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**Citation:** Malagodi, M. (2018). Challenges and Opportunities of Gender Equality Litigation in Nepal. *International Journal of Constitutional Law*, 16(2), pp. 527-551. doi: 10.1093/icon/moy041

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# Challenges and opportunities of gender equality litigation in Nepal

Mara Malagodi\*

*The constitutionalization of an enforceable right to equality opens novel avenues to pursue gender equality claims and presents a new set of challenges for feminist activists. This article analyzes Nepal's constitutional litigation for alleged breaches of the right to equality with respect to gender from the re-democratization of 1990 until the promulgation of the current constitution in September 2015. It makes one central argument: Nepal's Supreme Court has played a pivotal role in advancing the rights of Nepali women by crafting—in an incremental way—a nuanced, contextually sensitive, constitutional meaning of gender equality. In this respect, gender equality jurisprudence has been central to the judicial construction of Nepal's constitutional identity. Nepal's extensive experience of gender equality litigation offers key comparative lessons—especially for deeply divided societies—on the accommodation of demands for social inclusion and the construction of social identities by constitutional means.*

## 1. Introduction

The constitutional right to equality—in its textual, jurisprudential, and operational dimensions—offers unique insights into the role of law in constructing the polity's collective identity and in challenging (or preserving) existing socio-economic hierarchies. This article focuses on Nepal's Supreme Court-level constitutional litigation for alleged breaches of the right to equality with respect to gender between 1990 and 2015. It presents one central argument: Nepal's Supreme Court has played a pivotal role in advancing the rights of Nepali women by crafting—in an incremental way—a nuanced, contextually sensitive, constitutional meaning of gender equality. In this respect, gender equality jurisprudence has been central to the judicial construction of Nepal's constitutional identity. The Court has contributed to the definition and re-

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definition of the collective identity of the Nepali polity by classifying which forms of conduct constitute unlawful gender-based discrimination, and for what reasons. This process of judicial “meaning-making” is articulated through the definition of the scope, remit, and boundaries of gender equality in a discursive fashion. In the span of twenty-five years, Nepal’s Supreme Court has progressively become bolder and more assertive in its decisions, initially deploying a more limited formal conceptualization of gender equality and then increasingly embracing a more substantive understanding.

The article’s central claim, however, ought to be qualified at the outset. While Nepal’s Supreme Court has overall made a tremendous contribution to improving the status and position of Nepali women, its interventions have not been uniform, equally incisive, or proportionally successful. A combination of structural and cultural factors both inherent in constitutional litigation and specific to the Nepali context helps to explain the uneven impact of gender equality litigation in the country. First, issues of access to justice, the lack of diversity on the bench, the stifling of the rights discourse through formalistic interpretation and overly technical legal language, the difficulty in implementing judicial decisions, and the non-democratic nature of courts raise the question of whether the courtroom per se is the most appropriate site to advance gender equality claims.<sup>1</sup> Second, the way in which claims are framed, understood, and disposed of in the courtroom is shaped by the multidimensional nature of gender equality claims, which straddle issues of class *and* identity,<sup>2</sup> and are of an intersectional nature.<sup>3</sup> In fact, gender interlocks not only with class but also with other identity-based forms of social differentiation. In Nepal, these are caste, ethnicity, language, religion, region, sexuality, age, and disability. The combination of these forms of “ranking systems” has created over the years a dominant social order, historically entrenched hierarchies, and path-dependent patterns of social exclusion and disempowerment.<sup>4</sup> The context-specific way in which forms of oppression and discrimination have interlocked in Nepal over the centuries bears profound impact on the structures of constitutional adjudication and the behavior of the actors involved in

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<sup>1</sup> Tsvi Kahana & Rachel Stephenson, *The Promise of Democratic Constitutionalism*, in FEMINIST CONSTITUTIONALISM 244 (Beverly Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012).

<sup>2</sup> NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? 19 (2003).

<sup>3</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1(8) UNIVERSITY OF CHICAGO LEGAL FORUM 139 (1989).

<sup>4</sup> DFID/WORLD BANK, UNEQUAL CITIZENS: GENDER, CASTE AND ETHNIC EXCLUSION IN NEPAL (2006).

litigation. These factors are crucial to understanding the opportunities of – and limitations to – women’s constitutional agency in litigating the right to equality.

The article examines gender equality litigation in Nepal’s Supreme Court from the re-democratization of 1990 until the promulgation of the current constitution in September 2015. It represents the first major doctrinal account of the right to equality in Nepal over twenty-five years. In this respect, post-1990 Nepal is an ideal case study to investigate the judicial construction of the constitutional meaning of equality from a multidimensional perspective. An intersectional analysis of the country’s extensive gender equality litigation offers crucial insights into the role of law in constructing, re-constructing, and potentially unhinging social hierarchies. In fact, Nepal is one of the poorest, most unequal, and most diverse countries in the world.<sup>5</sup> Significantly, Nepal’s democratic opening in 1990 led to a sharper politicization of identity and growing demands for recognition from many marginalized groups. Nepal has also recently endured a ten-year civil war (1996–2006) launched by the Communist Party of Nepal (Maoist), which combined demands for equal recognition *and* redistribution. While identity and class-based political claims predate the “People’s War,” they were certainly radicalized by the conflict. Moreover, the civil war was the most systematic challenge to the monolithic state-framed construction of the Nepali nation. Nepali nationalism has been historically construed around the Shah monarchy, Hinduism, and the Nepali language—key markers of the identity of a country that was never colonized. Thus, the peace process (2006–2015) was informed by the mantra of “building a new Nepal” by delivering social inclusion through radical state restructuring by constitutional means.

After 1990 the Supreme Court acquired a pivotal role in negotiating demands for equal treatment within Nepal’s legal domain in these crucial years. The new 1990 constitution granted the Supreme Court extensive powers to review primary

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<sup>5</sup> The 2011 Census illustrates the diverse composition of Nepal’s population with 125 caste and ethnic groups, of which only the largest six are above 5 percent of the total population and are not territorially concentrated. The two biggest groups are the Chettri, i.e. Kshatriyas of local Khas origins (16.6 percent), and Bahun, i.e. Hill Brahmins, (12.2 percent); together they constitute the *Parbatiya* group, to which Nepal’s royal family and elites belong. About 81 percent of the population is Hindu. Nepali remains the lingua franca of the majority of the population, but only 44.6 percent named it as their mother tongue. In terms of historically marginalized groups, dalits (i.e. “former untouchables”) form about 14 percent of Nepal’s population. The sixty-three groups classified under the umbrella term “Adivasi Janajati” (i.e. indigenous people), who can be described as ethno-linguistic groups that do not use Nepali as their mother tongue, account for 36 percent of the total population. Madhesi groups (i.e. non-Pahari “Terai plain dwellers,” often erroneously described as “of Indian origins”) constitute slightly less than 20 percent of the total population. Available at <http://cbs.gov.np/image/data/Population/Major%20Highlights/Major-Finding.pdf>.

legislation and entertain public interest litigation (PIL), transforming the Court into a key constitutional player. As a result, a staggering amount of cases investing the constitutional right to equality have come before Nepal's apex court since the early 1990s.<sup>6</sup> The adjudication of gender equality claims at Supreme Court level offers key insight into the judicial construction of the category of women and their place in society through court proceedings. While gender identity is “transversal” to the narratives that inform Nepali nationalism, the definition of gender equality in legal terms through litigation bears profound implications for the constitutional construction of the collective identity of the Nepali polity. Gender equality litigation provides an interesting site to investigate patterns of marginalization in the country. The focus on gender brings into sharper focus the intersectional dimension of equality claims alongside the interplay of the politics of recognition and the politics of redistribution in their adjudication. Thus, Nepal's extensive experience of gender equality litigation imparts key comparative lessons—especially for deeply divided societies—on the accommodation of demands for social inclusion on the basis of gender equality and the construction of social identities by constitutional means.

## 2. Framing and litigating equality in Nepal

While the notion of political equality has shaped modern constitutional democracy since its origins,<sup>7</sup> it is only since the mid-twentieth century that equality as an enforceable right has gained traction and acquired a pivotal role in constitutional praxis.<sup>8</sup> In Nepal this feature became central to post-1990 constitutional arrangements. Thus, litigation pertaining to the constitutional right to equality ought to be framed in the broader context of the foundational and structuring functions of the constitution. This section analyzes the relationship of the right to equality to the constitutionalization of Nepal's national identity, then focuses on the position and

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<sup>6</sup> It is difficult to provide statistical data for Supreme Court litigation in Nepal. Only a small portion of the decisions are reported (either in the *Nepal Law Journal* or the *Supreme Court Bulletin*). While unreported decisions retain the status of binding precedent, they are sometimes made available by one of the parties in the case via social media, but this is ad hoc and unsystematic. Moreover, copies of the law reports have been digitized only from 2008 onward, and there is not to this day a publicly available searchable electronic database of Supreme Court's decisions, even in Nepali. The only statistical data is available by application to the Supreme Court.

<sup>7</sup> MICHEL ROSENFELD, CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 8 (1994); ROBERT DAHL, ON POLITICAL EQUALITY 6 (2006); ANNE PHILLIPS, WHICH EQUALITIES MATTER? 2, 3 (1999).

<sup>8</sup> Kate O'Regan & Madhav Khosla, *Equality in Asia*, in COMPARATIVE CONSTITUTIONALISM IN ASIA 278 (Rosalind Dixon & Tom Ginsburg eds., 2014).

powers of the Supreme Court in interpreting and enforcing fundamental rights since 1990.

## **2.1. Constitutional nationalism and gender equality**

The textual dimension of the constitution is the starting point to inquire about the legal articulation of the notion of “We, the People” and its relation to constitutional equality. In fact, “by expressing the common identity and norms of the nation, constitutions serve as the state’s charter of identity.”<sup>9</sup> In this respect, the 1990 constitution institutionalized a monolithic version of the Nepali nation centered on the dominant Parbatiya upper-caste Hindu males by subsuming the country’s many ethno-linguistic, caste, religious, and regional groups into a hierarchically structured collective identity under the banner of “unity in diversity” and restricting women’s rights to transmit citizenship.<sup>10</sup> The post-conflict 2007 interim constitution, instead, diluted these forms of constitutional nationalism and adopted a more inclusive approach to sociocultural diversity by declaring Nepal a secular state, remaining silent on the Shah monarchy and on citizenship, and curtailing the privileged status of the Nepali language.<sup>11</sup> Significantly, women had no representation at all in the drafting of the 1990 Constitution, and acquired very limited representation in the making of the 2007 document after several bouts of protests.<sup>12</sup>

The importance of forms of constitutional nationalism becomes apparent when adopting an intersectional approach to gender equality litigation, which requires a further distinction to be applied to the bearers of equality claims. Tarunabh Khaitan has introduced the helpful categorization of social groups into “potentially national groups”—those with expressive salience, i.e. with the potential of exclusively constituting a nation, such as ethno-linguistic and regional groups, etc.—and “non-national groups”—those without expressive salience, such as women, LGBTI (lesbian, gay, bisexual, transgender, intersex), caste groups, dalits, etc.<sup>13</sup> This distinction between different types of disadvantaged groups helps to explain the success, or lack thereof, of their anti-discrimination claims. Applied to the Nepali

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<sup>9</sup> Hanna Lerner, *Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach*, 16 *NATIONS & NATIONALISM* 68, 69 (2010).

<sup>10</sup> MARA MALAGODI, *CONSTITUTIONAL NATIONALISM AND LEGAL EXCLUSION* (2013).

<sup>11</sup> Mara Malagodi, *Constitutional Nationalism and the Quest for Legal Inclusion in Nepal*, in *RIGHTS IN DIVIDED SOCIETIES* 169 (Colin Harvey & Alex Schwartz eds., 2013).

<sup>12</sup> HELEN IRVING, *GENDER AND THE CONSTITUTION* (2008).

<sup>13</sup> TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 173–176 (2015).

context, an example of this distinction would be between equality claims made, on the one hand, by women and, on the other hand, by Adivasi Janajati groups or Madhesi. This raises the question of whether the claims of Nepali women belonging to potentially national groups are treated differently in litigation by virtue of their intersectional nature and potential threat not just to the existing social order but also to the nation.<sup>14</sup> Women—as structurally subordinated to men—are pivotal to the construction of the nation through their role in the biological reproduction of the community, appropriate forms of behavior that protect the boundaries of the nation, the transmission of the nation’s cultural values, the embodiment of the nation, and (to a lesser extent) participation in military struggles.<sup>15</sup>

In this respect gender-based *and* ethnic, linguistic, and racial narratives are central to the process of nation-building, in which the constitutional arena is also fundamentally implicated. Beverley Baines and Ruth Rubio-Marín astutely conclude that “constitutional rights espouse, and are expected to espouse, the fundamental values of a nation and this has both good and bad consequences for women because courts are prepared not only to uphold but also to limit women’s claims in the name of those fundamental values.”<sup>16</sup> Thus, in Nepal, the essence of equality litigation—even in gender-based discrimination cases—has been the definition of a collective we alongside the relationship between different groups and their relationship to the state. When the Supreme Court adjudicates on equality claims, it draws the line between lawful and unlawful forms of inequality. By deciding which inequalities society can tolerate while rejecting others, the Court also justifies the basis of their acceptability or rejection. Through equality jurisprudence, the Supreme Court effectively defines and re-defines the hierarchy of belonging to the Nepali political community in the constitutional domain. Given the position of the Supreme Court as the guardian of the constitution and its prominence in the public sphere, the creation of a juridical classificatory discourse on equality and inequality has great legal and political implications for society at large well beyond the doors of the courtroom.

The definition of the right to equality in both documents has been inextricably intertwined with the framing of the nation. In fact, the 1990 Constitution favored a

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<sup>14</sup> Kumud Rana, *Contesting Bodies in the Constitutional Debate About Citizenship in Nepal*, in *BODIES OF RESISTANCE* 95 (Wendy Harcourt ed., 2017).

<sup>15</sup> NIRA YUVAL-DAVIS & FLOYA ANTHIAS, *WOMAN-NATION-STATE* (1989).

<sup>16</sup> Beverley Baines & Ruth Rubio-Marín, *Introduction: Toward a Feminist Constitutional Agenda*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 10 (Beverley Baines & Ruth Rubio-Marín eds., 2005).



negative view of equality based on the principle of non-discrimination. Under the right to equality (article 11) cultural, linguistic, ethnic, and religious affiliations did not provide any basis to positive legal entitlements but were treated solely as possible causes for negative discrimination. The proviso also allowed for future enactments of special legislation for the advancement of the unprivileged segments of Nepali society. However, forms of affirmative action, as defined by the legislator, were not based on membership in a group whose identity was defined in ethno-linguistic or religious terms (i.e. potentially national groups) but restricted to categories of “non-national groups” and class groups defined by their lack of resources similar to the category of “other backward classes” in the Indian Constitution. Additionally, the 1990 Constitution preserved Nepal’s tradition of legal uniformity, with no personal law system as in India. With the growing emphasis on social inclusion at the beginning of the peace process, the 2007 interim constitution took a further step toward the recognition of the rights of potentially national groups on the basis of sociocultural criteria such as ethno-linguistic and regional identity (article 13). Similarly to the 1990 document, the interim constitution left measures of positive discrimination in the hands of the legislator, but expanded and further defined the categories of those potentially entitled to such measures to include Adivasi Janajati and Madhesi.

## **2.2. Constitutional rights and the Supreme Court**

The re-democratization of 1990 also entailed a significant shift toward the legal protection of rights in Nepal. From a domestic perspective, the new constitution contained an extensive fundamental rights section and mechanisms for judicial review of legislation and the enforcement of rights. From an international perspective, in the early 1990s Nepal ratified an array of international human rights instruments, which became enforceable domestically. The promulgation of the 1990 Constitution also brought substantial changes in the position and organization of the Nepali judiciary, expanding the powers and remit of the courts—particularly the Supreme Court.<sup>17</sup> The new constitution directly linked judicial independence to the protection of democratic constitutionalism (article 84). Moreover, the Supreme Court became the only institution authorized to provide the final and binding interpretation of the

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<sup>17</sup> CONST. OF KINGDOM OF NEPAL 1990, Part 11 The Judiciary, arts. 84–96.

constitution. This was reflected in the Court's extensive powers to review the constitutionality of primary legislation and void it under article 88(1). In Nepal, the Supreme Court's power of judicial review explicitly featured in the constitution, emulating the developments in independent India.

Thus, the 1990 Constitution departed from the Westminster model by formally establishing limits on parliamentary sovereignty and institutionalizing "strong-form institutions of judicial review."<sup>18</sup> In fact, article 23 on the right to constitutional remedy directly linked the protection and enforcement of fundamental rights to judicial intervention. It is also through the understanding of the concomitants, successes, and popularity of PIL in India that it is possible to evaluate the scope and goal of Nepal's constitution-makers in 1990 in empowering the Supreme Court to issue prerogative writs and employ the mechanism of PIL under article 88(2). The relaxation of the rule of *lucus standi* led to a great number of litigants approaching the Court. Thus, the Supreme Court sought to streamline PIL petitions and identified the following key principles: the dispute has to be based on existing laws and not be hypothetical; the petitioner must demonstrate a reasonable connection with and a substantial interest in the dispute; and all other remedies must have been exhausted.<sup>19</sup> The Supreme Court's powers of judicial review and PIL under the 2007 Constitution's articles 107(1) and 107(2) remained virtually unchanged and allowed the Court to strengthen its position. The Court became progressively bolder and more assertive in its decisions. At the same time, the number of PIL petitions continued to increase and in December 2012 the Supreme Court sought to restrict access to the Court.<sup>20</sup> The reforms have been criticized and deemed excessive as they now represent outright barriers of access (e.g. the mandatory requirement of legal representation).<sup>21</sup>

Effectively, post-1990 constitutional litigation often combined PIL and judicial review proceedings. For instance, a great deal of gender equality litigation has been conducted in the form of PIL and abstract review of primary or secondary legislation. In other words, many of these cases did not feature aggrieved individuals seeking redress for a concrete human rights violation they had suffered but activist

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<sup>18</sup> MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 15 (2007).

<sup>19</sup> *Radheshyam Adhikari v. Council of Ministers*, 2048, 33(12) NKP 810 (1991).

<sup>20</sup> Bhimsen Pokharel (2012). *Nepal Supreme Court Rules 2049 (1993)*, Chapter 6, Rules 31–42.

<sup>21</sup> S. Dahal, *Access Denied*, KATHMANDU POST, May 16, 2013, available at <http://kathmandupost.ekantipur.com/printedition/news/2013-05-15/access-denied.html>.

lawyers petitioning the Court in the name of public interest to have a specific law or part thereof declared void as breaching the constitutional right to equality. In a sense, the real defendants in these cases have been specific statutory provisions, while various government bodies as the respondent were tasked with defending the legal status quo. Therefore, the degree of the Supreme Court's intervention ought to be measured not just by the contingent remedy provided but also by its vigor in engaging the other branches of government in the course of the litigation.

Significantly, Nepal's Supreme Court has consistently lacked in diversity both in terms of gender and other socially marginalized groups. In 2013 the National Judicial Academy reported that the Supreme Court's composition as of December 2012 featured fourteen judges in total, with only one female judge. Almost 86 percent of the Justices were Bahun/Chettri, including the only female judge. Dalits and Muslims were not represented at all, while only one Madhesi and one Janajati (a Newar, one of the few groups even more over-represented than Bahun/Chettri) judge featured.<sup>22</sup> In this respect, a United Nations Development Programme (UNDP) Report from 2017 concluded that the lack of diversity across Nepal's judiciary has negatively affected the legitimacy and public perceptions of the judicial system, and also the ability of the bench to empathize with vulnerable groups.<sup>23</sup> Thus, the composition of the Supreme Court—dominated by the hegemonic groups—ought to be factored in when explaining patterns of judicial decision-making in gender equality litigation.

### **3. Constitutional equality and gender in Nepal: doctrine and praxis**

The analysis of Nepal's long string of Supreme Court-level gender equality cases between 1990 and 2015 from an intersectional perspective illuminates the broader constitutional meaning of the right to equality and its operationalization. This article contends that the analysis of Nepal's gender equality jurisprudence reveals how the Supreme Court has by and large advanced the rights of Nepali women by discursively construing the category of women as an object of equality in constitutional terms. To do so, the study analyzes key cases on the economic position of women within the family and in the workplace; the place of women within the family structure and their

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<sup>22</sup> NATIONAL JUDICIAL ACADEMY, GENDER EQUALITY AND SOCIAL INCLUSION ANALYSIS OF THE NEPALI JUDICIARY 50–52 (2013).

<sup>23</sup> UNDP NEPAL, STRENGTHENING THE RULE OF LAW AND RIGHTS PROTECTION SYSTEM IN NEPAL 12 (2017).

bodily autonomy; gender-based violence; and women's ability to pass on residency and citizenship rights. What emerges from this critical overview of the key case law is a nuanced picture of the constitutional meaning of gender equality. The judicially construed classification of conduct as discriminatory or non-discriminatory has become a core element of Nepal's constitutional identity negotiated between traditional autochthonous values and modern global norms.

### **3.1. The economic position of women: property rights, tax, and employment law**

Gender equality litigation in Nepal started with demands for ending gender-based discrimination in financial matters. These claims sought to redress injustices of both misdistribution and misrecognition. Petitioners in this line of cases have consistently been activist lawyers working through non-governmental organizations (NGOs), and their litigation strategy combined PIL with judicial review proceedings. Their ultimate goal was to use constitutional litigation to change the law. As such, most cases have been abstract challenges to the validity of different pieces of legislation violating the constitutional right to equality, often alongside other constitutional rights and international obligations. The key factor determining the outcome of this batch of cases has been whether discrimination against women was taking place within or outside the family. This "positionality" has determined how the Court conceptualized and treated Nepali women. When litigation has engaged the position of women within the family, the Court has effectively treated them as a valuable and indispensable part of the larger familial unit but has not challenged their structurally subordinate position. As such the Court consistently held that women are entitled to fair treatment within the family and a modicum of redistribution to correct unfairness. But it stopped short of recognizing their autonomy and unhinging those traditional roles.

The Supreme Court has not addressed gender-based injustices of misrecognition because it has assumed that women's identities and economic entitlements are defined by their gender roles within the family. These ascribed feminine "reproductive" roles have long structured the allocation of resources within the family in which women are by definition subordinate to men. The Supreme Court has not challenged this hierarchical ordering but took it at face value. However, when litigation has engaged the position of women in the labor market outside the family, the Supreme Court has been vocal and uncompromisingly progressive in construing

women as independent individuals making their financial way into the modern world. Thus, the Court has condemned gender discrimination as an outdated form of economic inefficiency to be eradicated by legal means, and Nepal's judicial construction of gender equality in the economic sphere has been informed primarily by traditional gender roles within the family, and *prima facie*, not by intersectional considerations. However, it is clear that this line of litigation has been primarily dictated by the preoccupations of upper class and middle class women from the dominant groups who have higher stakes in redistributive reforms of property law.

***(a) Property and inheritance law***

The first important Supreme Court decision on property rights is the famous *Mira Dhungana* (2052) case, in which activist lawyers challenged the validity of section 16 of the *Muluki Ain*'s chapter 13 on inheritance for daughters.<sup>24</sup> The Court acknowledged that the Code treated sons and daughters differently but argued that women were also entitled to a share of their husband's property, hence agreeing with the respondent's view that in Nepali society women have two different kinds of status: daughters living in their fathers' houses before marriage, and wives living in their husbands' houses after marriage. The Supreme Court relied on the advice of the *amicus curiae*, who had argued that the case had raised the problematic question of Nepal's social structure and, implicitly, of the relationship between law and society in the Nepali context. The *amicus* suggested that the complex issue of gender equality ought to be dealt with by parliament in a more comprehensive and systematic fashion.

The Supreme Court did not exercise its power of judicial review to strike down the impugned provision. The bench issued a *mandamus* to the government to introduce an appropriate bill in parliament in consultation with the various competent organizations. The Court also recognized the "patriarchal bias" of Nepali society, but it did not declare the provision *ultra vires* on the basis that "making sudden changes in traditional social customs and social norms which society has followed since long time society might be unable to adjust to these changes." The Court did not challenge the ideological foundations of these discriminatory practices and did not address the substantive meaning of equality under the constitution. Justice Laxman Aryal argued that—rather than the outcome of the litigation *per se*—*in primis* the significance of

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<sup>24</sup> *Mira Dhungana v. Ministry of Law and Justice*, 2052, 37(6) NKP 462 (1995).

the case resided in the fact that the Court had entertained the petition, hence opening the courtroom's doors to activist litigation and engaged the government by directing it to introduce legal reform in this area.

The Supreme Court adopted the same approach in the *Sapana Pradhan Malla* (2053) case, a PIL challenging the constitutional validity of section 26(1) of Land Act 1964 concerning daughters' tenancy rights.<sup>25</sup> The Court again did not exercise its power of judicial review and ordered the government to introduce an appropriate bill in parliament after consultations. The different position of daughters in the matter of tenancy rights was explained in relation to traditional social practices, "because a daughter after contracting her marriage is expected to go to the other house [i.e. the marital home] and become part of the other family according to the usual social values and rituals." The Court employed the South Asian notion of *kanyādān* ("giving away the bride") to justify the exclusion of daughters from tenancy rights. It was argued that the provision had been devised to guarantee the continuity of possession of the land within the tenant's family, ultimately to encourage agricultural production. Again the Supreme Court, while recommending an overhaul of this area of law, justified the rationale of gender discrimination in the existing legal regime.

In the *Canda Bajracharya* case, activist lawyers filed a PIL seeking the constitutional review of a number of *Muluki Ain*'s provisions discriminating against women on the basis of the right to equality and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>26</sup> Yet again the Supreme Court deferred to the legislature and did not invalidate the impugned legislation but explained the existing legal framework in light of Nepal's social and religious traditions. For the first time in cases pertaining to the right to equality, the Court directly connected the reference to Nepal's traditional social structure to the constitutional definition of Nepal as a "Hindu kingdom" in article 4(1) and the peculiar connotation of religion in article 19. The Court recognized that these provisions treat men and women differently but then argued that it is nearly impossible to realize absolute equality. The judges also held that family and social customs are inextricably intertwined like various provisions of Nepal's legal system, which is based on Hindu law. Thus, it would be unwise to strike down provisions in an erratic fashion and a systematic process of legal reform carried out by parliament

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<sup>25</sup> *Sapana Pradhan Malla v. Ministry of Law and Justice*, 2053, 38(2) NKP 105 (1996).

<sup>26</sup> *Canda Bajracharya v. Secretariat of Parliament*, 2053, 38(7) NKP 537 (1996).

would be preferable. Ultimately, the Supreme Court interpreted Nepal's social practices and traditions as reflected in the law to be quintessentially Hindu—just like the nation.

Notwithstanding the mixed experiences of activist lawyers in petitioning the Court via constitutional litigation, these early cases played a crucial role in transforming the Supreme Court into a key public forum in which women's rights were debated, interpreted and ultimately defined in their scope and remit. Moreover, even if the Court did not often grant a remedy, it exercised pressure on the government to introduce reforms designed to achieve greater gender justice. Thus, the *Muluki Ain* (11th Amendment) Act was eventually passed in 2002 and took important steps toward gender equality.<sup>27</sup> Activist lawyers were encouraged by the legislative developments and petitioned the Court further by combining abstract review of legislation with PIL. In the post-2002 case law on women's property rights, the Supreme Court became progressively bolder, tested the effectiveness of the 11th Amendment, and started to invalidate legislation.

The *Mira Dhungana* (2061) case challenged the validity of section 12A of the *Muluki Ain*'s chapter 13 on inheritance introduced by the 11th Amendment forcing daughters to return their share of the inherited property after marriage.<sup>28</sup> The Court struck down the impugned provision and directed the government to set up a commission to study and reform the laws discriminating on the basis of gender. Similarly, in the *Sapana Pradhan Malla* (2061) case the validity of section 2 of the *Muluki Ain*'s chapter 13 on inheritance discriminating between women on the basis of marital status was challenged.<sup>29</sup> The Court directed the government to set up a commission to study this area of law and then to amend the existing framework accordingly. Along those lines, the *Prakash Mani Sharma* (2062) case challenged the validity of sections 1A and 16 of the *Muluki Ain*'s chapter 13 on inheritance requiring daughters to return their share of the ancestral property after marriage.<sup>30</sup> The Supreme Court did not invalidate the impugned provision but held that it violated the constitutional right to equality, a number of international legal instruments, and the spirit of the *Muluki Ain*'s 11th Amendment, which was to secure equal inheritance rights for daughters. As a result, the Court directed the government to consult with

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<sup>27</sup> For an overview of the 11th Amendment, see <http://archive.li/o5K6g>.

<sup>28</sup> *Mira Dhungana v. Office of the Prime Minister*, 2061, 46(4) NKP 377 (2004).

<sup>29</sup> *Sapana Pradhan Malla v. Ministry of Law and Justice*, 2061, 46(4) NKP 387 (2004).

<sup>30</sup> *Prakash Mani Sharma v. Office of the Prime Minister*, 2062, 47(8) NKP 931 (2005).

civil society actors in order to assess the impact of the amendment and introduce further changes to the Code to eliminate gender-based discrimination in this area.

In another landmark decision, the *Lily Thapa* (2062) case, activists challenged the validity of section 2 of the *Muluki Ain*'s chapter on women's exclusive property, constraining the rights of women to dispose of their immovable property independently.<sup>31</sup> The Supreme Court held that the impugned provision imposed an unreasonable restriction on women and declared it to be *ultra vires* because it was discriminatory. The same reasoning was adopted in the *Mira Dhungana* (2063a) case, which successfully challenged the validity of section 7 of the *Muluki Ain*'s chapter on women's exclusive property, restricting women's ability to transfer their property on the basis of their marital status.<sup>32</sup>

The shift in the Supreme Court's attitude toward women's equal property rights claims was accompanied by a change in the authorities supporting the decisions. The post-2002 case law features extensive references to Nepal's international law obligations to explain the Court's more interventionist stance and a move away from discriminatory traditions and customs. The Supreme Court also continued to focus on its dialogue with the government and the legislature. In fact, after the promulgation of the interim constitution in 2007 and the passing of the Gender Equality Act 2006, more cases on women's property rights reached the Supreme Court, and confirmed the post-2002 position.<sup>33</sup> However, it is crucial to highlight that while the Supreme Court sought to achieve greater fairness in the distribution of material resources between men and women within the family, it did not challenge the gender-based male–female distinction that justifies gender-based discrimination in Nepal's property law. This is reflected in the fact that, according to the 2011 Census, only in 19.71 percent of Nepal's households do women enjoy ownership over land and property.<sup>34</sup> According to the earlier 2001 Census, less than 1 percent of the total households reported female ownership of the main three types of economic assets (house, land, and livestock). Significantly, this was the case across all of Nepal's social groups, condemning women across Nepali society to face greater economic insecurity than men “since their access to what has traditionally been the

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<sup>31</sup> *Lily Thapa v. Office of the Prime Minister*, 2062, 47(9) NKP 1054 (2005).

<sup>32</sup> *Mira Dhungana v. Ministry of Law and Justice*, 2063a, 48(8) NKP 979 (2006).

<sup>33</sup> *See, for instance*, *FWLD v. Office of the Prime Minister*, 2069, 56(10) NKP 1534 (2012).

<sup>34</sup> INTERNATIONAL ORGANIZATION FOR MIGRATION, *BARRIERS TO WOMEN'S LAND AND PROPERTY ACCESS AND OWNERSHIP IN NEPAL* ii (2016).



primary means of production has always been indirect and dependent on their relation as the daughter, wife or mother of a land owning male.”<sup>35</sup>

***(b) Tax law, employment law, and quotas***

The second batch of cases on the economic position of women concerns the legal treatment of women with regard to their work outside the family. In this respect, it is interesting to compare two gender equality cases in which women petitioned the Supreme Court to secure equal economic treatment to those of men. In *Sarala Rani Rauniyar* the petitioner unsuccessfully asked the Court to declare *ultra vires* section 21(a) of the Income Tax Act 1974, which required that a wife’s income be assessed on her husband’s name, on the grounds that it violated the right to equality.<sup>36</sup> The Court held that equality is not absolute and laws are discriminatory only when they provide unreasonable classifications between men and women. For instance, in this case, the Court argued that the law does not mandate a lower tax rate for husbands’ income than for wives.

The Supreme Court, however, adopted a completely different approach in the case of *Rina Bajracariya*, a petition regarding discrimination on the basis of gender in the retirement age of the employees of the Royal Nepal Airlines Corporation (RNAC).<sup>37</sup> The Court exercised its power of judicial review and struck down rule 16(1)(3) of the RNAC Service Regulations. It was held that the provision violated the right to equality and adopted a completely different reasoning to justify its decision. The difference in the outcome of these cases is best explained by looking at their context and the justification offered by the Court. In *Rina Bajracariya*, the judges held that men and women are both human beings and as such are entitled to fundamental rights in an equal manner. Interestingly, the Court differentiated between the countries that adopt the principle of gender equality as civilized and humane and those that reject it as uncivilized and underdeveloped. The judges also explicitly associated the freedom of women with modern civilization and the dawn of democracy.

This enormous shift in the justification of gender equality offered by the Supreme Court is significant because the judicial message is unequivocal: women

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<sup>35</sup> DFID/WORLD BANK, *supra* note 4, at 24.

<sup>36</sup> *Sarala Rani Rauniyar v. Her Majesty’s Government of Nepal*, 2050, 35(1) NKP 10 (1993).

<sup>37</sup> *Rina Bajracarya v. HMG Council of Ministers*, 2057, 42(5) NKP 376 (2000).

who have entered the marketplace as individuals ought to be treated as equal to men. Here the judges espouse the modern capitalist logic of meritocracy in which discrimination is treated as an economic inefficiency to be corrected. The deployment of a globalized equality language also frames gender equality in the context of international human rights and comparative constitutional experiences. As such, the Court identified the 1990 return to democracy and the promulgation of the constitution as crucial in the legal recognition of gender equality in Nepal because the document had been drafted in light of the experiences of the constitutional systems of other democratic countries and the universalization of human rights. The Court argued that it was in the spirit of the 1990 constitution to end all forms of discrimination against women. It also criticized parliament for not acting sufficiently fast in introducing legislative reforms on gender justice and giving form to the spirit of the constitution. The Supreme Court also went as far as arguing that the greatest impediment to end discrimination between men and women are the existing culture and laws. The comparison between these two cases reveals that the Court was prepared to recognize gender equality in the workplace but not women's financial autonomy within the patriarchal structure of the family.

In this respect, Nepal's Supreme Court succeeded in promoting a more equal playing field for women in the work place outside of the family by combining a strict approach to non-discrimination with a modicum of redistributive measures. This approach was also deployed in affirmative action cases on quotas and women's access to public employment. In an early case on quotas, *Pradhosh Chetri*, the Supreme Court adjudicated on the issue of reservations for the enrollment in academic institutions of women and other marginalized groups.<sup>38</sup> The Court directed the government to enact legislation to uplift the weakest segments of society pursuant to the right to equality. To support the advancement of women in the public sector, in *Pro-Public* (2062) the Supreme Court ordered the government to streamline the length of the probation period for female civil service employees.<sup>39</sup> Similarly, in the *Mira Dhungana* (2064) case, the Supreme Court struck down rule 10 of the Royal Nepal Army rules providing for the allowance to daughters of service men to be discontinued after their marriage as violating the right to equality.<sup>40</sup> On the same

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<sup>38</sup> *Pradosh Chetri v. Office of the Prime Minister*, 2061, 46(7) NKP 901 (2004).

<sup>39</sup> *Pro-Public v. Office of the Prime Minister*, 2063, 48(1) NKP 1 (2006).

<sup>40</sup> *Mira Dhungana v. Office of the Prime Minister*, 2064, 49(6) NKP 972 (2007).

basis, in the *Sapana Pradhan Malla* (2066) case, the Supreme Court invalidated the provision of the Military and Police Regulations prescribing that women—unlike men—had to be unmarried to join the force.<sup>41</sup> The Supreme Court has declared in an unequivocal and consistent manner that once women step out of the family and into the labor market the constitutional right to equality mandates non-discrimination on the basis of gender and equal economic treatment between men and women.

### **3.2. Women in the family: marriage, divorce, dowry, and reproductive rights**

Nepal's Supreme Court has interpreted gender equality within the familial relationship in a similar fashion to the case law on the economic position of women. *Prima facie* intersectional considerations had almost no role in the judgments. However, a more careful analysis reveals that many of these areas of law have been influenced by the legal culture of dominant Parbatiya groups. As a result, the Court has not challenged traditional gender roles but interpreted equality of treatment to mean fairness of treatment and extended judicial protection to women, who remain in a structurally weaker position. This has often resulted in a removal of discriminatory rules, but without challenging traditional gender roles in matters of marriage, divorce, and dowry. Instead, the area in which the Nepali Supreme Court has made enormous strides is that of reproductive rights. Starting from the need to protect women's well-being, the Court went on to affirm women's autonomy and their right of controlling their own bodies as independent individuals. The Court masterfully crafted a judicially sanctioned form of empowerment under the guise of protection.

#### **(a) Family law**

Immediately after the 11th Amendment of the *Muluki Ain* was passed, a string of PIL cases seeking review of various family law provisions conflicting with the constitutional right to equality ensued. Overall the Supreme Court responded positively to these actions and sought to ensure women were treated fairly within the family by removing discriminatory barriers. In the *Chandra Kanta Gyawali* (2061) case, the petitioner challenged the validity of section 9 of the *Muluki Ain*'s chapter on marriage prescribing a different legal treatment for men and women in cases of

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<sup>41</sup> *Sapana Pradhan Malla v. Office of the Prime Minister*, 2066, 51(7) NKP 1089 (2009).

bigamy.<sup>42</sup> The Supreme Court declared the provision *ultra vires* as conflicting with the constitutional right to equality. On a similar note, the *Mira Dhungana* (2063b) case was a challenge to the constitutionality of Section 1 of the *Muluki Ain*'s chapter on marriage allowing the husband to obtain a dissolution of marriage on the basis of the wife's infertility but not vice versa.<sup>43</sup> The Court declared the provision *ultra vires* on the basis that it violates the right to equality and international human rights standards; it also ordered the government to introduce the appropriate amendments to the existing legislation.

In the *Sapana Pradhan Malla* (2063) case, the petitioner asked the Supreme Court to strike down the provision of the Marriage Registration Act that differentiates between men and women with regard to their marital age, 22 and 18, respectively, and conflicted with the *Muluki Ain*.<sup>44</sup> On the basis of the petitioner's argument as supported by a United Nations International Children's Emergency Fund (UNICEF) report that the existing legal position violated the right to equality and facilitated child marriages, the Court held that the provision breached the right to equality, but it did not exercise its power of judicial review and ordered the government to amend the provision accordingly. A similar approach was adopted in post-2007 gender equality litigation on in family law matters. In the *Sapana Malla* (2063) case the Supreme Court reviewed section 9 of the *Muluki Ain*'s chapter on marriage allowing husbands to remarry when the wife is affected by an incurable venereal disease or serious mental disability. It found the provision to be discriminatory, but did not strike it down. Instead, the bench ordered the government to bring this piece of legislation in line with the interim constitution.<sup>45</sup> While the Supreme Court consistently ruled in favor of gender equality, it never recommended to the legislator the adoption of gender-neutral language in family law matters. This illustrates that the strides made by the Court on these issues have remained limited to securing a fair treatment of women within the traditional familial structures but did not extend to challenging those roles.

### **(b) Dowry**

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<sup>42</sup> Chandra Kanta Gyawali v. Office of the Prime Minister, 2061, 46(11) NKP 1418 (2004).

<sup>43</sup> Mira Dhungana v. Office of the Prime Minister, 2063b, 48(1) NKP 6 (2006).

<sup>44</sup> Sapana Pradhan Malla v. Office of the Prime Minister, 2063, 48(3) NKP 289 (2006).

<sup>45</sup> Sapana Pradhan Malla v. Office of the Prime Minister, 2065, 50(8) NKP 917 (2008).

The constitutional litigation on dowry offers invaluable insights into gender-based discrimination and its costs, in terms of both material distribution of resources and potential violence against women. The payment of dowry to the groom's side can be viewed as a price that the bride's family pays to secure their daughter's place in society through a suitable matrimonial arrangement and as a sort of insurance for the bride's future. The system of dowry is ultimately underpinned by the idea that women have a lower and more precarious status within society and within the family. As such the endowment of dowry reflects a gender-based structural social imbalance, requiring extra "material support" for women—an insurance premium the bride's family has to pay to secure the bride's future and almost a form of compensation to the groom's family for taking in the bride. Thus, it is impossible to develop a gender-neutral response to regulate the giving and taking of dowry—and its criminalization. The Court condemned the practice as a social evil—as do all the other South Asian courts – but in justifying its decision it never addressed the root causes of the problem, i.e. the cultural taboo of the unmarried woman, and the social imperative of securing an appropriate matrimonial match.

In this line of cases, given the complexity of the issue, the Supreme Court *in primis* sought to retain a dialogue with the other branches of government, while also taking an activist stance. In the *Mira Dhungana* (2063c) case, the petitioner succeeded in persuading the Supreme Court to declare *ultra vires* the provisions of the Social Behavior and Reform Act 1976 discriminating between the bride's side and the groom's side in the punishment for giving and demanding dowry.<sup>46</sup> The Court ruled that the provision violated the right to equality and issued a directive order to the government to amend the relevant legislation. Similarly, in the case of *Ram Pant Kharel* (2063), the Supreme Court dismissed the petitioner's request to declare *ultra vires* section 5 of the Social Behavior and Reform Act 1976 on the basis that the ground was not made out, but issued an order to the government to implement the letter and spirit of this piece of legislation with a view of eradicating the social evil of dowry.<sup>47</sup> In the landmark case of *Jyoti Lamsan Poudel*, the Court ordered the government to introduce legislative reforms on dowry regulation, enhance the punishment for dowry-related offences, and ensure implementation both to deter and

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<sup>46</sup> *Mira Dhungana, v. Office of the Prime Minister*, 2063c, 48(8) NKP 972 (2006).

<sup>47</sup> *Ram Pant Kharel v. Office of the Prime Minister* (Writ N. 063-WS-0019 of year 2060). Decided in 2065 BS (2008).

to eradicate the practice.<sup>48</sup> The Supreme Court's approach to dowry reflects the more general attitude of the Nepali state, which continues to increase the criminal penalties for dowry but does little to empower women as individuals regardless of their position within the family. As a result, the practice of dowry and the harm it causes remain widespread.<sup>49</sup>

### ***(c) Reproductive rights***

With regard to women's bodily independence and control over their reproductive rights, the Supreme Court has taken a consistent stance in prioritizing the protection of women through an expansive interpretation of the constitutional right to equality. It was only in 2002 with the *Muluki Ain*'s 11th Amendment that Nepal's abortion laws were substantively liberalized. In the early case of *Sapana Pradhan Malla* (2062), the Supreme Court tested the legislative reforms and directed the government to amend the provisions on sentencing for abortion-related crimes that distinguished between pregnant women and facilitators.<sup>50</sup> Conversely, in the case of *Achyut Kharel* (2065), the petitioner sought to claim that Nepal's abortion laws discriminate against Nepali men because the husband's consent to the procedure is not required.<sup>51</sup> The Court dismissed the petition and the following year the new interim constitution specifically recognized women's reproductive rights as part of the constitutionally protected and justiciable fundamental rights.

Under the guise of the right to equality the Supreme Court protected women's reproductive rights and health in the *Prakash Mani Sharma* (2065) case whereby the Court issued an order of mandamus to the government to secure medical treatment for women affected by uterus prolapse.<sup>52</sup> Similarly, the Supreme Court ordered the government to protect the reproductive rights of female prisoners.<sup>53</sup> Finally, the Supreme Court issued a landmark judgment in the case of *Laxmi Devi Dhikta*, in which abortion rights were deemed to be integral to the right against discrimination

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<sup>48</sup> Jyoti Lamsan Poudel v. Office of the Prime Minister, 2069, 54(9) NKP 1315 (2012).

<sup>49</sup> SUBEKSHYA KARKI, A STUDY ON DOWRY RELATED VIOLENCE IN NEPAL (2014), available at <http://www.inseconline.org/pics/1409727203.pdf>.

<sup>50</sup> Sapana Pradhan Malla v. Office of the Prime Minister, 2062, 47(1) NKP 10 (2005).

<sup>51</sup> Achyut Kharel v. Office of the Prime Minister (Writ N. 3352 of year 2061). Decided in 2061 BS (2004).

<sup>52</sup> Prakash Mani Sharma v. Office of the Prime Minister (Writ N. 064-WS-0230 of year 2060). Decided in 2066 BS (2009).

<sup>53</sup> Prakash Mani Sharma v. Office of the Prime Minister, 2065, 50(4) NKP 412 (2008); Jang Bahadur Singh v. Office of the Prime Minister, 2068, 53(6) NKP 986 (2011).

and the right to equality.<sup>54</sup> With regard to the implementation of these landmark judgments, the accessibility and affordability of abortion services, especially in remote areas, remains problematic.

### **3.3. Violence against women and harmful practices**

Another batch of gender equality cases combined judicial review and PIL to eradicate pernicious customs and violent behavior against women. These were purely identity-based non-discrimination cases filed on the basis of a negative understanding of the constitutional right to equality. The Supreme Court consistently sought to affirm the principle of equality interpreted in this context as a means of protecting the weakest segments of society and banning socially repugnant behavior. In this line of cases, the Supreme Court continued to address indirectly the question of what kind of polity Nepal aspires to be by determining which forms of conduct toward women (or certain categories of women) are acceptable, and which ones are not. The outcome of these cases, and in particular the justification offered by the Court, are pivotal to understanding the role of gender in the judicial construction of Nepal's constitutional identity. This is because the treatment of women has long been regarded as a key indicator of the civilizational level of a nation in the modern era.

#### ***(a) Superstitious practices***

The Supreme Court became an institutional vehicle to combat traditional superstitious practices harmful to women. In *Reshma Thapa*, the Court ordered the government to introduce legislation to eradicate and deter conduct that victimizes women on the basis of witchcraft.<sup>55</sup> In the *Dil Bahadur Bishwakarma* case, the petitioner filed a PIL and obtained a declaration by the Supreme Court that the practice of *chaupadi* breaches women's rights and violates the right to equality as well as an order of mandamus directed at various government departments to stop the practice.<sup>56</sup> Under this practice, women after childbirth and during menstruation are considered ritually polluting and are therefore forced by family members to leave the family home and live in a cowshed or hut, exposing them to a severe risk of sexual violence and attacks

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<sup>54</sup> Laxmi Devi Dhikta v. Office of the Prime Minister, 2067, 52(9) NKP 1551 (2010).

<sup>55</sup> Reshma Thapa v. Office of the Prime Minister, 2062, 47(2) NKP 205 (2005).

<sup>56</sup> Dil Bahadur Bishwakarma v. Office of the Prime Minister (Writ N. 3303 of year 2061). Decided in 2062 BS (2005).

by animals. This practice is prevalent in Nepal among upper caste Hindu groups and dalits in the rural areas. In such cases the Court unequivocally condemned the practices and justified its decisions on the basis of the modern language of enlightenment and rights. Tradition is condemned as superstition that ought to be erased from modern Nepal by means of criminalization and developmental interventions by the state. These practices continue unabated, especially in more remote areas.

### ***(b) Widowhood***

Widows in Nepal suffer from widespread discrimination as a result of a certain line of interpretation in Hinduism. The Supreme Court has significantly changed its stance on this matter since the early case of *Tara Paudel*.<sup>57</sup> The petitioner, the widow of an Army employee, had married the younger brother of the deceased husband to continue receiving the family pension under the Army Pension Regulation Act 1961. By way of judicial review, she challenged the legal basis of a lawsuit of incest filed by another coparcener in the husband's family against her at District Court level. The petitioner sought an order from the Supreme Court declaring section 4 of the *Muluki Ain*'s chapter 15 on incest unconstitutional as in violation of the right to equality. The Court dismissed the petition arguing that the gender-based distinction between a widower and a widow results from the fact that they do not have an equal position in society due to social, religious, and traditional beliefs and practices. The Supreme Court interpreted the right to equality as "equal application of the law and equal protection of the law among equals—it does not mean the equal application of the law and the equal protection of the law among non-equals." The different treatment under Nepali law between men and women who lost their spouse was again justified in terms of traditional social and religious values.

Later on, in the case of *Kavita Pandey*, the Court took a more progressive and reformist stance against the victimization of widows and invalidated the rule that granted different amounts for widows' state pensions on the basis of their age.<sup>58</sup> In the *Pro-Public* (2069) case, the Supreme Court went even further: while condemning the hardship and prejudice that widows face in Nepal, it also recognized the material

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<sup>57</sup> Tara Devi Poudel v. Cabinet Secretariat, NKP, 2058, 43(7/8) 375 (2001).

<sup>58</sup> Kavita Pandey v. Government of Nepal, 2067, 52(7) NKP 1128 (2010).



impact of discrimination and ordered the government to provide a monetary allowance to widows from the date of their husband's death.<sup>59</sup> The Court went further than simply condemning this gender-based discriminatory practice and sought to rectify the harm it causes through redistributive measures. However, the Court did little in terms of justification of its decision to challenge the root causes of the practice.

### *(c) Sexual violence*

Nepal's Supreme Court adopted an activist stance in cases concerning sexual violence. In *Mira Dhungana* (2063c), the Court adjudicated on the issue of marital rape through the lenses of the right to equality.<sup>60</sup> The petitioner sought an order from the Court declaring section 1 of chapter 14 on rape in the *Muluki Ain* unconstitutional as in breach of the constitutional right to equality and various international human rights instruments because the definition of the offense excluded "wife" from the categories of women listed as potential victims. The Court issued an order of mandamus to the government to introduce appropriate legislation to include the offense of marital rape, and declared marital rape a punishable criminal offense. The judicial reasoning in the case is significant. The government lawyers had argued that "according to our Hindu traditions and values, a husband having sexual intercourse with his wife can never be considered rape." The Supreme Court rejected the argument and held that "the *Dharmaśāstra* cannot condone marital rape because the true scope of religion is to promote love." The Court further refined the meaning of equality and argued that all women, by virtue of being human beings, are entitled to the enjoyment of fundamental rights and protection from harm irrespective of their marital status.

Post-2007, the Supreme Court's position on marital rape was reasserted in *Jit Kumari Pageni*—a rare instance in which the petitioner was directly affected by the legal issues in the case.<sup>61</sup> The Court held that the statutory provisions differentiating the length of custodial sentences for the offenses of marital and non-marital rape violated the constitutional right to equality and ordered the government to streamline them. Adopting the same reasoning that the status of the woman is irrelevant to the

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<sup>59</sup> Pro-Public v. Office of the Prime Minister, 2069, 54(10) NKP 1534 (2012).

<sup>60</sup> *Mira Dhungana v. Ministry of Law and Justice* (Writ N. 55 of 2058). Decided in 2059 BS (2002).

<sup>61</sup> *Jit Kumari Pageni v. Office of the Prime Minister*, 2065, 50(6) NKP 664 (2008).

offense of rape, in the case of *Sapana Pradhan Malla* (2059), the Supreme Court declared *ultra vires* part of section 7 of the *Muluki Ain*'s chapter on rape discriminating against prostitutes.<sup>62</sup> The Supreme Court reaffirmed the principle that all women are equally entitled to protection from sexual violence, regardless of their role within the family or position within society.

***(d) Gender-based violence***

Along similar lines, the Supreme Court has consistently sought to protect women from gender-based violence through an expansive interpretation of the right to equality and to retain a form of dialogue with the other branches in order to develop suitable legislative reforms. In the case of *Jyoti Paudel*, the Supreme Court issued an order of mandamus to the government to establish a fast-track court presided by female judges to hear cases on violence against women, especially domestic violence, and make arrangements to safeguard the privacy of the victims.<sup>63</sup> The Court reviewed section 7 of the Domestic Violence (Offence and Punishment) Act 2008 in light of the right to equality and justified the necessity of special procedural measures in cases of gender-based violence. In this respect, the Supreme Court's efforts in protecting women went as far as issuing an order of mandamus to the Ministry of Information and Communication to implement a gender-friendly advertising policy in the *Raju Chapagai* case.<sup>64</sup> The order was in response to the petitioner's argument that violence against women has an intimate relationship with advertisements objectifying women.

In the case of *Prakash Mani Sharma* (2067), the Supreme Court issued another order of mandamus to the government to enact legislation guaranteeing a safe and healthy work environment for women employed in dance bars and massage parlors, and interim directives to regulate these businesses to protect women from sexual harassment.<sup>65</sup> Then, in *Mira Dhungana* (2069), the Court struck down section 15(6) of the Human Traffic and Transportation Act 2007, which criminalizes the non-cooperation of human trafficking victims—mostly women—in proceedings against

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<sup>62</sup> *Sapana Pradhan Malla v. Ministry of Law and Justice* (Writ N. 56 of 2058). Decided in 2059 BS (2002).

<sup>63</sup> *Jyoti Poudel v. Office of the Prime Minister*, 2067, 52(11) NKP 1903 (2010).

<sup>64</sup> *Raju Chapagai v. Office of the Prime Minister*, 2065, 50(7) NKP 823 (2008).

<sup>65</sup> *Prakash Mani Sharma v. Office of the Prime Minister*, 2067, 52(9) NKP 1480 (2010).

the traffickers.<sup>66</sup> This batch of cases illustrates the Supreme Court's awareness of the importance of both women-friendly legal procedures and structures alongside contextual measures to guarantee women's safety also by changing the way in which women are portrayed, for instance, in advertisements.

### **3.4. Intersectional claims: immigration and citizenship**

Gender equality claims in the areas of immigration and citizenship law pertain to the fact that Nepali women have fewer legal rights than Nepali men in passing their entitlements to residency and citizenship to their children and foreign spouses. These claims are of an intersectional nature because a disproportionate number of Madhesi women in the Terai region are affected by these arrangements due to the frequency of cross-border marriages with Indian men in those areas. Significantly, this was also the reason for the inclusion of such discriminatory provisions in the 1990 Constitution and the relevant legislation.<sup>67</sup> In these types of cases, the petitioners are often individuals directly affected by the legal regime, and the remedies sought usually combine an order of mandamus to obtain the necessary documents (citizenship documents or visas) with an *ultra vires* declaration of the impugned provision. It must be noted from the outset that while the Supreme Court has progressively adopted an interpretation of the right to equality aimed at securing equal rights for Nepali women in these areas of law, the "success" of the petitioners in Court has not been matched by executive and legislative compliance with the many court orders. A 2013 study conducted by the Forum for Women, Law and Development showed that as of July 2011, 23.65 percent of Nepal's total population age 16 or above (i.e. over 4.3 million people) lacked citizenship certificates.<sup>68</sup>

With regard to immigration law, in the early case of *Benjamin Peters*, the Supreme Court dismissed on procedural grounds the petition asking the Court to strike down rule 14(3) of the Regulations Relating to Foreigners 1975 that provided for a shorter validity of spousal visa for the foreign husband of a Nepali woman than the foreign wife of a Nepali man.<sup>69</sup> A year later the same legal issue presented itself to

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<sup>66</sup> *Mira Dhungana v. Ministry of Law and Justice* (Writ N. 2068-WS-0046 of year 2068). Decided in 2069 BS (2012).

<sup>67</sup> MARA MALAGODI, CONSTITUTIONAL NATIONALISM AND LEGAL EXCLUSION 164–168 (2013).

<sup>68</sup> FORUM FOR WOMEN, LAW AND DEVELOPMENT, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL 1 (2013).

<sup>69</sup> *Benjamin Peters v. Home Ministry*, 2048, 33(11) NKP 749 (1992).

the Supreme Court in the *Mira Gurung* case; the Court struck down the rule on the grounds that it discriminated against Nepali women married to a foreign man and ordered the government to make the necessary amendments to the legislation to secure gender equality in this area of law.<sup>70</sup> Similarly, in the case of *Punyawati Pathak* the Supreme Court declared *ultra vires* the provision of the Nepal Immigration Act requiring the consent of the male guardian for a Nepali woman to acquire her passport.<sup>71</sup> In *Mira Dhungana* (2068) instead, the Supreme Court dismissed the petition asking the Court to invalidate section 4 of Schedule 9 of the Immigration Rules prescribing higher visa fees for foreign husband than for foreign wives of Nepali citizens on the grounds that it was a matter of policy for the executive.<sup>72</sup>

With regard to citizenship, the Supreme Court has decided a long string of cases pertaining to the gender-based discrimination in this area of law and consistently decided in favor of equal treatment between men and women. However, Nepal's citizenship framework has yet to be revised to comply with the many Supreme Court's orders and remains in breach of the country's international legal obligation. This area of law represents the biggest failure of the women's movement in Nepal, notwithstanding the numerous successes in litigation. This outcome can be explained only by the intersectional nature of these claims between the demands of non-national groups (women) and potentially national groups (Madhesi). In fact, inside the courtroom the claims have been treated purely as gender-based discrimination claims, but the litigation has never touched upon the political reasons behind the discriminatory nature of Nepal's citizenship framework.

The restrictions on Nepali women's ability to pass on citizenship has been historically linked to the issue of *Madhesi* regionalism, which is complicated by the open border with India. These restrictions have been engineered with the idea of insulating the Nepali nation from India. The aim has been to reduce cross-border marriages and prevent Indian men marrying Nepali women and their offspring from acquiring Nepali citizenship.<sup>73</sup> In fact, due to the sensitive political implications of the issue petitioners have not raised intersectional arguments in their pleadings.

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<sup>70</sup> *Mira Gurung v. Department of Immigration*, 2051, 35(1) NKP 68 (1993).

<sup>71</sup> *Punyawati Pathak and Mana Basnet Karki v. Ministry of Foreign Affairs*, 2062, 47(8) NKP 1025 (2005).

<sup>72</sup> *Mira Dhungana v. Office of the Prime Minister*, 2068, 53(11) NKP 8708 (2011).

<sup>73</sup> Surabhi Pudasaini, *Writing Citizenship*, 22(1) STUD. NEPALI HIST. & SOC'Y (SINHAS) 85 (2017).

Conversely, the Supreme Court never directed the government to reform the citizenship framework by using gender-neutral language. Politicians have long justified these discriminatory provisions on the basis of the notion of *kanyādān*—yet again constructing the identity of women and their legal rights on the basis of their familial relationship with men.

The *Chandra Kanta Gyawali* case was an early unsuccessful attempt to challenge the discriminatory citizenship provisions under the Nepal Citizenship Act and Part 2 of the 1990 Constitution through which the matrilineal acquisition of Nepali citizenship can only lead to naturalized citizenship and not citizenship by descent.<sup>74</sup> Instead, in the case of *Achyut Kharel* (2061), the Supreme Court secured citizenship rights to the children of Nepali women with an unknown father under the right to equality to prevent the issue of statelessness from arising.<sup>75</sup> In *Tek Tamrakar*, the Supreme Court issued an order of mandamus ordering the government to register the births and provide citizenship documents to the children of single mothers in the Badi community—a dalit social group in mid-western Nepal frequently involved in sex trade.<sup>76</sup> The Court held that the constitutional right to equality affords special protection to backward classes and ordered the government to improve the living conditions of this community, but it did not invalidate the provision of the Children Act 1991 requiring the naming of the father to register a child's birth.

In the post-2007 citizenship cases, the Supreme Court adopted a more activist stance with regard to women's citizenship rights. In the case of *Nakkali Maharjan*, the Court ordered the Kirtipur Municipality to issue a citizenship recommendation letter to the petitioner without discriminating on the basis of gender and marital status.<sup>77</sup> In *Ranjit Thapa* the Supreme Court held that an individual is entitled to choose whether to acquire citizenship via the residence address of the father or the mother.<sup>78</sup> In the landmark *Sabina Damai* decision, the Court ordered the Dolakha District Administration Office to issue the citizenship documents to the petitioner on the basis of her mother's Nepali citizenship regardless of the fact that the identity of the father was unknown, and the Ministry of Home Affairs to issue a circular to all district

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<sup>74</sup> *Chandra Kanta Gyawali v. Office of the Prime Minister*, 2058, 43(11) NKP 615 (2001).

<sup>75</sup> *Achyut Kharel v. Office of the Prime Minister*, 2062, 47(4) NKP 512 (2005).

<sup>76</sup> *Tek Tamrakar v. Government of Nepal*, 2062, 47(6) NKP 680 (2005).

<sup>77</sup> *Nakkali Maharjan v. Office of the Prime Minister*, 2065, 50(11) NKP 1340 (2008).

<sup>78</sup> *Ranjit Thapa v. Office of the Prime Minister*, NKP 2066 (2009), Vol. 51, N. 6, p. 1014.

administration offices to comply with the Court's ruling.<sup>79</sup> A string of cases ensued in which the Supreme Court issued order after order to the government to implement the Court's decisions at executive level and introduce necessary legislative reforms,<sup>80</sup> but the implementation of the decisions and the reform of the system continue to elude campaigners. In fact, the new 2015 constitution reintroduced a section on citizenship discriminating against women in passing their citizenship to their offspring. An amendment of these provisions using gender-neutral terms does not appear to be on the horizon, even if the Nepali government has been severely criticized in both domestic and international fora for the enduring gender-based discrimination in matters of citizenship, for instance, at the United Nations' Universal Periodic Review in November 2015.

## 5. Conclusions

The analysis of Nepal's gender equality litigation between 1990 and 2015 reveals the Supreme Court's pivotal role as a public forum to engage issues of gender equality and define its meaning in constitutional terms. Thus, the Court has contributed enormously to the advancement of women's rights by progressively chipping away at gender-based discriminatory laws, policies, and practices in an incremental fashion. A nuanced account of Nepal's gender equality jurisprudence over twenty-five years illuminates key trends in this area—and the challenges and opportunities ahead for constitutional litigation on women's rights. The article identifies two main ways in which the Supreme Court has advanced women's rights in Nepal.

First, with regard to the outcome of litigation narrowly understood as the verdict, Nepal's Supreme Court has consistently found for the petitioners demanding gender equality since the beginning of constitutional litigation in this area. With regard to the justification offered by the Court in its decisions on gender equality, the picture is more complex. A clear shift can be identified from an earlier, more deferential and formalistic approach to women's rights to a bolder, more assertive response to issues of gender-based discrimination. In the early case law, the Supreme Court adopted a formal understanding of gender equality and often provided

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<sup>79</sup> *Sabina Damai v. Government of Nepal*, 2068, 53(2) NKP 247 (2011).

<sup>80</sup> *Nina Tamang v. Government of Nepal*, (2012); *Sita Devi Adhikari v. Government of Nepal* (2013); *Bhola Nagarkoti v. Government of Nepal* (2014); *Dipti Gurung v. Government of Nepal* (2015), available at <http://fwld.org/wp-content/uploads/2016/12/Legal-Analysis-of-Citizenship-Law-of-Nepal-Citizenship-Report-English.pdf>.

legalistic, conservative, and inward-looking forms of justification for its decisions. While the Court sought to ensure that Nepali women were protected and treated with a modicum of fairness, it resisted radical challenges to the status quo. Instead, in later case law, the Court veered toward a more substantive notion of gender equality at the intersection of recognition and redistributive justice. Judges started to justify their decisions in progressive terms by referring to international law and foreign precedents seeking to bring the legal treatment of Nepali women in line with global norms. Significantly, they also sought to reframe the position of Nepali women within the coordinates of national history and local culture in which gender relations are embedded, to avoid a sterile dichotomic opposition between autochthonous and “foreign” values.

Second, the Supreme Court after 1990 sought to consolidate its institutional position while retaining a dialogue with the other branches of government and civil society. This is most evident in the type of remedies granted by the Court and the nature of its engagement with the executive and legislature. In earlier case law, the Supreme Court did not often exercise its power to invalidate primary legislation but ordered the government to revise the existing legal framework and introduce the necessary reforms. In case law decided after the crucial 2002 and 2006 amendments to the *Muluki Ain*, the Court became bolder and began to invalidate primary legislation in a number of cases. At the same time, the Court sought to continue its institutional dialogue with the other branches and not antagonize them. This approach has been fruitful as a number of legislative and policy reforms were actualized following decisions of the Supreme Court. Interestingly, the Court sought to maintain an open line of communication also with civil society by ordering the formation of expert commissions to report back to the Court itself and to the other branches of government, by relying on the briefs of an *amicus curiae*, and inviting oral testimonies of both expert witnesses and individuals affected. This led to a greater visibility of the Court, and a growing interest by civil society and the media in its work. As a result, Nepal’s Supreme Court succeeded in acting as a catalyst for debates on the meaning and remit of gender equality in the country.

In this respect, an important factor external to the Supreme Court is crucial to explain the success and impact of constitutional litigation in advancing women’s rights in the context of Nepal: the nature of the petitioners in gender equality litigation. Activist lawyers working through NGOs initiated most of the cases

analyzed in this article—many in the form of abstract review of legislation. As such, these activist lawyers deployed a systematic, incrementalist strategy in litigation. Initially they sought to petition the Supreme Court to remove discriminatory legal provisions, issue directives to the government and the legislature with regard to introducing new protections, and declare a growing number of forms of gender-based discrimination unlawful. They aimed at building a solid body of pro-women case law, but litigation was only one element of a broader, concerted strategy. Their ultimate goal was a comprehensive gender-sensitive overhaul of Nepal's legal system. This included lobbying the executive and legislative branches to introduce appropriate law and policy reforms and devising awareness campaigns alongside other development-oriented activities. It is also because of this network of civil society organizations focused on “cause lawyering” that the impact of gender equality litigation in Nepal has been so tangible, comprehensive, and pervasive.

Over the years Nepal's Supreme Court has sought to impose a growing number of obligations on the executive and the legislature to secure a more level playing field for women. However, the multidimensional nature of gender as a form social classification explains the limitations of the successes of the Supreme Court in advancing women's rights. A combination of discrimination on the basis of both class and identity (understood in intersectional terms) has limited the success of gender equality litigation with respect to access to justice, the outcome, and the impact of litigation. One of the areas where further improvement is needed remains access to justice. Poor women—and especially those from historically marginalized communities—have not succeeded in bringing their claims to Court due to a combined lack of material resources, cultural capital, and support structures.

With regard to outcome, the issues of justification given by the Supreme Court and implementation of judicial decisions require further qualification. In intersectional claims combining gender-based grievances with those of potentially national groups (e.g. citizenship), the Supreme Court has sidestepped entirely the intersectional nature of the claim in justifying its decisions. Similarly, implementation of the many Court decisions on citizenship has been weak and ineffective. In cases involving the position of women within the family, the Supreme Court has been reluctant to challenge the traditional construction of women's identities as dependent on their familial relationship and offered very weak, legalistic forms of justification revolving around fairness of treatment rather than substantive equality, for instance, in



property rights cases. These claims have challenged traditional gender roles within the family and demanded forms of redistributive justice together with the removal of discriminatory barriers. The Supreme Court both in citizenship and property rights cases, stopped short of the most obvious solution, i.e. recommending the use of gender-neutral language when dealing with issues of gendered-based discrimination. Thus, these rights remain contingent upon women's familial relationship to men. It is unsurprising that a report by leading anthropologist Lynn Bennett has identified the home—and the web of family relations that accompany it—as the key site of disempowerment for Nepali women.<sup>81</sup> The notable exception is represented by the case law on reproductive rights, in which the Court successfully combined the trope of protecting women with empowerment.

Finally, the Supreme Court's jurisprudence on gender equality has played an important role in the construction of Nepal's constitutional identity through progressive forms of justification, most obvious in cases about gender-based violence, reproductive rights, and gender equality in the workplace, and more conservative ones, notably in matters pertaining to the position of women within the family. By combining traditional autochthonous values and global norms, Nepal's constitutional discourse on gender equality continues to shape what can be thought and said about women and their place in Nepali society. In particular, the Court has produced a discreet, context-specific classification of what constitutes unlawful discriminatory conduct and lawful inequalities that Nepali constitutionalism must reject or can tolerate. This process has broader political implications as it offers key insights into the way in which the Supreme Court imagines, construes, and shapes the identity of the Nepali polity—and its internal "hierarchies of belonging." While embracing women's autonomy and individual identity in growing areas of law, the Court shied away from challenging gendered roles within the family and the traditional social order that they underpin. It is to be hoped that the Supreme Court will continue to contribute to the recognition and empowerment of *all* Nepali women as equal citizens so that they will be able to exercise full participatory parity within the family and in society at large—regardless of their gender, class, and intersectional identities.

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<sup>81</sup> DFID/WORLD BANK, *supra* note 4, at 13.