



## **Hindu Jurisprudence as The Basis and Source of Nepalese Family Laws: An Investigation**

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### **Abstract**

Hindu jurisprudence has played an important role in the formation of the basis and source of family law in Nepal. This article conducts an in-depth investigation of how Hindu legal principles have influenced the regulation of family law in Nepal. Through careful analysis, it outlines the historical development of Hindu jurisprudence and the way its influence manifests in Nepal's family law provisions, particularly under the National Civil Code 2017. It explores the historical foundations of Hindu law and identifies its practical consequences in the Nepalese context, including possible incongruities between Hindu law and its regulations. In doing so, it provides a deep insight into the complexity of the interaction between Hindu legal traditions and the structure of family law in Nepal. This article discusses in detail the historical development of the recognition of Hindu jurisprudence under Nepal's family law. It illustrates how key laws, such as legal arrangements for marriage, adoption, maintenance, or division, are influenced by Hindu scriptures. The article explains the provisions of the family law (enacted under the National Civil Code, 2017) in light of Hindu laws and practices prevalent in India. It also presents inconsistencies between Hindu laws and embedded regulations. This research approach integrates as legal research with a socio-legal approach, and a thorough literature review to uncover the impact of Hindu jurisprudence on Nepali family law, particularly under the National Civil Code 2017. Through these methods, this article strengthens the understanding of the complex relationship between Hindu legal tradition and family law regulation in Nepal. The conclusion of this study highlights the importance of understanding the practical implications of the application of Hindu law in the context of Nepalese family law, as well as emphasizing the need for consistency and harmonization between Hindu law and applicable regulations to achieve justice in Nepal's evolving family law system.

**Keywords:** Hindu law, Nepal, Mitakshara, Dayabhag, Civil Code, Law

## Introduction

The Hindu jurisprudence is as old as humanity itself; there is no founder of it other than the creator himself. Law proper has been the part and parcel of Sanatan Dharma and been watered by it since ages.<sup>1</sup> The law being part of Dharma, there was no disharmony and discord between law and Dharma and both constituted a single integrated whole. Dharma stands for “religious rights, fixed principles of rules of conduct and whole body of religious duties.” The legal philosophy of Dharma was based on ethical and moral and religious precepts which every person including the ruler had to follow.<sup>2</sup>

The law has been understood among the Hindus as a form of Dharma. In Bhagawad Geeta, Dharma signifies one's duty. Manu views it as a solemn duty.<sup>3</sup> However, in Rigveda, law was identified with Rita, which means cosmic order, that is, divine ordering of earthly life.<sup>4</sup> Likewise, Samveda views law to be divine creation. So, the habitual observance of law is, therefore, evidence of its existence since time immemorial. Yet, custom is only constitutive, not declaratory.<sup>5</sup>

In manusmriti, conduct is the basis of Dharma and “it is not what you think but what you do constitute your Dharma.”<sup>6</sup> Non-violence is the essence of Dharma. Religion and law are the only two facets of Dharma. Thus, the term “Dharma” also embodied the present motion of law.<sup>7</sup> For instance, Raj Dharma connotes the duty of king. Secondly, Dharma has been treated as religion. According to Gandhi, God and his laws, both, are synonymous terms. In third sense, Dharma connotes essential characteristic feature of thing or object. For instance, the essential characteristic feature of fire is to burn anything. The Dharma signifies characteristics, i.e., one should do his job based on his/her qualities.

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<sup>1</sup> N V Paranjape, *Studies In Jurisprudence And Legal Theory* (Central Law Agency, 2016).

<sup>2</sup> *Ibid.*

<sup>3</sup> धर्मशब्दःकर्तव्यतावचनः।Manusmriti VII 1

<sup>4</sup> Vasantha Muthuswamy, “Hinduism And Social Responsibility,” *Religious Perspectives On Social Responsibility In Health: Towards A Dialogical Approach*, 2018, 91-105.

<sup>5</sup> Dinshah Fardunji Mulla, *Principles of Hindu Law* (NM Tripathi, 1915).

<sup>6</sup> Manusmriti, Chapter-I, Verse 108

<sup>7</sup> N.V. Paranjape, *Studies In Jurisprudence And Legal Theory* (Bhopal: Central Law Agency)P. 127.

Manu says Dharma is that which is followed by those learned in the Vedas and what is approved by virtuous men.<sup>8</sup> Manu has described four folds of Dharma, i.e., Sruti, that is Vedas; Smriti; Sadachar and that which is pleasing to conscience of a person.<sup>9</sup> Smritis provided some non-legal rules, which a person was supposed to do, were prescribed under: (a) Achar<sup>10</sup>; (b) Vyavahara<sup>11</sup>; and (c) Prayaschit<sup>12</sup>. Manu further says that law is an order of human behaviours which is just and reasonable as it inmatates from god.

The countries, like Nepal and India where Hinduism has influenced the daily lives, have introduced some of the laws in line with Dharma and Vedic texts. It's said, neither the state, nor the king, nor the law authority govern the people, it is only by Dharma that people secure mutual protection.<sup>13</sup>

Nepal is one of the first countries in South Asia to enact a "comprehensive code of laws and human conducts," a document that incorporated laws, religious, and moral principles.<sup>14</sup> Enacted by Jayasthiti Malla, one of the 15th century King of Nepal, the Code called Manavnyayashastra<sup>15</sup> was highly influenced by the Hindu scriptures and Hindu way of life. Interestingly, this Code contained provisions for succession, inheritance, money lending, children and among others. There is no greater Dharma than truth and there is no bigger sin than speaking untruth.

After the Code of Nyayavikasini (Manavnyayashastra), Nepal adopted Muluki Ain (National Code) in 1854 (1910 BS), which was the first national code after unification of Nepal done by great King Prithivi Narayan Shah. There were provisions banning cow slaughtering, succession, gift and among other

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<sup>8</sup> Manu Samhita, Ch. II, Verse 1

<sup>9</sup> Stephen Knapp, *The Power of The Dharma: An Introduction To Hinduism And Vedic Culture* (Iuniverse, 2006).

<sup>10</sup> Regulations Relating to Performance of Religious Rites and Rituals and Ceremonies of Karmakand

<sup>11</sup> Rules Regulating Dealings Between Men and Society, Mainly Relating to Protection of Life, Liberty and Peace In Society

<sup>12</sup> It Dealt with Atonement for Various Sins, Immoral or Anti-Social Acts.

<sup>13</sup> "Hinduism In Nepal - Wikipedia," Accessed April 8, 2024, [https://en.wikipedia.org/wiki/Hinduism\\_in\\_Nepal](https://en.wikipedia.org/wiki/Hinduism_in_Nepal).

<sup>14</sup> This Code Was Called, "Code for Human Justice."

<sup>15</sup> The Manavnyaysashtra Is Available At: <https://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/Nyayavikasini-Manavanayashastra-Of-Jayasthiti-Malla.pdf> (Last Visited On 21 Dec 2023)

provisions in line with Hindu scriptures. In Chapter-I, Section 10, the 1854 Code had envisaged that if a person engages himself in performing religious deeds, his descendants would be citizens of good intellect.

The Muluki Ain (General Code), 1910 BS (1854) was impacted by Hindu Dharma as it did not outlaw caste-based system and untouchability. Thereafter, the government of Nepal (after 110 years) adopted Muluki Ain in 2020 BS, repealing erstwhile Muluki Ain. This Code contained the provisions of natural law and amalgamated the provisions with internationally recognized rights and duties. The Hindu Dharma was guarded by the constitutions enacted prior to 2007 Interim Constitution. Much like the erstwhile Muluki Ain, the current Muluki Devani Samhita (National Civil Code), 2074 BS (2017) recognizes Trusts in Chapter-6. The existence of laws, like Pahupati Area Development Trust Act, 1987 (2044 BS), and Lumbini Development Trust Act, 2042 BS (1985) suggest that there are laws that are there to safeguard Dharma.<sup>16</sup> The Greater Janakpur Area Development Council Act, 1998 mandates the government to safeguard, maintain and develop shrines, temples, lakes and religious sites within Janakpur and its intermediary circuit area.<sup>17</sup> This law aims to promote Janankpurdham, the place of goddess Sita, as a religious area.

Of seven constitutions so far enacted by Nepal, the 1959 Constitution was the first highest law of the land which firmly shown adherent to Hindu culture and tradition. The charter mandated, a person would be entitled to hold the office of the His Majesty King for the time being on being a Shahi (Royal) descendant of His Late Majesty King Prithvi Narayan Shah and adherent of Aryan culture and Hindu religion<sup>18</sup>. The same legacy was carried by the Constitutions of 1962 and 1990. However, the Constitutions enacted thereafter, i.e., the Interim Constitution, 2007 and 2015 Constitution of Nepal departed

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<sup>16</sup>Deepak Kumar Dahal, "Natural Law School", In Krishna Murari Shiwakoti & Narayan Subedi *Et. Al.* (Eds.), *General Introduction to Jurisprudence* (Kathmandu: Sopan, 1<sup>st</sup> Edition, 2020) At 31

<sup>17</sup>Jivesh Jha, What Happens When You Formulate Laws But Do Not Implement Them?, Nepal Live Today, 26 Oct 2021, Available At: <https://www.nepallivetoday.com/2021/10/26/What-Happens-When-You-Formulate-Laws-But-Do-Not-Implement-Them/> Accessed On 22 December 2022.

<sup>18</sup> Constitution of Nepal 1959, Article 1(3).

from previous position, declaring Nepal as a secular republic against that of Hindu monarchy.

Hindu majority Nepal records 81.3 per cent of total national population as Hindus, followed by 9 per cent Buddhists, 4.4 per cent Muslims, 0.2 per cent Sikh and 1.4 per cent Christians.<sup>19</sup> Yet, Nepal was declared a secular state on 28 May 2008 by the Constituent Assembly. The triumph of secularism over the Hindu identity has brought all communities, groups, and castes in the crossroads, where traditionally accepted identities are not simply working in Nepal.<sup>20</sup> This paper delves to discuss the legal arrangements made for “family laws”<sup>21</sup>, like marriage, maintenance, or adoption, under the National Civil Code, 2017, a substantive law in Nepal and their conformity with the Hindu laws.

## Method

**Methods** This research is categorized as legal research<sup>22</sup> with a socio-legal approach<sup>23</sup> on the relationship between Hinduism and Nepalese family law, and its implications for Nepalese society. This research investigates the contribution of Hindu Jurisprudence in the formation and implementation of family law in Nepal. The data sources in this research are legal documents, literature, case studies, interviews with family law experts and Hinduism in Nepal. Furthermore, data collection techniques: Document analysis, in-depth interviews, and observation. The content analysis is to identify patterns and themes related to the contribution of Hindu Jurisprudence to Nepalese family law. The Data Collection in Legal Documents includes a collection of laws,

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<sup>19</sup> Central Bureau of Statistics, *Government of Nepal, Population Monograph of Nepal*, Report 2014 At 4.

<sup>20</sup> Nirmala Mani Adhikary, *Post-2006 Terai/Madhesh Unrest In Nepal: A Byproduct of Secularism* (2010)12 *Swet Sardulat* 7.

<sup>21</sup> National Civil Code, 2017 (Hereinafter, National Civil Code, 2017 Will Be Referred as Civil Code), Pat 3 Deals With Family Law Which Includes: Laws Relating To Marriage; Divorce; Guardianship, Maternity And Paternity; Adoption, Partition; Inheritance; Succession; Inter-Country Adoption; And Guardianship.

<sup>22</sup> Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge New York, 2020).

<sup>23</sup> David N Schiff, “Socio-Legal Theory: Social Structure and Law,” *The Modern Law Review* 39, no. 3 (1976): 287-310.

regulations, and court decisions related to Nepalese family law. Furthermore, Literature documents include Books, journal articles, and research related to Hindu Jurisprudence and Nepalese family law. In an effort to analyze data related to the concept of Hindu Jurisprudence, the author identifies key concepts in Hindu Jurisprudence and how they are applied in Nepalese family law while analyzing the challenges and opportunities faced in incorporating the principles of Hindu Jurisprudence in Nepalese family law.

### **Toward Nepal's Family Laws Vis-À-Vis Hindu Laws**

The Hindu laws and the holy texts have influenced Nepal's legal system to an extent. The recognition of Hindu identity, custom, Vedic texts and cultural practices under the first Code of Nepal Manavnyayashastra followed by National Codes (of 1854 to present Codes of 2017) and the Constitutions enacted in 1959, 1962 and 1990 glorify the Hindu laws and their significance in Nepal. Austin's definition of law as the command of sovereign does not fit in the context of Hindu law.<sup>24</sup> For instance, the customary practices and the family laws governing marriage, maintenance, adoption, inheritance, succession, gift and the likes have influence of Sanskrit Vedic texts.

### **Marriage**

Marriage is a bond of trust whereby persons of two different sexes agree to live in matrimony. For instance, Section 86 of the National Civil Code, 2017 provides that the husband and wife shall lead matrimony with perpetual togetherness. Section 87 provides that the residential place of a woman, after marriage, shall be the residence of her husband, unless otherwise mutually agreed by the husband and wife. According to Manu, the daughter is given in marriage only once and she remains the wife of that person to whom she is in marriage for her whole life.<sup>25</sup>

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<sup>24</sup> U.P.D. Kesari, *Modern Hindu Law* (Allahabad: CLP, 9<sup>th</sup> Edition., 2013) At 5.

<sup>25</sup> Rina Verma Williams And Sayam Moktan, "Hinduism: India, Nepal, And Beyond," In *Oxford Research Encyclopedia of Politics*, 2019.

Section 88 of the Code, 2017 envisages, unless the context otherwise requires or unless the legal dispute arises in marriage, the husband or wife shall remain representative of one another. In Ramayana, wife has been considered to be soul of her husband and in Mahabharata, she is stated to be half part of her husband and his best friend. Section 105 of the National Civil Procedure Code, 2017 provides, summons issued in the name of defendant could be served to any family member, including wife.

In view of Narad and Parasar, husband or wife can remarry or end matrimony in circumstances, like where husband is lost; or dead or has renounced the world, or has become impotent or has been ousted from caste.<sup>26</sup>

Section 72 of National Civil Code prescribes that a marriage concluded between relatives is punishable by law on incest. Section 172 of Country Criminal Code, 2017 provides punishment for marriage solemnized within prohibited degree of relationship by consanguinity or affinity. Such marriage would be void and the parties in such a marriage would be punished for the offence of incest and liable to a sentence of imprisonment of not exceeding three months or up to NPR 30,000 of fine.

According to Mitakshara School of thought and Hindu law, there could not be a valid marriage between persons of same ancestors, i.e., Sapinda. As per Mitakshara, such Sapinda cannot intermarry who have descended from a common ancestor, and being traced on father's side are not beyond the seventh degree or on mother's side not beyond the fifth degree, both ancestor and the person in question being counted as one degree.<sup>27</sup> Section 70(2) of the Code provisions that the marriage could be solemnized in accordance with the ancient customs and usages prevalent in the society.

No.	Marriage under Hindu Law	Legal arrangement in Nepal
1	Wife as soul of husband	Wife to be representative of husband
2	Woman should live with husband after marriage	Wife's dwelling house would be at the husband's residence

<sup>26</sup> Todd T Lewis, "Himalayan Religions In Comparative Perspective: Considerations Regarding Buddhism And Hinduism Across Their Indic Frontiers," *HIMALAYA, The Journal of The Association For Nepal And Himalayan Studies* 14, No. 1 (1994): 8.

<sup>27</sup> "All You Need To Know About Sapinda Relationships - Ipleaders," Accessed April 8, 2024, <https://Blog.Ipleaders.In/All-You-Need-To-Know-About-Sapinda-Relationships/>.



**3      No marriage within common ancestors      No marriage in prohibited degrees**

This way, Nepal's legal arrangement on marriage is in recognition of Hindu scripture. Like Manu, the National Civil Code mandates that the husband and wife would live together for whole life and establish a family. Manu said that the woman, after marriage, would settle with husband. In the similar vein, Section 87 of the Civil Code provides that the residence of woman would be at the residence of husband. The Mitakshara and Dayabhag prohibit marriage in common ancestors, i.e., marriage is prohibited in prohibited degrees.<sup>28</sup>

### **Adoption**

Much like marriage, the legal arrangement relating to adoption is also influenced by Hindu laws. The adoption is the process of taking son or daughter, as a substitute of biological issue. In the words of Manu, adoption is the taking of a son, as substitute for the failure of a male issue. This respect, adoption is the transplantation of a son from the family in which he is born to another family where he is given by the natural parents by way of gift. Adoption is not recognized in any other personal laws. There is no provision of adoption in Muslim law, nor is it recognized by English or Parsi law.<sup>29</sup>

As Nepal has adopted uniform civil code (UCC), i.e., one nation, one law concept; the laws, including that of adoption, are equally applicable to non-Hindus as well. This fact renders the act of adoption as a secular act. Sir Henery Maine of Historical School of Jurisprudence said the entire law of adoption is based on different texts of Manu and Vasistha and metaphor of Saunak.<sup>30</sup>

Manu said, sonless parents could adopt son. Vasistha said, let him not give or receive in adoption an only son, for he must remain to continue the line of ancestors. In this context, Section 173 of National Civil Code, 2017 envisages that no person shall adopt a child who has completed the age of 14 years. It

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<sup>28</sup> Cynthia F Link, "Husbands, Wives, And In-Laws: Family Dynamics And Childbearing Behavior In Nepal" (University of Michigan, 2010).

<sup>29</sup> Bala Raju Nikku And Gopal Khadkha, "Adoption In Nepal: Mythologized, Misunderstood And Mobilized," *Misunderstood And Mobilized* (January 6, 2011), 2011.

<sup>30</sup>U.P.D. Kesari, *Modern Hindu Law* (Allahabad: CLP, 9<sup>th</sup> Edition., 2013) p, 208.



means a child of below 14 could only be adopted. Along with this, single child of parents cannot be given in adoption; once adopted, unless the previous adoption is quashed by law court, cannot be adopted and if adopted child is higher in degree in relation, he could not be adopted. Moreover, non-Nepali citizen cannot adopt or be adopted under this legal mandate.<sup>31</sup>

In an exception to above mentioned arrangement, Section 173(2) provides that a child of above 14, who is within three generations of adopting parents or issues of former husband or wife, could be adopted. In regard to age difference between adopting parents and adopting child, the National Civil Code under Section 174 provisions that there should be a minimum of 25 years of age difference between parents and adopted child. However, if the child and adopted parents are within three generations in relation, then in such a case, the minimum age difference rule would not strictly be applicable.<sup>32</sup>

According to Mitakshara School, a child of below 15 could be adopted. The age of majority stands at 15 as per Mitakshara School.<sup>33</sup> In India, a Hindu child, who is of below 15, not previously adopted and unmarried, save for particular customary practices, could be adopted. The minimum age difference between adopting mother or adopting father and adopting child should be of 21 years in India.<sup>34</sup>

The foundation of doctrine of adoption is the duty which everyone owes to his ancestor to provide for the continuance of the line and the solemnization of necessary rites. In India and Nepal, both, the consent of wife is essential before the husband plans to adopt.<sup>35</sup>

In India, a girl child could not be adopted in previous legislation governing adoption. The reason for this was that last rites of parents could be performed by sons, not daughters. However, the present 1956, Hindu Adoption and Maintenance Act outlaws such distinctions and provides that sons and

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<sup>31</sup> Michael J Paolisso Et Al., "Does Cash Crop Adoption Detract From Child Care Provision? Evidence From Rural Nepal," *Economic Development And Cultural Change* 50, No. 2 (2002): 313-38.

<sup>32</sup> Williams And Moktan, "Hinduism: India, Nepal, And Beyond."

<sup>33</sup> *Ibid.*, p .213.

<sup>34</sup> Hindu Adoption and Maintenance Act, 1956, Section 11 [India].

<sup>35</sup> *Amerendra V Sanatan*, AIR 1933, p 153. [India]

daughters, both, could be adopted. Under the old law, women were not entitled to give child in adoption in India. This law was based on text of Vasistha, which says, “let no women give or take son in adoption, except with the consent of her husband.”<sup>36</sup>The previous law of adoption demanded performance of Datta Homan ceremony to complete the process of adoption.

No	Adoption in Hindu Law	Legal arrangement in Nepal
1.	Child of below 15 could be adopted	Child of below 14 could be adopted
2.	Sole son of a parents could not be given in adoption	A parents having only son child could not give his child in adoption to other
3.	Sonless person could adopt a son	Sonless person could adopt a child

Under Mitakshara, a child of below 15 could be adopted; whereas, Nepal’s law on adoption provides for adoption of child of below 14. Sonless persons could adopt son, as Manu said and this arrangement has been recognized by the law of Nepal. In India and Nepal, a female can only take in adoption with the prior consent of her husband if she is married and her husband is alive. However, there is a substantial difference between Nepal and India. The former’s law on adoption is secular in nature, while the latter’s is personal law which is exclusively applicable to Hindus only.

## Gift

Gift is the voluntary transfer of property—movable and/or immovable—without any consideration. According to Mitakshara, gift is the incomplete without its acceptance. Gift can either be oral or written because Hindu law does not strictly demand that gift should be written form. As per Hindu law, donor, donee, property of gift, acceptance and formalities are the five essential elements of gif. For instance, the gift of a piece of land or a car would be incomplete without fulfilment of its formalities regarding ownership transfer. Under Hindu law, gift is complete after the transfer of possession of property.<sup>37</sup>

<sup>36</sup>U.P.D. Kesari, *Modern Hindu Law* (Allahabad: CLP, 9<sup>th</sup> Edition., 2013), p 211.

<sup>37</sup> Bal Krishna Khatri, “Marriage Practice in Contemporary Nepal,” *NUTA Journal* 8, no. 1-2 (2021): 13-20.

In the words of Narad, gift made by person in anger, fear, deep distress or with consideration would be void. He further says that gift made by minor, idiot or a person under compulsion or illness, disturbed mind, unsound mind, or by intoxicated person would be void. He adds that gift made with an intention that done would perform service in lieu of it would be void. Also, gift made with mistake of fact where purpose is not good, would be void. In Bhagvad Gita, the concept of git has been duly recognized. It provisions that a person who has right over a property can give it to another person without consideration in return at the proper time and in the mode of goodness.<sup>38</sup>

The National civil Code, 2017 recognizes gift. In its Section 406(1), it's been provisioned that gift is the voluntary transfer of a property by owner to a person or for religious, social or any public purpose without any consideration. Section 406(2) provides that if a person, who has right or ownership, voluntarily transfers a property without any consideration to another person as a reward, prize or tip in consideration of merits to him or her by that person by way of fostering him or her or otherwise or for family love or affection, such an act shall be deemed to be a gift. Clause (3) provides that gift made under clause (2) could come into effect immediately or after certain period or after the death of its maker.<sup>39</sup>

Section 407 of the Civil Code, 2017 provides that a person may donate a certain amount or property for any specific purpose by making pronouncement in writing or publicly in a function organized for that purpose. If a gift is refused by the donee, or if a donee dies before the gift is effected, or if a property donated to unborn child and baby is not alive, or gifted property is so destroyed that its existence is extinct before the donation or gift becomes effective, then in such cases, the transfer of property would be void [Section 408].

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<sup>38</sup>दातव्यमितियद्धानंदीयतेऽनपुकारिणे। देशकालेचपात्रेतद्वानंसात्त्विकंस्मृतम्॥20॥ Chapter 17, Verse 20 of Bhagvad Gita Says, "Charity Be Given A Worthy Person Simply Because It Is Right To Give, Without Consideration of Anything In Return, At The Proper Time And In The Proper Place, Is Stated To Be In The Mode of Goodness."

<sup>39</sup> Leonhard Adam, "The Social Organization and Customary Law of the Nepalese Tribes," *American Anthropologist* 38, no. 4 (1936): 533-47.

In case, if a property is transferred where someone has right and interest but his consent was not sought in the process of making of gift, then in such a case, the transfer of property would be made voidable by the aggrieved party.

In India, under old Hindu law, gift could not be made in favour of a person who is not in existence when the gift was made.<sup>40</sup> Nevertheless, this rule has been changed by Hindu Transfer and Bequest Act, 1914. Under Transfer of Property Act, 1882, Section 13<sup>41</sup> provides that property could be transferred to unborn child.

No	Gift under Hindu Law	Legal arrangement in Nepal
1	Gift is incomplete without acceptance	Gift should be transferred
2	Gift with consideration is void	There shouldn't be consideration in gift
3	Gift cannot be made to person who is not in existence	Gift can be made to be an unborn child

In Nepal and India, the concept of Donatio Mortis Causa, which means that the donor makes gift to another in his lifetime but with a condition that the said gift will take effect in future after his death, is duly recognized. In the case of *Durmaya Maharjan v Chirimai Maharjan*<sup>42</sup>, the Supreme Court of Nepal held that the donation or gift may enter into effect after the death of its maker. This legal arrangement is located under Section 406(3) of National Civil Code, 2017.<sup>43</sup>

In recognition of Narad and Hindu law, Nepal's law provides that gift made by minor, persons with unsound mind and with consideration would be

<sup>40</sup>*Tagore V Tagore*, 9 BLR 277.

<sup>41</sup> The Transfer of Property Act, 1882, Section 13: Transfer For Benefit of Unborn Person. Where, On A Transfer of Property, An Interest Therein Is Created For The Benefit of A Person Not In Existence At The Date of The Transfer, Subject To A Prior Interest Created By The Same Transfer, The Interest Created For The Benefit of Such Person Shall Not Take Effect, Unless It Extends To The Whole of The Remaining Interest of The Transferor In The Property. Illustration A Transfers Property of Which He Is The Owner To B In Trust For A And His Intended Wife Successively For Their Lives, And, After The Death of The Survivor, For The Eldest Son of The Intended Marriage For Life, And After His Death For A's Second Son. The Interest So Created For The Benefit of The Eldest Son Does Not Take Effect, Because It Does Not Extend To The Whole of A's Remaining Interest In The Property." [India]

<sup>42</sup> Decision Number 4997, NKP 2051 BS (1994) [Nepal]

<sup>43</sup> Kate Gilbert, "Women and Family Law in Modern Nepal: Statutory Rights and Social Implications," *NYUJ Int'l L. & Pol.* 24 (1991): 729.

void. Similarly, the gift made to unborn child or the transfer of gift to come into effect in future after certain period or with a condition has also been recognized. This shows that the legal arrangement on gift stands much closer to Hindu laws.<sup>44</sup>

## Maintenance

The right to maintenance is the offspring of the concept of Hindu Undivided Family (HUF). The Karta, head of the family, of HUF bears responsibility of all members of his family. He is responsible for performing or cause to perform the observance of discipline, civility and Sanskara in the case of every member and the marriage expenses thereof. The right to maintenance is also available to disabled persons who on account of being disabled are disentitled to inheritance. The right to maintenance includes all the reasonable necessities of life, such as food, clothes and shelter. This might create an obligation which is the outcome of legal relationship.<sup>45</sup>

According to Dharmasastras, old aged and infirm parents, legally wedded wife, children should be maintained.<sup>46</sup> In the words of Manu, "Old, infirm parents, a dedicated wife and minor children are to be maintained by committing even thousands of offences."<sup>47</sup>

In Nepal's legal context, Section 100 of National Civil Code, 2017 provides for maintenance. A woman, who has initiated a divorce petition, may seek a total sum, or a sum on monthly or yearly basis as alimony. However, the husband will not be liable to pay the maintenance cost if the woman marries to another person. Section 101 of the Code provisions that a woman, who has initiated a divorce petition before the law court and has not received her share from the property of husband, shall be entitled to receive maintenance cost from husband, subject to income of her husband. However, Section 102 provides that the maintenance cost could be claimed in line with mutual

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<sup>44</sup> Linda Weiss, "Single Women in Nepal: Familial Support, Familial Neglect," *Journal of Comparative Family Studies* 30, no. 2 (1999): 243-56.

<sup>45</sup> U.P.D. Kesari, *Modern Hindu Law* (Allahabad: CLP, 9<sup>th</sup> Edition., 2013) At 182.

<sup>46</sup> मातापितागुरुभार्याप्रजादानःसमाक्षितः।अभ्यागताऽतिथिश्चाग्निःपोष्यवर्गउदाहृतः।

<sup>47</sup> वृद्धौचमातापितरौसाध्वीभार्यासुतःशिशुः अच्यकार्यशतंकृत्वाभर्तव्यामनुराब्रवीत्।

agreement reached between husband and wife. Section 99 provides that the court shall cause partition to be effected between husband and wife before effecting divorce. There is a practice of issuing an interim protection order in favour of the aggrieved party in case of matrimonial disputes and among other family disputes, including that of domestic violence.<sup>48</sup>

No	Maintenance under Hindu law	Legal arrangement in Nepal
1.	Karta bears the responsibility of maintaining his family members	Wife, parents, sons and daughters are to be maintained
2.	Wife, parents and children should be maintained at any cost	Lawsuit maybe filed at the instance of non-maintenance of wife, children and parents
3.	Maintenance serves social purpose	Maintenance in the form of right as well as duty

The provision of maintenance supports and supplants the social solidarity concept laid down by Duguit, jurist of Sociological School of jurisprudence, and Roscoe Pound, who was also a jurist of Sociological School. Like Dharmasashtra, Roscoe Pound has rightly said that old aged parents, children, wife and other family members should be cared and maintained by the bread winners. Similarly, Duguit believed that every person should contribute in social solidarity for achieving the social welfare of the society. The legal arrangement on maintenance stands, by and large, closer to Hindu laws.

## Succession

Nepal's National Civil Code, 2017 provides arrangement for succession. Under Section 238, it provisions that upon the death of a person, his or her nearest heir shall be entitled to such succession. Section 239 provides for preference of heirs of succession where husband or wife of undivided family

<sup>48</sup> Savitri Goonesekere, "Family Support and Maintenance: Emerging Issues in Some Developing Countries with Mixed Jurisdictions," *Family Court Review* 44, no. 3 (2006): 361-75.

appears at first priority and son, daughter, widow, daughter-in law appears at second priority.<sup>49</sup>

The list of preference goes long which include: father, mother, step mother, grandson, granddaughter, granddaughter-in law—on the side of son or daughter living in undivided family; separated husband, wife, son, daughter, mother, step-mother; separated grand-son, granddaughter from son's generation; separated grandfather, grandmother; grandfather, grandmother, elder brother, younger brother, younger sister, widow elder brother's wife or younger brother's wife in undivided family; uncle, aunt, nephew, niece living in joint family and separated elder brother, younger brother, elder sister, younger sister, widow elder brother's or younger brother's wife.<sup>50</sup>

Section 246 of National Civil Code, 2017 provides for obligation and rights of person upon whom succession is evolved. These rights and obligations include duty to perform or cause to perform funeral or other last rites of deceased; duty to repay the debt borrowed by the deceased; and to have right over the debt lent and investment made by the deceased.

In Hindu law, there are two Schools of thoughts, viz., Mitakshara system and Dayabhag system. The Mitakshara system prevails in India, except that of State of West Bengal and adjoining districts of Assam, and Nepal; whereas Dayabhag system prevails in Bengal and Assam. Both systems are based on the text of Manu which provides that nearest Sapinda relationship would inherit the property.<sup>51</sup>

However there are distinctions between the two systems on certain grounds:

- a. The term "Sapinda" under Mitakshara law signifies a person who is connected through blood. The devolution of property goes equally among all the Sapinda relations in Mitakshara. However, in Dayabhag law, it

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<sup>49</sup> "Nepal Law of Succession: Basics Explained - OnlineKhabar English News," accessed April 8, 2024, <https://english.onlinekhabar.com/nepal-law-of-succession-basics-explained.html>.

<sup>50</sup> "Family Law Matters in Nepal | Nepal Divorce Services," accessed April 8, 2024, <https://nepaldivorce.com/blog/family-law-matters-in-nepal>.

<sup>51</sup> "Inheritance/Aputali Law in Nepal - Corporate Lawyer Nepal," accessed April 8, 2024, <https://corporatelawyer nepal.com/the-rights-relating-to-inheritance/>.



means a person who is connected through “Pinda”, that is, funeral cake presented to the males at the “Parvana Shradha” ceremony. Pinda could be given by Sapinda only. The rule of religious or spiritual benefit is the governing principle under Dayabhag.

- b. The rule of consanguinity or propinquity is the governing principle under Mitakshara for determining order of succession, while rule of religious or spiritual benefit is the governing principle under Dayabhag.
- c. Under the Mitakshara law, two modes of devolution of property is prominent, viz., devolution by survivorship and devolution by succession; while under Dayabhag, one mode of devolution, i.e., devolution by succession is recognized. It does not recognize the rule of survivorship in respect of joint property.
- d. Under Mitakshara, cognates<sup>52</sup> cannot inherit but agnates<sup>53</sup> can, while in Dayabhag, cognates are entitled to succession.

Manu said that impotent persons and outcaste, person born blind or deaf, insane and idiots and dumb as well as those deficient in any organ, receive no share.<sup>54</sup> Yajnavalkya said an impotent person, an outcaste and his issues, a lame, a lunatic and idiot, a blindman, a person afflicted with incurable disease are not entitled to share and they are to be maintained.<sup>55</sup>

No.	Succession under Hindu law	Legal arrangement in Nepal
1	The devolution of property goes equally among all Sapindas (Mitakshara) but in Dayabhag, devolution is connected through Pinda, i.e., funeral cake presented to males	The devolution of property goes equally among all coparceners
2	Impotent, outcaste, blind or deaf would receive no share (Manu)	Physical disability is no bar to devolution of property among coparceners
3	Persons with incurable disease would receive no share in parental property	Disease is not an issue in devolution of property among coparceners

<sup>52</sup> The Persons Related to Wholly Through Female Side

<sup>53</sup> The Persons Related to Wholly Through Male Side

<sup>54</sup> अनंशौक्लीवोपतितौजात्यमन्धवधिरौतथाउन्मत्तजऽमूकाश्चयेचकेचित्रिरिन्द्रयाः॥मनुः॥

<sup>55</sup> पतितस्ततसतःक्लीवःपंगुरुमतकोजडः।अन्धोऽचिकित्सरोगातोभर्तव्यास्तेनिरंशका॥याज्ञ।

Under Hindu law, a heir was excluded from inheritance on following grounds: physical disabilities, mental disabilities, moral disabilities, religious disabilities and disabilities based on equality. However, Nepal's law does not exclude a person from inheritance on the account of disabilities. Unlike Dayabhag, the devolution of property goes equally among from coparceners in Nepal.

## Partition

In partition, persons with fluctuating interest get their portion of share from joint family estate. Thus, partition is an act by which coparcener serves his relation with joint family, and loses his relation with joint family, and loses his status of coparcener and finally, becomes an independent individual from the joint family. In other words, partition is an act of adjustment of specific shares from common stock.

In nutshell, once the share of coparceners is well defined, the partition is deemed to be effected. However, the actual or mathematical division of shares among the coparceners may not be necessary as the partition among coparceners has much to do with consensus or consent among the family members. However, where there is no joint property to divide, there can be a partition by a mere declaration of "I am separate from thee," for a partition merely indicates the state of mind<sup>56</sup>.

This way, partition is unequivocal indication of intention by a member of family to declare or cause to declare date of separation of bread and board from the other coparceners. Still, partition could be regarded as mechanism of property division, not blood relation division. Lord Westburn held that partition is the division of right and division of property.<sup>57</sup> According to Manu, a dress, a vehicle, ornaments, cooked food, water, female slaves, property destined for pious use and sacrifices and pasture land are indivisible.

In general, property indivisible by nature, like ponds, staircase, passage, family idols and relics of worship, separate property of a family member, place

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<sup>56</sup> Girdhari Lal V Fateh Chand, AIR 1955 SC 148. [India]

<sup>57</sup> Approvier V Ram Sibbayya Aiyar, MIA 75 (PC). [India]

of worship, well and right to draw water from well, ornaments given to wives of coparceners, vehicles, animals, and cows cannot be divided between family members. A widow, though not a coparcener under Mitakshara law, could still claim a partition of joint estate under National civil Code, 2017.

It is not necessary that the deed of partition should be registered; it could be a mere declaration or by a compromise. Also, it could be by will, agreement, mediation, suit. Manu said, "Once partition is made, once a damsel is given in marriage, once a man says, "I give thee," these are by good men done, once for all and irrevocable."

The husband, wife, father, mother, son and daughter are deemed to be the coparceners for the purposes of apportionment of common property. However, each coparcener would have equal entitlement to partition share.<sup>58</sup> A child in mother's womb is a coparcener<sup>59</sup>. Even if the marriage is invalid or dissolved, the issues born out of that relationship would be entitled to partition share from such father and mother.<sup>60</sup> A son and daughter whose father is not traced out shall obtain partition share from mother's property.<sup>61</sup> However, if wife is kept without making public or son and daughter born from her would not be entitled to claim a partition share after the death of such husband or father.<sup>62</sup>

The sons and daughters or wives of brothers living in an undivided family would obtain partition share only from the part of their respective father or husband.<sup>63</sup> If the husband, father or mother dies before effecting partition, his wife or his child would obtain partition share to which husband, father or mother is entitled. If a person has more than one wife, they shall obtain their respective partition share from the part of the husband.<sup>64</sup> Each coparcener would have claim from common property for maintenance and medical

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<sup>58</sup>Civil Code, Sec. 206(1)

<sup>59</sup>*Ibid*, At Sec. 206(2)

<sup>60</sup>*Ibid.*, At Sec. 207

<sup>61</sup>*Ibid.*, Sec. 208(1).

<sup>62</sup>*Ibid.*, Sec. 208(2).

<sup>63</sup>*Ibid.*, Sec. 209(1).

<sup>64</sup>*Ibid.*, Sec. 209(3).

treatment. However, such separation could undertake by mutual agreement between coparceners.

If the husband or wife expels wife or husband from the house or if the husband or wife causes physical or mental torture to wife or husband, the husband or wife may get separated by obtaining his or her partition share.<sup>65</sup> Widow would get partition share from the portion of her husband. Partition has to take effect by balancing high value and less value properties.<sup>66</sup>

Still, there are certain conditions which have to be followed in entire partition episode. A common property should not be given to a coparcener; a father or son could transfer his portion of share in case of absence of consent of other coparceners; and property could be given to a coparcener with the consent of all coparceners.

If a coparcener is willing to get separated by setting aside his or her partition share, he or she may file a case, explaining therein the date of separation of bread and board from other coparceners.<sup>67</sup> In the inventory property, every coparcener would have to show movable and immovable property of his/her ownership or possession. The inventory of property has to be presented by setting out property details, livestock, debt, credit and among other transactions, as the case may be. The partition takes effect on the basis of inventory of property received.<sup>68</sup> If a coparcener conceals or hides a property liable for partition, then in such a case, other subsequent coparceners could file a lawsuit, demanding their portion of share in the property concealed.<sup>69</sup>

The partition, which appears in our laws, finds a prominent place in Hindu scriptures and scholarly writings. For instance, Manu, the great scholar of Hindu jurisprudence, recommended that on the death of father, the eldest son should take over entire patrimony and his brothers should live under his control, respecting him in the same manner as they respected their father. He suggested that eldest son should be respected by his brothers in the same

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<sup>65</sup>*Ibid.*, Sec. 213.

<sup>66</sup>*Ibid.*, Sec. 216.

<sup>67</sup>*Ibid.*, Sec. 220.

<sup>68</sup>*Ibid.*, Sec. 223.

<sup>69</sup>*Ibid.*, Sec. 226.

wavelength as the latter had respected their father when he was alive. So, the younger brothers should respect their elder brother.<sup>70</sup> Manu favoured joint family. But, at the same time, he recognized partition. However, he denied the son's right to divide the patrimony during the lifetime of their parents. In other words, Manu was of the view that partition of parental property could only take effect after the death of parents.

Therefore, where a person acquires some property by succession from his father, grandfather and great grandfather, his son, son's son and son's son's son would acquire an intestate in that property by birth and they assume the status of joint owners of such property reserving with them the right to demand partition in the days to come. This respect, all such descendants who are equipped with the right to demand partition constitute coparcenary. Thus, coparcenary includes male descendants up to three generations, i.e., son, son's son and son's son's son<sup>71</sup>.

No.	Partition Under Hindu Law	Legal arrangement in Nepal
1.	Registration of partition is not essential; mere declaration of "I am separate from thee" is enough.	Registration of deed of partition is essential
2.	Partition of parental property takes effect only after the death of father (Dayabhag), and in Mitakshara, partition could come into effect at any time.	Partition could be claimed at any time; Nepal's legal position is close to Mitakshara.
3.	No female/daughter could be a coparcener	Daughters have equal right over parental property

The joint Hindu family is thus a larger body consisting of a group of persons who are united by the ties of Sapindaship arising by birth, marriage or adoption. The fundamental principle of Hindu joint family is Sapindaship.<sup>72</sup> According to Mitakshara, coparcenary comes to an end by way of partition

<sup>70</sup> Chapter-IX, Verses 105, 108 And 111

<sup>71</sup> तष्मात्पैतृकेपैतामहचद्रव्येजन्मनैवस्वतं।पितरिविभागंअनिच्छतिअपिपुत्रच्छयापैतामहदुव्यविभागोभवति।  
तथाअविभक्त्येपितापैतामहेद्रण्येदीयमानेविक्रीमाणेवापौत्रास्थनिषेधेअपिअधिकारपित्रजितेनतुनिषेधाधिकारः।तत्परतंत्र  
त्वात्।।पिता०

<sup>72</sup>Surjit Lal V CIT, AIR 1976 SC 109. [India]

and/or by the death of the last surviving coparcener. In this way, coparcenary is the creature of Hindu law. The law also recognizes branch of family as a subordinate corporate body.<sup>73</sup>In Dayabhag, coparceners cannot demand partition, either of coparcenary property or of separate property, during lifetime of his father.

The transfer of coparcenary property by way of gift without consent of either coparceners would be void. In Mitakshara coparcenary, no female can be its members, though they are members of joint family. However, unmarried daughters have a right to be married out of joint family funds. In Dayabhag, there cannot be coparcenary between father and son so long father is alive.<sup>74</sup>

From the above discussions, what appears that the Nepal's partition law, by and large, is influenced from, both, Mitakshara and Dayabhag law. Like Mitakshara, partition can be demanded any time by coparceners any time. In contrast to Manu, vehicles, ornaments and pasture land of common stock is divisible among family members, as per Nepal's Civil Code. Unlike Dayabhag, a son is entitled to seek his share from paternity during the lifetime of his father. Like Dayabhag, female can be coparcener and it is evident from the arrangement of Article 38 of the Constitution of Nepal, which guarantees women's right to lineage and property. After the enforcement of Constitution of Nepal, which entered into effect on September 20, 2015, even a married daughter is entitled to demand her share from parental property.

## Conclusion

The family laws, in India and Nepal, are in recognition of the fact that rights and duties are jural-correlatives, as said by Hohfeld. In Hindu law, Dharma connotes duty and prescribes every person to do his duty first before claiming his right. The same is true in case of family legislations of Nepal. The laws relating to marriage prescribe a duty on the couples to maintain an enduring family on the bond of trust. The sons and daughters are obliged to maintain their and parents. These laws are, both, rights and duty oriented.

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<sup>73</sup>Bhagwan V Reoti, AIR 1962 SC 287. [India]

<sup>74</sup>U.P.D. Kesari, *Modern Hindu Law*, (Allahabad: CLP, 9<sup>th</sup> Edition, 2013) At 400.

The laws regulating marriage, adoption and other family laws are impacted by Mitakshara and Dayabhag laws and scholarly writings of Manu, Yajnavalkya and among other jurists of eastern philosophy. Recognising Mitakshara law, Nepal's Civil Code allows a son to demand partition at any time. Every coparcener has similar rights and not determined by Sapinda, like that of Dayabhag. Nepal's legislations are religion-neutral and in compliance of the notion of 'one state, one law', that is, Uniform Civil Code (UCC). Still, the customary practices prevalent since time immemorial have been recognized by the Nepal's Civil Code and other laws of the land. However, Nepal's family laws have a base on Hindu jurisprudence.

### **Bibliography**

Adam, Leonhard. "The Social Organization and Customary Law of the Nepalese Tribes." *American Anthropologist* 38, no. 4 (1936): 533-47.

"All You Need to Know about Sapinda Relationships - IPleaders." Accessed April 8, 2024. <https://blog.ipleaders.in/all-you-need-to-know-about-sapinda-relationships/>.

Creutzfeldt, Naomi, Marc Mason, and Kirsten McConnachie. *Routledge Handbook of Socio-Legal Theory and Methods*. Routledge New York, 2020.

"Family Law Matters in Nepal | Nepal Divorce Services." Accessed April 8, 2024. <https://nepaldivorce.com/blog/family-law-matters-in-nepal>.

Gilbert, Kate. "Women and Family Law in Modern Nepal: Statutory Rights and Social Implications." *NYUJ Int'l L. & Pol.* 24 (1991): 729.

Goonsekere, Savitri. "Family Support and Maintenance: Emerging Issues in Some Developing Countries with Mixed Jurisdictions." *Family Court Review* 44, no. 3 (2006): 361-75.

"Hinduism in Nepal - Wikipedia." Accessed April 8, 2024. [https://en.wikipedia.org/wiki/Hinduism\\_in\\_Nepal](https://en.wikipedia.org/wiki/Hinduism_in_Nepal).

"Inheritance/Aputali Law in Nepal - Corporate Lawyer Nepal." Accessed April 8, 2024. <https://corporatelawyernepal.com/the-rights-relating-to-inheritance/>.

Khatri, Bal Krishna. "Marriage Practice in Contemporary Nepal." *NUTA Journal* 8, no. 1-2 (2021): 13-20.

Knapp, Stephen. *The Power of the Dharma: An Introduction to Hinduism and Vedic Culture*. iUniverse, 2006.



- Lewis, Todd T. "Himalayan Religions in Comparative Perspective: Considerations Regarding Buddhism and Hinduism across Their Indic Frontiers." *HIMALAYA, the Journal of the Association for Nepal and Himalayan Studies* 14, no. 1 (1994): 8.
- Link, Cynthia F. "Husbands, Wives, and in-Laws: Family Dynamics and Childbearing Behavior in Nepal." University of Michigan, 2010.
- Mulla, Dinshah Fardunji. *Principles of Hindu Law*. NM Tripathi, 1915.
- Muthuswamy, Vasanth. "Hinduism and Social Responsibility." *Religious Perspectives on Social Responsibility in Health: Towards a Dialogical Approach*, 2018, 91-105.
- "Nepal Law of Succession: Basics Explained - OnlineKhabar English News." Accessed April 8, 2024. <https://english.onlinekhabar.com/nepal-law-of-succession-basics-explained.html>.
- Nikku, Bala Raju, and Gopal Khadkha. "Adoption in Nepal: Mythologized, Misunderstood and Mobilized." *Misunderstood and Mobilized* (January 6, 2011), 2011.
- Paolisso, Michael J, Kelly Hallman, Lawrence Haddad, and Shibesh Regmi. "Does Cash Crop Adoption Detract from Child Care Provision? Evidence from Rural Nepal." *Economic Development and Cultural Change* 50, no. 2 (2002): 313-38.
- Paranjape, N V. *Studies in Jurisprudence and Legal Theory*. Central Law Agency, 2016.
- Schiff, David N. "Socio-Legal Theory: Social Structure and Law." *The Modern Law Review* 39, no. 3 (1976): 287-310.
- Weiss, Linda. "Single Women in Nepal: Familial Support, Familial Neglect." *Journal of Comparative Family Studies* 30, no. 2 (1999): 243-56.
- Williams, Rina Verma, and Sayam Moktan. "Hinduism: India, Nepal, and Beyond." In *Oxford Research Encyclopedia of Politics*, 2019.
- The Manavnyaysashtra is available at: <https://www.lawcommission.gov.np/en/wpcontent/uploads/2018/09/nyayavikasini-manavanayashastra-of-jayasthiti-malla.pdf> (Last visited on 21 Dec 2023)
- The Persons Related To Wholly Through Female Side
- The Persons Related To Wholly Through Male Side
- The Transfer of Property Act, 1882, Section 13
- This Code Was Called, "Code For Human Justice."

U.P.D. Kesari, Modern Hindu Law (Allahabad: CLP, 9<sup>th</sup> edition., 2013) at 5.

Weiss, Linda. "Single Women in Nepal: Familial Support, Familial Neglect."  
Journal of Comparative Family Studies 30, no. 2 (1999): 243-56.

Williams, Rina Verma, and Sayam Moktan. "Hinduism: India, Nepal, and Beyond." In Oxford Research Encyclopedia