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LESSONS FROM NEPAL: PARTNERSHIP, PRIVILEGE, AND POTENTIAL

JANE AIKEN*

I. INTRODUCTION

In 2001, I lived with my family in Kathmandu, Nepal, as a participant in the Fulbright Program and under the auspices of the Council for the International Exchange of Scholars.¹ Surrounded by the warmth of the Nepali people and the majesty of the Himalayas, I was able to teach and work on significant policy issues for the country of Nepal. My long-term goal was to develop an effective partnership between Tribhuvan University in Kathmandu and Washington University School of Law. Since my journey to Nepal, fourteen of our students from the law school have traveled there to work on issues ranging from trafficking of women to constitutional law to international treaties.

While Nepal is often viewed as a quiet jewel among the clouds, it ranks 25th in population among all nations and is pinched between the behemoths of China and India. Furthermore, it is struggling mightily with efforts to reconcile its decade old constitutional democracy with scores of centuries of entrenched culture. This nation long ruled by a monarchy now faces many of the political challenges other countries faced during and after the industrial revolution—and it is doing it during the fast paced information age. In this cauldron of wrenching change, law students experience another way of living and an ancient social system struggling with the challenges that come with the decentralization of power. Partnership with lawyers in Nepal provides an opportunity for students to reflect upon the strengths and weaknesses of our own legal system and to gain insight into the successes and mistakes of

* Professor of Law, Washington University School of Law. Director, The Civil Justice Clinic. I want to thank my Nepali colleagues Sapana Pradham-Malla, Purna Shrestha, Sabin Shrestha, Shanta Thapalia, Amber Pant, Sudha Pant, Kanak Bikram Thapa, and Gautam Yadama. Also, thanks to Scott Stone, who served as a research assistant and a terrific ambassador to the program in Nepal, and Thomas Hagerty, who shared the experience of Nepal, and whose energy, support and suggestions enriched this Article. I continue to be indebted to Professor Guatam Yadama for introducing me to people and issues important to Nepal. I would also like to thank all of the partners that I have had in Nepal, including Dean Kanak Bikram Thapa, Michael Gill, Sapana Pradhan-Malla, Sabin Shrestha, Meera Dhungana, Rup Narayan Shrestha, Purna Shrestha, Salina Joshi, Binda Magar, Ratna Kaji Shrestha, Basanta Basnet, Sonali Regmi, Nanu Gurung, Pabita Adhikari, Pramesh Poudel, Himal Shrestha, Raju Sapkota, Pramod Shrestha, Nabin Shrestha, Nizma Shrestha, Amber Pant, and Sudha Pant.

1. Information about the Fulbright can be found at <http://www.iie.org/cies>.

others. It is a rare opportunity to participate in an important international effort and to work closely with public interest lawyers from another nation.

Culturally, Nepal seems quite “foreign” to Americans. As the only nation in the world officially designated as “the Hindu kingdom”, its culture fosters the widespread belief in reincarnation. This life view has profound effects on one’s vision and tolerance in this life. Notions of caste strictly constrain people within certain occupations, control what and how they eat, how they dress, who they can marry and the forms of their ceremonies.² Adding to the cultural fabric is a strong Buddhist influence. Although the Buddhist population is small relative to total population, Nepal is the birthplace of Buddha and it maintains a strong spiritual community dedicated to both Buddhist and Hindu traditions.

Dramatic differences in culture present students with the opportunity to gain considerable perspective on their own perceptions and a chance to operate in a legal environment that, like most endeavors in the world today, has become increasingly globalized. This kind of experience has generally been missing in the training of our university law students.

The students in Washington University’s Civil Justice Clinic have provided legal services to women and children who have been victims of violence in a wide array of socio-economic settings. They have also worked on policy initiatives that shape government on city, state and federal levels. But they have not typically had the opportunity to see how these issues—especially those involving human rights—play out in other countries. Social justice is an international endeavor—awareness of global human rights issues is essential for lawyers concerned about justice.

II. MY INITIAL WORK IN NEPAL

I worked primarily with the faculty at Tribhuvan University Law School in Kathmandu teaching classes and running seminars in such areas as women’s rights and constitutional law. My schedule also allowed me the flexibility to engage on a wide-scale with the community outside of the law school. The legal community in Nepal has historically been largely concentrated in the capitol, Kathmandu. This concentration has afforded unprecedented opportunities for visiting scholars and students alike to interface with public officials, politicians, the heads of both domestic and

2. The caste system was formally abolished in 1963 in Nepal. The laws of Nepal cannot technically enforce caste. However, the caste system preexisted these laws and is deeply ingrained with Nepali culture. It has proven to be very difficult to change social attitudes. JON BURBANK, *CULTURE SHOCK: A GUIDE TO CUSTOMS AND ETIQUETTE, NEPAL* (1995).

international non-governmental organizations, business leaders and associations, and the media.

My work outside the classroom took me to many venues. I worked with the Nepal Bar Association on the issue of Feminist Jurisprudence. I spoke on two radio shows (English is widely spoken in Kathmandu) on various aspects of domestic violence. I participated in advocacy training for rural advocates who would be educating women and helping them assert their property rights. I wrote a document setting out guidelines for Nepali laws and policies regarding HIV. I participated in the development and editing of a comprehensive document analyzing the legal and policy issues associated with the trafficking of women and girls in Nepal and assisted in developing language for a regional treaty on trafficking. I met with women advocates from all over Nepal and the head of the Human Rights Commission to discuss the fate of the Women's Property Bill and the approach the women's community should take towards the bill. I assisted in drafting an advocacy document describing the contents of the Women's Property Bill and areas for improvement/amendment in the Bill. It was an amazing chance to see social justice in action in a developing country, while gaining insight into our own system.

Just a year before I came to Nepal, Gautam Yadama, a professor in the George Warren Brown School of Social Work, helped create a Social Policy in Law partnership between Tribhuvan University and Washington University. Along with my other obligations, I worked to build on that program and further a good, solid working relationship with the faculty at Tribhuvan and associated organizations in Nepal. I hoped to create an infrastructure at Tribhuvan from which a mutually beneficial program could grow. The result was an exciting opportunity to provide new insights to Nepali law students while at the same time gleaning a few of my own. I typically offered the American perspective and learned the Nepali approach in the process of preparing and presenting my lectures and plans for class discussion. Often, fellow faculty and LL.M students would drop in to discuss legal issues. I was included in faculty seminars and other aspects of university life of the school such as alumni meetings and social events. When I left they made me an honorary member of the Nepal Law Campus L.L.M. Alumni Association.

III. SOCIAL AND LEGAL ISSUES IN NEPAL

A. *Violence Against Women*

Nepal is one of only three countries in the world where the life expectancy for women is lower than that of men (the others are Ethiopia and Afghanistan). Nepal's current needs in the area of women's human rights cries out for the kind of services lawyers can offer in the positive shaping of a society. Women's rights is perhaps the area in which Nepal is most ripe for change.

Nepali women are often victims of unprosecuted violence. Not unlike the United States, the data measuring the prevalence of domestic violence is woefully lacking. Nepali women suffer from many obstacles: lack of economic resources, absence of bargaining power due to entrenched cultural norms, dowry demands, polygamy, alcoholic husbands, and discrimination in the form of divorce laws designed to favor men. All of these elements contribute to an environment that fosters widespread domestic violence. While I was in Nepal, I encountered women who were beaten regularly by their husbands but had no recourse under the law without the risk of losing custody of their children and being left penniless.

According to the Nepal Treaty Act of 1991,³ international human rights instruments to which Nepal is a party have the force of domestic law in Nepal and the provisions of international instruments prevail over the domestic laws in case of conflict between the two. This creates a large armament to fight gender discrimination. Unfortunately, the laws have had little effect. On June 15, 1999, Terth Man Shakya, Secretary of Nepal's Ministry of Law and Justice, acknowledged that despite these laws, women in Nepal are still oppressed. Secretary Shakya said that the Nepalese government was committed to the empowerment of women and gender equality but that efforts toward achieving these goals were thwarted by poverty.

Under current laws, the State has no legal obligation to pursue a domestic violence case, often relegating women to proceed via the private sector. The lack of money to finance a private attorney, as well as the pressure to reconcile with her abuser, derails potential forms of relief. The only legislative act that covers domestic violence is the Some Public Offense Act (SPOA), but even SPOA only partially addresses the issue.⁴ The intent of

3. Nepal Treaty Act 1991, § 9.

4. Shadow Report on Initial Report of Government of Nepal on CEDAW, Kathmandu: Forum for Women, Law and Development.

SPOA is to eliminate incidents that threaten the public peace. Thus, an act of domestic violence would, in all intended purposes, have to occur outside of the home to trigger the provisions of the Act. Even if the Act is triggered, punishment is minimal. New legislation is needed to ensure women's safety within their own homes. Such efforts take time and significant energy.

Over ninety percent of Nepal's population survives (or tries to survive) through subsistence agriculture. Due to poverty, men in Nepal must often leave the household and migrate for work. This often means that the wife is left in charge of all aspects of keeping their farm functioning. This harsh reality can bring even greater burdens if the wife has moved into her husband's ancestral home where his family dominates. She can find herself in a strange household living an existence comprised of little but unending labor. She is often subject to abuse and even rape by the husband's family members. And though the wife might become an able farmer and manager, she resumes her subordinate role the instant her husband returns.⁵

B. Women and Property Rights

Despite its constitution and entry into the modern age, Nepal still operates under strong feudalistic norms and values. Land is the only thing of real value. In virtually all cases regarding marital property, the man takes ownership of the total. Nepal, as a nation, has only a glimmer of the notion that women's rights to property should equal those of men and that concrete measures might be taken to begin the process.⁶ In 1995, in the case of Meera Dhungana, the Supreme Court issued a directive order to introduce a bill in Parliament to remedy discrimination against women that was present in the law. Despite a Constitution that guaranteed women equal rights including equal property rights, it was not until 2002, after seven years of deliberations, that a law recognizing some property rights for women was passed by the Nepali Parliament. This law, the 11th Amendment in the Civil Code-2020, gives women rights that to Western sensibilities seem obvious but have only now been recognized in Nepal. The law creates some rights for women to inherited property. It establishes a woman's right to divorce and for a right to claim some of the husband's property after divorce. The law increases penalties for polygamy. Polygamy is still rampant in Nepal. Prior to the passage of the women's property law, a polygamist could be sentenced to punishment of one to three months and/or a small fine. The law increased the punishment to one to three years and/or a more significant fine. Perhaps the

5. SANGROULA & PATHAK, *GENDER AND LAWS: NEPALESE PERSPECTIVE* 83 (2002).

6. Reformed Country Code (Eleventh Amendment) Bill.

most significant change, and benefit of the new law, is the creation of a right to abortion. More than five dozen women across Nepal are in prison for the crime of abortion. The new law legalizes abortion with some conditions. Finally, the law increases the penalties for rape.

The Code is a good start, but only a start, toward ensuring, among other things, women's rights within the institution of marriage. The law addresses the rights of widows and divorced women to an inheritance. Unfortunately, the law does not allow a married woman to inherit from her own family and it requires a married daughter to return her inherited share should she marry after the distribution of the estate. This provision is even more restrictive than the prior law, which did not require the return of the inherited share. While the law is a step forward for widows and divorced women, it does not address the issue of women who must stay married to abusive men largely because they have no other source of support. They will find no relief in this law. Marriage often means the return of inherited assets with no prospect of inheriting from her husband's family. If a woman seeks to leave an abusive husband, she exits with no money. Nepali courts have no mechanism for ensuring that women are supported during the pendency of the divorce litigation. Therefore, an abused wife has little legal recourse and few resources for independent survival. Perhaps the need for changes in the system are clearest when people understand that even today, women find themselves unable to escape violence due to their poverty, illiteracy, and disregard by the legal system and their community.

C. Women's Right to Control Their Own Bodies

As noted above, one of the most significant changes the 2002 law provided was a woman's right to abortion. This new law is only the first step. For example, legalization of abortion has the immediate effect of preventing women from being sent to prison (often with little or no legal representation) for terminating a pregnancy. But the social stigma attached to abortion, not to mention the serious reproductive health issues arising from years of clandestine abortions by untrained midwives, indicates the long road ahead for all women seeking to exercise their right to terminate a pregnancy and have access to safe, affordable medical services by trained, certified personnel. Lest we view Nepal as an "unsophisticated" nation only now struggling with this "modern" issue, the struggle for women to control their own bodies is no less chaotic in the United States. *Roe v. Wade* teeters on a razor's edge even today.

I encountered women spending life sentences in jail for having aborted unwanted pregnancies. Some of these pregnancies were the result of rape.

Some of these supposed abortions were actually miscarriages, and these women owe their fate behind bars to unfounded accusations of jealous co-wives, relatives eager to deprive the woman of her property and husbands seeking to rid themselves of their wives. This state of the law exists despite Nepal's Constitution that guarantees equal rights to women and the adoption of powerful international agreements such as the CEDAW.

The need for work to support a family may also result in violence to a woman's health. In search of a sustainable livelihood men are migrating in increasing numbers in Nepal. When a husband leaves the family to work as a migrant worker he is removed from traditional social structures, such as family and kin. This has been shown to promote unsafe sexual practices, such as engaging in sex with multiple partners and in commercial sex. He often returns to Nepal with HIV and then infects his wife. Health care in rural areas is all but nonexistent. Even when health care is available, women's household and maternal duties often cause them to be the last to seek health care. What then are the rights of the woman? Where are the equities to be found? This problem faces Americans as well, but has not risen to national consciousness because poverty does not drive Americans across international borders in search of the wherewithal to live.

D. Women Trafficked for Prostitution

It is estimated that 5,000 to 7,000 women a year are victims of trafficking in Nepal. Over 200,000 Nepali women are currently working in the sex industry in India.⁷ A large percentage of these women are actually girls between the ages of ten and fifteen. The causes of trafficking are complex and deeply rooted in sexual subordination. Local level gender discrimination, lack of female education, lack of access to property, poverty without any prospect of economic change, and sometimes naivete or perhaps wishful thinking combine to make women, particularly rural women, vulnerable to traffickers. On a global level, trafficking is big business and the demands for younger and younger girls aggravate the problem in sending countries like Nepal.⁸ Nepali law enforcement is ill-equipped to deal with this highly organized crime. As in so many other parts of the world, many girls and young women trapped in hopeless poverty are lured by promises of a favorable marriage or lucrative employment. Many women are trafficked by

7. THE ASIA FOUNDATION & POPULATION COUNCIL HORIZONS, PREVENTION OF TRAFFICKING AND THE CARE AND SUPPORT OF TRAFFICKED PERSONS: IN THE CONTEXT OF AN EMERGING HIV/AIDS EPIDEMIC IN NEPAL (2001).

8. *Id.*

people known to them. Facing an environment of sex discrimination and no employment prospects, women often jump at the chance for the economic independence that is promised.

The history of legislation against human trafficking in Nepal is a long one. For the first time in 1749, during the reign of the King Rana Bahadur Shah, the act of human trafficking was declared an offense.⁹ Thereafter, the Country Code of 1853, the first codified law in the country, prohibited the slave trade, human trafficking, and the act of separating children from mothers and selling them. The new Country Code of 1963 devotes a separate chapter dealing with the offense of human trafficking, the Chapter on Trafficking of Human Beings.¹⁰ The Code prohibits the trafficking or taking a human being beyond the frontiers of the Kingdom for the purpose of trafficking.¹¹ A special law to combat trafficking in human beings was enacted in 1986, The Human Trafficking (Control) Act.¹² Other laws that indirectly deal with the problem of trafficking include the Foreign Employment Act (1985),¹³ the Labor Act (1991),¹⁴ the Children's Act (1991),¹⁵ and the Child Labor (Regulation and Control) Act 2000.¹⁶

9. REBATI RAMAN KHANAL, MULUKI AIN: KEHI BIBECHANA 321 (1982).

10. No. 1 of the Chapter reads

No one shall sell or take any person beyond the frontiers of Nepal for the purpose of trafficking.

The person who takes a human being for trafficking shall, if the trafficking is not committed, be liable to a punishment with imprisonment for ten years, and if trafficking is committed, be liable to a punishment with imprisonment for twenty years. If the person buying any person is found within Nepal, he/she shall also be liable to the punishment as same as to the seller.

11. The Country Code, enacted in the year 2020 (1963), contains a chapter on the offenses on Trafficking of Human Beings. It has prohibited the trafficking or taking a human being beyond the frontiers of the Kingdom for the purpose of trafficking.

12. The Human Trafficking (Control) Act 1986 was enacted at a time when the provisions in the then prevailing laws were realized as grossly inadequate in proportion to the rise on commissions of the offenses. Extra-territorial application of the Act and the shifting of the burden of proof to the accused are some of the new provisions made in the Act.

13. This Act has been enacted to control and regulate the matters of foreign employment and protects people from exploitation of their labor abroad.

14. This Act has been enacted to provide for the rights, interests, facilities and security of the workers and employees engaged in various enterprises and for making timely provisions with regard to labor.

15. This Act has been enacted following the ratification of the Child Rights Convention. The major purpose of the Act is to provide for protection of the rights and interests of the children and for their physical, mental and intellectual development. Section 16 of the Children's Act 1991 stipulates that no one shall engage or use a child in an immoral profession, and no photograph shall be taken or shall allowed to be taken for that purpose.

Similarly, Section 18 of the Act provides that no child shall be engaged in a work that cause adverse impact an the health of the child or is likely to cause adverse impact on the life of the child.

16. Similarly, the Child Labors (Prohibition and Regulation) Act 2000 has prohibited engaging a child below the age of fourteen years. Similarly, it has prohibited engaging a child in any of the hazardous business referred to in the schedule of the Act. The schedule contains a long list of business (industries and trades) that are hazardous for engaging a child. The Act also prohibits engaging a child

Despite all of this law, there appears to be little abatement in the problem of trafficking. Part of the reason is the significant barriers to effective law enforcement. Law enforcement officials are not trained to understand how trafficking networks operate, to identify when trafficking might occur, and to understand violence against women and children. There is a significant lack of communication between sending and receiving countries. Efforts need to be made to strengthen border control measures and maintain direct channels of communication among border control agencies. The government does not promote partnerships between and among law enforcement, social authorities, judicial and migration authorities, non-governmental organizations (NGOs), and international organizations. Even small changes would have some impact on the numbers of women who are taken from Nepal to the slave trade. For example, there are no special laws to prevent commercial vehicles from transporting victims and to prevent unlawful creation, issuance, and use of false documents.

Once a trafficker is caught and a woman returned to her family, the legal system does not respond efficiently and sensitively. Trafficking into the sex trade is a deeply gendered phenomenon. Members of the legal profession are not trained in gender equality. Victims, once freed from brothels, often find themselves jailed and prosecuted for immigration violations, or left with no travel papers, no money and no support for the traumatic reentry back to her country and family. Victims are provided no medical assistance even though so many are infected with HIV. They need social and psychological supports because they have no friends or family and often suffer significant social stigma. They need economic support because they must learn a new trade and have very little prospect of getting married and having the traditional support of a husband. If she decides to prosecute her traffickers, her identity is not protected so that she is vulnerable to threats and physical harm to stop her from testifying. In Nepal, very few traffickers are prosecuted and of those prosecuted, very few are convicted due to inefficient evidence gathering, lack of cooperation among the sending, transporting, and receiving nations, and lack of sophistication about the workings of organized crime.

Law is not enough to stop trafficking. Economic development is key. There are few economic alternatives for women in sender countries like Nepal. In order to stop trafficking, efforts are needed to develop and expand small businesses, job skills/vocational training, and micro-credit programs for women. It requires that meaningful poverty alleviation programs are launched and reinforced. This economic development must go hand in hand

as a labor against his/her will by way of persuasion, false promise, or fear of undue influence.

with efforts to enhance the economic, political, and social standing of women in Nepal.

E. Access to Education and Rights for Girls

Nepal has adopted the Convention on the Rights of the Child (CRC).¹⁷ Similar to the Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW)¹⁸ (which focuses on women's rights), the CRC is specifically focused on the protection and harmonious development of children. Although, the Convention does not speak specifically about female children, it has a significant impact on female children. It obligates signatory states to respect and ensure the enumerated rights of children without discrimination of any kind irrespective of many factors, including sex.¹⁹ Furthermore, it calls on member states to make special provisions in many areas for children; to wit, to undertake all appropriate legal, administrative, and other measures for the implementation of the rights recognized in the CRC.²⁰ The CRC is complemented by The International Covenant on Economic, Social, and Cultural Rights (ICESCR)²¹ which requires that its member states guarantee that rights be exercised without discrimination of any kind, including sex discrimination.²² The ICESCR demands that men and women (boys and girls) have equal rights to the enjoyment of all economic, social and cultural rights set forth in the Covenant.²³ State parties must take steps to achieve the full realization of these rights by all appropriate means.²⁴ Another international agreement to which Nepal is a party is The International Covenant on Civil and Political Rights (ICCPR)²⁵ which remains an important treaty for the protection of women's political as well as other civil rights. It obligates states parties to ensure the recognized rights without distinction of any kind, including sex,²⁶ and to ensure the equal right of men and women to the enjoyment of all rights set forth by the

17. Convention on the Rights of the Child, pmbl., G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter CRC].

18. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

19. *Id.* art. 2(1).

20. *Id.* art. 4.

21. Nepal acceded to the Covenant on May 14, 1991.

22. International Covenant on Economic, Social, and Cultural Rights, open for signature Dec. 16, 1966, art. 2(2), G.A. Res. 2200, U.N. GAOR, 21st Sess., U.N. Doc. A/6316.

23. *Id.* at art. 3.

24. *Id.* at 2(1).

25. Nepal acceded to the Covenant on May 14, 1991.

26. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2, G.A. Res. 2200A, U.N. GAOR, 21st, U.N. DOC. A/6316 (1966).

Covenant.²⁷

Signing treaties does not, of itself, improve lives, but committing to principles can provide a beginning. Nepal faces the formidable task of trying to better the lot of female children while also adhering to customs that date back centuries . . . or even millennia. For example, among Hindus, the onset of menstruation makes a girl “polluted.” During the menstrual cycle, she is not allowed to see male relatives, touch any food, or, in some cases, set foot inside the house. In poorer sections of the country, the health of female children is often neglected, contributing to the high infant and child mortality rates.

The preference for male children is not just a vestige of long-held cultural beliefs. The birth of a girl means more responsibilities and expenses for the parents. Girls must be “protected” until they are married, and marriage often entails finding a suitable husband, providing a dowry, and incurring heavy expenses for the wedding. A daughter works at home, but her services are lost when she marries and moves to her husband’s home. She often moves from being the beloved daughter in her own home to being essentially the house servant in her new setting with her husband’s family. However, marriage is essential to woman’s worth and being unmarried is considered unnatural.

Literacy rates for women are extremely low (approximately twenty-seven percent) and there is a substantial gender gap with men having a literacy rate of approximately fifty-seven percent. The major reasons for not sending girls to school include: lack of household resources, lack of a sense of importance since the girls will marry and leave the home for her husband’s home, girls’ workload at home, and lack of teachers and facilities. People working in population control efforts note that once a male child is born, families are much more likely to limit the number of children.

Nepal has a notoriously high incidence of child labor. According to one study conducted by Tribhuvan University, there are 2.6 million child laborers in Nepal, with sixty percent of those children between the ages of six to fourteen. These figures hold particular significance in view of Nepal’s increasing efforts to promote democracy. In fact, the Nepali Parliament enacted two separate legislative bills, the Labor Act of 1991 and the Children’s Act of 1992, purportedly to follow through with its ratification of the 1989 U.N. Convention on the Rights of the Child. Nepal’s non-compliance with its own legislative initiatives, reflected clearly in the study by Tribhuvan University, greatly distorts the notion that “children represent

27. *Id.* art. 3.

our future.”²⁸ Rather than developing their minds in school, these two million children are engaging in arduous labor that is often encouraged by their extremely impoverished families living in the many rural districts of Nepal. Through social advocacy and litigation, our partnership could have a profound impact on child labor in Nepal.

F. The New Constitution and the Destiny of Women

At the heart of the Constitution of 1990 is the promise of substantive equality to remedy past discrimination against women and ensure their full participation in civil society.²⁹ This is no small task. Issues for women in Nepal are substantial. The Forum for Women, Law, and Development published a study of the impact of discriminatory laws on women in Nepal in August 2000. At that time, the Forum identified 118 clauses/sections/rules, two rules in the entirety, and 67 schedules/annexes/forms in 54 different laws, including the Constitution, which had facially discriminatory provisions.³⁰

Nevertheless, the Constitution guarantees equality before the law and equal protection of the laws. It also provides that the state shall pursue a policy of ensuring increased participation by women in the task of national development by making special provisions for their education, health and employment.³¹ The Constitution also provides the state shall pursue such policies in matters of education, health and social security of orphans, helpless women, the aged, the disabled and incapacitated persons as will ensure their protection and welfare.³² Thus the government must take affirmative measures to ensure that women who have traditionally been economically, socially and legally disadvantaged can enjoy the rights of equality guaranteed by the Constitution.

Looking to the Nepali Constitution as a vehicle for vindicating the rights of women requires the advocate to confront theories of equality. The formal equality model calls for the absolute equal treatment of men and women under the law. The substantive equality model takes a pluralistic approach. Indeed, it is not one theory of equality but, in fact, it reflects many theories that take many types and sources of differences into account and seeks to

28. Children’s Act (1992), Kathmandu: Ministry of Law and Justice, His Majesty’s Government of Nepal (text on file with author).

29. CONST. OF THE KINGDOM OF NEPAL (1990).

30. SAPANA PRADHAM-MALLA, DISCRIMINATORY LAWS IN NEPAL (The Forum for Women, Law, and Development ed., 2000).

31. NEPAL CONST., art. 26(7).

32. *Id.*

achieve several substantive ideals. This model focuses on equality in the result and rejects the principle of sameness as a goal. According to this model, since there are different groups of different status, they cannot be treated in the same manner. Substantive equality theory exposes the lie of “sameness” and reveals that formal equality assumes the dominant norm, placing all that deviate from that norm at a disadvantage. Formal equality fails to take into account the preferred position that men have in society.

The principle of equal treatment may be demonstratively right, but fails to take into account past discriminatory practices that leave women at a disadvantage even when they receive equal treatment. The substantive equality model proposes that treating everybody in the same manner when they are in fact in unequal situations perpetuates inequality.³³ Neutral legislation may violate the right to equality and often fails to address the impact of subordinated status on a disadvantaged group. A violation of equality needs to be seen in terms of the impact of the law or policy on the group.

Unlike the U.S. Constitution, the Nepali Constitution obligates the state to level the playing field so that all can enjoy the equality rights equally. Unlike current U.S. jurisprudence concerning constitutional challenges to discrimination, the Nepali Constitution does not require proof of the legislature’s discriminatory intent, but provides that even neutral legislation can have an unequal impact or consequence and can be discriminatory.

The substantive equality approach considers a number of factors such as past discrimination or social conditioning. It asks whether policies and practices which are neutral on their face actually have an adverse impact on women due to factors which particularly affect them.³⁴ The substantive equality approach always keeps in mind the historical, external, or economic background of the group, and tries its best to correct the past experience and create conditions which would lead them to be substantive equals. De jure equality must get transformed to de facto equality. For lawyers, this commitment to substantive equality is an invitation to think creatively about ways in which to effect this affirmative duty on the part of the government. Social context analysis is critical to substantive equality analysis. For the American attempting to assist in this endeavor, our cultural bias creates considerable challenges in reading the Nepali social context and makes developing cross-cultural skills essential.

33. Justice Kalyan Shrestha, Address at the Interaction Programme on Gender Equality and Justice for High Court Judge and District Court Judges at Haldia (Calcutta), West Bengal, India (Jan. 2001).

34. HELEN FENWICK, CIVIL LIBERATION 483 (1999).

Women's rights advocates in Nepal need not rely solely on the Constitution. Since the adoption of its constitution, Nepal has also adopted virtually all of the international conventions designed to protect women's and children's rights. These include the CEDAW and, the Universal Declaration of Human Rights,³⁵ which reflect a universal standard of human rights and serve as a fundamental source of inspiration for national and international laws to protect and promote human rights by recognizing that all human beings are born equal in dignity and rights. It also provides the right to non-discrimination³⁶ and equality before the law.³⁷ Nepal adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, (Supplementary Slavery Convention).³⁸ The Supplementary Slavery Convention, focusing on the abolition of slavery, debt bondage, and serfdom by "all practicable and necessary legislative and other measures,"³⁹ acknowledges elements of discrimination unique to women.⁴⁰ By promoting corrective action, it obligates states to implement legislative and judicial measures in areas contribute to women's vulnerability. The Supplementary Slavery Convention is a useful treaty for combating discrimination against women because it further acknowledges certain factors that contribute to the vulnerability of women and legitimizes affirmative action to improve their treatment, all for the purpose of securing equality.

The Convention on the Political Rights of Women,⁴¹ provides for equal political rights for women. Under this Convention, states are obligated to ensure that women have the right to vote in elections,⁴² to be elected to publicly elected bodies,⁴³ and to hold public office⁴⁴ on equal terms with men. Women are entitled to be free from discrimination in the exercise of these rights. Though the Convention does not specifically mention affirmative action for women to increase their participation in political as well as public life, it does recognize the discriminatory practices that hinder

35. Universal Declaration of Human Rights, G.A. Res. 217A, 3d sess., pt. 1, art. 1, U.N.D.O.C. A/810 (1948) [hereinafter UDHR].

36. *Id.* art. 2.

37. *Id.* art. 7.

38. Nepal acceded to the Convention on January 7, 1963.

39. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 1, 18 U.S.T. 3201, 266 U.N.T.S. 3.

40. *Id.* art. 1(c).

41. Nepal acceded to the Convention on April 26, 1966.

42. Convention on the Political Rights of Women, Mar. 31, 1953, art. 1, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force July 7, 1954).

43. *Id.* art. 2.

44. *Id.* art. 3.

women's participation and obligates the state party to equalize the status of men and women in the enjoyment and exercise of political rights.

G. Women's Right to Control Their Ultimate Political Destiny

Perhaps the most significant of the numerous international declarations and resolutions affecting the future of Nepal are the CEDAW⁴⁵ and the Beijing Platform for Action crafted at the 1995 Fourth World Conference on Women. These declarations and resolutions, particularly the U.N. World Women's conferences in Mexico and later in Beijing, provide the bases for women's participation in state affairs. By codifying universal norms, values, and laws related to the improvement of the status of women in social, economic, and political fields, these international conventions envision a highly responsive and sensitized state vis-à-vis women. The state, as conceived and highlighted by these conventions, can be a significant institution dedicated to transforming the political, economic, and social landscape in pursuing gender equality in all spheres.

The fundamental aims of each convention to which Nepal is currently party is the promotion of equal rights and opportunities and non-discrimination of women.⁴⁶ Regardless, substantial improvement has not been seen in the overall position of women in Nepali society. However, in becoming party to these conventions, the Nepali government becomes vulnerable to accusations by NGOs, the Forum among them, of not doing enough to fulfill its treaty obligations and to realize the rights enumerated by the Constitution of 1990. The conventions also serve to articulate language and provide standards for activists seeking social change. But as stated before, there remains a substantial amount of work to be done.

CEDAW, which oversees countries like Nepal who have adopted the Women's Convention, has recognized that Nepal has been making efforts to rid gender discrimination, but cited patriarchal attitudes and norms as the major obstacles to improving women's rights in Nepal. They recommended that legislating equality is the first step toward achieving equality and identified legislative review in the areas of education, reproductive health,

45. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

46. In its General Recommendation No. 5, the CEDAW Committee encourages state parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, politics and employment. Further in its General Recommendation No. 8, the CEDAW Committee suggests that state parties employ the temporary special measure of affirmative action to ensure women equal opportunity to represent their governments internationally.

and trafficking and prostitution. The U.N. Human Rights Committee notes that there is both de jure and de facto discrimination against women in regards to marriage, inheritance, transmission of citizenship to children, divorce, protection against violence, criminal justice, and wages.

A Western lawyer in Nepal is an extremely valuable commodity. Enforcement mechanisms are virtually non-existent, but Nepal has adopted all of the necessary international conventions and an extremely thoughtful Constitution that offers a strong basis for creating such mechanisms. Because the Nepali Constitution is similar to many Western constitutions, working in this legal system is not a difficult transition.⁴⁷ It is a very dynamic and satisfying process.

Change is happening. Important laws are being passed that offer women potential remedies to combat discrimination. On a more tangible level, it is not uncommon to see women driving motorcycles in the congested Kathmandu streets, which was unheard of even five years ago. Even more shocking, these women forego the traditional sari for pants. These changes signal a fundamental change in cultural norms that have been the greatest barrier to women's freedom and equality.

IV. PARTNERSHIP

Nepal is primed and ready to make the promises of its Constitution and the international agreements that the country has adopted real. Through its summer program and work in the Civil Justice Clinic,⁴⁸ Washington University School of Law has access to lawyers who are on the forefront of these exciting efforts. This access to the legal community benefits both Washington University law students and the country of Nepal. The students have unparalleled learning opportunities and our partners in Kathmandu have support for their efforts to help Nepal join the international legal community. During the summer of 2001 and again in the summer of 2002, Washington University law students have traveled to Nepal to work at the Forum for Women, Law and Development, the U.N. Development Project, the U.N. Population Fund, and Didbahini (an organization working for children in Nepal). Funded by Washington University's Public Interest Summer Stipend Program that supports law students seeking public interest legal work, these

47. Because so many NGOs write their reports in English, it is useful to have a lawyer edit them. So much of law is technical that a lay person would have difficulty doing an effective edit. The editing process also often leads to opportunities for suggestions of policy initiatives that then are incorporated into the document.

48. See <http://ls.wustl.edu/Clinics/Civiljustnew/index.html> for more information on the Civil Justice Clinic.

students have been able to work side-by-side with their Nepali counterparts in Kathmandu. The experience has proved to be invaluable for the students, who have gained first-hand legal experience in a foreign country. They have also gained exposure to civil rights and women's rights issues in the developing world. Regardless of how effective I may have been in building this relationship initially, it has grown due to the efforts of students who go to Nepal for internships over the summer. Their work and energy have ensured that this program will continue to provide valuable services to a developing nation and to present tremendous learning experiences for Washington University students.

Students studying at Tribhuvan Law Campus, like their counterparts at Washington University, have an abiding interest in learning how to be effective lawyers. Many among this group share a deep desire to know not only how to practice law, but also how to assist in the delivery of justice. A clinical program offers students first-hand experience as lawyers and creates a stable of legal talent to work on issues that are not financially or politically feasible for private lawyers. A great deal of the legal work needed in Nepal arises from the lack of implementing legislation that would allow Nepalis to fully realize the rights enumerated in the Constitution of 1990. Drafting policy initiatives after investigating and studying these issues provides an excellent vehicle for learning these essential lawyering skills.

While in Nepal, I established a partnership between the Civil Justice Clinic and the Forum for Women, Law, and Development, a Nepali organization that advocated women's rights. This organization was founded eight years ago by one of Nepal's leading women's rights activists, Sapana Pradham Malla. Sapana is a former Tribhuvan law professor and a major figure in Nepali politics. Based in Kathmandu, the Forum is staffed by several Nepali lawyers and takes on everything from individual representation to large-scale policy initiatives.

As a small, but potent organization in Nepal, the Forum represents an ideal partner for the Civil Justice Clinic. The Clinic itself is a collaborative effort between law students and students in the George Warren Brown School of Social Work. The Forum directs projects by identifying the kind of social policy initiatives that would serve the interest of women, children, and other subordinated people in Nepal. Together, the Clinic, the Forum, and several law students from Tribhuvan Law School communicate via the Internet, exchanging documents and engaging in dialogue concerning: (1) the issues at hand; (2) comparative ways to address the issues (discussing how the U.S. legal system addresses similar problems, for example); and (3) applicable research published on the subject. In this regard, Washington University is an exceptional asset to the project because of its advanced

library and communications network system. That information will be shared via e-mail and refined to identify the best fit for Nepal. The students discuss strategies for implementing such policies and develop work-product consistent with each strategy.

Our partnership with the Forum serves a number of important goals. It allows us to study ways in which there can be meaningful international collaboration for addressing issues of social policy. We expose students from two nations to the issues and possible solutions to complex social problems. Students working in the Civil Justice Clinic gain cultural insight into issues of global concern. They are able to provide first-rate legal and social services to meet the community needs of Nepal. Students do legal research and writing that have real-world consequences. They encounter the barriers of poverty and illiteracy and its influence on democracy. They leave the Clinic with an appreciation of what it means to work in the public interest on both a local and global level. As our work progresses, we are able to create a database of other nations' attempts to make democracy meaningful, and representative government responsive to the needs of its people so that such information can be made available to nations struggling with similar issues.

Partnerships such as these do not pop out of thin air. Our work with the Forum is built upon the trust and friendship that grew from my first visit to Nepal two years ago. Accordingly, the Fulbright grant was instrumental in allowing me to focus on building these relationships and develop effective communication between the Clinic and the Forum, all with an underlying clarity and unity of purpose about what we would do together. This necessarily had to be done in Nepal over a significant time period. It has been maintained by a steady flow of Washington University law students who dedicate 10 weeks of their summer to working with the Forum. Students work from early in the morning until late at night, six days a week. Nepalis do not have a "weekend." Saturday is their holy day. The rest of the week is for work. It is hard work but it is rewarding.

The richness of the students' experience is best described in an e-mail I received from one student during the summer of 2002:

The Nepalis I work with at the Forum have this wonderful spirit to them: intelligent but with almost no cynicism; gentle and kind but perfectly honest; musical—someone is always humming some Hindi folk tune; and in possession of a humility that underscores an Eastern-minded intelligence and sophistication. I've done so much here, in this most strange, foreign, and altogether fascinating land. But more and more, as the novelty of being a tourist exhausts itself and I begin to feel more like an inhabitant of Kathmandu rather than a visitor, it's the

work at the Forum that's become the most meaningful. I've worked on issues such as legalized abortion and the trafficking of women and children for prostitution, and I remain equally amazed by how much, as an outsider, an American, and a law student, I am able to contribute, and by how much, as an outsider, an American, and a law student, I am able to learn. The Forum makes real contributions to peoples' lives here in an everyday sense. As a Nepali organization, staffed by Nepalis, directed by Nepalis, and working mostly with Nepalis and other South Asians, the Forum's sensitivity and responsiveness to the true impact of discriminatory laws and abusive practices puts a face on every report we write, a story behind every statistic we compile, a warm and sincere expression of gratitude from people we help. From the first day I was here, I became aware of this, and not long after, I became a part of it. Working in Nepal fosters an intimacy with the issues that's maybe not so easily achieved back home, and this is what makes it inspiring, even beautiful. And being in Nepal creates an awareness of the guts it takes to confront these issues, and so in addition to a deep admiration of the intellect, energy, and enthusiasm of my co-workers at the Forum, I also have a budding understanding and steadfast respect for their courage. So, you might say, I feel like I'm in the middle of the best thing I've ever done.⁴⁹

V. CLINICAL WORK IN NEPAL: PRIVILEGE AND POTENTIAL

Our work is sometimes hard to imagine. In order to make it more vivid and concrete, I offer the following hypothetical that demonstrates the kind of issue the Clinic might encounter. It also is but one example of the complex and difficult issues facing women there. A young Nepali man named Kanak asked a young Nepali woman named Shanta to marry him. Together they eagerly planned their wedding—a union of love in an otherwise conservative Hindu society where arranged marriages remain commonplace, the long-established norm. Shortly before the wedding, Shanta became pregnant with Kanak's child. Finding himself unable to cope with the financial and emotional responsibility, Kanak decided he did not want Shanta as his wife, and left her. Pregnant and abandoned, Shanta felt she had no choice but to give birth to the child because abortion in Nepal remains a controversial subject. Despite its recent legalization, it is a costly and hazardous procedure

49. Letter from Scott Stone, Washington University School of Law, Class of 2003, to Jane Aiken, Washington University School of Law, Professor (2002) (on file with author).

that carries as sharp a social stigma, if not moreso, than being a single mother with illegitimate children. Nevertheless, Shanta was fired from her job when she was no longer able to conceal the pregnancy from her employer, who dismissed her because of her unwed status. Her family, disgraced by her pregnancy, spurned her as well, leaving Shanta to fend for herself and her newborn child. Thus without family, husband, or job, Shanta tried to begin her life anew in a different country. But even in leaving she was thwarted by Kanak's refusal to acknowledge the child—a prerequisite to obtaining the citizenship papers necessary for the infant's travel. Without paternal recognition, the government would not grant citizenship to the child of an unwed mother. Without citizenship the child was denied many benefits so many others took for granted, such as the chance to attend school. Moreover, lack of citizenship rendered the child stateless. Without a father, a family, a country, or an education, the child depended solely on Shanta, who as a consequence of unwed motherhood was without family herself. Additionally, her status severely restricted her ability to find a new job.

Shanta and her child are not only victims a society whose rigid beliefs preclude acceptance of single mothers, but also of a legal system that is only beginning to confront the issues posed by Shanta's case and to develop institutional mechanisms capable of addressing her grievances and those of her child. Had this occurred in the United States, Shanta would have a number of legal causes of action and probably a chance to assault the reputation of her ex-fiancé on any number of daytime talk shows. Instead, it occurred in Nepal, a country still in the throes of implementing a democratic constitution that many hoped would both inaugurate a new era of democracy and equip citizens with the legal tools necessary to fight pervasive and long-standing discriminatory policies and practices. The Constitution of 1990 has been good law in Nepal for more than a decade, but stories such as Shanta's are typical. There has been no change, as of yet, to help Shanta.

What if you were charged with thinking about ways to solve Shanta and her baby's problems? What if you were invited to think about those problems at the broadest level? What if you had the chance to design a system for dealing with the ramifications for a child born outside of a marriage? What would it look like? How would it differ from how the United States treats unwed mothers and their children? What behaviors are forbidden by U.S. law? What works well in U.S. law? Where could it be improved? What are the problems that have appeared intractable to us? What has caused those problems? What have the courts done with the law to remedy the problems faced by unwed mothers and their children? Where are the courts likely to go in the future? What assumptions underlie our systems for dealing with "legitimacy" and citizenship? What infrastructure do we rely upon to make

the law work?

In working on Nepali legal dilemmas such as this, students in the Civil Justice Clinic have the unique opportunity to apply their understanding of how U.S. law seeks to combat discrimination using the legal system of a country without many of the constitutional, institutional, and social apparatuses that they take for granted in America. Students must consider what motivates this concern about citizenship in Nepal. How does the joint family system and the prevalence of arranged marriages affect these issues? How does the sex of the baby effect the analysis? How does caste effect the analysis? Does Shanta's clan or ethnicity make any difference? What is the effect of the Constitutional provision declaring Nepal a Hindu kingdom? Are the assumptions that underlie our law shared by the people of Nepal? Does the country have the infrastructure that we unconsciously rely upon in the United States that allows enforcement of these rights? How do we step outside ourselves and imagine something that grows out of a culture so different from our own? How do we fight the urge to replicate what we know? Struggling with these comparative, fundamental questions provides an opportunity to develop cross-cultural skills that are essential for lawyers today.

There is still a lot of work to do and lots of problems remain. The gallant efforts of individuals and NGOs to combat discrimination and to lobby the government to implement anti-discrimination policies have helped transform Nepali society over a remarkably short period of time. Previously, change was all but impossible, now, the prospect of change is at least accepted. It is very exciting to be able to participate in that transformation.

VI. SUMMARY

Working with such difficult issues is humbling to the eager lawyer. Some issues cannot be resolved merely by changing a discriminatory law. Rampant poverty and illiteracy facilitate these harms. Almost forty-two percent of the country's population is living below the poverty line. People living in poverty desperately need means of livelihood, and will seek such work despite the vulnerability factors associated with it. Lack of education, no skills training, and few employment opportunities further deteriorate their lifestyle. Most of the people who engage in agricultural employment remain largely underemployed. They do not have opportunities for full-time employment but rely on seasonal agricultural work. Ninety percent of

Nepal's twenty-one million inhabitants rely on subsistence agriculture.⁵⁰ Historically, economic pressures have created a high level of migration in search of sustainable livelihood options outside Nepal. That migration level is escalating, particularly among men and women of prime productive and reproductive age. Nepal now faces intense political instability and civil strife. Much of the discontent is fueled by frustration that the Constitution has not brought the freedom and prosperity that all had hoped. Of course, equality takes time. For those who experience inequality, each minute feels like an eternity. For women who are battered or imprisoned, the wait for equality might cost them their lives. Nepal is moving forward in trying to fulfill the promises of equality incorporated in its domestic and adopted international law, making them a reality. It is critical to alleviate poverty and raise the level of people's awareness about the techniques of traffickers. Unless poverty alleviation programs are effective, trafficking and child labor cannot be controlled or, if controlled at all, may not be sustainable. Unless poverty is addressed, women will be unable to exercise civil rights because they are consumed with the rigors of surviving. Insight into the effects of poverty ground lawyers in reality. Nepal offers no shortage of such lessons.

When visiting Nepal, one is often struck by all of the female imagery. Despite the deep-seated patriarchal structure of the system, countervailing images of women are ubiquitous. Hindu culture offers rich images of goddesses who are imbued with great powers. One such goddess is Saraswati. Saraswati is sometimes said to be born from the god Brahma. Brahma demonstrates a deep appreciation for women. Desiring to create the world, he went into meditation, whereupon his body divided in two, half male and half female. Enraptured by his female self, Saraswati, Brahma desired her, mated with her, and created the demigod Manu, who subsequently created the world. Those who worship Saraswati are blessed with eloquence and wisdom. She is identified with the dimension of reality that is best described as coherent intelligibility. It is believed that Saraswati oversees the on-going task of transforming the natural world through inspiration and learning.⁵¹ Clearly we are all in Saraswati's business. Our work both domestically and in Nepal moves us closer to a deep understanding of the potential and limits of law. This work provides a chance for one to get outside oneself, and allows us all a chance to make a difference

50. S. SHARMA & D. CHHETRY, *MIMAP RESEARCH ON POVERTY IN NEPAL: A SYNTHESIS* (1996).

51. DANIEL B. HABER, *HIMALAYAN PANTHEON: A GUIDE TO THE GODS AND GODDESSES OF NEPAL* (1998).

(more quickly than one could in the U.S. system). It is a daily reminder that we operate from assumptions that we rarely examine. Perhaps the most important lesson that this experience brings is an awareness of systems and the ability to change if we change our assumptions. In short, students leave understanding that we see from behind our own eyes. Students who leave law school with this insight are likely to play a critical role in transforming the world.