows:

"Whoever maliciously does anything to the body of a pregnant woman and thereby causes abortion shall be deemed to have committed the offence even if done without any intention to cause abortion."

Other sections also may be translated slightly differently in terminology and meaning, [] to insure, [] as far as possible, that the same meaning could be construed whether read in Nepali or in English.

- Dhurba Bar Singh Thapa
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*15. The suggestions for registering the daijo gift seem somehow
page 72 impossible.

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*16. The legal clinics of this Institute operate in all four Campuses
page 79 under its jurisdiction. The experience of its operation so far, however, is gloomy.

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*17. The suggestion for the establishment of a family court is highly
page 83 commendable.

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